THE MEANING OF A FREE APPROPRIATE PUBLIC EDUCATION FOR HOMELESS CHILDREN: AN ANALYSIS OF THE STEWART B. MCKINNEY HOMELESS ASSISTANCE ACT

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I. INTRODUCTION

Suppose you are a homeless child living temporarily at an emergency shelter walking into a new school. How would you differ from any other child coming to school that day?

This may be the third or fourth school that you are entering this year[1] and it is doubtful that all your school records are yet available.[2] Although it is likely that you have repeated a grade[3] and need

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1. MARYLAND STATE DEP'T EDUC., EDUCATING HOMELESS CHILDREN AND YOUTH: HOW ARE WE MEASURING UP? A PROGRESS REPORT SCHOOL YEAR 1988-89, at 1 (1989) [hereinafter EDUCATING HOMELESS CHILDREN]. The Maryland State Department of Education collected data about homeless children and found:

> Homeless families move frequently, sometimes in hope of finding a better life, sometimes because an emergency shelter or motel limits how long they can stay, sometimes because they will not abide by shelter rules and are asked to leave. As a result, homeless children might move two, three, four times a year. Many of these children attend a different school each time, do not attend school, or attend school irregularly. For the homeless child, moving can be traumatic and adjusting to still another school can be even more difficult.

Id.

2. Camilla M. Cochrane, Comment, *The Homeless School-Age Child: Can Educational Rights Meet Educational Needs?,* 45 U. MIAMI L. REV. 537, 549-50 (1990-91). "In a 1987 National Coalition for the Homeless Survey, twenty-five percent of the shelters reported difficulty in registering homeless children, and some homeless children faced actual denial of placement because of a lack of records from another school district." *Id*. at 549.

3. Hansen v. Department of Social Serv., 238 Cal. Rptr. 232, 239 n.8 (Ct. App.

additional educational services,[4] you may not receive any special assistance.[5]

Once you begin attending the new school, you will have difficulty finding a quiet place to study and do homework.[6] You may worry that you cannot complete an assignment because you cannot get to the library or do not qualify for a library card.[7] Chances are slim that you can afford special project materials[8] or go on class trips.[9]

1987) (quoting affidavit of child psychologist, Dr. Bassuk, given in a trial court proceeding); Mark Peters, *Homelessness: A Historical Perspective on Modern Legislation*, 88 MICH. L. REV. 1209, 1240 n.190 (1990) (*quoting* J. KOZOL, RACHEL AND HER CHILDREN: HOMELESS FAMILIES IN AMERICA 4 (1988)).

4. Declaration of Yvonne Rafferty, Ph.D, appendix to Appellants Brief at 6, National Law Ctr. on Homelessness & Poverty v. District of Columbia (D.C. Cir. Aug. 6, 1993) (No. 92-7143). In a study conducted by Advocates for Children of New York, Dr. Rafferty, a psychologist specializing in social psychology, interviewed 277 homeless families and found that homeless children scored lower in reading and mathematicas than their permanently housed peers and were held over a grade at twice the rate of non-homeless children. *Id*. *See also* ARIZONA DEP'T OF EDUC., NATIONAL ASS'N OF STATE COORDINATORS FOR THE EDUC. OF HOMELESS CHILDREN AND YOUTH, HOMELESS NOT HOPELESS: ENSURING EDUCATIONAL OPPORTUNITIES FOR AMERICA'S HOMELESS CHILDREN AND YOUTH 2-3 (1991) [hereinafter NATIONAL ASS'N OF STATE COORDINATORS].

5. EDUCATING HOMELESS CHILDREN, *supra* note 1, at 39.

6. AMY S. WELLS, OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, EDUCATING HOMELESS CHILDREN 7 (1989) (*available in* WESTLAW, ERIC database). "Homeless students rarely have the space or the peace and quiet for homework. Shelters are often large, noisy one-room barracks-like structures with no privacy. Students living in hotels often share one small room with their entire family." *Id*.

7. EDUCATING HOMELESS CHILDREN, *supra* note 1, at 36. Homeless children in Maryland, unless they had a library card prior to becoming homeless, may not register for a library card because they do not have a permanent address. The directors of a program created from federal funds have collaborated with local libraries to change registration policy and provide the children a quiet place to study, read, and receive assistance with homework. *Id*.

8. EDUCATING HOMELESS CHILDREN, *supra* note 1, at 36; WELLS, *supra* note 6, at 7. Educational supplies are not usually a priority for families that are more concerned about securing safe shelter for the night. Even if it were a priority, these families have little discretionary income to spend on school supplies. Consequently, most homeless children lack basic school supplies such as notebooks, pens, paper, folders, pencils, rulers, and bookbags. The lack of personal supplies is compounded by the fact that most homeless shelters lack educational materials for children, such as children's reading books, coloring books, crayons, dictionaries, and educational games. EDUCATING HOMELESS CHILDREN, *supra* note 1, at 36; WELLS, *supra* note 6, at 7.

9. EDUCATING HOMELESS CHILDREN, *supra* note 1, at 37. In response to the finding by the Maryland Department of Education that homeless children lack adequate recreational activities, local educators [funded through the McKinney Act provisions] created the "Sail Project." This program was specifically designed to provide homeless children the opportunity to participate in educational after-school activities. *Id*.

You are apt to have few recreational activities.[10] You worry that your peers will find out that you live in a shelter and will scorn you.[11] You are anxious about where your family is going to live next.[12]

You may have difficulty sleeping at the shelter and are ashamed to explain your fatigue to your teachers.[13] You probably do not eat breakfast.[14] As a result of your homelessness, you have an increased risk of health problems[15] including eating and sleeping disorders.[16]

You are prone to low self-esteem and a sense of helplessness and insecurity.[17] You may have difficulty making friends.[18] You are

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10. *Id.*

11. Stanley S. Herr, *Children Without Homes: Rights to Education and to Family Stability*, 45 U. MIAMI L. REV. 337 n.30 (1990-91) (quoting from Alperstein & Arnstein, *Homeless Children — A Challenge for Pediatricians*, 35 PEDIATRIC CLINICS N. AM. 1413, 1421 (Dec. 1988)). Homeless children are often stigmatized as "shelter kids" and "dirty babies" and ostracized by their peers. *Id*. A homeless boy testified before a Congressional Committee that "[i]t's hard being homeless and going to school. People make fun of you and tease you . . . . I love to read and learn, so that month was hard on me." *Id.* at 378 n.236 (reported in 1 IN JUST TIMES, June 1990 (newsletter of the National Center on Homelessness and Poverty)).

12. EDUCATING HOMELESS CHILDREN, *supra* note 1, at 7. Even as compared to low-income children living in public housing, homeless children are extremely anxious. Many homeless children who stay in shelters that are only open from 6 P.M. to 7 A.M. must contend daily with the uncertainty about where their family will find shelter next. *Id*.

13. *Id.* at 8. "Teachers at Public School 64 are used to seeing children fall into a deep sleep, their heads on their desks, because the hotel rooms they live in are so noisy and crowded that they get little rest at night." Peters, *supra* note 3, at 1239 (*quoting from* Suzanne Daley, *New York's Homeless Children: In the System's Clutches,* N.Y. TIMES, Feb. 3, 1987, at B1).

14. Stacey L. Hawkins, *Homeless Children: A National Tragedy*, USA TODAY, July 30, 1991, at 9A. In an interview with USA Today, Lisa Mihaly, Senior Program Specialist at the Children's Defense Fund noted: "People [in shelters] often have to be up and out by 7 in the morning. Children have to get up really early, often in the dark, in an unfamiliar place, without breakfast." *Id*.

15. Herr, *supra* note 11, at 345 n.37 (citing INST. OF MED., HOMELESSNESS, HEALTH AND HUM. NEEDS 156 (1988)). "Homeless children have chronic physical disorders with rates nearly twice the general population for anemia, asthma, and malnutrition. Homeless adolescents have high rates of substance abuse, sexually transmitted diseases, and pregnancy." *Id*. Often homeless children have chronic diarrhea and high levels of lead in their blood. Hawkins, *supra* note 14, at 9A.

16. NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, SMALL STEPS: AN UPDATE ON THE EDUCATION OF HOMELESS CHILDREN & YOUTH PROGRAM 1 (1991) [hereinafter NATIONAL LAW CENTER].

17. EDUCATING HOMELESS CHILDREN, *supra* note 1, at 16. "`In their gut, these students think they're losers.' The formation of `self-respect' had to precede academic engagement." Peters, *supra* note 3, at 1239 (quoting A. POWELL, E. FARRAR & D. COHEN, THE SHOPPING MALL HIGH SCHOOL: WINNERS AND LOSERS IN THE EDUCATIONAL MARKET-

likely to manifest symptoms of psychological distress.[19] Even at your young age, there is a good chance that you will contemplate suicide.[20] If you are a homeless child in a public school you are vastly different from children with homes; even children from very poor homes.[21] What kind of instruction would be appropriate to meet your unique educational needs?

II. HISTORY OF LEGISLATION TO FACILITATE EDUCATING HOMELESS CHILDREN

Up until 1987, there was no federal law or policy that recognized the distinct needs of our homeless children in public schools.[22] Congress addressed the issue for the first time when it enacted the Education Title of the Stewart B. McKinney Homeless Assistance Act (McKinney Act).[23] While the McKinney Act required schools to provide homeless children with a "free appropriate public education

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PLACE (1985)). *See also* Cochrane, *supra* note 2, at 539 n.10 (asserting that homeless children have a wide range of developmental regression and behavioral problems).

18. EDUCATING HOMELESS CHILDREN, *supra* note 1, at 17; WELLS, *supra* note 6, at 8 (reporting that homeless children are commonly plagued with socialization problems).

19. Hansen v. Department of Social Serv., 238 Cal. Rptr. 232, 239 n.8 (Ct. App. 1987). *See also* WELLS, *supra* note 6, at 8; Herr, *supra* note 11, at 345 n.38 (quoting Bassuk & Rubin, *Homeless Children: A Neglected Population*, 57 AM. J. ORTHOPSYCHIATRY 279 (1987)). Dr. Bassuk concluded from her research on the effects of homelessness on children that, "[o]ur data indicate that a majority of children living in Massachusetts' family shelters are suffering from developmental delays, severe anxiety, and depression . . . . Approximately half of the sheltered homeless children required psychiatric referral and evaluation." Bassuk & Rubin, *Homeless Children: A Neglected Population*, 57 AM. J. ORTHOPSYCHIATRY 279, 284-85 (1987) (*quoted in* Herr, *supra* note 11, at 345 n.37).

20. Herr, *supra* note 11, at 345 n.39. In a study of school-age homeless children, "[a] majority of the school-age children tested stated that they had suicidal thoughts; one-third of the children scored so high on the Children's Depression Inventory that there was presumptive evidence of clinical depression." *Id*.

