

Special Education No Man's Land

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ARTICLES

SPECIAL EDUCATION NO MAN'S LAND

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INTRODUCTION

Since 2014, unaccompanied immigrant children have migrated to the United States in staggering numbers.¹ The vast majority come from the Northern Triangle countries of Central America—El Salvador, Guatemala, and Honduras—and many are fleeing some of the highest homicide rates in the world.² Immigration lawyers have highlighted many problems with the federal regime that cares for these children before they are released to family members or other adults living in the United States while their immigration cases move forward.³ Yet there is one group of unaccompanied minors that is not even on the radar of many advocates: unaccompanied children with disabilities.

Neither the U.S. Department of Homeland Security (“Homeland Security” or “DHS”) nor the U.S. Department of Health and Human Services (“Health and Human Services” or

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¹ AM. IMMIGRATION COUNCIL, A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES, AND RESPONSES 1–2 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf [<https://perma.cc/GD6E-3MZA>].

² *Id.* In 2019, the United Nations published a report showing El Salvador, Honduras, and Central America generally, have some of the highest homicide rates in the world. See UNITED NATION OFFICE ON DRUGS & CRIME, *Homicide: Extent, Patterns, Trends and Criminal Justice Response*, in GLOBAL STUDY ON HOMICIDE 17, 52 (2019), <https://www.unodc.org/documents/data-and-analysis/gsh/Booklet2.pdf> [<https://perma.c/XUG5-RNU7>].

³ See, e.g., *Unaccompanied Immigrant Children*, NAT’L IMMIGRANT JUSTICE CTR., <https://immigrantjustice.org/issues/unaccompanied-immigrant-children> [<https://perma.cc/98BK-3ZA3>] (last visited Feb. 6, 2021) (discussing the organization’s legal representation of unaccompanied immigrant children and the issues that they face within the federal regime).

“HHS”)—the two agencies charged with the care and custody of unaccompanied minors—keep publicly-available statistics on the number of children with disabilities in their custody.⁴ Some have estimated that the number could be as high as 12.6%, mirroring the percentage of disabled Americans.⁵ But the percentage of unaccompanied children with disabilities—especially the percentage with mental health conditions—is likely much higher.⁶ Indeed, one 2008 report estimated that about 15% of all non-citizens in immigration proceedings had mental disabilities.⁷ Though the report does not provide statistics for both adults and children, there are reasons to believe that the figure could be just as high or even higher for children, given that unaccompanied refugee minors are comparatively “at a higher risk of developing post-traumatic stress disorder (“PTSD”) and other psychological sequelae such as depression and anxiety as a result of forced exile and exposure to traumatic events before, during, and after migration.”⁸

Unaccompanied minors with disabilities are being harmed because the federal regime that cares for them in the interim fails to consider how their disabilities may affect their needs while in custody. Although there are several ways in which disabled children are harmed by this regime, this Article focuses on the government’s failures in providing appropriate

⁴ Federal law requires the Office of Refugee Resettlement to keep statistics about the unaccompanied children that it cares for but does not require the ORR to carry statistics on whether or not these children have disabilities. *See* 6 U.S.C. § 279 (b)(1)(J)(i)–(v).

⁵ *See* Michael Waters, *Our Immigration System is Especially Cruel to Disabled Children*, THE OUTLINE (July 26, 2018, 6:01 PM), <https://theoutline.com/post/5074/immigration-disability-children-ice-detention?zd=1&zi=igojnz7j> [<https://perma.cc/HLV2-LE5X>]; Kristen Bialik, *7 Facts About Americans with Disabilities*, PEW RESEARCH CTR. (July 27, 2017), <http://www.pewresearch.org/fact-tank/2017/07/27/7-facts-about-americans-with-disabilities/> [<https://perma.cc/2RC6-KE43>].

⁶ *See* Charles D. R. Baily et al., *The Mental Health Needs of Unaccompanied Immigrant Children: Lawyers’ Role as a Conduit to Services*, 15 GRAD. J. OF PSYCHOL. 3, 3 (2014).

⁷ AM. CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, & INDEFINITE DETENTION IN THE U.S. IMMIGRATION SYSTEM 3 (2010), https://www.aclu.org/files/assets/usdeportation0710_0.pdf [<https://perma.cc/YY6E-W7NW>]. The report defined “mental disabilities” to include both “mental health problems” and intellectual disabilities and did not provide disaggregated statistics for each group. *Id.* at 12.

⁸ Diana Franco, *Trauma Without Borders: The Necessity for School-Based Interventions in Treating Unaccompanied Refugee Minors*, 35 CHILD & ADOLESCENT SOC. WORK J. 551, 551 (2018).

educational services to unaccompanied minors with disabilities while in Office of Refugee Resettlement-funded shelters (“ORR shelters”).⁹ Specifically, the Office of Refugee Resettlement (“ORR”) does not require its shelters to provide unaccompanied minors with disabilities special education and related services under the Individuals with Disabilities Education Act (“IDEA”).¹⁰ Additionally, states provide no educational services to children in ORR shelters, including services under the IDEA.¹¹ Since at least 2003, the U.S. Department of Education (“ED”) has issued letters explaining that neither state nor local school districts are required to extend the IDEA’s substantive and procedural protections to children with disabilities in federal prisons.¹² This practice would appear to cover children in ORR custody. If this is a correct interpretation of the statute, then there is an entire class of children with disabilities in federal custody who are living in a special education no man’s land. Although this Article focuses on unaccompanied children in ORR custody, the ED’s statutory interpretation affects children with disabilities in the custody of other federal agencies, including Immigration and Customs Enforcement (“ICE”), the Federal Bureau of Prisons (“BOP”), and the U.S. Marshals Service.

Although it is clear that the IDEA protects non-citizens once they enroll in public schools,¹³ this Article seeks to answer whether unaccompanied minors in ORR shelters are entitled to the IDEA’s substantive and procedural rights while in government custody. It argues that while the plain language of

⁹ ORR is an office within the U.S. Department of Health and Human Services. See OFFICE OF REFUGEE RESETTLEMENT, <http://acf.hhs.gov/orr> (last visited Feb. 4, 2021).

¹⁰ *Children Entering the United States Unaccompanied: Section 3.3.5*, OFFICE OF REFUGEE RESETTLEMENT [hereinafter *ORR Policy Guide*], <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.3.5> [<https://perma.cc/53FE-FESG>] (last updated Apr. 24, 2017) (providing no explicit requirement that unaccompanied minors with disabilities must receive special education under the IDEA).

¹¹ OFFICE OF REFUGEE RESETTLEMENT, FACT SHEET: UNACCOMPANIED ALIEN CHILDREN (UAC) PROGRAM (2019), <https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf> [<https://perma.cc/6WUZ-KLMX>] (providing that ORR-funded facilities are in charge of education for unaccompanied minors).

¹² See Letter to Yudien, 39 IDELR ¶ 270 (OSEP 2003).

¹³ See U.S. DEPT OF EDUC., FACT SHEET: EDUCATIONAL SERVICES FOR IMMIGRANT CHILDREN AND THOSE RECENTLY ARRIVED TO THE UNITED STATES [hereinafter *ED Fact Sheet*], <https://www2.ed.gov/policy/rights/guid/unaccompanied-children.pdf> [<https://perma.cc/X4ML-A2W7>] (last visited Feb. 8, 2021).

the statute would require states—but not federal agencies—to provide their residents with the IDEA's protections while in federal custody, it is at best unclear as to whether unaccompanied minors are state residents for the IDEA's purposes while in ORR shelters. However, because unaccompanied minors with disabilities will have better outcomes if they are provided IDEA-related services once they arrive in this country, Congress should amend the IDEA to explicitly extend its protections to unaccompanied minors in ORR shelters.

Part I of this Article describes the federal regime tasked with caring for unaccompanied minors in custody and educational services offered under that regime. Part II provides background information on the IDEA, including a discussion of two fundamental statutory rights: the substantive right to a free appropriate public education (“FAPE”) and the child-find right. Part II also explains when a child is considered a state resident for the IDEA's purposes. Part III argues that the ED's interpretation of the IDEA as applied to children in federal custody is wrong, at least with regard to state residents. Part IV explains why Congress should act to extend FAPE and child-find rights to unaccompanied minors in ORR custody.

