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EDUCATION LOST: THE HOMELESS CHILDREN’S RIGHT TO EDUCATION*

I. INTRODUCTION

Although it is very difficult to establish with great precision the number of homeless in America today, their number is estimated at over three million. Even more alarming than the increase in the overall homeless population is the change in the composition of the homeless population. The number of homeless with children is drastically increasing and it is now estimated that “40 percent of the homeless population consists of . . . families.” This translates into “[a]bout 500,000 children [living in a] homeless” state, many deprived of food, shelter, and education.

Because of this increase in homeless families, and homelessness in general, Congress, in 1987, passed the Stewart B. McKinney Homeless Assistance Act to attempt to counter this trend by providing a variety of homeless assis-

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1. The term homeless and homelessness will be used in this comment as meaning an individual without a fixed residence. 42 U.S.C. § 11302 (West Supp. 1988).
4. Id. at 2.
tance programs. The Act’s provisions include the creation of a federal agency charged with implementing and managing the federal homeless programs. This agency consists of members of the Cabinet as well as others, and is responsible for the food and shelter, housing assistance, training, education and community services programs for the homeless.

Subchapter VI, part B of the Act which addresses the problem of education for homeless children, is the subject of this comment. In part, this section directs those states which have a residency requirement as part of their compulsory education laws to establish procedures to assure public education is afforded to the children of the homeless.

The basic problem for homeless youth in the public school system is the question of whether the student "resides" within the district in which he wishes to attend school. Homeless students can be classified in at least two categories. First, there are homeless students who live in a temporary shelter or truly live on the streets and have, through their parents, the intent to remain in one school district. Second, there are students who do not remain in any one school district for any length of time, but must, in any event, be educated.

In the future it is clear that two conflicts will cause further tension in this area, homelessness and educational fund-

6. Id. §§ 11311-11319.
7. Id. §§ 11331-11352.
8. Id. §§ 11361-11394.
9. Id. §§ 11441-11450.
10. Id. §§ 11431-11435.
11. Id. §§ 11461-11472.

12. The author of this comment by no means wishes to deemphasize the magnitude of the homeless problem in general, specifically the daily need for many to find food and shelter. The purpose of this comment is only to address a small portion of the problem, which to those on the street struggling for daily existence may seem secondary at best.


   It is the policy of Congress that -

   (2) in any State that has a residency requirement as a component of its compulsory school attendance laws, the State will review and undertake steps to revise such laws to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education.
ing. The first, is the future of homelessness itself. Predictions for the last decade of this century are grim, if the percentage of homeless families continues to grow at the present rate and the problem remains unchecked. It is presently estimated that "only 43% of school-age homeless children currently attend school" and that "[o]ut of 29 cities surveyed by the U.S. Conference of Mayors, 17 reported that homeless children were denied access to education." The second facet of this problem is funding. Educational funding in California's budget each year is always one of the most controversial issues, especially because California ranks below average among other states in educational spending per student. Additionally, the education of these children is costly: the State spends over $3,700 per student per year. With the number of homeless growing rapidly, the money to educate the homeless will have to be derived from some source. The funding of schools will be an issue not only for the homeless youth, but also for those who have a fixed residence.

This comment will examine the law in California by analyzing the residency requirements of the California compulsory education law and propose a change to allow for the

15. Id.
17. Id.
18. H.R. CONF. REP. NO. 174, 100th Cong., 1st Sess. 93, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 362, 472, which provides, in part: "Washington city officials reported a 500 percent increase in the number of homeless families seeking shelter just this year."
19. Even though paying for the homeless child's education can be looked at as an investment in the future, many will be unwilling to invest this money in the children of a politically inactive group. The homeless not only do not contribute to the tax base of a school district, but are also a burden on the tax base which must fund their basic needs such as food and shelter.
20. California's compulsory education law provides:

Each person between the ages of 6 and 18 years not exempted under the provisions of this chapter or Chapter 3 (commencing with Section 48400) is subject to compulsory full-time education. Each person subject to compulsory full-time education and each person subject to compulsory continuation education not exempted under the provisions of Chapter 3 (commencing with Section 48400) shall attend the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the govern-
assimilation of homeless youth into the public school system. Section II will explore the background of education as a right by looking briefly at the United States Supreme Court's analysis and decisions of the California Courts. In addition, Section II will look to the mandates of the California legislature regarding public education. Section IV will analyze the changes in the legislative intent and judicial opinions regarding the attendance in public schools and how the related concepts of domicile and residence, where one is considered to live for "legal" purposes, fit into the puzzle. Section V will present a proposal to change the compulsory education law to insure that otherwise qualified pupils are not turned away at the door to the classroom and that the proposal is consistent with California law.

II. BACKGROUND

A. Homelessness

1. The McKinney Act

The McKinney Act is an attempt by Congress to insure that homeless youth are not denied education simply because of their status as indigents. Although the Act does not call specifically for individual state legislation, it does mandate a "State plan." This plan insures each homeless youth the opportunity to attend a public school. The Act calls for a state-level coordinator to gather data on homeless children, develop and institute a State plan, and report to the Secretary of the school district in which the residency of either the parent or legal guardian is located and each parent, guardian, or other person having control or charge of the pupil shall send the pupil to the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residence of either the parent or legal guardian is located.

Unless otherwise provided for in this code, a pupil shall not be enrolled for less than the minimum schoolday established by law.


tary of Education. The State plan allows for procedures to insure that school districts can no longer turn away a student due to lack of a fixed residence and that the child shall either attend the school in the district the student last attended, or the district where the youth is now living. In addition, Congress has mandated changes in school district procedure to solve many of the causes contributing to the homeless not receiving an education, including better accessibility of school records, providing grants to school districts, and other provisions.

Despite the apparently strong substantive protection Congress has provided for homeless children, it has appropriated only ten dollars per homeless student per year. In view of such facts, it is no surprise that the courts have had to deal with the denial of public education for homeless youths since the McKinney Act became law.

2. *Judicial Interpretation*

The most recent case involving the denial of public education to homeless youth is *Orozco by Arroyo v. Sobol.* A student asked the court to issue an injunction and decide which school district he should attend. Although this matter arose in New York, this case presents an opportunity for comparison with California law, because in both states enrollment in public school is limited by a residency requirement.

The two school districts in which the plaintiff wished to enroll both argued that the plaintiff should not be enrolled

23. *Id.* at § 11432(c), (d).
24. *Id.* at § 11432(e)(1), (3).
25. *Id.* at § 11432(e)(6).
26. *Id.* at § 11433.
27. *Id.* at § 11432(g); see *supra* note 3 and accompanying text.
29. New York's education law provides in part: "A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides . . ." N.Y. EDUC. LAW § 3202(1) (McKinney 1981) (emphasis added). In *Delgado v. Freeport Public School Dist.*, the court in interpreting the above section stated that "[t]he cited section has as its purpose the protection of a school district from any mandate to educate children who are not residents of the district." 131 Misc. 2d 102, 104, 499 N.Y.S.2d 606, 608 (1986).

