

No. 17-2886

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

G.S., a minor, by his parents, J.S. and E.S.,
Appellee,

v.

Rose Tree Media School District,
Appellant.

Rose Tree Media School District,
Appellant,

v.

G.S., a minor, by his parents, J.S. and E.S.,
Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Nos. 16-4782, 16-4849

**BRIEF OF AMICI CURIAE EDUCATION LAW CENTER, THE
HOMELESS CHILDREN'S EDUCATION FUND, THE NATIONAL LAW
CENTER OF HOMELESSNESS AND POVERTY, AND PEOPLE'S
EMERGENCY CENTER IN SUPPORT OF APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rules of Appellate Procedure 26.1 and 28, amici curiae Education Law Center, the Homeless Children's Education Fund, the National Law Center of Homelessness and Poverty, and the People's Emergency Center, by and through undersigned counsel, states that amici are nonprofit organizations and therefore are not publicly held corporations that issue stock.

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STATEMENT OF INTEREST

The Education Law Center-PA (the “ELC”) is a nonprofit, legal advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, and policy advocacy, ELC advances the rights of vulnerable students, including children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English learners, and students experiencing homelessness. During its forty-plus-year history, ELC has handled thousands of individual matters and impact cases.

ELC has a long history of vigorous advocacy on behalf of children and youth experiencing homelessness, including filing four federal lawsuits under the McKinney-Vento Homeless Assistance Act, all of which resolved in favor of ELC’s clients. ELC has also worked on a systemic level to enforce and expand the rights of students experiencing homelessness through legislative advocacy and policy reforms. ELC staff have been active participants in Pennsylvania’s Joint Legislative Committee on Homelessness and other statewide and local coalitions, including several interagency task forces in both Philadelphia and Pittsburgh.

The Homeless Children’s Education Fund (“HCEF”) is a nonprofit organization established in 1999 to support the educational needs of children experiencing homelessness in Allegheny County. HCEF’s mission is to advance

the education of children and youth experiencing homelessness, guiding them to be productive, empowered citizens. As a national model for addressing the educational needs of unstably-housed children and youth, HCEF leads a collaborative effort among regional partners by providing educational programs and services in Allegheny County and advocating for policy and system improvement.

The National Law Center of Homelessness & Poverty (the “Law Center”) is the only national organization dedicated solely to using the power of the law to end and prevent homelessness. Through policy advocacy, public education, and impact litigation, the Law Center addresses the symptoms and root causes of homelessness by developing, advocating for, and implementing effective laws and policies that meet the immediate and long-term needs of those who are homeless or who are at risk of experiencing homelessness. As it relates to the homeless student in this case, the Law Center specifically protects the rights of homeless children and youth to education and other public benefits, primarily through implementing and enforcing the provisions of the McKinney-Vento Homeless Assistance Act, which removes barriers to the identification, enrollment, attendance, and success in school of homeless children and youth.

People’s Emergency Center (“PEC”) has served families experiencing homelessness in Philadelphia for over forty years. Its mission is to nurture

families, strengthen neighborhoods, and drive change. PEC offers more than 235 affordable housing units, job training, parenting and early childhood education, financial planning, and technology coursework to homeless women with children and parenting youth. Its Community Development Corporation programs respond to community needs, expand mixed-income housing opportunities, and stimulate economic growth. PEC's Policy Research Advisory Consortium advocates for policy changes and fosters partnerships with local researchers and staff of local homeless family service providers to drive systemic reform. PEC seeks to change the life trajectories of the homeless families it serves and supports them to achieve housing security and financial stability.

Amici submit this brief to underscore the importance of ensuring that school districts uphold and enforce the protections of the McKinney-Vento Homeless Assistance Act for students who are homeless, including those who are "doubled up." The protections of the Act are critical to the school success of children such as Appellee.

BACKGROUND

An alarming number of children and youth in the United States experience homelessness, and the rates of homelessness have nearly doubled since the 2006-2007 school year.¹ Nationally, nearly 2.5 million youth are identified as homeless,² while 1 in 30 youth aged 13-17 experienced homelessness in 2016.³ Disproportionately, these youth are children of color and LGBT youth.⁴ In Pennsylvania, approximately 27,724 children or youth were identified as homeless during the 2015-16 school year, and 23,164 of them were also identified as being enrolled in school.⁵

¹ U.S. Dep't of Educ., Supporting the Success of Homeless Children and Youths, 1 (2016), <https://www2.ed.gov/policy/elsec/leg/essa/160315ehcyfactsheet072716.pdf>.

² Stacey A. Havlik, *College and Career Counseling for Students Experiencing Homelessness: Promising Practices for Secondary School Counselors*, 5 (2017), <https://nche.ed.gov/downloads/res-summ-sch-couns.pdf> [hereinafter, *Promising Practices*].

