



RECEPTION OF CHILDREN ON THE MOVE IN THE UNITED STATES OF AMERICA

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1. Application of international law in United States domestic law

1.1 Status of international treaties in domestic law

In the United States, the Constitution is the law of the land, and any treaty that conflicts with the Constitution will not be enforced. Treaties, however, are given the status of federal law. This means that they are supreme to state law.

Some international treaties that the United States enters into are self-executing, meaning that they go into domestic effect immediately after being signed and ratified.¹ Becoming a party to the treaty puts the treaty and all of its obligations in action by courts as a matter of domestic law. Treaties are automatically binding under the supremacy clause when they are self-executing.

Other treaties are deemed non-self-executing.² These treaties do not automatically go into effect upon being signed and ratified. They require implementing legislation that will direct or enable fulfillment of treaty obligations. When the implementing federal legislation takes effect, the law becomes supreme to state laws.

Even where a treaty is non-self-executing, courts may nonetheless take notice of the obligations of the United States in an appropriate case and may refer to the principles and objectives thereof, as well as to the stated policy reasons for ratification.³

1.2 Ratified international treaties

The United States is not a party to the United Nations Convention Relating to the Status of Refugees but it is a party to the United Nations Protocol Relating to the Status of Refugees.⁴ Under the Protocol, the United States may not return an individual to a country where he or she faces persecution from a government or a group the government is unable or unwilling to control based on race, religion, nationality, political opinion, or membership in a particular social group.⁵ This treaty is non-self-executing.⁶ However, it was implemented in significant part in the Immigration and Nationality Act,⁷ which defines a “refugee” as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁸ It provides for discretionary grants of asylum to persons meeting this definition, who are physically present in the United States or at a land border or port of entry to the United States.⁹

¹ See *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (interpreting article VI, cl. 2 of the US Constitution to contain a distinction between self-executing and non-self-executing treaties).

² See Carlos Manuel Vazquez, *Treaties as the Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599 (2008) (discussing the self-executing versus non-self-executing nature of treaties).

³ See, e.g., *Sale v. Haitian Centers Council*, 590 U.S. 155 (1994).

⁴ See United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, <http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> (listing the United States as a party to the 1967 Protocol only).

⁵ Text of the 1967 Protocol Relating to the Status of Refugees, Resolution 2198 (XXI) adopted by the United Nations Assembly, Article 33, <http://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

⁶ Memorandum Opinion for the Legal Adviser Department of State: *Legal Obligations of the United States Under Article 33 of the Refugee Convention*, Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel, Dec. 12, 1991, <https://www.justice.gov/file/23326/download>.

⁷ 8 U.S.C. §§ 1101(a)(42)(A).

⁸ *Id.*

⁹ John Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. of International L. 1, 2 n.5 (1997).

A separate treaty, known as the Convention Against Torture, prohibits the return of people to a country where there are substantial grounds to believe they may be tortured. The Convention Against Torture was also found to be non-self-executing, but its non-refoulement provisions have been effectively implemented through the federal administrative process and procedure and regulations.¹⁰

The United States is not a party to the Convention of the Rights of the Child.¹¹

1.3 The principle of “best interest of the child” in United States law

There is no standard definition of “best interests of the child,” in United States law.¹² However, in the judicial system, the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child, as well as who is best suited to take care of a child.¹³ “Best interest” determinations are made by considering a number of factors related to the child’s circumstances and the parent or caregiver’s circumstances and capacity to parent, with the child’s ultimate safety and well-being as the paramount concern.¹⁴ Common factors include: the emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers (15 states and DC), the capacity of the parents to provide a safe home and adequate food, clothing and medical care (10 states), the mental and physical health needs of the child, (9 states and DC), the mental and physical health of the parents (9 states and DC), and the presence of domestic violence in the home (9 states).¹⁵

State statutes frequently reference overarching goals, purposes, and objectives that shape the analysis in making best interest determinations.¹⁶ The following some of the most frequently stated guiding principles:

- The importance of family integrity and preference for avoiding removal of the child from his/her home
- The health, safety, and/or protection of the child
- The importance of timely permanency decisions
- The assurance that a child removed from his/her home will be given care, treatment, and guidance that will assist the child in developing into a self-sufficient adult.¹⁷

1.4 Separated and unaccompanied children

Children who arrive in the United States alone or who are required to appear in immigration court on their own are referred to as unaccompanied children or unaccompanied minors. The U.S. immigration laws do not define the term “accompanied” children, but children arriving in the U.S. with a parent or guardian are considered accompanied.¹⁸

¹⁰ See INA, 8 U.S.C. § 1229a (“Removal Proceedings”), 22 C.F.R. Parts 3, 103, 208, 235, 238, 240, 241 and 253, reprinted in 64 Federal Register 33 at 8478-8496 (19 February 1999) (INS regulations); 22 C.F.R. Part 95, reprinted in 64 Federal Register 38 at 9435-9437 (26 February 1999) (Department of State regulations). See also United States of America Report, Committee Against Torture, Oct. 15, 1999, <https://www.state.gov/documents/organization/100296.pdf> (explaining the measures the United States undertook to implement the Convention against Torture).

¹¹ United Nations Treaty Collection, Convention on the Rights of the Child, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en.

¹² Children’s Bureau, Child Welfare Information Gateway, Determining the Best Interests of the Child 2, Mar. 2016, [https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best interests definition](https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best%20interests%20definition).

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ See id. for a list of statutes from every state regarding best interests determinations.

¹⁸ American Immigration Council, A Guide to Children Arriving at the Border: Laws, Policies and Responses 1, June 2015, [hereinafter “A Guide to Children Arriving at the Border”], https://exchange.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the

“Unaccompanied alien children” (“UAC”) is a technical term defined by law as a child who “(a) has no lawful immigration status in the United States; (b) has not attained 18 years of age; and (c) with respect to whom – (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.”¹⁹ These young migrants receive certain protections under U.S. law due to their vulnerability.²⁰

2. Reception of Children in the United States

2.1 Initial Processing and Evaluation

Before 2002, the U.S. Immigration and Naturalization Service (INS) held unaccompanied children in its custody.²¹ The INS also acted as the children’s prosecutor, presenting charges that they had violated immigration laws and arguing for their deportation.²² The agency’s dual capacity as caretaker and prosecutor created a conflict of interest.²³ Because of this, as well as growing concerns about the conditions of detention, a broad coalition of human rights organizations, religious groups and political leaders pushed for improvements in the care and treatment of unaccompanied minors and lobbied for the transfer of their care and custody to another agency.²⁴

In 2002, the Homeland Security Act of 2002 (“HSA”) ²⁵ eliminated the INS and divided responsibility for unaccompanied children between the Department of Homeland Security (“DHS”) and the Department of Health and Human Services (“HHS”), thereby eliminating the conflict of interest. To DHS, the law assigned responsibility for the apprehension, transfer and repatriation of unaccompanied minors.²⁶ To HHS, the law assigned responsibility for coordinating and implementing the care and placement of unaccompanied minors in appropriate custody, reunifying them with their parents abroad if appropriate, maintaining and publishing a list of legal services available to them, and collecting statistical information on unaccompanied minors, among other responsibilities.²⁷

Unaccompanied children enter the U.S. immigration system when they are apprehended by federal authorities—one of the subsidiary agencies of DHS, such as Customs and Border Patrol (“CBP”), the U.S. Coast Guard, or Immigration and Customs Enforcement (“ICE”)—on suspicion of violating immigration law.²⁸

Approximately 73% of migrants are apprehended by ICE officers at US borders or ports of entry and 27% of migrants are apprehended once they are in the interior of the United States.²⁹ Immigration enforcement authorities, acting through ICE’s Enforcement and Removal Operations (ERO), apprehend children in the United States during worksite enforcement actions

[_border_and_the_laws_and_policies_governing_our_response.pdf](#)

¹⁹ 6 U.S.C. § 279(g) 2012.

²⁰ A Guide to Children Arriving at the Border at 1, *supra* note 18.

²¹ Olga Byrne, Vera Institute of Justice, *Unaccompanied Children in the United States: A Literature Review* 3, Apr. 2008.

²² Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers* 27 Fig. 11, Vera Institute of Justice, Mar. 2012, [hereinafter “The Flow of Unaccompanied Children Through the Immigration System”]

<http://archive.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

²³ *Id.*

²⁴ *Id.*

²⁵ P.L 107-296 (6 U.S.C. Ch. 1).

²⁶ William A. Kandel, Congressional Research Service, *Unaccompanied Alien Children: An Overview* at 4, Jan. 18, 2017 [hereinafter “Unaccompanied Alien Children: An Overview”], <https://fas.org/sgp/crs/homesec/R43599.pdf>.

²⁷ *Id.*

²⁸ *The Flow of Unaccompanied Children Through the Immigration System* at 8, *supra* note 22.

²⁹ U.S. Immigration and Customs Enforcement, *FY 2016 ICE Immigration Removals*, <https://www.ice.gov/removal-statistics/2016>.

or through operations to combat smuggling and human trafficking.³⁰ Most children, however, are apprehended by the Office of Border Patrol, a division of CBP, when they try to cross the border from Mexico into the United States.³¹ Between October 2016 and January 2017, the U.S. Border Patrol apprehended 25,694 unaccompanied children and 54,147 family units (defined as a parent, typically a mother, traveling with children) along the Southwest border.³²

Once apprehended and detained by Department of Homeland Security (“DHS”), agents interview the child and conduct a screening.³³ The screening involves a Border Patrol agent asking the minor a series of questions to determine if they are the victim of persecution or human trafficking and therefore eligible for protection in the U.S. under asylum laws.³⁴ A child, who at the time of apprehension has no lawful immigration status in the U.S., is under 18 years of age, and has no parent or legal guardian in the country present or available to provide care and physical custody meets the statutory definition of “unaccompanied minor.”³⁵ The law requires that such minor be transferred into the custody of the Department of Health and Human Services (“HHS”) within 72 hours.³⁶

Once in HHS custody, the Office of Refugee Resettlement (“ORR”) is responsible for caring for the minors and releasing them to family members or sponsors.³⁷ The ORR is a social service agency whose main function is to help refugees establish sustainable lives in the United States.³⁸ In 2015, the origin of youth referred to ORR were as follows: Honduras (17%), Guatemala (45%), El Salvador (29%), Mexico (6%) and other countries (3%).³⁹ In 2015, the average length of stay in the ORR program was 34 days.⁴⁰ The overwhelming majority of children served by ORR are released to sponsors who are family members.⁴¹

The process of searching for a sponsor (an individual or guardian who will care for the child) typically begins within 24 hours of a child’s arrival at the ORR facility.⁴² An intake form assesses the minor’s basic and immediate care needs and helps determine whether the child may be safely released to a sponsor in the United States.⁴³ A social worker at an ORR facility completes an admissions assessment within three to seven days of the minor’s admission to ORR custody, which includes biographic, family, legal/migration, medical, and/or any substance use or mental health history of the minor.⁴⁴ Finally, a master’s level social worker (or equivalent)—often referred to as the clinician—completes a psychosocial assessment of the minor and an

³⁰ The Flow of Unaccompanied Children Through the Immigration System at 8-9, *supra* note 22.

³¹ *Id.*

³² Jie Zong & Jeanne Batalova, Migration Policy Institute, Frequently Requested Statistics on Immigrants and Immigration in the United States, Mar. 8, 2017, <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

³³ National Conference of State Legislatures, Child Migrants to the United States, Oct. 28, 2014, <http://www.ncsl.org/research/immigration/child-migrants-to-the-united-states.aspx>.

³⁴ Rachael Bale, What Happens to Migrant Children After the Border Patrol Detains Them, *Reveal: The Center for Investigative Reporting*, July 31, 2014, [hereinafter, What Happens to Migrant Children After the Border Patrol Detains Them], <https://www.revealnews.org/article-legacy/what-happens-to-migrant-children-after-the-border-patrol-detains-them/>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See the ORR website, <https://www.acf.hhs.gov/orr/programs/ucs>.

³⁹ U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Children’s Program Fact Sheet 2, Jan. 2016, https://www.acf.hhs.gov/sites/default/files/orr/orr_fact_sheet_on_unaccompanied_alien_childrens_services_0.pdf

⁴⁰ *Id.*

⁴¹ *Id.* See also National Conference of State Legislatures, Child Migrants to the United States, Oct. 28, 2014, <http://www.ncsl.org/research/immigration/child-migrants-to-the-united-states.aspx> (stating that ORR estimates that it places 90% of children with a family member or friend, reuniting close to 30% with a parent).

⁴² The Flow of Unaccompanied Children Through the Immigration System at 17, *supra* note 22.

