DETAINED FROM EDUCATION: HOW UNDOCUMENTED CHILDREN HAVE BEEN LEFT BEHIND IN A POST-PLYLER ERA

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From the onset of Donald Trump's presidency, executive agencies, such as the Department of Homeland Security, have implemented a set of policies which take an aggressive stance on immigration. Collectively, these agency decisions have had two adverse effects. First, the policies have increased the number of unaccompanied alien children that have been placed into the care of the Office of Refugee Resettlement. Second, the administration's decisions have lengthened the duration of time that migrant children are held in detention. As a result, the Office of Refugee Resettlement has struggled to adapt financially to this situation and it has been instructed by the Department of Health and Human Services to shift funding towards activities which strictly promote the "protection of life and safety" of a child. One of the services that has been subsequently altered, or outright eliminated, as a result of this budgetary cut is a migrant child's access to education. This result is alarming when one considers two legal authorities which govern an undocumented child's academic experience—Plyler v. Doe and the Flores Settlement Agreement. These authorities provide undocumented youth with a legally binding promise which is at odds with the policies that are in place and this article will address whether the current immigration framework is depriving unaccompanied children of an education that they are entitled to under law.

"Our attitude towards immigration reflects our faith in the American ideal. We have always believed it possible for men and women who start at the bottom to rise as far as their talent and energy allow. Neither race nor place of birth should affect their chances."

- Robert F. Kennedy

INTRODUCTION

Over the past decade, there has been a tremendous increase in the number of unaccompanied alien children apprehended by the Department of Homeland Security (DHS).[1] Unlike the previous wave of

[1] U.S. Department of Health and Human Services, *Latest UAC Data-FY 2019*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2019/index.html (last reviewed Jan. 30, 2020) ("Since 2003, ORR has provided care for and found suitable sponsors for over 340,000 UAC. For its first nine years at ORR, fewer than 8000 children were served

immigrants, who primarily came from Mexico, a majority of current asylum seekers hale from Central America, specifically the Northern Triangle (El Salvador, Guatemala, and Honduras).[2] One of the leading reasons that these children endure such an arduous journey into the United States is to flee "chronic violence, corruption, and a lack of economic opportunity."[3]

Although these migrant youth enter the United States with the aspiration of achieving a better life, it is questionable whether the current detention conditions afford them this opportunity.[4] In the past few years, there has been mounting concern amongst immigration lawyers and the public at large regarding the detainment environments that undocumented children are exposed to, specifically with regards to whether these conditions comply with governing law.[5] This article will focus on an area that has not received much attention from the legal community—an unaccompanied migrant child's access to education as he or she navigates the inter-agency immigration system.

There are two legal authorities which govern this particular topic, *Plyler v. Doe* and the Flores Settlement Agreement.[6] In *Plyler*, the Supreme Court struck down a Texas statute which allowed the state government to withhold funds from schools that educated undocumented migrant children.[7] According to the Court, "if the state is to deny a discrete

annually in this program. Since Fiscal Year 2012 [Oct. 1, 2011–Sept. 30, 2012], this number has jumped dramatically, with a total of 13,625 children referred to ORR by the end of FY 2012. The program received 24,668 UAC referrals from DHS in FY 2013, 57,496 referrals in FY 2014, 33,726 referrals in FY 2015, 59,170 in FY 2016, and 40,810 in FY 2017. In FY 2018 49,100 UAC were referred.").

2 ACS Press Office, *Fact Sheet: Unaccompanied Alien Children (UAC) Program*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1, 2 (Sept. 30, 2019), https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf; Daniel Gonzalez, *The 2019 Migrant Surge is Unlike Any We've Seen Before. This is why*, USA TODAY (Sept. 25, 2019, 12:48 PM), https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-issues-migrants-mexico-central-america-caravans-smuggling/2026215001/.

3 Amelia Cheatham, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle (last updated Oct. 1, 2019).

4 *Cf.* Anya van Wagtendonk, *As Immigrant Children go Without Soap and Toothbrushes, Trump and Pence say Congress is to Blame*, VOX (June 23, 2019, 5:39PM), https://www.vox.com/policy-and-politics/2019/6/23/18714699/immigrant-children-soap-toothbrushes-detention-trump-pence-congress (describing the poor conditions that immigrant children face at detention facilities).

5 *Id.* (describing how necessities such as "food, water, soap, toothbrushes, [and] blankets" are denied to children in detention centers).

6 Plyler v. Doe, 457 U.S. 202 (1982); Flores v. Reno, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997), https://www.aila.org/File/Related/14111359b.pdf.

7 Plyler, 457 U.S. at 230.

group of innocent children the free public education that it offers to other children … *that denial must be justified by a showing that it furthers some substantial state interest.*"[8] This opinion played a pivotal role in explaining how a migrant child's education will shape his or her transition into the structure of American society.[9] As Justice Brennan wrote, "the illegal alien of today may well be the legal alien of tomorrow,"[10] and this certainly holds true for many of the unaccompanied youth who are currently apprehended along the southwest border.

While *Plyler* established the significance of a migrant child's access to education in America, the Flores Settlement Agreement (FSA) laid the foundation of what this education would actually look like for undocumented migrant children held in government facilities.[11] The FSA was the product of years of litigation between the federal government and a class of migrant youth who were held in detention by the Immigration and Naturalization Service (INS).[12] This court-stipulated agreement provided unaccompanied alien children with an understanding that:

> "1.) The government would release children 'without unnecessary delay' to (in order of preference) the children's parents, legal guardians, other adult relatives, or another individual designated by the parents/guardians.
>
> 2.) The government would put children in the 'least restrictive' setting appropriate.
>
> 3.) The government would create and implement standards for the care and treatment of immigrant children in detention."[13]

8 *Id.* (emphasis added).

9 *See id.* at 223 ("By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.").

10 *Id.* at 207.

11 Flores v. Reno, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997), https://www.aila.org/File/Related/14111359b.pdf.

12 Matthew Sussis, *The History of the Flores Settlement: How a 1997 Agreement Cracked Open our Detention Laws*, CTR. FOR IMMIGR. STUD. 1, 3 (Feb. 11, 2019) https://cis.org/sites/default/files/2019-02/sussis-flores-history.pdf (It should be noted that the INS agency no longer exists and that its roles have been placed into the hands of the Department of Homeland Security and the Department of Health and Human Services.).

13 *Id.*

Under the third factor, the agreement clarified the requisite educational standards that should be provided to undocumented alien children while they are held in detention.[14]

Collectively, the Flores Settlement Agreement and *Plyler* provide migrant children with two legal promises. First, the government may not foreclose an opportunity for education from undocumented alien children in the absence of a substantial governmental interest.[15] And additionally, there are certain services and academic resources that must be afforded to unaccompanied alien children while they are held in a government-run facility.[16] When one analyzes the current immigration landscape, it is evident that the federal government is failing to abide by these promises and that undocumented alien children are the ones that unfortunately suffer the academic consequences.[17] Although scholarship has focused on the conditions that detained migrant children are exposed to, there is currently a lack of contemporary legal academia discussing the education that migrant children receive while they navigate the interagency system. This article seeks to clarify this subject matter by addressing the present incongruency that exists between immigration policies and the relevant laws that govern an undocumented youth's education. It then recommends a set of solutions aimed at remedying this disparity.

Part I describes how *Plyler v. Doe* restricted the means by which a government may foreclose immigrant youth from receiving an education. It also clarifies what an education for unaccompanied alien children is intended to look like under the Flores Settlement Agreement. Part II explains the educational inequity that unaccompanied alien children currently face in Office of Refugee Resettlement (ORR) facilities. Additionally, this Part explores how the Trump Administration's immigration policies have led to results which conflict with the existing legal doctrine discussed in Part I. Part III assesses recent scholarship related to improving detention conditions for migrant children, including their access to an education. Lastly, Part IV suggests what lawmakers can

[14] These requirements will be explained in detail in Part I.

