APPEAL NUMBER 17-2886

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

G.S., E.S., & J.S.,
APPELLEES

v.

ROSE TREE MEDIA SCHOOL DISTRICT,
APPELLANT

RESPONSE OF APPELLEES

Appeal from Judgment in a Civil Case Entered on 31 July 2017
in the United States District Court for the Eastern District of Pennsylvania,
at Case Numbers 2:16-cv-4782-ER and 2:16-cv-4849-ER
By The Honorable Eduardo C. Robreno

MICHAEL D. RAFFAELE
Managing Attorney

Counsel for Appellees

Frankel & Kershenbaum, LLC
1230 County Line Road
Bryn Mawr, PA 19010
(610) 922-4200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL RULES

STATE RULE OF PROCEDURE

OTHER AUTHORITIES

ISSUES PRESENTED

I. Should the Court affirm the District Court's decision that under Pennsylvania law, a contract provision purporting to waive rights must be supported by adequate consideration?

II. Should the Court affirm the District Court's holding, based on the plain text of the McKinney-Vento Act, that G.S. is homeless and thus protected by the McKinney-Vento Act?

STATEMENT OF THE CASE

The material facts in this case are undisputed. In 2010, G.S. and his parents, E.S. and J.S, moved into a rental home within the bounds of Rose Tree-Media School District (herein "RTMSD" or "the District"). **A 231, 5:14-21**. They were the named lessors on the contract for lease. **A 234, 16:10-13**. They lived there together with J.S.'s parents, B.S. and F.S, but the home was large enough that everyone had a private space and space for personal belongings. **A 219, 8:10-18**.

Then, in 2013, J.S.'s employer abruptly shut down the business where J.S. worked as an auto mechanic. **A 218, 6:12-15**. When J.S. went out looking for a new position, he learned that one of his certifications was invalid because -- unbeknownst to him -- the program from which he received the necessary training was not properly staffed. **A 219, 9:10-16**. In November 2014, after approximately a year of paying rent from savings as J.S. looked for a job, E.S. and J.S. were unable to keep up the payments. **A 219, 10:11-20.** They had to leave their home. **A 234, 16:22-24.**

A. In 2014, RTMSD Found Appellees' Current Living Situation to fit the McKinney-Vento Act's Definition of Homelessness.

Since then, G.S. and his family have lived doubled-up in the single-family row house of his maternal grandmother, Ba.S. Ten people -- five adults and five children -- live together in that 1,500 square foot space. **A 314, 23:1-24 and 24:1-20**. The family all sleep in the living room, except when G.S. moves his cot to the kitchen or basement to obtain a modicum of privacy. **A 250, 9:1-19**.

RTMSD learned of the family's living conditions in Ba.S.'s home in November 2014. It deemed them homeless because, as the McKinney-Vento Act expressly states, being doubled up in a single-family home is not a "fixed, regular, and adequate" residence. **A 313, 19: 1-5 and A320, 45:4-6**. RTMSD consequently continued to enroll G.S. and his sister, S.S., as students in RTMSD. **A 313, 19:10-17 and A 317, 35:21-24**. Since that time – as RTMSD concedes, *see* **A 315, 26:4-6** – there has been no change in the family's living situation. They remain in the same circumstances that, in 2014, were considered by RTMSD as not "fixed, regular, and adequate."

In January 2015, less than two months after G.S. and his family lost their home, Appellant accused G.S. of a violation of its Student Handbook. **Joint Appendix (hereinafter "A") at 51**. It suspended him for three days, subsequently extended that suspension to ten days, and threatened him with expulsion. ***See* Appellant Brief (herein "Br.) at 31.** Parents, through counsel, challenged

RTMSD's actions under the provisions of the Individuals with Disabilities in Education Act ("IDEA") pertaining to the discipline of children eligible for, or thought to be eligible for, special education. *See* 20 U.S.C. § 1415(k); 34 C.F.R. §§ 300.530; 300.534. **A 121**. The Parties eventually resolved the matter pursuant to a negotiated settlement agreement ("the Settlement Agreement"). *See* **A 138-144**.

In its final edit to the Settlement Agreement, RTMSD, without prior discussion or redlining, inserted a provision purporting to waive G.S.'s rights under the McKinney-Vento Act to (1) an education in his school of origin and (2) immediate enrollment in the school in which his enrollment is sought in the event of a dispute over his enrollment ("the Proxy Waiver"). The Proxy Waiver, unlike all of the other waivers of rights and claims in the Settlement Agreement, began at the end of the 2015-2016 extended school year and extended into perpetuity:

> Parents agree that they will make no claim of homeless status after the 2015-16 school year and that the District will have no further obligations to Student after the 2015-16 school year.

A 140. But per the Settlement Agreement's express terms, RTMSD gave no consideration for the Proxy Waiver:

> **4. Adequate Consideration.** The Parents specifically acknowledge and agree that the District's agreement to make the above payments is intended to and does provide the Parents with sufficient consideration for a settlement and compromise of any and all outstanding education and discrimination claims that they may now have or have had, whether known or unknown, from the beginning of time *through August 31, 2016*. The Parents also expressly acknowledge and confirm that: (1) the only consideration

> for their signing of this Agreement consists of the terms and provisions stated hereinafter; and (2) no other promise or agreement of any kind, save those set forth in this agreement, has been made by any person or entity whatsoever to cause them to sign the document.

See **A 141 (emphasis added)**.

