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# THE FORGOTTEN STUDENTS: THE IMPLICATIONS OF FEDERAL HOMELESS EDUCATION POLICY FOR CHILDREN IN HAWAII

*Clifton S. Tanabe\* and Ian Hippensteele Mobley\*\**

## I. INTRODUCTION

In 2010, during one of the worst economic downturns since the Great Depression, the world's wealthiest individuals got exponentially wealthier.<sup>1</sup> In contrast, the individuals who felt the downturn the worst were the poor, impoverished, and homeless among us. In Hawaii, a recent report indicates a 36 percent increase last year in the number of people using homeless shelter programs and services.<sup>2</sup> Of this group, children are particularly vulnerable. Shelter usage by single adults and couples without children has recently declined, while the usage by families with children and pregnant women has increased.<sup>3</sup>

It is clear that homeless children and those who work to help them must overcome a variety of very serious and urgent problems. Many of these problems, such as obtaining food, shelter, and medical attention, are more pressing than others and therefore readily take precedence over other important, but less imminent, concerns. Although the educational needs of homeless children might not seem like an immediate threat, it is perhaps the most important key to breaking the cycle of poverty and should be given more attention.

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1. See Luisa Kroll & Matthew Miller, *2010 Forbes Billionaires*, FORBES, Mar. 29, 2010, at 69.

2. CTR. ON THE FAMILY, UNIV. OF HAWAII AT MANOA, HOMELESS SERVICE UTILIZATION REPORT 7 (2009) *available at* <http://uhfamily.hawaii.edu/publications/brochures/HomelessServiceUtilization2009.pdf>.

3. *Id.*

This paper seeks to highlight the barriers homeless children face in receiving an education and analyzes how the federal McKinney-Vento Homeless Assistance Act<sup>4</sup> (“the McKinney Act” or “the Act”) has affected those barriers. Specifically, it addresses the strengths of the Act and the issues that arise in its implementation. This paper also discusses how *Kaleuati v. Tonda* pointed out Hawaii’s shortcomings in complying with the Act, and how the case eventually led to greater compliance. In the end, the authors hope to show that homeless children and their families face a number of debilitating barriers to receiving an adequate education, and that while the available legal remedies to these barriers have offered some relief, they are not without problems.

Part II of this article discusses the current plight of homeless children nationwide, including some of the barriers that impede them from receiving an adequate education. Part III examines key aspects of the Act and their affect on these barriers. Finally, part IV reviews *Kaleuati v. Tonda*, a 2007 homeless education case in Hawaii involving the Act, to highlight the challenges a typical homeless family might face in gaining equal access to education, and to show how this case might be used as a model for future litigation in enforcing the Act.

## II. BARRIERS TO PROVIDING EDUCATION TO HOMELESS CHILDREN

At present in the United States, homeless children are not doing well academically.<sup>5</sup> Homeless children are twice as likely to repeat a grade, be suspended from school, and be diagnosed with learning and emotional disabilities.<sup>6</sup> They are also four times more likely to show “delayed development.”<sup>7</sup> One study revealed that, in particular, homeless children experience difficulty with language abilities such as vocabulary, word analysis, language mechanics, and language expression.<sup>8</sup>

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4. 42 U.S.C. § 11301 (2006).

5. THE NAT’L CTR. ON FAMILY HOMELESSNESS, AMERICA’S YOUNGEST OUTCASTS: STATE REPORT ON CHILD HOMELESSNESS 3 (2009).

6. THE NAT’L CTR. ON FAMILY HOMELESSNESS, AMERICA’S NEW OUTCASTS (1999).

7. *Id.*

8. HENRIETTA S. EVANS ATTLES, THE EFFECTS OF HOMELESSNESS ON THE ACADEMIC ACHIEVEMENT OF CHILDREN 63 (1997).

A chief cause of these issues is that they are not making it to school on a regular basis. In 2000, the Department of Education reported that only 67 percent of homeless school-age children are enrolled in school.<sup>9</sup> It is obvious that a young child cannot succeed in school if he or she is not able to regularly attend classes.

The following sections describe some of the most common reasons why homeless children are frequently absent, including a lack of transportation to and from school, barriers in enrollment requirements, and the social barriers that come with the stigma of being homeless.<sup>10</sup>

### *A. Lack of Transportation*

A Department of Education report to Congress stated that “[t]ransportation remains the biggest barrier for homeless children enrolling in school and accessing available programs and services.”<sup>11</sup> Studies have shown that because homeless families are highly mobile the children of these families often have to transfer from school to school within short periods of time.<sup>12</sup> One study revealed that some 40 percent of homeless children attend two different schools within a year, while 28 percent attend three or more different schools within a year.<sup>13</sup>

When a homeless family resides in a shelter that is outside of walking distance to the nearest school, it is very difficult for that family’s children to get to and from school. School buses do not generally stop at homeless shelters to pick these children up. Related to this problem is the critical issue of transporting homeless children back to their original schools. Several studies have suggested that returning children to their school of origin, and thereby maintaining a level of educational

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9. U.S. DEPT OF EDUC., EDUCATION FOR HOMELESS CHILDREN AND YOUTH PROGRAM: REPORT TO CONGRESS 5 (2000).

10. Some aspects of the review of the educational barriers faced by homeless children and the way the Act addresses such barriers are developed from one of the authors’ previously published articles and is used with permission from the *Journal of Inquiry & Action in Education*.

11. U.S. DEPT OF EDUC., *supra* note 9.

12. “For example, of 390 homeless students in New York City, 76% had transferred schools at least once since entering the shelter system; and 33% had transferred between two and six times.” Yvonne Rafferty, *The Legal Rights and Educational Problems of Homeless Children and Youth*, 17 *EDUC. EVALUATION & POLY ANALYSIS*, 39, 49 (1995).

