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NOTE

HOMELESS CHILDREN DREAM OF COLLEGE TOO: THE STRUGGLE TO PROVIDE AMERICA'S HOMELESS YOUTH WITH A VIABLE EDUCATION

I. INTRODUCTION

In the third grade, Chuck Bacon attended eight different schools. He never had the opportunity to attend the fourth grade because his family lived in abandoned houses, in the family car, or outside in open fields.² He bathed himself at a gas station and slept on a piece of cardboard.³ When he was twelve, he and his younger brothers began their routine of “walk[ing] two miles to the nearest bus stop to get to the Pappas School for its steady two meals and shelter.”⁴ Bacon remained a student at the Thomas J. Pappas School for Homeless Children (“Pappas School”) from fifth to eighth grade, at which time he graduated as valedictorian of his class. He then mainstreamed into a local public school where he maintained a 3.4 grade-point-average.⁵ In September 2000, Bacon and six other former Pappas students entered their freshman year of college.⁶ Bacon was awarded a full four-year college scholarship from the Pappas School.⁷

Unfortunately there are those who would take away separate schools, like the Pappas School, from Chuck Bacon and other homeless children who are in dire need of such resources. For the moment, those who wish to see the end of separate schools for homeless children seem to be winning the battle, as the McKinney-Vento Homeless Assistance

1. See National School Boards Association, School Board News, *School in Arizona Offers a Lifeline of Support to Homeless Children* (June 27, 2000), available at <http://www.nsba.org/sbn/00-jun/062700-8.htm> (last visited Sept. 8, 2001).

2. See *id.*

3. See *id.*

4. *Id.*

5. See *id.*

6. See *id.*

7. See *id.*

Act of 2001 may bring an end to these educational institutions. However, maintaining separate schools for homeless children is fundamental in providing the appropriate education that they are guaranteed under the Fourteenth Amendment.

It has taken many years for society to recognize the importance of educating homeless children and the different problems that educating homeless children presents.⁸ Until 1987, when Congress enacted the Stewart B. McKinney Homeless Improvement Act ("1987 Act"), there were no federal programs that provided funding to assist in educating homeless children.⁹ The 1987 Act was passed in response to reports that as many as fifty percent of homeless children were not attending school.¹⁰ However, sixteen years after the implementation of the 1987 Act, reports say that most homeless children still do not attend school at all.¹¹

Despite any progress¹² in school enrollment and attendance resulting from the passage of the 1987 Act, homeless children still face many barriers to education.¹³ Homeless children continue to face barriers in accessing public education through the secondary level, and preschool children, who may benefit most from early childhood services, are most often overlooked.¹⁴

There are an estimated one million children who will experience homelessness this year.¹⁵ Studies show that not only does homelessness have a devastating impact on the educational opportunities of children and youth, but homeless children go hungry at more than twice the rate of other children, have four times the rate of delayed development, and are twice as likely as other children to repeat a grade.¹⁶

School is an important source of security in the lives of all children, but for homeless children, school may be the *only* source of security,

8. See Deborah M. Thompson, *Breaking the Cycle of Poverty: Models of Legal Advocacy to Implement the Educational Promise of the McKinney Act for Homeless Children and Youth*, 31 CREIGHTON L. REV. 1209, 1211-12 (1998).

9. See National Coalition for the Homeless, *Education of Homeless Children and Youth* (2001), available at <http://lexisnexis.com.ciuniv> [hereinafter *Homeless Children 2001*].

10. See *id.*

11. See Thompson, *supra* note 8, at 1211.

12. In 1997, a survey reported that the percentage of students who cited residency requirements as a problem fell from sixty percent to twenty percent and the percentage citing transportation of school records as a problem fell from seventy percent to approximately forty-six percent. See *id.* at 1230 n.97.

13. See *id.*

14. See McKinney-Vento Homeless Education Act of 2001, H.R. 623, 107th Cong. § 2 (2001).

15. See *id.*

16. See *id.*

stability, structure, and accomplishment during a time of great upheaval.¹⁷ As Congress found, these children “require educational stability and the opportunity to maintain regular consistent attendance in school so that they acquire the skills necessary to escape poverty and lead productive, healthy lives as adults.”¹⁸

Homeless children need separate schools to attain the free and appropriate education they are constitutionally guaranteed under the Fourteenth Amendment. However, Congress’ recent enactment of the No Child Left Behind Act of 2001 creates a prohibition against these separate, but equal, homeless-only schools. Without these schools, homeless children will not be able to attend school at all, and will thus be deprived of their constitutional right to a free and appropriate education.

Part II of this Note discusses the ramifications of homelessness on children and the challenges they face in accessing an education. Part III reviews the history of the legislation passed to facilitate homeless children’s attendance at public school. It concludes with an examination of the effectiveness of the legislation passed in that effort. Part IV discusses the Pappas School and other separate schools that have been created nationwide to provide for the educational needs of homeless children. Part V addresses the current debate surrounding separate schools and their future. Part VI examines the McKinney-Vento Homeless Assistance Act of 2001, which eliminates federal funding for separate schools for homeless children and the ramifications this new legislation has on homeless children. Part VII examines homeless children’s constitutional right to a free and appropriate education. This analysis examines the constitutionality of maintaining separate schools for homeless children. Part VIII concludes with a discussion of the reasons for continued support of these learning institutions.

II. CHALLENGES TO EDUCATIONAL DEVELOPMENT

Who are homeless children? They are children who have a primary nighttime residence that is a public or private place not ordinarily used as sleeping accommodations for human beings.¹⁹ They are children who live in cars, parks, public spaces, substandard housing, bus stations, or

17. *See id.*

18. *Id.*

19. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 725, 115 Stat. 1425, 2005-06 (2002).

train stations.²⁰ They are children who share the housing of other persons due to the loss of housing, economic hardship, or similar reasons.²¹ They are children who live in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations.²² They are children who live in shelters or abandoned hospitals.²³ They are children who are awaiting foster care placement.²⁴

Homelessness can have profound consequences for children. Studies illustrate that stability is crucial for a child's healthy development. However, the life of a homeless child is unstable and ever changing. Most homeless families are single-mother families. These single mothers are typically twenty-five to thirty-five years old.²⁵ They lack education and work experience and, as a result, have difficulty finding employment to support their families.²⁶ These parents are so overwhelmed with trying to provide food, shelter, and clothing for their families that they neglect to attend to the academic needs of their children.²⁷ Consequently, education often takes a back seat to the struggle for survival.²⁸ The Texas Education Agency describes the stress that homelessness causes children in the following way:

Homeless children suffer the loss associated with separation from their home, furniture, belongings, and pets; the uncertainty of when they will eat their next meal and where they will sleep during the night . . . the embarrassment of being noticeably poor To assume that a child could push all of such suffering aside to adequately focus on academic tasks, may . . . be unrealistic.²⁹

Children who do not have parents with the time or the energy to be mindful of their children's needs; children in need of a quiet, safe place to do homework; children lacking a nutritious diet; and children without a stable home are at high risk of not attending school and/or ultimately

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See* James H. Stronge, *The Background: History and Problems of Schooling for the Homeless*, in *EDUCATING HOMELESS CHILDREN AND ADOLESCENTS: EVALUATING POLICY AND PRACTICE 3* (James H. Stronge ed., 1992).

26. *See* Paul Koegel et al., *The Cause of Homelessness*, in *HOMELESSNESS IN AMERICA 33* (Jim Baumohl ed., 1996).

27. *See* Maria Grace Yon et al., *A Child's Place: Developing Interagency Collaboration on Behalf of Homeless Children*, 25 *EDUC. & URB. SOC'Y* 410, 411 (1993).

28. *See* Stronge, *supra* note 25, at 4.

