

# Protecting Unaccompanied Children: The Office of Refugee Resettlement (ORR) and the Trafficking Victims Protection Reauthorization Act (TVPRA)

Since its first days, the Trump Administration has sought to weaken or eliminate protections for unaccompanied children as part of broader measures to deter asylum seekers. With the plight of these children garnering more attention, questions arise about the purpose, origins, and history of the protection system for unaccompanied children arriving to the United States. Media coverage of the Trump Administration's efforts and related policy debates frequently conflate various federal offices and agencies involved in the immigration system. It is important to understand the distinct mandates and activities of the agencies that unaccompanied children typically encounter, as well as the critical protections the law provides for this vulnerable population.

Two important components of this protection system are 1) the Homeland Security Act and its delegation of authority for the care and custody of unaccompanied children to the Office of Refugee Resettlement, and 2) the Trafficking Victims Protection Reauthorization Act (TVPRA), a law passed more than a decade ago with bipartisan support that extends protections for survivors of human trafficking to unaccompanied children.

This backgrounder aims to inform current policy discussions by providing a broader historical context, including how and when these protections were developed and why they are important for unaccompanied children.

## The Office of Refugee Resettlement (ORR)

The Office of Refugee Resettlement (ORR) is a federal government agency housed within the Administration for Children and Families (ACF) of the Department of Health and Human Services (HHS). In 2002, the Homeland Security Act (HSA)<sup>1</sup> transferred responsibility for the care and custody of unaccompanied children from the former Immigration and Naturalization Service (INS) to ORR/ACF. The transfer was due to a recognition, spurred in part by the 1997 *Flores* Settlement Agreement,<sup>2</sup> that unaccompanied children should not be subject to punitive detention, but rather should be placed with relatives for the duration of their court case. Congress decided ACF had the expertise and technical knowledge to create a system to provide care and custody for children until an appropriate family member could be found and that a system designed for children would be more appropriate than a law enforcement setting.

By definition, a child is unaccompanied if she "(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody."

6 U.S.C. § 279(g)(2).

<sup>1</sup> See Homeland Security Act of 2002, Pub. L. 107-296, § 462, 116 Stat. 2135, 2202-2205.

<sup>2</sup> The text of the agreement can be found at <https://www.aila.org/File/Related/14111359b.pdf>.

Under the terms of the HSA, the newly created Department of Homeland Security (DHS) retained enforcement and prosecutorial authority related to unaccompanied children, while ORR/ACF was given responsibility for placing children in the least restrictive setting in their best interests. Consistent with the *Flores* Settlement Agreement, this means prioritizing children's release to parents, legal guardians, and other adult relatives. Importantly, DHS retains custody of children who are detained with their parents or legal guardians. These children are considered "accompanied" and therefore not eligible for referral to ORR.

## A. "Kids in cages": DHS custody versus child-appropriate settings in ORR custody

Within DHS, U.S. Customs and Border Protection (CBP), a law enforcement agency, is usually the first federal agency to encounter or apprehend unaccompanied children arriving to the U.S. southwest border. CBP typically places unaccompanied children in short-term holding facilities until they can be processed and transferred to ORR. CBP's holding facilities, originally designed to hold single adults, are commonly referred to as "ice boxes" (or "hieleras") due to their extremely cold temperatures. Children and families may also be held in larger processing facilities operated by CBP, often in chain-link fence enclosures referred to as the "dog pound" (or "perrera") or cages. Poor and troubling conditions in CBP facilities, including inadequate food, poor hygiene, and mistreatment, have been widely reported by children, and confirmed by government and human rights monitors. At least three children have died in CBP custody alone since December 2018.<sup>3</sup>

Under federal law, CBP must transfer unaccompanied children to the care and custody of ORR within 72 hours.<sup>4</sup> To accomplish this, CBP typically contacts ORR from the border to notify the agency about an unaccompanied child in its care, and ORR then works to identify a placement for the child in one of more than 170 shelters and facilities in 23 states.<sup>5</sup> These facilities, specially contracted and staffed for the care of unaccompanied children, are wholly distinct from CBP's holding facilities at the border and from ICE's family detention centers.<sup>6</sup>

As ORR is obligated to place unaccompanied children in the least restrictive setting appropriate to their needs, it maintains contracts with different types of facilities where children may be placed until they can be released to a sponsor. These placements include shelter facilities, where children reside and receive services on site; transitional foster care, where children live with a foster parent but attend school and receive services at an ORR program; and more restrictive placements for children who require additional supervision due to intensive therapeutic needs or safety concerns. ORR also operates a federal foster care program known as the Unaccompanied Refugee Minors program for children who have obtained asylum or refugee status or other forms of humanitarian protection and who do not have a parent or relative available to provide long-term care.

