



January 25, 2022

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security

Re: Department of Homeland Security (DHS), Request for Input, *Identifying Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families*, Docket No. DHS-2021-0051, 86 Fed. Reg. 70512

Dear Ms. Deshommes:

Kids in Need of Defense (KIND) submits this comment in response to the above Request for Input, “Identifying Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families,” published by the Department of Homeland Security (DHS) on December 10, 2021 (86 Fed. Reg. 70512). Through its work with more than a thousand separated children and parents, KIND has witnessed the devastating and enduring impact of the Zero Tolerance policy on the wellbeing, lives, and safety of affected families.¹ We know, however, that unnecessary and harmful separations of families in the U.S. immigration system are not limited to this policy alone, but both predated it and continue to occur.

Despite global outcry and a court order halting most family separations from occurring, the underlying structures that paved the way for the large-scale separation of parents and children have not changed. In fact, a recent Department of Health and Human Services (HHS) Office of Inspector General update found that ORR referrals following a family separation incident, while far lower than during the Zero Tolerance period, remained four times higher than before the policy went into effect.² Families

¹ See generally Kids in Need of Defense (KIND), *Family Separation: Two Years Later, the Crisis Continues* (2020), <https://supportkind.org/wp-content/uploads/2020/07/Family-Separation-Report-2020-FINAL-2.pdf>.

² U.S. Dep’t of Health and Human Services, Office of Inspector General, Data Snapshot (Nov. 2021, OEI-BL-20-00680), at 2, <https://oig.hhs.gov/oei/reports/OEI-BL-20-00680.pdf>. (“In total, 1,178 separated children were referred to ORR between June 27, 2018 (the day after a Federal district court order halted most family separations) and November 15, 2020 (the date of the most recent complete data available at the time of OIG’s review). This accounts for 1.2 percent of all children referred to ORR during that period. That is approximately four times the

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processed at the border are still at risk of being separated today, and KIND has witnessed several recent examples of children separated from their parents.

Systemic reforms are urgently needed and long overdue. KIND welcomes the opportunity to work with the Biden Administration and the Interagency Taskforce on the Reunification of Families (“Taskforce”) to develop and implement policies that prioritize the best interests of children at all times, promote family wellbeing and unity, and prevent trauma and separation. We urge the Administration and Taskforce to create additional opportunities for stakeholders, including affected families, to share their expertise, experiences, and recommendations, and ask that the Administration continually engage and update stakeholders as these efforts proceed.

I. Ensure accountability and redress for past separations

Efforts to prevent future separations require at the outset a recognition of the harms wrought by wrongful separations as well as strong accountability measures and redress for affected families, which must include comprehensive remedies, legal protection, and support services. As part of these efforts, it is critical that the Administration create pathways to permanent legal status beyond humanitarian parole and support similar efforts by Congress in order to provide affected children and families with needed protection and stability and to alleviate ongoing uncertainty and risk of deportation that only exacerbate the trauma they have experienced. The federal government should also offer all separated children and families pro bono legal services and related supports to assist them in learning about and meaningfully accessing protections and services for which they are eligible. These measures are essential to ensuring justice for survivors of the government’s family separation policy and to making clear that cruelty has no place as a policy in the immigration system.

KIND strongly supports the Taskforce’s ongoing work to identify and facilitate the reunification of families separated under the Zero Tolerance policy. Yet we are deeply troubled by the Administration’s recent withdrawal from global settlement negotiations that would provide compensation to families upon whom the government inflicted severe harm and suffering. This decision belies the Administration’s commitment to address traumatic and harmful separations and unconscionably casts aside responsibility for these harms. Further, it threatens to deepen distrust of the U.S. government among families torn apart under Zero Tolerance and other policies, and to further deter them from responding to outreach by the U.S. government or engaging in opportunities to share their lived experience and vital perspective in policy efforts to prevent and address separations.

It is imperative that the Administration consider both the particular needs of each separated child and family as well as the collective impact of its decisions to ensure that it acts and communicates consistently to protect families, make them whole, and prevent future harm. This is critical to avoid re-

rate that ORR officials observed in late 2016 (0.3 percent of referrals) but is far lower than the rate at the height of the zero-tolerance policy (approximately 25 percent of all referrals).”).

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traumatizing separated children and families, many of whom have yet to be reunified, and to facilitate understanding of current policies and any shifts in approach that the Administration hopes to achieve. The Trump Administration's Zero Tolerance policy cruelly imperiled the wellbeing of children and families for purposes of politics and deterrence. The Biden Administration must make certain that remedies and accountability for these harms and the treatment of families in the future are grounded in dignity, fairness, and morality—not politics.

