THE RIGHT TO SPECIAL EDUCATION: UNDOCUMENTED CHILDREN AND THE PROMISE OF *PLYLER*

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> "[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[1]

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1. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

INTRODUCTION

The Supreme Court and Congress have consistently recognized that access to public education is of paramount importance for the creation and maintenance of our society.[2] Education allows children to grow into productive citizens who can contribute economically and socially to the Nation. On the other hand, denial of education isolates children and creates a class of individuals who are effectively prevented from meaningful engagement with the world around them.

In order to access public education, many children need the support and services that special education offers. Congress enacted the Individuals with Disabilities Education Act (IDEA) recognizing the struggle students with disabilities face, and that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[3] Prior to the enactment of IDEA, children with disabilities were often barred from receiving any education when school districts refused to offer special education support, instead keeping these children isolated or allowing them to fail. IDEA revolutionized education for these students. Since its enactment, approximately seven million students or 14 percent of school-aged children[4] have received special education, making its reach broad and its impact substantial.

Despite the paramount importance of education and the need for children with disabilities to receive special education services, one group has nonetheless been denied IDEA's protection: children who are detained in immigration detention facilities. These immigration facilities are located within local school districts that would otherwise be responsible for educating them, yet the law leaves them without clear, enforceable rights.

Special education would give detained children with disabilities the opportunity to access the education offered in these facilities, just as it would any other child. However, once children merely step foot in the facility they lose that right. There is no reason to suspect that the number of children requiring special education is any lower in detention centers. In fact, as a result of their experiences in these facilities, there is reason to believe they may have an increased need for these services.[5]

Perhaps more than any other area of law, immigration policies and interpretations of immigration laws are constantly shifting. This Article considers the provision of special education to migrant children detained by the United States government and attempts to take into account how shifting policies may affect the way these children are treated. Where possible, this article considers how the current policies may ultimately change children's access to education, while keeping in mind that policies change, sometimes rapidly, and many challenges to these policies remain unresolved as of the publication of this article. Confusion as to the applicability of certain laws exacerbates this problem. The lack of certainty alone provides support to the argument that clear, enforceable educational rights, or a change in detention

2. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *see* 20 U.S.C. §1400(c)(1) (2010); *see Plyler*, 457 U.S. at 221.

3. 20 U.S.C. § 1400(c)(1) (2010).

4. *Children and Youth with Disabilities,* NAT'L CENTER FOR EDUC. STAT. (estimating over 6.7 million students in 2015-2016 school year), https://nces.ed.gov/programs/coe/indicator_cgg.asp (last updated May, 2019).

5. *Id.*

policies, are necessary to ensure children receive access to education.

Children within these facilities face innumerable hardships every day, and the failure to receive education is but one small piece of their experience.[6] This Article does not mean to ignore these other aspects of the detention of children, nor does it seek to minimize those hardships. However, this Article argues that there are numerous reasons to ensure these children receive special education while detained by the United States government.

This Article argues that their potential value to our society should not be assumed away by these children's uncertain immigration status. The denial of education has far-reaching consequences that impair these children's ability to succeed upon release. Further, approximately 90 percent of these children will be released to sponsors while their immigration cases are pending, either family members or guardians, and placed in local schools.[7]

This Article also argues that children should not be excluded from receiving special education merely because their legal status is unknown. First, this Article considers the importance of education and, more specifically, special education in a historical and legal context. Then, it looks to the provision of education to children detained in immigration facilities, considering children's rights in light of *Plyler* and the Flores Agreement. It then considers how the uncertainty around whether IDEA applies to detained children results in a denial of access to special education. This article then argues that, given the power of education to meaningfully alter the course of an individual's life, the right to education, and special education in particular, must be protected. Finally, this Article argues that clear, enforceable laws are the best way to guarantee that shifting immigration policies do not prevent these children from accessing education generally and special education specifically. If the policies underlying IDEA are sound, it follows that the IDEA protections should extend to these particularly vulnerable children.

I. IDEA AND THE HISTORY OF SPECIAL EDUCATION IN AMERICA

IDEA was enacted in recognition of the fact that, for many children, access to education cannot occur without access to special education support.[8] As detailed in the following Section, IDEA sought to address a gap in the education system that affected some of the most vulnerable children. And "[a]mong the most vulnerable members of the homeless and highly mobile population are those children and youth who qualify for services under the Individuals with Disabilities Education Act (IDEA)."[9] In fact, the term "highly mobile children," a term that includes migrant children, was added to IDEA in 2004 in recognition of the additional support these children may require.[10]

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6. *See* Julie M. Linton, MD, et al., *Detention of Immigrant Children*, 139 PEDIATRICS, 1, 2-5 (April, 2017).

7. Report of the ICE Advisory Committee on Family Residential Centers (October 7, 2016), https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf [hereinafter Report].

8. Edwin Martin, Reed Martin & Donna Terman, *The Legislative and Litigation History of Special Education*, 6 THE FUTURE OF CHILD. 25, 26 (1996).

9. Luzanne Pierce & Eileen Ahearn, Highly Mobile Children and Youth with Disabilities: Policies and Practices in Five States, INFORUM (Mar., 2007), https://nasdse.org/docs/145_de04e76d-afae-4244-bae0-2beec674fbf9.pdf.

10. *Id.* at 1.

While it is fair to assume that detained children are at least as likely as any other child to need special education support, around 14 percent, it is likely this percentage is even higher for children who have been detained in immigration detention facilities.[11] Children in immigration detention facilities experience great hardships, before, during, and after detention. These experiences are likely to increase their need for special education support, making the denial of education even more detrimental:

> Studies of detained immigrants . . . have found negative physical and emotional symptoms among detained children, and posttraumatic symptoms do not always disappear at the time of release. Young detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school. Qualitative reports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems. Additionally, expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children.[12]

IDEA does not solely address traditional learning disabilities, but also encompasses a variety of mental health issues that can be addressed through special education services. These services can include things like psychological and social work services, counseling, and parent counseling.[13]

The U.S. Department of Education itself recognizes that "highly mobile children experience recurring educational challenges to a much greater degree than other children, and that special education and related services available under IDEA are critical to helping eligible highly mobile children with disabilities meet these educational challenges."[14]

A. The Creation of IDEA

IDEA recognizes that for many children, access to education means access to special education.[15] Denying children with disabilities the support that special education offers hinders or completely prevents children from receiving meaningful education.[16]

A review of the history of special education in America reveals systemic exclusion and isolation of children with disabilities from public schools.[17] Historically,

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11. UNITED STATES DEPARTMENT OF EDUCATION OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES (July 19, 2013), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-0392dclhighlymobile.pdf.

12. Linton, *supra* note 7, at 6; *see also supra* note6 at 10 ("[W]hile the Committee believes strongly that bona fide asylum seekers in general should not be needlessly detained, this is particularly true for children, whose best interests must be paramount in all enforcement decisions pertaining to them. The harmful effects of detention on children are well established.")

13. 34 C.F.R. § 300.34(a).

14. *Id.*

15. *See* 20 U.S.C. § 1400(c)(2) (2010).

16. *Id.*; Martin, *supra* note 9.

17. Martin, *supra* note 9. ("Through most of the history of public schools in America, services to children with disabilities were minimal and were provided at the discretion of local school districts. Until the mid-1970's, laws in most states allowed school districts to refuse to enroll any student they considered

many states enacted laws guaranteeing equal access to education, but in practice numerous districts found them too burdensome or costly and did not comply.[18] Some states passed laws that allowed school districts to deem a child "uneducable," exempting that school district from providing any education to a child with higher or different needs.[19] Ultimately, the periodic or complete removal from schools denied children with disabilities access to any substantive education, resulting in isolation and contributing to their disenfranchisement.[20] A growing understanding of the nature of disabilities, paired with vocal advocates, shifted public policy.[21] Numerous court cases and state legislation reflected this new public policy, favoring educational access for all.[22] Gradually, this led to the creation of IDEA.[23]

Two cases are often cited as the precursors to IDEA: *Mills v. Board of Education* and *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania et al.* (commonly referred to as *PARC*).[24] While these two cases are demonstrative of the ongoing problems children with disabilities face, prior to the enactment of IDEA at least thirty decisions recognized the right of children with disabilities to access public education.[25] Nonetheless, both *Mills* and *PARC* offer a snapshot of the changing tide of education policy leading up to the creation of IDEA.

In 1971, parents brought *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania et al.*, challenging a law that exempted children eight years or older who had not yet reached the mental age of five from receiving a free education.[26] The plaintiffs argued that Pennsylvania schools utilized this law to remove children who were less able to adjust to a typical classroom environment, and that this denial constituted a violation of the Equal Protection Clause of the Fourteenth Amendment.[27] After hearing expert testimony, the parties ultimately settled the case in a consent decree recognizing:

> all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it; and, whether begun early or not, that a mentally

'uneducable,' a term generally defined by local school administrators.").

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 25, 28.

23. *Id.* See also Tracy Blankenship et al., Inclusion and Placement Decisions for Students with Special Needs: A Historical Analysis of Relevant Statutory and Case Law, Electronic J. for Inclusive Educ., 1, 3 (Winter/Spring, 2007), https://corescholar.libraries.wright.edu/cgi/viewcontent.cgi?article=1074&context=ejie.

24. Martin, *supra n*ote 9, at 28.

25. *Id.*

26. *Id.*

27. *Id.* at 1258.

> retarded person can benefit at any point in his life and development from a program of education and training.[28]

Just one year after *PARC*, parents in the District of Columbia brought *Mills v. Board of Education*, alleging nearly identical fact patterns.[29]Although the defendants recognized that they were required to provide all students with a free education, they nonetheless consistently failed to place the plaintiff children in public schools or offer them tuition for private schools.[30] Once again, the court found for the plaintiffs, ultimately determining that the defendants' conduct constituted a violation of the Due Process Clause of the Fifth Amendment.[31]

Taken together, these two cases unequivocally recognized that the government may not exclude children merely because of a disability. In 1975, just three years after the court decided *Mills*, Congress enacted IDEA.[32] Originally called the Education for All Handicapped Children Act of 1975,[33] IDEA offers significant protections to children, including robust procedural protections and corresponding state obligations.[34] While IDEA has undergone several revisions, most recently in 2004, the guarantees embedded in IDEA have remained largely unchanged.[35]

B. IDEA

The special education process under IDEA begins with "child find," a provision requiring schools to identify children with disabilities who may be in need of special education.[36] This state obligation applies to almost all children with disabilities, including those who are homeless, in private school, or wards of the state, with very limited exceptions.[37] IDEA specifically mentions "[h]ighly mobile children, including migrant children" in outlining the child find requirement, recognizing that this population is particularly vulnerable to remaining unidentified.[38]

In order to qualify for protection under IDEA, children must have a disability that fits into one of thirteen categories, although these categories are quite broad and

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28. *Id.*

29. *Mills*, 348 F. Supp. 866 (D.D.C. 1972).

30. *Id.* at 871.

31. *Id.* at 875

32. 20 U.S.C. § 1400 *(2010).* 118 Cong. Rec. 17478 (1972) (recognizing that "[n]owhere in our public laws or in our budget figures do we find acceptance for the proposition that all handicapped children have the right to an education. It has been the courts which have forced us to the realization that we can delay no longer in making just such a commitment.").

33. Public Law 94-142.

34. 20 U.S.C. § 1400 (2010).

35. P.L. 108-446.

36. 34 C.F.R. § 300.111 (2018) ("The State must have in effect policies and procedures to ensure that—

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

(ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.").

37. *Id.* For instance, the IDEA exempts state prisons from the child find obligation when the individual is between the ages of 18 -21 and had not previously been identified as an individual with a disability. 20 U.S.C. 1412(a)(1)(B)(i) (2010). Federal prisons are similarly exempt. See also U.S. Dept. of Edu., Office of Special Edu. And Rehabilitative Services, Dear Colleague Letter (Dec. 5, 2014).

