A New Way Forward:

What Congress Must Do to Protect the Dignity, Health, and Safety of Children in Immigration Custody

National Center for Youth Law

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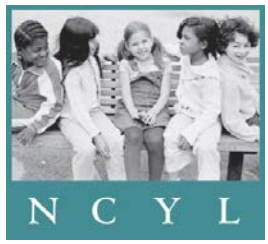
National Center for Youth Law



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The National Center for Youth Law is a non-profit law firm focused on transforming the multiple public systems serving vulnerable children—including child welfare, juvenile justice, education, mental health, and public health—such that these children receive the supports they need to advance and thrive. NCYL's Immigration Team weaves together a combination of litigation, policy, training, and education to protect the rights of children in federal immigration custody as well as immigrant children in the child welfare and juvenile justice systems. For further information on the issues presented in this briefing, please contact Neha Desai (ndesai@youthlaw.org; 510.899.6577). Website: youthlaw.org.

Data

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Data visualizations provided in this briefing were created with public data provided by U.S. Customs and Border Protection and aggregate, de-identified data from the monthly *Flores* data reports provided by the U.S. Department of Justice between January 2018 and December 2020.

Acknowledgements

The ideas reflected in this briefing incorporate thinking from numerous colleagues throughout the country, including co-counsel in *Lucas R.*, legal service providers, child advocates, and policy experts in the field. Most importantly, these recommendations are fundamentally informed by the many children in federal immigration custody that we have interviewed over the years. We are immensely grateful to these children for their bravery and we are forever inspired by their resilience.

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Overview

Over the past year, in the midst of a global pandemic, the Trump Administration intensified its four year-long attack on immigrant children. Immigrant children have been summarily expelled from the United States —in some instances to countries other than their country of origin. Others have been detained in Customs and Border Protection ("CBP") custody for prolonged periods of time, kept in unmonitored and unlicensed motels, and subjected to heightened COVID-19 risk during their time in government custody. The Trump Administration's actions inflicted new harms on children as well as exacerbated longstanding problems within the immigration detention system.

While children in other government systems have an established set of substantive and procedural safeguards, immigrant children in federal immigration custody have only a patchwork of modest and rudimentary protections. Amongst these protections is the *Flores* Settlement Agreement. Signed in 1997, the *Flores* Settlement established basic standards governing the custody, detention, and release of children in federal immigration custody. The Settlement imposes a floor—not a ceiling—for the services and protections that must be provided to children in federal custody. Most of the protections within the Settlement can be found nowhere in federal law.

Part I of this briefing describes how federal policy changes over the past year have impacted immigrant children. **Part II** provides detailed recommendations regarding how Congress can legislate a comprehensive set of protections for children in federal immigration custody. Specifically, Part II outlines recommendations for Health and Human Services ("HHS") and the Department of Homeland Security ("DHS") regarding the length of time children spend in custody, where children should be placed, what due process protections should be afforded to children, the services children should receive, and the independent oversight necessary to ensure that children's rights are protected.

NCYL's recommendations are based on longstanding experience as *Flores* counsel, deep expertise in the domestic child welfare and juvenile justice systems, and a profound commitment to advancing children's rights.

Summary of Recommendations

HHS

DHS

Part I: Children in Federal Immigration Custody, 2020 Year in Review

The federal government used COVID-19 as a pretext to close the border and expel thousands of children from the United States. This practice continues to this day.

In March 2020, the Centers for Disease Control and Prevention ("CDC") issued an order under Title 42 closing the northern and southern land borders to all "non-essential" travelers—including asylum seekers and children—and claimed that this action was necessary to protect public health during the COVID-19 pandemic.[1]

As of September 2020, DHS had used the Title 42 order to expel approximately 8,800 unaccompanied children and 7,600 accompanied children and their family members.[2] Pursuant to the order, children and families are summarily returned or "expelled" without legally mandated protection screenings, immigration court hearings, or other due process safeguards, rather than being transferred to the Office of Refugee Resettlement ("ORR") or Immigration & Customs Enforcement ("ICE"), or being released into the community from CBP custody.