³ Chapin Hall, *Missed Opportunities: Youth Homelessness in America*, 1 (2017), http://voicesofyouthcount.org/wp-content/uploads/2017/11/ChapinHall_VoYC_NationalReport_Final.pdf [hereinafter, *Missed Opportunities*].

⁴ *Id.* at 12. According to the 2017 National Voices of Youth Count Study, youth who identified as Black were 83% more likely to be experiencing homelessness than their White peers; and Latino youth were at 33% higher risk than their White peers. LGBT youth were at a 120% more likely risk of experiencing homelessness than their straight and cisgender peers.

⁵ Pa. Dep't of Educ., *Education for Children and Youth Experiencing Homelessness (EHYEH) 2015-16 State Evaluation Report*, 33 (2017), <http://www.education.pa.gov/Documents/K12/Homeless%20Education/2015->

Children who experience homelessness are among the most educationally at risk of all student populations. Nationally, an estimated 45% of homeless students do not attend school regularly, 43% repeat a grade, 50% fail academically, and only one-third read at grade level.⁶ The Pennsylvania Department of Education (“PA DOE”) reports similar outcomes to these national trends, as students who are homeless are subjected to repeated educational disruptions due to successive displacements.⁷ The PA DOE reports that “in general children who are homeless do not perform as well in school, have lower achievement scores, and more academic failures than housed students.”⁸ For example, during the 2015-2016 school year, only 33% of students experiencing homelessness in Pennsylvania achieved proficient or advanced scores on state-mandated tests such as the Keystone exam for literature or the Pennsylvania Alternative System of Assessment (“PASA”) exam for reading. Similarly, only 18% of homeless

16%20Pennsylvania%20ECYEH%20State%20Evaluation%20Report.pdf
[hereinafter *EHYEH Report*].

⁶ Ellen Bassuk & Lenore Rubin, *Homeless Children: A Neglected Population*, 57 *Am. J. of Orthopsychiatry* 2, 279-85 (1987).

⁷ Am. Psychological Ass’n, *Effects of Poverty, Hunger and Homelessness on Children and Youth*, 6-7 (2018), <http://www.apa.org/pi/families/poverty.aspx> [hereinafter *Effects of Poverty*].

⁸ Pa. Dep’t of Educ., *Education for Children and Youth Experiencing Homelessness: 2015-2016 State Evaluation Report*, 4 (2017), <http://www.education.pa.gov/Documents/K12/Homeless%20Education/ECYEH%20General%20Guide.pdf>.

students scored in the proficient or advanced levels for both the PASA math exam and the Algebra I Keystone exam.⁹

Devastated by abrupt changes in their lives, these children find their worlds upended by the unpredictability and chaos of homelessness. For many of these children, school is often the only remaining source of stability in their lives. While children experiencing homelessness represent the full range of talent, abilities, and creativity as their peers, too often they find themselves spiraling downward toward school failure. Homelessness itself is a significant predictor for dropping out of school and experiencing poor life outcomes—a vicious cycle that preys on students impacted by changes entirely outside their control.

The McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 et seq. (2016) (“McKinney-Vento Act” or the “Act”), was enacted in 1987 to address the unique educational needs of children experiencing homelessness. The Act seeks to support and protect this vulnerable student population by ensuring school stability and immediate enrollment, and providing additional supports and services to ensure that these children have access to instruction and an opportunity for school success. *See, e.g.*, 42 U.S.C. §§ 11434 A(2)(B)(i), 11432(g)(3)(E)(i). As Congress explained, the Act seeks to ensure that “homeless children and youths . . . have an opportunity to meet the same challenging State academic standards to which all

⁹ *Id.*

students are held.” *Id.* § 11431a(4). Over time, these protections have expanded to more fully address the identified needs of these students.¹⁰ When implemented with fidelity, this law can and does make a critical difference in the lives of children, not only by improving their academic outcomes and graduation rates, but by vastly improving life outcomes and breaking the cycle of poverty and homelessness.

Students who are deemed eligible for the McKinney-Vento Act are entitled to a comprehensive set of protections, and the Act’s provisions are clear and unambiguous. The cornerstone of the Act is maintaining “school stability” for children—the concept of permitting children to remain in their same school even after becoming homeless and no longer residing in the same school district or school catchment area. The Act’s focus on school stability stems from research demonstrating that changing schools frequently undermines school success and places youth at significant risk for dropping out.¹¹

¹⁰ For example, the McKinney-Vento Act was expanded through the Every Student Succeeds Act (ESSA), adopted in December 2015 to include preschoolers, *see* 42 U.S.C. § 11431(1), and in 2018 Congress made budget allowances, allocating additional resources to serve students displaced by natural disasters. H.R. Res. 1892, 115 Cong. (2018) (enacted) P.L. No. 115-124.