Pursuant to the Settlement Agreement, G.S. attended an out-of-district school for the 2015-2016 school year. At the end of the 2015-2016 school year, Parents wished to return G.S. to his school of origin because doing so was in his best interest. **A 243, 54:9-24 and A 245, 55:1; A 225, 32:11-24.** On 11 July 2016, G.S.'s mom notified RTMSD in writing of the family's intent to enroll G.S. in Penncrest High School after 31 August 2016. **A 363**.

B. In 2016, RTMSD Decided it No Longer Considers Appellees' Current Living Situation as Homelessness . . . except for G.S.'s sister, S.S., whom it continued to enroll as a homeless student.

RTMSD, through its Director of Pupil Services, refused to enroll G.S. for the 2016-2017 school year. *See id.* It further refused to enroll G.S. immediately at Penncrest High School pending resolution of the Parties' dispute regarding his enrollment under the McKinney-Vento Act. *See id.* It also refused G.S., E.S., and J.S. any opportunity to engage in a Level I grievance under Pennsylvania's State Plan. Moreover, RTMSD failed to inform the family of their right to appeal its refusal to admit G.S. *See id.*

On 9 August 2016, the Appellees initiated a Level II grievance with the Pennsylvania Department of Education's Homeless Education Project (hereinafter "PDE" and "HEP," respectively) regarding RTMSD's refusal to enroll G.S. The HEP Regional Coordinator assigned to investigate McKinney-Vento Act disputes in Delaware County, Pennsylvania (in which RTMSD is located), investigated Parents' complaint regarding Appellant's refusal to enroll G.S. As part of that investigation, the Regional Coordinator contacted Dr. DiMarino-Linnen and informed her of the investigation. **A 294**. RTMSD refused to cooperate with the investigation.[1] ***Id***.

On or about 24 August 2016, the Regional Coordinator again contacted RTMSD and, on behalf of PDE, directed RTMSD to admit G.S. pending the resolution of the Parties' dispute. **A 338**. PDE pointed RTMSD to its obligation under the McKinney-Vento Act to "immediately admit [G.S.] to the school in which enrollment is sought, pending resolution of the dispute . . . ." 42 U.S.C. § 11432(g)(3)(E). ***Id***. Despite the plain language of the McKinney-Vento Act,

[1] RTMSD claims that it was unable to participate in PDE's investigation because of the confidentiality provisions in the Settlement Agreement. This claim is belied by the text of the Settlement Agreement itself. The confidentiality provision on which RTMSD purports to rely does not prevent RTMSD from making any disclosures at all. **A 142**. In fact, it specifically provides that "this Agreement is a public document and that RTMSD may be required to disclose the contents if requested." *Id.* RTMSD's reliance on this provision to justify its refusal to cooperate with PDE therefore is disingenuous at best.

Pennsylvania's State Plan based thereon, a direct instruction from PDE, and RTMSD's own policies, *see* **A 287, 24:20-24 and A 288, 25:1-13**, RTMSD again refused to enroll G.S. **A 86-87 and A 124**.

The Regional Coordinator nonetheless completed his inquiry on 1 September 2016. He issued a determination letter to the Parties on behalf of PDE that states, in pertinent part:

> the outcome of our investigation is that [G.S.] . . . ha[s] the right under the federal McKinney-Vento Homelessness Act to continue being educated in the Rose Tree Media School District since it is [his] school district of origin and [he] is temporarily residing in a doubled up living situation that is not fixed, regular nor adequate.

A 365. That same day, E.S. emailed RTMSD to enroll G.S. and schedule a meeting regarding his programming under the IDEA. **A 123 at ¶24.** Once again, RTMSD refused to admit G.S. ***Id.*** **at ¶ 26.**

On the morning of 6 September 2016, G.S. filed his Verified Complaint and an Emergency Motion for Preliminary Injunction in Case Number 2:16-cv-4782-ER. The District Court held argument on G.S.'s motion on 15 September 2016, and on 16 September 2016, issued its Order granting G.S.'s Emergency Motion in part ("the Order"). In particular, the District Court held that G.S. must be enrolled as a student in RTMSD pending resolution of the Parties' dispute. It also ordered RTMSD to (1) provide G.S. an education via homebound instruction, (2) perform a multidisciplinary evaluation of G.S.'s educational needs, and (3) timely develop

and propose an Individualized Education Plan for G.S.

In November 2016, Bernadette Dacanay, RTMSD's Home and School Visitor, visited the residence where G.S. and his family are living doubled-up. **A 317, 36:1-9**. Ms. Dacanay determined that the family is still living doubled up with relatives, just as they had been in November 2014. **A 314, pp. 22-24**. In fact, as Ms. Dacanay testified, the living circumstances she observed were identical to those that, in November 2014, prompted RTMSD to deem the family homeless under the McKinney-Vento Act. Furthermore, G.S.'s living situation was, per Ms. Dacany's observations on behalf of RTMSD, identical to those of his sister, S.S. -- whom RTMSD has, throughout the pendency of this matter, continued to enroll and educate as a homeless child under the McKinney-Vento Act without dispute. **A 315, 26:15-17**; **A 300, 75:22-24, 76:1-2; and A 303-304.**

C. RTMSD's Evaluations Found that G.S. is a Healthy, Well-Adjusted Child who is Entitled to Enrollment in a Regular Education Program. It then Barred Him from School Again.