I. FEDERAL CUSTODY OF UNACCOMPANIED CHILDREN

Every year for the past decade, tens of thousands of unaccompanied children have crossed the southwestern border.¹⁴ In Fiscal Year 2018 (FY2018), DHS apprehended 50,036 unaccompanied children at the southwestern border, while an additional 8,624 unaccompanied children presented themselves at southwestern ports of entry.¹⁵ Of the more than 50,000 children that DHS apprehended in FY2018, the agency transferred 49,100 to ORR custody.¹⁶

¹⁴ See generally David Nakamura, *Trump Has the Same Central American Migrant Problem as Obama*, WASH. POST (Apr. 5, 2018, 4:39 PM), https://www.washingtonpost.com/politics/trump-has-the-same-central-american-migrant-problem-as-obama/2018/04/05/c49c78c4-3830-11e8-8fd2-49fe3c675a89_story.html?utm_term=.ba2f12cbf119 [https://perma.cc/A4AF-EZT7].

¹⁵ *Southwest Border Migration FY2018*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018> [https://perma.cc/PPY9-WHSU] (last visited Feb. 3, 2021).

¹⁶ OFFICE OF REFUGEE RESETTLEMENT, *Facts and Data*, U.S. DEP'T OF HEALTH & HUM. SERVICES, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [https://perma.cc/2DVM-VQ6M] (last visited Feb. 3, 2021).

Under federal law¹⁷ and the *Flores* Settlement Agreement (FSA),¹⁸ the government must release unaccompanied children to either available adults or ORR shelters, known under the FSA as “licensed program[s].”¹⁹ A licensed program is one “licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including . . . facilities for special needs minors.”²⁰ The programs must meet minimum standards, including the provision of educational services articulated in Exhibit 1 of the FSA.²¹ On average, children stay in ORR shelters for about two months, but unaccompanied minors with disabilities stay much longer.²²

Unaccompanied children come to the United States with large educational deficits and face many barriers that can prevent them from accessing their education. Some of these barriers include trauma, language, and multiple educational disruptions.²³ While in ORR custody, unaccompanied children

¹⁷ See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 8 U.S.C. § 1232(b)(3).

¹⁸ The FSA is a consent decree in a lawsuit that challenged the government’s catch-and-release policies of unaccompanied minors and their conditions of confinement. See Complaint for Injunctive & Declaratory Relief at 3–4, *Flores v. Meese*, No. CV 85-4544-RJK-(Px) (C.D. Cal. July 11, 1985) (class complaint), <https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0001.pdf> [<https://perma.cc/YU4P-X6JT>]; see also *Reno v. Flores*, 507 U.S. 292, 296 (1993) (discussing the background of the *Flores* litigation and the unique issues surrounding unaccompanied minor aliens); PHILIP G. SCHRAG, *BABY JAILS: THE FIGHT TO END THE INCARCERATION OF REFUGEE CHILDREN IN AMERICA* 11–22 (2020) (detailing the experiences of the named plaintiff in the *Flores* litigation).

¹⁹ See Stipulated Settlement Agreement at ¶ 14, in *Flores v. Reno*, No. CV 85-4544 RJK (C.D. Cal. 1997) [hereinafter *FSA*].

²⁰ *Id.* ¶ 6.

²¹ Exhibit 1 of the FSA supersedes the 1987 consent decree that the Parties to the lawsuit had entered regarding conditions of confinement. See *id.* ¶¶ 4, 9.

²² See *Unaccompanied Alien Children: Facts and Data*, OFFICE OF REFUGEE RESETTLEMENT <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [<https://perma.cc/YF27-2SVS>] (last visited Feb. 5, 2021). One reason unaccompanied minors may be staying in ORR custody longer is because federal law requires ORR to conduct a home study for “a special needs child with a disability” and defines “disability” consistent with the ADA. See 8 U.S.C. § 1232(c)(3)(B). The ADA defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of such individual; [or] a record of such an impairment; or . . . being regarded as having such an impairment.” 42 U.S.C. § 12102(1). Yet, these home studies may prolong a child’s stay in detention, as activists have claimed that they “significantly slow the release process” for immigrant children. See, e.g., Second Amended Complaint at 27, *J.E.C.M. et al. v. Lloyd et al.*, 352 F. Supp. 3d 559, No. 18-0903-LMB (E.D. Va. Feb. 22, 2019), ECF No. 21.

²³ See generally Deidra Coleman & Adam Avrushin, *Education Access for Unaccompanied Immigrant Children*, LOYOLA UNIV. CHI. CTR. FOR THE HUM. RTS. OF

cannot enroll in the public-school system, although they can receive services at shelters.²⁴

Shelters must provide children in their care “a structured education” that is “appropriate to the minor’s level of development and communication skills in a . . . classroom setting”²⁵ every weekday for six hours per day.²⁶ Within seventy-two hours of arrival, shelters must assess the academic levels of each child, but ORR does not require facilities to screen to determine whether a child has a disability or to understand how cognitive or emotional disabilities might affect a child’s ability to access her education.²⁷ Once facilities have completed their initial assessments, they must then develop an “individualized education plan based on [the child’s] literacy level and linguistic ability,”²⁸ but ORR does not require facilities to conduct the kinds of assessments that the IDEA mandates to appropriately plan for the education of a child with a disability.²⁹ Further, there are no

CHILD. 1, 5–8 (2017); Priya Konings, *Protecting Immigrant Children’s Right to Education*, AM. BAR ASS’N (Mar. 1, 2017), https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/mar-apr-2017/protecting-immigrant-childrens-right-to-education/ [https://perma.cc/HVN9-S733].

²⁴ *Education Services for Immigrant Children and Those Recently Arrived to the United States*, U.S. DEPT OF EDUC., <https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html> [https://perma.cc/75R7-EPNG] (last updated Sept. 19, 2014).

²⁵ See Loren Camera, *Unaccompanied and Uneducated: The Billions Spent at the Border*, U.S. NEWS & WORLD REPORTS (Sept. 28, 2018), <https://www.usnews.com/news/the-report/articles/2018-09-28/unaccompanied-and-uneducated-the-billions-spent-at-the-border>; FSA, *supra* note 19, at Ex. 1 ¶ A(4).

²⁶ *ORR Policy Guide*, *supra* note 10, <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied> [https://perma.cc/D2XE-DZ4Z] (“Each unaccompanied alien child must receive a minimum of six hours of structured education, Monday through Friday, throughout the entire year in basic academic areas (Science, Social Studies, Math, Reading, Writing, Physical Education, and English as a Second Language (ESL), if applicable.”). Although the current ORR Shelter Guide requires licensed facilities to provide unaccompanied children with six hours of education per day, as recently as June 2019, the Guide required shelters to only provide six hours per week. In practice, however, facilities vary in the amount of schooling time that they provide children in their custody. See DISABILITY RIGHTS CAL., *THE DETENTION OF IMMIGRANT CHILDREN WITH DISABILITIES IN CALIFORNIA: A SNAPSHOT 21* (2019).

²⁷ See *ORR Policy Guide*, *supra* note 10.

²⁸ Camera, *supra* note 25. These individualized educational plans are not the same as the individualized education programs (IEP) that the IDEA mandates. See 34 C.F.R. § 300.320(a) (specifying requirements for individualized education programs, including a statement of the child’s present levels of academic achievement, how the child’s disability affects her ability to access the general education curriculum, and a statement of measurable annual goals).

²⁹ Compare *ORR Policy Guide*, *supra* note 10 (requiring licensed facilities to conduct educational assessments to “determine the academic level of the child and

prescribed academic standards in ORR facilities, and ORR provides licensed programs with wide discretion to “adapt or modify local educational standards to develop curricula and assessments, based on the average length of stay for [unaccompanied children] at the care provider facility, and provide remedial education and after school tutoring as needed.”³⁰

Facility educators are to focus on developing basic academic skills of the children under their care—providing instruction in Spanish, although many unaccompanied children primarily speak indigenous languages—and only secondarily on English language training.³¹ Subject areas that shelters must cover include science, social studies, math, reading, writing, and physical education.³² Finally, shelters must provide children with reading materials for their leisure time.³³

However, the FSA and the ORR are silent as to the kinds of educational services that shelters must provide disabled children. In July 2019, Disability Rights California published a report based on an investigation into the nine facilities and programs with which ORR contracts in California; the report found that ORR failed to provide appropriate oversight or educational programming in many of these facilities.³⁴ For instance, one ORR shelter in California that screened and provided special education programming was the most restricted ORR facility in California and is now closed.³⁵ In other words, a child had to be placed in the most restrictive setting just to get special education.