[15] Plyler v. Doe, 457 U.S. 202, 230 (1982).

[16] Flores v. Reno, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997), https://www.aila.org/File/Related/14111359b.pdf.

[17] *See* Maria Sacchetti, *Trump Administration Cancels English Classes, Soccer, Legal Aid for Unaccompanied Child Migrants in U.S. Shelters*, WASH. POST (June 5, 2019, 9:12 PM), https://www.washingtonpost.com/immigration/trump-administration-cancels-english-classes-soccer-legal-aid-for-unaccompanied-child-migrants-in-us-shelters/2019/06/05/df2a0008-8712-11e9-a491-25df61c78dc4_story.html (detailing the services that were previously provided to unaccompanied immigrant minors at migrant shelters that have been cut by the current administration, including "English classes, recreational programs, and legal aid").

do in order to improve the existing state of education for UACs who are navigating the immigration system.

I. LEGAL AUTHORITIES WHICH GOVERN AN UNDOCUMENTED YOUTH'S EDUCATION

The issues above straddle two separate legal disciplines—education law and immigration law. In isolation, it may seem that these subjects are unrelated to one another. However, the caselaw that governs these disciplines interacts in important ways. Part I will begin by analyzing how *Plyler v. Doe* set the stage in affirming the importance of an undocumented youth's public education.[18] Following the *Plyler* analysis will be a discussion of the laws that dictate conditions within detention centers, and specifically, the educational standards that undocumented youth are entitled to under the Flores Settlement Agreement.[19]

A. Plyler v. Doe and its Promise to Migrant Children

In 1975, Texas enacted §21.031 of its state Education Code.[20] Pursuant to this statute, districts were permitted to deny enrollment in their public school systems to undocumented immigrant youth.[21] The state incentivized this behavior by withholding funding from schools that provided space in the classroom for migrant children.[22] In a landmark opinion, *Plyler v. Doe*, which was authored by Justice Brennan, the Court established that it is an unconstitutional violation of the Equal Protection Clause for any state to deny an undocumented, school-age child a public education in the absence of a "substantial state interest."[23]

In reaching this decision, the Court tackled three key issues. First, the Court determined that undocumented immigrants living within the jurisdiction of a state were entitled to the benefits of the Fourteenth Amendment's Equal Protection Clause.[24] The Court then established the appropriate level of scrutiny to assess whether §21.031 passed constitutional muster.[25] Lastly, the Court applied the scrutiny framework to the Texas state statute in order to determine whether it violated the Equal Protection Clause.[26]

The state argued that undocumented children are precluded from taking advantage of the rights that are guaranteed by the Fourteenth

18 Plyler v. Doe, 457 U.S. 202 (1982).

19 Flores v. Reno, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997), https://www.aila.org/File/Related/14111359b.pdf.

20 Plyler, 457 U.S. at 205.

21 *Id.*

22 *Id.*

23 *Id.* at 230.

24 *Id.* at 210–16.

25 *Id.* at 218–24.

26 *Id.* at 227–30.

Amendment.[27] In response to this claim, Justice Brennan directly cited the text of the Equal Protection Clause: "nor shall any State [...] deny to any person within its jurisdiction the equal protection of the laws."[28] He used the clause's language to explain that one's personhood in the United States is not dictated by his or her immigration status.[29] Instead, the Fourteenth Amendment is pertinent to all who reside in the state.[30]

To determine the appropriate level of scrutiny needed to assess §21.031, Justice Brennan began by grappling with how the Court should define this class of undocumented children. The state argued that immigrants possess their undocumented status as a result of their independent decision to enter the country illegally, and accordingly, they do not possess an immutable characteristic which warrants strict scrutiny.[31]

While acknowledging that the parents had made an independent decision to enter the country without documentation, Justice Brennan qualified the state's argument by explaining that "legislation directing the onus of a parent's misconduct against his children does not comport with the fundamental conceptions of justice."[32] The Court pointed out that although an adult accepts the potential consequence of deportation when he or she crosses the U.S. border illegally, a child should not be penalized for his or her parents' decisions.[33] Therefore, Justice Brennan held that it was necessary to examine undocumented children, as a class, under a more protective designation.[34]

The second question that the Court addressed was whether education fell under the constitutional classification of a fundamental right. Relying

[27] *Id.* at 210 ("Appellants argue at the outset that undocumented aliens, because of their immigration status, are not 'persons within the jurisdiction' of the State of Texas, and that they therefore have no right to the equal protection of Texas law.").

[28] U.S. Const. amend. XIV, §1; *id.* at 210.

[29] Plyler v. Doe, 457 U.S. 202, 210 (1982).

[30] In addition to the Fourteenth Amendment and its applicability to the states, the Court explained that migrant children can utilize the Fifth Amendment as a means of protection against unconstitutional decisions that are made by the federal government. *Id.* at 210 ("We have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government.").

[31] *Id.* at 219.

[32] *Id.* at 220.

[33] *Id.* at 220.

[34] *Id.* ("But §21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.").

on *San Antonio Independent School District v. Rodriguez*,[35] a case decided nine years before *Plyler*, the Supreme Court explained that the text of the Constitution does not explicitly grant the right to an education.[36] However, the Court recognized that education was not "merely some governmental benefit."[37] Harkening back to the democratic morale that blossomed out of the American Revolution, Justice Brennan acknowledged that gaining access to educational institutions empowers individuals to exercise their voice.[38] While failing to designate education as a fundamental right, the majority conceded that "education has a fundamental role in maintaining the fabric of our society."[39]

In conjunction with the elevated classification of undocumented youth, the Court's belief that a public education is far-reaching in a child's development demanded a standard of scrutiny that respected the idiosyncrasies and "constitutional sensitivity" of this particular case.[40] As a result, the majority was tasked with identifying if the denial of an education to undocumented migrant children was justified by the furtherance of a substantial governmental interest.[41]

The Court addressed three defenses made by the appellants. First, that the state had the right to protect itself from a sudden influx of immigrants; second, that the quality of education in Texas would suffer if undocumented immigrants were included in the classroom; and lastly, that the undocumented status of these children made it less likely that they would remain in the state as a contributing member of the state economy.[42] Justice Brennan rejected each of these defenses.

Beginning with the state's first argument, the Court reasoned that the vast majority of immigrants do not enter the United States in order to "avail themselves of a free education."[43] In other words, preventing migrant children from receiving an education would not curtail immigrants from entering the country illegally. Moreover, Justice Brennan was skeptical that the value of an education would be enhanced if undocumented children were excluded from the classroom.[44] The state provided no convincing evidence of this finding, and Justice Brennan pointed out that even if the state had done so, they would have had to justify why this particular group of children had been identified as the

35 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (finding that education did not fit under the constitutional classification of a fundamental right).

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

37 *Id.* at 221.

38 *Id.* at 223.

39 *Id.* at 221.

40 *Id.* at 226.

41 *Id.* at 230.

42 *Id.* at 228–30.

43 *Id.* at 228.

44 *Id.* at 229.

"target for exclusion."[45] In response to the state's final argument regarding a migrant child's likelihood of contributing to the economy, the Court reasoned that there is no guarantee that any child will remain in the state where he receives his education.[46] Therefore, this, too, did not meet the Court's definition of a substantial government interest.