That same month, RTMSD completed its multidisciplinary evaluation of G.S. RTMSD's own Certified School Psychologist determined that G.S. has no needs -- academic, social, behavioral, or emotional -- that require special educational programming. **A 413-414**. By contrast, the child and adolescent psychologist retained by RTMSD opined, based primarily on RTMSD's allegations from January 2015, that G.S. required observation to rule out possible

untreated emotional disturbances. *See* **A 412**. E.S. and J.S. consented to G.S.'s being placed in a 45-day diagnostic placement at LifeWorks. RTMSD then unilaterally extended the placement to 60 days.

On 12 May 2017, G.S. finished his placement at LifeWorks. LifeWorks found that he was not only not a threat to himself or to others, but no longer in need of special educational services. RTMSD, acting in violation of the District Court's preliminary injunction and the clear direction of the McKinney-Vento Act, nonetheless refused to enroll G.S. in his school of origin. It instead returned him to homebound instruction. **A 117**. One week later, following a telephone conference with the Parties, the District Court ordered RTMSD to immediately enroll G.S. at Penncrest High School. ***Id.*** G.S. enrolled, successfully completed his sophomore year, and advanced to his junior year.

On 31 July 2017, the District Court granted the Appellees' Motion for Summary Judgement in these consolidated matters. **A 8**. Specifically, in civil action 16-4849 – RTMSD's case – the District Court granted G.S., E.S., and J.S. summary judgment on both counts of RTMSD's case. **A 2**. In Civil Action 16-4782, the District Court denied RTMSD's Motion for Summary Judgment and granted G.S. summary judgment on Count One of his Verified Complaint and dismissed the other counts as moot. **A 6**. In its Order, the District Court described RTMSD's arguments in support of its positions as self-defeating, unsupported by

the law, and "strange, at best." ***Id.***

RTMSD nonetheless appeals and largely repeats its arguments below. It claims that the District Court's holdings against it – namely, (1) that the plain and unambiguous statutory language should control the interpretation and application of the McKinney-Vento Act, and (2) that Pennsylvania law requires that contractual waivers of rights be supported by adequate consideration – are not only incorrect, but the result of an experienced and incisive Federal judge somehow being distracted out of conducting a cogent analysis. *See* **Br. at 16**. As it did before the District Court, RTMSD points to no pertinent case law supporting its positions. G.S., J.S., and E.S. therefore respectfully suggest that this Court should also reject RTMSD's efforts to escape its duty educate a homeless child and affirm the District Court's grant of summary judgment. **A 1**.

STANDARD OF REVIEW

The Third Circuit's review of a District Court's grant of summary judgment is plenary. *Lexington Ins. Co. v. Western Pa. Hosp.*, 423 F.3d 318, 322 n.2 (3d. Cir. 2005). The Court therefore applies the same standard as the District Court, namely, that summary judgment is appropriate only where, drawing all reasonable inferences in favor of the nonmoving party, "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In addition, where, as here, both parties file a motion for summary judgment, the Court must consider each motion "on an individual and separate basis" to determine "for each side, whether a judgment may be entered in accordance with the Rule 56 standard." *Anderson v. Franklin Inst.*, 185 F. Supp. 3d 628, 635 (E.D. Pa. 2017) (quoting *Schlegel v. Life Ins. Co. of N. Am.*, 269 F. Supp. 2d 612, 615 n.1 (E.D. Pa. 2003)) (internal quotation marks omitted). *Accord* 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2720 (1998).

Finally, where a party raises arguments for the first time on appeal, the Court must deem those arguments waived absent compelling or exceptional circumstances. *See Prusky v. Prudential Ins. Co. of Am.*, 44 F. App'x 545, 547

(3d Cir. 2002). *See also Brown v. Philip Morris, Inc.*, 250 F.3d 789, 799 (3d Cir. 2001) (defining "exceptional circumstances" to include situations where "the public interest requires that the issues be heard or manifest injustice would result from the failure to consider such issues").

SUMMARY OF ARGUMENT

The Court should affirm the District Court's holdings on both of the questions presented in this appeal. First, the District Court correctly held that the Proxy Waiver is invalid under Pennsylvania law because, as the Settlement Agreement expressly states, the Proxy Waiver was not supported by adequate consideration. Second, the District Court correctly held that G.S. (like identically-situated sister, S.S., whom RTMSD continues to enroll pursuant to the McKinney-Vento Act without dispute) is homeless as that term is defined by the McKinney-Vento Act and therefore entitled to attend his school of origin.

RTMSD's arguments to the contrary are largely inapposite, unsupported by relevant case law, and, as below, "strange" and self-defeating. RTMSD's argument that the District Court was distracted, careless, and incorrect in holding the Proxy Waiver void for want of consideration, *see* Br. at 15-16, contains no discussion or analysis of the basic requirement that for a contractual waiver of rights to be valid in Pennsylvania, there must be adequate consideration for that waiver. Br. at 6-18. Nor does it address the fact that the Settlement Agreement

expressly disclaims the exchange of consideration for the Proxy Waiver. But as RTMSD neglects to say, consideration is a basic requirement of enforceable contracts under Pennsylvania law. The District Court rightly held that the Proxy Waiver was plainly not supported by consideration. The Court should accordingly reject the RTMSD's arguments and affirm the District Court's holding that the Proxy Waiver is invalid and unenforceable.

