

# The Right to Education for Unaccompanied Minors

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## Introduction

“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>1</sup> Despite the Warren Court’s convincing language in *Brown v. Board of Education*, supporting a child’s right to equal educational opportunities, the Burger Court made it clear twenty years later in *San Antonio Independent School District v. Rodriguez* that public education was not a fundamental right—rather it was deemed a fundamental value that required only rational basis review.<sup>2</sup> Yet, the Burger Court in *Plyler v. Doe* and *Lau v. Nichols* indicated that states cannot deny an undocumented child or English learner equal access to a public education because of her or his immigration status or language background.<sup>3</sup> Even in the context of immigration detention, a facility must provide a child with educational services.<sup>4</sup>

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1. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

2. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29, 28, 35, 37 (1973) (holding that a differential-impact Texas school-financing system assuring sufficient basic education for every child in satisfaction of compulsory attendance laws did not invoke strict scrutiny because “the Texas system does not operate to the peculiar disadvantage of any suspect class” and education is not a “fundamental interest”).

3. *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that a state may not deny access to a basic public education to any child residing in the state, whether present in the United States legally or otherwise.); *see also Lau v. Nichols*, 414 U.S. 563 (1974) (holding that all students deserve equal access to a high-quality education regardless of their language background).

4. *Flores v. Reno*, 507 U.S. 292, 298 (1993) (“The facilities must provide, in accordance with ‘applicable state child welfare statutes and generally accepted child welfare standards,

However, state and local institutions have not always adhered to these landmark decisions, particularly in the context of educating immigrant students.<sup>5</sup> Stakeholders across the country monitor and challenge the ongoing efforts of states legislatures, school district boards, and local public schools to deny educational opportunities to immigrant students.<sup>6</sup> Scholars and advocates have also long discussed the deplorable conditions and abuses that vulnerable unaccompanied and accompanied minors endure in detention facilities.<sup>7</sup> In 2010, Wendy Young and Megan McKenna identified the lack of legal representation for unaccompanied children as the “biggest gap” in the approach to serving unaccompanied minors.<sup>8</sup> While the pressing need to secure and ensure representation for unaccompanied minors remains, little to no attention has been paid to the educational services provided to unaccompanied minors in detention centers, shelters, and public schools.

In light of the recent “surge” of Central American and Mexican unaccompanied minors seeking refuge in the United States and concern about the educational opportunities provided to them, this Note will advocate for the recognition of an unaccompanied minor’s right to an education throughout her or his journey from a detention facility to a traditional classroom and the need for increased transparency and oversight over whether an unaccompanied minor is actually receiving an education.<sup>9</sup> Although there also has been a substantial surge in the number of apprehended families, particularly mothers who fled Central America with

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practices, principles and procedures,’ . . . an extensive list of services, including physical care and maintenance, individual and group counseling, *education*, recreation and leisure-time activities, family reunification services, and access to religious services, visitors, and legal assistance.”) (emphasis added).

5. Michael Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, U. CHI. LEGAL F. 27, 39 (2007).

6. *Id.*

7. Jacqueline Bhabha, “*Not a Sack of Potatoes*”: *Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197 (2006); *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 42 (2010); Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1662 (2012); *Unaccompanied Immigrant Children Report Serious Abuse by U.S. Officials During Detention*, ACLU (June 11, 2014), <https://www.aclu.org/immigrants-rights/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during>.

8. Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 256–57 (2010); *see also* Press Release, *Groups Sue Federal Government over Failure to Provide Legal Representation for Children*, AMERICAN IMMIGRATION COUNCIL (July 9, 2014), <http://www.legalactioncenter.org/newsroom/release/groups-sue-federal-government-over-failure-provide-legal-representation-children>.

9. Order re Plaintiffs’ Motion to Enforce Settlement of Class Action and Defendants’ Motion to Amend Settlement Agreement, *Flores v. Johnson*, CV 85-04544 DMG (AGRx) (C.D. Cal. 2015).

their children, the focus of this Note is on unaccompanied child migrants.<sup>10</sup> Part I of this Note provides background information on the historic treatment of unaccompanied minors in the United States. Part II discusses key cases and statutes supporting unaccompanied minors' right to an education while in federal custody or in the care of a parent or sponsor. Part III details the complex interagency process for detaining unaccompanied minors and placing them in a shelter or with a sponsor. Through a case study of Oakland Unified School District and Oakland International High School, Part IV provides insight into how local school districts and schools can better serve unaccompanied minors. Part V advocates for prioritizing unaccompanied minors' right to educational opportunities while increasing oversight over the interagency process.

## I. Background

### A. Historical Overview of the United States' Treatment of Unaccompanied Minors

"Immigration is the oldest and newest story of the American experience."<sup>11</sup> The United States ("U.S.") has experienced three waves or peaks of immigration in its history largely due to substantial economic changes and conflict abroad and is currently undergoing a fourth immigration wave.<sup>12</sup> Included in the U.S.'s immigration history is the long history of unaccompanied minors entering the country in search of family members, a safe haven, and a new beginning. In order to reach the U.S., unaccompanied minors often must endure traumatic journeys and "are easy prey for traffickers, who may offer them false promises of education, employment, or reuniting with family in the United States, only to put them into exploitative and abusive situations as child laborers or prostitutes."<sup>13</sup>

Similar to instances of altruism observed with the current surge, "local missionaries, synagogues, immigrant aid societies, and private citizens would often step in and offer to take guardianship of the child" during

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10. *Southwest Border Sectors*, U.S. BORDER PATROL (Dec. 1, 2015), [https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14\\_0.pdf](https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf).

11. Doris Meissner et al., *Immigration and America's Future: A New Chapter*, MIGRATION POLICY INSTITUTE, xiii (Sept. 2006), <http://www.migrationpolicy.org/research/immigration-and-americas-future-new-chapter>.

12. *Id.*; see also Stephanie Vatz, *History of Immigration in America: A Turbulent Timeline*, KQED (May 5, 2013), <http://blogs.kqed.org/lowdown/2013/05/05/u-s-immigration-policy-timeline-a-long-history-of-dealing-with-newcomers/> (The first wave of immigration involved British settlers and took place from 1607–1700. The second wave of immigration involved Western and Northern Europeans and occurred from 1820–1870. The third wave of Eastern and Southern European immigration occurred from 1880–1920.).

13. Young & McKenna, *supra* note 8, at 248–49.

immigration hearings for unaccompanied minors in the early 20th century.<sup>14</sup> However, the U.S. also had exclusionary immigration policies targeting immigrants from certain countries, such as China, during the third wave of immigration.<sup>15</sup> Additionally, during World War II, the U.S. was unreceptive to unaccompanied minors and refugee children. For instance, after Congress failed to pass the Wagner-Rogers Children's Bill of 1939, Great Britain, rather than the U.S., welcomed thousands of refugee Jewish children from Nazi Germany.<sup>16</sup>

Between 1945 and 1990, the U.S. admitted approximately 33,000 unaccompanied children through twelve different programs.<sup>17</sup> Prior to the Refugee Act of 1980, the programs admitting unaccompanied children varied depending on the particular crisis and were largely "ad hoc and situation-specific."<sup>18</sup> The table below specifies the U.S. programs for admitting unaccompanied children from 1940 to the 1980s, the number of children allowed, the country of origin, the age limits for the children, and the type of status assigned to the children:

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14. Tasneem Raja, *Child Migrants Have Been Coming to America Alone Since Ellis Island*, MOTHER JONES (July 18, 2014), <http://www.motherjones.com/politics/2014/07/child-migrant-ellis-island-history>.

15. Richard Alba & Nancy Foner, *The Second Generation from the Last Great Wave of Immigration: Setting the Record Straight*, MIGRATION POLICY INSTITUTE (Oct. 1, 2006), <http://www.migrationpolicy.org/article/second-generation-last-great-wave-immigration-setting-record-straight>; see also Vatz, *supra* note 12.

