

Statement for the Record
Kids in Need of Defense (KIND)
Jennifer Podkul, Esq.
Senior Director for Policy and Advocacy
on
“The Department of Homeland Security’s Family Separation Policy: Perspectives from the
Border”
U.S. House Committee on Homeland Security
Subcommittee on Border Security, Facilitation, and Operations
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Kids in Need of Defense (KIND) was founded by the Microsoft Corporation and the United Nations Refugee Agency (UNHCR) Special Envoy Angelina Jolie, and is the leading national organization that works to ensure that no refugee or immigrant child faces immigration court alone. We do this in partnership with over 600 law firms, corporate legal departments, law schools, and bar associations, which provide pro bono representation to unaccompanied children referred to KIND for assistance in their deportation proceedings. KIND has served more than 18,000 children since 2009, and leveraged approximately \$250 million in pro bono support from private sector law firms, corporations, law schools and bar associations. KIND also helps children who are returning to their home countries through deportation or voluntary departure to do so safely and to reintegrate into their home communities. Through our reintegration pilot project in Guatemala and Honduras, we place children with local nongovernmental organization partners, which provide vital social services, including family reunification, school enrollment, skills training, and counseling. KIND also engages in broader work in the region to address root causes of child migration, such as sexual- and gender-based violence. Additionally, KIND advocates to change law, policy, and practices to improve the protection of unaccompanied children in the United States, and is working to build a stronger regional protection framework throughout Central America and Mexico.

Introduction

Family unity is a fundamental human right and central principle of U.S. immigration policy and international law.¹ The Administration gutted this fundamental principle when it began separating families as a way to deter asylum seekers from seeking protection at the U.S./Mexico border. Families like that of Luisa, a 7-year-old child who was separated from her father after they entered the U.S. last summer.² The day after this separation, Luisa’s mother and 10-year-old brother entered the U.S. and passed a credible fear interview, which placed them into removal proceedings during which they may assert their claims for asylum. Although Luisa’s brother and mother were released, Luisa stayed in a detention facility. On her own, she could not have made

¹ See U.N. International Covenant on Civil and Political Rights, art. 23, Dec. 16, 1966, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; U.N. Convention on the Rights of the Child, art. 9, Nov. 20, 1989, 1577 U.N.T.S. 3. See also WILLIAM KANDEL, U.S. FAMILY-BASED IMMIGRATION POLICY, CONGRESSIONAL RESEARCH SERV. 2 (2014) (available at <https://trac.syr.edu/immigration/library/P9368.pdf>).

² *How You Can Help Separated Families and Ensure Protection for Children*, KIND (June 28, 2018), <https://supportkind.org/resources/how-you-can-help-end-family-separation-and-ensure-protection-for-children/>.

a case for asylum because she did not know why her family came to the U.S. When KIND spoke with Luisa, it was impossible to even conduct a legal assessment with her because she could not stop crying—she was so distraught by the separation that she simply sobbed during most of the meeting with an attorney.³

Additional policies of the Administration have delayed the release of children in detention to their families—even children that had gone through the horror of having been separated from their parents. Two sisters KIND is working with remained in ORR custody for nearly 8 months after being separated from their father, who was then deported. The girls’ mother submitted all necessary paperwork for the girls’ release, but officials insisted for months that one particular individual, who periodically resided in the home, but traveled frequently for work, also submit fingerprints. In December, ORR suddenly changed its policy and no longer required the missing fingerprints. The girls were finally released the week before Christmas and able to reunite with their mother. The children remain very concerned about their father, who was deported and faces ongoing threats to his safety.

These children belong with their families.

KIND recommends the following: First, the Trump Administration must end the “Migrant Protection Protocol (Remain in Mexico)” policy as well as metering at Ports of Entry that leave children in dangerous conditions in Mexico while waiting to ask for protection. Second, family separations should occur only when they are in the best interest of children using public standards created by child welfare experts. Third, the government should document the reason for separations, and allow parents to challenge separation decisions when they occur. Fourth, the government should track all separated family members and provide that information to the child and their attorney. Fifth Homeland Security should hire licensed child welfare professionals to screen and provide adequate care for children in DHS custody. Finally, DHS should never use information obtained from the Office of Refugee Resettlement to vet a sponsor to conduct enforcement⁴.

