"CERTAIN MINIMUM REQUIREMENTS": AN UNACCOMPANIED MINOR CHILD'S RIGHT TO EDUCATION IN FEDERAL IMMIGRATION FACILITIES

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TABLE OF CONTENTS

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I. INTRODUCTION

In 2018, the Trump administration announced its controversial "zero tolerance" immigration policy.[1] This policy required U.S. immigration officials to physically separate children from their families.[2] The children were also separated within the immigration system itself.[3] As the national news focused on this policy and its consequences, it brought attention to the conditions that children, particularly unaccompanied minor children ("UACs"), face while in the immigration system.[4]

Before this policy, children illegally immigrating to the United States with their parent(s) or guardian(s) were typically classified as "accompanied children."[5] This classification allowed minors to remain with their parents or guardians until their deportation hearings, even if they were detained by the U.S. Immigration and Customs Enforcement ("ICE").[6] Under the Trump Administration policy, however, officials instead began classifying these children as UACs.[7] Notably, a child classified as a UAC

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[1] *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, U.S. DEP'T OF JUST. (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/S8RB-4N9C].

[2] *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, U.S. DEP'T OF JUST. (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions [https://perma.cc/RPS4-HL3C].

[3] *See* discussion *infra* Section I.A.

[4] *See, e.g.*, Elizabeth Elkin & Emily Smith, *What is the Flores Settlement?*, CNN (July 10, 2018), https://www.cnn.com/2018/07/10/politics/flores-settlement-history/index.html [https://perma.cc/V3VQ-8RJP]; Andrew Ujifusa & Corey Mitchell, *Educating Migrant Children in Shelters: 6 Things to Know*, EDUC. WEEK (June 20, 2018), https://www.edweek.org/ew/articles/2018/06/20/6-things-to-know-about-the-trump.html [https://perma.cc/7PAQ-6SNU].

[5] *See A Guide to Children Arriving at the Border: Laws, Policies and Responses*, AM. IMMIGR. COUNCIL (June 26, 2015), https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses [https://perma.cc/GM2L-MWGV].

[6] *See* OLGA BYRNE & ELISE MILLER, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 9 (2012), https://www.vera.org/downloads/Publications/the-flow-of-unaccompanied-children-through-the-immigration-system-a-resource-for-practitioners-policy-makers-and-researchers/legacy_downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf [https://perma.cc/EL5Y-TBE9] (displaying a chart which depicts how accompanied children move through the immigration system).

[7] *See* WILLIAM A. KANDEL, RSCH. SERV. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 2 (2019), https://fas.org/sgp/crs/homesec/R43599.pdf [https://perma.cc/5PR2-KBHR]. *See generally* DEP'T OF HEALTH & HUM. SERVS., REPORT TO CONGRESS ON

must be removed from ICE's care and the general population of detained immigrants.[8] Rather, UACs are put under the care of the Office of Refugee Resettlement ("ORR").[9] While ORR can place UACs in a number of different placements until their detention hearings, UACs overwhelmingly seemed to be placed into privately-run shelters funded by ORR ("ORR-funded facilities").[10] This led to media attention regarding the conditions and locations of these ORR-funded facilities.[11] Yet, it has not lead to an improvement of the quality of these facilities. In fact, this Note is inspired by the questions raised after one such incident where media attention seemed to worsen conditions in the facilities, as discussed below.

In the early summer months of 2018, journalists reached out to the Texas Education Agency ("TEA") to discuss the fact that Texas's school districts, or local education agencies ("LEAs"), were using state funds to educate UACs in ORR-funded facilities located within their jurisdictions.[12] The TEA initially responded by denying this occurrence.[13]

In the following months, the knowledge of the facilities became more widespread and more teachers stated that they wanted to help educate

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SEPARATED CHILDREN (Oct. 24, 2019), https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/report-to-congress-on-separated-children/index.html [https://perma.cc/XQ6K-5VA4].

[8] *See* BYRNE & MILLER, *supra* note 6, at 10–11.

[9] *See id*. It is worth noting that ORR is a subsidiary of the Department of Health and Human Services. *Id*. at 7. Accompanied children and other immigrants remain solely under the care of DHS and its subsidiaries. *Id*. Furthermore, the ORR-funded facilities are technically within ORR's Division of Unaccompanied Children's Services. *Id*. However, for convenience, this Note will merely refer to the facilities as ORR-funded facilities.

[10] *See* Miriam Jordan, *Many Families Split at Border Went Untallied*, N.Y. TIMES, Jan. 18, 2019, at A1.

[11] Sally Ho, *US School Districts Weigh Duty to Youth Migrant Shelters*, AP NEWS (Aug. 18, 2018), https://apnews.com/ca8be7f3115148f682acd031f4fff9d2/US-school-districts-weigh-duty-to-youth-migrant-shelters [https://perma.cc/2AB2-68HG] ("The Associated Press inquired with public school districts in 61 cities nationwide where shelters are known to exist within their boundaries . . . . Some outside the border states, including Camden, New Jersey, said they only recently discovered the existence of migrant shelters in their community.")

[12] Aliyya Swaby, *Texas Won't Pay to Educate Migrant Kids in Shelters. Now Two Charter Schools Are Scrambling.*, TEX. TRIBUNE (Sept. 6, 2018), https://www.texastribune.org/2018/09/06/texas-charter-schools-funding-education-migrant-shelters [https://perma.cc/5KPT-2V5K].

[13] *Id*.

UACs.[14] When LEAs started applying for state funds to allow teachers to do so, the TEA systematically began to deny their applications.[15]

By August 2018, the TEA released a letter, addressed to every LEA, claiming that any school counting UACs among its student population, and thereby receiving state funds to educate these children, was in violation of Texas law.[16] The TEA stated that LEAs may educate UACs in ORR-funded facilities only if it was on a voluntary basis or they charged tuition.[17]

The TEA acknowledged that the law obligated it to fund the education of any UAC otherwise, such as when they were placed with a sponsor in the community.[18] However, it claimed that its legal obligation was different so long as the child remained in an ORR-funded facility.[19] According to the TEA, the federal government was financially responsible for these UACs in ORR-funded facilities, not the states.[20]

The above occurrence was not unique to Texas.[21] There were similar stories across the country as many state-certified teachers sought to help

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[14] *See, e.g.*, Aliyya Swaby, *Southwest Key May Partner with Brownsville ISD to Educate Migrant Students*, TEX. TRIBUNE (June 26, 2018), https://www.texastribune.org/2018/06/26/southwest-key-may-partner-brownsville-isd-educate-migrant-students [https://perma.cc/2J3W-TMVZ] (illustrating how awareness of the shelters caused more Texas school districts to discuss reaching out and partnering with ORR-funded facilities); *Texas Won't Pay For Educating Kids in Migrant Shelters*, AP NEWS (Aug. 31, 2018), https://apnews.com/article/4462b2d6acfd400e9f29b9f02c9bcc54 [https://perma.cc/6T3R-8BT3] (discussing that teachers around the country expressed their willingness to UACs in ORR-funded facilities in their communities once learning about their existence).

[15] *See* Shelby Webb, *TEA: Schools Cannot Use State Funds to Educate Migrant Children in Shelters*, HOUS. CHRON. (Aug. 30, 2018), https://www.houstonchronicle.com/news/houston-texas/houston/article/TEA-Schools-cannot-use-state-funds-to-educate-13194609.php [https://perma.cc/N4A6-FFXK] (attaching a letter to Promesa Public Schools explaining that the TEA denied their request to educate UACs in ORR-funded facilities), https://apnews.com/ca8be7f3115148f682acd031f4fff9d2/US-school-districts-weigh-duty-to-youth-migrant-shelters [https://perma.cc/756Z-P9RY].

[16] *Unallowable Double Funding for Unaccompanied Children Held in Custody by or for the Federal Government Being Served by Texas Public Schools*, TEX. EDUC. AGENCY (Aug. 31, 2018) [hereinafter *Unallowable Double Funding*], https://tea.texas.gov/about-tea/news-and-multimedia/correspondence/taa-letters/unallowable-double-funding-for-unaccompanied-children-held-in-custody-by-or-for-the-federal-government-being-served-by-texas-public-schools [https://perma.cc/W5BA-LZWQ]; *see also* TEX. EDUC. CODE ANN. § 25.003 (West 2019) ("[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.").

[17] *Unallowable Double Funding*, *supra* note 16 (the TEA argues that their interpretation of state law does not deprive UACs of an education, as it points to the federal government's responsibility to ensure that UACs in ORR-funded facilities receive education services).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See, e.g.*, Hank Stephenson, *TUSD to Discuss Educating Hundreds of Immigrant Children Being Detained in Tucson*, ARIZ. DAILY STAR (July 23, 2018),

educate UACs in these facilities.[22] This Note seeks to answer the questions raised in each of these instances: Do states have a legal obligation to educate UACs in ORR-funded facilities? If not, what role should states have in their education?

Part I provides some necessary background information to explain who UACs are, what ORR-funded facilities are, and the state of education services in ORR-funded facilities. It also generally describes both how public education is funded, and the varying roles each level of government has in the U.S. education system. Part II examines three legal sources that proponents for state involvement could possibly turn to—the Supreme Court's decision in *Plyler v. Doe*, the McKinney-Vento Homeless Assistance Act, and the Individuals with Disability Education Act. Part III argues that states should be responsible for the education of UACs in ORR-funded facilities and that to do otherwise would be against America's very concept of the right to education.

II. BACKGROUND

This Note discusses the interrelationship between two of the most complex U.S. systems—immigration and education. This section explains the relevant parts of each of these systems, which is necessary to better understand what is going on and the arguments going forward.

Section A focuses on UACs and their rights in ORR-funded facilities. It also briefly describes the history of ORR-funded facilities to highlight how their origin is rooted in the lawmakers' desire to protect particularly vulnerable UACs. Subsection 1 introduces the Flores Settlement Agreement ("FSA"), which is the consent decree that established the basic standard of care for UACs and their rights in ORR-funded facilities.[23] Subsection 2 explores what education rights UACs have in ORR-funded facilities.

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https://tucson.com/news/local/tusd-superintendent-child-migrant-detention-facility-lacks-educational-resources/article_6ffbee66-aadd-53e0-9339-1db4903a0a00.html [https://perma.cc/VY5N-WG3D].

[22] *See generally* Ho, *supra* note 11.

