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I. Introduction

Recent events at the U.S.-Mexico border\(^1\) suggest that it is time for members of Congress to establish clear legal standards for the care of children apprehended by Customs and Border Patrol and to codify the processing of arriving children and the terms of their release. The following information is intended to ensure that any legislation drafted is informed by established knowledge regarding child health. This document is intended to provide the reader with general overviews of (1) the current and recent legal landscape regarding children’s legal rights in immigration detention, (2) the children’s placement in various immigration-related facilities, and (3) rigorous scientific research highlighting the significant risk of harm from certain government policies and practices on arriving children.

II. Legal Background

For the past 34 years, tremendous time and energy has focused on the standards of care and terms of release for children who enter the United States without documentation. That concern led to the filing of \textit{Flores v. Meese}\(^2\) in 1985 on behalf of the children detained. That case was actively litigated for twelve years before the U.S. government and the children (through their attorneys) entered a settlement agreement in 1997, the Flores Settlement Agreement (FSA), which provides the U.S. government will do several basic things for children in its care, including:

\(^1\) Although the U.S. is nowhere near the highest number of apprehensions at the border in recent decades, since 2014, a higher percentage of apprehensions include families and unaccompanied children seeking humanitarian relief, which require government systems to adapt and respond accordingly.

\(^2\) Currently \textit{sub nom} Flores v. Barr, No. 17-56297, 2019 WL 3820265 (9th Cir. Aug. 15, 2019).
1. Expeditiously process the children;
2. Provide the children with a notice of their rights, including their right to request a bond redetermination hearing;
3. Hold the children in facilities that are “safe and sanitary” and are “consistent with...concern for the particular vulnerability of minors”;
4. Ensure “access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect the minor from others”;
5. Provide the children contact with family members arrested with the child; and

The U.S. government also agreed to a “general policy” favoring the release of children. Examples of the limited exceptions allowing the government not to release a particular child include to ensure the child’s safety or to secure the child’s timely appearance at court. Instead, almost all children are to be released from government custody “without unnecessary delay” to, in order of preference: (1) a parent; (2) a legal guardian; (3) an adult relative or entity designated by the parent or legal guardian; (4) a licensed program willing to accept custody; or (5) an adult or entity seeking custody of the child when there is no other likely alternative to long-term detention and family reunification is unlikely. According to Commander Jonathan White in his testimony to Congress in February 2019, of the children released from ORR custody in FY19, 89 percent were released to individual sponsors, and of those, 91 percent went to parents or other close relatives.

The FSA provides that the U.S. government would collect statistical information on all children taken into custody and provide that information to the children’s class counsel until “two years after the court determines...that the INS has achieved substantial compliance with the terms of this Agreement.” A determination of substantial compliance was never made. Instead, the children’s attorneys repeatedly documented, starting in the first few years after the settlement was reached, that the terms of the FSA were not being met and so litigated to enforce the agreement. Generally, the court in Flores has ruled with the children, relying on evidence collected by attorneys conducting attorney-client interviews or facility visits authorized under

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4 Id.
5 Id.
6 FSA at V.12A.
7 Id.
8 Id.
9 FSA at VI.
10 Id. at VI.14.
11 Id.
13 FSA at IX.28A-29.
Sections XI and XII of the settlement agreement. In recent years, the children’s attorneys have repeatedly documented children being detained for long periods of time and in conditions that are neither safe nor sanitary, and give no regard for the unique vulnerability of children. Indeed, Commander White reported in his testimony that the average length of detention for children in the custody of the Office of Refugee Resettlement has been 89 days in FY19, while a government attorney argued before the 9th Circuit Court of Appeals in June 2019 that the “safe and sanitary” provision under the FSA did not necessarily require the U.S. to provide children with soap or bedding—an argument that was roundly dismissed by the court.

The parties to the FSA agreed that it would terminate the earlier of five years after the court approved the agreement, which was January 17, 1997, or, as mentioned above, three years after the court determined that the US government was in substantial compliance with the agreement. However, one term was to survive the termination: the U.S. is obligated to continue to house the general population of children in custody in licensed facilities. The FSA also included (1) minimum standards for licensed programs, (2) “Instructions to Service Officers re: Processing, Treatment, and Placement of Minors,” (3) a contingency plan in case of an emergency or influx; (4) an agreement concerning facility visits; and (5) a notice of the right to judicial review that explains:

The INS usually houses persons under the age of 18 in an open setting, such as a foster or group home, and not in detention facilities. If you believe that you have not been properly placed or that you have been treated improperly, you may ask a federal judge to review your case. You may call a lawyer to help you do this. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form.

In December 2001, the children’s attorneys and the U.S. government agreed to extend the FSA until “45 days following defendants’ publication of final regulations implementing [the] Agreement.” The extension expressly reiterated that, “Notwithstanding the foregoing, the INS shall continue to house the general population of minors in INS custody in facilities that are state-licensed for the care of dependent minors” [emphasis in original].

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15 FSA at XI and XII.
16 Notice of Motion and Motion to Enforce Settlement Agreement, Flores v. Barr, No. CV 85-4544 (May 31, 2019).
20 FSA at XIX.40.
21 FSA at Exhibit 1.
22 FSA at Exhibit 2.
23 FSA at Exhibit 3.
24 FSA at Exhibit 4.
25 FSA at Exhibit. 6.
27 Id. at ¶ 1.
The final regulations ("Final Rule on Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children") were not published until August 23, 2019, and would (1) allow for the long-term detention of children in unlicensed facilities and (2) eliminate all external oversight of the children and (3) eviscerate the standards for their care. The final regulations are currently under review by the judge who oversees the Flores litigation to determine whether they sufficiently satisfy the terms of the FSA settlement to end the litigation.

The children’s attorneys immediately filed a response in opposition to the regulations on August 30, 2019, arguing that the regulations expressly breach the terms of the FSA in multiple ways. For example, the final regulations allow for the long-term detention of children in unlicensed facilities and eliminate all external oversight of the children and their standards of care. Many of the nation’s top children’s organizations filed an amicus brief opposing the regulations including the American Academy of Pediatrics, the American Medical Association, the American Academy of Child and Adolescent Psychiatry, the American Professional Society on the Abuse of Children, the American Psychiatric Association, the National Association of Social Workers, among others. The amici rely on some of the same research summarized below that shows the significant potential harm to children from some of the government’s policies and practices, including the detention of children and separation from family.

The proposed regulations appear to try to respond to the widespread public outcry that resulted when the “Zero Tolerance” policy was announced in spring 2018. That policy effected the routine separation of children from their parents when a family entered the U.S. without documentation, even if asylum claims were presented. The American Civil Liberties Union filed a lawsuit on behalf of the class of separated parents and the U.S. District for the Southern District of California issued a class certification and preliminary injunction requiring the U.S. government to keep children with their parents and to promptly reunify those children who had been separated from their parents.\(^{28}\) Priority was given to children under the age of 5 years. The court ordered that those children had to be reunified with their parents within 15 days. The U.S. government was ordered to reunify children between the ages of 5 and 17 years within 30 days. The government was unable to comply.\(^ {29}\) Moreover, there are other children who have been separated at the border by their parents and are unaccounted for to this day.\(^ {30}\)


\(^{30}\) Id.
These practices violate both domestic and international law. For example, the U.S. is a party to the International Covenant on Civil and Political Rights (ICCPR) and Article 9(3) of the ICCPR provides that detention “shall not be the general rule.” The enforcement body of the ICCPR, the United Nations Human Rights Committee (HRC), has already considered family detention in the case of Australia and held that the detention of a father and son for several months violated Article 9 of the treaty because parties are obligated to identify the least invasive means of accomplishing the country’s immigration policy objectives, such as reporting obligations or sureties. Moreover, the prolonged detention created a hardship for the child.

The United Nations Commissioner for Human Rights has stated: “Children should never be detained for reasons related to their own or their parents’ migration status. Detention is never in the best interests of the child and always constitutes a child rights violation.” Similarly, the Inter-American Commission on Human Rights, which has jurisdiction to make observations on U.S. compliance with international human rights law, has also found that:

the deprivation of liberty of a child for migratory motives would not be understood as a measure that responds to the child’s best interests. Multiple studies have documented that detention has negative and lasting effects on children’s physical and mental development, and lead to the development and worsening of conditions such as anxiety, depression, and psychological and emotional damage.

These negative health effects on children are described in more detail in Section IV below.

In short, current and proposed policies and practices with regard to children being held in immigration detention facilities violate the terms of FSA and domestic and international law and it is time for Congress to pass research-informed legislation to address this issue.

III. Overview of an Arriving Child’s Processing through U.S. Facilities

On arrival to the U.S. border, children and families usually present themselves to Customs and Border Patrol (CBP) agents. They are then processed into the U.S. immigration system. While...
some adolescents travel alone, younger children are highly dependent on the adults who have brought them to provide stability and protection. It is while in CBP custody that children are most likely to be separated from parents, either temporarily or long-term. Children are often separated from adult family members who are not parents, even though CBP regulations allow children to be kept with adult caregivers who are not parents if the family relationship is vetted and a CBP supervisor determines that keeping the child and the caregiver is appropriate under “the totality of the circumstances.”36

CBP processing facilities were designed for single migrant men—not children—and are staffed by law enforcement. These facilities are not equipped to provide for the unique needs of children. Hundreds of sworn declarations from both children and parents collected by the children’s attorneys document severe, widespread problems with lack of sanitation, nutrition, medical care, childcare and supervision, temperature controls, a lack of bedding, and more.

CBP stations are typically referred to as “la hielera” (the icebox) because of their cold temperatures; and “la perrera” (the dog kennel) because of the cages in which the children are kept. Children are not supposed to spend more than 72 hours in CBP facilities,37 although during site visits by both the U.S. Inspector General and Flores attorneys in the spring 2019, numerous facilities were documented as overcrowded with some people, including children being held in CBP facilities, for weeks. Numerous fatalities of children in CBP care or immediately after transfer were reported by the media between late 2018 and mid-2019.

After processing in CBP custody, families normally are detained in ICE facilities and “unaccompanied”38 children are transferred to Office of Refugee Resettlement (ORR)-contracted facilities. These facilities must follow child welfare standards and regulations set by the state in which they are found. Children receive medical and mental health evaluations upon entry and there are generally programs for education and recreation, although the administration recently ordered the discontinuation of those programs.39

ORR has created influx shelters such as the tent city in Tornillo, Texas, and the influx facility run at the abandoned military facility in Homestead, Florida, during times of high volume. Located on federal land, the administration has taken the position that these facilities are not required to follow state regulations regarding child residential facilities. The Homestead facility is run by a for-profit corporation, and according to Congresswoman DeLauro at a hearing on

38 Although some children arrive without familiar adult caregivers, such as parents, many arrive with their caregivers, such as their parents, but then are forcibly separated and classified as “unaccompanied.”
February 27, 2019, the cost to the U.S. taxpayer is $775 per day. The facilities have been criticized for their extremely large size and a lack of supervision and oversight.

All ORR shelters are supposed to provide the “least restrictive setting” for children. In reality the children are detained; they are locked into these facilities and cannot leave. It is within the ORR shelters where the process to reunify the child with their family in the U.S. or another sponsor takes place. Interviews with children in ORR facilities indicate that they do not know their legal rights, have limited access to speak with their family or other sponsors, and that they are not provided reliable information about the process for placement with their family or other sponsor, which leads to unnecessary anxiety and fear.

The Family Residential Detention Centers overseen by ICE are supposed to follow certain guidelines regarding the care and custody of children. In general, however, these facilities are often run by prison corporations and are just too big and unwieldy to provide care that is adequate for children. While these facilities are supposed to follow state child welfare regulations for housing of children, they have been challenged in court both in Texas and Pennsylvania. The ICE facilities lack pediatric expertise and child mental health professionals, and parents often complain that their concerns about the health of their children are not taken seriously. Both the size, lack of expertise and off-handed treatment of detainees has resulted in delays in care, which has led to deadly consequences in some cases.

IV. Physical and Mental Health-Related Effects of Detention and Separation on Children

Child detention and separation can cause profound and lasting physical and mental harm in many ways. We offer scientific evidence of the potentially harmful effects of these practices on child health to better inform policy.

A. The Biology of Adversity and the Health Consequences of Child Detention and Separation

Extensive neurobiological research demonstrates that significant trauma (including both neglect and abuse) can disrupt the architecture and function of the developing brain as well as other biological systems (e.g., immune, metabolic, cardiovascular) beginning in infancy and extending through adolescence. When separated abruptly from their parents, children experience a massive biological stress response. This includes elevated heart rate, activation of stress hormones, increased blood pressure, and mobilized inflammatory responses. These reactions are related to the fight or flight response, which is protective in an acute situation, but can have serious negative impacts if not resolved. While research on the neurobiology of detention affecting arriving children explicitly is limited, there is extensive evidence that circumstances

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41 FSA, at ¶ 11.
that trigger persistent fear and anxiety can produce “toxic stress” responses with negative impacts on child development and learning. In this context, it is important to underscore both the mitigating effects of responsive caregiving for children facing adversity and the “psychological unavailability” of a physically present parent or other familiar caregiver whose ability to provide nurturing care is severely compromised by her own traumatized condition. Stated simply, the psychological trauma of detention affects both adults and children—and a depressed or highly anxious caregiver may be too impaired to protect the child from a toxic stress response.

A wide range of adverse childhood experiences (ACEs) have been shown to affect multiple biological systems with lifelong consequences. Persistent inflammation can lead to greater likelihood of heart disease, obesity, diabetes, later dementia, and other chronic impairments later in life. Persistent elevation of stress hormones disrupts developing brain architecture that affects memory, attention, and behavior regulation, leading to problems in learning and long-term emotional well-being. Brain circuits especially susceptible to stress during early childhood are involved in detecting and responding to threats as well as later regulation of the stress response. Brain regions affected by adversity during the pre-pubertal and teenage years are involved in emotional regulation, impulse control, and other executive functions. These kinds of disruptions in brain development have lifelong impacts on the ability to respond to and recover from stress, and often lead to a host of stress-related diseases in adulthood.

