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July 2, 2019

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

Dear Secretary DeVos,

This letter is in response to the Department of Education's (ED) April 9, 2019 letter from Assistant Secretary Johnny Collett in which he stated that the "Department's longstanding position is that Part B of the Individuals with Disabilities Education Act (IDEA) places no obligations on states and school districts to conduct child find and provide special education and related services to children with disabilities in the custody of federal agencies."[1] As laid out both below and in the attached memorandum from the Congressional Research Service (CRS), ED's conclusion is unsupported by both the case law and the legislative history of IDEA.

As you know, IDEA requires states to provide a free appropriate public education (FAPE) to "all children with disabilities residing in the state" in order to receive program funds.[2] The "child find" provision of IDEA requires that states create policies to identify, locate, and evaluate all children with disabilities residing within the state.[3]

Federal Courts Have Ruled that IDEA applies to migrant children and under *Plyler v. Doe*, it is indisputable that immigrant children are entitled to access to public education and therefore are subject to IDEA's child find and FAPE requirements.[4] Although ED does not dispute that once ORR releases these children into the local community that these requirements apply, it maintains that the condition of an immigrant child in the custody of a federal agency relieves States from compliance with child find or FAPE requirements. ED's rationale is that if Congress had

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[1] April 9, 2019 Department of Education Letter from Assistant Secretary Collett
[2] 20 U.S.C. §1412(a)(1)(IDEA guarantees FAPE to children between 3 and 21 years old.)
[3] 20 U.S.C. §1412(a)(3)
[4] *See* 457 US 202, 226 (1982).

intended for these requirements to apply in this situation, Congress would have expressly amended the statute to do so.

While it is true that IDEA does not explicitly contemplate the Executive branch's responsibilities to children with disabilities after separating those children from their families, that does not mean that child find requirements do not apply to unaccompanied minors with disabilities who are held in federal custody.[5]

The leading Supreme Court opinion on this issue, *Board of Education v. Rowley,* makes clear a state has IDEA obligations to all children with disabilities residing "within its borders."[6] Two other Federal courts have repeatedly clarified that the residency language applies to any child who has a physical presence within the state's borders.[7] In *Rabinowtiz v. New Jersey State Board of Education* for instance, the court found that IDEA's obligations "could not have been more clearly expressed: if states are to accept funding under the Act, then they have an obligation to educate the handicapped children 'within their borders.'"[8]

ED's interpretation of IDEA strays from precedent in its April 9 letter, as ED contends that the child find requirement does not apply to minors with disabilities who are currently in the custody of either the Department of Health and Human Services' Office of Refugee Resettlement (ORR) or the Department of Homeland Security (DHS). According to ORR, "children spend fewer than 45 days on average at the shelters and do not integrate into the local community" and "will not be enrolled in the local school systems."[9] ED asserts that the statute makes no mention of state responsibility for children under the custody of a federal agency, including both ORR and DHS. While this position may represent longstanding ED policy, it is misguided and flawed.[10]

ED also claims that the above-mentioned cases do not address children with disabilities who are held by federal agencies and that they are rendered moot because of Congress's addition of the residency language to the FAPE requirement in 1997. However, ED's statutory interpretation is flawed given that the residency language in the child find section, which was addressed in the

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[5] ED also states that IDEA is Spending Clause legislation and that while any requirements on states must be "clear and unambiguous," and there is no specific IDEA provision that applies here. This holds true only if these children are not already covered by IDEA. *Rabinowitz* however makes clear that states have a clear and unambiguous duty when it comes to those who have a physical presence within their borders. And as explained above, the holding in *Rabinowitz* clearly applies to immigrant children in federal custody.

[6] 458 US 176, 181 (1982).

[7] See *Rabinowitz v. New Jersey State Board of Education* and *Sonya C. v. Arizona School for Deaf & Blind*

[8] See e.g. *Rabinowitz* 550 F. Supp. 481 at 489 (D.N.J. 1982).

[9] https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-frequently-asked-questions[10] ED also makes note of the Stipulated Settlement Agreement in *Flores v. Reno* which it says places the responsibility of immigrant children with disabilities in custody with INS. ED's view is that this agreement states that ICE is responsible for assessing if these children "have special needs." And while it is true that other federal agencies may also have responsibilities when it comes to immigrant children with disabilities, that on its own does not relieve states of their IDEA obligations.

[10] ED also makes note of the Stipulated Settlement Agreement in *Flores v. Reno* which it says places the responsibility of immigrant children with disabilities in custody with INS. ED's view is that this agreement states that ICE is responsible for assessing if these children "have special needs." And while it is true that other federal agencies may also have responsibilities when it comes to immigrant children with disabilities, that on its own does not relieve states of their IDEA obligations.

*Rowley* case, was not changed in 1997. More directly, the addition of the residency language to section (a)(1)(A) of the statute has no bearing on the interpretation of the child find provision.[11]

With regard to ED's assertion that the federal custody of migrant children inoculates states from child find responsibilities, this argument ignores what the Supreme Court has decided, and lower courts have reiterated. Namely, physical location, not legal custody, is the relevant condition triggering a state's obligations under IDEA. If a child is within a state's borders, IDEA imposes child find responsibilities on the state. The fact that neither of the district court cases specifically address children with disabilities who are held by a federal agency is irrelevant.