This is troubling because children with disabilities will not receive an appropriate education without proper services and

any particular needs he or she may have”), *with* 34 C.F.R. § 300.304(b)(1) (mandating that local educational agencies “[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent” to determine eligibility for special education and related services).

³⁰ See *ORR Policy Guide*, *supra* note 10, at § 3.3.5.

³¹ *FSA*, *supra* note 19, at Ex. 1 ¶ A(4).

³² *Id.*

³³ *Id.*

³⁴ DISABILITY RIGHTS CAL., *supra* note 26, at 10.

³⁵ *Id.* at 21 (discussing the services available at the highly-restrictive Yolo County’s detention center); see also Alexandra Yoon-Hendricks, *Yolo County to End Federal Contract Housing Immigrant Teens at Local Detention Center*, SACRAMENTO BEE (Oct. 8, 2019, 4:14 PM), <https://www.sacbee.com/news/local/article235929222.html> (reporting on Yolo County’s termination of its ORR contract).

accommodations. While Section 504 of the Rehabilitation Act of 1973³⁶ prohibits federal agencies and funds recipients from discriminating against otherwise qualified disabled individuals, these protections are not a substitute for the IDEA's robust services and statutory rights.

II. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Under the Education for All Handicapped Children Act of 1975³⁷—the IDEA's predecessor—Congress sought to ensure that *all* children with disabilities in the United States had access to a FAPE “that emphasizes special education and related services designed to meet [students'] unique needs.”³⁸ This Part of the Article provides relevant background information about the IDEA. Section II.A explains that in most instances, the IDEA only applies to states receiving funds under the statute, and not to the federal government. Section II.B describes two of the most important rights under the IDEA: the substantive right to a FAPE and the procedural child-find right.

A. *The IDEA Applies to States and Not the Federal Government*

Congress sought to provide every child with a disability in the United States with a FAPE by conditioning statutory funds to states upon “assurances” to ED that state laws, policies, and procedures conform with the statute's substantive and procedural requirements.³⁹ Thus, in order to qualify for IDEA funds, states must pass legislation that provides children with disabilities the minimum substantive and procedural protections outlined in the IDEA.

By its terms, the IDEA's substantive and procedural requirements apply only to states and not to federal agencies. For instance, section 1412 of the IDEA, which applies to the part of the statute covering children ages 3 to 21, is called “State

³⁶ See 29 U.S.C. § 794(a) (2018).

³⁷ Education for All Handicapped Children Act of 1975, Pub. L. No 94-142, 89 Stat. 773. Congress has continued to reauthorize the statute since 1975. Though the name of the protected class went from “handicapped children” to “children with disabilities” in 1990—and the name of the legislation was changed to “Individuals with Disabilities Education Act” to reflect “people-first” terminology—much of the statutory scheme has remained the same. Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1156 (2006).

³⁸ 20 U.S.C.A. § 1400(d)(1)(A) (West 2018).

³⁹ See 20 U.S.C. § 1412(a) (2018).

eligibility.”⁴⁰ There, it says that “[a] *State* is eligible for assistance under this subchapter . . . if the *State* submits a plan that provides assurances to the Secretary [of Education] that the *State* has in effect policies and procedures to ensure that the *State* meets” a number of conditions.⁴¹ Unless otherwise stated, the IDEA applies to states and not the federal government.

However, there are at least two statutorily-created exceptions to this general rule. One authorizes ED to provide the U.S. Secretary of the Interior with educational funds for disabled children on Indian reservations.⁴² Another extends the IDEA’s protections to children with disabilities attending schools on military installations run by the Department of Defense.⁴³ Congress has not allocated IDEA funds to the Department of Health and Human Services to serve unaccompanied minors in ORR custody. Therefore, ORR is not required to provide unaccompanied minors in its custody with any services under the IDEA. The next Section explores whether states are required to provide these services to unaccompanied minors in ORR custody.

B. Two Fundamental IDEA Rights: FAPE and Child Find

1. The Right to a Free Appropriate Public Education

ED provides IDEA funding to states upon assurances that “a free appropriate public education is available to *all* children with disabilities *residing* in the State between the ages of 3 and 21.”⁴⁴ While the U.S. Constitution does not guarantee a right to a public education,⁴⁵ the IDEA’s right to a FAPE is an “enforceable substantive right . . . in participating States” for children with disabilities.⁴⁶ States satisfy the FAPE requirement by providing

⁴⁰ *Id.* § 1412.

⁴¹ *Id.* § 1412(a) (emphasis added).

⁴² *See* 20 U.S.C. § 1411(h)(1)(A) (2018) (“The Secretary of Education shall provide amounts to the Secretary of the Interior to [fund and assist] the education of children with disabilities on reservations aged 5 to 21, inclusive, enrolled in elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior.”).

⁴³ 10 U.S.C.A. § 2164(f) (West 2013).

⁴⁴ 20 U.S.C. § 1412(a)(1)(A) (emphasis added).

⁴⁵ *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.”).

⁴⁶ *See* *Honig v. Doe*, 484 U.S. 305, 310 (1988); *see also* U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: PREVENTING RACIAL DISCRIMINATION IN SPECIAL EDUCATION 5–6 (Dec. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf> [<https://perma.cc/QP4C-A3T6>].

a child with a disability with “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”⁴⁷

The “core of the [IDEA] statute . . . is the cooperative process that it establishes between parents and schools” to develop an individualized education program (“IEP”).⁴⁸ The IEP is a legally-binding document that is developed at least annually; it must include “an assessment of the child’s current educational performance,” “measurable educational goals,” and a specific description of “the nature of the special services that the school will provide.”⁴⁹ To develop the IEP, the state must conduct comprehensive evaluations that assess the child in all areas of suspected need.⁵⁰ Further, “if the child is being educated in the regular classrooms of the public education system, [the IEP] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁵¹ The IEP must also ensure that the child is making more than *de minimis* progress, and it must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁵² Finally, the IDEA has additional procedural and substantive rights—including administrative and judicial remedies—to enforce the statute.⁵³

2. Child-Find Right

One important procedural right under the IDEA is the “child-find” right. Under child-find, a state must provide assurances to ED that it has a plan for identifying, locating, and evaluating all children with disabilities residing in the state who

⁴⁷ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982) (partially superseded by 1997 Amendments to the IDEA, which require public schools to provide children with disabilities with a meaningful educational benefit. For an explanation of these amendments, see *N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Directors, Missoula Cnty.*, 541 F.3d 1202, 1212–13 (9th Cir. 2008)). By “personalized instruction,” the *Rowley* Court was referring to special education, and by “support services,” the Court was referring to “related services.” See 458 U.S. at 201, 203.

⁴⁸ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (explaining the IEP process).

⁴⁹ *Id.*; see also 20 U.S.C. § 1414(d)(1)(A) (2018) (detailing the statutory criteria for IEPs).

⁵⁰ See 34 C.F.R. § 300.304(c)(4) (2021).

⁵¹ *Rowley*, 458 U.S. at 204.

⁵² *Andrew F. ex rel. Joseph F. v. Douglas Cty. Pub. Sch. Dist. RE-1*, 137 S.Ct. 988, 997, 999 (2017).

⁵³ See 34 C.F.R. §§ 300.508(a)(1), 300.516(c)(1)–(3) (2021). In addition, the prevailing party is entitled to attorneys’ fees. *Id.* § 300.517(a)(1)(i)–(iii).

are in need of special education and related services, “regardless of the severity of their disabilities.”⁵⁴ If found to apply to unaccompanied children in ORR custody, the right has the potential to revolutionize educational outcomes for unaccompanied minors with disabilities; these children would be identified as eligible for special education services even before they entered public schools. This would allow them to begin their education with the services and supports needed to obtain an educational benefit.