¹¹ Russell Rumberger, *Student Mobility: Causes, Consequences, and Solutions*, National Education Policy Center (2015), http://nepc.colorado.edu/files/pb_rumberger-student-mobility.pdf; Urban Institute, *The Negative Effects of Instability on Child Development* (2013), <https://www.urban.org/sites/default/files/publication/32721/412908-The-Negative-Effects-of-Instability-on-Child-Development-Fact-Sheet.pdf>; Russell Rumberger et

Under the Act, school stability is presumptively favored in accordance with a “student-centered” best interest determination, unless it is contrary to the wishes of the parent. *See* 42 U.S.C. § 11432(g)(3). All rights under the Act apply for the duration of homelessness—until the child becomes “permanently housed.” *Id.* § 11432(g)(3)(I)(i). Recognizing the profound impact of school mobility, the McKinney-Vento Act explicitly provides for pendency in the school to which enrollment is sought, pending resolution of any dispute. Specifically, the Act states that “[i]f a dispute arises over school selection or enrollment in a school . . . the child or youth shall be immediately admitted to the school in which enrollment is sought, pending resolution of the dispute.” *Id.* § 11432(g)(3)(E)(i).¹²

In addition, children experiencing homelessness are entitled to immediate enrollment without providing any of the documents normally required for enrollment. *See id.* § 11432(g)(3)(C)(i)(I). These children must have “equal

al., *The Educational Consequences of Mobility for California Students and Schools* (1999), <http://mina.education.ucsb.edu/rumberger/internet%20pages/Papers/Stuart%20Report--final.pdf>.

¹² *See also* Handling Enrollment Disputes, 67 Fed. Reg. 46 III(B)(3) (Mar. 8, 2002) (“[I]f a dispute arises between a school district and parents or guardians over school selection or enrollment, the local education agency must immediately enroll the child or youth in the school in which the parent or guardian seeks enrollment, pending resolution of the dispute.”); U.S. Dep’t of Educ., *Education for Homeless Children and Youth Program, Title VII-B of the McKinney-Vento Homeless Assistance Act, Non-Regulatory Guidance*, 14-15 (2004), <https://www2.ed.gov/programs/homeless/guidance.pdf>.

access to the same free, appropriate public education, including a public preschool education, as provided to other youths.” *Id.* § 11431(1). Finally, the Act requires state and local educational agencies to adopt policies and practices that do not stigmatize or segregate students on the basis of McKinney-Vento eligibility. *Id.* § 11432(g)(1)(J)(i). These protections of school stability and immediate enrollment are essential to the educational success of children and youth who are experiencing homelessness. Even a single school change can set a student back “three months of reading and math learning.”¹³

ARGUMENT

I. Children Who Live “Doubled Up” Qualify as Homeless Under the Express Language of the Act, and Public Policy Favors Their Inclusion in the Act’s Protections.

Students and families may experience homelessness for a variety of often interconnected reasons, “including a lack of affordable housing, extreme poverty, decreased governmental supports, racial disparities, and/or trauma, including domestic violence.”¹⁴ Experiences of homelessness are “often toxic to the physical, emotional, social, and educational well-being of children and youth” far beyond the boundary of the school doors, and ripple across generations.¹⁵

¹³ Sarah Sparks, *Student Mobility: How it Affects Learning*, Edweek.org (Feb. 1, 2018), <https://www.edweek.org/ew/issues/student-mobility/index.html>.

¹⁴ *Effects of Poverty*, *supra* note 7.

¹⁵ Joseph Murphy and Kerri Tobin, *When Homelessness Comes to School*, 82 (2011).

A. The McKinney-Vento Act Expressly Applies to Youth Living “Doubled Up.”

The McKinney-Vento Act applies to all students who are homeless, which is broadly defined to include all students who lack “a fixed, regular, and adequate nighttime residence.” 42 U.S.C. § 11434a(2)(a). The Act enumerates a diverse range of living arrangements that qualify as homelessness and expressly references “children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason.” *Id.* § 1143a(2)(B)(i); *see id.* § 11434a(2)(B)(i)-(iv). Other types of living arrangements identified in the Act include living in a shelter, in transitional housing, on the street, or in an abandoned building. Notably, the first example mentioned in the Act references students who are “doubled up.” The inclusion of these students is also reflected in the PA DOE’s state guidance, which references that the mandates of McKinney-Vento designate “doubled-up” students as a protected group, and that school district compliance with the McKinney-Vento Act “helps maintain continuity and school stability” for homeless students.¹⁶

¹⁶ Comm. of Pa. Dep’t of Educ., *Education for Homeless Youth*, 1 (2010), <http://www.education.pa.gov/Documents/Codes%20and%20Regulations/Basic%20Education%20Circulars/US%20Code/Education%20for%20Homeless%20Youth.pdf> [hereinafter, *Pa. Education for Homeless Youth*].