Because the appellants were unable to sufficiently defend the constitutionality of §21.031, the Supreme Court concluded that these undocumented migrant children were entitled to a public education.[47] Thus, beyond its role in defining the lasting consequences that a foreclosure of education can have on an undocumented child, this ruling delineated a legal limit on the government's ability to eliminate a migrant youth's access to the classroom. With this in mind, Section B will examine the Flores Settlement Agreement and its promise to youth who are apprehended along the southwest border.

B. The Lasting Effect of the Flores Settlement Agreement

The Flores Settlement Agreement has received a great deal of recent attention due to the spike in child migrants who have been detained by the Department of Homeland Security.[48] This section will explain what the Flores Settlement Agreement is, the litigation that led to its enactment, and what this court-stipulated agreement legally guarantees to undocumented alien children who are detained by the United States government.[49]

When the Flores Settlement Agreement was signed in 1997, it aimed to achieve two primary goals.[50] First, it sought to curb the length of time that a migrant child could be held in detention.[51] Second, it established a set of necessary conditions "under which children [could] be incarcerated in immigration detention."[52] But this agreement did not come to fruition easily. In fact, it was the product of a great deal of litigation.

In 1985, a class action was brought on behalf of immigrant children held in detention by the federal government, specifically the Immigration and Naturalization Service Agency (INS).[53] The class representative,

[45] *Id.*

[46] *Id.* at 230.

[47] *Id.*

[48] Amelia Cheatham, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN REL. (Feb. 10, 2020), https://www.cfr.org/backgrounder/us-detention-child-migrants.

[49] Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK, P11 (C.D. Cal. 1996), https://www.aila.org/File/Related/14111359b.pdf.

[50] *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUMAN RIGHTS FIRST (Oct. 2018), https://www.humanrightsfirst.org/sites/default/files/FLORES_SETTLEMENT_AGREEMENT.pdf.

[51] *Id.*

[52] *Id.*

[53] Sussis, *supra* note 12.

Jenny Flores, was the child of an undocumented immigrant who was working in California.[54] Due to her illegal status, Flores' mother refrained from contacting the INS personally out of a fear that she would be deported for coming forward to claim the teenager.[55] In other words, remaining silent outweighed reunification with her own daughter.[56]

For years, INS officers engaged in routine strip searches, placed youth in facilities with grown adults, and refused to release children with non-parent guardians. The litigation in this case sought to answer whether these actions unconstitutionally violated the substantive and procedural due process rights of migrant children.[57] Following a ruling in favor of the plaintiffs and a series of decisions made by a 9th Circuit Panel and the 9th Circuit sitting en banc,[58] the Supreme Court granted certiorari in order to settle whether the INS's policies violated the Due Process Clause.[59] Writing for the majority, Justice Scalia provided what, at the time, felt like a momentous victory for the federal government. He ruled that the agency protocol under scrutiny was constitutional and that the INS was not violating either the substantive or procedural due process rights of these migrant children.[60] According to the Court, the INS policy was a "reasonable response to the difficult problems presented when the service arrests unaccompanied alien juveniles."[61]

Although this litigation seemed to put an end to the question of whether the INS was complying with its Constitutional obligations, immigration lawyers continued to advocate on behalf of these children.[62] Their efforts hinged on the ambiguous nature of the deciding language in *Reno v. Flores*—specifically with regards to the standards and conditions that children were entitled to within an INS facility. For example, the majority pressed the government to provide "decent and humane" conditions for youth, but failed to clarify the boundaries of what this

54 *Id.*

55 *Id.*

56 This is a concern that many parents and sponsors currently struggle with in the United States. As they consider reaching out to immigration authorities, potential sponsors fear that they will be apprehended by DHS agents—a problem that will be addressed further in Part II.

57 Sussis, *supra* note 12 ("The lawsuit sought to establish standards for how INS [handled] detained minors, and specifically expressed concerns that Jenny Flores was strip-searched, that she shared living quarters and bathrooms with male adults, and that she couldn't be released to non-guardian relatives.").

58 Flores by Galvez-Maldonado v. Meese, 934 F.2d 991 (9th Cir. 1990); Flores by Galvez-Maldonado v. Meese, 942 F.2d 1352 (9th Cir. 1991).

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

60 *Id.* at 303 ("Where the Government does not intend to punish the child, and where the conditions of Governmental custody are decent and humane, such custody surely does not violate the Constitution.").

61 *Id.* at 315.

62 Sussis, *supra* note 12.

phrase actually meant.[63] Additionally, Justice Scalia denied that migrant children had a constitutional right to receive alternative placement "so long as institutional custody is … good enough."[64] But without a description of what constituted an environment that was "good enough," lawyers and activists lacked a legal mechanism to hold the government accountable for failing to comply with *Reno v. Flores*.[65]

The lack of clarity eventually led the federal government to reach a court-stipulated agreement with immigration lawyers in 1997.[66] Known as the Flores Settlement Agreement, it defined the requisite standards that undocumented children are legally entitled to while they reside in government detention.[67] This court-stipulated agreement has the "force of law,"[68] and it continues to be used by courts to secure the rights of undocumented children who reside in government detention.[69]

Outside of administering a set of standards for immigrant youths' living conditions, the Flores Settlement Agreement establishes that facilities must ensure that children receive:

> "Educational services appropriate to the minor's level of development, and communication skills in a structured classroom setting, Monday through Friday, which concentrates primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). The educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas should include Science, Social Studies, Math, Reading, Writing and Physical Education. The program

63 Reno v. Flores, 507 U.S. 292, 303 (1993).

64 *Id.* at 305 (emphasis added).

65 For more on the government's lack of compliance, *see generally* HUM. RTS. WATCH, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE (1997), https://www.hrw.org/sites/default/files/reports/us974.pdf.

66 Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997), https://www.aila.org/File/Related/14111359b.pdf.

67 *See id.*

68 Sussis, *supra* note 12 (quoting Doris Meisner, the INS commissioner that signed the Flores Settlement Agreement).

69 *See* Flores v. Barr, 934 F.3d 910 (9th Cir. 2019) (ruling that the Flores Settlement Agreement "requires immigration agencies to hold such minors in their custody 'in facilities that are safe and sanitary...'"); *see also* Flores v. Lynch, 392 F. Supp. 3d 1144 (C.D. Cal. 2017) (granting plaintiff's motion to enforce the Flores Settlement Agreement and establishing a migrant child's right to a bond redetermination hearing); Flores v. Johnson, 212 F. Supp. 3d 864 (C.D. Cal. 2015) ("This Court has the inherent power to enforce the terms of the Agreement ... [T]he construction and enforcement of settlement agreements are governed by principles of local law which apply to interpretation of contracts generally.").

> shall provide minors with appropriate reading materials in languages other than English for use during the minor's leisure time."[70]

Thus, the FSA gave agencies a more thorough set of guidelines to pursue, notably in the context of providing an education to undocumented migrant youth.[71] Often, however, executive agencies improperly treat these standards as aspirations rather than the legally binding agency protocol that they actually are.[72] If the FSA is to extend the legacy of *Plyler* by ensuring that detained children receive an adequate education, it is imperative that regulations are put in place to uphold that vision. The next portion of this article will address how recent policies have led to violations of the existing law discussed in Part I.

II. THE INEQUITY: A LACK OF EDUCATIONAL OPPORTUNITY FOR UNDOCUMENTED CHILDREN

Part II will begin by examining how undocumented children are detained and who the key agencies are that assist in apprehending these children. It will then review statistics which shed light on the rise in undocumented alien child (UAC) detainments and assess how these increases have led to the depletion of available academic resources in Office of Refugee Resettlement (ORR) shelters. Lastly, it will analyze why a dearth of educational capital in each shelter ultimately deprives a child of the education that he or she is currently entitled to under law.

