Pursuing the Educational Rights of Homeless Children: an Overview for Advocates

Evan S. Stolove
Introduction

Education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education in our democratic society. . . . [Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an adequate education.1

Although generally highly valued in our society, education has yet to receive the attention it deserves. Courts and legislatures continue to neglect their duty to see that all children receive an education—particularly homeless children. The educational system is of particular value to homeless children because of its ability to add "a much-needed sense of place and continuity that they otherwise lack in their fragmented lives."2 According to any estimate, however, the number of homeless school-age children who do not attend school is staggering.3 As a result, society is creating a large number of disenfranchised youth.4 If we continue to fail to provide for these children, "[they] will

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2. NATIONAL COALITION FOR THE HOMELESS, BROKEN LIVES: DENIAL OF EDUCATION TO HOMELESS CHILDREN 1 (Dec. 1987) [hereinafter NATIONAL COALITION].
3. See infra notes 9-10 and accompanying text.
become the next generation of dispossessed, uneducated, angry Americans.\textsuperscript{5}

This Comment explores why homeless children are being denied admittance to public schools and the effect that denial is having on them.\textsuperscript{6} Part I of this Comment addresses the barriers that keep homeless children out of school, and the toll that being denied admission takes on their health and psychological and intellectual growth. Part II surveys current legislation and litigation efforts and other tactics attorneys have employed in battling this problem. Part III explores approaches to the issue beyond common legal parameters and offers suggestions and new strategies for advocates.

I. THE PROBLEM

As of 1990, estimates of the number of homeless children in the United States ranged between 280,871 and 750,000.\textsuperscript{7} During the 1992-93 school year, there were 4566 homeless children in the state of Maryland alone.\textsuperscript{8} Moreover, Travelers Aid International and the Child Welfare League reported in 1987 that only forty-three percent of homeless children nationwide regularly attended school.\textsuperscript{9} In Maryland, 1240 out of the 6440 homeless children between the ages of zero and eighteen in 1989 did not attend school.\textsuperscript{10}

\begin{itemize}
\item \textsuperscript{5} National Coalition, \textit{supra} note 2, at 21.
\item \textsuperscript{6} Where possible, this Comment will focus specifically on the condition of homeless children in Maryland. Unfortunately, at the time this Comment was written, the most recent information the Acting Coordinator of Maryland's Office of Education of Homeless Children and Youth could provide was for the 1989-90 school year.
\item \textsuperscript{7} Herr, \textit{supra} note 4, at 340; see also National Coalition, \textit{supra} note 2, at 1 (estimating the number of homeless children to be 500,000).
\item \textsuperscript{8} Maryland State Department of Education, \textit{The Fact Book 1993-1994: A Statistical Handbook} 35 (1994). Of those children, 2634 were between the ages of 6 and 16.
\item \textsuperscript{9} Id.
\item \textsuperscript{11} Shelley Jackson, \textit{State Plans for the Education of Homeless Children and Youth: A Selected Survey of Thirty-Five States} 74 (June 1990); see also Dale Mezzacappa, \textit{Learning in a State of Chaos}, Phila. Inquirer, Feb. 27, 1989, at 1A, 8A (reporting that more than 30% of the homeless children in Philadelphia are absent from school on any given day); Sebastian Rotella, \textit{School for Homeless Children Opens at N. Hollywood Shelter}, L.A. Times, Aug. 29, 1991, at B1 ("School district surveys last year found 828 homeless children enrolled and estimated that at least another 2300 were not enrolled, figures that officials say are clearly low because 268 of the 650 schools surveyed could not identify homeless students.").
\end{itemize}
A. The Barriers

Many factors account for the absence of homeless children in our schools; the most common include transportation, social, legal, financial, bureaucratic, and familial barriers.¹¹

I. Transportation Barriers.—Transportation is a problem for homeless children because the shelters in which they reside often are far from the schools that they are supposed to attend. Generally, homeless children are required to attend a school in the same district in which they lived prior to becoming homeless.¹² Homeless families move frequently and sometimes far away from their former homes; thus, getting the children to school often can prove difficult.¹³ Moreover, even when not required to attend a school close to their previous home, children often are assigned to schools outside the region in which their shelter is located because the local school is “full.”¹⁴ As a result, some walk as far as two miles to school,¹⁵ while others are bused to schools more than forty miles away,¹⁶ or receive no transportation to schools that are not within walking distance of their shelter.¹⁷

The situation in Maryland is indicative of the problem as a whole. Most of the homeless youth in Maryland attend schools in the district of their shelter,¹⁸ but in some counties it takes an average of seven days to schedule transportation.¹⁹ Since the average stay in emergency shelters is thirty to forty days, many children attend five to six different schools a year with many periods of no schooling in be-

¹¹ L. Juane Heflin & Kathryn Rudy, Homeless and in Need of Special Education 17-20 (1991); see also Herr, supra note 4, at 348 (listing other categories).
¹³ See Reddick, supra note 12, at B3 (“[L]aws that limit the amount of days a family can stay at a shelter make it difficult for children to stay in school.”).
¹⁴ National Coalition, supra note 2, at 9-10.
¹⁶ Kozol, supra note 9, at 81. Some children have to leave their shelters so early in the morning that they do not get to eat breakfast, and many arrive at school late. Id.
¹⁷ See National Coalition, supra note 2, at 9.
¹⁸ Maryland State Department of Education, Educating Homeless Children & Youth: How Are We Measuring Up? 7 (1990) (reporting on progress made in the 1989-90 school year) [hereinafter How Are We Measuring Up?].
¹⁹ Id.
tween. Simple math indicates that some of these children are missing up to forty-two days of school a year—almost a month and a half.

2. Social Barriers.—Homeless children often resist attending school regularly because of their frequent exclusion from social interaction with other students. As one commentator has noted,

Children who are ashamed of being homeless often resist going to school, afraid that they are marked by their dirty clothes, their mode of transportation, their lack of supplies, their inability to invite friends home after school, or simply afraid that teachers and the other children know they are homeless. Unfortunately, in many schools other students do tease and taunt homeless children. Teachers sometimes unwittingly make it worse by singling out homeless children for special attention.\(^2^1\)

The ridicule and harassment can reach dangerous levels. In one district in California, for example, two five year-olds suffered nervous breakdowns caused by harassment.\(^2^2\)

3. Legal Barriers.—Legal barriers associated with residency requirements and guardianship arrangements often preclude homeless children from attending school. For example, districts in which shelters are located sometimes use residency requirements to keep “undesirable” homeless children out by labelling homeless families nonresidents.\(^2^3\) In fact, when districts disagree over how residency is determined, homeless children may be left in a legal limbo in which they are not considered residents anywhere.\(^2^4\) Even when children are admitted to school in a particular district, the length of their residency in the district is often limited by municipal ordinances that limit homeless family stays in shelters to a fixed number of days.\(^2^5\)