29. Yvonne Rafferty, *The Legal Rights and Educational Problems of Homeless Children and Youth*, 17 *EDUC. EVALUATION & POL'Y ANALYSIS* 39, 39-40 (1995).

failing in school.³⁰ Viewed in this context, being homeless has a substantial impact on a child's academic performance.³¹

A. Lack of Stability

A homeless child's problems are further complicated by their inability to remain in their home school. The school in which a child is enrolled prior to becoming homeless is known as the child's "home school."³² The home school plays a significant role in the educational development of a homeless child.³³ The inability to remain in a home school has been ranked by psychologists as one of the primary reasons for a homeless child's poor attendance and poor performance in school.³⁴ In the lives of children who are always in transition,³⁵ the classroom may be the only stable place for a homeless child.³⁶ A home school provides a sense of belonging and an environment that supports the child's emotional and social growth.³⁷ Allowing a child to remain in her home school is fundamental to the achievement of a homeless child's academic success.³⁸

[A]llowing children to remain in their home schools prevents gaps in learning that would otherwise exist due to differences in school curricula and teaching methods. Each time a child changes schools, his or her educational program is disrupted and the child must adapt to unfamiliar teachers and classmates, and catch up with a different curriculum or lesson plan, making it difficult to acquire even the most basic academic skills.³⁹

30. See Stanley S. Herr, *Children Without Homes: Rights to Education and to Family Stability*, 45 U. MIAMI L. REV. 337, 346 (1990).

31. See Lori Korinek et al., *Educating Special Needs Homeless Children and Youth*, in EDUCATING HOMELESS CHILDREN AND ADOLESCENTS 142 (James H. Stronge ed., 1992).

32. See Thompson, *supra* note 8, at 1211. The McKinney Act defines the term "school of origin" or "home school" to mean "the school that the child or youth attended when permanently housed or the school in which the child or youth was last enrolled." 42 U.S.C.S. § 11432(g)(3)(G) (Law. Co-op. 2002).

33. See MARY E. WALSH, MOVING TO NOWHERE 152, 155 (1992); see also Marybeth Shinn & Beth C. Weitzman, *Homeless Families Are Different*, in HOMELESSNESS IN AMERICA 109, 118 (1996) (stating that poor academic performance is related to high rates of school mobility).

34. See WALSH, *supra* note 33, at 155; Shinn & Weitzman, *supra* note 33, at 118.

35. See Thompson, *supra* note 8, at 1219.

36. See *id.*

37. See *id.*

38. See *id.*

39. *Id.* at 1219 (citing WALSH, *supra* note 33, at 155).

For a child who is homeless, moving often and frequently changing schools may be “fatal” to both her academic progress and social development.⁴⁰

B. Other Barriers to Education

Registering a homeless child in a public school presents many complications resulting from legal and administrative barriers.⁴¹ Most public schools nationwide have various requirements that make it difficult for parents to register their homeless children in the public school system and especially hard to keep these children enrolled in their home schools.⁴² In addition, even if a child is able to successfully enroll in a new school, lack of transportation usually prevents her from ever reaching the school’s doors.

1. Record Requirements

The inability to meet record requirements such as the presentation of birth certificates, or a lease or utility bill to show residency, also contributes to the denial of a homeless child’s education as it further frustrates the registration process.⁴³ Nationwide, state and local residency laws require that to attend school, a child must live permanently within the boundaries of the school district, or the child must pay tuition.⁴⁴ However, since homeless families are constantly on the move to find shelter, they are often unable to establish residency in any particular school district.⁴⁵

2. Immunization and School Records

Lack of proof of medical immunizations and school records pose another problem for homeless children who are trying to enroll in public schools.⁴⁶ Obtaining and keeping records becomes nearly impossible for a family who is constantly on the move and who may not have the resources to obtain copies of records from the respective agencies.⁴⁷ The result can be that a child may not attend any school while her parent

40. See WALSH, *supra* note 33, at 153.

41. See Herr, *supra* note 30, at 348.

42. See *id.*

43. See *id.*; Thompson, *supra* note 8, at 1224.

44. See Thompson, *supra* note 8, at 1222.

45. See *id.* at 1222-23.

46. See Stronge, *supra* note 25, at 20.

47. See Thompson, *supra* note 8, at 1223.

attempts to retrieve her necessary records, an absence that might last from a few days to a few months.⁴⁸

An even more pressing issue arises for students who are in need of special education programs. This is because homeless children “may not stay in one school district long enough for their needs to be fully identified” and thereby be evaluated and “placed in special education or other appropriate programs.”⁴⁹ Even if their special needs are identified, schools often fail to enroll homeless children in the special education programs for which they are eligible.⁵⁰ Furthermore, even when the school would like to enroll the child in such a program immediately, the process of transferring records to show a child’s eligibility may take so long that a child must wait up to forty-five days to receive the special educational services to which she is entitled.⁵¹

3. Lack of Transportation

Lack of transportation between the child’s current shelter and the school of enrollment is one of the most serious barriers to an education that a homeless child must face.⁵² Transportation problems stem from the fact that many homeless parents do not own cars and cannot afford the daily costs of transportation for their children to get to and from school.⁵³

Given the stability, transportation, record requirements, and other logistical implications, homelessness has a devastating effect on children and the education that they receive.⁵⁴ This is why effective legislation is fundamental in successfully educating homeless children. However, Congress’ most recent legislation will only exacerbate the already harsh consequences that homelessness inflicts on children.⁵⁵

48. *See id.*

49. Stronge, *supra* note 25, at 21.

50. *See* LESLIE M. ANDERSON ET. AL., AN EVALUATION OF STATE AND LOCAL EFFORTS TO SERVE THE EDUCATIONAL NEEDS OF HOMELESS CHILDREN AND YOUTH 39, 40 (U.S. Dept. of Educ. 1995).

51. *See id.*

52. *See* ANDERSON, *supra* note 50, at 39; Herr, *supra* note 30, at 348; Thompson, *supra* note 8, at 1224.

53. *See* Herr, *supra* note 30, at 348; Thompson, *supra* note 8, at 1224.

54. *See* Korinek, *supra* note 31, at 142.

55. *See* National Coalition for the Homeless, *Education of Homeless Children and Youth* (June 1999), available at <http://nch.ari.net/edchild.html> (last visited Nov. 12, 2002) [hereinafter *Homeless Children 1999*].

III. THE STUART B. MCKINNEY HOMELESS IMPROVEMENT ACT

When Congress passed the 1987 Act it became the first piece of legislation in history to respond to the educational needs of homeless children.⁵⁶ The impetus behind the legislation was to provide homeless children access to a free and appropriate education.⁵⁷ While the 1987 Act had substantial objectives, it had weaknesses both in its design and implementation.⁵⁸ Although the 1987 Act identified a set of significant barriers to education and offered a generalized standard for placing homeless children in schools, which served the child's best interest, the 1987 Act was really just symbolic legislation.⁵⁹

One of the largest obstacles to the success of the 1987 Act was funding. The inadequate funding that the federal government provided for the state educational agencies to participate in the program became a disincentive for the states to comply with the standards set forth in the 1987 Act.⁶⁰ The 1987 Act provided Congressional appropriations of fifty million dollars for grants toward the program.⁶¹ However, the distribution of these funds did not provide nearly enough money to meet either local or state needs.⁶²

The failure of the 1987 Act to carry out its goal of providing homeless children with an adequate education led Congress to make amendments in 1990 and again in 1994 ("Revised Act"). To ensure that homeless children were able to attend school, the Revised Act provided for an expanded list of barriers that states were required to remove. The Revised Act also provided for a significant increase in authorized funding, allowing states to make grants to local education agencies ("LEA") in furtherance of these goals.⁶³ In addition, the Revised Act

56. *See id.*

57. The Act has four educational provisions. First, each State educational agency shall ensure that homeless children have access to a free, appropriate education equivalent to that available to other children. *See* 42 U.S.C.S. §§ 11431(1), 11432(g)(D)(i) (Law. Co-op. 2002); *see also* Herr, *supra* note 30, at 350. Each State shall also amend its residency requirement laws to guarantee that homeless children are "afforded the same free, appropriate public education." 42 U.S.C.S. § 11431(2). Third, each State shall assure that the records of the homeless child are made available and are transferred in a timely fashion between schools. *See id.* at § 11432(g)(3)(D). Lastly, school placement choices are to be made in the child's "best interests." *See id.* § 11432(g)(3).

58. *See* Herr, *supra* note 30, at 350.

59. *See id.* at 351.

60. *See id.* at 364.

61. *See* 42 U.S.C.S. § 11432(g)(1); *Homeless Children 1999*, *supra* note 55. These figures are for the years 1990 through 1994.

62. *See* NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, SHUT OUT: DENIAL OF EDUCATION TO HOMELESS CHILDREN 1 (1990).