The child-find mandate is broad. It requires states to identify, locate, and evaluate children with disabilities who are homeless or in private school,⁵⁵ those in correctional facilities,⁵⁶ those in nursing homes,⁵⁷ and “[h]ighly mobile children, including migrant children,”⁵⁸ among others. In other words, states have child-find obligations even for children who are not enrolled in their schools. Moreover, ED has stated that “nothing in IDEA requires that an evaluation of a child suspected of having a disability take place in a school setting.”⁵⁹

The IDEA requires states to adopt state-wide “policies and procedures” for identifying children with disabilities.⁶⁰ Local education agencies like school districts often fulfill their child-find obligations with referrals from non-educational institutions like hospitals, physicians, child care providers, public health officials, or government agencies serving children and families.⁶¹ Once a school district receives a referral, the agency must obtain

⁵⁴ 20 U.S.C. § 1412(a)(3)(A) (2018).

⁵⁵ 34 C.F.R. § 300.111(a)(1)(i).

⁵⁶ U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. & REHAB. SERVS., DEAR COLLEAGUE LETTER ON THE IDEA'S APPLICATION TO CHILDREN IN CORRECTIONAL FACILITIES 8 (Dec. 5, 2014) [hereinafter *Students with Disabilities in Correctional Facilities*], <https://sites.ed.gov/idea/files/idea-letter.pdf> [<https://perma.cc/Y2K9-2CSU>] (“However, there is no obligation for States to identify and evaluate those students with disabilities in adult correctional facilities for whom the State is otherwise not required to provide FAPE.”).

⁵⁷ U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. & REHAB. SERVS., DEAR COLLEAGUE LETTER ON THE IDEA'S APPLICATION TO CHILDREN IN NURSING HOMES 2 (Apr. 26, 2016), <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/dcl-children-in-nursing-homes-04-28-2016.pdf> [<https://perma.cc/QS26-LVN5>].

⁵⁸ 34 C.F.R. § 300.111(c)(2) (2021).

⁵⁹ *Students with Disabilities in Correctional Facilities*, *supra* note 56, at 3.

⁶⁰ 34 C.F.R. § 300.111(a)(1) (2021).

⁶¹ See e.g., Memorandum from Kerri L. Briggs, DC State Superintendent of Education, Opinion Letter on Clarifying Child-Find Requirements (Mar. 22, 2010), <https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Comprehensive%20Child%20Find%20System.pdf> [<https://perma.cc/9J4Y-S7P7>].

parental consent to move forward with the evaluation process.⁶² If the school district cannot identify or locate the child's parent, or if the child is a ward of the state, the IDEA allows the local agency to assign a "surrogate parent" to assume the rights and responsibilities of the parent under the statute.⁶³ Because the IDEA's FAPE and child-find rights only apply to state residents, the following Section discusses how residency is defined under the statute.

C. *Residency Under the IDEA*

The IDEA does not define the term "residing," yet both ED and courts have defined the term. While ED determines residency based only on the residency of a child's parents, courts look to both state law and Supreme Court precedent when defining a child's residency, which considers the child's physical presence and their parents' intention to remain.

ED has stated that a child is a resident of the state if his or her parents are residents of the state, or if he or she is a ward of the state.⁶⁴ Under ED's rule, the controlling factor is residency, not the location of the child. In *Letter to McAllister*, ED did not require Utah to provide a FAPE to non-resident children attending Utah private schools when children were placed there by an out-of-state agency.⁶⁵ "It is residence that creates the duty under the statute and regulations," ED stated, "not the location of the child."⁶⁶ Because the child's residency was determined by the parent's residency, *Letter to McAllister* held that "[t]he movement of a child from one placement in one jurisdiction to another placement in another jurisdiction does not, in most instances, change a child's district of residence or shift the responsibility for providing FAPE from one public agency to another."⁶⁷

Likewise, in *Letter to Moody*, Massachusetts was no longer required to provide a FAPE to children placed at Massachusetts schools by Massachusetts school committees once the children's

⁶² See 34 C.F.R. § 300.304(c)(4); *Evaluating School-Aged Children for Disability*, CTR. FOR PARENT INFO. & RES. (Sept. 9, 2019), [https://www.parentcenterhub.org/evaluation/#\[https://perma.cc/PU48-64GF\]](https://www.parentcenterhub.org/evaluation/#[https://perma.cc/PU48-64GF]).

⁶³ See 34 C.F.R. § 300.519 (2021).

⁶⁴ See *Letter to McAllister*, 21 IDELR ¶ 81 (OSEP 1994).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

parent took up residency in another state.⁶⁸ Although the children in this case remained in Massachusetts, a change in parental residency meant that the State was no longer statutorily required to serve them.⁶⁹

Courts interpreting the term “residency” under the IDEA look to state laws for definitions.⁷⁰ The Supreme Court of the United States has stated that “‘residence’ generally requires both physical presence and an intention to remain,” and in “most” instances, “it is the intention of the parent or guardian on behalf of the child that is relevant” to determining the child’s legal residence.⁷¹ While states generally define a child’s residency as the residency of their parents,⁷² there are instances when state law would require a local school district to enroll a child in the public schools, even if his or her parents were not state residents.⁷³ In these instances, courts have found that states were required to provide IDEA services to children consistent with state law.⁷⁴

III. SPECIAL EDUCATION NO MAN’S LAND: CHILDREN IN FEDERAL CUSTODY

Despite ED’s longstanding rule that “[i]t is residence that creates the duty under the statute and regulations, not the

⁶⁸ Letter to Moody, 23 IDELR 833 (OSEP 1995).

⁶⁹ *Id.*

⁷⁰ See *Manchester Sch. Dist. v. Crisman*, 306 F.3d 1, 11–13 (1st Cir. 2002); *Linda W. v. Ind. Dep’t of Educ.*, 927 F.Supp. 303, 307 (N.D. Ind. 1996) (“[T]he IDEA leaves the determination of a student’s residency to state law.”); *J.S. v. Shoreline Sch. Dist.*, 220 F.Supp.2d 1175, 1192 (W.D. Wash. 2002) (“The court finds that whether C.S. is a resident of Washington for purposes of the IDEA is determined by state law.”).

⁷¹ See *Martinez v. Bynum*, 461 U.S. 321, 330, 332 n.14 (1983).

⁷² See, e.g., ALA. CODE § 30-3-161 (1975) (defining a child’s residence “at which the child lived with the child’s parents”); N.J. STAT. ANN. § 2A:34-65 (West 2013) (“[T]his State is the home state of the child . . . [if] a parent or person acting as a parent continues to live in this State”); N.Y. DOM. REL. LAW § 76 (McKinney 2002) (“[T]his state is the home state of the child . . . [if] a parent or person acting as a parent continues to live in this state”). Moreover, the definition is consistent with the Supreme Court’s definition of the term.

⁷³ See, e.g., TEX. EDUC. CODE ANN. § 25.001 (West 2019) (requiring admission of homeless students “regardless of the residence” of the student, parents, or guardians); TEX. EDUC. CODE ANN. § 25.040 (West 1995) (allowing students “situated on the border of Louisiana, Arkansas, Oklahoma, or New Mexico” to attend schools in bordering states under certain circumstances).

⁷⁴ See e.g., *Manchester*, 306 F.3d at 4–5; *E. Longmeadow Pub. Sch. v. Doe*, No. 17-30090, 2018 WL 4901093, at *2 (D. Mass. July 17, 2018); *R.F. v. Delano Union Sch. Dist.*, No.16-1796, 2017 WL 633919, at *3 (E.D. Cal. Feb. 15, 2017).

location of the child,”⁷⁵ ED seems to have carved out an exception for resident children in federal custody. This Part argues that, notwithstanding ED’s interpretation of the statute, states are required to provide FAPE and child-find rights to state residents in federal custody because children do not lose their residency when they are incarcerated. But what about undocumented children in federal custody? When, if ever, are they state residents? At best, the answer is ambiguous.

Section III.A explains that in addition to unaccompanied minors in ORR custody, there is an entire class of children in federal custody that ED says is outside of the IDEA’s reach. Section III.B explains ED’s argument regarding children’s ability to access the IDEA’s protection while in federal custody. Section III.C argues that, although ED’s interpretation of the IDEA is incorrect for American citizens, there are many children in federal custody who are either not state residents or for whom state residency is ambiguous at best.

A. *Children in Federal Custody*

In addition to the Department of Health and Human Services, which oversees ORR, other federal agencies have custody of children. One of these agencies is the Department of Justice, which oversees the BOP and the U.S. Marshals Service. Another is DHS, which oversees ICE.