B. Psychological and Mental Health Consequences of Child Detention and Separation

Clinical experience and research on child traumatic stress support the conclusion that children who are subjected to detention and family separations are vulnerable to posttraumatic stress disorders, long-term negative health consequences, and have poorer outcomes as compared to immigrant refugee children living in the community with caregivers. Children in immigration detention experience negative mental health outcomes similar to those that result from other forms of severe trauma. This includes significantly elevated rates of emotional and behavioral problems as well as symptoms of depression, anxiety, PTSD, and suicidal ideation.

47 Hughes et al., supra note 46.
50 Id.
52 Ann Lorek et al., The Mental and Physical Health Difficulties of Children Held within a British Immigration Detention Center: A Pilot Study, 33 CHILD ABUSE & NEGLECT 573 (2009); Louise Newman & Z. Steel, The Child
The environment of immigration detention has a detrimental effect on the psychological well-being of children. While in U.S. government custody, arriving children commonly experience denial of access to basic needs including adequate medical and mental health care, educational services and recreation and are often separated from caregivers and family members. Every one of these experiences constitutes a form of traumatization, maltreatment, and neglect. At its core, trauma results from a lack of control or personal agency while experiencing adversity or threat to an individual’s (or a loved one’s) well-being. Children are particularly vulnerable for developing Posttraumatic Stress Disorder (PTSD), as compared to adults, when exposed to such experiences and conditions. Furthermore, when trauma occurs during a time of critical brain development, there is a significant risk of disrupting normal neurological and cognitive development permanently.

A recent review of the research on immigration detainees, including adults, adolescents, and children concludes that all three age groups demonstrated higher levels of mental health problems during and following detention as compared to individuals who had not been detained. Those who were detained for longer periods demonstrate more severe symptoms, as did those who had greater exposure to trauma prior to detention. The duration of detention is positively correlated with deterioration of mental health and overall functioning and this is attributable to the ongoing uncertainty and associated distress of immigration detention. Being detained for prolonged and uncertain periods can induce profound hopelessness, despair, depression, and even suicidal urges. Other studies have similarly found that both adults and children held in immigration detention demonstrate poor mental health outcomes, including depression, anxiety, and PTSD. Children detained in immigration facilities may experience higher rates of social, emotional, and behavioral difficulties as well as developmental delays and regression.

Research has consistently found that that early separation from parents is associated with psychiatric symptoms that can continue into adulthood. In a study of 425 children detained with their mothers at an immigration center in the U.S. in mid-2018, the researchers found that almost half of the children still experience psychological distress, and that those who had been forcibly separated from their mothers, experience the most significant psychological distress. Depressed individuals who in childhood have experienced parental loss have poor coping skills and functional outcomes compared to age-matched controls and this, in turn, is a risk factor for

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56 Calvert, supra note 53; Mares, supra note 52; Zwi et al., supra note 51.


58 von Werthern et al., supra note 55.


long-term health problems.\textsuperscript{61} Even temporary separation from parents in childhood has been found to be associated with an increased risk for mental health and substance use disorders severe enough to contribute to psychiatric hospitalizations and increased risk of early death later in life.\textsuperscript{62}

Current government responses to children arriving in the U.S. create the conditions for trauma, as children in government custody experience: (1) chronic fear, anxiety, worry, and sadness; (2) a lack of information regarding what is happening to them or their loved ones; (3) a lack of agency, autonomy, or personal or family control over their situation and well-being; (4) denial of access to caregiving support and protective buffers typical of child development; and (5) denial of access to standard resources and protections available elsewhere in society. The resulting experiences of trauma in government custody (which include risk for exposure to physical, sexual, and/or psychological abuse) are compounded with prior traumas experienced before or during the migration process, thereby increasing the burden on children and increasing the prevalence and severity of both immediate and long-lasting negative psychological outcomes, maladaptive behaviors, poorer cognitive functioning and impaired social attachments.\textsuperscript{63}

Parental presence and comfort is the most important buffer against distress and mental health problems developing in children who have been exposed to severe adversity and trauma. The environment and circumstances of immigration detention, especially indefinite prolonged detention, is detrimental for children and families and poses a significant risk to overwhelm the ability of both parental caregivers and children to cope with and overcome the cumulative effects of the trauma they have experienced.

\section*{C. Health and Medical Systems in Detention.}

If the government is going to take arriving children its care, the government is obligated to provide a functioning public health and medical system. In September 2019, the Office of the Inspector General for the Department of Health and Human Services released a report documenting the numerous failings of the current ORR facilities to provide for the mental health needs of children in its care and recommended that “all reasonable steps” should be taken “to minimize the time that children remain in ORR custody.\textsuperscript{64} Public health conditions include severe crowding and lack of access to soap and water, which increase transmission of infectious disease. Ursula was closed due to flu outbreak. Young children not cared for (including diapering and feeding) constitutes neglect, the most common reportable form of child maltreatment.\textsuperscript{65}

\begin{itemize}
  \item\textsuperscript{62} Marius Lahtii et al., \textit{Temporary Separation from Parents in Early Childhood and Serious Personality Disorders in Adult Life}, 26 \textit{J. Personality Disorders} 751 (2012).
  \item\textsuperscript{63} Martin H. Teicher, \textit{Childhood Trauma and the Enduring Consequences of Forcibly Separating Children from Parents at the United States Border}, 16 \textit{BMC Medicine} No. 146 (2018).
  \item\textsuperscript{65} Other conditions documented in the June 2019 FSA site visits included inadequate nutrition, bedding, extreme temperatures, overcrowding, lack of physical movement, no educational or recreational activities, lack of care and supervision, infrequent washing, lack of diapering of a diaper-age child, forcible diapering of a school-aged child due to denial of access to toilets at night, assaults by government personnel, toileting inadequacies, lights being left
\end{itemize}
The media have reported seven known child deaths within or shortly following CBP or ORR detention with none recorded in the decade prior. While there are many factors that may have led to the death of these children, they stand out as sentinel cases exposing profound deficiencies in the medical care in these facilities such as lack of appropriate medical staff with pediatric training, overcrowded conditions that increase exposure and transmission of communicable diseases, and the inability to respond swiftly to a child showing rapid decline. These factors all contribute to poor outcomes including death. Additionally, there are anecdotal cases of children being moved back and forth from emergency departments and then to different detention facilities. The multiple moves place children at risk and also increases the risk of transmission of infectious diseases to multiple children. Other anecdotal reports include children being released from CBP and requiring direct admission to the hospital or at times the pediatric ICU. While these children would be important to track in order to understand the epidemiology of severe illness in arriving children, so far, given recent governmental policies, it is hard to keep track.

D. Health and Medical Conclusions.

Thus, it is not surprising that the American Academy of Pediatrics has issued a policy statement that “[C]hildren in the custody of their parents should never be detained, nor should they be separated from a parent, unless a competent family court makes that determination.”66 The AAP recommends that children have “limited exposure” to immigration detention facilities and that follow-up monitoring and care be provided to those children who experienced detention. “From the moment children are in custody of the United States, they deserve health care that meets guideline-based standards, treatment that mitigates harm or traumatization, and services that support their health and well-being.”67 In September 2019, the Office of Inspector General of the U.S. Department of Human Services issued two reports documenting the failures of the care provider facilities to ensure adequate health care for the children and appropriate staffing.68 In response, the American Psychological Association issued a statement offering its help:

on 24 hours a day, seven days a week in some locations and lack of windows (leading to disorientation between day and night. Notice of Motion and Motion to Enforce Settlement Agreement, Flores v. Barr, No. CV 85-4544 (May 31, 2019).


The health, mental health and well-being of these children must be paramount. The American Psychological Association agrees with the HHS’ Office of Inspector General that these facilities need evidence-based approaches to treating traumatized children, and that they must hire enough qualified caregivers to handle the increasing caseloads. APA and our more than 118,000 members stand ready to assist in any way possible.69

Another 220 organizations committed to the prevention of child abuse and neglect, including 45 national organizations and another 175 organizations from 38 states and Puerto Rico, sent a letter to Speaker Pelosi, Leader McCarthy, Leader McConnell, and Leader Schumer on August 21, 2019, calling on the administration and Congress to “take swift action” to ensure that immigration facilities “provide safe conditions that do not expose children to an unreasonable risk of physical or mental harm” and stated that the members of the coalition “are ready and eager to join with the Administration and U.S. Congress to consider how to best achieve this goal.”70 In short, there are hundreds of thousands of pediatric professionals across the country who stand ready to assist you as you work to establish clear legal standards for the care and custody of arriving children. Based on established knowledge, our initial recommendations are below.

V. Recommendations

In light of the children’s rights, domestic and international legal standards, and the established knowledge regarding child detention and family separation, we recommend that any legislation adhere to the following principles.

1. First and foremost, children should not be separated from their parents (or other familiar caregivers) or detained in institutionalized settings. Detention should not be used as a deterrent for immigration nor a punishment, especially not for children. If children must be placed in detention, it should be for the shortest amount of time possible. Children should not be held anywhere for more than 72 hours before transfer to a state-licensed and minimally-restrictive facility. While we advocate for appropriate conditions if they are detained, we should be mindful to avoid creating a culture and business of child detention. If resources are put into child detention, they should be used for creative, child-friendly, interagency interventions to help children reunite with sponsors in the most expeditious and safe manner possible. Alternative placements should be explored only if a child cannot be reunited with family or loved ones in the U.S. expeditiously.

2. During the limited period that children are in government custody for processing, transfer, reunification efforts, etc., their basic needs must be met including the provision

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70 Letter from the Alliance for Strong Families & Communities et al., to the Hon. Nancy Pelosi et al. (Aug. 21, 2019).
of adequate and nutritious food, clean drinking water, proper sleeping arrangements (clean beds and linens), hygiene products, toileting, exercise and recreation, education, adequate care and supervision by licensed professionals, access to physical and mental healthcare, proper temperatures and ventilation, appropriate privacy, etc.

3. Where detention cannot be avoided, children must be placed in a state-licensed and minimally-restrictive facilities. “Self-licensing” or overflow facilities must be affirmatively prohibited. Minimally restrictive facilities should be staffed by child welfare specialists and healthcare personnel with pediatric and child mental health expertise. For profit facilities should be avoided to ensure that children are not commodified and that there is no profit incentive to detaining children or cutting corners in the provision of their basic needs.

4. Families should be kept apprised, to the greatest extent possible, of the child’s location and state of physical and mental health, and be given frequent opportunities to communicate with the child. Both the child and the family should be advised of the timeline and steps necessary for reunification. Children especially should be informed of their case progress, and any changes in their status such as transfers between facilities—and the inability of young children to understand such information underscores their vulnerability and the need for rapid reunification.

5. Policies and procedures should ensure that family members living in the United States can come forward to sponsor a child without fear of immigration consequences (for example, information-sharing regarding sponsor applicants between ORR and ICE should not take place normally).

6. Health and medical systems must be set up in any facility where children are in government care for any length of time. These systems must contain protocols for care-seeking, evaluation, and transfer to a higher level of care as needed.

7. There must be an ability for independent child welfare specialists to monitor and report deficiencies.

8. Children normally should be with family and care-giver adults. If they arrive together, they should be kept together until the child is unified with their sponsor. If they become separated for any reason, all efforts should be made to reunify them. Limited exceptions should apply. Those exceptions should be made in accordance with the best interests of the child and should be made only by a court of law or licensed child welfare professional. If they cannot be with their own family, they should be placed with a parent-appointed guardian; and if not a guardian, then another family-oriented situation.

9. During any time spent separated from family, children should have access to cost-effective, developmentally appropriate, and personally empowering services (including case management, legal assistance, and trauma-sensitive mental health evaluation and treatment). There must be appropriate case management work towards expedient family reunification.
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Having spent 2 decades studying the effects of early adversity on children’s brain and behavioral development, including the effects of early, prolonged parent-child separation and the effects of institutional care, Dr. Nelson offers expertise relevant to the current situation many children and families find themselves in at the US-Mexican border.
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APSAC POSITION STATEMENT

SEPARATING IMMIGRANT CHILDREN FROM THEIR FAMILIES AT THE UNITED STATES BORDER

The American Professional Society on the Abuse of Children (APSAC) is an interdisciplinary organization of professionals working in the field of child maltreatment. APSAC is deeply concerned and profoundly dismayed at the maltreatment of immigrant children by the United States government that is taking place along the Southern border. On May 7th, the federal government implemented a new policy of pursuing criminal prosecution for every person who crosses the US border unlawfully, including parents traveling with minor children. This has resulted in separation of children from their families and the housing of thousands of children in makeshift shelters. Further, Immigration and Customs Enforcement has been separating and detaining parents and children who lawfully present themselves at the border seeking asylum. This traumatic separation of children from their parents is unnecessary. Each day, infants and children are being needlessly separated from their mothers and fathers. Older children are being housed at detention centers in cage-like structures. In some cases, younger children are being placed thousands of miles from their parents. These children are being left unattended without any of the support services that are necessary for children who face separation from their caregivers. Families are left without any information about when, or if, they will be reunited. The recent change in long-standing policy leaves these children and youth at risk for serious and long-term physical, social, and emotional injury.

