UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

E.G., individually and as parent and natural guardian of A.I. and L.I., minor children; M.M., individually and as parent and natural guardian of E.H., L.H., Ev.P., and E.P., minor children; O.M., individually and as parent and natural guardian of A.M., a minor child; and COALITION FOR THE HOMELESS, on behalf of themselves and all others similarly situated, Plaintiffs, -against- THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION; RICHARD A. CARRANZA, as Chancellor of the New York City Department of Education; NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES; STEVEN BANKS, as Commissioner of the New York City Department of Social Services; NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES; JOSLYN CARTER, as Administrator of the New York City Department of Homeless Services; NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; GARY JENKINS as Administrator of the New York City Human Resources Administration; NEW YORK CITY DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS; and JESSICA TISCH, as Commissioner of the New York City Department of Information Technology and Telecommunications, Defendants.	Index No. 20-cv-9879 (AJN)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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Plaintiffs E.G., M.M., O.M., and Coalition for the Homeless, by their attorneys, The Legal Aid Society and Milbank LLP, submit this Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint (Dkt. No. 61, the "Motion to Dismiss," or "Mot.").

INTRODUCTION

Just last December, Defendants sought to defeat Plaintiffs' preliminary injunction motion by arguing that the Amended Complaint failed to state a claim upon which relief may be granted. (Dkt. No. 32.) The Court rejected Defendants' challenge, holding that Plaintiffs had adequately alleged (at a minimum) a claim under New York State Education Law ("NYSEL") § 3209. (Dkt. No. 53.) Undeterred, Defendants seek to re-litigate that holding. As before, Defendants' Motion to Dismiss argues that the Amended Complaint fails to state a federal claim. This time, however, Defendants also argue that that supposed failure means that the Court should decline to exercise supplemental jurisdiction over the state law claims that would remain,[1] and instead should dismiss the case altogether, consigning it to a state court action that would have no hope of achieving timely relief. But Defendants' attack on the legal sufficiency of Plaintiffs' claims has no more force today than it did in December. The Motion to Dismiss should be denied.

The McKinney-Vento Act Claim. First, the overwhelming weight of authority holds that there is a private right of action to enforce the McKinney-Vento Homeless Assistance Act (the "McKinney-Vento Act") under 42 U.S.C. § 1983, including with respect to the provisions invoked by Plaintiffs here. *See, e.g.*, *Lampkin v. District of Columbia*, 27 F.3d 605, 612 (D.C. Cir. 1994); *Nat'l Law Ctr. on Homelessness & Poverty v. New York*, 224 F.R.D. 314, 319 (E.D.N.Y. 2004). Defendants attempt to downplay the clear and well-reasoned consensus regarding the McKinney-

[1] As noted, the Court has already held that the Amended Complaint states a NYSEL § 3209 claim. Defendants' position on the claim under Article XI, Section 1 of the New York State Constitution (the "Education Article") is a muddle. Defendants argue that the Court should "decline to exercise supplemental jurisdiction" over that claim, but then argue that it should be dismissed, which would amount to the exercise of jurisdiction over it. (Mot. 21, 23.)

Vento Act and instead rely on cases construing other unrelated statutes. As for the merits, the Amended Complaint plainly states a claim under 42 U.S.C. §§ 11431 and 11432, which require in mandatory terms that homeless children be provided equal access to school and related services, including transportation and online learning, to make that access a reality. The Amended Complaint alleges in detail how Plaintiffs and other Class members have been deprived of that access through a lack of reliable internet access in the shelters in which they live. And indeed, the Court has already held that Plaintiffs have stated a claim under NYSEL § 3209(6)(b), which is nearly identical to Section 11431(2) of McKinney-Vento.

The Equal Protection Claim. The Amended Complaint likewise states a claim under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Contrary to Defendants' position, the Equal Protection claim is ***not*** subject to rational basis review. If anything, the right to a ***minimal*** education—the "sound basic education" at the core of the Amended Complaint—is arguably subject to strict scrutiny (as the Sixth Circuit recently held); at a minimum, it is subject to heightened intermediate review for the cogent reasons set forth in *National Law Center*, 224 F.R.D. at 322. When subject to either form of scrutiny, the Equal Protection claim clearly satisfies Rule 12(b)(6). The Amended Complaint alleges that Defendants' policies and practices with respect to internet access in shelters have created a classification based on Plaintiffs' and other Class members' status as homeless children, treating them differently than similarly situated children. Contrary to Defendants' assertion, that classification is suspect, as Congress itself recognized in passing the McKinney-Vento Act.

Supplemental Jurisdiction. Even if both federal claims were subject to dismissal, the Court would nonetheless have ample basis for exercising supplemental jurisdiction over the remaining state law claims under NYSEL § 3209 and the Education Article. While COVID-19

and its impact on the educational experience are unprecedented, the gravamen of Plaintiffs' state law claims—basic educational access—is neither novel nor complex. Indeed, as this Court already held, Defendants do not meaningfully dispute that a duty to provide such access exists, asserting a fact-based defense that their efforts to date have satisfied the duty. (Dkt. No. 53 at 7.) Nor would the exercise of supplemental jurisdiction cause this federal court to foray into idiosyncratic issues of state law that are best left to the New York courts; the NYSEL itself was passed directly as a means of effectuating the federal policy adopted by Congress in the McKinney-Vento Act. Declining to exercise such jurisdiction ***would***, however, cause inefficiency and unfairness by forcing Plaintiffs to start over in state court, effectively nullifying the urgent relief they are seeking.

FACTUAL BACKGROUND

In March 2020, New York City became the epicenter of the COVID-19 outbreak in the United States, causing the City's public schools to close their doors to in-person education. (Am. Compl. ¶¶ 33-34.) Suddenly, the more than one million students in the City's public schools had to adjust to an entirely remote education. (*Id.*) When the City's school system moved online, many students were left without the technology necessary to access their classes. (*Id.* ¶ 40.)

At first, the City seemed to appreciate the risk that underprivileged students, particularly the estimated 114,000 homeless students who attend the City's public schools, would be unable to participate in remote education. (*Id.* ¶¶ 34, 36, 39-40.) The City distributed approximately 300,000 iPads equipped with T-Mobile cellular plans to students in need. (*Id.* ¶ 37.) This laudable initial effort, however, was quickly beset by problems. (*Id.* ¶¶ 37-42.)