1. Children in BOP and U.S. Marshal Services Custody

There are several paths that could lead a child into the custody of the BOP and the U.S. Marshals Services. One path is when a state either lacks jurisdiction or refuses to assume jurisdiction over a minor who has been accused of committing a federal crime, or who has been convicted of a federal crime. In those instances, the Federal Juvenile Delinquency Act allows the DOJ to try these children under federal delinquency proceedings or as adults.⁷⁶ The U.S. Marshals Service has custody of these

⁷⁵ Letter to McAllister, 21 IDELR ¶ 81 (OSEP 1994).

⁷⁶ See generally Federal Juvenile Delinquency Act, 18 U.S.C. § 5032 (2018); CHARLES DOYLE, CONG. RESEARCH SERV., RL30822, JUVENILE DELINQUENTS & FED. CRIMINAL LAW: THE FED, JUVENILE DELINQUENCY ACT & RELATED MATTERS 3–4 (2018).

children while in pre-trial detention, and the BOP has custody of them if and when they serve their federal sentences.⁷⁷

Because the federal government has jurisdiction over crimes committed in Indian Country, most children in BOP and U.S. Marshal Services custody are Native American males who have committed crimes on reservations.⁷⁸ But the U.S. Marshals Service and the BOP may also take custody of a District of Columbia resident charged and convicted under D.C. law as an adult pursuant to the National Capital Revitalization and Self Government Improvement Act (“Revitalization Act”).⁷⁹

2. Children in DHS Custody

DHS also has custody of children. The Customs and Border Protection (“CBP”) is charged with apprehending immigrants at land borders, while ICE may apprehend immigrants in the interior of the country.⁸⁰ Federal law, however, requires DHS to notify ORR within 48 hours of either apprehending or discovering an unaccompanied child; DHS must then transfer the minor to ORR custody within 72 hours.⁸¹ Thus, with some exceptions, unaccompanied minors are typically in DHS custody for a relatively short period of time.

However, accompanied minors have a different fate. DHS houses many of these children for longer periods at one of three ICE-run family residential detention centers in Texas and

⁷⁷ See *Custody & Care: Juveniles*, U.S. DEP'T OF JUSTICE, https://www.bop.gov/inmates/custody_and_care/juveniles.jsp [<https://perma.cc/4D9U-8LYZ>] (last visited Feb. 1, 2021); *Defendant and Prisoner Custody and Detention*, U.S. MARSHALS SERVS., <https://www.usmarshals.gov/prisoner/detention.htm> [<https://perma.cc/72KZ-6VTH>] (last visited Mar. 25, 2021).

⁷⁸ See *Custody & Care: Juveniles*, *supra* note 77.

⁷⁹ *Brown v. D.C.*, 324 F.Supp.3d 154, 158 (D.D.C. 2018). The Revitalization Act is a statute that “commits the ‘felon population sentenced pursuant to the [D.C.] Official code’ to ‘the custody, care, subsistence, education, treatment and training,’ of the federal [BOP] . . .” *Id.* at 157.

⁸⁰ WILLIAM A. KANDEL, CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 6, 8 (last updated Oct. 9, 2019).

⁸¹ See 8 U.S.C. § 1232(b)(2)(A), (3). This requirement that federal agencies transfer minors to ORR custody within 72 hours of apprehension is slightly different in the *Flores* Settlement Agreement. See *FSA*, *supra* note 19, at 8 (stating that the INS will transfer a minor to a placement “(i) within three (3) days, if the minor was apprehended in an INS district in which a licensed program is located and has space available; or (ii) within five (5) days in all other cases[,]” unless emergency circumstances exist).

Pennsylvania.⁸² In many ways, accompanied children and unaccompanied children enjoy similar rights. For instance, courts have found that accompanied children enjoy protections under the *Flores* Settlement Agreement.⁸³ However, accompanied children in ICE-run family residential shelters are subject to ICE Family Residential Standards. As the subsequent sections explain, these standards differ in key respects from ORR shelter guidelines.

B. ED's Interpretation of the IDEA for Children in Federal Custody

Since at least 2003, ED has maintained that states are not required to provide a FAPE to children under federal jurisdiction.⁸⁴ In *Letter to Yudien*, ED explained that Vermont had no FAPE duties to inmates in federal correctional facilities housed in Vermont, because these children fell under BOP jurisdiction and the statute does not make “specific provision[s] for funding educational services for individuals with disabilities through the BOP.”⁸⁵ In *Letter to Mahaley*, ED stated that the District of Columbia is not obligated to provide a FAPE to students with disabilities convicted as adults under D.C. law who are incarcerated in federal prison.⁸⁶ Citing *Letter to Yudien*, ED concluded that absent another law, states are not required to provide a FAPE to children in federal custody, because the statute does not allocate funds to serve this group of children.⁸⁷

Similarly, in *Letter to Anderson 2007*, ED explained that a Texas school district had no child-find duties to children with disabilities at a local ICE-run family detention facility.⁸⁸ Like in

⁸² These include the South Texas Family Residential Center in Dilley, TX, the Karnes County Residential Center in Karnes City, TX, and the Berks County Residential Center in Leesport, PA.

⁸³ SCHRAG, *supra* note 18, at 100–01.

⁸⁴ See *Letter to Yudien*, 39 IDELR ¶ 270 (OSEP 2003) (“You state that Vermont’s correctional system houses inmates from other states, and also, from the federal correctional system, and ask ‘What are Vermont’s obligations, if any, to provide FAPE for the students who are in these groups?’”).

⁸⁵ *Id.*

⁸⁶ *Letter to Mahaley*, 58 IDELR ¶ 20 (OSEP 2011).

⁸⁷ *Id.*

⁸⁸ See *Letter to Anderson 2007*, TK IDELR ¶ TK (OSEP 2007). Texas wrote the letter two months before the ACLU and the University of Texas School of Law filed a lawsuit after reports surfaced that DHS was housing children with their families in “prison-like conditions” at Hutto. See *Bunikyte ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at *5 (W.D. Tex. Apr. 9, 2007); Rebeca M. Lopez,

Letter to Yudien, ED explained that accompanied children did not have child-find rights because the IDEA created obligations on states receiving federal funds, and Congress had not allocated funds for serving children in the custody of either ICE or DHS more broadly.⁸⁹ Similar to children with disabilities in federal prisons,⁹⁰ ED found that Texas had no obligations to these children under the IDEA “absent any other applicable law.”⁹¹

A year later, Texas wrote back to ED after ICE issued Family Residential Standards, which “describe[d] special education services under the [IDEA] that ICE facilities must provide to children with disabilities”⁹² Texas was concerned that the new standards would conflict with ED’s previous guidance.⁹³ In its *Letter to Anderson 2008*, ED reassured Texas that its interpretation of the statute had not changed, and qualified the binding force of these ICE standards:

We contacted DHS’s Enforcement Law Division regarding the ICE Standards and the T. Don Hutto Family Residential Facility and confirmed that the standards are neither statutory nor regulatory and thus, do not create an additional requirement of law or impact the State’s or local educational agency’s (LEA) obligations under the IDEA. DHS acknowledged that ICE could not compel any State agency to provide educational services that are not mandated by law. Notwithstanding, DHS informed us that ICE, through its contractor The Corrections Corporation of America[], entered into a negotiated memorandum of understanding (MOU) with the Taylor Independent School District and services are currently being provided to school-aged children in the Hutto facility pursuant to that MOU.⁹⁴

In other words, ED explained that because the ICE standards were non-binding, the standards could not compel the local school district to provide IDEA services to the children in its custody. Although some ICE standards mirror the IDEA’s provisions, they are non-binding and do not create rights

Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody, 95 MARQ. L. REV. 1635, 1658 (2012).

⁸⁹ Letter to Anderson 2007, TK IDELR ¶ TK (OSEP 2007).

⁹⁰ *Id.*; see also Letter to Mahaley, 58 IDELR ¶ 20 (OSEP 2011); Letter to Yudien, 39 IDELR ¶ 270 (OSEP 2003).

⁹¹ Letter to Anderson 2007, XX IDELR ¶ XX (OSEP 2007).