38. *See* 34 C.F.R. § 300.111(c)(2) (2018).

can encompass a variety of disabilities such as "learning disability," "emotional disturbance," and "other health impairment."[39] Children have the right to receive special education until age twenty-one, unless the state designates a different age through legislation.[40] Qualifying children with disabilities are entitled to receive a free, appropriate public education (often called FAPE) with their non-disabled peers to the "maximum extent appropriate."[41] This positive requirement for inclusion, where possible, is called the Least Restrictive Environment or LRE.[42]

Children receive special education services through an Individualized Education Plan (IEP),[43] which serves to document the services, placement, and accommodations provided to each child.[44] While IDEA does not define what an "appropriate" education looks like, the Supreme Court interpreted that requirement as requiring "an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[45] Children are also entitled to "related services," which can encompass a broad range of services for instance, "counseling services, . . . school health services and school nurse services, social work services in schools, and parent counseling and training."[46] Generally, the Local Education Agency (LEA), often the local school district, is responsible for carrying out the requirements of IDEA, including ensuring schools participate in child find, providing evaluations, and drafting IEP.[47]

Individuals enjoy significant legal protections under IDEA, including the right to a hearing in front of an administrative law judge or hearing officer to contest the services on IEP, and the right to appeal their decision to a state or federal court.[48] There are additional protections for children with IEPs. For instance, when schools

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39. 34 C.F.R. § 300.8(a)(1) (2018) ("Child with a disability means a child [with] an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services."); U.S. Dep't of Educ., Office of Special Educ. Programs, Letter on Criteria for Making Eligibility Determinations Under Part B of IDEA 2 (Nov. 28, 2007), https://www2.ed.gov/policy/speced/guid/idea/letters/2007-4/redact112807eligibility4q2007.pdf.

40. See 34 C.F.R. § 300.102(a)(1) (2018) ("The obligation to make FAPE available to all children with disabilities does not apply with respect to . . . Children aged 3, 4, 5, 18, 19, 20, or 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children of those ages.").

41. *See* 34 C.F.R. § 300.101 (2018).

42. *See* 34 C.F.R. § 114 (2018).

43. 34 C.F.R. § 300.321 (2018) (holding that a team of individuals with knowledge about the child develops the IEP, which typically includes the child's parents, teachers, a representative of the public agency, and sometimes the child.). See 34 C.F.R. § 300.320 (2018).

44. *See id.*

45. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). See also 34 C.F.R. § 300.39(b)(3) (2018) (holding that tThe IDEA requires "specially designed instruction" that adapts, "as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction . . .[t]o address the unique needs of the child that result from the child's disability; and [t]o ensure access of the child to the general curriculum").

46. 34 C.F.R. § 300.34(a) (2018).

47. 34 C.F.R. § 303.23(a) (2018) ("*LEA* means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.").

48. 20 U.S.C. § 1415(b)(6) (2010).

attempt to remove them from school for disciplinary reasons.[49] This Article does not outline the full range of protections and support IDEA offers to children. Nonetheless, it is important to note the protections and level of support that IDEA requires each state to provide children within its borders.[50]

IDEA has been revolutionary in ensuring most children with disabilities are given access to a free, appropriate public education.[51] However, in the context of immigration, the provision of education in general, and special education in particular, has not always been so successful.

II. IMMIGRATION, EDUCATION, AND THE AMERICAN COURTS

Children within the United States borders are entitled to many protections both within and outside the realm of education. As with the litigation surrounding the rights of individuals with disabilities, the judicial system has long been involved with immigration matters, including considering the scope of the rights of migrant children.[52] The following cases outline the relevant caselaw related to the provision of education to undocumented migrant children, and more broadly the rights of undocumented migrant children. These cases laid the foundation for the right of children to access education, regardless of immigration status, and placed restrictions on facilities holding children. Although many of these cases were decided thirty years ago, courts are still determining their reach and scope.[53]

A. Immigration Agencies

A brief review of the agencies involved in immigration is beneficial to understanding the rights of detained children in various facilities, including the length of detention and their rights to education while detained. When they first enter the United States, the United States Customs and Border Patrol (CBP) is in charge of the initial detention of children.[54] CBP facilities are legally able to hold unaccompanied children for seventy-two hours.[55] If children are detained along with a parent or guardian,[56]they are placed in "Family Residential Centers" (sometimes referred to as FRCs) overseen by the United States Immigration and Customs Enforcement agency (ICE).[57]

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49. 34 C.F.R. § 300.530(e) (2018).

50. With limited exceptions, including those outlined in this article.

51. *See* Nat'l Center for Educ. Stat., *supra* note 5, at 2.

52. *See, e.g. Plyler v. Doe*, 457 U.S. 202 (1982); *see, e.g. Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

53. *See, e.g. Rilr v. Johnson*, 80 F.Supp.3d 164 (2015); see, e.g. *Plyler v. Doe*, 457 U.S. 202 (1982).

54. *Id.*

55. 8 U.S.C. § 1232(a)(2), (b); Recent reports suggest that individuals are being held for longer than seventy-two hours. For the purpose of this article, I do not explore children in CBP custody in detail because they should not be in custody for longer than three days. However, it should be noted that the same arguments could be made for children in CBP custody who are held for long periods of time. *See* Abigail Hauslohner and Maria Sacchetti, *Hundreds of Minors Meld at U.S. Border Facilities are There Beyond Legal Time Limits*, Washington Post, (May 30, 2019), https://www.washingtonpost.com/immigration/hundreds-of-minors-held-at-us-border-facilities-are-there-beyond-legal-time-limits/2019/05/30/381cf6da-8235-11e9-bce7-40b4105f7ca0_story.html.

56. For the sake of brevity, I use the term "parent" to refer to a parent or legal guardian moving forward.

57. Linton, *supra* note 7, at 2. ICE is overseen by a different governmental agency than ORR

However, when children are "unaccompanied," they are detained by the Office of Refugee Resettlement (ORR),[58] which falls under the Department of Health & Human Services (HHS).[59] It bears mentioning that the term unaccompanied minor is sometimes a misnomer.[60] Unaccompanied minors are defined by the government as children who have "no lawful immigration status in the United States; . . . [have] not attained 18 years of age; and, . . . with respect to whom, there is no parent or legal guardian in the United States, or no parent or legal guardian in the United States is available to provide care and physical custody."[61] While some children travel across the border unaccompanied by parents, many enter the United States with an adult guardian or parents but are later separated.[62]

When children are detained separately from their parents, the government considers them "unaccompanied" regardless of who was present with them when they were detained.[63] As described in more detail in the following sections, the number of children separated from their parents is subject to increases based on immigration policies in place during their detention.[64]

When children are placed in immigration detention facilities, they receive education within the facility, not in local schools.[65] Thus, whether and how long children are detained can have a substantial effect on the way they receive education.

B. Plyler v. Doe

The courts have been instrumental in helping to determine many aspects of the detention of children. In perhaps the most important legal decision regarding migrant children's right to education, in *Plyler v. Doe,* the United States Supreme Court held that children could not be excluded from public education on the basis of their immigration status.[66] The class action arose out of a challenge to a Texas law that withheld state funds from school districts for any student who was not "legally admitted" to the United States. Under the same law, school districts were allowed to

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and is a component of DHS, the federal cabinet department in charge of enforcing immigration laws. Frequently Asked Questions, U.S. Immigrations and Custom Enforcement, https://www.ice.gov/careers/faqs (last updated Apr. 2, 2019); Unaccompanied Alien Children Information, U.S. Dep't of Health and Human Services, https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/index.html

58. "On March 1, 2003, the Homeland Security Act of 2002, Section 462, transferred responsibilities for the care and placement of unaccompanied alien children (UAC) from the Commissioner of the Immigration and Naturalization Service to the Director of the Office of Refugee Resettlement (ORR)." About the Program, Office of Refugee Resettlement, https://www.acf.hhs.gov/orr/programs/ucs/about

59. *Id.*

60. *See* John V. Kelly, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, OIG Rep.No. 18-84, at 3 (2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf.

61. *See* 6 U.S.C. § 279(g)(2); *see also* Press Release, Health and Human Services, Unaccompanied Alien Children Sheltered at Homestead Job Corps Site, Homestead, Florida (August 6, 2019), https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/homestead-job-corps-site-fact-sheet/index.html.

62. *See* Kelly, *supra* note 62, at 3.

63. *Id.*

64. *Id.*

65. Fact Sheet: Educational Services for Immigrant Children and Those Recently Arrived to the United States, U.S. Dep't of Educ., at 3, https://www2.ed.gov/policy/rights/guid/unaccompanied-children.pdf.

66. 457 U.S. 202 (1982).

refuse the enrollment of those students in public schools.[67] The law required these families to pay tuition to attend any public school within the state of Texas.[68] The plaintiffs were school-aged children from Mexico who were unable to provide documentation of their legal status and who had been denied entry to their local public school.[69] They sued the school superintendent, and the board of trustees of the school district, and the State of Texas intervened.[70]

At the lower courts, the District Court found for the plaintiffs, finding the law violated the Equal Protection Clause of the Fourteenth Amendment.[71] The court concluded that the law failed under even the rational basis test, and thus, it was unnecessary to determine whether the state action involved a suspect classification or could survive a stricter analysis.[72] The Fifth Circuit upheld the ruling on appeal.[73]

Plyler was not the only challenge to the Texas law. By 1979, several district courts had heard arguments challenging the law.[74] These arguments were consolidated into a single case, *In re Alien Children Education Litigation* in the District Court for the Southern District of Texas.[75] That court found that the law violated the Equal Protection Clause of the Fourteenth Amendment. The court went further than the other courts in finding "the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit."[76] While the defendant's appeal was pending, the Fifth Circuit rendered its verdict in *Plyler*.[77] Not soon after, the Court of Appeals affirmed the lower court's decision in *In re Alien Children*.[78] The defendants in both cases appealed to the Supreme Court, which granted cert and consolidated the cases.[79]

Defendants asserted that undocumented immigrants were not "persons within the jurisdiction" of the United States for the purposes of the Fourteenth Amendment, and therefore not entitled to protection.[80] The defendants argued that while other amendments delineate constitutional rights, the Fourteenth Amendment is the only with the limiting language "persons within the jurisdiction."[81] Looking to the plain language of the Equal Protection Clause, the Court rejected that argument and noted "an alien is surely a 'person' in any ordinary sense of that term."[82] The Supreme Court considered the fact that undocumented immigrants have long been guaranteed other

67. *Id.* at 205.

68. *Id.* at 216.

69. *Id.* at 205-06. The original plaintiff, Humberto Alvarez, agreed to file suit after the school district excluded his children from attending school, even though as one author noted: "Alvarez's decision required genuine bravery because he felt that doing so substantially increased the risk of deportation for him and his family." Justin Driver, The Schoolhouse Gate, Public Education, the Supreme Court, and the Battle for the American Mind 350 (Pantheon Books 2018).

70. *Plyler*, 457 U.S. at 205-06.

71. *Id.* at 207-08.

72. *Id.* at 208.

73. The Fifth Circuit disagreed, however, with the lower court's finding that the law was preempted by federal law. *Id.* at 208-09.

74. *Id.* at 209.

75. 501 F.Supp. 544 (1980).

76. *Id.* at 582.

77. *Plyler,* 457 U.S. at 210.

78. 501 F.Supp. 544.

79. *Plyler,* 457 U.S. at 210.

80. *Id.*

81. *Id.* at 211.

82. *Id.* at 210.

constitutional protections, including Fifth and Fourteenth Amendment due process protections. The Court also cited a Supreme Court decision that recognized the right of undocumented immigrants to protection from unlawful discrimination.[83]

Defendants attempted to distinguish these earlier cases by concentrating on the wording of the Equal Protection Clause, noting that it contains the limiting language: "within its jurisdiction."[84] Defendants asserted that the Due Process clauses found in the Fifth and Fourteenth Amendments contain no mention of that phrase, and thus the Equal Protection Clause should be treated differently.[85] The Supreme Court rejected this argument, finding no support in other Supreme Court cases. The Court stated, "[w]e have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process."[86]

The Court next turned to the history of the Equal Protection Clause. After looking to the congressional debates concerning the phrase, the Court noted that nothing in those debates supported defendants' arguments:[87]

> To permit a State to employ the phrase 'within its jurisdiction' in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment.[88]

The Court went on to consider undocumented immigrants in a broader context, noting that their entry to the country created an "underclass" of persons.[89] Undocumented immigrants were denied the societal benefits given to lawful residents and some were encouraged to remain in the country as a part of an inexpensive workforce.[90] Although the Court acknowledged that "those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences," the Court considered the unique position of children.[91] Notably, the Court recognized that children were unable to change their own status and were unable to prevent their parents from entering the country in the first place.[92]

Although the Supreme Court expressly declined to find a constitutional right to public education, it did distinguish education from many other types of social welfare offered to citizens:[93]

> Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic

83. *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67 (1976)).
84. *Id.*
85. *Id.*
86. *Id.* at 211-12.
87. *Id.* at 213.
88. *Id.*
89. *Id.* at 219.
90. *Id.*
91. *Id.* at 220.
92. *Id.*
93. *Id.* at 221.

> institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The 'American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." We have recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government,' and as the primary vehicle for transmitting 'the values on which our society rests.'[94]

The Court noted that denying this class of children access to an education created a barrier that prevented them from advancing based on their own merit, which the court held was contrary to the very purpose of the Equal Protection Clause. The Court stated, "[p]aradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise to the level of esteem in which it is held by the majority."[95] The Court continued:

> Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.[96]

Finally, the Court turned to the level of deference that should be given to the Texas law.[97] The Court held that undocumented status was not sufficient to qualify as a suspect class, "because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Therefore, 'to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to 'the purposes for which the state desires to use it . . . '"[98] Additionally, the Court took into account the fact that education is not a fundamental right.[99]

In conducting the rational basis review, the Court noted that it would be appropriate to consider "[the law's] costs to the Nation and to the innocent children who are its victims."[100] The state asserted several arguments as to why the law satisfied the rational basis test. They first argued that the State was attempting to protect themselves from an influx of undocumented immigrants and the resultant in economic burdens for the state.[101] The Court rejected this argument finding, "no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc."[102] The Court noted that there was no evidence that

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94. *Id.* (internal citations omitted).
95. *Id.* at 221-22.
96. *Id.* at 222.
97. *Id.* at 226.
98. *Id.* at 223, 226 (citing *Oyama v. California*, 332 U.S. 633, 664–65 (1948) (Murphy, J., concurring)).
99. *Id.* at 223.
100. *Id.* at 224.
101. *Id.* at 228.
102. *Id.*

undocumented immigrants were entering Texas to access a free education for their children, and charging tuition to these children would be a "'ludicrously ineffectual attempt to stem the tide of illegal immigration.'"[103]

The state's second argument centered around an alleged negative effect of undocumented immigration on the ability of the State to provide a high-quality education.[104] The Court rejected this argument, finding that nothing in the record supported that claim. "[E]ven if improvement in the quality of education were a likely result of barring some *number* of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are 'basically indistinguishable' from legally resident alien children."[105] The Court looked at the costs of denying these children an education, creating a "subclass" of uneducated individuals, which could have a negative effect on things like crime and employment. The Court found that these costs are not outweighed by the savings associated with denying these children an education.[106]

Plyler opened the door for many children to access public education. Although Texas was the only state to have enacted a law preventing undocumented children from attending public schools, the Supreme Court effectively prevented any other state from following suit:[107] As one author noted, "[a]lthough initially rejecting a policy located only in Texas, the decision has enjoyed broad applicability throughout the nation, and has served as a vital bulwark against widespread efforts to deprive unauthorized immigrants of access to education."[108]

C. The Flores Agreement

In addition to *Plyler*, other cases have also had an impact on the educational rights of migrant children as well as their rights while in detention.

In 1985, several advocacy groups filed a class action lawsuit challenging the detention standards for minors in Immigration and Naturalization Service (INS) custody,[109] *Jenny Lisette Flores, et al, Plaintiffs v. Janet Reno, Attorney General of the United States, et al.*.[110] The plaintiffs challenged a law that ". . . provide[d] for the release of detained minors only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances."[111] , Additionally, the law required an immigration judge to review custody and deportability only upon request by the child.

Plaintiffs asserted claims under the Fifth and Fourteenth Amendments.[112]

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103. *Id.*

104. *Id.* at 229.

105. *Id.* (emphasis in original).

106. *Id.* at 230.

107. Driver, *supra* note 71, at 353-4.

108. *Id.*

109. Although historically the Immigration and Naturalization Service addressed the care and placement of children who enter the United States without a guardian or parent, in 2003 that responsibility shifted to the Office of Refugee Resettlement ("ORR"), which falls under the Department of Health & Human Services (HHS). "Children's Affairs" Homeland Security Act of 2002, Pub. L. No. 107–296, § 462, 116 Stat. 2135 (2002); *see also supra note 61*.

110. Stipulated Settlement Agreement at 1, Flores v. Reno, No. CV-85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997) [hereinafter "Flores Settlement"].

111. Reno v. Flores, 507 U.S. 292, 292 (1993).

112. *Id.* at 301. Children come into ORR custody in one of two ways – either by being

Plaintiffs opposed the requirement that migrant children could only be released to their families or legal guardians, asserting that they had the right to be released to "responsible adults" pending resolution of their deportation cases.[113] Additionally, Plaintiffs asked the court to recognize the right of all juveniles to a deportability and custody determination by an immigration judge independent of an affirmative request.[114]

The Supreme Court rejected the plaintiffs' argument, stating:

> Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in preserving and promoting the welfare of the child, and is not punitive since it is not excessive in relation to that valid purpose.[115]

The Court similarly rejected plaintiffs' argument that the government should conduct a hearing utilizing a "best interests of the child standard" to determine whether private placement or placement with a responsible adult is appropriate.[116]

The Court noted that the case did not involve a fundamental right, but rather the "impairment of a lesser interest (i.e. the alleged interest in being released into the custody of strangers)"[117]

> [N]arrow tailoring is required only when fundamental rights are involved. The impairment of a lesser interest . . . demands no more than a "reasonable fit" between governmental purpose (here, protecting the welfare of the juveniles who have come into the Government's custody) and the means chosen to advance that purpose. This leaves ample room for an agency to decide, as the INS has, that administrative factors such as lack of child-placement expertise favor using one means rather than another. There is, in short, no constitutional need for a hearing to determine whether private placement would be better, so long as institutional custody is (as we readily find it to be, assuming compliance with the requirements of the consent decree) good enough.[118]

In finding that the regulation had a "reasonable foundation," the Court noted that, although the policy may be tied to administrative convenience or efficiency, the underlying purpose of the policy was "to protect 'the welfare of the juvenile, and there is no basis for calling that false.'"[119] Although the plaintiffs raised concerns that this

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apprehended while crossing the border, or by being apprehended while already in the United States. See Fact Sheet: Unaccompanied Alien Child Shelter at Homestead Job Corps Site, Homestead, Florida at p. 3, hhs.gov , https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Sheltered-at-Homestead.pdf (last visited Aug. 6, 2019).

113. Flores, 507 U.S. at 301.

114. *Id.*

115. *Id.* at 303 (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

116. *Id.* at 303-304.

117. *Id.* at 305.

118. *Id.*

119. *Id.* at 311 (citing 53 Fed. Reg. 17449-01 (May 17, 1988) (codified at 8 C.F.R. pts. 212, 242).

interpretation could result in juveniles being held in INS custody for significant periods of time, the court found that the deportation hearing provided a sufficient limit.[120]

Plaintiffs also asserted a procedural due process claim, arguing the children should be entitled to an automatic hearing on deportability and custody, rather than having to affirmatively request such a hearing.[121] The Court also rejected this argument.[122] The Court compared the situation to similarly aged children waiving their right against self-incrimination:[123] "We have held that juveniles are capable of 'knowingly and intelligently' waiving their right against self-incrimination in criminal cases. The alleged right to redetermination of prehearing custody status in deportation cases is surely no more significant."[124]

The Supreme Court remanded the case to the lower courts for further proceedings consistent with the opinion.[125] Ultimately, after eleven years of litigation, and possibly as a result of shifting immigration policy, the parties settled the case to avoid further litigation.[126] The settlement was memorialized in a document that is now commonly referred to as the "Flores Agreement."[127]

The Flores Agreement outlines the government's obligations toward any minor detained by INS.[128] Broadly, it requires that the government place children in "the least restrictive setting appropriate to the minor's age and special needs . . .,"[129] and requires the government to release minors "without unnecessary delay," prioritizing release to family members or legal guardians, which at least one court has held can be up to 20 days.[130] Additionally, all facilities holding minors must be licensed by the state. Although the Flores Agreement covers many aspects of juvenile detention, its mention of children's educational rights is of special importance to this article.[131] The Agreement requires that, upon intake, each facility provide "[a]n individualized needs assessment which shall include . . . an educational assessment and plan . . . ."[132] The facility must also provide:

> Educational services appropriate to the minor's level of development, and communication skills in a structured classroom setting, Monday through Friday, which concentrates primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). The educational program shall include instruction and educational and other reading materials

120. *Id.* at 314.

121. *Id.* at 306.

122. *Id.* at 309.

123. *Id.*

124. *Id.* at 309 (citing *Fare v. Michael C.*, 442 U.S. 707, 724–727 (1979)).

125. *Id.* at 315

126. Miriam Jordan, Judge Blocks Trump Administration Plan, N.Y. Times (Aug. 20, 2019); *see also supra* note 112.

127. Flores Settlement*, supra* note 112.

128. "The term 'minor' shall apply to any person under the age of eighteen (18) years who is detained in the legal custody of the INS." *Id*. at 2.

129. The term "special needs" is used in the Flores Agreement in a broader context, and should be distinguished from the phrase as used in special education.

130. See *Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015), aff'd in part, rev'd in part and remanded, 828 F.3d 898 (9th Cir. 2016).

131. *Id.* at 6.

132. *Id*.

> in such languages as needed. Basic academic areas should include Science, Social Studies, Math, Reading, Writing and Physical Education. The program shall provide minors with appropriate reading materials in languages other than English for use during the minor's leisure time.[133]

The Flores Agreement also requires a "special needs" assessment upon entering the facility, which encompasses any special needs a minor may have and is not specific to the minor's education-related disability or corresponding needs.[134]

1. Enforcement of the Flores Agreement

The Flores Agreement has, in many ways, become the touchstone for the basic rights afforded to undocumented minors in federal custody.[135] Since its creation, there have been multiple lawsuits seeking judicial interpretation and enforcement of the Flores Agreement, many of which relate to children's educational rights or their right to be released from detention facilities.[136] These cases have largely arisen when the government issued new policies affecting minors in custody.[137]

For instance, in *Rilr v. Johnson*, plaintiffs challenged a policy instituted just one year earlier by ICE, which sought to utilize indefinite detention of families to deter other individuals from considering unauthorized immigration.[138] In finding for the plaintiffs, the Supreme Court held that "one particular individual may [not] be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration."[139] Following this decision, in May 2015, ICE announced that it was abandoning the policy.[140]

In another case brought under the Flores Agreement, *Flores v. Lynch*, the Ninth Circuit considered whether children detained with their mothers were protected by the Flores Agreement.[141] When ICE instituted a policy of detaining mothers with their children in unlicensed facilities pending the determination of whether they could remain in the United States, it created, in effect, two classes of minors: unaccompanied minors subject to the Flores Agreement and minors accompanied by their mothers who are not subject to the agreement's protections.[142] The Ninth Circuit analyzed the Flores Agreement, and "[a]pplying familiar principles of contract interpretation, . . . conclude[d] that the Settlement unambiguously applies both to accompanied and unaccompanied minors, but does not create affirmative release rights for parents."[143]

More recently, in 2017, plaintiffs filed a motion to enforce the Flores

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133. *Id.* at 15-16.

134. However, a minor's "special needs" in this context may have an impact on their ability to access education. In this way, the "special needs" assessment is a potential means of early identification of an education-affecting disability.

135. *See, e.g.,* Rilr v. Johnson*,* 80 F. Supp. 3d 164 (D.D.C. 2015); Flores v. Lynch, 828 F.3d 898, 904 (9th Cir. 2016).

136. *Id*.

137. *See, e.g*., Flores Settlement*, supra* note 112*; Rilr,* 80 F. Supp. 3d 164; *Flores,* 828 F.3d at 904.

138. 80 F. Supp. 3d at 188.

139. *Id.* at 188-89

140. *Flores,* 828 F.3d at 904.

141. *Id.*

142. *See id*.

143. *Id.* at 901

Agreement, claiming that government had breached the agreement by, among other things, "detaining class members for weeks or months in secure, unlicensed facilities; . . . commingling class members with unrelated adults for extended periods . . ."[144] The United States District Court for the Central District of California found that the defendants were not in substantial compliance with the order.[145] Important to this Article, the court held that, "[e]ven using Defendants' own numbers, a significant number of detainees still remained in detention for over 20 days . . . ."[146]

While the average number of days that a child remains in these facilities is explored in more detail later in this article, it is worth noting that, despite the parameters of the Flores Agreement, there are other ongoing issues with compliance.[147] Such challenges to the terms of the Flores Agreement highlight how shifting immigration policy can have profound effects on detention standards and the children subject to them.[148]

2. DHS Seeks to Terminate the Flores Agreement

The Flores Agreement cannot be terminated until the government publishes regulations that implement its terms.[149] In August 2019, DHS announced a rule intended to end the government's ongoing requirement to fulfill the Flores Agreement.[150] While some aspects of the Flores Agreement are incorporated into the rule, two critical aspects are missing.[151] First, the rule exempts Family Residential Centers from any state licensing requirement, instead creating a federal licensing scheme.[152] Second, the rule places no restriction on the detention of minors with their families, allowing the government to indefinitely detain them.[153] As of the date of this article's publication, nineteen states have brought lawsuits challenging the rule.[154]

III. CHILDREN AND THE AMERICAN IMMIGRATION SYSTEM

The immigration system in America has changed throughout the nation's

144. *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1048 (C. D. Cal. 2017).