Similarly, RTMSD's arguments that G.S. is no longer homeless under the McKinney-Vento Act (while his identically-situated sister somehow still is) ignore the plain and unambiguous language of the statute. In particular, its heavy reliance on the conjunction "and" in 42 U.S.C. § 11434(a)(2)(A) to argue for a novel, two-step analysis of whether a child or youth who is doubled-up in the home of another is homeless completely overlooks the fact that the very next word in the statute is "includes." As was the case before the District Court, RTMSD does not and cannot cite legal authority in support of its efforts to persuade the Court to ignore the plain, unambiguous language of the McKinney-Vento Act. The Court should therefore reject RTMSD's arguments and affirm the District Court's holding that G.S. is protected by the McKinney-Vento Act and entitled to attend Penncrest High School.

Finally, the Court should reject RTMSD's argument – raised for the first time on appeal – that G.S.'s return to his school of origin is not in his best interests.

RTMSD waived this argument by failing to raise it before the District Court and points to no compelling circumstances that would justify its consideration by this Court. In fact, compelling circumstances support its waiver: RTMSD's refusals abide by its clear and basic obligations under the McKinney-Vento Act, included a refusal to engage in a best interests determination with G.S., E.S., and J.S. Moreover, even if RTMSD had raised this argument below, it has adduced no evidence to overcome the McKinney-Vento Act's presumption that "the best interest of the student is to remain in the school of origin unless doing so is contrary to the request of the parent or youth." 42 U.S.C. § 11432(g)(3)(B). The Court should reject this argument and affirm the Order of the District Court.

ARGUMENT

At base, the goal of the McKinney-Vento Act is to provide for homeless children and youth something that is otherwise frequently lacking in their lives: stability. It does so by ensuring a continuous right to education in the school where the student last attended while permanently housed for the duration of the student's homelessness. *See* 42 U.S.C. § 11432 (g)(3)(a). Furthermore, by the express language of the McKinney-Vento Act, that right – the crucial right to the same, uninterrupted education given to peers with stable housing – belongs not to the parent, parents, or guardian, but to the child. *See* 42 U.S.C. § 11432(g)(6)(A)(vi). Without this guarantee of stable education, homeless children and youth would face more hardship and less success during their critical formative years.

RTMSD has nonetheless sought to escape its obligations to G.S. – the very same obligations that it has honored for his identically-situated sister – based on arguments that are self-defeating, contrary to the plain language of the Settlement Agreement and the McKinney-Vento Act, and unsupported by the applicable statutes or case law. The District Court correctly rejected the arguments that RTMSD rehashes here. Appellees therefore respectfully request the Court answer both of the questions presented in this appeal:

(1) Should the Court affirm the District Court's decision that under Pennsylvania law, a contract provision purporting to waive rights must be supported by adequate consideration; and

(2) Should the Court affirm the District Court's holding, based on the plain text of the McKinney-Vento Act, that G.S. is homeless and thus protected by the McKinney-Vento Act?

in the affirmative.

III. The District Court Correctly Held that the Proxy Waiver is Unenforceable under Pennsylvania Law Because it Was Not Supported by Consideration.

A. Pennsylvania law requires that there be adequate consideration for a contractual waiver of rights.

Under Pennsylvania law, "the fundamental rule in contract interpretation is to ascertain the intent of the contracting parties. In cases of a written contract, the intent of the parties is the writing itself . . . . When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself." *Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 905 A.2d 462, 468-69 (Pa. 2006). In addition, "before a contract may be found, all of the essential elements of a contract must exist, including consideration." *Commonwealth Dept. of Transp. vs. First Penna. Bank, N.A.*, 466 A.2d 753, 754 (Pa. Commw. Ct. 1983) (citations omitted). *Accord Fortwangler v. Workers' Comp. App. Bd. (Quest Diagnostics)*, 113 A.3d 28, 35 (Pa. Commw. Ct. 2015) (holding, in case where contract included consideration commensurate only with a waiver of past subrogation rights, that waiver of future subrogation rights did not occur in part

because "[a]ll essential elements, including consideration, must be present for a valid contract to exist.").

B. The Settlement Agreement expressly states that the Proxy Waiver was not supported by adequate consideration.

By the clear and unambiguous terms of the Parties' Settlement Agreement, the consideration offered by RTMSD to E.S. and J.S. for their waivers of rights and claims was sufficient only for waivers *up until* 31 August 2016:

> **4. Adequate Consideration.** The Parents specifically acknowledge and agree that the District's agreements to make the above payments is intended to and does provide the Parents with sufficient consideration for a settlement and compromise of any and all outstanding education and discrimination claims that they may now have or have had, whether known or unknown, *from the beginning of time through August 31, 2016*. The Parents also expressly acknowledge and confirm that: (1) the only consideration for their signing of this Agreement consists of the terms and provisions stated hereinafter; and (2) no other promise or agreement of any kind, save those set forth in this agreement, has been made by any person or entity whatsoever to cause them to sign the document.

A 141 (emphasis added). But the Proxy Waiver, on which RTMSD relies to attempt to escape its duty to educate a homeless child, is a waiver of rights that *begins on* 31 August 2016 and continues into perpetuity:

> Parents agree that they will make no claim of homeless status after the 2015-16 school year and that the District will have no further obligations to Student after the 2015-16 school year,

A 140.