The success of Defendants' iPad distribution plan depended on students' access to a robust internet connection using cellular service. (*Id.* ¶¶ 35, 38, 41.) But many New York City shelters were located in cellular "dead zones" where connectivity is weak or non-existent. (*Id.* ¶ 41.) And

most shelters throughout the City either did not have WiFi or did not allow residents to access the existing WiFi from their units. (*Id.*)

As early as March 26, 2020, less than two weeks after schools closed, Plaintiffs and other Class members began experiencing connectivity issues that prevented them from accessing their education. (*Id.*) The problems went beyond an inability to attend class—some students could not even access and download their homework assignments on their iPads. (*Id.* ¶ 42.)

Plaintiff Coalition for the Homeless quickly brought these connectivity issues to the City's attention. (*Id.* ¶¶ 59-64.) As early as June, DOE confirmed that it was aware that many families living in shelters were unable to connect to the internet using their DOE-issued iPads. (*Id.* ¶¶ 61-62.) Despite this knowledge, Defendants took no steps to facilitate WiFi installation at the City's shelters and insisted that cellular connectivity was the most appropriate solution. (*Id.* ¶ 64.)

On July 8, 2020, Mayor de Blasio announced that the City's public schools would not fully re-open for the 2020-2021 school year but would instead adopt a "blended learning" model. (*Id.* ¶ 66.) Thus, all students would be participating in at least some remote education for the 2020-2021 school year, and many would be fully remote for health reasons. (*Id.*) Yet Defendants continued to ignore appeals from the Coalition and other advocacy groups that the City consider ensuring access to WiFi in shelters. (*Id.* ¶¶ 65-67.)

In September, when the 2020-2021 school year began, Plaintiffs and other Class members continued to struggle to attend their classes and complete their coursework due to weak or non-existent internet connections. (*Id.* ¶¶ 75-76.) The Coalition continued to bring these issues to Defendants' attention throughout September and October, yet Defendants failed to meaningfully address the problem. (*Id.* ¶ 77.)

On October 8, 2020, Milbank LLP and The Legal Aid Society, counsel for Plaintiffs, sent a letter to Defendants Carranza and Carter demanding that they take action to install WiFi in all City shelters in which students were unable to access their online education. (*Id.* ¶ 78.) On October 14, 2020, Defendants' counsel responded, dismissing WiFi installation as unnecessary and Plaintiffs' counsel's "preferred solution." (*Id.* ¶ 79.) Instead, Defendants stated that they would begin switching out the T-Mobile-enabled iPads for Verizon-enabled iPads. (*Id.*)

On October 26, 2020 (seven months after schools first closed), and in the wake of the parties' letter exchange, the City abruptly changed its tune: Mayor de Blasio announced at a press conference that he had directed responsible officials to install WiFi in all of the City's shelters. (*Id.* ¶¶ 81-82.) As with the March 2020 distribution of iPads, however, this quick burst of progress was quickly plagued by problems of follow-through. (*Id.* ¶¶ 83-87.)

On October 28, 2020, just two days after Mayor de Blasio's announcement, Defendants' counsel stated that they could not offer a "defined timeframe" for installing WiFi at the City's shelters, but that they would pursue a self-described "aggressive goal" of completing installation by summer 2021. (*Id.* ¶ 83.) Defendants' counsel also noted that the City would try to complete installation at 27 "priority sites" with the most significant connectivity issues "this winter"—a deadline that would leave even the purportedly prioritized students unable to connect for at least an entire semester and potentially as late as March 2021. (*Id.*) Subsequent correspondence proved similarly fruitless. (*Id.* ¶¶ 85-87.)

On November 18, 2020, the City announced that all schools would again close to in-person education due to an uptick in the City's COVID-19 positive test rates. (*Id.* ¶ 88.) Days later, faced with the likelihood of prolonged remote education and ongoing difficulties with connectivity,

Plaintiffs brought suit. (Dkt. No. 1.) At the time of filing, Plaintiffs and other Class members continued to experience difficulty connecting to the internet and participating in school. (*Id.* ¶ 89.)

ARGUMENT

In ruling on a motion to dismiss under Rule 12(b)(6), the Court must consider whether the complaint states "a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To satisfy the plausibility standard, a plaintiff is required to "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must "accept[] all factual allegations in the complaint as true and draw[] all reasonable inferences in the plaintiff's favor." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).

I. THE AMENDED COMPLAINT STATES AN INDIVIDUALLY ENFORCEABLE MCKINNEY-VENTO ACT CLAIM.

Defendants make two basic arguments in favor of dismissal of Plaintiffs' McKinney-Vento Act claim: (1) that Plaintiffs have no private right of action to enforce the provisions of the McKinney-Vento Act cited in the Amended Complaint (Mot. 14-19); and (2) even if Plaintiffs had such a right of action, the Amended Complaint fails to state a claim that Defendants have violated the statute (*id.* at 20-21). Neither argument passes muster. First, the overwhelming weight of authority is that the McKinney-Vento Act is privately enforceable, including provisions of Sections 11431 and 11432 (both cited in the Amended Complaint). Second, the Amended Complaint plausibly alleges facts that, when accepted as true (as they must be), clearly violate the McKinney-Vento Act's mandates that states and localities "shall" provide homeless children with "equal access to the same free, appropriate public education . . . as provided to other children and youths," 42 U.S.C. § 11431(1); that they "shall" use federal grants to "provide services" that would enable homeless children to "attend" and "succeed" in school, *id.* § 11432(d)(2); and that they

"will" undertake steps to "revise" any policies or practices that "may act as a barrier" to homeless children's attendance or success in school, *id.* § 11431(2), just as is required by NYSEL § 3209.

A. Plaintiffs Have a Private Right of Action to Enforce the McKinney-Vento Act under 42 U.S.C. § 1983.

Defendants argue that, notwithstanding at least sixteen decisions recognizing a private right of action to enforce the McKinney-Vento Act under 42 U.S.C. § 1983, the specific provisions of the statute cited by the Amended Complaint are supposedly different from the provisions at issue in those cases, and do not create "enforceable rights" for a particular class of persons. (Mot. 17-18.) Defendants' argument is erroneous in multiple respects.

