Opening the Schoolhouse Gate to Homeless Children

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I feel sad when I see other kids going to school and we are not able to go. I don't want to sit there and be dumb when I grow up. I say to myself “Please, somebody, let me stay in one school so I can learn and live in a house like normal people do.”
—Erica, age 8.¹

For children like Erica, loss of a home often means loss of an education.² Homeless children face both bureaucratic and practical impediments towards enrollment, attendance and success in school. Bureaucratic obstacles encompass state- and locally-imposed prerequisites to enrollment, including residency, guardianship and record requirements, that the very state of homelessness may make difficult to fulfill. By contrast, practical problems are the byproducts of a transient, poverty-ridden lifestyle. For instance, parents pre-occupied with finding shelter, food and employment may place low priority on getting their children into school. Similarly, frequent moves may make enrollment meaningless. Lack of money for school supplies and clothing as well as lack of transportation may also prevent attendance. Homeless children who are able to overcome these hurdles face additional obstacles once enrolled. They may lack a quiet place to study, need extra tutoring or need psychological counseling to help them deal with the trauma caused by homelessness.³

¹ B.A. 1988, University of Pennsylvania; J.D. Candidate 1992, University of Chicago.
² Michele L. Norris, Homeless But Still Together; Prince George’s School Staff Helps Mother of 6 Who Contemplated Splitting Family, Washington Post A1, (Nov 1, 1989).
³ At age eight, Erica Young had already spent one fourth of her life without a home. Her cumulative school attendance during the two years in which her mother shuttled Erica and her five siblings between homeless shelters and the streets amounted to only a few weeks. Id.
This country has consistently recognized the link between education and economic self-sufficiency. As the Court wrote 37 years ago in *Brown v Board of Educ.*, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Barriers to enrollment deny homeless children—a class of children that could benefit most from receiving an education—access to a crucial means of escape from their poverty. The increasing importance of overcoming these barriers parallels the growth of the homeless population. While government agencies and homeless advocates may disagree on the numbers of homeless children, they agree that homeless families with children are the fastest growing segment of the homeless population.

Heightened concern over the expanding homeless population prompted Congress to enact the Stewart B. McKinney Homeless Assistance Act ("Act" or "McKinney Act") in July 1987, and to substantially amend it in November 1990. The Act contains seventeen different programs that address the needs of the homeless, such as funding for emergency housing and health care. Subtitle VII-B makes it a federal policy to remove all barriers that prevent homeless children from receiving classroom instruction. States and local education agencies must amend laws, regulations, practices or

Act, 2-13, 16 (National Association of State Coordinators for the Education of Homeless Children and Youth, Jan 1990) ("Position Document").
* 347 US 483, 493 (1954). See also 136 Cong Rec S9863 (July 17, 1990) in which Senator Edward Kennedy discusses the value of education as a "gateway to a better life" and a means of escaping poverty.

* The transient nature of homelessness and varying methodologies for counting lead to widely disparate estimates on the numbers of homeless. The Department of Education in 1990 estimated that 272,773 school-aged children in the nation are homeless. *Report to Congress on the Education for Homeless Children and Youth Program For the Fiscal Year 1989, 7* (US Dept of Educ, Mar 29, 1990) ("Report to Congress"). Other studies place the numbers higher. See, for example, *Shut Out* at 1, estimating that over two million children are "precariously housed and at imminent risk of homelessness." See also 136 Cong Rec H4100 (June 22, 1990) (remarks by Rep. George Smith); Jackson, Shelley, *The Education Rights of Homeless Children 1* (Center for Law and Education, May 1989).


* Stewart B. McKinney Homeless Assistance Amendments Act of 1990, Pub L 101-645, to be codified at 42 USC §§ 11431 et seq. At the time of this writing, the 1990 Act had not been codified. All cites to the 1990 Act will therefore be made to the Public Law. To avoid the confusion that may occur once the 1990 Act is codified, cites to the 1987 Act will refer to both the codification and the Public Law. See also 136 Cong Rec S13990 (Sept 26, 1990) for expressions of concern over the expanding homeless population and debate over the inadequacies of the original McKinney Act in comprehensively meeting the needs of homeless children.
policies that act as barriers to enrollment, attendance or success in school.\(^8\) Homeless children must have access to a “free, appropriate public education.”\(^9\)

This Comment focuses upon what actions states and localities must take to comply with the McKinney Act. Part I states a working definition of “homeless child” for purposes of this Comment. Part II analyzes the legislative history of the Subtitle to divine its intended scope. Part III focuses on bureaucratic barriers to enrollment in school. It is divided into three subsections describing residency, guardianship, and record requirements. Each subsection examines the impeding effects of these requirements and the policies behind them. The subsections then use these policy objectives as guidelines for proposals on how states should comply with the McKinney Act requirement that they remove barriers. Part IV explores the McKinney Act mandate that states and localities ensure the success of homeless children once enrolled. It examines some of the alternatives states have adopted to educate the homeless, such as shelter schools and mobile schools. It then focuses upon the possible advantages and disadvantages of these schools and discusses whether they violate the McKinney Act by segregating homeless children from nonhomeless children.

I. Defining Who Is Homeless

One requirement of the revised McKinney Act is that the Secretary of Education conduct a study to determine “the appropriate definition of the terms ‘homeless child’ and ‘homeless youth.’”\(^10\) This Comment uses the term ‘homeless child’ to mean a person who sleeps in a shelter; sleeps in the home of a friend or relative because he lacks a regular, fixed, adequate residence; sleeps in a shelter awaiting institutionalization, adoption, foster care or other placement; sleeps in a car, tent, abandoned building or other location not designated for regular sleeping accommodations.\(^11\) Runaways fall within this definition. At times, this Comment differentiates between different types of homeless children.