⁹² *Id.*; see also U.S. IMMIGR. & CUSTOMS ENFORCEMENT, ICE FAMILY RESIDENTIAL STANDARD: EDUC. POL’Y 9 (2007).

⁹³ Letter to Anderson 2008, 51 IDELR ¶ 165 (OSEP 2008).

⁹⁴ *Id.*

equivalent to those in the IDEA.⁹⁵ Additionally, as Part V explains, there is evidence that ICE was not enforcing these Standards.

C. The IDEA Requires States to Serve Residents Even in Federal Custody

States are required to provide FAPE and child-find rights to children in federal custody, because most children do not lose their state residency when they enter federal custody. If most children do not lose their state residency while in federal custody, then the plain language of the statute would require states to continue to provide a child previously receiving IDEA services a FAPE while in federal custody. Likewise, except in some instances where individuals aged 18 to 21 had not previously been identified as a child with a disability and are incarcerated in adult facilities,⁹⁶ the statute's plain language imposes child-find duties on states for their residents.

Brown v. District of Columbia, a recent District of D.C. case, illustrates how the IDEA's protections extend to children in federal custody.⁹⁷ The case dealt with Stephon Brown, a teenager and lifelong D.C. resident who had been eligible for special education and related services under the IDEA since childhood.⁹⁸ When he was eighteen, Mr. Brown was convicted of a felony under D.C. law and incarcerated for twenty-four months in a BOP facility.⁹⁹ Because he received no special education or related services while in BOP custody, Mr. Brown sued both D.C. and the BOP for denials of FAPE rights.¹⁰⁰ The court dismissed Mr. Brown's claim as to the BOP because the IDEA provides funding to states, and the BOP is a federal agency that receives

⁹⁵ For instance, unlike the IDEA, ICE Standards are not privately enforceable through mediation, administrative hearings, or a federal civil action. See 20 U.S.C. § 1415(e)–(i) (enumerating mediation and hearing procedures available to state educational agencies and parents of children with disabilities).

⁹⁶ None of the exceptions related to when a State is not required to provide FAPE to its residents turn on whether or not the child is in federal custody. For instance, states are not required to provide a FAPE to children aged 18 through 21 if state law does not require local educational agencies to provide special education and related services to children who are incarcerated in adult correctional facilities and they were not previously. See 20 U.S.C. § 1412(a)(1)(B) (2018); 34 C.F.R. § 300.102(a)(2)(i) (2020).

⁹⁷ 324 F. Supp. 3d 154, 158 (D.D.C. 2018).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

no funds under the statute.¹⁰¹ However, it allowed the claim against D.C. to move forward.¹⁰² The court held that D.C. was responsible for providing Mr. Brown a FAPE while in BOP custody because the Revitalization Act—which requires D.C. children convicted as adults to serve time in Federal prisons—“does not prevent the District from holding an independent obligation to ensure that those in the BOP’s custody who are disabled receive a FAPE.”¹⁰³ Further, it held that the Revitalization Act does not suggest that “Congress intended to transfer the District’s IDEA obligations . . . to the BOP.”¹⁰⁴

The magistrate judge grappled with two ED guidance letters—*Letter to Yudien* and *Letter to Mahaley*—but did not find them persuasive:

The undersigned agrees that BOP is not regulated by the IDEA and so has no responsibility to provide a FAPE to a disabled inmate in BOP custody. But the fact that BOP does not receive IDEA funds to educate children with disabilities in its custody says nothing about the responsibilities of a State that *does* receive such funds to provide FAPEs for its residents who require them, even if they are in BOP custody.¹⁰⁵

As the court’s reasoning illustrates, states continue to have responsibilities to residents in federal custody, because they do not lose their residency simply because they are in federal custody. ED’s guidance documents make clear that it is residency, not the location of the child, that determines FAPE rights.¹⁰⁶ Additionally, courts and ED guidance documents say that states may have FAPE and child-find duties to children even if they are attending out-of-state schools or schools that are not run by the state.¹⁰⁷

Nevertheless, not all children in federal custody are state residents. Because a child is a resident of the state where her

¹⁰¹ *Id.* at 160.

¹⁰² *Id.* at 162.

¹⁰³ *Id.* at 161.

¹⁰⁴ *Id.*

¹⁰⁵ *Brown v. D.C.*, No. 17-0348, 2018 WL 774902, at *13 (D.D.C. Jan. 24, 2018).

¹⁰⁶ U.S. DEP’T OF EDUC., FREQUENTLY ASKED QUESTIONS ABOUT THE RIGHTS OF STUDENTS WITH DISABILITIES IN PUB. CHARTER SCH. UNDER SECTION 504 OF THE REHAB. ACT OF 1973 5 (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faq-201612-504-charter-school.pdf> [<https://perma.cc/64VQ-CAN2>]; U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON SPECIAL EDUC. & HOMELESSNESS 9 (2008), <https://www2.ed.gov/policy/speced/guid/spec-ed-homelessness-q-a.pdf> [<https://perma.cc/9K58-UACK>].

¹⁰⁷ *Brown*, 324 F. Supp.3d at 160.

parents are residents, in most circumstances the children of non-residents are not considered residents for IDEA purposes.¹⁰⁸ The next Section explores whether or not unaccompanied minors in ORR shelters could be considered state residents for IDEA purposes.

D. Are Unaccompanied Minors State Residents While in ORR Shelters?

Many undocumented immigrants satisfy the requirements of state residency, which are physical presence in the jurisdiction and an intent to remain.¹⁰⁹ Although states may restrict some state social services and privileges such as in-state college tuition, driver's licenses, and health insurance to undocumented immigrants, some states nevertheless choose to extend these privileges.¹¹⁰ Moreover, all children—regardless of immigration status—are entitled to enroll in K–12 schools.¹¹¹

The U.S. Supreme Court held in *Plyler v. Doe* that the Equal Protection Clause of the Fourteenth Amendment prevents states from restricting school enrollment based solely on the child's status as an undocumented immigrant.¹¹² Once undocumented immigrants enroll in public schools, they are entitled to services under the IDEA.¹¹³ But are unaccompanied minors state residents even when in ORR custody? Many unaccompanied minors migrate to the United States to reunite with parents living in this country.¹¹⁴ Unlike the parents of accompanied immigrant children who are also detained, the parents of many unaccompanied minors are not only physically present in the United States but also intend to remain indefinitely.¹¹⁵ If the

¹⁰⁸ See *supra* Section II.C.

¹⁰⁹ *Martinez v. Bynum*, 461 U.S. 321, 330–32 (1983).

¹¹⁰ Erica Williams, Eric Figueroa & Wesley Tharpe, *Inclusive Approach to Immigrants Who Are Undocumented Can Help Families and States Prosper*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/state-budget-and-tax/inclusive-approach-to-immigrants-who-are-undocumented-can-help> [https://perma.cc/Y28C-PGJP] (last updated Dec. 19, 2019).

¹¹¹ *Id.* at 7.

¹¹² 457 U.S. 202, 230 (1982).

¹¹³ See *ED Fact Sheet*, *supra* note 13.

¹¹⁴ Amanda Levinson, *Unaccompanied Immigrant Children: A Growing Phenomenon with Few Easy Solutions*, MIGRATION POL'Y INST. (Jan. 24, 2011), <https://www.migrationpolicy.org/article/unaccompanied-immigrant-children-growing-phenomenon-few-easy-solutions> [https://perma.cc/4WB6-ZYG9].

¹¹⁵ Dennis Stinchcomb & Eric Hershberg, *Unaccompanied Migrant Children from Central America* 22 (Am. U. Ctr. for Latin Am. & Latino Stud., Working Paper No. 7, 2014), <http://ssrn.com/abstract=2524001> [https://perma.cc/HC4A-MF7L].

parents of unaccompanied minors meet the technical definition of residency—and children acquire the residency of their parents—then are unaccompanied minors who already have parents living in the United States also state residents while in ORR custody?

There is no clear answer. Each state can define residency and fashion its own school enrollment policies. Although *Plyler* prohibits a state from denying undocumented immigrants access to public schools, the Supreme Court's holding would not likely apply to children in ORR custody, so states can define residency to exclude children in federal custody.¹¹⁶ Oftentimes, they do exclude these children.

