



Children's Rights and Alternative Care: 2021 Day of General Discussion UN Committee on the Rights of the Child

Introduction

Kids in Need of Defense (KIND) appreciates the opportunity to share its experience and recommendations related to the rights of and alternative care for unaccompanied children as part of the UN Committee on the Rights of the Child's 2021 Day of General Discussion.

KIND is a U.S.-based nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in immigration removal proceedings. Since January 2009, KIND has received referrals for more than 21,000 children from 77 countries. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City, Seattle, and Washington, DC, and four offices currently provide services to unaccompanied children who are in Office of Refugee Resettlement care. Additionally, KIND advocates for laws, policies, and practices to improve the protection of unaccompanied children. Beyond U.S. borders, KIND's Mexico-based offices and its programming in Central America work with partners on the ground to address the root causes of migration, protect children during migration, and connect repatriated children to essential services. Through its European Initiative, KIND and partners in Belgium, France, Greece, Ireland, and the United Kingdom work to ensure access to high-quality pro bono legal assistance for unaccompanied children in Europe.

In recent months, unprecedented numbers of unaccompanied children have sought protection at the United States-Mexico border, with more than 16,000 unaccompanied children in the care of the Office of Refugee Resettlement in early June 2021.¹ Many of these children were forced to renew their search for protection after having been expelled by the U.S. under an unlawful border expulsion policy known as "Title 42" for the public health code on which it was purportedly based.² Back-to-back hurricanes in Central America in November 2020 and the COVID-19 pandemic have compounded the dangers facing unaccompanied children--deepening instability in the region and leaving children with no choice but to seek safety in the U.S.³ In February 2021, following a change in presidential administration, the U.S.

¹ See, e.g., Testimony of JooYeun Chang, Acting Asst. Sec., Administration for Children and Families, U.S. Dep't of Health and Human Services, before the Subcomm. on Oversight and Investigations, Comm. on Energy and Commerce, U.S. House of Representatives, at 2, https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Chang_OI_2021.06.09.pdf.

² See U.S. Dep't of Health and Human Services, Centers for Disease Control, Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists (Mar. 20, 2020), [CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf](https://www.cdc.gov/media/releases/2020/s0320-cdc-order-prohibiting-introduction-of-persons.html).

³ See KIND, *Fact Sheet: Why Are Children Leaving Central America and Arriving at the U.S. Border?* (May 2021), <https://supportkind.org/wp-content/uploads/2021/05/Root-Causes-Fact-Sheet-7.pdf>.

exempted unaccompanied children from the expulsion policy⁴ and has since begun to restore reception of unaccompanied children consistent with U.S. law providing protections for them.

U.S. efforts to care for and reunify thousands of unaccompanied children throughout this period shed light on both the particular needs of this vulnerable population and the significant work that remains to ensure the provision of high-quality alternative care.

Reception and Care of Unaccompanied Children

Unaccompanied children arriving to the U.S. are first encountered by immigration agents working for U.S. Customs and Border Protection (CBP), within the U.S. Department of Homeland Security (DHS). Following apprehension, unaccompanied children are placed in immigration removal proceedings and are typically held for initial processing in short-term detention facilities that are known for their poor conditions and failure to adequately provide for basic necessities.⁵ Initially designed for single adults, these facilities are unsuitable and unsafe for habitation generally, and particularly so for the large number of children and families arriving at the border in recent years.⁶ Continued use of these facilities and their staffing by personnel trained in law enforcement, rather than child welfare, raises serious concerns and underscores the way in which the U.S. immigration system has historically regarded the protection of migrant and refugee children as secondary to enforcement priorities.

Longstanding advocacy by stakeholders and policymakers has led to the development of basic standards of care for all children in the immigration system and legal safeguards for unaccompanied children. Although these laws and policies represent important steps forward, compliance with them is inconsistent and additional reforms are critical to creating a system in which children's protection and best interests are the primary focus.