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20. See id.
22. Christopher Pummer, School System Still Leaves Many Homeless Children Out in the Cold, L.A. TIMES (Ventura County Ed.), Dec. 2, 1991, at B1; see also Lynda Richardson, Walls of Shame Keep Homeless from School, N.Y. TIMES, Jan. 2, 1992, at A1 (reporting that a sixth-grade math teacher of a homeless boy “stood at the front of the class and told everyone who mattered in his adolescent world: ‘I didn’t know we had a shelter kid in here; give a hand for the shelter kid’”).
23. NATIONAL COALITION, supra note 2, at 5.
25. NATIONAL COALITION, supra note 2, at 6.
Other schools simply claim that they are unable to accommodate the children because they lack the space. 26

Guardianship arrangements also may prevent homeless children from attending school. Homeless parents may leave their children with another family or relatives in an attempt to provide their children with a more stable living situation. 27 Such guardianship arrangements, however, may decrease the children's school attendance. If the person with whom the children are living is not made a legal guardian, the children may be unable to register for school. 28 In addition, schools may refuse to allow a child to return to school after a suspension or absence unless the signature of a legal guardian or parent can be obtained. 29

4. Financial Barriers.—For homeless families, the basic requirements of food and shelter come first. 30 As a result, these families may not have enough money for school clothes or school supplies. 31 While some communities are willing to help through clothing banks, others are not so generous. 32 Consequently, the homeless are sometimes too ashamed to subject themselves to scrutiny at school. 33

5. Bureaucratic Barriers.—Schools often deny admittance to homeless children because they lack immunization records, reports from a previous school, and other miscellaneous records. 34 Requiring these documents often causes lengthy delays during which the child is unable to attend school. 35 Even when the records have not been destroyed or lost, obtaining them and the necessary immunizations can be a "logistical nightmare" with which many homeless parents are ill-prepared to deal. 36

Bureaucratic barriers may also cause de facto denials of admittance. For example, by the time a student is appropriately assessed

26. Id. at 8.
27. See id. at 13-14.
28. Id. at 14.
29. Id.
30. HEFLIN & RUDY, supra note 11, at 18.
31. Id.
32. See Mezzacappa, supra note 10, at 8A (discussing the efforts of Philadelphia principals and school teachers to provide clothes).
33. See Reddick, supra note 12, at B3 (reporting the efforts of one school to provide a child with new shoes because the ones he wore identified him as poor and caused ridicule by his peers).
34. NATIONAL COALITION, supra note 2, at 10-11.
35. See Barras, supra note 15, at B1 (noting one student's loss of a month of schooling).
36. NATIONAL COALITION, supra note 2, at 11.
and placed in a special education program, the child may have moved into another school district. Other schools delay beginning placement testing because homeless children move so often. As a result, children in need of special education often are placed in a regular classroom in which they gain little benefit during the short time they attend the school. Many also exhibit behavioral problems as a result of improper placement, which, in turn, may result in expulsion.

6. Familial Barriers.—Parents often believe their homeless condition is so temporary that they do not need to enroll their children in a new school. Others fail to enroll their children in school "to spare [them] yet another temporary environment." More fundamentally, most homeless parents are preoccupied with the struggle to earn wages and ensure the family's day-to-day survival. Consequently, school is less of a priority. For example, parents often need their school-age children to stay out of school to babysit younger children while the parents look for work, food, and shelter.

Other "familial" concerns of the homeless are based on fear. Children often fear leaving their shelter because they believe their belongings will be stolen while they are gone, and parents sometimes keep children out of school for fear of harm by abusive partners whom they are fleeing. Other parents are simply afraid of the neighborhood in which they live and do not wish to subject their children to the dangers of the streets.

B. The Effects of Homelessness

Sixty-five percent of homeless children suffer from one or more acute or chronic health problem. They have two times the normal rate of chronic disease and are three times more likely to have an elevated blood-lead level in comparison to other children of low socio-

37. See Heflin & Rudy, supra note 11, at 18-19.
38. Mezzacappa, supra note 10, at 8A; National Coalition, supra note 2, at 12.
40. Id., at 13.
41. How Are We Measuring Up?, supra note 18, at 7.
42. Mihaly, supra note 21, at 8.
43. Heflin & Rudy, supra note 11, at 20.
44. Mihaly, supra note 21, at 8.
45. Mezzacappa, supra note 10, at 8A.
46. Mihaly, supra note 21, at 8.
47. Mezzacappa, supra note 10, at 8A.
48. Id.
economic status. In addition, homeless children often suffer from poor nutrition and fail to seek health services until a medical condition becomes very severe. Even when they receive medical attention, they are often incapable of following the medical regimen prescribed and remain in poor health. Consequently, their performance and attendance in school suffers.

Even for homeless children who are fortunate enough to make it to school, learning is often more difficult for them than other children. Many suffer from developmental delays as a result of inadequate or no prenatal and postnatal care. Living in a shelter and sharing small quarters with an entire family also makes it difficult to study and keep up in school. Like all children, homeless children "need stability, support from their peers . . . and help from undistracted parents" to succeed in school. Because they frequently lack these advantages, they often suffer from stress, poor self-esteem, and depression.

The research of Ellen Bassuk and Lenore Rubin has graphically demonstrated the damaging effects of homelessness on the developing minds of school-age youth. Of the children in their study who

49. Heflin & Rudy, supra note 11, at 9 ("[N]either demographics nor substance abuse are the major factors leading to chronic illness. The major factor is homelessness itself.").
50. Id.
51. Id.
52. Id.
54. Heflin & Rudy, supra note 11, at 10; see also Ellen L. Bassuk & Lynn Rosenberg, Psychosocial Characteristics of Homeless Children and Children with Homes, 85 PEDIATRICS 257, 260 (1990) (noting that homelessness has a greater effect on preschoolers). Studies indicate that homeless preschoolers have significantly more developmental delays than their domiciled peers. See Leslie Rescorla et al., Ability, Achievement, and Adjustment in Homeless Children, 61 AM. J. ORTHOPSYCHIATRY 210, 218 (1991); Bassuk & Rosenberg, supra, at 266. They also suffer from "significantly higher rates of behavioral/emotional symptoms." Rescorla et al., supra, at 218. Possible reasons for the differences between the preschoolers, and those in school are: (1) preschoolers' homeless experiences have been a larger proportion of their total lives, id.; (2) children in school are "exposed in some degree to educational stimulation, expectations of socialization, [and] a stable and predictable routine," while "[t]he homeless preschoolers [are] spending their days in [an] unstructured and chaotic environment . . . , often in the presence of adults who [are] feeling highly stressed and overwhelmed," id. at 219; and (3) preschoolers' personalities are still developing, so they are more likely to be influenced by their environment. Id.
55. Moroz & Segal, supra note 53, at 137.
56. Mihaly, supra note 21, at 7.
57. Heflin & Rudy, supra note 11, at 9-10.
58. See Ellen Bassuk & Lenore Rubin, Homeless Children: A Neglected Population, 57 AM. J. ORTHOPSYCHIATRY 279 (1987). Bassuk and Rubin studied 156 children in 14 Massachusetts family shelters. In addition to their conclusions regarding school-age children, their research revealed that, among children five years of age and younger, 47% exhibited at least
were over five years old, a majority expressed suicidal thoughts,\textsuperscript{59} forty-three percent were failing or doing below-average work, and twenty-five percent were in special classes.\textsuperscript{60} A significant portion of the parents were aware of their children’s problems, but “preoccupied with concerns about survival”; they had “little energy for anything else. Overwhelmed, parents cannot act as successful advocates for their children.”\textsuperscript{61}

II. Existing Remedies Available to Advocates for Homeless Children

Attending school can offer homeless children a sense of stability, continuity, hope, and support. Obviously, school is not a complete solution to the problems plaguing homeless children because “without the stability of a permanent home, any meaningful education is extremely difficult.”\textsuperscript{62} Nevertheless, as one commentator noted, “there is no institution better situated to impact upon the cycle of homelessness than the school.”\textsuperscript{63} Thus, advocates must not abandon their efforts to see that homeless children are educated. This section examines existing legislation, currently viable legal theories, and other possible approaches for ensuring that homeless children are allowed to attend school.

