

UNACCOMPANIED, UNNOTICED, AND UNDEREDUCATED: AN ANALYSIS OF THE ADMINISTRATIVE CHALLENGES OF EDUCATING UNACCOMPANIED CHILDREN IN FEDERAL CUSTODY

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INTRODUCTION

From October 2017 to August 2018, the U.S. Border Patrol apprehended 45,704 unaccompanied children.¹ As of September 2018, 12,869 of these children remained in federal custody.² While in federal custody, unaccompanied children are supposed to receive an education provided by private or public organizations through a contract with the Office of Refugee Resettlement (ORR), under the Department of Health and Human Services (HHS).³ HHS must supply “a minimum of six hours of structured education, Monday through Friday, throughout the entire year in basic academic areas.”⁴ Yet, the education provided (if at all) in these shelters often suffers from uncertified teachers, a lack of resources, and rampant language barriers, among many other administrative roadblocks.⁵ According to HHS, local educational agencies are not required to provide educational services until these children are released from federal custody,⁶ as most children are only in federal custody for 35-57 days.⁷ But, some local jurisdictions clash with HHS’ jurisdiction, often causing the children to fall into a “‘canyon’ between them” in terms of who is meant to educate and to what extent.⁸ For example, the

1. U.S. CUSTOMS & BORDER PROTECTION, SOUTHWEST BORDER MIGRATION FY2018 (2018).

2. Judy Woodruff, *The numbers of unaccompanied minors in U.S. detention has exploded. Here’s why.*, PBS (Sept. 13, 2018), <https://www.pbs.org/newshour/show/the-number-of-unaccompanied-minors-in-u-s-detention-has-exploded-heres-why>; see also Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>.

3. OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP’T OF HEALTH AND HUMAN SERVS., UNACCOMPANIED ALIEN CHILDREN PROGRAM FACT SHEET (June 15, 2018); see 6 U.S.C. § 279 (2002).

4. OFFICE OF REFUGEE RESETTLEMENT, DEP’T OF HEALTH & HUMAN SERVS., *Services Provided*, <https://www.acf.hhs.gov/orr/about/ucs/services-provided>.

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

6. Goldstein & Fernandez, *supra* note 5; see also OFFICE OF REFUGEE RESETTLEMENT, DEP’T OF HEALTH & HUMAN SERVS., *Unaccompanied Alien Children Frequently Asked Questions* (July 9, 2018), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-frequently-asked-questions>.

7. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 4; *Educational Services for Immigrant Children and Those Recently Arrived to the United States*, U.S. DEP’T OF EDUC. (Sept. 9, 2014), <https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html>.

8. Laura Isensee, *Texas Education Agency Orders Districts Not to Use State Funds for Migrant Children’s Education*, HOUS. PUB. MEDIA (Sept. 3, 2018).

Texas Education Agency recently released a letter prohibiting the provision of state-funded educational services to undocumented children in detention centers, which only widened this canyon of missing services.⁹

This note will explore the administrative roadblocks preventing the education of unaccompanied children, and how these roadblocks point to key areas of improvement between the agencies at play. Section I will explain why unaccompanied children in federal custody have a right to an education and how that education is being provided by HHS and the organizations with which it contracts. Section II will elaborate on the legal, political, and administrative roadblocks facing the education of unaccompanied children in federal custody. Legally, the success of this education system faces constitutional, statutory, and regulatory issues. Politically, the country is divided almost exactly in half on immigration issues. Administratively, the system is suffering from unclear goals that complicate everything from funding to jurisdiction, and serves a needy, constantly varying population. Section III will then provide some recommendations, including collaboration among advocacy groups, oversight by the recently-elected majority-Democrat House, and use of systems which manage transient student populations as a model for helping unaccompanied children.

I. A JURISDICTIONAL MESS: THE CURRENT FRAMEWORK

The interplay of state, federal, and private participation in providing unaccompanied children an education while in federal custody is complex, with overlapping, unclear requirements causing areas to go completely unaddressed. Generally, only the federal government is required to provide for these children. States may assist if they wish, and private organizations often contract with the federal government. This section will describe first why these children have a claim to an education under federal law, and second how HHS currently provides education.

A. *Unaccompanied Children's Right to an Education*

Unaccompanied children have a right to an education while in federal custody, though it is not constitutionally protected. This right stems from the principles set forth in *Plyler v. Doe*, the most widely-known case regarding the education of children already residing in the U.S. *Plyler* held that children already residing in the U.S., regardless of immigration status, are guaranteed an education.¹⁰ The Supreme Court reasoned that not educating migrant children “imposes a lifetime of hardship on a discrete class of children not

9. TEX. EDUC. AGENCY, UNALLOWABLE DOUBLE FUNDING FOR UNACCOMPANIED CHILDREN HELD IN CUSTODY BY OR FOR THE FEDERAL GOVERNMENT BEING SERVED BY TEXAS PUBLIC SCHOOLS (Aug. 31, 2018).

10. *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

accountable for their disabling status.”¹¹ The same is true for unaccompanied children in federal custody.¹² This section will explain the legal framework stemming from this reasoning. First, HHS is the sole agency tasked with the care of these children, though local educational agencies and private organizations may volunteer help. Second, HHS’ provision of an education to unaccompanied children is dictated by statutes and guidelines. Third, the *Flores* settlement provides additional requirements for all government organizations working with unaccompanied children.

1. *HHS as the Solitary Agency in Charge*

The care of unaccompanied children transferred to HHS in 2002.¹³ HHS interprets this responsibility to mean that children should receive educational services at ORR detention centers and shelters, rather than at local schools.¹⁴ ORR, under HHS, does not provide educational services, but rather works with private organizations or voluntary public support.¹⁵

Local educational agencies (LEAs) are not required to take these children in as students unless they are released from HHS custody and then reside in the district.¹⁶ Some LEAs volunteer to help, such as the Miami-Dade County school district in Florida, which manages education at the His House Children’s Home.¹⁷ Prior to the Texas Education Agency’s letter, Texas public schools also provided educational services for many shelters in the state. The University of Texas Charter School system, for example, contracted with the St. Peter-St. Joseph Children’s Home in San Antonio to provide teachers.¹⁸ However, LEAs have the right to completely withdraw services, and may even ban state funds from going to these shelters.¹⁹

2. *HHS Statutes and Guidelines*

Under federal statutes, HHS and ORR are responsible for “coordinating and implementing the care” of these children, ensuring their interests are met, making placements, and managing the “infrastructure and personnel of facilities.”²⁰ Additionally, ORR must place each child “in the least restrictive setting that is in the best interest of [the] child.”²¹ In agency-created

11. *Id.*

12. Education can help unaccompanied children avoid poverty, involvement in gangs, and a sense that they do not belong in society. Lloydann A. Wade, *Illegal Immigration and Education*, NAT’L L. REV. 1-2 (Nov. 7, 2012); Andrew Simmons, *What Undocumented Students Bring to the Classroom*, THE ATLANTIC (Apr. 13, 2015).

