"Appropriate" Education: Educating Undocumented Children in Detention

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> The inestimable toll of that deprivation on the social, economic, intellectual and psychological well-being of the individual, and the obstacle it poses to individual achievement, makes it most difficult to reconcile the cost or principle of a status-based denial of basic education with framework of equality embodied in the Equal Protection Clause.[1]

Introduction

THE SOBS AND HEAVING of distressed children fill the recording. They beg to be reunited with their "Mami" and "Papá"[2] as a Border Patrol agent callously jokes about their cries: "We have an orchestra here. What's missing is a conductor."[3] The secret recording published by ProPublica is not only a reminder of the harsh effects President Trump's 2018 "zero-tolerance" policy[4] had on undocumented children, it also intensified the call for a bipartisan effort toward reform.

The April 23, 2018 memorandum, often referred to as the "zero-tolerance" immigration policy, sought to increase "immigration viola-

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

2. Ginger Thompson, *Listen to Children Who've Just Been Separated from Their Parents at the Border*, PROPUBLICA (June 18, 2018, 3:51 PM), https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy [https://perma.cc/9RKK-DM53].

3. *Id.*

4. Memorandum from Kevin K. McAleen, Comm'r, U.S. Customs & Border Prot., to the Sec'y, on Increasing Prosecutions of Immigration Violations (Apr. 23, 2018), https://www.pogo.org/document/2018/09/april-23-2018-memo-on-family-separation/ [https://perma.cc/VNH5-CT3B] [hereinafter Family Separation Memo].

tion prosecution referrals."[5] The policy memorandum further contemplated that "DHS could also permissibly direct the separation of parents or legal guardians and minors held in immigration detention so that the parent or legal guardian can be prosecuted."[6]

The separations were condemned by Democrats and Republicans alike. Democratic Senator Jeff Merkley of Oregon deemed it a "cruel new child separation policy."[7] All the while, Republican Senator Susan Collins of Maine noted the policy's potential effects of separating children from their parents: "That's traumatizing to the children who are innocent victims, and it is contrary to our values in this country."[8]

The country watched as the separation policy was carried out. It called for undocumented immigrants to be prosecuted and their children be placed in the custody of a relative or in a shelter.[9] Those recommendations have become a reality. The policy led to the separation of over 2800 families, placing children in detention centers away from their parents.[10] Women and children were sent to one of the United States' three family detention centers: Berks Family Residential Center ("Berks") in Berks County, Pennsylvania; Karnes Residential Center ("Karnes") in Karnes City, Texas; or South Texas Family Residential Center ("Dilley") in Dilley, Texas. News of the separations in May 2018 flooded news outlets. The media questioned the conditions of these facilities and reported children being held in cages in McAllen, Texas[11] and being drugged and abused in facilities run by the Department of Health and Human Services.[12] Other reports

5. *Id.*

6. *Id.*

7. Miriam Valverde, *What You Need to Know About the Trump Administration's Zero-Tolerance Immigration Policy*, POLITIFACT (June 6, 2018, 10:38 AM), https://www.politifact.com/truth-o-meter/article/2018/jun/06/what-you-need-know-about-trump-administrations-zer/ [https://perma.cc/5T7S-9A7W].

8. *Family Separation Policy Starts Dividing Republicans*, CBS NEWS (June 18, 2018, 6:41 AM), https://www.cbsnews.com/news/family-separation-policy-starts-dividing-republicans/ [https://perma.cc/RR4D-Y2HZ].

9. Valverde, *supra* note 7.

10. Rick Jervis & Alan Gomez, *Trump Administration Has Separated Hundreds of Children from Their Migrant Families Since 2018*, USA TODAY (May 2, 2019, 10:08 AM), https://www.usatoday.com/story/news/nation/2019/05/02/border-family-separations-trump-administration-border-patrol/3563990002/ [https://perma.cc/EW4B-GFSE].

11. Amanda Arnold, *What to Know About the Detention Centers for Immigrant Children Along the U.S.–Mexico Border*, CUT (last updated June 21, 2018), https://www.thecut.com/2018/06/immigrant-children-detention-center-separated-parents.html [https://perma.cc/8EBD-LLUN].

12. *E.g.*, Exhibits in Support of Motion to Enforce Settlement (Vol. 2: Exs. 21–30, Pages 109–73, Redacted Exhibits Only), at 133–37, Flores v. Sessions, No. CV 85-4544-DMG (AGRx) (Apr. 23, 2018), ECF No. 420-2; *see also* Tara Francis Chan, *Migrant Children Say*

shared that children were being administered psychiatric medications to help them deal with anxiety and depression, and, in turn, the children became so sedated that they would fall asleep during class and could not actively participate.[13]

The mistreatment of undocumented children in detention centers is, unfortunately, nothing new and ultimately culminated into the pinnacle case *Flores v. Meese* (discussed in further detail below).[14] Filed in the United States District Court for the Central District of California in 1985, the case continues to be active and open.[15] A partial settlement agreement was eventually reached with then-Attorney General Janet Reno, which set standards for the treatment of minors in detention centers and the level of education they should receive. The agreement currently applies to the Department of Homeland Security ("DHS"), which oversees minors entering into the United States accompanied by family, and the Department of Health and Human Services' Office of Refugee Resettlement ("ORR"), which cares for unaccompanied minors.[16] Presiding Judge Dolly Gee continues to order inspections of the country's detention centers when violations are alleged.[17] These inspections have led to the closure of one detention center in New Mexico, where many immigrants' due process rights were being violated.[18] Closing a detention center, however, is not easy; the violations and conditions must be extremely egregious to garner

They've Been Forcibly Drugged, Handcuffed, and Abused in US Government Detention, BUS. INSIDER (June 21, 2018, 1:55 AM), https://www.businessinsider.com/migrant-children-forcibly-drugged-abused-in-us-government-detention-2018-6 [https://perma.cc/NQB7-6ASE].

13. *See* Dana Goldstein & Manny Fernandez, *In a Migrant Shelter Classroom, 'It's Always Like the First Day of School'*, N.Y. TIMES (July 6, 2018), https://www.nytimes.com/2018/07/06/us/immigrants-shelters-schools-border.html [https://perma.cc/MR83-J8LK].

14. *See generally* Complaint for Injunctive and Declaratory Relief, and Relief in the Nature of Mandamus, Flores v. Meese, 681 F.Supp. 665 (C.D. Cal. July 11, 1985) (No. CV-85-4544-RJK(Px)) [hereinafter *Flores* Complaint]; *see also* discussion *infra* Section I.B.4.

15. *See generally Flores* Complaint, *supra* note 14; *see also* Stipulated Settlement Agreement at Exh. 1, Flores v. Reno, No. CV-85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Agreement].

16. *Frequently Asked Questions on the Flores Agreement Settlement*, JUSTICE FOR IMMIGRANTS (last updated May 2, 2019), https://justiceforimmigrants.org/2016site/wp-content/uploads/2018/08/Flores-Agreement-Settlement-1.pdf [https://perma.cc/K4MH-26XS].

17. Miriam Jordan, *Judge Orders Swift Action to Improve Conditions for Migrant Children in Texas*, N.Y. TIMES (June 29, 2019), https://www.nytimes.com/2019/06/29/us/migrant-children-detention-texas.html [https://perma.cc/M9SZ-987E].

18. DETENTION WATCH NETWORK, EXPOSE AND CLOSE: ARTESIA FAMILY RESIDENTIAL CENTER, NEW MEXICO 4 (2014), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Artesia%20Report.pdf [https://perma.cc/G82U-5975].

any type of action.[19] Accounts provided by many women and children detained at Berks Family Detention Center in Pennsylvania, prior to the separation policy, suggest that the facility continued to violate court orders and standards, including placing women in an environment that made them vulnerable to sexual assaults by facility staff and neglecting to provide medical care to children.[20]

Despite their undocumented status, these children still have rights that are unalienable.[21] Undocumented children held in detention should, at the very least, be provided the minimum detention standards that the government itself has created.[22] One area of the *Flores* Agreement that appears to be consistently violated across all family detention centers is the level of education that children receive.[23]

The *Flores* Agreement provides not only the level of care that undocumented minors should receive in detention, but it also sets the standard for the type of education these children should receive: an "appropriate" education to each child's "level of development" and "communication skills in a structured classroom setting."[24] As will be discussed in Section II, this type of education must also follow applicable federal and state laws and adhere to relevant case precedent interpreting educational standards.[25]

Education that is not "appropriate" can take different forms. One example is placing a child with a learning disability in a classroom without the necessary resources needed to aid the child's learning.[26] Either facilities must implement the resources needed, or the detained child must attend an outside institution that has resources for teaching children with learning disabilities.[27] Another example is

19. *E.g.*, *id.*

20. *See generally* Valeria Fernández, *Despite Losing its State Child Care License—and Years of Claims of Abuses—an Immigrant Family Detention Center in Pennsylvania Made Room for More Families*, PUBLIC RADIO INT'L (last updated July 13, 2018, 2:30 PM), https://www.pri.org/stories/2018-07-13/despite-losing-its-state-child-care-license-and-years-claims-abuses-immigrant [https://perma.cc/Z2SM-XJ6P] (stating that detained women suffered from sexual assault by Berks staff and Berks was negligent in providing medical care to children).