⁴³ *Id.*

⁴⁴ *Id.*

individualized service plan for him or her within 21 days of admission to ORR custody.⁴⁵

Even though an unaccompanied minor is transferred from DHS to HHS custody, that does not mean his or her immigration case is finished. After being placed with a sponsor or otherwise, every child is placed into deportation or “removal” proceedings pursuant to the Immigration Nationality Act.⁴⁶ When HHS releases the minor from an ORR facility to a sponsor, that means that the minor can live with a family member or guardian while his or her case is pending.⁴⁷ It does not give the minor legal permission to stay permanently in the United States.⁴⁸ An immigration judge or official must still decide if the minor can stay in the United States.⁴⁹

The following graphic from the Department of Homeland Security website illustrates the initial process for an unaccompanied minor entering the United States through the Southwest Border:

Unaccompanied Children at the Southwest Border

At the direction of the President, a Unified Coordination Group is leveraging Federal resources to address the humanitarian situation associated with the influx of unaccompanied children entering the U.S. across the southwest border. This chart depicts the general process to enhance capacity resulting from federal coordination.



* Note: This chart only shows interagency process to address the humanitarian situation.

U.S. Department of Homeland Security

Guidelines for Handling Unaccompanied Minors

Two statutes and a legal settlement directly affect U.S. policy for the treatment and administrative processing of unaccompanied minors: The Trafficking Victims Protection Reauthorization Act of 2008,⁵⁰ the Homeland Security Act of 2002,⁵¹ and the Flores Settlement Agreement of 1997.⁵²

⁴⁵ Id.

⁴⁶ National Conference of State Legislatures, Child Migrants to the United States, Oct. 28, 2014, <http://www.ncsl.org/research/immigration/child-migrants-to-the-united-states.aspx>.

⁴⁷ See Immigration and You: Know Your Rights (Manual for Children and Youth 2014), National Immigrant Justice Center, <http://immigrantjustice.org/sites/immigrantjustice.org/files/Immigration%20and%20You%202014.pdf>.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Pub. L. 110-457.

⁵¹ Pub. L. 107-296.

⁵² Flores v. Meese—Stipulated Settlement Agreement (U.S. District Court, Central District of California 1997) [hereinafter “Flores Settlement Agreement”]. Many of the agreement’s terms have been codified at 8 CFR §§236.3, 1236.3.

During the 1980s, allegations of unaccompanied minor mistreatment by the former INS caused a series of lawsuits against the government that eventually resulted in the 1997 Flores Settlement Agreement.⁵³ The Flores Settlement Agreement established a nationwide policy for the detention, treatment and release of unaccompanied minors and recognized the particular vulnerability of unaccompanied minors detained without a parent or legal guardian present.⁵⁴

The Agreement establishes a sensitive treatment policy for immigrant children based on their juvenile status.⁵⁵ The Policy provides that “[t]he [DHS] treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors.”⁵⁶ It required that immigration officials detaining minors provide (1) food and drinking water, (2) medical assistance in emergencies, (3) toilets and sinks, (4) adequate temperature control and ventilation, (5) adequate supervision to protect minors from others, and (6) separation from unrelated adults whenever possible.⁵⁷ Although the INS has been eliminated, the DHS and HHS are now responsible for implementing the Flores Agreement.⁵⁸

The Agreement also stipulates that the DHS and HHS should place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs, provided that such setting is consistent with its interests to ensure the minor’s timely appearance before the INS and the immigration courts and to protect the minor’s well-being and that of others.⁵⁹ It further states that whenever the DHS or HHS takes a minor into custody, it shall expeditiously process the minor and shall provide the minor with a notice of rights.⁶⁰

The Agreement also stipulates that unaccompanied minors should not be transported in vehicles with detained adults.⁶¹ If adherence to this policy is impracticable,⁶² the Agreement provides that “[t]he [DHS] shall take necessary precautions for the protection of the well-being of such minors when transported with adults.”⁶³ In addition, juveniles represented by counsel shall not be transferred without advance notice to their attorneys.⁶⁴ This provision aims to protect the relationship between detained children and their counsel.⁶⁵

In practice, while the DHS has custody of the minor following arrest (for no more than 72 hours), they must be placed in facilities that are safe and sanitary: they must provide 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 minors from others, and contact with family members who were arrested with the minor.⁶⁶

When a juvenile is initially detained at the border they are screened briefly to determine their immigration status. Asylum officers are instructed to conduct child appropriate interviews taking into account the age, stage of language development, background and sophistication level of the

⁵³ Unaccompanied Alien Children: An Overview at 3, *supra* note 26.

⁵⁴ *Id.*

⁵⁵ Areti Georgopoulos, *Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Immigration Children Detained by the United States* at 123, 23 *Law & Inequality: A Journal on Theory & Practice* [hereinafter “*Beyond the Reach of Juvenile Justice*”].

⁵⁶ *Id.*

⁵⁷ Unaccompanied Alien Children: An Overview at 3, *supra* note 26.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Flores Settlement Agreement, *supra* note 52.

⁶¹ *Id.*

⁶² The carve-out applies only when the unaccompanied minor is being transported from his or her place of arrest or apprehension by a Border Patrol officer.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Beyond the Reach of Juvenile Justice*, *supra* note 55.

⁶⁶ Flores Settlement Agreement, *supra* note 52.

minor.⁶⁷ However, investigative reporting has uncovered that these brief screenings are not effective because agents are not trained to deal with children – especially children who have experienced trauma.⁶⁸ Further, advocates say that Border Patrol stations are intimidating and not the kind of place where children or teens are likely to feel comfortable talking about kidnapping or abuse.⁶⁹ Federal regulations require that when a juvenile alien is apprehended, he or she must be given a Form I-770, Notice of Rights and Disposition.⁷⁰ If the juvenile is less than 14 years old or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands.⁷¹

In 1998, the INS issued guidelines to asylum officers in to provide “child-sensitive interview procedures and analysis.”⁷² The INS Guidelines for Children’s Asylum Claims uses the “best interests of the child principle” to establish significant procedural and evidentiary approaches to the adjudication of protection claims.⁷³ In 2009, the US Customs & Immigration Services Asylum Division published a lesson plan overview for the Asylum Officer Basic Training Course related to Guidelines for Children’s Asylum Cases.⁷⁴ The lessons introduced and were based on the Guidelines published by the INS in 1998.⁷⁵ Thus, the best interest of the child principle continues to be relevant in adjudicating protection claims.

Aimed at making the adjudication process “child friendly,” the procedures include allowing the child to be accompanied at the interview by a trusted adult and applying child-sensitive interviewing techniques.⁷⁶ The guidelines caution officers to be sensitive to the child’s age and development with respect to the ability to know, remember, and describe events relevant to the claim.⁷⁷ The guidance specifically instructs officers to “evaluate the child’s words from a child’s point of view” – to put themselves to the extent possible into the developmental situation of the child.⁷⁸ Because the child’s demeanor may be affected by their experiences with officials abroad as well as their age, development and culture, officers are instructed to be extra careful with respect to credibility determinations.⁷⁹

2.2 Establishment of identity/Age assessment

2.2.1 Age Assessment

The Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”)⁸⁰ strengthened federal trafficking laws and added provisions that govern the rights of unaccompanied immigrant children who enter the United States.⁸¹

⁶⁷ United States Citizenship & Immigration Services, Minor Children Applying for Asylum by Themselves, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves>.

⁶⁸ What Happens to Migrant Children After the Border Patrol Detains Them, *supra* note 34.

⁶⁹ *Id.*

⁷⁰ 8 C.F.R. 236.3(h).

⁷¹ *Id.*

⁷² United States Department of Justice Immigration & Naturalization Service, Guidelines for Children’s Asylum Claims, Dec. 10, 1998,

<https://www.immigrantjustice.org/sites/default/files/INS%2520Guideline%2520on%2520Children%2520Asylum%2520Claims.pdf>.

⁷³ *Id.*

⁷⁴ United States Citizenship & Immigration Services Asylum Division, Asylum Officer Basic Training Course Guidelines for Children’s Asylum Cases, Mar. 21, 2009,

https://cliniclegal.org/sites/default/files/AOBTC_Lesson_29_Guidelines_for_Childrens_Asylum_Claims_0.pdf.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Pub. L. 110-457, 122 Stat. 5044 (2008).

⁸¹ Legal Protections for Unaccompanied Minors in the Trafficking Victims Protection Act of 2008, First Focus: Center for the Children of Immigrants, July 2014, <https://firstfocus.org/wp-content/uploads/2014/08/Legal-Protections-for-Unaccompanied-Minors-in-the-Trafficking-Victims-Protection-Act-of-2008.pdf>.

This law instructs HHS to devise age determination procedures for individuals without lawful immigration status in connection with DHS.⁸² To carry out the TVPRA provision, HHS and DHS worked jointly to develop age determination policies and procedures.⁸³ At a minimum, the TVPRA requires the age determination procedures to take into account multiple forms of evidence which can include: official government-issued documents, including birth certificates, other reliable records such as baptismal certificates, school and medical records that indicate the unaccompanied child's date of birth, statements by the unaccompanied child regarding his or her age or birth date, statements from the unaccompanied child's parents or legal guardians, statements from other persons, and information from government agencies.⁸⁴ If the documentary and interview information is not enough, a medical age assessment such as the use of imaging technology such as radiography and physical examinations may be used.⁸⁵ The examination must be performed by a medical professional experienced in age assessment method(s), taking into account the individual's ethnic and genetic background.⁸⁶ Dental and skeletal (bone) maturity assessments using radiographs may be used to determine age, but only in conjunction with other evidence.⁸⁷ As no current medical assessment method can determine an exact age, best practice relies on the estimated probability that an individual is 18 or older.⁸⁸ The examining doctor must submit a written report indicating the probability percentage that the individual is a minor or an adult.⁸⁹ Under these procedures, each case must be evaluated based on the totality of all available evidence, including the statement of the individual in question.⁹⁰

When there is conflicting evidence regarding the age of a child in HHS custody, the care provider case worker shall immediately notify the HHS Federal Field Specialist, who will make the age determination based on his/her review of the multiple forms of evidence collected by the care provider.⁹¹ If an individual's estimated probability of being 18 or older is 75% or greater according to a medical age assessment, and this evidence has been considered in conjunction with the totality of the evidence, ORR may refer the individual to DHS. The unaccompanied minor is entitled to all services provided to unaccompanied children in HHS care and custody until the age determination is made.⁹² At any time, an unaccompanied minor in ORR care and or his/her designated legal representative may present new information or evidence that he/she is 18 or older for re-evaluation of an age determination.⁹³ If the new information or evidence indicates that an individual who is presumed to be an unaccompanied child is actually an adult, then HHS may transfer the individual to an adult facility.⁹⁴

⁸² Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1 Placement in ORR Care Provider Facilities*, Jan. 30, 2015, [hereinafter "Placement in ORR Care Provider Facilities"] <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.1>.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

2.2.2 Timing of the Age Assessment

An initial age assessment is made when the minor is in DHS custody. At this initial stage, the Flores Settlement Agreement instructs that if “a reasonable person would conclude that an alien detained by [DHS] is an adult despite his claims to be a minor, the [DHS] shall treat the person as an adult for all purposes, including confinement and release on bond or recognizance.”⁹⁵

Any subsequent age assessment is done in conformance with the procedure discussed above.

2.3 Migrant children victims of trafficking

The TVPRA also requires that unaccompanied children must be screened as potential victims of human trafficking within 48 hours of his or her apprehension.⁹⁶

Procedural protections for children are different for children from contiguous countries (i.e., Mexico and Canada) and non-contiguous countries (all others).⁹⁷ While children from non-contiguous countries are transferred to the HHS for trafficking screening, and placed into formal immigration court removal proceedings, Mexican and Canadian children are screened by CBP for trafficking and, if no signs of trafficking or fear of persecution are reported, may be summarily returned home pursuant to repatriation agreements.⁹⁸

A T visa is available to aliens present in the U.S. who have been the victims of human trafficking, who have been present in the United States on account of such trafficking and who “would suffer extreme hardship involving unusual and severe harm upon removal.”⁹⁹ One may be eligible for a T visa if he or she:

- Is or was a victim of trafficking, as defined by law;
- Is in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands or at a port of entry due to trafficking;
- Complies with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking (or is under the age of 18, or is unable to cooperate due to physical or psychological trauma);
- Demonstrates that he or she would suffer extreme hardship involving unusual and severe harm if removed from the United States; and
- Is otherwise admissible to the United States.¹⁰⁰

In order to protect unaccompanied children from being released to potential human traffickers, HHS follows certain procedures to vet potential sponsors.¹⁰¹ The ORR Policy Guide explains that ORR considers a number of factors when evaluating potential sponsors, including the nature and extent of the sponsor’s relationship with the UAC, if a relationship exists, the sponsor’s motivation for wanting to sponsor the UAC, the UAC’s view on the release of the identified individual, and the sponsor’s plan to care for the UAC.¹⁰²

The ORR also conducts a background check of potential sponsors.¹⁰³ The less close the

⁹⁵ Flores Settlement Agreement, *supra* note 52.

⁹⁶ TVPRA § 235(a)(4), 8 U.S.C. § 1232(a)(4).

⁹⁷ 8 U.S.C. § 1232(a)(2).

⁹⁸ *Id.*

⁹⁹ INA § 101(a)(15)(T)(i).

