

# KIND BLUEPRINT

CONCRETE STEPS TO PROTECT  
UNACCOMPANIED CHILDREN ON  
THE MOVE

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## Executive Summary

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KIND's Blueprint for the protection of unaccompanied children provides guidance on how the U.S. government should uphold its responsibility to treat these children humanely and in accordance with the law and this country's ideals. Their unique vulnerabilities require a legal and policy framework that provides enhanced procedural safeguards and protection mechanisms essential to helping unaccompanied children overcome daunting obstacles to relief.

This resource provides an administrative blueprint for establishing those safeguards and mechanisms and for best protecting children at every stage of their migration journey. It outlines a comprehensive set of policy recommendations, spanning a range of federal agencies and issue areas. KIND's recommendations are grounded in over a decade of experience working directly with thousands of unaccompanied children and in our vision for a world in which children's rights and well-being are protected as they migrate alone in search of safety.

### Protection for Unaccompanied Children

**The U.S. government should ensure that all unaccompanied children in immigration proceedings have attorneys.** Legal counsel is essential to ensuring due process for unaccompanied children. It is virtually impossible for children to navigate the U.S. immigration system alone. The U.S. government must support and take robust measures to maximize funding for children's counsel and postpone children's immigration court hearings until they obtain lawyers.

**The U.S. government should adopt a fundamentally humanitarian approach at the U.S.-Mexico border that recognizes unaccompanied children's need for protection and ensures their appropriate reception, screening, and care.** This includes ending the CDC order barring the entry of unaccompanied children and asylum seekers; adhering to all Trafficking Victims Protection Reauthorization Act requirements; enlisting humanitarian and child welfare experts at the border; and ending all measures that needlessly restrict children's access to humanitarian protection at the border.

**The U.S. government should establish a senior position in the White House dedicated to ensuring that all relevant government components uphold the safety, well-being, and access to legal protection of unaccompanied and refugee children.** Among other things, this position would help ensure that the Office of Refugee Resettlement (ORR) operates with necessary independence from law enforcement components.

**ORR should strengthen care and custody of unaccompanied children by fully anchoring its policies and practices in the best interests of the child. Towards this end, the August 2019 final rule that eviscerates Flores Settlement Agreement protections and standards must be rescinded and replace it with a rule that upholds and strengthens those protections and standards.** The Department of Health and Human Services should also end unwarranted information sharing with the Department of Homeland Security and the immigration courts; maximize placement in smaller-scale facilities and transitional and long-term foster care while prioritizing community and family-based care broadly; and enhance monitoring of ORR facilities to ensure compliance with federal, state, and local standards.

**The U.S. government should improve fairness in adjudications of unaccompanied children's cases by reinstating judicial independence to ensure a child's case can be efficiently and fairly considered and that the best interest of the child is a primary consideration in adjudications and case management.** The administration should also establish a special corps of immigration judges and adjudicators guided by unaccompanied children's best interests and trained in trauma-informed techniques. Additionally, guidance should



be provided clarifying that TVPRA protections and procedures apply to unaccompanied children for the duration of their cases.

**When immigration relief is not granted or when children choose to return to their countries of origin and return is in their best interests, the U.S. government must ensure that children return safely. Children should also receive comprehensive reintegration services to help them upon arrival and for a period of time following their return.** Children who are provided modest assistance are much more likely to be able to remain home safely and sustainably and are significantly less likely to re-migrate.

**DHS should immediately halt all parent-child and guardian-child separations.** In the exceptional case where separation is deemed necessary due to child welfare concerns, a child welfare professional should be responsible for determining its necessity before separation occurs. The U.S. government should also provide an independent process for challenging such separations and for promptly reunifying families who had previously been separated by the government.

**The U.S. government should ensure that unaccompanied children's legal rights and safety are fully upheld during the COVID-19 pandemic.** For the duration of the pandemic, immigration proceedings for unaccompanied children should be postponed, unless otherwise requested by the child's attorney and is in the child's best interests. Deportations of unaccompanied children should also be paused. Voluntary Departures should be carried out only if requested by the child's attorney and if child welfare experts have determined it to be in the child's best interests.

### **Protecting Children Beyond U.S. Borders**

**The U.S. government should prioritize foreign assistance to Central America and invest in programs to address the root causes of migration to ensure that fewer children feel compelled to flee their countries to seek safety.** Unaccompanied children who come to the United States are most often fleeing gender-based, gang, and familial violence. The United States should provide substantial long-term development assistance to local civil society organizations that address these issues, particularly for gender equality and community-based violence prevention programming, and for capacity building for national child welfare and protection systems.

**New and expanded refugee processing and resettlement programs are needed in Central America to provide safe, legal alternatives for children in need of international protection.** These programs can prevent the need for dangerous migration journeys by enabling children to apply for refugee protection in their home country or nearby countries. To be effective, programs must expand their scope and eligibility, ensure that children have legal assistance, and incorporate best interests standards in their processes.

**The U.S. government should focus diplomacy and foreign assistance on strengthening Mexico's capacity to protect migrants and receive asylum seekers, particularly children, families, and other vulnerable groups.** Children who travel through Mexico or seek to remain there are faced with a system with little capacity, resources, or infrastructure to ensure their safety. Many are never informed of their right to ask for protection in Mexico and some are denied access to the asylum system; others are detained throughout their adjudication in substandard facilities.

**The United States government must develop a whole-of-government strategy to respond to and prevent gender-based violence and serve survivors at all levels of government.** While gender-based violence (GBV) is one of the leading drivers of child migration, its prevalence and severity among migrant children is not well known by many U.S. government officials. Any strategy must include specific recommendations and actions for U.S. agencies and staff who work with unaccompanied children and child survivors of GBV, including guidelines and trainings for how to better serve their protection needs.





# Protecting Unaccompanied Children on the Move

Unaccompanied children, many of whom have fled life-threatening danger, are among the world's most vulnerable groups.

**Here is what we need to do to ensure their protection:**



## In Countries of Origin



- Address the Root Causes of Child Migration Through U.S. Foreign Policy
- Expand Refugee Processing in Latin America

## In Transit



- Improve Protections for Migrant Children in Mexico
- Ensure Proper Screening and Care of Children at the U.S.-Mexico Border

## In U.S. Custody



- Strengthen ORR Care and Custody of Unaccompanied Children
- End Parent-Child Separations and Promote Family Unity

## In Court



- Fairly Adjudicate Unaccompanied Children's Cases
- Ensure Legal Representation of Unaccompanied Children

## In Their Destination



- Assist Unaccompanied Children with Integration into the U.S.
- Ensure Safe Returns and Successful Reintegration to Countries of Origin

## At Every Stage



- Advance a Whole-of-Government Strategy on Gender-Based Violence Prevention and Response that Includes Migrant Children
- Ensure Unaccompanied Children's Health and Legal Rights During the COVID-19 Pandemic

## Introduction

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Unaccompanied migrant children are among the world’s most vulnerable individuals. They have traveled hundreds or thousands of miles to the United States, often completely on their own, to escape extreme violence, sexual abuse, human trafficking, and other dangers. Many of these children have fled northern Central America, a region gripped by humanitarian crises. With no protection in their countries of origin, children are forced to make a dangerous journey, and if they arrive to the United States, are immediately thrust into a complicated and protracted legal system. Often alone, these children face daunting obstacles in navigating the U.S. immigration system and obtaining potentially life-saving legal protection.

The vulnerabilities of these children demand a unique legal and policy framework—one affording them enhanced procedural safeguards and protection mechanisms. Regardless of their immigration status, these children need to be afforded all the protections and considerations granted in international and domestic law for every child. Congress recognized this obligation, and laid a foundation of such a framework, by unanimously passing the Trafficking Victims Protection Reauthorization Act of 2008.<sup>1</sup> The TVPRA codified heightened legal procedures designed to uphold fairness for unaccompanied children in the U.S. immigration system and to prevent their return to danger. Complementary laws and standards, including the Flores Settlement Agreement,<sup>2</sup> give further voice to the United States’ responsibility to treat children humanely.

The present resource furnishes an administrative blueprint for meeting that responsibility. The recommendations included in this blueprint address what is needed to protect children at every stage of their migration journey: addressing the root causes of migration, how to safely receive and screen a child, and even how to integrate them in to the community in which they will ultimately reside. It outlines a set of policy recommendations, spanning a range of relevant issue areas and federal agencies, whose adoption by the executive branch is essential for building toward a domestic and regional system commensurate with migrant children’s protection needs. If realized, the vision set forth would help ensure that every child’s rights and well-being are protected throughout their journey to safety.

Under this blueprint, effectively targeted developmental assistance to Central America would decrease the number of children forced to migrate. Refugee processing programs would offer at-risk children in the region alternatives to the dangerous trek north and assistance to Mexico would help ensure children are better protected en route. The U.S. government’s appropriate screening and care of unaccompanied children who flee to the United States, full legal representation of such children in immigration proceedings, and fair case adjudications, would help ensure that children in need of and eligible for humanitarian relief obtain it. Those children who return to their countries of origin would be reintegrated safely. Those children with a path forward in the United States would receive support services fostering their fullest contributions to the nation.

Informing this blueprint is Kids in Need of Defense (KIND)’s on-the-ground presence domestically and abroad. As the United States’ leading organization dedicated to ensuring that no child faces immigration court without an attorney, KIND has served over 20,000 unaccompanied children in U.S. immigration proceedings and trained more than 50,000 participants in pro bono representation. The organization’s social services program facilitates the coordinated provision to unaccompanied children of counseling, educational support, medical care, and other services. And KIND programs in Mexico and Central America work to address the root causes of forced migration and help protect the safety and well-being of migrant children at every phase of their migration journey.

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<sup>1</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (“TVPRA”).

<sup>2</sup> Flores v. Reno, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997) (“Flores Settlement Agreement” or “Flores”).



From this unique vantage, in recent years KIND has observed with alarm the U.S. government's movement away from, rather than towards, the vision advanced in this document.<sup>3</sup> The Department of State (DOS), for instance, suspended foreign aid addressing root causes of forced migration from Central America, increasing the likelihood that children in the region must flee for their lives.<sup>4</sup> The Department of Homeland Security (DHS) has expelled over 8,800 unaccompanied children under the false pretext of the COVID-19 pandemic, precluding them from immigration court hearings and other TVPRA-mandated protections.<sup>5</sup> Children who do receive hearings face Department of Justice (DOJ) policy changes that rush adjudications at the price of due process, heightening the risk they will be deported to the same dangers they escaped.<sup>6</sup> These are among scores of recent actions that betray America's responsibility to migrant children by making them dramatically less safe. KIND has seen the devastating toll of those actions on the children we serve.

These developments make urgent the recommendations laid out in this resource. The safety, and in too many cases, the lives of children unable to protect themselves hang in the balance. So does the nation's moral standing. We have a moral and legal responsibility towards these children, to whom, as Congress recognized, the United States carries a "special obligation."<sup>7</sup> This blueprint, then, is not only a body of policy prescriptions; it is a call to action to the U.S. government at a moment of profound pain, fear, and trauma for migrant children throughout the country and around the world. The work must begin now.

## Ensuring Legal Representation of Unaccompanied Children

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### Background

KIND was founded on the belief that no child should be forced to appear in immigration court alone. As our work has expanded across the United States and through the region, we have seen that legal counsel is essential to ensuring due process for unaccompanied children at every stage of their journey.

