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January 25, 2019

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Secretary DeVos:

I write in follow-up to the letter from the Deputy Secretary of Education dated December 21, 2018, responding to our letter of June 28, 2018, and to request additional legal analysis regarding states' obligations to children with disabilities in the custody of the Department of Homeland Security's U.S. Immigration and Customs Enforcement (ICE) or the Department of Health and Human Services' (HHS) Office of Refugee Resettlement (ORR). These children include alien children who have arrived at the border alone and children who have been separated from their families at the border and have been placed into a care provider facility under contract or cooperative agreement with ORR.

Under federal law, children may not be denied public educational services based on their immigration status. Specifically, the Supreme Court has held that the equal protection clause of the Fourteenth Amendment prohibits states from discriminating between aliens and United States citizens with respect to access to public elementary education. *See Plyler v. Doe*, 457 U.S. 202, 226 (1982). Furthermore, the 1997 settlement agreement in the federal *Flores v. Reno* litigation requires ORR care provider facilities to provide or arrange for (a) an individualized needs assessment for each child in their care, including "an educational assessment and plan," and (b) educational services appropriate to the child's level of development and communication skills, which concentrate primarily on the development of basic academic competencies. *See Flores v. Reno*, No. 85-4544, Exhibit 1, No.3 (C.D. Cal. Jan. 17, 1997) (Stipulated Settlement Agreement).

I am particularly interested in the education of children with disabilities. The Individuals with Disabilities Education Act (IDEA) is intended to "ensure all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living," and "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(A), (B). To achieve its intended purposes, the IDEA requires, among other things, that each state receiving IDEA funds

provide assurances to the Secretary of Education that the state has in effect policies and procedures to ensure that:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services. 20 U.S.C. § 1412(a)(3)(A) (emphasis added).

This “child find” requirement is also described in the Department of Education’s regulations. See 34 C.F.R. § 300.111(a)(1)(i) (2018). Further, the regulations specify that child find activities must include “[h]ighly mobile children, including migrant children.” 34 C.F.R. § 300.111(c)(2) (2018). In addition, under Part B of the IDEA, states are required to ensure that a “free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21.” 20 U.S.C. § 1412(a)(1)(A) (emphasis added).

In the December 21, 2018 letter that the Department sent in response to our June 28, 2018 letter, the Deputy Secretary of Education stated that “a state has no obligations related to child find or the provision of special education and related services under the IDEA for unaccompanied minors residing in HHS or other Federal residential facilities.” This conclusion is consistent with the Department’s earlier expressed view that states are not required to conduct child find under IDEA for children housed in ICE residential family facilities. Specifically, in prior letters sent to individual state educational agencies, the Department has stated that, “absent any other applicable law, the State has no child find obligations under the IDEA for children residing in ICE’s residential facility. This is similar to a State’s responsibility for children with disabilities in Federal prisons.” (Letter from the Office of Special Education Programs to the Texas Education Agency, Dec. 21, 2007).¹ Further, the Department has also expressed the opinion that states have no obligation to provide educational services to children with disabilities who are incarcerated in federal prison.² (Letter from the Office of Special Education Programs to the District of Columbia Superintendent of Education, Mar. 2, 2011). Thus, we seek written responses to the below questions:

1. In these letters, the Department has repeatedly noted that the IDEA makes no specific provision for funding child find or educational services for children with disabilities who are incarcerated in federal prison or “through” ICE, the Department of Homeland Security, HHS, or its contracted facilities. While this may be a relevant consideration, it

¹ The Department reiterated this position in 2008 (Letter from the Office of Special Education Programs to the Texas Education Agency, Apr. 22, 2008).

² By contrast, the Department has concluded that states are responsible for ensuring compliance with the IDEA, including child find, with respect to children with disabilities who are incarcerated in state prison, subject to certain statutory exceptions. (Letter from the Office of Special Education Programs to the Vermont Department of Education, Aug. 19, 2003).

is not clear to us, though it appears to be clear to the Department, that this fact alone compels a conclusion that the states and school districts where these children are physically located have no child find obligations under the IDEA. Notably, these letters offer no additional explanation for the Department's conclusion that states have no obligation to conduct child find or provide educational services to children with disabilities in federal custody. Rather, the Department's December 21, 2018 letter states that "[t]he provisions of the IDEA, including the child find provisions, apply to each state that receives Federal funds under Part B of the IDEA, public agencies within a state that are involved in the education of children with disabilities, and any public agency in a state that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B." The letter further states, with respect to unaccompanied minors residing in HHS or other Federal residential facilities, that "[g]enerally, those facilities, and not the local school district, are responsible for providing education services to unaccompanied minors, including children with disabilities." Please elaborate on the Department's conclusion, with respect to children in federal custody, that states where these children are physically located have no child find obligations under the IDEA, including how case law supports the Department's interpretation or may be distinguished.