21. Herr, *supra* note 11, at 345 n.39. On the Denver Developmental Screening Tests which evaluate a child's development in four major areas, homeless children score far worse than comparable children from middle class or poor families. *See* Cochrane, *supra* note 2, at 565 (noting that educational research confirms the difference between homeless and non-homeless children); Eric Schmitt, *Ordeal for Homeless Students in Suburbs*, N.Y. TIMES, Nov. 16, 1987, at B1 (reporting that homeless children are more prone to academic, physical and psychological problems). *But see* Hawkins, *supra* note 14, at 9A (finding that the differences between homeless and other low income children were smaller than expected).

22. *See* NATIONAL LAW CENTER, *supra* note 16, at ii; *see also* Cochrane, *supra* note 2, at 555-64 (discussing educational rights for homeless children under special education jurisprudence prior to the McKinney Act).

23. 42 U.S.C. §§ 11431-11435 (1988 & Supp. IV 1992).

(FAPE),"[24] its primary goal was to eliminate all legal or practical barriers that denied a homeless child *access* to an education.[25] Homeless children were denied access to educational opportunities through a myriad of barriers including: state residency and medical record requirements, local school record requirements, lack of transportation from shelters to schools, and the failure of schools to identify the educational needs of homeless children.[26]

The implementation of the Act untangled some of the red tape that shut homeless children out of school.[27] However, simply opening the door to education did not ensure that homeless children achieved success in school.[28] Congress responded to this concern by amending

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24. *Id*. § 11431(1). "[E]ach State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the State school attendance laws . . . " *Id*.

25. 42 U.S.C. § 11432(1), (2) (amended 1990) (emphasis added). H.R. CONF. REP. NO. 174, 100th Cong., 1st Sess. 93 (1987), *reprinted in* 1987 U.S.C.C.A.N. 441, 472.

> [O]ut of 29 cities surveyed by the U.S. Conference of Mayors, 17 reported that homeless children were denied access to education. As these families move in order to secure housing — often only temporary housing — children may shift from one school attendance area to another, or from one school district to another. Education is often disrupted which lowers student achievement, reduces attendance, and increases the risk that a student will drop out of school completely.

Id.

26. NATIONAL ASS'N OF STATE COORDINATORS, *supra* note 4, at 2; NATIONAL LAW CENTER, *supra* note 16, at 2 (discussing the obstacles homeless children face when trying to get a public education); JAMES H. STRONGE & CHERI TENHOUSE, EDUCATING HOMELESS CHILDREN: ISSUES AND ANSWERS (1990) (examining the legal barriers to education for homeless children including residency requirements, guardianship requirements, and institutional barriers such as lack of records and placement in inappropriate programs); Herr, *supra* note 11, at 348; Cochrane, *supra* note 2, at 544-51.

27. NATIONAL ASS'N OF STATE COORDINATORS, *supra* note 4, at 1. "Over the past three years, state departments of education have used McKinney Act resources to dramatically improve access to appropriate education for thousands of homeless children and youth." *Id*. *But cf*. Cochrane, *supra* note 2, at 565-66 (noting the weakness of the McKinney Act in establishing educational rights for homeless children).

28. NATIONAL ASS'N OF STATE COORDINATORS, *supra* note 4, at 2. Educators stress the critical link between providing homeless children with an environment that supports their physical, social, and emotional growth and securing their educational success. *Id*. Children's advocates urge educators and lawmakers to counter the effects of homelessness by providing early intervention programs, health care, mental health care, and the "same public education received by permanently housed children or better." Yvonne Rafferty, *Homeless Children in America: Challenges for the 1990s* (Oct. 4, 1990) (paper presented at the Annual Meeting of the American Public Health Association). *See also* NATIONAL LAW CENTER, *supra* note 16, at 2 (stating "unfortunately, the educational problems of homeless children do not end with these [residency, guardianship and immu-

the Act to expand the scope beyond providing mere access to education.[29] The revised policy required states to provide homeless children an appropriate education that eliminated all barriers that prevented them from attending or succeeding in school.[30] To encourage the success of homeless children in school, the amendments expressly authorized funding for a variety of direct services to homeless children.[31] Congress authorized other grants to sensitize educators and school personnel to the special needs and rights of homeless students.[32]

Despite the amendments, what constitutes a "free appropriate public education" to which each homeless child is entitled remains unclear.[33] Some support is found in the Act's legislative history for the proposition that Congress intended schools to provide homeless children with an education designed to meet their specific needs, which would ensure their success in school.[34] However, an examination of the legislative history alone is not sufficient to support this conclusion. Nonetheless, one way to understand the possible substantive meaning of an appropriate education for homeless children is to survey the extensive litigation over the FAPE requirement in a similar piece of legislation, the Individuals with Disabilities Education Act (IDEA), formerly known as the Education for All Handi-

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nization requirements] impediments to access"). *Id.* at 2.

29. *See* 42 U.S.C. § 11431(1). *See also* NATIONAL ASS'N STATE COORDINATORS, *supra* note 4, at 2. "Furthermore, through this [McKinney Act] legislation, Congress acknowledged that the true challenge was not simply to enroll homeless children, but to promote their success in public school." *Id.*

30. 42 U.S.C. § 11431(2). Section 11431(2) authorizes the Secretary of Education to make grants to states to carry out the activities listed in section 11432(c), (d), & (e). *Id*. § 11432(a). States are required to spend "not less than 50 percent" of the grant money on tutoring, remedial education and other sources. *Id*. § 11433(b).

31. *Id*. § 11433(b)(2). Initially the McKinney program did not provide direct services for homeless school-age children; instead, from 1987 to 1989 the funds were used to establish a coordinator's office and support state efforts to review homeless education policy. In June 1990, the Department of Education informed states that they could use any prior years unspent funds to start pilot projects to provide direct services to homeless children and youth. U.S. GEN. ACCT. OFFICE, REPORT TO CONG. COMM., HOMELESSNESS: MCKINNEY ACT PROGRAMS AND FUNDING THROUGH FISCAL YEAR 1990, at 75 (1991) [hereinafter U.S. GEN. ACCT. OFFICE].

32. 42 U.S.C. § 11433(b)(2)(B). According to the General Accounting Office, exemplary grants may be used to "increase the sensitivity and awareness of school personnel to the problems of homelessness." U.S. GEN. ACCT. OFFICE, *supra* note 31, at 81.

33. *See infra* text accompanying notes 66-76.

34. *See infra* text accompanying notes 98-113.

capped Children Act.[35] The standards that have emerged from the litigation may be applied to the term FAPE in the McKinney Act. Applying these judicial definitions to the education for homeless children, schools and advocates will have a clearer understanding of what an appropriate education for homeless children might entail.

Controversy in the IDEA cases focused upon whether a school was providing a disabled child an appropriate education within the provisions of the Act.[36] Lower courts grappling with the term created a continuum of criteria for defining an appropriate education for disabled children.[37] In 1982, the Supreme Court joined the ranks of other courts struggling to clarify the IDEA language.[38] In *Board of Education v. Rowley*,[39] the Supreme Court expressly rejected the trial court's holding that schools were required to provide disabled children with an educational opportunity equal to that provided non-handicapped children.[40] Instead, the Court found an education appropriate if it was tailored to the individual needs of the student and the services enabled the student to benefit from the instruction.[41]

If this analysis of an appropriate education is applicable to

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35. Pub. L. No. 101-476 § 901, 104 Stat. 1103, 1142 (1990). The IDEA guaranteed the right of disabled children to a free appropriate public education in the least restrictive environment. *See* 20 U.S.C. § 1412(2)(B), (5) (1988 & Supp. III 1991). Under the Act, each student's educational needs are assessed and an individualized educational program (IEP) is developed to set educational goals for the child. 20 U.S.C. § 1401(a)(20) (1988 & Supp. III 1991). Procedural safeguards exist to ensure that parents of disabled children are not excluded from the evaluation, programming, and placement decisions for their child. 20 U.S.C. § 1415(b)(1)(B) (1988). *See also infra* notes 85-182 and accompanying text.

36. *See* Steven N. Robinson, Rowley: *The Court's First Interpretation of the Education for All Handicapped Children Act of 1975*, 32 CATH. U. L. REV. 941, 951 n.78 (1983). In 1983, there were approximately 756 cases brought on behalf of handicapped students and 146 involved the appropriateness of the educational program. *Id*.

37. Perry A. Zirkel, *Building an Appropriate Education from* Board of Education v. Rowley: *Razing the Door and Raising the Floor*, 42 MD. L. REV. 466 (1983) (compiling and discussing IDEA cases).

38. Board of Educ. v. Rowley, 458 U.S. 176, 188 (1982). The Court found the legislative definition of FAPE tending toward the "cryptic rather than the comprehensive." *Id*.

39. 458 U.S. 176 (1982).

40. *Id.* at 200.

41. *Id.* at 189.

homeless students,[42] these decisions are fundamental to the meaning of the term in the McKinney Act. This Article shows that by analogy to the IDEA line of cases, an appropriate education for homeless children should include, at a minimum, an individualized education program that is calculated to bestow some educational benefit on the child.[43] However, homeless students need not be satisfied with the minimum standard. Given the legislative history,[44] the language of the Act, and the unique situation of homeless children,[45] the McKinney Act's charge to states to provide homeless children with an appropriate education means that they must offer services that do more than confer "some educational benefit" on homeless children.[46] A careful analysis of the language in the McKinney Act suggests that schools must provide homeless children an "educational opportunity" which equals that provided to non-homeless children.[47] An equal educational opportunity is one that provides each homeless child with an opportunity to achieve her full potential commensurate with the opportunity provided non-homeless chil-

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42. This Article argues that the analysis lower courts have used to interpret an appropriate education for disabled children is applicable to determine what is an appropriate education for homeless children. See *infra* text accompanying notes 85-113 for a comparison of the language in the two acts. *See also* Amicus Brief for Appellants at 19-20, Lampkin v. District of Columbia, No. 92-7143 (D.C. Cir. Aug. 6, 1993) (brief for U.S. Representatives Thomas Foglietta, George Miller, Tom Lantos, Louise Slaughter, and Jolene Unsoeld). That brief states:

> The E.H.A. [IDEA] . . . an extremely similar act which secured for handicapped children, as does the McKinney Act with regard to homeless children, the right to a "free appropriate education." Indeed the substantive difference between the E.H.A. and the McKinney Act is that the former includes an administrative review mechanism while the latter does not.

Id.

43. *Rowley*, 458 U.S. at 189.

44. See *infra* text accompanying notes 98-113 for a discussion of the legislative history of the McKinney Act.

45. See *supra* notes 1-21 and accompanying text for a discussion of the unique situation of homeless children.

46. *Rowley*, 458 U.S. at 215 (White, J., dissenting). In his dissent from the majority's opinion in *Rowley*, Justice White argued that the court's some benefit standard was so minimalist that it could be met by providing a hearing impaired child with a teacher who has a loud voice. *Id*.

