

# At a Crossroads: A Midterm Assessment of the Biden Administration's Protection of Unaccompanied Children

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On January 20, 2021, the Biden Administration inherited a U.S. protection system for unaccompanied children greatly weakened by the prior Administration. Two years later, amid operational challenges posed by this diminished infrastructure, combined with ongoing high numbers of unaccompanied children arriving at the U.S.-Mexico border, the Biden Administration's policies concerning this vulnerable population present a distinctly mixed record.

The Administration is championing a plan to achieve legal representation of all unaccompanied children by Fiscal Year (FY) 2027, yet relies on substandard "influx care facilities" to shelter many of these children. It has reunified hundreds of families separated under the prior Administration's cruel "Zero Tolerance" policy, yet continues to carry out unnecessary and traumatic separations of migrant families at the border. It exempted unaccompanied children from the harmful Title 42 border policy, yet often blocks those same children from accessing protection at ports of entry on their own. It has relaunched and expanded the Central American Minors (CAM) program to provide children with a safe alternative pathway to protection, yet in the first year that new applicants were able to apply, no child's case was successfully processed. In all, the Biden Administration adopted a range of laudable reforms that strengthen the safety of unaccompanied children, while simultaneously delaying or overlooking other necessary changes.

The midpoint of this administrative term amounts to a crossroads. During the remainder of his time in office, President Biden can leave a legacy of important, but limited, improvements to the U.S. protection system for unaccompanied children or he can stand behind a robust body of policy shifts that fully honor and advance the protection of children.

Reflecting this moment, Kids in Need of Defense (KIND) assesses the Administration's progress in protecting the welfare of unaccompanied children as measured by seven key objectives outlined below. We offer recommendations to the Administration for achieving those aims and indicate ways that Congress should assist. Informing KIND's analysis is our [2020 administrative blueprint](#) for building mechanisms that best safeguard unaccompanied children throughout their migration journey.

## Objectives

1. **Ensure** Legal Representation of Unaccompanied Children
2. **End** Family Separation and Reunify Separated Families
3. **Fairly Adjudicate** Unaccompanied Children's Cases
4. **Ensure** Humanitarian Reception of Unaccompanied Children at U.S.-Mexico Border
5. **Strengthen** ORR Care and Custody of Unaccompanied Children
6. **Address** the Root Causes of Child Migration and Strengthen Regional Protections in Central America and Mexico
7. **Protect** Unaccompanied Afghan Children Who Fled to the United States

# 1 | Ensure Legal Representation of Unaccompanied Children

## SNAPSHOT

Ensuring children have access to a legal representative while they go through the immigration process is essential to the fairness and efficiency of the immigration system, but many if not most unaccompanied children lack attorneys. The Administration stated that it plans to achieve legal representation of all unaccompanied children by FY 2027 and noticed a potential new contract for these children's legal services. But despite sharply increased congressional appropriations in recent years for such services, the Administration has thus far not allocated those funds as Congress intended. This year is a critical juncture for the Administration to begin meeting its pledge.

## POSITIVE ACTIONS TAKEN BY THE BIDEN ADMINISTRATION

- ✓ The Administration **called for** legal representation of all unaccompanied children by FY 2027.
- ✓ The Department of Health and Human Services **issued a notice** referencing a potential new contract focused on the provision of legal services for up to 80,000 unaccompanied children who have been released from Office of Refugee Resettlement (ORR) custody.
- ✓ The Department of Justice (DOJ)'s Executive Office for Immigration Review (EOIR) **released a memo** encouraging immigration courts to expand and facilitate pro bono legal services. The memo underscores the particular vulnerability of children in immigration court and strongly encourages immigration judges to facilitate free legal services and pro bono representation whenever children are involved.