First, Defendants mischaracterize the Amended Complaint as limiting its allegations of McKinney-Vento Act violations to Sections 11432(d)(2) and 11431(2). The Amended Complaint also cites Section 11431(1)—the bedrock provision of the McKinney-Vento Act that guarantees homeless children "equal access to the same free, appropriate public education . . . as provided to other children and youths." (Am. Compl. ¶¶ 97, 101, 137; *see also id.* ¶ 158 (seeking declaratory relief for violations of Sections 11431-11432).) The Amended Complaint also cites Section 11431(4), which articulates the statute's core policy that homeless children "should have access to the education and other services" that such children need to have an opportunity to succeed in school. (*Id.* ¶¶ 98, 140.) Defendants' assertion that Plaintiffs "do not specifically allege" that Defendants have violated these provisions (Mot. 14 n.7) is simply inaccurate, as virtually every page of the Amended Complaint alleges in unmistakable terms that Defendants have failed to provide Plaintiffs and other Class members with equal access to their public education by depriving them of reliable internet access in the shelters in which they live.

Second, Defendants are wrong in arguing that the decisions permitting private enforcement of the McKinney-Vento Act have been limited to statutory provisions other than those cited in the

Amended Complaint. (Mot. 17-18.) For instance, in *National Law Center on Homelessness & Poverty v. New York*, the court observed the "mandatory" requirements in Sections 11431(4) and 11432(d)—both cited by Plaintiffs here—in broadly holding that "the McKinney Act . . . evidences a clear and unambiguous intent of Congress to create individually enforceable rights." 224 F.R.D. 314, 320-321 (E.D.N.Y. 2004). In *Lampkin v. District of Columbia*, the court noted that plaintiffs sued under Section 11431(1) and (2), among other provisions of the McKinney-Vento Act. 27 F.3d 605, 607 (D.C. Cir. 1994).[2] And in other cases omitted from Defendants' brief, the plaintiffs were suing on the very McKinney-Vento Act provisions relied upon by Plaintiffs here, and the courts recognized that those claims were privately enforceable. *See, e.g.*, *Sylvia's Haven, Inc. v. Mass. Dev. Fin. Agency*, 397 F. Supp. 2d 202, 218–20 (D. Mass. 2005) (considering plaintiff's claim based on 42 U.S.C. § 11431 and concluding that it was likely the statutory provisions "do confer rights on homeless children that are privately enforceable"); *S.C. ex rel. Melissa C. v. Riverview Gardens Sch. Dist.*, 2019 WL 922248, at *6-7 (W.D. Mo. Feb. 25, 2019) (considering plaintiffs' claim under Section 11431(2), among others, and concluding plaintiffs stated claim sufficient to survive a motion to dismiss).

More fundamentally, Defendants' focus on the specific sub-provisions of the statutes cited in the Amended Complaint reflects a cramped reading of the governing precedent that distorts the meaning of those cases. *Lampkin* is instructive. There, the D.C. Circuit articulated a two-part test guiding the question whether the McKinney-Vento Act was privately enforceable under Section

[2] To be sure, the *Lampkin* court specifically referenced the provisions of Section 11432(e)(3) at the conclusion of the opinion. 27 F.3d. at 612. But that stands to reason, as plaintiffs were suing over issues expressly addressed by those provisions. Plaintiffs acknowledge that the McKinney-Vento Act does not expressly address the issue of internet access in homeless shelters (other than by requiring access to "online learning," 42 U.S.C. § 11432(g)(1)(F)(iii)), such that it makes sense to sue under the more general, but nonetheless mandatory, provisions. Nothing in *Lampkin* suggests a finding that Section 11431 is ***not*** privately enforceable, and as set forth below, the logic of the decision applies to Section 11431 with full force.

1983: (1) whether the statute was intended to benefit persons such as the plaintiffs; and (2) if so, whether the statute reflects a mere "congressional preference" for certain conduct or a "binding obligation on the governmental unit." 27 F.3d at 610. As here, the parties agreed that the statute was enacted to benefit homeless children, such that the first prong was easily satisfied. *Id.* The court further held that the statute clearly imposed binding obligations on States that accepted federal grants through a series of provisions dictating what recipients of the funds "shall" do. *Id.* at 610-611. Finally, the court observed that the statute lacked administrative enforcement mechanisms, "suggesting that Congress did not intend to foreclose a private cause of action," *id.* at 611, and concluded that the obligations imposed by the statute were not so "vague and amorphous" as to be beyond the ken of judicial administration, *id.* at 612.

National Law Center is even more expansive in finding a private right of action to enforce the McKinney-Vento Act through Section 1983. That case was focused principally on Suffolk County's failure to ensure adequate transportation to school for homeless children. 224 F.R.D. at 316-17. In analyzing the enforceability question, the court observed that the statute was framed in "mandatory" rather than "horatory" terms, including the requirement that federal grants "shall" be used to carry out the policies set forth in Section 11431 (relied upon by Plaintiffs here). *Id.* at 319. The court further noted that, "unlike other spending provisions that do not confer individually enforceable rights," the McKinney-Vento Act directed local educational agencies to carry out specific activities directed at specific individuals, *i.e.*, homeless children. *See id.* Thus, unlike statutory schemes with an "aggregate focus" on comprehensive education reform, the McKinney-Vento Act was designed to "ensure that each homeless child is given an equal opportunity to access the educational system." *Id.* at 320-21 (explaining that the focus on specific individuals rather than policies or practices indicates congressional intent to confer individually enforceable rights).