47. The equal educational opportunity standard, which has been used in numerous IDEA cases, was relied upon by the trial judge in the *Rowley* decision, and was noted in Justice White's dissent in the Court's reversal of *Rowley*. *Rowley*, 458 U.S. at 213 (White, J., dissenting); Rowley v. Board of Educ., 483 F. Supp. 528, 534-36 (S.D.N.Y. 1980).

dren.[48] Successful advocacy would obligate schools to provide a higher quality, comprehensive, and individualized education for homeless children.[49]

Part III of this Article examines the background of the McKinney Act, its effectiveness, and the 1990 amendments.[50] Part IV draws an analogy to the judicial interpretation of a "free appropriate public education" in the IDEA to the FAPE requirement in the amended McKinney Act.[51] Part IV also assesses the standards of appropriateness that courts have developed for IDEA. Part V applies the standards to the amended McKinney Act and concludes that the equal opportunity standard is the proper one to apply to the educational needs of homeless children.[52]

It is essential to determine the substantive meaning of the provisions of the McKinney Act so that public schools can pursue the Congressional mandate to educate homeless children. A legal duty imposed on educators to provide homeless children an educational opportunity equal to that provided to their housed peers requires the development and implementation of programs and curricula that specifically address the numerous physical, mental, and educational barriers that homeless children face daily in the public schools. It is not only within the schools' reach to maximize students' educational potential, it is also their obligation.

III. THE PURPOSE OF THE McKINNEY ACT AND THE 1990 AMENDMENTS

A. The Stewart B. McKinney Homeless Assistance Act

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48. *See Rowley*, 483 F. Supp. at 534.

49. This analysis will be particularly useful if courts determine that the McKinney Act grants homeless families a private right of action to enforce its provisions. To test the enforceability of the Act, the National Law Center on Homelessness and Poverty brought an action in federal court on behalf of 10 homeless parents seeking injunctive relief under the Act. The plaintiffs sought an order requiring the District of Columbia to comply with the statutory provisions of the Act, including the mandate to provide homeless children with an appropriate education. The District Court, relying on the reasoning in Suter v. Artist M., 112 S. Ct. 1360 (1992), dismissed the action on the basis that the McKinney Act does not provide for a private right of action. An appeal is pending. Lampkin v. District of Columbia, 60 U.S.L.W. 2807 (D.D.C. 1992).

50. *See infra* notes 53-84 and accompanying text.

51. *See infra* notes 85-182 and accompanying text.

52. *See infra* notes 183-212 and accompanying text.

The Stewart B. McKinney Homeless Assistance Act[53] was promulgated to "use public resources and programs in a more coordinated manner to meet the critically urgent needs of the homeless of the Nation."[54] The inclusion of the education provisions in the Act indicate that Congress was specifically concerned about the educational needs of homeless children and youth.[55] However, lawmakers' initial response to the issue was limited to eliminating barriers to education so that homeless children would receive equal access to education.[56]

To clarify the purpose of the McKinney Act, Congress set out two broad policies regarding states' duties to provide education for homeless children. The first policy is that the states shall assure that each homeless child or youth has access to a "free, appropriate public education."[57] The second policy directs the states to review and revise residency requirements which determine the school district within which a child is allowed to register.[58] These regulations are often great obstacles for homeless children who by definition do not have a residence.[59] States must revise those policies "to assure

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53. 42 U.S.C. §§ 11431–11435 (1988 & Supp. IV 1992).

54. 42 U.S.C. § 11301(b)(2) (1988).

55. H.R. CONF. REP. NO. 174, *supra* note 25. "The purpose of this [Education] subtitle is to make plain the intent and policy of Congress that every child of a homeless family and each homeless youth be provided the same opportunities to receive free, appropriate educational services as children who are residents of the state." *Id*.

56. *Id*. "No child or youth should be denied access to any educational services simply because he or she is homeless." *Id.*

57. 42 U.S.C. § 11431(1). The statute provides:

> [I]t is the policy of the Congress that . . . each State educational agency shall assure that each child of homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the State school attendance laws.

Id.

58. *Id*. § 11431(2). The statute further dictates:

> [I]n any State that has a residency requirement as a component of its compulsory school attendance laws or other laws, regulations, practices, or policies that may act as a barrier to the enrollment, attendance, or success in school of homeless children and homeless youth, the State will review and undertake steps to revise such laws to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education.

Id.

59. *See* Herr, *supra* note 11, at 352 (stating that "school districts view these children as hot potatoes to be tossed to the district least able to resist newcomers"); Cochrane, *supra* note 2, at 545-49 (stating that as a result of ambiguous residency re-

that the children of homeless individuals and homeless youth are afforded a free and appropriate public education."[60]

The United States Secretary of Education is authorized to make funds available to states that have applied for grants under the Act.[61] The states that receive a grant from the Secretary are authorized first, to carry out the two broad policies set out above; second, to establish an Office of Coordinator of Education of Homeless Children and Youth (the Coordinator); and third, to prepare and carry out a state plan that provides for the education of each homeless child or homeless youth within the state.[62] The Coordinator is responsible for preparing the state plan on the education of each homeless child. State plans must contain provisions which require local educational agencies to determine the placement of a child in a school that is in the child's best interest.[63]

The state is bound to provide services which are comparable to those services offered to other students.[64] These services include

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quirements schools are permitted to disclaim responsibility for educating non-resident homeless children).

60. 42 U.S.C. § 11431(2).

61. *Id*. § 11432(a). "The Secretary of Education is, in accordance with the provisions of this section, authorized to make grants to States to carry out the activities described in subsections (c), (d), and (e) of this section." *Id*.

62. *Id*. § 11432(c) (1988) (current version located at 42 U.S.C. 11432(c) (1988 & Supp. IV 1992)). *Id*.

63. *Id*. § 11432(e)(3). The McKinney Act is unclear on whether the local educational agency or the parent should make the placement decision. Most state plans authorize educational officials to make the decision unilaterally, while a minority of state plans take parental preference into account. Few state plans identify the criteria that should be used to determine which placement would be in the best interest of the child. Cochrane, *supra* note 2, at 552-53.

64. 42 U.S.C. § 11432(e)(5). "Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of paragraph (3)." *Id*.

The term "comparable services," like the term "appropriate education," fails to define substantively the services that schools should provide to meet the learning requirements of homeless children. Lacking consensus, states' plans for providing "comparable services" have varied greatly. For instance, under the Texas state plan, providing homeless children "comparable services" means that a homeless child receives counseling services along with other interdisciplinary efforts. DIVISION OF SPECIAL PROGRAMS, TEXAS EDUC. AGENCY, THE TEXAS STATE PLAN FOR THE EDUCATION OF HOMELESS CHILDREN AND YOUTH 1989-1990, at 12 (1989) [hereinafter DIVISION OF SPECIAL PROGRAMS]. By comparison, a homeless child in Georgia is denied access to before and after-school programs because the schools continue to charge a fee for such services. NATIONAL LAW CENTER, *supra* note 16, at 10. The different quality and quantity of services each state decides to provide their homeless children illustrates the fact that what constitutes an "appropriate" education for homeless children remains highly subjective. *See*

compensatory educational programs for the disadvantaged and educational programs for disabled homeless children who meet the eligibility criteria.[65]

B. Implementation of the McKinney Act

The federal government, through the Department of Education (DOE), has two obligations that are essential to the implementation of the McKinney Act. The first is the allocation of funds to states that have applied for a grant under the program.[66] The second major responsibility of the DOE is to monitor and review state plans to ensure that they are in compliance with the provisions of the Act.[67]

Unfortunately, the DOE, in its monitoring role, has not clarified the meaning of the "free appropriate public education" that schools were required to provide homeless children. As enacted in 1988, the language of the Act emphasized access to *any* education for homeless children rather than a quality education appropriate to the needs of homeless children.[68] The lack of clarity in the Act forced states to devise an educational program for homeless children with little idea of what the FAPE requirement means.[69] Without much support from

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Cochrane, *supra* note 2, at 554-55 (discussing the vagueness of the "comparable services" term and the disparity of state programs created to comply with this provision).

65. 42 U.S.C. § 11432(e)(5). Homeless children who meet the eligibility criteria may enroll in the students with limited English proficiency programs, programs for the gifted and talented, programs in vocational education, and school meal programs. *Id*.

66. *Id*. § 11433(a)(1). This section provides:

> The State educational agency shall, in accordance with section 11432(c)(6) of this title and from amounts made available to such agency under section 11432 of this title, make grants to local educational agencies for the purpose of facilitating the enrollment, attendance and success of homeless children and youths in schools.

Id.

67. *Id*. § 11434(b)(1). "The Secretary shall monitor and review compliance with the provisions of this part in accordance with the provisions of the General Education Provisions Act [20 U.S.C.A. § 1221 et seq.]."

68. Herr, *supra* note 11, 350-51 (stating that unlike the IDEA, the McKinney Act fails to specify the unique services that homeless children may require and it fails to provide an enforcement mechanism to ensure that a child actually receives an "appropriate" education).

69. *See* NATIONAL LAW CENTER, *supra* note 16, at 4. "DOE also had problems . . . giving guidance when the states needed assistance interpreting the new program." *Id.* Peggy Jackson-Jobe, Maryland Coordinator and President of the National Association of State Coordinators for the Education of Homeless Children and Youth, complains that the DOE does not respond timely to coordinators' questions about the Act and that the DOE often provides vague or unclear answers to their questions. *Id.* at 9.

the federal government, states have determined what policies and programs are necessary, if any, to guarantee that homeless children receive an appropriate education.[70] Not surprisingly, many states have failed to comply with the statutory requirements of the Act.[71]

The federal government's failure to provide adequate funding for the McKinney Act has further muddled the concept of an appropriate education for homeless children.[72] The DOE's interpretation of the statute to prohibit funding for any direct services to homeless children illustrates the Department's lack of understanding toward the unique educational needs of homeless children.[73]

A Maryland conference report on homeless children recommended that school systems "expand pilot special initiatives to include all homeless children in shelters and motels" and "target homeless children for existing school-based programs that may be adapted to meet their needs."[74] A report on homeless children from

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70. *Id*. at 4. In many cases state plans were not actually implemented and the services that were needed to provide for an appropriate education were not created. *Id*.

71. S. Jackson, THE EDUCATION RIGHTS OF HOMELESS CHILDREN, *reprinted in* MATERIALS ON THE EDUCATION OF HOMELESS CHILDREN 26 (1990). In a 20-state survey, 11 states reported a lack of access to comparable education services for homeless children in their school districts. *See also* Cochrane, *supra* note 2, at 552-53.