13. *THE NAT’L CTR. ON FAMILY HOMELESSNESS*, *supra* note 6.

consistency, is one of the most important influences on their school performance.<sup>14</sup>

### *B. Bureaucratic Enrollment Requirements*

Homeless children face other obstacles to regular school attendance due to legal or bureaucratic requirements attached to enrollment. For example, some school districts use legal residency requirements to keep “undesirable” homeless children out of a school by labeling homeless families as nonresidents.<sup>15</sup> Often when homeless children are finally allowed to attend school, local ordinances that limit how long families may stay in emergency shelters force parents to remove their children from school because the law requires them to find different housing arrangements.<sup>16</sup>

Legal guardianship requirements can be another barrier to school enrollment. Homeless parents often have their children stay with family members or friends who are able to provide more adequate housing. A study conducted by the National Center on Family Homelessness found that within one year, 22% of homeless children are separated from their families.<sup>17</sup> Because these arrangements are expected to be temporary, the children’s parents never transfer guardianship rights to these relatives or friends. As a result, these children are often unable to register for schools that require children to be enrolled by their parents or legal guardians.

In addition to formal legal barriers, the bureaucratic structure of a school or a school district can amount to a significant obstacle to homeless parents who seek to enroll their children. Because of their unique situation, homeless parents are subject to the bureaucratic decision-making process of educational institutions more so than other parents. Even when schools try to accommodate homeless students, the process that must be endured by them and their parents is inefficient and time consuming, often delaying enrollment.<sup>18</sup> As

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14. See Rafferty, *supra* note 12, at 40.

15. Evan S. Stolove, *Pursuing the Educational Rights of Homeless Children: An Overview for Advocates*, 53 MD. L. REV. 1344, 1347 (1994).

16. *Id.*

17. THE NAT’L CTR. ON FAMILY HOMELESSNESS, *supra* note 6.

18. See Deborah M. Thompson, *Breaking the Cycle of Poverty: Models of Legal Advocacy to Implement the Educational Promise of the McKinney Act for Homeless Children and Youth*, 31 CREIGHTON L. REV. 1209, 1222 (1998).

a result, homeless children are regularly put at an early educational disadvantage.

One consistent bureaucratic obstacle experienced by homeless parents navigating the school system is the requirement that children be fully immunized before being allowed to attend school.<sup>19</sup> The policy of full immunization is not unreasonable, but for homeless children who neither have the stability nor the resources to acquire such immunizations, this hurdle is nearly insurmountable. Even for those homeless children who have received the proper immunizations, maintaining and then producing these records can be daunting.<sup>20</sup> While non-homeless families may have the luxury of filing such records in a safe place in their home, homeless families must carry them on their backs from shelter to shelter and struggle to keep track of them.

### *C. Social Barriers*

As one might imagine, there are certain social barriers that homeless students face in obtaining an adequate education. Perhaps the most difficult is the stigma that comes with being homeless. Even young children who are homeless have learned to be ashamed of their predicament and resist going to school in order to avoid being taunted because of their lack of supplies or their unkempt appearance.<sup>21</sup> Often teachers are unaware or insensitive to the obstacles that homeless children face.<sup>22</sup> As a result, homeless children can become isolated from school personnel as well as from their classmates.<sup>23</sup> This isolation is compounded by the fact that homeless students often are not allowed to participate in certain school activities because they either cannot pay the required fees, or they are unable to participate in after-school activities because of unique transportation arrangements.

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19. *Id.* at 1223.

20. *See id.*

21. LISA K. MIHALY, HOMELESS FAMILIES: FAILED POLICIES AND YOUNG VICTIMS, CDF'S CHILD, YOUTH AND FAMILY FUTURES CLEARINGHOUSE 8 (1991).

22. *Id.*

23. *See* Maria Foscarinis & Sarah McCarthy, *Removing Educational Barriers for Homeless Students: Legal Requirements and Recommended Practices*, in EDUCATING HOMELESS STUDENTS: PROMISING PRACTICES 135, 138 (James H. Stronge & Evelyn Reed-Victor eds., 2000).

These barriers, individually and collectively, put homeless children at a disadvantage in their pursuit of an education relative to other children. Because of this inherent disadvantage, legislation is necessary to provide homeless children with equal access to education. Education is especially important for homeless children because it is one of the keys to allowing them to break the cycle of poverty in which they find themselves.

### III. THE MCKINNEY ACT

The McKinney Act is an example of the type of legislation needed to provide homeless children with equal access to education. The original Act was enacted in 1987 and was designed to “comprehensively combat homelessness.”<sup>24</sup> It remains the primary federal statute directed at homelessness and the only federal program that provides educational outreach to homeless children and youth.<sup>25</sup> The Act requires that each local educational agency make case-by-case determinations for each child based on his or her best interests.<sup>26</sup> In short, this means that the school district and the parent or guardian of a homeless child must decide how best to remove barriers to the enrollment and retention of the child in school. While the aims of the original Act were commendable, it was not often implemented in a satisfactory manner.

Despite the Act, and the funding that came with it, the rights and needs of homeless children were still ignored.<sup>27</sup> As a result, a group of homeless parents filed a class action lawsuit against the Chicago Public Schools (CPS) and the Illinois State Board of Education.<sup>28</sup> The case was settled in 1996, and in 1999, the CPS received a court order to carry out the terms of

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24. BARBARA J. DUFFIELD ET AL., EDUCATING CHILDREN WITHOUT HOUSING: A PRIMER ON LEGAL REQUIREMENTS & STRATEGIES FOR EDUCATORS, ADVOCATES, AND POLICYMAKERS ix (2002).

25. NAT'L COAL. FOR THE HOMELESS, MCKINNEY-VENTO ACT: NCH FACT SHEET # 18 1 (Jun. 2006) available at <http://www.nationalhomeless.org/publications/facts/McKinney.pdf>.

26. Thompson, *supra* note 18, at 1226.

27. See e.g., RENE HEYBACH & PATRICIA NIX-HODES, THE CHI. COALITION FOR THE HOMELESS, THE EDUCATIONAL RIGHTS OF HOMELESS CHILDREN: CREATING A MODEL PROGRAM IN ILLINOIS 1 (2000) available at [http://ceh.issuelab.org/fetch/chicago\\_coalition\\_for\\_the\\_homeless\\_26.pdf](http://ceh.issuelab.org/fetch/chicago_coalition_for_the_homeless_26.pdf).