13. 6 U.S.C. § 279.

14. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 4.

15. OFFICE OF REFUGEE RESETTLEMENT, CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED GUIDE, § 3.1, 3.3.5 (2015).

16. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 4.

17. Goldstein & Fernandez, *supra* note 5.

18. *Id.*

19. See TEXAS EDUC. AGENCY, *supra* note 9.

20. 6 U.S.C. § 279.

21. 8 U.S.C. § 1232(b)(2).

guidelines, HHS and ORR interpreted these statutory requirements to include the provision of “[c]lassroom education.”²²

HHS requires all of its care providers to comply with its procedures laid out in its guidelines.²³ Care providers “must conduct an educational assessment within 72-hours” of the child’s arrival to determine their academic needs and proficiency, though procedures do not state what this assessment must contain.²⁴ After this assessment, unaccompanied children “must receive a minimum of six hours of structured education” every weekday.²⁵ This instruction should cover the “basic academic areas” of “Science, Social Studies, Math, Reading, Writing, Physical Education, and English as a Second Language (ESL).”²⁶ These subjects stem from the *Flores* agreement, explained below.²⁷ The guide does not say where the curriculum for these subjects must come from, but ORR states that most care providers pull from local standards and each child’s individual needs.²⁸

In addition to these basic academic areas, care providers should also educate children on “the skills necessary to acculturate to the United States” so that they may become responsible residents.²⁹ Acculturation should involve English language classes, “[a]ccess to community services,” academics such as geography, U.S. holidays, U.S. laws, “[f]ood and entertainment,” and “[f]ield trips to local historical, scientific or cultural points of interest.”³⁰ Children must be allowed to communicate in their chosen language,³¹ and materials should “reflect cultural diversity and sensitivity,”³² meaning care providers should engage in “Services Related to Culture, Language, and Religious Observation.”³³

The children are supposed to be grouped by “academic development, level of literacy, and linguistic ability” instead of grade or age.³⁴ They are also allowed opportunities for advancement through college prep courses, special projects, independent studies, and more.³⁵ Academic reports should be included in the children’s case files so that they can be transferred when the child is released from federal custody.³⁶

22. U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 3.

23. *See generally* OFFICE OF REFUGEE RESETTLEMENT, *supra* note 15.

24. *See* OFFICE OF REFUGEE RESETTLEMENT, *supra* note 15.

25. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 15.

26. *Id.*

27. *See Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

28. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 15.

29. *Id.*

30. *Id.*

31. *Id.* at § 3.3.5.

32. *Id.*

33. *Id.* at § 3.3.7.

34. *Id.*

35. *Id.*

36. *Id.*

3. The *Flores* Agreement

Flores v. Reno and its eventual settlement agreement, go hand-in-hand with HHS guidelines.³⁷ The case was concerned with whether a regulation allowing unaccompanied children to be released only to parents, close relatives, or guardians violated substantive due process.³⁸ The settlement, however, encompassed standards for shelter and detention center procedures overall, including educational services.³⁹ The settlement called for “an educational assessment and plan” for each child and provided that students should receive an education appropriate for their progress.⁴⁰ Monday through Friday, the children were to be taught a curriculum focusing on “basic academic competencies and secondarily on English Language Training.”⁴¹ The settlement listed “Science, Social Studies, Math, Reading, Writing and Physical Education” as subjects that should be taught, much like HHS guidelines.⁴² Additionally, the settlement stipulated that materials in languages other than English should be available for the students.⁴³

B. *Actual Provision of Education*

Currently, HHS contracts with private organizations such as Southwest Key Program or the Catholic Charities of the Diocese of Galveston-Houston to carry out its requirements.⁴⁴ Not much is known about the education provided at these shelters on a day to day basis, as government officials and non-profit legal organizations alike are often turned away.⁴⁵ However, what is known about this education is not promising. Some shelters, such as St. Peter-St. Joseph Children’s Home, paint positive pictures of special education services, “guest lessons on cooking and aviation,” and even field trips.⁴⁶ The Brownsville Southwest Key shelter also boasts a positive outlook, but education seems focused on “American patriotism and geography” rather than the core subjects spelled out in the *Flores* settlement.⁴⁷ Other facilities, though, show a far worse picture. At the Shiloh Treatment Center in Texas, children were allegedly drugged so heavily they fell asleep at desks.⁴⁸ At the emergency shelter in Tornillo, reports show that no actual education is

37. *Reno v. Flores*, 507 U.S. 292 (1992); *Flores v. Reno*, No. CV 85-4544-RJK(Px), (C.D. Cal. Jan. 17, 1997).

38. *Flores*, 507 U.S. 292.

39. *Flores*, No. CV 85-4544-RJK(Px).

40. *Id.* at Exhibit 1.

41. *Id.*

42. *Id.*

43. *Id.*

44. Decca Muldowney, et. al, *The Immigrant Children’s Shelters Near You*, PROPUBLICA (June 27, 2018).

45. Laura Morel & Patrick Michels, *No one on the inside can talk about what’s happening at the tent city for migrant kids*, THE TEX. TRIB.(Nov. 28, 2018).

46. Morel & Michels, *supra* note 45.

47. *Id.*

48. Goldstein & Fernandez, *supra* note 5.

provided; children merely receive workbooks they do not need to complete.⁴⁹ Overall, the actual provision of education at ORR facilities is unknown. Without more tours of facilities and information releases, it is unclear whether any of the HHS guidelines, statutes, or *Flores* is being met.

II. FALLING INTO THE CHASM: ROADBLOCKS THE CURRENT PROCESS FACES

On paper, the requirements for the shelters and detention centers appear adequate and straightforward. Yet, it is entirely unclear whether these conditions are met, or whether they are effective in practice. Education at ORR facilities thus faces legal, political, and administrative roadblocks. Legally, education of unaccompanied children in federal custody faces three issues: a statutory problem, a constitutional problem, and a regulatory problem. Politically, immigration remains one of the most heavily debated topics for the general public and Congress. Administratively, unclear goals and the difficulties of managing a vulnerable, at-risk population further complicate matters. This section will explain each of these roadblocks, and the difficulties they cause.

A. *Legal Roadblocks*

There are three major legal roadblocks that affect the education of unaccompanied children: the statutory problem between Texas residency statutes and the Texas Education Agency's recent letter; the constitutional problem created by *Plyler* and *Martinez*; and finally, the regulatory problem of the proposed codification of the *Flores* settlement.