Indeed, it is virtually impossible for children to navigate protection systems without lawyers to assess their eligibility for humanitarian protection, assist with case preparation, and advocate for them during adversarial hearings. In the United States, during Fiscal Year 2018 and the first half of Fiscal Year 2019, immigration judges were 70 times more likely to grant relief to unaccompanied children with representation than to those without it<sup>8</sup>—making plain that attorneys mean the difference between relief and deportation, and by extension, safety and danger. Counsel also helps reduce waste of judicial resources by screening out inapplicable forms of protection and minimizing unneeded court time.

As a matter of both fairness and efficiency, therefore, the U.S. government should ensure that all unaccompanied children in U.S. immigration proceedings have attorneys. Moreover, any refugee processing outside of the United States should ensure that there is an opportunity for children to rely on support from legal counsel at all stages of their applications to ensure they are able to present the most complete and accurate application for protection. To realize this vision, the executive branch and Congress must support and/or take robust measures that include

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<sup>3</sup> See KIND, "A Timeline: How the Trump Administration is Rolling Back Protections for Children" (updated Jul. 2020); <https://supportkind.org/wp-content/uploads/2020/07/A-Timeline-Updated-July-2020-1.pdf>.

<sup>4</sup> See Congressional Research Service, "U.S. Strategy for Engagement in Central America: Policy Issues for Congress" (Nov. 12, 2019); <https://fas.org/sgp/crs/row/R44812.pdf>.

<sup>5</sup> Camilo Montoya-Galvez, "Nearly 9,000 migrant children have been expelled under pandemic border policy, court documents say," *CBS News* (Sep. 11, 2020); <https://www.cbsnews.com/news/8800-migrant-children-have-been-expelled-under-pandemic-border-policy-per-court-documents/>.

<sup>6</sup> See KIND, "A Timeline: How the Trump Administration is Rolling Back Protections for Children" (updated Jul. 2020); <https://supportkind.org/wp-content/uploads/2020/07/A-Timeline-Updated-July-2020-1.pdf>.

<sup>7</sup> 54 Cong. Rec. S10886 (daily ed. Dec. 10, 2008).

<sup>8</sup> KIND calculated this figure based on Executive Office of Immigration Refugee (EOIR) data published by the Congressional Research Service in its report titled "Unaccompanied Alien Children: An Overview," p. 15 (Oct. 9, 2019); <https://fas.org/sgp/crs/homesec/R43599.pdf>.



greater appropriation of funding for children’s counsel; allocation of a larger proportion of existing funding to the provision of counsel; postponement of children’s immigration court hearings until they obtain lawyers; and ultimately the passage and enactment of legislation mandating counsel for every unaccompanied child.

At present, more than half of unaccompanied children lack representation. And in the past several years, it has only become more difficult for children to access counsel for the duration of their legal case. New obstacles include Attorney General decisions that limit immigration judges’ use of docket management tools, like continuances and administrative closure, to afford children adequate time to secure lawyers, develop working relationships with them, procure evidence and witnesses, and prepare for frequently traumatizing testimony.<sup>9</sup> The Executive Office for Immigration Review (EOIR)’s imposition of a 60-day case completion requirement for detained children has further disincentivized such scheduling accommodations.<sup>10, 11</sup>

Far from a novel problem, though, underrepresentation of unaccompanied children is a chronic one. In Fiscal Year 2013, for example, only 46 percent of unaccompanied children in removal proceedings had attorneys—in the following fiscal year, just 14 percent.<sup>12</sup> This is despite the fact that there are thousands of trained and available private sector attorneys willing to take these cases pro bono. Given the dire consequences of unaccompanied children facing removal proceedings alone, one child without a lawyer is too many. The U.S. government must finally and fully confront this systemic due process failure.

## Recommendations

- ORR should designate specific funding through ORR’s Unaccompanied Alien Children program to support pro bono representation of the greatest number of unaccompanied children.
- ORR should request, and Congress appropriate, a substantial increase in funding over Fiscal Year 2020 levels dedicated to the expansion of pro bono legal representation for both released and detained unaccompanied children.
- The administration should support passage and funding of the Fair Day in Court for Kids Act,<sup>13</sup> which would guarantee counsel to all unaccompanied children in immigration proceedings.
- The Department of Justice (DOJ) should support congressional appropriations for the Legal Orientation Program for Custodians (LOPC) for unaccompanied children’s sponsors. This program is crucial to sponsors knowing how best to support the child through their immigration court case after release from federal custody. An administration should also support robust funding to the Department of Health and Human Services to provide child advocates when appropriate.
- DOJ should rescind its November 2019 memorandum on Friends of the Court and restore the September 2014 memorandum on this issue.<sup>14</sup> DOJ should also rescind and replace its November 2019 memorandum on child advocates with one properly reflecting the independent role of child advocates under the TVPRA

<sup>9</sup> See KIND, “A Timeline: How the Trump Administration is Rolling Back Protections for Children” (updated Jul. 2020); <https://supportkind.org/wp-content/uploads/2020/07/A-Timeline-Updated-July-2020-1.pdf>.

<sup>10</sup> See Priscilla Alvarez, “Trump administration puts pressure on completing deportation cases of migrant children” CNN (Feb. 12, 2020); <https://www.cnn.com/2020/02/12/politics/unaccompanied-children-deportation/index.html>.

<sup>11</sup> See Congressional Research Service, “Unaccompanied Alien Children: An Overview,” (Oct. 9, 2019); <https://fas.org/sgp/crs/homesecc/R43599.pdf>.

<sup>12</sup> TRAC Immigration, “Representation for Unaccompanied Children in Immigration Court” (<https://trac.syr.edu/immigration/reports/371/>).

<sup>13</sup> S. 662 (116th Cong.)

<sup>14</sup> EOIR Memoranda, “Legal Advocacy by Non-Representatives in Immigration Court” (Nov. 21, 2019); <https://www.justice.gov/eoir/page/file/1219301/download> “Friend of the Court Guidance” (Sep. 10, 2014); <https://www.justice.gov/sites/default/files/pages/attachments/2016/12/21/friendofcourtguidancememo091014.pdf>.





and emphasizing the importance of best interests recommendations in adjudications involving unaccompanied children.<sup>15</sup>

- DHS and EOIR should postpone hearings of children who do not have representation, refer the child to sources of pro bono representation, and only proceed with hearings for cases in which the child is represented by counsel and after adequate time to prepare the case is provided.
- EOIR should direct the immigration courts that, moving forward, they should re-open, sua sponte, previous orders of removal issued in absentia for children who were not represented by counsel. EOIR should empower immigration judges to consider granting motions to continue for an unrepresented child who misses a court date rather than immediately issuing an order of removal in absentia. DHS should support the continuance of these cases.
- Any refugee processing procedures children may avail themselves of must include an opportunity for children to receive the counsel and support of attorneys during the process to ensure they are able to present a complete and accurate application for relief.

## Addressing the Root Causes of Child Migration through U.S. Foreign Policy

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### Background

The U.S. needs a new approach to foreign policy in the northern Central American countries of El Salvador, Guatemala, and Honduras. This new approach should prioritize foreign assistance and invest in programs to effectively address the root causes of migration so that fewer children feel compelled to flee their homes and their countries to seek safety.

We have seen that stricter border control measures do not effectively deter migration but do increase the unnecessary suffering of migrants. The forcible return of migrants to their countries of origin often leave migrants in even worse circumstances and can increase the likelihood that they will take the risk of migrating again. However, for too long, the U.S. government has promoted immigration enforcement efforts designed to deter migration and punish migrants. These efforts not only violate the rights of unaccompanied children and others seeking protection, but they have also proven to be bad investments.

Instead, U.S. foreign assistance to the region needs to address the root causes of child migration: community violence and insecurity, interpersonal and gender-based violence, extreme poverty, lack of educational and economic opportunity, systemic inequality and discrimination, and the devastating impacts of climate change. Gender-based violence—particularly child abuse, intimate partner violence, sexual violence by gangs, human trafficking, and sexual exploitation—is a leading driver of child migration that requires increased attention and resources.<sup>16</sup>

Any hope of addressing the root causes of migration will require U.S. leadership and a substantial investment in effective development assistance. However, in recent years, appropriations have declined and funding obligations have fluctuated unpredictably in a way that makes long-term planning and sustainability impossible to achieve.

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<sup>15</sup> EOIR Memorandum, “Child Advocates in Immigration Proceedings” (Nov. 15, 2019); <https://www.justice.gov/eoir/page/file/1217976/download>.

<sup>16</sup> KIND, “Neither Security nor Justice: Report SGBV in Central America” (May 4, 2017); <https://supportkind.org/resources/neither-security-nor-justice-report-sgbv/>.



More concerning, funding has been subjected to sudden and arbitrary holds that have proven counterproductive to long-term development goals.<sup>17</sup> U.S. foreign assistance should never be conditioned on coercive anti-immigrant policies nor be used as leverage to allow the United States to avoid its legal obligations to receive those seeking protections under the law.

## Recommendations

- The U.S. government must resume leadership on addressing the root causes of child migration.
  - The White House should lead an inclusive process to develop a new inter-agency strategy for Central America that addresses the root causes of child migration and prioritizes assistance for children, women, families, and other vulnerable populations.
  - The U.S. government should also help convene and coordinate efforts of other donors and international organizations working to address root causes.
- U.S. foreign assistance should prioritize investments in people, communities, and local civil society organizations. Additionally, the United States should support assistance that helps restore the rule of law and addresses corruption and impunity. The Department of State, USAID, the Millennium Challenge Corporation, and other entities should increase efforts to ensure development programs are planned and implemented with the input and oversight of the people and communities receiving aid.
- U.S. foreign assistance to Central America should be administered in a way that builds local capacity, commits to long-term investments, and allows for responsible planning, monitoring, and evaluation of programs.
- The president's budget requests should include a substantial increase in foreign aid for the northern Central American countries that is long-term, sustained over time, and focused on development assistance. Development assistance in Central America should be targeted to address the drivers of child migration and therefore prioritize:
  - Community-based violence prevention and response, especially as it affects women, children, and youth. Programming should scale-up effective projects that address youth violence prevention and assist youth who are victims of violence or are renouncing gang membership.
  - Addressing and responding to gender-based violence (GBV), including:
    - A substantial increase in funding for programs that promote gender equality, including programs with a primary purpose of preventing and responding to gender-based violence, like intimate-partner violence and child abuse. Programs should serve survivors of sexual violence with a trauma-informed response and engage men and boys in violence prevention. Programs must also build the capacity of local judicial systems to respond to GBV-related crimes, including crimes against children, and protect survivors.
    - Integrating GBV prevention and response in all programs to ensure that projects in each sector are proactively addressing gender-based violence risks and not unintentionally contributing to increases in violence against women, children, or other vulnerable populations.
  - Capacity building for the country's child welfare and child protection systems that provide essential services to vulnerable children and their families. Programs should support specialized training for child protection system personnel to work with child survivors of violence, as well as an increase in family-based shelter options for children in need of protection.

<sup>17</sup> Congressional Research Service, "U.S. Strategy for Engagement in Central America: Policy Issues for Congress" (Nov. 12, 2019); <https://fas.org/sgp/crs/row/R44812.pdf>.