The District Court accordingly held that "[b]y the plain language of the Agreement, then, consideration was not provided for claims brought after August 31, 2016, making the waiver of such claims unenforceable for lack of consideration." The District Court granted Appellees summary judgment regarding the enforceability of the Proxy Waiver on that basis.[2]

In its appeal, RTMSD largely ignores these facts. It cites no law and makes no argument to demonstrate that the District Court's holding regarding the lack of

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[2] Because the District Court held that G.S.'s argument regarding the lack of consideration for the Proxy Waiver was invalid, it did not reach the merits of the other three arguments G.S. raised regarding the invalidity of the Proxy Waiver under Pennsylvania law. Those three arguments were that

(1) "Parents do not possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship," *Apicella v. Valley Forge Military Academy and Junior College*, 630 F. Supp. 20, 23 (E.D. Pa. 1985);

(2) Pennsylvania courts prohibit the enforcement of prospective waivers of claims where the waiver contravenes a public interest, *see Employers Liability Assurance Corp., Ltd. v. Greenvile Business Men's Ass'n*, 224 A.2d 620, 623 (Pa. 1966); and

(3) Pennsylvania courts prohibit the enforcement of contract provisions that are substantively or procedurally unconscionable. *See Salley v. One Option Mortg. Corp.*, 925 A.2d 115, 120 (Pa. 2007).

G.S., E.S., and J.S. maintain that the Court should affirm the District Court's grant of summary judgment based on the Proxy Waiver's want of consideration. Should the Court decide, however, that the District Court's holding on the want of consideration was incorrect, Appellees request that the Court remand the matter to the District Court for a ruling on the merits of these arguments.

consideration was incorrect. In fact, beyond a bare statement that E.S. and J.S. "received valuable consideration," Br. at 12, RTMSD makes no real argument at all regarding the Settlement Agreement's express statement that the Proxy Waiver was not supported by any consideration.[3] And the arguments RTMSD *does* make, which concern primarily the public interest in the enforcement of valid contracts where all essential elements (including consideration) exist, *see* Br. at 8-13, are based on inapposite case law and therefore unavailing.

RTMSD first relies on *Ballard v. Philadelphia School District* to incorrectly argue that E.S. and J.S. could waive rights belonging exclusively to G.S. In *Ballard*, the parent and Philadelphia School District entered into a settlement agreement that waived the student's right to a free, appropriate public education.

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[3] In Appellant's brief to this court, RTMSD argues that there was appropriate consideration when the family asserted homelessness because the consideration existed through 31 August 2016. Per their brief, the District Court was incorrect in finding a lack of consideration because the family notified RTMSD of their intent to reenroll G.S. for the 2016-2017 school year during the 2015-2016 school year. Implied in this argument is the disingenuous suggestion that RTMSD would have accepted E.S. and J.S.'s efforts to enroll G.S. at Penncrest effective 1 September 2016 if only they had begun on 1 September 2016, rather than before 31 August 2016.

While creative, the argument is misguided. The family notified RTMSD of G.S.'s anticipated, *post*-31 August 2016 attendance to allow time for all parties to prepare for G.S.'s reentry. Doing otherwise would have resulted in a significant educational loss while RTMSD reenrolled G.S., compiled his class schedule, and arranged for appropriate transportation. Put differently, RTMSD, which at every point refused to engage in the required processes with E.S. and J.S. for G.S.'s enrollment, complains that E.S. and J.S. tried to cooperate with them too much.

See Ballard v. Philadelphia Sch. Dist., 273 Fed. App'x 184, 186 (3d Cir. 2008) (not precedential). The parent then sought to invalidate the agreement. She claimed that she signed it under duress and while not effectively represented. *See id.* at 187. The Eastern District of Pennsylvania denied her motion to reopen the case. *See id.* She appealed.

The Third Circuit in *Ballard* affirmed the District Court for three reasons. RTMSD's Brief notes only the first two: because (1) Ms. Ballard did not show duress, and (2) public policy encourages settlements. *See id.* at 188. It omits the third, which is that (3) Ms. Ballard was permitted to make the waiver on behalf of her child because the IDEA delegates the right to refuse a FAPE to the parent. *See id.* at 188 ("A parent can waive her child's right to a FAPE.") (citing *Fitzgerald v. Camdenton R-III Sch. Dist.*, 439 F.3d 775 (8th Cir. 2006)). *See also* 20 U.S.C. § 1414(a)(i)(D)(II) ("If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to the child . . . ."). The McKinney-Vento Act contains no such delegation of rights to the parents of homeless children and youth. *Ballard* therefore is inapposite.

RTMSD's reliance on *D.R. by M.R. v. East Brunswick Board of Education* is similarly misplaced. Like the appellant in *Ballard*, D.R.'s parents had entered into a settlement agreement with the East Brunswick Board of Education whereby they

waived claims to special education and related services under the IDEA in exchange for adequate consideration, namely, the district's payment of a portion of tuition at their unilateral parent placement. *See D.R. by M.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896, 899 (3d Cir. 1997). Parents sought to invalidate the agreement when the cost of the unilateral parent placement went up very substantially due to the addition of one-to-one staffing costs. *See id.* The District refused to pay the staffing costs. *See id.*

The Third Circuit held in *D.R.* that the agreement was enforceable because the trigger condition for its invalidation – a significant change in D.R.'s circumstances – had not occurred. *See id.* at 901. As with *Ballard*, however, the waivers in *D.R.* were of D.R.'s right to a FAPE. The IDEA delegated those rights to the parents; they were thus permitted to waive them on behalf of D.R. Here, by contrast, rights at issue are G.S.'s rights under the McKinney-Vento Act. Those rights belong to G.S. The McKinney-Vento Act does not direct or even authorize their delegation. Therefore, even if the Proxy Waiver had been supported by adequate consideration – which it was not – Pennsylvania's baseline rule that a parent cannot waive the rights and claims of a minor by proxy would apply in this case to invalidate the Proxy Waiver. *C.f.* PA. R. CIV. P. 2039(a) (requiring court approval for any compromise of an action to which a minor is a party).