We urge the Committee to consider our recommendations and to hold the Trump Administration accountable to do what Congress has mandated: allow asylum-seekers to apply for protection in the U.S. Border security policies should protect the integrity of our immigration system and our nation’s commitment to extending protection to those in need of safety—particularly children.

The “Migration Protection Protocol” Policy Must Be Eliminated

In December 2018, DHS Secretary Kirstjen Nielsen announced the Migrant Protection Protocols (MPP)⁵—or the “Remain in Mexico” policy—under which certain asylum-seekers are forced to

³ *Id.*

⁴ This practice was limited in the 2019 DHS appropriations bill. *See*, <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/documents/Summary%20of%20Conference%20Report.pdf>

⁵ *See* Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration, Dep’t of Homeland Security (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-actionconfront-illegal-immigration>; *see also* Memorandum on MPP Guiding Principles (Jan. 28, 2019) (hereinafter

stay in Mexico pending their immigration proceedings in the U.S.⁶ Relatedly, in November 2018, DHS and the U.S. Department of Justice issued an interim final rule that, coupled with a Presidential Proclamation issued shortly after, would bar migrants from seeking asylum if they cross the border between official ports of entry.⁷ Both policies disregard Congress' express intent to allow asylum seekers to apply for protection, regardless of where they enter the country.⁸ They further violate international norms and treaties by which the U.S. is bound, including the 1951 Refugee Convention, which prohibits nations from expelling or returning refugees to a country where their lives would be threatened.⁹ In late January 2019, DHS formally implemented the Remain in Mexico policy turning back 240 migrants since that time.¹⁰

While the Administration has asserted that the Remain in Mexico policy would not apply to unaccompanied children,¹¹ U.S. and Mexican officials are nonetheless preventing unaccompanied children from entering the U.S. to seek asylum. Moreover, at least 25 minors have been returned to Mexico under the new policy.¹²

During a research mission to Mexico, KIND learned that CBP agents have turned back unaccompanied children to Mexico after telling them that they can no longer seek asylum in the U.S.¹³ Mexican officials are similarly blocking unaccompanied children from presenting themselves at U.S. ports of entry, with some Mexican officials even requiring migrants to pay thousands of dollars before letting them apply for asylum.¹⁴ Mexican officials also frequently transfer unaccompanied children seeking asylum in the U.S. to the custody of Mexico's child

MPP Memorandum), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

⁶ MPP Memorandum, *supra* note 4, at 1-2.

⁷ 83 Fed. Reg. 55934 (Nov. 9, 2018). The United States District Court of the Northern District of California issued an injunction against the measure. *East Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-06810-JST (N.D. Cal. Nov. 19, 2018) (Order Granting Temporary Restraining Order).

⁸ *See* INA § 208, 8 U.S.C. § 1158(a)(1) (2008).

⁹ Nations are prohibited from expelling or returning a refugee to a country where "his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion." UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf>. The U.S. is bound to the 1951 Convention as a signatory to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223.

¹⁰ Julia Ainsley, *Trump admin has turned back 240 asylum-seekers at border under 'Remain in Mexico' policy*, NBC NEWS (Mar. 12, 2019), <https://www.nbcnews.com/politics/immigration/trump-admin-has-turned-back-240-asylum-seekers-border-under-n982246>.

¹¹ MPP Memorandum, *supra* note 4, at 1.

¹² Maria Verza, *US sending Central American migrant minors back to Mexico*, AP (Feb. 25, 2019), <https://www.apnews.com/8548e76bed794a9eb1f3b38d15e0601b>.

¹³ *See* KIND, *The Protection Gauntlet: How the United States is Blocking Access to Asylum Seekers and Endangering the Lives of Children at the U.S. Border* (Dec. 21, 2018) (hereinafter *The Protection Gauntlet*), <https://supportkind.org/resources/the-protection-gauntlet-how-the-united-states-is-blocking-access-to-asylumseekers-and-endangering-the-lives-of-children-at-the-u-s-border/>.