¹⁰⁰ Victims of Human Trafficking: T Nonimmigrant Status, United States Citizenship and Immigration Services, <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

¹⁰¹ Office of Refugee Resettlement, Children Entering the United States Unaccompanied: Section 2, Safe and Timely Release from ORR Care, Jan. 30, 2015, [hereinafter “ORR Policy Guide Section 2”]

<https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2>.

¹⁰² *Id.*

¹⁰³ *Id.*

relationship between the potential sponsor and the UAC, the more comprehensive the background check.¹⁰⁴ The process could involve a public records check for criminal history, an immigration status check, an FBI fingerprint check, and/or a child abuse and neglect check.¹⁰⁵ Under certain situations, ORR will also conduct a home study.¹⁰⁶

2.4 Application for international protection

There are several other forms of immigration relief a minor migrant can seek in the United States:

Asylum: Asylum is a form of international protection granted to refugees who are present in the United States.¹⁰⁷ In order to qualify for asylum, a minor must demonstrate a well-founded fear of persecution based on one of five grounds, stemming from the United Nations Protocol Relating to the Status of Refugees: race, religion, nationality, political opinion, or membership in a particular social group.¹⁰⁸ The USCIS itself has stated that membership in a particular social group is complex and difficult to understand.¹⁰⁹ There is relatively little precedent about the meaning of “a particular social group” and that which exists has at times been subject to conflicting interpretations.¹¹⁰ Historically, the need for asylum has been recognized in situations where a foreign government has: imprisoned and tortured political dissidents or supposed undesirables, fired weapons on protesters, committed genocide against a certain race, made sure that members of a certain religion were left out of the political process, etc. The US Government and, in particular, the Bureau of Immigration Affairs has recognized forced marriage as a basis for asylum.¹¹¹

Special Immigrant Juvenile Status (“SIJS”): SIJS is a humanitarian form of relief available to noncitizen minors who were abused, neglected, or abandoned by one or both parents.¹¹² To be eligible for SIJS, a child must be under 21, unmarried, and the subject of certain dependency order issued by a juvenile court.¹¹³

U visas: A U visa is available to victims of certain crimes (adults and minors).¹¹⁴ To be eligible, the individual must have suffered substantial physical or mental abuse and have cooperated with law enforcement in the investigation or prosecution of the crime.¹¹⁵

T visas: A T visa is available to individuals (adults and minors) who have been victims of a severe form of trafficking.¹¹⁶ To be eligible, the minor must demonstrate that he or she would suffer extreme emotional hardship involving unusual or severe harm if removed from the United States.¹¹⁷

Violence Against Women Act (“VAWA”): The VAWA provisions in the INA allow certain

¹⁰⁴ Office of Refugee Resettlement Sponsor Application 089-090.

¹⁰⁵ Office of Refugee Resettlement Sponsor Application 089-090.

¹⁰⁶ ORR Policy Guide Section 2, *supra* note 101.

¹⁰⁷ A Guide to Children Arriving at the Border at 4, *supra* note 18.

¹⁰⁸ *Id.*

¹⁰⁹ Membership in a Particular Social Group, United States Citizenship and Immigration Services, <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-62325/0-0-0-64099/0-0-0-64242/0-0-0-64298.html>.

¹¹⁰ *Id.*

¹¹¹ See Matter of S-F, Center for Gender & Refugee Studies, <https://cgrs.uchastings.edu/our-work/matter-s-f>. For more on establishing the asylum eligibility of those forced into marriage, see World Organization for Human Rights, Guide to Establishing the Asylum Eligibility of Victims of Human Trafficking and Forced Marriage, <http://oppenheimer.mcgill.ca/IMG/pdf/Guide.pdf>.

¹¹² A Guide to Children Arriving at the Border at 4, *supra* note 18.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

spouses, children and parents of U.S. citizens and certain spouses and children of permanent residents (Green Card holders) to file a petition for themselves, without the abuser's knowledge.¹¹⁸ This allows victims to seek both safety and independence from their abuser, who is not notified of the filing.¹¹⁹ A child may be eligible to file if he or she is an abused child, under 21, unmarried and has been abused by his or her U.S. citizen or permanent resident parent.¹²⁰

2.4.1 Special Immigrant Juvenile Status

SIJS is available to eligible children who have been abused, neglected, or abandoned by a parent or legal guardian.¹²¹ SIJS does not automatically grant citizenship or lawful permanent resident status, which could eventually lead to citizenship.¹²² SIJS provides eligible abused, neglected or abandoned immigrant youth access to a path to lawful permanent residence.¹²³

SIJS is governed by the Immigration and Nationality Act.¹²⁴ The relevant legal eligibility requirements were updated in the TVPRA.

To be eligible for SIJS, the immigrant youth must be an unmarried, non-citizen under the age of 21.¹²⁵ In the first instance, a state court must make the following findings:

- (1) The child has been declared dependent by a juvenile court or the court has placed the child in the custody of a state agency, individual or entity appointed by the state or juvenile court;
- (2) The child's reunification with one or both parents is not viable due to abuse, neglect, abandonment, death or similar basis under state law; and
- (3) The child's best interest would not be served by being returned to his or her parents' country of nationality or last habitual residence.¹²⁶

Unlike all other forms of immigration relief, the state court plays a role in the SIJS process.¹²⁷ Federal law directs that the first step in the SIJS process occur in state "juvenile courts."¹²⁸ A "juvenile court" for SIJS purposes is defined by federal regulations as "a court located in the United States having jurisdiction under State law to make judicial decisions about the custody and care of juveniles."¹²⁹ There are often multiple appropriate courts in a jurisdiction to consider these requests, such as family, domestic relations, probate, guardianship, dependency (or child welfare), delinquency, and adoption courts.¹³⁰ In areas without courts designated for child care and custody matters, the appropriate court may be one of general jurisdiction.¹³¹

¹¹⁸ Battered Spouse, Children & Parents, United States Citizenship and Immigration Services, <https://www.uscis.gov/humanitarian/battered-spouse-children-parents>.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Kids in Need of Defense, Chapter 4: Special Immigrant Juvenile Status, [hereinafter, "KIND Ch. 4: SIJS"] <https://supportkind.org/wp-content/uploads/2015/04/Chapter-4-Special-Immigrant-Juvenile-Status-SIJS.pdf>.

¹²² Id.

¹²³ Id.

¹²⁴ INA § 101(a)(27)(J).

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Cristina Ritchie Cooper, American Bar Association, A Guide for State Court Judges and Lawyers on Special Immigrant Juvenile Status, Mar./Apr. 2007, [hereinafter "A Guide for State Court Judges and Lawyers on SIJS"] https://www.americanbar.org/publications/child_law_practice/special/mar-apr-2017/a-guide-for-state-court-judges-and-lawyers-on-special-immigrant-.html.

¹²⁸ Id.

¹²⁹ Id. (quoting 8 C.F.R. § 204.11(a)).

¹³⁰ Id.

¹³¹ Id.

The dependency declaration shall be “in accordance with state law governing such declarations of dependency.”¹³² Of all the aspects of SIJS eligibility that are determined under state law, this element entails the most variation among states or within them.¹³³ A common circumstance in which a child is declared dependent by the juvenile court includes when she is placed into foster care but it can include many other circumstances under state law.¹³⁴

There is no federal definition of “abuse, neglect or abandonment” that renders reunification with a parent not viable, and state definitions vary.¹³⁵ State courts are to use their own statutory, regulatory, or other definitions or understandings of these terms or any “similar basis under state law.”¹³⁶ The abuse, neglect, or abandonment that prevents reunification with a parent may have occurred in the child’s country of nationality, in the U.S. or in another country.¹³⁷ The TVPRA of 2008 clarified the requirement for SIJS eligibility—that reunification with one or both parents is not viable.¹³⁸ As a result, a child living with a parent, but unable to reunify with the other because of abuse, neglect or abandonment by her other parent is eligible for SIJS.¹³⁹

State courts will often require one or several hearings on the request for an SIJS finding at which the parties may present evidence.¹⁴⁰ Some evidence may be presented in written form, such as: child’s birth certificate; marriage certificate; death certificate; statements by the child or parent or other caregiver; educational records from the child’s country of nationality or from the U.S.; medical and/or mental health records from the foreign country or the U.S.; other records reflecting the abuse, neglect, or abandonment that occurred either in the country of nationality or in the U.S.; statements of relatives or friends in the country of nationality who witnessed the abuse, neglect or abandonment or other dynamics of the family relationship, conditions of the country of nationality, or circumstances.¹⁴¹

Additionally, witnesses may offer testimony under direct examination.¹⁴² The non-abusing parent, caregivers, or other family members may testify to share the child’s background and the nature of the abuse, neglect or abandonment by the other parent.¹⁴³ The child may also testify, depending on her age and development.¹⁴⁴

A youth seeking an SIJS order may seek an expedited or emergency hearing.¹⁴⁵ The State will ultimately determine whether or not to grant an SIJS predicate order.¹⁴⁶ If granted, the youth must submit the predicate order in the SIJS application that she submits to U.S. Citizenship and Immigration Services (USCIS), the federal agency that determines eligibility for immigration benefits.¹⁴⁷

Without this preliminary order, a child cannot seek SIJS from USCIS.¹⁴⁸ State courts are charged with making these critical threshold determinations because of their responsibility to protect children under their jurisdiction and their expertise in making decisions about the welfare and best

¹³² 78 C.F.R. § 204.11(c)(3).

¹³³ KIND Ch. 4: SIJS, *supra* note 121.

¹³⁴ *Id.*

¹³⁵ A Guide for State Court Judges and Lawyers on SIJS, *supra* note 127.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

interests of children.¹⁴⁹

The benefits to the child of SIJS status are substantial: a basis to apply for Lawful Permanent Resident status; employment authorization; ability to get a driver's license and government-issued identification; eligibility for public health insurance, in-state college tuition, scholarships, and study-abroad programs; and the possibility of becoming a U.S. citizen after turning 18.¹⁵⁰

2.4.2 Best interests of the child in an SIJS determination

“The final part of an SIJS order is the finding that the child’s best interest would not be served by returning to her country of nationality, or that of her parents. Although not all judges routinely make best interest determinations (e.g., those not serving in family, domestic relations, or dependency courts may be less familiar with the process) any state court judge can draw on existing state guidelines and resources for assessing a child’s best interest.

The most critical information to draw on, of course, is the evidence presented in support of the request for the SIJS order – the testimony, affidavits or other written statements, records regarding the family’s situation in the foreign country or the United States, records regarding the child’s education, physical and mental health, etc.

The state court need not be an expert on the conditions of the child’s country of nationality. To determine what is in a child’s best interest, the court need only consider and balance the information available. Evidence of that country’s stability and prevalence of unrest, levels of violence, educational or employment opportunities, or other factors may be presented in written reports or elicited through testimony or statements of individuals who have lived there. The court can consider the opportunities the child has in the U.S. in terms of safety versus likelihood of harm, connections with non-offending parents or caregivers, relationships with friends and other sources of support, medical and mental health well-being, educational opportunities, economic opportunities, and other resources and factors.”¹⁵¹

2.5 Migrant children’s access to justice

Like adults facing deportation, children facing deportation are not provided government-appointed counsel to represent them in immigration court.¹⁵² Under the immigration laws, all persons have the “privilege” of being represented “at no expense to the Government.”¹⁵³ This means that for those individuals who can afford a private lawyer, they can be represented, or that those who are able to find pro bono counsel to represent them free of charge can be represented in immigration court.¹⁵⁴

In the TVPRA of 2008, Congress directed the Secretary of Health and Human Services (HSS) to ensure the provision of counsel to unaccompanied children “to the greatest extent practicable.”¹⁵⁵ Congress further explained that the Secretary “shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.”¹⁵⁶

¹⁴⁹ Id.

¹⁵⁰ Emily Dudak Taylor, State Bar of Wisconsin, Where Immigration and Children’s Law Meets, <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=8&Issue=87&ArticleID=23540>.

¹⁵¹ A Guide for State Court Judges and Lawyers on SIJS, *supra* note 127.

¹⁵² A Guide to Children Arriving at the Border at 8, *supra* note 18.

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ 8 U.S.C. § 1232(c)(5).

¹⁵⁶ Id.