B. A Significant Portion of Homeless Youth Live “Doubled Up.”

Students who are living “doubled up” with friends or relatives, or “couch surfing,” make up the largest demographic of students experiencing homelessness. At the national level, 76% of children identified as experiencing homelessness are “living doubled up with other families due to loss of housing, economic hardship, or similar reason.”¹⁷ In more rural areas, being “doubled up” may be even more prevalent, as shelter systems may be inadequate or nonexistent altogether.¹⁸ The 2017 Pennsylvania evaluation report of Education for Children and Youth Experiencing Homelessness found that of the students whom local education agencies identified as homeless, 62% had a nighttime status of “doubled up” during the 2015-2016 school year.¹⁹

Being doubled up is a discrete experience of homelessness on its own and, for many families, living “doubled up” is a precursor to living in a shelter or becoming unsheltered and living on the street. One study found that 43% of families who were in a shelter had been living “doubled up” the night immediately preceding a stay in a shelter or had been forced to live unsheltered on the street.²⁰

¹⁷ *Promising Practices*, *supra* note 2, at 6.

¹⁸ *Missed Opportunities*, *supra* note 3, at 12.

¹⁹ *EHYEH Report*, *supra* note 5, at 28.

²⁰ Mary Cunningham, Robin Harwood, & Sam Hall, *Residential Instability and the McKinney-Vento Homeless Children and Education Program: What We Know, Plus Gaps in Research*, 2 (2010), <http://www.aecf.org/m/resourcedoc/UI->

Another found that 72% of youth who later slept on the streets or in a shelter had previously stayed with others.²¹

While these numbers paint a grim picture, it is unlikely that the present data fully captures the number of children and families experiencing homelessness, as many families are hesitant to disclose their “doubled-up” housing status due to stigma or fear of governmental interventions that could separate their families or result in child welfare or criminal justice involvement. Further, school districts may have under-inclusive definitions of “homelessness” and screen out eligible families during the enrollment process. In fact, Pennsylvania has consistently trailed behind other states in its identification of students who are “doubled up” as a subpopulation of students experiencing homelessness (*e.g.*, national percentage of doubled-up students is 76%, while Pennsylvania’s doubled-up population is 62% of all students experiencing homelessness).

C. Youth Living “Doubled Up” Face Unique Challenges.

Students who are “doubled up” face a greater risk of more significant housing instability and a greater risk of school transfer than their peers who either

ResidentialInstabilityandtheMcKinney-VentroHomeless-2010.pdf [hereinafter, *Residential Instability*].

²¹ *Missed Opportunities*, *supra* note 3, at 12.

have homes or have been in a shelter.²² Additionally, these students are typically forced to share overcrowded rooms and common spaces that lack a place that is quiet and sufficiently resourced for them to complete homework. Students may not have “access to adequate workspaces or to school supplies” in doubled-up situations. These students often report that they “feel unsafe, lack privacy, and a quiet space to do school work.”²³ Students who are “doubled up” face the same school instability dilemma as other students who are homeless. For them and others, frequent living and school changes are highly disruptive to their ability to learn, and undermine a feeling of belonging to a school community. For instance, each time students move while remaining doubled up, they must “adjust to new environments, new curricula, new teachers and classmates, while still learning the same information other students are expected to master.”²⁴ Like all students who are highly mobile, they are “at high risk for ‘broken bonds’ with teachers.”²⁵

A lack of school connection subjects these students to additional hardships and prevents them from accessing necessary services and supports. Students who are homeless—whether doubled up or in another temporary living arrangement—

²² See Inst. for Children, Poverty, and Homelessness, *Bridging the Graduation Gap, Stability is Key for Homeless High School Students* (Feb. 2017), http://www.icphusa.org/new_york_city/1897/.

²³ *Residential Instability*, *supra* note 20, at 4.

²⁴ *EHYEH Report*, *supra* note 5, at 6-7.

²⁵ *Id.* at 3.

are twice as likely to have a learning disability, repeat a grade, or be suspended from school.²⁶ Such moves may mean that a student with a disability is not properly identified, and, even if identified, fails to receive appropriate, consistent individualized education programming that confers a “free appropriate public education” as required by law. *See* Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 (d)(1)(A). School-aged children who experience homelessness also face increased instances of bullying, and alienation from peers.²⁷ In some cases, students face victimization and exclusion *because* they are experiencing homelessness. In response to these challenges, the McKinney-Vento Act offers specific provisions requiring schools to adopt policies and practices that support students, prohibits them from being segregated or stigmatized based on their homeless status, but requires schools to ensure equal access to comparable services.

All schools have the legal responsibility to comply with the McKinney-Vento Act, including providing these protections to students who are doubled up. Such compliance is integral to student success and achievement. As explained in state guidance issued by the PA DOE, “children need the stability of school and rely on academic support provided to them” because the impact of family mobility

²⁶ *Effects of Poverty*, *supra* note 7.