- Increased educational and economic opportunities focused on youth at risk of migration, with differentiated approaches for boys and girls. Vocational training should be tied to workforce needs and economic programs should include rural communities and address the distinct needs of urban and rural youth.
  - Global health programming that addresses the causes of migration and provides sexual, reproductive, and mental health services to children and youth.
  - Climate change adaptation programming that targets women, children, and other vulnerable groups experiencing the brunt of climate change impacts threatening their livelihoods and safety.
  - Inclusive programming that addresses inequality and targets assistance to vulnerable populations including indigenous peoples, racial and ethnic minorities, children, LGBTQIA individuals, and people with disabilities.
- The U.S. government must provide emergency assistance to address the primary and secondary effects of the COVID-19 pandemic and mitigate the likelihood that the pandemic will lead to a new wave of forced migration. Programming should focus on the needs of women, children, and other vulnerable groups who are at greatest risk.

## Strengthening Regional Protections for Children Fleeing Danger

### Background

New and expanded refugee processing and resettlement programs are needed to provide safe, legal alternatives for those in need of international protection—and in particular for children in Central America. These programs can prevent the need for dangerous migration journeys by enabling vulnerable people to apply for refugee protection after they are screened by U.S. or U.N. officials in their home country or nearby countries. Supporting and expanding such programs for unaccompanied children would reduce the number of children who need to make a dangerous journey to seek protection. Scaling up family-based programs, like the Protection Transfer Arrangement (PTA), would help keep families together and reduce the number of children who become separated, unaccompanied, or harmed on a dangerous migration journey.

For example, the Central American Minors (CAM) program was an in-country refugee processing program for minors administered by the U.S. government.<sup>18</sup> The program, which was predominately a family reunification tool, provided an avenue for protection and lawful admission to the United States for certain Central American children so that those in danger would not be forced to risk their lives trying to reach the United States. However, the program was limited in scope and resources and excluded many children needing protection. During its short duration, very few children were successfully resettled to the United States.<sup>19</sup> A new in-country refugee processing program for minors should be created and re-envisioned to include more children.

The United States provides modest support to the PTA, the family-based resettlement program administered by UNHCR that serves those who are in imminent danger in Central America.<sup>20</sup> Through the PTA, qualifying individuals and families can apply for refugee status and, after they are vetted, be resettled in countries like the United States, Australia, Canada, Brazil, and Uruguay. Those who are unable to safely wait in their countries can be temporarily relocated to Costa Rica while their applications are processed. This modest program should be expanded and made available to unaccompanied children.

<sup>18</sup> <https://hn.usembassy.gov/visas/central-american-minors-program/>; <https://www.uscis.gov/CAM>.

<sup>19</sup> David Nakamura, “Trump Administration Ends Obama-Era Protection Program for Central American Minors,” Washington Post (Aug. 16, 2017).

<sup>20</sup> See Emmanuelle Diehl, “Evaluation of effectiveness of the Protection Transfer Arrangement in Central America,” UNHCR (Dec. 2018); <https://www.unhcr.org/5c7e63064.pdf>.

Creating new refugee processing mechanisms and expanding upon existing programs will provide protection to many refugees, but these programs should not be seen in any way as replacing access to protection for those who arrive in the United States or Mexico.

## Recommendations

- The administration must work to restore U.S. leadership in global refugee resettlement.
- The U.S. government must create and manage new and improved in-country refugee processing and parole programs for children in northern Central America. In recognition of lessons learned from previous attempts, any new programs for Central American children should be developed with the following considerations:
  - Assistance for children through the provision of child protection advocates and qualified attorneys to accompany children throughout the process, including during their interviews.
  - Broader eligibility that includes not only children with a documented parent in the United States, but also children who have any adult relative in the United States who can safely care for them. Children without family members could also be eligible for resettlement as unaccompanied refugee minors.
  - Expeditious processing of claims so that qualifying children can gain safety as quickly as possible. Efforts should be made to ensure that security checks do not create unwarranted delays. Financial assistance and training should also be provided to local judicial and child protection systems in order to expeditiously process custody determinations and other requirements for children's travel under local law, in line with recommendations under the best interests determination process.
  - Accommodations for children in need of immediate protection through evacuation and temporary internal relocation, emergency transit centers in each country, or quickly processed humanitarian parole. Children should be afforded opportunities for refugee status determinations even after parole. Funding should be made available to civil society organizations throughout the region to provide safe shelter to children in need of internal relocation.
  - Improved accessibility for vulnerable and rural populations. Interviews and services should be adapted for children, gender-sensitive, and available outside of urban centers to reach more children and minimize vulnerable children's need to travel.
  - Targeted community outreach and training for civil society organizations that could provide referrals and assistance.
  - Any program focused on refugee processing and resettlement of children should include a robust mechanism for best interests processes by child welfare experts and best interests should drive outcomes, including the possibility of being granted parole for children that do not qualify for refugee status.
- The U.S. government should increase support to UNHCR and countries in the region to expand the capacity of third-country protection programs and other transfer mechanisms for refugees. The U.S. government should support a dramatic scaling up of existing programs like the Protection Transfer Arrangement, with expanded eligibility criteria. The United States should also support efforts to create new programs, like regional refugee processing centers in other Central American countries. Successful expansion of these programs requires:
  - Sustained, multi-year funding commitments by DOS's Bureau of Population, Refugees, and Migration to implementing partners like UNHCR and the International Organization for Migration.
  - Expanded eligibility for children without adult family members caring for them; unaccompanied children could be eligible for resettlement as unaccompanied refugee minors.





- A commitment to dramatically expand the refugee admissions ceiling from the recent historic low numbers and specifically increase the number of refugees resettled from the Latin American and Caribbean region to the United States.
- Closer partnerships and robust financial assistance throughout Central America and Mexico to alleviate the costs of programs. Assistance should include support for civil society shelter networks to provide safe internal relocation options during resettlement processing.
- Flexibility to ensure that individuals can apply and be processed for refugee resettlement to the United States from any location in the region to ensure that those who have been forcibly displaced are not excluded from consideration.

## Improving Protections for Migrant Children in Mexico

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### Background

Mexico should be recognized as a partner and ally that can work with the United States to increase regional protections for migrants and unaccompanied children.

Despite Mexico's robust children's rights laws, the government has inadequate capacity, resources, and infrastructure to ensure that children who travel through Mexico or seek to remain in Mexico can do so safely. Many children are never informed of their right to ask for protection in Mexico and some are even denied access to the asylum system. When children do exercise their right to seek protection in Mexico, they are often detained for the duration of the adjudication in substandard facilities with little access to outside resources, assistance from civil society organizations, or legal representation. Moreover, the Mexican government does not have enough officers to adjudicate the number of protection claims being made, and officers lack adequate training on how to interview children and survivors of trauma. Finally, many migrants, and especially unaccompanied children, face increasing levels of discrimination, threats, and violence as they travel through Mexico and wait at the U.S.-Mexico border.

While providing assistance to improve migrant protections within Mexico is important, it should not be viewed as a means to prevent migrants from accessing the U.S.-Mexico border, or otherwise deter migrants from seeking protection in the United States. This is especially important for unaccompanied children seeking to reunite with family members residing in the United States as their best interests may not be served by seeking protection in Mexico.

### Recommendations

- The U.S. government should focus diplomacy and foreign assistance on strengthening Mexico's capacity to protect migrants and receive asylum seekers, with a particular focus on ensuring access to asylum for children, families, and other vulnerable groups.
- The U.S. government should partner with Mexico to better coordinate the efforts of bilateral and multilateral donors and international nongovernmental organizations. The U.S. government should support international organizations, like UNHCR, UNICEF, and others, that are working to protect child migrants.
- U.S. assistance to Mexico should shift away from supporting immigration enforcement and security and toward enhancing protection and the rights of migrants. U.S. assistance should not be used to interdict asylum seekers, prevent children from accessing the U.S.-Mexico border to ask for asylum, or otherwise deter migrants from seeking protection.



- The U.S. government should increase funding to UNHCR to improve the long-term capacity of Mexico's asylum agency, COMAR, by, for example:
  - Increasing outreach and information sharing to migrants about asylum processes.
  - Strengthening the capacity of COMAR to identify and resolve protection claims in a timely manner.
  - Training asylum adjudicators on procedural best practices for interviewing children and trauma survivors.
  - Supporting and promoting the provision of legal representation for all unaccompanied children in asylum proceedings.
- The U.S. government should increase technical and financial assistance to Mexico's national child protection system (SIPINNA), child welfare agency (DIF), and federal and local child protection authorities (*Procuradurías de Protección de Niñas, Niños, y Adolescentes*) to ensure that the rights of migrant children are protected and best interests determinations are carried out resulting in meaningful protection. Efforts should focus on:
  - Supporting SIPINNA in implementing the *Ruta de Protección Integral de Derechos de Niñas, Niños y Adolescentes Migrantes*, including strengthening collaboration and coordination through a national database on migrant children.
  - Supporting Mexico's capacity to fully comply with existing Mexican laws requiring that migrant children be placed in the custody of DIF or in alternative forms of community-based care, rather than in the custody of Mexican migration officials (INM).
  - Providing support to civil society and child welfare experts to develop different models and new programs that expand alternatives to detention for children in Mexico. Encouraging the Mexican government to increase transparency and oversight in detention centers and ensure civil society access to municipal, state, and federal DIF facilities, as well as INM facilities where children are being held.
  - Building the capacity of the local child protection authorities to carry out best interest determinations for all migrant children and coordinate and oversee the implementation of appropriate protection measures based on those determinations through new hiring and trainings on best practices regarding migrant and refugee children.
- The U.S. government should increase funding to Mexico to prevent and respond to gender-based violence, especially as it impacts the migrant community and unaccompanied children. Assistance should be provided to ensure access to justice, protection, and specialized support services for survivors, including shelter, medical, and mental health services for migrants who are victims of violence in Mexico.
- The U.S. government should work with the Mexican government to create a mechanism by which unaccompanied children in the custody of the Mexican government can be safely transferred to U.S. officials to reunite with family members and seek protection in the United States when local child protection authorities determine that it is in the best interest of the child.

## Ensuring Proper Screening and Care of Unaccompanied Children at U.S. Borders

### Background

Children pursuing safety at the U.S.-Mexico border often have fled severe harm, including sexual assault and other significant trauma and loss. Recently, the government has promoted a deterrence policy towards these children distinguished by cruel and unsuccessful strategies to prevent them from seeking relief—strategies that have led to



rampant disorganization and human rights violations at the border.<sup>21</sup> The U.S. government should instead adopt a fundamentally humanitarian approach that recognizes these children’s need for protection and ensures their appropriate reception, screening, and care. The enlistment of a humanitarian actor, such as UNHCR or a nongovernmental agency, to coordinate with DHS in receiving children—one that would help restore order to border operations, create efficiencies, and optimize treatment of this vulnerable population—is one pillar of this approach. A second is the assignment of licensed child welfare professionals—experts specially trained in children’s psychological, physical, and emotional needs—to the care and screening of children in CBP custody. Screening should take place in confidential, child-friendly spaces located in hygienic facilities that accommodate access to counsel. These and other DHS policies for receiving children at the border should meet if not exceed relevant requirements codified in, among other laws and standards, the TVPRA and *Flores*—requirements that themselves reflect the necessity of a humanitarian approach to children.