145. *Id.* at 1070.

146. *Id.*

147. *See U.S. Dep't of Justice, Office of the Inspector Gen., I-2001-009,* Unaccompanied Juveniles in INS Custody (2001) (available at https://oig.justice.gov/reports/INS/e0109/chapter1.htm.

148. Additionally, as one organization has noted, "Congress, for its part, could largely override the *Flores* Settlement legislatively, although constitutional considerations relating to the rights of aliens in immigration custody may inform the permissible scope and effect of such legislation."). Sarah Herman Peck & Ben Harrington, The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions, 304, Congressional Research Service (updated September 17, 2018) (available at:,:https://trac.syr.edu/immigration/library/P15169.pdf).

149. Stipulation Extending Settlement Agreement at 1, Flores v. Reno, No.CV 85-4544-RJK (Px) (C.D. Cal. Dec. 7, 2001).

150. U.S. Dep't of Homeland Security, *Acting Secretary of Homeland Security Kevin K. McAleenan on the DHS-HHS Federal Rule on Flores Agreemen*t, (Aug. 21, 2019), https://www.dhs.gov/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-rule-flores-agreement.

151. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 FR 44392, 44403 (Aug. 23, 2019) (codified at 8 CF.R. pts. 212, 236; 45 C.F.R. 410).

152. *Id.* at 44392.

153. *Id.* at 44403.

154. Kathleen Ronayne, *19 States Sue Over Trump's Rule Change on Migrant Detention*, PBS (Aug 26, 2019), https://www.pbs.org/newshour/nation/19-states-sue-over-trumps-rule-change-on-migrant-detention.

history.[155] While children are usually treated differently than adults, shifting immigration policy can nonetheless have a significant effect on them, in particular on the length of time they are detained and whether they remain with their families. As explored in more detail in later sections, the length of time they are held for and where they are held can have profound effects on their access to education.

A. ORR Custody: Unaccompanied Minors and "Zero Tolerance" Separation

Policies formally in place from approximately April 6, 2018[156] to June 20, 2018[157] resulted in an increase of minors separated from their parents after entering the United States. For instance, the "zero tolerance" policy established by President Donald Trump caused parents to be referred for criminal prosecution and placed in federal custody while awaiting criminal deportation proceedings.[158] Children were then separated from their parents and detained in different shelters thereby becoming "unaccompanied minors." [159]

As the DHS Office of Inspector General observed in investigating the policy, "[t]he Zero Tolerance Policy . . . fundamentally changed DHS' approach to immigration enforcement. . . . Because minor children cannot be held in criminal custody with an adult, alien adults who entered the United States illegally would have to be separated from any accompanying minor children when the adults were referred for criminal prosecution."[160]

The American Civil Liberties Union filed a lawsuit challenging the policy , in what is commonly referenced as "Ms. L v. ICE," on behalf of the first plaintiff, a mother separated from her six year old child for five months.[161] While the lawsuit was pending, and after facing several legal challenges as well as political backlash to the separation of families, President Trump signed an executive order retracting the policy on June 20, 2018.[162] Less than a week later, on June 26, 2018, the U.S. District Court for the Southern District of California ruled in favor of the plaintiffs and issued an injunction to cease the practice of family separation under the zero tolerance policy.[163]

The actual dates through which the policy remained in effect are still debated. For instance, ORR reports mention family separation before April 2018.[164]Additionally, there are reports of more than 700 children separated from their

155. *See, e.g.,* D'vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, Pew Research Center (Sept. 30, 2015), https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/.

156. Office of the Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border (2018)., :

157. Exec. Order No. 13841, 83 FR 29435 (June 20, 2-18).

158. Kelly*, supra* note 62, at 3.

159. *Id.*; 6 U.S.C. § 279(g)(2)(c)(ii).

160. Kelly, *supra* note 62, at 3.

161. *Ms. L v. United States Immigration and Customs Enf't,* 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

162. D'vera Cohn, *supra* note 160; Congressional Research Service, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy*, R45266, at 9 (database updated February 26, 2019), https://fas.org/sgp/crs/homesec/R45266.pdf.

163. *Order Granting Plaintiffs' Motion for Classwide Preliminary Injunction, Ms. L v. ICE,* No.18-cv-00428-DMS-MDD, (S.D. Cal. June 26, 2018).

164. U.S. House of Representatives, Child Separations by the Trump Administration(July 2019), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf. Other policies contribute to the

parents between June 2018 and July 2019.[165]

ORR Officials estimate thousands of children were separated under this policy, with 2,737 remaining in ORR custody as of June 26, 2018.[166] However, calculating the number of children separated from their families under the zero tolerance policy is difficult, in part because of a ". . . lack of integration between CBP's, ICE's, and HHS' respective information technology systems . . . . As a result, DHS has struggled to provide accurate, complete, reliable data on family separations and reunifications, raising concerns about the accuracy of its reporting."[167]

The data used in this article reflects the increased number of children identified as unaccompanied under this policy and placed in ORR custody. This Article does not explore family separation in considerable detail; however, family separation is relevant to calculate the number of children in ICE or ORR custody. It is also relevant to calculate how long children remain in custody and how long they remain outside of local schools. Perhaps more importantly, the "zero tolerance policy" demonstrates how the constantly shifting approach to immigration can create significant changes for children in detention facilities. The ever-shifting nature of policies surrounding child detention is yet another reason why clear and enforceable protections for detained children are of paramount importance.

B. Days in Custody

The time spent in these facilities can be substantial, with some children spending months in government detention. The length of time minors spend in custody can change depending on which facility they are detained in, policy changes, and immigration patterns.

1. Customs and Border Patrol

Based on data released by CBP, there has been an increase in the apprehension of families in recent years due, in part, to the "zero tolerance" policy.[168] For the 2019 fiscal year, CBP reported that the number of families crossing the border increased by 600%:[169] "[In 2019], 60% of apprehensions along the Southwest border

length of time children remain in these facilities. For instance, HHS began requiring fingerprinting and background checks for all potential sponsors of unaccompanied children. Administration for Children and Families, Office of Refugee Resettlement, *Fact Sheet – December 2018, Subject: Unaccompanied Alien Children Program*, 2 (database updated December, 2018), https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied_alien_children_program_fact_sheet_december_2018.pdf. Many potential sponsors failed to come forward for fear of being deported. HHS abandoned this policy in December 2018 after it found that the additional measures did not contribute to the safety of the children in HHS custody. *Id.*

165. *Id.*

166. U.S. Dep't of Health & Human Services, OEI-BL-18-00511, Office of Inspector General: *Separated Children Placed in Office of Refugee Resettlement Care,* 1 (Jan. 17, 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf.

167. Kelly, *supra note 62, at 9.* Further, many children are transferred between facilities, including children who reach the age of 18 and are transferred to ICE custody. *See* John Burnett, *Migrant Youth Go From A Children's Shelter To Adult Detention On Their 18th Birthday*, NPR (Feb. 22, 2019), https://www.npr.org/2019/02/22/696834560/migrant-youth-go-from-a-childrens-shelter-to-adult-detention-on-their-18th-birth.

168. Karen Tandy et al., Homeland Security Advisory Council Final Emergency Interim Report CBP Families and Children Care Panel,at 1 (April 16, 2019), https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

169. *Id.*

are family units and unaccompanied children. . . ."[170] For 2018, CBP estimated that it detained 137 children per day on the Southwest border.[171]

According to CBP, although CBP is only legally authorized to hold children for up to seventy-two hours,[172] this increase in detained families has resulted in children being kept in CBP custody for longer than seventy-two hours.[173] Reports detail many children are held by CBP for "extended periods" in short-term facilities before being transferred, with one child detained for twenty-five days.[174]

2. Office of Refugee Resettlement

HHS has recently increased ORR's capacity to hold unaccompanied children due to an increase in its detention of children, including the creation of two temporary emergency influx shelters—re-opening one in Homestead, Florida, and creating one in Tornillo, Texas. [175] According to HHS, at this time there are over one-hundred ORR facilities for unaccompanied minor children in seventeen different states.[176] One estimate places the total capacity of these facilities at 15,000 children.[177]

ORR estimates that unaccompanied children spent approximately eighty-nine days in custody during the first quarter of the 2019 fiscal year,[178] an increase from the

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170. U.S. Customs and Border Protection, *CBP Releases March Statistics for Southwest Border Migration*
(Release Date: April 9, 2019) https://www.cbp.gov/newsroom/national-media-release/cbp-releases-march-statistics-southwest-border-migration.

171. U.S. Customs and Border Protection, *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018*, 2 (Oct. 23, 2018), https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions.

172. 8 U.S.C. § 1232(a)(2)(b). Recent reports suggest that individuals are being held for longer than seventy-two hours. For the purpose of this article, I do not explore children in CBP custody in detail because they should not be in custody for longer than three days. However, it should be noted that the same arguments could be made for children in CBP custody who are held for long periods of time. *See* Abigail Hauslohner and Maria Sacchetti, *Hundreds of minors held at U.S. border facilities are there beyond legal time limits*, Washington Post, (May 30, 2019), https://www.washingtonpost.com/immigration/hundreds-of-minors-held-at-us-border-facilities-are-there-beyond-legal-time-limits/2019/05/30/381cf6da-8235-11e9-bce7-40b4105f7ca0_story.html.

173. *See* 8 U.S.C. § 1232(a)(2)(b); Homeland Security Advisory Council, *Final Emergency Interim Report CBP Families and Children Care Panel*, 6 (April 16 , 2019),
https://www.dhs.gov/sites/default/files/publications/19_0416_hsac-emergency-interim-report.pdf.

174. Kelly, *supra note 62,* at 4-8 ("The OIG team determined that CBP exceeded the 72-hour period in many instances. Data provided by CBP to OIG indicates that, during the week of the OIG's fieldwork (June 25 to June 29, 2018), 9 out of the 21 unaccompanied alien children (42 percent) who approached the ports of entry visited by OIG were held for more than 72 hours. The data further indicates that 237 out of 855 unaccompanied alien children (28 percent) apprehended by Border Patrol between ports of entry were detained for more than 72 hours at the facilities the OIG team visited. Although the average length of time unaccompanied alien children spent in custody during this period was 65 hours, one unaccompanied alien child remained in custody for 12 days (over 280 hours))." For example, one CBP facility held 564 children over the authorized seventy-two hour period, with one child held for twenty-five days. *Id. See also* Jennifer L. Costello, Management Alert – *DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley* (Redacted), Office of the Inspector General, 2-3 (July 02, 2019).

175. *Id.*

176. U.S. Office of Health and Human Services, Frequently Asked Questions Regarding Unaccompanied Minors, https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/faqs/index.html.

177. John Burnet, *Almost 15,000 Migrant Children Now Held At Nearly Full Shelters*, National Public Radio, https://www.npr.org/2018/12/13/676300525/almost-15-000-migrant-children-now-held-at-nearly-full-shelters.

178. Congressional Research Service, *Unaccompanied Alien Children: An Overview*, at 23 (Updated October 9, 2019), https://fas.org/sgp/crs/homesec/R43599.pdf.

2018 fiscal year, where ORR estimated children spent sixty days in their custody.[179] Other calculations place "the median length of detention [at] 154 days" as of October 15, 2018,[180] with some children detained for over one and a half years.[181]

3. Immigration and Customs Enforcement

ICE utilizes two facilities to hold children with their families, the South Texas Family Residential Center and the Berks Family Residential Center.[182] The South Texas facility is the largest, able to hold 2,400 individuals,[183] and the Berks facility can hold up to ninety-six individuals.[184] One additional facility, the Karnes County Residential Center, previously held families but was temporarily converted to an adult facility in early 2019.[185] ICE recently announced plans to resume detaining minors with their families.[186]

The number of days that children spend in ICE custody has changed over time, largely affected by both policy shifts and, more recently, legal challenges to these policies.[187] Children spent, on average, 46.7 days in ICE custody in 2014, but that number dropped significantly in 2016 to 13.6 days and has stayed around that number since that time.[188] This was largely the result of a court decision that limited the number of days a minor could be detained in a Family Residential Center, which was explored in more detail in the prior sections.[189]

These numbers can change based on the facilities alone. For example, in July 2016 "most families in Berks were detained for more than 6 months . . ."[190] One inspection found approximately 25 percent of families were detained for more than ten days at Karnes and Dilley.[191] Some children who were initially separated from their

179. Office of Refugee Resettlement, Facts and Data, General Statistics Data provided by fiscal year (October 1–September 30), https://www.acf.hhs.gov/orr/about/ucs/facts-and-data; U.S. Department of Health and Human Services FACT SHEET Unaccompanied Alien Children (UAC) Program, (Aug. 2019) https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf.