²⁷ *Promising Practices*, *supra* note 2, at 7.

upon education is disruptive and is “the greatest barrier to school success.”²⁸ This disruption applies to all students who are homeless—including those who are doubled up. As the law recognizes, living doubled up is a hardship and an inherent barrier to academic success. Furthermore, intervening to support students experiencing homelessness prevents future homelessness, as “education and underlying factors that support educational attainment could protect youth from experiencing homelessness.”²⁹ Nationally, young people who are without a GED or high school diploma are at a 346% higher risk of experiencing homelessness than their peers who attained a high school diploma or GED.³⁰

D. There is No Time Limit to a Student Living “Doubled Up” Qualifying as Homeless.

To be eligible for the protections of the McKinney-Vento Act, the law demands only that a student be “doubled up” “due to loss of housing” or for “economic hardship.” 42 U.S.C. § 11434a(2)(B (i)-(iv)). Several district courts have concluded that students who have been displaced by loss of housing and/or economic hardship are “doubled up” and fall squarely within the scope of

²⁸ *Pa. Education for Homeless Youth*, *supra* note 16, at 6-7.

²⁹ *Missed Opportunities*, *supra* note 3, at 12; *see also Pa. Education for Homeless Youth*, *supra* note 16, at 7 (schools can counter the many risk factors in the lives of homeless children by providing welcoming and supportive spaces and helping children and their families link with programs to support holistic well-being and access to resources).

³⁰ *Id.* at 12.

McKinney-Vento protections. *See, e.g., M.O’K. v. Bd. of Educ. of the Borough of Cresskill*, No. A-0828-14T4, 2016 WL 4699166, at *1 (N.J. Super. Ct. App. Div. Sept. 8, 2016) (student initially displaced by foreclosure and subsequently by natural disaster was “doubled up” with relatives and qualified under the Act); *N.J. v. New York*, 872 F. Supp. 2d 204, 207 (E.D.N.Y. 2011) (student displaced by fire and thereafter economic hardship eligible as “doubled up” while living in a common area with parents); *Lampkin v. D.C.*, 879 F. Supp. 116, 121 (D.D.C. 1995) (student located with relatives prior to entering shelter system qualified as homeless under the Act); *L.R. ex rel. G.R. v. Steelton-Highspire Sch. Dist.*, No. 1:10-CV-00468, 2010 WL 1433146, at *1 (M.D. Pa. Apr. 7, 2010) (student living with aunt’s family following destruction of home he shared with his grandmother deemed “doubled up” under the Act).

The Court in *L.R.* rejected the school district’s unilateral attempt to strip a student of eligibility on the ground that the doubled-up situation had become permanent “despite no change in his circumstance.” *L.R.*, 2010 WL 1433146, at *4. As that Court concluded, “the Act makes it clear that there is no maximum duration of homelessness,” and no time limit applicable to being doubled up. *Id.* There is “no more clear expression of public interest than statutory language,” which demands that all students be protected for the full duration of homelessness. *Id.* at *5; 42 U.S.C. § 11432(g)(3)(A)(i). This same rationale applies with equal

force in this case. Like L.R. and thousands of other students who depend on the critical protections of the McKinney-Vento Act, Appellee should not be excluded because his family remains in the same doubled-up circumstance. Time alone does not establish permanence or trigger severance with the McKinney-Vento Act. Rather, the Act was intended to support all students who continue to lack a “fixed, regular, and adequate nighttime residence.” *Id.* § 11434a(2). Students such as Appellee face the same unique hardships and barriers to academic success whether it is their first day or their final day of homelessness. The passage of time does not neutralize this harm for “doubled-up” students.

There is no universal experience of homelessness or durational cap. Tragically, extended experiences of homelessness are not atypical. Family homelessness, once viewed as episodic, has become chronic for many, with families accounting for 37% of the overall homeless population and 50% of the sheltered population.³¹ Given the length of experiences of homelessness for many students like Appellee, ensuring access to McKinney-Vento protections, such as school stability and immediate enrollment, for the duration of this experience is essential to their school success. Therefore, this Court should conclude that

³¹ Bassuk, E. L., DeCandia, C. J., & Richard, M. K. (2015), *Services Matter: How Housing and Services Can End Family Homelessness*, Needham, Mass.: The Bassuk Center, <http://www.bassukcenter.org/wp-content/uploads/2015/11/Services-Matter.pdf>.

Appellee, as a youth living “doubled up,” is eligible for the protections of McKinney-Vento.

II. Under Pennsylvania Law, Particularly in the Context of McKinney-Vento, Parents Cannot Waive a Child’s Rights in Perpetuity.

The McKinney-Vento Act protects the core educational rights of a uniquely vulnerable group—homeless children. In particular, McKinney-Vento enshrines a child’s right to remain at his or her school of origin, which allows students like Appellee to maintain some semblance of normalcy while homeless. The challenges homeless children face and the benefits that flow from McKinney-Vento’s protections, as described in detail *supra*, show the significance of these rights to a child’s well-being, and why any claimed waiver of such rights should be closely scrutinized and rejected by courts.