21. *See* discussion *infra* Section II.

22. *See* discussion *infra* Section II.

23. *See infra* notes 31–34 and accompanying text.

24. *Flores* Agreement, *supra* note 15.

25. *See* discussion *infra* Section II.

26. *See* IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE FAMILY RESIDENTIAL STANDARD: EDUCATIONAL POLICY 9 (2007), https://www.ice.gov/doclib/dro/family-residential/pdf/rs_educational_policy.pdf [https://perma.cc/AW8S-NLMP] [hereinafter ICE Educational Policy].

27. *Id.* at 7–9.

placing a teenager in a classroom with much younger children and in a learning environment that is much more basic than what the teenager needs, as was the case *In re Hutto Center*,[28] where litigants used the *Flores* Agreement to challenge conditions in a Texas family detention center.[29]

Even though there are laws and cases that necessitate educating undocumented children in detention, the future of education in detention centers is dim.[30] In June of 2019, the Trump administration announced it would scale back aid intended for children held in detention.[31] Evelyn Stauffer from the ORR stated, "ORR instructed grantees to begin scaling back or discontinuing awards for activities that are not directly necessary for the protection of life and safety, including education services, legal services, and recreation . . . ."[32] Michelle Ortiz, the deputy director of Americans for Immigrant Justice, noted that "[e]ven Death Row inmates have access to educational and recreation services."[33]

This Comment focuses on the problems, applicable standards, and potential solutions for educating undocumented children while they are held in detention. Section I discusses the applicable federal laws, cases, and some notable aspects of relevant Texas and Pennsylvania state laws—all of which help to both shape the educational standards for children held in family detention centers and demonstrate what other states must do to be compliant in providing adequate and appropriate education to undocumented children. Section II offers a glimpse into the types of violations and problems experienced by children held in detention centers. Finally, Section III proposes potential solutions to help eliminate the problems and inadequacies of detention centers.

28. Complaint for Declaratory and Injunctive Relief at 19–20, *In re* Hutto Family Det. Ctr., 1:07-CV-00165-SS (W.D. Tex. Mar. 6, 2007) [hereinafter *Hutto* Complaint].

29. *See generally* Appendix in Support of Plaintiff's Motion for a Temporary Restraining Order and Plaintiff's Motion for a Preliminary Injunction, *In re* Hutto Family Det. Ctr., No. 1:07-CV-00165-SS (W.D. Tex. Mar. 6, 2007), ECF No. 2-1 (providing accounts of teenagers being placed in classrooms with younger children rather than in a learning environment that taught to their education level).

30. *See* cases and statutes cited *infra* Section I.

31. Monique O. Madan, *Trump Administration to Migrant Kids: No More Art, Soccer, Lawyers or School for You*, MIAMI HERALD (June 5, 2019, 7:31 PM), https://www.miamiherald.com/news/local/immigration/article231203923.html#storylink=cpy.

32. *Id.*

33. *Id.*

I. What is the Standard? And What Should Education in a Detention Look Like?

Regardless of the mode in which an undocumented child enters the United States, a child held in detention is afforded "appropriate" education.[34] But what constitutes "appropriate" requires an understanding of the laws and case precedents that help build this educational standard. This section discusses the federal laws, state laws, and case precedents that shape the type of "appropriate" education that children in family detention centers should receive.

A. Federal Laws at Play: EEOA and IDEA

The federal laws that help shape the level of education that children should be receiving are the Equal Educational Opportunities Act ("EEOA") and the Individuals with Disabilities Education Act ("IDEA").

The EEOA is crucial to children held in detention centers. It states that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[35] Many of the children who attend school at the detention center do not speak any English.[36] For them, the EEOA provides the opportunity to receive the benefits of an education.[37] The federal law mandates that school districts and state educational agencies ("SEA") take measures to overcome language barriers that prevent English Language Learners ("ELL") from participating equally in educational programs.[38] A school district or SEA can be found in violation of the EEOA by not providing adequate resources or by not taking appropriate action to address the needs of ELL students.[39] Examples of EEOA violations include an English as a Second Language ("ESL") program that: lacks ESL teachers, fails to

34. *Flores* Agreement *supra* note 15, at Exh. 1.

35. 20 U.S.C. § 1703(f) (2012).

36. Camilo Montoya-Galvez, *Trump Administration Nixes Educational, Recreational Activities for Migrant Children in U.S. Custody*, CBS NEWS (June 5, 2019, 9:55 PM), https://www.cbsnews.com/news/trump-administration-nixes-educational-recreational-activities-for-migrant-children-in-u-s-custody/ [https://perma.cc/YZS4-45LH].

37. *See* 20 U.S.C. § 1703(f) (2012).

38. *Types of Educational Opportunities Discrimination*, U.S. DEP'T JUST. (last updated July 28, 2017), https://www.justice.gov/crt/types-educational-opportunities-discrimination [https://perma.cc/RXR9-L2AD].

39. *Id.*

provide adequate services, or fails to provide parents of ELL students with oral or written translations of important notices or documents.[40]

Next, IDEA states that children with disabilities who are held in detention centers must also receive "free appropriate public education" under the Individuals with Disabilities Act.[41] The Act ensures that students with disabilities receive a "free appropriate public education" that is tailored to the student's special needs and will help them with future "education, employment, and independent living."[42] This means that children under the IDEA must receive an Individualized Education Plan ("IEP") that helps them grow academically and is tailored to their specific needs.[43] Ultimately, the IDEA is important for special-needs children in family detention centers because it provides them with additional resources, which their learning capacity may require.

B. Cases Shaping the Educational Standard for Undocumented Minors Held in Detention Facilities

While education is not a fundamental right as set forth in *San Antonio v. Rodriguez*,[44] there are cases that combine to create the education afforded to undocumented minors held in detention facilities.

1. *Plyler v. Doe*

Plyler v. Doe[45] is a crucial case for children in family detention centers because it held that undocumented children could not be denied education. The plaintiffs challenged a Texas statute denying educational funding for children who were not legally admitted into the United States.[46] They asserted that the statute was in violation of the Equal Protection Clause of the Fourteenth Amendment, which states that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[47] The Supreme Court found this argument persuasive and held that the Texas statute was indeed in violation of

40. *Id.*
41. 20 U.S.C. § 1400(d) (2012).
42. 20 U.S.C. § 1400(d)(1) (2012).
43. 20 U.S.C. § 1401(14) (2012).
44. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").
45. Plyler v. Doe, 457 U.S. 202, 202 (1982).
46. *Id.*
47. *Id.*

the Equal Protection Clause.[48] Despite being undocumented, the children were still "persons" under the Equal Protection Clause regardless of their status.[49] The Supreme Court also reiterated that children should not be held responsible for the conduct of their parents, and that by denying them education, the State is punishing them for a decision over which they had little control.[50] Ultimately, education is something that cannot be denied to a child—no matter their status.[51]

Plyler's importance to children in immigration detention centers is two-fold. The case protects children from being denied an education because of their immigration statuses.[52] It is a reminder that the Equal Protection Clause applies to all who enter the United States, not just those who are citizens or are legally admitted.[53] Moreover, *Plyler* echoes the sentiment that children are merely victims in an adversarial process that punishes them for something out of their control, a situation that parallels many of these children's experiences.[54] These children make the journey without a choice and are yet subject to the consequences of their parents' decisions.

2. *Board of Education v. Rowley* and *Endrew F.*

Since *Plyler* affords undocumented children the same educational opportunities as their citizen counterparts, children with disabilities who are held in family detention centers must receive the same "free appropriate public education" given to citizens, as provided by the

48. *Id.*

49. *Id.*

50. *Id.*

51. *See id.* at 203 ("The undocumented status of these children vel non does not establish a sufficient rational basis for denying them benefits that the State affords other residents. It is true that when faced with an equal protection challenge respecting a State's differential treatment of aliens, the courts must be attentive to congressional policy concerning aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the legislative record, no national policy is perceived that might justify the State in denying these children an elementary education.").

52. *See id.* at 222 ("The inestimable toll of deprivation of basic education on social, economic, intellectual and psychological well-being of the individual, and obstacle it poses to individual achievement, makes it most difficult to reconcile cost or principle of status-based denial of basic education with framework of equality embodied in equal protection clause.").

53. *See id.*

54. *See id.* at 220 ("Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.").