28. Salazar v. Edwards, No. 92CH-5703 (Ill. Cir. Ct. 1992).

the settlement. The settlement included, among other things, a broader definition of homelessness and a commitment that the CPS would endeavor to identify and enroll homeless children and youth in its schools.<sup>29</sup> However, “[t]he single most significant practical achievement of the settlement is the expansive new transportation system it established for homeless children.”<sup>30</sup> Ultimately, many of the changes made to the Act during the reauthorization process were based on this settlement agreement.<sup>31</sup>

In January 2002, Title VI-B (or, the Education for Homeless Children and Youth Program) of the Act<sup>32</sup> was reauthorized under the No Child Left Behind Act.<sup>33</sup> Among the most important provisions of Title VI-B is the requirement that all states, regardless of whether the state is receiving funding from the Act or not, ensure that all homeless children receive the same “free, appropriate public education” that is available to other, non-homeless children.<sup>34</sup> Toward this effort, the Act encourages states to aggressively “ensure academic success for students in homeless situations by giving students the right to remain in one school . . . and guaranteeing access to all appropriate education opportunities and services.”<sup>35</sup>

This provision has an impact on several other key aspects of the Act. For instance, the Act requires that each state submit a detailed “state plan” describing how it will “provide for the education of homeless children and youths within the state.”<sup>36</sup> Moreover, the state plan must include a description of how every single school district in the state will address this issue, not just those that are being funded by the Act.<sup>37</sup> The Act also requires that each state have a “state coordinator”<sup>38</sup> and that

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29. LAURENE M. HEYBACH & STACEY E. PLATT, THE CHI. COALITION FOR HOMELESS, ENFORCING THE EDUCATIONAL RIGHTS OF HOMELESS CHILDREN AND YOUTH: FOCUS ON CHICAGO § VII.D. (1998) available at [http://ech.issuelab.org/fetch/chicago\\_coalition\\_for\\_the\\_homeless\\_11.pdf](http://ech.issuelab.org/fetch/chicago_coalition_for_the_homeless_11.pdf).

30. *Id.*

31. See HEYBACH & NIX-HODES, *supra* note 27, at 1–2.

32. 42 U.S.C. § 11431 (2006).

33. DUFFIELD ET AL., *supra* note 24, at ix.

34. 42 U.S.C. § 11431 (2006).

35. HOUS. INDEP. SCH. DIST., CREATING SUCCESS FOR STUDENTS IN HOMELESS SITUATIONS, available at [http://www.cgcs.org/images/PastConference\\_pdfs/AG10.pdf](http://www.cgcs.org/images/PastConference_pdfs/AG10.pdf) (last visited Oct. 2, 2010).

36. 42 U.S.C. § 11432(g) (2006).

37. See *id.* § 11432.

38. See *id.* § 11432(f).

each school district have at least one local homeless education “liaison.”<sup>39</sup> The coordinator, with the assistance of the liaisons must, among other things, develop and carry out the state plan.

Thus, the Act has undergone several changes as a result of litigation and statutory amendments that have improved its effectiveness in ensuring education for homeless children. These amendments have addressed problems in transportation policies, enrollment requirements, and stigmatization. In spite of these improvements, the Act continues to suffer from a persistent shortage of funding, and the extent of the right to sue for enforcement remains unclear.

#### *A. The McKinney Act: Addressing the Lack of Transportation*

The expanded coverage of the reauthorized Act allows it to directly address the problem of transportation. The Act states that “the State and its local educational agencies will adopt policies and practices to ensure that transportation is provided, at the request of the parent or guardian (or in the case of an unaccompanied youth, the liaison), to and from the school of origin.”<sup>40</sup> Therefore, if a child once lived on the east side of town, but now lives in an emergency shelter on the west side of town, the Act requires that the state make a reasonable effort to transport the child to the school on the east side of town which the child originally attended.

Note, however, that this provision is not an affirmative guarantee of transportation for homeless children. It still requires the parent or guardian or liaison to request that the school district provide transportation. It is still uncertain whether such requests will be made by the guardian when necessary. Parents and guardians may simply be unaware of this provision within the law, or they may be unable or unwilling to make the request required in order to trigger the transportation provision.

#### *B. The McKinney Act: Addressing Bureaucratic Enrollment Requirements*

In addition to addressing the issue of transportation, the Act also focuses directly on the legal and bureaucratic barriers

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39. *See id.* § 11432(g)(1)(J)(ii).

40. *Id.* § 11432(g)(1)(J)(iii).

discussed above. The Act requires that local educational agencies develop strategies to address “problems resulting from enrollment delays that are caused by— (i) immunization and medical records requirements; (ii) residency requirements; (iii) lack of birth certificates, school records, or other documentation; (iv) guardianship issues; or (v) uniform or dress code requirements.”<sup>41</sup> This is an affirmative responsibility now placed on school districts to reshape educational policy to meet the demands of providing homeless children with reasonable access to public education. The Act goes on to assert that school districts “shall immediately enroll the homeless child or youth, even if the child or youth is unable to produce records normally required for enrollment.”<sup>42</sup>

### *C. The McKinney Act: Addressing Social Barriers*

The Act contains provisions aimed directly at reducing the often debilitating stigma faced by homeless children. It requires state and local educational agencies to provide assurances that they “will adopt policies and practices to ensure that homeless children and youths are not stigmatized or segregated on the basis of their status as homeless.”<sup>43</sup> Such language is broad, and strongly worded. This provision is clearly not merely a recommendation that school districts stop stigmatizing homeless children. It is a strong command to state and local educational agencies to proactively determine ways to ensure that homeless children are not stigmatized by administrators, teachers, or students while pursuing a public education.

### *D. The McKinney Act: The Problem of Insufficient Funding*

The primary setbacks of the Act spring from the problem of insufficient funding. The Act requires that homeless children in every state be allowed to receive the same free, appropriate public education that is provided to all other children.<sup>44</sup> Part of this mandate requires that local education agencies affirmatively ensure that “homeless children and youths are identified by school personnel and through coordination

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41. *Id.* § 11432(g)(1)(H).

