

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,

v.

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

**MOTION TO CONVERT A NOT PRECEDENTIAL OPINION TO
PRECEDENTIAL**

As Amici in this matter, Education Law Center (“ELC”), the Homeless Children’s Education Fund (“HCEF”), the National Law Center on Homelessness and Poverty (the “Law Center”), and the People’s Emergency Center (“PEC”) respectfully move to convert the “Not Precedential” opinion issued in this matter to a “Precedential” opinion on the ground that it has significant precedential and institutional value beyond the trial court and parties to this case. In support thereof, movants state as follows:

1. On November 6, 2018, this Court issued an opinion designated as “Not Precedential” affirming the District Court’s grant of summary judgement in favor of a student experiencing homelessness and requiring Rose Tree Media School District to educate the student, G.S., who was living “doubled-up” with others due to economic hardship.
2. The Court ruled that the student qualified as homeless pursuant to Subtitle VII-B of the McKinney-Vento Homeless Assistance Act (“McKinney-Vento Act” or “the Act”), 42 U.S.C. § 11434a(2) and § 11434(g)(3)(A)(i). *See* Not Precedential Opinion dated Nov. 6, 2018 at p. 2.
3. The Court’s decision represents the first time any federal appellate court has addressed the educational provisions of the McKinney-Vento Act. Several lower courts across the country have adjudicated disputes related to the educational provisions of the McKinney-Vento Act, but guidance is lacking from an appellate court. *See, e.g., L.R. ex rel. G.R. v. Steelton-Highspire Sch. Dist.*, No. 1:10-CV-00468, 2010 WL 1433146 (M.D. Pa. Apr. 7, 2010); *M.O.K’ v. Bd. Of. Educ. of the Borough of Cresskill*, No. A-0828-14T4, 2016 WL 4699166 (N.J. Super. Ct. App. Div. Sept. 8, 2016); *Lampkin v. District of Columbia*, 879 F. Supp. 116 (D.D.C. 1995).

4. The three-judge panel’s decision was designated as “Not Precedential” pursuant to the Third Circuit’s Internal Operating Procedures which defines a “Not Precedential Opinion” as one that “appears to have value only to the trial court or the parties.” 3rd Cir. Internal Operating Procedure (“I.O.P.”) 5.3 (2018).¹
5. Movants contend that conversion of the opinion to precedential status is warranted because the value of the decision extends beyond the trial court or the parties to this particular case.
6. The McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 *et seq.*, was enacted in 1987 to address the unique educational needs of students experiencing homelessness. The law provides critical protections for a vulnerable cohort of students experiencing homelessness in order to ensure their equal access to public school.
7. The Act’s comprehensive array of protections for students experiencing homelessness includes school stability (the right to remain in a child’s

¹ While some jurisdictions expressly authorize the filing of a motion to convert an opinion to precedential, other jurisdictions direct that a party send a letter making such a request to the Court. *See e.g.*, 9th Cir. R. 36-4 (requiring filing party to send a letter requesting that a nonprecedential opinion be made precedential); and 11th Cir. R. 36-3 (requiring a party to file a motion requesting that non-precedential opinion be made precedential). The Third Circuit’s Local Appellate Rules and the Internal Operating Procedures of the Third Circuit do not address the appropriate format such a request should take. In the absence of guidance, movants filed a motion in this matter.

current school or the school the child attended prior to homelessness), immediate enrollment in a new school without the ordinarily-required enrollment documents, the right to transportation services, and access to additional supports and services to ensure access to instruction and an opportunity for school success. *See, e.g.*, 42 U.S.C. § 11434 A(2)(B)(i) and § 11432(g)(3)(E)(i).

8. The purpose of the McKinney-Vento Act, as explained by Congress, is to ensure that “homeless children and youths... have an opportunity to meet the same challenging State academic standards to which all students are held,” illuminating the clear public interest in protecting the educational rights of students experiencing homelessness. 42 U.S.C § 1143a(4).
9. The Court’s opinion in this case provides critical guidance regarding the Act’s protections for students living doubled-up due to economic hardship, concluding that these students fall within the purview of the Act.
10. Specifically, the Court ruled that G.S. was experiencing homelessness as defined by the McKinney-Vento Act because he was living doubled-up with his maternal grandmother after his family lost their home. This is an all-too-common experience for many families.