180. American Civil Liberties Union, *Family Separation by the Numbers*, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation.

181. Child Separations by the Trump Administration, *supra* note 168, at 17.

182. *Id.*

183. U.S. Immigration and Customs Enforcement, South Texas Family Residential Center (Feb. 15, 2019), https://www.ice.gov/factsheets/south-texas-family-residential-center.

184. Justice for Immigrants, *Family Detention*, https://justiceforimmigrants.org/wp-content/uploads/2019/02/Family-detention-backgrounder-2.5.19.pdf.

185. Federal Register / Vol. 84, No. 164 / Friday, August 23, 2019 / Rules and Regulations 44501.

186. *See* Maria Sacchetti*, ICE to resume detaining migrant families at Texas facility*, Washington Post (Sept. 21, 2019), https://www.washingtonpost.com/politics/ice-to-resume-detaining-migrant-families-at-texas-facility/2019/09/21/0b3207e8-dcb5-11e9-bfb1-849887369476_story.html.

187. *See Flores v. Lynch*, 828 F.3d 898, 904 (9th Cir. 2016).

188. *See* Federal Register, Proposed Rules, Vol. No. 174.

189. *Id.*

190. John Roth, *Results of Office of Inspector General FY 2016 Spot Inspections of U.S. Immigration and Customs Enforcement Family Detention Facilities*, Office of Inspector General, OIG-17-65 (June 2, 2017),
https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-65-Jun17.pdf?utm_source=E-mail+Updates&utm_campaign=e1d1c3e779-EMAIL_CAMPAIGN_2017_06_16&utm_medium=email&utm_term=0_7dc4c5d977-e1d1c3e779-45096257, 3.

191. *Id.*

parents and placed in ORR custody were placed in ICE detention after reunification.[192] According to one calculation,

> [e]ven after they were reunited with their parents, hundreds of children continued to be detained for weeks or months in ICE family detention at the Dilley and Karnes facilities in Texas. Approximately 385 of the 2,648 separated children included in the data were reunited with their families in ICE family detention. Most of them were held longer than 20 days—which courts have held is the legal limit under the Flores settlement.[193]

Families remained in detention for around fifty-eight days on average, however "[m]any families remained in detention for several months, with approximately seventy-five families in detention for 3-4 months and approximately thirty families in detention for 4-5 months."[194]

C. Emergency Influx Care Facilities and The Federal Land Exception

There is one additional kind of detention facility for children. When detention facilities are full, ORR moves children into Emergency Influx Care Facilities.[195]

> During an influx of [unaccompanied children], ORR may lack sufficient capacity to place the children within its established licensed care provider network. In that situation, ORR arranges for influx care facilities to meet the need. An influx care facility provides temporary emergency shelter and services for UAC [unaccompanied alien children] during an influx or emergency.[196]

ORR has operated two of these facilities—Homestead and Tornillo.[197]

Two important differences mark these facilities—their presence on federal land, and their designation as "temporary emergency influx" or "emergency influx care" facilities.[198] As a result of the differences from other facilities, ORR has consistently taken the position that these facilities are not required to comply with state law or the state licensure requirement required by the Flores Agreement:[199]

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192. U.S. Dept. of Homeland Security, Fact Sheet: Zero-Tolerance Prosecution and Family Reunification (June 23, 2018), https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification.

193. Child Separations by the Trump Administration, *supra* note 168, at 18.

194. *Id.*

195. Lynn Johnson, Memorandum The Tornillo Influx Care Facility: Concerns About Staff Background Checks and Number of Clinicians on Staff (A-12-19-20000), Department of Health and Human Services, Office of Inspector General, 2 (November 27, 2018), https://oig.hhs.gov/oas/reports/region12/121920000.pdf.

196. *Id.*

197. *Id.* at 3 n. 6.

198. *Id.* at 2-3; *Unaccompanied Alien Child Shelter at Homestead Job Corps Site, Homestead, Florida*, Health and Human Services, p. 3 (August 6, 2019) ("Homestead operates as a temporary influx care facility on federal property and therefore is not required to obtain a license from state of Florida to operate. It is, however, subject to all applicable federal regulations and ORR policies and procedures."), https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/homestead-job-corps-site-fact-sheet/index.html.

199. *Id.*

> Because of the temporary and emergency nature of influx care facilities, they may not be licensed or they may be exempt from licensing requirements. In addition, influx care facilities like Tornillo may be opened on federally owned or leased properties, in which case the facility is not subject to State or local licensing standards.[200]

The Homestead facility sits on federal land in Homestead, Florida.[201] The facility was initially utilized as a Jobs Corps facility until August 2015.[202] It was then converted into a shelter for unaccompanied minors in June 2016 and temporarily closed in April 2017.[203] By the next year, "[i]n February 2018, state and local community leaders were notified about the re-activation of the Homestead shelter. . . . Since March 2018 over 14,300 UAC have been placed at the shelter."[204] However, HHS claims that "[a]s of August 3, 2019 no UAC are sheltered at the Homestead facility."[205] Although HHS did not provide data on how long children remained in Homestead, they noted in April 2019 that unaccompanied children "discharged from the Homestead facility in the last 30 days remained in care on average for 52 days."[206] However, HHS itself noted that "[t]his number is subject to change frequently based on many factors."[207]

The only similar facility was Tornillo. Often referred to as a "tent-city," this facility consisted of "a semi-permanent structure, meaning it [wa]s devoid of permanent infrastructure, such as fixed facilities for housing, dining, and toileting, and all utilities. To provide for the UAC's basic needs, Tornillo use[d] soft-sided structures and portable sanitation, restroom, and laundry facilities."[208] While Tornillo was intended to serve as a temporary shelter, it stayed open for over six months.[209] The government claimed that "[t]he need to continue the temporary operation at Tornillo [was] based on the number of UAC in ORR care."[210]

ORR estimated that "[a]s of December 25, 2018, there were about 2,300 UAC, ages 13-17, residing at Tornillo. . . . UAC spen[t], on average, thirty-six days at Tornillo."[211] The facility closed in January 2019 after the CEO of the organization refused to continue operating. The organization noted increased delays in releasing

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200. Lynn Johnson, *supra* note 197, at 2,

201. *No Home for Children: The Homestead "Temporary Emergency" Facility*, Amnesty International, at 2-3 (2019) https://www.amnestyusa.org/wp-content/uploads/2019/07/Homestead-Report_1072019_AB_compressed.pdf.

202. *See Fact Sheet*, *supra* at n. 200.

203. *Unaccompanied Alien Children sheltered at Homestead Job Corps Site, Homestead, Florida*, Health and Human Services (Aug. 6, 2019).

204. *Id.*

205. *Id.*

206. No Home for Children, *supra* note 203, at 18.

207. FACT SHEET Unaccompanied Alien Child Shelter at Homestead Job Corps Site, Homestead, Florida, Health and Human Services (July 22, 2019), https://media.local10.com/document_dev/2019/08/03/Unaccompanied-Alien-Children-Sheltered-at-Homestead_22149460_ver1.0.pdf.

208. Johnson, *supra* note 197, at 2.

209. Joshua Barajas, *All migrant children to be moved from Tornillo, once the largest U.S. shelter for migrant children*, PBS News Hour (Jan 11, 2019), https://www.pbs.org/newshour/nation/all-migrant-children-to-be-moved-from-tornillo-once-the-largest-u-s-shelter-for-migrant-children.

210. *Id.* at 3.

211. *Id.*

children to sponsors as well as continued requests by President Trump to expand the facility.[212] The children in the facility were either transferred to other facilities or released.[213]

It is unclear if any similar facilities, operating on federal land and outside of state law, may open in the future. For instance, in March 2019, news outlets began to report that the Department of Defense agreed to work with HHS to provide facilities to house unaccompanied minors.[214] This is again, an area where the rapidly changing landscape can have a profound effect on children.

IV. THE EDUCATIONAL RIGHTS OF CHILDREN IN CUSTODY

Plyler and the Flores Agreement made clear that children held by federal authorities in ICE and ORR facilities have a right to an education, regardless of their immigration status. The parameters of what encompasses that education, however, are less clear.

A. Education in ORR Detention Facilities

Each agency publishes their own guides that detail the rules and outline the programs offered within the facilities. According to the ORR Guide to Children Entering the United States Unaccompanied (the ORR Guide), children in ORR custody have the right to "an educational assessment within seventy-two-hours of [their] admission into the facility in order to determine the academic level [they are at] and any particular needs he or she may have . . . ."[215] This guide states that ORR facilities must provide "educational services based on the individual academic development, literacy level, and linguistic ability of each unaccompanied alien child."[216] Children must receive "structured education" for six hours each day, Monday through Friday.[217] Children in ORR facilities are not enrolled in local schools—instead, they are educated by staff from within the facilities or individuals who have contracted with the facilities.[218]

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212. *See* Joshua Barajas, *All migrant children to be moved from Tornillo, once the largest U.S. shelter for migrant children*, PBS News Hour (Jan 11, 2019), https://www.pbs.org/newshour/nation/all-migrant-children-to-be-moved-from-tornillo-once-the-largest-u-s-shelter-for-migrant-children; Federal Register, Rules and Regulations, Vol. 84, No. 164, 44440 (Friday, Aug. 23, 2019), https://www.govinfo.gov/content/pkg/FR-2019-08-23/pdf/2019-17927.pdf.

213. *Id.*

214. Ellen Mitchell, *Trump administration asks Pentagon to house up to 5,000 migrant children*, The Hill (March 7, 2019), https://thehill.com/policy/defense/433118-trump-administration-asks-pentagon-to-house-up-to-5000-migrant-children.

215. U.S. Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 3 Services*, section 3.3.5 (April 24, 2017), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.3.5.

216. *Id.*

217. *Id.*

218. U.S. Department of Education, *Fact Sheet: Educational Services for Immigrant Children and Those Recently Arrived to the United States*, 3, https://www2.ed.gov/policy/rights/guid/unaccompanied-children.pdf;
As noted by the US Department of Education: "[t]he children are provided with basic education services and activities by HHS grantees. Thus, these children do not enroll in local schools while living in HHS shelters."

Additionally, ORR standards require "[c]are providers[219] adapt or modify local educational standards to develop curricula and assessments, based on the average length of stay for UAC at the care provider facility, and provide remedial education and after school tutoring as needed. Learning materials must reflect cultural diversity and sensitivity."[220] Under these standards, each child must be placed into a class "according to their academic development, level of literacy, and linguistic ability rather than by chronological age."[221] Care providers must create academic progress reports and notes, which may be transferred to another care facility or given to the child upon release from the facility.[222]

The ORR Guide does not reference IDEA.[223] In terms of special education, the ORR Guide notes that: "[u]nder the terms of the Flores Settlement Agreement, care providers must offer the following minimum services for each unaccompanied alien child in their care: . . . individualized needs assessment which includes . . . identification of the unaccompanied alien child's special needs including any specific problems which appear to require immediate intervention, an educational assessment and plan . . ."[224] While the assessment of a child's special needs may necessarily involve consideration of how those needs may affect their education, this is not made explicit in the ORR Guide.

B. Education in ICE Detention Facilities

As ICE itself notes, "the practice of detaining migrating families has presented FRCs with an unfamiliar challenge of providing an education for children apprehended with their parents."[225] Nonetheless, the educational offerings in FRCs mirror those in ORR facilities in many ways. According to the ICE Family Residential Standard, within three days of arriving at the facility, children must be given an "Individual Educational Assessment." Children are also entitled to "a minimum of one-hour daily instruction in each of the core subjects, Monday through Friday, on a year-round schedule."[226] As with children detained in ORR facilities, children in ICE Family Residential Centers are not enrolled in local schools but are educated within the facilities.[227]

In terms of special education, however, the ICE Family Residential Policy differs from the ORR Guide in that it specifically references IDEA.[228] As explored in more detail in the following section, the ICE Family Residential Policy explicitly contemplates robust LEA involvement with the special education process, in line with

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219. "Care Provider – A care provider is any ORR funded program that is licensed, certified or accredited by an appropriate State agency to provide residential care for children, including shelter, group, foster care, staff-secure, secure, therapeutic or residential treatment care for children." *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *See id.*

224. In this context, "special needs" appears to encompass more than educational special needs but also more generally a disability, mental health issue, or any other unique needs of a child. *Id.*

225. https://www.ice.gov/sites/default/files/documents/Report/2016/AC.F.R.C-sc-16093.pdf, 54.

226. U.S. Immigration and Customs Enforcement, *ICE Family Residential Standard Educational Policy*,
Section 2:1, p. 1, https://www.ice.gov/doclib/dro/family-residential/pdf/rs_educational_policy.pdf.