Finally, as in *Lampkin*, the court in *National Law Center* found that the lack of administrative enforcement mechanisms "strongly" pointed to a congressional intent to permit private enforcement pursuant to Section 1983. *Id.* at 320.[3]

While *Lampkin* and *National Law Center* are the most widely cited cases on this topic, a large number of cases (most omitted from Defendants' brief) have followed their lead in recognizing a private right of action to enforce the McKinney-Vento Act. *See, e.g.*, *Ely v. Mobile Cty. Sch. Bd.*, 2016 WL 3188926, at *6 (S.D. Ala. May 11, 2016) ("The McKinney-Vento Act does confer rights on its beneficiaries that are enforceable in a private right of action[.]"); *Doe v. Perille*, 2018 WL 5817024, at *6 (D. Mass. Nov. 6, 2018) ("The McKinney-Vento Act confers rights on homeless children that are enforceable under 42 U.S.C. § 1983."); *Bey v. E. Penn Sch. Dist.*, 2017 WL 3129127, at *5 n.7 (E.D. Pa. July 24, 2017) ("[C]ourts have held that a plaintiff may enforce [] rights [under the McKinney-Vento Act] by invoking 42 U.S.C. § 1983.").[4] The handful of cases that have reached the opposite conclusion are devoid of reasoning or cited authority.[5]

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[3] Defendants do not contest the absence of enforcement mechanisms for the statutory provisions Plaintiffs invoke. Instead, Defendants curiously (and mistakenly) argue that the ***lack*** of any "method for addressing individual claims arising from state compliance" with Sections 11431 and 11432(d) is evidence that Congress sought to foreclose a private cause of action to enforce those claims. (Mot. 18.) But the absence of enforcement mechanisms cuts the exact opposite way, suggesting that Congress did ***not*** intend to foreclose a private cause of action. *See Lampkin*, 27 F.3d at 611; *Nat'l Law Ctr.*, 224 F.R.D. at 320.

[4] *See also Sylvia's Haven*, 397 F. Supp. 2d at 218–20; *Dukes v. Cold Spring Harbor Cent. Sch. Dist. Bd. of Educ.*, 2021 WL 308341, at *4 (E.D.N.Y. Jan. 29, 2021); *Holmes-Ramsey v. District of Columbia*, 747 F. Supp. 2d 32, 39–40 (D.D.C. 2010); *S.L.S v. Clark Cty. Sch. Dist.*, 2017 WL 4102462, at *4 (D. Nev. Sept. 15, 2017); *L.R. ex rel. G.R. v. Steelton-Highspire Sch. Dist.*, 2010 WL 1433146, at *1 (M.D. Pa. Apr. 7, 2010); *G.S. ex rel. J.S. v. Rose Tree Media Sch. Dist.*, 914 F.3d 206, 211 (3d Cir. 2018); *N.J. v. New York*, 872 F. Supp. 2d 204, 213-14 (E.D.N.Y. 2011); *Bullock v. Bd. of Educ. of Montgomery Cty.*, 210 F.R.D. 556, 557 (D. Md. 2002); *Riverview Gardens Sch. Dist.*, 2019 WL 922248, at *6; *D.C. ex rel. C.C. v. Wallingford-Swarthmore Sch. Dist.*, 2018 WL 3968866, at *9 (E.D. Pa. Aug. 20, 2018); *Beaulieu v. McKay*, 2019 WL 2271546, at *6–7 (W.D. Wash. May 7, 2019).

[5] In *Richardson v. City of New York*, the court simply stated, without reasoning or citation, that the HEARTH Act—which reauthorized portions of the McKinney-Vento Act—did not "create enforceable individual rights." 2013 WL 2124176, at *3 (S.D.N.Y. Apr. 17, 2013). The two cases piggy-backing off of *Richardson*'s conclusion are similarly devoid of reasoning. *See, e.g.*, *Joseph v. Safehaven CEC*, 2015 WL 5276448, at *7 (E.D. Pa. Sept. 9, 2015); *Kalashnikov v. Herbert*, 2020 WL 7408213, at *6 (D. Utah Dec. 2, 2020). And the *Kalashnikov* court recognized that,

Faced with this forbidding legal backdrop, Defendants mostly seek to sidestep it by relying on inapposite case law from unrelated statutory contexts. (Mot. 15-17.) These cases, even when cited by way of analogy, are unavailing. For instance, the court in *National Law Center* cogently distinguished the statute at issue in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), which (unlike McKinney-Vento) contained an enforcement mechanism for investigating and adjudicating violations. 224 F.R.D. at 320. Defendants' reliance on *Backer ex rel. Freedman v. Shah*, 788 F.3d 341 (2d Cir. 2015), fares no better. There, the court held that the Medicaid Act's requirement that state Medicaid plans serve the "best interests of the recipients" was "too vague and amorphous to create a Section 1983 private right of action." *Id.* at 344. Here, there is nothing vague or amorphous about the McKinney-Vento Act's guarantee of homeless children's equal access to a public education. *See Nat'l Law Ctr.*, 224 F.R.D. at 321 ("The [McKinney-Vento] Act provides mandatory entitlements to homeless children by ***clear and precise direction*** to state and local officials.") (emphasis added).[6]

In sum, Defendants offer no basis for this Court to depart from the broad judicial consensus that the provisions of the McKinney-Vento Act, including the provisions cited in the Amended Complaint, are privately enforceable. Defendants' arguments to the contrary should be rejected.

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even if the McKinney-Vento Act itself did not provide a mechanism for civil enforcement of the rights it confers, other courts had recognized those rights may be enforced though Section 1983. *Id.* at *6 n.19.

[6] *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), is likewise distinguishable. There, the spending legislation announced general "findings" concerning the rights and appropriate treatment of persons with disabilities; it lacked any conditions on the funding provided under the statute. *Id.* at 13. By contrast, Section 11431 of the McKinney-Vento Act declares that it is the policy of Congress that state and local education agencies"shall" provide equal educational access to homeless children, and then imposes significant restrictions on the use of monies granted under the statute—much more than a mere "nudge in the preferred directions." *Pennhurst*, 451 U.S. at 19.

B. The Amended Complaint Plausibly Alleges Violations of the McKinney-Vento Act.

Defendants' challenge to the sufficiency of Plaintiffs' allegations as they relate to the McKinney-Vento Act fares no better. This Court has already held that Plaintiffs have adequately pled the existence of a "duty to ensure that homeless students have the means necessary to access the internet when schooling is predominantly taking place remotely." (Dkt. No. 53 at 7.) The Court also observed that Defendants "do not meaningfully dispute that such a duty exists," just whether the efforts they have undertaken satisfy the duty—an issue the Court correctly held is factual in nature and cannot be resolved on the pleadings. (*Id.*) Notably, the Court located this duty in NYSEL § 3209(6)—a provision that is nearly identical to Section 11431(2) of the McKinney-Vento Act (cited in the Amended Complaint). Defendants acknowledge that their re-litigation of the NYSEL § 3209 claim is for appellate purposes. (Mot. 3 n.1.) Defendants' effort to dismiss the McKinney-Vento Act claim must be as well, for Defendants offer no reason for the Court to depart from its earlier holding that the Amended Complaint pleads an actionable failure to remove the barriers to educational access caused by lack of reliable internet connectivity.