## ACTIONS THE BIDEN ADMINISTRATION SHOULD TAKE NOW

- In recent years, Congress **substantially elevated appropriations** for unaccompanied children's legal services, but the Administration has not meaningfully increased the amount of funding allocated toward those legal services. Fiscal Year 2023 presents an opportunity to move toward fulfillment of its plan to achieve counsel for all unaccompanied children, including by executing the noticed contract centered on legal services for children released from ORR care.
- Through its **planned promulgation** of an "Unaccompanied Children Program Foundational Rule," and consistent with the **Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)**, ORR should request, as part of its annual budget process, congressional funding to ensure legal representation of all unaccompanied children who are or have been in ORR custody and allocate it appropriately.
- Any refugee processing procedures children may avail themselves of, including the Central American Minors Refugee program (CAM), 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.

## HOW CONGRESS SHOULD ASSIST

- Further elevate discretionary funding levels for unaccompanied children's legal services to narrow the persistent representation gap for this uniquely vulnerable population.
- Pass the **Fair Day in Court for Kids Act**, which would guarantee counsel for all unaccompanied children in immigration proceedings.
- Conduct ongoing oversight of the Department of Health and Human Services to ensure that it is allocating appropriations for unaccompanied children's legal services as Congress intends.



## 2 | End Family Separation and Reunify Separated Families

### SNAPSHOT

The Administration made appreciable progress in contacting and reunifying families separated under the Trump Administration. Unfortunately, many of those families continue to lack essential protections and services, and the Department of Homeland Security (DHS) is still carrying out unnecessary separations at the border. The Administration should enact a new administrative framework for protecting family unity.

### POSITIVE ACTIONS TAKEN BY THE BIDEN ADMINISTRATION

- ✓ President Biden **issued an Executive Order** establishing an interagency Family Reunification Task Force to reunify families who were separated at the border under the Trump Administration's cruel "Zero Tolerance" policy. To date, the Task Force has helped reunify almost **700 children** with their parents.
- ✓ The Department of State's Bureau of Population, Refugees, and Migration (PRM), in partnership with the United Nations High Commissioner for Refugees and KIND, has led a project **reaching over 890** separated families located outside the United States. As part of this project, PRM supports a help desk that fields questions or concerns eligible families may have about registering for the government's reunification program.
- ✓ HHS and DHS **launched a small pilot program**, informed by KIND's vision of co-locating HHS child protection staff at Customs and Border Protection (CBP) border facilities, under which children who arrive at the U.S.-Mexico border with trusted non-parental relatives can be more expeditiously reunified with those relatives as sponsors. The Administration also led successful co-location initiatives focused on individuals and families fleeing Afghanistan and Ukraine.

### ACTIONS THE BIDEN ADMINISTRATION SHOULD TAKE NOW

- › Despite the end of the "Zero Tolerance" policy mandating the separation of all families, the Biden Administration continues to unnecessarily separate some families at the border. The Administration should review all relevant policies and practices to identify improvements to ensure that separations only occur when necessary to protect the welfare of the child, instituting a new policy framework under which:
  - › There are clear guidelines on when separations may occur for the safety of the child and ensure a robust review of any separation;
  - › Separated parents are afforded an immediate process for challenging separations and legal counsel to assist in navigating that process; and
  - › Any instances of family separation are carefully documented to ensure that families can be quickly reunified and separated children are not lost in the system.
- › DHS should expeditiously onboard licensed child welfare professionals using **dedicated funding to DHS provided by Congress**. DHS should assign them to, among other functions, the prevention of unnecessary family separations
- › Families separated under "Zero Tolerance" should have access to ongoing support and services, including legal representation, mental health services, and assistance with housing and other needs to ensure their security following reunification.

### HOW CONGRESS SHOULD ASSIST

- › Congress should conduct oversight of the Administration's continuing, needless separation of children from their parents and legal guardians at the U.S.-Mexico border.
- › Congress should pass legislation providing family members separated under "Zero Tolerance" with a path to citizenship, as proposed under the **"Families Belong Together Act,"** as well as with legal services, mental health services, and assistance with housing needs.