63. *See Homeless Children 1999*, *supra* note 55.

required schools to comply, to the extent that they were capable, with a policy to hold homeless children to the same standards that are expected of all children.⁶⁴

The foundation of the Revised Act was the requirement that each LEA make individual, case-by-case school placement determinations based on the “best interests” of the child.⁶⁵ Once a determination was made as to where the child should attend school, eliminating all other barriers such as lack of transportation, obtaining records, etc., became the job of the LEA.⁶⁶

The Revised Act required that the states eliminate other barriers such as those caused by immunization requirements,⁶⁷ residency requirements,⁶⁸ lack of school records, birth certificates or other documentation,⁶⁹ and guardianship problems.⁷⁰ In addition, Congress specified that children be provided with the services for which they were eligible, such as special education, gifted and talented programs, programs for students with limited English proficiency, and school meal programs.⁷¹

The Revised Act also provided that states must eliminate transportation barriers and provide transportation services for the child so that he or she would have access to whichever school was determined to be in the child’s best interest to attend.⁷² Congress emphasized that transportation is a crucial element in the successful provision of education for homeless children.⁷³

Pursuant to the Revised Act’s mandate that children be provided adequate transportation and educational services, the LEAs of each state were required to apply to the State Department of Education for money to facilitate transportation services and other activities to improve enrollment and retention of homeless children.⁷⁴ The LEAs were

64. *See id.*

65. *See* Thompson, *supra* note 8, at 1226.

66. *See* 42 U.S.C.S. § 11432(g)(4)-(5) (Law Co-op. 2002); *see also* Lampkin v. District of Columbia, 27 F.3d 605, 606 (D.C. Cir. 1994).

67. *See* 42 U.S.C.S. § 11432(g)(1)(F)(ii)(I).

68. *See id.* § 11432(g)(1)(F)(ii)(II).

69. *See id.* § 11432(g)(1)(F)(ii)(III).

70. *See id.* § 11432(g)(1)(F)(ii)(IV).

71. *See id.* § 11432(g)(4)(B)-(E).

72. *See* Thompson, *supra* note 8, at 1226.

73. *See id.*

74. *See* 42 U.S.C.S. § 11433(d) (Law Co-op. 2002). The grants may also be used to expedite many types of activities to increase the enrollment rate of homeless children, as well as other programs. *See id.* § 11433(d)(1). These programs include tutoring, and other supplemental educational services, training for school personnel, before and after-school programs, parent education, cost of school supplies, counseling services, etc. *See id.*

authorized to spend as much of their apportioned funds as necessary to improve transportation and other services. However, the amount of funding provided by the Revised Act was inadequate to fulfill its mandate to remove all educational barriers facing homeless children, especially transportation.⁷⁵

As a result of the lack of funding, a promising piece of legislation became an almost complete failure. When the McKinney Act was passed in 1987, Congress authorized funds of fifty million dollars for the education of homeless children. Today, sixteen years later, despite the reports of increasing homelessness among children,⁷⁶ the federal funding for these programs has reached a mere thirty million dollars—twenty million dollars less than the original amount appropriated under the Revised Act.⁷⁷ The result is that many states have been forced to reduce or eliminate their homeless education programs,⁷⁸ and those states that still have these programs only serve a small portion of their estimated population of homeless children.⁷⁹

Inadequate funding has meant that educational needs of homeless children are not being met.⁸⁰ The separate schools that have been established for homeless children around the country in response to these persistent barriers appear to be the only educational institutions that are meeting the goals that the Act was designed to achieve for homeless children.⁸¹

75. See National Coalition for the Homeless, *America's Homeless Children, Will their Future be Different? A Survey of State Homeless Education Programs* (July 1997), available at <http://www.nationalhomeless.org/edsurvey97> (Commentary by David Davidson, President of the National Association of State Coordinators for the Education of the Homeless Children and Youth) [hereinafter *America's Homeless Children*].

76. The number of children experiencing homelessness has increased from 272,722 in 1989 to an astonishing 930,232 in 2000. See Iowa Dep't of Educ., Title X Part C, *No Child Left Behind Act—2001*, (2002), available at <http://www.state.ia.us/educate/.PDF>.

77. See *Homeless Children 1999*, *supra* note 55. The problems associated with the lack of funding has only be accentuated by the fact that many states have not used the funding that they have available to them in a timely and efficient manner. See Rafferty, *supra* note 29, at 53. For example, New York State, one of the largest recipients of funding as of 1992, had spent none of its Subtitle VII-B funds, none of its FY92 funds, and only thirty-nine percent of its FY90 funds apportioned for education programs for the homeless. See *id.*

78. See *America's Homeless Children*, *supra* note 75.

79. This means that only about three percent of all LEAs receive McKinney funds. See *Homeless Children 1999*, *supra* note 55.

80. See Rafferty, *supra* note 29, at 53.

81. See *Homeless Children 2001*, *supra* note 9. Despite the effectiveness of the Act, problems still remain regarding the ability of homeless children to succeed in and attend public schools. See *id.* In addition to funding, one of the main barriers in educating homeless children is still transportation. See *id.* This is especially the case when it is determined that it is in the best interest of the homeless child to attend the home school. See *id.*

IV. SEPARATE SCHOOLS FOR HOMELESS CHILDREN

Homeless children are stereotyped as unhealthy, unruly, unclean, and having a negative influence on other children in regular public schools.⁸² Separate schools for the homeless were launched to combat this widely held misconception.⁸³ At first, separate schools were started in shelters, churches, or wherever space became available.⁸⁴ The schools' emphasis was to help homeless children catch up on missed schooling and to enable them to integrate more easily into a local school system when the chance to enroll became available to them.⁸⁵ Educators soon began to realize that these early separate schools were an important stopgap and the idea of separate schools for homeless children began to take another form.⁸⁶

Funding provided by the Revised Act, combined with an impetus to improve the lives and education of homeless children throughout the country, has lead to the creation of approximately forty-one⁸⁷ schools nationwide that cater solely to the educational needs of homeless children.⁸⁸ One of the most nationally recognized of these schools is the Pappas School.⁸⁹ The Pappas School has become the "epicenter" of the debate over the manner in which to educate homeless children.⁹⁰

82. See *Educating Homeless Children: Hearing Before the Subcomm. on Early Childhood, Youth, and Families of the House Comm. on Education and the Workforce*, 106th Cong., 106-118 (2000) (statement of Luisa Stark, Exec. Director, Pheonix Consortium to End Homelessness).

83. See *id.*

84. See *id.*

85. See *id.*

86. See *id.*

87. See Marjorie Coeyman, *Homeless Kids, Steered Into Regular Schools*, CHRISTIAN SCI. MONITOR, Aug. 20, 2002, at 15.

88. See Michael Janofsky, *Debate Weighs Merits of Schools for Homeless*, N.Y. TIMES, Sept. 19, 2001, at A12. Separate schools are in operation in fifteen different states throughout the United States. See *id.* Cities in which these schools are located include Charlotte, North Carolina, and Chicago, Illinois. See *id.*; see also NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, SEPARATE AND UNEQUAL: A REPORT ON EDUCATIONAL BARRIERS FOR HOMELESS CHILDREN AND YOUTH (2000).

89. See Sergio Bustos, *Bill Would Help Pappas School*, GANNETT NEWS SERVICE (Feb. 27, 2001), available at <http://www.azcentral.com/news/education/0227pappas27.html> (last visited Sept. 8, 2001).

90. See *id.* The School was the site of a congressional hearing held during the fall of 2001 to examine the issue of educating homeless children. See *id.* In addition it was featured on CBS' 60 Minutes twice in 2001. See *id.* Roughly two-thirds of the funding that Pappas schools receives is through the state and federal government, the remaining one-third comes from donations. See Diane Hudson, *Prescription for Learning: Thomas J. Pappas School*, ATHENS STATE UNIVERSITY (Mar. 1, 2000), available at http://home.hiwaay.net/~kenth/diane/column/p_030100.htm (last visited Sept. 8, 2001). In the year 2000, the school received more than \$290,000 in contributions. See *id.* In addition to monetary donations, private contributions are made by means of clothing, food, toiletry items, and volunteer mentors from area companies. See *id.* There are three sources from which the Pappas

The Pappas School has three locations in Arizona throughout the Phoenix area.⁹¹ It opened in a shelter for the homeless eleven years ago to aid only eight students and is now one of the nation's largest public schools for homeless students.⁹² The Pappas School serves approximately 2100 students ranging in age from kindergarten through twelfth grade.⁹³ Each year the school welcomes through its doors more than 1500 new students.⁹⁴ Each school day, the Pappas School sends out its twelve buses to cover a 1000 square mile area to pick up and drop off more than 600 homeless children.⁹⁵ The Pappas School changes its busing routes on a daily basis to accommodate the students who sometimes move up to three times per week.⁹⁶ The students who attend the Pappas School are grouped into their respective grade levels according to their ability as determined by the school when they enter.⁹⁷ The school then provides the same curriculum as regular public schools so that when a student chooses to leave the Pappas School, he or she is on the same level as students attending traditional neighborhood schools.⁹⁸

Every month, each student at the Pappas School receives a hygiene pack containing a toothbrush, toothpaste, deodorant, soap, a hairbrush, and a comb.⁹⁹ In addition, each student receives a clothing pack which contains two outfits, three pairs of socks, and three pairs of underwear, which are all donated by the community.¹⁰⁰ Through the school, the students are fed breakfast, lunch, and dinner.¹⁰¹ The students are also given nonperishable food boxes from the school to bring home for their families.¹⁰² The school provides free medical and dental care on the

school receives funding: state aid based on student attendance—Arizona pays \$3,500 per child—other federal and state grants, and private donations. See National School Boards Association, *supra* note 1.