16. *Kindertransport, 1938–1940*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, (Jan. 2, 2015) <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005260>; see also Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. & POL'Y REV. 137, 146–47 (1989); see also Wagner-Rogers Children's Bill of 1939, 76th Cong. (1939) (proposed legislation that would have allowed 20,000 Jewish children aged newborn to fourteen in Germany with visas into the United States).

17. Steinbock, *supra* note 16, at 140–41.

18. The Refugee Act of 1980, 8 U.S.C. § 1525 (1999); see also Steinbock, *supra* note 16, at 142.

**Figure 1: U.S. Programs for Admitting  
Unaccompanied Children, 1940–1982<sup>19</sup>**

<b>Program</b>	<b>Date</b>	<b>Number of Children</b>	<b>Origin</b>	<b>Age Limits</b>	<b>Status of Admitees</b>
Evacuation of British Children	1940	861	UK	5–14	Immigrants & Visitors
	1940	450	UK	5–14	Quota Immigrants
Child Refugees on the Continent	1942	110	Europe		Quota Immigrants
Truman Doctrine of 1945	1945-48	1,275	Europe		Preference for Refugees & Displaced Persons within National Quota
Displaced Persons Act of 1948	1948-52	3,037	Europe	16	Non-quota Immigrants
Refugee Relief Act of 1953	1953-56	4,000	Asia & Europe	10	Non-quota Refugee
Refugee- Escape Act of 1957	1957-59	2,500	Asia & Europe	14	Non-quota Refugee
Hungarian Refugee Program	1956-57	1,000	Hungary	18	Non-quota Refugee & Parole
Cuban Refugee Program	1960-67	8,000	Cuba	6–18	Nonimmigrant (Student & Visitor)
Operation Babylift	1975	2,547	Vietnam	0–12	Parole
Indochinese Refugee Program	1975	800	Vietnam	18	Parole
Indochinese Refugee Program	1979	8,000	Vietnam, Cambodia, Laos	18	Parole & Refugee
Amerasians	1982	300	Vietnam	18	Non-quota Immigrants & Refugee

The Refugee Act of 1980, which amended the Immigration and Nationality Act, defined “refugee,” raised the limit of admitted refugees each fiscal year from 17,400 to 50,000, provided procedures for

19. Source: *Steinbock, supra* note 16 at 140–41.

emergencies when the number of admitted refugees exceeded 50,000, and established the Office of Refugee Resettlement (“ORR”) to provide for the effective resettlement of refugees and establish a program for unaccompanied children.<sup>20</sup>

### B. The Increased Unaccompanied Minor Population

The definition of a “refugee” does not necessarily apply to an unaccompanied minor who has been apprehended at the U.S. border.<sup>21</sup> Although unaccompanied minors may have documents showing that they were temporarily in the care and custody of ORR, they are not consequently considered “refugees” and are not entitled to receive the same services, such as “special educational services,” as unaccompanied *refugee* children.<sup>22</sup> As defined in Section 462 of the Homeland Security Act of 2002, an unaccompanied minor, or unaccompanied alien child, 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.<sup>23</sup>

Notably, if an unaccompanied minor is from a non-contiguous country, she or he is subject to certain protective procedures under the

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20. Steinbock, *supra* note 16, at 154.

21. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2014) (“The term ‘refugee’ means: (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

22. *Fact Sheet II: Additional Questions & Answers on Enrolling New Immigrant Students*, U.S. DEPARTMENT OF EDUCATION, 1 (Jan. 2, 2015), <http://www2.ed.gov/policy/rights/guid/unaccompanied-children-2.pdf>.

23. Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (2006). “Alien” is a term that appears throughout the Immigration and Nationality Act and refers to a foreign national who is not a citizen or national of the United States; *see also* David L. Neal, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, 3 (May 22, 2007), <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf>.

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”).<sup>24</sup> The unaccompanied minor is transferred from the Department of Homeland Security (“DHS”) to the care and custody of the Department of Health and Human Services (“HHS”), placed in formal removal proceedings, and permitted to pursue a range of immigration remedies, including asylum, special immigrant juvenile status, and U or T visas.<sup>25</sup> If the unaccompanied minor is from the contiguous countries of Mexico and Canada, then she or he is subject to less protective procedures and screened within forty-eight hours of apprehension.<sup>26</sup> The screening is designed to determine whether the minor is from Mexico or Canada, a victim of human trafficking or has an asylum claim. If the minor is a victim of human trafficking or has an asylum claim due to credible fear of persecution upon returning, she or he is transferred to the care of HHS and can pursue immigration remedies, including asylum, while in removal proceedings.

In addition to human trafficking, HHS recently identified the following inter-related reasons why unaccompanied minors have fled to the U.S.: to escape sustained violence, abuse or persecution in their home countries; to find family members already residing in the U.S.; and to seek work to support themselves, their family, or their own children.<sup>27</sup> In a 2014 report drawing on interviews with over 400 unaccompanied minors from El Salvador, Guatemala, Honduras, and Mexico, the United Nations High Commissioner for Refugees (“UNHCR”) identified similar thematic categories for reasons why children left their home countries: violence in society, abuse in the home, deprivation and social exclusion, family reunification and better opportunity.<sup>28</sup> The UNHCR’s qualitative research revealed that forty-eight percent of interviewed unaccompanied minors experienced violence or threats by organized crime groups or by state actors in their home countries, and twenty-two percent reported experiencing abuse at home at the hands of their guardians.<sup>29</sup> Many

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24. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232 (2008); *see also* Maya Burchette, Marion Githegi & Ann Morse, *Child Migrants to the United States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 28, 2014), <http://www.ncsl.org/research/immigration/child-migrants-to-the-united-states.aspx>.

25. Burchette, Githegi & Morse, *supra* note 24.

26. *Id.*

27. *Unaccompanied Alien Children Program*, U.S. DEPARTMENT OF HUMAN SERVICES (May 2014), [https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied\\_childrens\\_services\\_act\\_sheet.pdf](https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied_childrens_services_act_sheet.pdf).

28. *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, UNHCR 2, 23 (July 2014), <http://unhcrwashington.org/children>.

29. UNHCR *supra* note 28, at 23.

unaccompanied minors have come to the U.S. from nations, particularly the Northern Triangle of Central America, that are experiencing the negative consequences of armed conflict, high poverty rates, and increased gang violence.<sup>30</sup> Overall, the UNHCR found that more than half of the interviewed unaccompanied minors had reasons related to “international protection” and could potentially meet the refugee definition.<sup>31</sup>

Since the start of the 21st century, the number of unaccompanied minors who arrive in the U.S. each year has substantially increased.<sup>32</sup> In 1999, the former agency Immigration and Naturalization Service (“INS”) within the Department of Justice (“DOJ”) held approximately 2,000 unaccompanied minors in juvenile jails.<sup>33</sup> In 2004, after the formation of DHS and the responsibilities for the care, custody, and placement of unaccompanied minors transferred from the INS to ORR, 6,471 unaccompanied minors were admitted into U.S. custody.<sup>34</sup> In 2014, Customs and Border Patrol (“CBP”), an agency within DHS, apprehended a record number of unaccompanied minors at the U.S.-Mexico border.<sup>35</sup> Specifically, in fiscal year 2014, immigration officials apprehended 67,339 unaccompanied minors, a marked increase from 38,759 apprehensions in fiscal year 2013.<sup>36</sup> From October 1, 2013, through August 31, 2015, CBP apprehended over 102,000 unaccompanied minors.<sup>37</sup> With the highest murder rate in the world, severe gang violence, and drug trafficking,

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30. *Id.*; see also Rodrigo Dominguez Villegas & Victoria Rietig, *Migrants Deported from the United States and Mexico to the Northern Triangle: A Statistical and Socioeconomic Profile*, MIGRATION POLICY INSTITUTE, 1 (2015), <http://www.migrationpolicy.org/research/migrants-deported-united-states-and-mexico-northern-triangle-statistical-and-socioeconomic>.