A. Federal Statutes

1. The McKinney Act.—In 1987 Congress enacted the Stewart B. McKinney Homeless Assistance Act,\textsuperscript{64} the first federal legislation to address the problems facing homeless people in America. Title VII, subtitle B of the Act deals specifically with education.\textsuperscript{65} It was amended in 1990 to address more effectively the problem of homeless children not attending school.\textsuperscript{66} For states who choose to seek federal
grants pursuant to the Act, it requires creation of plans to increase the school attendance levels of homeless children and prohibits the use of homelessness as a basis for denial of admission. The Act also mandates that the states remove barriers to school attendance such as residency and records requirements.

The McKinney Act, however, is far from a panacea for homeless children. It does not specifically address the need for supplemental services such as transportation and counseling, nor does it provide parents with procedural safeguards to protect their children from arbitrary expulsions or denials of admission. Furthermore, Congress has failed to appropriate sufficient funding to implement the Act, and there are no sanctions for noncompliance.

2. The Runaway and Homeless Youth Act.—The Runaway and Homeless Youth Act provides grants for the establishment and operation of centers to meet the immediate needs of homeless youth and their families. Recognizing that keeping children in elementary and secondary schools may help prevent juvenile delinquency, Congress

ports estimate[d] that a significant number of homeless school-aged children are not attending school regularly."

The McKinney Act originally required States to remove residency-related policies which were keeping homeless children out of school... The Committee bill directs States to address remaining barriers, specifically including residency requirements, problems with school and immunization record transfer, transportation, and guardianship requirements and demonstrate that the State and local educational agencies have developed and will implement and enforce policies to remove barriers to the enrollment and retention of homeless children and homeless youth.

Id. at 6417-18.

68. Id. § 11431(1) & (3).
69. Id. § 11431(2); see supra notes 11-47 and accompanying text (discussing the barriers).
70. See generally JACKSON, supra note 10, at 33-34 & n.75 (making suggestions for improvement). Among Jackson's suggestions include: (1) more broadly defining "homeless"; (2) requiring greater accountability at both local and state levels; (3) allowing parents to make school choice decisions; (4) ensuring that dispute resolution mechanisms are informal so that a lawyer is not required and definitive time limits are established; (5) placing responsibility on local educational agencies for obtaining records, providing necessary vaccinations, and tracking students; (6) making definitive statements regarding transportation, and (7) requiring more substantial involvement in monitoring and implementation of state plans by the U.S. Department of Education. Id.
71. Herr, supra note 4, at 851.
73. Cochrane, supra note 68, at 541.
75. Id. § 5711(a).
passed the Act primarily to supplement the Juvenile Justice and Delinquency Prevention Act of 1974. Congress also found that there is a strong correlation between the living conditions common to homeless children—such as poverty, illiteracy, and poor medical and mental health resources—and juvenile delinquency. Advocates for the homeless should consider using this legislation to fund programs to combat the common problems of juvenile delinquency and homeless youth.

3. Individuals with Disabilities in Education Act.—The Individuals with Disabilities in Education Act (IDEA) requires states to provide children who meet the statutory definition of an "individual with disabilities," including homeless children who meet the definition, a free appropriate public education. It also provides parents of disabled children a private right of action to challenge decisions of the state educational agency regarding the educational needs of their children. This Act is of vital importance to advocates for homeless children because estimates indicate that the percentage of homeless children who qualify for services under the IDEA is higher than that for the population of children as a whole. As a result of homelessness, "a high proportion of . . . children suffer severe anxiety, depression, emotional trauma, and developmental delays." Handicapped

79. Section 1401(a)(1)(A) states:
The term "children with disabilities" means children—(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
(ii) who, by reason thereof, need special education and related services.
Section 1401(a)(1)(B) states:
The term "children with disabilities" for children aged three to five, inclusive, may, at a State's discretion, include children—
(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development
81. Id. § 1415(e).
82. Cochrane, supra note 63, at 558.
83. Herr, supra note 4, at 353; see also supra notes 57-61 and accompanying text.
homeless children who encounter barriers to education therefore are entitled to the rights and corresponding administrative and judicial reviews available under the IDEA.84

B. Maryland Law

Maryland's founders believed that education should be at the forefront of the state’s concerns and embodied the belief in the state constitution.85 As a result, Maryland has a system of free public schools throughout the state.86 Proof of the state's commitment to education is demonstrated by the free and reduced-price breakfast and lunch programs the schools administer.87

In accordance with the McKinney Act,88 Maryland adopted a plan to address homelessness and education. In determining whether a child will attend school in his original district or district of current residence, Maryland chose a progressive approach.89 Local education officials are required to consider the views of the child’s parents in making their determination.90 The plan fails to provide guidance, however, as to whether the local agency of the child’s residence, or of the child’s origin, should make this determination.91

Under the plan, placement disputes are brought to local officials and then, if unresolved, to state officials.92 The plan does not, however, indicate which school a child should attend prior to the resolution of a dispute; it indicates only that local education agencies should review dispute procedures to ensure that the child’s schooling is not disrupted.93

Whatever its faults, Maryland’s plan is promising, primarily because it recommends that homeless students be enrolled regardless of

84. See 20 U.S.C § 1415(b) (authorizing parents to review records and obtain an independent educational evaluation of the child). These remedies can also be pursued under the Rehabilitation Act, 29 U.S.C. §§ 701-797b (1988 & Supp. IV 1992) (amended 1992), which prohibits any program receiving governmental assistance from discriminating on the basis of a disability. This Comment does not reach the issue of whether the Rehabilitation Act provides any additional relief other than that already available under the IDEA.

85. Md. Const. art. VIII, § 1 ("The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation or otherwise, for their maintenance.").

87. Id. §§ 7-501, 7-503, 7-5A-01.
88. See supra notes 64-69 and accompanying text.
89. Jackson, supra note 10, at 9-10.
90. Id. at 10 & n.30.
91. Id. at 10 & n.29.
92. Id. at 12 & n.38.
93. Id. at 14.
the availability of records and that local agencies refer and monitor the immunization of unimmunized children.\textsuperscript{94} Moreover, Maryland has implemented a tracking system for its homeless children that should provide advocates with valuable information.\textsuperscript{95}

Other provisions of Maryland’s legislative scheme provide advocates with remedial measures of dubious value. First, sections 8-101 to 8-107 of the Education Article allow for the creation of compensatory programs for children who qualify as a “disadvantaged child.”\textsuperscript{96} The definition of a “disadvantaged child” under the statute is broad enough to include homeless children. Unfortunately, it applies only to children who are already attending school, not those seeking admission.\textsuperscript{97} This statute nevertheless should be used to help equalize the imbalance in the treatment of homeless children already attending school.