Psychology/Mental Health

The unnecessary and coercive separation of a child from their parents is a form of child maltreatment that can cause catastrophic physical and mental health consequences. Children who are traumatically separated from a parent often develop severe physiological distress and emotional pain. Many children will go on to develop mental health disorders such as Acute Stress Disorder, Post-Traumatic Stress Disorder (PTSD), and Major Depressive Disorder. The youngest children will be at high risk for Reactive Attachment Disorder, which

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can cause permanent emotional disturbance. Traumatized children can develop numerous medical problems. Media reports suggest that immigration officials have been directed not to touch crying babies. Since John Bowlby’s groundbreaking work in the 1950’s, the psychological and medical communities have known that babies deprived of physical contact may suffer grave consequences.

Child Welfare
The Honorable Kirstjin Nielson, Secretary of Homeland Security has said that the process for separating children from parents at the border will be “no different than what we do every day in the United States when a parent is prosecuted for a crime.” This is not true. For American children, when the government determines a child must be separated from his or her parents to assure the child’s safety and wellbeing, child welfare agencies are required to act in the “best interest of the child.” Children are placed with relatives or other adults with whom they have a preexisting relationship whenever possible to minimize the trauma of removal and maintain children’s emotional connections. Potential caregivers are subjected to rigorous background checks to ensure they do not pose a threat to the child’s well-being. Children are placed with strangers as a last resort. These non-familial caregivers must be licensed foster families with special training in providing therapeutic care for children who have been traumatized. Young children and infants are placed in family settings, not in institutions. Foster families are given information about a child’s history, development, routines, likes and dislikes, medical conditions, and special needs so they can maintain continuity and stability for the child. Legal proceedings are instituted to protect the child’s interests. Children are provided with specialized medical, mental health, educational and social services. Trained caseworkers provide interventions to help children reunite with their parents as soon as possible.

Law
In February, the American Civil Liberties Union filed suit against the Department of Homeland Security and the Department of Health and Human Services. The plaintiff in Mrs. L. v. ICE has informed the federal courts that over 1,000 children have had their Constitutional rights violated by the actions of the federal government. In a preliminary ruling, the District Court upheld the longstanding rule that the Constitution applies to all persons on U.S. soil regardless of immigration status, and that there is a fundamental legal right to family integrity for all persons present in the U.S. If the government seeks to separate families, there must be a compelling reason, such as abuse or neglect of the child by the parent. There must also be due process of law. APSAC believes that the federal government’s separation of children from their parents with no notice, no hearing, and especially, no reason is an outrageous violation of the United States’ Constitution and the fundamental rights of these children. Indeed, the District Court recently found the government’s conduct to be “brutal, offensive” and said that it “shocks the conscience” of an ordinary person.
Ethics
APSAC’s issue is not with the government enacting comprehensive reform of current US immigration law. Instead, APSAC believes that any immigration practice or policy must be consistent with the developmental needs of the children who will be impacted by such reform. Our society’s responsibility to children is perhaps its most basic moral obligation. Children are totally dependent on the goodwill of others. Unnecessarily separating children from their families is a troubling social concern in need of immediate corrective action.

Immediate Call for Action
Separation of children and parents, when the children are not in danger from their parents, is unconscionable. APSAC calls upon our government to immediately end this abusive practice.
Detention of Immigrant Children

Drs. Linton, Griffin, and Shapiro collectively drafted, critically revised, and reviewed this policy.

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The guidance in this statement does not indicate an exclusive course of treatment or serve as a standard of medical care. Variations, taking into account individual circumstances, may be appropriate.

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abstract

Immigrant children seeking safe haven in the United States, whether arriving unaccompanied or in family units, face a complicated evaluation and legal process from the point of arrival through permanent resettlement in communities. The conditions in which children are detained and the support services that are available to them are of great concern to pediatricians and other advocates for children. In accordance with internationally accepted rights of the child, immigrant and refugee children should be treated with dignity and respect and should not be exposed to conditions that may harm or traumatize them. The Department of Homeland Security facilities do not meet the basic standards for the care of children in residential settings. The recommendations in this statement call for limited exposure of any child to current Department of Homeland Security facilities (ie, Customs and Border Protection and Immigration and Customs Enforcement facilities) and for longitudinal evaluation of the health consequences of detention of immigrant children in the United States. From the moment children are in the custody of the United States, they deserve health care that meets guideline-based standards, treatment that mitigates harm or traumatization, and services that support their health and well-being. This policy statement also provides specific recommendations regarding postrelease services once a child is released into communities across the country, including a coordinated system that facilitates access to a medical home and consistent access to education, child care, interpretation services, and legal services.

INTRODUCTION

Communities nationwide have become homes to immigrant and refugee children who have fled countries across the globe. However, in the dramatic increase in arrivals that began in 2014 and continues at the time of writing this policy statement, more than 95% of undocumented children have emigrated from Guatemala, Honduras, and El Salvador (the Northern Triangle countries of Central America), with much smaller numbers from Mexico and other countries. Most of these undocumented children cross into the United States through the southern border. Unprecedented violence, abject poverty, and lack of state protection...
of children and families in Central America are driving an escalation of migration to the United States from Guatemala, Honduras, and El Salvador. Children, unaccompanied and in family units, seeking safe haven* in the United States often experience traumatic events in their countries of origin, during the journeys to the United States, and throughout the difficult process of resettlement. In fiscal year (FY) 2014, Customs and Border Protection (CBP) detained 68,631 unaccompanied children and another 68,684 children in family units (a child with parent[s] or legal guardian[s]). In response to these numbers, the US government implemented a media campaign in Central America and increased immigration enforcement at the southern border of Mexico in an effort to deter immigration. Yet despite decreasing numbers of unaccompanied children and children in family units attempting to emigrate to the United States in FY 2015, another significant increase of both groups began in FY 2016, with 59,692 unaccompanied children and 77,674 family units detained in FY 2016. Interviews with children in detention from Mexico and the Northern Triangle Countries revealed that 58% had fear sufficient to merit protection under international law, and in another survey, 77% reported violence as the main reason for fleeing their country.

Children first detained at the time of entry to the United States, whether they are unaccompanied or in family units, are held by the Department of Homeland Security (DHS) in CBP processing centers. If an accompanying adult cannot verify that he or she is the biological parent or legal guardian, this adult is separated from the child, and the child is considered unaccompanied. After processing, unaccompanied immigrant children are placed in shelters or other facilities operated by the US Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR), and the majority are subsequently released to the care of community sponsors (parents, other adult family members, or nonfamily individuals) throughout the country for the duration of their immigration cases. Children detained with a parent or legal guardian are either repatriated back to their home countries under expedited removal procedures, placed in Immigration and Customs Enforcement (ICE) family residential centers, or released into the community to await their immigration hearings.

Pediatricians who care for previously detained immigrant children in communities throughout the United States should be aware of the traumatic events these children have invariably experienced to better understand and address their complex medical, mental health, and legal needs. Pediatricians also have an opportunity to advocate for the health and well-being of vulnerable immigrant children. This policy statement applies principles established by numerous previous statements, including care of immigrant children, toxic stress, and social determinants of health, to the specific topic of detention of immigrant children.

**HISTORY**

In the 1980s, the United States experienced a dramatic increase in numbers of migrant children fleeing Central America as a result of civil wars in those countries. At that time, the Immigration and Naturalization Service (INS), under the Department of Justice, was responsible for enforcing the immigration law and seeking the deportation of unaccompanied children and for their care and custody while they were in the United States. In 1997, after more than a decade of litigation responding to unjust treatment of unaccompanied children in the care of the INS, the government entered into a settlement agreement, still in force today, for the care of children. The Flores Settlement Agreement set strict national standards for the detention, treatment, and release of all minors detained in the legal custody of the INS. It requires that children be held in the least restrictive setting appropriate for a child’s needs and that they be released without unnecessary delay to a parent, designate of the parent, or responsible adult as deemed appropriate.

After September 11, 2001, the Homeland Security Act of 2002 attempted to resolve the conflict of interest between the dual role of the INS as both a prosecutor and caretaker of unaccompanied children. That law divided the functions of the former INS between the DHS and HHS (Fig 1). Under the DHS, CBP and ICE are charged with border control and homeland security. The care and custody of unaccompanied immigrant children were transferred to the HHS Administration for Children and Families, specifically the ORR. The responsibility of the ORR is to promote the well-being of children and families, including refugees and migrants.

**CURRENT PRACTICE AND TERMINOLOGY**

Noncitizen children younger than 18 years are processed through the immigration system in several ways depending on where they are first detained, whether they are accompanied or unaccompanied by a parent, and whether they come from a contiguous or noncontiguous

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*The term safe haven encompasses the diverse immigration statuses that may be pursued and acknowledges the humanitarian needs of those seeking relief.*
An unaccompanied alien child, referred to as an unaccompanied immigrant child in this policy statement, is defined by the Homeland Security Act as a child who “has no lawful immigration status in the United States; has not attained 18 years of age; and 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.” A parent or legal guardian is considered “not available” if not present at the time of the child’s apprehension.

Accompanied children are those who are detained with their parent or legal guardian, most often the mother. DHS refers to accompanied children as part of a family unit. Most children who come into immigration custody are first detained at the border; a smaller number are apprehended within the country (ie, more than 100 miles away from a border), known as internal apprehensions.

Lastly, the immigration process is different for children who come from contiguous countries (most from Mexico and smaller numbers from Canada). When the Trafficking Victims Protection Reauthorization Act (TVPRA) was passed in 2008, Congress mandated that CBP screen children from Mexico and Canada for trafficking (child labor or sex) and other harms before allowing them to return to their countries and before they are placed in US immigration proceedings. Specifically, CBP must screen a child from Mexico or Canada to ensure that the child is not a potential victim of trafficking, has no possible claim to asylum, and can and does voluntarily accept return. If a child from Canada or Mexico does not have authorization to enter the United States and can be returned safely, the child can be repatriated without ever being placed in immigration proceedings. If any of the answers to the aforementioned inquiries into protection concerns are positive, or if no determination of all 3 criteria can be made within 48 hours, the TVPRA mandates that the child shall “immediately” be transferred to custody of ORR. Once transferred to ORR, Mexican and Canadian children are treated like all other unaccompanied children in detention.
At the time of apprehension by CBP, children pass through 1 or more CBP processing facilities, some of which provide limited medical screening (eg, scabies, lice, varicella); complete medical histories and physical examinations (including vital signs) are not conducted. Screening is performed by a variety of nonmedical and medical personnel, such as border patrol officers, emergency medical technicians, nurse practitioners, or physician assistants. Children with medical problems beyond the scope of aforementioned personnel are taken to a local hospital emergency department.**

At the time of release from CBP processing centers, the immigration pathway diverges for unaccompanied immigrant children and children accompanied by a parent or legal guardian.

**ORR Children Shelters: Unaccompanied Immigrant Children**

ORR contracts with a network of child welfare agencies, both nonprofit and government organizations, to care for unaccompanied immigrant children in a variety of facility types that range in size and level of security. A small number of these contracts are with local foster care agencies. With more than 9200 beds located across the country, these shelters have procedures ensuring compliance with federal law regarding the care and custody of immigrant children. Children are provided with dormitory-style rooms, shared bathrooms, showers, clothes, hot meals, year-round educational services, recreational activities, and limited legal services. In FY 2015, the average length of stay in the program was 34 days, although some children remain in ORR custody for significantly longer periods of time, for a number of different reasons.

At the time of entry into an ORR facility, children receive an initial medical and mental health evaluation. The ORR is responsible for providing the children with ongoing medical and mental health care, which may be provided on or off site, while in custody. Pediatricians caring for previously detained children released into communities can access the American Academy of Pediatrics (AAP) Immigrant Health Toolkit (https://www.aap.org/en-us/about-the-aap/Committees-Councils-Sections/Council-on-Community-Pediatrics/Pages/Immigrant-Child-Health-Toolkit.aspx) for more comprehensive guidelines (eg, universal hearing and sexual health screenings) and can ask the child or sponsor for the medical records, provided to each child at the time of release from the shelter, or request records (including vaccinations and tuberculosis testing) from the ORR Web site (https://www.acf.hhs.gov/orr/resource/unaccompanied-childrens-services).

**Family Residential Centers: Accompanied Children**

Some family units are released from CBP processing centers directly into the community to await immigration proceedings, some undergo expedited return to their country of origin, and others are sent to ICE-contracted family residential centers. Three family detention centers exist nationally, including 2 in Texas, operated by for-profit prison corporations (ie, GEO Group and CCA) and 1 in Pennsylvania operated by local government (ie, Berks County); 2 other centers were closed because of “dangerously inadequate” conditions. The present total operating capacity of the detention facilities is 3326 beds. Each residential center has staff comprising representatives from their contracting organizations and...
ICE employees. In general, multiple families stay in dormitory-style rooms. Nearly all the family detention beds are for mothers with children younger than 18 years, and 1 facility (Berks County) accepts fathers. An August 2015 ruling by a California US District Court in a case brought against DHS, *Flores v Johnson*, found that family detention centers are in violation of the Flores Settlement Agreement. The court did not exclude children in family units from the requirement that children be held in the least restrictive environments. Despite this order, children continue to be detained, and even with shorter lengths of stay, some were still found to suffer traumatic effects.

Care of children held in detention centers is subject to the standards outlined on the ICE Web site. Limited medical, dental, and mental health services are provided by the prison corporations in the Texas facilities and through public health services in Pennsylvania. Detention centers also rely on nearby emergency departments and tertiary care centers for the treatment of medical and mental health conditions beyond their scope. Visits to family detention centers in 2015 and 2016 by pediatric and mental health advocates revealed discrepancies between the standards outlined by ICE and the actual services provided, including inadequate or inappropriate immunizations, delayed medical care, inadequate education services, and limited mental health services.