<sup>3</sup> Nicole Acevedo, "[Why are migrant children dying in U.S. custody?](#)" NBC News, May 29, 2019 (reporting on seven deaths of children in total in U.S. immigration custody, including those in CBP custody).

<sup>4</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, § 235(b)(3), 122 Stat. 5044, 5077.

<sup>5</sup> U.S. Department of Health and Human Services, Administration for Children and Families, "[Fact Sheet: Unaccompanied Alien Children \(UAC\) Program](#)", Oct. 31, 2019, at p. 2.

<sup>6</sup> Sometimes ICE picks up immigrant youth in the interior of the U.S. and transfers them to juvenile detention facilities. As these youth are usually living with a parent or legal guardian before arrest, they are designated as "accompanied" children and are not transferred to ORR custody. Immigration attorneys and human rights advocates describe these detention facilities as "black holes" with little oversight or access to lawyers. These detention centers do not appear on ICE's online map, no reports are filed about their conditions, and the government's federal detainee locator only includes information about adults, making it impossible for parents and caregivers to find out where their children are being held. Without easy access to counsel, ICE often detains these youth well past limits specified in the *Flores* Settlement Agreement, which sets standards for the detention and placement of immigrant children. Children are often forced to defend themselves against the serious criminal allegations ICE brings against them, even when these are unfounded. See Blake Ellis and Melanie Hicken, "[Secret and unaccountable: Where some immigrant teens are being taken by ICE](#)", CNN, October 24, 2019.

In contrast to CBP custody and ICE's family detention centers, all of ORR's facilities, except its influx facilities, are licensed by the states in which they are located. State licensing plays a critical role in protecting the safety and welfare of children by setting forth minimum standards for programs housing and caring for children, regulating compliance through monitoring and oversight, and providing for the investigation of violations of standards, or abuse or neglect of children in care. Further, ORR policy requires that ORR provide children in its custody with the following: classroom education, health care, socialization/recreation, vocational training, mental health services, access to legal services, access to Child Advocates where applicable, and case management.<sup>7</sup> These services are in addition to regular meals, regular showers or baths, clean clothing, clean bedding, and provision of personal hygiene items.

In addition to its network of licensed programs and as mentioned above, ORR also operates influx facilities to maintain bed space for unaccompanied children in the event of unexpectedly high arrival numbers that exceed the agency's capacity of licensed placements. While intended for only temporary or emergency use, in 2018, ORR's influx facilities remained opened for extended periods and housed thousands of children. These facilities, which ORR has historically situated on federal land, are not licensed by the state in which they are located. As such, there may be little or no independent oversight of these facilities to ensure compliance with minimum standards of care, safety, and the availability of essential services. Advocates, policymakers, and children themselves have expressed concern about the long-term use and size of such facilities, as well as the care available to children in them.

## *B. Most children in ORR custody have not been separated from their parents by U.S. border officials*

Since 2014, large numbers of unaccompanied children have arrived at the U.S.-Mexico border each year. During the height of the family separation crisis, thousands of additional children who had been rendered unaccompanied were referred to ORR. However, since June 2018, the number of separated children in ORR custody has dropped substantially and the vast majority of ORR's population arrived to the U.S. without a parent.

## *C. Factors that led to the record number of children in ORR custody during Fiscal Year 2019*

The Trump Administration's policies have created a rapid increase in children in ORR care, putting enormous strain on the system and resulting in unsafe situations for children.<sup>8</sup> In addition to the root causes that continue to force children to flee their home countries and seek safety in the United States and elsewhere, the lingering impacts of family separations resulting from the zero-tolerance policy,<sup>9</sup> as well as ongoing family separations,<sup>10</sup> have directly resulted in thousands of children being separated from their parents and referred to ORR custody.

7 For greater detail, see: ORR, Policy Guide, §3 "Services," <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.3>.

8 Kids in Need of Defense (KIND), [A Timeline: How the Trump Administration is Rolling Back Protections for Children](#), June 10, 2019.

9 See e.g., Human Rights Watch, ["Q&A: Trump Administration's 'Zero-Tolerance' Immigration Policy,"](#) Aug. 16, 2018; American Bar Association, ["Family Separation and Detention,"](#) last accessed Nov. 27, 2019. See also, ["Newly Released Documents and Personal Testimonies Provide Evidence of Systemic Family Separations a Year After the End of Zero-Tolerance Policy,"](#) June 22, 2019 (detailing the findings of a Freedom of Information Act request filed by the American Immigration Council, National Immigrant Justice Center, Kids in Need of Defense, Women's Refugee Commission, and Florence Immigrant and Refugee Rights Project).