72. 42 U.S.C. § 11432(g). Funding has been a problem since Congress passed the Act. In 1988, Congress appropriated only $5 million to the Homeless Children and Youth Program. *Id*. By 1991, despite the authority in the amendments to increase the funds to $50 million, only $7.2 million had been appropriated because Congress had not approved the bill necessary to increase the appropriation. Telephone interview with Lorraine Friedman of the National Law Center on Homelessness and Poverty (Nov. 18, 1991). In 1992, then President Bush, the "Education President," proposed to eliminate the McKinney educational program all together. Budget of the United States Government Fiscal Year, 1992, Part IV, at 713 (1991) (*quoted in* NATIONAL LAW CENTER, *supra* note 16, at 10). "When compared to the $2.1 billion spent in 1988 on IDEA, it is apparent that the program for Homeless Children and Youth is seriously underfunded." Herr, *supra* note 11, at 364 (quoting U.S. DEP'T OF EDUC., TENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE EDUCATION OF THE HANDICAPPED ACT (1988)). In order for the McKinney Act to be effective Congress needs to appropriate the full $50 million to fund state programs. NATIONAL LAW CENTER, *supra* note 16, at 8.

73. CONFERENCE PROCEEDINGS, HOMELESS CHILDREN AND YOUTH: COPING WITH A MARYLAND TRAGEDY — II (1990) [hereinafter MARYLAND TRAGEDY]. Childrens' advocates, educators, and Congress concur that homeless children require direct specialized services to ensure their success in school. *See* S. REP. NO. 436, 101st Cong., 2d Sess. 17 (1990) (indicating that grant funds are to be used to provide services to "enhance the opportunities for homeless children and youth to enroll in and be successful in school"); DIVISION OF SPECIAL PROGRAMS, *supra* note 64, at 13 (52% of shelter directors interviewed believed that homeless children need counseling services to increase the likelihood of their success in school); EDUCATING HOMELESS CHILDREN, *supra* note 1, at 7-8.

74. MARYLAND TRAGEDY, *supra* note 73, at 6.

the Office of Educational Research and Improvement recommended school-shelter liaisons, workshops for parents to find housing and jobs, in-school social workers and counselors, and training for school personnel to raise their awareness of the problems of homeless students.[75] The DOE's proscription against funding for these programs reflects its failure to contemplate the substantive meaning of an "appropriate" education for homeless children.[76]

The Act effectively sent a message to state and local educational agencies that homeless children could no longer be denied access to education. However, neither the Act's language nor the previous Administration's policies defined the kind of education that states should provide homeless children once they entered the school door.

C. The McKinney Act Amendments

Congress passed the 1990 amendments to the McKinney Act ostensibly to alleviate problems that the original Act did not resolve.[77] First, the revised policy statement requires schools to ensure the *success* of homeless children in school in addition to the requirement that states guarantee homeless children access to school.[78] Second, the amended Act expressly states that local educational agencies may use federal grants for direct services to homeless students.[79] Third, the authorized funding for the Act designated to facilitate the enrollment, attendance, and success of homeless children

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75. WELLS, *supra* note 6, at 7.

76. NATIONAL LAW CENTER, *supra* note 16, at 4.

77. *See* H.R. REP. NO. 583, 101st Cong., 2d Sess. 41 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6417. "Three years after the enactment of this program, national reports estimate that a significant number of homeless school-aged children are not attending school regularly. The Committee bill addresses a number of problems which are keeping homeless children out of school or hindering their achievement." *Id.*

78. *See* 42 U.S.C. § 11431(2).

> [I]n any state that has a residency requirement as a component of its compulsory school attendance laws or other laws, regulations, practices, or policies that may act as a barrier to the enrollment, attendance, or *success* in school of homeless children and homeless youth, the State will review and undertake steps to revise such laws, regulations, practices or policies to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education.

Id. (emphasis added).

79. *Id*. § 11433(b)(1)(2). Direct services include tutoring, remedial education services, expedited evaluation for special education programs, counseling, social work, psychological services, and referrals for health services. *Id*.

in schools is significantly increased.[80]

However, problems with the Act persist. Notwithstanding the stronger language in the amendments, the DOE is still not providing the level of supervision, guidance, and technical assistance to the states that it is required to provide to carry out the purpose of the statute.[81] As of 1992, the funds Congress pledged to support educational programs remained unappropriated; thus state plans are seriously underfunded.[82] Many state coordinators are dissatisfied with the previous administration's lack of concern for the McKinney program.[83] Other states, still lacking DOE monitoring and a grasp of the meaning of FAPE, have failed to create or implement a state plan consistent with the amended Act.[84] The resulting confusion and frustration among state school systems adds to the mystery of how schools should provide an appropriate education for homeless children.

IV. THE MEANING OF A "FREE APPROPRIATE PUBLIC EDUCATION" IN THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

A. An Analogy of "Free Appropriate Public Education" in the Individuals with Disabilities Education Act to the Requirement in the McKinney Act

The duty of the public education system to meet the needs of

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80. *Id*. § 11432(g). This section authorized $50 million to be appropriated to states for fiscal year 1991. *Id*.

81. NATIONAL LAW CENTER, *supra* note 16, at 8. Joan Alker of the National Coalition for the Homeless believes that many of the education problems for homeless children can be solved "with more resources . . . and a higher level of commitment from the Department of Education." *Id*. Congresswoman Louise Slaughter agrees that in order for the program to be successful the DOE "must ensure that states receive proper technical assistance." *Id.* at 9.

82. NATIONAL ASS'N OF STATE COORDINATORS, *supra* note 4, at 34. The 1992 Congressional budget appropriated approximately $25 per homeless child per year. *Id*.

83. Telephone interview with Lorraine Friedman of the National Law Center on Homelessness and Poverty (Nov. 18, 1991). David Davidson, Georgia coordinator, reports, "I am not confident about [DOE's] level of commitment and administration of this program." NATIONAL LAW CENTER, *supra* note 16, at 10. Congresswoman Louise Slaughter complained, "[e]very single pronouncement from the Education Department, from the so-called `Education President,' leaves [homeless children] out completely." Robert Pear, *Homeless Children Challenge School*, N.Y. TIMES, Sept. 9, 1991, at A10.

84. NATIONAL LAW CENTER, *supra* note 16, at 4.

homeless students has been neither clearly articulated by Congress nor enforced by executive or judicial mandate.[85] The DOE is obligated to insure that states that have received grant funding under the McKinney Act are complying with the Act by providing programs or direct services to homeless children.[86] However, the DOE has appropriated funds to states that merely quote verbatim from the Act that homeless children will receive "comparable services" without requiring a showing that the state is actually providing these services to homeless children.[87] Additionally, until the judicial system determines that homeless families can bring a private right of action to enforce the McKinney Act, there will not be a judicial standard for determining the appropriateness of state educational plans for homeless students.[88] Since there is no legally adequate definition of appropriate education for homeless children,[89] advocates may draw from the definitions of appropriateness that have emerged from the body of litigation over the same language in the IDEA.[90]

Both the content and context of the two bills are sufficiently distinct that the meaning of the language in one law cannot have the identical meaning in the other.[91] That is, what constitutes "free

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85. In a newspaper interview, Rep. Louise Slaughter, one of the drafters of the Act, stated that "the [Bush] Administration has not been aggressive in enforcing either the original law, passed in 1987, or [the 1991] amendments." Pear, *supra* note 83, at A10.

86. 42 U.S.C. § 11433(b)(1). The Act requires states receiving funding to use not less than 50% of the money to provide tutoring, remedial education services, or other education services to homeless children and youth. *Id*.

87. Cochrane, *supra* note 2, at 554 n.110 (citing S. JACKSON, STATE PLANS FOR THE EDUCATION OF HOMELESS CHILDREN AND YOUTH: A SELECTED SURVEY OF THIRTY-FIVE STATES 9 (1990)).

88. See *supra* note 49 for a discussion of a private right of action.

89. Unlike the term in the IDEA, which has been frequently litigated, there has not been any litigation involving the requirement in the McKinney Act. In fact, the McKinney Act has been relied on only once for any legal remedy. Herr, *supra* note 11, at 351 (citing National Coalition for the Homeless v. Department of Educ., No. 87-3512-TFH at 1 (D.D.C. 1988) (indicating that the government is required to make a good faith effort to encourage states to apply for grants to educate homeless children)).

90. The statutory definition of FAPE in IDEA is:

> The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18) (1988 & Supp. IV 1992).

91. H.R. REP. NO. 583, *supra* note 77. The disparity in the levels of funding be-

appropriate public education" for disabled children need not mean precisely the same thing for homeless children.[92] Still, parallels in the two laws allow for a viable analogy between the language in the IDEA and the language in the McKinney Act. In the absence of any other definition, states, schools, and advocates should look to the lower courts interpretations in the IDEA cases and modify them to the unique situation of homeless children.

The IDEA[93] is a comprehensive statute designed to ensure that disabled children receive education that is appropriate to their needs. The core requirement is that every disabled child receive a "free appropriate public education" that is provided in conformity with an "individualized education program"[94] which includes special education and related services.[95] The IDEA requires public schools to create an admission, review, and dismissal committee that works with parents to devise an individual education program for their child.[96] There are procedural safeguards and due process rights under the IDEA for parents to ensure that their children are receiving an education appropriate to their needs.[97]

The McKinney Act does not provide for an "individualized education program" for each homeless child, nor does it provide for extensive procedural or due process rights.[98] One could argue that the

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tween the two programs suggests that Congress made some distinction between the language in IDEA and that in the McKinney Act.

92. *See* Cochrane, *supra* note 2, at 551-52 (noting that the interpretation of "appropriate" education for homeless handicapped children falls under the IDEA). The following analysis proceeds on the assumption that the homeless child is not handicapped. A homeless child who is handicapped would be afforded the same rights under IDEA as other handicapped children.

93. *See* 20 U.S.C. §§ 1400–1401, 1406 & 1411–1420 (1988 & Supp. IV 1992).

94. *See* 20 U.S.C. §§ 1400–1401 (1988 & Supp. IV 1992). An "individualized education program" is a written comprehensive outline describing the special education needs of a student and the services to be provided by the school to meet those needs. *Id*. § 1401(a)(20).

95. *See* 20 U.S.C. § 1401 (1988 & Supp. IV 1992).

96. 34 C.F.R. §§ 300.340–.349 (1992).

97. *See* 20 U.S.C. § 1415 (1988 & Supp. IV 1992) (stating that parents/guardians have the right to prior written notice when an agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child; parents/guardians have a right to an impartial due process hearing conducted by the local educational agency where the parents/guardians may be accompanied and advised by counsel). *Id.*

98. 42 U.S.C. § 11432(e)(1)(B). The McKinney Act, however, commands the states to "provide procedures for the prompt resolution of disputes regarding the educational placement of homeless children and youth" within the state's plan. *Id. See also*

comparison to the IDEA is not viable because the IDEA bases the appropriateness of the education on the development and implementation of an individualized education program. While the McKinney Act does not require a formal individualized education plan for each child, it would be impossible for states to meet their duties under the Act without considering the individual needs of a homeless child.