[23] When this Note refers to the FSA, it refers both to statutes which have codified the FSA and to the FSA itself for parts that have not yet been codified. Although the FSA was originally intended to only last, at most, five years, it has been the governing law for over twenty years because, in 2001, the parties in *Flores v. Reno* agreed that the FSA would remain in effect until every part of it is codified. *See* Stipulation Extending Settlement Agreement and for Other Purposes; and Order Thereon ¶ 1, Flores v. Reno, No. CV 85-4544-RJK-Px (C.D. Cal. Dec. 7, 2001) [hereinafter Stipulated Extending Settlement Agreement] (replacing the previous termination agreement with an agreement that the FSA would remain in effect until "[forty-five] days following [the government's] publication of the final regulations implementing this Agreement). Various parts

Section B focuses on the public education system, specifically the primary and secondary school systems.[24] It discusses how public schools are typically funded and the roles that each level of government plays in providing a public education.

A. THE U.S. IMMIGRATION SYSTEM AND UNACCOMPANIED MINOR CHILDREN

Prior to 2003, the whole immigration system was under the purview of one government agency, the U.S. Immigration and Naturalization Service ("INS"), meaning that it served in a "dual capacity as caretaker and prosecutor" to all immigrants.[25] As the number of UACs crossing the border started to increase, advocates were concerned about what INS's conflicting roles could affect for such a vulnerable class.[26] Thus, advocates pushed Congress to pass the Homeland Security Act of 2002 ("HSA").[27]

HSA changed numerous things including terminating INS and creating the U.S. Department of Homeland Security ("DHS") in its place.[28] Today, DHS handles nearly all immigration issues either directly or through one of its subsidiaries.[29] For example, all illegal immigrants must be first processed through DHS as a first step towards their detention hearing.[30]

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of the FSA have been codified over the years, including the most recent codification in October 2019. *See generally* 45 C.F.R. §§ 410.100–410.810 (2019). Although the government stated that this recent codification triggered the termination of the FSA, this argument has not held up in court. *See* Flores v. Rosen, No. 19-56326, 2020 U.S. App. LEXIS 40573, at *52–53 (9th Cir. Dec. 28, 2020) (holding that the government had both promulgated rules consistent and inconsistent with the FSA, and that they could not point to the inconsistent rules as justification for claiming that the FSA was ready to be terminated). Thus, when this Note uses the term FSA, it will be interchangeably used to describe any and all ways that the terms of the FSA enforced. *See also* Homeland Security Act of 2002, 6 U.S.C. § 279 (2018) (making ORR and DHS responsible for the care, custody and placement of UACs while they wait for their immigration hearings to begin); William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, 8 U.S.C. §§ 1158, 1232 (provides special protections to UACs from Mexico and Canada, such as that immigration officials must screen them to determine whether anyone is believed to be the victims of human trafficking). A consent decree can be described as "[a] court order to which all parties have agreed. It is often done after a settlement between parties that is subject to approval by the court." *Consent Decree*, NOLO, https://www.nolo.com/dictionary/consent-decree-term.html [https://perma.cc/R46L-JKSY].

[24] By definition, a UAC can only remain in ORR-funded facilities until they are eighteen. Therefore, this Note only focuses on primary and secondary school students.

[25] *See* BYRNE & MILLER, *supra* note 6, at 6.

[26] *See id.*

[27] *Id.*

[28] *Id.* at 8, 10.

[29] *Id.* at 8–10.

[30] *Id.*

Most notably, HSA and other laws also placed a limitation on DHS's power in dealing with UACs.[31]

Upon apprehending anyone who is in the United States without lawful immigration status, DHS must determine whether that person appears to be under the age of eighteen (that is, a minor);[32] and, if they are, DHS also must determine whether they have a parent or legal guardian present in the United States.[33] Based on this determination, officials must either legally classify these children as either (1) an accompanied child, or (2) an unaccompanied alien child ("UAC").[34] A UAC is a minor without a parent or guardian present in the United States,[35] while an accompanied child is a minor with a parent or guardian present.[36] This classification determines on which of two different tracks the minor will continue in the immigration system.[37]

Accompanied children remain with their parents or guardian under the purview of DHS until their detention hearing.[38] In contrast, the HSA requires that DHS transfer UACs to custody of ORR.[39] As a special case,

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[31] *Id*. at 6.

[32] This Note adopts the use of the term "minor" as it is defined in the original FSA. *See* Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK, at 4 (C.D. Cal. Jan. 17, 1997) [hereinafter Stipulated Settlement Agreement] ("The term "minor" shall apply to all person under the age of eighteen . . . years who is detained in the legal custody of [ORR or DHS].").

[33] *See* BYRNE & MILLER, *supra* note 6, at 10 (stating that DHS must determine whether any child is unaccompanied upon their apprehension).

[34] *See Id*.

[35] 6 U.S.C. § 279(g)(2) (2018) ("[T]he term 'unaccompanied alien child' means a child who—(A) has no lawful immigration status in the United States; (B) has not attained [eighteen] years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States available to provide care and physical custody."). DHS will make the determination based on whether the minor is with a parent or legal guardian "at the time of apprehension—or within geographical proximity . . . ." *See* BYRNE & MILLER, *supra* note 6, at 10.

[36] There is no legal definition of an accompanied child in immigration law. *See A Guide to Children Arriving at the Borders: Laws, Policies and Responses*, AM. IMMIGR. COUNCIL (June 26, 2015), https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses [https://perma.cc/2ZWC-9V8W]. The definition of an accompanied child has come to mean a child that meets all of the criteria of the UAC definition except for 6 U.S.C.S. § 279(g)(2)(C). If a U.S. official classifies a child as an accompanied child and that child later meets all of the criteria of a UAC, DHS may reclassify him or her as a UAC and put the child on the same immigration track as other UACs. However, once a child is classified as a UAC, they cannot be reclassified as an accompanied minor even if his or her parent becomes present in the United States.

[37] *See* BYRNE & MILLER, *supra* note 6, at 8 10. When this Note uses the term "track" to describe how children experience the immigration process, it means to refer to the different systems that these children are exposed to, which is dependent upon their classifications. This is further explained in this section and throughout the Note.

[38] *See id*.

[39] *Id*.

UACs from Mexico or Canada, have the choice to return home voluntarily instead of waiting for a removal hearing[40] in a process called voluntary return.[41] While a vast majority of Mexican and Canadian UACs choose to return home,[42] the law prevents DHS from offering a voluntary return if the minor is a victim of trafficking or would be at risk of being trafficked if the minor were to return home.[43] Thus, the population of UACs in ORR custody is mostly made up of non-Canadian and non-Mexican minors, and Canadian and Mexican minors that either chose not to return home or could not return due to human trafficking concerns.

After DHS transfers UACs to ORR's custody, officials place every minor in one of its facilities and begin to process them in their database.[44] Children remain in these facilities until either ORR finds them a sponsor, their detention hearing is held, or they age out.[45]

The government usually contracts third-party providers to run these facilities.[46] ORR remains obligated, however, to provide funding and to ensure that facilities meet the obligations required under the FSA.[47] The FSA and the standards it imposes provide insight into the circumstances surrounding UACs in ORR-funded facilities. This insight is crucial for the legal and policy arguments which follow, as the FSA, in part, ensures that UACs have a right to education in ORR-funded facilities.[48]

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[40] *See* 8 U.S.C. § 1232(a)(2); *id*. at 10–11. The TVPRA requires that UACs from Mexico and Canada be given the option to participate in the voluntary return process. Other UACs, that is those not from Mexico or Canada, may be able to receive voluntary departure as well. *See* WILLIAM A. KANDEL, CONG. RSCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 7 (2017), https://crsreports.congress.gov/product/pdf/R/R43599/25 [https://perma.cc/RN9G-7GQU] (explaining that other UACs may be eligible for voluntary departure, at no cost, under INA § 240B, 8 U.S.C. § 1229c).

[41] *See* BYRNE & MILLER, *supra* note 6, at 10–11, 26 (the process of UACs asking to return to their country of origin is called voluntary department).

[42] *See id*. at 11 (citing BETSY CAVENDISH AND MORU CORTAZAR, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS 16 (2011)) ("The vast majority of unaccompanied Mexican children apprehended at the southern border elect to go back to Mexico through the voluntary return process.").

[43] Trafficking Victims Protection Reauthorization Act § 235(a)(2)(A), 8 U.S.C § 1232 (2018); *see also* BYRNE & MILLER, *supra* note 6, at 8–10 ("If a [UAC] chooses [the process called voluntary return, DHS] must first conduct a screening to verify that the child is not a victim of trafficking or at risk of being trafficked upon return to the home country, that the child does not have a credible fear of persecution in that country, and that he or she is capable of making an independent decision to withdraw an application for admission into the [United States].").

[44] *See* BYRNE & MILLER, *supra* note 6, at 14.

[45] *See id*. at 14–17.

[46] *See id*. at 16.

[47] *See generally* 45 C.F.R. §§ 410.100–410.810 (2019).

[48] *See* 45 C.F.R. § 410.402(c)(4).

1. The *Flores* Settlement Agreement and Qualities of ORR-Funded Facilities

The FSA is the name of a 1997 court settlement, specifically a consent decree.[49] It is the result of years of litigation, starting in 1985, by third-party plaintiffs on behalf of UACs against INS "challenging [their] procedures regarding the detention, treatment, and release of [UACs]."[50]

It is perhaps best to understand the FSA by examining the Supreme Court case from which it stemmed. In *Reno v. Flores*, Justice Scalia, writing for the majority, held, in part, that that UACs do not have a constitutional right to be placed in available private placements over institutional custody—even when a private placement was in their best interest.[51] In explaining the standard for determining UACs' legally enforceable rights, Justice Scalia compared the federal government to parents.[52] He explained that parents or guardians may legally subordinate a child's interest to that of other children or themselves "[s]o long as certain minimum requirements of child care met."[53] Similarly, the federal government can subordinate the rights of UACs so long as it meets minimum standards of care and does not impair the child's fundamental rights.[54] For over two decades now, the FSA has defined the minimum standards of care that the federal government must ensure when fulfilling its responsibilities to the minors.[55]

One minimum standard is that ORR must ensure that UACs have shelter while in its care and custody.[56] While in its care, DHS gathers as much information as possible about each UAC, including "gender, age, country of origin, date and location of apprehension, medical and psychological condition, and previous contact with the juvenile or criminal justice system."[57] When DHS transfers a UAC to ORR, DHS relays this information to ORR's intake team so that it can better determine the child's

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[49] *See generally* Stipulated Settlement Agreement, *supra* note 32.