For the education law in California, see generally CAL. EDUC. CODE § 48200 (Deering 1987 & Supp. 1990).
in their respective districts. The district in which the plaintiff
and her mother were actually residing\textsuperscript{30} refused to enroll
the child because they did not permanently reside within the
district. The other district refused enrollment because the
plaintiff did not physically live within its boundaries.\textsuperscript{31} The
court declined to accept arguments based on traditional legal
concepts such as residency and domicile and instead looked
to the practical solution of having the child attend school in
the district in which the student actually lived.\textsuperscript{32} The court
deferred to the legislature to formalize a comprehensive solu-
tion to the problem. The legislature, according to the court,
was made aware of this dilemma several years before.\textsuperscript{33}

Even before the passage of the McKinney Act courts
were deciding the meaning of the phrase the “child’s best
interests,” which is central to the Act. The “child’s best inter-
est”\textsuperscript{34} was analyzed in regard to the placement of a home-
less youth within the public school system by a New York
court in 1986,\textsuperscript{35} in Delgado v. Freeport Public School Dis-
trict.\textsuperscript{36} The case involved two students who lived in the
Freeport School District and were forced to leave due to
economic conditions “beyond [the student’s mother’s] con-
trol.”\textsuperscript{37} For undisclosed reasons, the petitioner wished
to have her two children attend the Freeport schools. She
argued that in fact and in law she was a resident of the
Freeport district. The court summarized the theory of the
plaintiff’s argument writing that:

\textsuperscript{30} The term “residing” is used loosely here. The mother was in an
emergency shelter at the time she attempted to enroll the child in school and this
"residence" was not permanent in any way. Delgado, 131 Misc. 2d at 102, 499
N.Y.S.2d at 607.
\textsuperscript{31} The reason the mother tried to enroll her child in this district (Mount
Vernon) was because of her intent to find a permanent residence there. Id. at
103, 499 N.Y.S.2d at 607.
\textsuperscript{33} Id. at 130.
\textsuperscript{34} 42 U.S.C. § 11432(e)(3) (West Supp. 1988).
\textsuperscript{35} This comment is not meant to be an exhaustive treatment of New
York law and the cases presented here are for comparison only.
\textsuperscript{36} 131 Misc. 2d 102, 499 N.Y.S.2d 606 (1986).
\textsuperscript{37} Id. The petitioner ultimately resided in a temporary shelter in the Roose-
velt District, but a condition of living in the shelter was to “spend the daytime
hours away from such premises and in search of permanent housing.” Apparently,
the residence of the petitioner would not remain the same for any length of time
and was the primary concern of the Roosevelt School District’s Administration. Id.
at 102, 499 N.Y.S.2d at 607.
one does not change residency unless the intention to make a change is manifested. Absent such intention, it is argued, the last residency and all the rights that attach to it must prevail, and that includes the right to public education at schools within the district of such 'retained' residency.\footnote{38}

However, the court gave little deference to this argument and found that the child's best interest would be to attend the school in the district where she actually resided, even though temporary, and not the district of original attendance or preference.\footnote{39} The court gave no consideration to the arguments that the child may soon move to a new residence or that the lack of continuity in the youth's education would be unnecessarily disruptive.\footnote{40}

B. Compulsory Education Law

1. Federal Law

The United States Supreme Court has had numerous opportunities to analyze the status of compulsory education and related laws of various states. The Court's analysis of education-related laws is, for the most part, limited to an equal protection analysis.

In \textit{San Antonio Independent School District v. Rodriguez}\footnote{41} a group of parents challenged the propriety of the method used by Texas to finance public schools.\footnote{42} The Court wrote that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."\footnote{43} The court clearly rejected the idea that the right to education is protected by the Federal Constitution as a "fundamental"\footnote{44} right, but explicitly accepted the premise

\begin{footnotes}
\item[38] Id.
\item[39] Id. at 104-05, 499 N.Y.S.2d at 608.
\item[40] Id.
\item[41] 411 U.S. 1 (1973).
\item[42] In this case, the plaintiffs were using, among others, equal protection arguments for the protection of a fundamental right, education. Id.
\item[43] Id. at 95.
\item[44] As one of their arguments, the plaintiffs contended that education should
\end{footnotes}
from *Brown v. Board of Education*\(^{45}\) that "education is perhaps the most important function of state and local governments".\(^{46}\)

More recently, in *Plyler v. Doe*,\(^{47}\) the United States Supreme Court analyzed the right of the children of illegal aliens to attend public schools.\(^{48}\) Reiterating their opinion in *Rodriguez*, the Court held that although public education is not a constitutional right, it 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."\(^{49}\) As in *Rodriguez*, the Court examined the equal protection status of children of illegal aliens vis-a-vis the right to attend public school. The Court ultimately held that there was no legitimate state interest in excluding the children of illegal aliens from public school and, therefore, the State was prohibited from doing so.\(^{50}\)

Before *Plyler* was decided, a factually similar case came before the California Court of Appeals for the Second District, which was decided contrary to *Plyler*. Although not expressly overruled, *Anselmo v. Glendale Unified School District*\(^{51}\) is clearly overruled sub silentio\(^{52}\) by *Plyler*.\(^{53}\) *Anselmo* concerned the denial of admittance to a public school of a student whose parents resided in the United States through

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be a fundamental right protected by the Constitution because it is necessary to utilize other fundamental rights, such as voting. However, the Court noted that "the right to vote, *per se*, is not a constitutionally protected right . . . [but that the right] to participate in state elections on an equal basis with other qualified voters" is a protected right. *Id.* n. 78.


46. *Id.* at 493.

47. 457 U.S. 202 (1982).

48. As with illegal aliens, the homeless are not considered legal residents of the school district. However, the homeless are usually residents of the state and should be entitled to rights such as education at least on par with illegal aliens.

49. *Plyler*, 457 U.S. at 221.

50. *Id.* at 230.


52. *Sub silentio* is defined as "[u]nder silence; without any notice being taken".* Black's Law Dictionary* 1280 (5th ed. 1979).

53. *Anselmo* is clearly overruled by *Plyler* because the rationale upon which both decisions are based are similar. Additionally, no reasonable distinction exists in applying an equal protection analysis to illegal aliens as in *Plyler* and not to the legal aliens in *Anselmo*.
non-immigrant visas. The parents purchased a house in California and subsequently attempted to enroll their child in public school. The court did not allow the child to enroll in school because he did not “reside” in the district. Although *Anselmo* is no longer valid, its importance is in recognizing the trend in the interpretation of California law of residency and the central role the residency requirement plays in the compulsory education law. Although *Plyler* seems to mandate education regardless of residency status, the decision in *Orozco by Arroyo v. Sobol* indicates that there are still issues of education for the homeless yet to be resolved.

2. California’s Compulsory Education Law

In *Piper v. Big Pine School District*, the California Supreme Court aptly stated that “[t]he education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution.” The California Constitution provides:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.