31. UNHCR *supra* note 28, at 23.

32. Jens Manuel Krogstad, Ana Gonzalez-Barrera & Mark Hugo Lopez, *Children 12 and under are fastest growing group of unaccompanied minors at U.S. border*, PEW RESEARCH CENTER (July 22, 2014), <http://www.pewresearch.org/fact-tank/2014/07/22/children-12-and-under-are-fastest-growing-group-of-unaccompanied-minors-at-u-s-border/>.

33. Young & McKenna, *supra* note 8 at 248.

34. *Id.*

35. Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, MIGRATION POLICY INSTITUTE (June 13, 2014), <http://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions>.

36. *Southwest Border Unaccompanied Alien Children*, U.S. CUSTOMS AND BORDER PROTECTION (Jan. 2, 2015), <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

37. Sarah Pierce, *Unaccompanied Child Migrants in U.S. Communities, Immigration Court, and Schools*, MIGRATION POLICY INSTITUTE 1 (Oct. 2015), <http://www.migrationpolicy.org/research/unaccompanied-child-migrants-us-communities-immigration-court-and-schools>; see also *An Administration Made Disaster: The South Texas Border Surge of Unaccompanied Alien Minors*: Hearing Before the H. Comm. on the Jud., 113th Cong. (2014), [http://judiciary.house.gov/\\_cache/files/ef2bbf0f-9186-431a-be29-b65608bcbe12/113-84-88437.pdf](http://judiciary.house.gov/_cache/files/ef2bbf0f-9186-431a-be29-b65608bcbe12/113-84-88437.pdf) (“DHS projected 142,000 apprehensions in 2015.”).



Honduras is the top country of origin for unaccompanied minors apprehended at the border.<sup>38</sup> In addition to Honduras, the majority of unaccompanied minors apprehended at the border are male teenagers from El Salvador, Guatemala, and Mexico.<sup>39</sup> Notably, there has been a one hundred and seventeen percent increase of apprehensions of children twelve years old or younger in fiscal year 2014 as compared to fiscal year 2013.<sup>40</sup>

Figure 2: Unaccompanied Minors Apprehended by CBP,  
2009–2015<sup>41</sup>

Country of Origin	2009	2010	2011	2012	2013	2014	2015
El Salvador	1,221	1,910	1,394	3,314	5,990	16,404	9,389
Guatemala	1,115	1,517	1,565	3,835	8,068	17,057	13,589
Honduras	968	1,017	974	2,997	6,747	18,244	5,409
Mexico	16,114	13,724	11,768	13,974	17,240	15,634	11,012

## II. Case Law and Federal Statutes Support the Right to Access Educational Opportunities for Unaccompanied Minors

Once apprehended at the Southwest border, ports of entry, or internally within the United States, unaccompanied minors enter a bureaucratic web created in part by case law, agreements, and statutes. This web controls every step of the legal journey for unaccompanied minors within the U.S. and impacts their access to educational opportunities, whether in a detention facility, shelter, or public school.<sup>42</sup> This section not only provides support for an unaccompanied minor's right to an education while in federal custody or in the care of a parent or sponsor, but also provides context for the interagency process that will be discussed in the next Section.

38. U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 36.

39. Haeyoun Park, *Children at the Border*, N.Y. TIMES (Oct. 21, 2014), [http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?\\_r=0](http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0).

40. *Id.*

41. Source: U.S. CUSTOMS AND BORDER PROTECTION, *supra* note 36.

42. Olga Byrne & Elisa Miller, *The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers*, VERA INSTITUTE OF JUSTICE 4 (Feb. 29, 2012), <http://www.vera.org/pubs/flow-unaccompanied-children-through-immigration-system-resource-practitioners-policy-makers-and>.

### A. *Plyler v. Doe*

*Plyler v. Doe* is the equal protection case that most informs and supports an undocumented and unaccompanied child's right to enroll in and attend public elementary and secondary schools.<sup>43</sup> *Plyler* provides that a state may not "deny a discrete group of innocent children the free public education that it offers to other children residing within its borders" without "showing that it furthers some substantial state interest."<sup>44</sup>

Nine years after the *San Antonio Independent School District v. Rodriguez* decision, the *Plyler* Court returned to the question of whether there is a fundamental right to education in an equal protection challenge to Section 21.031 of the Texas Education Code.<sup>45</sup> The revised code authorized school districts to charge tuition or deny undocumented children access to public elementary and secondary schools.<sup>46</sup> Rather than apply the *Rodriguez* Court's rigid rational basis standard of review, the *Plyler* Court applied a heightened scrutiny standard of review to Texas' amended law.<sup>47</sup> The Court concluded that Texas failed to show that its classification and treatment of undocumented children advanced "some substantial state interest" and in turn struck down Section 21.031.<sup>48</sup>

In reaching its conclusion, the Court assessed Texas' "colorable state interests that might support" Section 21.031.<sup>49</sup> The Court first rejected Texas's interest in preserving "limited resources" for "legally admitted" residents, noting that "the State must do more than justify its classification with a concise expression of an intention to discriminate."<sup>50</sup> Second, the Court rejected Texas' interest in deterring the immigration of unauthorized individuals by charging tuition and deemed the law to be "ludicrously ineffectual."<sup>51</sup> Third, due to a lack of evidence, the Court rejected Texas' interest in excluding undocumented children in an effort to improve the "overall quality of education in the State."<sup>52</sup> Lastly, the Court rejected Texas' interest in serving only children who will remain within the State's

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43. *Plyler v. Doe*, 457 U.S. 202, 202 (1982); *see also* U.S. CONST. amend XIV ("[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

44. *Plyler* 457 U.S. at 230.

45. *San Antonio Indep. Sch. Dist.*, 411 U.S. 1 (1973); *see also Plyler*, 457 U.S. at 221.

46. *Plyler*, 457 U.S. at 202.

47. *Id.* at 230.

48. *Id.* ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

49. *Id.* at 227.

50. *Id.* at 227, 230.

51. *Id.* at 228.

52. *Id.* at 229.

boundaries and utilize their education within the State because Texas has “no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State’s borders.”<sup>53</sup>

Although Justice Brennan, writing for the majority, abandoned support for the fundamentality of the right to education with the assertion that, “[n]or is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population,” he provided a unique recognition of personhood and protection for undocumented individuals.<sup>54</sup> The Court rejected Texas’ argument that undocumented people are not “‘persons within the jurisdiction’ of the State of Texas” and lack a right to equal protection.<sup>55</sup> Even though the Court did not confer the status of a suspect class on undocumented individuals, the Court clarified, “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”<sup>56</sup>

Additionally, the Court distinguished undocumented children from their undocumented parents, whom the Court concluded “elect to enter our territory by stealth and in violation of our law” and “should be prepared to bear the consequences, including, but not limited to, deportation.”<sup>57</sup> Referencing *Trimble v. Gordon*, which involved disparate benefits conferred to “legitimate” children rather than “illegitimate” children, the Court noted that children of undocumented parents cannot affect “their parents’ conduct nor their own status” and as a result, should not be the target of the state’s penalty.<sup>58</sup>

The Court’s analysis has implications for the nuanced context and treatment of apprehended unaccompanied minors, particularly while under the care and custody of ORR. Although unaccompanied minors in the care and custody of a sponsor or guardian have the right to access a *public* education, unaccompanied minors without a sponsor or guardian are left in the care and custody of ORR and are denied the opportunity to enroll in and attend a local public school.<sup>59</sup> Due to the opaque accessibility and

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53. *Id.* at 230.

54. *Id.* at 223.

55. *Id.* at 210.

56. *Id.* at 210, 223 (“Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”).

57. *Id.* at 220.