[50] *See generally* Flores v. Meese, 681 F. Supp. 665 (C.D. Cal. 1988), *aff'd en banc*, 942 F. 2d 1352 (9th Cir. 1991), *rev'd sub nom.* Reno v. Flores, 507 U.S. 292 (1993); Stipulated Settlement Agreement, *supra* note 32; *see also The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUM. RTS. FIRST (Oct. 2018), https://www.humanrightsfirst.org/sites/default/files/FLORES_SETTLEMENT_AGREEMENT.pdf [https://perma.cc/9VUE-UVPU].

[51] Reno v. Flores, 507 U.S. 292, 303 (1993).

[52] *Id.* at 304–05 (writing that, just as with parents and guardians, the government is not required to provide the serve the best interest of the child, as a minimum for adequate childcare).

[53] *Id.*

[54] *Id.*

[55] *See* Stipulated Settlement Agreement, *supra* note 32.

[56] *See* 8 U.S.C. § 1232(c) (2018).

[57] *See* BYRNE & MILLER, *supra* note 6, at 14.

shelter needs and render a placement decision.[58] Typically, ORR sends the UAC to one of four initial placement facilities: shelter care, staff-secure care, secure care, and transitional foster care (the "ORR-funded facilities").[59] The restrictiveness of these facilities vary depending on the needs of each UAC.[60] The FSA requires ORR to place minors in the facility that qualifies as its "least restrictive setting."[61] Relevant immigration statutes do not clearly define "least restrictive setting."[62] Instead, the law directs ORR's intake teams to consider relevant information including age and special needs.[63] The team must also consider whether a setting is in a child's best interest and whether a child would be a danger to themselves or the community.[64] For instance, the FSA articulates criteria for placing a UAC in a secure facility.[65]

Some UACs remain in their initial placements until their immigration hearing date.[66] However, the FSA tasks ORR with releasing UACs to a sponsor "without unnecessary delay."[67] Sponsors can include either a

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[58] *See id*. at 13–15.

[59] *Id*. at 14 (describing which children get placed in which placement).

[60] *See id*. Shelter care is for the children ready to be placed in the a "minimally restrictive level of care." *Id*. The UACs sent here are those who "do not have special needs or a history of contact with the juvenile or criminal justice system." *Id*. Staff-secure care is more restrictive than shelter care. *Id*. UACs in staff-secure care typically have "a history of violence or petty offenses or who present an escape risk . . . ." *Id*. Secure care is even more restrictive. *Id*. It is meant for minors "with a history of violent offense or who pose a threat to themselves or others . . . ." *Id*. There is also transitional (short-term) foster care where minors are placed with a foster family. *Id*. The minors prioritized for their care are "children younger than [thirteen], sibling groups with one child younger than [thirteen], pregnant and parenting teens, and children with special needs . . . ." *Id*. There are other types of facilities, but these are the main four that minors are initially placed into upon arrival to ORR care. *See* OFF. OF REFUGEE RESETTLEMENT, CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED § 1.1 (2019), https://www.acf.hhs.gov/orr/report/children-entering-united-states-unaccompanied-section-1#1.1 [https://perma.cc/9LLW-JBKW].

[61] 8 U.S.C. § 1232(c)(2)(A). In the study by the Vera Institute of Justice of ORR facilities between 2008 and 2010, over ninety percent of UACs did not receive more than one placement while in ORR's care. *See* BYRNE & MILLER, *supra* note 6, at 17.

[62] *See, e.g.*, 8 U.S.C. § 1232 (2018) (charging ORR with placing UACs in the least restrictive environment, without further defining the term itself); 8 C.F.R. § 236.3(g)(2) (2019) (stating merely that, while in DHS's care prior to being transferred to ORR, "UACs shall be held in the least restrictive setting appropriate to the minor or UAC's age and special needs").

[63] *See* BYRNE & MILLER, *supra* note 6, at 6.

[64] 8 U.S.C. § 1232(c)(2)(A).

[65] *See* 45 C.F.R. § 410.203.

[66] *See* BYRNE & MILLER, *supra* note 6, at 14.

[67] 45 C.F.R. § 410.301(a). The term "without unnecessary" is not defined in the statute. *See id*. Of note, the FSA gives reasons why ORR can choose to not place UACs with a sponsor, which includes more ambiguous reasoning such as the ORR believing that the minor will not appear to a court proceeding if released to a sponsor. *Id*.

UAC's parent, a guardian, or a close relative.[68] The FSA provides a list of the potential sponsors in order of preference.[69] There seems to be many benefits to placing UACs with a sponsor. Sponsors become wholly responsive for them and pay for their needs and ensure they make all immigration court appearances.[70] Since ORR claims no responsibility for UACs placed with sponsors, sponsors reduce the government's costs.[71] When placed with a sponsor, UACs may enjoy all of the same rights as other children living in their state, such as the right to enroll in the local school district.[72]

HHS's data suggests that most UACs are released to sponsors.[73] However, this does not mean that these minors do not remain in ORR's care for long. In 2020, according to ORR, the average child spent 102 days under ORR care.[74] The average stay is higher for UACs subject to the Trafficking Victims Protection Reauthorization of 2008 ("TVPRA"), which requires HHS to subject the potential sponsor to a home study.[75] Because ORR faces

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[68] 45 C.F.R. § 410.301(b) (2019).

[69] *Id*.

[70] *See* BYRNE & MILLER, *supra* note 6, at 20.

[71] *Id*.

[72] *Educational Services for Immigrant Children and Those Recently Arrived to the United States*, U.S. DEP'T OF EDUC. (Sept. 9, 2014), https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html [https://perma.cc/87X6-FXJK].

[73] *Compare Referrals*, OFF. OF REFUGEE RESETTLEMENT (2021), https://www.acf.hhs.gov/orr/about/ucs/facts-and-data [https://perma.cc/H73C-KH8A] (listing the number of referrals of UACs that ORR receives from DHS within each fiscal year, ranging from the 2012 fiscal year to the 2020 fiscal year), *with Unaccompanied Alien Children Released to Sponsors by State*, OFF. OF REFUGEE RESETTLEMENT (2021), https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-alien-children-released-sponsors-state [https://perma.cc/B9TU-RL8N] (listing the total number of UACs that ORR releases to sponsors within each fiscal year, ranging from the 2015 fiscal year to the 2021 fiscal year). In the Vera Institute of Justice's published study on ORR, it claims that ORR places at least 65 percent of UACs with sponsors. *See* BYRNE & MILLER, *supra* note 6, at 17.

[74] *Facts and Data*, OFFICE OF REFUGEE RESETTLEMENT (Jan.11, 2021), https://www.acf.hhs.gov/orr/about/ucs/facts-and-data [https://perma.cc/YY68-H623]. Although the year 2020 presented some unique circumstances, ORR had previously recorded similarly long length of stays in ORR-funded facilities. *See, e.g.*, FACT SHEET: UNACCOMPANIED ALIEN CHILDREN (UAC) PROGRAM, OFF. OF REFUGEE RESETTLEMENT 2 (Sept. 30, 2019), https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf [https://perma.cc/BAP4-6Z75] (stating that in November 2018, the average length of care was ninety-three days).

[75] *See* 8 U.S.C. § 1232(c)(3)(B) (2018) (requiring a home study if the minor either: ". . . is a victim of a severe form of human trafficking; the [minor] has a disability . . , as defined under the Americans with Disabilities Act of 1990; the child has been a victim of physical or sexual abuse under circumstances indicating that the child's health or welfare has been significantly harmed or threatened; or the proposed sponsor clearly represents a risk of the child of abuse, maltreatment, exploitation, or trafficking"); *see also* BYRNE & MILLER, *supra* note 6, at 19.

more restrictions when picking a sponsor,[76] this can prolong a minor's stay in ORR-funded care.[77]

While immigrants are usually considered the sole responsibility of the federal government,[78] this is not true for UACs. In recognition of a UAC's "particular vulnerability" and their need for protection,[79] the FSA makes both the federal and state governments responsible for ensuring the wellbeing of UACs while they remain in ORR-funded facilities.[80] Specifically, the FSA requires that ORR monitor facilities to ensure that providers are in compliance with the FSA's terms.[81] For instance, ORR must ensure that providers are offering every UAC "certain enumerated services," such as food, medical care, and education services.[82] The facilities must be state-licensed childcare centers,[83] and the FSA requires that providers "[c]omply with all applicable state child welfare laws and regulations[.]"[84] By requiring facilities to be licensed as childcare centers, the FSA, by its nature, triggers state involvement in order to ensure the well-being of these UACs. For instance, a license as a child care facility in Texas involves monitoring.[85] Therefore, while something like immigrant facilities would typically be under the sole purview of the federal government, the UACs also are afforded the benefit and protection of state laws.

2. Education Services for Children in Federal Immigration Facilities

The FSA mandates that the federal government has a responsibility to ensure that UACs in ORR-funded facilities receive an education.[86] More

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[76] *See* BYRNE & MILLER, *supra* note 6, at 19.

[77] *See id.*

[78] *See* Fiallo v. Bell, 430 U.S. 787, 792–95 (1977) (discussing the Congress's plenary power over issues involving immigration and naturalization).

[79] *See* 45 C.F.R. § 410.400 (2019).

[80] *See* 45 C.F.R. § 410.402 (defines the certain minimum standards that ORR-funded facilities must meet, including that each facility "[b]e licensed by an appropriate State agency"); 45 C.F.R. § 410.403 (states that ORR is responsible for making sure that the ORR-funded facilities meet the requirements stated in 45 C.F.R. § 410.401).

[81] 45 C.F.R. § 410.403.

[82] *See generally* 45 C.F.R. § 410.402.

[83] By "childcare centers," this Note means that ORR-funded facilities "must . . . be licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children." *See* 45 C.F.R. § 410.402(b). UACs are considered dependent children. *See id.*

[84] This means these are not federal enclaves, and that these children are subject to the jurisdiction of the state in which it exists.

[85] *See* TEX. HUM. RES. CODE ANN. § 42.044 (West 2019) (stating that all state licensed childcare facilities will be subject to at least one inspection a year).