Alternatives to detention offer opportunities to respond to families' needs in the community as their immigration cases proceed. For most families, release into the community allows families to live their lives as normally as possible. In the setting of community-based alternatives to detention, many families are able to comply with immigration proceedings when they are provided information about rights and responsibilities, referrals to legal services, and psychosocial supports. Some families may benefit from case management, which is cost-effective and can increase the likelihood of compliance with government requirements.

**Release of Children Into the Community: Unaccompanied Immigrant Children**

Before release, the ORR seeks to reunite an unaccompanied immigrant child with a sponsor, preferably a parent or other family member. Sponsors must be considered suitable for caring for a child and go through background checks, occasionally including home visits. Most children are released to parents or other family members; in some cases, the sponsor may be someone the child does not know well or at all. The ORR must approve the child’s release, but in almost all cases, the sponsor is financially responsible for transportation and other expenses incurred. Some children receive limited postrelease services from nongovernment organizations funded by ORR. These services are typically provided only to children whose release followed a home study, required for certain children under TVPRA, including those who have histories of abuse or trafficking or those with disabilities.

Most children released from the ORR do not qualify for Medicaid, the Children’s Health Insurance Program, or other state and federal public benefit programs. Other important stressors may also arise once the child has been placed with a sponsor, including relationship conflicts between child and sponsor or other household members, school enrollment and other educational challenges, food insecurity, housing insecurity, other financial strain (eg, clothes, school supplies), and acculturation difficulties.

**Release of Children Into the Community: Family Units**

Family units arriving together at the US border are currently placed into “expedited removal proceedings,” which means that the adult must pass a “credible fear interview” or, in some cases, a “reasonable fear interview” (for families with previous orders of removal from the United States) before a US Customs and Immigration Service officer to establish a basis for the presence of persecution or torture. If the interview is passed, families may be released from the detention center on bond or released under other conditions, such as being required to wear an electronic monitor, but only for the duration of their immigration case. If they do not pass the credible fear or reasonable fear interview or a judge concurs with a negative “fear” decision, they will be removed from the United States. Currently, more than 75% of families held in family residential centers pass their “credible fear” or “reasonable fear” interviews or are successful in appealing adverse decisions after retaining an attorney, meaning that must have a right to seek protection in the United States. Families who are granted release into communities pending immigration proceedings may be taken to nearby bus terminals or local churches but must independently navigate reunification with family members across the country. Families must also find attorneys to represent them in their immigration cases, which will continue until they appear for an asylum hearing before an immigration judge or pursue some other immigration benefit (such as a visa for trafficking victims). These families must rely on family members living in the United States for assistance or incur their own travel and legal expenses. Many adult members of family units have been
released into the community with electronic monitors to ensure that their whereabouts can be tracked.33

Impact of Detention on Child and Family Health

Detention of children is a global issue condemned by respected human rights and professional organizations both within and beyond US borders.11,32,33,51 Moreover, the United Nations Convention on the Rights of the Child, an internationally recognized legal framework for the protection of children’s basic rights (ratified by every country in the world except for the United States), emphasizes freedom from arbitrary arrest and detention (Article 37), the provision of special protection to children seeking asylum (Article 22), humane and appropriate treatment of children in detention (Article 37), and guidelines regarding maintaining family unity (Article 9).52 The AAP has endorsed this human rights treaty as an important legal instrument.53 US state court proceedings and the United Nations Convention on the Rights of the Child underscore the “best interests of the child,” including safety and well-being, the child’s expressed interests, health, family integrity, liberty, development (including education), and identity.54

Studies of detained immigrants, primarily from abroad, have found negative physical and emotional symptoms among detained children,55–57 and posttraumatic symptoms do not always disappear at the time of release.56 Young detainees may experience developmental delay58 and poor psychological adjustment, potentially affecting functioning in school.59 Qualitative reports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems.60 Additionally, expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children.51

Studies of adults in detention have demonstrated negative physical and mental health effects that can reasonably be applied to adult members of detained family units. For instance, detained adult asylum seekers suffered from musculoskeletal, gastrointestinal, respiratory, and neurologic symptoms.61 They also commonly experienced anxiety, depression, posttraumatic stress disorder, difficulty with relationships, and self-harming behavior.52–66 Detention itself undermines parental authority and capacity to respond to their children’s needs; this difficulty is complicated by parental mental health problems.56,67 Although data are limited regarding the effects of a short detention time on the health of children, there is no evidence indicating that any time in detention is safe for children.

In the United States, reports from human rights groups and other child advocates, including pediatricians, corroborate the deleterious effects of detention found in the aforementioned studies.33,35,41–44 These reports describe prisonlike conditions; inconsistent access to quality medical, dental, or mental health care; and lack of appropriate developmental or educational opportunities.11,33,35,62 Parents interviewed for these reports described regressive behavioral changes in their children, including decreased eating, sleep disturbances, clinginess, withdrawal, self-injurious behavior, and aggression.33,44 Parents exhibited depression, anxiety, loss of locus of control, and a sense of powerlessness and hopelessness.44,68 Parents often faced difficulty parenting their children and subsequently experienced strained parent–child relationships.44 Detained families’ sense of isolation and desperation were intensified by detention center practices that created communication barriers with the outside world (eg, expensive telephone service and lack of Internet services). Additionally, detainees reported being anxious about the lack of access to legal advocates.33,68

After almost a year of investigation, the DHS Advisory Committee on Family Residential Centers ultimately made this recommendation34:

DHS’s immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families—and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children.

THE ROLE OF PEDIATRICIANS IN THE COMMUNITY

Awareness of the immigration pathway, conditions in detention facilities, and medical care during detention can help community pediatricians provide sensitive and targeted care based on AAP recommendations (https://www.aap.org/en-us/about-the-aap/Committees-Councils-Sections/Council-on-Community-Pediatrics/Pages/Immigrant-Child-Health-Toolkit.aspx) for newly arrived immigrant children30 and Centers for Disease Control and Prevention refugee health guidelines.69 Many of these children have never had access to a medical home or regular primary care surveillance. A trauma-informed approach acknowledges the impact of trauma and potential paths for recovery, recognizes signs and symptoms of trauma, responds by integrating knowledge into the system of care, and resists retraumatization.70–72 Trauma-informed care is essential for medical, mental health, and community-based services. Unfortunately, access to postrelease services is limited, because lack of legal status leaves immigrant children ineligible for
most public benefits. Most states do not provide health care benefits to children of undocumented immigration status. However, by law children have the right to a free, public education without regard to immigration status. Pediatricians can make families aware that newly arrived children are entitled to a free education and direct them to local public school districts for enrollment.

By facilitating access to legal representation through screening and referral, pediatricians may ultimately increase access to health care once the immigrant child has lawful status. Furthermore, pediatricians may provide key evidence used by attorneys to assist in children’s immigration cases. By some estimates, nearly 45% of unaccompanied children in deportation proceedings do not have attorneys in immigration court. Not surprisingly, children without counsel are far more likely to be deported, regardless of the merits of their case or the dangers to which they would return. The complexity of immigration law makes it all the more imperative for practitioners who care for immigrant children and youth to have a referral network of legal experts (preferably nonprofit or pro bono) with whom they work closely.

A basic understanding of the different forms of legal relief can help pediatricians collect key medical and psychosocial histories and clinical evidence that may be used to support legal claims by children seeking safe haven. The most common legal statuses pursued by previously detained children include special immigrant juvenile status, asylum, and what are often referred to as visas for victims of trafficking (T visa) or serious crimes (U visa). Histories of abuse, neglect, abandonment, persecution, trafficking, or violence may be disclosed to clinicians but not lawyers because of fear or shame. Furthermore, victims of labor or child sex trafficking and commercial sexual exploitation of children rarely self-identify. When assessing the trauma history of previously detained children, pediatricians may identify concerns for trafficking and subsequently facilitate needed medical and mental health care and initiate referrals to law enforcement, child protective services, and legal services.

Children who are identified as victims of trafficking may be eligible for a T visa, and children who are victims of crimes in this country, including exposure to domestic violence, may be eligible for a U visa if they are willing to cooperate with law enforcement. Trauma-focused treatment can facilitate disclosure of painful histories to children’s lawyers and judges, thereby improving chances for winning legal relief. By referring children for legal services and providing affidavits or court testimonies, pediatricians can directly advocate on behalf of children facing immigration proceedings.

**RECOMMENDATIONS**

Pediatricians have the opportunity to advocate for systems that mitigate trauma and protect the health and well-being of vulnerable immigrant children. Children, especially those who have been exposed to trauma and violence, should not be placed in settings that do not meet basic standards for children’s physical and mental health and that expose children to additional risk, fear, and trauma. Until the unprecedented 2014 increase in Central American migration, children detained with a parent or legal guardian were released into the community. The government’s decision in 2014 to place them in family detention was intended, in part, to send a message of deterrence abroad. It is the position of the AAP that children in the custody of their parents should never be detained, nor should they be separated from a parent, unless a competent family court makes that determination. In every decision about children, government decision-makers should prioritize the best interests of the child.

The following recommendations pertain to handling of immigrant children, including their health care, while they are in custody:

- Treat all immigrant children and families seeking safe haven who are taken into US immigration custody with dignity and respect to protect their health and well-being.
- Eliminate exposure to conditions or settings that may retraumatize children, such as those that currently exist in detention, or detention itself.
- Separation of a parent or primary caregiver from his or her children should never occur, unless there are concerns for safety of the child at the hand of parent. Efforts should always be made to ensure that children separated from other relatives are able to maintain contact with them during detention.
- While in custody, unaccompanied children and family units should be provided with child-friendly orientation and regular updates regarding their current status, expectations, and rights.
- Because conditions at CBP processing centers are inconsistent with AAP recommendations for appropriate care and treatment of children, children should not be subjected to these facilities.
- Processing of children and family units should occur in a child-friendly manner, taking place outside current CBP processing.
centers or conducted by child welfare professionals, to provide conditions that emphasize the health and well-being of children and families at this critical stage of immigration proceedings.

- DHS should discontinue the general use of family detention and instead use community-based alternatives to detention for children held in family units.
- Community-based case management should be implemented for children and families, thus ending both detention and the placement of electronic tracking devices on parents. Government funding should be provided to support case management programs.
- Children, whether unaccompanied or accompanied, should receive timely, comprehensive medical care that is culturally and linguistically sensitive by medical providers trained to care for children. This care should be consistent throughout all stages of the immigration processing pathway.
- Trauma-informed mental health screening and care are critical for immigrant children seeking safe haven. Screening should be conducted once a child is in the custody of US officials via a validated mental health screening tool, with periodic rescreening, additional evaluation, and trauma-informed care available for children and their parents.
- When children are in the custody of the federal government, extra precautions must be in place to identify and protect children who have been victims of trafficking and to prevent recruitment of new children into the trafficking trade.
- Children should be provided with language-appropriate, year-round educational services, including special education if needed, throughout the immigration pathway.
- Recreational and social enrichment activities, such as opportunities for physical activity and creative expression, may alleviate stress and foster resiliency and should be part of any program for detained children. At a minimum, outdoor and major muscle activity should meet the minimum standards set by the Flores Settlement Agreement.
- Children and families should have access to legal counsel throughout the immigration pathway. Unaccompanied minors should have free or pro bono legal counsel with them for all appearances before an immigration judge.
- The AAP encourages longitudinal evaluation of the health consequences of detention of immigrant children in the United States.

Given the complex medical, mental health, and legal needs of these children, the following recommendations pertain to postrelease care of previously detained immigrant children in the community. Children and families need a coordinated system that facilitates access to a medical home that can address the children’s physical and mental health needs and facilitates access to education, child care, and legal and interpretation services.

- The AAP advocates for expanded funding for postrelease services to promote the safety and well-being of all previously detained immigrant children and to facilitate connection and access to comprehensive services, including medical homes, in the community. Community-based case management should be implemented for children and families.
- All immigrant children seeking safe haven should have comprehensive health care and insurance coverage, which includes the right to access qualified medical interpretation covered by medical benefits, pending immigration proceedings.
- Children not connected to medical homes may first present to nonprimary care settings. Pediatric providers and staff in these facilities, particularly urgent care and emergency departments, can support referral to the medical home and access to comprehensive services.
- Pediatric providers should familiarize themselves with trauma-informed care and promote access to comprehensive mental health evaluation in the community. The AAP Trauma Toolbox for Primary Care (https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/healthy-foster-care-america/Pages/Trauma-Guide.aspx) offers an accessible resource for pediatricians to build these skills. Integrated behavioral health in the primary care setting is an optimal model for care of immigrant and other vulnerable children, minimizing the difficulty in navigating the health care system.
- Pediatric providers serving previously detained immigrant children should elicit specific history of abuse, neglect, abandonment, persecution, trafficking, or violence to screen children for legal needs and subsequently refer these children for legal services. Integrated care strategies, such as
medical–legal partnerships, may increase connectivity. Likewise, immigration lawyers should have opportunities to refer children to medical homes if children reach the legal system before seeking medical care.

- Pediatric practices should facilitate children’s enrollment in public educational services, essential to children’s development and future well-being.
- School facilities should be safe settings for immigrant children to access education. School records and facilities should not be used in any immigration enforcement action.
- No child, whether accompanied or unaccompanied, should ever represent himself or herself in court. After release into the community, all previously detained immigrant children should have access to legal services at no cost to the child or his or her sponsor.
- Child trafficking victims and other unaccompanied children should be appointed independent child advocates, pursuant to TVPRA, to advocate for their best interests on all issues, including conditions of custody, release to family or sponsors, and relief from removal.
- Pediatricians everywhere should advocate for comprehensive, high-quality health care in a medical home for all children in the United States, including all immigrant children and those detained or otherwise in the care of the state.