58. *Id.* (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

59. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

quality of the educational opportunities afforded to unaccompanied child migrants in ORR custody, it is unclear whether the education provided will assist in “prepar[ing] individuals to be self-reliant and self-sufficient participants in society.”<sup>60</sup> Differentiating between the actions of unaccompanied minors and those of adults, a court should logically extend the *Plyler* holding to conclude that the federal government’s decision to isolate a group of innocent children and bar them from a public education available to other children “residing within its borders” is “ineffectual” and “unjust.”<sup>61</sup> Such isolation and deprivation of public school access could result in increased trauma, damaged intellectual and psychological well-being of the children, and lasting disadvantages that widen the achievement gap between undocumented immigrant students and documented, nonimmigrant students.

### **B. *Flores v. Reno* Settlement Agreement**

The *Flores v. Reno* Settlement Agreement (“FSA”) established minimum standards and conditions for the housing and release of all minors in federal immigration custody.<sup>62</sup> In a series of related lawsuits, one of which reached the U.S. Supreme Court, *Flores v. Reno* involved a class action challenge to the INS’ treatment of minor immigrant detainees.<sup>63</sup> The named plaintiff, Jenny Lisette Flores, was a fifteen-year-old girl from El Salvador. Apprehended at the U.S.-Mexico border by the INS, Jenny was detained in a juvenile detention center offering neither “educational, nor many recreational opportunities” for two months.<sup>64</sup> The INS refused to allow Jenny to reunite with her aunt, “a third-party adult,” in the U.S. prior to her deportation hearing. The class of minors argued that they had a fundamental right to due process, including the right to be released to “the custody of responsible adults.”<sup>65</sup>

The INS settled the lawsuit with the class of detained minors in the landmark 1997 FSA. The FSA provides that detained minors should be released into the least restrictive environment appropriate to their age and special needs in order to ensure their protection and well-being, such as a home or shelter licensed for the care of dependent and “non-delinquent”

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60. *Plyler*, 457 U.S. at 222 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

61. *Id.* at 230 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

62. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

63. *Flores v. Reno*, 507 U.S. 292, 294 (1993).

64. Lisa Rodriguez Navarro, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 596 (1998).

65. *Reno*, 507 U.S. at 294.

minors.<sup>66</sup> The FSA also requires that unaccompanied minors be released from custody without unnecessary delay to a parent, legal guardian, adult-relative, individual designated by the parent, licensed program, or an adult who seeks custody and receives approval by the INS. The FSA enumerates basic necessities that immigration officials must provide such as food and drinking water, medical assistance in emergencies, toilets and sinks, and adequate temperature control and ventilation.<sup>67</sup> However, throughout the text of the FSA there is no mention of education rights and services.

### C. *Flores v. Johnson*

In *Flores v. Johnson*, plaintiffs alleged that DHS violated the terms of the 1997 FSA.<sup>68</sup> In the summer of 2014, Immigration Customs and Enforcement (“ICE”) “adopted a blanket policy to detain all female-headed families, including children, in secure, unlicensed facilities for the duration of the proceedings that determine whether they are entitled to remain in the United States.”<sup>69</sup> This policy was established in response to the increase of Central American families and unaccompanied minors migrating to the U.S. In accordance with the “no-release” policy, children and their mothers were detained in three family detention centers in Texas and Pennsylvania.<sup>70</sup>

On July 21, 2015, Judge Dolly Gee of the Central District of California held that DHS and “its subordinate entities” materially breached the 1997 FSA by detaining children and their mothers under the “blanket no-release policy,” noting that the FSA applies to *all* minors.<sup>71</sup> Judge Gee ordered in part that DHS “must release an accompanying parent as long as doing so would not create a flight risk or a safety risk.”<sup>72</sup> Judge Gee also held that ICE’s policy of detaining children in “secure,” nonlicensed

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66. Stipulated Settlement Agreement at 7–8, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

67. *Id.*

68. Order re Plaintiffs’ Motion to Enforce Settlement of Class Action and Defendants’ Motion to Amend Settlement Agreement, *Flores v. Johnson*, CV 85-04544 DMG (AGRx) (C.D. Cal. 2015).

69. *Id.*

70. Order re Plaintiffs’ Motion to Enforce Settlement of Class Action and Defendants’ Motion to Amend Settlement Agreement at 2, *Flores v. Johnson*, CV 85-04544 DMG (AGRx) (C.D. Cal. 2015); see also Julia Preston, *Judge Orders Release of Immigrant Children Detained by U.S.*, N.Y. TIMES (July 25, 2015), <http://www.nytimes.com/2015/07/26/us/detained-immigrant-children-judge-dolly-gee-ruling.html> (explaining that as of June 30, 2015, approximately 2,600 children and women were held in the three centers).

71. Order re Plaintiffs’ Motion to Enforce Settlement of Class Action and Defendants’ Motion to Amend Settlement Agreement at 5, 9, *Flores v. Johnson*, CV 85-04544 DMG (AGRx) (C.D. Cal. 2015).

72. *Id.* at 9.

facilities breached the Agreement, and ordered the release of minors who do not pose a flight or safety risk.<sup>73</sup> In response to the order, the federal government filed a “thinly-veiled motion for reconsideration,” which Judge Gee denied.<sup>74</sup> Prior to an October 23, 2015 deadline to comply with the court’s order and the 1997 FSA, the federal government filed a notice of appeal before the Ninth Circuit in order to preserve its ability to challenge portions of the order.<sup>75</sup> The government also assured the public that DHS transitioned the unlicensed family residential centers into short-term “processing centers where individuals can be interviewed and screened rather than detained for a prolonged period of time.”<sup>76</sup>

Despite this change in rhetoric, the number of detained adults and children increased from 658 to 1,658 individuals at the detention center in Dilley, Texas in a matter of months, and by the end of 2015, the capacity of the three family detention centers was “expected to expand to 3,700 beds.”<sup>77</sup> Regarding access to educational services at the family detention centers, Judge Gee’s order provided conflicting accounts. According to the Chief of Juvenile and Family Residential Management Unit, the Texas-based “centers provide state-licensed teachers to all school-age children, where the classroom ratio is one teacher to twenty students, and both recreational and law library services to residents.”<sup>78</sup> Yet, one detainee asserted, “[t]here are no classes for my children here . . . .”<sup>79</sup> Further, plaintiffs provided evidence regarding the “secure” Karnes, Texas facility, noting that “children detained at Karnes have never been permitted outside the facility to go to the park, library, museum, or other public places. Children attend school exclusively within the walls of the facility itself. Detainees, including children, are required to participate in a ‘census’ or headcount three times daily.”<sup>80</sup>

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73. *Id.* at 2 (“‘Secure’ in this context refers to a detention facility where individuals are held in custody and are not free to leave.”).

74. *Id.*

75. Molly Hennessy-Fiske, *Immigrant family detention centers are prison-like, critics say, despite order to improve*, L.A. TIMES (Oct. 23, 2015), <http://www.latimes.com/nation/nationow/la-na-immigration-family-detention-20151020-story.html>.

76. Press Release, Statement by Secretary Jeh C. Johnson on Reforms to Family Residential Centers (Sept. 18, 2015) (on file with the U.S. Department of Homeland Security).

77. Molly Hennessy-Fiske, *supra* note 75.

78. Order re Plaintiffs’ Motion to Enforce Settlement of Class Action and Defendants’ Motion to Amend Settlement Agreement at 14, *Flores v. Johnson*, CV 85-04544 DMG (AGRx) (C.D. Cal. 2015).

79. *Id.*

80. *Id.* at 15.

While Judge Gee's order is a major step forward in ensuring the well-being of all detained children and mothers, it remains to be seen whether DHS will fully comply with the order and the 1997 Agreement.