42. *Id.* § 11432(g)(2)(C)(i).

43. *Id.* § 11432(g)(1)(J)(i).

44. *Id.* § 11431(1).

activities with other entities and agencies.”<sup>45</sup> This affirmative responsibility to seek out and identify homeless students is often given short shrift by school districts. Part of the reason for this is that the Act does not provide adequate funding to fulfill its mandates to provide transportation and affirmative identification.<sup>46</sup> As a result, school districts that operate under tight fiscal restraints are often financially unable to meet the affirmative demands of the Act.

In addition, states are often unable to meet the administrative requirements of the Act without additional funding. For example, the Act requires that each state assign a coordinator for homeless education.<sup>47</sup> For many states, like Hawaii, the lack of funding provided by the Act has forced them to tack this responsibility on to the job descriptions of people who already have other full-time duties.<sup>48</sup> As a result, many states have had to delay developing and modifying the state plans that are required by the Act.<sup>49</sup>

The Act simply does not provide sufficient funding to implement its mandates. JoAnn Grouzuczak Goedert addressed the funding issue bluntly when she stated, “McKinney Act funding is insufficient to provide homeless students with a guarantee of improved services.”<sup>50</sup> Concededly, this comment was published before the reauthorization of the Act, and before the recently passed American Recovery and Reinvestment Act of 2009 which provides a one-time distribution of \$70 million in stimulus funds to support the McKinney Act.<sup>51</sup> Given these recent developments, one may wonder whether the above comment regarding insufficient funding is still valid. We believe that it is. For example, the state of Wisconsin reported nearly 11,000 homeless children in

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45. *Id.* § 11432(g)(6)(A)(i).

46. JoAnn Grouzuczak Goedert, *The Education of Homeless Children: the McKinney Act and Its Implications*, 140 ED. LAW REP. 9, 18 (2000).

47. *See* 42 U.S.C. § 11432(f).

48. Telephone interview with Judy Tonda, Hawaii State Coordinator for Education of Homeless Children and Youths (April 21, 2003). (This interview with Ms. Tonda took place four years before she became the lead defendant in the *Kaleuati v. Tonda* case that is reviewed in the second half of this article).

49. *Id.*

50. Goedert, *supra* note 46, at 18.

51. *See* U.S. DEPT OF EDUC., GUIDANCE ON MCKINNEY-VENTO HOMELESS CHILDREN AND YOUTH PROGRAM FUNDS MADE AVAILABLE UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, available at <http://www2.ed.gov/policy/gen/leg/recovery/guidance/homeless.pdf>.

2009,<sup>52</sup> and the state received a mere \$688,200 for that year from the McKinney Act.<sup>53</sup> That equals about \$63 per homeless child for the year. Even the one-time boost of \$904,290<sup>54</sup> in stimulus funds only bumps this figure to around \$145 per homeless child. Considering all that the McKinney Act requires educational institutions to do, including providing transportation, supplying materials, and identifying administrative liaisons, \$145 per child for the year is a paltry sum,<sup>55</sup> especially considering less than half of that amount will be received from year to year.

*E. The Litigation Limitation Provision in the No Child Left Behind Act and its Impact on the McKinney Act*

In addition to the lack of funding provided for homeless education, there is another equally troubling problem with the McKinney Act. Namely, it is unclear whether under the Act, homeless students and their parents still retain the right to sue for its enforcement.

Before the reauthorization of the Act, the U.S. Court of Appeals for the District of Columbia made it clear in *Lampkin v. District of Columbia* that homeless students and parents had a right to sue to enforce the Act.<sup>56</sup> In *Lampkin*, a group of parents sued the District of Columbia on behalf of their homeless children.<sup>57</sup> The group argued, among other things, that by not providing transportation and not ensuring access to various educational programs, the District of Columbia was not

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52. WIS. DEP'T OF PUB. INSTRUCTION, EDUC. FOR HOMELESS CHILDREN AND YOUTH PROGRAM (EHCY). NUMBER OF STUDENTS IDENTIFIED AS HOMELESS REPORTED BY THE SCHOOL DISTRICT ON THE ESEA CONSOLIDATED APPLICATION AS OF 2/10/10, at 11, [http://www.dpi.state.wi.us/homeless/pdf/wi\\_hmls\\_count\\_0809.pdf](http://www.dpi.state.wi.us/homeless/pdf/wi_hmls_count_0809.pdf). (This number represents only the number of homeless children identified by the public school districts as being homeless. The actual number of homeless children in Wisconsin may be much higher.)

53. WIS. DEP'T OF PUB. INSTRUCTION, WISCONSIN RECEIVES \$1.6 MILLION IN EDUCATION FUNDING TO SUPPORT STUDENTS AND FAMILIES WHO ARE HOMELESS (Aug. 6, 2009), [http://www.dpi.state.wi.us/homeless/pdf/3yr\\_ARRA\\_awards.pdf](http://www.dpi.state.wi.us/homeless/pdf/3yr_ARRA_awards.pdf).

54. *Id.*

55. "Homeless students often need additional assistance, including tutoring and school supplies, that are not available from existing school resources. Moreover, the enrollment of a student in their school of origin often creates significant transportation and other costs. Scant McKinney Act dollars cannot come close to meeting all of these competing needs." Goedert, *supra* note 46, at 18.

56. *Lampkin v. District of Columbia*, 27 F.3d 605, 612 (D.C. Cir. 1994).