Another significantly less attractive approach is to argue that the child is subject to “neglect.”\textsuperscript{98} “Neglect” includes failure by a child’s

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\textsuperscript{94} Id. at 53. The plan, however, neglects to address important transportation issues.
\textsuperscript{95} Id. at 20 & n.15.
\textsuperscript{96} Id. at 17.

Participants in this system—shelter providers, social services workers and [local education agencies]—submit completed “tracking forms” about all homeless children between birth and age eighteen, including the child’s name, social security number, age, sex, ethnic origin, school attended, grade and current housing arrangements (including the date the child entered the shelter or motel) to the [state educational agency] according to an established schedule. . . . The [state educational agency] enters this information into a computerized data system each month, and disseminates an interpretation of the data to local contacts twice each year.

\textsuperscript{97} Id. §§ 8-101 to -107.

\textsuperscript{98} See Md. Code Ann., Fam. Law § 5-701(n)(1) (1991 & Supp. 1993) (amended 1993). “‘Neglect’ means the leaving of a child unattended or other failure to give proper care and attention to a child by the child’s parents, guardian, or custodian under circumstances that
parents to provide for their child's educational needs. A finding of "neglect" allows child protective services to intervene; they, however, may not intervene based on homelessness alone.

C. Litigation Strategies

Just maybe the litigation process, done intelligently and done well, aside from winning an injunction here and there, can also help create the clarity of solutions that we need to get past some of these particularly awful public scandals.

The litigation process is another avenue available to advocates interested in protecting the right of homeless children to attend school. Claims based on the right to due process, equal protection, or provisions of the McKinney Act each may succeed in the courts.

1. The Due Process Argument.—Entitlement to a public education is a property interest. Once a state has granted a child the right to an education, it cannot deny that right without due process of the law. How much process is due is a question of federal constitutional law.

indicate that the child's health or welfare is significantly harmed or placed at risk of significant harm.” Id.


After a period of homelessness, the children frequently experience medical neglect, educational neglect, and/or a lack of supervision while parents look for work and housing. Given this, child protective services often intervene in situations of homelessness with a more intrusive intervention than would be required if families had access to appropriate housing resources.

Id.

101. Id. at 289 (citation omitted). "Homelessness in the absence of a parental act of omission or commission that places the child in serious jeopardy would not warrant the intervention of child protective services.” Id.


105. See Harrison v. Sobol, 705 F. Supp. 870, 876 (S.D.N.Y. 1988). The length of the deprivation does not determine whether process is due. See Goss, 419 U.S. at 575-76 ("'[L]ook not to the "weight" but to the nature of the interest at stake.'”) (quoting Board of
The United States District Court for the Southern District of New York addressed a relevant due process argument in Takeall ex rel. Rubinstein v. Ambach. In Takeall, an eighteen-year-old male complained of being denied admission to school. He was given oral notification, but no written notice of the denial and no notice of any hearing or other chance for review. Using the test developed in Matthews v. Eldridge, the court found that the risk of erroneous deprivation was much greater than the minor administrative burden involved in supplying written notice. To meet due process standards, the court ruled, the school must notify students and their families of any decision to deny admission, a list of reasons for the denial, and any available administrative remedies.

A homeless child denied admission to school is entitled, at a minimum, to the procedures articulated by the court in Takeall. It is well documented, as discussed earlier in this Comment, the effect that deprivation of a school atmosphere has on a homeless child. As one court characterized it, denying a homeless child admission to school could result in "irreparable harm" in relation to the child's educa-

Regents v. Roth, 408 U.S. 564, 570-71 (1972)). Rather, the length and severity only go to the type of process due. Id. at 576. "A 10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause." Id.

Some states also have due process clauses in their constitutions. See, e.g., Md. Const. Decl. of Rts. art. 24 ("That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by judgment of his peers, or by the Law of the land."). States are free to grant more due process under their state constitutions than the federal constitution affords.


107. Id. at 83.
108. Id.
109. 424 U.S. 319, 335 (1975). Under Matthews, the strength of the private interest, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards [are weighed against] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id.
110. Takeall, 609 F. Supp. at 85.
111. Id. at 87.
tional, social, and psychological development.\textsuperscript{112} The harm, therefore, to the child will undoubtedly warrant significant predeprivation procedural safeguards.

2. The Equal Protection Argument.—To date the Supreme Court has refused to find the right to education a fundamental constitutional right.\textsuperscript{113} In its decision in \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{114} however, the Court, in dicta,\textsuperscript{115} unknowingly indicated its support of the "Total Deprivation Theory."\textsuperscript{116} This theory suggests that if a child is being totally deprived of an education, an equal protection argument may win him admission.

This theory gained further support in the Court's opinion in \textit{Plyer v. Doe},\textsuperscript{117} in which Justice Brennan declared that education is not merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction . . . . [It] provides the basic tools by

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  \item \textsuperscript{113} San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1972). The Court stated that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." \textit{Id.} at 30. In determining whether education is a fundamental right, the Court insisted that, "the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." \textit{Id.} at 33-34. The Court found no such guarantee. \textit{Id.} at 35.
  \item \textsuperscript{114} 411 U.S. at 1.
  \item \textsuperscript{115} The Court began with the following phrase: "Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children . . . ." \textit{Id.} at 37.
  \item \textsuperscript{116} See David Woodward, \textit{Homelessness: A Legal Activist Analysis of Judicial and Street Strategies}, 3 N.Y.L. SCH. HUM. RTS. ANN. 251, 255 (1986) (exploring the Total Deprivation Theory's applicability to the right to shelter litigation). Woodward believes that the Court has lent support to the theory in connection with the deprivation of many rights affecting homeless people. \textit{See id.} at 260-69 (exploring criminal, voting, residency, access to courts, and public benefits law). While he considers the Court's support of the theory a first step toward reaching justice for the homeless, he recognizes that it is inadequate by itself, and he explores various other current statutory provisions to provide "side doors." \textit{See id.} at 269-87 (considering mental health, welfare, and state sex discrimination law). Furthermore, Woodward explored nonjudicial "street strategies." \textit{See id.} at 287-97; \textit{see also infra} notes 180-182, 185-188 and accompanying text. He measured the merits of each strategy, and ultimately found that the Total Deprivation Theory is best saved for some future time when the make-up of the Court has changed. Woodward, \textit{supra}, at 299. He advocates using the "side door" approaches in combination with aggressive street strategies. \textit{Id.} at 306-07.
  \item \textsuperscript{117} 457 U.S. 202 (1982) (striking down as violative of the Equal Protection Clause a Texas statute that denied illegal alien children access to school).
\end{itemize}
which individuals might lead economically productive lives .... [E]ducation has a fundamental role in maintaining the fabric of our society .... [D]enial of education to some isolated group of children poses an affront to ... the goals of the Equal Protection Clause .... Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. 118

Even in Plyer, however, the Court did not apply strict scrutiny in reviewing the denial of admission in the case, thus again failing to accord education the status of a fundamental right. 119 Although it is difficult to tell how wide the applicability of the Plyer holding is—especially in light of the caveats sounded by Justice Powell120 and Chief Justice Burger121—it is clear that a total denial of education would violate equal protection regardless of the class of citizens involved. 122