#### **D. Homeland Security Act of 2002**

Section 462 of the Homeland Security Act of 2002 codified the FSA, requiring that unaccompanied children be released into the least restrictive setting.<sup>81</sup> The Homeland Security Act also assigned apprehension, transfer, and repatriation responsibilities to DHS and assigned the coordination and implementation of care and placement of unaccompanied minors into appropriate custody to ORR.<sup>82</sup> ORR also must maintain and publish a list of legal services available to unaccompanied minors, but ORR is not required to secure counsel for unaccompanied minors.<sup>83</sup>

#### **E. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008**

Further codifying the FSA and addressing criticism about failing to fully implement the agreement, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA").<sup>84</sup> In a section addressing efforts to combat child trafficking at the border and ports of entry and exploitation within the U.S., the Act states that the Secretary of HHS should "promptly" place an unaccompanied minor in its custody "in the least restrictive setting that is in the best interests of the child."<sup>85</sup> ORR is expected to take into consideration the unique nature of each child's situation and incorporate child welfare principles when making placement, clinical, case management, and release decisions that are in the best interest of the child.<sup>86</sup>

The inclusion of the "best interests of the child" phrase evokes the values and principles established by the United Nations Convention on the

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81. Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (2006).

82. Lisa Seghetti, Alison Siskin & Ruth Ellen Wasem, *Unaccompanied Alien Children: An Overview*, CONG. RESEARCH SERV., 3 (Sept. 8, 2014), <http://fas.org/sgp/crs/homesecc/R43599.pdf>; see also Young & McKenna, *supra* note 8, at 256.

83. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 expanded access to legal services for UACs by directing HHS to provide "to the greatest extent practicable: that all unaccompanied alien children who have been in DHS custody have counsel to represent them in immigration proceedings." See 8 U.S.C. § 1232 (c)(5) (2008).

84. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232 (2008).

85. 8 U.S.C. § 1232 (c)(2)(A) (2008).

86. *About Unaccompanied Children's Services*, OFF. OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/programs/ucs/about> (last updated Sept. 10, 2015).

Rights of the Child (“CRC”).<sup>87</sup> The CRC outlines the rights inherent to the humanity of children, including the right to a family, a name, a nationality, and an education, as well as protection from abuse, abandonment, or neglect.<sup>88</sup> Article 3 of the CRC specifies, “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>89</sup> Despite the language included in the TVPRA and the U.S.’ signing of the CRC, the U.S. is the only member of the United Nations that has not yet ratified the CRC.<sup>90</sup>

### III. The Interagency Web Devalues the Right to Education for Unaccompanied Minors

#### A. The Six Phases of the Interagency Process

As a result of the *Flores v. Reno* Settlement Agreement and the aforementioned federal statutes, there is an interagency process in place to address the apprehension and temporary care of unaccompanied minors. DHS, HHS, and DOJ facilitate and engage in a process that can be divided into the six phases below.<sup>91</sup> The U.S. Department of Education (“ED”) is not explicitly involved in the interagency process. As a result of the various federal departments and agencies involved and the several phases that unaccompanied children must endure during their journey, the education of unaccompanied minors is frequently interrupted and potentially non-existent during the disjointed interagency process.<sup>92</sup>

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87. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

88. *Id.*

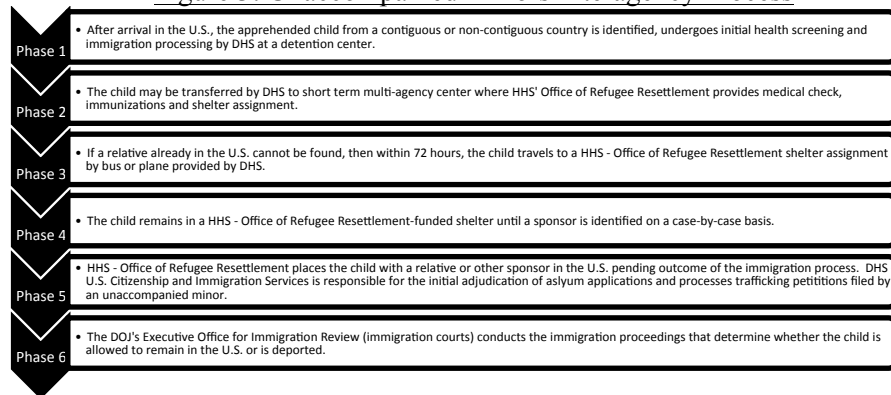
89. United Nations Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

90. U.N. Convention on the Rights of the Child, Feb. 16, 1995; *see also UN lauds South Sudan as country ratifies landmark child rights treaty*, UN NEWS CENTRE (May 4, 2015), <http://www.un.org/apps/news/story.asp?NewsID=50759#.VpH3zIMrKCQ> (“This means that as of today, the United States is the only country that has yet to ratify the landmark treaty.”).

91. *Unaccompanied Children at the Southwest Border*, DEPARTMENT OF HOMELAND SECURITY (July 17, 2015), <http://www.dhs.gov/unaccompanied-children>.

92. Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES, Feb. 4, 2015, [http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?\\_r=0](http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?_r=0) (“The Flores settlement requires the government to provide regular schooling for juveniles in detention, but the mayor of Artesia, Phillip Burch, said that on several visits to the compound, the classrooms were always empty . . . . When one member asked why the building was empty, an ICE official replied that school was temporarily closed. Detainees have consistently told their lawyers that the school was never reliably open. They recall a few weeks in October when classes were in session for an hour or two per day, then several weeks of closure through November, followed by another brief period of classes in December.”).



Figure 3: Unaccompanied Minors Interagency Process<sup>93</sup>

As noted above in Phases 2 through 4, ORR is the agency that provides custody and care for apprehended unaccompanied minors. In accordance with the FSA, ORR reunites an unaccompanied minor with a sponsor, or coordinates housing the child in either a shelter or foster care placement.<sup>94</sup> If ORR is able to reunite the child with a sponsor, such as a parent or guardian, then the individual must complete a Parent Reunification Packet, which includes a Sponsor Care Agreement Form.<sup>95</sup> The first provision of the Sponsor Care Agreement Form specifies: “[p]rovide for the physical and mental well-being of the minor, including but not limited to, food, shelter, clothing, education, medical care and other services as needed.”<sup>96</sup> However, once a child secures a sponsor, a caseworker is not typically assigned to monitor whether the sponsor is upholding the provisions of the agreement form—which includes ensuring the child receives an education and has been promptly enrolled in a local school.<sup>97</sup> Eighty percent of unaccompanied minors referred by DHS to

93. Source: Lisa Seghetti, Alison Siskin & Ruth Ellen Wasem, *Unaccompanied Alien Children: An Overview*, CONG. RESEARCH SERV., 4–11 (Sept. 8, 2014), <http://trac.syr.edu/immigration/library/P8978.pdf>.

94. Stipulated Settlement Agreement at 10, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) (The agreement outlines the following preference ranking for sponsor types: (1) a parent, (2) a legal guardian, (3) an adult relative, (4) an adult individual or entity designated by the child’s parent or legal guardian, (5) a licensed program willing to accept legal custody, or (6) an adult or entity approved by ORR.).

95. *ORR/DCS Family Reunification Packet for Sponsors: Sponsor Care Agreement Form* (English/Español), U.S. DEPT. OF HEALTH AND HUMAN SERVICES, OFFICE OF REFUGEE RESETTLEMENT (Oct. 9, 2015), <http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-childrens-services>.

96. *Id.*

97. Telephone Interview with Nate Dunstan, Refugee and Asylee Specialist, Oakland Unified School District (Dec. 30, 2014); *see also* email from Nate Dunstan, Refugee and Asylee Specialist, Oakland Unified School District (Jan. 19, 2016) (“For particularly vulnerable

ORR are placed in a shelter setting, which is the least restrictive type of placement available within ORR's system.<sup>98</sup> ORR estimated that unaccompanied minors are expected to stay in ORR care for 30-35 days.<sup>99</sup> According to a 2012 Vera Institute of Justice study, the length of stay in ORR's care "ranged from less than a day to 710 days."<sup>100</sup> The average stay for a child admitted to ORR custody in fiscal years 2009 and 2010 was sixty-one days and seventy-five percent stayed for one week to four months.<sup>101</sup> ORR reported that approximately eighty-five percent of the unaccompanied minors served are reunified with their families.<sup>102</sup> Interestingly, the 2012 Vera Institute of Justice analysis noted, "at least sixty-five percent of children admitted to ORR custody are ultimately placed with a sponsor living in the United States."<sup>103</sup> ORR funds approximately 125 shelters across the country.<sup>104</sup> As indicated previously and illustrated below, the number of unaccompanied youth in the custody of ORR increased substantially in 2014.<sup>105</sup> Given the increase in unaccompanied minors, children are cared for during varying periods of time in shelters, group homes, residential treatment centers, and foster care operated by state licensed, ORR-funded care providers.