A. Analysis of the Relevant Agencies that Oversee Undocumented Alien Children

In the years leading up to the Flores Settlement Agreement, the Immigration and Naturalization Service (INS) apprehended and repatriated UACs who were entering the United States.[73] Beyond detaining these children, the INS was also tasked with taking care of and

[70] Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997), https://www.aila.org/File/Related/14111359b.pdf.

[71] *The Flores Settlement Agreement & Unaccompanied Children in Federal Custody*, NAT'L CTR. FOR YOUTH L. (Feb. 2019), https://www.prisonlegalnews.org/media/publications/National_Center_for_Youth_Law_-_The_Flores_Settlement_Agreement__Unaccompanied_Children_in_Federal_Custody_2019.pdf ("The Settlement protects 'all minors who are detained in the legal custody of the INS' or its successors in interest, ICE, CBP, and ORR").

[72] Dana Goldstein & Manny Fernandez, *In a Migrant Shelter Classroom, 'It's Always Like the First Day of School'*, N.Y. TIMES (July 6, 2018), https://www.nytimes.com/2018/07/06/us/immigrants-shelters-schools-border.html.

[73] *See* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 4 (2019).

identifying adequate placement for unaccompanied youth in custody. As time went on, it became clear that these two responsibilities were incongruent with one another and needed to be handled by two separate agencies.[74] The Homeland Security Act remedied this intragovernmental dilemma in 2002 when it apportioned these responsibilities between the newly created Department of Homeland Security (DHS) and the U.S. Department of Health and Human Services (HHS).[75]

Under the umbrella of the DHS, there are three agencies: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS).[76] CBP and ICE are the primary agencies engaged in apprehending UACs.[77] As its title suggests, the U.S. Customs and Border Protection Agency is responsible for apprehending adults and children at or near the United States border.[78] The central difference between CBP and ICE is that ICE focuses on apprehending those who already reside within the confines of the United States.[79] When either of these two agencies detain a child, it is tasked with identifying whether the child falls under the statutory classification of an Unaccompanied Alien Child.[80] According to the Homeland Security Act, a UAC is a child who:

> (A) has no lawful immigration status in the United States;
>
> (B) has not attained 18 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 is available to provide care and physical custody.[81]

[74] *The Flores Settlement*, *supra* note 50 ("According to advocates, as well as the Department of Justice Office of the Inspector General, the INS did not immediately comply with the terms of the Agreement. It was only after the Office of Refugee Resettlement (ORR) assumed responsibility for the care and custody of unaccompanied children in 2003—a product of years of advocacy on the part of human rights organizations, religious groups, and political leaders—that significant changes were implemented.").

[75] Homeland Security Act, Pub. L. No. 107–296, 116 Stat. 2135 (2002).

[76] *Operational and Support Components*, DEP'T OF HOMELAND SEC. (2018), https://www.dhs.gov/operational-and-support-components.

[77] KANDEL, *supra* note 73, at 5–6.

[78] *Id.* at 6–8.

[79] *Id.* at 6–9.

[80] 6 U.S.C. § 279(g)(2) (2009).

[81] *Id.*

If a youth in custody meets each of these qualifications, CBP and ICE are legally required to transport the child to the Office of Refugee Resettlement (ORR).[82] The ORR falls under the umbrella of the HHS and it is responsible for facilitating the placement of UACs into adequate custody with a sponsor or family member.[83] During the period of time that the agency oversees the care of a child, it is required to abide by the "principles and provisions established [in] the Flores Settlement Agreement of 1997."[84] Although the FSA aims to secure conditions which protect the general welfare of an undocumented child while he or she is detained—including a set of necessary educational standards—the recent influx of UACs into the United States has posed a strain on the resources that are available in each shelter.[85]

B. Statistics Pertaining to the Educational Inequity

The current administration's immigration policies have denied unaccompanied alien children from attaining access to the education that they are legally entitled to under the Flores Settlement Agreement and *Plyler v. Doe*. At the end of FY2019, Customs and Border Protection reported that it had apprehended a total of 76,020 children.[86] This was a fifty-two percent increase from the number of unaccompanied alien children who had been captured the previous fiscal year.[87] The drastic increase raises two questions—where are these individuals specifically fleeing from and why are so many individuals emigrating from their home countries?

82 Homeland Security Act, Pub. L. No. 107–296, 116 Stat. 2135 (2002) (transferring the responsibilities for the care and placement of UAC's to the Office of Refugee Resettlement).

83 KANDEL, *supra* note 73 at 5.

84 *About the Program*, OFF. OF REFUGEE RESETTLEMENT (May 18, 2019), https://www.acf.hhs.gov/orr/programs/ucs/about; *see also 3.3: Care Provider Required Services*, DEP'T OF HEALTH & HUM. SERVS. (Apr. 20, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3.

85 Abigail Hauslohner, *U.S. Returns 100 Migrant Children to Overcrowded Border Facility as HHS says it is Out of Space*, WASH. POST (June 25, 2019), https://www.washingtonpost.com/immigration/us-returns-100-migrant-children-to-overcrowded-border-facility-as-hhs-says-it-is-out-ofspace/2019/06/25/397b0cb6-96b6-11e9-830a-21b9b36b64ad_story.html.

86 *Southwest Border Migration FY 2019*, U.S. CUSTOMS & BORDER PROT. (2019), https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019.

87 Paulina Villegas, *Detentions of Child Migrants at the U.S. Border Has Surged to Record Levels*, N.Y. TIMES (Oct. 29, 2019), https://www.nytimes.com/2019/10/29/world/americas/unaccompanied-minors-border-crossing.html; *see also Southwest Border Migration FY2018*, U.S. CUSTOMS & BORDER PROT. (2018), https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018 (reporting that 50,036 UACs were detained in FY2018).

Starting with the latter question, the immigration landscape has experienced a dramatic shift in the countries of origin from which immigrants hail. In FY2000, ninety-eight percent of detainees along the southwest border came from Mexico.[88] Comparatively, fifty-two percent of those who were apprehended along the same border in FY2018 emigrated from either El Salvador, Guatemala or Honduras.[89] As a means of illustrating these changes, a 2017 Pew Research Center study found that the "Northern Triangle immigrant populations in the U.S. grew more sharply than the overall foreign-born population from 2007 to 2015."[90] This migration pattern can be attributed to a variety of factors including rampant crime, chronic poverty, and gang violence currently present in these countries of origin.[91]

In order to escape the traumatic environments that surround them, these children leave behind their homes with the hope of finding new communities that will allow them to live a better life. However, recent executive branch decisions have made it difficult for children to achieve that goal.

C. The Conflict Between Law & Policy

This section will focus on two current policies—the Interagency Information Sharing Agreement between the ORR, ICE, and CBP, and the Zero Tolerance Immigration Enforcement Policy.[92] In April 2018, a memorandum of agreement (MOA) was reached between the HHS and DHS.[93] The agreement established the sharing of information pertaining to children who were housed in facilities and prospective sponsors who were coming forth to assume custody of these children.[94] In order to

88 JILL H. WILSON, CONG. RESEARCH SERV., R45489, RECENT MIGRATION TO THE UNITED STATES FROM CENTRAL AMERICA: FREQUENTLY ASKED QUESTIONS 2 (2019).

89 *Id.*

90 D'Vera Cohn et al., *Rise in U.S. Immigrants From El Salvador, Guatemala and Honduras Outpaces Growth From Elsewhere*, PEW RES. CTR. (Dec. 7, 2017), https://www.pewresearch.org/hispanic/2017/12/07/rise-in-u-s-immigrants -from-el-salvador-guatemala-and-honduras-outpaces-growth-from-elsewhere/.

91 *See* KANDEL, *supra* note 73, at 2.

92 *See* KANDEL, *supra* note 73, at 21–24.