CONCLUSIONS

The AAP supports comprehensive health care in a medical home for all children in the United States, including all immigrant children and those detained or otherwise in the care of the state. Children deserve protection from additional traumatization in the United States and the identification and treatment of trauma that may have occurred in children’s country of origin, during migration, or during immigration processing or detention in the United States. The AAP endorses the humane treatment of all immigrant children seeking safe haven in the United States, whether unaccompanied or in family units, throughout the immigration pathway.

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ABBREVIATIONS

AAP: American Academy of Pediatrics
CBP: Customs and Border Protection
DHS: Department of Homeland Security
FY: fiscal year
HHS: US Department of Health and Human Services
ICE: Immigration and Customs Enforcement
INS: US Immigration and Naturalization Service
ORR: Office of Refugee Resettlement
TVPRA: Trafficking Victims Protection Reauthorization Act

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HEARING ON “EXAMINING THE FAILURES OF THE TRUMP ADMINISTRATION’S INHUMANE FAMILY SEPARATION POLICY”

February 7, 2019

Testimony Submitted by:

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SUMMARY

This testimony is based on strong scientific consensus supported by extensive research across multiple disciplines. A century of countless studies across the behavioral and social sciences provide extensive evidence of the consequences of separating children from their parents, especially if that separation is unexpected, abrupt, or in a frightening context. Recent advances in 21st-century biology are now providing a deeper understanding of the disruptions that occur in the developing brain and other biological systems, which explain why and how traumatic, parent-child separation can have such devastating effects.

The broad overview of peer-reviewed literature summarized in the section that follows this summary illustrates the depth of knowledge available to inform a credible, science-based analysis of the policies and actions that have separated thousands of children from their parents or other caregivers at the U.S.-Mexico border.
Sudden, forcible separation of children from their parents is deeply traumatic for both. Above and beyond the distress we see “on the outside,” separating a child from his or her parents triggers a massive biological stress response “inside” the child, which remains activated until the parent returns and provides comfort. Continuing separation removes the most important resource a child can possibly have to prevent long-term damage—a responsive adult who’s totally devoted to his or her well-being.

The results of thousands of studies converge on the following two core scientific concepts:

(1) **A strong foundation for healthy development in young children requires a stable, responsive, and supportive relationship with at least one parent or primary caregiver.**

(2) **High and persistent levels of stress activation (known as “toxic stress”) can disrupt the architecture of the developing brain and other biological systems with serious negative impacts on learning, behavior, and lifelong health.**

Early experiences are literally built into our brains and bodies, and the experiences that are most important in driving positive development are the care and protection provided by parents and other primary caregivers. Stable and responsive relationships promote healthy brain architecture, establish well-functioning immune, cardiovascular, and metabolic systems, and strengthen the building blocks of resilience.

If these relationships are disrupted, young children are hit by the “double whammy” of a brain that is deprived of the positive stimulation it needs and assaulted by a stress response that disrupts its developing circuitry. When any of us feels threatened, our body’s stress response systems are activated. Heart rate and blood pressure go up, stress hormone levels are elevated, blood sugar rises, and inflammatory responses are mobilized. This is the “fight or flight” response. We all know what that feels like physically when we’re really stressed out! This response is automatic and essential for survival, but it is designed to go back to normal when the threat is over.
If the sense of danger continues, ongoing activation of the stress response shifts from protection to disruption or outright damage. For example:

- Persistently elevated stress hormones can disrupt brain circuits that affect memory and the ability to focus attention and regulate behavior.

- Excessive inflammation and metabolic responses to stress in childhood increase the risk of heart disease, diabetes, depression, and many other chronic illnesses in the adult years.

Unlike “positive” or “tolerable” stress, which can build resilience, the excessive and prolonged nature of what we call “toxic stress” increases the risk of lifelong problems.

The scientific principles described above provide a powerful framework for assessing the damage caused by the current family separation policy. All children who were abruptly separated from their parents or primary caregivers experienced substantial stress and we must bear the responsibility for their well-being. Will some of these children survive without significant problems? The answer is yes. Will many be seriously impaired for the rest of their lives. The answer again is yes. The biology of adversity suggests three factors that are particularly important for understanding who is at greatest risk.

The first is age. Younger children are the most vulnerable to long-term impacts, both because their brain circuitry and other biological systems are relatively under-developed and because they are most dependent on adult caregivers.

The second is previous harm from adversity. The pile-up of stress on children who are already compromised shifts the odds against them even further. The intentional withholding of the most powerful healing intervention we could possibly offer—the care and protection that parents provide for their children when they’re in danger—goes against everything science tells us.

The third reason for variation in outcomes is the duration of separation. Toxic stress is a ticking clock—and prolonged separation inflicts increasingly greater harm as each week goes by.
From a scientific perspective, both the initial separation and the lack of rapid unification are indefensible. Forcibly separating children from their parents is like setting a house on fire. Prolonging that separation is like preventing the first responders from doing their job.

PEER-REVIEWED LITERATURE ON THE SCIENCE OF CHILD HEALTH AND DEVELOPMENT AND THE BIOLOGY OF ADVERSITY

The remaining sections of this testimony provide a more detailed review of peer-reviewed evidence that reflects the cutting edge of 21st-century science. This content has been excerpted from almost two decades of working papers and related materials produced by the National Scientific Council on the Developing Child, which I have chaired since its founding in 2003. The following four documents (each of which has been subjected to intensive, scientific peer review) provide a wealth of complex scientific knowledge that has been synthesized and translated for non-scientists.


*Supportive Relationships and Active Skill-Building Strengthen the Foundations of Resilience: Working Paper 13*

These and other relevant materials are available on the website of the Center on the Developing Child at Harvard University ([www.developingchild.harvard.edu](http://www.developingchild.harvard.edu)).
The Critical Importance of the Parent-Child Relationship

Nurturing and stable relationships with caring adults are essential to healthy development beginning from birth. These relationships affect virtually all aspects of development—intellectual, social, emotional, physical, and behavioral—and their quality and stability in the early years lay the foundation that supports a wide range of later outcomes. These outcomes include self-confidence and sound mental health, motivation to learn, achievement in school and later in the workplace, the ability to control aggressive impulses and resolve conflicts in nonviolent ways, behaviors that affect health risks, lifelong physical and mental health outcomes, and the capacity to develop and sustain friendships and close relationships and ultimately become a responsible citizen and successful parent of the next generation.

“Serve and return” interactions (i.e., mutually responsive vocalizing, facial expressions, and gestures back and forth between young children and the adults who care for them) build sturdy brain architecture, beginning at birth, and create strong relationships in which the child’s experiences are affirmed and new abilities are nurtured. Children who have healthy relationships with their parents and other important caregivers are more likely to develop insights into other people’s feelings, needs, and thoughts, which form a foundation for cooperative interactions with others and an emerging conscience. Sensitive and responsive parent-child relationships also are associated with stronger cognitive skills in young children and enhanced social competence and work skills later in school, which illustrates the connection between social-emotional development and intellectual growth.

The gradual acquisition of higher-level skills, including the ability to focus and sustain attention, set goals, follow rules, solve problems, and control impulses, is driven by the development of the prefrontal cortex (the large part of the brain behind the forehead) from infancy into early adulthood. A significant part of this formative development begins during early childhood and is refined and made more efficient during adolescence and the early adult years. Although these capabilities (known as executive function and self-regulation) do not emerge automatically, children are born with the potential to acquire them within the context of responsive relationships that model the skills and scaffold their development. Acquiring the
building blocks of executive function and self-regulation is one of the most important and challenging tasks of early childhood, and the opportunity to build on these foundational capacities is critical to healthy development through middle childhood, adolescence, and into adulthood.²³

The stability and predictability of the caregiving environment affects the health and development of young children through its effect on the consistency, quality, and timing of daily routines which shape developing regulatory systems. Beginning in the earliest weeks of life, the predictability and nature of these experiences influence the most basic biological rhythms related to waking, eating, eliminating, and sleeping.²⁴,²⁵ When positive experiences are repeated regularly in a predictable fashion, the complex sequences of neural stimulations create pathways that become more efficient (i.e., “neurons that fire together wire together.”) For example, infants who learn that being soothed and comforted occurs shortly after they experience distress are more likely to establish more effective physiological mechanisms for calming down when they are aroused and are better able to learn to self-soothe after being put down to sleep.²⁴,²⁶ In contrast, when eating and being put to bed occur at different times each day and when comforting occurs unpredictably, the organization and consolidation of sleep-wake patterns and self-soothing responses do not develop well, and biological systems do not “learn” healthy routines and self-regulation.²⁷

Just as early experiences affect the architecture of the developing brain, they also shape the development of other biological systems that are important for both physical and mental health. For example, responsive caregiving plays a key role in the normal maturation of the neuroendocrine system.²⁸⁻³⁰ A wealth of animal research that is now being replicated in humans demonstrates that caregiving behavior also shapes the development of circuits that regulate how individuals respond to stressful situations.³¹,³² Genes involved in regulating the body’s stress response are particularly sensitive to caregiving, as early maternal care leaves a signature on the genes of her offspring that carry the instructions for the development of physiological and behavioral responses to adversity. That signature (known as an epigenetic marker) is a lasting imprint that affects whether the offspring will be more or less likely to be fearful and anxious
later in life. Consequently, early overloading of the stress response system can have a range of adverse, lifelong effects on learning, behavior, health, and longevity.

Regulatory mechanisms that manage stress also influence the body’s immune and inflammatory responses, which are essential for defending against disease. Young children cared for by individuals who are available and responsive to their emotional and material needs develop well-functioning immune systems that are better equipped to deal with initial exposures to infections and to keep dormant infections in check over time. Conversely, inadequate caregiving and limited nurturance very early in life can have long-term (and sometimes permanent) effects on immune and inflammatory responses, which increase the risk of chronic impairments such as asthma, respiratory infections, and cardiovascular disease.

The Biology of Adversity and Resilience

When faced with an acute challenge or threat, the body’s stress response systems shift into immediate action mode. Heart rate and blood pressure go up, stress hormone levels are elevated, blood sugar rises, inflammation is increased, and blood flow is diverted preferentially to the brain and muscles. This is the classic “fight or flight” response and it is essential for survival.

Stressful experiences for children can be positive, tolerable, or toxic depending on their duration, intensity, and timing, and on whether protective relationships are available to help the child feel protected and thereby restore the biological activation to baseline levels. The National Scientific Council on the Developing Child created three categories of stress response that provide a framework for understanding the underlying biology of each.

- Positive stress refers to moderate, short-lived stress responses, such as brief increases in heart rate or mild changes in the body’s stress hormone levels. This kind of stress is a normal part of life and learning to adjust is an essential feature of healthy development. Adverse events that provoke positive stress responses tend to be those that a child can learn to control and manage well with the support of caring adults, and which occur against the backdrop of
generally safe, warm, and positive relationships. Examples include meeting new people, dealing with frustration, or getting an immunization. This is an important part of the normal developmental process.

- **Tolerable stress** refers to stress responses that have the potential to negatively affect the architecture of the developing brain but generally occur over limited time periods that allow for the brain to recover and thereby reverse potentially harmful effects. Tolerable stress responses may occur as a result of the death or serious illness of a loved one, a frightening accident, an acrimonious parental separation or divorce, or persistent discrimination, but always in the context of ongoing, supportive relationships with adults. Indeed, the presence of supportive adults who create safe environments that help children learn to cope with and recover from adverse experiences is one of the critical ingredients that make serious stressful events such as these tolerable. In some circumstances, tolerable stress can even have positive effects, but in the absence of supportive relationships, it also can become toxic to the body’s developing systems.

- **Toxic stress** refers to strong, frequent, or prolonged activation of the body’s stress management system. *Stressful events that are chronic, uncontrollable, and/or experienced by children who do not have access to support from caring adults tend to provoke these types of toxic stress responses.* Studies indicate that toxic stress can have an adverse impact on brain architecture. In the extreme, such as in cases of severe, chronic abuse, especially during early, sensitive periods of brain development, the regions of the brain involved in fear, anxiety, and impulsive responses may overproduce neural connections while those regions dedicated to reasoning, planning, and behavioral control may produce fewer neural connections. Extreme exposure to toxic stress can change the stress system so that it responds at lower thresholds to events that might not be stressful to others, and, therefore, the stress response system activates more frequently and for longer periods than is necessary, like revving a car engine for hours every day. This wear and tear effect increases the risk of stress-related physical and mental illness later in life.38
Protective relationships play a central role in building resilience by buffering children from sources of stress and providing the support needed to build their own capacities to cope with adversity. Decades of research have produced a rich knowledge base that explains why some people develop the adaptive capacities to overcome significant adversity and others do not. Whether the burdens come from the hardships of poverty, the challenges of parental substance abuse or serious mental illness, the stresses of war, the threats of recurrent abuse or chronic neglect, or a combination of factors, the single most common finding is that children who end up doing well have had at least one stable and committed relationship with a supportive parent, caregiver, or other adult. These relationships provide the personalized responsiveness, scaffolding, and protection that buffer children from the sources of disruption. They also build key capacities—such as the ability to plan, monitor and regulate behavior, and adapt to changing circumstances—that enable children to overcome adversity and thrive as they get older. This combination of supportive relationships, adaptive skill-building, and positive experiences constitutes the foundations of what is commonly called resilience. On a biological level, resilience protects the developing brain and other organs from the damage that can be produced by excessive activation of stress response systems. Stated simply, resilience transforms potentially toxic stress into tolerable stress.

Resilience requires relationships, not rugged individualism. There is no “resilience gene” that determines the life course of any individual irrespective of the experiences that shape genetic expression. The capacity to adapt and thrive despite adversity develops through the interaction of supportive relationships, gene expression, and adaptive biological systems. Despite the widespread belief that individual grit, extraordinary self-reliance, or some in-born, heroic strength of character can triumph over calamity, science now tells us that it is the reliable presence of at least one supportive relationship and multiple opportunities for developing effective coping skills that are essential building blocks for the capacity to do well in the face of significant adversity.