Minimum Standards of Care

The *Flores* Settlement Agreement, signed in 1997 to resolve litigation over the troubling conditions in which migrant and refugee children were detained, requires the federal government to treat minors in immigration custody “with dignity, respect and special concern for their particular vulnerability.”⁷ The Agreement provides minimum standards for facilities and a general policy in favor of promptly releasing children to the care of sponsors, with a priority on parents and other close family members. It generally requires the government to place children in “the least restrictive setting appropriate to the minor’s age and special needs” and in programs licensed by states for the care of children until reunification is achieved.⁸ Additional standards require proper physical care and accommodations, medical care, individualized needs assessments, education, recreation, counseling, family reunification services, and access to legal services, among other requirements.⁹

Importantly, the Agreement permits *Flores* attorneys to visit facilities to observe conditions and interview children. This authority has proven essential to learning about the conditions experienced by children and

⁴ U.S. Dep’t of Health and Human Services, Centers for Disease Control and Prevention, Notice of Temporary Exception from Expulsion of Unaccompanied Noncitizen Children Encountered in the United States Pending Forthcoming Public Health Determination (Feb. 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDCPauseNotice-ExceptfromExpulsion.pdf>.

⁵ See generally Kids in Need of Defense (KIND), *Mapping Migrant Children in Detention*, Feb. 2021, <https://supportkind.org/wp-content/uploads/2021/02/Mapping-Migrant-Children-2.1.pdf>.

⁶ U.S. Customs and Border Protection, *Southwest Land Border Encounters*, June 3, 2021, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

⁷ See *Flores* Settlement Agreement (1997), available at <https://www.aila.org/File/Related/14111359b.pdf>.

⁸ *Id.*

⁹ *Id.* at Exh. 1, Minimum Standards for Licensed Programs.

to enforcing compliance with the settlement. Despite these efforts, violations are frequent and concerning. In 2019, the federal government took steps to terminate the settlement by publishing regulations that weakened its provisions and that remain the subject of litigation.¹⁰ Enforceable minimum standards and robust third-party oversight are critical to ensuring the safety and wellbeing of children. Additional accountability measures, including monitoring and access by human rights organizations serving children, can help ensure safe and appropriate care. Several policymakers have developed legislative proposals to establish ombudspersons and other mechanisms to establish routine monitoring and provide children with accessible and confidential pathways for submitting concerns and complaints.¹¹ These proposals remain pending.

Legal Protections for Unaccompanied Children

Following the *Flores* Settlement and upon the creation of DHS in 2002, Congress transferred responsibility for care and custody of unaccompanied children from the former immigration agency to the Department of Health and Human Services (HHS), in recognition that an agency with expertise in the care of refugee children is better suited than a law enforcement agency to care for this vulnerable population.¹² Since that time, specific protections for unaccompanied children have been codified into law through the Trafficking Victims Protection Reauthorization of 2008 (TVPRA).¹³

The TVPRA requires that unaccompanied children be screened for protection needs and generally transferred from initial custody by DHS to the care of HHS within 72 hours of apprehension.¹⁴ HHS must place each unaccompanied child in the least restrictive setting in the child's best interests.¹⁵ The law requires HHS to conduct assessments of potential sponsors before children may be released to them.¹⁶ It directs HHS "to the greatest extent practicable" to provide all unaccompanied children in and released from the agency's custody with lawyers,¹⁷ and authorizes the appointment of independent child advocates for victims of trafficking and other vulnerable unaccompanied children.¹⁸ Additional safeguards exempt unaccompanied children from certain bars to asylum, provide for consideration of their asylum claims in a non-adversarial interview, and broaden legal protection for children who have been abused, abandoned, or neglected.¹⁹ The TVPRA also requires the government to ensure the safety of children being repatriated.²⁰

¹⁰ Dep't of Homeland Security, Dep't of Health and Human Services, Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Federal Register 44392 (Aug. 23, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-08-23/pdf/2019-17927.pdf>.

¹¹ See, e.g., Gillibrand, Cortez Masto, Jayapal Unveil Bicameral Legislation To Protect Immigrant Children In Government Custody (Feb. 23, 2021), <https://www.gillibrand.senate.gov/news/press/release/gillibrand-cortez-masto-jayapal-unveil-bicameral-legislation-to-protect-immigrant-children-in-government-custody>.

¹² Homeland Security Act of 2002, Public Law 107-296, 6 U.S.C. § 279(a).