First, the Act mandates that "[e]ach State shall adopt a plan to provide for the education of each homeless child or homeless youth within the State . . . ."[99] The word "each" in this provision suggests that schools may not devise general and sweeping education programs to apply to all homeless children. This inference is supported by the legislative history of the amendments which demonstrates the emerging Congressional concern for the individual needs of homeless children.[100] The Senate Committee recognized that certain homeless children may require exceptional services depending on a particular child's living arrangements.[101] The Senate Committee intended for educators to reach the individual child who was experiencing "exceptional circumstances" and to provide that child with

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Cochrane, *supra* note 2, at 553 (stating that a minority of states permit parents to have a dominant role in the placement process).

99. 42 U.S.C. § 11432(e)(1).

100. S. REP. NO. 436, *supra* note 73, at 17. The report from the Senate Committee on Labor and Human Resources indicates that Congress was cognizant of the special needs of homeless children and the individualized attention that is required to meet those needs. The report states:

> The Committee is concerned that homeless children often are not receiving the services for which they are eligible in a comprehensive manner. The Committee bill directs the coordinators to work with parents, education agencies and providers of services for homeless children to improve the provision of appropriate education . . . . [H]omeless children's attendance and achievement are hindered by a number of other problems including lack of transportation, school supplies, and clothing . . . lack of information about other available services such as medical, dental, mental, and other services; and lack of information about children's needs and rights among those who work with them . . . . [T]he Committee bill creates a new demonstration grant program to enable State and local education agencies *to provide and support services as are necessary to ensure the education of homeless children and youth* . . . . [E]ach participating jurisdiction should *design a range of services which meet the needs identified in the State plan*.

Id. (emphasis added).

101. S. REP. NO. 436, *supra* note 73, at 18. "[I]t is also contemplated that where exceptional circumstances such as safety concerns related to domestic violence exist, for example, involving a parent who is not living at home, . . . funds may be used for the provision of home-bound services." *Id*.

educational services at her temporary residence.[102]

The Senate Report on the amendments delineated the type of services that schools should provide to ensure the educational success of homeless children.[103] The Senate Committee recognized that because of the unique situation of homeless children, some services are more efficiently provided at a shelter or temporary housing facility rather than at a school.[104] This statement implies that schools should make the determination of where tutoring or counseling should be provided based on the unique needs of the homeless child.

The Senate Committee was particularly "concerned that homeless children may be disproportionately exposed to violent behavior in the home" and, as a result, suffer psychological damage.[105] The Committee's strong message to educators was that homeless children suffering from intense stress will require individual attention to enable them to profit from their educational experience.[106] Therefore, under the Committee's recommendations, educators are encouraged to delve into the personal life of a homeless child to determine if domestic problems are affecting the child's chance for academic success.

Second, under the McKinney Act, the local school district of each homeless child and each homeless youth determines whether the student will continue at the school she is currently attending or

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102. *Id*.

103. *Id*. at 17.

> Section 723(c)(3) states that the uses of funds may include: expedited evaluation for special programs; before and after school and summer educational programs; adaptation of space at nonschool facilities for educational activities during nonschool hours; preschool programs; counseling, social work and psychological services, including violence counseling, and referral to such services; referral to health services; school supplies; parent education; sensitization of school personnel to needs of homeless children; transportation; records transfer; coordination with other agencies serving homeless; and other emergency assistance.

Id.

104. S. REP. NO. 436, *supra* note 73, at 17.

105. *Id*.

> [T]he term "violence counseling" means counseling to counteract the potential emotional or psychological damage done to a child or youth who observes or is a victim of violence. The Committee is concerned that homeless children may be disproportionately exposed to violent behavior and strongly urges that the Secretary and LEA's [Local Educational Association] give special attention to this troubling problem.

Id.

106. S. REP. NO. 436, *supra* note 73, at 17.

at the school of her origin based on "whichever is in the child's best interest."[107] The local district must consider the parents' or guardians' request when assigning a homeless child to a school.[108] Therefore, a school must evaluate an individual child on a personal level and consult with her parents to determine what is in the child's best interest.[109] The same personal attention and parental consultation is necessary under the IDEA which requires a school to devise an educational program tailored to a disabled child's individual needs.

Third, the amended McKinney Act specifically authorizes local schools to use funding for activities that are designed to meet the unique needs of homeless children.[110] For example, schools may provide for "expedited evaluations of the *strengths and needs* of homeless children and homeless youths."[111] The statutory language suggests that local schools should not evaluate homeless children in the aggregate to determine their strengths and needs but on an individualized basis to design programs to meet their distinctive requirements.

Although the McKinney Act does not explicitly require schools to create an "individualized education program" for each homeless child, the legislative history and the Act's provisions require educators to consider the special educational requirements of each homeless child in order to provide an appropriate education.[112] Thus, the McKinney Act provisions compel the states to create, albeit informally, an individualized educational program for each homeless student. An appropriate education under the McKinney Act that requires individualized attention and evaluation is comparable to the individualized appropriate education required under the

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107. 42 U.S.C. § 11432(e)(3)(A).

108. *Id*. § 11432(e)(3)(B). *See also* Cochrane, *supra* note 2, at 552-54 (discussing state plans that have varying degrees of parental involvement in the placement decision).

109. *See* S. REP. NO. 436, *supra* note 73, at 16.

> [T]hese amendments are intended to curb the unfortunate practice of children and youth transferred to several schools within a single school year, as the family moves to different temporary housing situations . . . . It is hoped that, *to the maximum extent feasible*, the parent's request will be considered by the local educational agency in making a school assignment.

Id. (emphasis added).

110. 42 U.S.C. § 11433(a)–(b).

111. *Id*. § 11433(b)(2)(A) (emphasis added).

112. *See supra* notes 98-111 and accompanying text.

IDEA.[113]

B. Judicial Interpretation of a "Free Appropriate Public Education" under the IDEA

Congress responded to advocates' calls for a right to public education for disabled children by enacting the IDEA.[114] Two federal court decisions[115] involving the rights of disabled children to public schooling greatly influenced Congress' drafting of the Act.[116] The IDEA incorporated the holdings of these decisions by requiring schools to provide disabled children access to a free appropriate public education.[117] Litigation promptly ensued over the vague statutory definition of an appropriate education.[118] The state and federal court decisions that have attempted to decipher its possible meaning

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113. 42 U.S.C. §§ 11431–11435 (1988 & Supp. IV 1992); 20 U.S.C. §§ 1401–1415 (1988 & Supp. III 1991).

114. H.R. REP. NO. 332, 94th Cong., 1st Sess. 2 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432. "Of the approximately eight million handicapped children in the United States in 1975, roughly one-half were receiving no education at all, while many others were sitting idly in regular classrooms awaiting the time when they were old enough to drop out." *Id*.

115. Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) (holding that all children are entitled to public education, regardless of mental, physical, or emotional disability); Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 343 F. Supp. 279 (E.D. Penn. 1972) (indicating that the state is required to provide access to a free public program of education and training appropriate to the capacities of each mentally retarded child).

116. The Senate report noted that it was the *Mills* and *PARC* decisions that led to the federal government's role in establishing the right to education for handicapped children. *See* S.R. NO. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S.C.C.A.N., 1425, 1430.

117. *See* 20 U.S.C. §§ 1400–1401.

118. There have been hundreds of administrative hearings and numerous court decisions interpreting the FAPE term in the IDEA. *See* Colin K. v. Schmidt, 536 F. Supp. 1375, 1386 (D.R.I. 1982) (providing a thorough summary of the cases decided up to that point). For a scholarly analysis of the federal courts' interpretation of an appropriate education for disabled children, see John E.B. Meyers & William R. Jenson, *The Meaning of "Appropriate" Educational Programming Under the Education for All Handicapped Children Act*, 1984 S. ILL. U. L.J. 401, 405-09 (describing pre-*Rowley* case law interpreting an "appropriate" education); Judith Welch Wegner, *Variations of a Theme — The Concept of Equal Educational Opportunity and Programming Decisions Under the Education for All Handicapped Children Act of 1975,* 48 LAW & CONTEMP. PROBS., Winter 1985, at 169, 179 (reviewing early cases interpreting the level and extent of services required by the IDEA); Zirkel, *supra* note 37 (summarizing the lower courts' interpretations of FAPE and concluding that differences among disabled children defy a single standardized concept of an appropriate education).

have created a range of definitions.[119]

Some courts found an education appropriate if it was directed toward achieving self-sufficiency,[120] while other courts considered an education appropriate only if it maximized a disabled child's educational potential.[121] In *Rowley,* the Supreme Court fashioned a two-pronged test to evaluate educational programs for children with disabilities.[122] The Court held first that a school must provide an individualized education program in accordance with the procedural guidelines of the Act and second that the program must enable the student to receive "some educational benefit" from the instruction.[123] Many scholars are not satisfied with the Supreme Court's formula for calculating whether an educational program is appropriate.[124]

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119. *See* Cathy A. Broadwell & John C. Walden, *"Free Appropriate Public Education" After* Rowley: *An Analysis of Recent Court Decisions*, 17 J.L. & EDUC. 35, 51 (1988) (concluding that federal court decisions on FAPE after *Rowley* hold that schools must only provide disabled children with access to a beneficial education); Meyers & Jenson, *supra* note 118 (outlining the different approaches courts use to analyze the FAPE term both before and after the *Rowley* decision); Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 377-426 (1990) (describing the lower courts decisions after *Rowley* as a dramatic retreat from the Supreme Court's interpretation of FAPE); Patricia Young Taylor, Comment, *An `Appropriate' Education for the Handicapped* — Board of Education v. Rowley, 26 HOW. L.J. 1645 (1983) (reviewing the definition of an "appropriate" education as defined in IDEA, emphasizing the *Rowley* decision).

120. *See, e.g.*, Stacey G. v. Pasadena Indep. Sch. Dist., 547 F. Supp. 61, 77 (S.D. Tex. 1982). The self-sufficiency analysis usually has been limited to those students who are severely handicapped. *Id*. *See* Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 54 (N.D. Ala. 1981). *See also* John S. Harrison, Comment, *Self-Sufficiency Under the Education for All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516.

121. *See* Eberle v. Board of Pub. Educ., 444 F. Supp. 41, 42 (W.D. Pa. 1977), *aff'd*, 582 F.2d 1274 (3d. Cir. 1978) (noting that a disabled child required instruction to enable him to achieve his optimal development); Lascari v. Board of Educ., 560 A.2d 1180, 1189 (N.J. 1989) (holding that schools must provide an education "according to how the pupil can best achieve success in learning" (citation omitted)).

122. Board of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982). *See also* Broadwell & Walden, *supra* note 119, at 40.

123. *Rowley*, 458 U.S. at 206-07.