57. *See id.* at 607.

in compliance with the Act.<sup>58</sup> The district court did not get to the merits of the plaintiff's case because it granted the District of Columbia's motion to dismiss on the grounds that the plaintiffs did not have a private right of action,<sup>59</sup> and therefore could not sue to enforce the Act. However, the Court of Appeals reversed this decision and held that, "the McKinney Act confers enforceable rights on its beneficiaries and that appellants may invoke section 1983 to enforce those rights."<sup>60</sup> The Supreme Court did not hear the case.<sup>61</sup>

Since the McKinney Act was reauthorized under the No Child Left Behind Act, the right to sue, reinforced by the court in *Lampkin*, may be in jeopardy. The No Child Left Behind Act is the most significant reform to the Elementary and Secondary Education Act since it was passed in 1965.<sup>62</sup> Among its many provisions is a section that governs litigation for states that receive funds under the No Child Left Behind Act (which amounts to every state in the union, without exception). This section, called the Paul D. Coverdell Teacher Protection Act,<sup>63</sup> limits liability for teachers, which it defines as, among others, teachers, instructors, principals, administrators, educational professionals, and school board members.<sup>64</sup> It states, "no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school," as long as the teacher is acting within the scope of his or her employment and in conformity with applicable laws.<sup>65</sup>

The McKinney Act has addressed many of the most important barriers affecting the education of homeless children; however, it has fallen short in its implementation due to a lack of funding. Furthermore, the ability of parents to enforce their rights under the Act has been hindered by the ambiguity of whether teachers are immune from litigation under the Act.

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58. *See id.*

59. Goedert, *supra* note 46, at 16.

60. *Lampkin*, 27 F.3d at 612.

61. *District of Columbia v. Lampkin*, 513 U.S. 1016 (1994).

62. U.S. DEPT OF EDUC., FACT SHEET ON THE MAJOR PROVISIONS OF THE CONFERENCE REPORT TO H.R. 1, THE NO CHILD LEFT BEHIND ACT: ARCHIVED INFORMATION (Aug. 23, 2003), <http://www2.ed.gov/nclb/overview/intro/factsheet.html>.

63. Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. § 6731 (2006).

64. *Id.* § 6733(6).

65. *Id.* § 6736.

IV. THE *KALEUATI* CASE

Perhaps the best way to frame the discussion of the barriers homeless children face in receiving an education is through a narrative example. The following case provides an illustration of the sort of challenges a typical homeless family will encounter in pursuing educational opportunities, and provides a model by which parents can seek enforcement of their rights under the McKinney Act.

On October 7, 2007 the American Civil Liberties Union (ACLU) of Hawaii, in partnership with Lawyers for Equal Justice and the law firm of Alston, Hunt, Floyd & Ing, confirmed that homeless children and their parents can still litigate to enforce the reauthorized version of the Act. In the class action suit, *Kaleuati v. Tonda*, the ACLU successfully argued that the Hawaii State Department of Education was in violation of, and must begin to comply with, the Act.<sup>66</sup>

The ACLU's original Complaint for Declaratory and Injunctive Relief opened by providing a framework for the alarming current state of homelessness in the state of Hawaii. For example, there are at least 5,000 homeless persons living on beaches and in parks, sleeping on benches, in cars, and in homeless shelters in Hawaii on any given night.<sup>67</sup> The more than 100,000 "hidden homeless," or persons rapidly moving from one temporary living arrangement to another, provide additional cause for alarm.<sup>68</sup> The complaint also specified that at the time of the lawsuit, the Hawaii Department of Education's (DOE) records showed that only 908 homeless children had enrolled in school. Moreover, the DOE publically admitted that its own statistics on homeless students vastly understated the problem.<sup>69</sup> After framing the problem, the complaint introduced the ways in which Hawaii's homeless children were regularly excluded from the educational system. The myriad ways included unnecessary school changes, failing to provide transportation, and significant delays in paperwork processing and enrollment.

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66. *Kaleuati v. Tonda*, Civ. No. 07-00504 (D. Haw. Oct. 2, 2007).

67. Complaint at 9, *Kaleuati v. Tonda*, Civ. No. 07-00504 (D. Haw. Oct. 2, 2007), available at <http://www.lejhawaii.org/mckinney/complaint.pdf>.

68. *Id.* at 10.

69. *Id.*

In a Motion for a Preliminary Injunction, the ACLU described the abject failure of the Hawaiian DOE to comply with the McKinney Act.<sup>70</sup> Hawaii, which requested and received more than \$200,000 every year from 2004 to 2008 for compliance with the Act, is the only state in the U.S. to be comprised of a single school district.<sup>71</sup> This one school district serves approximately 181,355 students in 258 schools. Due to this consolidated structure, the DOE is both the state and local educational agency for Hawaii.<sup>72</sup>

This structure effected the compliance with the Act because, as previously noted, the Act requires that the state agency monitor the local agency. At the time of the lawsuit, the Hawaii DOE had established only one educational agency liaison, which operates as both statewide coordinator and the local educational agency liaison. As noted by the plaintiffs' counsel, the failure to comply with the Act arose from the structural limitations and the limited personnel devoted to homeless education.<sup>73</sup>

Due to the failure to comply with the Act, the Hawaii DOE was put on formal notice by the U.S. Department of Education's Student Achievement and School Accountability Programs office (US DOE) in 2006.<sup>74</sup> By this time, well over a year had passed since the US DOE had first outlined the Hawaii DOE's failures and demanded an action plan for amelioration, but no significant action was subsequently undertaken by the state.<sup>75</sup> Specifically, the US DOE found that Hawaii put in place unnecessary bureaucratic procedures that would render equitable educational attainment difficult for homeless parents and guardians.<sup>76</sup> The Hawaii DOE also failed to regularly provide materials on the educational rights of homeless children to local schools, and had an inadequate process to monitor adherence to the Act.<sup>77</sup> The plaintiffs' counsel put forth the 2007-2008 Hawaii DOE Supplement,

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70. See generally, Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, *Kaleuati v. Tonda*, Civ. No.07-00504 (D. Haw. Nov. 6, 2007) available at [http://www.lejhawaii.org/mckinney/iso\\_memo.pdf](http://www.lejhawaii.org/mckinney/iso_memo.pdf).

71. *Id.* at 7.

72. *Id.* at 18.

73. *Id.* at 8.

74. *Id.* at 12.

75. *Id.*

76. *Id.*

77. *Id.* at 13.

detailing a number of policies in direct violation of the Act.<sup>78</sup> The plaintiffs' counsel substantiated this evidence with a letter to a local homeless shelter from the chief defendant, Judy Tonda, who was the statewide coordinator for education of homeless children and youth. The letter explained that the state would no longer provide bus passes for homeless children.<sup>79</sup>

### A. *The Plaintiffs*

Perhaps the most compelling aspect of both the original complaint and the Motion for Preliminary Injunction is the way in which both documents carefully illustrated the difficult lives and circumstances of three homeless families living on the island of Oahu.