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\(^8\) Pub L 101-645, § 612(a)(2)(A).
\(^10\) Pub L 101-645, § 612(d)(3). At the time of writing, the Department of Education had yet to complete the study. For this reason, the Comment adopts a definition of “homeless child” from another section of the McKinney Act.
\(^11\) This definition is taken from the original McKinney Act definition of “homeless person.” Pub L 100-77, § 103(a), codified at 42 USCA § 11302(a). For purposes of this Comment the term ‘homeless child’ will be used to cover both homeless children and youth (“youth” are teenagers).
II. HISTORY OF THE MCKINNEY ACT

Congress passed the McKinney Act in 1987 as a response to a "compelling national need" for increased funding and coordination of programs assisting the homeless.\(^\text{18}\) However, the 1987 Act failed to comprehensively address the problems of homeless children and education. The Act required states to review and revise only residency requirements\(^\text{19}\) in order to meet the objective of providing homeless children with the same "free, appropriate public education" that would be given to any state resident.\(^\text{14}\) Many states have adjusted their residency laws or policies\(^\text{16}\) and at least one group of educators believes that the 1987 McKinney Act adequately addressed the barrier effect of residency laws.\(^\text{18}\)

Nevertheless, the limited scope of the 1987 Act meant that bureaucratic requirements continued to keep homeless children out of school.\(^\text{17}\) A 1990 Department of Education ("DOE") study estimated that 28 percent of 272,773 homeless children did not attend...

\(^{18}\) 133 Cong Rec S4814 (Apr 8, 1987).

\(^{19}\) Pub L 100-77, § 721(2), codified at 42 USCA § 11431(2). Neither the Act nor the legislative history reveal why Congress limited the Act to residency requirements, although it seems likely that it was because these were the only requirements that had led to litigation. See, for example, Stewart B. McKinney Homeless Assistance Act of 1987, HR Rep No 100-174, 100th Cong, 1st Seas in 133 Cong Rec H5383 (June 22, 1987): "Of particular concern are potential disputes between school districts over the placement of these children, which could result in the homeless being denied an education in any school district." See also 133 Cong Rec S4812 (Apr 8, 1987) (remarks by Sen. Edward Kennedy): "Because, by definition, homeless children have no permanent residence, it has been far too easy for a school district to say that any particular homeless child is someone else's responsibility."

\(^{14}\) Pub L 100-77, § 721(1), codified at 42 USCA § 11431(1).

\(^{16}\) See Report to Congress at 2 (cited in note 5). See also Position Document at 4 (cited in note 3):

Laws, policies, and regulations have been reviewed, and in some cases revised, to prevent homeless children from being denied access to education. In several states, it was not necessary to revise laws, however, it was appropriate to issue administrative clarifications, interpretations, or directives to insure that all school districts understood that existing laws did not preclude school attendance for homeless children.

\(^{18}\) Position Document at 4.

\(^{17}\) The 1987 Act's only reference to guardianship states that the choice regarding school placement must be made regardless of whether the child is living with his/her parents. Pub L 100-77, § 722 (3)(4), codified at 42 USCA § 11432(e)(4) (1978 and Supp 1989). Literally read, this provision directs school officials to make a placement decision. It does not compel school officials to waive guardianship requirements and enroll the child. Similarly, the Act's only reference to records states that school districts must maintain records so that they are available "in a timely fashion." Pub L 100-77, § 722(e)(6)(A), codified at 42 USCA § 11432(e)(6)(A). This requirement does not address the problems caused by schools that refuse to transfer records because students owe money; nor does it address problems that occur when homeless families lose records such as birth certificates and immunization booklets. See text accompanying notes 70-85.
school in the previous fiscal year. A twenty state survey of providers of services to homeless children conducted by the National Law Center on Homelessness and Poverty in early 1990 provides a more detailed breakdown of the impact of bureaucratic requirements on enrollment. Sixty percent of those surveyed reported that states and/or localities imposed residency requirements in a manner that excluded homeless children. Forty percent reported that guardianship requirements were blocking enrollment. Seventy percent reported difficulties in record transfers. In another study, approximately 25 percent of shelter providers reported that difficulties in obtaining prior school or immunization records prevented or significantly delayed enrollment by homeless children.

The failure of the 1987 Act to adequately address barriers to enrollment led Congress to enact a major overhaul of Subtitle VII-B in 1990. The 1990 version is a sweeping attack upon impediments to enrollment. States must review and revise “laws, regulations, practices or policies that may act as a barrier to the enrollment, attendance, or success in school of homeless children.” Local education agencies must also review their policies. As a measure of its intent to seriously attack these problems, Congress increased funding tenfold, from $5 million to $50 million. The states can now make grants of federal money to local districts for
substantive programs helping homeless children. The 1990 Act also expands the duties of the Office of Coordinator of Education of Homeless Children and Youth ("Office"), which each state had to establish under the 1987 Act. Each Office must still prepare a state plan—a blueprint on how the state intends to provide education for homeless children—however, the 1990 Act requires states to address substantially more issues than the 1987 Act.