124. *See* Dixie S. Huefner, *Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POL'Y 483, 494-95 (1991) (noting that the Court's "some benefit" standard ignores the importance of the IEP as a reliable method to evaluate the appropriateness of a disabled child's education); John H. Kibbler, *The Education of the Handicapped Act: The Floor of Opportunity*, 12 J. JUV. L. 26, 34 (1991) (stating that the Court's interpretation of the Act limits the availability of educational services to disabled children); Meyers & Jenson, *supra* note 118, at 427 (indicating that the Court's interpretation of appropriate education in terms of some educational

The following is a brief survey and critique of the courts' interpretations of an appropriate education for disabled children.

1. Precursors to the IDEA: The PARC *and* Mills *Decisions*

Prior to the passage of the IDEA, disabled children were generally excluded from schools or relegated to inadequate special classes.[125] Congressional action to remedy this treatment was triggered by the federal courts' decisions in *Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania*[126] and *Mills v. Board of Education*,[127] which addressed the educational rights of disabled children. The courts in the *PARC* and *Mills* cases held generally that the state has an obligation to provide disabled children access to a public education.[128] Congressional reliance on these decisions in its framing of the IDEA did not go unnoticed by the Court in the *Rowley* decision.[129] Justice Rehnquist referred to the *PARC* and *Mills* decisions when he concluded that the legislative intent of the IDEA was merely to provide access to education rather than require a certain level of education.[130]

The class action suit in the *PARC* case challenged Pennsylvania statutes which excluded mentally disabled children from public

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benefit fails to clarify the educational standards required under the IDEA); Robinson, *supra* note 36, at 944 (concluding that the *Rowley* decision does not provide adequate guidelines for applying the IDEA).

125. Wegner, *supra* note 118, at 171 n.6 (citing Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 868-83, 899-910 (1975)).

126. 343 F. Supp. 279 (E.D. Pa. 1972). For a detailed discussion of the *PARC* decision, see Dennis E. Haggerty & Edward S. Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 966-75 (1977).

127. 348 F. Supp. 866 (D.D.C. 1972). *Mills* strengthened the *PARC* decision by holding that schools could not deny educational services to handicapped children by claiming they lacked sufficient funds to provide adequate services. *Id.* at 876. Additionally, *Mills* set out many of the procedural guarantees that the IDEA would adopt. *Id.* at 878-83.

128. *PARC*, 343 F. Supp. at 302; *Mills*, 348 F. Supp. at 878.

129. Board of Educ. v. Rowley, 458 U.S. 176, 180 (1981). "Two cases . . . [*PARC* and *Mills*] were later identified as the most prominent of the cases contributing to Congress' enactment of the [IDEA] Act." *Id*. at 180 n.2.

130. *Id*. at 193. "*Mills* and *PARC* both held that handicapped children must be given *access* to an adequate, publicly supported education. Neither case purports to require any particular substantive level of education." *Id*.

schools.[131] The court approved the agreement between the parties that ordered the state to provide mentally disabled children with "access to a free public program of education and training appropriate to [their] learning capacities."[132] The court judged the agreement, which provided for due process hearings on a child's educational placement, to be "fair and reasonable."[133]

In *Mills*, plaintiffs brought an action against the Board of Education for excluding children with behavioral, emotional, or mental problems from public education in the District of Columbia.[134] The court held that the Board had a duty to provide disabled children with a "free and suitable" public education, despite any additional cost.[135] The court found that the District of Columbia's education laws[136] and the federal Constitution entitled disabled children to a suitable public education.[137]

In the narrowest reading, the *PARC* and *Mills* decisions hold simply that schools may not deny disabled children access to a public education.[138] There is, however, language in the opinions that invites a broader reading of the decisions. The *Mills* court's refer-

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131. *PARC*, 343 F. Supp. at 282. The suit was "brought by the Pennsylvania Association for Retarded Children and the parents of thirteen individual retarded children on behalf of all mentally retarded persons between the ages 6 and 21" who were excluded from the Pennsylvania public schools under state laws. *Id*. at 281-82.

132. *Id*. at 302. The court did not decide the due process and equal protection challenges raised by the plaintiff because the parties had entered into a final consent agreement. *Id.* at 285.

133. *Id.* at 301-02.

134. *Mills*, 348 F. Supp. at 868. Plaintiffs alleged that although they could profit from either supportive services or special classes, "they have been labelled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive," and excluded from public schools "with no provision for alternative educational placement." *Id.*

135. *Id.* at 878.

136. *Id*. at 873-74. The court noted that the statute which requires parents to send their children to school under penalty of criminal sanctions presupposes that an "educational opportunity" will be made available to them. *Id.* at 874.

137. *Id*. at 875. The court concluded that "the defendants' conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause." *Id*.

138. Laura Gangemi, Comment, *After* Rowley*: The Handicapped Child's Right to an Appropriate Education*, 38 U. MIAMI L. REV. 321, 341-43 (1984) (concluding that the *Rowley* decision held that the IDEA does not extend beyond mere access to education and that such holding is the correct interpretation of the *PARC* and *Mills* decisions and the Act).

ence to *Hobson v. Hansen*[139] suggests that denying handicapped children an "equal educational opportunity" may violate the Fourteenth Amendment.[140] In *Rowley*, Justice White noted in his dissent that the *Mills* case, upon which the lawmakers relied to draft the IDEA, "sets a standard not of *some* educational benefit, but of educational opportunity equal to that of non-handicapped children."[141] If the decisions relied in part on an equal opportunity analysis, then the Act which incorporated the holdings in those decisions may require a standard higher than mere access to education.

2. The Passage of the IDEA and the Equal Opportunity Analysis

The early judicial responses to the IDEA were, not surprisingly, convoluted.[142] Generally, the decisions that interpreted FAPE either very narrowly (mere access standard)[143] or very broadly (maximum achievement standard)[144] were not widely accepted. The greatest number of cases addressing the issue adopted the flexible equal opportunity standard.[145] The trial court in *Rowley* also applied a comprehensive equal opportunity analysis of the FAPE requirement.[146] Subsequent federal decisions on the issue suggest that the Supreme Court's rejection of the equal opportunity approach was

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139. 269 F. Supp. 401 (D.D.C. 1967) (denying poor public school children educational opportunities equal to that available to more affluent public school children violates the Due Process Clause).

140. *Mills*, 348 F. Supp. at 875.

141. *Rowley*, 458 U.S. at 214 n.2 (White, J., dissenting).

142. See Robinson, *supra* note 36, at 950-53; Zirkel, *supra* note 37, at 472-73; Tony Lindsay, Note, Board of Education v. Rowley*: Defining Free Appropriate Public Education*, 24 S. TEX. L.J. 338, 342-47 (1983).

143. *See* Rowley v. Board of Educ., 483 F. Supp. 528 (S.D.N.Y. 1980) (stating that appropriate education requires more than access to an adequate education), *rev'd*, 458 U.S. 176 (1982).

144. *See* Lindsay, *supra* note 142, at 342 (stating that "federal district courts have generally rejected an outright . . . best possible education standard").

145. *See* Meyers & Jenson, *supra* note 118, at 408 (noting that until the Supreme Court's decision in *Rowley*, the equal opportunity standard appeared to be the standard of choice); Wegner, *supra* note 118, at 179 n.42.

146. *Rowley*, 483 F. Supp. at 534. In defining "appropriate education" guaranteed under the Education for Handicapped Children Act of 1975, the proper standard requires "that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children." *Id*. *See also* Meyers & Jenson, *supra* note 118, at 408 (stating that "the trial court opinion in the *Rowley* litigation became a leading exposition of the equal opportunity standard").

misguided.[147] If it is the case that most courts are holding schools to a higher equal opportunity standard, rather than the lower some benefit standard, then it is more likely that the equal opportunity standard of appropriateness will apply to homeless children's education.

The issue before the trial court in *Rowley* was whether a school had an obligation to provide Amy Rowley, a deaf first-grader, with a sign language interpreter.[148] The school had attempted to meet Amy's educational needs by providing her with a hearing aid, tutorial instruction for an hour per day, and assistance from a speech therapist three times a week.[149] Amy Rowley was a very adept lip reader, and her academic performance exceeded that of the average non-handicapped student in her school.[150]

Before articulating the equal opportunity standard, the trial court rejected both the minimalist adequate education measurement and the maximum achievement standard.[151] Instead, the court embraced a standard between the two extremes; one that was "more in keeping with the regulations [of the IDEA], with the Equal Protection decisions which motivated the passage of the Act, and with common sense."[152] The court's equal opportunity standard required that "each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children."[153]

Applying the standard to Amy's situation, the court found that

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147. *See, e.g.*, Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988) (holding that a disabled child was entitled to the services of a licensed physical therapist by distinguishing the facts from *Rowley* and stating the IDEA required educational progress rather than some benefit), *cert. denied*, 489 U.S. 1030 (1989). *See also* Weber, *supra* note 119, at 352-53. Weber argues that the lower courts have made a dramatic retreat from *Rowley* by distinguishing it from their decisions, minimizing its precedential value, or finding other sources of authority to hold schools to a higher standard than the some benefit test. *Id*. *See also* Mark G. Yodof, *Education for the Handicapped:* Rowley *in Perspective*, 92 AM. J. EDUC. 163, 174 (1984) (suggesting the possibility that lower federal courts might not apply the "spirit of *Rowley*").

148. *Rowley*, 483 F. Supp. at 529.

149. *Id.* at 531.

150. *Id.* at 530-32.

151. *Id*. at 534. The court noted that "an `appropriate education' could mean an `adequate' education . . . . [A]n `appropriate education' could also mean one which enables the handicapped child to achieve his or her full potential." *Id*. The court characterized both these standards as extreme. *Id*.

152. *Id.*

153. *Rowley*, 483 F. Supp. at 534.

she was not reaching her full educational potential under the school's program and that an interpreter in her classrooms could improve her academic performance.[154] The court conceded that this standard required some objective judicial measurement of a child's educational potential.[155] The court's involvement was justified, however, because the law requires the court to assess the needs of disabled children.[156] The court implied that it was disingenuous for the defendants to assert that courts can determine whether a disabled child's education is appropriate without any reference to generally accepted methods of education for disabled children.[157]

3. The Rowley *Decision and the "Some Benefit" Standard*

The standard that the *Rowley* trial court promulgated was summarily rejected by a majority of the Supreme Court Justices on appeal.[158] The Supreme Court rejected the lower court's conclusion that Amy's education was inappropriate because of the school's fail-

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154. *Id.*

> While this evidence firmly establishes that Amy is receiving an "adequate" education, since she performs better than the average child in her class and is advancing easily from grade to grade, it establishes little more. I find that the defendants' emphasis on her academic performance and the suggestion that only academic deficiencies would induce them to provide Amy with an interpreter are based on an erroneous understanding of the law; they ignore the *importance of comparing her performance to that of non-handicapped students of similar intellectual calibre and comparable energy and initiative.*

Id. (emphasis added).