1. *The Statutory Problem*

The statutory problem revolves around the chasm left between state and federal requirements. Like most states, Texas requires public school districts to admit any person, ages five to twenty-one, if they meet residency requirements.⁵⁰ There are two residency options under which undocumented children might qualify as residents: (1) the child is considered homeless; or (2) the child "resides at a residential facility" in the district.⁵¹ First, unaccompanied children may qualify for residency as they are technically homeless. A child is homeless if they live in a "supervised publicly or privately operated shelter designated to provide temporary living arrangements."⁵² ORR facilities are publicly operated, and HHS admittedly only wishes to provide temporary living arrangements, as they estimate that children stay in federal

49. Caitlin Dickerson, *Migrant Children Moved Under Cover of Darkness to a Texas Tent City*, N.Y. TIMES (Sept. 30, 2018).

50. TEX. EDUC. CODE ANN. § 25.001(a).

51. *Id.* at (b)(3), (5), (7).

52. 4 U.S.C. § 11302(a)(3).

custody for only 35-57 days.⁵³ Unaccompanied children may therefore be considered homeless. Secondly, unaccompanied children may qualify for residency as they reside at residential facilities in Texas districts.⁵⁴ As most unaccompanied children transfer to schools within the districts where they are kept in custody, interpreting these statutes to mean the children are residents even before leaving federal custody could help with their transition.⁵⁵

Despite these residency options and their benefits, the Texas Education Agency recently published a letter stating that districts and charter schools may not use state funding to provide teachers or resources to shelters and detention centers.⁵⁶ Instead, provision of educational services to unaccompanied children in federal custody “must come from sources such as tuition.”⁵⁷ TEA’s letter seems to directly contradict its residency statutes, and at the very least makes the statutes unclear and ineffective. The letter also will potentially jeopardize partnerships formed between local Texas public schools and shelters and detention centers.⁵⁸ The San Benito Consolidated Independent School District (CISD), for example, had a partnership with the Southwest Key Casa Padre shelter. The district was looking to receive “an additional \$2.8 million in state funding by including the shelter’s students in its enrollment numbers.”⁵⁹ Now, it does not have this extra funding. Promesa Public Schools even asked to expand one of their campuses to serve these children before the letter was issued.⁶⁰ Thus, the conflict between Texas statutes and TEA’s letter leaves the education ORR facilities and Texas public schools could provide in limbo.

2. *The Constitutional Problem*

Another legal roadblock facing unaccompanied children in federal custody lies in a disconnect between *Plyler* and *Martinez v. Bynum*. *Plyler* established that all children residing in the United States, regardless of immigration status, are entitled to a free public education.⁶¹ A year later,

53. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 4; U.S. DEP’T OF EDUC., *Educational Services for Immigrant Children and Those Recently Arrived to the United States* (Sept. 9, 2014), <https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html>.

54. TEX. EDUC. CODE ANN. § 25.001(a)(7). Texas has 25 shelters for unaccompanied children: Southwest Key Program, Inc., at Canutillo, Casa Franklin, Casita Del Valle, Combes, Casa Rio Grande, Nueva Esperanza, Casa El Presidente, Casa Padre, La Esperanza, Casa Blanca, Casa Houston, Casa Quetzal, Houston, Casa Montezuma, Conroe; Upbring Children’s Centers at New Hope and Bokenkamp; BCFS Health and Human Services International Children’s Services Emergency Shelter (three) and International Children’s Shelter; St. Peter - St. Joseph Children’s Home Emergency Center; Shiloh Treatment Center; Catholic Charities Fort Worth; and St. Michael’s Home for Children. Muldowney, et al, *supra* note 44.

55. TEX. EDUC. CODE ANN. § 25.001(b)(7).

56. TEXAS EDUC. AGENCY, *supra* note 9.

57. *Id.*

58. Shelby Webb, *TEA: Schools cannot use state funds to educate migrant children in shelters*, SAN ANTONIO EXPRESS-NEWS (Aug. 30, 2018), <https://www.expressnews.com/news/local/article/TEA-Schools-cannot-use-state-funds-to-educate-13195204.php#article-comments>.

59. *Id.*

60. *Id.*

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

Martinez held that children living apart from their parent or guardian could not be considered residents of a school district if their presence was solely to attend free public schools.⁶² Although *Martinez* did not technically limit *Plyler*, it created a “wedge” between the two cases that could prove detrimental to unaccompanied children.⁶³ According to Professor Michael Olivas, a *Plyler* scholar, unaccompanied children whose families do not live within district zones, as in those in federal custody, may fall into this wedge.⁶⁴ Olivas says *Plyler* meant that unauthorized children could establish residency in the U.S., whereas *Martinez* dealt with children whose parents had not established residency.⁶⁵ As unaccompanied children do not have parents to establish residency, yet technically reside in the U.S., they fall into a gap where it is unclear whether *Plyler* or *Martinez* applies.

This gap can also enable LEAs to enact legislation against enrolling unaccompanied children without any risks.⁶⁶ Olivas states that the likelihood of schools acting in such manners is more likely if accompanied by an increase in border security or the drug trade along the border.⁶⁷ As if acting on Olivas’s words, the Trump administration rolled out a “zero tolerance” border policy this past year.⁶⁸ Drug trafficking along the U.S.-Mexico border is an ongoing problem.⁶⁹ The wedge between *Plyler* and *Martinez*, coupled with the zero tolerance policy and drug trade, create the perfect storm Olivas described in which a school could limit residency to exclude unaccompanied children without repercussions. Texas has done exactly this with its recent letter prohibiting school districts from spending state funding on providing educational resources to unaccompanied children in federal custody. As Olivas predicted, Texas took advantage of the wedge in residency and required its public and charter schools to charge tuition in order to provide educational resources to these children.⁷⁰ Without clarification on whether *Plyler* or *Martinez* applies, unaccompanied children in ORR facilities in Texas will continue to fall into the gap.

62. *Martinez v. Bynum*, 461 U.S. 321, 321 (1983).

63. Michael Olivas, *Plyler v. Doe: Guaranteeing Unauthorized Immigrant Children’s Right to Attend U.S. Public Schools*, MIGRATION POLICY INST. (Sept. 9, 2010), <https://www.migrationpolicy.org/article/plyler-v-doe-still-guaranteeing-unauthorized-immigrantchildrens-right-attend-us-public>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Salvador Rizzo, *The facts about Trump’s policy of separating families at the border*, WASH. POST (June 19, 2018, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border>.

69. Customs and Border Patrol seized approximately 156,000 pounds of narcotics in 2017, totaling to over \$200 million. Chris Riotta, *Bodies, drugs and walls: On the road with US Border Patrol amid Trump’s immigration crackdown*, THE INDEPENDENT (Oct. 22, 2018, 6:30 PM), <https://www.independent.co.uk/news/world/americas/us-border-patrol-mexico-crossing-trump-wall-immigrants-laredo-immigration-a8596841.html>.