[86] *See generally* 45 C.F.R. § 410.402(c) (2019).

specifically, the FSA mandates that the federal government ensure that providers are "providing or arranging for" a minimum criterion of educational services.[87]

The FSA merely requires that every child must receive an education that is appropriately tailored to "[their] level of development and communication skills,"[88] as determined by conducting individualized "educational assessment[s] and plan[s]."[89] This assessment must be done within seventy-two hours of a child's entrance into a facility,[90] and according to the ORR, this includes conducting special education needs assessments and plans when necessary.[91] ORR must provide the funding for these education services.[92] Providers are expected to use that funding to find service providers to teach lessons in a "structured classroom setting, [from] Monday through Friday."[93] The FSA requires that the primary focus be "on the development of basic academic competencies,"[94] which "should include science, social studies, math, reading, writing and physical education."[95] The secondary focus is to be teaching English.[96]

As these are the "minimum standards," these requirements serve as the floor and not the ceiling of what is required.[97] The federal government and state governments naturally can exceed these requirements. However, ORR does not currently seem to have any policies that expand educational rights for UACs.[98] There have been multiple stories about the deficiencies of ORR-funded facilities seemingly because of this.[99] For example, journalists have reported ORR-funded facilities placing children of all grades between two rooms to receive their educational services.[100] There have also been

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[87] *See* 45 C.F.R. § 410.402(c)(3)(iv), (c)(4).

[88] *Id*. § 410.402(c)(3)(iv).

[89] *Id*. § 410.402(c)(3)(iv).

[90] Ujifusa & Mitchell, *supra* note 4.

[91] *See* 45 C.F.R. § 410.402(c)(3)(iii)-(iv).

[92] *See* BYRNE & MILLER, *supra* note 6, at 4.

[93] 45 C.F.R. § 410.402(c)(4) (2019).

[94] *Id*.

[95] *Id*. § 410.402(c)(4)(ii).

[96] *Id*. § 410.402(c)(4).

[97] *See id*.

[98] *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392, 44,528 (Aug. 23, 2019) (codified at 45 C.F.R. § 410).

[99] *See, e.g.*, Dana Goldstein & Manny Fernandez, *'Always Like the First Day of School' for Detained Young Migrants*, N.Y. TIMES, July 7, 2018, at A1; Rebecca Klein & Dana Liebelson, *Here's What School Is Really Like for Some Migrant Children Separated from Their Parents*, HUFFPOST (July 6, 2018, 8:36 AM), https://www.huffpost.com/entry/school-for-migrant-children_n_5b3e8490e4b07b827cbeb479 [https://perma.cc/9JZJ-36LL].

[100] *Id*.

stories of facilities where the educational staff were not bilingual and therefore were unable to communicate with the children.[101] Some teachers barely taught English.[102]

Of course, it does not have to be this way. The government could ensure that these minors receive better education as ICE did for accompanied minors in its Family Residential Centers ("FRCs").[103] Like ORR, ICE is also subject to the FSA.[104] However, unlike ORR, ICE uses the FSA as more of a floor than a ceiling. ICE's Educational Policy, for example, is ten pages long, with further requirements and detailed standards added to what is included in the FSA.[105] ICE employs state educators and partners with the LEAs in order to educate accompanied children.[106] It accomplished this by entering into agreements with Texas and Pennsylvania.[107] While some ORR-funded facilities also have done this,[108] this seems to be a practice of the distant past, given that there have been reports of many of these partnerships stopping in recent years.[109]

An important note is that the FSA only applies to the federal government.[110] It does not necessarily limit the responsibility a state has to these children.[111] Despite this, the U.S. Department of Education ("ED") merely states that it will not enroll UACs in "local school systems" while in ORR-funded facilities.[112] It has said that UACs may enroll if they are released to a sponsor.[113] However, prior to 2017, it was not uncommon for ORR-funded facilities to partner with LEAs in order to provide educational

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[101] *Id*.

[102] *Id*.

[103] *See generally* U.S. IMMIGR. & CUSTOMS ENF'T [ICE], FAMILY RESIDENTIAL STANDARDS (FRS) § 5.2 (2020) [hereinafter ICE EDUCATION POLICY], https://www.ice.gov/doclib/frs/2020/5.2_EducationalPolicy.pdf [https://perma.cc/3KAV-E684].

[104] *See* Flores v. Johnson, 212 F. Supp. 3d 864, 872 (C.D. Cal. 2015).

[105] *See generally* ICE EDUCATION POLICY, *supra* note 103.

[106] *See id*.

[107] *See id*.

[108] *See* Goldstein & Fernandez, *supra* note 99; Memorandum of Understanding, Yolo Cty. Off. of Educ. & Yolo Cty. (Jan. 6, 2017), https://yoloagenda.yolocounty.org/docs/2019/BOS/20190723_2002/8876_Dan%20Jacobs%20MOU%20Draft%2007.15.19.pdf [https://perma.cc/T9MU-BWHP].

[109] *See, e.g*., Alexandra Yoon-Hendricks, *Yolo County to End Federal Contract Housing Immigrant Teens at Local Detention Center*, SACRAMENTO BEE (Oct. 8, 2019), https://www.sacbee.com/news/local/article235929222.html [https://perma.cc/H2HH-TLR3].

[110] *See generally* Stipulated Settlement Agreement *supra* note 32.

[111] *Id*.

[112] *Educational Services for Immigrant Children and Those Recently Arrived to the United States*, U.S. DEP'T OF EDUC. (Sept. 9, 2014), https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html [https://perma.cc/RTE4-LTUA].

[113] *Id*.

services to UACs.[114] Therefore, ED's statements read more like a promise to states rather than a legal requirement.

B. THE U.S. PUBLIC EDUCATION SYSTEM

The United States typically considers the responsibility of educating minors to best fall upon on state and local governments.[115] Education is considered to be under the power of state and local governments, meaning that it is traditionally thought to be outside the scope of Congress's enumerated powers.[116] The Supreme Court has held that the U.S. Constitution does not ensure a fundamental right to education;[117] however, every state constitution has a public education provision.[118] There is a pervasive belief in the United States that state and local governments know their residents and their children better than the federal government, and therefore, those entities are better suited to make the decisions regarding citizens' educations.[119] This notion is possibly best reflected in the role that each level of government plays in providing that education, both from a funding and a structural perspective.

Historically, the federal government has had very little role in the education system.[120] The U.S. Department of Education ("ED") was not even created until 1867.[121] Then, for nearly the next century, the ED's role expanded slowly.[122] It was not until the middle of the twentieth century that the ED started to take the role that it has today—as a sort of great

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[114] *See supra* notes 12–13, 77 and accompanying text.

[115] *See The Federal Role in Education*, U.S. DEP'T OF EDUC. (May 25, 2017), https://www2.ed.gov/about/overview/fed/role.html [https://perma.cc/Q6NR-EJ54].

[116] *See id*.

[117] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

[118] *See* Scott Dallman & Anusha Nath, *Education Clauses in States Constitutions Across the United States*, FED. RSRV. BANK MINNEAPOLIS 1 (Jan. 8, 2020), https://www.minneapolisfed.org/~/media/assets/articles/2020/education-clauses-in-state-constitutions-across-the-united-states/education-clauses-in-state-constitutions-across-the-united-states.pdf [https://perma.cc/GNX6-7VQK] ("The U.S. Constitution is silent on the subject of education, but every state constitution includes some language that mandates the establishment of a public education system."); *see, e.g.*, ALA. CONST. art. XIV, § 256; CAL. CONST. art. IX, §§ 1, 5; KAN. CONST. art. VI, §§ 1, 6; TEX. CONST. Art. XII, §§ 1, 3 & 5; WIS. CONST. art. X, § 3; WYO. CONST. art. 7, §§ 1, 8 & 9.

[119] *See* U.S. DEP'T OF EDUC., *supra* note 115.

[120] *See id*. (explaining that the Department of Education was not even created until 1867 and further discussing the federal government's slow development in taking on a greater role in education).

[121] *See id*.

[122] *See id*.

equalizer.[123] The ED sees its role "as a kind of 'emergency response system,' a means of filling gaps in state and local support for education when critical national needs arise."[124] The ED works to serve its missions promoting "access and excellence though the administration of programs that cover every area of education and range from preschool education through postdoctoral research."[125] One of the main ways that the ED does this is by providing grants.[126] However, as of 2017, less than 8 percent of the funding for elementary and secondary schools came from the ED.[127]

Of course, as education does not fall under one of Congress's enumerated powers, it cannot enact any laws that affect it directly.[128] However, Congress does use its spending power in order to encourage states to enact laws that promote the ED's mission. Part II discusses two instances of such laws: the Individuals with Disabilities Education Act ("IDEA") and the McKinney-Vento Homeless Assistance Act ("McKinney-Vento Act").[129] Of course, these laws are only effective if states choose to adopt them.[130] Furthermore, once states adopt them, plaintiffs may sue only under state (not federal) law to enforce the rights provided therein. In fact, nearly all laws regarding public education are found at either the state or local level.[131] While each state has its own nuances, there are some common and important similarities between them.

In each state, a child's right to a public education flows from that state's constitution.[132] Every state's constitution ensures different rights. Currently, there are discussions and lawsuits regarding education funding, which, at their heart, are arguments framing each state's constitution's educational provision and what it affords to its citizens.[133] At one end, state

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[123] *See id*. (discussing how World War II and the Cold War led to significant expansions in the federal government's role in education, and how the Civil Rights Movement "brought about a dramatic emergence of the Department's equal access mission").

[124] *See id*.

[125] *See id*.

[126] *See id*.

[127] *See id*.

[128] *See id*.; U.S. Const. art I., § 8, cl. 17.

[129] In the U.S. Code, the federal government offers states that the IDEA up to forty percent of the average cost of educating students with disabilities in the state's public elementary and secondary schools. 20 U.S.C. §1411(a)(2)(ii) (2018). Congress also authorized the federal government to provide grants to every state that adopts the McKinney-Vento Act's Education for Homeless Children and Youths ("EHCY") program. *See generally* 42 U.S.C. § 11432 (2018).

[130] *See generally id*.

[131] *See* U.S. DEP'T OF EDUC., *supra* note 115.

[132] *See* Scott Dallman & Anusha Nath, *supra* note 118, at 1.

[133] *See* William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation,* 79 EDUC. L. REP. 19, 22–28 (1993) (discussing the relevance between a state's

constitutions seem to merely ensure free public school system.[134] At the opposite end, some states have held that minors have a fundamental right to education.[135]

There are usually two intertwined government entities entrusted with the duty to ensure that minors in their respective states receive an education, as provided for under the law. For the purposes of this Note, the state-level agency will be referred to as a state education agency ("SEA").[136] The local-level agency will be called a local education agency ("LEA").[137] In Texas, for example, the TEA is its SEA.[138] The SEA supervises the administration of the state's public-school system.[139] Typically, it sets many state-level policies and regulations for schools.[140] While the SEA's focus is on broader issues, it still wields considerable power.[141]

Most states divide public education systems into geographical regions called public school districts.[142] The LEA manages these districts.[143] Typically, children are assigned to a public school within a district based on

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language and the outcomes of funding cases); Jonathan Shorman & Dior Lefler, *Kansas School Funding Is Adequate, High Court Says. But Justices Still Will Oversee Case*, WICHITA EAGLE (June 14, 2019), https://www.kansas.com/news/politics-government/article231533023.html [https://perma.cc/H878-WL44] (discussing the outcome of a decades long case concerning whether Kansas's constitution required schools to be adequately funded); *see, e.g.*, *infra* notes 134–135 and accompanying text.