Critical juvenile rights should be especially closely guarded from unreasonable parental waiver. In the McKinney-Vento context, for example, a parent should not be able to discharge a child’s right to education without commensurate benefit flowing to the child in return. Federal and state courts have recognized that a parent’s power to waive a child’s rights *does* have limits. In those contexts, when a parent purportedly waives a child’s *future* ability to vindicate a right key to his or her child’s development, courts often invalidate those waivers. Because the educational rights of McKinney-Vento are such an

essential right, this Court should hold that any purported waiver of a child's future rights is unenforceable.

A. The State's Responsibility to Protect Children as *Parens Patriae* Supports a Court's Role in Invalidating Any Purported Waiver of a Child's Future Rights.

This Court should acknowledge that policing inappropriate settlement agreements that bargain away a child's future ability to vindicate his or her rights is in line with the state's role as *parens patriae*.³² The interpretation of a release under McKinney-Vento is governed by state law, in the instant case: Pennsylvania. *White v. U.S. Dep't of Interior*, 639 F. Supp. 82, 86 (M.D. Pa. 1986), *aff'd*, 815 F.2d 697 (3d Cir. 1987) ("Generally, the construction and enforcement of settlement agreements are governed by principles of local law applicable to contracts generally.").

The rule in Pennsylvania is clear—the state and its courts have a role in protecting the rights of children when the best interests of a child are at issue. The Pennsylvania Supreme Court has identified that "[t]he state's responsibility to protect its weaker members authorizes interference with parental autonomy and decision-making in appropriate circumstances." *In re William L.*, 383 A.2d 1228,

³² *Parens patriae*, Latin for "ultimate parent or parent of the country," refers to the power of the state to usurp the legal rights of the natural parent, and to step in as the parent of any child who is in need of protection. Marvin Ventrell, *The History of Child Welfare Law*, in *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases*, 113, 126-27 (Marvin Ventrell & Donald N. Duquette eds., 2005).

1236 (Pa. 1978). For example, courts have invoked this responsibility to override parental control “in safeguarding children from various kinds of physical and emotional harm and promoting their well-being,” requiring school attendance, and ensuring that children are not deprived of beneficial relationships with family members. *DP v. GJP*, 146 A. 3d 204 (Pa. Super. Ct. 2016); *see Green Appeal*, 292 A.2d 387, 389 (Pa. 1972); *Matter of Terwilliger*, 450 A. 2d 1376 (Pa. Super. Ct. 1982).

Federal courts, and the Third Circuit in particular, have recognized the state’s role as *parens patriae* to step in when rights are not properly guarded by parents. In *J.B. ex rel Benjamin v. Fassnacht*, for example, this Court noted that although children “are assumed to be subject to the control of their parents, . . . if parental control falters, the State must play its part as *parens patriae*.” 801 F. 3d 336, 343, n.41 (3d Cir. 2015) (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1984)); *see also W. Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971) (acknowledging the *parens patriae* “role of the state as sovereign and guardian of persons under a legal disability to act for themselves such as juveniles”). Because the McKinney-Vento rights are crucial to a child’s well-being and homeless children in particular are vulnerable to waiver of their rights, this Court should find any purported waiver of a child’s future ability to vindicate those rights unenforceable as a matter of common law and against public policy.

B. Pennsylvania Law Closely Protects Children’s Rights from Waiver.

Although the parent-child relationship is marked by a parent’s ability to make a wide range of choices about the upbringing of his or her child, *see Troxel v. Granville*, 530 U.S. 57 (2000) (recognizing the fundamental right of parents to make decisions pertaining to the care, custody, and control of their minor children), many states, including Pennsylvania, have recognized areas where a parent cannot waive a child’s future rights even with express authorization and consideration.³³ The rationales for these protections share a common theme, that when rights in essence *belong* to children themselves, parents’ agreement to waive such rights can be invalidated. *See, e.g., Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. Ct. 2000).

³³ Many states hold that the common law prevents parents from bargaining away their child’s right to sue and, depending on the applicable jurisdiction for any settlement agreement, this would apply to the rights under McKinney-Vento. For example, Michigan’s Supreme Court recently held that a parent has no right to sign a contractual release of liability on behalf of his or her child. *Woodman v. KERA LLC*, 785 NW 2d 1 (Mich. 2010). Many other states, including New Jersey, have rejected the argument that parental release of liability on behalf of the child is part of the “parent’s fundamental right to direct the upbringing of his or her child.” *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 390 (N.J. 2006) (citing the “wider public policy concerns”). These states identify the vulnerable position of the child, that the right at issue belongs to the child, and the importance of the child’s future ability to vindicate that right, in their decision to protect the right from waiver. These rights, and McKinney-Vento educational rights, inhere to the child himself or herself, and as such should only be waivable under strictly circumscribed conditions.