Far from moving towards this model, DHS has doubled down on a “law enforcement” framework at the border that neglects the vulnerabilities of children, jeopardizes their safety, and violates, rather than enforces, longstanding laws. Epitomizing this posture, DHS has by all accounts failed to fulfill Congress’s directive to hire child welfare professionals at southern land border CBP facilities during Fiscal Year 2020.<sup>22</sup> This defiance of the legislative branch entrenches DHS’s treatment of the screening and care of children at the border as solely advancing law enforcement goals rather than addressing humanitarian needs—and has resulted in tragic family separations and the mistreatment and even death of unaccompanied children.<sup>23</sup>

Recent DHS actions further disregard congressional will by contravening the TVPRA’s requirement that DHS afford unaccompanied children unique procedural safeguards without exception. On March 20, 2020, the administration illegally swept aside the TVPRA altogether by issuing a now-indefinite order barring arriving unaccompanied children and asylum seekers from entry into the United States.<sup>24</sup> Pursuant to that order, to date DHS has expelled over 8,800 unaccompanied children at the border, depriving them of TVPRA-mandated legal protections and summarily returning them to dangerous conditions.<sup>25</sup> Additional measures—such as a currently-enjoined regulation that precludes from asylum virtually any individual who arrives to the United States by land after transiting through a third country—apply explicitly to unaccompanied children.<sup>26</sup> Many others, such as the so-called Migrant Protection Protocols (MPP)<sup>27</sup> and “metering” practices that limit the number of asylum seekers whom CBP ports of entry will process during a given period,<sup>28</sup> purport to exempt unaccompanied children but nonetheless directly or indirectly obstruct their path to relief.<sup>29</sup> Taken together, these actions effectively eliminate children’s access to protection at the border and result in clear legal violations.

DHS’s enforcement approach to these children—and its harmful consequences—long precedes implementation of these measures. DHS has perennially failed to fully adhere to the TVPRA and to take other actions vital to securing fair treatment of and due process for this vulnerable population. In 2015, for example, the Government

<sup>21</sup> See, e.g., Human Rights First, “Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger” (May 2020); <https://www.humanrightsfirst.org/sites/default/files/PandemicAsPretextFINAL.pdf>

<sup>22</sup> See H. Rep. 116-180 (incorporated by reference into Joint Explanatory Agreement at <https://docs.house.gov/bills20191216/BILLS-116HR1158SA-JES-DIVISION-D.pdf>).

<sup>23</sup> See Camilo Montoya-Galvez, “Deaths of migrant children in U.S. custody in 2018 were preventable, parents and doctors tell Congress,” *CBS News* (July 15, 2020); <https://www.cbsnews.com/news/migrant-children-deaths-2018-preventable-doctors-parents-congress/>.

<sup>24</sup> “Order Suspending Introduction of Certain persons From Countries Where a Communicable Disease Exists,” 85 FR 17060.

<sup>25</sup> Camilo Montoya-Galvez, “Nearly 9,000 migrant children have been expelled under pandemic border policy, court documents say,” *CBS News* (Sep. 11, 2020); <https://www.cbsnews.com/news/8800-migrant-children-have-been-expelled-under-pandemic-border-policy-per-court-documents/>.

<sup>26</sup> ACLU, “Federal Appeals Court Upholds Block on Asylum Ban” (Jul. 6, 2020); <https://www.aclu.org/press-releases/federal-appeals-court-upholds-block-asylum-transit-ban>.

<sup>27</sup> See Sec. Kirstjen Nielsen, “Policy Guidance for Implementation of the Migrant Protection Protocols” (Jan. 25, 2019); [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf).

<sup>28</sup> See Hillel R. Smith, “The Department of Homeland Security’s Reported ‘Metering’ Policy: Legal Issues,” *Congressional Research Service* (Aug. 13, 2019); <https://fas.org/sgp/crs/homsec/LSB10295.pdf>.

<sup>29</sup> See KIND, “A Timeline: How the Trump Administration is Rolling Back Protections for Children” (updated Jul. 2020); <https://supportkind.org/wp-content/uploads/2020/07/A-Timeline-Updated-July-2020-1.pdf>.



Accountability Office documented extensive noncompliance by CBP agents and officers with TVPRA screening requirements for unaccompanied children from Mexico<sup>30</sup>—a systemic issue underscoring the need for child welfare professionals. Additionally, for many years CBP has detained unaccompanied children in substandard conditions that damage their physical and psychological health and limit access to counsel.<sup>31</sup>

It is not enough, then, simply to unwind recent harmful policies. The path forward—the establishment of a humanitarian approach to children at the border that ensures their welfare and a full and fair opportunity to seek protection—demands core reforms, not least the enlistment of a humanitarian actor and the hiring of child welfare professionals.

## Recommendations

- The U.S. government should enlist a nongovernmental humanitarian actor to coordinate with DHS and HHS in ensuring the appropriate reception, screening, and care of children who arrive to the United States at or between ports of entry. In the immediate term, the government should also consider coordinating with the Federal Emergency Management Agency in the performance of these duties. ORR staff should be present at the reception centers to, among other roles, expedite appropriate placement of children in ORR facilities.
- DHS should promptly fulfill Congress’s directive to hire licensed child welfare professionals at every southern land border facility and should make these placements permanent. These professionals should conduct all required screening and processes for both unaccompanied and accompanied children, ensuring identification of all relevant protection needs, while also supervising their care.
- DHS and other U.S. government components should immediately and fully adhere to all TVPRA requirements, including those governing the treatment and transfer to ORR custody of unaccompanied children arriving at the U.S.-Mexico border, whether at or between ports of entry. These components should likewise immediately and fully comply with all requirements in the Flores Settlement Agreement and National Standards on Transport, Escort, Detention, and Search (TEDS),<sup>32</sup> which set minimum standards for the care and treatment of unaccompanied children in government custody.
- The U.S. government should immediately end its March 20 order barring the entry of unaccompanied children and asylum seekers, along with all associated orders, regulations, and memoranda, while at the same time implementing evidence-based protocols that protect the health and safety of unaccompanied children and government personnel during these children’s screening and placement, while upholding protections under domestic and international law.
- DHS and DOJ should immediately end all other measures, such as MPP, the asylum transit ban,<sup>33</sup> metering, and Asylum Cooperative Agreements<sup>34</sup> that, directly or indirectly, needlessly restrict unaccompanied children’s access to humanitarian protection at the border, while coordinating the rollback of these policies

<sup>30</sup> GAO, “Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody” (Jul. 14, 2015); <https://www.gao.gov/assets/680/671393.pdf>.

<sup>31</sup> See, e.g., University of Chicago Law School - Global Human Rights Clinic, et al, “Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection” (May 2018); <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1001&context=ihrc>.

<sup>32</sup> U.S. Customs and Border Protection, “National Standards on Transport, Escort, Detention, and Search” (Oct. 2015); <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf>.

<sup>33</sup> “Asylum Eligibility and Procedural Modifications,” 84 FR 33829 (July 16, 2019) (injunction upheld in *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020)).

<sup>34</sup> See U.S. Department of Homeland Security, “Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador” (2019); [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf).





with on-the-ground nongovernmental actors with expertise in the welfare and humanitarian protection of children that can help ensure appropriate and orderly processes.

- DHS, in collaboration with ORR, should modify its southern land border facilities to ensure child-friendly spaces in which children can be held, designated areas in which children can be screened by child welfare professionals in a confidential and child-appropriate manner, basic hygiene accommodations, and meeting spaces for in-person Know Your Rights presentations and other legal assistance furnished by nongovernmental organizations. The U.S. government should also strengthen transparency and accountability by ensuring access to these facilities by independent third parties, including nongovernmental organizations, that can meaningfully monitor conditions and compliance with the TVPRA, *Flores*, TEDs, and other relevant laws and standards.
- DHS should end the practice of separating children from their parents and legal guardians, and, in coordination with ORR, minimize prolonged separations of extended family members. More detailed recommendations for ensuring the unity of protection-seeking families are provided in a following section.

## Strengthening ORR Care and Custody of Unaccompanied Children

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### Background

Under the Homeland Security Act of 2002 (HSA), Congress vested ORR with responsibility for the care and placement of unaccompanied children.<sup>35</sup> This development reflected bipartisan recognition that appropriate standards must be instituted to protect the rights and needs of children in government custody. The HSA also carefully separated ORR's functions from the immigration law enforcement duties assigned to components within DHS, reflecting Congress's intent that ORR prioritize the safety and well-being of the children in its care, guided by the children's best interests and informed by child welfare expertise. The HSA reinforced *Flores* requirements that highlight the paramount importance of children's proper care and placement.

To realize Congress's vision, ORR must fully anchor its policies in the best interests of the child. This requires meaningful independence from other agencies and decision-makers, particularly those with a law enforcement focus. The resulting autonomy would empower ORR to achieve a stronger role in advocating for children's best interests, an effort that the White House could bolster by creating a senior position at the White House dedicated to humanitarian protection for vulnerable populations like refugees and unaccompanied children. This position would be committed to ensuring that all relevant government components uphold the well-being and access to protection of unaccompanied children. In the same vein, ORR should extend, in partnership with DOJ and Congress, legal representation to unaccompanied children without exception as envisioned under the TVPRA. And it must prioritize shelter in smaller-scale settings, along with family and community-based care, while holding every ORR facility accountable to humane and safe custody standards.

Most unaccompanied children perennially lack legal representation,<sup>36</sup> due in part to insufficient funding furnished to the agency for this purpose. Under multiple administrations, ORR has relied on large-scale congregate care settings unsuitable for vulnerable children. And year after year, many ORR facilities fail to maintain proper conditions. Ongoing facility problems include the incidence of sexual abuse of children by facility staff, inadequate and/or misguided mental health treatment, and a lack of accommodations for transgender, indigenous, disabled, and other particularly vulnerable children. No less troubling, during periods when unexpectedly high numbers of

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<sup>35</sup> P.L. 107-296.

<sup>36</sup> See, e.g., TRAC Immigration, "Representation for Unaccompanied Children in Immigration Court" (<https://trac.syr.edu/immigration/reports/371/>).

unaccompanied children have arrived in the United States, emergency influx facilities have been plagued by overcrowding and limited access to vital legal services.

Underlying virtually all these systemic issues is ORR's relative lack of autonomy—a condition prohibitive to meeting its mandate. The undue influence of other government components—often ones motivated by an enforcement agenda—erodes ORR's ability to ensure children's well-being and safety. In all, sweeping reforms are long overdue.