¹⁴ Emily Green, *Exclusive: Mexican Officials are Extorting Thousands of Dollars from Migrants Applying for Asylum*, VICE (Mar. 13, 2019), https://news.vice.com/en_us/article/kzdy4e/exclusive-mexican-officials-are-extorting-thousands-of-dollars-from-migrants-to-apply-for-asylum.

welfare agency (DIF).¹⁵ Once in DIF custody, these children are informed that they may seek asylum in Mexico or be deported to their countries of origin.¹⁶ They are not informed of their right to seek protection in the U.S.¹⁷ Fearful of deportation by Mexican officials, some unaccompanied children have chosen to hide from Mexican officials or to cross the border between ports of entry—circumstances that increase the dangers facing vulnerable youth.¹⁸

Due to severe restrictions on the number of available U.S. asylum interviews, migrants must wait months to present their asylum claim at the border.¹⁹ In several cities on Mexico’s northern border, migrants place their name on a non-governmental waitlist and wait to be called by U.S. officials to present themselves.²⁰ Once called, the migrants can then present themselves for asylum at the U.S. border.²¹ Unaccompanied minors, however, are not permitted to place themselves on the waitlist, impeding their ability to even make any asylum claim under the new Migrant Protection Protocol.²²

Unaccompanied children face grave danger in Mexican border towns, where they may be preyed upon by smugglers and human traffickers.²³ Last December, two unaccompanied youth were tricked, abducted, tortured, and killed in Tijuana.²⁴ A third child reported that he and his friends were kidnapped, tied to chairs, undressed, and tortured with scissors in an attempt to extort their relatives for money. Across our Southern border there are children and babies sleeping in tents, on the streets, exposed to the elements and depending on volunteers for food. When they finally are allowed to present themselves to U.S. officials many are sick, dehydrated, and in need of medical attention. Despite horrendous incidences like this, Mexican officials continue to block unaccompanied children from accessing U.S. ports of entry.²⁵

Family Separations Should Occur Only When They are in the Best Interest of the Child

On May 7, 2018, Attorney General Jeff Sessions announced the Administration’s Zero Tolerance Policy (ZTP), under which families arriving at the border would be separated. Parents would be

¹⁵ KIND, *The Protection Gauntlet: How the United States is Blocking Access to Asylum Seekers and Endangering the Lives of Children at the U.S. Border 2-3*, (Dec. 21, 2018) (hereinafter *The Protection Gauntlet*), <https://supportkind.org/resources/the-protection-gauntlet-how-the-united-states-is-blocking-access-to-asylumseekers-and-endangering-the-lives-of-children-at-the-u-s-border/>.

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ Fernanda Echavarri, *Teens Fleeing Central American Gangs Are Stuck at the Border—and Fear for Their Lives*, MOTHER JONES (Mar. 7, 2019), <https://www.motherjones.com/politics/2019/03/unaccompanied-minors-asylum-seekers-central-america-tijuana/>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Jack Herrera, *Five Takeaways from the Lawsuit Over Trump’s Plan to Keep Asylum Seekers in Mexico*, PACIFIC STANDARD (Feb. 14, 2019), <https://psmag.com/news/five-takeaways-from-the-lawsuit-over-trumps-plan-to-keep-asylum-seekers-in-mexico>.

²⁴ Ed Vulliamy, *Tricked, abducted and killed: the last day of two child migrants in Mexico*, THE GUARDIAN (Feb. 16, 2019), <https://www.theguardian.com/world/2019/feb/16/tijuana-migrant-child-murders-mexico-us-asylum>.

²⁵ Herrera, *supra* note 23.

held in adult detention facilities and prosecuted for illegal entry—despite exercising their lawful right to seek asylum—while children would be reclassified as unaccompanied children and placed in the custody of the Office of Refugee Resettlement (ORR). From May to July 2018, at least 2,700 immigrant and refugee children were separated from their parents after crossing into the U.S. seeking safety.

The American Civil Liberties Union (ACLU) filed a lawsuit—the *Ms. L v. Sessions* case—which resulted in a court injunction mandating reunification of children with their parents by July 26, 2018. With other direct legal service providers,²⁶ KIND formed a part of the Steering Committee ordered by the court, to provide legal expertise and input in the lawsuit and locate and interview the deported parents.

In response to the ZTP, KIND formed a dedicated Family Separation Response Team (FSRT). In addition to directly handling the legal cases of separated children and their families, the FSRT provides expert mentorship and training to pro bono attorneys and staff, collaborates in ongoing coalition-building and litigation efforts, and works with partners across the U.S. to support families affected by the crisis. The team has also collaborated in the effort to locate deported parents in Central America. Additionally, KIND represented over 100 detained children who had been separated as part of this policy. The average age of these children was 10 years old.