93 Memorandum of Agreement Among the Off. of Refugee Resettlement of the U.S. Dep't of Health & Hum. Servs. and U.S. Immigr. & Customs Enf't and U.S. Customs & Border Prot. of the U.S. Dep't of Homeland Sec. Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (Apr. 13, 2018), https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf.

94 NAT'L IMMIGR. JUST. CTR., CHILDREN AS BAIT: IMPACTS OF THE ORR-DHS INFORMATION SHARING AGREEMENT 1 (Mar. 2019), https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2019-03/Children-as-Bait.pdf.

explain its decision, the Trump Administration presented the MOA as a means of screening potential sponsors to ensure that undocumented children were being placed into safe and proper hands.[95] But as time went on, it became apparent that the information sharing was functioning as a means of arresting undocumented family members. In fact, "[f]rom July through November 2018, ICE [was] reported to have arrested 170 potential sponsors—109 of who had no previous criminal histories—and placed them [into] deportation proceedings."[96]

Although Congress passed a FY2019 appropriations bill which narrowed the scope of the DHS's ability to use this information for enforcement purposes,[97] the memorandum's original effects have dissuaded many potential sponsors from reaching out to connect with unaccompanied minors.[98] With fewer sponsors coming forth, many critics have drawn a connection between the MOA and the increased amount of time that UACs are held within government-run facilities.[99]

Additionally, in May of 2018, the Department of Justice implemented the Zero Tolerance Immigration Enforcement Policy which allowed prosecutors to criminally charge undocumented immigrants and separate children from their families.[100] "Under [this] policy, when a parent entered the U.S. illegally with a minor and was detained in criminal detention, DHS treated the child as an unaccompanied alien child and transferred him or her to ORR custody."[101] This approach led to approximately 3,000 children being separated from their families, which in turn encumbered the ORR's ability to care for these youth.[102] Although there has been a subsequent court order requiring that children be reunited with their families,[103] thousands of immigrant youth have been separated and placed into the hands of the ORR, despite the federal court's injunction.[104]

95 KANDEL, *supra* note 73, at 22.

96 *Id.*

97 H.R.J. Res. 31, 116th Cong. § 224 (2019).

98 Teresa Mathew, *They Feel Like They Are Being Jailed*, SLATE (Aug. 13, 2019), https://slate.com/news-and-politics/2019/08/orr-shelters-unaccompanied-migrant-children-abuse.html ("On top of the escalation in immigration enforcement, a 2018 agreement between ORR, CBP, and ICE mandates that the agencies share information, which has discouraged potential sponsors from coming forward to take the children home.").

99 KANDEL, *supra* note 73, at 22.

100 WILLIAM A. KANDEL, CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY 1–2 (2019).

101 KANDEL, *supra* note 73, at 23.

102 *Id.*

103 *See* Ms. L. v. ICE, 302 F. Supp. 3d 1133 (S.D. Cal. 2018).

104 John Washington, *The Government Has Taken at Least 1,100 Children from Their Parents Since Family Separations Officially Ended*, THE INTERCEPT (Dec. 9, 2019 10:59 AM), https://theintercept.com/2019/12/09/family-separation-policy-lawsuit/; *see also* Miriam Jordan, *Judge Gives U.S. 6 Months*

Collectively, these two policies have crucial ramifications. The Zero-Tolerance Policy has contributed to the already increasing number of children being sent to the ORR and the Interagency Information Sharing Agreement has increased the average number of days that these children are held in ORR facilities.[105] As a result, ORR shelters have been unable to support the existing children housed in facilities. In June of 2019, the HHS reported that it was close to reaching its maximum capacity for adequately housing incoming youth,[106] and consequently, ORR facilities were ordered to limit activities that were not directly required for the "protection of life and safety" of a child.[107] One of the activities that has been subsequently constrained—or in some cases, outright eliminated—as a result of this recent budgetary adjustment is a child's access to educational services.[108]

For example, though the Flores Settlement Agreement established that ORR shelters are legally required to provide certain standards of education including "English Language Training,"[109] ORR shelters have been forced to get rid of English classes because of recent budgetary cuts.[110] Taking this into consideration, it is doubtful that detained migrant children are receiving the desired language guidance that was envisioned by the FSA. In addition to violating the tenants of the FSA, these policies led to educational results that conflict with the Court's ruling in *Plyler v. Doe*. According to *Plyler*, a government may not foreclose an education from

to Account for Thousands More Separated Migrant Families, N.Y. TIMES (Apr. 25, 2019), https://www.nytimes.com/2019/04/25/us/migrant-family-separation-judge.html.

105 KANDEL, *supra* note 73, at 21–24.

106 *See* Abigail Hauslohner, *U.S. Returns 100 Migrant Children to Overcrowded Border Facility as HHS Says it is Out of Space*, WASH. POST (June 25, 2019, 10:09 PM), https://www.washingtonpost.com/immigration/us-returns-100-migrant-children-to-overcrowded-border-facility-as-hhs-says-it-is-out-of-space/2019/06/25/397b0cb6-96b6-11e9-830a-21b9b36b64ad_story.html.

107 Vanessa Romo & Joel Rose, *Administration Cuts Education and Legal Services for Unaccompanied Minors*, WLRN (June 5, 2019), https://www.wlrn.org/post/administration-cuts-education-and-legal-services-unaccompanied-minors.

108 *See* Astrid Galvan & Adriana Gomez Licon, *Feds: No More Education, Legal Services for Immigrant Kids*, ASSOCIATED PRESS (June 5, 2019), https://apnews.com/3f27f157636145838b108fa421e3e4ad; *see also* Sacchetti, *supra* note 17; *see also* Vanessa Romo & Joel Rose, *Administration Cuts Education and Legal Services for Unaccompanied Minors*, NPR (June 5, 2019, 6:07 PM), https://www.npr.org/2019/06/05/730082911/administration-cuts-education-and-legal-services-for-unaccompanied-minors.

109 Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997), https://www.aila.org/File/Related/14111359b.pdf.

110 Sacchetti, *supra* note 17.

an undocumented alien child in the absence of a substantial governmental interest.[111] The Court's decision in 1982 states:

> The record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. *It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.*[112]

With the recent budgetary cuts and subsequent elimination of English classes in mind, the Court's language above solidifies the understanding that fiscal and budgetary justifications cannot serve as sufficient constitutional defenses for eliminating an undocumented child's access to education.[113] The current administration's policies have led to this exact outcome and are at odds with the law governing this issue.

D. Connecting the Length of Time that a Child is Typically Held in a Shelter with the Burden on their Education

Before delving into potential solutions and the existing scholarship, one must analyze the effects that such a foreclosure of education will have on an immigrant child. In October 2018 and 2019, children in ORR custody were held for an average of eighty-two and one hundred twenty-three days respectively.[114] Comparing these figures to those of the Obama Administration, which held children in ORR shelters for an average of thirty-four days in FY2015 and thirty-eight days in FY2016, it is reasonable to conclude that the increase can be attributed to a shift in domestic immigration policies.

The aforementioned data display that children are held in substandard (or non-existent) educational conditions for an amount of time that averages at least three months. By restricting access to academic activities

111 Plyler v. Doe, 457 U.S. 202, 230 (1982).

112 *Id.* (emphasis added).

113 *Id.*

114 *Latest UAC Data – FY2020*, DEP'T OF HEALTH & HUM. SERVS. (2020), https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2020/index.html; *Latest UAC Data – FY2019*, DEP'T OF HEALTH & HUM. SERVS. (2019), https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2019/index.html.

in shelters for this amount of time,[115] ORR facilities are essentially placing these students into a category of chronic absenteeism. Chronic absenteeism is defined as missing more than ten percent of the school year, which is approximately eighteen days.[116] This amounts to a quarter of the time that an unaccompanied alien child is currently held in an ORR shelter without English courses.