IDEA.[55] *Board of Education v. Rowley*[56] was the first case to interpret the IDEA. In this case, deaf student Amy Rowley's parents challenged her school's decision not to provide her a sign language interpreter as a violation of the Education for All Handicapped Children Act of 1975, which was amended and later enacted as the IDEA.[57] Amy was an exceptional lipreader with minimal residual hearing and performed above average in regular classrooms.[58] After completing kindergarten, the school created an IEP for the upcoming school.[59] Her parents agreed with part of the IEP, but also wanted a sign language interpreter during instruction.[60] The school evaluated the potential need for an interpreter.[61] It found that Amy did not need an interpreter for the first grade and that it would not provide one for the school year.[62] Her parents challenged this decision.[63] Ultimately, the Supreme Court held that the school was not obligated to provide Rowley with a sign language interpreter since she was already receiving a "free appropriate public education" with personalized instruction that allowed her to benefit from her instruction.[64]

More recently, the Supreme Court's decision in *Endrew F.*[65] provides more guidance on the interpretation of the IDEA. In *Endrew F.*, an autistic child's parents placed their son in a private school, hoping that it would provide him a better education than what was offered at the public school.[66] His parents later sought reimbursement for tui-

55. 20 U.S.C. §1400(d)(1)(A) (2012); *see also* discussion *supra* Section I.B.1 on *Plyler v. Doe*; *see also* Michael Wald, William S. Koski, Jonathan Berry-Smith, Sarah Brim, Carolyn Hite & Ray Li, *Protecting Undocumented and Vulnerable Students*, STAN. L. SCH. 6 (June 2017), https://law.stanford.edu/wp-content/uploads/2017/06/CCSA-YELP-SLS-Policy-Lab-Protecting-Undocumented-Students.pdf [https://perma.cc/Q9ND-ZDDC].

56. *See generally* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176 (1982) (interpreting the standards of the IDEA and when a child is considered to be receiving a "free appropriate public education").

57. *See Rowley*, 458 U.S. at 185; *see also History Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, U.S. OFF. SPECIAL EDUC. PROGRAMS (June 19, 2007), https://www2.ed.gov/policy/speced/leg/idea/history.html [https://perma.cc/2K2L-T97U].

58. *Rowley*, 458 U.S. at 184.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 184–85.

63. *Id.* at 185.

64. *Id.* at 189.

65. *See generally* Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) (interpreting the level of education a child with disabilities should receive under the IDEA).

66. *See Endrew F.*, 137 S. Ct. at 991.

tion under the IDEA, but their request was denied by an administrative judge, who held that the school provided a "free appropriate public education" to their son.[67] The question before the Supreme Court asked what level of educational benefit must be provided to a child with disabilities for it to be considered "free appropriate public education" under IDEA.[68] The Supreme Court provided a general approach to determine the adequacy of an education served under this Act: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[69] The Court also suggested that the IDEA considers "reasonably calculated" to include not only input from school officials, but from the child's parents as well.[70] Furthermore, the Court held that this standard is "markedly more demanding than 'merely more than *de minimis*.'"[71]

Rowley and *Endrew F.* clarify the educational standard undocumented, special needs children held in a detention should receive. The interpretation of the IDEA in *Rowley* serves as a boundary for when a child is considered to be receiving a "free appropriate public education."[72] However, *Endrew F.* benefits a child with a disability by ensuring that the child receives an education that helps him or her make academic advances that are more than *de minimis*.[73] These elements from *Endrew F.* are critical because they require detention centers to provide a level of education that demonstrates growth and progression from students with disabilities; it is not enough to provide a basic education. Additionally, an IEP requires input from both the school and the child's parents to be reasonably calculated.[74] A parent's involvement is important in creating a plan that is tailored to the child. In a detention center, where the child is placed in a new and less-than-ideal learning environment, parent input is necessary in developing the best educational plan for their child since the parent knows their child best. While *Rowley* provides a boundary to determine when an appropriate education is provided, *Endrew F.* is beneficial for children with disabilities in detention centers because it ensures that

67. *Id.* at 993.

68. *Id.*

69. *Id.* at 999.

70. *Id.* at 991–92.

71. *Id.* at 1000.

72. *See generally* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176 (1982).

73. *See Endrew F.*, 137 S. Ct. at 999.

74. *Rowley*, 458 U.S. at 176.

an education provided under IDEA is best for supporting and encouraging a child's academic progression.[75]

3. *Castaneda v. Pickard*

In *Castaneda v. Pickard*,[76] Mexican-American children brought a class-action complaint against the Raymondville, Texas Independent School District ("RISD").[77] The action asserted that RISD engaged in racial discrimination against Mexican-Americans and thus deprived them of the rights afforded to them under the 42 U.S.C §1983, the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the EEOA.[78] The EEOA affords English-language learners access to an education that will assist them in learning English and provides equal access to a school's education program.[79] Moreover, it states:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by— . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[80]

The plaintiffs specifically challenged that RISD failed to provide adequate bilingual education to overcome language barriers that hindered the plaintiffs' equal participation in the district's educational programs.[81] In determining this, the Fifth Circuit provided guidance on how to evaluate an English-language program.[82]

The Fifth Circuit created a three-prong test to determine whether an English-language program meets educational standards.[83] First, the court will examine the evidence regarding the soundness of the educational theory or principles on which the program is based.[84] Second, the court asks whether the school system's programs and practices "are reasonably calculated to implement effectively the educational theory adopted by the school."[85] In the third and final prong of the test, the court determines if the school system has implemented a sound program for alleviating barriers impeding the educational

75. *See generally id.*; *see also generally Endrew F.*, 137 S. Ct. at 988.
76. Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
77. *Id.* at 992.
78. *Id.*
79. *Id.*
80. 20 U.S.C. § 1703 (2012).
81. *Castaneda*, 648 F.2d at 992.
82. *Id.* at 1009–10.
83. *Id.* at 1009–10.
84. *Id.* at 1009.
85. *Id.* at 1010.

progress of some students and whether the school has made bona fide efforts to make the program work.[86]

The plaintiffs did not convince the court on the first or second prongs of the test, and the court found the defendants had easily met their burden.[87] The court did, however, raise concerns regarding the third prong—the implementation of the educational program.[88] The court questioned the qualifications of teachers providing ELL education.[89] The court relied on testimony provided by RISD's bilingual supervisor to assess whether the program was being properly implemented[90] and learned that the record demonstrated the inadequacy of the teachers in the program.[91] It also showed that teachers in the program taught almost exclusively in English and used Spanish, at most, one day a week; the supervisor testified that the certifying committee approved some teachers who required much more training.[92] Relying on the bilingual supervisor's testimony, the court ultimately ruled in the plaintiffs' favor and found that the school district had not implemented a program that assisted students in overcoming language barriers.[93]

The *Castaneda* three-prong test is important because it provides guidance on how a court can examine a family detention center's English-language program. The test would help in determining whether a center is making the proper efforts to help the children overcome the language barriers they experience. Many of the children in the detention center do not speak English, and it is important for them to have programs that assist them in learning the language.[94] When these programs do not exert effort in trying to overcome children's language barriers, they fail to provide children in family detention centers equal access to educational opportunities as mandated by the EEOA.

86. *Id.*
87. *Id.* at 1010–12.
88. *Id.* at 1012.
89. *Id.* at 1013.
90. *Id.* at 1012.
91. *Id.* at 1012–13.
92. *Id.*
93. *Id.* at 1013.
94. Montoya-Galvez, *supra* note 36.

4. *Flores v. Meese*: The Standards for Minors Held in Immigration Detention

Flores v. Meese is the pinnacle case in protecting children in family detention centers.[95] In 1985, fifteen-year-old Jenny Lissette Flores was arrested for entering the United States without inspection by an Immigration and Naturalization Service ("INS") officer in San Ysidro, California.[96] She fled her home country of El Salvador where a civil war was being waged.[97] Authorities placed her in a detention center in Pasadena, California.[98] Some of the problems she faced in the detention center included strip searches among adults and a lack of educational opportunities.[99] She and other plaintiffs subsequently filed a class action lawsuit in 1985 against then-Attorney General Edward Meese.[100] The third cause of action asserted that one of INS's policies and practices denied minors "appropriate materials and educational services while incarcerated."[101] Finally in 1997, after many years of litigation, the plaintiffs and succeeding-Attorney General Janet Reno stipulated to a settlement agreement.[102] The agreement bound DHS and the Department of Health and Human Services ("HHS") and is appended with exhibits that outline the conditions to which licensed centers must adhere.[103] It further lays out standards, including healthcare and education, provided to minors held in detention facilities.[104] Exhibit 1 of the *Flores* settlement titled "Minimum Standards for Licensed Programs" provides the educational standards that licensed programs must provide to detained non-citizen minors:

> Licensed programs shall comply with all applicable state child welfare laws and regulations and all state and local building, fire,

95. Flores v. Meese, No. CV-85-4544 (C.D. Cal. filed July 11, 1985).

96. *Flores* Complaint, *supra* note 14, at 5.