However, when this section was adopted at the time of statehood, there was no reason to provide for the homeless problem. Even a cursory reading of this section implies that homeless children should be educated and that strong public policy reasons support this position.

The problem concerning the homeless is not whether they *should* attend school, but *where* they shall attend. Each district is a quasi-autonomous public body responsible for educating the youth of its district. But in the case of the homeless, they live within no particular school district. This concept of attending school in the district of residence is as old as the state itself. The California Constitution provides

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56. 193 Cal. 664, 226 P. 926 (1924).
57. *Id.* at 669, 226 P. at 928.
that:

The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.\textsuperscript{59}

There has never been a provision in the education code for the residential determination of the homeless. However, the case law continually speaks to specific districts of school attendance as an integral part of the educational scheme in California. In \textit{Ward v. Flood},\textsuperscript{60} the court noted that students must attend the school "nearest their residence."\textsuperscript{61} And in \textit{Piper v. Big Pine School District},\textsuperscript{62} the court quotes the relevant code\textsuperscript{63} as to the education of California's youth holding that "each school district of California shall be open for the admission of all children between six and twenty-one years of age residing within the boundaries of the district."\textsuperscript{64}

Although the United States Supreme Court held that the right to education is not a fundamental right under the Federal Constitution,\textsuperscript{65} California courts have held that education is a fundamental right under the California Constitution. In \textit{Slayton v. Pomona Unified School District},\textsuperscript{66} the court holds, based on Article IX, sections 1 and 5 of the California Constitution,\textsuperscript{67} that "California has extended the right to an education"\textsuperscript{68} and the right is clearly fundamental.\textsuperscript{69} \textit{Ward} concerned the right of a student to attend a public, but segregated school, and was quoted in \textit{Slayton}. The court wrote that the right to attend public school is a right:

\begin{itemize}
\item \textsuperscript{59} CAL. CONST. art. IX, § 5 (emphasis added).
\item \textsuperscript{60} 48 Cal. 36 (1874).
\item \textsuperscript{61} Id. at 44.
\item \textsuperscript{62} 193 Cal. 664, 226 P. 926 (1924). This case was very similar to \textit{Ward}, except that \textit{Piper} dealt with an Indian child who wished to attend public school instead of a black child. \textit{Id.}
\item \textsuperscript{63} At this point in time, the relevant code section was section 1662 of the California Political Code, subdivisions (2) and (3).
\item \textsuperscript{64} CAL. POL. CODE § 1662 (Deering 1922) (emphasis added).
\item \textsuperscript{65} See \textit{supra} notes 43-46 and accompanying text.
\item \textsuperscript{66} 161 Cal. App. 3d 538, 207 Cal. Rptr. 705 (1984).
\item \textsuperscript{67} See \textit{supra} notes 58-59 and accompanying text.
\item \textsuperscript{68} 161 Cal. App. 3d at 548, 207 Cal. Rptr. at 711 (emphasis in original).
\item \textsuperscript{69} \textit{Slayton}, \textit{Id.}
\end{itemize}
derived and secured to [each child] under the highest sanction of positive law. It is, therefore, a right— a legal right— as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all guarantees by which other legal rights are protected and secured to the possessor.\textsuperscript{70}

If it is unquestionable that the right to an education is to be protected as any other vested legal right in California, it leaves unanswered why so many homeless children, who desire an education, are not eligible to attend school. The California Department of Education has recognized the problem of the homeless being denied admission to public schools writing that “[a]s the residency law is typically applied [in California], if the parents cannot provide proof of a street address within the district, the child is denied admission.”\textsuperscript{71}

3. \textit{Education Code Section 48200}

The Compulsory Education Law of California has experienced many legislative changes in the residency requirement and the interpretation since inception.\textsuperscript{72} In 1955, the law was amended\textsuperscript{73} to change the word “resides” to the word “lives.”\textsuperscript{74} However, it was the opinion of the California Attorney General that “[n]o substantive change was made by the amendments.”\textsuperscript{75}

Specifically, the California Attorney General’s office,

\begin{itemize}
\item \textsuperscript{70} Ward, 48 Cal. at 50.
\item \textsuperscript{71} Application of the Residency Requirements for Homeless Children and Youth, CAL. ST. DEP’T. OF EDUC., Legal Opinion No. 5-88, at 2.
\item \textsuperscript{72} The main provision of this section mandates that each child shall attend full-time day school. CAL. EDUC. CODE § 48200 (Deering 1987 & Supp. 1990).
\item \textsuperscript{73} Id. § 16601 (Deering 1955 & Supp 1959).
\item \textsuperscript{74} Section 16601 of the Education Code, after the 1955 amendment read: Each parent, guardian, or other person having control or charge of any child between the ages of 8 and 16 years, not exempted under the provisions of this chapter, shall send the child to the public full-time day school for the full time for which the public schools of the city, city and county, or school district in which the child lives are in session.
\item \textsuperscript{75} Id.
\end{itemize}
wrote that the “action of the Legislature in changing ‘reside’ to ‘live’ confirms our previous interpretation that ‘reside’ was not used in the meaning of ‘domicile’ as defined by Government Code section 244.”76 The Attorney General previously interpreted the word “reside,” as used in the compulsory education law, “to mean the place where the school child is actually living without regard to the legal residence or domicile of his parents unless he resides in the district for the sole purpose of attending the schools of the district.”77

In 1987, the California Legislature removed from the compulsory education law the reference to Welfare and Institutions Code section 17.1. Therefore, one must now look to the residency of the parent in order to determine the school district which the child should attend. Section 244 of the Government Code states that the domicile of a minor is the same as the parent. Therefore, the finding of domicile and residency of the student’s parent is now determinative. Further, since there are no exceptions to the residency requirement which apply to homeless youth,78 a conflict exists between the incompatible compulsory education requirement, which requires that the student attend full-time school, and the residency requirement, which requires that the student only attend the school in the district where they live. Thus, there exists a need for reconciliation.

C. Residency and Domicile

The concepts of domicile and residence are often confused as the same idea and repeatedly used interchangeably. However, these concepts have different legal meanings. The California Supreme Court has recognized the difference between domicile and residence stating that “‘[d]omicile’ is normally a more comprehensive term, in that it includes both the act of residence and an intention to remain.”79 It is widely accepted that an individual may have more than one

76. Id.
77. Id.
78. Section 48204 of the California Education Code provides exceptions to the residency requirements for school attendance in a school district regardless of actual residence. However, no exception is applicable to the problem at hand. CAL. EDUC. CODE § 48204 (Deering 1989 & Supp. 1990).
residence, but only one domicile at any one time.  