RTMSD's arguments that the District Court erred in finding the Proxy Waiver unenforceable therefore are without merit.[4] This Court should accordingly affirm the holding of the District Court and uphold its grant of summary judgment to Appellees.

IV. The District Court Correctly Held, Based on the Plain Text of the McKinney-Vento Act, that RTMSD Must Enroll G.S. Because He is a Homeless Child and Entitled to Attend his School of Origin.

Congress enacted the McKinney-Vento Act in 1987 to provide a broad range of assistance to homeless individuals and families. Congress significantly amended the Act in 1990, and in 2002, reauthorized it as the McKinney-Vento Homeless Education Assistance Improvements Act in the No Child Left Behind Act. Subtitle VII-B of the McKinney-Vento Act, which is encoded at 42 U.S.C. § 11431-11435, provides that children who "lack a fixed, regular, and adequate

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[4] RTMSD also appears to argue that Pennsylvania's common law rule prohibiting parents from waiving the rights and claims of minors based only on their parental relationship is inapplicable here because this case is not one of the types of cases where that rule is most frequently applied. *See* Def. Mem. at 8-9. This argument is, at best, specious.

As the Pennsylvania Supreme Court made clear in *Knorr*, the reason the parties to a divorce case cannot bargain away the rights and claims of a child as part of a settlement is not because the case is a divorce case, but because the child's rights, claims, and interests are distinct from the parents and must be separately protected. *See Knorr v. Knorr*, 588 A.2d 503, 504-505 (Pa. 1991). *Accord Sonder v. Sonder*, 549 A.2d 155, 163 (Pa. Super. 1988). The same is true in personal injury cases. The restriction on such waivers has nothing to do with the type of claim, but rather Pennsylvania's public interest in protecting the rights and claims of minors in all types of civil actions.

nighttime residence" shall be considered homeless and are entitled to the Act's protections. *See* 42 U.S.C. § 11434a(2)(A). The Act expressly includes in that definition children, like G.S., who "are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason. . ." *See* 42 U.S.C. § 11434a(2)(B)(i).

A. Under the McKinney-Vento Act, RTMSD is obligated to enroll a homeless child or youth in his school of origin for the duration of their homelessness, and in the event of a dispute regarding enrollment, for the pendency of that dispute.

In enacting the McKinney-Vento Act, Congress made funds available for the Commonwealth of Pennsylvania to assist with the education of homeless children. Those funds are available to each state on the condition that "[e]ach State educational agency . . . ensure[s] that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education . . . as provided to other children and youths." 42 U.S.C. § 11431(1). Under the McKinney-Vento Act, Pennsylvania Local Education Agencies – like RTMSD – must also ensure that homeless children and youth are (1) advised of their choice in schools, (2) immediately enrolled in their selected school, and (3) promptly provided with necessary services to allow them to exercise their choice of schools. LEAs (including RTMSD) must also provide families with a written explanation of a school selection or enrollment decision that includes the rights of the family to appeal the decision. *See* 42 U.S.C. § 11432(e)(3)(E).

The McKinney-Vento Act further provides that a school district shall, according to the child's "best interest," continue a homeless youth's education in the "school of origin" for the duration of the homelessness or, if the child becomes permanently housed, for the remainder of the school year. 42 U.S.C. § 11432(g)(3)(A)(i).[5] It also states that in determining a youth's "best interest," a district shall, "to the extent feasible," keep a homeless youth in the school of origin, except when doing so is contrary to the wishes of the youth's parent or guardian. 42 U.S.C. § 11432(g)(3)(B)(i). The McKinney-Vento Act further provides that the youth may remain in the chosen school "for the duration of homelessness," or, in the case of a student who finds permanent housing during the school year, "for the remainder of the academic year." 42 U.S.C. § 11432(g)(3)(A).

Finally, in the event of a dispute over where a child should be enrolled, the McKinney-Vento Act requires that the LEA immediately admit the child in the school in which his parent or guardian is seeking enrollment pending full resolution of the dispute process. *See* 42 U.S.C. § 11432(g)(3)(E). The goal of the McKinney-Vento Act, in short, is to ensure the stability and continuity of

[5] The McKinney-Vento Act defines "school of origin" as "the school that the child or youth attended when permanently housed . . . ." 42 U.S.C. § 11432(g)(3)(G). Where, as here, a student has passed the grade level of students served by the school he attended when last permanently housed, "school of origin" is defined to include the school to which the student would go when he moved on to the next grade level. *See* 42 U.S.C. § 11432(g)(3)(I)(ii).

education for a child for the entire time the she or he must bear the stresses and uncertainty of homelessness.

Pursuant to the requirements of the McKinney-Vento Act, Pennsylvania has developed a State Plan, Pennsylvania's Education for Children and Youth Experiencing Homelessness Program (hereinafter "State Plan"), which spells out in finer detail how Pennsylvania LEAs must comply with the requirements of the McKinney-Vento Act. In addition to the State Plan, the Pennsylvania Department of Education ("PDE") has issued guidance to school districts regarding the requirements of the McKinney-Vento Act. PDE's guidance includes a description of the process established by the State to advise families of student rights and ensure immediate enrollment. All of these authorities – the McKinney-Vento Act, the State Plan, and PDE's guidance – compel the same result in the event of a dispute regarding a child's enrollment under the McKinney-Vento Act: the LEA liaison must ensure that the youth is immediately enrolled, explain the dispute resolution process to families, and help them to use that dispute resolution process. *See* 42 U.S.C. § 11432(g)(3)(E)(iii); **A 430-431**.