According to the Department of Education, "children who are chronically absent in preschool, kindergarten, and first grade are much less likely to read at grade level by the third grade."[117] Third grade students who are behind in their reading level are four times more likely to drop out at some point in high school,[118] and these drop out results hold true for high schoolers who are chronically absent as well.[119] Therefore, the inadequate educational foundation that is present within ORR facilities will negatively affect students of all ages.

In *Plyler v. Doe*, Justice Brennan stated that "by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority."[120] Analogously, one could argue that undocumented children in ORR facilities are being denied the opportunity to attain an academic experience which will allow them to shift the narrative regarding their existence in America. An unaccompanied alien child cannot progress in American society if he or she is denied the educational capital that is necessary to develop academically. That is why one needs to acknowledge the educational shortfalls that are currently present within these government-run facilities.

III. SCHOLARLY PROPOSALS

Although a majority of legal research has not focused on the education that undocumented alien children receive in government shelters, articles, notes, and comments alike have aimed to align their recommendations with the overall tenets of the Flores Settlement Agreement and *Plyler*. In many ways, the suggestions that have been made will implicitly increase

115 *See* Miriam Jordan, *Migrant Children May Lose School, Sports and Legal Aid as Shelters Swell*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/us/migrant-children-services.html.

116 *See Nearly 7.5 Million U.S. Students are Chronically Absent, Missing 18 or More Days of School Each Year*, PR NEWSWIRE (Nov. 9, 2012), https://www.prnewswire.com/news-releases/nearly-75-million-us-students-are-chronically-absent-missing-18-or-more-days-of-school-each-year-178070121.html.

117 *Chronic Absenteeism in the Nation's Schools: A Hidden Educational Crisis*, DEP'T OF EDUC. (June 7, 2016), https://www2.ed.gov/datastory/chronicabsenteeism.html.

118 *Id.*

119 *Id.*

120 Plyler v. Doe, 457 U.S. 202, 222 (1982).

the value and effectiveness of education in these facilities and that is why it is crucial to understand current trends in scholarship. This section will examine and critique the solutions put forth in "Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody" by Rebeca M. López and "The Right to Education Under Obergefell" by Alexis Piazza.

A. Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody

Rebeca M. López argues that because the Flores Settlement Agreement is insufficiently used to leverage agencies towards its desired outcomes, it is necessary for Congress to codify this agreement.[121] López's Comment focuses on conditions within CBP and ICE facilities. However, the codification of the Flores Settlement Agreement would also influence the treatment of children in ORR shelters.

López argues that codifying the Flores Settlement Agreement "will empower judges to better enforce the standards set forth in the FSA and will enable the courts to provide remedies for children who suffer abuse while in detention."[122] Central to López's thesis is the idea that justiciability plays a central role in protecting the rights of children, and if all of the agencies that house undocumented children are bound by this recommended legislation, it will allow courts to administer the law in an effective way.[123] Furthermore, it will incentivize facilities to be proactive by ensuring that resources—including those that affect a youth's education—are adequately provided to each child from the onset of their time in a government-run facility.

Although this is a course of action that would likely yield positive outcomes for UACs, it is debatable in the current political landscape whether Congress would be able to cross partisan lines to codify the FSA. Over the past year, immigration has become an increasingly partisan issue.[124] In a 2019 report that was conducted by the Lester Crown Center on U.S. Foreign Policy, nineteen percent of Democrats viewed immigration as a national threat compared to seventy-eight percent of

121 Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1670–72 (2012).

122 *Id.* at 1669.

123 *Id.*

124 *See* Scott Clement & Dan Balz, *Partisan divisions over immigration widen after a year of turmoil at border*, WASH. POST (Sept. 9, 2019, 9:30 AM), https://www.washingtonpost.com/politics/partisan-divisions-over-immigration-widen-after-a-year-of-turmoil-at-border/2019/09/09/2b4e6482-cfdf-11e9-8c1c-7c8ee785b855_story.html.

Republicans.[125] A fifty-nine percent differential between the parties on this hot-button issue raises serious doubts about whether codification is possible at this particular moment.

However, some scholarship has suggested that coalition-building can serve as a potential solution to this problem by providing a platform that will amplify the voices of immigrants.[126] Perhaps the aggregated voice of immigrants, lawyers, and advocates could shift the national dialogue in favor of López's proposed legislation.[127] After all, this is the means by which the FSA came to fruition.[128]

There is a key point of disagreement between this article and López's Comment. In López's opinion, the FSA does not provide immigrants with a cognizable right, specifically a right to education,[129] and as a result, it lacks the binding force that is necessary to hold executive agencies accountable for the care of undocumented alien children. However, in the wake of recent court decisions which have upheld the FSA's legal promise to detained migrant children,[130] this article argues that the FSA does, indeed, possess the means by which litigators can bring valid constitutional claims in court. Still, the legislative action that is proposed by López would contribute to the justiciability of the FSA, and for that reason, codification could potentially assist UACs in the future.

B. The Right to Education under Obergefell

Although *Plyler* established a legal boundary on the government's ability to limit a migrant child's access to education,[131] the Court is still bound by *San Antonio Independent School District v. Rodriguez*.[132] In *Rodriguez*, the Court held that there is no fundamental right to education

125 Dina Smeltz et al., *Rejecting Retreat*, THE CHICAGO COUNCIL ON GLOB. AFFS. (Sept. 6, 2019), https://www.thechicagocouncil.org/publication/lcc/rejecting-retreat.

126 Sahng-Ah Yoo, *Learning to Speak Human: A Conversation with Donald Anthonyson*, N.Y.U. REV. L. & SOC. CHANGE (Jan. 21, 2019), https://socialchangenyu.com/harbinger/learning-to-speak-human-a-conversation-with-donald-anthonyson/.

127 *Id.*

128 Sussis, *supra* note 12.

129 López, *supra* note 121, at 1662.

130 *See, e.g.*, Flores v. Barr, 934 F.3d 910 (9th Cir. 2019) (ruling that the settlement agreement "requires immigration agencies to hold such minors in their custody 'in facilities that are safe and sanitary...'"); *see also* Flores v. Lynch, 392 F. Supp. 3d 1144 (C.D. Cal. 2017) (granting plaintiff's motion to enforce the Flores Settlement Agreement and establishing a migrant child's right to a bond redetermination hearing).

131 Plyler v. Doe, 457, U.S. 202, 230 (1982) ("If the state is to deny a discrete group of innocent children the free public education that it offers to other children … that denial must be justified by a showing that it furthers some substantial state interest.").

132 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

under the Constitution,[133] and for years, this case has posed a legal hurdle for education advocates who have pushed for the classification of education as a federal right.[134]

In a recent article, Alexis Piazza provides readers with a novel argument that the "reasoned judgment" standard prescribed by Justice Kennedy in *Obergefell* can be utilized in order to establish a federal right to education.[135] In *Obergefell*, the Court was tasked with determining whether a state is required by law to issue marriage licenses to same-sex couples who are lawfully wedded out-of-state.[136] Writing for the majority, Justice Kennedy concluded that this was a constitutional requirement under the Due Process and Equal Protection Clauses and that there is a fundamental right to marriage.[137]

As a means of determining the existence of a fundamental right, the Court turned away from its traditional formulaic approach, and instead utilized a "reasoned judgment" standard.[138] According to Justice Kennedy, a judiciary should "exercise reasoned judgment *in identifying interests of the person so fundamental that the State must accord them its respect*."[139] Using this standard, Piazza provides readers with a variety of constitutional interests which might be used in order to support the existence of a federal right to education.[140] Importantly, two of these interests draw parallels with the Court's reasoning in *Plyler*, and are explored below.[141]

To begin, Piazza argues that education plays a foundational role in furthering the Constitution's "anti-caste promise."[142] The constitutional theory behind the anti-caste interest has existed for more than a century. For example, in *Plessy v. Ferguson*, Justice Harlan wrote in his famous dissent that "in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no

133 *Id.* at 37 ("We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive.").