Pennsylvania courts have largely maintained a hands-off approach, allowing parental rights to prevail over requirements like mandatory school attendance; however, there are limits particularly with respect to the parental right to sign contractual waivers on behalf of children. For example, Pennsylvania prevents parents from waiving a child's right to monetary support and recognizes that a child maintains his or her own cause of action to sue for personal injury. *See, e.g., Miesen v. Frank*, 522 A.2d 85, 87 (Pa. Super. Ct. 1987) (“[O]ne parent cannot contract away the right of his or her child to seek adequate support from the other parent.”); *see also Hathi v. Krewstown Park Apartments*, 561 A.2d 1261, 1262 (Pa. Super. Ct. 1989) (recognizing a child's own right to sue for “pain and suffering and for losses after minority” in personal injury).

Pennsylvania courts have intervened when parental waiver infringes on the “best interests” of the child. *See, e.g., Knorr v. Knorr*, 588 A.2d 503, 505 (Pa. 1991) (“When [parent's child support] gives less than required or less than can be given to provide for the best interest of the children, it falls under the jurisdiction of the court's wide and necessary powers to provide for that best interest.”). Just as lack of monetary support can unquestionably be detrimental to a child's development, clearly so can lack of education. This Court should recognize that waiving a child's right to attend his or her “school of origin” is not in a child's “best interests” and can be devastating for the child. As noted above, student

mobility “leads to negative impacts on students,” and the impact tends to be most severe for those students who suffer from “chronic mobility” often caused by homelessness.³⁴ Because homeless children are most susceptible to the negative outcomes associated with school disruption,³⁵ courts should exercise the same level of review over parental waiver of educational rights that they use when looking at personal injury and support issues.

1. Cases decided in the child support context are instructive.

Pennsylvania courts indiscriminately prevent parents from waiving children’s rights to child support. For example, in *Knorr*, the Pennsylvania Supreme Court held that parents have no power to “bargain away the rights of their children.” 588 A.2d at 505. In that case, two parents agreed in a release that their child’s support payments would be \$200 per month, but the court found the agreement “at best advisory.” *Id.* Crucially, the court recognized that the right to support is so central, so important for a child’s development, that parents cannot take it upon themselves to trade it away. The parents’ effort to diminish their child’s right via contract was unenforceable under Pennsylvania law.

Since *Knorr*, courts in Pennsylvania have consistently protected a child’s right to financial support against parents’ improvident attempts to bargain it away.

³⁴ Rumberger, *Student Mobility: Causes, Consequences, and Solutions*, *supra* note 11 at 10-11.

³⁵ *Id.*

Recently, the Pennsylvania Superior Court noted that it “has routinely held that a child’s right to adequate support payments cannot be bargained away and that any release or compromise on child support obligations is invalid if it prejudices the child’s welfare.” *Huss v. Weaver*, 134 A.3d 449, 454, *appeal denied*, 158 A.3d 1231 (Pa. Super. Ct. 2016). In *Huss*, parents negotiated a \$10,000 disincentive that a parent was required to pay any time he or she filed a support claim for the child. *Id.* at 450-52. Such a roadblock to the full vindication of a child’s rights was “unenforceable as against public policy” because it “substantially impair[ed] . . . the Commonwealth’s duty to determine what is in a child’s best interest.” *Id.* at 452.

The rule against parental waiver of child support rights is not ironclad, but encourages courts to find waivers unenforceable when they are doing damage to the holder of the right. Pennsylvania courts have recognized that agreements that set limits on child support will be upheld if they “do[] not prejudice the welfare of the child.” *See, e.g., Kraisinger v. Kraisinger*, 928 A.2d 333, 337 (Pa. Super. Ct. 2007). Therefore, courts look into whether support is adequate given the circumstances to see if the best interests of the child are protected. If an agreement provides for insufficient child support or disincentives for suing to enforce rights, then such an agreement is against public policy. *See id.* at 345.

This Court should recognize that Pennsylvania courts would scrutinize any settlement agreement that purports to bargain away a child's future educational rights just as it would an agreement between divorcees to set support payments. Otherwise, the negotiation process between parents and schools (as between separated parents for child support) has the potential to eliminate the core rights that McKinney-Vento establishes, which is exceptionally problematic for such a vulnerable population.