¹³ See William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Public Law 110-457 (Dec. 23, 2008), codified at 8 U.S.C. § 1232, et al., <https://www.congress.gov/110/plaws/publ457/PLAW-110publ457.pdf>.

¹⁴ See 8 U.S.C. § 1232(a)(4) & (b)(3).

¹⁵ *Id.* at § 1232(c)(2)(A).

¹⁶ *Id.* at § 1232(c)(3)(A).

¹⁷ *Id.* at § 1232(c)(5).

¹⁸ *Id.* at § 1232(c)(6).

¹⁹ TVPRA, Pub. L. 110-457, Sec. 235, codified at 8 U.S.C. § 1101(a)(27)(J)(i); 8 U.S.C. § 208(a)(2)(E); 8 U.S.C. § 208(b)(3)(C).

²⁰ 8 U.S.C. § 1232(a)(5).

HHS' Office of Refugee Resettlement (ORR) now contracts with approximately 200 licensed programs and facilities to provide care to unaccompanied children.²¹ ORR maintains various placement types, including short-term and long-term foster care, group homes, shelters, residential treatment centers, and more restrictive or secure placements.²² ORR also maintains "influx" facilities, and more recently "emergency intake sites," to house children in emergencies or at times of unexpected increases of unaccompanied children arriving to the U.S. These facilities, unlike ORR's other placements, are not licensed, typically house hundreds or thousands of children, and often lack many of the services available in other placements. While a child is in either ORR's standard programs or a temporary facility, ORR case managers work to contact family members or other potential sponsors in the U.S. with whom the child can be safely reunified. Some children may have to attend immigration court hearings while still in custody. Legal services providers provide legal orientations to children about their legal rights and processes, and work to connect them with legal representation following their release, although need greatly exceeds government funding provided. Historically, more than half of unaccompanied children must attend immigration court without an attorney to represent them. Post-release social services--which may include support services to help children work through prior trauma and adapt to new living arrangements and a new country, help enrolling in school, or accessing other supports--similarly are not available to all children, with historically from 20 to 40 percent of children released receiving them.²³

In recent years, protections for children have been targeted by administrative policies that have made it more difficult for children to be released from custody and to have a fair opportunity to present their claims for protection. For example, in April 2018, DHS and HHS signed a memorandum of agreement²⁴ that allowed for the continuous sharing of information about unaccompanied children between the agencies. This information could then be used for enforcement purposes against sponsors and others in their households. Such policies blurred the distinct immigration enforcement and child welfare missions of DHS and HHS, respectively, deterred potential sponsors from caring for children in government care, and led to delays in children's release.

Although the current administration has begun to unwind some harmful policies and to restore compliance with the TVPRA²⁵ and ORR's child welfare mission, it has experienced significant challenges in appropriately caring for and reunifying unaccompanied children during the pandemic and a time of historic arrivals of children to the U.S. While the government has worked diligently to move children out of jail-like border facilities, the conditions in ORR's newly created unlicensed, temporary facilities raise

²¹ See Office of Refugee Resettlement, *Fact Sheet: Unaccompanied Children (UC) Program*, [uac-program-fact-sheet.pdf \(hhs.gov\)](https://www.hhs.gov/oirp/fact-sheet/pdf/unaccompanied-children-fact-sheet.pdf).

²² Office of Refugee Resettlement, *Children Entering the U.S. Unaccompanied*, <https://www.acf.hhs.gov/orr/report/children-entering-united-states-unaccompanied-section-1#1.4.6>, Sec. 1.2.

²³ Mark Greenberg, et. al., *Strengthening Services for Unaccompanied Children in U.S. Communities*, Migration Policy Institute (June 2021), at 12 ("From FY 2015 through FY 2019, the number of children receiving post-release services represented approximately 20 percent to 40 percent of minors released to a parent or other sponsor."), <https://www.migrationpolicy.org/research/services-unaccompanied-children-us-communities>.

²⁴ See Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Dep't of Health and Human Services, and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the Dep't of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (Apr. 13, 2018), available at <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf>.