There exists a vast network of pro bono legal services for unaccompanied minors.¹⁵⁷ During the Obama Administration, the federal government provided some funding to legal service providers in order to increase representation for unaccompanied children.¹⁵⁸ In June 2014, the justice AmeriCorps program was awarded \$1.8 million for representation of certain children in immigration court, and HHS subsequently provided an additional \$9 million for representation in FY 2014 and FY2015.¹⁵⁹ But while pro bono legal service providers represent many children nationwide, they are still many unaccompanied minors who are not afforded legal representation.¹⁶⁰

Many states and localities have begun providing funding for legal services to child migrants.¹⁶¹ In 2014, California extended \$3 million to nonprofit organizations offering legal services to children in immigration proceedings.¹⁶² Similarly, in 2014 the New York City Council and two philanthropic groups announced a \$1.9 million grant to increase legal representation for unaccompanied minors in removal proceedings.¹⁶³ As of July 2015, the New York City Council's Unaccompanied Minors Initiative had provided legal support for nearly 650 unaccompanied minor cases.¹⁶⁴ New York City representatives in immigration courts also advise families on how to connect children to relevant educational, health and social services.¹⁶⁵

If the child is placed with a sponsor from ORR custody, such sponsor must agree to take care of the unaccompanied child and to bring him or her to their immigration hearings.¹⁶⁶ ORR offers a legal orientation program for custodians of unaccompanied alien children.¹⁶⁷ This program offers free legal information about the immigration court process, how to obtain social services and free legal counsel, and how to protect the child from mistreatment, exploitation and trafficking.¹⁶⁸

Further, in 2007, the Chief Immigration Judge of the United States issued guidelines to judges handling immigration court cases involving unaccompanied alien children.¹⁶⁹

Every immigration judge is expected to employ child sensitive procedures whenever a child respondent or witness is present in the courtroom.¹⁷⁰ However, it is equally true that all such cases are not alike, and the procedures appropriate for a very young child may differ significantly from those appropriate for a teenager.¹⁷¹ All immigration judges are expected to understand that special attention is required for cases involving child witnesses or unaccompanied alien child respondents.¹⁷² An immigration judge should decide, on a case by case basis, whether special procedures should be put in place for a child respondent.¹⁷³

¹⁵⁷ Id.

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Sarah Pierce, Migration Policy Institute, *Unaccompanied Child Migrants in U.S. Communities, Immigration Court, and Schools* 14, Oct. 2015.

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ Id.

¹⁶⁶ Office of Refugee Resettlement, *What You Need to Know About Your Rights and Responsibilities Under the Law: A Legal Resource Guide for Children Entering the United States Unaccompanied*, [hereinafter "What You Need to Know?"], https://www.acf.hhs.gov/sites/default/files/orr/legal_resource_guide_introduction_4_20_15.pdf.

¹⁶⁷ See *Unaccompanied Children Program*, Office of Refugee Resettlement, LOPC Overview, <https://www.acf.hhs.gov/orr/resource/unaccompanied-childrens-services>.

¹⁶⁸ Id.

¹⁶⁹ *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, David L. Neal, Chief Immigration Judge, May 22, 2007, <https://www.justice.gov/eoir/file/oppm17-03/download>

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Id.

Modifications to normal courtroom procedure may include: allowing children to visit an empty courtroom prior to their scheduled hearing, conducting cases involving unaccompanied alien children on a separate docket or at a fixed time in the week or month, which would improve the ability of custodians to transport the children and of legal service providers to assist them, permitting reasonable courtroom modifications such as allowing counsel to bring pillows or booster seats for young respondents, permitting young respondents to sit in one of the pews with an adult companion, or permitting the companion to sit at counsel's table, allowing a young child to bring a toy, book or other personal item into the courtroom, and permitting the child to testify while seated next to an adult or friend, rather than in the witness stand, etc.¹⁷⁴

3. Child Protection System

3.1 Sponsorship System

Once in HHS custody, the ORR attempts to find a suitable sponsor with whom the UAC can live—someone who will both safely care for the child and ensure his appearance before the immigration court.¹⁷⁵ Parents, other relatives, or close family friends can apply to have the child released to their care. A legal guardian is a person who was appointed charge or custody of a child in a court order recognized by U.S. courts.¹⁷⁶

The Flores Agreement has a general release policy that requires ORR to release a minor from its custody “without unnecessary delay” to one of several parties.¹⁷⁷ These are, in order of preference:

1. A parent;
2. A legal guardian;
3. An adult relative (brother, sister, aunt, uncle, grandparent or first cousin);
4. An adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being;
5. A licensed program willing to accept legal custody; or
6. An adult individual or entity seeking custody, in the discretion of the ORR, when it appears that there is no other likely alternative to a long-term detention and family reunification does not appear to be a reasonable possibility.¹⁷⁸

ORR groups these release options into the following categories:

- Category 1: Parent or legal guardian (this includes qualifying step-parents that have legal or joint custody of the child or teen)
- Category 2: An immediate relative – a brother, sister, aunt, uncle, grandparent or first cousin (this includes biological relatives, relatives through legal marriage, and half-siblings)

¹⁷⁴ See *id.* for a complete discussion of the guidance and suggestions the Executive Office for Immigration Review has made to immigration judges handling cases with unaccompanied minors.

¹⁷⁵ Placement in ORR Care Provider Facilities, *supra* note 82. The system to care for unaccompanied minors is an entirely different system from the guardianship system that applies to non-migrant children, which is governed by probate laws.

¹⁷⁶ ORR, Children Entering the United States Unaccompanied: Guide to Terms, [hereinafter “ORR Guide to Terms”], <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms>.

¹⁷⁷ The Flores Settlement binds the INS and the Department of Justice as well as “their agents, employees, contractors, and/or successors in office.” Flores Settlement Agreement, Case No. CV 85-4544-RJK(Px). The Homeland Security Act which transferred responsibility for immigration from the INS to DHS and HHS included an explicit savings provision specifying that the settlement remains in effect as to the new agencies, as if the transfer had not occurred. HSA § 279(a). The federal government has never disputed that the Flores Agreement remains binding on both ORR and DHS. See Lutheran Immigration and Refugee Service & the Women's Refugee Commission, Family Detention & the Flores Settlement Agreement, <https://endfamilydetention.com/wp-content/uploads/2015/07/07272015-Flores-Settlement-and-Family-Detention-final.pdf>.

¹⁷⁸ Flores Settlement Agreement, *supra* note 52.

- Category 3: Other sponsor, such as distant relatives and unrelated adult individuals
- Category 4: No sponsor identified.¹⁷⁹

All potential sponsors must complete an application in order for a child to be released to them from ORR custody (the “Family Reunification Application”).¹⁸⁰ Within 24 hours of identification of a potential sponsor for a child, the care provider or the ORR National Call Center sends the sponsor a package with the application and related documents.¹⁸¹ The application includes the following documents:

- A flyer with contact information on organizations offering a Legal Orientation Program for Custodians (LOPC)
- Family Reunification Packet Cover Letter
- Authorization for Release of Information
- Family Reunification Application
- Family Reunification Checklist for Sponsors
- Sponsor Care Agreement
- (If applicable) Fingerprint instructions
- Sponsor Handbook
- (If parent or legal guardian wishes to specify) Letter of Designation for Care of a Minor¹⁸²

The care provider is available to help the potential sponsor complete the application.¹⁸³ The care provider also informs potential sponsors that they may submit additional information to support the application and reminds potential sponsors of the deadlines for completing the forms.¹⁸⁴ The sponsor may also receive assistance in completing the application at some fingerprinting locations.¹⁸⁵

Potential sponsors must also provide documentation of identity, address, and relationship to the child they seek to sponsor.¹⁸⁶ Potential sponsors must also submit documentation verifying the identity of the children they seek to sponsor, and evidence verifying the identity of all adults residing with the sponsor and all adult care givers identified in the sponsor care plan.¹⁸⁷

Such sponsor must agree to take care of the child and bring him to his immigration hearings.¹⁸⁸ The sponsor, however, is not deemed the minor’s legal guardian merely by sponsorship, unless the sponsor is the child’s mother or father.¹⁸⁹ A sponsor who wants to pursue legal guardianship of the child must apply to become the child’s guardian. While the child is in the custody of ORR or a sponsor, ORR or the sponsor is responsible for the child. However, the child may remain without a legal guardian. Typically, decisions about how to proceed in a child’s immigration case have been left to the child to make, in consultation with her attorney, if she has one.¹⁹⁰

¹⁷⁹ ORR Policy Guide Section 2, *supra* note 101.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ What You Need to Know, *supra* note 174.

¹⁸⁹ Sponsor Handbook, Office of Refugee Resettlement, https://www.acf.hhs.gov/sites/default/files/orr/5_31_17_sponsor_english_handbook_003.pdf.

¹⁹⁰ Kids in Need of Defense, Chapter 1: Representing Children in Immigration Matters, <https://supportkind.org/wp-content/uploads/2015/04/Representing-Children-In-Immigration-Matters-FULL-VERSION.pdf>.

The Flores litigation established that the rule for the detention and release of juveniles provides for the release of minors to adult relatives other than parents and legal guardians, and the release and custody of minors to unrelated responsible adults only in “unusual and compelling circumstances.”¹⁹¹ For example, if the child’s parents are not in the United States and an adult relative is not available, the minor may be released to an unrelated responsible adult only if the parents travel to the United States consulate and sign a sworn statement before the consular officer which names the responsible adult.¹⁹² This process is extremely burdensome, if not impossible, for many parents in poor and war-torn countries.¹⁹³ It also presents a special problem for orphans, abandoned children, and children who cannot locate their parents, much less obtain their sworn statement.¹⁹⁴

If the minor is not released, a juvenile coordinator is assigned to locate “suitable replacement . . . in a facility designed for the occupancy of juveniles.”¹⁹⁵

The DHS can briefly detain the minor in an INS facility designed for juveniles, but the DHS must place immigrant juveniles, within 72 hours of their arrest, in a facility meeting or exceeding standards established for the care of immigrant minors.¹⁹⁶

3.2 Appointment of sponsors for migrant children

The application process for release of an unaccompanied alien child involves a number of steps, including background checks and submission of the application by the sponsor. The sponsor assessment reviews a sponsor’s strengths, resources, risk factors and special concerns within the context of the unaccompanied child’s needs, strengths, risk factors, and relationship to the sponsor.¹⁹⁷ ORR also determines whether to conduct a home study, as required by law or as necessary to ensure the welfare of the child.¹⁹⁸

ORR considers the following factors when evaluating family members and other potential sponsors:

- The nature and extent of the sponsor’s previous and current relationship with the child or youth and the unaccompanied alien child’s family, if a relationship exists.
- The sponsor’s motivation for wanting to sponsor the child or youth.
- The unaccompanied alien child’s parent or legal guardian’s perspective on the release to the identified potential sponsor (for cases in which the parent or legal guardian has designated a sponsor).
- The child or youth’s views on the release and whether he or she wants to be released to the individual.
- The sponsor’s understanding of the unaccompanied alien child’s needs, as identified by ORR and the care provider.
- The sponsor’s plan to provide adequate care, supervision, access to community resources, and housing.
- The sponsor’s understanding of the importance of ensuring the unaccompanied alien child’s presence at all future hearings or proceedings, including immigration court

¹⁹¹ 8 C.F.R. § 242.24(a)(4).

¹⁹² Lisa Rodriguez Navarro, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 *Chicano-Latino L. Rev.* 589 (1998), <https://escholarship.org/uc/item/8wf4g0bm>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 8 C.F.R. § 242.24(c).

¹⁹⁶ 8 C.F.R. §242.24(d). The standards for the care of alien minors were established by the Alien Minors Care Program of the Community Relations Service, Department of Justice, 52 *Fed. Reg.* 15569 (1987).

¹⁹⁷ ORR Policy Guide Section 2, *supra* note 101.

¹⁹⁸ *Id.*

proceedings, and the sponsor's attendance at a Legal Orientation Program for Custodians (LOPC) presentation.

- The linguistic and cultural background of the child or youth and the sponsor, including cultural, social, and communal norms and practices for the care of children.
- The sponsor's strengths, resources, and mitigating factors in relation to any risks or special concerns of the child or sponsor, such as a criminal background, history of substance abuse, mental health issues, or domestic violence and child welfare concerns.
- The unaccompanied alien child's current functioning and strengths in relation to any risk factors or special concerns, such as children or youth who are victims of human trafficking; are a parent or are pregnant; have special needs, disabilities or medical or mental health issues; have a history of criminal, juvenile justice, or gang involvement; or a history of behavioral issues.¹⁹⁹

Before a minor is released from ORR custody, the custodian must execute an Affidavit of Support (Form I-134) and an agreement to:

- A. provide for the minor's physical, mental and financial well-being;
- B. ensure the minor's presence at all future proceedings before the INS and the immigration court;
- C. notify the INS of any change of address within five (5) days following a move;
- D. in the case of custodians other than parents or legal guardians, not transfer custody of the minor to another party without prior written permission of the District Director;
- E. notify the INS at least five days prior to the custodian's departing the United States of such departure, whether the departure is voluntary or pursuant to a grant of voluntary departure or order of deportation; and
- F. if dependency proceedings involving the minor are initiated, notify the INS of the initiation of such proceedings and the dependency court of any immigration proceedings pending against the minor.²⁰⁰

The Flores Settlement Agreement provides for INS termination of the custody arrangement and assumption of legal custody of any minor whose custodian fails to comply with the provisions.²⁰¹

It also provides that a positive suitability assessment may be required prior to the release of any individual or program.²⁰² A suitability assessment may include such components as an investigation of the living conditions in which the minor would be placed and the standard of care he would receive, verification of identity and employment of the individuals offering support, interviews of members of the household, and a home visit.²⁰³ Any such assessment should also take into consideration the wishes and concerns of the minor.²⁰⁴

Under the TVPRA, HHS is required to commission a home study (which assesses the suitability of a custodial placement) of a potential sponsor in the following four situations:

- the child is a victim of a severe form of human trafficking;
- the child has a disability, as defined under the Americans with Disabilities Act of 1990;
- the child has been a victim of physical or sexual abuse under circumstances indicating that the child's health or welfare has been significantly harmed or threatened; or

¹⁹⁹ Id.