## 3 | Fairly Adjudicate Unaccompanied Children's Cases

### SNAPSHOT

U.S. government adjudications of unaccompanied children's cases should employ heightened safeguards reflecting these children's unique vulnerabilities. The Biden Administration helped deliver security and stability to thousands of abused, abandoned, and neglected immigrant children through its "deferred action" policy for Special Immigrant Juveniles. It also reversed several Trump-era decisions that short-circuited due process and docket efficiency in unaccompanied children's immigration court proceedings. The Administration should now move swiftly to require specialized children's dockets throughout the immigration court system that would help ensure child-appropriate adjudications of unaccompanied children's protection claims.

### POSITIVE ACTIONS TAKEN BY THE BIDEN ADMINISTRATION

- ✓ U.S. Citizenship and Immigration Services (USCIS) **now considers** Special Immigrant Juvenile Status (SIJS) recipients who lack available visa numbers for "deferred action"—a policy shift promoting the safety and stability of young survivors of parental abuse, abandonment, and neglect.
- ✓ USCIS **published a Temporary Final Rule** lengthening the automatic extension period of employment authorization from up to 180 days to up to 540 days for certain Employment Authorization Document (EADs) renewal applicants, helping ensure continuity for unaccompanied children who rely on EADs as personal identification documents and/or to financially support themselves and loved ones.
- ✓ Attorney General Garland issued a series of rulings improving the ability of unaccompanied children to access protection in immigration courts, including:
  - ✓ **A decision** improving access to asylum for unaccompanied children and other asylum seekers fleeing persecution by nongovernment actors, including in cases of sexual-, gender-, and gang-based persecution.
  - ✓ Decisions reversing Trump-era rulings that restricted immigration judges' ability to manage their court dockets by **administratively closing** and **terminating** cases. These decisions help ensure that children can acquire counsel, prepare their cases, and pursue relief through USCIS.
- ✓ EOIR issued new **Friend of the Court** guidance including encouraging language directing immigration courts to facilitate and accommodate Friend of the Court practice and published a **new rule** expanding the circumstances in which practitioners can enter limited appearances to provide legal assistance with document filing in proceedings.

### ACTIONS THE BIDEN ADMINISTRATION SHOULD TAKE NOW

- EOIR should establish **specialized children's dockets** in every relevant immigration court. These dockets would be dedicated to adjudicating unaccompanied children's cases and governed by child-friendly practices. EOIR should staff these dockets with specially trained immigration judges, governed by child-friendly practices, and coordinate closely with local legal services providers.
- Attorney General Garland should rescind **Matter of M-A-C-O-**, in which the Board of Immigration Appeals (BIA) held that immigration judges have the power to determine initial jurisdiction over asylum applications filed by unaccompanied children, to align EOIR policy with TVPRA and USCIS policy, which provide that USCIS has initial jurisdiction over the asylum cases of unaccompanied children, including those who filed for asylum after they turned 18.
- EOIR should direct immigration judges that an application for relief pending before or approved by USCIS creates a presumption in favor of granting an unaccompanied child's request to administratively close or terminate proceedings.
- USCIS should ensure that SIJS petitions 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



## HOW CONGRESS SHOULD ASSIST

- › Congress should pass legislation establishing a “children’s court” dedicated to the adjudication of unaccompanied children’s claims. A specially trained corps of judges would oversee the court, while focusing on the best interests of children, including prioritizing child safety, permanency, and well-being.
- › Congress should appropriate additional funding to EOIR’s legal orientation programs to increase capacity so that legal services providers are regularly in court on days that unaccompanied children’s cases are heard so that they can conduct legal screenings and provide legal assistance to unrepresented children.
- › Congress should pass legislation, such as the [Working for Immigrant Safety and Empowerment \(WISE\) Act](#), that lifts the arbitrary annual limits on SIJS visas, allowing children who have survived parental abuse, abandonment, or neglect to obtain lasting security and stability in the United States.

## 4 | Ensure Humanitarian Reception of Unaccompanied Children at U.S.-Mexico Border

### SNAPSHOT

The U.S. government should adopt a fundamentally humanitarian approach at the U.S.-Mexico border that recognizes unaccompanied children’s particular needs and ensures their appropriate reception, screening, and care. Though the Biden Administration ended or exempted unaccompanied children from some harmful Trump-era border measures, many children are still unable to ask for protection at the U.S.-Mexico border.