In addition, KIND has now received approximately 280 additional referrals for released, separated children across our 10 field offices, including numerous children whose parents were deported. KIND is also assisting dozens of reunified family units.

Parents and children face lasting trauma as a result of their forced separations. In 2017, the American Academy of Pediatrics explained that detention stunts child development and causes severe psychological trauma, like depression and post-traumatic stress disorder.²⁷ Medical and mental health experts have concluded that the forced separation of migrant children who fled violence can have particularly harmful consequences, even if the separation is brief.²⁸ At the Port Isabel detention center, a father articulated the pain he felt being separated from his 9-year-old son, saying, “I haven’t seen my son in over two months—I don’t want anything from the United States other than my son.”²⁹ A mother who was separated from her 6-year-old son said, “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.”³⁰

Not only are family members physically separated, but their legal cases and experiences within the immigration enforcement system are also bifurcated. This raises serious due process concerns, and serious inefficiencies in a backlogged system, especially when individuals from the same family have the same claim for asylum. Children, in particular, may not know all the

²⁶ The Steering Committee approved by the Court in the *Ms. L* litigation includes the law firm Paul, Weiss as well as three non-governmental organizations: Justice in Motion, Kids in Need of Defense (KIND), and the Women’s Refugee Commission (WRC).

²⁷ JULIE M. LINTON ET AL., AM. ACAD. OF PEDIATRICS, DETENTION OF IMMIGRANT CHILDREN 6 (2017).

²⁸ BETRAYING FAMILY VALUES, *supra* note 41, at 12.

²⁹ #SilencedVoices, KIND, <https://supportkind.org/get-involved/silencedvoices/>.

³⁰ *Id.*

details or have important documents relating to their family’s asylum claim. When this happens, disparate results and incomplete information are far more likely to affect important immigration proceedings.

Children should not be separated from their parents barring instances in which separation legitimately protects the child and is in line with child welfare standards.

Reasons for Separations Must be Documented and the Government Should Track all Separated Family Members

The uptick in family separations came after the Department of Justice (DOJ) and the Department of Homeland Security (DHS) implemented a “zero-tolerance” immigration policy in the spring of 2018.³¹ The policy directed DHS border officials to refer every individual apprehended near the border who did not present at an official port of entry to DOJ for criminal prosecution, even when individuals were primary caregivers to children and exercised their lawful right to seek asylum.³² Adults were taken to federal detention facilities, while children were transferred into the care of ORR, which operates within HHS.³³ Once separated from their parents, DHS classified the kids as “unaccompanied.”³⁴

Even before the ZTP, the *New York Times* reported that, from October 2017 to April 2018, over 700 children were taken from their parents.³⁵ The latest HHS Inspector General’s report estimates that DHS separated thousands of children from 2017 to June 2018.³⁶ After the Administration officially acknowledged the ZTP, a Customs and Border Protection (CBP) official testified that 639 parents traveling with 658 children were processed for prosecution in the span of thirteen days in May alone.³⁷ As of December 2018, HHS had identified 2,737 children who had been separated from their parents under the policy and were required to be reunified under a June 2018 federal court order.³⁸

Alarming, the HHS Inspector General’s report confirms what KIND has seen with its own caseload, which is that the Trump Administration continues to separate families at the border. Even after President Trump announced an end to the ZTP, ORR received at least 118 newly

³¹ U.S. DEP’T OF HEALTH & HUM. SERV., OFFICE OF INSPECTOR GENERAL, OEI-BL18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019), 1 (hereinafter INSPECTOR GENERAL REPORT).

³² Press Release, KIND & Women’s Refugee Comm’n, Family Separation at the Border (May 30, 2018) (on file at <https://supportkind.org/media/family-separation-at-the-border/>).

³³ INSPECTOR GENERAL REPORT, *supra* note 35, at 2.

³⁴ Press Release, *supra* note 36.

³⁵ Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border*, NYTIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>.

³⁶ INSPECTOR GENERAL REPORT, *supra* note 35, at 1, 13.

³⁷ *TVPRA and Exploited Loopholes Affecting Unaccompanied Alien Children: Hearing Before the Subcomm. on Border Security & Immigration*, 105th Cong. (2018) (statement of Richard Hudson, Deputy Chief of the Operations Program, Law Enforcement Operations Directorate, U.S. Customs & Border Protection).