Extensive evidence indicates that deprivation or neglect—defined broadly as the ongoing disruption or significant absence of caregiver responsiveness—can cause more harm to a young child’s development than overt physical abuse. The clearest findings that support
this conclusion come from studies of children who have experienced severe neglect while being raised in institutions.\textsuperscript{45} This research has provided an opportunity to investigate the distinctive consequences of extreme psychosocial deprivation apart from the impacts of other forms of maltreatment. Additional knowledge comes from studies involving institutionalized children whose life circumstances have been positively transformed through foster care placements or permanent adoption.\textsuperscript{46-50}

**There is extensive evidence that severe neglect in institutional settings is associated with abnormalities in the structure and functioning of the developing brain.** Children who experience extreme levels of social neglect early in life show diminished electrical activity in the brain, as measured through electroencephalography (EEG).\textsuperscript{47,50} Institutionally reared children also show differences in the neural reactions that occur when looking at faces to identify different emotions.\textsuperscript{48,49} These findings are consistent with behavioral observations that neglected children struggle to correctly recognize different emotions in others.\textsuperscript{44,51} Children who experience severe neglect in institutional settings also exhibit decreased brain metabolism and poorer connections among different areas of the brain that are important for focusing attention and processing information, thereby increasing the risk for emotional, cognitive, and behavioral disorders later in life.\textsuperscript{46,52}

**The impact of severe neglect can be manifested in different ways across different periods of development.** At younger ages, maltreated children show impairments in their ability to discriminate different emotions, yet these difficulties are not observed at older ages.\textsuperscript{44,53,54} Conversely, antisocial behavior may be more salient among adults or older adolescents with early childhood histories of neglect.\textsuperscript{55,56} Given the fact that interpersonal relationships and life challenges (e.g., dealing with peers, becoming involved in romantic relationships, entering parenthood, achieving financial stability) change across the lifespan, it is essential that the adverse consequences of significant deprivation are addressed in a developmentally appropriate manner.

**Early adversity can affect long-term health and development by chemically altering the expression of genes.** Extensive research has demonstrated that the healthy development of all
organs, including the brain, depends on how much and when certain genes are expressed. When scientists say that genes are “expressed,” they are referring to whether they are turned on or off—essentially whether and when genes are activated to do certain tasks. Research has shown that there are many non-inherited environmental factors and experiences that have the power to chemically mark genes and control their functions. These influences create a new genetic landscape, which scientists call the epigenome. Some of these experiences lead to chemical modifications that change the expression of genes temporarily, while increasing numbers have been discovered that leave chemical signatures that result in an enduring change in gene expression. Research tells us that some genes can only be modified epigenetically during certain periods of development, defined as critical periods of modification. In some cases, very early experiences and the environments in which they occur can shape developing brain architecture and strongly affect whether children grow up to be healthy, productive members of society.

**Modification of the epigenome caused by stress during early childhood affects how well or poorly we respond to stress as adults and can result in increased risk of adult disease.** Some of our genes provide instructions for how our bodies respond to stress, and research has shown that these genes are clearly subject to epigenetic modification. For example, research in animals has shown that stressful experiences soon after birth can produce epigenetic changes that chemically modify the receptor in the brain that controls the stress hormone cortisol and, therefore, determines the body’s response to threat (the fight-or-flight response). Healthy stress responses are characterized by an elevation in blood cortisol followed by a return to baseline to avoid a highly activated state for a prolonged period of time. If young children experience toxic stress as a result of serious adversity in the absence of protective relationships, persistent epigenetic changes can result. These modifications have been shown to cause prolonged stress responses, which can be likened to revving a car engine for long periods of time. Animal studies have shown correlations between excessive stress and changes in brain architecture and chemistry as well as behaviors that resemble anxiety and depression in humans. Human studies have found connections between highly stressful experiences in childhood and increased risk for later mental illnesses, including generalized anxiety disorder and major depressive disorder. Atypical stress responses over a lifetime can also result in increased risk for physical ailments, such as asthma, hypertension, heart disease and diabetes.
Children who have experienced serious deprivation in infancy are at risk for abnormal physical development and impairment of the immune system. Severe neglect is associated with significantly delayed growth in head circumference (which is directly related to brain growth) during infancy and into the toddler years. More extreme conditions of deprivation, such as those experienced in institutional settings that “warehouse” young children, are associated with even more pervasive growth problems, including smaller body size, as well as impairments in gross motor skills and coordination. Children who are raised in institutional settings also have more infections and are at greater risk of premature death than children who live in supportive homes. One possible explanation for these findings is that chronically disrupted cortisol levels suppress immunologic reactivity and physical growth, thereby leading to a greater risk for infection and chronic, stress-related disease throughout life.

Chronic neglect over time can alter the development of biological stress response systems in a way that compromises children’s later ability to cope with adversity. Extensive research indicates that the two primary stress response systems in humans—the sympathetic-adrenal-medullary (SAM) system, which produces adrenaline and affects heart and respiration rates, and the hypothalamic-pituitary-adrenal (HPA) axis, which elevates cortisol, a key stress hormone—are both disrupted by significant deprivation. For example, years after adoption, children who experienced extreme neglect in institutional settings show abnormal patterns of adrenaline activity in their heart rhythms, which can indicate increased biological “wear and tear” that leads to greater risk for anxiety, depression, and cardiovascular problems later in life.

The consequences of severe neglect can be reduced or reversed through appropriate and timely interventions. The capacity for recovery in children who are removed from neglectful conditions and placed in nurturing environments in a timely fashion has been well-documented. However, improvement often requires more than simply the cessation of neglectful caregiving. Rather, systematic, empirically supported, and often long-term (six to nine months or longer) interventions are needed to promote effective healing. Successful treatments have been shown to reduce behavioral difficulties and attachment problems in previously neglected young children who have been placed in foster homes as well as to promote
secure attachments in young children who continue to live with their families, while being monitored by child welfare agencies because of previous allegations of neglect. On a biological level, systematic interventions targeting the social-emotional needs of young children living in foster care settings (the majority of whom were victims of neglect rather than physical abuse) have shown evidence of improved stress-regulatory capabilities with patterns of cortisol production that are indistinguishable from those of non-neglected, healthy children. With appropriate intervention, previously institutionalized children have also demonstrated improvements in brain activity as measured by EEG.

Children’s recovery rates are influenced by the severity, duration, and timing of the deprivation as well as by the timing and type of the intervention that is provided. Children who experience more severe neglect, especially during the early childhood years, are more likely to withdraw when stressed and show more anxiety and difficulties regulating their mood than children whose experiences of deprivation are less severe. Longer periods of deprivation have also been associated with greater deficits in attention and cognitive control, academic achievement, brain activity, and dysregulation of the HPA axis. Previously institutionalized children who experienced the most extreme levels of deprivation often continue to struggle with problems in attention and behavioral regulation even after intervention has been provided.

Concluding Thoughts

The scientific knowledge base available to inform policies that affect the health and development of children is extensive and accessible. Any policy that involves separating children from their families raises serious questions that require thoughtful reflection. When decisions are made that do not draw on authoritative knowledge for guidance, the well-being of children can be jeopardized and lead to serious, lifelong consequences. The evidence provided in this testimony is offered in the hope that it can be used to guide science-informed policies going forward. With respect to the children who remain separated from their families today, science is telling us that excessive stress activation will continue for as long as the separation persists—and the longer these children are deprived of the healing effect of supportive caregiving, the worse the consequences will be.
References


Good afternoon. Chair DeGette and Ranking Member Guthrie, thank you for the opportunity to meet with you today.

My name is Jack Shonkoff. I am Director of the Center on the Developing Child at Harvard University, Professor of Child Health and Development at the Harvard Chan School of Public Health and Graduate School of Education, and Professor of Pediatrics at Harvard Medical School and Boston Children’s Hospital. I am a pediatrician by training and my work is focused on early life influences on learning, behavior, and health.

My testimony today is based on strong scientific consensus supported by decades of peer-reviewed research. Sudden, forcible separation of children from their parents is deeply traumatic for both the child and the parent. Above and beyond the distress we see “on the outside,” this triggers a massive biological stress response “inside” the child, which remains activated until the parent returns and provides comfort. Continuing separation removes the most important protection a child can possibly have to prevent long-term damage—a loving adult who’s totally devoted to his or her well-being.

Without exaggeration, thousands of studies converge on the following two core scientific concepts:

(1) A strong foundation for healthy development in young children requires a stable, responsive, and supportive relationship with at least one parent or primary caregiver.

(2) High and persistent levels of stress activation (known as “toxic stress”) can disrupt the architecture of the developing brain and other biological systems with serious negative impacts on learning, behavior, and lifelong health.

Early experiences are literally built into our brains and bodies. Stable and responsive relationships promote healthy brain architecture, establish well-functioning immune, cardiovascular, and metabolic systems, and strengthen the building blocks of resilience.
If these relationships are disrupted, young children are hit by the “double whammy” of a brain that is deprived of the positive stimulation it needs and assaulted by a stress response that disrupts its developing circuitry.

When any of us feels threatened, our body’s stress response systems are activated. Heart rate and blood pressure go up, stress hormone levels are elevated, blood sugar rises, and inflammatory responses are mobilized. This is the “fight or flight” response. We all know what that feels like physically when we’re really stressed out!

This response is automatic and essential for survival, but it is designed to go back to normal when the threat is over. If the sense of danger continues, ongoing activation of the stress response shifts from protection to disruption or outright damage. For example:

- Persistently elevated stress hormones can disrupt brain circuits that affect memory and the ability to focus attention and regulate behavior.

- Excessive inflammation and metabolic responses to stress in childhood increase the risk of heart disease, diabetes, depression, and many other chronic illnesses in the adult years.

Unlike “positive” or “tolerable” stress, which can build resilience, the excessive and prolonged nature of what we call “toxic stress” increases the risk of lifelong problems.

The scientific principles I have just described provide a powerful framework for understanding the damage caused by the current family separation policy. All children who were abruptly separated from familiar caregivers at the border experienced overwhelming stress. Will some survive without significant problems? The answer is yes. Will many be seriously impaired for the rest of their lives. The answer again is yes. The biology of adversity suggests three factors that influence who is at greatest risk.

**The first is age.** Younger children are the most vulnerable because their brain circuitry and other biological systems are relatively under-developed, and because they are most dependent on adult caregivers.

**The second is previous harm from adversity.** The pile-up of stress on children who are already compromised shifts the odds against them even further. Intentionally withholding the most powerful healing intervention we could possibly offer—the care that parents provide when their children are in danger—goes against everything science tells us.

**The third reason for variation in outcomes is the duration of separation.** Toxic stress is a ticking clock—and prolonged separation inflicts increasingly greater harm as each week goes by.

From a scientific perspective, the initial separation and the lack of rapid unification are both indefensible. Forcibly separating children from their parents is like setting a house on fire. Prolonging that separation is like preventing the first responders from doing their job.

Chair DeGette and Ranking Member Guthrie, this concludes my oral testimony. I am happy to answer any questions that you or your colleagues may have. Thank you.
Statement for the Record

Kids in Need of Defense (KIND)

Jennifer Podkul, Esq. Senior Director for Policy and Advocacy

on

“Reviewing the Administration’s Unaccompanied Children Program”

House Committee on Appropriations

Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

February 27, 2019

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 585 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.

Policies Affecting Children in ORR Custody

Nearly all of the children and minors who receive legal services through KIND are at some point detained in the custody of the U.S. Department of Health and Human Service’s Office of Refugee Resettlement (ORR). Many of these children have fled their countries of origin because of violence, abandonment, and other unsafe situations, and they face significant challenges upon arriving to the U.S., including healing from a history of trauma, overcoming language and educational barriers, and navigating the immigration system. The quality and scope of care received from ORR and the length of time spent in federal custody can have a profound impact on a child’s well-being and ability to make a claim for humanitarian protection.
Federal law and authority, including the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)\(^1\) and the *Flores Settlement Agreement*, provide for the prompt release of unaccompanied children from federal custody to the care of sponsors in the community. The release of children from detention to community and home-based care is consistent with the best interests of children and also facilitates access to critical legal and social services and the child’s meaningful participation in immigration proceedings.

KIND is concerned that recent policies, including a Memorandum of Agreement (MOA) between ORR and the Department of Homeland Security (DHS) related to information sharing, have led to prolonged detention and traumatization of children while doing little to improve child welfare and safety. Such policies have also had a dramatic impact on the number of children in ORR care and have resulted in the use of costly emergency influx facilities with limited services, *despite* relatively steady arrival numbers of unaccompanied children at the border. KIND is deeply concerned that in addition to imposing significant and unnecessary costs, the MOA and other policies are undermining the ability of children to access humanitarian protection for which they are eligible. Consequently, children may be returned to harm, danger or death in their countries of origin. Such a result not only runs counter to congressional intent as laid out in the Homeland Security Act of 2002 (HSA) and TVPRA, but to ORR’s very mission of child welfare.

**Memorandum of Agreement between ORR and DHS**

The HSA assigns ORR responsibility for “coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status.”\(^2\) The TVPRA clarifies that ORR is to “promptly [place children] in the least restrictive setting that is in the best interest of the child.”\(^3\) 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,\(^4\) and directs that parents and legal guardians receive priority among potential sponsors, who may also include other immediate relatives, distant relatives, or unrelated individuals.\(^5\)

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\(^4\) 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.

\(^5\) *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 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.”).
In accordance with these laws, ORR evaluates potential sponsors of unaccompanied children for their ability to provide for a child’s safety and well-being and to ensure the child’s appearance at immigration proceedings. ORR maintains numerous policies and procedures for evaluating the suitability of potential sponsors. These typically include: (i) the identification of potential sponsors; (ii) the potential sponsor’s submission of a Family Reunification Application; (iii) the evaluation of a potential sponsor’s suitability, including verification of identity and relationship to the child; (iv) fingerprinting and background checks, where applicable; and (v) in some cases, home studies.