II. Prioritize children's best interests and family unity during border processing

The Zero Tolerance policy weaponized immigration law and the government's resources against families—prioritizing prosecution, enforcement, and deterrence without regard for the rights and unity of families and the best interests of children. President Biden has condemned those policies and through an Executive Order announced that it is this Administration's policy “to respect and value the integrity of families seeking to enter the United States” and that the Administration will “ensure that children entering the United States are not separated from their families, except in the most extreme circumstances where a separation is clearly necessary for the safety and well-being of the child or is required by law.”³ To date, however, existing legal standards fail to adequately prioritize family unity and to ensure that children receive all legal protections afforded to them by law while limiting separations to only those cases that present a danger to a child's safety and wellbeing. Additionally, inconsistent application of current legal standards—and their implementation by border officials trained in law enforcement, rather than child wellbeing—has continued to result in harmful separations that are contrary to children's best interests and beyond the parameters in U.S. law and court orders in family separation litigation, without clear procedures by which families can challenge wrongful separations. Even in recent months, KIND has witnessed examples of children being separated from their parents and caregivers where the apparent basis for separation was not clearly grounded in child welfare considerations. Moreover, these recently separated families still do not have a clear mechanism to challenge the separation or obtain legal help in reuniting.

Implementing the Administration's commitment to protecting family unity will require the development of policies that ensure children's best interests are the starting point for any decisions and processes affecting them—from reception and screening of families at the border to custody and release determinations, and decisions about legal relief, enforcement, or removal.

We provide here several broad recommendations to further ensure children's best interests, while urging continued engagement with experts and stakeholders to inform the details of these policies, which necessarily involve complex considerations related to child welfare, children and families' legal rights, and access to humanitarian protection.

³ White House, Executive Order on the Establishment of Interagency Task Force on the Reunification of Families (Feb. 2, 2021), at § 1, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/>.

A. Ensure appropriate staffing at the border to screen and oversee care of children

Decisions about the potential separation of children from parents and legal guardians or other family members pose significant consequences for children's wellbeing and ability to access humanitarian protection as well as family unity. Any such determinations should be made by professionals with appropriate training and expertise in child development and welfare, family relationships, and indicators of trafficking or other danger to ensure that separations occur only when truly required to protect the child. For too long, however, reception and processing of children and families at the border have been grounded in a law enforcement approach and staffed by Customs and Border Protection (CBP) agents with specialized training in immigration enforcement, not child protection.

The consequences of these staffing decisions were dramatically apparent during the active Zero Tolerance period, during which children were arbitrarily and forcibly separated from parents or legal guardians in thousands of cases in which children's best interests were wholly overlooked and separation was *not* in the child's best interests. The following case is just one example.

"I don't know how he's doing; I haven't spoken to him, I don't know where he is. We're here because we watched our family get murdered. He has bad separation anxiety – it was bad even before we left because, imagine, he watched his family get murdered. He never wants to leave me and gets really bad if we're apart and then we got here and they took him. I can't imagine what he's like, I just want to take his suffering for him. He can't be apart from me, he's suffering, I know it."

– Mother of a 6-year-old son

Congress has previously appropriated funds to DHS to hire licensed child welfare professionals at the southwest border, but DHS has yet to fulfill this requirement. The hiring of these professionals is long overdue and should begin immediately to usher a shift in both culture and practice that can help prevent unnecessary separations and ensure that all children and families are treated with the care and dignity they deserve.

B. Establish clear criteria to prevent inappropriate separations of parents/legal guardians and children

In the absence of clear criteria and due process safeguards, parents and legal guardians may be separated from children for arbitrary reasons, including, for example, for a parent's minor criminal history that is decades old or that does not indicate a danger to the child. Children have also been separated on the basis of arbitrary determinations by CBP officials regarding a parent's decision-making or fitness, and due to inappropriate challenges to or the failure to recognize legal guardian relationships and valid legal documents establishing parentage. Policies must make clear that separations should never occur, absent a clear danger to the child's welfare and safety, or evidence of trafficking concerns. Clear criteria must be established to guide these consequential decisions and prevent biased, ad hoc, or inappropriate determinations. Any decisions to separate a parent/legal guardian and child must be subject to review, including by supervisors as well as independent oversight agencies. Procedures must also be established to ensure that assessments and decisions are documented in writing, maintained in

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government records, and shared with affected parents/legal guardians, and that children and their attorneys are provided information about the basis of the separation.