227. U.S. Office of Refugee Resettlement, *supra* note 220.

228. *ICE Family Residential Standard Educational Policy*, *supra* note 231, at 8-9.

IDEA:

> Facility Staff will fill out the Preliminary Questions section of the Educational Services Eligibility Worksheet Form for each person for whom it seeks the assistance of the LEA and deliver or make the form available to LEA within 2 days. In addition, Facilities will develop and implement a public awareness effort that focuses on the early identification of children who are eligible for services.[229]

Referencing IDEA,[230] ICE detailed the special education requirements, including routine screenings that utilize standards promulgated by the LEA, which grant LEA staff access to students for assessments and instruction, as well as access to student records.[231] It further requires that all staff "assure procedural safeguards required by IDEA are follow[ed] on all matters on which LEA's assistance has been requested . . ." and that facility staff must "coordinate with the LEA to provide for the education and related services for eligible students . . . ."[232]

1. The Anderson Letters

While ICE appears to recognize the rights of children as the protections and services of IDEA, their policy may be misleading regarding the legal rights of these children and how education is actually offered within these facilities. One state, Texas, sought clarification on the educational rights of children in ICE facilities.

It is not uncommon for government agencies to seek clarification on IDEA from the United States Department of Education. Often these inquiries come in the form of letters to the U.S. Department of Education's Office of Special Education Programs (OSEP).[233] OSEP letters "provide written guidance and clarification regarding implementation of the IDEA. O.S.E.P. typically issues these letters in response to specific questions raised by parents, educators, representatives of advocacy organizations, state educational agencies, early intervention programs and their providers, and other interested parties."[234] While these letters are offered to members of the public for clarification and guidance, they are not legally binding.[235]

David Anderson, general counsel for the Texas Education Agency, wrote to the U.S. Department of Education with a request for clarification.[236] Anderson specifically requested clarification as to whether the mandates of IDEA apply to children in an ICE Family Residential Center, the Don Hutto Family Residential Facility.[237] On December 21, 2007, OSEP issued a letter in response to David Anderson's letter (the 2007 Anderson letter).[238] The U.S. Department of Education's

229. *Id.*
230. *Id.* at 1.
231. *Id.* at 7-8.
232. *Id.* at 8-9.
233. *See* O.S.E.P. Policy Documents, *Laws & Guidance Special Education & Rehabilitative Services,* https://www2.ed.gov/policy/speced/guid/idea/letters/revpolicy/tpduepro.html.
234. *Id.*
235. 20 U.S.C § 1406(e).
236. *Id.*
237. *Id.*
238. U.S. Dep't of Educ. Office of Special Educ. Programs, Letter regarding Child Find (Dec. 21, 2007), https://www2.ed.gov/policy/speced/guid/idea/letters/2007-4/anderson122107childfind4q2007.pdf.

letter unequivocally stated that the mandates of IDEA do not apply to children in ICE Residential Centers:

> The provisions of the IDEA, including the child find provisions, apply to each State that receives Federal funds under Part B of the IDEA, public agencies within the State that are involved in the education of children with disabilities, and any public agency in the State that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B. 34 C.F.R. §300.2. *The IDEA makes no specific provision for funding child find or educational services for individuals with disabilities through the ICE or the Department of Homeland Security. Thus, absent any other applicable law, the State has no child find obligations under the IDEA for children residing in ICE's residential facility.* This is similar to a State's responsibility for children with disabilities in Federal prisons. Although there is no obligation under the IDEA, the facility and the State or local school district could enter into a voluntary agreement to provide child find or other educational services.[239]

This appears to settle the matter. According to the U.S. Department of Education, IDEA makes no provision for funding special education in federal facilities and it does not speak to whether IDEA applies to individuals within these federal facilities.[240] Therefore, the facilities are not bound by IDEA, and children within the facilities are not protected by it. This is in line with the U.S. Department of Education's interpretation of IDEA's application to individuals in other federal facilities.[241] For instance, although the text of IDEA does not specifically address the provision of special education in federal prisons, the U.S. Department of Education has taken the position that federal prisons are exempt from IDEA mandates.[242]

This is also in line with the text of IDEA, which specifically applies to all "public agencies"[243] within the state and offers funding to these public entities provided they comply with IDEA mandates.[244] This includes the following:

> ". . . all political subdivisions of the State that are involved in the education of children with disabilities, including:
>
> (i) The State educational agency (SEA).
> (ii) Local educational agencies (LEAs), educational service agencies (ESAs), and public charter schools . . .

239. *Id.* (emphasis added).

240. *See* 34 C.F.R. § 300.33, 34 C.F.R. § 300.2.

241. *See* Letter from Stephanie Smith Lee, Dir., Office of Special Educ. Programs, U.S. Dep't of Educ., to Geoffrey A. Yudien, Legal Counsel, Vermont Dep't of Educ.' (Aug. 19, 2003), https://www2.ed.gov/policy/speced/guid/idea/letters/2003-3/yudien081903fape3q2003.pdf.

242. *Id.*

243. 34 C.F.R. § 300.33., "Public agency includes the SEA, LEAs, ESAs, nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities."

244. 34 C.F.R. § 300.2., Currently, every state in the United States accepts IDEA funding. Congressional Research Service, *The Individuals with Disabilities Education Act (IDEA) Funding: A Primer*, https://www.everycrsreport.com/reports/R44624.html.

> (iii) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for children with deafness or children with blindness).
> (iv)State and local juvenile and adult correctional facilities . . . "[245]

Important to this article, nowhere in the text of IDEA does the statute purport to apply to federal agencies.[246]

However, on December 21, 2007, just a few days after OSEP issued this letter, ICE published the "ICE Family Residential Standard."[247] In direct contradiction to the 2007 Anderson Letter, these standards require full compliance with IDEA[248]

The ICE Family Residential Standard, understandably, caused confusion because it offers the very protection the 2007 Anderson Letter declined to recognize. As a result, almost one year later, on April 22, 2008, the U.S. Department of Education issued another letter to Anderson after he requested clarification a second time (the 2008 Anderson letter).[249] After consulting with DHS's Enforcement Law Division, the U.S. Department of Education, "confirmed that the standards are neither statutory nor regulatory. Therefore, the standards do not create an additional requirement of law or impact the State's or local educational agency's (LEA) obligations under the IDEA." The letter restated the U.S. Department of Education's position in the 2007 Anderson Letter which stated "the IDEA makes no specific provision for funding child find or educational services for individuals with disabilities through the ICE or Department of Homeland Security (DHS)." While encouraging ICE and DHS to work with the LEA to provide services, they noted that "DHS acknowledged that ICE could not compel any State agency to provide educational services that are not mandated by law."

While ICE's Family Residential Standards appear to acknowledge children's rights under the IDEA, both ICE's legal department and the U.S. Department of Education take the position that the standards are not based in law.[250] For instance, despite the 2008 Anderson Letter, ICE has not altered their education policy in the Family Residential Standards—evidenced by the fact that, as of the publication of this article, those standards remain available online.[251]

There appears to be ongoing confusion over whether IDEA protections apply to detained children. Despite both DOE and DHS assertions (through the Anderson letters), on June 28, 2018, the U.S. House of Representatives Committee on Education and the Workforce issued a letter to the U.S. Department of Health and Human Services, the U.S. Department of Education, the U.S. Department of Homeland Security, and the U.S. Department of Justice regarding minors in federal immigration detention centers:

> Are you aware that each state in receipt of funds under the Individuals with Disabilities Education Act (IDEA) must comply

245. Congressional Research Institute, *The Individuals with Disabilities Education Act (IDEA) Funding: A Primer*,1 FN 4 (Updated Aug. 29, 2019), https://fas.org/sgp/crs/misc/R44624.pdf.

246. *See* 20 U.S.C. § 1400 et seq.

247. *ICE Family Residential Standard*, *supra* note 231.

248. *Id.*

249. U.S. Dep't of Educ. Office of Special Educ. Programs, *Letter regarding Child Find* (Apr. 22, 2008), https://www2.ed.gov/policy/speced/guid/idea/letters/2008-2/anderson042208ice2q2008.pdf.

250. *See id.*; *Letter regarding Child Find* (Dec. 21, 2007), *supra* note 243.

251. *ICE Family Residential Standards*, *supra* note 231, at 8-9.

> with statutory requirements to locate, identify, and evaluate all children with disabilities located within the state, including unaccompanied minors? . . . If families are detained in DHS custody as a result of the Executive Order [Zero Tolerance Policy], what processes are in place to ensure compliance with all IDEA requirements for identification, evaluation, and provision of special education services for unaccompanied minors[252] with disabilities?[253]

Further, on September 30, 2016, DHS's own Advisory Committee on Family Residential Centers (the Committee) recommended that:[254]

> The Family Residential Standards for education state that all incoming students will be assessed for special needs. Students determined to have a disability under the Individuals with Disabilities Education Act (IDEA), the federal law that requires schools to serve the educational needs of students with disabilities, and who are eligible for special education services, will receive an Individualized Education Program (IEP), . . . and [provide] appropriate services at FRC schools or from the local education agency.[255]

However, the Committee did not offer any authority to support their contention that IDEA protections extend to children in DHS custody.[256]

This ongoing confusion about the rights of children in detention facilities is further confounded by the lack of information regarding the actual provision of education within ICE and ORR facilities.[257] How and to what extent children actually receive special education in these facilities is largely unknown.[258] Because of the lack of information, even if IDEA applied to children detained within ICE and ORR faculties, it is difficult to ascertain whether children actually receive that education.[259]

It is unclear how often, or to what extent, LEAs are involved in the education at immigration facilities.[260] For instance, the Committee noted that "[t]he ACFRC has little corroborating information about how special education actually works in FRCs

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252. Note that there appears to be some confusion, as families detained by DHS would not include "unaccompanied minors" but minors with their guardians or parents.

253. Committee on Education and the Workforce, U.S. House of Representatives, 4-5 (June 28, 2018), https://edlabor.house.gov/imo/media/doc/Forced%20Separation%20Oversight%20Letter%206.28.2018.pdf. This author could not find a response to that letter from any of the agencies to which it was addressed.

254. Per the ICE website, "The U.S. Immigration and Customs Enforcement (ICE) Advisory Committee on Family Residential Centers (ACFRC) was established on July 24, 2015, under the authority of the U.S. Department of Homeland Security (DHS), and chartered under the provisions of the Federal Advisory Committee Act (Title 5, United States Code, Appendix). The ACFRC comprises experts in the fields of primary education, detention management, detention reform, immigration law, family and youth services, trauma-informed services, and physical and mental health. The Committee will play a critical role in providing advice to the Department and ICE on matters concerning family residential centers." U.S. Immigration and Customs Enforcement, Advisory Committee on Family Residential Centers (ACFRC), https://www.ice.gov/acfrc.

255. Report*, supra* note 8, at 69-70.

256. *See id*.

257. *See id.* at 64.

258. *Id.* at 70.

259. *See id.*

260. Report, *supra n*ote 8, at 69-70.

and received information that students at Karnes and Berks may not have access to a qualified IEP team."[261] One inquiry looked at "public school districts in sixty-one cities nationwide where shelters are known to exist within their boundaries. Among the fifty that responded, most said they had no contact with the shelter or federal program authorities. Some outside the border states, including Camden, New Jersey, said they only recently discovered the existence of migrant shelters in their community."[262]

2. Issues with contracting with state LEAs

While the 2007 DHS education policy clearly contemplates robust LEA involvement in the education of children with special needs, and the U.S. Department of Education appears to encourage such involvement, the Anderson Letters make clear that LEAs are under no legal obligation to provide any support.[263]

As states continue to grapple with how to handle the influx of children and families within state lines, some SEAs and LEAs have attempted to work with the detention facilities to provide education services.[264] However, at least one SEA has placed barriers to LEAs working with facilities within its borders.

On August 31, 2018, the Texas Education Agency (TEA) issued a letter announcing that the state would no longer allow state funding to be used to support education provided within federal immigration detention facilities:[265] "If Texas public schools provide educational services to children held in custody by the federal government, under Texas law payment for those services must come from sources such as tuition, not from state funds."[266] TEA did not expressly prevent local school districts from providing education to children in detention, but these local school districts would have to do so without receiving any financial compensation or by charging tuition pursuant to Texas statute:

> (a) Notwithstanding any other provision of this code, a school district shall charge tuition for a child who resides at a residential facility and whose maintenance expenses are paid in whole or in part by another state or the United States.
>
> (b) A tuition charge under this section must be submitted to the commissioner for approval.

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261. *Id.* at 70.