## Recommendations

- Pursuant to White House memorandum, the U.S. government should establish a senior position in the White House dedicated to ensuring that all relevant components, including but not limited to ORR, uphold the safety, well-being, and access to legal protection of unaccompanied and refugee children. As part of its mandate, this position should ensure that ORR's adoption of policies and practices serve the best interests of the children in its care and that ORR maintains sufficient independence from immigration enforcement components.
- HHS, together with DHS, should rescind the since-enjoined August 2019 final rule that, if implemented, would severely undermine *Flores*. In its place, these departments should issue a regulation that upholds and/or strengthens standards, protections, and protocols outlined in the settlement agreement. A third-party review board with unrestricted access to ORR facilities and data should be established to monitor implementation of this new regulation.
- ORR should immediately end unwarranted information sharing practices with other agencies, including DHS and DOJ's Executive Office for Immigration Review (EOIR), that undermine the best interests of, and fair adjudications for, unaccompanied children. Specifically, among other measures, HHS should terminate the May 2018 Memorandum of Agreement with DHS<sup>37</sup> and make clear that the February 22, 2016 Memorandum of Agreement between the departments outlines the parameters for future information-sharing. ORR should also adopt policies ensuring the confidentiality of counseling and mental health services provided to unaccompanied children, including all related documentation, and prohibit sharing of confidential information concerning a child's case with DHS or the immigration courts.
- ORR should allocate existing funds in its Unaccompanied Alien Children program to support representation of the greatest number of unaccompanied children possible. Additionally, for Fiscal Years 2021 and beyond, ORR should request, and Congress appropriate, a substantial increase in funding over Fiscal Year 2020 levels dedicated to the expansion of pro bono legal representation for both released and detained unaccompanied children.
- Prior to operationalizing any ORR facility, ORR should ensure that a legal service provider is contracted and positioned to provide every child in that facility a Know Your Rights presentation, a legal screening, as well as a referral and ongoing access to legal services to ensure that they receive fair adjudications grounded in due process.
- ORR should develop and implement a strategic plan for maximizing placement of unaccompanied children in smaller-scale facilities, transitional foster care, and long-term foster care. The plan should prioritize family and community-based care broadly, in service of the best interests of the child and consistent with domestic child welfare practices, while ensuring the child has full access to legal assistance and other

<sup>37</sup> "Memorandum of Agreement Among ORR, ICE, and CBP Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters" (signed April 13, 2018); <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf>.



support. ORR should likewise ensure appropriate and inclusive care accommodations for particularly vulnerable children, including LGBTQIA, indigenous, disabled children, and children with mental health needs.

- The use of influx facilities should occur only in extraordinary circumstances involving an unanticipated influx of unaccompanied children. If such circumstances arise, ORR should engage in ongoing coordination with nongovernmental organizations with expertise in working with unaccompanied children to ensure that these facilities are designed, equipped, and administered consistent with child welfare standards. Additionally, these facilities should be located in, or close to, urban centers where legal and social services are readily available and in proximity to immigration courts. Placement in influx facilities should be limited to children at least 14 years of age without special language, medical, or other needs and with an identified sponsor to ensure children stay for only limited periods of time.
- ORR should significantly strengthen policies for monitoring facilities' compliance with ORR guidance and licensing standards and for making monitoring findings more transparent to Congress and the public. Among other actions towards these ends, ORR should:
  - Perform its own comprehensive, on-site monitoring visits to all facilities on no less than an annual basis and make available to relevant congressional committees post-visit reports detailing findings;
  - Accommodate and support oversight of its facilities by *Flores* monitors and other independent third-party actors;
  - Establish a robust complaint mechanism for children harmed in ORR care or who otherwise feel unsafe. For children who allege sexual abuse, ORR should guarantee robust protections, including legal representation, access to confidential external counseling, and procedures for determining the need for removal from the facility.
  - Create a third-party review board with unrestricted access to ORR facilities and data that will ensure compliance with state and federal standards.

## Fairly Adjudicating Unaccompanied Children's Cases

### Background

Unaccompanied children face unique obstacles—including incomplete cognitive development and the absence of a legally responsible adult upon their arrival to the United States—to navigating a complex system in order to request humanitarian protection in the United States. Only by adjudicating their cases in a way that ensures heightened procedural protections like those mandated under the TVPRA can the government achieve due process and fundamental fairness for this vulnerable population. This adjudication responsibility falls both to EOIR—into whose proceedings DHS is required to place all unaccompanied children from noncontiguous countries, as well as unaccompanied children from Mexico and Canada who meet TVPRA-mandated screening criteria—and USCIS—which has jurisdiction over unaccompanied children's asylum and Special Immigrant Juvenile Status (SIJS) applications, among others. Any failure on their part to properly discharge that duty can result in children's return to grave danger in their countries of origin.

Appropriate adjudications for unaccompanied children demand, as a foundational matter, that the legal safeguards guaranteed such children under the TVPRA and other laws attach for the full duration of their cases.<sup>38</sup> Anything less places those children at risk of losing essential due process protections. EOIR and USCIS should also establish special corps of immigration judges and adjudicators guided by unaccompanied children's best interests, steeped in

<sup>38</sup>See Office of the Citizenship and Immigration Services Ombudsman, "Ensuring a Fair and Effective Asylum Process for Unaccompanied Children" (Sep. 20, 2012); <https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac.pdf>; *J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367 (D.Md. 2019) (temporary restraining order later converted to preliminary injunction, No. 19-cv-1944, Dkt. # 71 (Oct. 15, 2019)).



trauma-informed interviewing and adjudication techniques, and who have undergone in-person trainings in which child welfare and protection experts participate. The immigration judge corps should preside over EOIR dockets dedicated to unaccompanied children, which would not only help ensure fairness in decision-making, but also increase legal service providers' efficiency in identifying and meeting children's representation needs, and by extension, government efficiency in case processing.<sup>39</sup> EOIR must also provide unaccompanied children the time and scheduling accommodations necessary to obtain counsel and prepare their cases. Additionally, EOIR and USCIS should align their policies with proper interpretation of U.S. and international law, under which protection claims prevalent among unaccompanied children, including gang-related and sexual and gender-based violence claims, constitute valid bases for asylum and other humanitarian relief.

Virtually none of these conditions presently exist. To the contrary, in recent years these agencies have ushered in sweeping policy changes that undermine fair adjudication of unaccompanied children's cases.<sup>40</sup> Some of those changes have opened the door to unwarranted redeterminations of children's "unaccompanied alien child" status in the middle of their cases, which could strip away those children's legal protections and counsel. In September 2017, DOJ's General Counsel's office issued a memorandum to the EOIR Director concluding that EOIR is not bound by DHS's determination that a child meets the UAC definition.<sup>41</sup> In May 2019, USCIS issued a currently-enjoined memorandum that, if implemented, would compel USCIS adjudicators to make similar redeterminations of unaccompanied children applying for asylum before the agency, which could limit those children's ability to seek this relief in a non-adversarial setting rather than in adversarial EOIR proceedings.<sup>42</sup>

Many additional DOJ and EOIR measures have restricted immigration judges' ability to afford unaccompanied children vital due process safeguards.<sup>43</sup> Attorney General decisions issued in 2018 in *Matter of Castro-Tum*,<sup>44</sup> *Matter of L-A-B-R*,<sup>45</sup> and *Matter of S-O-G- & F-D-B*,<sup>46</sup> limited those judges' use of administrative closure, continuances, and termination of proceedings, respectively. These are key docket management tools that help ensure children have adequate time to acquire legal counsel and prepare their cases, as well as complete out-of-court processes essential to establishing eligibility for relief. EOIR also imposed a 60-day case completion deadline in detained unaccompanied children cases, further discouraging scheduling accommodations.<sup>47</sup> This accelerated decision-making has curbed children's ability to seek protection before USCIS, which often takes months, if not years, to adjudicate applications and petitions. In some cases, immigration judges have issued removal orders to unaccompanied children even though USCIS has already approved their applications for SIJS but the associated visas have not yet become available.<sup>48</sup>

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<sup>39</sup> An example of this model is the way the New York City immigration courts previously provided physical space for legal service providers to connect with children and sponsors during the days it held its juvenile docket. This model ensured children could be connected to low cost counsel increasing the efficiency of their court proceedings. Legal service providers were able to rotate 'duty' days at the court to reduce the burden on each agency. *See also* DOJ Press Release "Justice Department and CNCS Announce New Partnership to Enhance Immigration Courts and Provide Critical Legal Assistance to Unaccompanied Minors" (Jun. 6, 2019) (featuring statement by Attorney General Eric Holder that the justice AmeriCorp program's provision of legal services to unaccompanied children would "bolster both the efficacy and efficiency of our immigration courts.")

<sup>40</sup> *See* KIND, "Death By a Thousand Cuts" (May 2018); [https://supportkind.org/wp-content/uploads/2018/05/Death-by-a-Thousand-Cuts\\_May-2018.pdf](https://supportkind.org/wp-content/uploads/2018/05/Death-by-a-Thousand-Cuts_May-2018.pdf).

<sup>41</sup> EOIR, Memorandum from Jean King, General Counsel of Executive Office for Immigration Review, to James R. McHenry III, Acting Director of EOIR, Legal Opinion re: EOIR's Authority to Interpret the Term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA (Sep. 19, 2017) <https://cliniclegal.org/resources/childrens-issues/unaccompanied-children/11212017-eoir-foia-disclosures-unaccompanied>.

<sup>42</sup> *See id.*

<sup>43</sup> *See* KIND, "A Timeline: How the Trump Administration is Rolling Back Protections for Children" (updated Jul. 2020); <https://supportkind.org/wp-content/uploads/2020/07/A-Timeline-Updated-July-2020-1.pdf>.

<sup>44</sup> 27 I&N Dec. 271 (A.G. 2018); <https://www.justice.gov/eoir/page/file/1064086/download>.

<sup>45</sup> 27 I&N Dec. 405 (A.G. 2018); <https://www.justice.gov/eoir/page/file/1087781/download>.

<sup>46</sup> 27 I&N Dec. 462 (A.G. 2018); <https://www.justice.gov/eoir/page/file/1095046/download>.

<sup>47</sup> *See* KIND, "A Timeline: How the Trump Administration is Rolling Back Protections for Children" (updated Jul. 2020); <https://supportkind.org/wp-content/uploads/2020/07/A-Timeline-Updated-July-2020-1.pdf>.

<sup>48</sup> *See id.*





## Recommendations

- An Executive Order should be issued requiring DHS and EOIR to make the “best interests of the child” a primary consideration in all adjudications involving unaccompanied children. This best interests framework should take into account factors including but not limited to a child’s wishes, developmental stage, safety, well-being, and family unity. The input of child advocates should inform adjudicators’ best interests considerations. In particularly sensitive and complex cases, Best Interests Determination panels should be convened, through which experts such as child welfare professionals, country condition authorities, children’s attorneys, and child advocates recommend to adjudicators case outcomes serving children’s best interests.
- DOJ and DHS should promulgate regulations making clear that protections and procedures outlined in the TVPRA for unaccompanied children attach at the moment children are determined to be UACs for the full duration of their cases regardless of whether the child turns 18 or is reunified with a parent.
- EOIR and USCIS should establish a specialized corps of immigration judges and adjudicators trained and with substantial experience in best interests considerations, child-friendly hearing and interviewing techniques, and substantive issues common in unaccompanied children’s cases. Required training should include initial in-person, headquarters-level training in which non-governmental experts in children’s cases and protection participate, reinforced by continuing in-person training with such professionals.
- EOIR should create dedicated dockets for unaccompanied children staffed by these specially trained immigration judges. Guidance governing these dockets should include a new memorandum that replaces the December 2017 memorandum,<sup>49</sup> requires child-friendly court practices, and encourages courts to allow space for legal service providers to consult with children.
- DOJ and EOIR should discontinue policies that rush case completions at the expense of due process. Necessary measures toward this end include:
  - Rescission of the Attorney General decisions in *Matter of Castro-Tum*, *Matter of L-A-B-R-*, and *Matter of S-O-G and F-D-B-*, as well as of the proposed regulation issued on August 26, 2020<sup>50</sup> that limits administrative closure authority, and of other measures that needlessly prevent immigration judges from employing docket management tools to ensure due process;
  - Termination of expedited policies for detained unaccompanied children, including the 60-day case completion requirement.<sup>51</sup> EOIR should also issue a joint memorandum with DHS prohibiting the filing of a Notice to Appear (NTA) for an unaccompanied child within 60 days of her arrival to the United States unless requested by the child’s attorney. This will help ensure that children have an opportunity to reunify with sponsors and obtain counsel before they are required to make any pleadings in their cases, thereby increasing efficiency and decreasing the waste of government resources associated with transferring children’s cases between courts; and
- Rescission of the proposed EOIR regulation issued on September 23, 2020<sup>52</sup> imposing a 15-day filing deadline on asylum and withholding of removal applications.
- DOJ should ensure USCIS is given the full opportunity to adjudicate a child’s application for protection. Necessary measures toward this end include:

<sup>49</sup> Attorney General Sessions, “Memorandum for the Executive Office for Immigration Review” (Dec. 5, 2017); <https://www.justice.gov/eoir/file/1041196/download>.