²⁰⁰ Flores Settlement Agreement, *supra* note 52.

²⁰¹ Id.

²⁰² Id.

²⁰³ Id.

²⁰⁴ Id.

- the proposed sponsor clearly presents a risk to the child of abuse, maltreatment, exploitation, or trafficking.²⁰⁵

3.3 Other persons / organs that may carry out sponsorship functions

Children who remain in ORR custody receive care through a network of local providers, including private and nonprofit organizations, as well as governmental juvenile justice agencies.²⁰⁶ These providers are sponsors of the unaccompanied child but do not become their guardian until the sponsor applies for legal guardianship through a local court.

3.4 Responsibilities and duties of sponsors for migrant children

If release to a sponsor is approved by HHS, the sponsor is required to sign a document agreeing to notify the immigration court of any changes to the UAC's address within 5 days,²⁰⁷ to provide for the physical and mental well-being of the child,²⁰⁸ to ensure that the unaccompanied child reports for removal proceedings,²⁰⁹ and to notify the National Center for Missing and Exploited Children if the child disappears, is kidnapped, or runs away.²¹⁰

After HHS releases a UAC to a sponsor, the UAC can contact HHS through the HHS "Help Line" and a sexual abuse hotline.²¹¹

3.5. Profile of sponsors

ORR Care providers are ORR funded programs that are licensed, certified or accredited by an appropriate State agency to provide residential care for children, including shelter, group, foster care, staff-secure, secure, therapeutic or residential treatment care for children.²¹² Information on the different types of institutional sponsors is provided in section 5.2.

3.6. Child brides

With regard to child brides, 18 is the legal age of marriage in most states.²¹³ A party who is married under the age of 18 can bring an action for an annulment.²¹⁴ A New York court, in determining whether to grant an annulment, makes a discretionary determination taking into account all of the facts and circumstances surrounding the marriage.²¹⁵ In the United States, the state has the authority to determine the marital status of its own citizens and to protect minor children whose consent to marriage may have been obtained without full knowledge or comprehension.²¹⁶ As such, state courts may relieve the minor of marriage, notwithstanding that

²⁰⁵ TVPRA § 235(c)(3)(B).

²⁰⁶ The Flow of Unaccompanied Children Through the Immigration System at 13, *supra* note 22.

²⁰⁷ ORR Policy Guide Section 2 ("Depending on where the unaccompanied child's immigration case is pending, notify the local Immigration Court or the Board of Immigration Appeals within 5 days of any change of address or phone number of the child.... [and if applicable, file a Change of Venue motion on the child's behalf.]), *supra* note 101.

²⁰⁸ See *id.* (sponsor must agree to "[p]rovide for the physical and mental well-being of the child, including but not limited to, food, shelter, clothing, education, medical care and other services as needed").

²⁰⁹ See *id.* (sponsor must "[e]nsure the unaccompanied child's presence at all future proceedings before the DHS/Immigration and Customs Enforcement (ICE) and the DOJ/EOIR.")

²¹⁰ See *id.* (sponsor must "[n]otify the National Center for Missing and Exploited Children").

²¹¹ United States Senate Permanent Subcommittee on Investigations, Staff Report, Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement, <https://www.mccaskill.senate.gov/imo/media/doc/ORRStaffMemo.pdf>.

²¹² ORR Guide to Terms, *supra* note 184.

²¹³ For a full list of each state's age of consent laws, see State-by-State Marriage "Age of Consent" Laws, <http://family.findlaw.com/marriage/state-by-state-marriage-age-of-consent-laws.html>.

²¹⁴ Alan D. Scheinkman, West's McKinney's Forms Matrimonial and Family Law § 1:8: Qualifications for marriage—Age (Mar. 2017).

²¹⁵ *Id.*

²¹⁶ *Id.*

the marriage was lawful in the place where it occurred.²¹⁷ Thus, if a minor comes to the United States with a spouse, they may petition for annulment and be deemed unaccompanied. In New York, a petition for annulment may also be brought by the parent of the minor, by the minor's guardian, or the court may allow the action to be maintained by any person as the next friend of the minor.²¹⁸

Further, the US Government is opposed to forced marriage, which it considers to be a human rights abuse.²¹⁹ If the victim of a forced marriage is a child, the forced marriage is also a form of child abuse.²²⁰

To be eligible for SIJ status, the minor cannot be married when he or she files his or her application and when USCIS makes a decision on the application. "Not married" includes a child whose marriage ended because of annulment, divorce or death.²²¹

4. Family reunification

4.1. Family tracing

A family member can apply for release of a minor in ORR custody. Such family member must submit a family reunification application which can be downloaded from the ORR website.²²² The application requires the family member to supply their name, their relationship to the minor, their household information, financial information, etc.²²³ The family member must provide at least one form of evidence verifying the relationship claimed with the child.²²⁴ Acceptable documents include: birth certificates, marriage certificates, death certificates, court records, guardianship records, hospital records, school records, written affirmation of relationship from a consulate or other similar documents.²²⁵ The family member is also required to submit their fingerprints to conduct a background check to ensure the safety of the child.²²⁶

4.2 ORR's Family reunification responsibilities

"One of ORR's principal responsibilities is to implement the Flores settlement's guidelines favoring timely release of unaccompanied children to an approved sponsor unless continued custody is necessary to ensure their appearance before DHS or in immigration court. The process of release to a sponsor is called reunification, even if the child did not previously live with this individual, family, or program. At least 65 percent of children admitted to ORR care are ultimately placed with a sponsor."²²⁷ The process of searching for a sponsor is ongoing, and may change if a minor's family members later enter the United States.

The child's care provider is responsible for implementing safe screening methods when contacting and communicating with potential sponsors.²²⁸ These methods are to ensure that a potential sponsor does not pose a risk to the unaccompanied alien child, to other children in the

²¹⁷ *Cunningham v. Cunningham*, 206 N.Y. 341, 99 N.E. 845 (1912).

²¹⁸ New York Domestic Relations Law § 140.

²¹⁹ United States Citizenship & Immigration Service, Forced Marriage, <https://www.uscis.gov/humanitarian/forced-marriage>.

²²⁰ *Id.*

²²¹ United States Citizenship & Immigration Services, Eligibility Status for SIJ, <https://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij>.

²²² Family Reunification Application, Unaccompanied Children Program, Office of Refugee Resettlement, <https://www.acf.hhs.gov/orr/resource/unaccompanied-childrens-services>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ ORR Policy Guide Section 2, *supra* note 101.

²²⁶ *Id.*

²²⁷ The Flow of Unaccompanied Children Through the Immigration System at 17, *supra* note 22.

²²⁸ ORR Policy Guide Section 2, *supra* note 101.

care provider facility or to care provider staff.²²⁹

These safe screening methods include:

- Use of appropriate interpreters
- Identity of the sponsor is obtained
- Verification of family relationships
- Coordination with the unaccompanied alien child’s parents, legal guardians, or closest relatives prior to contacting non-relative adult potential sponsors
- Screening for exploitation, abuse, trafficking, or other safety concerns and
- Engaging the child to communicate openly with care provider staff about his or her own sense of safety.²³⁰

4.3 Family Reunification Procedures

The facility where a child is detained has primary responsibility for assessing a potential sponsor, under the oversight of ORR field staff.²³¹ When possible, a child will be released to a parent living in the United States. Some children, however, may not have living parents, may have parents who reside outside of the country, or may have parents who are unavailable or unable to care for them.²³² In these situations, a child may be released to a legal guardian, adult relative, or another ORR-approved individual or entity.²³³ In accordance with the Flores Settlement Agreement, the following order of preference is used when releasing a child to a sponsor:

1. a parent;
2. a legal guardian;
3. an adult relative (brother, sister, aunt, uncle, or grandparent);
4. an adult individual or entity designated by the child’s parent or legal guardian as capable and willing to provide care;
5. a licensed program willing to accept legal custody (such as a shelter for homeless youth); or
6. an adult or entity approved by ORR, when another alternative to long-term detention is unlikely and family reunification does not appear to be a reasonable possibility.²³⁴

“ORR requires documentation establishing the sponsor’s relationship to the child. In 2008, it issued a policy clarification about releasing children to adults who are not relatives. For a sponsor in the fourth category, the parent or legal guardian must provide documentation establishing his or her relationship to the child and a notarized letter designating the adult who will care for the unaccompanied child upon release. ORR does not allow release to a child’s adult boyfriend or girlfriend, even if the child’s parent consents. The sixth category, an adult sponsor not designated by the parent or legal guardian, is to be used only as a last resort, when likely alternatives to long-term care in ORR custody do not exist.

Once the facility identifies a potential sponsor, staff sends that person or program a family reunification packet, which includes requests for information such as verification of the relationship to the child, age, gender, address, household composition, employment, and immigration status. A facility staff member verifies the potential sponsor’s relationship to the child; explores the motivation for sponsorship, the ability to address the child’s needs, the home environment, and support system; and verifies the potential sponsor’s legal status and financial and employment status. ORR also requires a fingerprint background check of potential sponsors

²²⁹ Id.

²³⁰ Id.

²³¹ Id.

²³² Id.

²³³ Id.

²³⁴ Flores Settlement Agreement, *supra* note 52.

to investigate any criminal record or history of child abuse, factors that often disqualify them. Before approving such a placement, a facility case manager interviews the unaccompanied child, the potential sponsor, and parents or legal guardians, if available. After the packet is completed, the facility makes a recommendation for or against release. Ultimately, ORR staff must approve all release decisions.”²³⁵

ORR offers a legal orientation program for custodians of unaccompanied alien children.²³⁶ This program offers free legal information about the immigration court process, how to obtain social services and free legal counsel, and how to protect the child from mistreatment, exploitation and trafficking.²³⁷ The program also provides information about possible pro bono services for the child during the immigration court process.²³⁸

ORR does not seem to have any official procedure for family tracing to locate family members abroad.

4.4 Grounds for refusal

Unfortunately, none of the forms of relief described in section 2.4 of this report will provide immigration relief to family members of the minor. For a child to petition for his or her parents to live in the United States as Green Card holders, the child must be a U.S. citizen and at least 21 years old.²³⁹ Green Card holders (permanent residents) may not petition to bring parents to live permanently in the United States.²⁴⁰

A minor’s parent, if they are a U.S. citizen or a Green Card holder, may petition the government for citizenship status for the minor child.²⁴¹ A U.S. citizen may also petition for their spouse’s children or their fiancé’s children.²⁴² Neither a U.S. citizen nor Green Card holder may petition the government for other minor relatives.

5. Placement of migrant children

5.1 Temporary Shelter/1st Reception Centers

Unaccompanied children are not held in detention pending their immigration proceedings. The DHS can briefly detain the minor in an INS facility designed for juveniles, but the DHS must place immigrant juveniles in a facility meeting or exceeding standards established for the care of immigrant minors.²⁴³ Juveniles in DHS custody must be transferred to ORR custody within 72 hours (absent an emergency or unexpected influx of children).²⁴⁴

²³⁵ The Flow of Unaccompanied Children Through the Immigration System at 17, *supra* note 22.

²³⁶ See Unaccompanied Children Program, Office of Refugee Resettlement, LOPC Overview, <https://www.acf.hhs.gov/orr/resource/unaccompanied-childrens-services>.

²³⁷ *Id.*

²³⁸ ORR Policy Guide Section 2, *supra* note 101.

²³⁹ See United States Citizenship & Immigration Services, Bringing Parents to Live in the United States as Permanent Residents, <https://www.uscis.gov/family/family-us-citizens/bringing-parents-live-united-states-permanent-residents>.

²⁴⁰ *Id.*

²⁴¹ See United States Citizenship & Immigration Services Bringing Children, Sons and Daughters to Live in the United States as Permanent Residents, <https://www.uscis.gov/family/family-us-citizens/bringing-children-sons-and-daughters-live-united-states-permanent-residents>.

²⁴² See United States Citizenship & Immigration Services, Family of U.S. Citizens, <https://www.uscis.gov/family/family-us-citizens>.

²⁴³ 8 C.F.R. §242.24(d). The standards for the care of alien minors were established by the Alien Minors Care Program of the Community Relations Service, Department of Justice, 52 Fed. Reg. 15569 (1987). Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, *Flores v. Meese*, No. 85-4544-RJK (Px) (C.D. Cal., 1987) (incorporating the Community Relations Service notice and program description), reprinted in App. to Pet. for Cert. 148a-205a [hereinafter *Juvenile Care Agreement*].