70. TEXAS EDUC. AGENCY, *supra* note 9.

3. *The Regulatory Problem*

While *Flores* contains actual requirements for educating unaccompanied children in federal custody, these requirements are rather lackluster and outdated. The settlement came about in 1997, over 20 years ago.⁷¹ Since then, the Department of Education retired both the Elementary and Secondary Education Act and the No Child Left Behind Acts, replacing them with the Every Student Succeeds Act just three years ago.⁷² The *Flores* settlement, meanwhile, remained unchanged. Not only has education in the U.S. changed, but the population of ORR facilities has as well. In 2012, just six years ago, ORR received only 13,625 referrals of unaccompanied children.⁷³ In 2018, these referrals nearly quadrupled in number to 49,100.⁷⁴ *Flores* did not update for this population change, nor any other before 2012. The *Flores* settlement, for all of its protections, is also entirely out of touch.

Outside of issues with the settlement itself, this September, HHS and the Department of Homeland Security (DHS), proposed a rule that would codify the *Flores* settlement. The proposed rule states that its primary purpose is to allow DHS to detain family units together, rather than paroling the whole family or separating parents from their children.⁷⁵ However, many organizations⁷⁶ are opposed to the proposed rule, as it would allow DHS to keep children incarcerated indefinitely in “unsafe, inappropriate conditions.”⁷⁷ By keeping children with their parents, the requirements for placement of unaccompanied children would no longer apply. No longer would children average only two months in custody, nor would facilities need to be state-licensed.⁷⁸ Instead, DHS could create its own standards for children detained with their families. This means DHS could create its own educational standards as well, which would not need to be nearly as rigorous as *Flores* standards.

71. *Flores v. Reno*, No. CV 85-4544-RJK(Px), (D. Cent. Cal. 1997).

72. U.S. DEP'T OF EDUC., EVERY STUDENT SUCCEEDS ACT (2015), <https://www.ed.gov/essa>.

73. *Facts and Data*, OFFICE OF REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

74. *Id.*

75. Apprehension, Processing, Care, and Custody of Alien Minor and Unaccompanied Alien Children, 83 Fed. Reg. 45486, 45492 (proposed Sept. 7, 2018) (to be codified at 45 C.F.R. pt. 410).

76. See Philip E. Wolgin, *The High Costs of the Proposed Flores Regulation*, CTR. FOR AM. PROGRESS (Oct. 19, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation> (describing how the Center for American Progress, Houston Immigration Legal Services Collaborative, Kids In Need of Defense, the Young Center, the American Immigration Lawyers Association, the Hebrew Immigrant Aid Society, and the Interfaith Immigration Coalition, to name a few, have all issued statements opposing this proposed rule.); See also *Detention of families likely to increase as regulations replace Flores settlement*, HOUSTON IMMIGRATION LEGAL SERV. COLLABORATIVE; *HIAS Statement on Proposal to Terminate Flores Agreement*, HEBREW IMMIGRANT AID SOC'Y (Sept. 7, 2018); *Oppose Proposed Flores Rule: Sample Interfaith Points*, INTERFAITH IMMIGRATION COAL.

77. Wolgin, *supra* note 76.

78. *Id.*

B. *Political Roadblocks*

The current political climate places considerable hindrances on the likelihood of any administrative remedies for educating unaccompanied children in federal custody. Just a year ago, the Pew Research Center found that 84% of Democrats were in favor of immigration, while only 42% of Republicans felt the same.⁷⁹ The recent midterm elections in Texas show that this nationwide divide has only persisted, if not worsened. Ted Cruz, the Republican incumbent for Texas's Senate seat, won with 50.9% of votes.⁸⁰ Cruz supports President Trump's border wall plan, and takes a harsher stance on immigration.⁸¹ His challenger, Beto O'Rourke, came surprisingly close, with 48.3% of votes.⁸² O'Rourke's platform included support for immigration reform that would allow for a fair path to citizenship for those who arrived in the country illegally.⁸³ This stark divide in Texas demonstrates how torn the country remains on immigration issues, meaning that improvements to educating unaccompanied children could be hotly debated and never make it through Congress.

In addition to the nation's political divide, Congress has long employed "self-deportation," by which "a group not desired as part of the polity" is indirectly removed.⁸⁴ Self-deportation arises when states create laws meant to make life in the U.S. so difficult for immigrants that they would deport themselves rather than deal with those laws.⁸⁵ President Trump's family separation policy was an example of such a law, and Chief of Staff John Kelly even stated the administration's intent for the policy to be a "tough deterrent."⁸⁶ TEA's recent letter cutting off state-funding and resources for Texas shelters and detention centers can also be seen as a self-deporting policy. Educators in Texas claim this letter shows TEA is taking a "hands-off approach," which could indicate to unaccompanied children that they will receive no help from Texas once released federal custody.⁸⁷ This could be an incentive for these children to return to their home countries, where they might at least have some family.

C. *Administrative Roadblocks*

Although HHS provides relatively clear guidelines for the provision of education to unaccompanied children in federal custody, the execution of

79. *Growing partisan gaps on govt, race, immigration*, PEW RESEARCH CENTER (Oct. 4, 2017).

80. *Texas Election Results 2018*, POLITICO (Dec. 9, 2018).

81. *Immigration*, U.S. SENATOR FOR TEXAS: TED CRUZ, <https://www.cruz.senate.gov/?p=issue&id=33>.

82. Politico, *supra* note 80.

83. *Immigration*, BETO FOR SENATE, <https://betofortexas.com/issue/immigration/>.

84. K-Sue Pak, *Self-Deportation Nation 2* (Nov. 8, 2018) (unpublished draft) (on file with author and Professor Pasachoff).

85. *Id.* at 3 (quoting Alabama Representative Micky Hammon).

86. *Id.* at 47 (quoting Williams Cummings, *John Kelly defends separating immigrant families, saying 'the name of the game is deterrence'*, USA TODAY (May 11, 2018)).

87. Lauren Camera, *Unaccompanied and Uneducated: The Billions Spent at the Border*, U.S. NEWS (Sept. 28, 2018).

these guidelines illustrates confusion and inconsistency in HHS, its facilities, and surrounding LEAs. This is particularly true in Texas, where the TEA's recent letter has caused intense confusion and strained ORR facilities and LEAs. This section will analyze the administrative roadblocks Texas shelters and detention centers face, in light of the aforementioned legal and political roadblocks. First, even though HHS's guidelines are straightforward, its goals are murky at best. Whether HHS's job is to provide an education to prepare unaccompanied children to integrate into the surrounding communities, or to merely pass time before they are deported, the goal of HHS's provision of education is unclear. Second, the federal government is pouring money into these shelters. But, without clearer goals, this massive funding has no clear purpose or direction. Third, shelters and detention centers face a constant influx and outflux of a particularly needy population of children, who have a trauma-informed background and are all at very different academic stages. These facilities are currently ill-equipped to deal with this fluctuating population, with the only solution being coping and placing all the children together regardless of academic level.