The state of the law in California is such that "[e]very person has, in law, a residence." Although domicile is a common law concept, the statutes, in referring to residence, are in actuality referring to domicile. Residence is determined by Government Code section 244. In Government Code sections 243 and 244, the term "residence" has been determined to be "used . . . synonymous[ly] with do-

80. CAL. GOV'T CODE § 244 (Deering 1982); see also Smith, 45 Cal. 2d at 239, 288 P.2d at 499.
81. CAL. GOV'T CODE § 243 (Deering 1982).
82. BLACK'S LAW DICTIONARY 435 (5th ed. 1979) defines domicile as "[t]hat place where a man has his true, fixed, and permanent home and principle establishment, and to which whenever he is absent he has an intention of returning."
83. Residence is defined as:

Personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently, but not necessarily combined with design to stay permanently . . . . As "domicile" and "residence" are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with the intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile. Id. 1176-77.
84. Government Code section 244, entitled "Determination of place of residence," provides:

In determining the place of residence the following rules shall be observed:
(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.
(b) There can only be one residence.
(c) A residence cannot be lost until another is gained.
(d) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of such unmarried minor child.
(e) The residence of an unmarried minor who has a parent living cannot be changed by his or her own act.
(f) The residence can be changed only by the union of act and intent.
(g) A married person shall have the right to retain his or her legal residence in the State of California notwithstanding the legal residence or domicile of his or her spouse.

CAL. GOV'T CODE § 244 (Deering 1982).
micile." For the purposes of this comment the term 'residence' will connote the meaning of a fixed place of residence with the intention to remain.

1. Residency Generally in the Law

"The question of residence or domicile is a mixed question of law and fact . . ." However, what constitutes residence is very often different depending on the area of law for which residence needs to be established. In 1947, the California Court of Appeals for the First District attempted to establish the concept of residency under the California Vehicle Code in Briggs v. Superior Court. There was no case law on point and little statutory authority. The court in discussing this point wrote that:

[...]residence, as used in the law, is a most elusive and indefinite term. It has been variously defined, and means one thing under the attachment laws, another under the voting laws, and still another under the venue laws . . . To determine its meaning, it is necessary to consider the purpose of the act.

The court had to shape a new definition with respect to residency in order to effectuate the purpose of the statute.

Although the case law developed around the concept that each area of law has different requirements for determination of residency, there are common threads which run through all areas of the law of residency. Generally, in California, "[t]o establish a domicile, two things are necessary: (1) the taking up of a physical or actual residence in a particular place, and (2) the intent to make it a permanent abode. Union of act and intent is essential; and until such union occurs, one retains his former domicile." This concept of

85. Smith, 45 Cal. 2d at 239, 288 P.2d at 499.
86. For the purposes of this comment and the homeless problem in general, there is little reason to consider the problem of having two residences and only one domicile.
89. Id. at 245, 183 P.2d at 762.
retention of former domicile is especially important in the consideration of the plight of the homeless.

As the homeless problem grows, more cases are reaching the courts which are defining the rights of these individuals. In *Nelson v. Board of Supervisors of San Diego*, a group of homeless individuals brought an action against the county for withholding general relief payments because they lacked a fixed, residential address. In a footnote, the court wrote that "[t]he County cites no authority suggesting a dwelling address is an element of residence under California law . . . . Under *Adkins*, a dwelling address is at most only an objective criterion of residence, not an element of residence itself." Although the court found a dwelling address was not necessary, an individual still must establish a legal residence within the county.

The question of whether it is necessary to have an actual dwelling address has not been answered for most inquiries into the residence question. Clearly, in *Nelson* the scope of the welfare-type benefits was the relief for the economic distress of the indigents. It follows that many indigents are unable to afford a dwelling address, and that, therefore, the court should insure that those lacking a residence are not precluded from realizing a state benefit directed towards them. On the other hand, the majority of those who attend public school have a residential address, wealth not being a factor per se in the attendance of public school. The question remaining is whether the California Education Code's residency requirement necessitates a dwelling address.

2. School District of Residence

The focus of this comment is the concept of the school district and how it interacts with the concept of residency, which combine to establish eligibility of attendance. But is it important what school district a student attends? In theory, no; however, in reality it is important to many that the con-

92. Id. at 30, 235 Cal. Rptr. at 309, referring to *Adkins v. Leach*, 17 Cal. App. 3d 771, 95 Cal. Rptr. 61 (1971).
93. A homeless individual may legally reside within one county, never leaving it and having the intention to stay within its boundaries, however, that same person may "sleep" in a different school district nightly.
control over schools be retained on a local basis, a strong relationship be maintained with the immediate community, and there be continuity in attendance patterns. Therefore, the school attended by the student is of great concern.\textsuperscript{94} In \textit{Laton Joint Union High School District v. Armstead},\textsuperscript{95} the court analyzed the question of whether or not a school district had a valuable interest in the attendance of pupils residing within the district to attend its schools. The court, in examining the financial support system of the school district, based on the attendance of students, wrote that “[i]t must necessarily follow then that the school district of residence has a valuable interest in the attendance of pupils residing within it.”\textsuperscript{96}

California courts, in making decisions on collateral matters to residency, note the importance of the district of residence concept. In deciding the nature of the funding system of public schools via local property taxes in \textit{Serrano v. Priest},\textsuperscript{97} the California Supreme Court noted that “education is so important that the state has made it compulsory — not only in the requirement of attendance but also by assignment to a particular district and school.”\textsuperscript{98} The integrity of the residency requirements in the school district system is firmly established. But as the homeless problem becomes more evident in California, the courts have been following “[t]he most fundamental [rule,] . . . that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law”\textsuperscript{99} which is to insure that the homeless are given every benefit the legislature intended. It is clear that the intent of Education Code section 48200 is to educate all of the state’s youth, without regard to a fixed residence.

3. Voting as an Analogy to Education

\textsuperscript{94.} In the 1970s, many school districts were ordered by courts to desegregate themselves because of the clear separation of the races at schools within the district. At that time it was clearly important to many vocal parents who attended what school.

\textsuperscript{95.} 130 Cal. App. 628, 20 P.2d 757 (1933).

\textsuperscript{96.} Id. at 631, 20 P.2d at 758.

\textsuperscript{97.} 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

\textsuperscript{98.} Id. at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619.

\textsuperscript{99.} Walters v. Weed, 45 Cal. 3d 1, 9, 752 P.2d 443, 447, 246 Cal. Rptr. 5, 9 (1988) (citation omitted).
Residency requirements for voting provide an appropriate analogy to the residency requirement in the compulsory education law. There are many similarities between the voting and the compulsory education residency requirements. In the *Serrano* case, the court wrote that "[t]he analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is 'preservative of other basic civil and political rights.'" There are other similarities: unlike other forms of residency requirements, such as venue, attachment, and probate proceedings, voting and education residency requirements are part of everyday life. Venue, attachment, and probate proceedings arise only in the context of litigation. By comparison, venue is no more specific than the county of residence, while both voting and education are tied to areas as small as a few city blocks.

Finally, a voting analogy is appropriate because "voting registration is 'one of the important acts to be considered' in determining residence [domicile]." Many cases, in determining whether the intent necessary to change residence exists, look to where the questioned individual is registered to vote.