<sup>50</sup> “Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure,” 85 FR 52491.

<sup>51</sup> See Priscilla Alvarez, “Trump administration puts pressure on completing deportation cases of migrant children,” CNN (Feb. 12, 2020); <https://www.cnn.com/2020/02/12/politics/unaccompanied-children-deportation/index.html>.

<sup>52</sup> “Procedures for Asylum and Withholding of Removal,” 85 FR 59692; <https://www.federalregister.gov/documents/2020/09/23/2020-21027/procedures-for-asylum-and-withholding-of-removal>.



- Instructions from EOIR to immigration judges to administratively close, continue, or terminate proceedings of unaccompanied children applying for relief before USCIS; and
  - Rescission of *Matter of M-A-C-O*<sup>53</sup> as well as USCIS’s rescission of the May 31, 2019 memorandum<sup>54</sup> limiting USCIS’s initial jurisdiction over unaccompanied children’s asylum applications. USCIS should revert to the jurisdictional framework set out in its March 2013 memorandum.<sup>55</sup> Likewise, EOIR should defer to USCIS’s exercise of initial jurisdiction.
- EOIR should instruct immigration judges that, in instances where they determine that children do not qualify for immigration relief, they may consider information presented to the court about whether a return to country of origin would be against the child’s best interests. If such information is presented to the court, the judge should administratively close or terminate those cases.
  - DHS should reinstate guidelines for consideration of requests for favorable prosecutorial discretion, including in cases involving particularly vulnerable unaccompanied children.
  - USCIS should ensure that I-360s are adjudicated within the statutorily required timeframe of 180 days from the date of filing. USCIS should also adjudicate in a timely manner other applications and petitions filed by unaccompanied children.
  - USCIS should grant deferred action to children with approved SIJ applications who are unable to adjust until a visa becomes available. This would not only protect children from removal that USCIS has already concluded runs counter to their best interests by approving the SIJ application, but also provide them access to employment authorization, which often serves as a form of identification needed to obtain basic support services and to facilitate integration into their communities.
  - DOJ should amend its regulations to clarify that VTC shall not be used in any proceedings in children’s cases unless requested by a child’s attorney or child advocate because it was determined to be in the child’s best interest.
  - Attorney General decisions in *Matter of L-E-A*<sup>56</sup> and *Matter of A-B*<sup>57</sup> should be rescinded and replaced with decisions that restore recognition of asylum claims based on persecution due to family relationships and persecution by non-state actors, including gang-related and sexual and gender-based protection claims. USCIS should issue equivalent guidance to adjudicators, including through reinstatement and enhancement of the 1998 Guidance for Child Asylum Claims<sup>58</sup> and 2009 Asylum Officer lesson plan,<sup>59</sup> and ensure that they receive extensive and ongoing training in interview techniques for child survivors of sexual and gender-based violence, as well as country conditions in Northern Triangle countries, especially as they relate to gang and gender-based violence.
  - DOJ should also request, and Congress appropriate, funds ensuring the provision to unaccompanied children’s sponsors of Legal Orientation Program for Custodians (LOPC). The first section of this blueprint provides further recommendations for ensuring that unaccompanied children receive essential legal services.

<sup>53</sup> 27 I&N Dec. 477 (BIA 2018); <https://www.justice.gov/eoir/page/file/1101226/download>.

<sup>54</sup> USCIS Memorandum, “Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children” (May 31, 2019); [https://www.uscis.gov/sites/default/files/document/memos/Memo\\_-\\_Updated\\_Procedures\\_for\\_I-589s\\_Filed\\_by\\_UACs\\_5-31-2019.pdf](https://www.uscis.gov/sites/default/files/document/memos/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf).

<sup>55</sup> USCIS Memorandum, “Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children” (May 28, 2013); <https://www.uscis.gov/sites/default/files/document/memos/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf>.

<sup>56</sup> 27 I&N Dec. 581 (A.G. 2019); <https://www.justice.gov/file/1187856/download>.

<sup>57</sup> 27 I&N Dec. 316 (A.G. 2018); <https://www.justice.gov/eoir/page/file/1070866/download>.

<sup>58</sup> INS Memorandum, “Guidelines for Children’s Asylum Claims” (Dec. 10, 1998); <https://www.uscis.gov/sites/default/files/document/memos/ChildrensGuidelines121098.pdf>.

<sup>59</sup> USCIS Memorandum, “Lesson Plan: Guidelines for Children’s Asylum Claims” (March 21, 2009); <https://www.refworld.org/pdfid/4f3e30152.pdf>.

- DOJ should ensure that unaccompanied children in removal proceedings promptly receive and have adequate time to review copies of all non-classified government documents relevant to their cases.

## Advancing Unaccompanied Children's Integration into the United States

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### Background

As unaccompanied children transition into lives in the United States—free of the persecution and other dangers they fled in their countries of origin—they are poised to make vital contributions to their communities. Policies that promote ongoing integration thus benefit not only the children themselves, but their communities and the nation.<sup>60</sup> Thoughtful measures implemented today to support unaccompanied children who have acquired lawful status in the United States will reap significant rewards in the future.

Such measures should account for this population's unique vulnerabilities. Those include a high percentage of these children having experienced traumatic events and adverse childhood experiences (ACEs); childhood grief and loss, including parental separation; socioeconomic challenges faced by many of the low-income families in the United States with whom these children reunite; difficulties adjusting to the U.S. education system; language barriers and acculturation difficulties; and the need for alternate support systems for teenagers and young adults who must often navigate their new lives on their own. It also bears emphasis that, for many years, only a relatively small percentage of unaccompanied children have received case management services following their release from ORR custody—services critical to laying the groundwork for children's educational attainment, community involvement, and continued physical and mental health. In combination, these conditions can lead to negative health and educational outcomes, as well as children's heightened vulnerability to domestic violence, sexual assault, and other harm.

In view of these challenges, ORR should facilitate post-release case management services to all unaccompanied children for at least 180 days following their release from ORR custody. Post release services and integration support for unaccompanied children should mirror the benefits and services provided to children arriving in the United States through the unaccompanied refugee minor program.<sup>61</sup> Those services—including medical and mental health services, assistance with school enrollment, and parent education and support—would position children to best acclimate to and ultimately thrive in their new environments. Additionally, DHS and EOIR should provide unaccompanied children who are granted humanitarian relief, such as asylum, SIJS, U visas, and T visas, with information on the importance of, and the steps necessary to obtain, legal permanent residence and citizenship. This will substantially enhance children's legal protections and eligibility for future opportunities. USCIS should also ensure that applications for employment authorization,<sup>62</sup> legal permanent residence, and naturalization remain affordable through reduced fees and generous fee waiver policies.

Unfortunately, the Trump Administration has weakened rather than strengthened efforts to support unaccompanied children's integration into the United States. For instance, DHS recently sought to implement dramatic fee increases for applications for employment authorization, legal permanent residence, and citizenship, as well as to slash fee waiver eligibility—moves currently enjoined by federal court.<sup>63</sup> If implemented, these measures would

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<sup>60</sup>Extensive research demonstrates, for example, that measures resulting in higher naturalization rates would yield substantial economic gains locally and nationally. *See, e.g.*, Urban Institute, "The Economic Impact of Naturalization on Immigrants and Cities" (Dec. 15, 2020); <https://www.urban.org/research/publication/economic-impact-naturalization-immigrants-and-cities>.

<sup>61</sup> <https://www.acf.hhs.gov/orr/programs/urm>

<sup>62</sup> Employment authorization documents EADs serve as critical federal identification documents needed for unaccompanied children to access housing, medical care and education.

<sup>63</sup> *See ILRC v. Wolf* (N.D. Cal 2020) 20-cv-05883-JSW, "Order Granting Plaintiffs' Motion For Preliminary Injunction and Request for Stay of Effective Date of Rule and Denying Request for Administrative Stay."

inhibit, if not outright block, many children’s access to these immigration benefits. The chilling effect exerted by the administration’s “public charge” rule<sup>64</sup>—which can result in the denial of legal permanent residency due to, among other factors, use of certain public benefits—has also impeded the integration of many children and families, including unaccompanied children living in mixed-status households. Though the rule exempts various vulnerable populations, including asylees and trafficking victims, it has led parents and children to disenroll from and forego use of critical public benefit programs even if they do not fall into one of the covered populations.

Altogether, there are a host of changes that the U.S. government can and should promptly make to promote children’s integration and foster their fullest contributions to the country.

## Recommendations

- ORR should support congressional funding for and facilitate linguistically and culturally appropriate post-release case management services to all unaccompanied children for at least 180 days following their release from ORR custody. Certain particularly vulnerable children should receive post-release services for the duration of their removal proceedings. Consistent with statute, unaccompanied children subject to mandatory home studies must continue to receive post-release services until they turn 18 or upon termination of their proceedings.
- The post-release services that ORR facilitates should include, but not be limited to, legal services referrals, medical, mental, and dental health services, assistance with school enrollment and positive educational and vocational training outcomes, assistance with community integration, parent education and support, and family counseling.
- DHS and EOIR should ensure that unaccompanied children in immigration proceedings who receive immigration relief, such as asylum, SIJS, U visas, or T visas, are provided with information on the importance of, and steps necessary to obtain, legal permanent residence and citizenship. Broader initiatives and campaigns undertaken or supported by the U.S. government, including initiatives that directly assist with filing applications for naturalization, should address the unique needs and vulnerabilities of current and former unaccompanied children who are or could become eligible to adjust status and then naturalize. ORR and other agencies that provide services to unaccompanied children and other immigrant youth should be included in any integration task forces or other cross-government efforts to coordinate and improve immigrant integration.
- USCIS should rescind the currently enjoined limitations on fee waivers, as well as the fee increases for, among other application and petition types, applications for employment authorization, legal permanent residence, and naturalization. USCIS should ensure broad fee waiver availability for unaccompanied children and other vulnerable individuals.
- The U.S. government should rescind its August 2019 public charge rule and all associated rules, policies, and procedures.
- The Administration for Children and Families should provide guidance to relevant state agencies concerning the eligibility of immigrant families for early education and child care and encourage wide dissemination of that guidance to local communities

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<sup>64</sup> “Inadmissibility on Public Charge Grounds,” 84 FR 41292 (effective Oct. 15, 2019) (injunction lifted in *New York v. DHS*, No. 20-2537 (2d Cir. 2020)).



## Ensuring Safe Returns and Successful Reintegration

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### Background

As described above, unaccompanied children should not be deported from the United States unless they have had access to full, fair, and objective consideration of their claims to relief through procedures that comport with due process. Consistent with domestic and international child welfare standards, no child should be repatriated to their country unless repatriation is in their best interests.