Equal protection arguments may not be as effective, however, in attacking the less severe educational barriers faced by homeless children. Because education has not been deemed a fundamental right and homeless children are unlikely to be considered a suspect class, 123

118. Id. at 221-22.
119. The Court instead applied an intermediate level of scrutiny. Id. at 224 ("In light of [the costs to the nation and the innocent children, this law] can hardly be considered rational unless it furthers some substantial goal of the State."). For an excellent discussion of the standards of review utilized by the Supreme Court in applying the Equal Protection clause, see Gerald Gunther, Constitutional Law 602-08 (12th ed. 1992).
120. See Plyer, 457 U.S. at 236 (Powell, J., concurring) (emphasizing "the unique character of the cases").
121. See id. at 243 (Burger, C.J., dissenting) ("[T]he Court's opinion ... will likely stand for little beyond the results of these particular cases.").
122. Compare Herr, supra note 4, at 354 ("As ... Plyer v. Doe made clear, equal protection of the laws demands that no child be denied access to a state-created system of free, compulsory education. If the children of illegal aliens can not [sic] be stripped of that right, then surely the native-born children of homeless persons cannot forfeit their entitlement to education.") (footnotes omitted) with Cochrane, supra note 63, at 560 (noting that equal protection claims generally fail partly because the court refuses to find that education is a fundamental right). But see Cochrane, supra note 63, at 560-61 ("Nonetheless, outright exclusion of homeless children from state-funded educational opportunities by school districts that continue to interpret state residency laws in a discriminatory manner may be actionable under section 1983 as a violation of the equal protection clause.").
courts probably would apply the weak rational basis test\textsuperscript{124} to decide cases involving other education-related rights.\textsuperscript{125}

In light of the federal judiciary's lack of receptiveness to constitutional claims, some advocates have turned to state constitutions.\textsuperscript{126} Unfortunately for Maryland's homeless children advocates, Article 24 of the Maryland Declaration of Rights\textsuperscript{127} has been held to be \textit{in pari materia} to the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{128} Thus, the Maryland Court of Appeals has declined to recognize education as a fundamental right as well.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{124} See \textsc{Guntner}, supra note 119, at 602 (describing the court's historical application of rational basis scrutiny). "[T]he courts did not demand a tight fit between classification and purpose; perfect congruence between means and ends was not required; judges allowed legislators flexibility to act on the basis of broadly accurate generalizations and tolerated considerable overinclusiveness and underinclusiveness in classification schemes." \textit{Id}.
\item \textsuperscript{125} See \textsc{Lampkin} v. District of Columbia, No. 92-0910, 1992 U.S. Dist. LEXIS 8049, at *25 (D.D.C. June 9, 1992) (mem.) (evaluating an equal protection claim challenging the provision of transportation for homeless children under the rational basis test). \textit{See also infra} note 148 (discussing the subsequent history of \textsc{Lampkin}).
\item \textsuperscript{126} See \textsc{Michele Galen}, \textit{An End Run Around the High Court,} \textsc{Bus. Wk.}, May 11, 1992, at 58-62 (recognizing the shift in focus by civil rights groups towards state constitutions in light of the "staunchly conservative U.S. Supreme Court"); \textit{see also} \textsc{Daan Braveman}, \textit{Children, Poverty and State Constitutions}, 38 \textsc{Emory L.J.} 577 (1989). Braveman suggests that litigators turn to state courts and constitutions because the states are sovereign and capable of interpreting their constitutions more broadly, because (1) the text of state constitutions is different and therefore subject to different interpretation, \textit{id} at 594; (2) states traditionally have demonstrated responsibility toward children, \textit{id}; (3) "[s]tate judges are under fewer constraints than their federal counterparts," \textit{id}; (4) state judges work under a common law tradition, and therefore are more free to consider arguments about social reality, public policy, and fairness, \textit{id} at 611; and (5) state judges do not have federalism concerns. \textit{Id} at 612.
\item \textsuperscript{127} But see \textsc{Sally S. Spector}, \textit{Finding a Federal Forum: Using the Stewart B. McKinney Homeless Assistance Act to Circumvent Federal Abstention Doctrines}, 6 \textsc{Law \\& Ineq.} J. 273 (1988). Spector argues that [a] judicial forum is needed which not only can decide conclusively the Constitutional issues presented by the homeless, but also can implement solutions to those problems. The federal courts should be that forum. The federal judiciary has demonstrated that it has the ability to grant relief which affects, and may even restructure, state institutions so that the homeless could receive the full benefit of state and federal laws. \textit{Id} at 275.
\item \textsuperscript{128} \textsc{Hornbeck v. Somerset County Bd. of Educ.}, 295 Md. 597, 640, 458 A.2d 758, 781 (1983). The court noted, however, that "the two provisions are independent of each other so that a violation of one is not necessarily a violation of the other." \textit{Id}.
\item \textsuperscript{129} \textit{Id} at 650, 458 A.2d at 786.
\end{itemize}
In *Hornbeck v. Somerset County Board of Education*, however, the court implied that it would apply strict scrutiny to judge the validity of a "significant deprivation" of educational rights. Under *Hornbeck*, advocates in Maryland may be able to use the "significant deprivation" language to expand the educational rights of homeless children. This language lends itself to a theory with even broader applicability to education than the Total Deprivation Theory.

3. *The McKinney Act.*—The McKinney Act is the most comprehensive and promising legislation to date for the homeless community, but it remains unclear whether a homeless person can bring suit privately to enforce the Act when a state fails to comply with its provisions.

In *Cort v. Ash*, the Supreme Court laid out four factors to be considered in determining whether a private cause of action should be implied when Congress has included no determinative express provision in a statute: (1) whether the plaintiff is a member of the class for whom the act was enacted; (2) whether there exists any indication that the legislature intended to create or deny such a remedy; (3) whether it would be consistent with the purpose of the act to imply the existence of such a remedy; and (4) whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law."

The *Ash* Court added that as long as it is "clear" that the statute gave "a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit pur-

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130. Id. at 597, 458 A.2d at 758.

131. See id. at 653, 458 A.2d at 788. In *Hornbeck*, the plaintiffs challenged only the disproportionate impact of the school financing system. *Id.* at 603, 458 A.2d at 761-62. The court held that "the heightened review test [was] not applicable . . . because there [had] been no significant interference with, infringement upon, or deprivation of the underlying right to take advantage of a thorough and efficient education . . . ." *Id.* at 653, 458 A.2d at 788.

132. See supra notes 113-122 and accompanying text.

133. See supra notes 64-73 and accompanying text (discussing the Act).

134. A court could either imply a private right of action or allow a private action to be brought pursuant to 42 U.S.C. § 1983 (1981).

135. 422 U.S. 66 (1975). In *Ash*, a stockholder brought an action against a corporation and its directors pursuant to 18 U.S.C. § 610 (1970 & Supp. III 1991), a criminal statute. *Id.* at 68. Section 610 included no express provision allowing a private right of action, and the Court held that no right to a private remedy was implied within the statute. *Id.* at 77-78.