91. See National School Boards Association, *supra* note 1.

92. See Janofsky, *supra* note 88. The School currently has three locations where it holds classes: two in downtown Phoenix, and one in Tempe. See also National School Boards Association, *supra* note 1.

93. See Thomas J. Pappas School, *Frequently Asked Questions About the Pappas School*, available at <http://www.tjpappasschool.org/faqs.html> [hereinafter *FAQ's*].

94. See National School Boards Association, *supra* note 1.

95. See *FAQ's*, *supra* note 93.

96. See *id.*; see also National School Boards Association, *supra* note 1.

97. See *FAQ's*, *supra* note 93; see also National School Boards Association, *supra* note 1.

98. See *FAQ's*, *supra* note 93; see also National School Boards Association, *supra* note 1.

99. See National School Boards Association, *supra* note 1.

100. See *id.*

101. See *Pappas School Offers Kids Hope*, PHOENIX BUS. J. (Sept. 8, 2000), available at <http://phoenix.bcentral.com/phoenix/stories/2000/09/11/editorial4.html>.

102. See National School Boards Association, *supra* note 1.

premises for the students.¹⁰³ The school also provides cultural activities, counseling, special education (for those students who need it), intensive basic skills lessons, English-as-a-second-language classes, and after-school activities.¹⁰⁴

The success of the Pappas School is exemplified by the accomplishments of its students. Chuck Bacon,¹⁰⁵ a former Pappas student, is only one example of the Pappas School's success.¹⁰⁶ Other examples of the school's success can be seen in its students' test scores. At the beginning of the 2000 school year, children who entered the Pappas School in the first through third grades tested below pre-kindergarten ability at the lowest reading level.¹⁰⁷ After extensive instruction from Pappas teachers and faculty members, the third graders were reading at the fourth grade level.¹⁰⁸

The majority of the students at the Pappas School are unable to attend regular public schools for several reasons.¹⁰⁹ Many of these students have head lice and impetigo, and a few even have TB, all of which make them unacceptable for admission into regular public school.¹¹⁰ Others do not have school or medical records, nor the required residency documents like electric or telephone bills to prove that they maintain a permanent residence.¹¹¹ Lack of transportation and clothing are other problems that keep Pappas students out of mainstream schools.¹¹²

The families of the students who attend the Pappas School are homeless for many reasons.¹¹³ The most common reasons are domestic violence, drug-abuse, low-paying jobs, or mental illness.¹¹⁴ In Arizona, the state's welfare laws only encourage a poor family's transience.¹¹⁵ The law allows a family to remain in a shelter for only three months, at which time the family must move, and may not return to that particular

103. *See id.* Four doctors donate their time to the school four days a week. *See id.* There are also two nurses in the school every day that the school is in session. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*; *supra* notes 1-7 and accompanying text.

107. *See* National School Boards Association, *supra* note 1.

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

shelter for one calendar year.¹¹⁶ Because the Pappas School provides the necessary transportation, clothing, support and services, and disposes with residency and other documentary prerequisites, it removes barriers to education for homeless children. In doing so, the Pappas School and other schools like it, provide education for children, who would, without these schools, receive no education at all.¹¹⁷

V. THE FIGHT FOR SEPARATE SCHOOLS FOR HOMELESS CHILDREN

Opposition to homeless-only schools started in early 2000 when the National Law Center on Homelessness and Poverty published a report urging that separate schools for homeless children be closed since they segregate homeless students.¹¹⁸ The report recommended putting homeless students into regular classrooms.¹¹⁹ In general, the opposition to the mission of the Pappas School, and other similar schools, claims that separate schools provide an inadequate public education to the children they work to serve.¹²⁰ “‘It’s putting a Band-Aid on a situation and making it worse The bottom line is kids are not getting the same education they would get in a regular school environment. It’s a myth to say they are.’”¹²¹

The report supplied the following evidence of inadequacy: there are some homeless-only schools that operate as one-room school houses, where children of a variety of ages are grouped together and are all taught by one teacher;¹²² some separate schools do not maintain the same

116. See *id.* Only one in 100 families find permanent housing. Of those families, eighty percent return their children to Pappas within three to six months. See *id.* When the children return, they have not been to another school since their last attendance at the Pappas School. See *id.*

117. See Hudson, *supra* note 90; see also Bustos, *supra* note 89.

118. See National School Boards Association, *supra* note 1. The report released in January of 2000, *Separate and Unequal: A Report on Educational Barriers for Homeless Children and Youth*, says that separate schools violate the Act’s guarantee of “equal access to a public school education.” *Id.*; see also *Pappas School Offers Kids Hope*, *supra* note 101.

119. See *Pappas School Offers Kids Hope*, *supra* note 101; see also National Coalition for the Homeless, *School Segregation and Homeless Children and Youth: Questions and Answers*, available at <http://nch.ari.net.unequal.html> (last visited Nov. 12, 2002) [hereinafter *School Segregation*]. The surveys that were published in 1999 and 2000 provide information about the education practices that work best for homeless children, as well as information about what practices may hinder a homeless child’s education and development. See *School Segregation*, *supra*.

120. See Janofsky, *supra* note 88; see also *School Segregation*, *supra* note 119. The general argument is that mainstream schools are better equipped to meet the needs of homeless children than are Pappas type schools. See *School Segregation*, *supra* note 119.

121. Janofsky, *supra* note 88 (quoting Barbara Duffield, director of education for the National Coalition for the Homeless, a non-profit group that supports the integration of homeless children in mainstream public schools).

122. See *School Segregation*, *supra* note 119.

standards and curricula that are required of regular public schools by state and/or LEAs;¹²³ some of these schools are not able to provide their students with special programs such as special education, bilingual education, or gifted and talented programs;¹²⁴ and some segregated classes are taught by teachers who are not certified to teach the grade they are teaching.¹²⁵ The report concluded that homeless-only schools provide an “unnatural” social environment for their students by often grouping the students by housing, class, and racial status, and, therefore, they “deprive homeless children of key aspects of a ‘normal’ childhood.”¹²⁶

The report did, however, make brief mention of the fact that many homeless children who are enrolled in separate schools may be successfully integrated into the public school system, but that is where the report stopped short.¹²⁷ The report does not recognize the significant achievements that many of the separate schools have accomplished in the struggle to educate homeless children—achievements that continue to elude mainstream schools.

The report ignores the fact that unlike mainstream schools, schools like the Pappas School are providing their students with food, clothing, a solid education, and attention for the special emotional needs of homeless children.¹²⁸ The study also discounts the emotional hardships that homeless children must face when they are forced out of Pappas-like schools, and into the public school system.¹²⁹

123. *See id.*

124. *See id.*

125. *See id.*

126. *Id.*

127. *See id.* In Tucson, Arizona, sixty percent of the homeless children in the program increased their grade-point-average, while twenty-five percent stayed the same. *See id.* Their reported dropout rate was less than ten percent. In Houston, Texas, an estimated fifty percent of the students in the program passed all three statewide assessment exams. In addition, they out-scored the total student population (eighty-three to seventy-seven percent) on the writing exam. *See id.* In Brentwood Union Free School District, the elementary reading increased by six percent, elementary math increased by twelve percent, and the number of those who were failing their high school coursed decreased by nineteen percent. *See id.* In Alabama, there was a reported twenty-seven percent increase in attendance for the students whom attended mainstream schools. *See id.* “In Victoria, Texas, the school district adopted a ‘one child, one school, one year’ policy to ensure that children maintain educational continuity regardless of family mobility.” *Id.* The result was an increase in attendance, an increase in education funding from the state, and an increase in statewide standardized testing scores. *See id.*

128. *See Janofsky, supra* note 88.