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. 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.” 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.”

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. ICE arrested more than 400 people in its initiative targeting sponsors for smuggling. However, news reports indicated that the majority of those arrested were not

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6 8 U.S.C. § 1232(c)(3)(A) (2013). ("[A]n unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child’s physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian’s identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.").
8 Id.
10 Id.
11 Id.
charged with federal smuggling crimes, but instead charged with violations unrelated to smuggling.\textsuperscript{14} 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.\textsuperscript{15} 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.\textsuperscript{16}

In April 2018, information-sharing between DHS and ORR was formalized through a Memorandum of Agreement 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.\textsuperscript{17} That notice stated that ICE will use information about sponsors obtained through ORR to “identify and arrest those who may be subject to removal.”\textsuperscript{18} At the same time, HHS pursued modifications to forms related to its sponsorship process to implement the MOA.\textsuperscript{19} ORR’s modified process included expanded fingerprinting and background check requirements, including for all potential sponsors and adult members of their households.

**Impacts of the MOA**

1. *Prolonged Detention and Traumatization of Children*

The Memorandum of Agreement 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.\textsuperscript{20} 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

\textsuperscript{14} Dreier, Relatives of Undocumented Children Caught Up in ICE Dragnet, *supra* note 13.
\textsuperscript{15} See Garcia, ICE Arrests Young Immigrant’s Sponsor Months After Feds Assured Him He’d Be Safe, *supra* note 13.
\textsuperscript{17} 83 Fed. Reg. 20844 (May 8, 2018).
\textsuperscript{18} Id.
\textsuperscript{20} 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.”).
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.\(^{21}\) Nearly 64 percent (or 109) of the individuals arrested had no criminal record.\(^{22}\) 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.\(^{23}\)

In recognition of the delays caused by its new fingerprinting requirements, ORR modified its policy in December 2018 to limit the household members subject to the fingerprinting requirements.\(^{24}\) The change led to the release of several thousand children from ORR custody toward the end of 2018.\(^{25}\) Recent language in the 2019 appropriations bill sets forth important and necessary limits on DHS’ use of information obtained from HHS for immigration-related enforcement against sponsors and other adults.\(^{26}\) This language is an important first step in curtailing the negative impacts of the MOA, however it is not a complete

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\(^{22}\) *Id.*

\(^{23}\) 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-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.”).

\(^{24}\) ACF, Division of Policy and Procedures FAQ: December 2018, Fingerpint Modifications Pursuant to ORR Operational Directive.


\(^{26}\) Conference Report, Continuing Appropriations for the Department of Homeland Security for Fiscal Year 2019, and For Other Purposes, Sec. 224, https://docs.house.gov/billsthisweek/20190211/CRPT-116hrpt9.pdf (“None of the funds provided by this Act or any other Act, or provided from any accounts in the Treasury of the United States derived by the collection of fees available to the components funded by this Act, may be used by the Secretary of Homeland Security to place in detention, remove, refer for a decision whether to initiate removal proceedings, or initiate removal proceedings against a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor of an unaccompanied alien child . . . based on information shared by the Secretary of Health and Human Services.”). The section provides an exception in certain cases of felony convictions or pending charges related to child abuse and other child-related crimes.
prohibition on information-sharing. For example, information may be used for enforcement purposes if someone is charged with a crime—even if there has been no prosecution. Moreover, because this provision was part of an annual appropriations bill, it will only last for that fiscal year and it is not permanent. ORR’s information-sharing continues to have a chilling effect on sponsors that is prolonging the detention of children, with profound impacts for their health and well-being and legal cases.

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 lethal danger 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.27

KIND has witnessed such effects in its representation of children, including one client who was only 8 years old. The sponsor successfully completed ORR’s clearance processes, as outlined in the MOA, in August 2018. After receiving information concerning their successful completion, the sponsors did not receive additional information as to when the child would be released to them until KIND intervened in October 2018. During this period, the child had limited communication with both his mother and his proposed sponsor. Consequently, the child began to self-harm and, at one point, asked to be returned to his home country out of desperation caused by his prolonged detention, despite his mother’s insistence that it was too dangerous for him to return.

In another case of a fourteen-year-old child, the child needlessly spent five additional months in ORR custody due to the changing MOA policies and their bungled implementation. After the sponsor complied with all of the requisite procedures, including having all adults in her household submit fingerprints, ORR changed the requirements. Once ORR began processing the potential sponsorship again under the new requirements, the mother’s fingerprints had expired. When she resubmitted her fingerprints to ORR, it triggered an error in the system because it was the second set of prints reviewed for the same person. During these absurd bureaucratic missteps, the child languished in detention and expressed suicidal ideation. Without consistent intervention from the KIND attorney, the child would have spent even longer in detention.

KIND also represented a child who had been separated from his father under the Administration’s Zero Tolerance Policy. The father had been removed from the country and, due to the MOA, reunification with the child’s uncle was delayed. The combined trauma of having been forcibly separated from his father and having been detained for a prolonged period resulted

27 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
in the child’s asking to be repatriated to his country of origin, even though he had a credible fear of harm.

Prolonged detention has also led to many unaccompanied children turning 18 while in ORR custody and “aging out” of ORR care. In many cases, ICE has assumed custody of these children on their 18th birthdays—transferring them to more restrictive care with more limited access to needed services, including counsel to assist them with their legal cases. Despite federal law being clear that alternatives to detention must be considered instead of automatically transferring children to ICE custody, KIND frequently serves children who have aged-out because ORR has not offered ICE any alternative. Those children are brought, often at midnight on their 18th birthday, from the ORR shelter to an adult detention facility.

KIND assisted a child who had been detained and was waiting to be reunified with his mother. Because of complications related to arranging fingerprints for all adult household members, as required by the MOA at the time, the child turned 18 before his mother was approved as a sponsor. Instead of being able to finish the court process in the home of his mother, he was detained in an ICE facility for adults.

Court efficiency is also negatively impacted when children are detained for long periods of time. Immigration judges are often loathe to move ahead with a child’s case while the child’s reunification with a sponsor is pending. Important information and documents necessary to prove children’s cases are often hard to access for children separated from their families. Access to counsel is incredibly limited in ORR facilities, and with the uncertainty of reunification schedules, families often cannot secure pro bono or private counsel to begin working on a child’s case. Finally, some forms of humanitarian protection require the child to be reunified before court procedures necessary for legal protection can begin. Detention fatigue often makes children want to give up their claims for protection. They are unable to withstand the harsh conditions and prolonged family separation. When children struggle with the decision about giving up their claims for protection, attorneys must spend time consulting with their clients about their options. Time that would otherwise be spent preparing for a hearing is spent advising the child about their options and providing emotional support as the child makes an agonizing decision. This is not only devastating for the child, but it drains limited resources and prolongs the processing of children’s legal cases.

In another affront to due process for unaccompanied children, the MOA explicitly allows ORR to provide ICE with information that is unavailable to a child’s attorney without a

28 8 U.S.C. § 1232(c)(2)(A)
30 See Detention of Immigrant Children, supra note 27 (Qualitative reports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems. Additionally, expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children.)
centralized file request.\textsuperscript{31} These requests can take months to process. During that time, ICE has information that could be used in the removal proceedings against the child, but neither the child nor the child’s attorney may be aware of it. This information may be pertinent to the child’s eligibility for humanitarian protection. If the information is inaccurate, the child must know about it to correct the mistake and prepare his or her defense.

The direct correlation between the MOA and increased lengths of stay has resulted in a ballooning population of detained children. Never have so many children been detained by ORR. This has also led to significantly greater costs to the government. With each day that a child’s release is delayed costs increase, multiplied by thousands of children. Cost concerns have intensified with ORR’s use of expensive emergency influx facilities, such as those in Tornillo, Texas, and Homestead, Florida, to address the agency’s strained capacity.

\textbf{2. Increased Use of Emergency Influx Facilities}

In March 2018, ORR re-opened an emergency influx facility in Homestead, Florida, to address its capacity needs. This facility was followed by the creation of an emergency influx facility in Tornillo, Texas. While emergency influx facilities may be necessary in cases of unexpected increases in arrival numbers to prevent backups of children in short-term CBP facilities at the border, as occurred in 2014, no such emergency currently exists. Importantly, these facilities have come into recent use not as a result of unanticipated increases in the number of unaccompanied children arriving at the border, but rather as a consequence of ORR and DHS’ own policy changes. With the cost of emergency influx facilities estimated at $750 per night,\textsuperscript{32} or nearly three times that of a shelter facility, the impacts are sizeable and far-reaching.

As emergency influx facilities, Tornillo and Homestead are not held to the same child welfare and licensing standards as ORR’s other shelters. As a result, services for children are decidedly more limited in such facilities. Located in a remote desert area, Tornillo offered only limited access to education or classes, and to legal and medical services, including mental health care, prior to its closure in December 2018. Indeed, the facility went nearly two months before securing access to legal services for the thousands of children held in the tent city. Sprawling in size, Tornillo was inappropriate for the long-term care of children and presented significant challenges for identifying and serving the needs of thousands of children held there. The facility at Homestead, which now houses over 2,000 children, presents similar challenges.

Children’s ability to have their cases fairly heard is severely impeded by being held in an emergency facility. In Tornillo, children had very limited access to know your rights presentations and legal screenings. The small number of legal services providers ORR supported


were unable to dedicate sufficient attention to each case. Often children would be notified the day of their first court hearing, and attorneys would scramble to try to explain complex immigration law to children before they were driven to court. As a result, judges could not move forward with these children’s cases. There is insufficient private meeting space for attorneys to use to discuss incredibly difficult and sensitive details of a child’s case. KIND met with one girl from Guatemala who had a strong claim for asylum. However, because she could not get a private attorney to represent her in Tornillo, and ORR had not contracted with a legal service provider to represent children in individual cases, the child gave up her claim and agreed to return to a place where she feared for her life.

The expanded use of influx facilities in the absence of a true emergency has led to the indefinite detention of children with only limited access to basic services—the precise circumstance the Flores Settlement Agreement sought to remedy and prevent.

**Conclusion**

To fulfill ORR’s obligation to serve the best interests of unaccompanied children in its care, ORR must immediately end the MOA with DHS and stop sharing immigration status information about potential sponsors. ORR should focus on finding the best sponsor for a child who will provide a safe home and support that child during his or her removal proceedings. Permanently ending the MOA will restore ORR’s correct prioritization of child welfare over immigration enforcement.

Secondly, ORR must only rely on emergency influx facilities to house unaccompanied children when it is faced with caring for unexpected numbers of children. Barring unpredictably large arrivals of children in need of care, ORR should use permanent, small, and state-licensed facilities to house children only as long as needed to approve an appropriate sponsor. Children must not be held in federal facilities any longer than necessary. Moreover, ORR must develop public standards for its unlicensed emergency facilities to ensure the appropriate provision of legal, medical and educational services. These standards should include timeframes by which the legal, medical and educational services must be provided to each child following placement in the facility and limits on how long ORR can use an unlicensed facility.

Finally, ORR should prioritize children’s access to high-quality legal counsel. Children are in ORR custody precisely because of immigration removal proceedings. Everything possible should be done to ensure children are able to fairly and efficiently tell their story to a trained adjudicator who can decide which children need protection in the United States and which would be safe to return to their country of origin. Having children represented during their proceedings not only helps the child access meaningful due process, but it increases efficiency in a sorely overwhelmed system.

Child protection must be a priority in the enforcement of our immigration laws. Congress assigned responsibility for the care and custody of unaccompanied children to the Office of Refugee Resettlement because of its expertise in child welfare. The basic tenets of
child welfare must be reflected in the agency’s policies, and the agency must always act in the best interests of children.
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
March 26, 2019

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

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.  

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 enforcement.

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)—or the “Remain in Mexico” policy—under which certain asylum-seekers are forced to
stay in Mexico pending their immigration proceedings in the U.S.\textsuperscript{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.\textsuperscript{7} Both policies disregard Congress' express intent to allow asylum seekers to apply for protection, regardless of where they enter the country.\textsuperscript{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.\textsuperscript{9} In late January 2019, DHS formally implemented the Remain in Mexico policy turning back 240 migrants since that time.\textsuperscript{10}

While the Administration has asserted that the Remain in Mexico policy would not apply to unaccompanied children,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{14} Mexican officials also frequently transfer unaccompanied children seeking asylum in the U.S. to the custody of Mexico’s child

\textsuperscript{6} MPP Memorandum, supra note 4, at 1-2.
\textsuperscript{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.
\textsuperscript{11} MPP Memorandum, supra note 4, at 1.
\textsuperscript{12} Maria Verza, US sending Central American migrant minors back to Mexico, AP (Feb. 25, 2019), https://www.apnews.com/8548e76bed794a9eb1f3b38d15e0601b.
welfare agency (DIF). Once in DIF custody, these children are informed that they may seek asylum in Mexico or be deported to their countries of origin. They are not informed of their right to seek protection in the U.S. 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.

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. 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. Once called, the migrants can then present themselves for asylum at the U.S. border. 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.

Unaccompanied children face grave danger in Mexican border towns, where they may be preyed upon by smugglers and human traffickers. Last December, two unaccompanied youth were tricked, abducted, tortured, and killed in Tijuana. 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.

**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

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16 Id.
17 Id. at 3.
18 Id.
20 Id.
21 Id.
22 Id.
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, 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 reunited 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. 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. 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.” 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.”