Esperanza Zendejas, superintendent of the Brownsville Independent School District in Brownsville, Texas, reached out to the Texas Educational Agency (“TEA”) to see how her district could provide educational services to unaccompanied children in local ORR shelters.¹¹⁷ “The intent was to reach out and assist with any special needs children and any specialized programs that the shelters did not have or did not have access to,” Zendejas said.¹¹⁸ In response, TEA issued a memorandum in August 2018 explaining that if Texas public schools provide services to children held in federal custody, “those services must come from sources such as tuition, not from state funds.”¹¹⁹

TEA explained that pursuant to both the U.S. Refugee Act of 1980 and the *Flores* Settlement Agreement, the Director of ORR has “assume[d] legal responsibility (including financial responsibility) for the [unaccompanied refugee] child’s immediate care.”¹²⁰ Because the children do not enroll in public schools, this meant that ORR was also responsible for providing educational services.¹²¹ TEA further explained that the Texas Education Code (“TEC”) requires school districts to “‘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.’”¹²² TEA concluded, that “[o]nce the children are no longer held in federal custody, the tuition requirement under

¹¹⁶ See *Plyler*, 457 U.S. at 230.

¹¹⁷ Camera, *supra* note 25.

¹¹⁸ *Id.*

¹¹⁹ Tex. Educ. Agency, Opinion Letter on Unallowable Double Funding for Unaccompanied Children Held in Custody by or for the Federal Government Being Served by Texas Public Schools (Aug. 31, 2018).

¹²⁰ *Id.*

¹²¹ *Id.* (citing *ED Fact Sheet*, *supra* note 13).

¹²² *Id.* (quoting TEX. EDUC. CODE ANN. § 25.003(a) (West 2019)).

TEC § 25.003 no longer applies, and the attendance of those children in Texas public schools may be counted for purposes of state funding.”¹²³ Thus, even if local school districts wanted to serve children with disabilities in ORR custody under the IDEA, in some instances, state law would prevent them from doing so.

IV. SPECIAL EDUCATION NO MAN'S LAND NO MORE

This Part argues that, because of their uncertain status as state residents, Congress should amend the IDEA to allocate funds to HHS to ensure that unaccompanied minors with disabilities have child-find and FAPE rights while in ORR shelters. Section IV.A explains that ORR should have child-find duties because unaccompanied minors—even those without disabilities—have tremendous educational needs. Identifying, locating, and evaluating children with disabilities in ORR custody would give these children a substantial advantage upon entering public school. These procedures would enable students to arrive at school with a battery of assessments and evaluations that would explain what services and supports they need to obtain educational benefit. Section IV.B explains that congressional action is needed. ORR cannot be left to voluntarily change its guidelines to require its shelters to provide these services. The experience of accompanied minors in ICE family residential shelters has shown that absent congressional action, agencies do a poor job of enforcing their non-binding guidelines.¹²⁴

A. *Congress Should Amend the IDEA to Create Child-Find Duties on ORR*

Many unaccompanied children have experienced the kind of trauma that could lead to mental health conditions that require special education and related services under the IDEA.¹²⁵ Many unaccompanied children may be able to stay in the United States and integrate into the community because many may have strong immigration claims. Although the IDEA's child-find requirements compel states to identify, locate, and evaluate unaccompanied children once they enroll in public schools,

¹²³ *Id.*

¹²⁴ See Bailly et al., *supra* note 6, at 4.

¹²⁵ Coleman & Avrushin, *supra* note 23, at 6–7.

waiting until children are released from custody potentially misses an incredible educational opportunity.

1. Unaccompanied Minors, Trauma and IDEA Eligibility

Scientific research around trauma has shown that “children who are exposed to trauma are at increased risk of negative health and wellbeing outcomes,” including “post-traumatic stress, anxiety, depression, and cognitive impairments, among others.”¹²⁶ Many of these conditions will require special education and related services to allow students to access their education. “The available literature suggests that unaccompanied youth are at high risk for repeated exposure to psychosocial stressors before, during, and after their migration to the United States.”¹²⁷ Thus, unaccompanied minors may have mental health conditions that require special education and related services at a higher-than-average rate.

One psychosocial stressor that puts unaccompanied children at greater risk for mental health conditions is exposure to violence.¹²⁸ Social scientists have found that many unaccompanied children are exposed to violence before migrating to the United States, in the form of war and civil unrest, forced recruitment as soldiers, displacement caused by natural disasters, child labor, and sexual slavery.¹²⁹ This is certainly true for children from Northern Triangle countries, where the vast majority of unaccompanied children have come from in recent years.¹³⁰

For instance, in FY2018, ninety-two percent of the unaccompanied children that DHS referred to HHS custody were from Northern Triangle countries.¹³¹ These nations have experienced significant societal violence over the past decade.¹³² In 2012, all three countries were among the world’s top-five nations with the highest homicide rates.¹³³ Indeed, in 2014, the

¹²⁶ *Id.*

¹²⁷ See Baily et al., *supra* note 6, at 3.

¹²⁸ *Id.* at 3–4.

¹²⁹ Lilian Chavez & Cecilia Menjivar, *Children Without Borders: A Mapping of the Literature on Unaccompanied Migrant Children to the United States*, 5 MIGRACIONES INTERNACIONALES 71, 83 (2010).

¹³⁰ See Stinchcomb & Hershberg, *supra* note 115, at 18; ORR, *Facts and Data*, *supra* note 16.

¹³¹ ORR, *Facts and Data*, *supra* note 16.

¹³² Stinchcomb & Hershberg, *supra* note 115, at 18.

¹³³ *Id.*

homicide rate for San Pedro Sula, Honduras—the country's second largest city—was 187 homicides for every 100,00 inhabitants.¹³⁴ This rate was even higher than those of war-torn countries like Afghanistan and Iraq.¹³⁵

Many unaccompanied children from these countries also faced violence at home.¹³⁶ A 2014 United Nations High Commissioner for Refugees (“UNHCR”) study noted that of 302 children interviewed from Northern Triangle countries, almost one-fourth reported violence in the home as a factor causing migration.¹³⁷ As one report notes, “[i]n many cases, male heads of household[s], frustrated by the inability to generate income sufficient to satisfy even [minimal] necessities . . . become aggressors not only in the public sphere but in the private one as well. Wives and children become victims of this complex chain of violence.”¹³⁸

Unaccompanied children also experience psychosocial stressors during the journey itself. Many spend months traveling alone, over rugged terrain and “treacherous conditions.”¹³⁹ They are also vulnerable to many types of physical and sexual abuse by “bandits, smugglers, and local officials.”¹⁴⁰

The detention itself may also be traumatizing. One study notes that, “[a]lthough government guidelines have been created to protect unaccompanied children apprehended by U.S. immigration, they may be detained in prison-like conditions for extended periods of time prior to release to family members or other less restrictive settings.”¹⁴¹ The American Academy of Pediatrics (“AAP”) has recognized the psychosocial stress that immigration detention, even for short periods of time, causes both adults and children.¹⁴² A 2017 AAP Policy Statement cites

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 21.

¹³⁷ For instance, of the 104 children interviewed from El Salvador, 21 reported abuse in the home; of 100 children interviewed from Guatemala, 23 reported abuse in the home; and of 98 children interviewed from Honduras, 24 reported abuse in the home as a factor for fleeing their country. U.N. HIGH COMM'R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION, at 25 (2014).

¹³⁸ Stinchcomb & Hershberg, *supra* note 115, at 21.

¹³⁹ See Baily et al., *supra* note 6, at 3.

¹⁴⁰ *Id.* at 3–4.

¹⁴¹ *Id.* at 4.

¹⁴² Julie M. Linton et al., *Detention of Immigrant Children*, 139 PEDIATRICS 1, 5 (2017).

studies of detained immigrant children that found that detention can lead to “negative physical and emotional symptoms” and that “posttraumatic symptoms do not always disappear at the time of release.”¹⁴³ The statement noted that some children were found to suffer the traumatic effects of detention, even with shorter lengths of stay.¹⁴⁴

2. Marco’s Case Illustrates Why ORR Should Have Child-Find Duties

“Marco” is a young man from Central America whom I represented in a special education case. When Marco was about 13, he and two younger siblings walked for weeks to the U.S. as unaccompanied minors. While in Mexico, drug traffickers kidnapped the boys and held them for ransom. Because he tried to protect his siblings from their captors’ physical and verbal abuse, the traffickers tortured Marco. When he reached the U.S. and enrolled in school, the trauma incurred throughout his journey and an undiagnosed learning disability made it almost impossible for him to make progress in school without specialized instruction and accommodations.