Figure 4: Unaccompanied Minors in ORR Custody, October 2008  
through June 2014 (Monthly Referrals)<sup>106</sup>

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[children] of concern to the shelter/ORR, they will assign a CW [caseworker]. Of the 400 or so UACs we've worked with, only one or two have had a caseworker follow up by doing a home visit.") (on file with author).

98. Byrne & Miller, *supra* note 42 at 4, 14 (ORR has four categories of initial placements for unaccompanied children: "Shelter care. Children who are eligible for a minimally restrictive level of care are placed in shelters. Most children in shelter care do not have special needs or a history of contact with the juvenile or criminal justice system. Staff-secure care. Children with a history of nonviolent or petty offenses or who present an escape risk are placed in staff-secure care. Secure care. Children with a history of violent offenses or who pose a threat to themselves or others are placed in secure care. Transitional (short-term) foster care. Children younger than thirteen, sibling groups with one child younger than thirteen, pregnant and parenting teens, and children with special needs are prioritized for short-term placement with a foster family.").

99. *Residential Services for Unaccompanied Alien Children Application*, U.S. DEP'T. OF HEALTH AND HUMAN SERV. – OFF. OF REFUGEE RESETTLEMENT, [http://www.acf.hhs.gov/grants/open/foa/files/HHS-2015-ACF-ORR-ZU-0833\\_0.pdf](http://www.acf.hhs.gov/grants/open/foa/files/HHS-2015-ACF-ORR-ZU-0833_0.pdf).

100. Byrne & Miller, *supra* note 42, at 17.

101. *Id.*

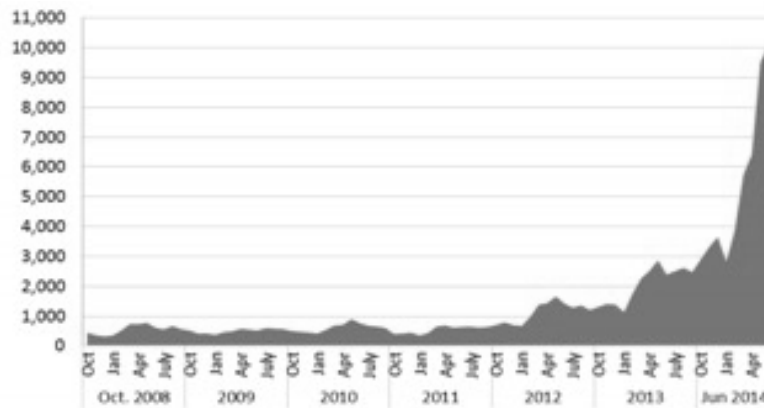
102. OFF. OF REFUGEE RESETTLEMENT, *supra* note 86.

103. Byrne & Miller, *supra* note 42, at 4.

104. Telephone Interview with Eskinder Negash, former Director, Office of Refugee Resettlement, U.S. Department of Health and Human Services (Feb. 6, 2015); *see also* Seghetti, Siskin & Wasem, *supra* note 82, at 3.

105. Seghetti, Siskin & Wasem, *supra* note 82, at 9.

106. Source: Seghetti, Siskin & Wasem, *supra* note 82.



For example, sites in Texas are licensed by the Texas Department of Family and Protective Services yet funded and monitored by ORR.<sup>107</sup> Most of the providers are located in remote areas where immigration officials apprehend large numbers of unaccompanied minors; however, in such remote and rural regions, there are limited numbers of *pro bono* legal services to assist the apprehended youth.<sup>108</sup> According to ORR and its June 2014 grant application for potential ORR grantee providers, approved providers operate under cooperative agreements and contracts and “provide children with classroom education, health care, socialization/recreation, vocational training, mental health services, family reunification, access to legal services, and case management.”<sup>109</sup> The grant application provides more detailed requirements and expectations for residential care provider applicants, specifying that these comprehensive services must be provided in “the language of the majority of UAC in their facility” and in a “structured, safe, and productive environment that meets or exceeds respective state guidelines, the *Flores Settlement Agreement*, and ORR service requirements.”<sup>110</sup> In a section of the grant application addressing “Individual Needs Assessments,” the application also specifies that residential care providers are required to provide an individual assessment for each unaccompanied minor, which includes an educational assessment

107. Terri Langford & Jessica Hamel, *Interactive: Federal Children’s Shelters in Texas*, TEX. TRIBUNE (June 24, 2014), <http://www.texastribune.org/2014/06/24/federal-childrens-shelters-texas/>.

108. Young & McKenna, *supra* note 8, at 258.

109. *About Unaccompanied Children’s Services*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES - OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/ort/programs/ucs/about#overview>; see also *Residential Services for Unaccompanied Alien Children Application*, *supra* note 99.

110. *Residential Services for Unaccompanied Alien Children Application*, *supra* note 99, at 4.

and plan.<sup>111</sup> The ORR grant application for residential care providers includes one brief “Education” section on educational services, which states:

Educational services are required to be provided daily, Monday through Friday and appropriate to the UAC’s level of development, education, and communication skills. Educational services are required to be administered in a structured classroom setting and concentrate primarily on the development of basic academic competencies and secondarily on English Language Training. The educational program consists of instruction, educational materials, and other reading materials in the following basic academic areas: Science, Social Studies, Mathematics, Reading, Writing, and Physical Education. Educational services are required to serve both short-and long-term needs of UAC. Residential care providers are encouraged to partner with local school districts for the provision of educational services and/or for curriculum.<sup>112</sup>

As indicated in the above description, ORR shelters and its grantee providers are required to have a classroom and provide educational services to unaccompanied minors five days per week.<sup>113</sup> While ORR-funded providers are encouraged to “partner” with local school districts, unaccompanied children in the care of ORR cannot enroll in local public schools.<sup>114</sup>

Without detailed public information regarding the educational opportunities provided to unaccompanied children beyond what is stated briefly on provider websites and in an ORR grant application, anecdotal evidence provided by a program director for International Educational Services, Inc. (“IES”), an ORR-funded provider located in rural Texas, demonstrated adherence to ORR grant requirements involving educational programming.<sup>115</sup> However, the provider did not encourage interaction and

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111. *Id.*

112. *Id.* at 5.

113. Telephone Interview with Eskinder Negash, *supra* note 104.

114. Langford & Hamel, *supra* note 107; see also *Educational Services for Immigrant Children and Those Recently Arrived to the United States*, U.S. DEPARTMENT OF EDUCATION, <http://www2.ed.gov/policy/rights/guid/unaccompanied-children.html>.