136. Id.
pose to deny such cause of action would be controlling.”\textsuperscript{137} The Court did not, however, give any indication as to how these factors should be weighed in relation to one another.

The Court elaborated on the \textit{Ash} factors four years later in \textit{Touche Ross & Co. v. Reddington.}\textsuperscript{138} In \textit{Touche Ross}, the Court stated that in the past it found an implied right of action only when “the statute in question at least prohibited certain conduct or created federal rights in favor of private parties.”\textsuperscript{139} Moreover, the Court explained, “[t]he ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.”\textsuperscript{140} Moreover, it is insufficient to find that a right of action should exist simply because a provision of an Act was intended to provide protection for a certain class of people.\textsuperscript{141} Thus, without some indication from the legislature that it envisioned a private remedy, the Court is likely to refuse to find one.\textsuperscript{142}

At least one commentator believes that an implied private right of action exists under the McKinney Act.\textsuperscript{143} Applying the four part test established in \textit{Ash}, Andrew S. Hughes has asserted that (1) “[i]t is clear from the McKinney Act and its legislative history that the statute was, in part, designed to benefit homeless youth who are denied access to

\begin{itemize}
  \item \textsuperscript{137} \textit{Id.} at 82.
  \item \textsuperscript{138} 442 U.S. 560 (1979). In \textit{Touche Ross}, a customer of a security brokerage firm attempted to sue an accounting firm that audited reports for a corporation pursuant to § 17(a) of the Securities Exchange Act of 1934, now amended and codified at 15 U.S.C. § 78q(a) (1970). \textit{Id.} at 562. The Act included no express provision allowing a private right of action. \textit{Id.} at 569. The Court held that while § 17(a) provided early warning to investors, it did not provide any remedies. \textit{Id.} at 570.
  \item \textsuperscript{139} \textit{Id.} at 569.
  \item \textsuperscript{140} \textit{Id.} at 578.
  \item \textsuperscript{141} See \textit{id.} (“Certainly, the mere fact that § 17(a) was designed to provide protection for brokers’ customers does not require the implication of a private damages action in their behalf.”).
  \item \textsuperscript{142} See \textit{id.} at 571 (”[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.”); cf. National Assoc. of Counties v. Baker, 842 F.2d 369, 375 (D.C. Cir. 1988) (holding that, in the absence of clear congressional intent, no implied right of action will be found to enforce substantive rights under the Revenue Sharing Act), \textit{cert. denied}, 488 U.S. 1005 (1989); Smith v. Reagan, 844 F.2d 195, 201 (4th Cir.) (“The regulation of access to the courts is largely a legislative task, and one that courts should hesitate to undertake. For this reason, implied rights of action are disfavored, and will not be found in the absence of clear evidence of legislative intent.”), \textit{cert. denied}, 488 U.S. 954 (1988).
  \item \textsuperscript{143} For a thorough discussion of \textit{Touche Ross} and \textit{Ash}, see generally Charles C. Marvel, Annotation, Implication of Private Right of Action from Provision of Federal Statute not Expressly Providing for One—Supreme Court Cases, 61 L. Ed. 2d 910, 914-16 (1979).
  \item \textsuperscript{144} Hughes, \textit{supra} note 72, at 855; see also Herr, \textit{supra} note 4, at 351 (”[I]t arguably creates a new federal right . . . .”)
\end{itemize}
public education";\textsuperscript{144} (2) since there are no express provisions for enforcement, and the Act speaks in mandatory language without exception, "Congress probably implied a private cause of action";\textsuperscript{145} (3) such an action "is entirely consistent with and helpful to the implementation of the legislative intent";\textsuperscript{146} and (4) while education is traditionally in the realm of the states, "the federal government has always had the right to intervene."\textsuperscript{147}

Hughes, however, fails to consider the conservative approach the Court adopted in \textit{Touche Ross}. One would be hard pressed to find a true hint by the legislature that it \textit{actually intended}, as required by the \textit{Touche Ross} Court, to create a private right of action. Moreover, the United States District Court for the District of Columbia recently found, in \textit{Lampkin v. District of Columbia},\textsuperscript{148} that no implied private right of action exists under the McKinney Act.\textsuperscript{149} Applying the \textit{Ash} Court's analysis, the \textit{Lampkin} court found that Congress did not intend to create an implied right of action, and that finding one would be inconsistent with the overall statutory scheme.\textsuperscript{150}

The \textit{Lampkin} court also considered whether private citizens have a right under 42 U.S.C. § 1983 to bring suit under the McKinney

\textsuperscript{144} Hughes, \textit{supra} note 72, at 853.

\textsuperscript{145} \textit{Id.} at 854; \textit{cf.} Allen V. State Bd. of Elections, 393 U.S. 544, 557 (1969) (holding that without the right to bring a private cause of action, the promise of § 5 of the Voting Rights Act would have been an empty promise). \textit{But see supra} notes 141-142 and accompanying text.

\textsuperscript{146} Hughes, \textit{supra} note 72, at 854; \textit{cf.} Cannon v. University of Chicago, 441 U.S. 677, 704-06 (1979) (holding that while Title IX has a statutory procedure for terminating funding for institutions receiving federal funds if they are engaged in discriminatory practices, a private action is "not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute").

\textsuperscript{147} Hughes, \textit{supra} note 72, at 854-55; \textit{see e.g.,} Brown v. Board of Educ., 347 U.S. 483, 493 (1954); Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 (1988).


\textit{Author's note:} Late in our editorial process, the Court of Appeals for the District of Columbia Circuit reversed the district court's holding in \textit{Lampkin}. See 27 F.3d 605 (1994). We chose to retain this section of the Comment because the opinion of the district court, and the analysis of that opinion contained herein, may be useful to advocates in other jurisdictions seeking to bring a private enforcement action. Interestingly, the Court of Appeals adopted an analysis similar to that suggested by the author here in holding that: "\textsection{11432(e)(3) of the McKinney Act confers enforceable rights on its beneficiaries and that appellants may invoke section \textsection{1983} to enforce those rights.\textit{ Id.} at 612.

\textsuperscript{149} \textit{Lampkin}, 1992 U.S. Dist. LEXIS 8049, at *22. The court also considered an equal protection argument challenging the school transportation assistance given handicapped children but not the plaintiffs. \textit{Id.} at *24-26. Applying the rational basis test, the court determined that it could not end the disparate treatment in transportation assistance, which the defendants conceded existed. \textit{Id.} at *26.

\textsuperscript{150} \textit{Id.} at *23.
In deciding the issue, the court relied heavily on the Supreme Court's recent decision in *Suter v. Artist M.* In *Suter*, the plaintiffs attempted to bring an action for declaratory and injunctive relief pursuant to the Adoption Assistance and Child Welfare Act of 1980. Reversing the Court of Appeals for the Seventh Circuit, Justice Rehnquist, writing for the majority, determined that the Adoption Act did not confer "rights, privileges, or immunities" on the plaintiffs as required under § 1983. Rather, the Court held that the Act merely created a federal reimbursement program for states that incur expenses in providing the services specified under the Act.