In contrast, ED believes this situation is akin to when a child with a disability is held in a federal prison, where ED similarly asserts that states are free of IDEA obligations.[12] While this represents a longstanding ED opinion, the Court in *Brown v. District of Columbia* explicitly rejected this argument.[13]

In *Brown,* while both the Bureau of Prisons (BOP) and the District of Columbia (DC) argued that they had no responsibility to provide the plaintiff with a FAPE while he was in federal custody, the federal court rejected this contention.[14] The Court indicated that while BOP had no obligation to provide a FAPE to an inmate in their custody, states "are regularly required to provide FAPEs to students who are being educated in schools under the jurisdiction of a different sovereign."[15] This opinion clarifies that as long as the plaintiff was residing in Washington, DC, then IDEA obligates Washington, DC to provide a FAPE.[16] The District Court further found that ED's position "contradicts the plain text of the IDEA."[17]

While the Court did limit the holding of this case to the circumstances in question, the analysis in *Brown* explicitly undermines ED's position.[18] ED's argument is premised on the analogy that children with disabilities held by ORR and DHS are the equivalent of those who are held in a federal prison. If children with disabilities in a federal prison are still subject to child find

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[11] *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 239 (2009) (The 1997 "Amendments preserved the Act's purpose of providing a FAPE to *all* children with disabilities.") (emphasis added).

[12] Federal prisoners are often considered as residents of the state in which they are imprisoned. *See e.g.* https://www.census.gov/newsroom/press-releases/2018/residence-criteria.html.

[13] *Brown v. District of Columbia,* 324 F. Supp. 3d 154 (D.D.C. 2018).

[14] In its April letter ED stated that if Congress had intended another federal agency to have received IDEA funds, it would have done so explicitly as it did so with the Department of Interior. The question here however, is not whether the federal agency in question has IDEA responsibilities but whether the state continues to have child find obligations even when an immigrant child is held in federal custody.

[15] *Brown Report and Recommendation*, 2018 U.S. Dist. LEXIS 24300, at *38.

[16] Id.

[17] Brown, 324 F. Supp. at 161.

[18] *Brown* chose not to decide "whether states are, under all circumstances, obligated to provide a FAPE to resident children even when they are held in federal custody." Id. at 160. While the district court did not resolve the broader question, it did adopt the magistrate judge's rationale regarding ED's position in its entirety and noted the "considerable force" of its reasoning.

requirements, then it would follow that these requirements also apply children with disabilities held by ORR and DHS.[19]

One final point raised by both *Brown* and the CRS memo is that there are "valid pragmatic challenges" States may face undertaking their obligations under IDEA in this scenario.[20] However, the fact that implementation is complicated or presents challenges does not absolve States adherence the law.[21] *Brown* further noted that these challenges, "have no bearing on the correct interpretation of IDEA."[22] Moreover, in its April letter, ED itself admitted that there is nothing that would prevent States and Federal agencies from entering into voluntary agreements to conduct child find. It would follow that if ED believes such agreements are feasible, they do not view these potential challenges as impractical or unworkable. Indeed, States and local school districts often work with all different kinds of institutions to ensure that they fulfill their IDEA obligations. Finally, ED also made no mention of any potential implementation issues in its April letter.

*Brown* further suggests that a state could be forced to provide compensatory education services as a form of relief for failing to uphold their responsibilities.[23] If a state is forced to wait until immigrant children with disabilities are released into the local community then the amount of those compensatory education services is likely to be significantly higher. These children may very well also have a cause of action against the states for failing to uphold their IDEA obligations.[24]

Conditions in these facilities have been referred to as "torture facilities" and "worse than jail."[25] Other reports have indicated that, "flu and lice outbreaks were going untreated, and children were filthy, sleeping on cold floors, and taking care of one another because of the lack of attention from guards."[26] While its unthinkable that any children would be subject to these horrendous conditions, this sort of inhumane treatment is likely to have a particularly devastating impact on children with disabilities. Based on the case law and legislative history discussed above I believe that the child find requirement does apply to minors with disabilities who are currently in the custody of ORR and DHS. I accordingly ask that ED provide a response to this letter and the attached memo from CRS no later than July 16, 2019.

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[19] It is also clear that *REG v. Fort Bragg Dependent Schools* is not applicable in this situation as it was premised upon the question as to whether a federal agency is required to provide a FAPE to a student with a disability.
[20] *Brown*, 324 F. Supp. at 162.
[21] See *Goldring v. District of Columbia*, 416 F.3d 70, 77 (D.C. Cir. 2005) ("[T]his line of argument — based on considerations of public policy rather than statutory integration — is, in our view, addressed to the wrong branch of government under our constitutional design…Our job is to interpret the law as it is, not as it should be.").
[22] *Brown*, 324 F. Supp. at 162.
[23] *Id.* at 161.
[24] *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 244 (2009) ("A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.").
[25] https://abcnews.go.com/Politics/doctor-compares-conditions-immigrant-holding-centers-torture-facilities/story?id=63879031&cid=social_twitter_abcn
[26] https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children. *See also* https://apnews.com/46da2dbe04f54adbb875cfbc06bbc615.

Thank you in advance for your attention to this matter. If you have any questions regarding this request, please contact Kia Hamadanchy at (202) 225-3725.

Sincerely,

**ROBERT C. "BOBBY" SCOTT**
Chairman