1. *Unclear Goals*

When agencies put forward unclear goals, execution of the goals depends on the circumstances workers encounter, their beliefs and experiences, and external pressures.⁸⁸ HHS did exactly this in its shelters and detention centers, listing no clear goal for what educating unaccompanied children is supposed to accomplish.⁸⁹ HHS does not list standards for students to meet, measurements for performance, or any other method of tracking progress.⁹⁰ Such an unclear goal means shelters must rely on the circumstances inside the shelters, their beliefs and experiences regarding unaccompanied children, and external pressures from HHS and the general public. Relying on these factors rather than a clear goal allows for considerable discretion amongst and within ORR facilities, for better or for worse.

In terms of circumstances, Texas detention centers and shelters primarily deal with a constant change in children, described in more detail below. As one teacher said, every day is "like the first day of school."⁹¹ Facilities also receive children from a broad range of grade levels, academic development, and experiences with trauma.⁹² Teachers also state that they simply do not have enough resources to meet every child's needs.⁹³ Such circumstances, without a clear goal, likely force workers at facilities to primarily cope with these issues rather than attempting to solve them.

88. JAMES Q. WILSON, BUREAUCRACY 34 (1989).

89. See OFFICE OF REFUGEE RESETTLEMENT, *supra* note 15.

90. *Id.*

91. Goldstein, *supra* note 5.

92. *Id.*

93. Camera, *supra* note 87.

The beliefs of these workers are likely to range as broadly as the beliefs of Texas political figures discussed earlier in this section. Some workers will likely be in the pro-immigration camp, like Beto O'Rourke, or at least the pro-aiding children camp, making them more likely to believe their goal is to provide these children with the best services possible. Others, however, could be anti-immigration like Senator Cruz, and might believe their goal to be helping find the fastest path to deportation. When Texas allowed school districts to provide teachers to the facilities, the teachers' experiences in their own schools likely dictated much of the educational goals. Now that these teachers have been forced to withdraw their services, their experience is gone, which could impact how other teachers and staff at shelters and detention centers act. Relying on personal beliefs causes great differentiation, and allows discretion which may or may not be helpful.

Finally, external pressures from the government and public opinion likely affect how workers at these facilities view their goal. Most Texans who live in border cities state that they feel perfectly safe in these cities, with or without increased border patrol presence, indicating that they might be comfortable with unaccompanied children residing in their cities.⁹⁴ Polls also showed that a majority of U.S. citizens, 67%, opposed Trump's family separation policy, pointing to a general care for unaccompanied children. At 71%, a majority of citizens also support Deferred Action for Childhood Arrivals (DACA), further demonstrating care for unaccompanied children.⁹⁵ The government, however, has made repeated attacks on various aspects of unaccompanied children remaining in the country, from recent attempts to revoke the *Flores* settlement⁹⁶ to HHS spending copious amounts to keep these children in federal custody⁹⁷ to President Trump's separation policy. Such conflicting external pressures likely confuse workers as to which group to satisfy.

2. *Heavy Funding with No Direction*

The lack of clarity in what the educational goal ought to be for these children is further complicated by the confusing, allegedly misplaced funding for ORR facilities. The federal government granted over \$3 billion to the private organizations that contract with shelters and detention centers since

94. Carlos Morales, *How Residents Of Texas Border Towns Are Reacting To Trump's Plan To Send National Guard*, NPR (Apr. 5, 2018, 4:19 PM), <https://www.npr.org/2018/04/05/599895231/how-residents-of-texas-border-towns-are-reacting-to-trumps-plan-to-send-national>; Kevin Sullivan, *'An all-American city that speaks Spanish': Immigration isn't a problem for this Texas town – it's a way of life*, WASH. POST (July 4, 2018, 4:29 PM), https://www.washingtonpost.com/national/an-all-american-city-that-speaks-spanish-welcome-to-the-texas-border-town-at-the-center-of-the-immigration-fight/2018/07/04/a177254c-7ef8-11e8-bb6b-c1cb691f1402_story.html.

95. Eleanor O'Neil, *Immigration issues: Public opinion on family separation, DACA, and a border wall*, AEI/DEAS (June 21, 2018), <https://www.aei.org/politics-and-public-opinion/immigration-issues-public-opinion-on-family-separation-daca-and-a-border-wall>.

96. See Section I. a. iii. The *Flores* agreement, *supra* note 37; see also Apprehension, Processing, Care, and Custody of Alien Minor and Unaccompanied Alien Children, 83 Fed. Reg. 44392 (proposed Sept. 7, 2018) (to be codified at 45 C.F.R. pt. 410).

97. Camera, *supra* note 87.

2015.⁹⁸ Southwest Key alone, which operates the majority of Texas shelters, received over \$1.2 billion in federal funding since 2015.⁹⁹ Southwest Key reports that it spent \$9.7 million on educational expenses this year.¹⁰⁰ But, it would have cost the organization \$63.5 million to meet the average spending per pupil in public education, indicating that ORR facilities are under-funded or are spending money frivolously.¹⁰¹ No other organization was willing to provide specific information about how federal money was spent.¹⁰² This lack of transparency and apparently misplaced funds are especially troubling, considering that HHS is planning to divert funding from other educational and health agencies to fund the detention of unaccompanied children in the upcoming year.¹⁰³ The total budget for the detention of unaccompanied children will total \$266 million under this proposal, but it is unclear how much of this budget is meant to go to education, or where the budget is to be spent at all.¹⁰⁴

3. *A Variable and Needy Population*

The effects of unclear goals worsen the next administrative roadblock: the constantly changing, traumatized nature of unaccompanied children. These children are in constant flux, their emotional and educational needs are great and variable, and HHS and its facilities seem unequipped to manage the fallout. Unaccompanied children arrive at shelters already suffering from “traumatic stressors” which arose throughout their entire migration. They must cope with abandonment, abuse, neglect, separation, grief, deprivation, physical injuries, sexual abuse, absence of parents and other relationships, fear, social isolation, discrimination, and more, all before even entering an ORR facility.¹⁰⁵ Children react to situations of stress and danger based on their attachment relationships, relationships with people in their lives and with whom they create life experiences.¹⁰⁶ When children are separated from attachment figures, every aspect of their development can be disrupted,

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. HHS is diverting funds from the Center for Disease Control and Prevention, the National Institute of Health, other refugee programs, Head Start (and educational program providing low-income children with early childhood education), the Ryan White HIV/AIDS program, and the National Cancer Institute. Rebekah Entralgo, *HHS to cut funds from Head Start, cancer research to pay for the detention of immigrant children*, THINKPROGRESS (Sept. 20, 2018, 3:45 PM), <https://thinkprogress.org/hhs-cuts-cancer-research-child-detention-210dbb16cc32>.