Two themes run throughout the congressional debate on the amendments: the failure of the original McKinney Act to go far enough in removing barriers to enrollment, and the potential harmful economic consequences of this failure. For instance, during his introduction of the bill reauthorizing and amending the McKinney Act, Senator Kennedy referred to the 1990 DOE report that 28 percent of homeless school-aged children "still" did not attend school. The debates also show an acute awareness by the legislators of the link between education and economic self-sufficiency. The amendments began in the House as the Access to Education for Economic Security Act, and the bill's sponsors in both the House and Senate cast the amendments as an economic measure. Another consideration mentioned by bill supporters was the

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Id at § 612(c). Under the revised Act, a minimum of 50 percent of any grant to a local agency must go to educational services such as tutoring. Not less than 35 percent may go to a variety of services including expediting evaluation of homeless children and youth for special services, facilitating record transfers, paying fees for tracking and obtaining records, school supplies and transportation to school. By contrast, the 1987 Act contained an exemplary grant program administered by DOE. See Pub L 100-77, § 723, codified at 42 USCA § 11433 (1978 and Supp 1989). Both the amount of money available and its appropriate usages were more limited.

Pub L 101-645, § 612(b)(4-7). For instance, the amended Act adds a requirement that the Office facilitate coordination between the state education agency, state social services agencies and other agencies providing services to the homeless "to improve the provision of comprehensive services to homeless children" and their families.

Id at § 612(b)(8-9). For example, plans must develop awareness programs for school personnel on the needs of homeless children and must ensure participation by eligible homeless children in federal, state or local food and before- and after-school care programs.

See, for example, Senator Kennedy's remarks in 136 Cong Rec S9863 (July 17, 1990): "If we allow 750,000 to [sic] million children to grow up untrained, uneducated, and unhealthy, then we have no
stabilizing role that school can play in a homeless child’s life. Additionally, legislators expressed concern that the longer a child is out of school, the less likely it is that the child will ever return.

III. Scope of the 1990 McKinney Act

The McKinney Act directs states and local education agencies to remove barriers to enrollment, attendance and success of homeless children in school. Except for residency laws, where Congress specifies exemption for homeless children, the Act leaves to state and local discretion the decision on how to remove various barriers. Both the tone of the debates and the language of the statute suggest that states must exempt homeless children from requirements, if that is the only way to fulfill this mandate. For instance, the Act requires states and localities to “remove” barriers, while bill supporters spoke in terms of removing, eliminating, and taking down all barriers to enrollment. However, exempting homeless children from “bureaucratic” requirements to enrollment undermines the policies that these requirements promote. The legislative history of the Act contains no indication that Congress even remotely considered, let alone differentiated among, the policy objectives behind these prerequisites to enrollment. Instead, Congress seemed to assume that these laws served only bureaucratic, school administrative goals.

This generalization fails to account for external social policy objectives that pre-enrollment requirements advance. This Comment argues that states and localities should differentiate among the policy objectives behind each requirement when deciding how
best to remove barriers. Differentiating among policy objectives allows states and localities to balance congressional intent against their countervailing interests in enrollment prerequisites. States and localities should exempt homeless children from requirements enacted to facilitate school administration ("internal" goals) because Congress clearly deemed these as unworthy of protection. By contrast, states and localities should enact alternative means of compliance with requirements implemented to achieve public health and social welfare aims ("external" goals).42 Alternative methods of compliance would allow states to protect these external social policies from the erosion caused by exemptions, while negating a requirement's impeding effect.43

A. Residency Requirements

Residency rules typically require a student to prove he lives in a given district before he can enroll. The Supreme Court recognized in 1983 that a bona fide residency requirement furthers the state interest in assuring that services provided for state residents are enjoyed only by them.44 Residency prerequisites are constitutional as long as they have a rational purpose such as the proper planning and operation of schools.45 However, even laws with a rational purpose can prevent enrollment for children who, due to their homelessness, may have no legal residence.

For instance, in Orozco v Sobal,46 a mother placed in a Yonkers hotel by the New York State Division of Social Services tried to enroll her daughter in a Mount Vernon school because she intended to seek a permanent home in Mount Vernon. Mount Vernon school officials refused to enroll the child, claiming that she was a resident of Yonkers. Yonkers school officials refused to enroll the child, claiming that she did not permanently reside in

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48 The second category is referred to as "external" because it encompasses requirements that states and localities enacted to meet social policy objectives.
44 This conclusion is premised on the assumption that some requirements meet such important public goals that no one should be exempt from compliance.
44 Martinez v Bynum, 461 US 321, 328 (1983). The Court upheld a Texas residency statute barring children from tuition-free public education if they were in the state for the sole purpose of receiving an education.
46 Id at 329. The Court stated that "[a]bsent residence requirements, there can be little doubt that the proper planning and operation of the schools would suffer." The Court relied on the District Court's findings that invalidating the residency requirement would cause school populations to fluctuate. These fluctuations would result in over- or under-estimates of teachers, supplies and materials needed for each school, overcrowded facilities and overlarge student-teacher ratios. Id at 329 and n 9.
48 674 F Supp 125 (S D NY 1987).
Yonkers. The court granted the mother a preliminary injunction ordering the Yonkers school district to enroll the child. The court later declared the case moot because New York had enacted regulations mandating that local education agencies enroll homeless students in their original district or the district in which they currently reside.

The 1990 McKinney Act language is aimed at fine tuning residency problems that stemmed from vagueness in the 1987 language. The original Act mandated that states and districts give homeless children the choice between enrolling in their original school district (the one they lived in before becoming homeless) or the one in which they currently live. The revised Act broadens this option to "school of origin" instead of "district of origin." The amendments define "school of origin" to include not only the school in which the child was enrolled when permanently housed, but also the school in which the child was last enrolled. Local education agencies must consider parental preferences when making placement decisions. The standard to decide placement is the child's best interest.