In any event, setting aside the Court's prior ruling, Defendants' challenge to the McKinney-Vento Act claim is based on a blinkered parsing of isolated bits of statutory text—one that is divorced from the broader text, structure, and purpose of the Act. *See Philbrook v. Glodgett,* 421 U. S. 707, 713 (1975), *superseded on other grounds by statute*, Social Security Act, 42 U.S.C. § 607(b)(2)(C)(ii) ("'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (quoting *United States v. Heirs of Boisdoré*, 49 U.S. 113, 122 (1850)). Before exploring why Defendants' parsing is incorrect, it is important not to lose the forest for the trees and to revisit the Amended Complaint's allegations of how Defendants' conduct violated the Act.

It is undisputed that Congress passed the McKinney-Vento Act in recognition of the significant obstacles that homeless individuals face, with a specific emphasis in Subtitle VII-B on education of homeless children and youths. (Am. Compl. ¶¶ 96-97.) The statute seeks to lessen those obstacles by providing funds to States in exchange for various mandatory legal obligations, some of them highly specific and others quite broad. As alleged in the Amended Complaint:

- Section 11431(1) requires that State educational agencies "ensure 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." (*Id.* ¶¶ 97, 137.)

- Section 11432(d)(2) requires State and local educational agencies to use federal grant monies to "provide services and activities . . . to enable [homeless children and youths] to enroll in, attend, and succeed in school." (*Id.* ¶¶ 97, 138.) Elsewhere in the provisions governing State plans for the education of homeless youth, the plan is required to include a description of procedures for ensuring access to "online learning." 42 U.S.C. § 11432(g)(1)(F)(iii).

- Section 11431(2) requires State and local educational agencies to "review and undertake steps to revise" any "regulations, practices, or polices" that "may act as a barrier to the . . . attendance or success in school of . . . homeless children and youths." (Am. Compl. ¶¶ 98, 139.)

All of these provisions, and Subtitle VII-B more generally, are aimed at a simple goal: ensuring that homeless children are given "equal access" to the same education as other children. 42 U.S.C. § 11431(1). And it is precisely the deprivation of such access caused by Defendants' failure to provide reliable internet access in shelters that is at the core of the Amended Complaint.

Defendants' response is threefold. First, as concerns Section 11432(d)(2), Defendants argue that the Amended Complaint lacks allegations that Defendants are ***not*** using federal grant monies to provide services that would enable homeless children to attend and succeed in school. (Mot. 20.) Section 11432(d), however, is much more than a negative prohibition on use of funds for non-enumerated purposes; it is an affirmative requirement that, upon acceptance of federal funds, State and local educational agencies "shall" use the funds for each of the enumerated

activities. True, the statute does not specifically prescribe that the "services" required to be provided to homeless children include reliable internet access, as Defendants repeatedly note. But it strains credulity to suggest that, in the midst of a viral pandemic that has shifted the educational experience almost entirely online, Defendants (who admit they are recipients of federal funds pursuant to the McKinney-Vento Act) could remain in compliance with Section 11432(d)(2) while failing to facilitate homeless children's access to the virtual classroom. *See Nat'l Law Ctr.*, 224 F.R.D. at 319 (citing Section 11432(d) as a "mandatory rather than hortatory requirement").

Second, as concerns Section 11431(2), Defendants seek to belittle that provision (as well as other provisions of Section 11431) as "merely outlin[ing] broad policy goals." (Mot. 16.) But Defendants offer no support for the proposition that a statutory pronouncement that it is the "policy of Congress" that educational agencies "shall" or "will" do certain things, coupled with later provisions designed to effectuate those mandates, does not carry the force of law.

Third, Defendants further argue that the Amended Complaint shows they have complied with Section 11431(2) by "undertak[ing] steps" to remove barriers to homeless children's attendance or success in school. (Mot. 20-21.) Defendants point to Mayor de Blasio's pronouncement in a press conference that WiFi would be installed in all of the City's shelters (Am. Compl. ¶ 140), describing the pronouncement as a "revision of policy" that is "exactly what section 11431(2) requires." (Mot. 21.) This argument entirely ignores the subsequent allegations of the Amended Complaint, which allege numerous facts showing the fecklessness of the Mayor's pronouncement, most notably Defendants' admission shortly thereafter that their "plan" to install WiFi would not be complete until after the school year was over. (Am. Compl. ¶¶ 83-87.) Contrary to Defendants' suggestion, the eradication of barriers to homeless children's educational access cannot be accomplished through a statement at a press conference; at a minimum, Plaintiffs

are entitled to explore in discovery whether the Mayor's announcement was in fact the kind of "revision of policy" that Defendants claim puts them in compliance with the statute. *See Chance v. Armstrong*, 143 F.3d 698, 701 (2d Cir. 1998) ("At the 12(b)(6) stage, the issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims.") (internal quotation marks and citation omitted).

II. THE AMENDED COMPLAINT STATES AN EQUAL PROTECTION CLAIM.

Defendants argue that the conduct challenged in the Amended Complaint is subject to rational basis review—a permissive standard that, Defendants contend, requires dismissal of the Equal Protection claim. But Defendants apply the wrong standard. The policies and practices that the Amended Complaint alleges have deprived many homeless children of basic educational access are subject to strict scrutiny or, at a minimum, heightened intermediate review. When that error is corrected, it is plain that the Amended Complaint states an Equal Protection claim.

A. The Equal Protection Claim Is Subject to Strict Scrutiny or Heightened Intermediate Review, Not Rational Basis Review.

Under the Supreme Court's Equal Protection jurisprudence, the level of scrutiny a court must apply depends on the nature of the underlying violation. *See Ramos v. Town of Vernon*, 353 F.3d 171, 174-75 (2d Cir. 2003). When government action (or inaction) interferes with a "fundamental right" or targets a "suspect class," strict scrutiny applies. *Id.* at 175. Here, the Defendants' policies and practices interfere with the fundamental right to a minimal education ***and*** target the congressionally-recognized suspect class of homeless children.