³⁸ Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, NYTIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html>.

separated children between July 1 and November 7, 2018.³⁹ ORR often receives little or incomplete information about the reasons for such separations.

DHS Must Develop Standard Guidelines for the Continued Separations

The HHS Inspector General’s report notes that DHS only provides ORR with “limited information” about why a family has been separated.⁴⁰ Under current policies and practices, these decisions are arbitrary. They require no justification or documentation and do not call for the screener to have any child welfare expertise.⁴¹ The HHS Inspector General’s report emphasizes that “[i]ncomplete or inaccurate information about the reasons for separation, and a parent’s criminal history in particular, may impede ORR’s ability to determine the appropriate placement for a child.”⁴² It also notes that DHS does not consistently respond to ORR’s requests for follow-up information about the reasons for a child’s separation.⁴³ KIND continues to see cases in which neither ORR nor the attorney are notified that DHS separated a child from a parent. A parent can lose physical custody of their child without any judicial oversight and for reasons that are inconsistent with child welfare legal standards.⁴⁴ For example, while a parent may have a prior deportation order or an arrest warrant in the home country, that history may actually be the basis of the parent’s asylum claim for government persecution, such as in the case of a parent fleeing an oppressive government regime.

KIND has seen several recent cases, post-ZTP, of children separated from their parents for unknown reasons. In one case, a father was separated from his teenage daughter and no information was given for the reasons for the separation. Moreover, KIND only found out this child had been separated from her father through interviews with the child. The separation was not noted in her file and no one from ORR flagged the separation for the attorney of record. Frequently in these cases, KIND attorneys have had to track down the location of the parents, and then begin the difficult task of communicating with them at an ICE detention facility, often several hundred miles away. Even when KIND attorneys are able to establish contact with the separated parent, the parent is typically given little to no information as to why they were forcibly deprived of their ability to remain with their child. There is currently no formal written document issued to parents outlining the reasons for the separation, and no vehicle for them to challenge any assertions being made against them. Moreover, even when the separations are recorded, it is taking almost a week for DHS to facilitate communication between the parent in their custody and the child.

Many children are also separated from extended family members like siblings or grandparents, or when CBP questions the veracity of the relationship between the adult and child. These separations are not recorded in the new DHS system. Therefore, if CBP does not believe an

³⁹ *Id.* at 11.

⁴⁰ INSPECTOR GENERAL REPORT, *supra* note 35, at 11.

⁴¹ KIND, WOMEN’S REFUGEE COMM’N & LUTHERAN IMMIGRATION SERV., BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES 4 (2017) (hereinafter BETRAYING FAMILY VALUES).

⁴² INSPECTOR GENERAL REPORT, *supra* note 35, at 12.

⁴³ *Id.*

⁴⁴ BETRAYING FAMILY VALUES, *supra* note 45, at 7.

adult is the true parent of a child, the separation will not be recorded and there is no way for that parent to find their child and challenge the separation later. Many children travel with extended family members like grandparents or other relatives who may have cared for the children their entire lives but never obtained legal guardianship in the home country. CBP must separate these family members but they should be tracking these separations for the same reasons it is important to track children separated from their parents. The separation from extended family members may be just as emotionally traumatic as being separated from a parent and that adult may have important information related to the child's legal claim for protection.

DHS Must Ensure Child Welfare Professionals Screen and Care for Children in Their Custody

KIND recommends the government hire child welfare professionals at the border to supervise the protection of children and families and the circumstances in which family separations occur.⁴⁵ Further, immigration enforcement agents should be trained to consider family unity as a primary factor in charging and detention decisions.⁴⁶ Written standards should be drafted, in consultation with child welfare experts, describing protocols and procedures for determining when separation may be in the best interest of a child. Immigration enforcement agents should also receive training on how to apply the “best interests of the child” framework for when they believe a child's separation from their parent is warranted.⁴⁷ These instances include when a parent has a conviction for a violent offense or child abuse or neglect offense. DHS should also consider ORR's best interest recommendation. Family separation should be recorded and justified in writing, with an opportunity provided to the parent or child to challenge the separation. ORR, family members, and attorneys should be able to easily access this information. In order to ensure that accurate information is available, ORR must demand that DHS input detailed information about any separations going forward into the ORR portal in a rigorous and systematic way.