[134] *See, e.g.*, Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758, 780 (Md. 1983) (stating that Maryland's constitution merely ensures students the right to "a thorough and efficient public school education," but the education did not have to be equal).

[135] *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186, 206 (Ky. 1989) (holding that the right to education is fundamental under the Kentucky's constitution); Sneed v. Greensboro Bd. of Educ., 264 S.E.2d 106, 113 (N.C. 1980) (holding that students in North Carolina had a fundamental right to receive equal access to its public education schools).

[136] 34 C.F.R. § 303.36(a) (2019). The SEA is sometimes called the state's board of education or department of education.

[137] 34 C.F.R. § 303.23(a). The LEA is sometimes called the school board.

[138] *See About TEA*, TEX. EDUC. AGENCY, https://tea.texas.gov/about-tea [https://perma.cc/BQS9-QEZU] ("The Texas Education Agency is the state agency that oversees primary and secondary public education.").

[139] *See* ASPEN INST., ROLE AND RESPONSIBILITIES OF THE STATE EDUCATION AGENCY 2 (2015), https://dpi.wi.gov/sites/default/files/imce/statesupt/pdf/DocumentDetail.pdf [https://perma.cc/2DX7-UFHQ].

[140] *See id.*

[141] *See generally id.*

[142] ANTONELLA CORSI-BUNKER, UNIV. MINN., GUIDE TO THE EDUCATION SYSTEM IN THE UNITED STATES 2 (2015), https://isss.umn.edu/publications/USEducation/2.pdf [https://perma.cc/E93H-89HH].

[143] *See Definitions*, U.S. DEP'T OF EDUC., https://www.ed.gov/race-top/district-competition/definitions [https://perma.cc/TZ5K-RLVD] (defining "local educational agency").

residential address.[144] In contrast, some states allow minors and their parents or guardians to choose any school in the state.[145]

State and local governments play an important role in public education as the primary sources of funding.[146] Most states provide funding based on the number of students in attendance in any school district in any given year.[147] Therefore, if LEAs include UACs as part of their student bodies, the total funding from states like Texas would increase accordingly.[148] On the other hand, local governments usually base their funding based on property taxes collected from a geographic region.[149]

III. ANALYSIS OF LEGAL ARGUMENTS PROPOSING THAT STATES ARE RESPONSIBLE FOR THE EDUCATION OF UACS IN ORR-FUNDED FACILITIES

UACs fall under the purview of state and federal law. While there may be more claims brought under state law, which is where the majority of education law has been codified, this Note only considers whether states denying these children state-funded educational services violates either the U.S. constitution or federal legislation that has been adopted in every state. This Note will test the viability of some of the most prominent arguments that states like Texas are in violation of either: (A) the Supreme Court's decision in *Plyler v. Doe*, (B) the McKinney-Vento Homeless Assistance Act ("McKinney-Vento Act"), or (C) the Individuals with Disability Education Act ("IDEA"). For each argument, the core question is whether these sources of law allow states to treat children differently merely because they reside in ORR-funded facilities—despite knowing that these children

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[144] *See* Alvin Chang, *We Can Draw School Zones to Make Classrooms Less Segregated. This Is How Well Your District Does*, VOX (Aug. 27, 2018), https://www.vox.com/2018/1/8/16822374/school-segregation-gerrymander-map [https://perma.cc/2BJC-T5T9] (discussing the nature of school districts based on where a student lives).

[145] *See What is School Choice?: The Definition*, EDCHOICE, https://www.edchoice.org/school-choice/what-is-school-choice [https://perma.cc/XEV9-Z8B5] (explaining that districts that engage in school choice allow students to decide where they will attend school).

[146] *See* U.S. DEP'T OF EDUC., *supra* note 115.

[147] *See FundEd: National Policy Maps*, EDBUILD, http://funded.edbuild.org/national#formula-type [https://perma.cc/6NYD-8LKC] (the "Formula Type" filter shows that most states base their education formulas on enrollment figures in a district).

[148] *See id.* (the definition of "Student-Based" in the legend states that school-based formulas assign a certain cost to educate an average student). Therefore, a greater number of students in a district would yield greater funds received.

[149] *See id.* (the "Local Share" filter shows that most LEAs base their education formulas on property value, that is property taxes).

would qualify for any of these educational services if they resided outside of ORR-funded facilities.

A. *PLYLER V. DOE*

Various articles have contemplated whether it is unconstitutional for states to deny education to UACs in ORR-funded facilities, per *Plyler v. Doe*.[150] While both *Plyler* and the present issue involve immigrant children, the issue with applying *Plyler* to the present case is that the justification for the holding in *Plyler* may not match the current issue. Still, this difference may be overcome.

Plyler had wide-sweeping implications on a child's right to public education.[151] *Plyler* clarifies the early *San Antonio Independent School District v. Rodriguez* decision that, while it is not a fundamental right, education is more than "merely some governmental benefit."[152] Both *Plyler* and *Rodriguez* are important cases to determine how a court should evaluate whether the current Texas statute and others are unconstitutional, at least as applied to UACs in ORR-facilities. The "Court has declined to extend heightened scrutiny in regard to education beyond the "unique circumstances" of *Plyler*."[153] The question, thus, is whether this situation involves the unique circumstances of *Plyler*.

Plyler involved a Texas statute that withheld state funds for educating children who were admitted to the United States illegally.[154] This kind of "[d]iscriminatory treatment by the government is sufficient to trigger assessment under the Equal Protection Clause."[155] The statute allowed the Texas school board to deny the enrollment of children based on their

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[150] *See, e.g.*, Ujifusa & Mitchell, *supra* note 4; Lisette Partelow & Philip E. Wolgin, *The Trump Administration's Harsh Immigration Policies Are Harming Schoolchildren*, CTR. FOR AM. PROGRESS (Nov. 30, 2018), https://www.americanprogress.org/issues/education-k-12/news/2018/11/30/461555/trump-administrations-harsh-immigration-policies-harming-schoolchildren/ [https://perma.cc/3RDD-N5AZ].

[151] *See, e.g.*, Anthony D. Romero, *School is For Everyone: Celebrating Plyer v. Doe*, AM. CIV. LIBERTIES UNION (June 11, 2012), https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/school-everyone-celebrating-plyler-v-doe [https://perma.cc/AD94-M7D6].

[152] Plyler v. Doe, 457 U.S. 202, 221 (1982) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).

[153] Nat'l Law Ctr. on Homelessness & Poverty v. New York, 224 F.R.D. 314, 325 (E.D.N.Y. 2004) (citing Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988)) (holding that the case was similar to the circumstances in *Plyler*, claiming that defendants penalized children for being without a home was similar to being penalized for the illegal conduct of one's parents choosing to cross the border).

[154] Plyler, 457 U.S. at 225.

[155] Nat'l Law Ctr. on Homelessness & Poverty, 224 F.R.D. at 321.

immigration status.[156] If a school allowed a child to attend school regardless of their immigration status, then the child had to pay tuition.[157] The Supreme Court held this statute unconstitutional because it denied undocumented children the ability to attend public schools for no reason substantially related to an important state interest.[158]

Plyler has had wide implications in terms of education rights.[159] The federal government, for example, has interpreted the *Plyler* decision to mean that states are "required to provide all children [residing in the State] with equal access to public education at the elementary and secondary levels."[160] When taken together with other federal laws, including Title IV and VI of the Civil Rights Act of 1984,[161] schools are not allowed to act in ways that would chill the enrollment of children, such as asking parents or children for evidence of legal immigration status or whether someone receives financial assistance from the Federal government.[162] Under this interpretation, it would appear that States cannot deny children in ORR facilities access to public education, such as by requiring them to pay tuition, because these children are residents of the states.

However, it is worth considering the instances in which the Court has said that there might be circumstances where a State may discriminate against children without legal status without it being a violation of federal law. Therefore, from looking at *Plyler*, it is not certain whether a statute, like that of Texas would be struck down by the Court.

Plyler reached this decision because the Court claimed that this classification of this particular class of plaintiffs was entitled to intermediate scrutiny under the law.[163] The concurrence described this class of plaintiffs as "all undocumented school-age children of Mexican origin residing in the school district," and every plaintiff was represented by their parents.[164] Justice Powell concurring argued that these children were afforded heightened scrutiny because it saw this class of children as not being accountable for their disabling status—being undocumented—and the Texas statue imposed onto them a "lifetime hardship" in denying them

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[156] Plyler, 457 U.S. at 205.

[157] *Id*. at 206 n.2.

[158] *Id*. at 230.

[159] *See, e.g*., Romero, *supra* note 151.

[160] *See* U.S. DEP'T OF EDUC., *supra* note 115.

[161] Letter from Department of Justice and Department of Education to "Colleagues" (May 8, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf [https://perma.cc/EPU8-XP89].

[162] *See id*.

[163] *See* Plyler, 457 U.S. at 218 n.16.

[164] Plyler, 457 U.S. at 240 n.5 (Powell, J., concurring).

access to education because of their immigration status.[165] As a result of reaching intermediate scrutiny, the court rejected that any statute involving the same children could be justified as serving an important purpose.[166]

In its dissent, the Court lists reasons why minors could be justifiably kept out of the education system.[167] Some of the reasons it states are that: (1) the state is protecting itself from the influx of illegal immigrants; (2) to reduce educational costs; and (3) minors' lack of legal status coupled with the lack of certainty that they will remain in any state's borders.[168] These are worth considering given that the Court has shown that that the application of *Plyler* is limited.[169]

There are two arguments that UACs in ORR-funded facilities are of the same class of plaintiffs, or protected under *Plyler*, such that any statute affecting them must be evaluated under intermediate scrutiny. The first argument is easier to make: UACs are the innocent children that *Plyler* sought to protect. The second argument is that a statute, like that of Texas, imposes a lifetime hardship onto UACs.