Olive Kaleuati and her two children (Kaleuati, age 10, and Klayton, age 7), Venise Lewis and her two children (Raeana, age 11, and Kauilani, age 9), and Alice Greenwood and her child (Daniel, age 6) were all homeless at the time of litigation and living in a transitional shelter on Oahu.<sup>80</sup> Olive Kaleuati first encountered difficulty getting her children enrolled in school in 2004 when she was told by a school receptionist that she needed a permanent address in order to enroll her son. When Ms. Kaleuati explained that she could not provide one, her son was not allowed to enroll.<sup>81</sup> She then sent her son to American Samoa for 6 months to stay with relatives and attend school, until she was able to move her family into a transitional shelter in Waianae, Oahu and was able to use its address.<sup>82</sup>

After reaching the two-year limit at that particular shelter in 2006, the Kaleuati family had to relocate to another shelter in the area that was farther from her children's school.<sup>83</sup> When Ms. Kaleuati inquired at her children's school whether there was a city bus route that went from her new shelter to the school, she was told that because their new shelter was outside of the school's boundaries she would have to fill out a form for each child requesting that an exception be made.<sup>84</sup> There was

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78. *Id.* at 23–25.

79. *Id.* at 26.

80. Complaint, *supra* note 67, at 25.

81. *Id.*

82. *Id.*

83. *Id.* at 26.

84. *Id.*

no box on the form to indicate homelessness status, and Ms. Kaleuati was not informed of the rights given to her family under the Act.<sup>85</sup> The day before school started, Ms. Kaleuati was told that her request had been denied, and she was directed to the school closest to her new shelter.<sup>86</sup> Starting at a new school after spending two years in the same school had a detrimental effect on Ms. Kaleuati's two children, who were upset that they had to change schools.<sup>87</sup> Throughout this process, no one from the Hawaii DOE informed Ms. Kaleuati, or her children, of their right to remain enrolled at the initial school and to be provided with transportation to get there.<sup>88</sup>

Venise Lewis and her two children had been homeless since January 2003, and began encountering problems with the educational system the following year.<sup>89</sup> Ms. Lewis' eldest son, not a party in the case, was sent to live with a guardian in 2004, during which time he was forced to switch schools to accommodate school boundary regulations.<sup>90</sup> After six months of living with his guardian, Ms. Lewis' son moved back in with his family and switched schools again, and his school performance suffered as a result.<sup>91</sup> In March 2007, Ms. Lewis and her children moved to the shelter in which they resided at the time of the case.<sup>92</sup> In this new environment, Ms. Lewis quickly ran into difficulty arranging public transportation for her children. Although her caseworker was able to provide bus passes for a few months, Ms. Lewis was told by the administrators at her children's school that free public transportation could not be provided to and from the school.<sup>93</sup> However, Ms. Lewis was ardent and was eventually able to obtain bus passes for her children through the homeless liaison's office in September of 2007.<sup>94</sup> At this point, however, her children had missed seven days of school in just over a month.<sup>95</sup> They were unable to expunge the unexcused absences

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85. *Id.* at 27.

86. *Id.*

87. *Id.*

88. *Id.* at 28.

89. *Id.*

90. *Id.* at 29.

91. *Id.*

92. *Id.*

93. *Id.* at 29–30.

94. *Id.* at 30–31.

95. *Id.* at 32.

from their record, had fallen behind in class work, and had lost classroom points that were required for them to participate in school activities.<sup>96</sup>

Beginning in May 2006 Alice Greenwood and her son, Daniel, became homeless and since March 2007 lived in transitional settings.<sup>97</sup> During the interim period, before they were able to move into a homeless shelter, Ms. Greenwood, who is disabled, was frequently unable to accompany her son as he walked or rode the bus to first grade.<sup>98</sup> As a result, Daniel was frequently tardy or absent from school.<sup>99</sup> When Daniel's teacher called Ms. Greenwood to discuss his truancy, she tried to explain that she was disabled and homeless, and thus faced great difficulty in helping to ensure Daniel's prompt and consistent attendance.<sup>100</sup> Ms. Greenwood was never offered transportation assistance, and was instead informed that Daniel would possibly be punished and that Ms. Greenwood, herself, was "in jeopardy," which she took to mean in danger of losing custody of her son.<sup>101</sup>

Alarmed, Ms. Greenwood attempted to speak with the school principal, but this ultimately availed nothing, and again she was not offered transportation assistance.<sup>102</sup> Once they moved into a shelter in March 2007, Ms. Greenwood was able to procure bus passes for a few months, but sought supplementary assistance from the school.<sup>103</sup> After a lengthy process, she was provided with a single bus pass, good for only one month.<sup>104</sup> During this time, Daniel received thirty-three unexcused absences and eighteen tardies during his first grade year, and severely fell behind in school.<sup>105</sup>

The ACLU argued that the Hawaii DOE regularly failed to provide outreach, technical assistance, opportunities, and advocacy to homeless children and their families, and that the plaintiffs had no adequate remedy at law.<sup>106</sup> In seeking

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96. *Id.*

97. *Id.*

98. *Id.* at 33.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 34.

103. *Id.*

104. *Id.* at 35.