To date, only one case has dealt with the issue of the homeless and their right to vote in California. *Collier v. Menzel* involved three individuals who considered themselves "homeless" and who were denied the right to vote by the County of Santa Barbara. The three listed on their voter residence affidavits the address of a city park where they

100. *Serrano*, 5 Cal. 3d at 607-08, 487 P.2d at 1258, 96 Cal. Rptr at 618 (quoting Reynolds v. Sims 377 U.S. 533 (1964)).
claimed to reside. The County informed the plaintiffs that the address listed was insufficient and if the plaintiffs so desired they could register in the precincts of their former residences until the establishment of a new one. The plaintiffs asserted that “California law does not require that a voter registrant live in an actual building.” The court found that this view was supported by state law.

The only requirement in question was the need of a fixed habitation, because normally the homeless are not considered to be fixed in residential location as compared to one who owns or rents residential real estate. The court stretched this interpretation, using the dictionary definition of “habitation,” and found that “[a] dwelling or shelter is a subjective term since it can mean entirely different things to different people.” The court used the Legislature’s provision for establishing a residence in a trailer or other vehicle to infer that there is no need for a “fixed” habitation. Obviously, implicit in the notion of a vehicle is mobility. However, the types of vehicles that this section covers are vehicles that, for instance, require special hook-ups in order to emulate a home and make the subjective definition of “habitation” much narrower than the court’s interpretation.

The defendant County argued that the plaintiffs still had a right to vote considering that the homeless were entitled to vote in their last established domicile. But, as in the case of homeless children, requiring voters, or students, to travel a substantial distance to exercise their rights would be unnecessarily restrictive, and this solution was found to be unacceptable by the court.

There was no reason presented to the court to deny the plaintiffs the right to vote in the area where they chose to live. It makes no difference in educational residency or residency for voting purposes “whether people ‘sleep under a

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104. Collier, 176 Cal. App. 3d at 29, 221 Cal. Rptr. at 111.
105. Id. at 30, 221 Cal. Rptr. at 112.
106. Id. at 37, 221 Cal. Rptr. at 116.
107. Id. at 31, 221 Cal. Rptr. at 112.
108. “Residence in a trailer or vehicle or at any public camp or camping ground may constitute a domicile for voting purposes if the registrant complies with the other requirements of this article.” CAL. ELEC. CODE § 207 (Deering 1977).
bush or a tree or in the open air . . . "110 since there is clearly no rational link between where individuals sleep and their right to vote or receive an education. Therefore, the court held that the plaintiffs would be eligible to vote using the address of the city-owned park, noting that "[i]t is patently unjust that society ignores the homeless and yet also denies them the proper [political] avenues to remedy the situation."111 As with the homeless youth of California, without a proper education to establish even minimal competency, they will not only be unable to remedy their personal situation, but will be forced to continue on the welfare rolls of the state.

More recently, the California Supreme Court analyzed voter domicile in the context of a contested election in Santa Cruz County in Walters v. Weed.112 The case presented the question of whether those who leave their domicile with no intention of returning, lose their right to vote in that domicile even though they fail to establish a new one. However, for many homeless, the rationale behind the Walters holding applies by analogy. The Court held:

that when a person leaves his or her domicile with the intention to abandon it, and when that person currently resides in a place in which he or she does not intend to remain, that person may vote in the precinct of his or her former domicile until a new domicile has been acquired.113

The holding in that case was proclaimed to be narrow in scope,114 so its potential of bearing on the plight of the homeless could be limited. However, the rationale behind the case is important. For the majority of homeless, where they "currently reside" is not a place where they intend to remain. Although this holding does not explicitly apply to educational residency requirements, the holding does suggest that courts might be willing to insure that the compulsory education law is enforced and that at least some options, including attend-

110. Id. at 35, 221 Cal. Rptr. at 115.
111. Id. at 36, 221 Cal. Rptr. at 116.
112. 45 Cal. 3d 1, 752 P.2d 443, 246 Cal. Rptr. 5 (1988).
113. Id.
114. Id. at 14, 752 P.2d at 451, 246 Cal. Rptr. at 13.
ing school in their prior district, are available.

When the residency requirements for voting are analogized to the residency requirements of the compulsory education law it is apparent that the trend in the law is to assist the homeless in exercising their rights as citizens of California and that even those citizens who lack a fixed residence will be protected by the courts.

III. STATEMENT OF THE PROBLEM

California's compulsory education law unfairly limits access to education. Youth who are otherwise entitled to attend public schools in this state are denied this opportunity because they lack a fixed residence. This lack of a street address should not be sufficient to rob these children of an opportunity to be educated.

A. Impact of the Problem

The homeless youth have been thrown involuntarily into a cycle of poverty that is destined to perpetuate itself. Therefore, the impact on homeless youth of the denial of education is perhaps more detrimental than to the youth of any other socio-economic class. Furthermore, homeless families are not afforded the luxury of planning their child's educational future. Indeed, the parents of homeless children are concerned with significantly more pressing problems. The homeless youth have a clear need to be educated in order to stop the cycle they are trapped within.

B. The Necessity of an Easy Solution

The problem can be reduced to one statement: homeless youth, who in many ways have the greatest need for education, are being denied access to education because of problems in the law.

The goal of assuring that homeless students can be easily assimilated into the educational system will not be an easy one to meet. The problems of registering in a particular school is the major obstacle faced by the homeless. Everyone agrees that the homeless should be educated, but no one agrees on where this should occur. The longer these children are deprived of an education, the damage suffered increases proportionally. However, there are only limited resources
available to provide the answers. Those searching for solutions to the problem of enrolling these youth in school, must also be concerned with transportation of the homeless to school, the continuity of education, the level of education, and the content of that education. But above all, a simple solution that can be easily adopted and administered is required, because as the burden to register the homeless for school increases, the number of those attempting to enroll will decrease.

IV. Analysis

The McKinney Act is a good beginning to the solution of the homeless education problem, but it is only a beginning. This federal legislation leaves open many alternatives to the states for individual tailoring of the Act, provided that the goal of educating the homeless youth is met. Because of the unlimited number of options available to the state, California should conform their homeless youth education solution to maintain conformity with present state law, as set out in Section V, the proposal section, of this comment.

A. Changes in the Residency Requirements of Education Code Section 48200

The two major questions concerning the residency requirement of the compulsory education law are: (1) is it the minor’s or the parent’s residence which ultimately determines the district of attendance, and (2) will residence be defined as living in a fixed residence or will simply living “on the streets” of that district suffice?

In 1976, when section 48200 was enacted, the provisions for determining residence were essentially unchanged from the previous compulsory education law. Prior to 1976, one looked to the place where the “child lives.” After 1976, one looked to Welfare and Institutions Code section 17.1.

115. *See supra* notes 73-74 and accompanying text.

116. Section 17.1 of the Welfare and Institutions Code is entitled “Determination of minor’s residence” and provides in relevant part: “Unless otherwise provided under the provisions of this code, to the extent not in conflict with federal law, the residence of a minor person shall be determined by the following rules: (a) The residence of the parent with whom a child maintains his or her place of abode . . . determines the residence of the child.” CAL. WELF. & INST. CODE §
which provided that in the majority of cases the minor's legal residence would be that of the parent. In most cases, there is little difficulty in determining the residency requirement; when the child lives with the parent the school that the child is to attend is easily ascertainable. The change in 1976 is of little concern to the majority of the school-age population, because most children live and attend school where their parents live.