C. A Ban on Waiver of Future Rights in McKinney-Vento Aligns with Caselaw Interpreting the IDEA.

While parents are permitted to waive certain rights under the IDEA, 20 U.S.C. § 1400 *et seq.*, the case law in the context of the IDEA further supports a prohibition on a parent's ability to waive future claims in the McKinney-Vento context. The IDEA authorizes the settlement of IDEA claims, *see* 20 U.S.C. § 1415(c); however, waivers of federally protected civil rights are generally required to be knowing and voluntary. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974). This Court has applied this heightened standard to the waiver of a child's rights under the IDEA. *W.B. v. Matula*, 67 F.3d 484, 497 (3d Cir. 1995) (concluding that material issues of fact remained in dispute regarding

whether the “alleged agreement by W.B. not to file civil actions against those persons who denied services to her child was voluntary and knowing”).³⁶

Moreover, in the IDEA context, while no court has squarely addressed the issue, courts have expressed doubt that a parent could waive a child’s right to future claims. The case of *N.W. et al v. District of Columbia*, 107 F. Supp. 3d 141 (D.D.C. 2015), is particularly instructive. In *N.W.*, the school district claimed that a release in a 2013 agreement barred IDEA claims for subsequent school years. The Court looked objectively at the language at issue and concluded that a reasonable person in the position of the parties would not have concluded that the waiver included subsequent years and that “[v]iewed as a whole, the settlement agreement represents a straightforward resolution to the parties’ dispute” for the 2012-2013 school year. *Id.* at 149. The court also pointed out that the consideration paid by the school district related only to the 2012-2013 year. *Id.* Importantly, the court noted:

[T]he relevant question goes beyond whether Plaintiffs knowingly and voluntarily settled claims for past conduct and instead extends to whether they prospectively waived claims for alleged violations of the IDEA that had not yet occurred. With respect to Title VII, the ADEA, and the ADA, the Supreme Court and Courts of Appeals have recognized that “there can be no prospective waiver of an employee’s rights.”

³⁶ This Court abrogated the *Matula* decision on other grounds. See *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 799 (3d Cir. 2007) (concluding that Section 1983 remedies are not available for an IDEA claim).

Id. at 153 (quoting *Alexander*, 415 U.S. at 51, and citing *EEOC v. Allstate Ins. Co.*, 778 F.3d 444, 450 (3d Cir. 2015) (“Releases . . . must be knowingly and voluntarily signed and cannot waive future claims.”)). The Court did not reach the question of whether any prospective waiver of IDEA rights is void since it had already determined that the release unambiguously did not apply to claims in subsequent school years. *Id.* at 153.³⁷

Just as in *N.W.*, this Court should find that G.S.’s parents did not waive G.S.’s McKinney-Vento rights against Rose Tree Media School District in perpetuity. The Court should conclude that any purported waiver of future rights under the McKinney-Vento Act is void as against public policy. This is a particularly dangerous precedent because homelessness disproportionately affects students with disabilities³⁸ and parents experiencing homelessness often lack access to counsel and legal resources to protect their rights.

³⁷ The Court concluded by emphasizing that “even apart from any outright prohibition on the waiver of claims for future violations of federal statutes designed to protect individual rights, the Court notes that the extraordinary nature of such a release mitigates against the conclusion that . . . the parties intended such a result.” *Id.* at 153.

³⁸ *Supporting Homeless Children and Youth with Disabilities: Legislative Provisions in the McKinney-Vento Act and the Individuals with Disabilities Education Act*, National Center on Homeless Education (October 2015) (referencing report by National Center on Family Homelessness stating that homeless children are three times more likely to have emotional and behavioral problems, four times more likely to show delayed development, and have twice the rate of learning disabilities) available at <https://nche.ed.gov/downloads/briefs/idea.pdf>.

This Court should conclude that under Pennsylvania law, particularly in the context of McKinney-Vento, parents cannot waive a child's future educational rights. In the alternative, this Court should conclude that the waiver at issue is void, as it was not made knowingly or voluntarily and lacked consideration as the District Court expressly held.

CONCLUSION

For all these reasons, ELC respectfully suggests that this Court conclude that a youth living “doubled up” qualifies as homeless and that a parent cannot waive a child’s future rights under McKinney-Vento. This Court should affirm the opinion of the District Court.

Respectfully submitted,

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Dated: February 28, 2018

CERTIFICATE OF COMPLIANCE

I, Shannon L.C. Ammon, certify:

Bar Membership. Jeffrey A. Sturgeon, Maura McInerney, and I are members in good standing of the Bar of this Court.

Word Count. This brief complies with the Federal Rule of Appellate Procedure 32(a)(7) and contains 5,733 words, as counted by Microsoft Office word-processing software.

Typeface. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Electronic Filing. I prepared the electronic version of this brief in portable document format; it is identical to the paper version of the brief filed with the Court. I ran a virus scan on the electronic version of this brief using McAfee VirusScan software, and no virus was detected.

/s/ Shannon L.C. Ammon
Shannon L.C. Ammon

Dated: February 28, 2018

CERTIFICATE OF SERVICE

I, Shannon L.C. Ammon, certify that on February 28, 2018, I caused the Brief of Amici Curiae Education Law Center, the Homeless Children's Education Fund, The National Law Center of Homelessness and Poverty, and the People's Emergency Center in Support of Appellee to be served on all counsel of record listed on the CM/ECF Service List.

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