C. Create clear and independent mechanisms for challenging wrongful separations and reunifying families

At present, families separated at the border have few avenues for meaningfully challenging wrongful separation decisions in real time or receiving assistance in understanding and navigating procedures with grave impacts for their rights, legal cases, and family relationships. Due process demands that separated parents/legal guardians be provided with clear information, including written documentation, about the grounds for the separation and that they be provided an opportunity to be heard through independent appeals procedures. These procedures should include a chance to review and provide evidence and documentation and share testimony. Separated parents/legal guardians and children should each be provided with attorneys to assist them. Recognizing the trauma caused by wrongful separations, these processes should be prioritized so as to not delay reunification where evidence indicates that separation is not appropriate. Robust mechanisms should be established to expeditiously reunite families in such cases, and policies should enable regular communication between separated children and family members until reunification is achieved.

D. Improve data and record systems for documenting and tracking separations

The Zero Tolerance policy demonstrated a callous disregard for the wellbeing of separated children and families, including in its failure to ensure appropriate systems for tracking family relationships to assist in reunifying affected families. Without information to connect children to their family members, reunification has been difficult, if not impossible, for many affected families. The government must undertake systemic improvements to database and records systems to ensure that any separations in the future are comprehensively documented and tracked. This information should also be subject to review and inspection by oversight authorities and Congress.

III. Pilot policies to prevent separations of children from trusted family caregivers

Importantly, separations occur not only of children from parents and legal guardians but also of children traveling with extended family members such as grandparents, aunts and uncles, and adult siblings. Pursuant to the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), children traveling without a parent or legal guardian are legally considered unaccompanied children. It is critical that these children be afforded all of the legal protections provided for them by law as unaccompanied children, yet policies must also be created to avoid unnecessary and traumatic separations of children from family members who may be the best and most appropriate caretakers for them, including after the child's release from immigration custody.

Customary caregiver relationships are common and important for unaccompanied children whose families have been impacted by migration or forced to flee persecution and other unsafe conditions in their countries of origin. In some cases, adult relatives may have helped to raise the child or be

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recognized in their community as the guardian, parent, or primary decisionmaker regarding matters affecting the child. In addition to providing vital emotional, psychological, and physical support, caregivers also may have crucial knowledge about the circumstances giving rise to the child's search for protection and be aware of other information or context that is essential to the child's legal case. Indeed, the *Flores* Settlement and ORR policies recognize immediate relatives among the preferred sponsors for unaccompanied children.⁴ The federal government can prevent the disruption of these crucial bonds by creating procedures that allow for the co-location at the border of HHS professionals who can ensure that children are appropriately identified as legally unaccompanied while evaluating, on an expedited basis, accompanying family members as potential sponsors with whom the child could be released together, without the need for separation. The federal government has recently implemented a similar approach with respect to unaccompanied Afghan children evacuated to the U.S. Lessons learned from that process and the experience of stakeholders working with children and families can inform the development of future policies to prevent unnecessary separations from trusted caregivers for all children.

We recommend that ORR and DHS consider a pilot project for these approaches. The Taskforce's support and participation in any such efforts can aid in upholding the Administration's commitment to preserving family unity and preventing future separations.

IV. Discontinue border policies that deny due process and force family separation

While the Zero Tolerance policy has officially ended, several other immigration policies continue to force families apart, including by denying access to the U.S. to request protection and/or placing children and families in danger. The Administration's recent action to reinstate the Migrant Protection Protocols and to expand this policy to individuals from additional countries, for example, Haiti, will likely result in many more families being forced to wait in dangerous regions for the opportunity to apply for U.S. protection, or even render children unaccompanied. The continued, unlawful expulsions of families under the Title 42 policy similarly force many children to undertake more dangerous routes to secure protection or to separate from their families to seek safety in the U.S. as unaccompanied children. These policies should be immediately ended, and all families arriving to the border should be treated with dignity and provided a fair legal process, consistent with U.S. and international law, including the right to request humanitarian protection.

We also urge the Task Force to make recommendations that lay the groundwork for statutory reforms to ensure that family separation becomes a thing of the past. This is particularly critical given the shift in migration patterns and demographic changes throughout the Western hemisphere. Re-examining the entire process for the processing, reception, and treatment of families and children must be a priority for the Administration, but attention must also be paid to statutory reforms that increase legal opportunities for short-term and long-term immigration to the United States, recognizing that work-

⁴ See ORR Policy Guide, at § 2.2.1, <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-2#2.2.1>; *Flores* Settlement Agreement ¶14.

based, family reunification, and humanitarian pathways for legal migration provide the best protections for safe and orderly migration and ultimately the best protection for all children.

Conclusion

Years after the Zero Tolerance policy ended families continue to suffer the harmful effects of forced separation. Efforts to protect, support, and reunify affected families must include urgent action to ensure that other families will not suffer similar harm at the hands of the government. The recommendations detailed above are provided as initial considerations. We believe that meaningful reform to prevent future separations will require ongoing engagement with and input from affected families and other stakeholders. We look forward to the opportunity to participate in these efforts.

Sincerely,

/s/

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