With the passage of the 1987 amendment to the compulsory education law,\(^\text{117}\) the conclusion of the California Attorney General that no substantial change in the residency requirement was effectuated is no longer valid.\(^\text{118}\) However, the present version\(^\text{119}\) of the law focuses on the "school district in which the residency of either the parent or legal guardian is located" and, in consideration of the 1987 amendment, the residence of the minor child appears insignificant. The statute no longer refers to the child individually and, in 1987, the legislature purposely removed all reference to the residential determination of the minor. Thus, Government Code section 244 is the only statutory reference remaining in which to interpret section 48200.

B. **Domicile and Residence**

The concept of "domicile" was used in many of the cas-

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\(^{117}\) In 1987, the California legislature deleted the last sentence of Education Code section 48200 which read: "Residency, for the purpose of attendance in public schools, shall be determined by Section 17.1 of the Welfare and Institutions Code." CAL. EDUC. CODE § 48200 (Decring 1987 & Supp. 1990).

\(^{118}\) See supra note 73 and accompanying text.

\(^{119}\) See supra note 20.
es cited in Section II of this comment. These decisions form the basis of the common law in California on the subject of educating the homeless children. Focusing mainly on California cases, this subsection of this comment will analyze the court's rationales in the interpretation of the residency requirements of California law.

The court in *Orozco by Arroyo v. Sobol*\(^{120}\) stated that the "traditional legal concepts" of domicile and residence are ineffective in making a judicial decision with regard to placing the homeless in public schools.\(^{121}\) The *Orozco* case dealt only with a short-term solution to the homeless youth problem and for only one individual student. However, a long-term solution to the problem of educating the homeless youth population of California requires the use of established legal concepts in order to avoid inconsistent determinations in the placement of homeless students in public schools.

The establishment of a domicile requires the union of act and intent.\(^{122}\) However, a question arises as to how to apply these concepts to homeless individuals. In the case of an individual or family being evicted from a home, the prior residents clearly have no intent to return. No matter how far these homeless individuals move from their previous residence, they are technically still domiciled in that previous place. Rights based upon State law which depend on place of residence, such as school of attendance, are greatly affected. Is the homeless person's former domicile retained in the previous district or does it follow the individual for the purpose of school attendance?

The interpretation of the *Nelson*\(^{123}\) rationale is easily distinguishable from the homeless education problem. The case dealt with the distribution of welfare-type benefits and not residency for the purposes of school attendance. There is considerable difference in establishing the residence of an individual in a county versus residence in a school district because the area covered by a school district is usually more limited in scope than an entire county and therefore the *Nelson* holding will not apply to the homeless education prob-

\(^{120}\) 674 F. Supp. 125, 131 (S.D.N.Y. 1987).
\(^{121}\) See *supra* notes 28-33 and accompanying text.
\(^{122}\) See *supra* note 89 and accompanying text.
\(^{123}\) See *supra* notes 90-92 and accompanying text.
lem. The implication of Nelson is that homeless youth may be unable to define their residency specifically enough to entitle them to attend a particular school.

The homeless are often forced to relocate to temporary residences such as temporary shelters or even sleeping on the streets. Thus, the issue to be resolved is whether a new domicile has been acquired.

The court in DeYoung v. DeYoung\(^{124}\) wrote that "[t]he acquisition of a new domicile is generally understood to require an actual change of residence accompanied by the intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode."\(^{125}\) Homeless people do not meet the first part of this definition; there is no actual change in residence. The homeless by definition are without a home. However, the homeless are leaving their previous residences without the purpose of returning and thus meet the second part of the definition. The homeless will be unable to send their children to school without establishing a new domicile or residence if this residency concept as currently defined is kept in the compulsory education law.

The definition used in the In re Estate of Glassford\(^{126}\) further this concept that the domicile of the homeless does not follow them to where they reside. The court stated: "[t]he judicial concept of domicile is essentially equivalent to the lay idea of home. [citation] It embodies a disposition towards permanence, an attitude of attachment."\(^{127}\) The court conveniently defined domicile as a home. Although for the most part this holds true, for the homeless it only hinders the exercise of their right to education. This definition does not allow the homeless to exercise their rights which are residence specific. If this definition remains viable the homeless will lose rights to which they are clearly entitled.

In 1985 case of Collier v. Menzel,\(^{128}\) the court noted that "there is no statutory authority for the position that a residence cannot be a place where there are no living facili-

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124. 27 Cal. 2d 521, 165 P.2d 457 (1946).
125. Id. at 524, 165 P.2d at 458 (emphasis added).
127. Id. at 186, 249 P.2d at 911.
ties." It is this developing line of cases that will allow the homeless to exercise their rights. Although most of the domicile and residence specific statutes refer to a home or fixed residential structure, these cases signal a change in the attitudes of the judiciary. Judges are now more willing to construe residence to allow the homeless the rights they are entitled to. The next step in solving the problem of insuring that the homeless can exercise their right to public education is to change the definitions in the law.

C. A Private Cause of Action

If the proposal presented in the next section is not adopted and the homeless youth is prevented from attending public school, one answer would be to file a private cause of action. In 1975, the United States Supreme Court decided the landmark case of Cort v. Ash which established the test for implying private causes of action in federal statutes. As presented in Cort the plaintiff had to satisfy a four factor test. The first factor questioned "is the plaintiff 'one of the class for whose especial benefit the statute was enacted' . . . that is, does the statute create a federal right in favor of the plaintiff." It 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 public education. The aim of the statute is to insure that the largest number of homeless youth are educated and that no state regulations hinder this goal. There is no question that the McKinney Act was enacted for the especial benefit of the homeless.

"Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?" There is no express indication in the statute or legislative history as to a private cause of action. However, some courts "have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute . . . what must ultimately be determined is

129. Id. at 55, 221 Cal. Rptr. at 115.
130. 422 U.S. 66 (1975).
131. Id. at 78 (emphasis in original) (quoting Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).
132. Id.
whether Congress intended to create the private remedy asserted." But this "does not mean that [the Supreme Court] require[s] evidence that Members of Congress . . . actually had in mind the creation of a private cause of action." Finding an implicit indication of Congressional intent is difficult. Congress provided that the homeless youth will be educated in public schools and there are no exceptions to this Congressional mandate. However, there are no provisions for enforcement in states which fail to implement such a program. Since the McKinney Act provides only ten dollars per homeless student per year there is little incentive for the state to educate the homeless. Therefore, Congress probably implied a private cause of action so that a youth denied access to education could sue the state in order to establish her right to a public education.

"Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" While a private remedy will not be implied to the frustration of the legislative purpose, "when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." As mentioned above there is no incentive to the individual states to implement the homeless education programs. It is entirely consistent with and helpful to the implementation of the legislative intent of the McKinney Act for individuals to prosecute actions to allow them admission to public schools. If the Court allows private actions in these types of matters, the purpose of Congress to ensure the education of homeless youth will be furthered.