129. *See id.* Children who are homeless are in need of a great deal of emotional support. *See Hudson, supra* note 90. Teachers agree that students cannot be taught until they are given the opportunity to vent their frustrations. *See id.*

For example, ten percent of all children who are able to mainstream from separate schools to regular public schools suffer isolation and other ridicule from their non-homeless classmates and teachers. They are “teased there and become outcasts because they are picked up at shelters . . . [and] [t]eachers pull away if you’re homeless because you may be dirty.”¹³⁰ The study overlooks the fact that sending homeless children to mainstream schools often stunts a child’s psychological development and lowers a child’s self-esteem.¹³¹ The study disregards the implications of exposing these children to teasing and tormenting from their classmates over glaring signs of poverty (such as wearing the same clothes for several days in a row or being picked up by the school bus at a homeless shelter) which can emotionally torment any child, and impede that child’s ability to concentrate and do well in the classroom.¹³² Most importantly, the study ignores the fact that regardless of the legislation that Congress passes, the reality of poverty and homelessness means that many of these children are not going to attend school at all if their only option is to attend mainstream schools.¹³³

The debate over whether or not to force the integration of homeless children into mainstream schools is a constitutional one. Defenders of separate schools, such as the Pappas School, agree that students may not receive the same exact education attending a separate school as they would in an “integrated” public school.¹³⁴ They also do not entirely disagree that integration may in some ways benefit these homeless children.¹³⁵ They do contend, however, that the only acceptable way to require homeless children to integrate would be if the mainstream public schools could provide homeless children with the same support they would receive at homeless-only schools: clean clothing, meals, school supplies, medical attention, counseling, daily transportation to and from their always changing “homes,” birthday presents, and even hugs from the teacher.¹³⁶ Supporters further assert that even if mainstream schools could provide homeless children with these tangibles, they would never be able to provide the intangibles such as emotional support and understanding; and the intangibles are the most important reason to

130. National School Boards Association, *supra* note 1 (quoting Ernalee Phelps, Resource Development Director of the Pappas School).

131. See Janofsky, *supra* note 88.

132. See *id.*

133. See *id.*

134. See *id.*

135. See *id.*

136. See *id.*

provide a separate education for homeless children in the first place.¹³⁷ Even the critics of these separate schools concede that most mainstream schools do not have the ability to provide these things for their homeless students and that homelessness is not going to go away.¹³⁸

VI. THE MCKINNEY-VENTO HOMELESS ASSISTANCE ACT OF 2001

The McKinney-Vento Homeless Assistance Act ("2001 Act") was reauthorized by the No Child Left Behind Act of 2001.¹³⁹ The 2001 Act preserves many of the programs provided for in the Revised Act, although it makes subtle changes to the transportation, enrollment, and funding provisions. However, unlike any previous versions of the McKinney-Vento Homeless Act, the 2001 Act regulates funding for separate schools and prohibits the creation of any additional homeless-only schools.¹⁴⁰

A. Requirements Under the 2001 Act

The 2001 Act requires the LEA to provide or arrange for transportation to the homeless child's school of origin when that school is within the LEA's district.¹⁴¹ If the school is in a different LEA district from where the child is living, the LEAs from both districts are required to agree on a method for sharing transportation responsibilities and costs.¹⁴²

The 2001 Act also requires that, pending resolution of a dispute about school placement, an LEA may immediately enroll a homeless student in the school of her choice, even if she does not have the required documents. The LEA must provide a written explanation of the rights of appeal to the parent or guardian and the student if the LEA chooses to send the student to a school other than the home school or the school requested by the parent or guardian.¹⁴³

137. *See id.*

138. *See id.* The number of homeless children in the United States grows by the hundreds of thousands each year.

139. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002). The No Child Left Behind Act of 2001 was signed into law by President Bush on January 8, 2002 and became effective in July 2002. *See id.*

140. *See* 42 U.S.C.S. § 11432(e)(3)(2002) (Law Co-op. 2002).

141. *See id.* § 11432(g)(1)(J)(iii).

142. *See id.*

143. *See id.* § 11432(g)(2)(E)(ii).

The 2001 Act provides for a twenty-five percent increase of state funds for state educational activities¹⁴⁴ and requires that subgrants for the purposes of facilitating the enrollment, attendance, and success in school of homeless children, shall be awarded to all LEAs on a competitive basis.¹⁴⁵ It also requires all districts, whether or not they are receiving subgrants, to designate local liaisons for homeless children.¹⁴⁶

While most changes to the Revised Act are mere technical changes to the provisions that have been in place for the last sixteen years, the 2001 Act makes one sweeping change that has an enormous impact on homeless children. This change, which is one of the most important provisions in the 2001 Act, pertains to separate schools. The Act states “in providing a free public education to a homeless child or youth, no State receiving funds under this subtitle shall segregate such child or youth in a separate school, or in a separate program within a school, based on such child’s or youth’s status as homeless.”¹⁴⁷

This provision effectively prohibits funding to all existing separate schools nationwide by threatening to pull all federal funding from a state if that state allocates funds for any state sanctioned separate schools for homeless children. The provision contains a very limited exception, which applies only to five of the forty-one separate schools that were operational in the fiscal year 2000.¹⁴⁸ However, to fall within the exception and receive funds, these five separate schools are required, at the time the child seeks enrollment in the separate school, to provide written notice, at least twice a year, informing the parent or guardian of the child: (i) of the general rights provided under the Act; (ii) of the choice of schools that the student is eligible to attend; (iii) that no homeless child is required to attend a separate school; (iv) that homeless children shall be provided services such as transportation, educational services, and meals; and (v) contact information for the local liaison for

144. See *id.* § 11432(e); see U.S. Dep’t of Educ.: *The No Child Left Behind Act of 2001: Preliminary Overview of Programs and Changes*, available at <http://www.ed.gov/offices/OESE/ese/a/progsum/homeless.html> (last modified July 11, 2002) (providing a twenty-five percent increase from the amounts provided for under the Reformed Act).

145. See 42 U.S.C.S. § 11432(e)(3)(E); U.S. Dep’t of Educ., *supra* note 144. Under the Reformed Act, subgrants were awarded on a need basis. See 42 U.S.C.S. § 11432(e)(3)(E).

146. See 42 U.S.C.S. § 11432(g)(1)(J).

147. *Id.* § 11432(e)(3)(A) (citations omitted). The 2001 Act also contains a grandfather clause that allows those separate schools that were operational in the fiscal year 2000, in a covered county, to be eligible to receive funds. See *id.* § 11432(e)(3)(B).

148. See *id.* § 11432(e)(3)(A)-(B); see also Coeyman, *supra* note 87. The five schools that were granted federal funding under the exception are located in only four counties in the U.S.: Orange, San Diego and San Joaquin counties in California, and Maricopa County in Arizona. See April Ummering, *Three R’s and Two Squares a Day*, USA TODAY, Sept. 3, 2002, at 7D.

homeless children and the State Coordinator for Education of homeless children.¹⁴⁹

The separate school must also provide assistance to the parent or guardian to exercise the right to attend the parent's or guardian's choice of school, and must coordinate with the LEA's jurisdiction for the school selected by the parent or guardian.¹⁵⁰ The separate school is required to ensure that the parent or guardian receive all of the information required by the 2001 Act.¹⁵¹ In addition, in the school's application for funds it must demonstrate that it: (i) has complied with the provisions of the 2001 Act; (ii) is meeting the same federal and state standards, regulations, and mandates as other public schools in the state; and (iii) is providing students with a full range of educational and related services, including those applicable to disabled students.¹⁵² If any of the five grandfathered schools fails to meet the aforementioned requirements it will cease to be eligible for funding under the 2001 Act.¹⁵³

B. Effects of the 2001 Act

Congress' mandate that homeless-only schools meet the same "standards, regulations and mandates" as other public schools is tantamount to a death sentence for the five grandfathered schools. The additional requirements of the 2001 Act only add to the challenges already facing the homeless-only schools. The combination of the new requirements and the preexisting problems are an insurmountable recipe for failure. For example, when a child enters a separate school she usually does so with the ability of a child several grades behind where she should be.¹⁵⁴ While there has been much success in bringing students up to their appropriate grade levels in homeless-only schools, this success is largely attributable to their uniqueness rather than the conformity that the 2001 Act would impose.¹⁵⁵ Furthermore, in light of the education level of the incoming students, it is unreasonable to tie the funding for these grandfathered schools to the same standardized requirements as mainstream public schools.