In instances where no immigration relief is granted or where children choose to return to their countries of origin and return is in their best interests, the U.S. government must ensure that children return safely. Children should also receive comprehensive reintegration services to help them upon arrival in their home country and for a period of time following return to their communities. In practice, children who are provided a modest level of assistance are much more likely to be able to remain home safely and sustainably and are significantly less likely to re-migrate.<sup>65</sup>

### Recommendations

- The U.S. government should lead and coordinate cross-border efforts to provide comprehensive return and reintegration services to all returning children.
- Return and reintegration efforts should be led by those with expertise in child migration and child welfare.
- Child welfare professionals should be the main point of contact for repatriated children. Child welfare professionals should meet with children in advance to inform them about the process and their rights, assess their needs and best interests, and accompany children on return flights (rather than immigration agents or contracted security/transportation services).
- DOS, USAID, HHS, and DHS should work with receiving countries, in particular El Salvador, Guatemala, Honduras, and Mexico, to develop formal cross-border case management systems for returns and repatriations.
  - U.S. officials should formalize channels of communication with their counterparts in countries of origin to inform pre-departure planning and to better share current practices and policies related to repatriation, reception, reunification, and reintegration of unaccompanied children and their families.
- Prior to repatriation, interdisciplinary teams—to include social workers, counselors, health and mental health providers, attorneys and child advocates—should work to assess the history, needs, and best interests of each child, as well as the conditions to which they will return. Teams should make individualized plans for each child that include the child’s voice, with specific recommendations for repatriation and reintegration that can be shared with case managers in the child’s country of origin and ensure continuity of care.
- DOS/PRM and USAID should develop and fund reintegration programs to provide long-term, culturally and child-appropriate services to returning children and their families. Programs should encourage local governments to partner with community-based organizations with child welfare expertise and be designed to build local capacity. Reintegration services should include, as appropriate, food and housing assistance,

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<sup>65</sup> Migration Policy Institute, “Sustainable Reintegration: Strategies to Support Migrants Returning to Mexico and Central America” (Jan. 2019); <https://www.migrationpolicy.org/research/sustainable-reintegration-migrants-mexico-central-america>.



mental health and medical care, family counseling, education and job skills training, legal assistance, specialized services for survivors of GBV, and ongoing case management.

## Preventing Family Separations

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### Background

The separation of protection-seeking families inflicts severe and lasting psychological damage on children. It also hinders children's ability to pursue legal cases carrying life and death consequences. For these and other pressing reasons, the preservation of family unity, especially children with their parents and primary caregivers, should serve as an organizing principle of U.S. immigration policy.

That principle demands, as a starting point, that DHS prioritize the best interests of children in all decisions, including custody, removal, and repatriation. In the vast majority of cases, the family unity principle must be upheld alongside the best interests standard. In the extraordinary circumstances in which separation of a child from their parents or legal guardians is deemed necessary for the child's safety, responsibility for reaching that determination should fall not to law enforcement personnel, but to licensed child welfare professionals specially trained in children's psychological, physical, and emotional needs. Any children and parents or legal guardians who are separated should be afforded a fair process for challenging that action and, when successful, be promptly reunified. These and additional measures would help create a U.S. protection system in which families remain together and the welfare of children is secured.

Alarming, in recent years the U.S. government has appeared less committed to keeping families whole than breaking them apart. Most visibly, pursuant to the "zero tolerance" policy in place for most of May and June 2018—a policy requiring separation of any children from their parents or legal guardians when they arrived at the border together without documentation—the government split more than 2,800 children, including more than 1,000 children under the age of 10, from these caretakers.<sup>66</sup> From July 2017 to April 2018, through a less-known pilot program that served as a precursor to zero tolerance, the government separated over 1,500 children from their parents and legal guardians.<sup>67</sup>

Zero Tolerance ended in June 2018, but family separation did not. Under an overbroad interpretation of a federal court decision handed down that month in *Ms. L v. ICE*,<sup>68</sup> CBP agents and officers have continued to carry out unwarranted family separations on sweeping discretionary, and often pretextual grounds, such as when parents have *any* indicia of prior criminal history or upon deeming parents unfit to care for their children—determinations reached despite these law enforcement personnel's lack of child welfare expertise. In total, CBP has separated more than 1,150 children from their parents and legal guardians since Zero Tolerance was ruled unlawful.<sup>69</sup> Meanwhile, in the past year at family detention centers in Texas and Pennsylvania, ICE has forced numerous parents into a cruel and unnecessary choice between indefinite family detention and the release of their children alone into ORR custody.<sup>70</sup>

Ongoing mismanagement of family separations has made matters worse. Often the government fails to inform parents or children of the grounds for separation or to extend an opportunity to challenge it. In many cases,

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<sup>66</sup> KIND, "Family Separation: Two Years Later, The Crisis Continues" (Jul. 2020); <https://supportkind.org/wp-content/uploads/2020/07/Family-Separation-Report-2020-FINAL-2.pdf>.

<sup>67</sup> Id.

<sup>68</sup> 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

<sup>69</sup> KIND, "Family Separation: Two Years Later, The Crisis Continues" (Jul. 2020); <https://supportkind.org/wp-content/uploads/2020/07/Family-Separation-Report-2020-FINAL-2.pdf>.

<sup>70</sup> See Chantal Da Silva, "ICE Accused of Using Coronavirus Crisis to Launch 'Family Separation 2.0'" *Newsweek* (May 19, 2020); <https://www.newsweek.com/ice-accused-using-coronavirus-crisis-launch-family-separation-2-0-1505156>.



separated children face obstacles in communicating with their parents and legal guardians. Additionally, the government’s continuing failure to properly track family relationships has frustrated, and in some cases prevented, reunification.

Importantly, systemic issues with family separation extend well beyond needless separations of children from parents and legal guardians. By law, a child under 18 who lacks lawful immigration status and has no parent or legal guardian to provide care and custody is an “unaccompanied alien child,” including when that child arrives in the United States with family members other than parents or legal guardians.<sup>71</sup> This law—and the government’s compliance with it—is essential to ensuring such children’s full legal protections in the U.S. immigration system. But too often, when a parent or legal guardian is not subsequently available to assume care and custody of such a child and it is in the best interests of the child to be with the family members with whom she arrived, she nonetheless faces separation from those family members for a needlessly prolonged period. This is due, in many cases, to ICE’s unnecessary detention of those family members and/or failure to promptly release them from detention. These protracted separations can be traumatic for children and limit their ability to effectively present their protection claims.

In all, unwarranted separations of protection-seeking families are frequent and devastating. Ending them will require nothing short of a transformation in policy.

## Recommendations

- DHS should consider and prioritize the best interests of the child in all decisions, including screening, custody, removal, and repatriation. In accordance with child welfare principals, there is a presumption that it is in a child’s best interest to be cared for by family.
- DHS should immediately halt all parent-child and guardian-child separations. In the exceptional case where separation is deemed necessary due to child welfare concerns, a child welfare professional should be responsible for determining its necessity before separation occurs and recommend separation only when warranted by specific criteria and approved by supervisory review. The assessment should be provided in writing to the parent and a copy maintained in their detention file. A copy of the assessment should also be uploaded to the unaccompanied child portal and made accessible to legal service providers and advocates assisting the child.
- In the exceptional case where a separation must occur due to concerns about the child’s well-being, DHS should provide children and parents or guardians with clear information about the basis for separation, in writing, in their language or with access to an interpreter; information about how to reach each other; an accessible, immediate, and independent process by which they can challenge the separation; and access to government records including adverse records regarding the parent or legal guardian. When a determination is made that the parent provides no safety threat to the child, the parent should be prioritized for release from detention.
- DHS and ORR should upgrade database systems and create robust mechanisms to track information about any and all separations of children from parents, legal guardians, and other family members, including the reasons for any such separations.
- The U.S. government should ensure that each separated child and parent or legal guardian is represented by legal counsel. DHS and ORR will share information with legal counsel necessary to effectuate representation, including by making information regarding the parent’s case available to the counsel for the child.

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<sup>71</sup> See 6 U.S.C. § 279(g)(2).

- Unless otherwise counseled by a child welfare professional or child advocate, DHS and ORR should facilitate routine video communication between separated parents or legal guardians and children, as well as facilitate in-person visitation for each parent or legal guardian and child when the separation lasts for more than 30 days, which should occur in only the most extreme circumstances.
- DHS and ORR should develop streamlined and expedited processes to reunify children and their parents or legal guardians when the reasons for the separation have been successfully challenged or overcome.
- Children subject to separation in the extreme cases where separation occurs should retain their designation as “unaccompanied alien child” for the duration of their cases for any protections and procedural benefits that attach to that designation, even if later reunified with a parent or legal guardian.
- DHS should offer to settle any claims for damages filed with the agency arising out of family separation, including claims under the Federal Torts Claims Act, but not condition the acceptance of settlement offers on any immigration benefit; families should be permitted to freely and fully exercise their opportunities to file such claims in federal court.
- DHS should develop policy memoranda promoting humanitarian benefits and prosecutorial discretion for families impacted by family separation, which should advise adjudicators, prosecutors, and enforcement personnel at various agencies, including ICE and USCIS, to adopt generous and ameliorative approaches to decision-making involving separated families and children.
- The U.S. government should use its parole authority to provide for family reunification for families separated under immigration policies, including the administration’s Zero Tolerance policy, that resulted in removal of a parent to the country of origin while the child remained in the United States or the removal of a child to country of origin while the parent remained in the United States. Families still separated by these harmful policies continue to experience deep trauma and many removed parents and/or children face danger back in the country of origin. The family member in the country of origin seeking U.S. reunification should be expeditiously processed for parole to the United States and provided an opportunity to seek relief. In addition, families that reunified in the country of origin who have experienced persecution following reunification or who fear persecution should be offered parole to return to the United States to pursue asylum. Many of the families that reunified in the country of origin did so out of sheer desperation to be together and had to forego seeking U.S. protection to be together.
- DHS should immediately end the practice of requiring parents in family detention centers to choose between keeping their family together or allowing the child to be released separately into ORR custody.
- With regard to children separated from family members who are not their parents or legal guardians, HHS, DHS, and DOJ should develop and implement policies and practices that: (1) ensure the continued designation of such children as “unaccompanied alien children” consistent with the HSA and TVPRA and the attachment to those children of the legal protections associated with UAC status for the duration of their cases; (2) track relevant information concerning such separations and facilitate communication between separated children and family members as appropriate; (3) develop processes to ensure the unity of these children and family members when those children’s parents or legal guardians are not available to provide care and custody. Such procedures would include expediting release for the detained adult upon recommendation from ORR, if ORR case managers determine that the child would be best cared for by the adult family member, but for the family member’s detention. DHS would then weigh the recommendation of ORR heavily in its determination to release the adult for the pendency of their proceedings, applying similar standards to when determining whether to detain a parent caring for a child.



# Advancing a Whole-of-Government Strategy on Gender-Based Violence Prevention and Response that Includes Migrant Children

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## Background

Gender-based violence (GBV) is one of the leading drivers of child migration.<sup>72</sup> Consequently, many unaccompanied children are survivors of gender-based violence and many more have been impacted by GBV in their homes or communities. During their migration journey, unaccompanied children are at high risk for gender-based violence and remain vulnerable to abuse even after their arrival in the United States.