134 Alexis M. Piazza, *The Right to Education After Obergefell*, N.Y.U REV. L. & SOC. CHANGE (Apr. 2, 2019), https://socialchangenyu.com/harbinger/the-right-to-education-after-obergefell/ ("Initially … proponents for a constitutional right to education have had to overcome *San Antonio Ind. Sch. Dist. v. Rodriguez*, the Court's 1973 decision declining to recognize education as a fundamental right.").

135 *Id.* at 75–77.

136 Obergefell v. Hodges, 135 S.Ct. 2584, 2593 (2015).

137 *Id.* at 2607 ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.").

138 *Id.* at 2598.

139 *Id.* (emphasis added).

140 Piazza, *supra* note 134, at 75–77.

141 *Id.*

142 *Id.*

caste here. Our constitution is color blind, and neither knows nor tolerates classes among citizens."[143]

Utilizing the Court's reasoning, Piazza pulls language from *Plyler* to demonstrate that the judiciary has historically been concerned with "raising the specter of a permanent caste of undocumented resident aliens" and that the "existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law."[144] In *Plyler*, the majority felt that an education would further this fundamental interest, and for that reason, Piazza argues that the Court should acknowledge the existence of a constitutional right to education.[145] As an alternative interest that would fulfill Obergefell's "reasoned judgment" standard, Piazza suggests that the preservation of social order is an interest that the Constitution seeks to promote.[146] Once again she quotes *Plyler*, stating that "education has a fundamental role in maintaining the fabric of our society."[147] Based on this language, it is undeniable that the Court understood the significance of these two constitutional interests, and with Justice Kennedy's new standard for establishing a fundamental right, there is a strong argument under "reasoned judgment" that there is a federal right to education.

If such a right were established by the Supreme Court, it would provide immigration lawyers and advocates with additional legal support to litigate the inequities that exist within government-run shelters. Specifically, a lawyer could argue that when the federal government forecloses a migrant child from accessing various educational services,[148] it is depriving the child of a constitutional liberty that he or she is entitled to under law. With that in mind, education and immigration proponents may have a stronger argument by framing their advocacy for a federal right to education around the "reasoned judgment" standard in *Obergefell*.

The hurdle undermining Piazza's recommendation is that since *Obergefell* was decided in 2015, there has been a dramatic change in the composition of the Supreme Court. With the appointments of Justice Gorsuch and Justice Kavanaugh, it is difficult to conceive of a situation in which the judiciary would recognize a federal right to education or endorse the fluid test that was proposed by Justice Kennedy in *Obergefell*.[149] Rather, the Court would likely take a stance aligning with

143 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

144 Piazza, *supra* note 134, at 76 (quoting Plyler v. Doe, 457 U.S. 202, 218–19 (1982)).

145 *Id.* at 77.

146 *Id.* at 76, 78.

147 *Id.* at 63 (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).

148 As ORR shelters have currently done, detailed in Part II.

149 *Cf.* David H. Gans, *The Selective Originalism of Judge Neil Gorsuch*, CONST. ACCOUNTABILITY CTR. (Mar. 2017), https://www.theusconstitution.org/wp-content/uploads/2017/12/CAC-Selective-Originalism-of-Gorsuch.pdf ("Gorsuch argued that liberals were too reliant on

the Court's previous conservative justices in *Rodriguez*.[150] Therefore, it is crucial that litigants are mindful of the legal arguments that are available in the absence of a federal right to education.

IV. REMEDYING THE EDUCATIONAL DISPARITY

As an increasing number of unaccompanied alien children are apprehended along the southwest border, there will continue to be a growing strain on the ORR resources that are available for each individual child. In order to remedy this situation, it is crucial for lawmakers and policy analysts to determine what changes are necessary to sustain educational capital for UACs. Additionally, legislators will be tasked with identifying who will serve as agents of this change. The following recommendations aim to solve these questions, and although the approaches may not eliminate the disparity altogether, they will certainly aim to lessen the inequity.

A. Increasing Oversight and Enforcement Through Congress

There is currently a lack of transparency and oversight within ORR facilities, and such an absence allows these shelters to maintain inadequate academic conditions.[151] Because of this existing investigative gap, the first recommendation is to identify a legislative body that can enhance administrative supervision.[152] This in turn will allow lawyers to assess whether the classroom and curriculum are compliant with the FSA's requisite academic standards in Part I.

the courts 'as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education,' urging them to recognize that the 'ballot box and elected branches are generally the appropriate engines of social reform.'"); *see also Key Rights At Stake: Brett Kavanaugh's Nomination to the US Supreme Court*, HUM. RTS. WATCH (Aug. 21, 2018), https://www.hrw.org/news/2018/08/21/key-rights-stake-brett-kavanaughs-nomination-us-supreme-court.

[150] At the time that *Rodriguez* was decided, the following justices sat on the bench: Blackmun, Brennan, Burger, Douglas, Marshall, Powell, Stewart, Rehnquist, and White.

[151] *See* John Hudak & Christine Stenglein, *How States Can Improve America's Immigration System*, BROOKINGS (Sept. 10, 2019), https://www.brookings.edu/research/how-states-can-improve-americas-immigration-system/.

[152] TODD GARVEY & DANIEL J. SHEFFNER, CONG. RESEARCH SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 30 (2018) ("Congressional committees can significantly influence agency action through investigative oversight. These investigations may uncover and publicize agency abuse of authority or maladministration, prompting a legislative response or immediate change in policies by the investigated agency itself. Hearings may also provide a committee the opportunity to give an agency guidance on how the committee believes an agency should carry out its functions.").

The HHS Office of Inspector General (OIG) serves as the largest actor engaging in annual ORR inquiries.[153] According to their website, the HHS OIG is tasked with protecting the "integrity of HHS programs, as well as the health and welfare of the people they serve."[154] These beneficiaries include the undocumented alien children who are at the heart of this article. Even though the HHS OIG is in charge of monitoring the "health and welfare" of UACs, ORR facilities do not seem to be abiding by the OIG's decrees.[155]

In order to increase accountability as well as transparency, the House Committee on Oversight and Reform should play an active role in assessing whether the ORR is complying with the instructions of the Office of Inspector General. In Section A of Part III, Rebeca López suggested the creation of an independent oversight committee focused on child welfare.[156] Rather than reinventing the wheel with a separate committee, this responsibility would fit more congruently under the purview of the Civil Rights & Civil Liberties Subcommittee of the House Oversight Committee.[157] This subcommittee could be tasked with conducting an annual secondary investigation following the initial examination that is directed by the HHS OIG. The primary function of the secondary investigation would be to determine whether the ORR shelters have made a good-faith effort to remedy any Flores violations that are identified by the HHS OIG.

This would not be the first time that the House Oversight Committee has requested briefs and documents from government agencies. In fact, in August of 2019, former Committee Chairman, Representative Elijah E. Cummings, "sent a letter to the Department of Justice and Homeland Security requesting documents and a briefing to investigate the recent coordinated immigration enforcement actions, resulting in the arrest of 680 people in Mississippi."[158] Therefore, it is in the scope of the Oversight

153 *About OIG*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., https://oig.hhs.gov/about-oig/about-us/index.asp (last visited June 21, 2020).