DHS Must Conduct Oversight of Facilities Holding Migrant Children

At a time when children, both accompanied and unaccompanied, make up a significant portion of all migrants processed at the Southern border, this Administration has actively sought to roll back *Flores* protections, which set out national standards for the government's treatment, detention, and release of children. In September 2018, it proposed regulations that would relax *Flores* standards for how kids in custody can be held and transported.⁴⁸

The proposed regulations would eliminate the vital third-party oversight and monitoring that is currently provided through judicial enforcement of *Flores*. As recently as July 2018, the supervising court found that the government had breached the agreement in several ways, including by undertaking policies that “unnecessarily delay” the release of children to

⁴⁵ *Id.* at 2.

⁴⁶ *Id.* at 1.

⁴⁷ *Id.* at 7.

⁴⁸ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 7, 2018) (to be codified at 45 C.F.R. pt. 410).

custodians.⁴⁹ In January 2019, it was reported that *Flores* counsel discovered facilities holding unaccompanied children operating without licenses.⁵⁰ *Flores* counsel recounted that ORR has failed to notify children and parents of their rights relating to securing children’s release from facilities, discouraged parents from seeking their children’s release by passing their information to ICE,⁵¹ and delayed background investigations of potential sponsors.⁵²

ORR remains the appropriate entity to care for migrant children—it has experience resettling refugees and child welfare expertise. It is not an immigration enforcement agency. However, third-party monitoring of facilities must be retained and protected, particularly at a time when there is enormous strain on ORR’s resources. Compliance with *Flores* must not be left to discretion, especially at a time when ORR policies result in higher and longer detention rates for children.

DHS Should Never use Information Obtained from the Office of Refugee Resettlement to Conduct Enforcement

The Homeland Security Act requires the Office of Refugee Resettlement to “coordinate and implement the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status.”⁵³ The TVPRA clarifies that ORR is to “promptly [place children] in the least restrictive setting that is in the best interest of the child.”⁵⁴ This requirement derives from the longstanding *Flores* Settlement Agreement (FSA), which provides that children should be placed in the “least restrictive setting” in their best interests,⁵⁵ and directs that parents and legal guardians receive priority among potential sponsors, who may also include other immediate relatives, distant relatives, or unrelated individuals.⁵⁶

⁴⁹ KIND, Comment Letter on Proposed Rule Relating to Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children 29 (Nov. 6, 2018), <https://supportkind.org/wp-content/uploads/2018/11/KIND-Comments-DHS-Docket-ICEB-2018-0002-11.6.18.pdf>.

⁵⁰ Graham Kates, *Migrant Children in U.S. Are Being Held in Unlicensed Shelters, Lawyers Say*, CBS NEWS (Jan. 24, 2019, 2:17 PM), <https://www.cbsnews.com/news/migrant-children-in-u-s-are-being-held-in-unlicensed-shelters-lawyers-say/>.

⁵¹ A leaked internal DHS memo from December 2017 proposed a Memorandum of Understanding between ORR and ICE, under which the agencies would coordinate to place undocumented sponsors in removal proceedings. It anticipated that the policy would “result in a deterrent impact on ‘sponsors’ who may be involved with smuggling children into the United States” and there would be “a short term impact on HHS where sponsors may not take custody of their children in HHS facilities, requiring HHS to keep the UACs in custody longer.” Memorandum from Dep’t of Homeland Security (Dec. 2017) (on file at <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>). This policy took effect four months later.

⁵² Kates, *supra* note 56.

⁵³ The Homeland Security Act, Pub. L. No. 107–296, 116 Stat. 2135 § 462(b)(1)(A) (2002).

⁵⁴ 8 U.S.C. § 1232(c)(2)(A) (2013).

⁵⁵ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997), available at https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf [hereinafter *Flores* Settlement Agreement]. The *Flores* Settlement Agreement is the result of a class action against the government by a class consisting of all immigrant children detained in custody of the government. *Id.* at ¶ 10. This binding agreement sets standards for the detention and release of immigrant children to sponsors. *See id.* at ¶ 9.