The Court contemplates the limit on how far reaching its decision is. For instance, in the concurring decision, Justice Powell mentions that there might be some distinctions in this class that would not fit this justification, such as "a minor, old enough to be responsible for illegal entry and yet still of school age, entered this country illegally on his own volition."[170] The Court fails to explain exactly what age would serve as a potential cut off from this class to provide clarity as to when a child is considered to have entered the country illegally by his or her own volition.

As UACs by definition have entered the country on their own in some regard, the Court seems to directly exclude UACs in ORR facilities. However, this is not necessarily the case. UACs may meet this description as many of them have the choice to voluntarily leave this country, which most UACs choose.[171] However, the choice is not always voluntary, like when a child remains a UAC because they qualify as having the possibility of being trafficked, per the TVPRA.[172] Additionally, in the case of separated children, these minors entered the country with their parents, were removed

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[165] *Id*. at 223.

[166] *Id*. at 230.

[167] Plyler, 457 U.S. at 249 n.10 (Burger, J., dissenting).

[168] *Id*.

[169] *See* Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 459–60 (1988) (citing Plyler v. Doe, 457 U.S. 202, 243 (1988) (Burger, J., dissenting)) (claiming that it would not extend the reasoning of *Plyler* since the facts of the case were different).

[170] Plyler, 457 U.S. at 240 n.5 (Powell, J., concurring).

[171] *See supra* notes 41–43 and accompanying text.

[172] *Id*.

from their parents, and remained in ORR care while the federal government scrambled to locate their parents.[173] They did not seem to have a choice to enter ORR's care.[174]

While it is arguable that a state then could limit its application to only children who are deemed to have come into this country on their own volition, certain statutes that were created to protect children in ORR care do not allow states to access this information.[175] This would require the state to take action that is reserved to the federal government, thus overstepping its powers. Consequently, if states are required to provide an education to an undetermined number of UACs in ORR facilities, education must be offered to them all equally.

The critical argument could be that denying UACs access to public education while in ORR facilities amounts to such a "denial of education" that the Court believes is necessary to reach intermediate scrutiny.[176] The Court's rationale in *Plyler* focused on the implication that a complete lack of access to education would create a "shadow population" within the United States, which would harm everyone.[177] Here, the question becomes whether a child is denied an education if the child is denied access to a public education but still has an opportunity to receive an education otherwise.

It is difficult to argue that denying UACs in ORR facilities will "risk[] the significant and enduring adverse consequences" as necessary to reach the heightened review of *Plyler*.[178] While UACs may be in ORR facilities for months,[179] HHS gives evidence that the majority do not remain for many years.[180] Minors will either leave the care voluntarily, by order, or when the

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[173] *See* Caitlin Dickerson, *U.S. Still Can't Locate Parents of 545 Children Separated at Border*, N.Y. TIMES, Oct. 22, 2020, at A1.

[174] Furthermore, if they had not been separated from their families, they would have remained classified as accompanied children and likely been put into a FRC with their parents under the care of ICE. *See* 8 C.F.R. §236.3(h) (2019). As a result of being under ICE care, they would have received an education through educators in the LEA. *See supra* notes 104–110 and accompanying text.

[175] *See* BYRNE & MILLER, *supra* note 6, at 19–20.

[176] *Compare* Plyler, 456 U.S. at 217–20, n.16 (stating that the Texas's statute that required immigrant children to pay tuition to attend public school was deserving of intermediate scrutiny given how it denied these children an education), *with* Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 459–60 (1988) (explaining charging a family living below the poverty line a school bus fee amount to merely an obstacle, not a denial of education, especially when the family could find alternative means to send the student to school).

[177] *See* Plyler, 456 U.S. at 218–220.

[178] *See* Nat'l Law Ctr. on Homelessness & Poverty v. New York, 224 F.R.D. 314, 322 (E.D.N.Y. 2004).

[179] *See supra* note 74 and accompanying text.

[180] *See supra* note 73 and accompanying text.

providers find them sponsors. Given these facts, this case seems to fail to meet the standard in *Plyler*, and thus, statutes, like that of Texas, might receive rational basis review and be deemed constitutional. However, the counterpoint is that the any amount of time that a minor spends in federal care is still significant, and the question actually should be: How long can a child remain in ORR-funded facilities with poor educational services without it causing significant and enduring adverse consequences?

B. THE MCKINNEY-VENTO HOMELESS ASSISTANCE ACT

In an effort to combat the issue of homelessness, Congress passed the McKinney-Vento Act, which it did by creating federal programs and mandating participation in those programs by states that received funding under the Act.[181] Today, every state has adopted the McKinney-Vento Act and implemented its Education for Homeless Children and Youths ("EHCY") program and its policies.[182] This aims to address the difficulties that children without homes face while trying to obtain a free public education.[183]

Teachers in states like Arizona have been looking at whether UACs in ORR-funded facilities are eligible for the EHCY program because its protections might make what states like Texas are doing illegal.[184] Most notably, school district zoning restrictions do not apply to qualifying students.[185] Instead, the state must forgo any law that denies qualifying students "equal access to the same free, appropriate public education, . . . as

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[181] 42 U.S.C. § 11432(d)(1) (2018).

[182] *See Fiscal Years 2019-2021 State Tables for the U.S. Department of Education*, U.S. DEP'T EDUC. (last modified Apr. 12, 2021), https://www2.ed.gov/about/overview/budget/statetables/index.html#update [] (click hyperlink for "MS Excel [329KB]" next to "State tables by program;" find table labeled "Homeless Children and Youth Education"; shows that all fifty states, Washington D.C., and some U.S. territories, have all received grants for the EHCY for the last three fiscal years); *see also* 42 U.S.C. § 11432(d)(1) (explaining how a state qualifies to receive a grant under the EHCY program); 42 U.S.C § 11432(d)(2)–(5) (highlighting all the requirements on the state and local levels).

[183] One of the goals of McKinney-Vento Homeless Assistance Act was to give "each homeless youth [] equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youths." 42 U.S.C. § 11431(1). Courts have understood it to impose mandatory requirements on states that accept funding from the bill, creating a private right to enforce in children through a § 1983 claim. *See* Lampkin v. District of Columbia, 27 F.3d 605, 612 (D.C. Cir. 1994).

[184] *See* Stephenson, *supra* note 21.

[185] *See* 42 U.S.C. § 11432(g)(3)(A) (stating that local education agencies must allow a child to choose to remain in their school of origin, even if they are no longer residing within the school's zone).

provided to other children and youth."[186] In order to receive the benefits of this program, UACs must meet the definition of "homeless" under the Act.[187]

The McKinney-Vento Act says that to be a homeless child, the individual must "lack a fixed, regular, and adequate nighttime residence."[188] While the Act gives a few examples of what is included in this definition, some consider this area to be not very well understood, as there have been very few court cases on the issue.[189]

The ED has made a blanket statement that UACs are only eligible for McKinney-Vento services when they are released to sponsors, not while they are in ORR-funded facilities.[190] However, it has not provided clarification as to why.[191] The best one can argue is that the ED considers ORR-funded facilities are fixed, regular and adequate.[192] However, it has not released any official policy of the matter.

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[186] 42 U.S.C. § 11431(1)–(2).

[187] *See generally* 42 U.S.C. § 11434a(2) (2018).

[188] 42 U.S.C. § 11434a(1).

[189] Congress created a completely separate definition of "homeless" from its general definition of "homeless person," when considering whether an individual qualifies for other aspects of the Act. *Compare* 42 U.S.C. § 11434a(2) (defining the term "homeless children and youth" who are eligible for the EHCY program), *with* 42 U.S.C. § 11302(a) (defining the term "homeless individual" who is eligible for general services under the McKinney-Vento Act). However, it is worth noting a few things. Congress used the previous definition as a reference in the provisions regarding the EHCY program, which shows that they intended it to inform the new definition. *See* 42 U.S.C. § 11434a(2)(A). This point is further strengthened by the fact that the list of qualifying housing situations in § 11434 is nonexclusive. *See* 42 U.S.C. § 11434a(2). UACs would likely qualify for services under the Act under the general definition of a "homeless person," which includes "an individual or family living in a supervised publicly or privately operated shelter designated to provide temporary living arrangements (including hotels and motels by Federal, State or local government programs . . .)." 42 U.S.C. § 11302(a)(3).

[190] *See* U.S. DEP'T OF EDUC., *supra* note 115.

[191] On the Department of Education's website, there are different links to websites with further documents about McKinney-Vento eligibility. *Id.*; *Home Page*, NAT'L CTR. FOR HOMELESS EDUC. [NCHE], https://nche.ed.gov/ [https://perma.cc/F6BM-C4WE]. Here, there are documents that explain that ORR-funded facilities do meet the definitions of fixed, regular and adequate, without any clarification as to why it does not meet these definitions. NCHE, BEST PRACTICES IN HOMELESS EDUCATION BRIEF SERIES: SUPPORTING THE EDUCATION OF IMMIGRANT STUDENTS EXPRESSING HOMELESSNESS (Dec. 2017), https://nche.ed.gov/wp-content/uploads/2018/10/imm_lia.pdf [https://perma.cc/J6GJ-7SYG]. Furthermore, the ED's website disclaims that they do not endorse the information on these websites. *Disclaimer of Endorsement*, DEP'T OF EDUC. (July 13, 2011), https://www2.ed.gov/notices/disclaimer/index.html [https://perma.cc/H79H-LLJV]. So, one cannot even say that the ED even adopts this bare reasoning offered. *Id.* Therefore, without more, or a rule or policy in place, it may be hard to argue that the ED has made this claim at all or given any clear policy or guidance explaining why UACs in ORR-funded facilities are not eligible for McKinney-Vento services.