104. Amy Goldstein & Robert Moore, *Trump administration diverts nearly a half-billion dollars to migrant children in custody*, WASH. POST (Sept. 21, 2018, 5:21 PM), https://www.washingtonpost.com/national/health-science/trump-administration-diverts-nearly-a-half-billion-dollars-to-migrant-children-in-custody/2018/09/21/2eca4de0-bd04-11e8-8792-78719177250f_story.html.

105. See generally RoseMarie Perez Foster, *When Immigration Is Trauma: Guidelines for the Individual and Family Clinician*, 71 AM. J. OF ORTHOPSYCHIATRY 153 (2001).

106. Carmen Rosa Noroña, *Unaccompanied Immigrant Minors: Clinical Considerations when Serving Very Young Children and their Caregivers*, 9 (Child Witness to Violence Project, Boston Medical Center).

including cognitive growth and learning.¹⁰⁷ Unaccompanied children in federal custody thus have to manage these stressors without their attachment figures, causing disruptions in their educational development. Based on the HHS guidelines described in the first section, there are no special protocols to manage this trauma and how it affects education. These children also are between 0 to 18 years of age, meaning their levels of education and educational needs span the entire primary school range.

Not only do children reach ORR facilities deeply traumatized and with variable educational needs, they are also constantly arriving and departing from shelters and detention centers. This is especially true for Texas, as a border state. HHS estimates that unaccompanied children will remain in federal custody for 35–57 days, meaning there is a turnaround of less than two months for most of these children.¹⁰⁸ This constant change in shelters and detention centers exacerbates all of the previous roadblocks. Processing of students at these facilities likely causes teachers to feel as though they are merely coping, unable to provide what the students need and merely doing their best with the time they have.¹⁰⁹ Teachers at these facilities likely must cope with this constant changing by modifying their “conceptions of work” and “conceptions of clients.”¹¹⁰ To modify conceptions of work, teachers must develop their own goals, and exercise more discretion than is called for “in order to salvage a semblance of proper client treatment as they define it.”¹¹¹ To modify conceptions of clients, teachers must save a portion of their efforts for specific students, and differentiate amongst the students to choose who gets what attention.¹¹² This means that teachers at ORR facilities are exercising excessive discretion, and potentially ignoring children they do not believe need extra help in the process. This can lead to some unaccompanied children slipping through the cracks, only worsening the trauma and educational development challenges they already face.

Without direction from HHS, teachers and staff at ORR facilities have no guidance for how to manage the constant change and dire needs of their students. This could explain why some shelters gave students enough drugs to knock them out, while others simply hand out work packets. The teachers are confused, creating their own goals, and merely coping each day with what limited resources they have.

III. A FAIR PATH TO EDUCATION: THE STARTING LINE

There is no easy fix to these roadblocks. Each roadblock involves a wide variety of players, moving pieces, and inherent difficulties, all of which may

107. *Id.*

108. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 4.

109. See Goldstein, *supra* note 5; see also Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (1980).

110. Lipsky, *supra* note 109.

111. *Id.* at 150.

112. *Id.*

or may not be able to change. But, the situation is not as grim as it appears. There are key areas of improvement that are attainable, and that can make tangible changes for unaccompanied children in federal custody. Given the complex issues these children face legally, advocacy groups will need to collaborate in their lawsuits. Seeking asylum and release from shelters and detention centers are important causes, but neither of these will repair the initial living situation for these children. Second, the newly elected, majority-Democrat House of Representatives will need to step up its oversight of these shelters and detention centers, as knowledge of what actually occurs in them is relatively unknown right now. Finally, to manage the difficulties that arise from an ever-changing, disadvantaged population, these facilities and HHS should look to policies implemented to help students experiencing homelessness. These students are as transient and in need of assistance as the unaccompanied children at ORR's facilities. None of these suggestions offer an easy, overall solution, but each can contribute to positive changes.

A. *Collaboration Amongst Advocacy Groups*

When President Trump enacted his family separation policy, legal advocacy groups leapt into action. The American Civil Liberties Union,¹¹³ Muslim Advocates, Legal Aid,¹¹⁴ and more all filed suits contesting the policy. While these lawsuits are crucial, none address the status of education at these facilities. Even though President Trump ended his family separation policy,¹¹⁵ unaccompanied children will still be sent to ORR facilities. In 2017, before any family separation policy was implemented, ORR received 40,810 referrals for placing unaccompanied children.¹¹⁶ In 2014, during President Obama's time in office, ORR received 57,496 referrals.¹¹⁷ Though the presence of unaccompanied children in ORR facilities became the target of public backlash this summer, it has long been, and will continue to be, a pressing matter. The current lawsuits can only do so much as they are focused on the family separation policy. Therefore, collaboration in order to improve the conditions at these shelters is necessary. Specifically, groups such as the ACLU, Muslim Advocates, and Legal Aid should team up with education organizations, such as Advocates for Justice and Education, Children's Law Center, or the Center for Children's Law and Policy, to bring a lawsuit using

113. Petition for Writ of Habeas Corpus & Complaint for Declaratory and Injunctive Relief, Ms. L. v. U.S. Immigration & Customs Enf't, No. 18-cv-0428-DDS-(MDD) (S.D. Cal. Feb. 26, 2018) (No. 3:18-cv-00428).

114. Dara Lind, *Exclusive: new lawsuit claims Trump illegally denied asylum claims of separated parents*, VOX (Aug. 20, 2018, 9:38 AM), <https://www.vox.com/policy-and-politics/2018/8/17/17718530/separated-families-asylum-stay-us-deported-lawsuit>.

115. Miles Parks, Scott Detrow, & Kelsey Snell, *Trump Signs Order To End Family Separations*, NPR (June 20, 2018), <https://www.npr.org/2018/06/20/621798823/speaker-ryan-plans-immigration-votes-amid-doubts-that-bills-can-pass>.

116. OFFICE OF REFUGEE RESETTLEMENT, *supra* note 73.

117. *Id.*

their expertise in both immigration and education to challenge some of the systemic issues facing children in federal custody.

Collaboration should begin with a Freedom of Information Act (FOIA) request to discover what education exactly occurs at facilities. This is an especially prescient time to make FOIA requests, as Southwest Key is launching an internal inquiry into its shelters.¹¹⁸ Based on initial news reports, FOIA requests are likely to turn up evidence of inadequate education. Lawyers were recently given a tour of the Tornillo detention center in Texas, and stated that children were only given workbooks instead of an actual education.¹¹⁹ One student who is partially deaf has been unable to participate in classes as she has not received hearing aids.¹²⁰ At the Shiloh Treatment Center in Texas, lawyers reported that the shelter heavily dosed children with psychiatric drugs, causing them to fall asleep at their desks for hours.¹²¹ FOIA requests will paint a better picture of not just these more shocking incidents, but also the overall, every day failings of education at ORR facilities.