97. *When Migrant Children Were Detained Among Adults, Strip Searched*, NBC NEWS (July 24, 2014 6:57 AM), https://www.nbcnews.com/storyline/immigration-border-crisis/when-migrant-children-were-detained-among-adults-strip-searched-n161956 [https://perma.cc/WCZ9-QUNF].

98. *Flores* Complaint, *supra* note 14, at 5.

99. *Id.* at 9.

100. *Id.* at 1–2.

101. *Id.* at 26.

102. *See generally Flores* Agreement, *supra* note 15.

103. Immigration and Naturalization Services ("INS") was bound to the *Flores* Agreement until it was dissolved in 2003. The agreement now binds DHS and HHS. *See id.* at 6; *see also* Abbie Gruwell, *Unaccompanied Minors and the Flores Settlement Agreement: What to Know*, NAT'L CONF. ST. LEGISLATURES (Oct. 30, 2018), http://www.ncsl.org/blog/2018/10/30/unaccompanied-minors-and-the-flores-settlement-agreement-what-to-know.aspx [https://perma.cc/57U5-866X].

104. *See generally Flores* Agreement, *supra* note 15.

> health and safety codes and shall provide or arrange for the following services for each minor in its care: . . . . Educational Services appropriate to the minor's level of development, and communication skills in a structured classroom setting, Monday through Friday, which secondarily on English Language Training (ELT). The education program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas should include Science, Social Studies, Math, Reading, Writing and Physical Education. The program shall provide minors with appropriate reading materials in languages other than English for use during the minor's leisure time.[105]

The *Flores* Agreement was a win for minors held in detention. Within the context of education, the victory mandated that children, at the time and in the future, receive at least basic instruction in English-language training and core subjects.[106] Today, each detained child must also go through an educational assessment and have a plan that correlates.[107] The agreement grants children educational opportunities in hopes that they will benefit in the future and have a sense of stability while in detention.[108] Ultimately, *Flores* sets an educational standard with lasting effects and avenues for challenging those who fail to comply with it.

5. Post-*Flores*: *In re Hutto Center*

While *Flores* set the standards for detention center education, *In re Hutto Center* echoed and affirmed those standards.[109] In 2006, T. Don Hutto Residential Center ("Hutto") in Taylor, Texas was repurposed from a medium-security prison and reopened as a family detention center to hold undocumented families.[110] At the time, Hutto was only the second family detention center in the United States—Berks being the first in 2001.[111]

105. *Id.* at Exh. 1.

106. *Id.*

107. *Id.*

108. *See id.* at 7 ("The INS treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors."); *see also id.* at Exh. 1.

109. *See generally Flores* Agreement, *supra* note 15; *see also* Settlement Agreement at 1, *In re* Hutto Family Det. Ctr., No. 1:07-CV-00164-SS (W.D. Tex. Aug. 26, 2007), ECF No. 92-1 [hereinafter *Hutto* Agreement].

110. Barbara Hines, *Detention of Mothers and Children is the Wrong Approach*, UT NEWS (Sept. 4, 2014), https://news.utexas.edu/2014/09/04/detention-of-mothers-and-children-is-the-wrong-approach [https://perma.cc/X6V-RP9N].

111. Andrea Grimes, *Child Careless*, TEX. OBSERVER (Mar. 10, 2016), https://www.texasobserver.org/child-care-immigrant-family-detention/ [https://perma.cc/G72U-QJRB].

On March 6, 2007, Rasa Bunikiene filed a complaint on behalf of her nine-year-old daughter, Saule Bunikyte, both of whom were held in Hutto at the time.[112] Count XIII of the complaint asserted that the defendants failed to provide Saule with an adequate education appropriate to her development.[113] Saule was placed in an education setting that was not challenging enough given her stronger academic capabilities.[114] Her mother feared she would fall behind in school and would not be able to graduate from her then-current grade.[115] Bunikyte sought, among other remedies, an injunction to enforce the *Flores* Agreement and require the defendants to comply with the provisions as they pertained to Saule.[116] Saule's case was later consolidated with other individual actions (later referred to as *In re Hutto Center*), which sought relief from the conditions and violations that continued to take place at Hutto.[117]

Eventually, the parties in *In re Hutto Center* reached a settlement agreement.[118] The case was a success in that the agreement affirmed the standards from *Flores*, and the consolidation of the cases made Hutto's violations very clear.[119] The agreement also specifically subjected Hutto to periodic review and required the facility to improve its living conditions.[120] However, the *Hutto* Agreement did not have the blanket effect of protecting minors in the way *Flores* has had; the *Hutto* Agreement was limited to the facility itself, whereas *Flores* provides standards for all undocumented minors held in detention throughout the country.[121]

In 2009, Hutto stopped detaining children all together, and today, it only holds undocumented adult women.[122] While Hutto was

112. *Hutto* Complaint, *supra* note 28, at 1.

113. *Id.* at 27.

114. Declaration of Rasa Bunikiene, on behalf of Saule Bunikyte, *In re* Hutto Family Det. Ctr., No. 1:07-CV-00164-SS (W.D. Tex. Mar. 6, 2007), ECF No. 2-1 [hereinafter Bunikiene Declaration].

115. *Id.*

116. *Hutto* Complaint, *supra* note 28, at 29.

117. *See Hutto* Agreement, *supra* note 109.

118. *See generally id.*

119. *Id.* at 1.

120. *Id.* at 3–6.

121. *See id.* at 11.

122. *See* Terry Cook, *The Long Road to T. Don Hutto*, STATESMAN (June 28, 2018, 12:01 AM), https://www.statesman.com/news/20180628/terry-cook-the-long-road-to-t-don-hutto [https://perma.cc/5FRQ-8XJ6]; *see also* Cristina Parker, *What the Hell is Going on Inside the Hutto Detention Center?*, GRASSROOTS LEADERSHIP (Nov. 6, 2017), https://grassrootsleadership.org/blog/2017/11/what-hell-going-inside-hutto-detention-center [https://perma.cc/YZ76-XQZY].

successfully deemed unfit to detain children, family detention centers in Karnes and Dilley opened in Texas a few years later and continue to provide inadequate education to undocumented minors.[123] Transitioning Hutto from a family detention center into a women's detention center was merely a means to avoid compliance with the *Flores* standards, and because the *Hutto* Agreement was specific to Hutto itself, the opening of Karnes and Dilley placed the facilities out of the *Hutto* Agreement's reach—but luckily, not out of *Flores*'s.[124]

C. Texas and Pennsylvania State Standards for Providing Education

Family detention centers not only must follow the standards set in the *Flores* and *Hutto* Agreements, but they must also adhere to applicable Pennsylvania and Texas state laws. The education provided in the licensed programs at Dilley, Karnes, and Berks are all subject to educational standards provided by the states where they reside. State laws set the curriculum standards for the schools and the progression that children should be making in core academic subjects and in English-Language Learner ("ELL") programs.

1. Texas Standards

In accordance with the *Hutto* Agreement, detention center schools must comply with the Texas Essential Knowledge and Skills ("TEKS").[125] The TEKS is a set of standards that details what a child "should know and be able to do"[126] and is consistently reviewed by committees that ensure the curriculum is rigorous, up-to-date, and appropriate to the skills of each grade level.[127] These standards apply to all schools in the Texas school system.[128] It sets the curriculum standards for specific subjects including Language Arts, Math, Science, Social Studies, Health and Physical Education, Fine Arts, and English as a Second Language, to name a few.[129]

123. *See* Grimes, *supra* note 111.

124. *Hutto* Agreement, *supra* note 109, at 11.

125. *Id.* at 29 (referring to "Texas Educational Knowledge and Skills" statute, but the proper name of the statute is "Texas Essential Knowledge and Skills").

126. *Texas Essential Knowledge and Skills*, TEX. EDUC. AGENCY, https://tea.texas.gov/index2.aspx?id=6148 [https://perma.cc/7VAF-2ZU3] [hereinafter TEKS].

127. *TEKS Review and Revision*, TEX. EDUC. AGENCY, https://tea.texas.gov/index2.aspx?id=25769817636 [https://perma.cc/XF44-9PLJ].

128. TEKS, *supra* note 126.

129. *Id.*

The *Flores* and *Hutto* Agreements in conjunction with the TEKS augments the education children receive while in detention and strives to place them at an education level equivalent to their grade-level un-detained peers. After many years of ambiguity in interpreting "appropriate education" as set out in *Flores*, *Hutto* gave meaning to what this should look like: Children should receive an education that holds them to the same expectations as other Texas students.[130] Holding these children to the same standards will not only make the transition to other schools much easier, but a more rigorous education will better prepare them for life and the challenges that lay ahead.