10 See Jeremy Stahl, ["These Horrifying Family Separation Cases Have All Happened Since Trump 'Ended' the Policy,"](#) Slate, Aug. 1, 2019; American Civil Liberties Union (ACLU), ["ACLU Asks Federal Court to Halt Unlawful Ongoing Family Separations,"](#) July 31, 2019.

Additionally, the Trump Administration implemented an unprecedented information-sharing agreement, starting in May 2018, by which ORR shared with DHS data on adults who could be sponsors for children in its care. That information was passed on to ICE to further the Administration's enforcement agenda against undocumented adults. The information-sharing agreement scared off many potential sponsors.<sup>11</sup> As a result, many children who could have been released remained in ORR custody and for increasingly long periods of time.<sup>12</sup> The confluence of these policy decisions led to the activation of influx facilities such as the Homestead facility in Florida, which housed more than 2,500 children at one point.<sup>13</sup> These facilities were unsafe placements for children and could have been avoided with different policy choices.

#### *D. Unaccompanied children are processed differently from accompanied children*

Recognizing the particular vulnerability of children alone in the U.S. immigration system, federal law provides a number of procedural protections to help ensure that children are not returned to trafficking or other harm, and to help them access legal protection. Perhaps most significantly, unlike children accompanied by parents or legal guardians, unaccompanied children cannot be subject to expedited removal at the border. Instead, they are placed in full removal proceedings in which they have an opportunity to make their legal cases before an immigration judge. If they fear return to their country, pursuant to the TVPRA (see more below), they have the right to present their asylum claim in a non-adversarial interview with a trained asylum officer rather than in a court hearing. In contrast, during a court hearing, a government attorney argues for the child's deportation before an immigration judge. Although persons in immigration proceedings have the right to an attorney, representation is not provided at government expense and therefore many children are forced to appear *pro se*.

The *Flores* Settlement Agreement further directs that while in government custody, unaccompanied children must be placed in the "least restrictive setting in the best interest of the child," and that the government make "prompt and continuous efforts" toward release of the child to parents or other family members. The *Flores* Settlement Agreement also requires that children be held in state-licensed, non-secure facilities. Unaccompanied children are screened by legal service providers for eligibility for relief from removal from the U.S. and may be appointed an independent Child Advocate to safeguard their best interests.

In contrast, following apprehension at the border, accompanied children may be placed into expedited removal (ER) proceedings with their parent(s) as a family unit. A child's case is linked to that of her parent, unless the child affirmatively requests her own case to apply for other forms of relief, for example, humanitarian visas for victims of trafficking or severe crimes, or Special Immigrant Juvenile Status. Accompanied children may be returned with their parent(s) to their home countries in a matter of days or subjected to the Administration's "Remain in Mexico" policy<sup>14</sup> and forced to wait for weeks or months in Mexico for their U.S. immigration proceedings—in

11 The Office of U.S. Senator Jeff Merkley, *Shattered Refuge: A U.S. Senate Investigation into the Trump Administration's Gutting of Asylum*, Nov. 2019, p. 26 (citing the Women's Refugee Commission (WRC), National Immigrant Justice Center (NIJC), & American University College of Law Clinical Program, *Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement* (Mar. 26, 2019)).

12 U.S. Conference of Catholic Bishops, Women's Refugee Commission, National Immigrant Justice Center, Lutheran Immigration and Refugee Service, and Young Center for Immigrant Children's Rights, "The ORR and DHS Information Sharing Agreement and Its Consequences," last updated Oct. 2, 2019, <https://justiceforimmigrants.org/wp-content/uploads/2019/10/Updated-formated-MOA-background-10.2.19.pdf>; HHS Office of the Inspector General, *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody*, OEI-09-18-00431, Sept. 2019, p. 12-13.

13 Women's Refugee Commission, Homestead Emergency Influx Facility (Florida), May 2019, <https://www.womensrefugeecommission.org/rights/resources/1762-homestead-emergency-influx-facility>.

14 The "Remain in Mexico" policy forces asylum seekers presenting themselves at the U.S. border to wait in Mexico while their

dangerous conditions, without access to basic services or counsel. The *Flores* Settlement Agreement applies to accompanied children as well, but a court has found that, if they are allowed to enter the United States with their parents while their case is pending, they may also be subject to detention in an ICE family detention center for limited processing purposes even if the facility is not licensed and secure.

## Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)

The TVPRA filled a crucial gap in U.S. anti-human trafficking efforts by bringing unaccompanied migrant children within the scope of U.S. legal protections. Prior to the TVPRA, migrant children were not being adequately screened by DHS to detect whether they were survivors of trafficking or at future risk of being trafficked or persecuted in the U.S. or in their home countries. These children, including children who were not Mexican nationals, were often summarily turned away at the U.S.-Mexico border, where they were left without any protection. In other cases, CBP was releasing children directly to adults who were not screened or confirmed to be related to the children. As a result, many of them ended up in the hands of smugglers and traffickers who came looking or were waiting for them.<sup>15</sup>

### *A. The TVPRA protects children from exploitation and trafficking*

The TVPRA requires DHS to screen all unaccompanied children arriving to the U.S. to more readily identify child survivors of trafficking. As mentioned above, it also establishes procedures to ensure that children's cases are considered fairly, so that no child is returned to a situation of exploitation. Other protections in this legislation include eliminating the one-year asylum filing deadline, as unaccompanied children are frequently transferred between various facilities during their first year in the U.S. and filing paperwork is impracticable without a permanent location; and providing children with the opportunity to have their cases heard in a private interview before an Asylum Officer from the U.S. Citizenship and Immigration Services (USCIS) agency as opposed to an adversarial court proceeding.<sup>16</sup>

### *B. Screening process at the U.S. southern border*

Under the TVPRA, DHS must first determine that an individual is under the age of 18. Once that happens, if the child is deemed unaccompanied, that child must be transferred to an appropriate facility in ORR's network within 72 hours.

If, however, the child is from Mexico or Canada (a "contiguous" country to the United States), she is not by default transferred to ORR custody. Instead, CBP must screen to ensure that the child 1) is not a potential victim of trafficking, 2) has no possible claim to asylum, and 3) can and does voluntarily accept return.

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immigration cases are processed. Implementation of this policy began on January 29, 2019. As of the end of November 2019, over 55,000 people, including families with young children, have been subjected to Remain in Mexico and are currently awaiting their U.S. immigration court hearings along Mexico's northern border in dangerous conditions.

15 Women's Refugee Commission, *We Must Preserve the Trafficking Victims Protection Reauthorization Act of 2008 for Unaccompanied Children*, Apr. 2019, <https://www.womensrefugeecommission.org/images/zdocs/We-Must-Preserve-TVPR-04-2019.pdf>.

16 Kids in Need of Defense, *The TVPRA is Not a Loophole*, Jan. 2018, <https://supportkind.org/resources/typra-not-loophole/>. Note: Children's asylum cases are held to the same legal standard (in terms of eligibility for protection) as any other case.

Unless all these questions are answered in the affirmative, the child cannot legally be immediately returned, but rather must remain to be evaluated for a claim to protection in the United States. In those cases, the child will be transferred to ORR custody. If it appears that the child does not have authorization to enter the United States, and can safely be returned, the child can be repatriated without ever being placed in immigration proceedings. Finally, if the child has a possible claim for relief or if no determination can be made within 48 hours, the TVPRA mandates that the child shall “immediately” be transferred to ORR. Once transferred to ORR, Mexican and Canadian children are treated like all other unaccompanied children.<sup>17</sup> However, this screening process still requires improvements: as evidenced by official data collected by the U.S. and Mexican governments, in the decade since the TVPRA was enacted, it appears that far more Mexican children were returned to danger than were given the opportunity to seek protection.<sup>18</sup>

### *C. Separations of children from non-parental caretakers*

Under federal law, an “unaccompanied” child is one who does not have a parent or legal guardian in the United States, or a parent or legal guardian available to provide care or custody. This definition recognizes the unique vulnerability of children traveling alone to trafficking and other harm. It also reflects the constitutional rights of all parents and legal guardians to the care and custody of their children, regardless of their immigration status. Although family members who accompany a child to the United States are in many cases the best caregivers for the child, they do not share these same legal rights. As such, and in an effort to safeguard children from the risk of trafficking or abuse, an accompanying family member’s relationship to and role in a child’s life must be promptly evaluated. Unfortunately, this has led to the separation of children, often for extended periods, from loving caregivers. Children can spend months in ORR custody, while relatives are often subject to expedited removal or prolonged ICE detention. More needs to be done to ensure that family members and caregivers arriving at the border with children are considered as potential sponsors for the children in their care and every effort is made to minimize time apart in custody.

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<sup>17</sup> Women’s Refugee Commission, *Step-by-Step Guide on Apprehension and Detention of Juveniles in the United States*, July 2014, <https://www.womensrefugeecommission.org/images/zdocs/Step-by-Step-Guide-on-Apprehension-and-Detention-of-Juveniles-in-the-United-States.pdf>.

<sup>18</sup> The Young Center for Immigrant Children’s Rights, *Current Border Screening of Unaccompanied Children from Mexico Has Failed and Should Not be a Model for “Reform,”* July 2019. See generally, United Nations High Commissioner for Refugees (UNHCR), *Children on the Run*, Mar. 2014 (citing a UNHCR study in which UNHCR found that a majority of Mexican unaccompanied children it interviewed raised potential international protection needs, including specific risks that uniquely apply to Mexican children).