[192] *Id.*

By looking at other guidance, one could make an argument that UACs in ORR-funded facilities are eligible for McKinney-Vento services. In particular, guidance on how "fixed, regular and adequate" should be interpreted is useful.[193] Through examining these dictionaries, one may see that ORR-funded facilities are arguably not "fixed." To interpret the term "fixed," the following definitions can be helpful: "fixed" as defined by Merriam- Webster Collegiate Dictionary and "inhabitant" and "domicile" as defined by Ballentine's Law Dictionary.[194]

Merriam-Webster describes fixed as "securely placed or fastened; not subject to change or fluctuation."[195] The intention in the law is that ORR-funded facilities are not to be considered fixed locations. This is not the intention of the FSA, which intends for these facilities to be temporary housing and requires ORR to attempt to place UACs with a sponsor "without unnecessary delay."[196] Even for the UACs that remain in the facilities and are never placed with sponsors, calling the facilities fixed does not reflect the reality of them. The Vera Institute of Justice's study on ORR-funded facilities found that the majority of UACs will move between multiple facility locations while in ORR care.[197]

To understand the term "fixed," the Ballentine's Law Dictionary's definitions of "inhabitant" and "domicile" can also be helpful.[198] Ballentine's describes "inhabitant" as "[o]ne, who, although he may not be a citizen, dwells or resides in a place permanently, or has a fixed residence therein, as distinguished form an occasional lodger or visitor."[199] It describes "domicile" as "[t]he place where a person has his true fixed permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning, and from which he has no

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[193] The National Center of Homeless Education ("NCHE") at Serve suggest using Merriam-Webster Collegiate Dictionary and Ballentine's Law Dictionary to determine what is meant by "fixed, regular, and adequate." *See* NCHE, BEST PRACTICES IN HOMELESS EDUCATION BRIEF SERIES: DETERMINING ELIGIBILITY FOR MCKINNEY-VENTO RIGHT AND SERVICES 3–4, 7 (Mar. 2021), https://nche.ed.gov/wp-content/uploads/2018/10/det_elig.pdf [https://perma.cc/8BDU-7F2R]. Of course, the NCHE also claim that UACs do not qualify for services under the EHCY, *see supra* note 178 and accompanying text. This Note will show that ORR-funded facilities actually do not meet any of the definitions used that the NCHE use to determine the meaning of "fixed." *See* NCHE, *supra* note 193, at 7.

[194] *Id*.

[195] *Fixed*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (1993).

[196] *See* 45 C.F.R. § 410.301(a) (2019). The Vera Institute of Justice claims that ORR providers start looking for sponsors within twenty-four hours of a UAC arriving to their care. *See* BYRNE & MILLER, *supra* note 6, at 17.

[197] *See id*. at 21. The study gives an example of a UAC that between three facilities, in five months, before returning to Mexico. *Id*.

[198] *See supra* note 180 and accompanying text.

[199] *Inhabitant*, BALLENTINE'S LAW DICTIONARY (1969).

present intention of moving."[200] Respectively, UACs and ORR-funded facilities are distinguishable from both of these definitions. UACs are more like occasional lodgers in ORR-funded facilities. There is no intention for them to remain permanently or that these facilities remain a fixed residence for them. Even when ORR declines to place UACs with sponsors, the reality is that they are not usually fixed in a "permanent" facility. Furthermore, no one could argue that the U.S. government intends for any ORR-funded facility to become the domicile of any UAC for when a UAC leaves an ORR-funded facility, it is without the intention of returning.

Furthermore, ORR-funded facilities are similar to the examples of qualifying living arrangements for the EHCY program.[201] The Act references "emergency or transitional shelters."[202] This encompasses the spirit of ORR-funded facilities as many children are fleeing conflict in their countries or are victims of trafficking in need of protection until more stable housing can be found for them.[203]

One could argue that the EHCY was created to protect those that experience homelessness within a geographical region, as it protects children by allowing them to remain at the school of their choice.[204] Therefore, under this rationale, it was not meant to protect UACs who could leave an ORR-funded facility and be placed with a sponsor in another state. However, the McKinney-Vento Act places no such restrictions on eligibility.[205] It merely requires that a child live in a dwelling which is not fixed, or that it not be adequate or regular.[206] If one can prove that ORR-funded facilities are not fixed, then states like Texas would be violating the law by requiring that UACs in ORR-facilities pay tuition in order to be enrolled in the school of their choice.

Additionally, although Congress maybe did not envision UACs when writing this Act,[207] they nevertheless fit who they were trying to protect. Congress recognized that children without a home are vulnerable and in need of protection.[208] The McKinney-Vento Act provides even greater

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[200] *Domicile*, BALLENTINE'S LAW DICTIONARY (1969).

[201] *See generally* 42 U.S.C. § 11434a(2) (2018).

[202] *Id*. § 11434a(2)(B)(i).

[203] *See Unaccompanied Children*, OFF. OF REFUGEE RESETTLEMENT (Mar. 18, 2019), https://www.acf.hhs.gov/orr/uac-infographic [https://perma.cc/JXP5-TNTZ] (stating that in the 2013 fiscal year 48 percent of UACs "were fleeing violence from drugs cartels and gangs").

[204] 42 U.S.C. § 11432(g)(3)(A).

[205] *See generally* 42 U.S.C. § 11434a(1).

[206] *Id*.

[207] *See generally* 42 U.S.C. § 11301 (stating the finding and purpose of the McKinney-Vento Act).

[208] *Id*.

protections to "unaccompanied youth" because it recognizes how extremely vulnerable these children are.[209]

C. INDIVIDUALS WITH DISABILITY EDUCATION ACT

ICE implicitly acknowledged its need to comply with the Individuals with Disability Education Act ("IDEA") by negotiating with the states of Texas and Pennsylvania to educate accompanied minors in its Residential Family Centers.[210] In contrast, immigration officials have stated that ORR itself fulfills the requirements of IDEA, so there is no need for the state to be involved in the education of UACs in ORR facilities.[211]

IDEA requires that states provide a "free, appropriate public education" ("FAPE") to every student with a qualifying disability.[212] It requires states to tailor these students' education to meet their special education and related-service's needs.[213] For example, if assessments show that a UAC in an ORR-funded facility has autism, and it is determined that the child must remain in the facility for their own safety, one could easily argue that IDEA requires the state to fund the education of the minor within the facility. Nearly every state is subject to this mandate, as nearly every state accepts federal funding under the Act.[214] However, one of the biggest issues is whether UACs in ORR-funded facilities are subject to Child Find.

Child Find is the process of finding children to assess for qualifying disabilities.[215] After finding these children, the SEA or LEA must assess

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[209] Note that the McKinney-Vento Act provides even greater protection for children that are both "homeless" and "not in the physical custody of a parent or guardian," that is "unaccompanied." *See, e.g.*, 42 U.S.C. § 11432(g)(6)(x) (2018).

[210] *See generally* ICE EDUCATION POLICY, *supra* note 103.

[211] *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,4462 (Aug. 23, 2019) (codified at 8 C.F.R. pt. 236) (HHS claiming that it is not in conflict with the IDEA because it provides UACs with individual assessments to determine their needs).

[212] 34 C.F.R. § 300.101(a) (2019); *see also* 34 C.F.R. § 300.101(b).

[213] *See* 20 U.S.C. § 1412(a)(4) (stating that eligible students must receive an individualized education program tailored to their needs).

[214] *See Fiscal Years 2019-2021 State Tables for the U.S. Department of Education*, U.S. DEP'T OF EDUC. (Apr. 12, 2021), https://www2.ed.gov/about/overview/budget/statetables/index.html#update [https://perma.cc/U4RJ-7VDF] (click "MS Excel [329KB]" next to "State tables by program" and find table labeled "Impact Aid Payments for Children with Disabilities") (showing that for the only states that did not receive IDEA grants in the past three fiscal years were Indiana, New Hampshire, and Vermont, as well as Washington D.C.); *see also* 20 U.S.C. § 1412(a) (explaining that states are eligible to receive funds if they meet the conditions explained therein).

[215] *See* 20 U.S.C. § 1412(a)(3).

them for any qualifying disabilities.[216] Any determination that a student qualifies entitles that student to receive a free appropriate public education ("FAPE").[217] Parents may request these assessments.[218] Nevertheless, IDEA assigns states the affirmative duty to find every student with a disability within their jurisdiction.[219]

It is likely that UACs in ORR-funded facilities are subject to Child Find. Congress intended Child Find to be expansive.[220] The rule is that LEAs must conduct Child Find on anyone living within its borders, despite their current educational situation.[221] For instance, students enrolled in private schools are not entitled to FAPE under the IDEA.[222] However, states still have an obligation to conduct Child Find on these students.[223] Furthermore, IDEA bars states from considering things such as cost when determining whether it has met its Child Find duties.[224]

ORR claims that it is screening UACs for disabilities and is tailoring the education of those students to meet their determinations, at least when it can.[225] Furthermore, caregivers, like those providers that manage ORR-funded facilities, may be allowed to deny states from conducting assessments of students within their care.[226] Regardless of this, states may conduct assessments if they feel that there are students with disabilities whose educational needs are not being met.[227] Thus, even without hard proof, if one can prove that there is a statistical likelihood that there are

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[216] 20 U.S.C. § 1414(a)(1)(A) (2018).

[217] *See generally* 34 C.F.R. § 300.101. The IDEA defines FAPE as: "special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 614(d) . . . ." 20 U.S.C. § 1401(9).

[218] 20 U.S.C. § 1414(a)(1)(B).

[219] *See id*. § 1412(a)(3).

[220] States are required to identify any child with a disability that lives in the state, even if they are not attending public school. *See* 20 U.S.C. § 1412(a)(3). However, IDEA provides some exceptions to offering FAPE or Child Find; however, nearly none of these situations apply here. It is only when the child is in a correctional facility that the LEA is not obligated to conduct Child Find. This exception does not apply to ORR facilities, as the court has ruled that they are "not correctional facilities." *See* Reno v. Flores, 507 U.S. 292, 298 (1993).

[221] *See generally* 34 C.F.R. § 300.111 (2019).

[222] *See* 20 U.S.C. § 1412(a)(10) (2018).

[223] *Id*. § 1412(a)(3)

[224] *Id*. § 1412(a)(10)

[225] *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,4439 (Aug. 23, 2019) (codified at 8 C.F.R. pt. 236).

[226] *See* 20 U.S.C. § 1414(a)(1)(B).

[227] *See id*. § 1412(a)(3).

UACs with disabilities that are not being properly educated, a right exists to assess these children.[228]

LEAs and advocates may also be able to prove that the state must be involved if they can force the facilities, as the official caregivers of the UACs, to allow LEAs to conduct Child Find.[229] As a growing number of facilities become desperate for ways to educate these children and funding continues to diminish,[230] this seems more likely to happen. Since these facilities function as the caregivers for UACs, it should be the decision of those facilities, not ORR, as to whether LEAs can conduct Child Find. Furthermore, this would not violate ORR's policy, which arguably merely prefers that the facilities conduct their own assessments.[231] The only objection that might remain is being whether allowing LEAs to conduct assessments would violate the safety of these children.

Opponents might argue that using the law in this way does not fit its purpose, which was that children's special education needs were not "excluded entirely from the public-school system and from being educated with their peers."[232] Certainly, while UACs would likely not be placed in public schools, this does place them in the public-school system. This would ensure that UACs with disabilities are given the tools to learn, and thus receive a similar education as their peers. Currently, if UACs do not have those tools and states refuse to educate them, then those states and the federal government are truly the entities defying the purpose of IDEA.