A second key part to education in family detention centers is bilingual education. One of the most important Texas laws that applies to detention centers speaks to bilingual and English-language education.[131] The applicable state law states that "public schools are responsible for providing a full opportunity for all students to become competent in speaking, reading, writing, and comprehending the English language."[132] The Texas Education Code further provides that basic English skills are a prerequisite for participation in Texas's educational program.[133]

The TEKS provides the level of proficiency and progression a Texas student should obtain when placed in an ELL program.[134] Because the TEKS standards apply to detention centers via the *Flores* Agreement, children in Texas detention centers should be learning English at the same pace and adequacy as their Texas peers, given their age and level of English proficiency.[135] The TEKS's ELL standards are important because they require children reach a certain level of English proficiency,[136] a skill which will undoubtedly be to their benefit regardless of their future and additionally helps them to better streamline into American culture.

However, despite the rigorous academic standards, a crucial element of providing education and helping children overcome language barriers is the implementation of these programs. Strong standards are useless without the ability to implement them. Regard-

130. *See id.*

131. TEX. EDUC. CODE ANN. § 29.051 (West 2018); *see also* discussion *infra* Section I.D on the ICE Educational Policy and the applicability of state law to detention centers.

132. EDUC. § 29.051.

133. *Id.*

134. 19 TEX. ADMIN. CODE § 74.4 (2012).

135. *See* EDUC. § 29.051; *see also* discussion *infra* Section I.D on the ICE Educational Policy and the applicability of state law to detention centers.

136. EDUC. § 29.051.

ing bilingual education in Texas, the state statutes hold school districts accountable by admonishing non-compliance with the state standards for bilingual programs as provided in the state laws.[137] The inspecting agency will monitor nine different areas to determine whether a school district or charter school is satisfactorily in compliance: (1) program content and design; (2) program coverage; (3) identification procedures; (4) classification procedures; (5) staffing; (6) learning materials; (7) testing materials; (8) reclassification of students for either entry into regular classes conducted exclusively in English or reentry into a bilingual education or special education program; and (9) activities of the language proficiency assessment committees.[138] If a school district or charter school fails to appropriately adopt the standards passed by the Texas legislature, the school may face removal of accreditation, loss of school funds, or both.[139]

One of the weaknesses in the Texas Education Code pertaining to bilingual education is an exception for schools who cannot acquire accredited teachers.[140] The statute states that, "if a program other than bilingual education must be used in kindergarten through elementary grades, documentation for the exception must be filed with and approved by the agency."[141] The school must file an application stating that it is unable to hire a sufficient number of credentialed teachers appropriate for bilingual education.[142] The application must demonstrate: (1) the district has taken affirmative steps to acquire certified teachers but has failed;[143] (2) the district hiring policies and procedures are consistent with needs of children with limited English proficiency;[144] (3) no qualified teacher has been unjustifiably denied employment within the last twelve months;[145] and (4) there is a plan outlining how the district will remove the conditions that have created the need for the exception.[146] A granted exception lasts one year.[147]

This is a potentially problematic exception. It allows school districts that apply for the exception to operate when there are not enough certified bilingual education teachers. This places children in

137. *See* EDUC. §§ 7.102(c)(4), 28.002, 28.005, 29.051.
138. EDUC. § 29.062(b).
139. EDUC. § 29.062(e).
140. EDUC. § 29.054(a).
141. *Id.*
142. EDUC. § 29.054(b).
143. EDUC. § 29.054(b)(1).
144. EDUC. § 29.054(b)(2).
145. EDUC. § 29.054(b)(3).
146. EDUC. § 29.054(b)(4).
147. EDUC. § 29.054(c).

family detention centers at a substantial risk of not receiving an education since many do not speak English, and detention centers consistently do not have ESL-qualified teachers.[148] Without a bilingual education, the children will not be able to overcome the language barriers which the EEOA strives to break down. A year without bilingual education substantially harms children from gaining basic academic competencies and places them at a further disadvantage in their education once they are released. Ultimately, granting an exception will deny education to children in detention centers for an extended amount of time, further placing them at academic disadvantages.

2. Pennsylvania Standards

Pennsylvania's state education standards are not very different from Texas's in that they both have standards for the core subjects and ELL programs.[149] Pennsylvania has its own set of academic standards for each subject, and the state mandates that school districts provide an ELL program.[150] These standards are applicable to Berks through the *Flores* Agreement and the ICE Educational Policy (discussed later) which defer to state statutes and standards in providing educational instruction.[151]

Pennsylvania's education standards add an extra layer to ELL standards compared to Texas. The Pennsylvania Public Code states:

> Every school district shall provide a program for each student whose dominant language is not English for the purpose of facilitating the student's achievement of English proficiency and the academic standards under § 4.12 (relating to academic standards). Programs under this section shall include appropriate bilingual-bicultural or English as a second language (ESL) instruction.[152]

Pennsylvania's education standards attempt to hold true to this, and an interesting aspect in their system is that, in addition to providing standards for basic subjects and ELL programs, the educational

148. *See* Dana Goldstein & Manny Fernandez, *In a Migrant Shelter Classroom, 'It's Always Like the First Day of School'*, N.Y. TIMES (July 6, 2018), https://www.nytimes.com/2018/07/06/us/immigrants-shelters-schools-border.html [https://perma.cc/7HJV-SNUK].

149. 22 PA. CODE §§ 4.20, 4.28 (2014).

150. *See* 22 PA. CODE § 4.26.

151. *See Flores* Agreement, *supra* note 15, Exh. 1; *see also* discussion *infra* Section I.D on ICE Educational Policy.

152. 22 PA. CODE § 4.26 (2014); *see also Educating English Learners (ELs)*, PA. DEP'T EDUC. (July 1, 2017), https://www.education.pa.gov/Policy-Funding/BECS/PACode/Pages/EducatingELs.aspx [https://perma.cc/CJ3K-6KUC].

standards also provide ELL Overlay standards.[153] These ELL Overlay standards set forth an ELL student's expected proficiency levels in Math and Science, taking into account their grasp of English and their grade level.[154] These standards would likely benefit children in Berks because they provide teachers more guidance on how to teach ELL students, ways to incorporate ELL strategies, and the level of proficiency each ELL student should reach in that particular subject. Undoubtedly, as a teacher, it would be difficult to construct a lesson in a core subject and simultaneously include separate ELL standards without any guidance for how to do so. Furthermore, these regulations increase the accountability for the education provided at Berks because it gives concrete benchmarks and allows teachers to determine if their instruction is effective in reaching benchmarks while teaching subjects other than ELL. The ELL Overlay standards are an advantage for Berks children because they give additional guidance to teachers on how to provide lessons in Math and Science to ELL students and makes Berks more accountable for the proficiency of ELL students in those subjects.

D. ICE's Educational Policy for Family Detention Centers

ICE has developed its own education policy for children held in family detention centers that incorporates the applicable federal laws, case precedent, and defers to state law when applicable.[155] ICE's Educational Policy for Family Residential Standards states that "[a]ll children residing in an ICE Residential Family Facility who reach the minimum age required by applicable state law shall be provided with educational services and programming appropriate to the minor's level of development and communication skills in a structured classroom setting."[156]

Undocumented children who are detained in family detention centers are to receive an education that is suited to their educational needs.[157] To ensure each child receives the most appropriate educa-

153. *ELL Overlay*, STANDARDS ALIGNED SYS. (Sept. 24, 2019), https://www.pdesas.org/module/sas/curriculumframework/elloverlay.aspx [https://perma.cc/VS2M-5S89].

154. *See generally id.* (providing guidance and performance benchmarks for each grade with consideration to the respective subject and the student's grasp of English as a second language).

155. ICE Educational Policy, *supra* note 26, at 5.

156. *Id.*

157. *See id.* at 1.

tion, ICE's Educational Policy lays out the procedures for placing and planning the proper curriculum for the child.[158]

According to ICE's Educational Policy, children go through a comprehensive procedure to place them in the appropriate educational program.[159] Within three days of their arrival to the detention center, children must receive an educational assessment.[160] After the assessment is complete, each child is assigned to a specific grade or grade cluster based on their assessment outcomes.[161] Children attend the educational program Monday through Friday on a year-round school schedule.[162] Every day, the children receive an hour of instruction in each of the core subjects: Science, Social Studies, Math, Language Arts, and Physical Education.[163] The standards for each of these core subjects is set by the state laws, respective of each facility's location.[164]

Not only does ICE's Educational Policy provide the procedures and conditions for teaching children who are not English speakers, but the policy also gives instructions for the intake of children with special needs.[165] As previously noted, detention centers must provide "free appropriate public education" to eligible children with disabilities under IDEA.[166] After determining that a child has special needs, the IEP team works with the local education agency ("LEA"), which is responsible for furnishing special education services for a child within its jurisdiction.[167] If a child with a disability cannot be accommodated at the facility, transportation is arranged for the child to receive the accommodations they need off site.[168]

On their faces, ICE's Educational Policy, federal laws, and Texas and Pennsylvania laws create an education standard that would more than suffice the standards as set forth in *Flores*. The problem, however, is not the standards currently set, but rather the detention centers that fail to comply with these legal obligations.