11. The Court affirmed the right of a child living doubled-up to remain in his school of origin, the school he attended prior to experiencing homelessness, and recognized his right to access the full protections of the McKinney-Vento Act for the duration of his family’s homelessness. Opinion at p. 10.
12. This is an important ruling because students who are doubled-up comprise the majority of students experiencing homelessness, and yet, are often under-identified by schools. Nationally, 76% of students experiencing homelessness are living doubled-up,² while in Pennsylvania, 63% of identified students are living doubled-up.³
13. In addition, the decision recognized the principle that there is no finite duration to experiencing homelessness. Specifically, the Court found that the McKinney-Vento Act does “not impose a time limit on the duration of homelessness,” finding that a doubled-up residence cannot “transform into a fixed, adequate, and regular nighttime residence” due to

² Stacy A. Havlick, *College and Career Counseling for Students Experiencing Homelessness: Promising Practices for Secondary School Counselors*, 5 (2017), <https://nche.ed.gov/wp-content/uploads/2018/10/res-summ-sch-couns.pdf>.

³ Pa. Dep’t of Educ., *Education for Children and Youth Experiencing Homelessness, (ECYEH) 2016-2017 State Evaluation Report*, 29 (Feb. 2018), <https://www.education.pa.gov/Documents/K-12/Homeless%20Education/2016-17%20Pennsylvania%20ECYEH%20State%20Evaluation%20Report.pdf>.

the simple passage of time. Opinion at p. 9. This issue has arisen in other cases involving a school district's unilateral disenrollment of students experiencing homelessness. *See, e.g., L.R. v. Steelton-Highspire*, 2010 WL 1433146 at 9.

14. Accordingly, the decision involves a legal issue of continuing public interest because it delineates the right of students living doubled-up and experiencing homelessness to have equal access to a free, appropriate, public education.
15. The Court also held that a settlement agreement which purported to waive G.S.'s ability to claim McKinney-Vento eligibility was unenforceable due to lack of consideration. Opinion at p. 7. The settlement at issue was reached in the special education context which is also an issue likely to arise for other students experiencing homelessness.
16. The Court's opinion in this matter is particularly important in light of the increasing number of students experiencing homelessness. In 2018, the United States Department of Housing and Urban Development reported a national increase in homelessness for the second year in a row.⁴

⁴ The U.S. Dep't of Hous. and Urban Dev., *The 2018 Annual Homeless Assessment Report (AHAR)*, 1 (Dec. 2018), <https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>.

17. Nationally, nearly 2.5 million young people were identified as experiencing homelessness in 2016.⁵ In Pennsylvania during the 2016-2017 academic year, 30,264 children were identified as experiencing homelessness, 25,113 of whom were enrolled in school.⁶
18. The federal identification rate of students experiencing homelessness has nearly doubled since 2004, when federal data was initially collected on this student population. In the 2004-2005 school year, 655,591 students were identified⁷, compared to the 1,304,803 students who were identified during the 2015-2016 school year.⁸
19. The Court's decision is particularly instructive to school districts in addressing the under-identification of McKinney-Vento eligible students,

⁵ Chapin Hall, *Missed Opportunities: Youth Homelessness in America*, 1 (2017) https://voicesofyouthcount.org/wp-content/uploads/2017/11/ChapinHall_VoYC_1-Pager_Final_111517.pdf. [hereinafter *Missed Opportunities*]

⁶ Pa. Dep't of Educ., *Education for Children and Youth Experiencing Homelessness, (ECYEH) 2016-2017 State Evaluation Report*, 27, 28 (Feb. 2018), <https://www.education.pa.gov/Documents/K-12/Homeless%20Education/2016-17%20Pennsylvania%20ECYEH%20State%20Evaluation%20Report.pdf>.