154 *Id.*

155 *Id.*; U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE, (Jan. 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf.

156 López, *supra* note 121, at 1675.

157 H.R. Res. 116th Cong. (2019) (This committee "has oversight jurisdiction over: issues related to civil rights, civil liberties and the equal protection of laws, including voting rights, freedom of religion, speech, press, and assembly; equal employment; nondisclosure agreements; and criminal justice reform policies; and legislative and oversight jurisdiction over the Census Bureau and the Census.").

158 Press Release, House Comm. on Oversight and Reform, Chairman Cummings, Thompson, and Raskin Request Information on Immigration Enforcement Actions in Mississippi (Aug. 9, 2019),

Committee to engage in an annual investigation of the HHS by requesting compliance documents from its ORR facilities.

A difficulty with this proposal is identifying what the Oversight Committee would do in the event that ORR facilities are neglecting their responsibility to care for youth. If the shelters have failed to make a good-faith effort to comply with the orders of the HHS OIG, the Oversight Committee may issue a public report that explains how the HHS is failing to commit to its administrative duties.[159] By making this document available to the public, it would ideally spur constituents to place pressure on their respective legislators to codify the Flores Settlement Agreement. As was previously mentioned, codification would hold the ORR more accountable for their failure to provide an education to UACs and an investigation of this nature may yield such a legislative outcome.[160]

Another positive feature of this recommendation is that it effectively serves as a form of checks and balances by facilitating a direct interaction between the legislative branch and the executive branch. The goal of requiring a secondary governmental entity to monitor the care of unaccompanied alien children is to incentivize these two branches to collaborate in a way that assures UACs the protections they are entitled to under the Flores Settlement Agreement—including their right to access an education.

B. Defining Education Standards and Attaching them to Funding

One of the biggest practical failings of the Flores Settlement Agreement is that there is no clear curriculum set in place for children who are situated within ORR shelters. The FSA states that children are entitled to "educational services *appropriate* to the minor's level of development."[161] But in order for an individual to assess whether an academic service is actually appropriate for a particular child, they must be able to frame their assessment around a set of administrative standards that address the child's placement in a government facility.

https://oversight.house.gov/news/press-releases/chairmen-cummings-thompson-and-raskin-request-information-on-immigration.

159 GARVEY & SHEFFNER, *supra* note 152.

160 López, *supra* note 121, at 1669 ("Codification will empower judges to better enforce the standards set forth in the FSA ... Although such standards could open the agency to litigation for abuses in the future, the possibility of litigation serves as an additional enforcement mechanism to ensure the agency's compliance.").

161 Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997), https://www.aila.org/File/Related/14111359b.pdf (emphasis added).

Currently, children are assessed in the initial stages of detention to determine their level of academic proficiency.[162] However, after these assessments are conducted, there is no particular list of standards tailored towards the classroom which a child is placed into. Scholars have considered creating educational standards in order to solve the inequities that are present within the American public school system,[163] and a similar approach can be adopted to advance the education that undocumented youth receive in ORR shelters.

Adding to López's suggestion that the Flores Settlement Agreement needs to be codified, Congress should consider inserting a clause within this legislation which would require the Department of Health and Human Services to define curriculum standards for varying levels of academic skill. Government-run shelters should identify the resources necessary in order to attain each of these standards and finances should then be tied to the resources identified by the Office of Refugee Resettlement. Following the passage of this legislation, shelters will ideally have more guidance on how they are supposed to place undocumented migrant children into a classroom and UACs will have more access to a better learning environment.

C. Redrafting the Inter-Agency Memorandum of Agreement

As Part II discussed, the memorandum of agreement between the DHS and HHS has left a lasting mark on the ORR's ability to connect undocumented alien children with sponsors and family members.[164] This in turn has extended the length of stay for detained children with inadequate educational services. The best outcome for a child is to expedite the overall removal process so that he or she can receive an education within a traditional academic setting.[165] To achieve this, the HHS needs to promulgate regulations that create positive incentives for sponsors to come forth, as opposed to the current standards which produce a chilling effect on such activity.

Although Congress has worked towards curtailing DHS's ability to use sponsor information as a means of arresting undocumented adults,[166] within the existing agreement's language, ICE is still allowed to detain immigrants who come forth—thus continuing to disincentivize potential

162 Kylie Diebold et al., *Educating unaccompanied children in US Shelters*, FORCED MIGRATION REV. (Mar. 2019), https://www.fmreview.org/education-displacement/diebold-evans-hornung.

163 David G. Sciarra & Danielle Farrie, *From Rodriguez to Abbott: New Jersey's Standards-Linked Funding Reform*, *in* THE ENDURING LEGACY OF RODRIGUEZ 119, 119–42 (2015).

164 NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 94.

165 This includes being placed into a school environment that is outside the confines of an administrative facility.

166 *See* H.R.J Res. 31, 116th Cong. §224 (2019) (enacted).

sponsors from reaching out.[167] To combat this problem, HHS and DHS need to re-draft a memorandum of agreement which would alter the scope of the information that is currently shared between agencies. The language in the present agreement states that agency information may be shared if it pertains to "the time of referral from ICE or CBP to ORR, while in the care and custody of ORR, *including in the vetting of potential sponsors and adult members of potential sponsor households, and upon release from ORR care and custody.*"[168] The italicized portion of the MOA must be removed and the new agreement should insert language which affirmatively disallows the ORR from sharing sponsor information with the DHS for arrest purposes.

As this article previously mentioned, one of the negative effects of the information sharing agreement is the protracted length of stay for migrant children.[169] If a new memorandum were drafted, the HHS would have an opportunity to provide sponsors with a universal understanding that they would not be apprehended by ICE. This in turn would ideally lead more family members to come forth, resulting in a shorter length of detention for unaccompanied alien children. With fewer youth being held by the government for an extended period of time, there would be less of a financial strain on the HHS's budget—allowing the federal government to reinstate the educational programs that have recently been eliminated by ORR shelters. Such an outcome would align with the spirit and goals of the existing legal authorities discussed in Part I.

CONCLUSION

In light of *Plyler v. Doe* and the Flores Settlement Agreement, it is clear that an undocumented migrant child is entitled to access an education while he or she is in detention.[170] The learning that takes place in a classroom plays a foundational role in a youth's development, and according to existing caselaw, the government cannot foreclose a child from accessing such an academic experience in the absence of a substantial governmental interest.[171] With that in mind, it is problematic that the administration's immigration policies have effectively precluded unaccompanied alien children from attaining such an education for months on end in the absence of such a substantial interest.

167 *See* Melissa Hastings et al., *The ORR and DHS Information-Sharing Agreement and Its Consequences*, JUST. FOR IMMIGRANTS. (Oct. 3, 2019), https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/orr-and-dhs-information-sharing-agreement-its-consequences/.

168 NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 94.

169 KANDEL, *supra* note 73, at 21–24.

170 Plyler v. Doe, 457 U.S. 202, 221 (1982); Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997), https://www.aila.org/File/Related/14111359b.pdf.

171 *Id.* at 202.

As President Barack Obama explained in his 2009 State of the Union Address: "in a global economy, where the most valuable skill you can sell is your knowledge, a good education is no longer a pathway to opportunity. It is a prerequisite."[172] This holds true for unaccompanied alien children who are attempting to assimilate into a country that is completely foreign from the one they consider home. In order to better serve these children, it is crucial that subsequent administrations align their immigration policies with the existing legal authorities that govern a migrant child's education. Only then will UACs be able to reach their maximum potential in America.

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[172] *Obama speech to Congress focuses on economy*, CNN (Feb. 24, 2009), https://www.cnn.com/2009/POLITICS/02/24/sotn.obama.transcript/.