⁵⁶ *Id.* at ¶ 14; 8 U.S.C. § 1232(c); *Sponsors and Placement: Release of Unaccompanied Alien Children to Sponsors in the U.S.*, ORR, <https://www.acf.hhs.gov/orr/about/ucs/sponsors> (last visited Sept. 23, 2018); U.S. Dep’t of Health and Human Services, Office of Inspector General, HHS’s Office of Refugee Resettlement Improved Coordination

Although ORR has received information about a potential sponsor’s immigration status since 2005, it has not, until recently, shared immigration status information with other agencies for the explicit purpose of immigration enforcement, as immigration status typically is not relevant to evaluating whether the sponsor can adequately care for a child.⁵⁷ Instead, ORR’s policy has been to enable “the release of unaccompanied alien children (UAC) to undocumented sponsors, in appropriate circumstances and subject to certain safeguards.”⁵⁸ Rather than disqualifying potential sponsors, immigration status information has previously only been used “to ensure the safety and well-being of the child by making sure that there is an adequate care plan in place that takes all relevant aspects of the sponsor’s situation into consideration.”⁵⁹

In the summer of 2017, however, U.S. Immigration and Customs Enforcement (ICE) began using information gathered by ORR to initiate enforcement against sponsors—identifying individuals for enforcement based on their role as the designated or potential caretakers of unaccompanied children.⁶⁰ ICE arrested more than 400 people in its initiative targeting sponsors for smuggling.⁶¹ However, news reports indicated that the majority of those arrested were not charged with federal smuggling crimes, but instead charged with violations unrelated to smuggling.⁶² Many of those arrested were not the suspects ICE had targeted, but merely present in the home of the potential sponsors when the agency arrived.⁶³ These actions stoked fear in immigrant communities and raised concerns among many about stepping forward to care for unaccompanied children in ORR custody. KIND issued a report in December 2017 documenting the stories of unaccompanied children and sponsors affected by DHS’ enforcement actions and the detrimental impacts of enforcement against sponsors on the well-being of children and due process.⁶⁴

and Outreach to Promote the Safety and Well-Being of Unaccompanied Alien Children (July 2017) (“ORR releases most children to their parents or an immediate relative.”).

⁵⁷ *Sponsors and Placement: Release of Unaccompanied Alien Children to Sponsors in the U.S.*, ORR, <https://www.acf.hhs.gov/orr/about/ucs/sponsors> (last visited Feb. 25, 2018).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See KIND, Targeting Families 8 (Dec. 2017), https://supportkind.org/wp-content/uploads/2017/12/TargetingFamilies_-December-2017_Final-v.2.pdf.

⁶¹ John Burnett, *ICE Has Arrested More Than 400 in Operation Targeting Parents Who Pay Smugglers*, NPR (Aug. 18, 2017), <https://www.npr.org/2017/08/18/544523231/arrests-of-undocumented-parents-sparks-debate-between-federal-officials-and-immi>; Hannah Dreier, *Relatives of Undocumented Children Caught Up in ICE Dragnet*, ProPublica (Sept. 11, 2017), <https://www.propublica.org/article/relatives-of-undocumented-children-caught-up-in-ice-dragnet>; Uriel J. Garcia, *ICE Arrests Young Immigrant’s Sponsor Months After Feds Assured Him He’d Be Safe*, THE NEW MEXICAN, Sept. 9, 2017, http://www.santafenewmexican.com/news/local_news/ice-arrests-young-immigrant-s-sponsor-months-after-feds-assured/article_428366f5-6d03-552c-a277-93b83d3005e2.html.

⁶² Dreier, *Relatives of Undocumented Children Caught Up in ICE Dragnet*, *supra* note 13.

⁶³ See Garcia, *ICE Arrests Young Immigrant’s Sponsor Months After Feds Assured Him He’d Be Safe*, *supra* note 13.

⁶⁴ KIND, Targeting Families 8 (Dec. 2017), https://supportkind.org/wp-content/uploads/2017/12/TargetingFamilies_-December-2017_Final-v.2.pdf.

In April 2018, information-sharing between DHS and ORR was formalized through a Memorandum of Agreement (MOA) providing for the continuous sharing of information about unaccompanied children from the time of their apprehension through their release from custody, including information about potential sponsors and other adults in the home. Shortly after, DHS issued a notice in the Federal Register to modify its system of records to carry out the agreement.⁶⁵ That notice stated that ICE will use information about sponsors obtained through ORR to “identify and arrest those who may be subject to removal.”⁶⁶ At the same time, HHS pursued modifications to forms related to its sponsorship process to implement the MOA.⁶⁷ ORR’s modified process included expanded fingerprinting and background check requirements, including for all potential sponsors and adult members of their households.