⁷ National Center for Homeless Education, *Education for Homeless Children and Youth Program: Analysis of 2006-2007 Federal Data Collection and Three-Year Comparison*, 6 (2008), <https://www2.ed.gov/programs/homeless/datacomp03-06rpt.pdf>.

⁸ National Center on Homeless Education, *Federal Data Summary School Years 2013-14 to 2015-16*, 8 (2017).

which remains a persistent problem.⁹ The Commonwealth of Pennsylvania consistently trails behind the national rate of identifying McKinney-Vento eligible students. For example, Pennsylvania identified 8% of students as experiencing homelessness during the 2016-2017 academic year compared to the national average of identifying 14% of students.¹⁰ Pennsylvania ranks 44th out of 50 states in the rate of identifying students experiencing homelessness.¹¹

20. Students who are doubled-up are some of the most significantly under identified cohort of students experiencing homelessness.¹² This often occurs because many schools are unaware that these students qualify for the Act's legal protections. Local educational agencies ("LEAs") which are charged with identifying such families often use impermissibly narrow definitions of homelessness, which exclude doubled-up students¹³

⁹ National Law Center on Homelessness and Poverty, *Homeless Students Count: How States and School Districts Can Comply With the New McKinney-Vento Education Law Post- ESSA*, 1 (2017) <https://www.nlchp.org/documents/Homeless-Students-Count>.

¹⁰ Anna Shaw-Amoah and David Lapp, Research for Action, *Students Experiencing Homelessness In Pennsylvania: Underidentification and Inequitable Enrollment*, 1 (Dec. 2018), <https://8rri53pm0cs22jk3vvqna1ub-wpengine.netdna-ssl.com/wp-content/uploads/2018/12/RFA-Students-Experiencing-Homelessness-PACER-Brief-Dec.-2018-v2.pdf>.

¹¹ *Id.* at 5.

¹² *Id.* at 4.

¹³ *Id.*

in contravention of the McKinney-Vento Act's explicit protection. *Id.* § 1143a(2)(B)(i).¹⁴

21. Moreover, even if a student is identified, he or she remains at risk for having protections prematurely stripped due to the protracted duration of homelessness. In ELC's experience, students like G.S. who experience extended periods of homelessness are often prematurely and unlawfully denied these protections simply due to the duration of homelessness. *See, e.g., L.R. ex rel. G.R. v. Steelton-Highpire Sch. Dist.*, 2010 WL 1433146 (M.D. Pa. Apr. 7, 2010) (holding that the McKinney-Vento Act does not impose a durational cap on homelessness).
22. Based on the foregoing, we respectfully request that the "Not Precedential" opinion issued in this matter be converted to a Precedential Opinion. This change is warranted because the decision involves legal issues of continuing importance and of public interest which extend beyond the trial decision and the parties in this case.
23. The Court's ruling upholds the critical right of a child experiencing homelessness by virtue of living doubled-up for economic reasons to attend the same school or be immediately enrolled in a new school and

¹⁴ *Id.*

access all other protections of the McKinney-Vento Act for the entire duration of his family's homelessness.

24. Making this opinion precedential will provide valuable instruction to lower courts in the Third Circuit, and jurisdictions across the country regarding the scope of the McKinney-Vento Act's protection of students who are doubled-up and the obligations of LEAs to serve these students for the duration of homelessness.

For the forgoing reasons, we request that the Non-Precedential Opinion issued in this matter be converted to a Precedential Opinion.

Respectfully Submitted,

/s/Maura McInerney
Maura McInerney (PA Bar No. 71468)
Education Law Center-PA
1315 Walnut St. Suite 400
Philadelphia, Pa 19107
(215) 238-6970 ext. 313

On Behalf of Amici
Date: January 7, 2019

CERTIFICATE OF SERVICE

I hereby certify that this document has been served electronically via the ECF notification system to all counsel of record listed on the CM/ECF Service List in this matter.

/s/Maura McInerney
Maura McInerney, Esquire