²⁴⁴ National Conference of State Legislatures, Child Migrants to the United States, Oct. 28, 2014, <http://www.ncsl.org/research/immigration/child-migrants-to-the-united-states.aspx>.

Unaccompanied minors are first placed in ORR custody. ORR's Intake Team operates 24 hours a day, 7 days a week, year round to accept referrals from DHS and find placement of children and youth within ORR's network of care providers.²⁴⁵

Children who arrive with family members may be detained by DHS in family detention centers.²⁴⁶ Family detention is the practice of holding immigrant families, including children and babies, in prison-like detention centers with their parents. Currently, families are housed in three facilities: the South Texas Family Residential Center in Dilley, Texas, Karnes County Residential Center in Karnes City, Texas, and Berks Family Residential Center in Leesport, Pennsylvania.²⁴⁷ Commentators have noted that family detention is rarely in the best interests of the child.²⁴⁸ In February 2015, the U.S. District Court for the District of Columbia acknowledged that DHS was detaining asylum seeking mothers and their children indiscriminately and denying their release as a strategy to deter other families from coming to the United States.²⁴⁹ The Court deemed this blanket practice of denying individualized determinations for the purpose of "deterrence" to be illegal.²⁵⁰

The majority of families seeking asylum are detained in family detention centers for 20 days or less. Families seeking asylum must pass a "credible fear interview" in the family detention center, i.e. they must be able to prove persecution because of race, religion, national origin, political opinion or membership in a particular social group. If the family members pass the credible fear interview, then they are released from the detention center and given a court date. Prior to the Executive Order discussed in Section 10.4, *infra*, children who arrived with their family members stayed in family detention and if released, were released together.

5.2 Placement of Migrant Children

The ORR intake process begins when an ICE juvenile coordinator contacts ORR's centralized intake team, which is on call around the clock.²⁵¹ To determine the category of placement, the team tries to gather as much information as possible from ICE about the child—including gender, age, country of origin, date and location of apprehension, medical and psychological condition, and previous contact with the juvenile or criminal justice system.²⁵²

ORR places unaccompanied children in the least restrictive setting that is in the best interest of the child.²⁵³ When making a placement determination or recommendation, ORR and care providers consider the following factors as they pertain to the child:

- trafficking or other safety concerns
- any special needs or issues requiring specialized services (for example, a child with language needs, mental health or medical concerns, or a youth who is pregnant or parenting)
- possibility of heightened vulnerability to sexual abuse due to prior sexual victimization
- prior sexual abusiveness

²⁴⁵ See Placement in ORR Care Provider Facilities, *supra* note 82.

²⁴⁶ A Guide to Children Arriving at the Border at 9, *supra* note 18.

²⁴⁷ *Id.* at 10.

²⁴⁸ *Id.*

²⁴⁹ American Immigration Council, Leigh Barrick, Divided by Detention: Asylum-Seeking Families' Experiences of Separation at 4, August 2016, <https://www.americanimmigrationcouncil.org/research/divided-by-detention-asylum-seeking-families-experience-of-separation>.

²⁵⁰ *Id.*

²⁵¹ The Flow of Unaccompanied Children Through the Immigration System at 14, *supra* note 22.

²⁵² *Id.*

²⁵³ Placement in ORR Care Provider Facilities, *supra* note 82.

- identification as lesbian, gay, bisexual, transgender, questioning or intersex, or gender non-conforming appearance of manner
- location of potential sponsor and family sponsorship options
- siblings in ORR custody
- immigration issues (for example, legal representation needs, immigration proceedings)
- behavior
- criminal or juvenile background
- danger to self
- danger to the community
- escape risk
- age
- gender
- length of stay in ORR custody
- location where the child was apprehended.²⁵⁴

ORR also requests the following information from the referring agency:

- How the referring agency made the determination that the minor is an unaccompanied alien child.
- Health related information including, but not limited to, if the unaccompanied alien child is pregnant or parenting and whether there are any known physical or mental health concerns. If there are significant medical concerns (i.e., the unaccompanied alien child is not fit for travel), ORR requests that the referring Federal agency medically clear the child before ORR will designate placement. In its discretion, ORR may designate placement for unaccompanied alien children who are pending medical clearance.
- Whether the child has any medication or prescription information, including how many days' supply of the medication will be provided with the child or youth when transferred into ORR custody.
- Biographical and biometric information, such as name, gender, alien number, date of birth, country of birth and nationality, date(s) of entry and apprehension, place of entry and apprehension, manner of entry, and the unaccompanied alien child's current location.
- Any information concerning whether the child or youth is a victim of trafficking or other crimes.
- Whether the unaccompanied alien child was apprehended with a sibling or other relative.
- Identifying information and contact information for a parent, legal guardian, or other related adult providing care for the child or youth prior to apprehension, if known.
- If the unaccompanied alien child was apprehended in transit to a final destination, what the final destination was and who the child or youth planned to meet or live with at that destination, if known.
- Whether the unaccompanied alien child is an escape risk, and if so, the escape risk indicators.
- Any information on a history of violence, juvenile or criminal background, or gang involvement known or suspected, risk of danger to self or others, State court proceedings, and probation.
- Any special needs or other information that would affect the care and placement for the child or youth.²⁵⁵

Under most circumstances, ORR places siblings together.²⁵⁶ If siblings must be placed separately, the care provider tries to maintain regular ongoing contact, unless mental health or child welfare

²⁵⁴ Id.

²⁵⁵ Id.

²⁵⁶ Id.

professional deems the contact harmful.²⁵⁷

The majority of youth are cared for through a network of state-licensed ORR funded care providers.²⁵⁸ Care provider facilities are state licensed and must meet ORR requirements to ensure a high level of quality care.²⁵⁹ The facilities, which operate under cooperative agreements and contracts, provide children with classroom education, health care, socialization/recreation, vocational training, mental health services, access to legal services, access to child advocates where applicable, and case management, all pursuant to the Flores Settlement.²⁶⁰ They also undertake ongoing efforts to identify and assess relatives or other individuals in the United States as sponsors to whom children can be safely released.²⁶¹ Care provider facilities' case management teams use standardized screening tools to assess children for mental health and victims of trafficking issues.²⁶²

After obtaining physical custody of an unaccompanied alien child, the care provider must immediately ensure the physical and mental well-being of the child by:

- Ensuring that the unaccompanied alien child receives food and beverages and bathes or showers within two hours of entering the care provider facility.
- Providing the unaccompanied alien child, at a minimum, with the following items: clean clothing, clean bedding, and personal hygiene items.
- Assisting the unaccompanied alien child in contacting family members or other relatives, if contact is considered safe, following ORR and the care provider's internal safety procedures.
- Ensuring that to the extent practical under the circumstances, the child eats and bathes before interacting with other children.
- Ensuring that the unaccompanied alien child receives a complete initial medical exam, including screening for infectious diseases by a licensed physician or physician's assistant, within 48 hours of admission (excluding weekends and holidays).
- Creating an inventory list for all cash and other property obtained from the unaccompanied alien child upon admission.²⁶³

To identify any of the child's immediate needs or issues, a trained staff member with the care provider must use the *Initial Intakes Assessment* to interview the child within 24 hours of the child's admission to the facility.²⁶⁴ The *Initial Intakes Assessment* guides the interviewer through a series of questions to obtain information about family members, any immediate medical or mental health concerns, current medications, and any concerns about personal safety that the child may have at that time.²⁶⁵

ORR has the following four categories of placements for children for whom no individual sponsor or guardian can be found:

²⁵⁷ Id.

²⁵⁸ Office of Refugee Resettlement, Children Entering the United States Unaccompanied: Section 3 Services, Apr. 20, 2015, [hereinafter "ORR Care Facility Services"] <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.1>.

²⁵⁹ Id.

²⁶⁰ Id.

²⁶¹ Id.

²⁶² Id.

²⁶³ Id.

²⁶⁴ Id.

²⁶⁵ Id.

- **Shelter care.** Children who are eligible for a minimally restrictive level of care are placed in shelters. Most children in shelter care do not have special needs or a history of contact with the juvenile or criminal justice system. A shelter is a residential care provider facility in which all of the programmatic components are administered on-site, in the least restrictive environment.
- **Staff-secure care.** Children with a history of nonviolent or petty offenses or who present an escape risk are placed in staff-secure care. A staff secure care provider is a facility that maintains stricter security measures, such as higher staff to unaccompanied alien children ratio for supervision, than a shelter in order to control disruptive behavior and to prevent escape. A staff secure facility is for unaccompanied alien children who may require close supervision but do not need placement in a secure facility. Service provision is tailored to address an unaccompanied alien child's individual needs and to manage the behaviors that necessitated the child's placement into this more restrictive setting. The staff secure atmosphere reflects a more shelter, home-like setting rather than secure detention. Unlike many secure care providers, a staff secure care provider is not equipped internally with multiple locked pods or cell units; however, the staff secure provider may have a secure perimeter with a "no climb" fence.
- **Secure care.** Children with a history of violent offenses or who pose a threat to themselves or others are placed in secure care. A secure care provider is a facility with a physically secure structure and staff able to control violent behavior. ORR uses a secure facility as the most restrictive placement option for an unaccompanied alien child who poses a danger to self or others or has been charged with having committed a criminal offense. A secure facility may be a licensed juvenile detention center or a highly structured therapeutic facility.
- **Transitional (short-term) foster care.** Children younger than 13, sibling groups with one child younger than 13, pregnant and parenting teens, and children with special needs are prioritized for short-term placement with a foster family. ORR transitional foster care is synonymous with ORR short term foster care. Transitional foster care is an initial placement option for unaccompanied alien children under 13 years of age, sibling groups with one sibling under 13 years of age, pregnant/parenting teens, or unaccompanied alien children with special needs. Unaccompanied alien children are placed with foster families in the ORR network of care but may attend school and receive most service components at the care provider site.²⁶⁶

Care providers must comply with all applicable State child welfare laws and regulations and all State and local building, fire, health and safety codes.²⁶⁷ Care providers must deliver services in a manner that is sensitive to the age, culture, native language, and needs of each unaccompanied alien child.²⁶⁸ Care providers must develop an individual service plan for the care of each child. An individual service plan is a plan prepared by the care provider for an individual unaccompanied alien child that identifies placement and case outcome goals, and delineates services, action steps, and individuals responsible for tasks to achieve the goals.²⁶⁹

Care providers are also required to maintain records of case files and make regular reports to ORR.²⁷⁰ Care providers must have accountability systems in place which preserve the

²⁶⁶ ORR Guide to Terms, *supra* note 184.

²⁶⁷ ORR Care Facility Services, *supra* note 279.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

confidentiality of client information and protect the records from unauthorized use or disclosure.²⁷¹

Under the terms of the Flores Settlement Agreement, all care providers must provide the following minimum services for each unaccompanied alien child in their care:

- Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing and personal grooming items.
- Appropriate routine medical and dental care, family planning services, including pregnancy tests and comprehensive information about and access to medical reproductive health services and emergency contraception, and emergency health care services, including a complete medical examination (including screenings for infectious disease) within 48 hours of admission, excluding weekends and holidays, unless the unaccompanied alien child was recently examined at another ORR care provider facility; appropriate immunizations in accordance with recommendations of the U.S. Department of Health and Human Services /U.S. Public Health Service (PHS), Centers for Disease Control and Prevention (CDC); administration of prescribed medication and special diets; appropriate mental health interventions when necessary.
- An individualized needs assessment, which includes the various initial intake forms, collection of essential data relating to the identification and history of the child and his or her family, identification of the unaccompanied alien child's special needs including any specific problems which appear to require immediate intervention, an educational assessment and plan, an assessment of family relationships and interaction with adults, peers and authority figures; a statement of religious preference and practice; an assessment of the unaccompanied alien child's personal goals, strengths and weaknesses; identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in connecting the child with family members.
- Educational services appropriate to the unaccompanied alien child's level of development and communication skills in a structured classroom setting, Monday through Friday, which concentrate primarily on the development of basic academic competencies and secondarily on English Language Training. The educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas should include Science, Social Studies, Math, Reading, Writing and Physical Education. The program must provide unaccompanied alien children with appropriate reading materials in languages other than English for use during leisure time.
- Activities according to a recreation and leisure time plan that include daily outdoor activity, weather permitting, with at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (that should not include time spent watching television). Activities should be increased to a total of three hours on days when school is not in session.
- At least one individual counseling session per week conducted by trained social work staff with the specific objective of reviewing the child's progress, establishing new short term objectives, and addressing both the developmental and crisis-related needs of each child.
- Group counseling sessions at least twice a week. Sessions are usually informal and take place with all unaccompanied alien children present. The sessions give new unaccompanied

²⁷¹ Id.

alien children the opportunity to get acquainted with staff, other children, and the rules of the program. It is an open forum where everyone gets a chance to speak. Daily program management is discussed and decisions are made about recreational and other activities. The sessions allow staff and unaccompanied alien children to discuss whatever is on their minds and to resolve problems.