Although the Supreme Court has observed that public education in general is not a fundamental right, *see Plyler v. Doe*, 457 U.S. 202, 221 (1982), it has also noted that whether children have a fundamental right to a ***minimal*** education is an open question. *Papasan v. Allain*, 478 U.S. 265, 285 (1986) ("[T]his Court has not yet definitively settled the question[] whether a

minimally adequate education is a fundamental right . . . ."). Recently, the Sixth Circuit held that such a right exists. *Gary B. v. Whitmer*, 957 F.3d 616, 648 (6th Cir. 2020), *vacated for rehearing en banc*, 958 F.3d 1216 (6th Cir. 2020).[7] There, the plaintiffs brought an equal protection claim against the State of Michigan for failure to provide an adequate education to students of Detroit schools. In reaching its decision, the Sixth Circuit reasoned that public education plays a "unique role" to create opportunities for children, "separate from the means of a child's parents." *Id.* at 649. This unique role "creates a heightened social burden to provide at least a minimal education," and "the exclusion of a child from a meaningful education by no fault of her own should be viewed as especially suspect." *Id.* The Sixth Circuit went on to explain that the right to a basic minimum education means "the state must ensure that students are afforded at least a rudimentary educational infrastructure[.]" *Id.* at 660. Here, Plaintiffs seek vindication of this precise right.

Even if this Court were to find there is no fundamental right to a minimal education, it should still apply strict scrutiny to Plaintiffs' Equal Protection claim because homeless children are a suspect class. Although the Supreme Court has not settled on one cohesive definition of a "suspect class," courts generally look at whether a group has "historically been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Plyler*, 457 U.S. at 216, n.14 (citations and internal quotation marks omitted). In enacting the McKinney-Vento Act, Congress highlighted the political powerlessness homeless students have faced, recognizing the need to create better protections for them. *See, e.g.*, 42 U.S.C. § 11431(2) (guarding against "regulations, practices, or policies" that "may act as a barrier to the . . . attendance, or success in school of, homeless children and youths").

[7] The Sixth Circuit's decision to rehear the case *en banc* caused the opinion to be vacated under the Sixth Circuit's rules, and the case subsequently settled and was dismissed as moot. Order, *Gary B, v. Whitmer*, No. 18-1855/1871 (6th Cir. June 11, 2020). Plaintiffs offer the opinion as compelling persuasive authority.

Defendants' argument that discrepancies in wealth cannot form the basis of a suspect class is not to the contrary. (Mot. 8-9.) While it is true that the Supreme Court has declined to define a suspect class based on wealth "alone," *see Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988), the Court there was not faced with a class of homeless children with no or substantially limited ability to access their education.[8]

Were this Court to conclude that no fundamental right or suspect class exists to trigger strict scrutiny, at a minimum, heightened intermediate review should apply. Contrary to Defendants' assertions, *Plyer* and *National Law Center* clearly control this case. In *Plyler*, the Supreme Court struck down a Texas statute that denied undocumented school-age children the public education Texas offered to citizen children. 450 U.S. at 205, 230. The court held that the Texas statute "pose[d] an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.* at 221–22. The *Plyler* court recognized that although public education is not a fundamental right, it still has a "fundamental role in maintaining the fabric of our society" and lack of access to it is "an enduring disability." *Id.* Given this importance, the Court reasoned that any denial of education must be justified by some "substantial goal" of the State. *Id.* at 223–24. As *National Law Center* later explained, *Plyler* endorsed courts' ability to apply "heightened" or "intermediate" scrutiny to claims where the government is penalizing children for the actions of their parents and putting children at risk for "significant and enduring adverse consequences."

[8] Defendants also point to a handful of non-binding cases to support their argument that relative levels of wealth do not create a suspect class. (Mot. 8-9.) This Court should not give any weight to Defendants' meritless comparison of homeless children to homeless sex offenders. (Mot. 9 (citing *Wallace v. New York*, 40 F. Supp. 3d 278, 330 (E.D.N.Y. 2014)).)

See Nat'l Law Center, 224 F.R.D. at 321-22 (applying heightened scrutiny to a claim alleging Suffolk County schools failed to properly enroll, transport, and educate homeless students).

Defendants strain to distinguish *Plyler* and *National Law Center.* True, the government actions challenged in those cases were different from the government inaction challenged here, but the facts alleged by Plaintiffs fit squarely within the *Plyler* two-part framework. First, just like the immigrant children in *Plyler*, Plaintiffs and other Class members are being penalized for conditions outside of their control. These children are being denied access to the most basic education because of their parents' lack of housing and Defendants' failure to equip shelters with the technology necessary to facilitate meaningful school attendance. Second, Plaintiffs and other Class members are at serious risk of long-lasting damage to their educational development. (Am. Compl. ¶¶ 109-114.) Equal protection cases in other contexts counsel the same result. *See Ramos*, 353 F.3d at 175, 181 (holding that intermediate review should apply to the "important, though not constitutional" right of minors to move freely at night); *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001) (applying intermediate scrutiny to a law that denied children of immigrants automatic eligibility for Medicaid benefits even though the denial of public education in *Plyler* was "more burdensome"); *Eisenbud v. Suffolk County*, 841 F.2d 42, 45-46 (2d Cir. 1988) (acknowledging that intermediate scrutiny should be applied to a financial disclosure law because the impinged right to privacy was "important though not protected by the Constitution").

B. When the Equal Protection Claim Is Subject to the Appropriate Standard of Review, It Is Clear That the Amended Complaint States a Claim.

Whereas rational basis review would require the Court to consider whether Defendants' failure to provide reliable internet access in shelters is rationally related to a legitimate government interest, strict scrutiny would look to whether the inaction is narrowly tailored to support a compelling government interest. *City of Cleburne. v. Cleburne Living Center*, 473 U.S. 432, 440

(1985). Alternatively, under the heightened intermediate standard, Plaintiffs would not be "required to negate any reasonable conceivable set of facts that could provide any rational basis for the classification of the children, as required when utilizing rational basis review." *Nat'l Law Ctr.*, 224 F.R.D. at 322. Thus, as the court recognized in *National Law Center*, this difference in the standard of review significantly lightens Plaintiffs' pleading burden, such that the Equal Protection claim passes muster under Rule 12(b)(6).