The purpose of these revisions is to prevent children from having to change schools every time they change locations. Families frequently stay in a shelter for the maximum time period,

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47 Id at 131. The court found a right to an education in the New York State constitution. Id at 128-29. The court then deferred to the Division of Social Services in making the placement decision. Id at 131.

48 Orozco v Sobol, 703 F Supp 1113 (S D NY 1989) ("Orozco II"). See also Harrison v Sobol, 705 F Supp 870 (S D NY 1988). A mother filed suit on behalf of her two children alleging that the Peekskill, New York procedures for terminating a student's education because of nonresidency violated the Due Process Clause of the Fourteenth Amendment. The children had been living with their father, a Peekskill resident, after a fire destroyed their home in Lake Mohegan, New York. Id at 873. The father's landlord eventually prohibited the father from allowing his children to live with him in the building. Id. After they moved out of the father's building, the school district expelled them due to non-residency. Id. As in Orozco II, the court deemed the case moot because of the new state regulation regarding residency. Id at 875.


50 Pub L 101-645, § 612(b)(9)(B), to be codified at 42 USC §§ 11431 et seq.

51 Id.

52 Id. States were required under the 1987 Act to provide procedures for resolution of placement disputes. Pub L 100-77, § 722(e)(1)(B), codified at 42 USCA § 11432(e)(1)(B). The 1990 Act keeps this requirement but modifies "resolution" with the word "prompt." Pub L 101-645, § 612(b)(8)(B)(i).

53 See, for example, 136 Cong Rec H9246 (Oct 10, 1990) (remarks by Rep. Miller): "We wanted to see whether or not we could get them to schools that are close to the shelters and to see that they were not moved out of a school every time they moved to a different shelter."
move to another shelter or out on the streets for a period, and then return to the first shelter. Under the old law, children would have to switch schools if they moved into a different school attendance zone, even though they remained in the same school district.

The Act specifically requires an exemption from residency requirements and tells states how to enact this exemption. Consequently, states and localities do not have to analyze the policies behind residency laws to decide how to comply. They can codify the 1990 language in the same manner that many codified the 1987 language.

Examining treatment of residency requirements may help explain congressional intent for the treatment of other bureaucratic barriers because the residency context is the only one in which Congress has mandated a specific action. One possible interpretation of the treatment of residency requirements is that it establishes as congressional policy that no protection will be given to laws facilitating internal school operation. In other words, states and localities should exempt homeless children from any form of compliance with laws, such as residency requirements, that serve "internal" purposes only.

B. Guardianship Requirements

Many states and local educational agencies require that a parent or guardian sign permission forms to register a child for school. States and localities enact these requirements for a variety of reasons. Districts commonly use guardianship requirements to prevent an influx of children seeking a free education in the district and to protect themselves from possible liability arising from enrolling a child without the parents' or legal guardians' permission. Additionally, concern about missing and exploited children has led some states to order districts to verify that the individual enrolling the child is in fact a parent or guardian. Other districts

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55 Position Document at 9 and 16 (cited in note 3).
56 See, for example, Norris, Washington Post at A1 (cited in note 1).
57 Pub L 101-645, § 612(b)(9)(B), to be codified at 42 USC §§ 11431 et seq.
58 For examples of statutes that comply with the 1987 Act, see 1990 Colo Rev Stat § 22-1-102; Fla Stat § 232.01 (1989). Some states already comply with portions of the revised Act. See, for example, 1989 NJ Rev Stat § 18A:38-1 stating "the district of residence [of a homeless child] shall determine the educational placement of the child after consulting with the parent or guardian."
59 Position Document at 6; Shut Out at 6 (cited in note 3).
60 Position Document at 6 (cited in note 3).
61 Id.
under court-ordered desegregation plans use guardianship requirements to ensure that parents and children do not evade the plan by crossing district lines. However, loss of a home often causes families to split up and send children to stay with family friends or relatives. Parents or guardians may consequently be unavailable to register the child for school.

Several sections of the McKinney Act explicitly mandate that states and localities "review and revise" their guardianship requirements to eliminate their impact as barriers to enrollment. However, unlike the residency sections, these sections do not give any guidance on what revisions states and localities should enact. The obligation to remove guardianship barriers may conflict with a desire to continue enforcing the public policy goals behind the requirement. Arguably the rationales for guardianship laws are of varying importance. Preventing an influx of students who want to take advantage of the free education in the district seems of lower ("internal") priority than preventing kidnapping or enforcing court-ordered desegregation.

How a state or locality changes its guardian laws should depend in part upon the policies behind them. Waiver is an appropriate remedy where states or localities have guardianship laws solely to prevent students from taking advantage of educational opportunities in a district. Precedent for this approach is found in Congress's mandated waiver of residency requirements which usually serve this same purpose. In both this and the residency situation, the policies behind the law relates to administrative ease and budgetary concerns. No greater public policy issue is at stake.

By contrast, states should be able to require some evidence of homelessness where the guardianship requirement serves "external" policy objectives before granting a waiver. States should fol-
low several guidelines if they do adopt an evidentiary requirement. First, they should presume homelessness and enroll a child immediately. To defer enrollment until evidence of homelessness is produced does nothing to reduce the barrier effect of a guardianship requirement. Second, states and localities need to keep evidentiary burdens low, otherwise homeless children may not be able to fulfill them. They should keep document requests to a minimum, if not eliminate them, because they can prove impossible for homeless children to meet. Instead, they should consider requesting references such as former neighbors, landlord, employers, schools or homeless service agencies who can vouch for the child’s homelessness. The district could then conduct its own investigation. Such an arrangement shifts the burden from the child proving homelessness to the school district proving nonhomelessness.