158. *See id.* (providing the procedures for educational assessments for children in the family detention center including those who need accommodations for special needs).
159. *Id.* at 1–3.
160. *Id.* at 1.
161. *Id.* at 3.
162. *Id.* at 1.
163. *Id.* at 2.
164. *Id.* at 3.
165. *See generally id.* at 7–9 (stating the procedures for assessing appropriate intervention for special needs children).
166. *Id.* at 9.
167. *Id.*
168. *See id.* at 8.

II. Immigration Detention Facilities and Their Problems

Despite the concerns about Trump's stricter immigration policies, hundreds of thousands of undocumented immigrants trek to the United States border. During the 2018 fiscal year, 396,579 border apprehensions were reported, many of which were asylum seekers.[169] They hoped to escape violence, find better opportunities, and receive better education. Prior to the implementation of the "zero-tolerance" policy, the manner in which a child entered the United States determined where a child was detained.[170] If a child entered the United States with their family, that child was sent to a family detention center with their parent and any other siblings.[171] If the child entered the country unaccompanied, the child was sent to a facility run by the Office of Refugee Resettlement.[172]

The "zero-tolerance" policy changed the landscape with respect to how and where children are detained. It gave authorities the discretion to choose whether a child, entering the United States with their parent or legal guardian, should be detained separately.[173] Yet, as the country would later see, this discretion had the effect of separating thousands of children from their families.[174]

A. Types of Detention

1. Family Detention Centers

When making their journeys to the United States, families presented themselves at the border, hoping their fears about returning to their home countries were deemed credible and worthy of asylum; however, many were simply arrested for entering the United States without inspection.[175] The families were subsequently brought to a processing center.[176] Once processed, the husbands and fathers

169. Jeremy C.F. Lin et al., *Here's What We Know About Trump's Mexico Wall*, BLOOMBERG (Feb. 13, 2017), https://www.bloomberg.com/graphics/trump-mexico-wall/ [https://perma.cc/W7V4-5GLZ].

170. *See A Guide to Children Arriving at the Border: Laws, Policies and Responses*, AM. IMMIGR. COUNCIL (June 26, 2015), https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses [https://perma.cc/36RA-EGHW].

171. *Id.*

172. *Id.*

173. Family Separation Memo, *supra* note 4.

174. Jervis & Gomez, *supra* note 10.

175. *Questions & Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERV. (last updated July 15, 2015), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening [https://perma.cc/FE8V-TCFD].

176. Michael Garcia Bochenek, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells*, HUM. RTS. WATCH (Feb. 28, 2018), https://www.hrw.org/

were separated from their families and sent to detention centers across the country.[177] Women and children were sent to one of the United States' three family detention centers: Berks Family Residential Center ("Berks") in Berks County, Pennsylvania; Karnes Residential Center ("Karnes") in Karnes City, Texas; or South Texas Family Residential Center ("Dilley") in Dilley, Texas as they waited for their claims to be heard.[178] Karnes, Dilley, and Berks all provide education to detained minors in their respective facilities.[179]

Texas's family detention centers are run by private companies.[180] Dilley is run by CoreCivics, a corporation that manages correctional centers around the country, while Karnes is run by a different corrections corporation called Geo Group, Inc.[181] These centers provide charter-school educations.[182] Geo Group touts that school-age children at Karnes receive free charter-school education in classrooms equipped with state-of-the-art smart-boards, and the children go on monthly field trips.[183]

Unlike Karnes and Dilley, Berks is not a privately-run detention center, and its education program is not facilitated as or modeled af-

report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells [https://perma.cc/9FDV-NP5T].

177. *Id.*

178. Brian X. McCrone, *Inside ICE's Berks County Residential Center: Pennsylvania's Controversial Immigrant Family Detention Center*, NBC10 PHILA. (July 28, 2017, 9:12 AM), https://www.nbcphiladelphia.com/news/local/Inside-Look-at-ICE-Berks-County-Residential-Center-1-Million-Boon-for-Local-Government-437112913.html [https://perma.cc/3CVM-WCST]; *Navigating The 'Sick' and 'Horrific' Conditions in Family Detention Centers*, WNYC STUDIOS: TAKEAWAY (June 26, 2017), https://www.wnycstudios.org/podcasts/takeaway/segments/navigating-law-and-inhumane-conditions-family-detention-centers [https://perma.cc/PGH5-USRQ].

179. *See Our Locations: Karnes County Family Residential Center*, GEO GROUP INC., https://www.geogroup.com/FacilityDetail/FacilityID/58 [https://perma.cc/XJT2-JUEY] [hereinafter THE GEO GROUP, INC.]; *see also South Texas Family Residential Center*, CORECIVIC (Apr. 8, 2018), http://www.corecivic.com/facilities/south-texas-family-residential-center [https://perma.cc/9LZK-TNGM]; *see also* Peter Hall, *Immigrant Family Detention Center Puts Berks County in Eye of Political Storm*, MORNING CALL (July 7, 2018, 7:35 PM), https://www.mcall.com/news/local/mc-nws-berks-immigration-family-detention-center-20180703-story.html [https://perma.cc/2AKQ-L6AT].

180. *See* Guillermo Contreras, *ICE Opens South Texas Facility for Women, Children from Central America*, HOUS. CHRON. (July 31, 2014, 8:47 PM), https://www.houstonchronicle.com/news/houston-texas/houston/article/ICE-opens-south-Texas-facility-for-women-5661274.php [https://perma.cc/MTN3-FNAX].

181. THE GEO GROUP, INC., *supra* note 179.

182. *See* Bob Libal, *Dept. of Justice Urged to Investigate ADA Violations in Karnes Family Detention Center*, GRASSROOTS LEADERSHIP (Sept. 19, 2016), https://grassrootsleadership.org/releases/2016/09/dept-justice-urged-investigate-ada-violations-karnes-family-detention-center [https://perma.cc/5DAG-SVAB]; *see also* Contreras, *supra* note 180.

183. THE GEO GROUP, INC., *supra* note 179.

ter a charter school.[184] The state runs the educational program and contracts services through the Berks County Intermediate Unit, which provides teachers and educational services to the facility.[185] In 1971, the Pennsylvania State Legislature created Intermediate Units as a way to support the academic needs of the regions they encompass.[186] Pennsylvania currently has twenty-nine intermediate units.[187]

B. Reported Educational Challenges Faced by Children in Family Detention Centers

Life within family detention centers is closely guarded by ICE, but the people are not well taken care of.[188] Many advocacy groups and nonprofits have reported some of the educational challenges that children face in the centers.[189] Under federal law and binding settlement agreements, DHS must provide children in detention centers an education that conforms with state laws and standards on a year-round school schedule.[190] Additionally, children must go through an initial evaluation to determine their education level and educational needs.[191] This helps to determine a child's academic placement.[192] DHS must also provide ELL education and incorporate ELL when providing instruction in the core subjects listed in the *Flores* Agreement.[193] Moreover, facilities must provide resources for children with disabilities in compliance with the IDEA.[194] Federal and state laws, in conjunction with the *Flores* and *Hutto* Agreements, provide a founda-

184. Ivey DeJesus, *Wolf Administration: Only Washington Can Shut Down Berks County Immigrant Detention Center*, WHYY (July 3, 2019), https://whyy.org/articles/wolf-administration-only-washington-can-shut-down-berks-county-immigrant-detention-center/ [https://perma.cc/G49H-6JCQ].

185. McCrone, *supra* note 178.

186. Pa. Ass'n Intermediate Units (PAIU), https://www.paiu.org [https://perma.cc/YQE2-T9JV].

187. *Intermediate Unit Locations*, PAIU, https://www.paiu.org/Find-an-IU [https://perma.cc/3NNV-BMZC].

188. Olga Byrne, Hum. Rts. First, Family Detention in Berks County, Pennsylvania 1 (2015), https://www.humanrightsfirst.org/sites/default/files/HRF-Family-Det-Penn-rep-final.pdf [https://perma.cc/4SZY-ZGKE].

189. *See id.* at 10; Blake Gentry, Ama Consultants, Exclusion of Indigenous Language Speaking Immigrants in the US Immigration System, A Technical Review 41 (2015), http://www.amaconsultants.org/uploads/5638303bb62f9.pdf [https://perma.cc/2ZBT-7WYV].

190. *See Flores* Agreement, *supra* note 15, at Exh. 1.

191. *See id.* at 1–2.

192. *Id.* at 3.

193. *See Flores* Agreement, *supra* note 15, at Exh. 1.