262. Sally Ho, *Schools grapple with obligations to migrants in shelters*, PBS News Hour (Aug. 19, 2018),
https://www.pbs.org/newshour/education/schools-grapple-with-obligations-to-migrants-in-shelters.

263. *Letter regarding Child Find* (Apr. 22, 2008), *supra* note 254; *Letter regarding Child Find* (Dec. 21, 2007), *supra* note 243.

264. *See e.g.* Hank Stephenson, *TUSD investigates taking over education of migrant kids detained in Tucson*,
Arizona Daily Star (Jul. 25, 2018), https://tucson.com/news/local/tusd-investigates-taking-over-education-of-migrant-kids-detained-in/article_1e5c5fbf-e38a-56fb-9803-f9b146448657.html.

265. Texas Education Agency, *Letter: Unallowable double funding for unaccompanied children held in custody by or for the federal government being served by Texas public schools*, p. 1 (Aug. 31, 2018),
https://tea.texas.gov/sites/default/files/UAC-TAA%208-31-18.pdf.

266. *Id.*

> (c) The attendance of the child is not counted for purposes of allocating state funds to the district.[267]

Citing to the United States Refugee Act of 1980,[268] TEA noted that the ORR Director is both legally and financially responsible for any children in its custody.[269] TEA went on to cite the Flores Agreement, which requires ORR facilities holding children to provide education services and which cites to the U.S. Department of Education's guidelines that outline HHS's responsibility to provide education to children in their custody.[270]

By withholding state funding, TEA effectively prevents school districts from providing education services to these children. This directive contradicted prior agreements between Texas school districts and charter schools with residential facilities.[271] The facilities could still choose to contract with the local school districts; however, the Commissioner of Education would still be required to approve any tuition rate and the facility would likely have to agree to pay for it.[272]

Although TEA does not refer to IDEA or the Anderson Letters, this scheme is only possible if IDEA protections do not extend to children in custody. If children in ICE custody were entitled to IDEA protection, TEA could not refuse to participate in their education. The TEA directive read alongside the Anderson Letters and the ICE Education Policy, demonstrate that these standards prevent children from accessing the protections of IDEA.

TEA's actions highlight one of the issues that arise out of the educational scheme envisioned by the U.S. Department of Education and ICE. While SEAs and the corresponding LEAs may contract with local facilities, they are under no obligation to do so.[273] At any point in time, they may cancel that contract, change its terms, or, as with TEA, the state may decide to place further barriers to LEA involvement. Each facility is under no obligation to work with the local school district and may determine it is more cost effective to educate children on their own, thereby preventing school children from accessing local educators, services, and schools.

While the ICE Education Policy appears to offer the legal protections and mandates of IDEA, it is more of an aspirational goal than an actual promise. As the U.S. Department of Education itself noted, "ICE [cannot] compel any State agency to provide educational services that are not mandated by law."[274] As discussed, the state and the federal government have no legal obligations to provide special education to these children.

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267. T.E.C. § 25.003

268. 8 U.S.C. § 1522(d)(2)(B)(ii)

269. Texas Education Agency, *supra* note 269.

270. *Id.*

271. *See* Shelby Webb*, TEA: Schools cannot use state funds to educate migrant children in shelters* (Aug. 30, 2018; Updated: Aug. 31, 2018*), https://www.chron.com/news/houston-texas/houston/article/TEA-Schools-cannot-use-state-funds-to-educate-13194609.php (highlighting that shelters for migrant children in Texas had already formed partnerships with at least two traditional school districts).*

272. T.E.C. § 25.003 (b)

273. *Letter regarding Child Find* (Apr. 22, 2008), *supra* note 254; *Letter regarding Child Find* (Dec. 21, 2007), *supra* note 243.

274. *Letter regarding Child Find* (Apr. 22, 2008), *supra* note 254.

C. Consequences for Children

The current framework and general confusion leaves children with disabilities vulnerable. Under this framework, children are very likely denied access to special education when they are already at a significant disadvantage.

The drafters of IDEA recognized that: "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[275] ICE also acknowledges that "[g]iven the limited English proficiency of most students enrolled in [family residential center] schools, and the trauma of their immigration journey and detention experience, determining eligibility for special education is especially complex and providing appropriate education services is critical."[276] Yet the state of special education in immigration detention facilities is uncertain at best and nonexistent at worst. This failure to provide special education can have long-term negative repercussions.

Mental health considerations must be taken into account. Many, if not all, of these children have experienced trauma prior to coming to the United States, during their journey, or after apprehension by U.S. authorities: [277] "Children, unaccompanied and in family units, seeking safe haven[] in the United States often experience traumatic events in their countries of origin, during the journeys to the United States, and throughout the difficult process of resettlement."[278] Numerous studies detail the negative effects of detention on children and adults, including "developmental delay and poor psychological adjustment, potentially affecting functioning in school."[279] These same studies demonstrate that even short periods of detention can have long-term mental health effects.[280] These issues could be addressed, at least in part, by special education services through IDEA.

If IDEA does not apply to children detained by the U.S. government, the facilities have no obligation to participate in child find. Children spent, on average, eighty-nine days in ORR custody during the first quarter of the 2019 fiscal year.[281]Compared to the average school year in the United States, which is around 180

275. 20 U.S.C. § 1400(c)(1) (2018).

276. Report, *supra* note 8, at 70.

277. Human Rights Watch, *Deportation by Default, Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System*, at 3 (July 2010), https://www.aclu.org/files/assets/usdeportation0710_0.pdf ("While no exact official figures exist, the percentage of non-citizens in immigration proceedings with a mental disability is estimated to be at least 15 percent of the total immigrant population in detention—in other words, an estimated 57,000 in 2008.").

278. Linton, *supra* note 7; Child Defense Fund, *Renewed Appeal from Experts in Child Welfare, Juvenile Justice and Child Development to Halt the Separation of Children from Parents at the Border,* 2 (June 7, 2018), https://www.childrensdefense.org/wp-content/uploads/2018/08/child-welfare-juvenile.pdf ("Forced separation disrupts the parent-child relationship and puts children at increased risk for both physical and mental illness. Adverse childhood experiences—including the incarceration of a family member—are well-recognized precursors of negative health outcomes later in life. And the psychological distress, anxiety, and depression associated with separation from a parent would follow the children well after the immediate period of separation—even after eventual reunification with a parent or other family.").

279. Linton, *supra* note 7, at 6; *see also Report, supra* note 8, at 10 ("[W]hile the Committee believes strongly that bona fide asylum seekers in general should not be needlessly detained, this is particularly true for children, whose best interests must be paramount in all enforcement decisions pertaining to them. The harmful effects of detention on children are well established.").

280. *Id.*

281. HEALTH AND HUMAN SERVICES, *supra* note 114, at 2 (calculated during the first quarter of the 2019 fiscal year).

days, children with disabilities in ORR custody spent, on average, half of a school year without access to special education.[282] This means that they are not only behind by half a school year in terms of identification, pushing back the timeline to getting services, but that they may have been unable to access the education offered within the facility. Given the length of time children remain in these facilities, this could have detrimental effects on their ability to succeed once they are released.[283]

Further uncertainty surrounds these children's educational rights. It is unclear at this point how long children may be detained in ICE facilities given the government's proposed dissolution of the Flores Agreement.[284] If the government is successful in dissolving the Flores Agreement, it could allow for even longer periods of detention.[285] Emergency influx facilities further complicate the time limits for detention, as the government contends that these facilities are not required to comply with state licensure requirements and are not bound by the time limits placed on detaining children in other ORR facilities.[286]

More is denied to these children than just services. Children within these facilities are also left without the legal remedies and protections that would otherwise be available to them.[287] Under IDEA, children have the right to receive independent evaluations to determine whether they may have a disability, and the extent and manifestations of that disability.[288] Children and their parents also have substantial procedural protections, such as the right to mediation, the right to file a due process complaint, or, when these fail, the right to file a complaint in state or federal court.[289] Children in these facilities do not appear to have access to any of these rights or services until they are released from the facility into local school districts.

Perhaps most importantly, IDEA envisions significant parent involvement in their children's education.[290] Parents, and at a certain age their children, are given the right to participate in the IEP Team Meeting, where knowledgeable individuals make the determination of what services, placement, and additional support the child may need.[291] Under the current framework, the parameters of parental involvement remain unclear.

D. Release and Education

Children are released into communities and local school districts after weeks, sometimes months, of inadequate education.[292] However, these time frames are likely to change depending on several factors, including the policies in place at the time and

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282. *See National Center for Education Statistics*, *Table 5.14 Number of Instructional Days and Hours in the School Year, by State: 2018*, https://nces.ed.gov/programs/statereform/tab5_14.asp.

283. *See Report*, *supra* note 8, at 70.

284. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, *supra* note 156 at 44486 ("DHS reiterates that while this rule would allow DHS to hold non-UAC minors with their parents or legal guardians at FRCs for more than twenty days, this intent does not clash with the intent of the FSA.").

285. Congr. Research Serv., Unaccompanied Alien Children: An Overview, 23 (Updated October 9, 2019), https://fas.org/sgp/crs/homesec/R43599.pdf.

286. Johnson, *supra* note 200, at 3 n.6.

287. 20 U.S.C. § 1415 (2018).

288. *See* 34 C.F.R. §§ 300.301, -300.306 (2018).

289. *Id.*

290. *See* 34 C.F.R. § 300.321(2018).

291. *Id.*

292. *See* Child Separations by the Trump Administration, *supra* note 168, at 18.

the number of children taken into custody.[293] Nevertheless, the majority of children in immigration detention are released into the community, sometimes for years, and many of them will remain in the United States permanently.[294] This highlights the need for comprehensive education, including special education, while in facilities.

Children who leave ICE and ORR custody may be released to their parents or guardian, released to sponsors or relatives, moved to an ICE facility after being reunited with their parents, or deported.[295] Some children will be granted asylum or otherwise be able to find legal recourse to stay in the United States.[296] According to HHS, while awaiting adjudication of their claim, the "overwhelming majority," more than 90 percent, are released either to sponsors or family in the United States.[297] A different review found that out of the "[a]pproximately 300 of the families that were reunified in ICE detention, or roughly 80%, ultimately were released from custody rather than deported . . . ."[298]

Children from these facilities who are released will likely enter local schools. Allowing the school district to provide education services while the children are detained would help ease their eventual transition out of the facilities.[299] Not only would they learn the same curriculum as children who are not detained, but they could receive credits that would transfer to the new school.[300]

The benefit of education is not only for the children, but also the general public. For instance, ICE's own Advisory Committee on Family Residential Centers acknowledged the importance of ensuring that children have access to education upon release, calling that access "critical" and noting that "attending school also encourages families to appear in court for their immigration cases."[301] As the Supreme Court

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293. For instance, "government policies that took effect in May 2018 required fingerprinting of a sponsor's entire household and allowed for information sharing with the US Department of Homeland Security Immigration and Customs Enforcement (ICE). Subsequently, reports of detention of 170 would-be sponsors by ICE led to a steep drop in sponsorship claims and an increase in the number of unaccompanied children with no clear point of contact for consent. . . . As a result, the time a child spends in detention has lengthened considerably, with government data showing that the average time spent in detention has been as high as eighty-nine days in the first four months of fiscal year 2019." Giselle Malina, *How Should Unaccompanied Minors in Immigration Detention Be Protected From Coercive Medical Practices?*, 21 Am. Med. Assoc. J. of Ethics 603, 605 (2019), https://journalofethics.ama-assn.org/sites/journalofethics.ama-assn.org/files/2019-06/pfor1-peer1-1907_1.pdf.

294. *See* Report, *supra* note 8.

295. Child Separations by the Trump Administration, *supra* note 168, at 14.

296. Health and Human Services, Administration for Children and Families Fiscal Year 2020 Justification of Estimates for Appropriations Committee (2020), https://www.acf.hhs.gov/sites/default/files/olab/acf_congressional_budget_justification_2020.pdf.

297. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, *supra* note 156 at 44486.

298. *See id.;* Child Separations by the Trump Administration, *supra* note 168, at 17. Another estimate from the American Immigration Council placed this percentage at 85%. See American Immigration Council, A Guide to Children Arriving at the Border: Laws, Policies and Responses, https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses; Michael D. Shear and Eileen Sullivan, *What Is Asylum and Who Can Seek It? Explaining Trump's New Restrictions*, N.Y. Times (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/us/politics/asylum-facts-seekers-laws.html.

299. Shelby Webb, *supra* note 275. As Salvador Cavazos, the then-Vice President for education services for Southwest Key (a company that contracts with ICE to provide residential facilities for detained children) noted, "Because we're in a partnership, we would have been able to provide additional resources, partner with credit-bearing institutions, provide grades and help them achieve credits [that] go to other public schools."