Unfortunately, the unique protection needs of GBV survivors, particularly migrant children, are not well understood and many U.S. government officials lack the training and expertise to serve survivors of GBV. At all levels of government, there is insufficient understanding of the prevalence and severity of GBV, and the impunity enjoyed by its perpetrators in the United States, as well as Central America and Mexico. There are also inadequate resources dedicated to effectively serving survivors, in particular training for those who interact with survivors of GBV or work on policies that will impact survivors. In the United States, a whole of government strategy is needed to adequately address gender-based violence and the strategy must include migrant children.

## Recommendations

- The U.S. government must lead an inclusive process to develop a whole-of-government strategy to respond to and prevent gender-based violence and serve survivors at all levels of government.
  - The U.S. government strategy should result in specific policies, guidelines, recommendations, and training for U.S. agencies and staff who work with unaccompanied children and immigrant populations.
  - The U.S. strategy must include a plan for better data collection that can inform policy and program development. Data must be disaggregated by relevant factors, such as sex, gender identity, distinct age ranges, location, ethnicity, disability, marital status, sexual orientation, and migratory status. Sensitive data must be collected and stored in line with human rights considerations and relevant data protection standards.
  - DOS, USAID, DHS, HHS, DOJ, and other agencies should develop action plans for the strategy's implementation and these action plans should include considerations for unaccompanied children and child survivors of GBV.
- The U.S. government must regain its leadership position promoting gender equality and prioritize GBV prevention and response in its diplomacy, external partnerships, and stakeholder relationships.
  - The State Department and USAID should support women's rights and the rights of gender and sexual minorities through visible, proactive diplomacy and strategic aid programs.
  - The State Department should resume full coverage of women's rights, including reproductive rights and LGBTQIA rights, in the department's annual human rights reports.

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<sup>72</sup> UNHCR, "Children on the Run"; <https://www.unhcr.org/en-us/children-on-the-run.html>; KIND & Human Rights Center Fray Matias de Cordova, "Childhood Cut Short" (June 2017); <https://supportkind.org/resources/childhood-cut-short-report-sgbv/>.

# Ensuring Unaccompanied Children's Health and Legal Rights During the COVID-19 Pandemic

## Background

The COVID-19 pandemic poses health and safety risks to unaccompanied children who are already vulnerable to a wide range of dangers. Not only has the current administration failed to properly mitigate those risks, it has used the pandemic as a false pretext for stripping unaccompanied children of legal protections vital to their ability to seek humanitarian relief. The U.S. government should take key steps to better safeguard the health of unaccompanied children during the pandemic while fully upholding their rights under domestic and international law.

Among other failures to alleviate risks that children face due to the pandemic, DHS has deported numerous unaccompanied children without observing protocols recommended by public health and child welfare experts for ensuring those children's safety during and after return to their home countries. The pandemic's exacerbation of sexual and gender-based violence in Central America—violence that often forces children there to flee in search of protection—has made ongoing deficiencies in the United States's response to such violence even more damaging.

The U.S. government has at the same time baselessly cited the pandemic as justification for the implementation or expansion of policies that deny children longstanding legal safeguards. The now-indefinite March 20, 2020 CDC order epitomizes this practice.<sup>73</sup> This order, which illegally prohibits unaccompanied children and asylum seekers from entering the United States, has prompted DHS's expulsion of over 8,800 unaccompanied children in need of safety.<sup>74</sup> The government claims that these actions are necessary to protect public health amid the pandemic. Independent public health experts, however, have determined that the expulsions and underlying order lack any meaningful public health rationale and that the U.S. government is fully capable of receiving and placing unaccompanied children while protecting public health and safety.<sup>75</sup> Confirming this position, recent media reports revealed that CDC scientists themselves found that the order served no public health purpose, but that the White House overrode their objections and forced the order's issuance.<sup>76</sup>

Even during periods when EOIR has rightly suspended court proceedings for non-detained respondents on account of the pandemic, it has moved forward with hearings for detained unaccompanied children. This insistence has posed health risks to many of these children, while frequently compelling them to undergo hearings via video conferencing technology (VTC), which poses profound due process obstacles for this vulnerable population.<sup>77</sup> In-person immigration court proceedings are challenging enough for such children to comprehend; remote hearings often multiply those challenges by diminishing a child's ability to see, hear, and understand court actors and proceedings. Further, attorneys must routinely appear for VTC hearings in locations separate from their clients, limiting children's ability to engage in essential interaction with counsel during complex proceedings with life and death consequences.

<sup>73</sup> "Order Suspending Introduction of Certain persons From Countries Where a Communicable Disease Exists," 85 FR 17060.

<sup>74</sup> Camilo Montoya-Galvez, "Nearly 9,000 migrant children have been expelled under pandemic border policy, court documents say" *CBS News* (Sep. 11, 2020); <https://www.cbsnews.com/news/8800-migrant-children-have-been-expelled-under-pandemic-border-policy-per-court-documents/>.

<sup>75</sup> See "Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum Seekers" (May 18, 2020); <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>.

<sup>76</sup> Jason Dearen and Garance Burke, "Pence ordered borders closed after CDC experts refused," *Associated Press* (Oct. 3, 2020); <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae>.

<sup>77</sup> See Jennifer Podkul, "Remote hearings for unaccompanied children proves a disaster" *The Hill* (Mar. 16, 2020); <https://thehill.com/opinion/immigration/487440-remote-hearings-for-unaccompanied-children-proves-a-disaster>.





Although ORR has adopted numerous policy changes in response to the pandemic that help protect the health of children in its care and expedite the release of those children into safe households, there are other readily implementable steps it has not taken. These include enhanced use of home study waivers and accelerated planning for the placement of 17-year-olds currently in its custody.

The U.S. government should strengthen policies for protecting unaccompanied children from dangers stemming from or intensified by the pandemic. That includes pausing deportations of unaccompanied children while still allowing for voluntary departures when they serve the best interests of the child as determined by, among other experts, child advocates. The government must also recognize that any choice between upholding unaccompanied children's legal rights and protecting public health during the pandemic is a false one—the United States can and must do both. As such, the U.S. government should immediately terminate the March 20, 2020 CDC order and associated measures, and in its place implement evidence-based health protocols that both adhere to legal obligations and uphold public health and safety. These actions should form part of a broader initiative ensuring that the U.S. government never again exploits this pandemic or any other circumstances in ways that violate unaccompanied children's rights under domestic and international law.

## Recommendations

- The U.S. government should immediately rescind its March 20, 2020 order barring the entry of unaccompanied children and asylum seekers, along with all associated orders, regulations, and memoranda. The lawful reception and screening of unaccompanied children, consistent with the TVPRA, should restart immediately, concurrent with the implementation of evidence-based protocols that protect the health and safety of unaccompanied children, government personnel, and the public during these children's time in government custody.
  - Recommended DHS health and safety protocols include:
    - Mandatory mask usage by CBP personnel and distribution of masks to, and recommended usage by, unaccompanied children consistent with age-appropriate CDC guidance
    - Socially distant queuing at ports of entry
    - Heightened sanitation and handwashing measures at all CBP facilities
    - Safe processes at CBP facilities, including through use of clear plastic or plexiglass barriers at interview locations as needed
    - Health screenings of unaccompanied children by personnel outfitted with full personal protective equipment
    - Quarantine of unaccompanied children as needed while ensuring that quarantined children receive proper care and robust mental health support
    - Minimization of time in CBP custody, during which children can be held in safe designated spaces
    - Safe transport to and from CBP facilities and during transfer to ORR custody, including through drivers' use of masks, distribution to and recommended use of masks by children as consistent with age-appropriate CDC guidance, and regular and frequent disinfection of vehicles.
  - In addition to policy changes that ORR has already adopted in response to the pandemic that help protect the health of children in its care and expedite the release of those children into safe households, recommended ORR health and safety protocols include:
    - Home study waivers for certain cases already in process that have not been referred for a home study due to TVPRA-mandated reasons, thereby expediting children's release to safe sponsors
    - Accelerated planning for 17-year-olds currently in custody to ensure safe and appropriate placements for children before they turn 18 years old



- Enhanced mental health support, including technology-based options, for all children in its custody.
- The U.S. government must provide humanitarian aid to help Mexico and the northern countries of Central America address the immediate impacts of the COVID-19 pandemic, including increased hunger and economic deprivation. Funding should also build resiliency through long-term investment in national health systems and regional public health organizations. Transparency and oversight of these funds must be prioritized.
- The U.S. should reaffirm and fulfill its commitment to domestic and international protection of unaccompanied children and asylum seekers while at the same time safeguarding public health.
- EOIR should postpone immigration proceedings for unaccompanied children for the duration of the current national public health emergency unless otherwise requested by the child’s attorney and in the child’s best interests. These proceedings should not resume until at least 60 days after the national public health emergency has ended. EOIR should fully and clearly convey to stakeholders, including through publication on its website, all relevant information pertaining to scheduling of and procedures for resumed proceedings. That must include at least 30 days’ advance notice of the resumption of proceedings at any immigration court.
- DOJ should amend its regulations to clarify that VTC shall not be used in any proceedings in children’s cases unless requested by a child’s counsel and in a child’s best interests.
- DHS should pause deportations of unaccompanied children for the duration of the current national public health emergency. The Department should continue to carry out voluntary departures of unaccompanied children when requested by the child’s attorney and in the child’s best interests as determined by child advocates, child welfare experts working for international organizations, and attorneys serving the children themselves. To the extent that a child granted voluntary departure is unable to depart within the voluntary departure period due to COVID-related risks or restrictions, DHS should seek to ensure that the child’s voluntary departure does not convert to a removal order and the child’s right to depart under voluntary departure is preserved.

## Conclusion

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Congress has made clear that the United States should treat unaccompanied migrant children in a way that recognizes their special vulnerabilities and ensures a fair opportunity to find permanency and safety. By fulfilling the recommendations in this blueprint, an administration can bring the U.S. government treatment of these children back to what Congress envisioned when passing the Homeland Security Act and the TVPRA. As the humanitarian crises roiling northern Central America continues to compel children’s flight from danger on a broad scale, the United States must adjust course to ensure our country’s moral and legal responsibilities to this unique population are met.

Taken together, the measures recommended in this document address each stage of a child’s migration journey. Many of these actions are needed urgently. All are achievable. Their adoption would help establish a national and regional system that fully protects children’s rights and well-being as they migrate alone. Whether the U.S. government embraces or rejects this vision holds life and death consequences for those children now and into the future. There is no time to wait.



## Additional Resources

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1. The Flores Settlement Agreement: [https://www.aclu.org/sites/default/files/assets/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement011797.pdf](https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf)
2. KIND Timeline on recent changes affecting unaccompanied children: [https://supportkind.org/wp-content/uploads/2020/07/A-Timeline\\_-Updated-July-2020-1.pdf](https://supportkind.org/wp-content/uploads/2020/07/A-Timeline_-Updated-July-2020-1.pdf)
3. Homeland Security Act of 2002: [https://www.dhs.gov/xlibrary/assets/hr\\_5005\\_enr.pdf](https://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf)
4. CBP National Standards on Transport, Escort, Detention, and Search: <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf>
5. KIND 2020 Family Separation Report: <https://supportkind.org/wp-content/uploads/2020/07/Family-Separation-Report-2020-FINAL-2.pdf>
6. American Bar Association: Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/standards\\_for\\_children\\_2018.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/standards_for_children_2018.pdf)