B. RTMSD violated the McKinney-Vento Act when it refused to enroll G.S. because G.S. is a homeless child and Penncrest High School is his school of origin.

As an initial matter, RTMSD's continued arguments that G.S. is not a homeless child are belied by its own statements and actions. RTMSD's homeless

liaison admitted under oath that RTMSD enrolled G.S.'s identically-situated sister, S.S., as a homeless child pursuant to the McKinney-Vento Act. **A 290, 33:5-9**. She further admitted that but for the Proxy Waiver, RTMSD would have done the same for G.S. *See* **A 300 and A 301, 77:3-8**. Yet despite its clear words and actions, RTMSD now alleges that the District Court erred in holding that G.S. is a homeless child within the meaning of the McKinney-Vento Act. Its arguments that the District Court erred are, at best, misguided.

1. The undisputed facts show G.S. is a homeless child under the McKinney-Vento Act.

Since November 2014, the Appellees have lived doubled-up in the home of E.S.'s mother, Ba.S. As RTMSD itself decided in November 2014, G.S.'s living situation thus qualifies him as a homeless child under the definition of "homelessness children and youths" in the McKinney-Vento Act:

> The term "homeless children and youths" . . . means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302(a)(1) of this title); and . . . includes . . . children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason . . . .

42 U.S.C. § 11434a(2)(B)(i). *See also* United States Department of Education *Guidance for the Education for Homeless Children and Youth Program*, at A-3 (rev. 2004), http://www2.ed.gov/programs/homeless/guidance.pdf (noting that the term "homeless children and youth" includes "[c]hildren and youth who are . . . sharing the housing of other persons due to loss of housing, economic hardship, or

a similar reason (sometimes referred to as *doubled-up*). . . .") (emphasis in original). The same was true in August 2016, when RTMSD admitted G.S.'s sister, S.S., as a homeless child under the McKinney-Vento Act, but refused G.S. **A 292, 44:16-24**; **A 315, 26:4-6**. There has been no change in their circumstances since either November 2014 or August 2016. **A 315, 26:4-6**. G.S. remains doubled up in the residence of another due to loss of housing and economic hardship. Therefore, as the District Court correctly held, G.S. remains homeless and entitled to an education at his school of origin as a matter of law.

RTMSD's continued argument that G.S.'s family's residence has become fixed, regular, and adequate is – as the District Court held – contrary to the plain and unambiguous language of the McKinney-Vento Act. The McKinney-Vento Act's definition of homeless children and youth contains no time limitation. *See* 42 U.S.C. § 11432(a)(2). To the contrary: As the McKinney-Vento Act makes clear, the condition of being homeless is defined by its circumstances, not its duration. *See* 42 U.S.C. § 11432(g)(3)(A)(i) (providing that a district of origin "shall, according to the child's or youth's best interest . . . continue the child's or youth's education in the school of origin for the duration of homelessness . . . ."). RTMSD's own Home and School Visitor perhaps put it best when she testified on behalf of RTMSD that "There is no deadline on homelessness." **A 316, 31:23.**

Accord L.R. v. Steelton-Highspire, 2010 U.S. Dist. LEXIS 34254, at 13-14 (M.D. Pa. April 7, 2010) (holding, like the District Court below, that "the [McKinney-Vento] Act makes clear that there is no maximum duration of homelessness," that "an LEA must accommodate a homeless child for the entire time that they are homeless," and that a decision that a child was no longer homeless "despite no change in his circumstances" was "arbitrar[y].").

Because it is unable to overcome the unambiguous language of the statute, RTMSD tries on appeal (as it did before the District Court) to substitute new meanings for the statute's plain text. This time, however, RTMSD focuses on the conjunctive "and" (while omitting the plain and unambiguous word "includes") in an attempt to make § 11434a(2)'s determination of "fixed, regular, and adequate" separate from its determination of whether a child is living doubled-up. *See* Br. at 26 (quoting 42 U.S.C. § 11434a(2)(A) as reading, "The term 'homeless children and youths' – (A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302(a)(1))); and . . ." (emphasis and terminal ellipsis by Appellants).

But as the full, pertinent language of 42 U.S.C. § 11434a(2) shows, and as the District Court correctly held, the McKinney-Vento Act expressly directs that 'homeless children and youths' is to include children who, like G.S., are doubled-

up with others due to loss of housing:

> The term "homeless children and youths" –
>
> (A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302(a)(1) of this title); and
>
> (B) includes –
>
> (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason . . ..

42 U.S.C. § 11434a(2) (emphases added).

Under the plain, unambiguous, and complete language of the statute, RTMSD cannot credibly argue that the District Court erred in holding that G.S. is a homeless child under the McKinney-Vento Act. Its sole argument is, therefore, that a child can cease to be homeless if she or he lives doubled up longer than an LEA, like RTMSD, is willing to unilaterally consider as not "fixed, regular and adequate." RTMSD offers no legal support for this proposition, and as the District Court said, its arguments for this proposition are self-defeating:

> [B]ecause the family's living arrangement has persisted for more than two years, the School District argues that G.S.'s housing has now become "fixed, regular and adequate," such that he is no longer homeless. This argument is defeated by the School District's own reasoning. Specifically, the School District urges the Court to "infer the meanings" of the words "fixed," "regular," and "adequate" from the examples of homeless children provided in the statute. Def.'s Mem. Law at 12. But the Court need not infer anything, because G.S.'s situation is already plainly covered by one of the examples given.