105. *Id.*

106. *Id.* at 36–37.

declaratory and injunctive relief, the ACLU argued that the injustices illustrated in the complaint would continue and worsen if not immediately acted upon.<sup>107</sup> In the Motion for Preliminary Injunction, the ACLU illustrated that the Hawaii DOE had been operating in clear violation of the Act, and such actions caused undeniable detrimental effects on homeless children and their families.<sup>108</sup> The counsel maintained that the plaintiffs were likely to succeed based on the merits of their case, in light of the stipulations of the Act.<sup>109</sup> The ACLU also argued that mere “substantial compliance” or “reasonable efforts” are insufficient under the Act.<sup>110</sup> The Motion for Preliminary Injunction further substantiates the stories of Kaleuati, Greenwood, and Lewis.<sup>111</sup> It also gives accounts detailing the experiences of sixteen children at a homeless shelter in Maui who were forced to transfer schools due to nonexistent transportation assistance and inefficient bureaucratic red tape.<sup>112</sup> The motion also included the story of one particular Oahu student who was told that her school enrollment depended on the maintenance of satisfactory grades.<sup>113</sup>

The ACLU maintained that structural flaws were at the heart of the Hawaii DOE’s failure to adhere to the Act. For example, Judy Tonda was both the statewide coordinator for education of homeless children and youth and the sole local educational agency liaison for the entire state of Hawaii.<sup>114</sup> She was tasked with developing statewide policies, implementing them at the local level in all 258 Hawaii public schools, and serving as her own supervisor to ensure proper compliance with the Act.<sup>115</sup> In the Motion for Preliminary Injunction, the ACLU detailed the comparably-sized state of Delaware as having twenty-two homeless liaisons, compared to Hawaii’s one.<sup>116</sup> Even more glaring is the fact that, in 2006, Delaware

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107. *Id.* at 39.

108. Plaintiffs’ Memorandum, *supra* note 70, at 3.

109. *Id.* at 16.

110. *Id.* at 5.

111. *Id.* at 8–11.

112. *Id.* at 11.

113. *Id.* at 12.

114. *Id.* at 18.

115. *Id.*

116. *Id.* at 19.

had ninety fewer public schools, 60,000 fewer students, and received about \$60,000 less in McKinney Act funding per year than Hawaii.<sup>117</sup> The ACLU also highlighted Tonda's lack of authority to implement changes.<sup>118</sup> In her role, Tonda was powerless to implement the provisions of the Act. For example, she was unable to force superintendents, principals, and other school personnel to override state policy that prohibited granting geographic enrollment exceptions on the basis of homelessness.<sup>119</sup> She was also unable to order the provision of transportation or order the immediate enrollment of children who are without certain relevant documentation.<sup>120</sup> Without a doubt, Tonda was woefully overburdened, and it came as no surprise that McKinney Act materials had not been seen in local schools and shelters. In short, Tonda was given inadequate authority and resources to succeed in her duties, regardless of her own will to do so.<sup>121</sup>

Building on this line of reasoning, the ACLU pointed to numerous failures of outreach, notice, staff training, and resource provision.<sup>122</sup> These failures rendered the plaintiffs and other homeless families in Hawaii unable to assert their rights under the Act, and to participate in the public educational system.<sup>123</sup> Specifically, the Hawaii DOE's shortcomings included a failure to provide geographic exceptions, allow exceptions for student health records for homeless children, provide free public transportation to and from school, allow children to remain in their home school, ensure immediate enrollment of homeless students, and develop and implement adequate procedures for dispute resolution.<sup>124</sup>

### *B. The Response from the Defendants*

In response, the Hawaii DOE maintained that the number of homeless children who had been denied or given limited access to education was very small and insufficient for a

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117. *Id.*

118. *Id.* at 20.

119. *Id.*

120. *Id.*

121. *Id.* at 21.

122. *Id.* at 21–23.

123. *Id.* at 23.

124. *Id.* at 24–31.

preliminary injunction.<sup>125</sup> The defendants also argued that the Act did not stipulate any specific method or activities that must be followed, and that this open-endedness allowed for a great deal of state discretion, so it would be difficult to assert that the State of Hawaii is not in compliance.<sup>126</sup> The defendants also cited a several-months-old task force appointed by the Hawaii DOE, which at the time was working on an action plan to ensure compliance with the Act.<sup>127</sup> Testimony from Assistant Superintendent Daniel Hamada, who was put in charge of this task force, was promised throughout the Opposition to Preliminary Injunction.<sup>128</sup> It was written that Mr. Hamada was planning on adding a number of positions to the Hawaii DOE specifically to ensure implementation and compliance with the Act, although the exact nature was not specified.<sup>129</sup> The defense also maintained that the Hawaii DOE had “recently” placed posters identifying the rights of homeless families at all DOE offices, schools, and homeless shelters in the state of Hawaii, in concurrence with a reiteration of the Act’s stipulations to school staff.<sup>130</sup> The defense also detailed the ongoing development of a plan to provide “more robust transportation services” to homeless children.<sup>131</sup>

In arguing that the facts did not support a preliminary injunction, the defense maintained that the plaintiffs had taken the statements of a few families and extrapolated them to the entire homeless population of Hawaii without adequate support.<sup>132</sup> It was argued that no real and immediate threat of harm existed to Hawaii homeless families, and that the court must consider the significant cost of state compliance when addressing the plaintiffs’ motion.<sup>133</sup> The defendants also brought to bear sworn statements from Tonda and other school

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125. Defendants’ Opposition to Plaintiffs’ “Motion for a Preliminary Injunction” at 1, *Kaleuati*, Civ. No.07-00504 (D. Haw. Jan. 24, 2008), available at [http://www.lejhawaii.org/mckinney/Defendant\\_opp\\_injunction.pdf](http://www.lejhawaii.org/mckinney/Defendant_opp_injunction.pdf).

126. *Id.* at 2.

127. *Id.* at 3.

128. *Id.*

129. *Id.*

130. *Id.* at 11.

131. *Id.* at 13.

132. *Id.* at 4.