Yet, the school district never evaluated him for eligibility for these services under the IDEA, because it said that it did not assess recently-arrived immigrant children until they had reached a higher level of proficiency in English. Marco’s disability, however, prevented him from learning the language. Having failed year after year, Marco stopped going to classes altogether and dropped out of school by the time he was sixteen.

The school district where Marco was enrolled denied him a FAPE under the IDEA. Failure to master the English language does not excuse a state or local school district from their child-find duties. Indeed, many of the assessments and tools used to determine whether or not a child is eligible for special education and related services under the IDEA are available in languages other than English. Had Marco been identified as eligible under the IDEA while in ORR custody, the public school district would have had a roadmap in place to begin providing him appropriate services as soon as he enrolled in schools.

Moreover, ORR shelters would be the perfect location to begin the IDEA eligibility process. Although the school district

¹⁴³ *Id.* at 6.

¹⁴⁴ *Id.* at 5.

where Marco was a student certainly had the staff and resources needed to administer eligibility assessments in Spanish—Marco's native language—not all school districts have access to these tools or have clinicians who are able to administer diagnostic tools in languages other than English. It therefore makes perfect sense to require ORR shelters to begin the diagnostic process to determine the extent of a child's disability and the tools and accommodations needed to obtain an educational benefit. ORR shelters already employ bilingual and bicultural clinicians who are capable of determining whether or not a child's educational struggles are due to a lack of schools, an inability to speak English, or a disability.

B. Congress Must Amend the IDEA to Ensure Agency Action

One option short of amending the IDEA would be for ORR to simply amend its shelter guidelines so that they require grantees to provide these services directly. For instance, ICE Standards governing family residential facilities require detention centers to provide IDEA-type services to accompanied children in those facilities.¹⁴⁵ However, the troubling experience of accompanied minors in ICE custody illustrates why Congress must amend the IDEA to explicitly require ORR to provide child-find and FAPE rights to unaccompanied minors in its custody.¹⁴⁶ Simply relying on the ORR to amend its Shelter Guidelines would not give proper assurances that immigrant children will receive appropriate services while under ORR supervision.

ORR Shelter Guidelines reflect requirements in federal law and the *Flores* Settlement Agreement. However, neither federal law nor the FSA require ORR to provide children with disabilities FAPE or child-find rights under the IDEA. Thus, as the Department of Education's *Letter to Anderson 2008* explained with respect to ICE standards, any requirement to provide IDEA-type rights to children would be "neither statutory nor regulatory."¹⁴⁷

Only ORR could enforce the provisions of its Shelter Guidelines, and it would have discretion in doing so. The experience of accompanied minors in ICE custody shows that

¹⁴⁵ See ICE FAMILY RESIDENTIAL STANDARD: EDUC. POL'Y, *supra* note 92.

¹⁴⁶ See *supra* Section III.B (discussing the inefficacy of non-binding ICE guidelines).

¹⁴⁷ Letter to Anderson 2008, 51 IDELR ¶ 165 (OSEP 2008).

children and advocates have little recourse if the agency decided not to enforce these requirements.

In 2015, a year after a spike in DHS apprehensions of family units at the border,¹⁴⁸ RAICES, a San Antonio-based immigration legal services provider that works with immigrant families in Texas, wrote a letter to the Department of Education asking whether the private detention centers operating these facilities had child-find duties under the IDEA.¹⁴⁹ RAICES stated that many of the children in the center were “victims of trauma” and had “suffered violence in their home countries and on their journeys to the United States.”¹⁵⁰ Given that the “vast majority . . . [were] eligible for asylum,”¹⁵¹ many would be staying in the United States and would be required to enroll in public school once they were released from detention.

Although ICE Standards require grantees to refer children suspected of having disabilities to the local school district, RAICES pointed out that the private detention centers were making few referrals.¹⁵² And ICE was not enforcing these Standards on contract facilities.¹⁵³ Moreover, RAICES noted problems with the ICE Standards themselves. They “only require[d] that the facility involve the [local school districts] after there ha[d] been a determination by the detention center that the student is a student with a disability.”¹⁵⁴ Thus, school districts were “unaware and uninvolved in the eligibility determination process.”¹⁵⁵ RAICES explained that given the school districts’ limited role in the eligibility process, the districts struggled “to ensure that IDEA’s requirements [were] being complied with, and [that this] prevent[ed] [the TEA] from monitoring the

¹⁴⁸ The U.S. Border Patrol defines “Total Family Unit Apprehensions” as “the number of individuals (either a child under 18 years old, parent or legal guardian) apprehended with a family member.” U.S. BORDER PATROL, TOTAL FAMILY UNIT APPREHENSIONS BY MONTH (2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf> [<https://perma.cc/73VQ-4LWQ>]. In FY 2013, the Border Patrol apprehended 15,056 family units at the border. *Id.* That number skyrocketed to 68,684 in FY 2014 and remained high (40,053) in FY 2015. *Id.*

¹⁴⁹ Letter from Manoj Govindaiah, Managing Att’y, RAICES, to Melody Musgrove, Dir., Office of Specialr Educ. Programs, U.S. Dep’t of Educ. (Aug. 21, 2015) (on file with the author).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *See id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

implementation of [the] IDEA within the state.”¹⁵⁶ A Department of Education officer called RAICES attorney Manoj Govindaiah and reiterated the agency’s policy articulated in *Letter to Anderson 2007* and *Letter to Anderson 2008* discussed above.¹⁵⁷ Because of this experience, it is important that Congress amends the IDEA to ensure that children can enforce their rights to a FAPE and child-find.

CONCLUSION

As the new presidential administration of Joe Biden begins to set its legislative and policy agenda, it cannot forget the rights and needs of children with disabilities caught up in the immigration system. In addition to ensuring that the IDEA guarantees child-find and FAPE rights for unaccompanied and accompanied minors in HHS and DHS custody respectively, the new administration must also re-evaluate policies that disproportionately place children with disabilities in ORR’s most restrictive settings¹⁵⁸ and that ultimately cause ORR to hold these children in custody longer than those without disabilities.¹⁵⁹ Moreover, because prolonged confinement can have lasting effects on a child’s mental health and wellbeing, the administration should close shelters—especially the family residential shelters that ICE operates. In its place, the government should create alternatives to detention that include legal representation, case-management, and mental health services and treatment as children and families wait on final decisions to their immigration claims.¹⁶⁰ Finally, scholars should

¹⁵⁶ *Id.*

¹⁵⁷ Telephone conversation between Manoj Govindaiah and author, May 23, 2019 (citing *Letter to Anderson 2007*, TK IDELR ¶ TK (OSEP 2007); *Letter to Anderson 2008*, 51 IDELR ¶ 165 (OSEP 2008)).

¹⁵⁸ See generally, Adrián E. Alvarez, *Enabling the Best Interest Factors*, 2 ARIZ. ST. L.J. ONLINE 90, 102–07 (2020), <https://arizonastatelawjournal.org/wp-content/uploads/2020/11/Alvarez-Final.pdf> [<https://perma.cc/5FAL-TZJB>] (arguing that using past gang affiliation as the sole criteria for placing unaccompanied minors in the most restrictive settings could have a disparate impact on unaccompanied minors with disabilities).

¹⁵⁹ See NAT’L CTR. FOR YOUTH L. & SOC. EMERGENCY MED. & POPULATION HEALTH PROGRAM, CHILD WELFARE & UNACCOMPANIED CHILDREN IN FEDERAL IMMIGRATION CUSTODY: A DATA & RESEARCH-BASED GUIDE FOR FEDERAL POLICY MAKERS 19 (2019), <https://youthlaw.org/wp-content/uploads/2019/12/Briefing-Child-Welfare-Unaccompanied-Children-in-Federal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf> [<https://perma.cc/CLV3-KFZH>].

¹⁶⁰ See SCHRAG, *supra* note 18, at 281–84 (discussing alternatives to the current system of housing children and families).

study the long-term societal costs of an immigration system that ensures that children caught up in its web are perpetually disadvantaged because they lack access to the most basic human needs such as an appropriate education.