See **A 5** (emphasis by District Court). The Court should therefore reject RTMSD's arguments and affirm the District Court.

2. Penncrest High School is G.S.'s school of origin.

As stated above, the McKinney-Vento Act defines "school of origin" as "the school that the child or youth attended when permanently housed or the school in which the child or youth was last enrolled," and, where a student has graduated the highest grade level offered in his school of origin, includes as a matter of law "the designated receiving school at the next grade level for all feeder schools." 42 U.S.C. § 11432(g)(3)(I). In this case, there is no dispute that G.S. resided within the bounds of Rose Tree Media School District and attended school there when last permanently housed. *See* **A 82 at ¶8.** There is also no dispute that since G.S. and his family lost their home in RTMSD due to economic hardship, the family has lived doubled-up with Ba.S. Nor is there any dispute that RTMSD agreed in November 2014 (and again in August 2016, for G.S.'s sister) that the family's living arrangements fit McKinney-Vento's definition of homelessness. Penncrest High School therefore is G.S.'s school of origin. *See* 42 U.S.C. § 11432(g)(3)(G).

RTMSD appears to have abandoned its argument that Penncrest High School is not G.S.'s school of origin. *See* **A 84 at ¶ 15**; Br. at 30. It instead argues that it is not required to return G.S. to Pencrest because attending Penncrest is not

in G.S.'s best interest. *See* Br. at 30. The Court should reject this argument for two reasons. First, RTMSD raises it for the first time on appeal. RTMSD gave the District Court no opportunity to consider its assertions. No compelling interest or need to avoid a manifest injustice warrants its consideration now – especially given that RTMSD's actions in this case deprived G.S., E.S., and J.S. their opportunity for a "best interests" determination in September 2016. The Court should therefore deem RTMSD's "best interests" argument waived. *See Prusky v. Prudential Ins. Co. of Am.*, 44 F. App'x 545, 547 (3d Cir. 2002); *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 799 (3d Cir. 2001).

Second, even assuming that RTMSD *had* raised this argument below, it has failed to bear its burdens of proof and persuasion on that "best interests" showing. The McKinney-Vento Act sets out a statutory presumption that unless a child or parent objects to return to the school of origin, return to the school of origin is in the child's best interests. *See* 42 U.S.C. § 11432 (g)(3)(B)(i). RTMSD is clearly aware of this presumption, *see* Br. at 30, but has adduced no evidence to overcome it. In fact, it has offered nothing in support of its "best interests" claim beyond its bald speculation G.S.'s re-enrollment would be "embarrassing" for him – which speculation is fatally undermined by RTMSD's own evaluations of G.S., his successful completion of 9th grade, and his continued enrollment as a junior.

For these reasons, the Court should reject RTMSD's arguments and affirm the District Court's holding that G.S. entitled under the McKinney-Vento Act to attend Penncrest High School for the duration of his homelessness.

CONCLUSION

The undisputed facts and applicable law show that RTMSD cannot refuse its duty to educate G.S., and that the District Court should be affirmed. RTMSD's claims that G.S. is no longer homeless or that Penncrest High School is not his school of origin are refuted by the plain text of the McKinney-Vento Act, belied by RTMSD's enrollment of S.S., and contrary to their own admissions. The Proxy Waiver is unenforceable under Pennsylvania law and should be severed from the Settlement Agreement. RTMSD therefore has no justification for its prior refusal to enroll G.S. Nor does it have any justification for its failure to abide by Pennsylvania's Local Agency Law or Pennsylvania's State Plan. RTMSD simply breached its obligations under the McKinney-Vento Act and the Local Agency Law, and did so in reliance on a Proxy Waiver that is void under Pennsylvania law for want of consideration. The Court should therefore uphold the District Court's decision.

Dated: February 21, 2017

Respectfully submitted,

/s/Michael D. Raffaele

Michael D. Raffaele (PA ID 91615)
Frankel & Kershenbaum, LLC 1230
County Line Road
Bryn Mawr, PA 19010
T: (610) 922-4200
F: (610) 646-0888
Michael@MyKidsLawyer.com

COMBINED CERTIFICATES OF ADMISSION AND COMPLAINCE WITH F.R. App. P. 32(a) AND LOCAL RULE 31.1

Pursuant to Third Circuit L.A.R. 28.3(d), I hereby certify that I am an attorney admitted to practice in the United States court of Appeals for the Third Circuit.

This brief complies with the type volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 7,566 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14-point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic is identical to the text of the paper copies, and Symantec Endpoint Protection Virus Scan has been run on the file containing the electronic version of this brief and no viruses were detected.

Dated: 21 February 2018

/s/ Michael D. Raffaele
Michael D. Raffaele
Frankel and Kershenbaum

CERTIFICATE OF FILING AND SERVICE

I, Michael D. Raffaele, hereby certify pursuant to Fed.R. App. P. 25(d) that, on 21 February 2018 the foregoing Brief on Behalf of Appellee was filed through the CM/ECF system and served electronically on parties in the case.

/s/ Michael D. Raffaele