115. Telephone Interview with Program Director, International Educational Services, Inc. (Dec. 30, 2014); see also *Immigrant Youth Shelters*, SOUTHWEST KEY PROGRAMS, <http://www.swkey.org/programs/shelters/>; *Educational Services*, INT’L. EDUC. SERV., INC., <http://web.iestex.org/services-2/educational-service/>.

partnership with local public schools. All teachers on staff are state certified educators and Spanish speakers, as the majority of the children in IES's care speak Spanish. At the facility in Texas, IES employs ten educators to instruct approximately 205 unaccompanied minors in classrooms from 8:00 a.m. until 4:00 p.m. Monday through Friday.<sup>116</sup> Each unaccompanied minor is assessed during an intake to determine her or his appropriate grade level.<sup>117</sup> In regard to interaction with ORR and oversight mechanisms, an ORR-funded shelter is expected to be in daily communication with ORR as part of the licensing requirement, and an ORR representative is expected to visit a shelter two to three times per week.<sup>118</sup>

#### **IV. Lessons from the Field: Approaches to Providing Robust Educational Opportunities for Unaccompanied Minors**

Despite the immigration “rocket docket” and the DOJ’s “fast-tracking” of unaccompanied minor deportation hearings, legal proceedings for unaccompanied minors often remain unresolved for two years.<sup>119</sup> Upon securing a sponsor and leaving a shelter, unaccompanied minors seek to enroll in public schools and integrate into local communities while awaiting a resolution in their respective cases. After receiving over a dozen complaints related to questionable enrollment policies and practices by public schools or districts refusing to serve unaccompanied minors, ED and DOJ recently reiterated that schools cannot refuse educational services to unaccompanied minor students.<sup>120</sup> Public schools must serve and educate

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116. Telephone Interview with Program Director, *supra* note 115.

117. *Id.*

118. Telephone Interview with Eskinder Negash, *supra* note 104.

119. Byrne & Miller, *supra* note 42, at 4 (“Fewer than one percent of children are granted relief from removal during their stay in ORR custody.”); *see also* Jayashri Srikantiah, *The Immigration “Rocket Docket”: Understanding the Due Process Implications*, STANFORD LAWYER (Aug. 15, 2014), <https://stanfordlawyer.law.stanford.edu/2014/08/the-immigration-rocket-docket-understanding-the-due-process-implications/>; *see also* Richard Gonzales, *A Top Immigration Judge Calls for Shift on ‘Fast-Tracking’*, NPR (Aug. 8, 2014), <http://www.npr.org/blogs/thetwo-way/2014/08/08/338908762/a-top-immigration-judge-calls-for-shift-on-fast-tracking>; Brian M. O’Leary, *Docketing Practices Relating to Unaccompanied Children Cases in Light of the New Priorities*, U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV. (Sept. 10, 2014), <http://www.justice.gov/eoir/statpub/Docketing-Practices-Related-to-UACs-Sept2014.pdf>.

120. *Dear Colleague Letter on the Rights of All Children to Enroll in Public Schools*, U.S. DEP’T OF JUST., U.S. DEP’T OF EDUC. (May 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>; *see also* Ensuring English Learner Students Can Participate Meaningfully and Equally in Educational Programs, U.S. DEP’T OF EDUC., U.S. DEP’T OF JUST. (Jan. 7, 2015), <http://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-joint-guidance-ensure-english-learner-students-have-equal-access-high-quality-education>; *Public schools prep for unaccompanied minors*, MSNBC (Aug. 15, 2014), <http://www.msnbc.com/jose-diaz-balart/public-schools-prep-unaccompanied-minors>; Benjamin Mueller, *School*

this vulnerable population of English learners who likely have experienced trauma and suffer from other emotional and psychological issues.<sup>121</sup>

In preparation for the 2014-2015 academic year, schools across the country prepared to serve as many as 50,000 unaccompanied minors.<sup>122</sup> While several states, such as California, Texas, Florida, and New York, have long served immigrant student populations, many state and local education officials grew concerned about sufficient funding due to an increased student population with substantial needs and an unknown duration of stay.<sup>123</sup> As a result, education officials, such as those in Oakland, California have sought additional city funding and foundation grants to support the new students with education, legal services, housing, and mental health services.<sup>124</sup> Demonstrating the positive impact of such wrap-around services for unaccompanied minors, Oakland Unified School District and Oakland International High School are the focus of the following case study.

#### A. Oakland Unified School District

Founded in 1865, Oakland Unified School District (“OUSD”) within northern California’s Alameda County currently operates 119 schools serving 47,327 students in grades Kindergarten through 12th.<sup>125</sup> Eighty-six

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*District on Long Island Is Told It Must Teach Immigrants*, N.Y. TIMES (Oct. 17, 2014), [http://www.nytimes.com/2014/10/18/nyregion/school-district-on-long-island-told-it-must-teach-immigrants.html?emc=edit\\_tnt\\_20141018&nid=69896903&ntemail0=y&r=1](http://www.nytimes.com/2014/10/18/nyregion/school-district-on-long-island-told-it-must-teach-immigrants.html?emc=edit_tnt_20141018&nid=69896903&ntemail0=y&r=1); Benjamin Mueller, *Immigrants’ School Cases Spur Enrollment Review in New York*, N.Y. TIMES (Oct. 22, 2014), <http://www.nytimes.com/2014/10/23/nyregion/amid-immigrant-cases-new-york-state-education-dept-will-review-school-enrollmentprocess.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22R1%3A7%22%7D>.

121. According to an Oakland International High School 2014–2015 Student Demographics Fact Sheet, forty-six percent of the high school’s eleventh and twelfth graders surveyed in the 2012–2013 California Healthy Kids Survey experienced “frequent sad, hopeless feelings” and twenty-one percent “seriously considered suicide” in the past year.

122. *Schools brace for up to 50,000 migrant kids*, USA TODAY (Aug. 11, 2014), <http://www.usatoday.com/story/news/nation-now/2014/08/06/public-schools-immigrant-children/13661353/>.

123. *Unaccompanied Children Released to Sponsors by State*, U.S. DEP’T OF HEALTH AND HUMAN SERV., OFF. OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/ort/programs/ucs/state-by-state-uc-placed-sponsors> (last updated Jan. 4, 2016).

124. Lisa Fernandez, *School Districts Brace for Unaccompanied Minors From Central America, Find Funding to Pay for Help*, NBC BAY AREA (Aug. 13, 2014), <http://www.nbcbayarea.com/news/local/School-Districts-Brace-for-Unaccompanied-Minors-From-Central-America-Find-Funding-to-Pay-for-Help-271073271.html>; see also Matt O’Brien, *Oakland: \$1 million plan would help child migrants who fled Central America*, SAN JOSE MERCURY NEWS (Oct. 10, 2014), [http://www.mercurynews.com/immigration/ci\\_26705693/oakland-1-million-plan-would-help-child-migrants](http://www.mercurynews.com/immigration/ci_26705693/oakland-1-million-plan-would-help-child-migrants).

125. *Zellerbach Family Foundation Grant Application: Proposal: Unaccompanied Minor Inter-agency Support System*, OAKLAND UNIFIED SCH. DIST., DEP’T OF FAMILY, SCH., AND CMTY. P’S HIPS (2014).

percent of OUSD students are students of color and thirty percent of all students are English Learners.<sup>126</sup> Notably, OUSD is the first large, urban school district in the nation to adopt a commitment to developing “Full Service Community Schools,” in which schools serve as resource and service hubs for students and their families.<sup>127</sup> In 2011, OUSD established a Family, School & Community Partnerships Department, which partners with school sites and community agencies involved in education, legal services, community advocacy and mental health “to ensure that students have a supportive educational environment, appropriate academic interventions, access to legal services, and, when necessary, access to mental health services/trauma interventions.”<sup>128</sup>

The Bay Area, including Alameda County, is home to California’s second largest unaccompanied minor population.<sup>129</sup> Between January 2014 and May 2015, 503 unaccompanied minors were released to sponsors in Alameda County.<sup>130</sup> Since June 2013, OUSD has received an increase in unaccompanied minors, who are predominantly male and high school age.<sup>131</sup> Through a foundation grant secured in 2014, OUSD hired an Unaccompanied Minor Support Services Consultant to serve as the point person for affected schools, staff, and provide service integration and wrap-around case management to the district’s unaccompanied minor students.<sup>132</sup> While OUSD receives a federal grant from ORR, this funding is limited to services for refugees who arrived in the last three years and does not provide for services targeting the increased unaccompanied minor student population.<sup>133</sup>

## B. Oakland International High School

With the support of the OUSD, Internationals Network for Public Schools, and the Gates Foundation, Oakland International High School

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126. *Id.* at 6.