Organizations could then file a lawsuit based on the intersection of the Trafficking Victims Protection Reauthorization Act (TVPRA) and the *Flores* agreement.¹²² The TVPRA protects unaccompanied children, in an effort “to prevent trafficking in persons.”¹²³ Under the TVPRA, HHS must place unaccompanied children “in the least restrictive setting that is in the best interest of the child.”¹²⁴ Before placing a child, HHS must also make sure the “proposed custodian” can care for the “physical and mental well-being” of the child.¹²⁵ As discussed earlier, the *Flores* settlement requires an educational assessment and plan, and classes Monday through Friday in basic academic areas.¹²⁶ Most ORR facilities are not up to any of these standards. Holding children in a converted Walmart, as the Brownsville shelter does, is hardly the “least restrictive setting” in which a child can be placed, especially when attending school. As evidenced by the use of psychiatric drugs at the Shiloh shelter, the organizations caring for children at ORR’s facilities are also not capable of caring for unaccompanied children’s physical or mental well-being. Under *Flores*, mere workbooks being distributed at other facilities would also not satisfy the requirement that children be taught according to their specific educational needs. A lawsuit based on these failings, as a

118. Kim Barker, Nicholas Kulish, & Rebecca Ruiz, *Southwest Key, Leading Migrant Shelter Provider, Orders Internal Inquiry*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/us/southwest-key-detained-migrant-children-inquiry.html>.

119. Morel & Michaels, *supra* note 45.

120. Goldstein & Fernandez, *supra* note 5.

121. *Id.*

122. The ACLU proposed such an intersection in a 2014 report. ACLU IMMIGRANTS’ RIGHTS PROJECT, THE RIGHTS OF CHILDREN IN THE IMMIGRATION PROCESS (2014), https://www.aclu.org/sites/default/files/field_document/aclu_irp_legal_backgrounder_on_children_july_2014_final.pdf.

123. 8 U.S.C. § 1232.

124. *Id.*

125. *Id.*

126. *Flores v. Reno*, No. CV 85-4544-RJK(Px) at Exhibit 1 (C.D. Cal. Jan. 17, 1997).

collaboration amongst immigration and education organizations, would be a prospective place to start.

B. *A Blue Wave of Oversight*

Following the recent midterm elections, Democrats won control over the House of Representatives, gaining at least 27 seats.¹²⁷ Although Democrats cannot completely change President Trump's immigration policies, they now have the power to conduct thorough oversight of the shelters and detention centers where unaccompanied children are kept.¹²⁸ Executive director of America's Choice, Frank Sharry, predicted before midterms even concluded that Democrats would push for "an aggressive oversight agenda."¹²⁹ House Democrats need to follow through on this agenda through committees designed to give citizens a look inside the ORR facilities that have long denied access.¹³⁰ The House of Representatives currently has a Subcommittee on Immigration and Border Security, which has jurisdiction over immigration and naturalization matters broadly, "non-border immigration enforcement," and "relevant oversight."¹³¹ This subcommittee should be used to investigate and oversee the provision of education at shelters and detention centers. Representatives should also continue pressing for access to the facilities and release of statistics and data, then use the information found during these visits to publish a report on the state of the facilities.

C. *Lessons from Educating Homeless Youth*

The last area of improvement lies in shelters and detention centers borrowing from lessons learned from the education of homeless youth. In 2016, the Department of Education released a guidance document and fact sheet on the McKinney-Vento Act, which provides protection and educational guarantees for children experiencing homelessness.¹³² HHS and ORR should promulgate a guidance document and a fact sheet on unaccompanied minors, which will help define the goal of teachers and staff at shelters and detention centers. In turn, this will help teachers and staff manage, rather than cope with, the

127. Alana Abramson, Kathy Ehrich Dowd, & Mahita Gajanan, *The Latest Midterm Results: Democrats Win U.S. House of Representatives*, TIME (Nov. 6, 2018), <https://time.com/5446274/midterm-election-results>.

128. Elisa Foley, *Democratic Control In House Means Oversight of Trump's Immigration Crackdown – Finally*, HUFFINGTON POST (Nov. 7, 2018), https://www.huffpost.com/entry/democrats-house-immigration_n_5be2ec2fe4b0e84388924c3d.

129. Richard Gonzales, *A Democratic Wave In Congress Could Change Immigration Policy*, NPR (Nov. 3, 2018), <https://www.npr.org/2018/11/03/663706696/a-democratic-blue-wave-in-congress-could-change-immigration-policy>.

130. See, e.g., Jason Axelrod, *Local officials across U.S. denied entry into immigrant children detention facility*, AMERICAN CITY & COUNTY (June 25, 2018), <https://www.americancityandcounty.com/2018/06/25/local-officials-across-u-s-denied-entry-into-immigrant-children-detention-facility>.

131. *Subcommittee on Immigration and Border Security*, HOUSE OF REPRESENTATIVES: JUDICIARY COMMITTEE, <https://judiciary.house.gov/subcommittee/subcommittee-on-immigration-and-border-security/>.

132. U.S. DEP'T OF EDUC., EDUCATION FOR HOMELESS CHILDREN AND YOUTHS PROGRAM NON-REGULATORY GUIDANCE (July 27, 2016).

transient nature of unaccompanied children. The McKinney-Vento guidance document provides concrete tools that can be transferred to the shelter and detention center context, and a guidance document in general can solve the lack of clear goals and excessive teacher discretion currently at play. The fact sheet provides fast, important information that can be quickly disseminated and easily learned, even with constant turnover and teachers who might be unfamiliar with the children's circumstances.

While Congress could pass a comprehensive act updating Flores and adding more requirements, similar to McKinney-Vento itself, issuing a guidance document and fact sheet are faster, and more easily attainable in the current political climate. Especially when considering the fact that Congress might already codify *Flores* with zero updates or additional requirements, an entire act is not as feasible as guidance.

1. *Guidance Document*

The Department of Education's guidance document on McKinney-Vento is a comprehensive, 51-page document, encompassing all issues and necessary clarifications revolving around the act.¹³³ While a guidance document on educating unaccompanied children might not amount to 51 pages, it could still be comprehensive and could borrow many of the tips and information included in the McKinney-Vento guidance document. For example, the McKinney-Vento guidance document includes a section defining what the elusive phrase "best interest" of the child means.¹³⁴ Statutes conveying the care of unaccompanied children to ORR use the same phrase, in relation to placing children in the least restrictive setting which is also in the "best interest" of the children.¹³⁵ The McKinney-Vento guidance document states that a child's best interest is in keeping the child in their school of origin, meaning they will not need to move around as much and will be able to experience stability.¹³⁶ The same stability would be incredibly helpful to unaccompanied children, though some agreement would need to be worked out with states like Texas who do not want to spend state resources on these children. Even if this exact definition does not fit, a definition based on the same concept of stability would be helpful.