- Acculturation and adaptation services which include information regarding the development of social and inter-personal skills which contribute to those abilities necessary to live independently and responsibly.
- A comprehensive orientation regarding program intent, services, rules (written and verbal), expectations and the availability of legal assistance.
- Whenever possible, access to religious services of the child's choice.
- Visitation and contact with family members (regardless of their immigration status), which is structured to encourage such visitation. The staff must respect the child's privacy while reasonably preventing the unauthorized release of the unaccompanied alien child.
- A reasonable right to privacy, which includes the right to wear his or her own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.
- Services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied alien child.
- Legal services information, including the availability of free legal assistance, the right to be represented by counsel at no expense to the government, the right to a removal hearing before an immigration judge, the right to apply for asylum or to request voluntary departure in lieu of deportation. (This information is included in the [Legal Resource Guide for Unaccompanied Alien Children](#)).²⁷²

5.3 Detention/retention

The TVPRA mandates that unaccompanied minors may not be held in DHS custody for longer than 72 hours. DHS must transfer these children to the custody of ORR, where the children await an immigration hearing.

The Flores Agreement establishes a sensitive treatment policy for immigrant children based on their juvenile status.²⁷³ The Policy provides that “[t]he [DHS] treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors.”²⁷⁴ It requires that immigration officials detaining minors provide (1) food and drinking water, (2) medical assistance in emergencies, (3) toilets and sinks, (4) adequate temperature control and ventilation, (5) adequate supervision to protect minors from others, and (6) separation from unrelated adults whenever possible.²⁷⁵ Although the INS has been eliminated, the DHS and HHS are now responsible for implementing the Flores Agreement.²⁷⁶

DHS must maintain facilities that are safe and sanitary: they must provide toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency

²⁷² Id.

²⁷³ Flores Settlement Agreement, supra note 52.

²⁷⁴ Id.

²⁷⁵ Id.

²⁷⁶ Id.

services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor.²⁷⁷

6. Access to fundamental rights

6.1 Education

U.S. law guarantees education for all youth, regardless of immigration status; thus unaccompanied children are entitled to free public elementary and secondary education.²⁷⁸ All that is required to enroll a child in a local school is documentation to establish the residency and age of the child.²⁷⁹ Immigration status is also not a condition of eligibility for the National School Lunch Program and the School Breakfast Program, so qualifying unaccompanied minors may receive free or reduced-price meals.²⁸⁰ Immigration status is thus irrelevant for public education.

Because they are in unauthorized status, unaccompanied migrants are eligible for few public services other than public education. ORR offers some post-release services, but these are limited to very few migrants. For services such as legal representation, unaccompanied children must depend on proactive service providers, localities, states, or federal programs that create services to meet their specific requirements. The result is a patchwork of services.

6.2 Health care

ORR provides routine and emergency medical and mental health care for all unaccompanied alien children in its care, including an initial examination, appropriate follow-up care, and weekly individual and group counseling sessions with care provider clinicians.²⁸¹ UACs receive additional medical screening and vaccinations at ORR shelter facilities.²⁸² While children are in ORR custody, the federal government is responsible for their medical care.²⁸³ ORR provides:

- Routine medical and dental care
- Family planning services, including pregnancy tests and comprehensive information about and access to medical reproductive health services and emergency contraception
- Emergency health services
- A complete medical examination (including screening for infectious diseases) within 48 hours of admission (excluding weekends and holidays and unless the youth was recently examined at another facility)
- Immunizations
- Administration of prescribed medications and special diets
- Appropriate mental health interventions.²⁸⁴

²⁷⁷ Id.

²⁷⁸ United States Department of Education, Educational Services for Immigrant Children and Those Recently Arrived to the United States, Sept. 19, 2014, <https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html>.

²⁷⁹ United States Department of Education, Fact Sheet II: Additional Questions & Answers on Enrolling New Immigrant Students, <https://www2.ed.gov/policy/rights/guid/unaccompanied-children-2.pdf>.

²⁸⁰ USDA Food & Nutrition Services: Child Nutrition Programs, Eligibility Manual for School Meals: Determining and Verifying Eligibility, Jul. 18, 2017, https://fns-prod.azureedge.net/sites/default/files/cn/SP36_CACFP15_SFSP11-2017a1.pdf.

²⁸¹ Office of Refugee Resettlement, Health & Safety, Jun. 29, 2017, <https://www.acf.hhs.gov/orr/about/ucs/health-and-safety>.

²⁸² Id.

²⁸³ Id.

²⁸⁴ ORR Care Facility Services, *supra* note 279.

However, once the child has been placed with a sponsor, the health care of the child becomes the responsibility of that sponsor.²⁸⁵ In general, permanent resident immigrants (Green Card holders) are eligible for Medicaid and Children’s Health Insurance Program (CHIP) after five years of residence on the same basis as U.S. citizens and must meet all other program requirements.²⁸⁶ Unauthorized immigrants are not eligible for federal health insurance programs, and are only eligible for more discrete programs like emergency medical assistance under Medicaid, services in federally qualified health centers and certain public health programs.²⁸⁷

However, California, Illinois, Massachusetts, New Jersey, New York, Washington, and the District of Columbia have expanded some health-care coverage and services to include income-eligible children (including unaccompanied minors) regardless of their immigration status.²⁸⁸

7. Expulsion

7.1 Exclusions

Since April 1, 2007, the process of adjudicating inadmissibility in the United States takes place either in an expedited removal process or in a removal proceeding before an immigration judge.²⁸⁹ 8 U.S.C. § 1182 lists classes of aliens who are ineligible for visas or admission. These grounds include health related issues, including having a communicable disease, to have a physical or mental disorder that may pose a threat to the property, safety or wellbeing of others, having a drug abuse or addiction problem, involvement in trafficking controlled substances and conviction of certain crimes, amongst many others.

7.2 Repatriation Process

“DHS is responsible for the physical removal of a child from the United States. Once a detained child has received a final order of removal or voluntary departure, the standard procedure is that DHS initiates the repatriation process by contacting the consulate of the child’s home country, and then the ORR facility, to inform staff that DHS is in the process of obtaining travel documents from the consulate.

Once travel documentation is in order, the child is transferred back into DHS custody and the agency arranges for transportation. In some regions, consulates visit and interview children in ORR shelters to obtain information that will facilitate the processing of travel documents and, potentially, notification of relatives in the home country. In other regions, however, these interviews are typically conducted by telephone.”

Little is known about what happens to children after they are returned to their home countries. Advocates have referred to repatriation as a ‘black hole where unaccompanied children easily fall through the cracks.’ In 2010, pursuant to the mandate under Section 235(a) of the TVPRA, the U.S. Department of State (DOS) provided a report to Congress on behalf of DOS, DHS, and HHS that reflected its own guidelines on the repatriation of unaccompanied children. Although the report described basic policies and procedures related to DHS’s apprehension of unaccompanied children, it did not specifically describe the process of repatriating those ordered to return to their country of origin. The report did note, however, that DOS, through the Bureau of Population, Refugees, and Migration, in collaboration with the International Organization for Migration, had established a pilot program for the safe and sustainable repatriation of

²⁸⁵ Id.

²⁸⁶ National Conference of State Legislatures, Immigrant Eligibility for Health Care Programs in the United States, Oct. 19, 2017, <http://www.ncsl.org/research/immigration/immigrant-eligibility-for-health-care-programs-in-the-united-states.aspx>.

²⁸⁷ Id.

²⁸⁸ Id.

²⁸⁹ United States Citizenship & Immigration Services, Exclusion, <https://www.uscis.gov/tools/glossary/exclusion>.

unaccompanied El Salvadoran children.²⁹⁰

Generally, when a child is apprehended by U.S. immigration authorities, those authorities initiate a removal proceeding before an immigration court. The court in those proceedings then makes a decision on the child's removability based upon his eligibility for certain forms of humanitarian relief. If the unaccompanied child does not fall within an existing category of humanitarian relief, the child is ordered deported to his home country even if return is not in his best interests. Repatriation thus results from a removal order, rather than on a reasoned decision on the best interests of the child or a determination of his safety upon return.

Bipartisan immigration reform legislation which passed the Senate in 2013 (S. 744) would have required the Border Patrol, in making repatriation decisions, to give "due consideration" to the best interests of a child, "family unity," and "humanitarian concerns."²⁹¹ Amendment 1340 to S. 744, which was not voted on as part of a compromise, would have made the best interests of a child the "primary consideration" in all federal decisions involving unaccompanied immigrant children.²⁹² This Bill died in the 113th Congress.

The TVPRA calls for the safe and sustainable repatriation and reintegration of unaccompanied children. The TVPRA was the first federal legislation to (1) include language on the safe and sustainable repatriation and reintegration of unaccompanied children and (2) mandate that the United States government report on measures taken to ensure safe removal of children.²⁹³ Despite this legislation, the United States still lacks clear policies to ensure the safe removal of children. In general, the U.S. repatriation process for unaccompanied children is not transparent and varies greatly from country to country.

7.3 Resettlement to a Third Country

ICE is the government agency that handles deportations. ICE has its own air transportation arm and uses a combination of commercial and charter flights to move detainees among American cities and from the United States to foreign countries.²⁹⁴ ICE has regularly scheduled charter flights to countries that have a steady number of deportees, such as El Salvador and Honduras.²⁹⁵ The agency also shuttles deportees on charter flights to Europe, Asia and Africa, though less frequently.²⁹⁶ Individuals from Mexico are usually flown to U.S. border cities and either walk or are bused across the border.²⁹⁷

In FY2016, ICE removed individuals from 185 countries, the top ten of which were Mexico, Guatemala, Honduras, El Salvador, Dominican Republic, Colombia, Ecuador, Brazil, Nicaragua, and Jamaica.²⁹⁸

²⁹⁰ The Flow of Unaccompanied Children Through the Immigration System at 27-28, *supra* note 22.

²⁹¹ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., Sec. 1115(b)(1)(B), <http://www.lawandsoftware.com/bseoima/bseoima-senate-1115.html>.

²⁹² S. 744, 113th Cong., Amt. 1340, <https://www.congress.gov/amendment/113th-congress/senate-amendment/1340/text>.

²⁹³ Kids in Need of Defense, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges*, Wendy Ramirez, Megan McKenna, and Aryah Somers, Chapter 12: Repatriation and Reintegration of Migrant Children, Feb. 2015, <https://supportkind.org/wp-content/uploads/2015/04/Childhood-and-Migration-in-Central-and-North-America.pdf>

²⁹⁴ New York Times, Fernanda Santos, The Road, or Flight, From Detention to Deportation, Feb. 20, 2017, <https://www.nytimes.com/2017/02/20/us/the-road-or-flight-from-detention-to-deportation.html>.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ USA Today, Sara Wise, George Petras, The Process of Deportation, June 25, 2018, <https://www.usatoday.com/pages/interactives/graphics/deportation-explainer/>.

²⁹⁸ ICE, Fiscal Year 2016 ICE Enforcement and Removal Operations Report, at 11-12, <https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf>.

8. Data Collection

8.1 Data regarding migrant children on the move collected by the public authorities

ORR collects the following data on unaccompanied minors: age breakdown, country of origin, gender, the number of home studies, the number of children served by post-release services, the average length of stay in a shelter care, the number of referrals ORR receives from DHS, and the number of unaccompanied children released to sponsors by state and by county.²⁹⁹

The individual care providers that service ORR are also required to maintain records of case files and make regular reports.³⁰⁰ Care providers must have accountability systems in place which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.³⁰¹

8.2. Data protection

ORR claims that, as a service provider, it is committed to protecting the privacy and safety of the children in its care. In order to ensure the privacy and security of the children in its care, ORR and its grantees do not discuss specific cases or individuals with members of the media or others.

Care providers must have written policies, procedures, and practices that protect the confidentiality of medical information. To safeguard children's privacy, care providers must use discretion when communicating with an unaccompanied alien child about medical appointments in the presence of others. Care providers must also dispense medication in a private location. Care providers must also maintain the privacy and confidentiality of information concerning a minor's sexual orientation and gender identity.

9. International Relations

9.1. Foreign aid that addresses root causes of migration of minors (in particular of unaccompanied minors) in countries of origin and transit countries.

The United States Department of State contains the Bureau of Population, Refugees, and Migration. The mission of the Bureau of Population, Refugees, and Migration (PRM) is to provide protection, ease suffering, and resolve the plight of persecuted and uprooted people around the world on behalf of the American people by providing life-sustaining assistance, working through multilateral systems to build global partnerships, promoting best practices in humanitarian response, and ensuring that humanitarian principles are thoroughly integrated into U.S. foreign and national security policy.³⁰²

The Bureau has approximately 130 civil service and foreign service staff.³⁰³ The Bureau works with the United Nations and other international organizations, as well as with non-governmental organizations that operate relief programs.³⁰⁴ In 2016, the Bureau contributed more than \$3.4 billion to humanitarian efforts globally, the majority of which went to overseas humanitarian assistance and refugee resettlement. Nearly 80% of all Bureau assistance focused on three areas -- \$1.3 billion went to the Near East, including assistance to refugees and internally displaced people in Syria and Iraq, more than \$776 million in humanitarian aid went to vulnerable populations in Africa, and more than \$124 million of assistance went to vulnerable refugees, stateless persons, and internally displaced people in South Asian countries such as Afghanistan and Pakistan.