155. *Id.*

156. *Id.* at 535. "While it is true that the law requires the needs of each individual handicapped child be assessed, and in keeping with that goal eschews any general formulations or guidelines, as a practical matter those needs cannot be assessed without reference to generally accepted methods of special education for the handicapped." *Id.*

157. *Id.*

158. *Rowley*, 458 U.S. 176, 190. The majority agreed that the statute itself did not mandate an equal opportunity standard:

> Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts — that States maximize the potential of handicapped children "commensurate with the opportunity provided to other children."

Rowley, 483 F. Supp. at 534. That standard was expounded by the district court without reference to the statutory definitions or even to the legislative history of the Act. *Rowley*, 458 U.S. at 190.

ure to provide her with a sign language interpreter.[159] To determine the standard of appropriate education, the Court examined the legislative history of the IDEA.[160] The Court concluded that Congress did not intend that "[s]tates maximize the potential of handicapped children commensurate with the opportunity provided to other children."[161] It summarized the legislative history as follows: "By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful."[162] The Court reasoned that "if personalized instruction is being provided with sufficient supportive services to permit the child to *benefit* from the instruction, . . . the child is receiving a `free appropriate public education.'"[163] The Court concluded that the "`basic floor of opportunity' provided by the Act" was instruction designed to confer "educational benefit to the disabled child."[164] The Court found that Amy was receiving passing marks and advancing from grade to grade; therefore, she was receiving some educational benefit from the individualized instruction she was provided.[165]

The Court rejected the trial court's equal opportunity standard on several grounds. First, the Court did not find any persuasive evidence that Congress intended to require an equal educational opportunity for all disabled children in public schools.[166] Second, the

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159. *Id.* at 189.

160. *Id.* at 190. "Although we find the statutory definition of `free appropriate public education' to be helpful in our interpretation of the Act, there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard." *Id.*

161. *Rowley*, 458 U.S. at 189-90.

162. *Id.* at 192.

163. *Id.* at 189 (emphasis added).

164. *Id.* at 201 (quoting H.R. REP. NO. 332, *supra* note 114).

165. *Id.* at 203 n.25. The Court maintained that an education will not automatically be appropriate if the student receives passing marks and moves from grade to grade but that this is one factor that should be seriously considered when evaluating whether an educational program is appropriate. *Id.* at 203 & n.25.

166. *Rowley*, 458 U.S. at 189-90. The majority did not "find any suggestion from the [provisions] of the statute that the requirement of an `appropriate education' was to be limitless." *Id.* at 190 n.11. The Court characterized the equal opportunity language in the Act as "passing references and isolated phrases" which are not controlling for analyzing legislative history. *Id.* at 204 n.26.

Court found the more stringent equal opportunity standard "entirely unworkable" because it requires "impossible measurements and comparisons."[167] Finally, the Court noted that an equal opportunity standard would require courts to engage in evaluating competing education methodologies, which are policy matters for educators, not justices.[168]

Justice White disagreed with the majority's reading of the legislative history of the Act and its interpretation of the FAPE term.[169] He suggested that the Court's standard was so minimal that a "teacher with a loud voice" would meet the Court's benefit test.[170] Justice White also criticized the Court for limiting the scope of judicial review of educational programs for disabled children. In his view, the Act was designed to allow a "full and searching [judicial] inquiry into any aspect of a handicapped child's education."[171] He supported the district court's opinion because he regarded it as "an accurate reflection of Congress' intent to give handicapped children an educational opportunity commensurate with that given other children."[172]

Justice Blackmun, concurring in the *Rowley* result, rejected the majority's reasoning.[173] Instead he adopted a kind of totality of the circumstances review within an equal opportunity test.[174] Justice Blackmun focused his inquiry on whether Amy Rowley's educational program, "*viewed as a whole,* offered her an opportunity to understand and participate in the classroom that was substantially equal

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167. *Id.* at 198.

168. *Id.* at 208.

169. *Rowley*, 458 U.S. at 212 (White, J., dissenting). Justice White stated, "[T]he majority opinion contradicts itself, the language of the statute, and the legislative history. Both the majority's standard for `free appropriate education' and its standard for judicial review disregard congressional intent." *Id.*

170. *Id.* at 215. Justice White argued that the provisions of the Act which require an education specifically designed to meet the unique needs of a child demand a higher standard than a benefit test. *Id.*

171. *Rowley*, 458 U.S. at 218 (White, J., dissenting). Justice White felt that the legislative history illustrated Congress' intent for courts to undertake "substantive review" of the appropriateness of schools' educational programs for disabled children. *Id.* at 217.

172. *Id.* at 214.

173. *Rowley*, 458 U.S. at 210 (Blackmun, J., concurring). "The clarity of the legislative intent convinces me that the relevant question here is not, as the Court says, whether Amy Rowley's individualized education program was `reasonably calculated to enable [her] to receive educational benefits.'" *Id.* at 210-11.

174. *Id*. at 211.

to that given her non-handicapped classmates."[175] Because he found that his totality test standard had been met, Justice Blackmun concurred in the result reached by the majority, notwithstanding his disagreement with their reasoning.[176]

*4. Critique of the Appropriate Standard and Post-*Rowley *Decisions*

> "It is a common feeling among educators that no one can accuse them of not offering an appropriate education because no one can define appropriate."[177]

At first glance the *Rowley* decision seemed to set out a definitive and substantive standard of review for determining whether a school has provided an appropriate education to a disabled child under the IDEA provisions.[178] If in the years following the *Rowley* decision the "some benefit" standard had been broadly accepted[179] and universally applied,[180] this analysis would probably end here. However, there exists voluminous scholarly criticism[181] of the standard as well as some evidence that the standard is not being faithfully applied by the lower courts.[182] Therefore, it is reasonable to

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175. *Id*.

176. *Id.* at 211-12.

177. REED MARTIN, EDUCATING HANDICAPPED CHILDREN: THE LEGAL MANDATE 57 (1979).

178. Broadwell & Walden, *supra* note 119, at 35 (noting that the Supreme Court's decision in *Rowley* left future courts to apply the two-pronged test to determine whether a school district was providing the free appropriate education required by the Act).

179. Weber, *supra* note 119, at 374 (stating that popular reaction to the *Rowley* decision was that the civil rights movement has suffered a serious setback).

180. *See* Weber, *supra* note 119, at 374. Weber argues that the lower federal courts have rejected the Supreme Court's analysis in *Rowley* and in doing so are fulfilling the original intention of Congress to effectuate radical social change by requiring equal educational opportunity for disabled students. *Id.* at 406-10.

181. *See supra* note 124. For a comprehensive list of law review articles that criticize *Rowley*, see Weber, *supra* note 119, at 352 n.12. *See also* Katherine T. Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child,* LAW & CONTEMP. PROBS., Spring 1985, at 7, 43-44 (criticizing *Rowley* as irrational); Bonnie P. Tucker, Board of Education of the Hendrick Hudson Central School District v. Rowley: *Utter Chaos*, 12 J. LAW & EDUC. 235 (1983) (arguing that the Court deliberately ignored Congress' intent to provide equal educational opportunities).

182. Weber, *supra* note 119, at 377-404. For a list of cites of numerous federal court cases which have applied *Rowley* to deny services requested for disabled students, see Weber, *supra* note 119, at 377 n.166.

postulate that the some benefit analysis is an inadequate test for determining the appropriateness of a disabled child's education. The first inquiry, for the purposes of this Article, is whether it is also inadequate for determining the appropriateness of a homeless child's education. If it is inadequate, the second inquiry is whether the equal opportunity standard is a more suitable standard.

V. THE MEANING OF A "FREE APPROPRIATE PUBLIC EDUCATION" IN THE McKINNEY ACT

Ideally, the litigation over the FAPE requirement in the IDEA would have inspired Congress to enact explicit provisions in the Act that clarified the meaning of an appropriate education for homeless children.[183] Perhaps the IDEA litigation could have motivated the DOE to offer guidance to schools regarding the meaning of a FAPE for homeless children. Since there is not much congressional, judicial,[184] or executive guidance on what the Act's terms mean, schools and advocates must look elsewhere for a substantive meaning of an appropriate education for homeless children. The standards from the early IDEA cases provide models to apply to the components of a homeless child's education.

A. The "Some Benefit" Model

A "some benefit" standard under the McKinney Act would require schools to provide an individualized educational program that is reasonably calculated to confer some educational benefit on a homeless student.[185] This standard would force states that are not providing any direct education or support services to homeless children to furnish, at a minimum, services reasonably calculated to confer some benefit to them.[186]

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183. Even if Congress had intended to adopt the some benefit standard articulated in *Rowley*, there is no explicit language in the McKinney Act to affirm such an intention.

184. *See supra* text accompanying notes 114-82.

185. *See* Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). The application of this standard would improve the educational chances of homeless students by explicitly requiring school districts to design educational plans specific to the needs of each homeless student in the district. *See* Broadwell & Walden, *supra* note 119, at 35 (stating that the *Rowley* standard requires an individualized educational program as the first part of the two-step analysis).

186. *Rowley*, 458 U.S. at 203. This standard is consistent with the Act which re-

The majority in *Rowley* emphasized that the benefit standard would realize the congressional intent to provide disabled children "meaningful access" to public education.[187] There is legislative history on the McKinney Act to support the conclusion that Congress sought to provide homeless children with meaningful access to public education.[188] In addition, the explicit language in the Act, which requires states to ensure each homeless child has access to education equivalent to that which would be provided to a resident child, implies the access provided must be meaningful.[189]

There are still some states not complying with the requirements of the amended McKinney Act.[190] Some states fail to use McKinney funding properly for direct services to homeless children,[191] or their school personnel are unaware that many homeless children need special attention in order to achieve educational success.[192] For these situations, applying a benefit standard could result in higher quality and more individualized educational programs for homeless children.

The problem with the benefit test is that it can be construed as a de minimus standard.[193] A narrow benefit standard may im

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quires a state to apply at least 50% of its funding to direct services. 42 U.S.C. § 11433(b)(1) (Supp. IV 1992). The minimalist some benefit standard could serve to excise wasteful or duplicative programs that fail to confer any educational benefit on homeless students.

187. *Rowley*, 458 U.S. at 192.

188. *See supra* notes 98-113.

189. 42 U.S.C. § 11431(1) (Supp. IV 1992). The supposition is that school districts are already providing meaningful access to education for the non-homeless residents attending school. This provision, which requires schools to provide that same access to homeless students, must mean that the access assists homeless students to gain some educational benefit. To argue that the schools are not even required to meet that standard would be to argue that public schools are not legally required to educate the housed or homeless children that attend the school.

190. Lampkin v. District of Columbia, 60 U.S.L.W. 2807 (D.D.C. 1992) (dealing with an action brought by the National Law Center on Homelessness and Poverty on behalf of ten homeless parents and their children to force the District of Columbia to comply with the provisions of the McKinney Act which require state and local governments to remove barriers to the education of homeless children).