127. *Id.*

128. *Unaccompanied Alien Children in the OUSD*, One-Pager, Oakland Unified School District (2014) (on file with author).

129. Alejandra Barrio, *Bay Area Services to Unaccompanied Minors*, ASS’N OF BAY AREA GOV’TS (July 24, 2015), [http://abag.ca.gov/planning/pdfs/AB\\_Finalized\\_Presentation\\_FINAL.pdf](http://abag.ca.gov/planning/pdfs/AB_Finalized_Presentation_FINAL.pdf).

130. *Id.* at 7.

131. Telephone Interview with Nate Dunstan, *supra* note 97 (Around seventy-five percent unaccompanied minors are in high school, ten percent in middle school, and fifteen percent in Elementary; forty-nine percent are from Guatemala, thirty-three percent from El Salvador, eighteen percent from Honduras; and, thirty-five percent are Female and sixty-five percent male).

132. Interview with Sailaja Suresh, Co-Principal, Oakland Int’l High School (Dec. 16, 2014); *see also Unaccompanied Alien Children in the OUSD*, *supra* note 128.

133. Telephone Interview with Nate Dunstan, *supra* note 97.

(“OIHS”) opened in August 2007 and by design, began serving ninth graders who were newly arrived immigrants and English Learners.<sup>134</sup> Serving all English Learners and newly arrived immigrants, OIHS was the first public school of its kind in California.<sup>135</sup> OIHS has grown steadily since opening its doors in 2007 and now serves 373 ninth through twelfth grade students who are one-hundred percent English Learners and recent arrivals, including unaccompanied minors who comprise twenty-three percent of the student body and twenty-five percent refugees or asylees, who have fled their home countries due to persecution.<sup>136</sup> OIHS students hail from over twenty-five countries and speak over thirty-five languages combined.<sup>137</sup> Over ninety-five percent of OIHS students qualify for a free and/or reduced lunch.<sup>138</sup>



Source: Oakland International High School, Site Visit, December 16, 2014

Drawing on the wrap-around services model and best practices of the Internationals Network for Public Schools, OIHS not only educates diverse and vulnerable students, but also assists students in securing attorneys to represent them and help them navigate the complex immigration system through community partnerships and drop-in legal clinics.<sup>139</sup> Additionally,

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134. Email from Sailaja Suresh, Co-Principal, Oakland Int'l High School (Apr. 9, 2015) (on file with author).

135. Interview with Sailaja Suresh, *supra* note 132.

136. *Id.*; see also *Unaccompanied Alien Children in the OUSD*, *supra* note 128; Monica Almelda, *Survival English*, N.Y. TIMES (Nov. 8, 2014), <http://www.nytimes.com/video/us/100000003202876/survival-english.html>.

137. *Unaccompanied Alien Children in the OUSD*, *supra* note 128.

138. *Id.*

139. Interview with Sailaja Suresh, *supra* note 132.



OIHS connects students with mental health services and provides additional after school and language development classes and a fifth-year program, which allows students to catch up to others.<sup>140</sup>

Regarding academic achievement, OIHS students graduated at the highest rate in the school's history during the 2013-2014 academic year and the school's truancy rate decreased to seventeen percent.<sup>141</sup> However, most members of the graduating class were not unaccompanied child migrants and lived with two parents.<sup>142</sup> Academic success is no doubt challenging for unaccompanied minors who are learning a new language, attending a new school, and often entering into a new family situation while precariously awaiting an immigration court date.<sup>143</sup> At OIHS, several students "have to pay rent to the adults they live with, so they take jobs at nearby restaurants, working as many as thirty hours a week—with cash payments, almost always under the table, far below the legal minimum wage."<sup>144</sup> Even unaccompanied minors who are living with parents may not have met their parents before or seen them in years, and for those unaccompanied minors who are living with a sponsor they hardly know, such as "a friend their father made years ago while working in the United States, an acquaintance who simply agreed to sign guardianship papers," abuse and neglect can occur.<sup>145</sup> Without monitoring and the involvement of a caseworker, abuse and neglect can occur especially among older teenaged unaccompanied minors. Even at OIHS, several students "have to pay rent to the adults they live with, so they take jobs at nearby restaurants, working as many as thirty hours a week—with cash payments, almost always under the table, far below the legal minimum wage."<sup>146</sup>

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140. Interview with Sailaja Suresh, *supra* note 132 (Approximately forty percent of OIHS students are students with interrupted formal education); *see also* Chris Branch, *Child Migrant Crisis Raises Questions for Schools*, HUFFPOST LIVE (Sept. 12, 2014), [http://www.huffingtonpost.com/2014/09/12/undocumented-children-education\\_n\\_5811662.html](http://www.huffingtonpost.com/2014/09/12/undocumented-children-education_n_5811662.html); *see also* Interview with Nicole Germanov, Volunteer and Program Coordinator, Refugee Transitions (Dec. 15, 2014); Alexandra Starr, *From NYC's International Schools, Lessons for Teaching Unaccompanied Minors*, NPR (Nov. 4, 2014), <http://www.npr.org/blogs/ed/2014/11/04/360187176/from-nycs-international-schools-lessons-for-teaching-unaccompanied-minors>.

141. Interview with Sailaja Suresh, *supra* note 132.

142. *Id.*

143. Telephone Interview with Margot Danker, Immigration Staff Attorney, Ayuda (Dec. 22, 2014).

144. Jennifer Medina, *Honduran Youth Finds Welcome Mat at Oakland School Designed for Immigrants*, N.Y. TIMES (Nov. 8, 2014), [http://www.nytimes.com/2014/11/09/us/honduran-youth-finds-welcome-mat-at-oakland-school-designed-for-immigrants.html?gwh=CEFF4B871FE6D82793BF73FAAF8517B4&gwt=pay&assetType=nyt\\_now](http://www.nytimes.com/2014/11/09/us/honduran-youth-finds-welcome-mat-at-oakland-school-designed-for-immigrants.html?gwh=CEFF4B871FE6D82793BF73FAAF8517B4&gwt=pay&assetType=nyt_now).

145. Telephone Interview with Nate Dunstan, *supra* note 97; *see also* Jennifer Medina, *supra* note 144.

146. Jennifer Medina, *supra* note 144.

## V. The Need to Prioritize Educational Opportunities for Unaccompanied Minors

“Once apprehended and charged with violating U.S. immigration laws, children enter a disjointed, labyrinthine system.”<sup>147</sup> Unaccompanied minors likely have endured a great deal of suffering in their home countries, on their journeys to the U.S., and upon apprehension by federal immigration officials. They are initially detained in unfamiliar facilities with notoriously inhumane conditions and subsequently shuffled around to various locations. While the *Flores v. Reno* Settlement Agreement, federal statutes, and landmark cases, such as *Plyler v. Doe*, have improved detention facility standards and education access for unaccompanied children and undocumented youth in general, there is still no fundamental right to education and many abuses can occur during the interagency process, which lacks transparency and oversight.

As long as the interagency process persists and the immigration of unaccompanied children to the United States persists, the Administration, Congress, ORR-funded providers, and school districts must seek to simplify the interagency process and increase oversight in order to ensure that unaccompanied minors are learning and receiving an education at every step along their journey in the United States. Vanguard school districts and schools such as Oakland Unified School District and Oakland International High School serve as innovative examples of the comprehensive services and educational support that unaccompanied minors are in need of and that should be prioritized and provided by detention facilities, ORR-funded shelters, and school districts. However, some unaccompanied minors attending public schools, including OIHS, continue to experience abuse and neglect in their new living situations and could benefit from the involvement of caseworkers. To close, just as the Court recognized in *Plyler*, the unaccompanied student of today may well be the documented and reunified student of tomorrow and without consistent educational opportunities, unaccompanied child migrants could experience further injustice and “become permanently locked into the lowest socio-economic class.”<sup>148</sup>

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147. Byrne & Miller, *supra* note 42, at 5.

148. *Plyler v. Doe*, 457 U.S. 202, 207–08 (1982).



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