²⁹⁹ This data can be found at: <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

³⁰⁰ ORR Care Facility Services, *supra* note 279.

³⁰¹ *Id.*

³⁰² United States Department of State, About PRM, <https://www.state.gov/j/prm/about/>.

³⁰³ *Id.*

³⁰⁴ *Id.*

The Bureau also has an Office of International Migration which supports the development of migration policy options and addresses emerging or current migration related crises. The Office of International Migration addresses large movements of migrants across borders by: (1) providing direct assistance to vulnerable migrants; (2) building government capacity to identify protection concerns in migrant populations and implement humane migration management practices; (3) supporting regional dialogues on cross-border migration management and cooperation; (4) promoting cooperation between the International Organization for Migration (IOM) and the UN High Commissioner for Refugees (UNHCR); and (5) developing governments' capacities to manage migration emergencies.³⁰⁵

9.2 Cooperation with civil society

The United States Conference of Catholic Bishops/Migration and Refugee Services (USCCB/MRS) is the largest nongovernment refugee resettlement agency in the world.³⁰⁶ It is an agency authorized by the US Department of State and DHS to resettle unaccompanied refugee children.³⁰⁷ USCCB/MRS works with more than 100 local refugee resettlement and foster care programs annually to assist approximately 20,000 and other displaced populations.³⁰⁸ USCCB/MRS builds the capacity of agencies nationally and internationally to respond to the emerging needs of refugees, undocumented migrants, asylum seekers, victims of trafficking and other vulnerable migrating populations.³⁰⁹

9.3 Visa policies

USCIS provides a number of humanitarian programs and protection to assist individuals in need of shelter or aid from disasters, oppression, emergency medical issues or other circumstances.³¹⁰ However, the US does not allow applications for asylum to be made abroad, even at a US embassy or consulate. Asylum seekers can apply for asylum only if they are physically present in the United States.³¹¹

As noted in Section 2.4 there are several other forms of immigration relief a minor migrant can seek in the United States:

Asylum: Asylum is a form of international protection granted to refugees who are present in the United States.³¹² In order to qualify for asylum, a minor must demonstrate a well-founded fear of persecution based on one of five grounds, stemming from the United Nations Protocol Relating to the Status of Refugees: race, religion, nationality, political opinion, or membership in a particular social group.³¹³

Special Immigrant Juvenile Status ("SIJS"): SIJS is a humanitarian form of relief available to noncitizen minors who were abused, neglected, or abandoned by one or both parents.³¹⁴ To be eligible for SIJS, a child must be under 21, unmarried, and the subject of certain dependency order

³⁰⁵ United States Department of State, International Migration, <https://www.state.gov/j/prm/migration/>.

³⁰⁶ The United States Unaccompanied Refugee Minor Program: Guiding Principles and Promising Practices, United States Conference of Catholic Bishops vii (2013) [hereinafter, "Unaccompanied Refugee Minor Program"], <http://www.usccb.org/about/children-and-migration/unaccompanied-refugee-minor-program/upload/united-states-unaccompanied-refugee-minor-program-guiding-principles-and-promising-practices.pdf>.

³⁰⁷ United States Conference on Catholic Bishops, Children and Migration, <http://www.usccb.org/about/children-and-migration/>.

³⁰⁸ Unaccompanied Refugee Minor Program, *supra* note 336.

³⁰⁹ *Id.*

³¹⁰ United States Citizenship & Immigration Services, Humanitarian, <https://www.uscis.gov/humanitarian>.

³¹¹ NOLO, How to Obtain Protection from a U.S. Embassy or Consulate, <https://www.nolo.com/legal-encyclopedia/how-obtain-protection-us-embassy-consulate.html>.

³¹² See The Flow of Unaccompanied Children Through the Immigration System at 25-26, *supra* note 22.

³¹³ See *id.*

³¹⁴ See *id.* at 26.

issued by a juvenile court.³¹⁵

U visas: A U visa is available to victims of certain crimes (adults and minors).³¹⁶ To be eligible, the individual must have suffered substantial physical or mental abuse and have cooperated with law enforcement in the investigation or prosecution of the crime.³¹⁷

T visas: A T visa is available to individuals (adults and minors) who have been victims of a severe form of trafficking.³¹⁸ To be eligible, the minor must demonstrate that he or she would suffer extreme emotional hardship involving unusual or severe harm if removed from the United States.³¹⁹

10. Additional Remarks/Resources

10.1 Additional Resources

The Office of Refugee Resettlement website provides several useful resources for lawyers seeking to help unaccompanied minors navigate the immigration process in the United States and for potential sponsors of unaccompanied minors. ORR's website outlines its reunification policy.³²⁰ Their website also provides key documents for the unaccompanied children program in the United States.³²¹

The United States Conference of Catholic Bishops also provides helpful information on its efforts to resettle unaccompanied refugee children.³²² Their website also provides information on their family reunification program.³²³

The United States Senate Subcommittee on Investigations issued a report on the role of the ORR in protecting unaccompanied children from trafficking and other abuses which outlines the ORR policies that aim to protect unaccompanied children as well as discusses some flaws in the system that led to some minor children being placed in the hands of human traffickers.³²⁴

10.2 Deferred Action for Childhood Arrivals (“DACA”)

Individuals who arrived in the country after January 1, 2007 are not eligible for DACA.

10.3 The 1,500 Missing Immigrant Children

In late April of 2018, a top Health and Human Services official told Congress that the agency had lost track of nearly 1,500 migrant children who had recently left government custody. This created an outcry. What this meant in reality was that there had been 1,500 unaccompanied minors who were transferred from ORR custody to the custody of an individual sponsor. When this happens, the HHS is supposed to have a 30-day check in phone call with the sponsor. In the

³¹⁵ Id.

³¹⁶ Id.

³¹⁷ Id.

³¹⁸ Id.

³¹⁹ Id.

³²⁰ ORR, Key Documents for the Unaccompanied Alien Children Program, [https://www.acf.hhs.gov/orr/resource/unaccompanied-childrens-services#Family Reunification Packet for Sponsors](https://www.acf.hhs.gov/orr/resource/unaccompanied-childrens-services#Family%20Reunification%20Packet%20for%20Sponsors).

³²¹ Id.

³²² United States Conference of Catholic Bishops, Children and Migration, <http://www.usccb.org/about/children-and-migration/>.

³²³ United States Conference of Catholic Bishops, Family Reunification Program, <http://www.usccb.org/about/children-and-migration/family-reunification/index.cfm>.

³²⁴ United States Senate Permanent Subcommittee on Investigations, Staff Report, Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement, <https://www.mccaskill.senate.gov/imo/media/doc/ORRStaffMemo.pdf>.

case of the 1,500 “missing” children, the phone calls were not answered. Some find this very concerning, given that HHS has lost track of the whereabouts of many of the children who were once in its custody. Others argue that there is an upside – the children can live their lives without constant fear of deportation.

10.4 Family Separation at the Border

Also in April of 2018, the United States Attorney General Jeff Sessions announced that federal prosecutors would begin pursuing a “zero-tolerance policy” of criminally prosecuting every adult who illegally crossed the border into the United States or tried to do so.³²⁵ Following such announcement DHS began referring any immigrant caught crossing the border without legal documents to the Department of Justice to be prosecuted in federal court.³²⁶

This meant that adults crossing the border were sent to jail or long-term indefinite detention while their asylum requests or removal orders were processed.³²⁷ However, the federal government was of the view that because the Flores settlement prevents children from being held in indefinite detention, parents and children arriving at the border together must be separated.³²⁸ Thus, for those adults who crossed the border with children, the children were removed and held separately while trying to place them with relatives or in a licensed ORR facility.³²⁹

On June 20, 2018, President Trump issued an Executive Order³³⁰ stating that the policy of the Trump administration is now to keep families together. It seems to envision a system in which families are housed together in detention centers, including on military bases that the administration hopes a court will approve.³³¹

However, 2,300 children had already been separated from their parents at the border and placed in ORR custody.³³² On Tuesday June 26, 2018, a federal judge in California ordered a halt to family separation and the reunification of all families that had been separated.³³³ Specifically, the court ordered required federal officials to stop detaining parents apart from their minor children, absent a determination that the parent is unfit or the parent declines reunification; to reunify all parents with their minor children who are under age 5 within 14 days and reunify all parents with their minor children age 5 and older within 30 days.³³⁴

According to the Inspector General’s Office, which conducted a review of family separation issues under the zero tolerance policy, and released a report on September 27, 2018, as of September 30, 2018, the Government had reported to the court that it had reunified or otherwise released 2,167 of the 2,551 children over 5 years of age who were separated from a parent and

³²⁵ Explaining Trump’s Executive Order on Family Separation, New York Times, (June 20, 2018), https://www.nytimes.com/2018/06/20/us/politics/family-separation-executive-order.html?utm_campaign=website&utm_source=TakeCareBlog&utm_medium=Email [hereinafter “Explaining Trump’s Executive Order on Family Separation”].

³²⁶ What You Should Know About Family Separation, The Marshall Project, (June 19, 2018), https://www.themarshallproject.org/2018/06/19/what-you-should-know-about-family-separations?utm_campaign=website&utm_source=TakeCareBlog&utm_medium=Email.

³²⁷ Explaining Trump’s Executive Order on Family Separation, supra note 355.

³²⁸ Id.

³²⁹ Id.

³³⁰ Executive Order: Affording Congress an Opportunity to Address Family Separation, https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/?utm_source=twitter&utm_medium=social&utm_campaign=wh&utm_campaign=website&utm_source=TakeCareBlog&utm_medium=Email.

³³¹ Explaining Trump’s Executive Order on Family Separation, supra note 355.

³³² Id.

³³³ Ms. L. v. ICE, 18-cv-428 (S.D. Cal. June 26, 2018); see CNN Politics, Federal Judge Orders Reunification of Parents and Children, End to Most Family Separations at Border (June 27, 2018), <https://www.cnn.com/2018/06/26/politics/federal-court-order-family-separations/index.html>.

³³⁴ Id.

deemed eligible for reunification.³³⁵ According to the Government, the remaining 402 children involved in the lawsuit that are still in HHS' care include 182 children where the adult associated with the child is not eligible for reunification or is not currently available for discharge, and 220 children where the Government has determined that the parent is not entitled to reunification under the lawsuit.³³⁶ In 134 of those 220 cases, the adult is no longer in the United States and has indicated an intent not to reunify with his or her child.³³⁷ The Government also reported that it had reunited 84 of the 103 children under the age of 5 who were separated and initially deemed eligible for reunification.³³⁸

The Inspector General's Report concluded that DHS was not fully prepared to implement the zero tolerance policy or to deal with certain effects from the policy following implementation.³³⁹ The Report notes that CBP had alien children separated under the policy for long periods of time in facilities intended solely for short term detention.³⁴⁰ It also found that a lack of fully integrated Federal immigration information technology system made it difficult for DHS to reliably track separated parents and children, raising questions about the Government's ability to accurately report on separations and subsequent reunifications.³⁴¹ Further, the Report notes that inconsistencies in the information provided to alien parents resulted in some parents not understanding that their children would be separated from them, and made communication with their children after separation difficult.³⁴²

On September 28, 2018, the Office of the Inspector General released another report, titled "Results of Unannounced Inspections of Conditions for Unaccompanied Alien Children in CBP Custody."³⁴³ This Report concluded that the CBP facilities the Inspector General's Office had visited appeared to be operating in compliance with the standards set out in Flores.

But then, on September 30, 2018, the news media began reporting that hundreds of migrant children had been roused in the middle of the night and loaded onto buses sent to a barren tent city in Tornillo, Texas.³⁴⁴ The children moved to this type of shelter will undoubtedly not be able to receive the same resources they would in other ORR facilities. Schooling is not required at the facility, and it will likely be difficult for the minors there to obtain legal services.³⁴⁵ The move to Texas is intended to be temporary for these children, but because sponsorship placements can be protracted, it is possible that many children could end up living in the tent city for months.³⁴⁶

³³⁵ Department of Homeland Security, Office of the Inspector General, Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy at 3 (September 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

³³⁶ *Id.* at 3 n.7.

³³⁷ *Id.*

³³⁸ *Id.* at 3-4.

³³⁹ *Id.* at 4.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 4-5.

³⁴² *Id.* at 5.

³⁴³ Department of Homeland Security, Office of the Inspector General, Results of Unannounced Inspections of Conditions for Unaccompanied Alien Children in CBP Custody, (September 28, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-87-Sep18.pdf>.

³⁴⁴ New York Times, Caitlin Dickerson, Migrant Children Moved Under Cover of Darkness to Texas Tent City, (September 30, 2018), <https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html>.

³⁴⁵ *Id.*

³⁴⁶ *Id.*