One of the most concerning downfalls to this proposal is that successfully applying IDEA to UACs would require states to educate only those with qualifying disabilities. Thus, in order to reach the conclusion that states must educate all UACs in ORR-funded facilities, advocates will have to pursue other avenues.

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[228] *See Students with Disabilities*, NAT'L CTR. FOR EDUC. STAT. (May 2020), https://nces.ed.gov/programs/coe/indicator_cgg.asp# [https://perma.cc/79D6-8J6V] (finding that, in the 2018-2019 school year, fourteen percent of all students were eligible under the IDEA).

[229] *Educational Services for Immigrant Children and Those Recently Arrived to the United States*, U.S. DEP'T OF EDUC. (Sept. 19, 2014), https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html [https://perma.cc/P5TP-YLB2]; *see also* 8 C.F.R. § 236.3(b)(2), (g)(2) (requires DHS to place minors and UACs in the least restrictive setting appropriate to the minor or UAC's age and special needs), (i)(4) (requires that facilities conduct a needs assessment for each minor, which would include both an educational assessment and a specific needs assessment).

[230] *See* Matt Stieb, *Playground Access for Detained Migrant Children*, N.Y. MAG., June 5, 2019, https://nymag.com/intelligencer/2019/06/detained-migrant-kids-to-lose-education-recreation-access.html [https://perma.cc/57YD-4J2N].

[231] *See* 84 Fed. Reg. 44392, 44,468 (Aug. 23, 2019) (codified at 45 C.F.R. pt. 410).

[232] 20 U.S.C. § 1400(c)(2) (2018).

IV. STATES SHOULD ALLOW CHILDREN IN ORR-FUNDED FACILITIES TO ENROLL IN LEAS FOR FREE, EVEN IF THEY ARE NOT REQUIRED TO UNDER THE LAW

The stated purpose of the FSA rings true today: UACs are a particularly vulnerable group.[233] By definition, today, UACs are minors who have either entered a foreign country alone or been separated from their families.[234] In ORR-funded facilities, they do not have family members who can protect them. Even worse, these facilities are a form of detention for these UACs.

Despite this, the reality of the state of education inside ORR-funded facilities is grim. As discussed, unlike schools regulated by state laws, these facilities are subject to minimal requirements.[235] One article claims that job listings for a teacher position in a Phoenix facility did not require applicants to be licensed or meet have any of the typical requirements of a public-school teacher.[236] Teachers claimed to not have access to books or curriculums.[237] Another article revealed similar things, and even claimed that some teachers cannot speak fluent Spanish. This article directly compares this Phoenix facility with another that receives state funding and has teachers who are state certified.[238] There, teachers are able to take students on field trips and it is suggested that they have more structured curricula.[239]

Advocates created the FSA in order to protect these UACs.[240] It is telling that alongside guaranteeing water and health care, they also sought to guarantee these children a right to education.[241] This is fitting because, as Part III discusses, the United States treats the right to education as a protection for vulnerable minors.[242] However, the reports from inside ORR-

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[233] *See* Stipulated Settlement Agreement, *supra* note 32, at ¶ 11 ("The [ORR and DHS] treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors.").

[234] *See* 6 U.S.C. § 279(g)(2).

[235] *See* discussions *supra* Sections I.A.2, I.B.

[236] *See* Klein & Liebelson, *supra* note 99.

[237] *Id.*

[238] *Id.*

[239] *See id.*

[240] *See* Lorelei Laird, *Meet the Father of the Landmark Lawsuit That Secured Basic Rights for Immigrant Minors*, A.B.A. J. (Feb. 1, 2016, 5:00 AM), https://www.abajournal.com/magazine/article/meet_the_father_of_the_landmark_lawsuit_that_secured_basic_rights_for_immig# [https://perma.cc/3LYP-N4MW].

[241] *See* Stipulated Settlement Agreement, *supra* note 32.

[242] *See* discussion *supra* Part III.

funded facilities show otherwise—that they do not treat education like a right that they are entrusted to provide.

Part IV expands upon this idea and further argues why education in ORR-funded facilities should improve. It explains that states adopting a role in educating UACs fits the American understanding of this right and that keeping these minors from enrolling in LEAs is a violation of their right to education.

Instead of defining what is entailed in this right, the courts and federal government have mostly left this question of the right to education up to the state and local governments.[243] Policymakers believe that the state and local governments are best equipped to answer this question, as they know these children the best.[244] This mindset that education is a state matter is even reflected in the current policies of the ICE facilities, which look to the states to provide an education to accompanied children.[245]

As discussed before, education is not one of Congress's enumerated powers,[246] the federal government thought it would be best to give local and state governments more power to make education decisions.[247] Although the federal government's role in education has grown throughout the years, the federal government maintains that it sees its role "as a kind of 'emergency response system'" used to "fill gaps in [state] and local support for education."[248]

The result of the state and local government's involvement in education is that every state has its own education code defining the duty to provide each child with an education.[249] Previous scholars have divided each state's constitutions into four distinct categories based on the duty that its language imposes.[250] States labeled as Categories III and IV impose a greater duty, with Category IV constitutions generally describing education as "fundamental," "primary," or "paramount."[251] States that fall into Category I have the lowest duty imposed upon them, as they "merely mandate a system of free public schools."[252] Thus, at a "minimum," states

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[243] *See* U.S. DEP'T OF EDUC., *supra* note 115.

[244] *See id*.

[245] *See generally* ICE EDUCATION POLICY, *supra* note 103.

[246] *See* U.S. CONST. art. 1, § 8.

[247] *See* U.S. OF DEP'T EDUC., *supra* note 115.

[248] *Id*.

[249] *See supra* note 118 and accompanying text.

[250] *See generally* Thro, *supra* note 133, at 19.

[251] *Id*. at 24; *see e.g*., FLA. CONST. art. IX, § 1; WYO. CONST. art. 7, §§ 1, 8 & 9.

[252] Thro, *supra* note 133, at 23; *see also* ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; KAN. CONST. art. VI, §§ 1, 6; LA. CONST. art. VIII, §§ 1, 11 & 13; MISS. CONST. art. 8, §§ 201, 206 &

are not violating a child's right to education, so long as they are providing the child with a free public school system.[253]

Of course, there are situations where the state would not have to provide a free public-school education for a child. It would be within the parent's right to place the child in a private school.[254] If parents want to send their child to school in a different school district, the school has the right to charge for tuition if the state law allows it.[255] However, the state ultimately has an interest in interfering with the student's education, should it find the education was being provided did not amount to an education at all.[256]

When it comes to children and their rights, the federal government employs a fail-safe system attempting to balance two of its own interests: (1) to not become too involved in the personal life and (2) to protect children.[257]

In *Pierce v. Society of Sisters*,[258] the Supreme Court exemplified how this fail-safe system works. Here, the Court decided that, given its interpretation of *Meyer v. Nebraska*, the Oregon's Compulsory Education Act violated the constitutional rights of parents to raise and educate their children.[259] The Court noted that while children should not be thought of as "creature[s] of the [s]tate," the state did have the lawful power and right to interfere with the child when there was an injury at issue, since it had a real interest in preventing any future injury.[260] Ultimately, this case illustrated that government action within the family life and any fundamental rights would be justified if the state had an interest in protecting a child's interest.[261]

Each state has their own rules and regulations for what it classifies as appropriate schooling for children. For the most part, education decisions

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206A; NEB. CONST. art. VII, § 1; N.M. CONST. art. XII, §§ 1, 4; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, §§ 1, 2; OKLA. CONST. art. XIII, §§ 1, 1a; S.C. CONST. art. XI, § 3; UTAH CONST. art. 10, §§ 1, 2 & 5; VT. CONST. Ch. II, § 68.

[253] Thro, *supra* note 133, at 23.

[254] *See* Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923).

[255] *See, e.g.*, TEX. EDUC. CODE § 25.003.

[256] *See generally, e.g.*, Soc'y of Sisters, 268 U.S. 510, 535–36 (1925).

[257] *See e.g.*, Meyer, 262 U.S. at 403 (holding that a parent's right to engage a teacher was afforded under the Fourteenth Amendment); Troxel v. Granville, 530 U.S. 57, 66 (2000) (holding that parents have a fundamental right to make decisions about their child's "care, custody, and control" under the Due Process Clause).

[258] Pierce, 268 U.S. 510 (1925);

[259] *Id.* at 535–36 (1925); *see also* Meyer, 262 U.S. at 390.

[260] Pierce, 268 U.S. at 535–36.

[261] *See id.*

are local.[262] There is a belief that the person who knows the child the best should be able to define what "school" is as it pertains to the individual child and that parents will generally act in the child's best interest.[263] Otherwise, there is a call for the fail-safe switch to turn on if the child's best interest is not being met. As UACs in ORR facilities do not have the protection of a parent, guardian, or caregiver beyond the federally sponsored partners, there is a paramount need for a fail-safe switch to activate. It is exactly situations like this that call for policy decisions to be made so that these children's best interests are met. In these cases, their best interest lies directly in being enrolled in LEAs at no cost.

State constitutions ensure an education to all children subject to it, and it is the state's job to ensure that every child receives an education. The state's role in providing that right is key. If UACs are subject to state law, it would seem that one would be taking away their right to education, as provided under the constitution, by saying that the state had no involvement in providing that right. ORR can be thought of as a bad parent that has decided to homeschool their children. The state should step in when it recognizes that the bad parent's actions have meant that children are not receiving an education, as is happening here.

V. CONCLUSION

The United States treats education as a form of protection for children, whom are viewed as vulnerable. The truth is that these minors, who are possibly in need of the most protection, are receiving the bare minimum. An examination of federal education legislation adopted by states and the Supreme Court's decision in *Plyer v. Doe* shows that there is a case to be made that this bare minimum is not enough under our laws. These minors, while in these facilities, are not provided the rights they have or should have at a federal level. For these UACs, education should be included among necessities like water, food, and medicine, because court decisions, the federal government, and public policy illustrate that education is necessary to function in our society. If our federal immigration policies continue to detain UACs in these ORR facilities, the least we can do is provide these children with full and proper access to local education agencies.

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[262] *See e.g.*, WYO. DEP'T OF EDUC., FOUR QUESTIONS ABOUT WYOMING EDUCATION, http://edu.wyoming.gov/downloads/measures-up/brochure-master.pdf [https://perma.cc/32QZ-NX25].

[263] *See* U.S. DEP'T OF EDUC., *supra* note 115.