191. NATIONAL LAW CENTER, *supra* note 16, at 10.

192. WELLS, *supra* note 6, at 8.

193. *See, e.g.*, Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, at 180-83 (rejecting the some benefit standard as toothless and requiring only a de minimus benefit to the child); Robinson, *supra* note 36, at 961-62 & n.166. Robinson maintains that the some benefit standard is a "hollow euphemism," which he likens to the "some rational basis" test where any rational basis will support state action. *Id*. By analogy, Robinson believes a court may find *any* benefit to be sufficient. *Id*. Meyers & Jenson,

prove the education of some homeless children, but it is not in keeping with the spirit of the amended McKinney Act. The congressional debates before the passage of the amendments stressed the goal of achieving "success" at school for homeless children.[194] Congress did not simply reiterate the access provision of the original Act. Instead, it required schools to spend a specific percentage of the increased funding on direct services[195] designed to achieve the success of homeless children in school.[196] The amendments imply that Congress envisioned a quality education for homeless children beyond a merely adequate education.

B. The Equal Opportunity Standard

The equal opportunity standard would require schools to provide each homeless child an opportunity to achieve her full education potential commensurate with the opportunity provided to other children.[197] A school would not be required to "maximize the educational potential" of every homeless student in the school district or guarantee academic excellence for every student.[198] The spirit of the McKinney Act is that children should not be prevented from receiving an appropriate education by the mere circumstance of their homelessness.[199] To that end, homeless children should be provided with those services that would enable them to receive the educa-

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supra note 118, at 427 (stating that defining an education in terms of "some benefit" is just as obscure as defining it as "appropriate").

194. *See* H.R. REP. NO. 583, 136th Cong., 2d Sess., pt. 2, 42 (1990); S. REP. NO. 436, 136th Cong., 2d Sess., pt. 2, 17 (1990); 149 CONG. REC. 12,771 (1990).

195. 42 U.S.C. § 11433(b)(1). "Not less than 50 percent of amounts provided under a grant under this section shall be used to provide tutoring, remedial education services, or other education services to homeless children or homeless youths." *Id.*

196. *Id*. § 11433(a)(1). "The State educational agency shall, in accordance with section 11432(c)(6) of this title and from amounts made available to such agency under section 11432 of this title, make grants to local educational agencies for the purpose of facilitating the enrollment, attendance and *success* of homeless children and youths in school." *Id.* (emphasis added).

197. *Rowley,* 483 F. Supp. at 534.

198. *Id.* at 528, 534. The maximum potential standard was rejected by the trial court in *Rowley*. It is not suggested here that a maximum potential standard is a realistic duty to impose upon educators.

199. *See* 136 CONG. REC. H9230 (daily ed. Oct. 10, 1990) (statement of Rep. Slaughter). "They will be able to study before and after school, to get a breakfast, to get a tutor, and to get pencils, papers, books, and things that most American children take for granted. And indeed, if you were to ask any American, they would say that these are things every American child is entitled to have." *Id.* at H9245.

tional opportunity that non-homeless children receive.

There are several reasons why the equal opportunity standard is best suited to the FAPE requirement in the McKinney Act. First, the concept behind the educational provisions of the Act is essentially one of fairness. Congress recognized that poor children without homes should be afforded the same educational opportunities made available to their more affluent non-homeless peers. It is axiomatic in modern law that one should not be deprived of public services because of her race, sex, handicap or economic position. It follows that schools have a duty to place children on an equal educational playing field. An equal opportunity standard is nothing more than the recognition that all children in public schools should have the chance to learn and succeed, regardless of the economic background or their housing situation.

Second, the plain language in the Act requires states to provide homeless children educational services comparable to those provided non-homeless children.[200] Under this provision, schools are required to provide specialized services to children who are educationally disadvantaged due to a disability. If a school fails to provide a disabled child services specifically designed to address her individual disability, the school would be in violation of the law. Schools are prohibited by law from treating unequals as equals. Given the extensive data on the deleterious effects of homelessness on a child's education, it follows that homeless children are not equal to non-homeless children. Under an equal opportunity standard, public schools would be prohibited from treating them as such. Thus, the Act may be construed to mean that a homeless child's education as a whole should be comparable to a non-homeless child's education.

Third, an equal opportunity standard applied to the education of homeless children would not require excessive costs or bureaucracy to implement. In *Rowley*, the Court held that the equal educational opportunity standard was immeasurable and "unworkable" because children's handicaps vary greatly.[201] The standard as applied to homeless children is both measurable and workable based on uni-

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200. 42 U.S.C. § 11432(e)(5). "Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of paragraph (3) . . . ." *Id*.

201. *Rowley*, 458 U.S. at 198.

form educational evaluations.[202] It is not unmanageable for schools to compare the performance of the non-homeless child to that of the homeless child of similar intellectual capability to determine whether the deficiency in academic performance is due to the lack of appropriate education. The problems affecting homeless children, while varied, are manageable compared to the multitude of complex mental and physical afflictions affecting a disabled child's ability to learn. An equal educational opportunity standard would require schools not already doing so to evaluate a homeless child's individual needs and provide educational services to meet the child's needs. For many homeless children these needs may be met by group activities coupled with some individualized attention. This standard does not require a personal counselor or tutor for each homeless student. Although a personal counselor or tutor would greatly enhance a homeless student's educational experience, the equal opportunity standard does not require schools to maximize a homeless child's educational opportunity.

Finally, the court's reluctance to become engaged in educational policymaking is outweighed by the need for clarity of the statutory language in the Act. The Act specifies that schools are required to use McKinney funds for educational programs for homeless children. The ambiguity lies in the question of degree. The court has a duty to determine the level of educational programs required to provide an appropriate education. It is the function of the court to interpret ambiguous statutory language. When a court interprets language in a banking law or an insurance law, arguments that the court is engaging in policymaking are unpersuasive. Even under the minimalist "some benefit" standard, courts engage in some degree of decisionmaking about educational policy.[203]

C. Problems with Application of the Equal Educational Opportunity Model

First, the legislative history on the McKinney amendments may not be sufficient to convince a post-*Rowley* court that Congress in-

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202. *Id*. Justice Rehnquist found that an equal opportunity standard for handicapped children was unworkable because it required impossible measurements. *Id. See also* NATIONAL ASS'N OF STATE COORDINATORS, *supra* note 4, at 2 (describing how direct services to homeless children can contribute to their academic success).

203. *See* Zirkel, *supra* note 37, at 484.

tended to provide homeless children with an educational opportunity equal to that of their non-homeless peers. The court that dismissed explicit equal educational opportunity language as "passing references"[204] in its discussion of the IDEA may very well be unconvinced by arguments seeking to apply it to the McKinney Act.

Second, an equal educational opportunity analysis may require courts to measure the effectiveness of different educational programs. The Court is reluctant to make decisions that involve choosing between "competing educational methodologies."[205] The courts have shown great deference in the past to the judgment of educators.[206] In *Rowley,* Justice Rehnquist cautions that courts lack the "`specialized knowledge and experience' necessary to resolve `persistent and difficult questions of educational policy.'"[207]

Third, this standard would require parents to legally challenge a school for failing to provide their child an educational opportunity commensurate with the education provided a non-homeless child. Unfortunately, the McKinney Act does not grant parents of homeless children the same procedural safeguards that the IDEA grants parents of disabled children.[208] In addition, homeless parents may not have knowledge of their child's legal right to an appropriate education or the resources to pursue legal battles to protect their child's right.

Fourth, the McKinney Act, unlike the IDEA, is a non-prescriptive statute.[209] Even though all fifty states have applied for and received grant money under the Act, they are afforded great latitude in complying with the Act's requirements.[210] Therefore, it is unclear how an action asserting that a school is failing to provide homeless

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204. *Rowley*, 458 U.S. at 204 n.26.

205. *See* Zirkel, *supra* note 37, at 483-84. Zirkel points out that while this position is consistent with the traditional approach courts have taken regarding education policy, courts are required to make numerous educational judgments even under the some benefit analysis. *Id.* at 484.

206. *Id.* at 698-99.

207. *Rowley,* 458 U.S. at 208 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)). "Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." *Id.*

208. *See supra* note 97 and accompanying text. The issue of whether McKinney provides a private right of action has still not been resolved by the courts. *See supra* note 49.

209. *See* Cochrane, *supra* note 2, at 564.

210. Cochrane, *supra* note 2, at 565.

children an appropriate education under the law could be brought in court.[211] Finally, without adequate funding the question of "appropriateness" becomes moot. It may be difficult to convince the courts that more specialized attention for homeless children is needed at a time when school budgets are being drastically reduced.[212]

VI. CONCLUSION

Homelessness affects a child's ability to succeed in school. If homeless children do not progress educationally then there is little chance that they will break out of the cycle of homelessness and poverty as adults. Congress enacted the McKinney Act and particularly the 1990 amendments to the Act with these two facts in mind. It is now federal law that states must provide homeless children with a "free appropriate public education" that includes activities to ensure the enrollment, attendance, and success of homeless children in public schools. However, states and local educational agencies have not been provided with any clear guidance from the legislature or the courts on what "free appropriate public education" means for homeless children. For some guidance, they may look to the case law which attempts to clarify the meaning of "free appropriate public education" for disabled children.

The IDEA case law and the scholarly writings analyzing these holdings provide some framework for an understanding of the FAPE requirement. However, an analysis of the meaning of the term in the McKinney Act cannot end with a simple analogy. There are inherent dangers in making such an analogy. To argue that the FAPE requirement in the McKinney Act is analogous to the FAPE term in the IDEA runs the risk that the only applicable standard could be the "some benefit" model created by the Supreme Court in *Rowley*. Arguing that the term in the McKinney Act is not analogous to the IDEA term, thus not limiting it to a some benefit model, nonetheless gives it little frame of reference. The slight tension in this legal argument suggests that there are alternative ways to frame the issue.

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211. Herr, *supra* note 11, at 368-77 (summarizing possible roles for attorneys representing the homeless).

212. *See* NATIONAL LAW CENTER, *supra* note 16, at 8. However, the Act encourages schools to use existing school-based programs to meet the needs of homeless children. The use of existing programs not only reduces the cost of providing homeless children an appropriate education, it prevents the risk of stigmatizing homeless children.

The goal is, after all, to educate homeless children. By itself, a judicial interpretation of the statute seems a weak tool for achieving that goal. However, as a part of a comprehensive approach to educating homeless children, judicial enforcement reinforces the goal.

A comprehensive approach would include Congressional amendments to the Act requiring schools to create an individualized educational program for each homeless student and evaluation procedures to objectively test the effectiveness of the school's plan. Another component must be increased awareness by educators of the special needs of homeless children and local implementation of the Act. An additional amendment to the McKinney Act containing equal educational opportunity language, coupled with local and state support of programs designed with this principle in mind, might convince courts that the equal opportunity model is the appropriate standard by which to judge public education for homeless children.