300. *See id.*

301. REPORT *supra* note 8, at 72.

recognized in *Plyler*, the mere fact that some of these children may ultimately be deported is not a sufficient reason to deny them an education:

> The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.[302]

It stands to reason that to best facilitate the transition from detention centers to local schools, children should be introduced to these schools as early as possible. This would likely speed up the "child find process," allowing LEAs to identify children in their schools, and thus give them earlier access to special education.

Despite the recognition of this complex issue, and the fact that a robust framework already exists to help navigate it, the United States government appears to be under no obligation to utilize its own law.

V. PROPOSED CHANGES

Recent changes to the way the United States handles immigrant children and families have resulted in prolonged periods of detention, highlighting the need for concrete legal protections for children in detention centers. This frequently changing immigration landscape demonstrates the need for clarity surrounding these children's educational rights. Although there are numerous areas where clear guidelines would benefit these vulnerable children, education, and in particular special education, cannot be ignored given its critical importance.

The easiest solution, by far, with inarguably the best results for children overall, would be to cease the detention of children altogether.

Although this Article does not explore the conditions of detention in detail, the wellbeing of children within the detention centers must be taken into consideration.[303] Recent reports detail troubling conditions in many immigration detention facilities holding children, including inadequate access to showers, medical care, and food.[304] From December 2018 to May 2019, seven children died while in government detention, including one toddler age two-and-a-half.[305]

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302. *Plyler*, 457 U.S. at 230.

303. Linton, *supra* note 7.

304. Michael Grabell, *Pediatrician Who Treated Immigrant Children Describes Pattern of Lapses in Medical Care in Shelters*, Pro Publicaa (May 3, 2019), https://www.propublica.org/article/pediatrician-who-treated-immigrant-children-describes-pattern-of-lapses-in-medical-care-in-shelters; Costello, *supra* note 179; *see also* Linton, *supra* note 7.

305. *See Congressional Hispanic Caucus, Statement on Death of Teen Migrant in US Custody* (May 20, 2019), https://congressionalhispaniccaucus-castro.house.gov/media-center/press-releases/congressional-hispanic-caucus-statement-on-death-of-teen-migrant-in-us;

Further, as discussed earlier in this article, there are long-term effects associated with even brief periods of detention, including post-traumatic symptoms, developmental delay, reduced ability to adjust psychologically, and increased risks of mental health disorders like anxiety and depression. [306] These long-term effects continue after the child is released.[307] DHS's own report acknowledged that: "DHS's immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families—and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children."[308]

For unaccompanied children, the largest barrier appears to be finding appropriate sponsors or family members. While clearly difficult, this problem is not insurmountable. When no appropriate family member or individual sponsor can be found, children can be released to a community-based setting.[309] Community-based setting releases can include placements with local foster care families or agencies that could simultaneously prioritize locating any existing family in the United States: "For separated children, community-based care is preferable to institutional care as it keeps the child within his or her community and provides continuity in socialization and development."[310]

In addition, for the parents of children taken into ICE custody, other options can be utilized in lieu of detention, thereby allowing families to remain together outside of detention facilities:

> ICE operates two alternatives to detention (ATD) programs for adult detainees—a "full service" program with case management, supervision, and monitoring (either by GPS or telephone check-in), and a "technology-only" program with monitoring only. . . . As to asylum seekers, a prior U.S. government-commissioned study found that "asylum seekers do not need to be detained to appear," and "[t]hey also do not seem to need intensive supervision."[311]

These alternatives to detention have an additional societal benefit, as "[a]ccording to U.S. government data, 95 percent of participants in ICE's full service program appeared at scheduled court hearings from fiscal years 2011 to 2013."[312] Cost considerations also weigh in favor of release, with one estimate at as little as seventeen

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Joaquin Castro & Ruben Gallegos, *Letter to Department of Homeland Security and Department of Health and Human Services* (May 24, 2019), https://congressionalhispaniccaucus-castro.house.gov/sites/congressionalhispaniccaucus.house.gov/files/HHS%20ORR%20letter.pdf; Patricia Sulbarán Lovera, *How did six migrant children die on the US border?*, BBC World News (May 23, 2019), https://www.bbc.com/news/world-us-canada-48346228; Cynthia Pompa, *Immigrant Kids Keep Dying in CBP Detention Centers, and DHS Won't Take Accountability*, Am. Civil Liberties Union (June 24, 2019), https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/immigrant-kids-keep-dying-cbp-detention.

306. Linton, *supra* note 7, at 6; *see also R*EPORT*, supra* at Note 8 at 10 ("[W]hile the Committee believes strongly that bona fide asylum seekers in general should not be needlessly detained, this is particularly true for children, whose best interests must be paramount in all enforcement decisions pertaining to them. The harmful effects of detention on children are well established.").

307. Report, *supra* note 8, at 18.

308. *Id.* at 2.

309. American Immigration Council, *supra* note 303, at 8.

310. International Committee of the Red Cross, Inter-agency Guiding Principles on Unaccompanied and Separated Children, 43, (.2004), https://www.unicef.org/protection/IAG_UASCs.pdf.

311. *A Guide to Children Arriving*, *supra* note 303, at 10-11.

312. *Id.*

cents to seventeen dollars per person, per day for alternatives to detention for adults.[313] By comparison, one government estimate places the cost of family detention at $319.37 per family bed, per day.[314] Some estimates placed the cost of housing one unaccompanied child at Tornillo at $775 per child per day.[315]

This approach, prioritizing community-based placement, allows children to quickly be placed in the local community and to enter the local schools. It offers more stability paired with the best chances for academic and personal success. Once children enter the local school, they would be under the protection of IDEA and eligible for full special education protections.

Barring the complete dissolution of these detention centers, all detained children should be allowed to enter district schools or otherwise be placed under the local district's jurisdiction while in custody. One way to achieve this would be to require any organization contracting with the U.S. government to also contract with LEAs. This requirement could serve as a necessary condition that must be fulfilled prior to the execution of the contract with the government. If the LEAs are unable, or unwilling, to work with the facilities, the facilities would be barred from entering into a contract and thus prevented from detaining children within the facility. This proposed solution would give children access to consistent education, and the full range of special education support and protection.

Although children without identifiable guardians pose a problem, it is also not insurmountable. For "unaccompanied" children whose parents cannot be located, either because they were forcibly separated and the government failed to track them, or because they crossed the border alone, there is a process within IDEA for "wards of the state":

> Consent for wards of the State
>
> (I) In general
>
> If the child is a ward of the State and is not residing with the child's parent, the agency shall make reasonable efforts to obtain the informed consent from the parent. . . of the child for an initial evaluation to determine whether the child is a child with a disability.
>
> (II) Exception The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if—
>
> (aa) despite reasonable efforts to do so, the agency

313. Am. Civil Liberties Union, *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, 2, https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf. Another estimate places the cost of alternative detention at $5.16 per day. Katie Sullivan and Jeff Mason, *Immigration Detention in the United States: A Primer*, Bipartisan Policy Center (Apr. 24, 2019), https://bipartisanpolicy.org/blog/immigration-detention-in-the-united-states-a-primer/.

314. Dep't of Homeland Sec., Department of Homeland SEcurity U.S. Immigration and CUstoms Enforcement Budget Overview Fiscal Year 2018 *(2018)*, https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf.

315. Noman Merchant, *New holding center for migrant children opens in Texas*, PBS (Jul. 10, 2019), https://www.pbs.org/newshour/nation/new-holding-center-for-migrant-children-opens-in-texas; John Burnette, *Inside The Largest And Most Controversial Shelter For Migrant Children In The U.S* National Public Radio (Feb. 13, 2019), https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u-.

> cannot discover the whereabouts of the parent of the child . . .[316]

While the ideal solution would always be to include parents in the special education process, this section of the IDEA allows children to at least begin the process of determining whether they need special education.

At the very least, the U.S. Department of Education, ORR, and ICE must clarify the policy surrounding the provision of special education in immigration detention facilities. If, in fact, IDEA protections do apply to these children, that must be made clear so that the families can be made aware and can advocate for their children's rights. This would also allow the U.S. Department of Education, SEAs, and LEAs to monitor and enforce IDEA within these facilities. If they do not, they could, at the very least, open a discussion into how to ensure these children receive the education to which they are entitled.

These proposed solutions are not without their problems. Some communities may feel that this places a burden on an already underfunded school district. However, many of the children in these shelters will eventually be released into these communities. Those communities will bear the larger burden of poorly-supported students, who have likely received sub-par, or no, special education and are suffering from the long-term effects of detention. For instance, when children fall behind in school, they may repeat grades, creating a further cost to local communities as children stay in school longer.[317] Additionally, these LEAs could receive per-pupil funding, including funding through IDEA, to help offset any additional cost.[318]

There are clear benefits to children when they receive access to adequate education, and, more broadly, there are clear benefits to society. Numerous studies have found that when children receive adequate education, they are more active members of society, are less likely to commit crimes, and are more likely to find gainful employment.[319]The costs associated with failing to educate these children clearly weigh in favor of ensuring educational access. As ICE itself acknowledges, "[a]ccess to education is a basic human right. It helps to stabilize immigrants, reduce poverty, develop knowledge useful in daily life . . . education is key to the promise of a better life for detained families when they are released into U.S. communities."[320]

The fact that some of these children may ultimately be deported is not a sufficient reason to deny them educational access. As the Court recognized in *Plyler*, "[i]n light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an

316. 20 U.S.C. § 1414 (a)(1)(D)(iii) (2018).

317. *See, e.g., The Institute for Children, Poverty, and Homelessness, A Tale of Two Students: Homelessness in New York City PUblic Schools,* 5 (2014), https://www.icphusa.org/wp-content/uploads/2016/09/ICPH_policyreport_ATaleofTwoStudents.pdf.

318. *See* 34 C.F.R. § 300.700 (2018).

319. *See, e.g., Lance* Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports,* 94 Am. Econ. Rev. 155; Nat'l Ctr. for Children in Poverty, *Parents' Low Education Leads to Low Income, Despite Full-Time Employment* (Oct. 2006), http://www.nccp.org/publications/pdf/text_685.pdf; Michael Greenstone & Adam Looney, *Education Is the Key to Better Jobs,*

The Brookings Institute (Sept. 17, 2012), https://www.brookings.edu/blog/up-front/2012/09/17/education-is-the-key-to-better-jobs/.

320. Report, *supra* note 8, at 58 (noting that education helps in adjusting to living in an FRC).

inchoate federal permission to remain."[321]

Many LEAs are working actively with detention centers and multiple LEAs have expressed, anecdotally, their desire to support detained children.[322] However, the Texas Education Agency's stance highlights the need for clear protections for these children, regardless of a LEA's desire to work with detained children. The only way to protect a child's right to education against changes brought on by shifting immigration policies is to ensure concrete protections are in place.

CONCLUSION

Congress enacted IDEA to reflect a fundamental set of public policies supporting access to education for all children and to recognize the public benefit stemming from this access. The courts have consistently followed that policy, upholding all children's right to access public education when they are within the United States borders. Nowhere in IDEA or the Supreme Court's history is there support for the denial of education to a certain class of children.[323]

Through the Anderson Letters, the United States Department of Education effectively overrides the policy to create a "subclass" of children.[324] The strong policy arguments in favor of the creation of IDEA, and the Supreme Court's decision in *Plyler*, do not support such an approach.

This Article considers only one small piece of these children's experiences. Children in these facilities face unimaginable challenges and hardships every day, and these often continue even after release.[325] Denying these children access to education only serves to further that hardship. The only way to remedy this exclusion is to ensure that all children, regardless of immigration status, have access to special education through clear, enforceable laws. Without these laws, the denial of special education will continue to disadvantage not just the children in these detention facilities, but society as a whole. As the court recognized in *Plyler*, "[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[326]

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321. *Plyler v. Doe*, 457 U.S., at 226 (1982).

322. *See, e.g.,* Hank Stephenson, *TUSD investigates taking over education of migrant kids detained in Tucson*, Tucson.com (Jul. 25, 2018), https://tucson.com/news/local/tusd-investigates-taking-over-education-of-migrant-kids-detained-in/article_1e5c5fbf-e38a-56fb-9803-f9b146448657.html.

323. *See, e.g. id.; U.S. Office of Special Education Programs, History: Twenty-five Years of Progress in Educating Children With Disabilities Through IDEA* (2000), https://www2.ed.gov/policy/speced/leg/idea/history.pdf; Martin, *supra* note 9, at 30.

324. Letter Regarding Child Find (2008), *supra* note 254; Letter Regarding Child Find (2007), *supra* note 243.

325. *See* Linton, *supra* note 7, at 5-6.

326. 457 U.S. at 223-24.