### POSITIVE ACTIONS TAKEN BY THE BIDEN ADMINISTRATION

- ✓ The Biden Administration [exempted unaccompanied children](#) from the destructive Title 42 border policy, which uses public health grounds as a pretext to restrict those seeking protection at the border from accessing humanitarian relief in the United States.
- ✓ The Biden Administration is winding down the “Remain in Mexico” program, which resulted in tragic family separations and directly rendered numerous children unaccompanied.
- ✓ HHS and DHS [launched a small pilot program](#), informed by KIND’s vision of co-locating HHS child protection staff at CBP border facilities, under which children who arrive at the U.S.-Mexico border with trusted non-parental relatives can be more expeditiously reunified with those relatives as sponsors.
- ✓ The Biden Administration committed to working with the Mexican government to ensure unaccompanied children in Mexican custody can apply for protection in the United States when it is in their best interest.

### ACTIONS THE BIDEN ADMINISTRATION SHOULD TAKE NOW

- › Open all ports of entry to unaccompanied children. The Administration has in many cases [kept ports of entry closed](#) to unaccompanied children and others seeking protection without lawyers, despite reopening them to most other travelers, including tourists. This compels children seeking safety to pursue dangerous routes to enter the United States between ports—which places children in needless harm and impedes orderly border processing.
- › At the same time that the Administration has sought to terminate the Title 42 border policy—only to be rebuffed in federal court—it [repeatedly expanded](#) the populations subject to Title 42 expulsions, widening the policy’s devastating impact on families fleeing life-threatening danger and resulting in the separation of some children from their parents. The Biden Administration should instead limit applying the Title 42 policy while continuing to advocate for its termination in federal court.



- › The Administration **announced that it is initiating rulemaking** that could result in a “transit ban” broadly precluding from asylum those who did not apply for or receive humanitarian protection while travelling through a third country en route to the United States—including potentially unaccompanied children. The Administration should immediately cease considering such a regulation, which, if applied to unaccompanied children, would directly violate the TVPRA and end the U.S. protection system for these vulnerable children as we know it.
- › Although Congress **dedicated funding to DHS** to hire and deploy licensed child welfare professionals at CBP border facilities, DHS failed to meet Congress’s directive. DHS should expeditiously onboard these professionals and assign them to administer care to children in CBP facilities, conduct TVPRA-mandated protection screenings, and prevent unnecessary family separation.
- › DHS and HHS should replicate and strengthen the co-location pilot at facilities throughout the U.S-Mexico border to minimize separating children from loved ones.

## HOW CONGRESS SHOULD ASSIST

- › Congress should perform oversight of DHS to ensure humane and orderly reception of unaccompanied children at the border, including by pressing DHS to:
  - › Restore full access to protection at ports of entry for unaccompanied children and other migrants;
  - › Meet Congress’s directive to hire and deploy licensed child welfare professionals at border facilities; and provide DHS and HHS resources to expand the DHS and HHS co-location pilot.
- › Congress should reject codification of the Title 42 policy or any equivalent and convey to the Administration that a “transit ban” of any kind is illegal and inconsistent with U.S. values and obligations.

## 5 | Strengthen ORR Care and Custody of Unaccompanied Children

### SNAPSHOT

Congress vested ORR with responsibility to care for and place unaccompanied children, intending for the agency to prioritize the safety and well-being of these children based on their best interests and informed by child welfare expertise. Amid continued high levels of unaccompanied child arrivals to the United States, ORR transitioned away from placing these children in “emergency intake sites” but continues to rely on unlicensed, substandard “influx care facilities.” ORR should take every measure to eliminate such reliance while ensuring that its forthcoming “foundational rule” meets and exceeds standards established under the Flores Settlement Agreement.