194. *See* discussion *supra* Section I.B.2 on the *Rowley* case's interpretation of the IDEA and Section I.D on ICE's Educational Policy regarding children with disabilities.

tion for the minimum education that children in family detention centers should be receiving. However, it is clear from several different accounts that ICE and DHS do not comply with these standards, and that children are not being provided the level of education that they should be receiving, resulting in violations and adverse educational experiences that go unchecked.[195]

The most pressing education issue in the family detention centers is the inadequacy of ELL programs. Without understanding English, students are unable to comprehend the material taught in school. ICE requires that the "[t]eaching staff [be] ESL certified or enrolled in an ESL certification program."[196] However, unqualified and non-ESL teachers often teach in detention centers.[197] This issue was documented in an August 2015 report by advocacy group Human Rights First.[198] The report describes the experiences of two girls who were given assignments in English to complete, despite the fact that neither of them read or spoke English.[199] Additionally, the teacher who administered the assignment was unable to explain it to them in Spanish.[200] Since these girls were unable to understand the assignment and their instructor was unable to communicate with them, the girls did not receive any educational benefits, essentially rendering the lesson meaningless.

Additional barriers exist for children who only know indigenous languages and do not speak more common languages like Spanish or Arabic. A report prepared by Blake Gentry from AMA Consultants describes the experience of an indigenous-language-speaking child held in a now-closed Arizona detention center.[201] The child was unable to participate in the detention center's educational program for seven weeks because he could not understand any of the instruction provided to him.[202] The child did not speak English or Spanish, had no translator, and had no peers who spoke the same language.[203] Children who speak indigenous languages are at an even greater educational disadvantage because of the lack of access to interpreters. When a child cannot understand the language of instruction and has no in-

195. BYRNE, *supra* note 188, at 10; Goldstein, *supra* note 13.
196. ICE Educational Policy, *supra* note 26.
197. BYRNE, *supra* note 188, at 10.
198. *Id.*
199. *Id.*
200. *Id.*
201. GENTRY, *supra* note 189, at 41.
202. *Id.*
203. *See id.*

terpreter, they are foreclosed from any educational opportunities that could be available to them.

Another issue raised by the Human Rights First report is the fact that these schools do not adhere to a year-round school schedule.[204] An ICE officer at Berks reported that a summer reading program was not required.[205] Yet, this violates the *Flores* Agreement and ICE's own Educational Policy. ICE must provide educational instruction Monday through Friday in compliance with the *Flores* Agreement and relevant state law, not merely a summer reading program; moreover, ICE violates its own Educational Policy by failing to adhere to a respective state's year-round school schedule.[206] Therefore, a simple summer reading program is inadequate in providing education in the detention center and inadequate in meeting the requirements under both the *Flores* Agreement and ICE's Educational Policy. Additionally, a report made by Detention Watch Network noted a similar situation that the now-closed Artesia Center (located in New Mexico) did not start school until late-September, where as many of the New Mexico public schools started in mid-August.[207] By failing to provide a year-round school schedule, children in detention centers are not receiving the time they need to learn and are placed at a further disadvantage.

For older children, the education provided does not teach to their respective grade levels and is not academically rigorous. In *In Re Hutto Center*,[208] the education that nine-year-old Saul Bunikyte received was far from adequate.[209] On some days, she only received one hour of instruction in a classroom surrounded by seventy other students ranging from ages five to eleven.[210] Her brother stated that, on occasion, the teachers did not provide instruction and merely gave out packets for the students to complete.[211] In another declaration filed in the action, a nine-year-old boy named Kevin stated that no one would help him learn more and the education was inadequate; he was

204. BYRNE, *supra* note 188, at 10.

205. *Id.*

206. *Flores* Agreement, *supra* note 15, at Exh. 1; ICE Educational Policy, *supra* note 26, at 1.

207. *Expose and Close, supra* note 18, at 7.

208. *See In re* Hutto Family Det. Ctr., No. 1:07-CV-00164-SS (W.D. Tex. Mar. 6, 2007) (dismissed with prejudice Oct. 5, 2009).

209. Bunikiene Declaration, *supra* note 114.

210. *Hutto* Complaint, *supra* note 28, at 20.

211. Appendix in Support of Plaintiff's Motion for a Temporary Restraining Order and Plaintiff's Motion for a Preliminary Injunction, Exhibit H: Declaration of Egle Baubonyte, at 42–1, *In re* Hutto Det. Ctr., No. 1:07-CV-00164-SS (W.D. Tex. Mar. 6, 2007), ECF No. 2-4, 2-5.

placed at a kindergarten level that was continually learning the alphabet.[212] Older children in the detention centers are not provided educations that are congruent with their grade levels and challenge them academically.

The educational experiences of children in family detention centers demonstrate the wide range of academic problems they face. These experiences illuminate the fact that ICE and DHS are a far cry from compliance with academic standards, and the education that is provided is anything but an "appropriate" education.

1. Facilities for Unaccompanied Minors and Children Separated From Their Families

The implementation of the "zero-tolerance" policy has allowed authorities to separate parents and children and place children in separate facilities.[213] This placed separated children and unaccompanied minors into the same facilities.

Many of the child detention facilities are operated by a nonprofit organization called Southwest Key Programs.[214] Prior to the Trump administration's separation policy, the ORR contracted with the nonprofit to provide services to immigrant children who entered the United States unaccompanied by family.[215] Now, the organization also provides services to children who arrived with families but have now been separated from them.[216] The nonprofit operates the largest number of child immigration detention centers in United States, with thirty-two facilities in Texas alone as of June 25, 2018.[217] One of the nonprofit's most notable facilities is a former Walmart Supercenter in Brownsville, Texas, which is the largest child immigration detention center in the United States.[218] With an initial capacity of 1200, the

212. Appendix in Support of Plaintiff's Motion for a Temporary Restraining Order and Plaintiff's Motion for a Preliminary Injunction, Exhibit J: Declaration of Kevin Yourdkhani, at 7–9, *In re* Hutto Det. Ctr., No. 1:07-cv-00164-SS (W.D. Tex. Mar. 6, 2007), ECF No. 2-5.

213. Family Separation Memo, *supra* note 4.

214. Southwest Key Programs, https://southwestkey.org/ [https://perma.cc/3NLJ-MXGY].

215. *See* Ann Gerhart et al., *Where Are the Migrant Child Facilities? Scattered Across America*, Wash. Post (last updated June 25, 2018), https://www.washingtonpost.com/graphics/2018/national/migrant-child-shelters/?utm_term=.43a5215f0599 [https://perma.cc/72Y9-BJQY].

216. *Id.*

217. *Id.*

218. Alicia A. Caldwell, *Inside Former Texas Walmart, a Shelter for Migrant Boys*, Wall St. J. (last updated June 14, 2018, 6:06 PM), https://www.wsj.com/articles/inside-former-texas-walmart-a-shelter-for-migrant-boys-1528977659 [https://perma.cc/55RJ-KER3].

facility held almost 1500 boys ages ten to seventeen as of June 2018 and detains both unaccompanied and separated accompanied minors.[219]

Details regarding the type of instruction detained children receive is fairly limited to accounts provided by those who have spent time in the facilities that hold minors only. Yet, one school district superintendent was able to take a glimpse into an immigration detention facility's classroom and noted that the classroom lacked the basic infrastructure to provide education.[220] The Tucson Unified School District Governing Board asked its Superintendent Gabriel Trujillo to assess the district's rights and responsibilities in taking over a child immigrant facility within the school district.[221] Trujillo, who is a former ESL teacher, noted the lack of infrastructure in a Tucson facility run by Southwest Key Programs.[222] He explained:

> From an old ESL teacher's perspective, I didn't see that the classrooms were 100 percent equipped for high-quality second language instruction . . . . (That kind of class) usually features large spaces for collaborative learning. It usually features digital technology inside the classroom. You have a lot of manipulative (tools), you have a lot of flash cards to teach vocabulary, big pictorial flash cards. You have picture books and bilingual resources. I didn't see a lot of that present in those classes.[223]

The Tucson superintendent's observations shed light into the type of education that immigrant children are receiving in the shelters across the country. His perception illuminates the possibility that immigrant children detention facilities are not equipped with resources to provide sufficient ESL instruction, and thus, detention facilities are potentially failing to provide the level of education that immigrant children are entitled to, despite their immigration status.

2. Potential Solutions—Where Do We Go From Here?

Case precedent and federal and state laws set strong standards for what is "appropriate" education, and ICE and DHS are bound to them. However, these agencies continue to fail to provide education

219. *Id.*

220. Hank Stephenson, *TUSD Superintendent: Child Migrant Detention Facility Lacks Education Resources*, TUCSON.COM (Aug. 15, 2018), https://tucson.com/news/local/tusd-superintendent-child-migrant-detention-facility-lacks-educational-resources/article_6ffbee66-aadd-53e0-9339-1db4903a0a00.html [https://perma.cc/KT8H-DD67].

221. *Id.*

222. *Id.*

223. *Id.*

in detention centers, and in turn, violate these children's rights.[224] It is clear from the few collected experiences that education in the detention centers is out of compliance with applicable laws and agreements, and that children are not benefitting to the level that they should be benefitted. Yet, no matter how bleak the outlook may appear, there are potential solutions that can challenge and, hopefully, resolve the lack of educational opportunities in family detention centers.