In accordance with the 2001 Act, if the grandfathered schools fail to meet the requirements set forth, they will no longer be qualified to

149. See 42 U.S.C.S. § 11432(e)(3)(C).

150. See *id.*

151. See *id.* § 11432(e)(3)(C)(i).

152. See *id.* § 11432(c)(3)(E)(4).

153. See *id.* § 11432(e)(3)(D).

154. See *supra* notes 107-08 and accompanying text.

155. See *id.*

receive federal funding, and will in all likelihood be forced to close their doors. It is painfully obvious that Congress has set the stage for these five remaining federally funded separate schools to fail.¹⁵⁶ As expressed by Congress, the legislation itself is an attempt to force homeless children out of separate schools and to integrate them into mainstream public schools.¹⁵⁷

As shown by the lack of success of the McKinney Act in years passed,¹⁵⁸ the 2001 provisions will not cure the problem of educating homeless children in mainstream schools. These new provisions do not change the workings of the system created sixteen years ago by the 1987 Act.¹⁵⁹ History will repeat itself. Only a fraction of the money that is appropriated to the states under the bill will actually be distributed to the states, and of that, only a smaller fraction will be used accordingly.¹⁶⁰ Even now, States are ignoring the requirements of the Act, just as they have done in the past.

Less than a year after the enactment of the 2001 Act, there is already evidence to show that the Act is not working and will not work in the future. For example, although schools are now required to take homeless children, regardless of their current address, many schools have already turned away homeless students, claiming that their schools are too crowded.¹⁶¹ The failure of the 2001 Act is further exemplified by the class action lawsuit that is currently pending in the District Court of Maryland.¹⁶² The lawsuit has been brought against the Montgomery County School Board on behalf of a class comprising all school-aged children aged three and older who, on or after November 1, 2002, have lived or will live in Montgomery County, Maryland, and are homeless as defined by the 2001 Act.¹⁶³ The class is alleging that the Board of

156. It is clearly the goal of the 2001 Act to eliminate all separate schools in the United States, including the five "exempted" schools. *See* Bustos, *supra* note 89.

157. *See id.*

158. *See* Thompson, *supra* note 8, at 1213-14, 1227.

159. *See generally* 42 U.S.C.S. § 11431 (Law. Co-op. 2002) (It is the policy of Congress that "[e]ach State educational agency shall ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education.").

160. *See* Thompson, *supra* note 8, at 1213 n.18.

161. *See Educating Homeless Kids: Schools Struggle to Comply with Federal Mandate*, NPR PROGRAMMING, Apr. 2, 2002, available at <http://www.npr.org/programs/morning/features/2002/apr/homeless/> (last visited Jan. 11, 2003). There is controversy over whether or not there has been widespread compliance with the new provisions of the 2001 Act. *See id.* The government has no solid figures to support either side, as the Secretary is not required to submit a report concerning the progress of mainstreaming homeless children until January of 2004. *See id.*; *see also* 42 U.S.C.S. § 11432(e)(3)(F).

162. *See* *Bullock v. Bd. of Educ.*, 210 F.R.D. 556 (D. Md. 2002).

163. *See id.*

Education, an LEA, and the Superintendent of Montgomery County have violated the 2001 Act in several ways, including the following:

- (1) failing to identify families as homeless as defined by the Act;
- (2) arbitrarily adopting a limited definition of "homeless" that denies homeless children and families their rights under the [2001 Act];
- (3) failing to provide a process for selecting the school that is in the best interest of the homeless child; (4) failing to provide an opportunity for the parent of a homeless child to state what he or she believes to be the best interest of the child in school selection; (5) failing to ensure that homeless children have an opportunity to remain in their schools of origin, and instead forcing them to transfer to the "local school" in the area in which they stay while homeless; (6) failing to comply with the parent's choice regarding school selection by refusing to provide the services necessary, such as transportation, to accommodate the parent's choice; and (7) failing to remove barriers when a parent chooses to re-enroll her child in the home school or transfer her child to the local school.¹⁶⁴

This only demonstrates the fact that just because a law says that a state must, does not mean that it will, and that once again, the McKinney Act will fail, leaving homeless children without a school to attend.

The 2001 Act will certainly exacerbate an already horrifying problem. All separate schools nationwide will most likely be forced to shut down, leaving homeless children at the mercy of the mainstream school systems that have failed them time and time again. Mainstream schools may try to provide an adequate education for thousands of children, but will still lack the necessary resources to bus homeless children to and from ever-changing shelters on a daily basis and to deal with the myriad of other special problems caused by their homelessness. Those children who are able to find their way to the front door of a mainstream school may arrive at school hungry, distracted, unbathed, in need of clean clothing, and in the wrong frame of mind to learn. They may be tormented by other students for wearing the same clothing several days in a row, or for their deficiencies in their basic skills as a result of missing many days or weeks of school, or for having been picked up for school at a homeless shelter. In short, if forced to attend mainstream schools, homeless children will avoid going to school at all.

The only change the 2001 Act may actually implement is that separate schools, developed for the purpose of providing an innovative way of educating homeless children, who, without these schools, would

164. *Id.*

not be attending school at all, will be shut down. In addition, where there is a need to create new separate schools, the funding will simply be unavailable, so that those homeless children who require a learning institution, like the Pappas School, will not have access to one.¹⁶⁵ The 2001 Act is not only a major set back for separate schools for homeless children, one of the only sources of progress that has been achieved for homeless children over the last sixteen years,¹⁶⁶ but it also violates the constitutional rights of homeless children by depriving them of their right to receive a free and appropriate education.

VII. THE CONSTITUTIONALITY OF SEPARATE SCHOOLS FOR HOMELESS CHILDREN

Any law prohibiting the creation of separate schools for homeless children violates the Fourteenth Amendment. Any law resulting in the closing of separate schools for homeless children violates the Fourteenth Amendment. Any law requiring the integration of homeless children into mainstream public schools violates the Fourteenth Amendment.

To deny any child the right to a free and appropriate public education, regardless of his race, color, nationality, or financial status, is a violation of that child's rights guaranteed by the Fourteenth Amendment.¹⁶⁷ When a state provides an opportunity for education in its public schools, that right must be available to all students on equal terms.¹⁶⁸ Although the 2001 Act states that it is the policy of Congress to undertake such steps to "ensure that homeless children and youths are afforded the same free, appropriate public education as provided to other children and youths,"¹⁶⁹ the provisions of the 2001 Act actually serve to place a constitutional bar to providing those children a free, and most importantly, appropriate education.¹⁷⁰

165. See Bustos, *supra* note 89.

166. See *Educating Homeless Children: Hearing Before the Subcomm. on Early Childhood, Youth and Families of the House Comm. on Education and the Workforce*, 106th Cong., 106-118 (2000) (statement of Matt Salmon, Chairman of the Subcomm.).

167. See U.S. CONST. amend. XIV § 1. The Fourteenth Amendment states that no state shall make any laws that "deny to any person within its jurisdiction the equal protection of the laws." *Id.*; see also *Plyler v. Doe*, 457 U.S. 202, 212 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954); *Lampkin v. District of Columbia*, 879 F. Supp. 116, 118 (D.D.C. 1995).

168. See *Plyler*, 457 U.S. at 223; *Brown*, 347 U.S. at 493.

169. 42 U.S.C.S. § 11431 (Law. Co-op. 2000).

170. The question of whether a "minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review" has been addressed by the Supreme Court only four times. *Papason v. Allain*, 478 U.S. 265, 285 (1986); see also *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450 (1988); *Plyler*, 457 U.S. 202; *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). As the Court itself has

In determining what free and appropriate means, a parallel may be drawn to separate schools for handicapped children. Although all handicapped students may attend mainstream public schools, there are many separate schools that have been created to meet the particular needs of these students. As required by the Individuals with Disabilities Education Act ("IDEA"), states receiving money under the IDEA must assure that all handicapped children receive the right to a free and appropriate public education.¹⁷¹ Despite Congress' preference for mainstreaming handicapped children,

Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The [IDEA] expressly acknowledges that "the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." The [IDEA] thus provides for the education of some handicapped children in separate classes or institutional settings.¹⁷²

Homeless children, like handicapped children, are afforded the right to a free and appropriate public education. If the appropriate education cannot be provided for homeless children in mainstream schools, then homeless children, like handicapped children, have the right to attend separate schools that are better suited to meet their educational needs.