²⁵ Although the U.S. has partially restored processing of unaccompanied children consistent with the TVPRA, unaccompanied children and asylum seekers are still being denied the ability to request protection at ports of entry to the U.S. due to travel restrictions related to the pandemic. These policies have forced unaccompanied children to undertake more dangerous routes to request protection. The U.S. also continues to expel families and single adults through the Title 42 expulsion policy.

significant concerns. Some of these facilities house several thousand children. Although ORR recently issued standards for its “emergency intake sites,” it is unclear how these are being implemented at various locations, and many critical services appear to be dependent on discretion, location, or staffing availability. Insufficient case management capacity has led to delays in family reunification for many children, in some cases taking more than two months.²⁶ Prolonged stays in custody cause significant distress to children, yet mental health support services in emergency facilities remain limited.

Recently, the number of children in government care has been reduced as additional resources have been directed to case management and arrivals to the border have begun to fall.²⁷ Nevertheless, significant and rapid changes are needed to safeguard the wellbeing of children in government custody—and to transform policies and systems going forward to ensure appropriate care of children, grounded in their best interests and need for protection, at *all* times, including in times of influx or emergency.

Recommendations

Ensure humanitarian reception and prevent unnecessary separations of children from family members.

Some unaccompanied children arrive to the border with family members such as a grandparent, aunt or uncle, or adult sibling.²⁸ In order to prevent unnecessary trauma and separation and minimize institutional care, the federal government should co-locate HHS professionals at the border who can evaluate family members as potential sponsors and facilitate joint release, while ensuring children are designated as unaccompanied and receive all related legal protections. HHS professionals also can reduce the time children spend in custody by beginning the family reunification process for all unaccompanied children immediately after their arrival at the border and helping to identify appropriate placements for children in need of temporary care by ORR. Additional reforms, such as hiring child welfare professionals to oversee care and screening of children and modifying facilities to create child-friendly spaces for temporary processing, can advance humanitarian reception.

Expand capacity of family- and community-based placements. To ensure alignment with child welfare principles from the U.S. child welfare system and children’s best interests, it is critical that ORR create plans and timelines for reducing reliance on congregate facilities and dramatically increasing its capacity of family- and community-based placements such as foster care and group homes. ORR must work to onboard new families and providers to ensure sufficient and appropriate capacity at all times.

Ensure that all children are provided legal counsel. All children must receive legal orientation and services while in custody and legal representation for the duration of their immigration cases after their release. Current government funding is insufficient to meet this need and must be increased significantly to support legal representation for all unaccompanied children. Funding to expand appointments of child advocates is similarly essential to ensure the best interests of vulnerable children. Broader reforms must also be undertaken to create immigration processes grounded in children’s best interests, including

²⁶ See, e.g., Michael Shear, et al., *Young Migrants Crowd Shelters, Posing Test for Biden*, The New York Times (Apr. 10, 2021), <https://www.nytimes.com/2021/04/10/us/politics/biden-immigration.html>; Amy Taxin, Adriana Gomez Licon and Julie Watson, *Migrant youth describe desperation to leave large shelters*, Associated Press (June 22, 2021), https://www.washingtonpost.com/politics/migrant-youth-describe-desperation-to-leave-large-shelters/2021/06/22/26b89152-d390-11eb-b39f-05a2d776b1f4_story.html.

²⁷ U.S. Dep’t of Health and Human Services, *Data Set: HHS Unaccompanied Children Program, 2021*, <https://healthdata.gov/National/HHS-Unaccompanied-Children-Program/ehpz-xc9n/data>.

²⁸ Under U.S. law, an unaccompanied child is defined as a child under 18, who has no lawful immigration status, and who has no parent or legal guardian in the U.S. or available to provide care and custody. Homeland Security Act of 2002, Public Law 107-296, 6 U.S.C. § 279(g)(2).

measures to ensure children do not have to face adversarial court proceedings and that their cases are considered by adjudicators specially trained in children's claims and child-sensitive techniques.

Ensure delivery of high-quality care and reunification services, even in influxes and emergencies. The COVID-19 pandemic has highlighted the ability to mobilize resources quickly and deploy a whole-of-government response engaging humanitarian actors. It is critical, however, to ensure that large, congregate facilities are not the standard going forward. Plans are needed for winding down temporary facilities and expanding family- and community-based capacity to be able to appropriately respond to all future influx or emergency situations. Such plans should include having child welfare staff or teams ready to deploy as needed to serve children at those times.