C. Claimant Challenges

Claimants can bring actions to challenge the different types of educational violations in the family detention centers. Three potential ways a claimant can challenge the education is through the *Flores* Agreement, the EEOA, and the IDEA. First, a claimant can bring an action alleging that a detention center is in violation of *Flores*. The *Hutto* Agreement could come into play in the event that Hutto Center returned to detaining children, given that its respective settlement is only applicable to the center itself.[225] Second, a party can also specifically challenge the ELL education provided by the detention centers and assert that they are in violation of the EEOA. Finally, assuming there are instances in which a child with a disability is not provided "free appropriate public education," another potential claim can be brought by arguing that the detention center is not complying with the IDEA.

1. Enforcing *Flores* and *Hutto*

In re Hutto Center is a Post-*Flores* case challenging the level of education in detention centers and seeking an injunction to enforce the *Flores* Agreement.[226] Depending on the circumstances, a federal court would likely enjoin ICE, DHS, or the detention center's management to follow the standards if there is a demonstrated violation of the one of the agreements. However, fortifying the rights of undocumented children is a stronger solution that holds these defendants more accountable.

One solution is for the court to impose periodic, unannounced detention center inspections. This would involve hiring impartial reviewers to inspect the detention centers. Not providing notice to the

224. *E.g.*, *id.*

225. *See In re* Hutto Family Det. Ctr., No. 1:07-CV-00164-SS (W.D. Tex. Mar. 6, 2007) (dismissed with prejudice Oct. 5, 2009).

226. *See id.*

centers is important because it would prevent the centers from only staying in compliance when they know an inspection is approaching. It would essentially force them to stay in compliance regardless. Depending on the gravity of the infractions that are found, the detention center should be required to fix the problems immediately. If the infractions continue, the court should mandate that the detention center hire experts and invest resources into fixing the problem. This plan should include the experts, a potential budget, and a description of how the solution will be, and will continue to be, implemented.

While the process would be costly, it would not be a waste of judicial resources. The harm of non-compliance on the part of ICE and DHS is much graver than the costs, especially given the educational and other violations suffered by children in the detention centers.

2. ELL Challenges and the *Castaneda* Three-Prong Test

As previously stated, one of the major issues affecting education in family detention centers is the language barriers that remain despite English-learning being a priority in both ICE's Educational Policy and Texas and Pennsylvania state laws.[227] One of the ways to potentially solve this problem is bringing a cause of action that challenges the implementation of the ELL program, as was done in *Castaneda*.

Many children in the detention centers do not speak English and are not able to fully participate in their education because of the language barriers they face.[228] Bringing an ELL challenge under the EEOA would depend on the circumstances of the case. However, the accounts of children receiving education in detention centers points to an inadequacy of ESL-certified teachers and the lack of general education provided to English-language learners.[229] It is not a perfect solution because it does not address other educational issues faced in the detention centers, but it does bring one of the main adversities faced by children in detention centers to the forefront—English-language training.

As previously mentioned, the *Castaneda* test requires school programs for English-language learners to (1) be based on sound educational policy, (2) have "programs and practices" that are "reasonably

227. *See* discussion *supra* Section I regarding language barriers in detention centers.

228. *See* discussion *supra* Section II.B on problems faced by children due to language barriers.

229. BYRNE, *supra* note 188, at 10; GENTRY, *supra* note 189, at 41; Goldstein & Fernandez, *supra* note 13.

calculated" to effectively implement the school's sound educational policy, and (3) be effective in "alleviating the language barriers impeding the educational progress."[230] Bringing a challenge under *Castaneda* will be difficult. A claimant is not likely to succeed on the first and second prongs since it is easy for a defending school district to demonstrate that its educational theory was sound and reasonably calculated.[231] The third prong of the *Castaneda* test is where a claimant could bring a successful challenge. The accounts of inadequate ESL teachers in the family detention centers parallels that of *Castaneda*. If a claimant can demonstrate that the ELL teachers in the detention centers are not properly prepared or credentialed, a court could find that the detention center is not providing "appropriate" education.

3. The IDEA Challenges

Similar to raising an ELL challenge, an injured party could challenge the family detention center for not providing a "free appropriate" education to a child with a disability, as obligated by the IDEA.[232] To determine whether a child is receiving a free appropriate education, the court will ask whether a school offered an "IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[233] Here, depending on the facts, a claimant can challenge that the child's IEP was not "reasonably calculated."[234] Justice Roberts stated that the IDEA contemplates that school administrators and parents should be part of the fact-intensive evaluation in determining what is "reasonably calculated."[235] If a parent of a child in the detention center was not involved in this process, it could demonstrate that the IEP was not "reasonably calculated," and therefore, an education under the IDEA was not provided. This would be the most successful challenge under IDEA. Under the IDEA, children must also receive more than a *de minimis* education for it to be considered appropriate.[236] However, arguing that only a *de minimis* education was provided under the IDEA would be difficult for a claimant because it would require an analysis of the education over an extended period of time. The median amount of time migrant children

230. Castaneda v. Pickard, 648 F.2d 989, 1009–10 (5th Cir. 1981).
231. *E.g.*, *id.*
232. *See* discussion *infra* Section II.C.3.
233. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).
234. *See id.*
235. *Id.*
236. *Id.* at 997.

are held in detention is approximately five months.[237] Even though this is a substantial amount of time, it may not be long enough to see advances in a child's academic competencies and address the issues. The process for challenging an IEP is long;[238] and once the child is out of detention, the child no longer has standing to challenge the education since he or she is no longer suffering an injury by the center. Ultimately, the most successful way for a child with a disability to challenge the education is by asserting that their IEP was not "reasonably calculated."

D. Congressional Power to Hold ICE, DHS, and Corrections Corporations Accountable

The strongest solution for forcing DHS into compliance is for Congress to pass laws that fortify the *Flores* and *Hutto* agreements or enact the agreements into law, thus holding accountable those who are responsible for the non-compliance. Despite extensive litigation, ICE and DHS continue to abuse their power and find ways to avoid rather than solve the issues at heart and provide what families in the detention centers need. While federal agencies do not govern state education laws, ICE and DHS do operate the detention facilities. It is reasonable that they should work with education providers to ensure that the education sectors of the centers are in compliance with state laws.

With the reports from the summer of 2018, Congress needs to hold a committee hearing to gather more information on the conditions in the family detention centers and potentially hear from families who have experiences first hand. A well-informed Congress would be apt to create policies that give children in detention centers more

237. *Family Separation by the Numbers*, ACLU, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation [https://perma.cc/44ZR-BEQC].

238. *See Endrew F.*, 137 S. Ct. at 992–93 ("The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review' . . . . At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The nature of the IEP process ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue; thus, by the time any dispute reaches court, school authorities will have had the chance to bring their expertise and judgment to bear on areas of disagreement . . . . At that point, a reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.").

protection and a better quality of life, including better education. A hearing would make clear that these children are merely victims and suffer the consequences of the adversarial system by no fault of their own. It will also bring to light the education standards that ICE knows it should be held to, but still chooses to not comply with. With all of these facts in mind, Congress would be able to tailor a piece of legislation that gives children more protection and better conditions.

Timing would be crucial in passing a bill that enacts the *Flores* and *Hutto* agreements into law. Under the Trump Administration, passing a law like this would be difficult, considering the Administration's stance on immigration. President Trump would likely veto such a bill. Even if he does veto the bill and it returns to Congress, it would still be difficult to override the veto since it requires a two-thirds majority from both the House and Senate. Strategically, it would be best to bring the bill under a more liberal president in office because the likelihood of it passing would be greater.

Ultimately, given how non-compliant DHS and ICE have been in following the settlement agreements and federal laws, passing legislation is the strongest solution. An enacted law would protect children and give them a better quality of life that includes education. It would also hold accountable those responsible for non-compliance in detention centers. It would be difficult to pass legislation, but the long-term effects would be immense in protecting children in detention.

Conclusion

The emotional, physical, financial, and moral repercussions of these separations will be long lasting. Providing the education that migrant children are entitled to in detention is the very least the United States can do to mitigate the worst of these effects. Despite laws and case precedent affording migrant children in detention educational opportunities, ICE and DHS continue to provide a level of education that is inadequate. Moreover, the Trump administration continues to maintain their stance in ceasing to fund educational services for migrant children in detention. Without appropriate education, not only are migrant children placed at a grave disadvantage, but we, as a country, are as well. *Plyler* states it perfectly:

> The deprivation of public education is not like the deprivation of some other governmental benefit. Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage; the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psy-

> chological well-being of the individual, and poses an obstacle to individual achievement.[239]

Regardless of the Trump administration's actions to defund educational services, migrant children have rights that protect their educational opportunities and make them entitled to, at the very least, an "appropriate" education.

239. Plyler v. Doe, 457 U.S. 202, 202–03 (1982).