The Fourteenth Amendment guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Supreme Court has interpreted this as "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne*, 473 U.S. at 439. Thus, to state a valid Equal Protection claim, Plaintiffs must allege that they were treated differently or less favorably than other persons in similar circumstances. *See Plyler*, 473 U.S. at 216. Here, Plaintiffs claim that Defendants' policies and practices of failing to provide reliable internet access in shelters deprives homeless children in New York City of the same access to public education enjoyed by non-homeless children. (Am. Compl. ¶ 146.) Such discriminatory treatment by the government is sufficient to trigger an Equal Protection analysis. *See Lewis*, 252 F.3d at 590; *Nat'l Law Ctr.*, 224 F.R.D. at 321.

Defendants respond that their conduct has created no classification at all, and to the extent it has, the classification is a ***favorable*** one—that is, children living in shelters are receiving ***privileged*** treatment as compared to their non-homeless peers. (Mot. 8.) Defendants' argument assumes that a government can violate the Equal Protection clause only through legislation or other action that affirmatively separates similarly situated individuals into separate classes; this ignores the fact that government ***inaction*** can likewise create constitutionally problematic classifications. *See Missouri v. Canada*, 305 U.S. 337, 349-50 (state's failure to create law school for black

students or admit black students to white law school violated the Equal Protection Clause); *Nat'l Law Center*, 224 F.R.D. at 316–17, 322 (state's failure to provide enrollment and transportation services to homeless children adequately formed basis of Equal Protection claim). As for Defendants' bemusing contention that Plaintiffs and other Class members are benefiting from Defendants' conduct, that is plainly not what the pleadings allege and is a disputed factual defense that should not be considered in the context of a Rule 12(b)(6) motion.[9]

Ultimately, Defendants' argument is based on a false premise that iPads and internet service are ***added benefits*** to the basic requirements of providing children with a free public education. But this is a pre-COVID understanding of what a "free public education" means. As this Court recognized in its order rejecting Defendants' legal challenge to the preliminary injunction motion, before the pandemic, the City was required to provide enrollment services, transportation, and classrooms for ***all*** students so that they were able to access a minimal education. *See Nat'l Law Center*, 224 F.R.D. at 321-22. The reality of the pandemic is that Defendants must reimagine what these requirements entail. The "classroom" is now an internet application where students can connect via videoconference to their teachers and classmates. "Transportation" now has two components: a device with the capability to connect to the internet and reliable internet service. Without both, students have no way to access their education. Viewed through this lens, it is clear that Plaintiffs have alleged sufficient facts to show that the policies and practices of the City have created a classification based on Class members' status as homeless children.

[9] The cases cited by Defendants in this regard (Mot. 7-8) merely reiterate the rule that an Equal Protection claim requires a plaintiff to allege the government's actions created a classification among similarly situated people—a point that is not in dispute. Each of the cases is factually inapposite, involving affirmative legislation creating classifications, as opposed to government inaction that effectively does the same thing. *See, e.g.*, *Missouri, Kan., & Tex. Ry. Co. v. Cade*, 233 U.S. 642, 650 (1914) (finding the statute at issue did not create different classes of citizens because the statute allowed anyone to sue or be sued).

Finally, to the extent Defendants argue that an Equal Protection claim based on a delay of government services requires a showing of invidious discrimination (Mot. 12), Defendants misinterpret the law. A showing of invidious discrimination is required only for claims analyzed under rational basis review. *See Plyler*, 457 U.S. at 217–18 (explaining that certain governmental classifications may not be "facially invidious" but "nonetheless give rise to recurring constitutional difficulties"); *Edelman v. Comm'r of Soc. Sec.*, 83 F.3d 68, 72 (3d Cir. 1996) (describing the rational basis standard of review for the claim at issue). And the delay at issue in *Edelman*—a less than one-month delay in Medicaid benefits—is plainly not comparable to homeless children missing an entire year or more of their schooling, as alleged in the Amended Complaint. (Am. Compl. ¶¶ 8-9, 83, 85, 89, 105, 107, 113.)

III. EVEN IF THE FEDERAL CLAIMS WERE DISMISSED, THE COURT WOULD BE WELL-JUSTIFIED IN EXERCISING SUPPLEMENTAL JURISDICTION OVER THE REMAINING STATE LAW CLAIMS.

Once a federal court determines that a state law claim is related to a claim within the court's original jurisdiction—*i.e.*, where the facts underlying the federal and state claims derive from a common nucleus of fact—supplemental jurisdiction over the related claim is mandatory. *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 335 (2d Cir. 2006); *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 447 (2d Cir. 1998). Under such circumstances, the "discretion to decline supplemental jurisdiction is available ***only if*** founded upon an enumerated category of subsection 1367(c)." *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 85 (2d Cir. 2018) (citation and internal quotations omitted) (emphasis in original).

Where one of the Section 1367(c) categories applies, the court may then undertake a discretionary inquiry into whether to exercise supplemental jurisdiction by weighing the factors set forth in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966)—namely, judicial economy, convenience, fairness, and comity. *See Nowak v. Ironworkers Local 6 Pension Fund*,

81 F.3d 1182, 1191–92 (2d Cir. 1996). Only where a court determines that exercising supplemental jurisdiction would not promote these values should it decline to exercise supplemental jurisdiction. *Catzin*, 899 F.3d at 85.

None of the grounds for declining supplemental jurisdiction in Section 22(c) are present here. And even if they were, the values of judicial economy, convenience, fairness, and comity weigh heavily in favor of exercising supplemental jurisdiction over Plaintiffs' state law claims.

A. None of the Section 1367(c) Factors Have Been Met.

Defendants invoke Sections 1367(c)(1) and (3). The first permits a court to decline to exercise supplemental jurisdiction over a claim that raises "novel or complex issue[s] of State law," 28 U.S.C. § 1367(c)(1); the second does so where "the district court has dismissed all claims over which it has original jurisdiction," *id.* § 1367(c)(3). The latter is easily disposed of—for the reasons set forth above (*see supra* Points I & II), the Amended Complaint has stated claims under federal law over which the Court has original jurisdiction. The former is likewise without merit.