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

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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).
28 BETRAYING FAMILY VALUES, supra note 41, at 12.
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. 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. Adults were taken to federal detention facilities, while children were transferred into the care of ORR, which operates within HHS. Once separated from their parents, DHS classified the kids as “unaccompanied.”

Even before the ZTP, the *New York Times* reported that, from October 2017 to April 2018, over 700 children were taken from their parents. The latest HHS Inspector General’s report estimates that DHS separated thousands of children from 2017 to June 2018. 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. 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. Alarprisingly, 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

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34 Press Release, supra note 36.
separated children between July 1 and November 7, 2018. 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. 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. 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.” 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. 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.

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

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39 *Id.* at 11.
40 INSPECTOR GENERAL REPORT, supra note 35, at 11.
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. Further, immigration enforcement agents should be trained to consider family unity as a primary factor in charging and detention decisions. 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. 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.

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

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45 Id. at 2.
46 Id. at 1.
47 Id. at 7.
In January 2019, it was reported that Flores counsel discovered facilities holding unaccompanied children operating without licenses. 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, and delayed background investigations of potential sponsors.

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.” The TVPRA clarifies that ORR is to “promptly [place children] in the least restrictive setting that is in the best interest of the child.” 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, and directs that parents and legal guardians receive priority among potential sponsors, who may also include other immediate relatives, distant relatives, or unrelated individuals.

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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.
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.
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.\(^64\)


\(^{58}\) Id.

\(^{59}\) Id.


\(^{62}\) 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.

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.\(^{71}\)

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\(^{66}\) Id.


\(^{68}\) 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.”).


\(^{70}\) Id.

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.

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⁷²See, 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](https://pediatrics.aappublications.org/content/139/5/e20170483.short)
Statement for the Record  
**Kids in Need of Defense (KIND)**  
Jennifer Podkul, Esq. Senior Director for Policy and Advocacy  
on  
“Trump Administration’s Inhumane Family Separation Policy”  
U.S. House Committee on Energy & Commerce  
February 7, 2019

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 585 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.

**Background on the Zero Tolerance Policy and Family Separations**

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 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 majority of these families came from the Northern Triangle of Central America: Honduras, El Salvador, and Guatemala. The Trump Administration implemented the policy with no specific plan in place to connect or reunite these children with their parents and ultimately deported hundreds of parents without their children. The remote and scattered locations of the parents and children, challenges in gaining access to detention facilities, and the frequent transfers of child and adult detainees without notice created enormous obstacles to helping families access legal protections under the Immigration and Nationality Act during the height of the crisis.

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,¹ 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.

**KIND’s Response to the Zero Tolerance Policy**

In response to the ZTP, KIND formed a dedicated Family Separation Response Team (FSRT). The other legal staff in KIND’s 10 field offices also provide support on family separation cases, and senior legal services leadership provides oversight and support. 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 with KIND’s Regional Team in the effort to locate deported parents in Central America.

Over the summer, KIND sent rotating teams of staff to the border attendant to the family separation crisis. In total, KIND assisted over 200 detained parents at Immigration and Custom Enforcement’s Port Isabel Processing Center (PIPC). KIND staff provided triage services to help detained parents reestablish contact with their children, prepared them for their credible fear hearings (which are the initial threshold screenings for asylum), and helped them establish eligibility for reunification and release from detention. In addition, four KIND staff members provided screening and services to separated children and families who were transferred to the Karnes and Dilley family detention centers as well as ORR’s Tornillo Emergency Reception Center. 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.

KIND continues to serve these families to the extent possible. Despite the fact that many families have scattered throughout the U.S. in locations where KIND does not have a presence, every effort is made to provide remote support and/or referrals to local provider options.

In addition to the above, 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.

**Summary**

KIND strongly opposes the use of family separation for purposes of punishing or deterring the migration of children and families. Through our work we have witnessed the far-reaching and devastating impacts of the Administration’s family separation policies on both the well-being of children and parents as well as their cases for legal protection. The lack of an integrated data system to track separated families across agencies created a chaotic situation last summer, in which parents and children were unable to locate or communicate with each other, in many cases

¹ 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).
for several weeks. This lack of effective tracking also inhibited the prompt reunification of families separated by the Administration and remains of grave concern. KIND is similarly concerned about ongoing family separations, which continue to occur without any particular standards in place, systematic tracking of separations, or detailed information about why the separation occurred, such as evidence indicating that a parent poses a risk to their child’s safety or well-being. KIND further objects to the proposed limits on third-party government oversight once children are in detention facilities. We hope the Committee will consider these problems and their long-term and detrimental effects on children and families, who often come to our country in search of protection from harrowing violence and other threats to their lives.

We urge the Committee to request assurances that all family separation policies will be promptly reevaluated and that the important recommendations outlined below will be implemented.

Introduction

Family unity is a fundamental human right and central principle of U.S. immigration policy and international law. 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. 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 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.

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.

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4 Id.
These children belong with their families.

More Children Are Separated and Detained by the Government

These two stories offer a small window into the trauma experienced by the nearly 15,000 migrant children who were held in government custody in December 2018. ORR was running out of beds in its 130 shelters, forcing it to use emergency overflow tent facilities, like the one in Tornillo, Texas. That camp shuttered its doors after a troubling report issued by HHS’ Office of Inspector General. The report warned of “serious safety and health vulnerabilities,” even though the government must abide by court-mandated safety standards.

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. 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. Adults were taken to federal detention facilities, while children were transferred into the care of ORR, which operates within HHS. Once separated from their parents, DHS classified the kids as “unaccompanied.”

Even before the ZTP, the New York Times reported that, from October 2017 to April 2018, over 700 children were taken from their parents. The latest HHS Inspector General’s report estimates that DHS separated thousands of children from 2017 to June 2018. 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. As of December 2018, HHS had identified 2,737

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9 INSPECTOR GENERAL REPORT, supra note 7, at 2.

10 Press Release, supra note 8.


12 INSPECTOR GENERAL REPORT, supra note 7, at 1, 13.

children who had been separated from their parents under the policy and were required to be reunified under a June 2018 federal court order.\(^\text{14}\)

Alarmingl##y, 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 separated children between July 1 and November 7, 2018.\(^\text{15}\) ORR often receives little or incomplete information about the reasons for such separations.

\textit{Sponsors Fear Coming Forward}

Once in custody, ORR must provide a safe and secure placement for a child in the “least restrictive setting that is in the best interest of the child” while he or she awaits immigration proceedings.\(^\text{16}\) ORR must prioritize reunification with a parent or close family member. However, recent Administration policies prevent ORR from bringing families back together. In the summer of 2017, ICE used information gathered from CBP, ORR, and the kids themselves to target, question, and arrest sponsors of unaccompanied children.\(^\text{17}\) More recently, ORR, CBP, and ICE entered a memorandum of agreement that, among other things, permits the sharing of information about sponsors and other adults in their homes, including for immigration enforcement purposes. As part of efforts to implement this agreement, ORR added burdensome sponsorship requirements. Between June and December 2018, sponsors and every adult living with them were required to submit their fingerprints as part of the vetting process. The government later admitted that the extra screening was “not adding anything to the protection or the safety of children.”\(^\text{18}\) As information-sharing for enforcement purposes persists, potential sponsors, who may be the safest and best person to care for the child, are deterred from coming forward to care for their young family members. Consequently, children remain in detention facilities, potentially indefinitely.

\textit{Tracking Mechanisms for Recording Family Relations are Deficient}

The HHS Inspector General’s report emphasizes that the total number and current status of children separated from their parents or legal guardians by DHS and then referred to ORR’s care is unknown.\(^\text{19}\) Although HHS has devoted “considerable resources” to improving tracking mechanisms, the agency admits the lack of an existing and integrated data system that can track separated families across agencies poses significant challenges.\(^\text{20}\) In HHS’ filing in the \textit{Ms. L}...
case on February 1st, HHS noted that when DHS transferred children to ORR, “certain DHS components provided any anecdotal information about their separation of children to ORR on a discretionary, ad hoc basis by transmitting the information into the child’s record on the ORR portal.” The Declaration goes on to state, “For instance, certain Customs and Border Patrol (CBP) stations created notes in the records of children on the ORR Portal, using terms such as ‘separation’ in order to identify separation cases.” The fact that such information was not required, or was not diligently maintained in a systematic way, is shocking and unacceptable. ORR should demand that DHS input detailed information about any separations going forward into the ORR portal in a rigorous and systematic way.

The glaring problems with these tracking systems are not new. While there was no blanket family separation policy under the Obama Administration, family separations did occur in limited circumstances. As KIND and our partners highlighted in January 2017, children were separated from parents or legal guardians if there was a concern for the child’s safety such as an indication the adult abused the child, or if families were composed of individuals with “mixed” immigration statuses.21

When separations occur, DHS and HHS have no consistent or comprehensive means to document family status or track family members between their agencies. There is no database or hotline across ICE, CBP, and ORR that can help identify a separated family member’s location or assist with reunification.22 This is not only important for children separated from their parents and legal guardians, but it is important when, according to the Trafficking Victims Protection Act,23 a child is classified as unaccompanied and separated from an extended family member or sibling.

DHS’s widespread failure to consistently record, track, and transmit family information has yielded damaging results. This reached a boiling point in the summer of 2018 when the government implemented the ZTP, triggering a crisis of chaos and confusion. Separated families are left with little, if any, knowledge of their family members’ locations. One family member may have exclusive access to information or key evidence for legal proceedings, which hampers and bifurcates immigration cases. Repatriations of parents and children have occurred without notice to counsel of record, or even to the adults hoping to receive the child off the plane in the country of origin.

Recommendation: To ensure children are not subject to needless harm and have access to due process, KIND recommends that HHS work with DHS to develop protocols and ensure child welfare professionals screen children to ensure separations are only done when it is in the best interest of the child. DHS should coordinate with HHS to identify separated families and to facilitate release and reunification.24 DHS should bring back the Family Case Management

22 Id. at 4.
23 8 U.S. Code § 1232. Enhancing efforts to combat the trafficking of children
24 BETRAYING FAMILY VALUES, supra note 21, at 2.
Program to support released families so that they may make a request for protection.\textsuperscript{25} We are encouraged by ORR’s efforts to modify its online case management system and create a consolidated spreadsheet.\textsuperscript{26} Efforts to improve communication, transparency, and accountability for the identification, care, and placement of separated children should continue. Further, all family relationships should be recorded and communicated to ORR as well as the child’s attorney in order to facilitate the family reunification process.

\textit{There Are No Stated Reasons for Separation}

The HHS Inspector General’s report notes that DHS only provides ORR with “limited information” about why a family has been separated.\textsuperscript{27} Under current policies and practices, these decisions are arbitrary. They require no justification or documentation and do not involve the screener to have any child welfare expertise.\textsuperscript{28} 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.”\textsuperscript{29} 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.\textsuperscript{30} 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.\textsuperscript{31} 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.

\begin{itemize}
\item \textsuperscript{25} https://www.womensrefugeecommission.org/rights/resources/1653-family-case-management-program
\item \textsuperscript{26} The HHS Inspector General also commends this course of action in his January 2019 report. INSPECTOR GENERAL REPORT, supra note 7, at 13.
\item \textsuperscript{27} INSPECTOR GENERAL REPORT, supra note 7, at 11.
\item \textsuperscript{28} BETRAYING FAMILY VALUES, supra note 21, at 7.
\item \textsuperscript{29} INSPECTOR GENERAL REPORT, supra note 7, at 12.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} BETRAYING FAMILY VALUES, supra note 21, at 7.
\end{itemize}
**Recommendation:** 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. Further, immigration enforcement agents should be trained to consider family unity as a primary factor in charging and detention decisions. 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. 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.

**Oversight of DHS and HHS Facilities Holding Migrant Children is Essential**

Children being detained alone in such high numbers places enormous strain on the ORR system. Even prior to this Administration’s policies, ORR struggled to provide required post-release services for kids who legitimately needed support. Currently, ORR is required by the Flores Settlement Agreement to hold children in the “least restrictive setting” possible. Nonetheless, the Administration actively seeks to roll back Flores protections, which set out national standards for the government’s treatment, detention, and release of unaccompanied children and other minors. In September 2018, it proposed regulations that would relax Flores standards for how kids in custody can be held and transported.

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 custodians. In January 2019, CBS News reported that Flores counsel discovered facilities

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32 *Id.* at 2.
33 *Id.* at 1.
34 *Id.* at 7.
holding unaccompanied children operating without licenses.\textsuperscript{39} 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,\textsuperscript{40} and delayed background investigations of potential sponsors.\textsuperscript{41}

Recommendation: 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.

\textit{Parents and Children Face Long-Lasting Consequences}

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.\textsuperscript{42} 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.\textsuperscript{43} 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.”\textsuperscript{44} 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.”\textsuperscript{45}

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 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.

\textsuperscript{40} 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.
\textsuperscript{41} Kates, \textit{supra} note 39.
\textsuperscript{42} JULIE M. LINTON ET AL., \textit{AM. ACAD. OF PEDIATRICS, DETENTION OF IMMIGRANT CHILDREN 6} (2017).
\textsuperscript{43} BETRAYING FAMILY VALUES, \textit{supra} note 21, at 12.
\textsuperscript{44} \#SilencedVoices, KIND, https://supportkind.org/get-involved/silencedvoices/.
\textsuperscript{45} \textit{Id.}
**Recommendation:** 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.

**Conclusion**

KIND condemns the use of any tactics to deter people from seeking protection in the United States that clearly harm children. KIND is deeply concerned about the lack of tracking mechanisms for separated families, ongoing separations, proposed limits on third-party oversight once children are in government care, and serious long-lasting psychological and legal impacts on the most vulnerable in our immigration system. Child protection must be a priority in the enforcement of our immigration laws. We urge the Committee to request assurances that all family separation policies will be promptly reviewed and that important changes will be immediately implemented.