C. Record Requirements

Like guardianship requirements, record production requirements fall within the intended reach of the revised Act. Typically

The Governing Board may admit children who are residents of the United States without payment of tuition if evidence indicates that because the parents are homeless or the child is abandoned . . . the child's physical, mental, moral or emotional health is best served by placement with a person who does not have legal custody of the child and who is a resident within the school district, unless the governing board determines that the placement is solely for the purpose of obtaining an education in this state without payment of tuition.

Similarly, Texas allows a child under eighteen living apart from his parent or guardian to enroll in school upon proof that the primary reason for his presence in the district is not to enable him to attend the schools. Tex Educ Code Ann § 21.031(d) (Vernon 1987 and Supp 1991).

See, for example, Texas State Plan at 6 (cited in note 23). Texas schools may request documentation, which homeless children may not have, to prove that a child is in the district for non-education reasons. Document production to meet any requirement conflicts with the McKinney Act mandate that states remove record production barriers. If states must stop requiring prior school records, birth certificates and other records as prerequisites for enrollment then it follows that states should not be permitted to continue document requests to fulfill other requirements. See text accompanying notes 70-85.

Another example of a low burden is the acceptance by some schools in Texas of the signature of shelter personnel as proof of homelessness. Texas State Plan at 6.

Pub L 101-645, § 612(b)(8)(C), to be codified at 42 USC § 11431 et seq, requires state plans to address problems with respect to immunization records and lack of birth certificates, school records or other documentation. Section 612(b)(9)(D) requires that schools maintain “any record ordinarily kept by the school, including immunization records, academic records, birth certificates, guardianship records, and evaluations for special services or programs” of homeless children so that they are available in a “timely fashion” when a child enters a new school district. (The 1987 Act contains the “timely fashion” requirement but it is limited to “school records.” Pub L 100-77, § 722(e)(6), codified at 42 USCA § 11432(e)(6) (1978 and Supp 1989)). Pub L 101-645, § 612(b)(9)(E) requires state and local educational agencies to review and revise policies that may act as barriers to enrollment,
schools request one or all of the following types of records prior to enrollment: transcripts from former schools, birth certificates, and immunization records. The differing policies behind each of these records must be examined in order to determine an appropriate method of complying with the McKinney Act.

1. **Academic records.**

School districts generally request previous academic records to aid in grade level placement. Many states have written policies or procedures governing the transfer of records for homeless children. However, some of these laws or regulations allow, or even require, districts to withhold school records if the student has outstanding fees, fines or unreturned books. Some schools refuse to enroll children without records, which often take time to request and receive. These policies and practices can keep children out of school for weeks.

States should amend their laws to exempt homeless children from having to produce prior academic records because schools can easily adopt procedures to substitute for the lack of records. Schools can meet their policy objectives by doing their own placement testing. Furthermore, the McKinney Act orders schools to maintain the records of homeless children so that they can quickly transfer them. This requirement means that schools should be able to enroll a child and make adjustments upon receipt of prior records within a short time period. States and districts should also amend their policies to force schools to forward records of homeless children, even if the student has outstanding fees or unreturned books.

2. **Birth certificates.**

Many states require that children present birth certificates prior to enrollment. States and districts use birth certificates to giving consideration to issues concerning requirements of immunization, birth certificates, school records and other documentation.

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71 Position Document at 6 (cited in note 3).
72 Id. See also Texas State Plan at 5.
73 Position Document at 6.
74 See Ariz Rev Stat Ann § 15-828(A-G) (West 1990) for an example of a state that has already waived academic record requirements for homeless children.
75 Pub L 101-645, § 612(b)(9)(D) (see note 70 for text of statute). The Act also allows local education agencies to use grant money to pay fees associated with “tracking, obtaining and transferring records necessary to enroll homeless children.” Id at § 612(c).
76 While schools may have these policies as a way to recoup their losses, the penalty of keeping a child out of school for an unreturned book is excessive.
verify age, particularly where state funding is contingent upon the student being between certain ages. They also may use birth certificates as proof of parent or guardian relationship. However, families frequently lose birth certificates and parents may not have the money to replace them.

States and local districts should waive the requirement of birth certificates because it does not implement any external policy goals and because schools can obtain the information after enrollment. As detailed above, states can fulfill guardianship requirements without using documents. As for proof of age, the waiver requirement imposes only a temporary delay. The McKinney Act proscription that schools maintain all records for quick transferral means that schools in some cases will receive a birth certificate copy upon receipt of prior school records. Alternatively, school districts that still want to obtain birth certificates can apply for McKinney Act funding to pay certificate fees.

3. Immunization records.

Immunization record requirements present a more intractable problem than either birth certificates or academic records. States and local education agencies have a strong interest in requiring students to be immunized against contagious, life threatening diseases before they allow enrollment. However, families may lose immunization records in the course of various moves. Alternatively, children may not have been immunized and end up being shut out of school because they cannot afford the immunization and/or lack transportation to clinics.