133. *Id.* at 8–9.

officials to dispute the claims of Ms. Greenwood and Ms. Kaleuati.<sup>134</sup>

### *C. The Ruling and Settlement*

On February 11, 2008, U.S. District Court Chief Judge Helen Gillmor granted the motion for preliminary injunction, and the plaintiffs' motion to proceed as a class action.<sup>135</sup> In so ruling, Chief Judge Gillmor found that the DOE's current enrollment process and administrative procedures violated the McKinney Act and caused homeless families to have to overcome considerable barriers to keep their children in school.<sup>136</sup> Chief Judge Gillmor ruled that the DOE must do more to identify homeless children and ensure that they are allowed to stay in their school of origin.<sup>137</sup> As one commenter noted, "[t]he Court's final justification for granting the preliminary injunction took public interest into account by reasoning that denying homeless children their educational rights would also harm society in general."<sup>138</sup>

The defendants' case was weakened by placing blame and burden on homeless parents for not knowing their rights, when the DOE itself had done little outreach and education to inform parents of these rights. In addition, many of the DOE's enrollment forms and administrative rules and procedures violated the McKinney Act, preventing homeless children from being identified and assisted. In their Motion Against Preliminary Injunction, the defendants maintained that they were making a reasonable effort to correct these mistakes, but Chief Judge Gillmor deemed these efforts insufficient. Chief Judge Gillmor ordered the Hawaii DOE to change its enrollment procedures to ensure that it fulfilled its legal obligation to provide homeless children with equal access to a

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134. *Id.* at 5.

135. Order Granting Preliminary Injunction at 2, *Kaleuati*, Civ. No.07-00504 (D. Haw. filed Feb. 19, 2008), available at [http://lejhawaii.org/mckinney/PI\\_order\\_2.19.08.pdf](http://lejhawaii.org/mckinney/PI_order_2.19.08.pdf).

136. *Id.* at 10.

137. *Id.* at 8.

138. Benjamin Petersburg, Note, *Reconciling the McKinney-Vento Act with the Vision of the Universal Declaration of Human Rights: Improving Local Educational Agency Liaisons' Ability to Serve America's Homeless Children*, 30 *HAMLIN J. PUB. L. & POL'Y* 447, 473 (2008).

free and appropriate public education in accordance with the McKinney Act.<sup>139</sup>

Ultimately, the *Kaleuati* case was settled. Among the stipulations of the settlement was an agreement that the Hawaii DOE would employ additional support staff to work with Ms. Tonda.<sup>140</sup> The DOE also agreed to immediately enroll any and all students while awaiting receipt of relevant forms or records, to identify personnel at each Hawaii public school to operate as a point of contact for homeless children and their parents or guardians, to provide ongoing training for school-level DOE personnel regarding the McKinney Act specifications, and to ensure greater supervision over each individual school through site visits by Ms. Tonda or her staff.<sup>141</sup> Increased outreach also composed a significant part of the settlement and, as a result, the DOE is now required to widely publish multilingual information regarding the rights of homeless children and families under the McKinney Act and must inquire about homelessness with any student or parent who seeks to enroll, withdraw, transfer, or obtain a geographic exception.<sup>142</sup> Additionally, it was stipulated that the DOE improve internal recordkeeping for students, revise all relevant forms to include information on rights under the Act, and develop and improve relationships with local shelters, other human service agencies, and local social workers to keep abreast of issues pertaining to the homeless children in Hawaii.<sup>143</sup>

#### *D. The Impact of Kaleuati*

As we can see from the plaintiffs' stories, communication between schools and homeless parents and children has not been effective. Operating under this realization, the settlement includes detailed stipulations regarding school consultations with parents or guardians of all students identified as homeless. Ideally, this will also operate as a source of

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139. Order, *supra* note 135, at 12.

140. Stipulation for Dismissal with Prejudice at 16, *Kaleuati*, Civ. No.07-00504 (D. Haw. Aug. 12, 2008), available at [http://lejhawaii.org/mckinney/settlement\\_order.pdf](http://lejhawaii.org/mckinney/settlement_order.pdf).

141. *Id.* at 17.

142. *Id.* at 20.

143. *Id.* at 18–19.

meaningful outreach, to increase awareness of one's rights under the McKinney Act.

Finally, the settlement made strides to facilitate transportation for homeless students.<sup>144</sup> The DOE is now required to make every effort to provide uninterrupted transportation to homeless students in need through bus passes or travel reimbursements.<sup>145</sup> The DOE is also required to support the proliferation of new bus routes connecting shelters to schools, and to make an effort to support the involvement of homeless children in before- or after-school programs.<sup>146</sup>

According to Dan Gluck, an attorney at the ACLU, Hawaii's unique educational structure, namely having one unified school district, benefitted the ACLU's efforts on the Kaleuati case.<sup>147</sup> Rather than having to negotiate between different cities and jurisdictions, the ACLU attorneys focused on one large defendant, which "made getting solutions to the problem easier."<sup>148</sup> Currently, the ACLU of Hawaii is continuing to monitor implementation of the settlement agreement. The organization receives biannual reports from the state to ensure that they are holding to the agreed-upon stipulations and the lawyers involved in the case remain hopeful that their achieved settlement will have a significant impact on the lives of homeless youth and their families. As of the end of the 2008 school year, the state had identified 1640 students eligible for services under the McKinney Act, a significant increase from the 908 students identified before the lawsuit.<sup>149</sup>

## V. CONCLUSION

Regardless of one's personal views on the issue of homelessness, access to education can provide a pathway out of poverty for homeless children. This article has highlighted some of the barriers homeless children face in seeking equal access to education, including transportation, enrollment, and

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144. *Id.* at 30.

145. *Id.*

146. *Id.* at 30–32.

147. Interview with Daniel Gluck, American Civil Liberties Union of Hawaii (Aug. 17, 2009).

148. *Id.*

149. *Id.*

social barriers. Although many of these barriers have been addressed through amendments to the McKinney Act, the Act falls short in implementing solutions due to its lack of funding and adequate enforcement provisions.

In successfully arguing that the Hawaii DOE failed to comply with the McKinney Act, the plaintiffs in *Kaleuati* aid other homeless families and their advocates, not only in Hawaii but across the United States, by showing which legal theories are most effective in litigation relating to the enforcement of their rights under the Act. But, the three families at the center of *Kaleuati*—the Kaleuati family, the Lewis family, and the Greenwood family—do much more than that. Through telling the story of their efforts to obtain the educational rights due to them under the law, they begin to reveal particularities of the routine and harsh struggles faced by so many families in poverty. It is the hope of the authors of this paper that by sharing these families' struggles and their victory, we might engender further advocacy for homeless children. Although implementation of the settlement remains a pressing concern, the *Kaleuati* case can model a significant step toward justice and equal opportunity for homeless children and their families.