The fourth factor relates to 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." Traditionally, education has been in the realm of

135. See supra notes 3, 26 and accompanying text.
137. Transamerica, 444 U.S. at 34 (White, J., dissenting) (quoting Cannon v. University of Chicago, 441 U.S. 677, 703 (1979)).
state regulation. However, the federal government has always had the right to intervene into the actions of states. There is no reason to allow the states to exclude the homeless from public education. Therefore, this element of the four-part Cort test, along with the other three prongs tends to support the finding of a private cause of action for the homeless youth.

However, there has been a trend by the United States Supreme Court to limit the finding of a private cause of action. In Touche Ross & Co. v. Redington,\(^\text{139}\) the Court began limiting the Cort test, commenting that “implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.”\(^\text{140}\) More recently, in Thompson v. Thompson,\(^\text{141}\) the Court refused to find a private cause of action implied in the Federal Kidnapping Prevention Act. The rationale used was based solely on the second factor of the Cort test, whether there is an express legislative intent to allow a private cause of action. Justice Scalia wrote a concurring opinion in Thompson in which he wrote “[i]t could not be plainer that we effectively overruled the Cort v. Ash analysis in Touche Ross & Co. v. Redington.”\(^\text{142}\) Although the Court has not expressly overruled the Cort analysis, it clearly uses the second prong as a threshold test — a test that very few cases meet.\(^\text{143}\) Justice Scalia concludes his concurrence by writing that the Court “should get out of the business of implied private rights of action altogether.”\(^\text{144}\) If the Court eventually adopts this as their opinion, the future of private causes of action for homeless youth, and all others, will be extinguished.

V. PROPOSAL

The solution to the problem of homeless education requires an exception to the compulsory education law which

\(^{139}\) 442 U.S. 560 (1979).

\(^{140}\) Id. at 571.


\(^{142}\) Id. at 189.

\(^{143}\) Justice Scalia wrote in his concurrence in Thompson that “[t]he recent history of our holdings is one of repeated rejection of claims of an implied right. This has been true in nine of eleven recent private right of action cases heard by this Court, including the instant case.” Id. at 190.

\(^{144}\) Id. at 192.
allows for a new definition of residency. Many competing factors need to be analyzed in order to insure that each homeless youth is not only afforded the right to a public education but permitted to attend a school which can be determined with little difficulty and not slowed by endless administrative hearings or judicial processes.

To effectuate this expanded definition of residency, the following addition should be made to the California Education Code under division four which contains special education programs. Part 37 would be entitled "Educational Programs for the Homeless" and read as follows:

Section 65000 — Legislative Findings and Declarations
The Legislature finds and declares that all individuals with exceptional needs have a right to participate in free appropriate public education and that special educational instruction and services for these persons are needed in order to ensure them of the right to an appropriate educational opportunity to meet their unique needs.

It is the intent of the Legislature to assure that all individuals with exceptional needs are provided their rights to appropriate programs and services which are designed to meet their unique needs as defined by the Stewart B. McKinney Homeless Assistance Act.

Section 65001 — Individuals with Exceptional Needs
(a) The County Superintendent of Schools shall be responsible for actively searching for and identifying individuals who qualify under this part.
(b) The County Superintendent of Schools shall assign the student to any school within the county; such school shall be in the child's best interest.
(c) The term homeless as used under this part shall be the same as defined in the Stewart B. McKinney Homeless Assistance Act.

Section 65002 — Homeless Education Programs
The legislature finds and declares that in order to effectively educate those who are homeless the following must occur:
(1) that individualized or small group instruction in core academic subjects be provided to allow individuals identified under this part to attain an educational level equivalent to that individual's chronological age; and
(2) that children identified under this part be assimilated
with the children of similar age in non-academic subjects.

Section 65003 — Funding
(a) The state shall make available to the County Superintendent of Schools funding equal to the amount required for the implementation of actively searching for and identifying individuals who qualify under this part.
(b) The state shall make available to the individual school districts for each homeless child enrolled, funding available to cover the costs of educating, supplying, and administrating the program under this part.
(c) Funding will also be available to the schools to allow individuals identified under this part to participate in any extracurricular activities the school may offer, with no expense to the student or his parent.

Section 65004 — School Records
The County of Superintendent of Schools shall be required to keep a duplicate copy of the scholastic records, including, any immunization records, for any individual identified under this part and shall be made available to any requesting school district or the parent or guardian of the student within one business day after their request is made.

Section 65005 — Awareness Education
(a) All public elementary, junior high, and senior high schools shall include in their curricula educational materials that deal with the homeless problem to foster a better understanding of the problem in general, and specifically how it impacts individuals.
(b) At no time shall any school official, teacher, or other employee identify any student as “homeless,” such conduct shall be punishable as a misdemeanor.

Section 65006 — Regulations
The California Department of Education is hereby instructed and authorized to promulgate regulations to ensure immediate and consistent implementation of this part.

The purpose of this part is to ensure that homeless children are properly educated, socialized into the mainstream culture, and that enough funding is allocated for this purpose.

A. The Educational Program

The implementation of the homeless child’s education program must address two distinct issues. Firstly, because of
her homeless condition, the child is likely to have little continuity in her educational program. In such a situation the student takes significantly longer to achieve the next grade level of competency.

The case of the children of migrant laborers is analogous and has been studied in great detail. The problem of leaving one school for another is common to both children of migrant laborers and the homeless. "The average migrant student may be in three different schools a year, with resulting fragmentation."145 This fragmentation which results from attending several schools in one year is extremely prohibitive to the student attaining a complete education. "Roughly three years are required for the average migrant student in some states to advance one grade level."146 Thus, continuity is an important factor in the education of any student. With individualized or small group instruction, the student will be better able to maintain educational norms throughout their scholastic careers and allow for the child to more easily restart the learning process at their appropriate level at a new school.

The second factor is the homeless child's ability to interact with other children. One of the most important functions of a school-attendance experience is the interaction with other children. By requiring the homeless child to take "regular" non-academic courses with non-homeless students, such as physical education and other electives, because these courses do not depend on continuity, the student will be able to interact with other children and realize the important socialization effect of schooling.

B. Funding

Without a financial incentive for schools and counties to seek out homeless children, as a practical matter, and for the most part, it will not occur. Although funding will be the most difficult issue to overcome in an era of budget deficits and a call for lower taxation, without an investment in our future, the costs will only be more expensive later.

146. Id. at 15.
California has a choice, either invest now and make homeless children productive members of society upon reaching adulthood, or be forced to support these people for the rest of their lives on state welfare rolls. As residents of the most affluent state in the country, we should also be concerned with the fact that we are unable to supply even minimal housing to all of our residents.

C. Determining the Child's Best Interests

The child's best interests are nebulous and encompass a wide range of considerations. First, education should be continuous and not broken up by constant reshuffling of the student from school to school. There will be little time to develop relationships with teachers and fellow students if the youth is continually moved. Additionally, the student will be unable to comprehend any one subject and as a result will require constant review of the subject matter, as discussed above.