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77 See, for example, Tex Educ Code Ann § 21.031(c) (Vernon 1987 and Supp 1991). Texas specifies that schools will receive state money only for children who are between the ages of five and 21 by September 1 of any scholastic year.
78 Position Document at 5 (cited in note 3).
79 Shut Out at 21 (cited in note 3); Texas State Plan at 5 (cited in note 23). Some states charge as much as $8-10 to obtain a copy of a birth certificate, a large sum of money for families with little or no income. Position Document at 5.
80 Arizona has also waived birth certificate requirements for homeless children. Ariz Rev Stat Ann § 15-828(G) (West 1990). The waiver of both birth certificate and academic records admittedly creates a moral hazard. Lack of record requirements may enable school districts to claim that they have enrolled a certain number of non-existent homeless children. They would then receive state money for the non-existent children. Presumably, states already have policing mechanisms to ensure that claimed enrollment equals actual enrollment.
81 Pub L 101-645, § 612(b)(9)(D), to be codified at § 11431 et seq.
82 Id at § 612(c).
83 Position Document at 5 (cited in note 3); Shut Out at 6.
Public health concerns dictate against exemption from immunization requirements, particularly since studies show that homeless children are more susceptible to health problems.\textsuperscript{44} However, precluding enrollment until a child produces proof of immunization would violate the McKinney Act's mandate to remove enrollment barriers. One alternative is to enroll children and provide them with a short grace period in which to either produce immunization records or to get immunized. An appropriately set grace period should minimize any potential risk of transmission that occurs from enrolling non-immunized children.\textsuperscript{85} Also, the requirement that schools maintain all records in a "timely fashion" means that a prior school district should be able to forward immunization records quickly, even if a parent or guardian has no copy. Overall, the harm caused to a child by keeping him out of school outweighs the likelihood of disease transmission if the grace period is kept to a minimum.

4. Requirements summary.

With the exception of residency requirements, the Act gives no guidance on how states should change their laws to meet the goal of removing barriers to enrollment, attendance and success in school. Exempting homeless children from prerequisites to enrollment, as mandated in the residency sections, would in all circum-

\textsuperscript{44} Several reports have concluded that homeless children are particularly vulnerable to disease and experience much higher rates of health problems than do children nationally. See, for example, James Wright and Eleanor Webb, *Homelessness and Health* (McGraw-Hill's Health Care Information Center, 1987). See also Sally Andrade, *Living in the Gray Zone: Health Care Needs for Homeless Persons* (1988), a report commissioned by the Texas Department of Human Services and the Texas Commission on Alcohol and Drug Abuse as cited in the *Texas State Plan* at 14 (cited in note 23) and the *Position Document* at 10-11.

\textsuperscript{85} In order to determine the length of a grace period, education officials should consult with medical experts to assess the transmission risks over varying lengths of time. Nonhomeless children who presumably had to be immunized before they could enroll are at low risk of catching anything from unimmunized homeless children. The greatest risk appears to be from nonimmunized children infecting other nonimmunized children. Charles B. Clayman, ed, "Immunization," *The American Medical Association Encyclopedia of Medicine*, 571-75 (Random House, 1989); "Immunity," 20 *New Encyclopedia Britannica: Macropaedia, Knowledge in Depth* 843 (Encyclopedia Britannica, Inc, 15th ed 1987). School officials should balance these transmission risks against the time usually needed to get immunized or to obtain records from previous schools.

Some states, such as Texas, already allow a grace period of up to 30 days for students transferring from another school. Tex Admin Code, ch 97.71 as cited in *Texas State Plan* at 5. However, see *Position Document* at 5 for reports that some schools are reluctant to grant the grace period because of the possibility that students may move before the grace period ends and continue going to school without immunizations. Keeping children out of school because they might leave the school before they get immunized is specious logic and seems to be a "practice" under Pub L 101-645, § 612(a)(2)(A) that the McKinney Act forbids.
stances be a sure method of compliance. At the same time, a policy of blanket exemptions may severely undermine long standing public policy objectives that states and localities have strong (if not court-ordered) reasons to preserve.

Congress appears to have based its contempt for requirements on the mistaken assumption that they meet administrative purposes only. Based upon congressional policy towards residency laws, which typically serve administrative purposes only, exemption is appropriate where a requirement serves “internal” school purposes. However, states and localities should adopt flexible methods for homeless children to fulfill the policy objectives behind the requirements, if not the letter of the requirement, where the ordinance implements external policy goals. They should enroll children first, and allow them to comply with residency requirements subsequently; they should not make satisfaction of residency requirements a precondition to enrollment.

IV. ALTERNATIVE EDUCATION PROGRAMS AND THE McKinney ACT

Many school districts, in their quest to provide at least some education to homeless children, have created alternative programs to regular public schools. Examples include schools conducted in homeless shelters and mobile schools. These alternative schools appear to violate the McKinney Act, which clearly envisions enrolling homeless children in regular public schools. They further conflict with the general education policy in this country against segregating groups of children. These considerations, along with a lack of empirical evidence on the quality of alternative programs, militate in favor of abandoning alternative schools or operating them only as supplemental programs to regular public schools.

An example of a shelter school that has received publicity as a paradigm of how to educate homeless children is the Eugene Tone School in Tacoma, Washington. The Tone school was started in May 1988 in a Young Women’s Christian Association building (“YWCA”). Initially, the school was for children of domestic violence who lived in the YWCA’s women’s shelter. It has since expanded and now operates a school bus which picks up children at three other area shelters and brings them to the YWCA. Two

See, for examples, Sara Crickenberger, A Home Room, Seattle Times C1, (Dec 12, 1988); Timothy Egan, School For Homeless Children: A Rare Experience, NY Times A20 (Nov 17, 1988). All information on the Tone School was verified in a telephone conversation with Mel Durand, Tone School social worker (Jan 9, 1991). Notes available on file in the Legal Forum office.
teachers conduct classes for an average of about 40 children, grades kindergarten through eight. Regular subjects include reading, math and physical education and occasionally art, music, science and history. The average stay in the school is two weeks, a time period that coincides with the time-limit on most of the shelter stays. In addition to providing children with classes, the school provides each child with at least two outfits of clothing, breakfast and lunch, and medical services. A full time social worker, a half-time nurse, and half-time counselor also staff the school.