Comparing the Adoption Act to the McKinney Act, the *Lampkin* court found that only the Secretary of Education is subject to an enforceable obligation under the McKinney Act. The court stated that "[t]he Secretary must comply with section 11434 [of the Act] and review state plans as well as state laws, policies and practices to assure that the states adequately address the problems of educating homeless children before the Secretary may grant federal funds to each state." In turn, the court determined that the only requirement imposed on the state is to submit a plan or application to the Secretary of Education. Thus, it found that the Act does not "confer an enforceable right upon plaintiffs."

Arguably, the *Lampkin* court's § 1983 analysis is flawed. First, although the Supreme Court's opinion in *Suter* may have had the wide-sweeping effect advanced by the *Lampkin* court, it seems unlikely that the Court intended to dismiss established precedent without so much as a mention of the principles "formerly" recognized in § 1983 analysis. Most recently, the District Court for the Southern District

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151. *Id.* at *1-2.
156. *Id.*
158. *Id.* at *19-20.
159. *Id.*
160. *See id.* at *18.
161. *Id.* at *19.
162. *See* Suter v. Artist M., 112 S. Ct. 1360, 1371 (1992) (Blackmun, J., dissenting) ("[T]he Court reaches its conclusion without even stating, much less applying, the principles our precedents have used to determine whether a statute has created a right enforceable under § 1983.").
of Ohio insisted, in *Wood v. Wallace*,\(^{163}\) that "Suter . . . did not by any means overrule [prior case law such as] *Wilder [v. Hospital Ass.'n*]*.\(^{164}\)"

As the Court recognized in *Suter*, the Court in *Wilder v. Hospital Association* allowed a § 1983 action partly because "the statute and regulations [at issue] set forth in some detail the factors to be considered."\(^{166}\) In *Suter*, the Court identified a lack of specificity under the Adoption Act,\(^{167}\) but the same is not true for the McKinney Act. Section 11434 of the McKinney Act is very explicit as to the requirements placed on the states,\(^{168}\) and these requirements have been further clarified by the Department of Education.\(^{169}\)

Furthermore, the *Lampkin* court stated that the McKinney Act's only requirement on states was "to submit plans or applications to be approved by the federal government,"\(^{170}\) but the Act also speaks in mandatory terms regarding achievement of its goals beyond the obligation of the states to submit plans. Section 11431, which sets forth Congress's goals, states in positive language that "each State educational agency shall assure"\(^{171}\) and that "the State will review and undertake steps"\(^{172}\) to achieve the breakdown of legal and procedural barriers barring homeless children from school.\(^{173}\)

Given the adequate room for contention with the *Lampkin* court's reasoning, advocates should not be deterred from bringing a suit to enforce the McKinney Act under § 1983. Additionally, advocates

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\(^{165}\) *Wood*, 825 F. Supp. at 182.
\(^{166}\) *Suter*, 112 S. Ct. at 1368. The Court in *Wilder* determined that the Boren Amendment to the Medicare Act, 42 U.S.C. § 1369(a)(13)(A), was enforceable pursuant to § 1983. *Wilder*, 496 U.S. at 510.
\(^{167}\) *Suter*, 112 S. Ct. at 1369 ("What is significant is that the regulations are not specific, and do not provide notice to the States . . . .").
\(^{169}\) U.S. DEP'T OF EDUCATION, NONREGULATORY GUIDANCE (Nov. 1987).
\(^{172}\) Id. § 11431(2) (emphasis added).
\(^{173}\) Moreover, the legislative history states: "The purpose of [subtitle B—Education for Homeless Children and Youth] 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." H.R. CONF. REP. No. 174, 100th Cong., 1st Sess. 93 (1987), reprinted in 1987 U.S.C.C.A.N. 460, 472; see also Non-Regulatory Guidelines—Education of Homeless Children and Youth, in MATERIALS ON EDUCATION OF HOMELESS CHILDREN 2-3 (Shelley Jackson ed. 1988) ("A homeless child may not be turned away from school prior to adoption of an overall state plan. . . . [T]he obligations . . . are not contingent upon adoption of the plan. States are responsible . . . for assuring that each homeless child have access to a free, appropriate public education which would be provided to the children of residents.").
should lobby to encourage Congress to amend the Act to clarify that it creates a federal right that Congress intended to be enforceable through a private right of action and that such an action would help effectuate the underlying purposes of the Act.

III. OTHER POSSIBILITIES FOR ADVOCATES

A. Human Rights Advocacy

International human rights advocates often find themselves with little in the way of legislation and traditional litigation tactics to aid them in their causes. This, however, has not stopped them from acting. Professor Irwin Cotler, a renowned international human rights attorney, has laid out a four-part strategy for human rights advocates, which provides a useful model for homeless advocates. He suggests: (1) creating a “mobilization of shame” against the violators through the use of the media and published reports; (2) developing “a permanent documentary record” indicating that the advocate is “bearing witness”; (3) providing “solidarity-succor and assistance” to the victims so they “know that they are not alone;” and (4) “use[ing] this advocacy as a mobilizing mechanism . . . for one’s bar association, government, or academic milieu.”

Advocates for the homeless can achieve a “mobilization of shame” in a variety of ways. First, they can write press releases or call on the media to report the plight of their clients. Advocates can issue reports for release to the media, local politicians, academia, other attorneys, and others with power in the community. Moreover, they can stage protests or engage in civil disobedience to attract attention to the problem. When engaging in this sort of activity, however, advocates must be careful to avoid “alienat[ing] friends and foes alike” and

175. Id. at 23.
176. Id. at 24.
177. Id.
178. Id.
179. For example, the National Coalition for the Homeless issued such a report in 1987. See NATIONAL COALITION, supra note 2.
180. See Woodward, supra note 116, at 287-90 (recounting the radical efforts of the Community for Creative Non-Violence in attracting attention to the plight of the homeless).
181. Id. at 304.
saturating the media to the point of societal disinterest and diversion of attention from the reality to the drama.\textsuperscript{182}

While the second item in Cotler's plan, creation of "a permanent documentary record," may seem part of any lawyer's duties, it may be particularly useful in connection with advocacy for the homeless to record anecdotal information. A good example of such recordkeeping is Jonathan Kozol's \textit{Rachel and Her Children: Homeless Families in America},\textsuperscript{183} in which Kozol recorded the personal stories of a group of homeless families living in a welfare hotel in New York City.\textsuperscript{184} Such a detailed account of the plight of homeless families is likely not only to attract the attention of the media and society in general, but, by invoking an emotional response in many readers, also may motivate individuals to become involved in remedying the situation.