### POSITIVE ACTIONS TAKEN BY THE BIDEN ADMINISTRATION

- ✓ ORR **transitioned away** from use of emergency intake sites—large-scale, unlicensed facilities for unaccompanied children that were generally held to lower standards and provided fewer services than **influx care facilities**.
- ✓ ORR streamlined procedures for safely reunifying children with sponsors, thereby shortening children’s length of stay in government custody and reducing strain on its care provider network.
- ✓ The Administration **terminated a 2018 Memorandum of Agreement** between HHS and DHS that led to ORR sharing information about unaccompanied children in its care with immigration enforcement agencies. The agreement had a chilling effect on potential sponsors of children coming forward to accept custody of children, thus prolonging children’s time in custody.
- ✓ In FY 2022, ORR **expanded the provision** of post-release social services to more than 42 percent of unaccompanied children released from ORR custody, up from 25 percent in FY 2021. ORR plans to administer these services, which are intended to promote children’s welfare and stability in their new communities, to 100 percent of released unaccompanied children by FY 2024.



## ACTIONS THE BIDEN ADMINISTRATION SHOULD TAKE NOW

- › ORR continues to rely on influx care facilities to house unaccompanied children. ORR should take every available measure to end such reliance moving forward, not least by doubling down on efforts to expand its network of licensed small-scale, child appropriate shelters, long-term foster care, and transitional foster care.
- › Through its **planned “foundational rule,”** the ORR should uphold and strengthen standards, protections, and protocols outlined in the Flores Settlement Agreement, including by enlisting robust third-party monitoring of ORR facilities and programs to ensure proper treatment of unaccompanied children.
- › HHS and DHS should replicate and strengthen the co-location pilot at facilities throughout the U.S-Mexico border to minimize the separation of children from loved ones.

## HOW CONGRESS SHOULD ASSIST

Congress should continue oversight of ORR care and programs, pressing the agency to, among other things:

- › Ensure that influx care facilities meet all relevant standards.
- › Expand its network of standard care providers to eliminate future reliance on influx care facilities.
- › Ensure ORR continues to coordinate with DHS to replicate and strengthen the co-location pilot program.

## 6 | Address the Root Causes of Child Migration and Strengthen Regional Protections in Central America and Mexico

### SNAPSHOT

Two years ago, President Biden proposed a plan to invest \$4 billion over four years to address the root causes of migration from Central America and began developing updated migration strategies. Some progress has been made but more must be done to dedicate resources and attention to address the root causes that compel children to flee their countries to seek safety. Gender-based violence in particular—including child abuse, intimate partner violence, sexual violence by gangs, human trafficking, and sexual exploitation—is a leading driver of child migration requiring increased focus.

### POSITIVE ACTIONS TAKEN BY THE BIDEN ADMINISTRATION

- ✓ The President’s Budget Request for fiscal years 2022 and 2023 included \$861 million and \$987 million, respectively, to help address the root causes of migration. These requests represent President Biden’s intent to meet his commitment to invest \$4 billion in the region over the next four years.
- ✓ President Biden **issued an Executive Order** in February 2021 to develop comprehensive strategies to address the drivers of migration from Central America and manage migration across the region. Compared to previous approaches, the Biden Administration’s root causes strategy has increased focus on youth, human rights, and gender-based violence. The migration management strategy highlighted the importance of expanding access to alternative pathways for protection, such as the Central American Minors (CAM) program, and for reintegration services for returning migrants that address the needs of children.
- ✓ On the margins of the Summit of the Americas in June 2022, the U.S. government released the Los Angeles Declaration on Migration and Protection, which “committed to protecting the safety and dignity of all migrants,” while promoting “the conditions for safe, orderly, humane and regular migration” across the hemisphere.
- ✓ In October 2021, the Biden Administration released the first-ever **National Strategy on Gender Equity and Equality**, a whole-of-government approach that explicitly includes recommendations to address gender equality in immigrant communities and recognizes that gender-based violence and gender inequality are factors that drive migration from Central America and around the world.