The guidance document also includes a section on "Tips on Facilitating Immediate Enrollment," which is meant to ease the transition from homelessness to attending schools.¹³⁷ Were HHS to release a document with a section such as this, it would help teachers at ORR facilities orient themselves toward a goal of enrolling their students at local schools, integrating into the surrounding community as soon as possible. Many of the tips from this section

133. U.S. DEP'T OF EDUC., *supra* note 132.

134. *Id.* at 23.

135. 8 U.S.C. § 1232(c)(2)(A).

136. U.S. DEP'T OF EDUC., *supra* note 132, at 23.

137. *Id.* at 26.

could be applied to the unaccompanied children in federal custody context, including: developing “short diagnostic assessments to place students immediately[,]” creating an online database for records, or putting together a “portfolio of information and samples of schoolwork” for when students transition to a new school and living situation.¹³⁸

Lastly, the guidance document provides “Tips for Promoting Supportive Discipline and a Positive School Climate for Homeless Students,” which should be applied to the ORR facility context.¹³⁹ These tips are meant to understand and assist homeless children, who “face many challenges outside the classroom,” similar to those that unaccompanied children face.¹⁴⁰ HHS’ website, rules, and statutes do not mention how unaccompanied children should be disciplined, nor the type of climate in which the children should be educated. Like homeless children, unaccompanied children arrive at school with heavy emotional baggage. Both groups of children need to feel safe and supported in their classrooms to learn.¹⁴¹ The McKinney-Vento guidance document suggests first educating teachers and staff about behaviors students might exhibit as a result of their homelessness, and what strategies can help students.¹⁴² The document then suggests informing teachers and staff of how trauma can impact the students, and how they can alleviate these impacts.¹⁴³ Most importantly, the document recommends providing students with mental health services where needed.¹⁴⁴ A guidance document borrowing from these sections of the McKinney-Vento guidance document would make great strides in improving the unclear goals, constant fluctuation, and excessive discretion that teachers and students face in ORR facilities.

2. *Fact Sheet*

In addition to a longer guidance document, a short and fast fact sheet explaining the difficulties and statistics on unaccompanied minors face would help teachers and staff at shelters and detention centers. Life at ORR facilities is hectic, and teachers likely find it difficult to even educate most days. Having a quick fact sheet to keep on hand could tone down this harried environment. Overall, the McKinney-Vento fact sheet breaks down the number of homeless youth, which subgroups of homeless youth are most at-risk, the impact of homelessness, the rights of homeless youths, and tips for supporting these students.¹⁴⁵ Shelters and detention centers and their staff need to

138. *Id.*

139. *Id.* at 34-35.

140. *Id.* at 34.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 35.

145. U.S. DEP’T OF EDUC., SUPPORTING THE SUCCESS OF HOMELESS CHILDREN AND YOUTHS: A FACT SHEET & TIPS FOR TEACHERS, PRINCIPALS, SCHOOL LEADERS, COUNSELORS, AND OTHER SCHOOL STAFF (July 27, 2016).

know the trauma unaccompanied children suffer and its effects, just as the McKinney-Vento fact sheet laid out the “significant, lasting impacts” of homelessness.¹⁴⁶ The fact sheet warns teachers and staff that homeless students are far more likely to experience school mobility, much like the unaccompanied children who spend only two months in a shelter.¹⁴⁷ The fact sheet then advises teachers and staff that this mobility interrupts a child’s education, leading to lower achievement and an increased risk of dropping out.¹⁴⁸ As mentioned above, the constant flux of unaccompanied children at shelters and detention centers can cause teachers to develop their own goals and exercise far more discretion than most teachers would need. Were teachers and staff to be given a fact sheet stating the effects of the trauma unaccompanied children suffer, they could orient themselves toward addressing the increased mobility and lower achievement rather than picking and choosing what they believe needs help.

Additionally, a fact sheet could spell out why unaccompanied children have the right to an education under HHS rules and the *Flores* settlement, similar to the McKinney-Vento fact sheet’s explanation of homeless children’s rights.¹⁴⁹ The fact sheet could include a brief breakdown of what each state allows its local educational agencies to provide, such as how Texas does not allow state-funding to go toward the shelters. Having the fast facts on what exactly is, and is not, required by law would provide teachers and staff with a baseline toward which they should educate their students.

Finally, a fact sheet could provide quick tips for supporting unaccompanied children which teachers could implement every day, no matter the constant influx and outflux of children.¹⁵⁰ The tips should focus on the five or six most important items to remember when dealing with a sensitive, variable population. Many of the tips can be borrowed from the McKinney-Vento fact sheet, including: “[c]reate a welcoming climate and build trust with all students[,]” “support homeless students[,]” and “avoid jumping to conclusions about students[,]” and “[b]e sensitive and understanding.” Avoiding jumping to conclusions would be particularly helpful in curbing the excessive discretion teachers currently exercise at shelters. Although these tips are simple and broad, they provide a clearer goal of what a teacher at an ORR facility is supposed to do than any of the information currently provided.

CONCLUSION

The administrative framework for educating unaccompanied children in federal custody is sparse, but also complex. There is very little data available,

146. *Id.* at 1.

147. *Id.*

148. *Id.*

149. *See Id.* at 2 (including students’ rights to remain in their school of origin and be immediately enrolled in a new school if it is in a student’s best interests).

150. *Id.* at 3.

and only one statute even applicable to its provision. A single agency controls this education, with private organizations assisting, but the inner workings of these partnerships are kept hidden from public knowledge. This framework brings with it unique, difficult to resolve roadblocks. From unclear goals to illogical funding schemes to a complete lack of oversight by Congress, unaccompanied children in federal custody are up against a considerable challenge, adding onto their already traumatic entry into the country.

Though the plight of unaccompanied children in federal custody is considerable, there are tangible, initial steps HHS, Congress, and advocacy groups can take to make their circumstances better. Advocacy groups must combine their expertise in immigration and education, and remember not to focus solely on the “interesting” topic of family separation. Long before and likely long after family separation, unaccompanied children faced these conditions, and they need lawyers to advocate for better conditions. Congress as well must step up and play a major role in the next year to oversee and get information out about the inner workings of ORR facilities. Finally, HHS should learn from how the McKinney-Vento Act has helped homeless children, who are as transient and traumatized as unaccompanied children. Borrowing from this act to clarify both goals and purposes will greatly improve education at ORR facilities.