A. *Plyler v. Doe*

In *Plyler v. Doe*, the Supreme Court announced that all children have an equal right to a free and appropriate public education under the Equal Protection Clause.¹⁷³ As the *Plyler* Court explained, the right to an education is of such importance in our society, that the impact of its

stated, it has not *definitively* settled this question. However, in situations where there has been an alleged denial of education or denial of access to education, Congress has recognized the importance of access to education and thus allowed the existence of separate schools in situations where mainstream schools have been unable to provide a "free and appropriate education" as promulgated by the courts.

171. See 20 U.S.C.S. §§ 1400(d)(1)(A), 1412(a)(1)(A) (Law. Co-op. 1998).

172. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 n.4 (1982) (citing 20 U.S.C.S. §§ 1412, 1413(a)(4)). Section 1412(a) requires that States establish procedures to assure that:

To the maximum extent appropriate, [handicapped children,] including children in public or private institutions or other care facilities, are educated with children who are not [handicapped,] and special classes, separate schooling, or other removal of [handicapped] children from the regular educational environment occurs only when the nature or severity of the [handicap] is such that [regular] education in regular classes . . . cannot be achieved satisfactorily.

Id. § 1412(a)(5)(A).

173. See *Plyler*, 457 U.S. at 221-22.

deprivation in the life of an innocent child makes that deprivation a violation of a child's due process rights under the Fourteenth Amendment.¹⁷⁴ The Court further held that the right to an education cannot be classified as some governmental benefit that is indistinguishable from other kinds of social legislative benefits, but that the importance of education in our society adjoined with the impact of its deprivation in the life of an innocent child, marks the great distinction between the importance of education and other forms of social welfare legislation.¹⁷⁵

In *Plyler*, the Court was faced with deciding whether alien children should be afforded the right to receive a free and appropriate public education. The Court addressed three specific issues: (1) whether undocumented aliens should be afforded protection under the Fourteenth Amendment;¹⁷⁶ (2) whether alien children are a suspect class within the confines of the Equal Protection clause;¹⁷⁷ and (3) whether alien children have a fundamental right to a public education.¹⁷⁸ The statute at issue in *Plyler* not only withheld funds from local school districts that enrolled alien children, but it also expressly authorized the districts to deny any further enrollment of such children.¹⁷⁹ The Court held that this statute inherently violated the Equal Protection Clause.¹⁸⁰

174. *See id.*

175. *See id.*

176. *See id.* at 210. The Court stated:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' *These provisions are universal in their application, to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws."

Id. at 212 (quoting *Yick Wo v. Hopkins*, 188 U.S. 356, 369 (1886)). The Court also noted that the Equal Protection Clause was intended to "work nothing less than the abolition of all caste-based and invidious class-based legislation." *Plyler*, 457 U.S. at 213. This said, "[t]hat objective [of the Fourteenth Amendment] is fundamentally at odds with the power that . . . [Texas] asserts here to classify persons subject to its laws as nonetheless excepted from its protection." *Id.*; *see also* *Wong Wing v. United States*, 163 U.S. 228, 242 (1896) (stating that the "[t]erm 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction" of the United States, and that any person domiciled in the United States, whether or not a legal citizen, is entitled to the equal protection of the laws of the United States).

177. *See Plyler*, 457 U.S. at 216-17.

178. *See id.* at 223.

179. *See id.* at 205.

180. *See id.* at 207-08, 230 (holding the statute unconstitutional because it was not passed in furtherance of a substantial state goal; the statute did not offer an effective solution to dealing with the problem of educating alien children; nor did the record show that the exclusion of undocumented children is likely to improve the overall quality of education in Texas).

The Court held that despite a person's status with regard to the immigration laws of the United States, an alien is a "person" within the ordinary sense of the term and is therefore, recognized as a person who is guaranteed due process of the laws of the Fourteenth Amendment.¹⁸¹ If aliens are entitled to due process of this country's laws, then homeless persons, who are born citizens of this country, should be afforded the same due process rights. Although illegal aliens are not a "suspect class,"¹⁸² children of illegal aliens who are minors are special members of an "underclass," and are afforded protection when their classification as aliens may impose disabilities upon them.¹⁸³ In defining the meaning of "underclass" in this context, the Court stated:

[W]hen the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with those purposes . . . of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group—through the State's action—will have been converted into a discrete underclass.¹⁸⁴

181. *See id.* at 210.

182. *See id.* at 216, 219 n.19. Homeless children are not part of a suspect class as defined by the courts. The *Plyler* Court explained its standard for the evaluation of suspect classes:

Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal Legislation imposing special disabilities upon groups disfavored by virtue of circumstance beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

Id. at 216 n.14. In the past, the courts have treated those classifications that disadvantage a "suspect class" or that encroach upon the exercise of a fundamental right, as a discriminatory classification that violates the Fourteenth Amendment. *See id.* at 216-17. With regard to these classifications, a state must demonstrate (i) that the categorizing of a group of people has been precisely implemented to serve a compelling governmental interest; and (ii) "that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *Id.* at 217-18. If a state cannot demonstrate these two criteria with respect to the classification, then the classification violates the Fourteenth Amendment rights of all persons included in the class. *See id.* at 216-17. Since no state has ever argued that being a homeless child is a suspect classification created to serve some compelling governmental interest, it follows that a homeless child is not part of a suspect class.

183. *See id.* at 219-20.

184. *Id.* at 234 (Blackmun, J., concurring).

The Fourteenth Amendment affords homeless children the same protection as alien children and all children of every race, color, or nationality.¹⁸⁵ Homeless children are afforded this protection as a special underclass, where their classification as “homeless” may impose disabilities on them, just as minor alien children.¹⁸⁶ Homeless children, just like children of illegal aliens, have no control over their parents’ conduct nor can they control their own status.¹⁸⁷ The Court stated that no child is responsible for her own birth or presence in any country and punishing the child is an ineffectual and unjust way of deterring a parent.¹⁸⁸ The same is so for a homeless parent’s conduct with these children; no child is responsible for her homelessness. Minor children are at the mercy of their parent(s), and no child should be punished for the acts of his or her parent.

Like all children, homeless children are guaranteed the right to a free and appropriate public education.¹⁸⁹ In *Plyler*, the Court held that although “[p]ublic education is not a ‘right’ granted to individuals by the Constitution,”¹⁹⁰ the right to a free and appropriate public education is an inherent right granted by the Fourteenth Amendment.¹⁹¹ The damage to society from denying children an appropriate education was a consequence recognized by the Court in *Plyler* and it applies equally to the homeless. Education plays a fundamental role in maintaining the “fabric of our society” and the Court could not ignore the significant detriment that is caused to society when select groups are denied the

185. *See id.* at 212.

186. *See id.* at 221-22. In applying the Equal Protection Clause, the Court must seek “assurance that the classification at issue bears some fair relationship to a legitimate public purpose.” *Id.* at 216.

187. *See id.* at 220. Even if the State were to find that it was able to control the actions of parents by discriminating against their children, this type of legislation does not comply with the fundamental conceptions of justice that the United States stands for. *See id.*

188. *See id.* (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). The Court has never identified the status of persons who are unlawful in this country as a suspect class, and illegal aliens who voluntarily enter into the United States will not be recognized as a protected class. *See Plyler*, 457 U.S. at 220. However, the Court reasoned that children of illegal aliens have no control over their parents’ conduct nor can they control their own status. *See id.* The Court held that since the statute at issue was directed at children and imposed a discriminatory burden on the basis of the child’s citizenship, a characteristic over which minor children have no control, that the State must carry the burden and present to the Court a rational justification for penalizing these children for their presence in the United States. *See id.* at 220, 226.

189. *See* 42 U.S.C.S. § 11431(1) (Law. Co-op. 2002) (“Each State educational agency shall ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youths.”); *see also* U.S. CONST. amend. XIV § 1; *Plyler*, 457 U.S. at 220.