## ACTIONS THE BIDEN ADMINISTRATION SHOULD TAKE NOW

- › As it implements root causes and migration management strategies, the Administration must include and elevate migrant children's needs, which have not been prioritized. It is also critical to integrate gender equality and gender-based violence issues into inter-agency strategies and regional migration strategies such as the Los Angeles Declaration on Migration.
- › In implementing programs that address gender-based violence, the Administration should prioritize programs preventing and responding to violence against children including programs that enhance child protection systems in Central America.
- › As the Administration works with Mexico to address migration, it must focus on strengthening Mexico's capacity to protect migrants and receive asylum seekers. Building up Mexico's infrastructure to receive migrants could benefit many unaccompanied children who wish to remain but should not be viewed as a means of preventing migrants from accessing protection in the United States.
- › To provide a meaningful alternative to dangerous migration journeys, the Administration must accelerate implementation and further expand eligibility to the CAM program. It should continue to support outreach and assistance to eligible families and provide counsel to children in the program.
- › In situations where a child does not qualify to remain in the United States, and can be returned safely, the U.S. government must ensure that children receive comprehensive reintegration services upon arrival in their country of origin. In the Administration's [Collaborative Migration Management Strategy](#), assisting and reintegrating migrants, including targeted support for migrant children, is listed as one of the key areas of effort. To date, the Administration has made little progress implementing that strategy, however, and not made any new resources available for returning migrant children.

## HOW CONGRESS SHOULD ASSIST

Congress should conduct oversight of the Department of State, the U.S. Agency for International Development, and other entities working to manage migration to advance support and services to unaccompanied and refugee children around the world, for example, in:

- › Elevating children when implementing the Administration's root causes and migration management strategies and regional migration strategies, like the Los Angeles Declaration on Migration;
- › Implementing programs that address violence against children and women as a driver of migration and a risk to those migrating and in implementing Women and Children Protection Compacts in key countries; and
- › Ensuring that returning and repatriating unaccompanied children is done in a safe, child-sensitive way and improving reintegration services for children who have been returned so they are not compelled to remigrate.

## 7 | Protect Unaccompanied Afghan Children Who Fled to the United States

### SNAPSHOT

The Administration has taken robust measures to parole into the United States and provide care for Unaccompanied Afghan Minors separated from their parents and caregivers. The Administration must do more to meet the unique needs of these traumatized children.



## POSITIVE ACTIONS TAKEN BY THE BIDEN ADMINISTRATION

- ✓ As part of **Operation Allies Welcome**, the Administration paroled approximately 1,550 unaccompanied Afghan minors into the United States, adapting existing policies and procedures to meet the unique legal, social, and cultural needs of children and youth separated from their parents and families as during the relocation of Afghan nationals in August 2021.
- ✓ When additional relocation flights resumed in spring 2022, the State Department prioritized reunifying unaccompanied Afghan minor family members, resulting in approximately 30 reunifications in the United States to date and a pipeline of additional families eligible for relocation.

## ACTIONS THE BIDEN ADMINISTRATION SHOULD TAKE NOW

- The Administration has not responded fully to the unique needs of Afghan children who remain in custody. Communication gaps, especially between children who were released to sponsors early in the relocation effort and ORR, continue to surface, requiring a more concerted effort to monitor the progress of all unaccompanied Afghan minors.
- The Administration must ensure there is no gap in services when a child's parole status expires. The Administration should automatically renew parole for unaccompanied Afghan minors and provide them with an attorney to help them apply for permanent relief.
- The Administration must resolve continuing problems pertaining to misclassifying some children to ensure that all Afghan children separated from their families during the relocation remain eligible for statutory benefits.

## HOW CONGRESS SHOULD ASSIST

- Pass the **"Afghan Adjustment Act,"** which would streamline the process for unaccompanied Afghan minors and other Afghan parolees to obtain permanent legal status in the United States and reduce unaccompanied Afghan minors' anxiety about their future while offering additional measures to support future reunification efforts.
- Ensure necessary funding for increasing the capacity of legal and social service providers to meet the ongoing needs of unaccompanied Afghan minors, including assistance addressing continued separation from parents or caregivers.