Another alternative adopted in Orange County, California is a mobile school. A county Department of Education teacher travels with lessons to parks, motels and other areas frequented by the homeless. The mobile school, funded by a $300,000 federal DOE grant, is outfitted with books, computers and screening facilities to monitor students' health. The project keeps track of homeless families through a toll free number that parents phone to leave their new location whenever they move. The teacher assesses the children's grade levels and puts together an educational program for them. The teacher also groups children by age and grade level and then teaches the appropriate lesson to each group.

These types of alternative programs most likely violate the McKinney Act, which envisions enrolling children in regular public schools. The Act's plain language repeatedly prohibits states and localities from segregating homeless children from the nonhomeless. The policy section states that "homelessness alone should not be sufficient reason to separate students from the mainstream school environment." Other sections of the Act direct schools to adopt policies and practices to ensure that homeless children are not "isolated or stigmatized" and that homeless children are integrated to "the maximum extent practicable" with nonhomeless children.

Other considerations in addition to the Act's language support the conclusion that alternative programs violate the statute. For instance, the whole thrust of the Act is aimed at dismantling barriers to enrollment, attendance and success in school. It is inconsis-

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87 The school has a medical clinic and a nurse whose duties include following up on immunization records.
89 The legislative history contains no mention of alternative programs.
90 Pub L 101-645, § 612(a)(3), to be codified at 42 USC § 11431 et seq.
91 Id at § 612(b)(8)(C).
92 Id at § 612(c).
tent with this goal to allow alternative programs, many of which came into effect to educate children excluded from regular schools by the very barriers Congress means to eliminate. Furthermore, states must give "[s]pecial attention . . . to ensuring the enrollment and attendance of homeless children and youths who are not currently attending school." This latter rule implies that once a school district has knowledge of a homeless child, the district must make a concerted effort to get the child into a regular school. Adding weight to this argument is the fact that the revised Act requires states and school districts to address problems caused by lack of transportation to school. Finally, the change in funding from exemplary programs in the 1987 McKinney Act to grants for direct services seems to eliminate money for these types of programs.

However, the provision that "homelessness alone should not be sufficient reason" to separate homeless children from the mainstream school environment implies that other reasons, in addition to homelessness, may justify separate schools. One possible justification for these alternative schools would be that they reach children whose parents would not enroll them in school. Parents who move frequently may continue to be reluctant to enroll their children in school even if states and localities remove all barriers. As Mel Durand, social worker for the Tone School states, the problem is not just one of state-imposed barriers but of parental intransigence: "The question is whether [parents] will even put these kids in school. There is nothing, at least in Washington, that puts any teeth in any law that you have to have your kid in school.

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88 Id at § 612(b)(9)(E).
84 Pub L 101-645, §§ 612(b)(8)(C) and 612(b)(9)(C).
86 Under the revised Act, money can go to a variety of programs such as tutoring, school supplies, before- and after-school programs and record fees. However, all programs for homeless children must "[t]o the maximum extent practicable . . . be provided through existing programs and mechanisms that integrate homeless individuals with nonhomeless individuals." Id at § 612(c). The original McKinney Act had an exemplary grant program under which alternative programs such as the mobile school in Orange County received money. Pub L 100-77, § 723, codified at 42 USCA § 11433 (1978 and Supp 1989).
88 Pub L 101-645, § 612(a)(3) (emphasis added), to be codified at 42 USC § 11431 et seq.
87 The McKinney Act's provisions broadening school of origin will not reach a class of homeless children whose frequent moves cover long distances. Additionally, Pub L 101-645, § 612(b)(9)(C) says that states must provide "comparable" transportation services. Under this provision, it appears that a homeless child will not receive transportation to school if a nonhomeless child living in the same location would not qualify. It is not clear how the § 612(b)(8)(C) mandate that states address "transportation issues" interacts, or in any way broadens, this "comparable" requirement.
Probably what's happening in places that don't have schools like ours is kids aren't going at all."

However, ameliorating parental intransigence that results from the frustrations of homelessness should not be a justification for alternative programs. As a threshold issue, it is not clear that intransigence is a justification arising from more than "homelessness alone." Furthermore, the McKinney Act implies that once a school district has knowledge of the whereabouts of a homeless child, the district, not the parent, has the burden of ensuring that the child attends school. Allowing parental frustrations to serve as a justification for alternative schools permits school districts to abdicate their responsibility to get children into school. It is also the functional equivalent of allowing parents to dictate exceptions to mandatory school attendance laws.

A stronger reason to retain alternative schools is the possibility that they are better able to meet the McKinney Act requirement of ensuring the "success" of homeless children than are regular public schools. A homeless child may benefit from individualized attention in a program where a teacher tailors lessons to each child rather than in a regular classroom where the child is just one among many. However, as in the parental intransigence case, many of the "success" problems of these children arise from their condition of homelessness. As a result, the "success" rationale does not pass a threshold test of arising from more than "homelessness alone." Perhaps more importantly, no empirical studies have been done to compare services at alternative programs with those of regular schools. This means that education at alternative programs could be inferior to that provided by regular schools.

A different but related concern is the ability of regular public schools to fulfill the demands of the McKinney Act. Government and media focus during the last few years has revealed vast deterioration in many of the country's schools. It is unrealistic to think that overburdened public schools can meet the extensive...