Second, the availability and cost associated with transportation must be considered. If the student is constantly moving around an area which contains several school districts, or even within a particular district, transporting the student to the classroom presents an additional problem. In a time where funding resources for any extra activities are scarce, transportation must be considered when making a decision as to the best location in which to educate the student. If the student primarily resides in one district, but occasionally is sheltered in a second district, it is entirely feasible that a third district, central to all of the shelters visited by the student, will be most appropriate. Although this example is extreme, it provides an illustration of the types of considerations which must be made when considering what is in the pupil's best interest.

D. Abuse of the Residency Requirement

Safeguards must be provided so there is no abuse of the expanded residency requirement. Issues surrounding public education constantly arise and parents search for ways to maintain their children in free public education and at the same time avoid the perceived pitfalls. In the early 1970's, the desegregation issues instilled in many parents the desire
to place their children in schools unaffected by desegregation and not in schools as determined by their residence. The current drive for the year-round school\textsuperscript{147} may also prompt parents to improperly change their child's school.

If the proposal of this comment is adopted, many parents may view this provision as a loophole to be used to keep their children out of a school with undesirable characteristics. However, this is not the intention of the proposed provision.

Safeguards such as signing an affidavit under penalty of perjury and establishing a maximum income level to determine the homeless status could be instituted, but must remain flexible. However, school administrators should be aware of the susceptibility to fraud that these safeguards cannot protect against. These devices should, nonetheless, discourage the majority of those who will abuse the provision.

Additional safeguards are still required in order to preserve the school system in its present form. Because so many of the homeless youth are maladjusted,\textsuperscript{148} school administrators and instructors should be able to more easily recognize these students.

Also, resources should be spent in properly adjusting the homeless youth to their new scholastic "culture" to insure that these students can take full advantage of their opportunity to attend public school.

E. Reconciling with McKinney

The solution proposed only deals with that part of the McKinney Act which insures that students will be admitted to the school which is in his or her best interest. In comparing the proposal to the McKinney Act, all of the major provisions are fulfilled. The Act calls for the adoption of a state plan of which this proposal would be a part. The county superintendent under this proposal would be charged with

\textsuperscript{147} In many school districts, because of increasing enrollment and decreasing budgets, the districts have been forced to search for new ways to educate its students. One solution currently being implemented is year-round schools. The student takes three one-month vacations instead of one three-month "summer" vacation. Many parents oppose this solution and may attempt to relocate their children to other schools unaffected by this "solution."

determining the best interests of the student. In addition, the county superintendent in being responsible for determining the school in the child's best interest will also be charged with maintaining a duplicate set of the student's records. The McKinney Act provides that the school records of each homeless child or youth shall be maintained so that the records are available, in a timely fashion, when a child or youth enters a new school district. By having the county maintain a duplicate set of records for the student and forward such records at time of the determination of the homeless child's best interest, the McKinney Act will be complied with.

In the event a student resides in two counties, the county in which the student attends school more frequently would be charged with making the decisions and keeping the duplicate set of records. Because student's school records are not voluminous, the additional resources in maintaining a duplicate set will not cause an undue hardship to the school districts or central county agency.

F. Reconciling with the Domicile Concept

The domicile concept in California requires that individuals only have one domicile and most people have only one residence, both being in the same fixed location. At first, it appears that the proposed solution ends the necessity for the residency or domicile concept. However, it is still important in the determination of the right to an education. The homeless are domiciled in limbo, and may actually be domiciled several hundred miles away from their present locale. However, the homeless have clearly established a pseudo-domicile for some purposes. For example, in Collier v. Menzel, the homeless were allowed to vote in Santa Barbara County using an address which was clearly not their established and legal domicile. Analogous to this situation is the case of educating homeless youth. Wherever the youth is presently living will clearly be his or her "domicile" for school attendance purposes. Of course, if the local education agency determines that the child's best interest is in attending a school district

150. See supra notes 102-10 and accompanying text.
which is clearly not where the student is living, an exception to the domicile concept much like the exceptions provided to other students\textsuperscript{151} will result.

G. The "Choice" Plan

A plan has been suggested at both the federal and California State levels with regard to education known as the "choice" plan. Essentially, this plan provides that parents decide for each of their children where the student should attend school. The state’s education subsidy for each student would be paid to the school to which that student is attending, not the district of residence as it is presently done.

For the homeless, this solution seems ideal. The residency requirement would be ended and for these purposes would no longer matter where a student resides or was domiciled. The student would simply attend the school most convenient for him or her. However, when the plan is fully adopted a homeless child may not be able to attend any school.\textsuperscript{152} Schools will become highly competitive to enter, much like university education is today. The closest school in proximity to the homeless youth could be unreasonably distant. Especially in view of the fact that homeless youth are educationally below-average as a class, they will only be able to attend schools which have received a low "educational rating." These schools will have less students, therefore, less funding, because students will naturally move toward schools with better reputations. The schools that the homeless attend may not only be low in educational ranking, but also poorly equipped to handle the special problems of the homeless, many of whom have an educational deficiency.\textsuperscript{153}

VI. CONCLUSION

The homeless problem is growing and all aspects are in

\textsuperscript{151} See generally CAL. EDUC. CODE § 48204 (Deering 1987).

\textsuperscript{152} This rationale also applies to those in poverty stricken neighborhoods as well. The students will continue to receive a poor quality education and only those who can afford to transport their children to "better" schools will receive the benefit of this change in the education system. The poverty stricken can least afford transportation of their children to the better schools and will suffer more than proportionally.

\textsuperscript{153} See supra notes 144-45 and accompanying text.
need of immediate solutions. One-half million children are homeless and each one of them is not only entitled to a public education, but is in dire need of it. The solution to this problem involves a multi-faceted approach. There are limited resources from which to draw upon and implementing a solution will not be easy. Many plans to solve this problem have been suggested. However, many of these plans are impractical and could end up making a large problem worse.

The purpose of this comment was to analyze the sources of law which impact upon the homeless education problem. This purpose was accomplished by examining federal and state judicial and legislative analysis as well as proposed solutions to the problem. The McKinney Act presents a good basis with which to address the problem, but does not go far enough. The individual states must do more in order to solve this societal problem which unchecked is destined to repeat itself. It is clear that California’s present law must be changed. The exclusion of the homeless from public education has no place in our society. The “choice” plan is an attempt to allow access to better public schools by America’s middle class at the cost of the homeless and the poverty stricken.

The proposed solution draws upon many sources and adopts many different aspects of several plans, but above all it remains flexible as to the homeless student to insure that the youth is educated. Unlike the present circumstances and proposed plans, the solution offered will not upset the present balance, yet insures that the homeless are quickly placed into the public education system. The proposed solution should be adopted, because it will put an end to the cycle of poverty that has trapped the homeless, alleviate the need for future assistance programs for the homeless, and ultimately benefit all society.

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