Advocates may achieve Cotler's third suggestion, providing "solidarity-succor and assistance," by involving local community groups such as churches and temples in the advocacy process. Religious institutions hold a "significant judicial, moral and political value,"\textsuperscript{185} and enjoy a constitutionally protected religious freedom that may allow them to participate in activities from which other groups might be barred.\textsuperscript{186} The moral dimension added by invoking the aid of religious institutions may, in the eyes of many, increase the weight of arguments for change. As one commentator has found, "moral outcries can lead to, and lay the groundwork for, additional legislative responses."\textsuperscript{187} Religious institutions such as churches and temples are "highly respected, credible institution[s]" whose aid "adds an impeccable presence and a persuasive voice . . . . And it is an institutional voice that is often listened to by decision makers."\textsuperscript{188}

\textbf{B. Put the Power in the Hands of the People}

Stephen Wexler opined that "poor people can stop poverty only if they work at it together."\textsuperscript{189} Thus, advocates for the homeless "must

\textsuperscript{182} Id.
\textsuperscript{183} Jonathan Kozol, \textit{Rachel and Her Children} (1988).
\textsuperscript{184} Id.; see also Jonathan Kozol, \textit{Savage Inequalities: Children in America's Schools} (1991) (exploring the state of education for minority and socially handicapped children).
\textsuperscript{185} Woodward, supra note 116, at 292.
\textsuperscript{186} Id. at 294. For example, in \textit{St. John's Evangelical Lutheran Church v. Hoboken}, 479 A.2d 935 (N.J. 1983), a church was permitted, as an exercise of religious freedom, to operate a homeless shelter despite zoning laws prohibiting such activity in the area. \textit{Id.} at 936-37.
\textsuperscript{187} Woodward, supra note 116, at 296.
\textsuperscript{188} Id. at 297.
put their skills to the task of helping [them] organize themselves."\(^{190}\) Solving problems for the poor on an individual basis is harmful to their ultimate cause because it isolates them from one another and creates a dependency on the skills of lawyers.\(^{191}\) Lawyers must recognize what clients can do themselves and "teach them to do more."\(^{192}\)

Wexler believed that this type of practice is beneficial for four reasons: (1) the number of lawyers is inadequate to meet the needs of the homeless; (2) "it is better for poor people to acquire new skills than new dependencies"; (3) the poor will often be able to do things "lawyers cannot or will not do"; and (4) such a practice will demystify the law for the homeless.\(^{193}\) In fact, a lawyer advocating for the homeless might be most effective as an organizer, a teacher of rights through both classes and written materials, and a trainer of laypersons in the art of advocacy and confrontation.\(^{194}\)

C. Tell Government How to Do it Better

This strategy is a conglomeration of ways in which advocates can tell members of the government how they should do their jobs better. It incorporates Cotler's suggestions regarding the use of detailed reports and shame to motivate change,\(^{195}\) and includes the preparation of critiques and recommendations, as well as scandalous reports.

One particularly extensive example of this approach is the work of Yvonne Rafferty,\(^{196}\) which outlines more than twenty strategies that policymakers could undertake to improve conditions for homeless children.\(^{197}\) Many of these strategies shift the onus of achieving educational equity for these children to current providers for the homeless. For example, Rafferty suggests that the school districts and shelters be held responsible for tracking the whereabouts of homeless children.\(^{198}\) Other suggestions include computerizing immunization and placement records and creating a shared database among

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190. Id.
191. Id.
192. Id. at 1055.
193. Id.
194. Id. at 1056.
195. See supra notes 174-178 and accompanying text.
196. YVONNE RAFFERTY, AND MILES TO GO... BARRIERS TO ACADEMIC ACHIEVEMENT AND INNOVATIVE STRATEGIES FOR THE DELIVERY OF EDUCATIONAL SERVICES TO HOMELESS CHILDREN (1991).
197. See generally id. at 69-150.
198. See id. at 69 (proposing that district coordinators maintain a list of students); id. at 71 (proposing that shelters be visited daily by educational personnel and have preregistration services).
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schools, faxing records between schools, providing families with information on their rights, and supplying them with fact sheets stating the basic information necessary to register and place their children in school. Finally, Rafferty suggests the obvious—stop bouncing these families from shelter to shelter.

FINAL THOUGHTS

The method or remedy an advocate chooses when attacking a problem necessarily depends greatly on the client and the client's needs. If the client is a six-year-old child who needs a ride home from school, the lawyer should probably not assert that great constitutional law argument he or she has devised. A lawyer—especially a public interest lawyer dealing with the poor—must realize that every day their client's problem goes unresolved can be extremely detrimental. A large company may be able to afford losing $100,000 a day for six months without incurring devastating harm, and a personal injury victim may be able to wait two years before collecting damages, but a six-year-old child cannot afford to lose even a day of school.

It is important to recognize that these children have already waited too long for a remedy. Therefore, lawyers must decide which method of advocacy will achieve the goal of getting homeless children in school now. If possible, they should ensure the rights of other children along the way, but if not possible, they should continue to achieve their original goal in a timely manner. Homeless children cannot afford to wait for them to devise a more encompassing strategy.

In deciding upon a strategy, advocates must also weigh the value of the input against the value of the output. For example, they should note that litigation is a difficult road for most plaintiffs, and particu-

199. Id. at 74-75, 92.
200. Id. at 75.
201. Id. at 81.
202. Id. at 92.
203. Id.

Each school transfer represents irrevocable time lost. The cumulative effect of these losses, even within a quality education program, contributes to academic underachievement, holdover rates, and a loss or break in continuity of learning. In fact, many parents indicated that transferring their children to a different school every time they moved to a new shelter had detrimental educational consequences. With each transfer, school records must be transferred, frequently resulting in a delay, and transportation issues must be resolved. Parents also noted that frequent transitions had a negative impact on their children's academic performance, attendance, and attitude.

Rafferty, supra note 12, at 122.
larly the poor. As one commentator has urged, "litigation as a tool for accomplishing something for poor people is an abysmal tool."\(^{204}\) Clients may perpetually have to go back to court to ask for assistance in enforcing a ruling, and many may not have the know-how or energy to do so.\(^{205}\) In addition, the results can be inadequate, and the process of obtaining the results may involve massive wastes of time, money, and energy.\(^{206}\) "Litigation is always slow, sometimes hard to fund, and frequently an inefficient mode of accomplishing what is better achieved by statute, regulation or vigorous social advocacy, given that the rights of homeless children to an education somewhere are basically noncontrovertible."\(^{207}\)

Although litigating new theories can undoubtably play an important role in protecting the rights of the homeless,\(^{208}\) relying on existing state statutes, organizing the homeless, lobbying in the state legislature, and using the strategies set out by Cotler, Woodward, and Rafferty appear to be more worthwhile. State statutory remedies have better chances of success because they generally are not "unmarked terrain." In such a context, "[r]ather than seeming to be leading a vanguard regiment in a battle for a new fundamental right, plaintiffs invoking these state law grounds appear merely to be asking for the delivery of services and benefits the legislature has already said they are entitled to receive."\(^{209}\) While the provisions of the McKinney Act might look promising, they are not likely to be the haven for homeless children originally believed. Advocates can only hope that the decision in *Lampkin v. District of Columbia*\(^{210}\) is not a promise of things to come.

\(^{204}\) Hayes, *supra* note 102, at 1.

\(^{205}\) Id. at 8 (describing difficulty in enforcing a victory in litigation involving a homeless shelter).

\(^{206}\) See generally *id*. If it is necessary to litigate, it is advisable, in light of the current conservative trend in the federal courts, to seek remedies in state courts. See *supra* note 126 and accompanying text.

Simply put, the federal constitution is understood as a restraint on governmental conduct and not as the source of an affirmative governmental duty to undertake any action. The Constitution is, in the words of Judge Posner, 'a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services ....


\(^{208}\) See Braveman, *supra* note 126, at 577 ("I concede from the start that courts cannot solve the problems confronting poor children. Nevertheless, courts can play some role in the overall efforts to combat poverty among children.").