While the context surrounding the instant dispute—the COVID-19 pandemic and its impact on the educational system—may be unprecedented, there is no particular novelty or complexity to Plaintiffs' state law claims. If anything, these claims are unusual for their simplicity. The Education Article requires Defendants to provide a "sound basic education"; by failing to provide Plaintiffs and other Class members with reliable access to remote schooling during the pandemic, Defendants have failed to satisfy that obligation. (Am. Compl. ¶¶ 124-129.) Similarly, NYSEL § 3209 requires Defendants to change policies and practices that act as a barrier to homeless children's educational access; Defendants have failed in that regard as well for the same reason. (Am. Compl. ¶¶ 130-135.) All that remains for the Court to do on these claims is to adjudicate fact disputes over whether the efforts Defendants have purportedly undertaken to remedy the

problem are sufficient to put them in compliance—something this Court is just as well-equipped to do as any state court (and indeed more so given its familiarity with the case).

Defendants' arguments to the contrary are unavailing. With respect to Plaintiffs' NYSEL § 3209 claim, Defendants express concern that it "could be interpreted as obligating all school districts across the state to provide internet access not just to homeless students, but all 'indigent students' for the entire duration of the pandemic." (Mot. 22.) Setting aside why Defendants would find such an obligation objectionable, Defendants' problem is with the statutory language (which does indeed speak in terms of "indigent children"), not any involvement by this Court. In any event, the concern is misplaced, as Plaintiffs' claims are on behalf solely of students residing in shelters (Am. Compl. ¶ 116), not indigent children outside of the shelters.

As for the Education Article claim, Defendants do not articulate their theory of novelty and complexity except to argue that Plaintiffs' demand for basic educational access "fall[s] well outside the contours delineated by existing New York Court of Appeals case law." (Mot. 23.) Ultimately, this is an argument in favor of dismissal, not a Section 1367(c) argument. To the extent Defendants' position is that the Education Article claim threatens expansion of the right to a "sound basic education," that is wrong. If anything, the "Campaign for Fiscal Equity" cases that Defendants cite by way of distinction (Mot. 24) pressed the boundaries of that right by delving into matters of adequate State funding, which arguably ***could*** implicate comity or federalism concerns. This case, by contrast, is about basic access: whether homeless children are being admitted to the virtual classroom.[10]

[10] Plaintiffs' other challenges to the Education Article claim (Mot. 24-25) simply restate their opposition to the preliminary injunction motion. Defendants have not cited, and Plaintiffs have not found, a single case in which an Education Article claim was dismissed on the ground that such a claim runs only against New York State, not against New York City—a creature of statute and an agent of the State bound by the New York State Constitution pursuant to which it was created, *see, e.g.*, *Pelham Council of Governing Bds. v. City of Mt. Vernon*, 186 Misc. 2d 301, 306

B. The *Gibbs* Factors Weigh Strongly in Favor of Retaining Jurisdiction.

Even if one of the grounds in Section 1367(c) were applicable, the values of judicial economy, convenience, fairness, and comity overwhelmingly weigh in favor of retaining jurisdiction over the state law claims. *See Catzin*, 899 F.3d at 83, 85 (district courts must "carefully evaluate" the relevant *Gibbs* factors, even if one of the § 1367(c) categories is present, and ***declining*** to exercise supplemental jurisdiction "must actually promote" the *Gibbs* factors).

The Second Circuit's decision in *Catzin* is instructive. There, the Court held that the district court had abused its discretion in declining to exercise supplemental jurisdiction over state law claims after federal claims had been dismissed. 899 F.3d at 79. In so holding, the Court heavily emphasized that the parties were on the eve of trial; that the trial would be short (as here, three days); and that there were no particularly thorny issues of state law that the federal court was not amply equipped to adjudicate. *Id.* at 86. The Court accordingly concluded that "[t]he record yields no clarity as to how judicial economy, convenience, fairness, or comity might be served by requiring the parties to expend additional years as well as dollars re-litigating in state court." *Id.*

Where, as here, the parties have expended substantial time and effort to litigating the state law claims, considerations of "fairness" weigh heavily in favor of retaining jurisdiction over the state law claims. *See Nowak*, 81 F.3d at 1191-92 ("[A]fter there has been substantial expenditure in time, effort, and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair.") (citation and internal quotations omitted); *Bosch v. LaMattina*, 901 F. Supp. 2d 394, 402 (E.D.N.Y. 2012) (declining to exercise supplemental jurisdiction would be "unfair and unnecessary" given the "substantial expenditure in time, effort,

(Sup. Ct. Westchester Cty. 2000). And the Amended Complaint clearly alleges "district-wide deficiencies"—Defendants themselves have acknowledged that nearly ***3,000 families***, or approximately ***30%*** of the families served by DHS alone, have reported connectivity problems in the shelters in which they live.

and money," including the completion of fact discovery and several depositions). The parties have gone to great lengths to conduct expedited discovery and depositions prior to the evidentiary hearing on the preliminary injunction motion. By the time this Court is in a position to rule on the Motion to Dismiss, thousands of pages will have been produced by parties and non-parties; as many as 15 witnesses (fact and expert) will have been deposed; and numerous hearings or conferences will have been held. The evidentiary hearing will be days away. Dismissing the case so that the parties can start over in state court would not only fail to promote the *Gibbs* values; it would actively thwart them. *See Catzin*, 899 F.3d at 86 (finding the record failed to "lend itself to an understanding as to how convenience or fairness was served by setting backwards the course of a case the parties had vigorously litigated" and would cause them to expend significant "time, legal fees, and distraction starting over in state court").

Moreover, this case presents the "somewhat unusual circumstance in that determination of plaintiffs' claims is highly time-sensitive." *Justiana v. Niagara Cty. Dep't of Health*, 45 F. Supp. 2d 236, 241 (W.D.N.Y. 1999). Every day that passes without judicial relief is a day when many children in shelters may miss school, with tragic consequences for their development, well-being, and ability to break the cycle of poverty. Thus, concerns of fairness weigh even more heavily in favor of exercising supplemental jurisdiction over Plaintiffs' state law claims. Forcing the parties to start over again in state court on a claim that this Court has already found to be adequately pled will "substantially delay any determination in this matter and result in unfairness to the litigants" and effectively prevent the relief Plaintiffs are seeking. *See id.*; *see also Catzin*, 899 F.3d at 86.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.

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