190. *See Plyler*, 457 U.S. at 221 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

191. *See id.* at 221-22.

education necessary to absorb the “values and skills upon which our social order rests.”¹⁹²

The Court stated in *Plyler* that without an education, alien children who may already be disadvantaged as a result of poor English-speaking skills, poverty, and undeniable racial prejudices, might, as a result, become perpetually locked into a bottom-rung socioeconomic class.¹⁹³ Homeless children face the same kinds of disadvantages as do alien children. Homeless children may have poor basic skills as a result of many missed days of school; they live in a world of severe poverty; and they may be subject to racial prejudices.¹⁹⁴ “By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”¹⁹⁵

The rule from *Plyler* applies with no less force to the minor children of the homeless than it did to the minor children of aliens. The denial of education poses an indignity to one of the goals of the Equal Protection Clause: “the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”¹⁹⁶ The *Plyler* Court noted that it is difficult to reconcile the cost of a status-based denial of a basic education within the framework of impartiality embodied in the Equal Protection Clause.¹⁹⁷ Therefore, to deny any child her right to an education is a violation of that child’s Fourteenth Amendment rights. As is clearly set forth in *Plyler*, all children from all socioeconomic classes, races, colors, and nationalities are guaranteed the right to the same free and appropriate public

192. *Id.* at 221 (stating that education provides the fundamental tools which are needed for individuals to lead economically productive lives, to benefit themselves as well as all others); *see also* *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (recognizing “the public schools as a most vital civic institution for the preservation of a democratic system of government,” and as the primary vehicle for transmitting the values upon which our society rests); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (stating that the American people have always regarded the acquisition of knowledge and a proper education as a very important matter).

193. *See Plyler*, 457 U.S. at 207-08.

194. *See WALSH*, *supra* note 33, at 153.

195. *Plyler*, 457 U.S. at 223.

196. *Id.* at 222. The Court discusses the ramifications of depriving children of education as negatively affecting an individual’s self-esteem, self-reliance, and ability to be a self-sufficient participant in society. *See id.* The Court also briefly addresses the handicaps of illiteracy that an individual who lacks an education may have to face. *See id.* “The inability to read and write will handicap the individual deprived of a basic education each and every day of his life.” *Id.*

197. *See id.* (stating that the damage that the deprivation of education can cause on the social, economic, intellectual, and psychological well being of an individual may be inestimable).

education as all other children.¹⁹⁸ Accordingly, it follows that homeless children are afforded this same right.

B. Separate, Not Segregated

The words “separate school” conjure images of racial strife and social upheaval. If the word separate is confused with segregated, then landmark decisions like *Brown v. Board of Education*, come to mind, bringing with them the precept that “separate but equal” is unconstitutional. However, separate schools for homeless children do not violate Equal Protection rights under the *Brown v. Board of Education* framework.¹⁹⁹

In *Brown*, the Supreme Court held that segregation of children in public schools based solely on their race, even though the physical facilities and other “tangible” factors may be equal, deprived minority children of their Fourteenth Amendment rights.²⁰⁰ The Court explained that to separate children from others of the same age and qualifications, based on race alone, generates an irreversible feeling of inferiority as to their status in the community.²⁰¹ The Court reasoned that the impact of segregation is even greater when it has the sanction of the law since the policy of segregating races usually is interpreted as indicating the inferiority of the minority group.²⁰² “A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”²⁰³

The Supreme Court further concluded that the doctrine of “separate but equal” has no place in the field of public education since separate schools are inherently unequal. As the Court stated in 1954:

In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in

198. See *id.* at 212 (“These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws.”) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

199. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

200. See *Brown*, 347 U.S. at 493; see also *Brown*, 349 U.S. at 294.

201. See *Brown*, 347 U.S. at 494.

202. See *id.*

203. *Id.*

the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.²⁰⁴

In approaching the problem of educating homeless children, we cannot turn the clocks back to 1954 when *Brown* was decided. We must consider public education and its place in American life throughout the Nation today, in the year 2003. We must consider the problems that the one million homeless children in this Nation must face in today's society. Only in this way can it be determined if separate schools deprive homeless children of the equal protection of the laws.

In 1954, although the Supreme Court conceded that some separate schools had reached a level of equality in terms of certain tangibles, such as buildings, curricula, qualifications, and salaries of teachers, the Court held that there was an inherent inequality that separate schools could never overcome.²⁰⁵ Today, however, mainstream schools are ill equipped to provide homeless children with the tangibles, no less the intangibles, that homeless children need. Mainstream schools cannot provide adequate transportation for homeless students, nor can they provide food, clothing, appropriate medical care, or the individualized attention that is necessary to successfully educate children whose lives are in constant upheaval.²⁰⁶ Most importantly, mainstream schools cannot provide a sense of equality for homeless children. Instead, sending homeless children unwillingly to mainstream schools creates the same sense of inferiority that the *Brown* Court held to be the reason for separate schools' inherent inferiority. Homeless children who are forced to attend mainstream schools, who are picked up at homeless shelters, who come to school unbathed, who wear the same clothing day after day, who are hungry, and who are behind in school, are faced with the same sense of inferiority that the *Brown* Court attempted to eliminate from this Nation's public school system. Forcing children into

204. *Id.* at 492-93. The Court went on further to state:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

205. *See id.* at 492-93.

206. *See supra* notes 134-38 and accompanying text.

mainstream schools will retard homeless childrens' educational and mental development and deprive them of the benefits they would receive in a separate school. In short, forcing homeless children into mainstream schools is effectively doing that which is the equivalent of putting African-American students into separate schools in 1954. Forcing homeless children to integrate into mainstream schools is doing that which the *Brown* court declared a violation of the Fourteenth Amendment.

Separate schools provide an opportunity for homeless children to attain an education equal to that of a mainstream public school education. As such, the maintenance of separate schools for homeless children does not violate the Fourteenth Amendment under the *Brown* framework. Rather, maintenance of separate schools actually furthers the goals that were set forth in the *Brown* decision while providing homeless children with their equal right to a free and appropriate public education as required by the Fourteenth Amendment and espoused by the Supreme Court in the *Plyler* decision.

VIII. CONCLUSION

Until the government can find a way to guarantee that the integration of homeless children into mainstream schools will adequately provide for the educational needs of homeless children, Congress' prohibition of homeless only schools violates the Fourteenth Amendment rights of homeless children to receive a free and appropriate education. Without homeless only schools, like the Pappas School, homeless children might not otherwise attend school at all.²⁰⁷ While integration may sound like an ideal situation for homeless children, the government has tried since 1987 to provide an adequate means of educating homeless children, and has failed.²⁰⁸ Homeless-only schools are the only institutions that have been able to provide these unfortunate children with the education to which they are constitutionally entitled.

Segregation is the wrong characterization for what happens at the Pappas School and other schools like it. No child is forced to attend these learning institutions. The parents of a homeless child may choose to send their child to a public school, and many do so. The reason that parents choose to send their children to homeless-only schools is that these schools specialize in the needs of homeless children and their families, whereas mainstream schools fail to meet the basic educational

207. See Bustos, *supra* note 89.

208. See *Homeless Children 2001*, *supra* note 9.

needs of homeless children. These parents decide to send their children to homeless only schools because they believe that it is in their child's best interest to do so. To remove the choice for children to attend these schools, when there are currently no other viable options, is to take away a fundamental right of homeless children to receive a free and appropriate public education.

Legal arguments aside, perhaps the best argument in favor of preserving separate schools for homeless children comes from Chuck Bacon, a former Pappas student, in his testimony before the Subcommittee on Early Childhood, Youth and Families:

[I]f you closed down schools like Pappas, you would be taking [away] one of the safest places that kids have to go. You will not only be shutting down a school. You will be shutting down kids' hopes and dreams for a better tomorrow.

....

... [W]hen you come to [schools like] Pappas ... [t]hey expect the unexpected. They are there for you. You do not have to adjust for them. They adjust to you.

... I do not understand why they would want to shut down something that is doing such a great thing for [homeless children]... they say everybody is supposed to get an equal opportunity.... How are ... homeless children getting an equal opportunity when [they are sent] ... into a mainstream school unprepared?

....

... [I]f it [were] not for the Pappas School I would probably have just become what many people say is a statistic because I probably would not have even made it through high school.

. . . .

I thought that, you know, I guess the government or whatever out there is supposed to try to help educate the youth these days, not take it away.²⁰⁹

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209. *Educating Homeless Children: Hearing Before the Subcomm. on Early Childhood, Youth and Families of the House Comm. on Education and the Workforce*, 106th Cong., 106-118 (2000) (statement of Chuck Bacon).

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