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98 Telephone interview with Mel Durand (Jan 9, 1991) (cited in note 86).
99 See text accompanying notes 89-95 discussing the McKinney Act's goal of enrolling children in regular schools.
needs of homeless children when they cannot even adequately provide for the nonhomeless. Furthermore, it may be more economically efficient to have a small number of well-equipped alternative schools than to spread limited resources over a large number of regular schools. These considerations are to some extent undermined by the fact that some schools that serve homeless children have managed to provide comprehensive services to them, albeit with partial private funding.

A final potential advantage is that separate programs may benefit homeless children psychologically by sheltering them from ostracism and taunts by nonhomeless classmates. Homeless children already suffering from psychological problems due to their homelessness do not need the added emotional trauma caused by teasing from insensitive classmates. However, this type of separation seems to conflict with some of the ideological underpinnings of the school desegregation movement. In Brown v Board of Educ., the Court held that “[s]eparate educational facilities are inherently unequal” and that separation violates the Equal Protection Clause. Underlying these conclusions was empirical evidence that segregation led to a sense of inferiority among black children. No empirical evidence currently exists showing the impact of separate schools upon homeless children so it is not clear whether homeless children are harmed by being kept in separate schools. However, it is difficult to imagine why it would be illegal to operate separate schools that cause psychological harm to black

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103 McKinney funding is limited to $50 million nationwide in fiscal year 1991. Pub L 101-645, § 612(b)(10)(A), to be codified at 42 USC § 11431 et seq. The number of homeless children in any one school may be too small to enable that school to qualify for grant money to provide services that homeless children often need. See id at § 612(c) for how states are to determine which localities receive grant money.

104 See, for example, Fred M. Hechinger, Education: About Education, NY Times B9 (Mar 14, 1990), describing how Public School 225 in Rockaway, Queens has established after-school programs for homeless children, providing tutoring, a daily snack, instructions in arts, crafts and athletics, as well as school supplies. Two nonprofit groups provide these and other services. Teachers and paraprofessionals help with homework. The principal and some colleagues went to a shelter to “recruit” the children. In 1989, the program served 50 children for an average of one month each (one month equals the limit on shelter stays in the area).


106 See notes 1-3.


108 Id at 494 and n 11.
students, but legal to operate separate schools that cause the same type of harm to any other class of children. Furthermore, arguing that homeless children benefit from separate schools by avoiding exposure to classmates who call them "hotel kid" is like the Board of Education in Brown arguing for separate schools to protect black children from white children who call them "nigger."

The McKinney Act's clear preference for enrolling children in regular public schools, the questionable benefits of alternative programs and their questionable legality, mean that states and localities should operate them only on a limited basis, if at all. At most, these programs should be transitional. States should limit enrollment to the most transient of children and limit stays to short periods of time—perhaps two weeks to one month. If a child was still present in the district after the time limit expired, the school district should interpret this as constructive intent to stay and enroll the child in a regular school. Districts should send children with relatively stable living arrangements, such as those who live with relatives or friends or even in the same park, to regular schools. Alternatively, since some of these schools may be better providers of comprehensive services to homeless children, children could attend regular schools during normal school hours, but participate in these shelter programs to fulfill supplemental needs.

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108 The distinction between minorities and homeless in terms of the level of protection they are afforded under the Equal Protection Clause does not dictate a different result since the focus in Brown seemed to be not so much on the class, but on the harm of the practice. The Court considers blacks a "suspect class" deserving of heightened Equal Protection scrutiny, while it rarely considers the poor or homeless deserving of this heightened protection. See, for example, San Antonio Indep. School Dist. v Rodriguez, 411 US 1, 20-28 (1973).

109 The McKinney Act calls on states to develop programs to heighten school personnel awareness of the educational needs of homeless children and youth. Pub L 101-645 §§ 612(b)(3)(E), 612(b)(8)(C), to be codified at 42 USC § 11431 et seq. Educators could remedy at least some student insensitivity by classroom awareness discussions on homelessness.

110 Such time limits have proved workable at the Tone school. According to Durand, the school staff evaluates any child who is there for more than a month and is in favor of having them placed in a regular school. Also, a Tone School brochure states that staff assist family in attaining documentation required for placement in mainstream schools so that the shelter school provides only transitional education.

111 The McKinney Act states that to the maximum extent practicable services to homeless children should be provided through existing programs and through mechanisms that integrate homeless children with nonhomeless children. Pub L 101-645, § 612(c). Thus, it would seem to be valid under the McKinney Act for alternative schools to continue providing services that supplement the regular academic program if this was the most "practicable" method. Sections 612(b)(8-9) and 612(c) outline supplemental programs such as before- and after-school care programs and tutoring.
CONCLUSION

The best solution to the problems of educating homeless children is permanent housing. However, children cannot afford to wait until they are permanently housed before enrolling or re-enrolling in school. The McKinney Act compels states and localities to do everything they can to enroll homeless children in school and ensure their attendance and success. This mandate may conflict with the implementation of external societal goals via prerequisites to enrollment. States and localities may want to find a middle ground in which they can continue to meet these policy objectives while ensuring that homeless children get into school. Analyzing the policies behind these requirements to determine whether they are “internal” or “external” should give states guidance on how to revise their laws. Regardless of how states and localities choose to adjust their laws, under no circumstances should homeless children have to fulfill any preconditions to enrollment.

Additionally, because the McKinney Act is geared towards enrolling children in regular schools, use of alternative programs should be kept to a minimum. States should evaluate alternative programs to determine whether or not they better ensure the “success” of homeless children than regular schools and to determine if they offer an equivalent education. They should only retain those programs that ensure success and provide comparable education. In those programs that meet these standards, states and localities should only enroll children for short time periods. Alternatively, educational agencies can use these programs to provide the supplemental services mandated by the McKinney Act.