The MOA has impeded ORR’s ability to promptly place unaccompanied children in the least restrictive setting by deterring potential sponsors for unaccompanied children. Potential sponsors have expressed fear of engaging with the agency’s sponsorship and family reunification process due to both the expanded scope of the information collected as well as ICE’s intent to use information it receives from ORR for immigration enforcement.⁶⁸ KIND has heard reports of individuals declining ORR’s request to fill out necessary paperwork to serve as sponsors or withdrawing from the family reunification process after their applications have been submitted. Fear of enforcement has similarly compelled some potential sponsors and other household members to miss their fingerprinting appointments or to discontinue their applications. Moreover, the burdensome requirement that all adult household members submit information significantly delayed some reunifications.

Recent enforcement actions by ICE in the course of implementing the MOA have only compounded these fears. From July through November 2018, ICE arrested 170 potential sponsors of unaccompanied children in ORR custody.⁶⁹ Nearly 64 percent (or 109) of the individuals arrested had no criminal record.⁷⁰ Such actions have led to a decline in the number of individuals willing to sponsor unaccompanied children in ORR custody and delayed the release of children from ORR. Numbers of children in ORR custody have soared as children remain in care for longer, indefinite periods. In the fall and winter of 2018, the number of unaccompanied children in ORR’s care reached historic levels—with nearly 15,000 children in care in mid-December 2018. The length of time in ORR care similarly ballooned as a result of the MOA and other policies—at one point with an average length of stay at longer than 70 days.⁷¹

⁶⁵ 83 Fed. Reg. 20844 (May 8, 2018).

⁶⁶ *Id.*

⁶⁷ *See, e.g.*, Administration for Children & Families, Sponsorship Review Procedures for Approval for Unaccompanied Alien Children, OMB No. 0970-0278, 83 Fed. Reg. 22490 (May 15, 2018); 83 Fed. Reg. 42895 (Aug. 24, 2018); 83 Fed. Reg. 52221 (Oct. 16, 2018).

⁶⁸ *See* 83 Fed. Reg. at 20846 (noting among the purposes of DHS’ proposed system of records change “[t]o screen individuals to verify or ascertain citizenship or immigration status and immigration history, and criminal history to inform determinations regarding sponsorship of unaccompanied alien children . . . and to identify and arrest those who may be subject to removal.”).

⁶⁹ Geneva Sands, CNN, *ICE arrested 170 potential sponsors of unaccompanied migrant children* (Dec. 10, 2018), <https://www.cnn.com/2018/12/10/politics/ice-potential-sponsors-arrests/index.html>.

⁷⁰ *Id.*

⁷¹ Jonathan Blitzer, *To Free Detained Children, Immigrant Families Are Forced to Risk Everything*, *The New Yorker* (Oct. 16, 2018), <https://www.newyorker.com/news/dispatch/to-free-detained-children->

Held indefinitely in ORR custody with no knowledge of when and to whom they may be released, unaccompanied children experience significant anxiety and distress. These impacts may be particularly significant for child survivors of trauma. In detention for months potentially without the emotional support of family members children may grow hopeless and decide to return to their countries of origin, even when they may have viable claims for humanitarian protection and face serious harm or death if deported. Detention fatigue not only affects children's physical and mental health, but it negatively impacts their ability to proceed with their legal cases.⁷²

Conclusion

Children and families seeking asylum in the U.S. are often escaping dangerous and violent conditions in their countries of origin. The opportunity of asylum-seekers to pursue protection from harm is the very foundation of our country's asylum laws, and efforts to restrict access to humanitarian protection like the Remain in Mexico policy do nothing to make our country safer. Instead of restricting access to protection for unaccompanied children and families, the Administration should ensure that all are provided due process and an opportunity to have their claims fully and fairly considered. We look forward to working with Members to ensure our country's continued commitment to justice and to the protection of the most vulnerable.

[immigrant-families-are-forced-to-risk-everything](#) ("Officially, the H.H.S. claims that the average time is fifty-nine days, but according to one of the department's own officials, who agreed to speak with me on the condition of anonymity, detained children now spend an average of seventy-four days in federal custody, more than double what it was at the start of 2016.").

⁷² See, e.g. Julie M. Linton, Marsha Griffin, Alan J. Shapiro, Am. Academy of Pediatrics, *Detention of Immigrant Children* (May 2017), <https://pediatrics.aappublications.org/content/139/5/e20170483.short>