2. Please explain the Department's view as to whether children held in ORR custody are "residing in the state" where the care provider facility is located for purposes of IDEA child find, ensuring that your response fully addresses each the following questions.
 - a) How does the Department interpret the phrase "residing in the state" for purposes of states' IDEA child find obligations?
 - b) Federal courts have varied in the extent to which they consider state residency laws in determining whether a child is "residing in the state" for purposes of the IDEA. To what extent does the Department consider state residency laws to be (a) a factor, or (b) dispositive with respect to the determination of whether the child is "residing in the state," such that states' child find obligations under the IDEA could differ significantly from state to state?
 - c) The Department has previously expressed the opinion that "[g]enerally, where the student is not emancipated or of the age of majority, residency is determined by the State in which the parent or guardian resides or the State that has designated the youth as a ward of the State." (Letter from the Office of Special Education Programs to the Vermont Department of Education, Aug. 19, 2003). How, if at all, does Education apply this approach to children with disabilities held in ORR custody? Specifically, please clarify how this approach is applied to such children in a variety of circumstances, including those whose parents or guardians are in federal custody, reside in a state and are not in federal custody, and are located outside of the United States.

d) In *Board of Education v. Rowley*, the Supreme Court observed:

In order to qualify for federal financial assistance under the Act [the predecessor to the IDEA], a State must demonstrate that it ‘has in effect a policy that assures all handicapped children the right to a free appropriate public education.’ That policy must be reflected in a state plan submitted to and approved by the Secretary of Education, which describes in detail the goals, programs, and timetables under which the State intends to educate handicapped children within its borders. 458 U.S. 176, 180-81 (1982) (emphasis added; internal citations and footnote omitted).

At least two district court cases have also found, citing *Rowley*, that states have an obligation to provide a free public education to all children with disabilities within the state’s borders, regardless of the child’s legal domicile or state residency status. See *Rabinowitz v. N.J. State Bd. of Educ.*, 550 F. Supp. 481, 486 (D.N.J. 1982); *Sonya C. v. Ariz. Sch. for Deaf & Blind*, 743 F. Supp. 700, 711-12 (D. Ariz. 1990). To the extent the Department’s view does not reflect the holdings in these cases, please describe how the Department reconciles its interpretation of “residing in the state” with these cases.

3. How, if at all, does the fact that a child with disabilities is in federal custody affect a state’s otherwise existing child find obligation under the IDEA with respect to that child? Please specifically explain your reasoning, making sure to address the following questions.

- a) The IDEA provides that, “when a child with a disability reaches the age of majority under State law,” the state may transfer all rights afforded to parents under Part B of the IDEA to the child, including children who are incarcerated in “an adult or juvenile Federal, State, or local correctional institution.” 20 U.S.C. § 1415(m)(1)(D). This language suggests that the provisions of the IDEA apply to children in federal prisons. However, the letters cited above (as well as the Department’s regulations)³ suggest that the Department’s position is that states have no child find or other IDEA responsibilities for children with disabilities in federal prisons. Please describe how the Department reconciles its interpretation that states do not have child find responsibilities under the IDEA with the language of 20 U.S.C. § 1415(m)(1)(D).
- b) To what extent does the Department consider states’ child find responsibilities for children in ORR custody to be the same as states’ child find responsibilities for children in federal prison? Please explain your reasoning.

³ The Department stated in a proposed rule that “[w]ith regard to the permissive transfer of rights to individuals who are in correctional institutions, we would not include the reference, from the statute, to Federal correctional institutions, as States do not have an obligation to provide special education and related services under the Act to individuals in Federal facilities.” 70 Fed. Reg. 35,782, 35,810 (June 21, 2005).

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4. With respect to each of the questions above, please explain how, if at all, the Department's responses and supporting analysis would change for children who remain in the custody of ICE or another federal immigration agency, and who are not transferred to ORR custody.⁴

Thank you for your immediate attention to these questions. I look forward to your prompt and detailed response by February 22, 2019.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman

⁴ Although the *Flores* settlement agreement generally requires the release of children from federal immigration custody "without unnecessary delay," there may be circumstances where such a release is not appropriate. Further, the *Flores* settlement agreement is currently the subject of ongoing litigation. See *Flores v. Reno*, No. 85-4544 (C.D. Cal. Sept. 6, 2018) (notice of appeal).