The CDC's Title 42 order was last extended in October 2020,[3] and the Trump Administration maintained throughout its term that the order and accompanying expulsions were a necessary public health response in spite of evidence to the contrary. Media reports reveal that the Title 42 order did not originate from the CDC, but from White House advisor Stephen Miller – who had sought to use public health laws to restrict immigration even before the COVID-19 pandemic began.[4] CDC scientists themselves objected to the Title 42 order, finding no "valid public health reason to issue it."[5]

> "The CDC order is based on specious justifications and fails to protect public health. . . . The nation's public health laws should not be used as a pretext for overriding humanitarian laws and treaties that provide life-saving protections to refugees seeking asylum and unaccompanied children."
>
> *Letter to HHS Secretary Azar and CDC Director Redfield Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions*[15]

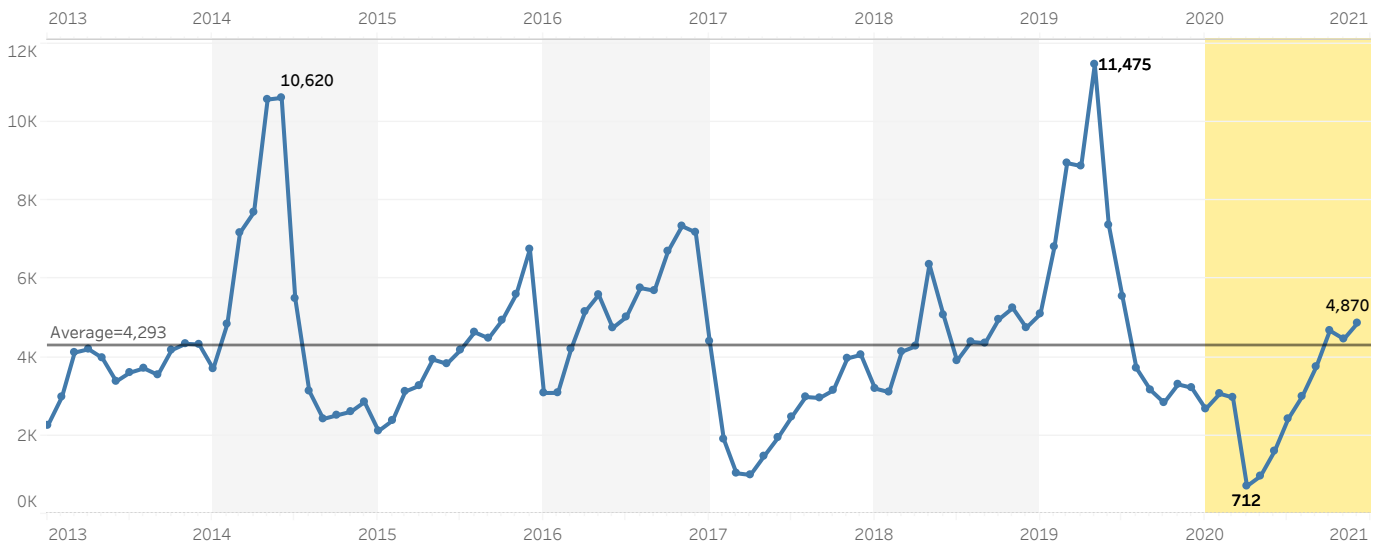
Independent public health experts have also determined that there is no public health justification for a categorical ban on asylum seekers.[6] In a letter to then HHS Secretary Azar and former CDC Director Redfield, more than two dozen health experts at leading public health schools, medical schools, and hospitals voiced their opposition to the Title 42 order, emphasizing that the government could use evidence-based public health measures to safely process asylum seekers without closing the border.[7] Multiple legal organizations have stressed that the Title 42 order fails to comply with domestic and international legal obligations to asylum seekers.[8]

The CDC's Title 42 order has placed thousands of children and families in heightened danger of persecution and other grave harms[9] and continues to inflict suffering on a daily basis. In at least some cases, DHS has further exacerbated the dangers facing children. For example, media reports

reveal that DHS expelled 208 Central American unaccompanied children to Mexico,[10] where they likely have no family connections or immigration status. In one case, DHS expelled a 10-year-old child to his home country "without notifying any of his family members."[11] In desperation, some children have attempted to enter the United States multiple times since the Title 42 order was implemented—experiencing repeated apprehension, detention, transfer, and expulsion.

In November 2020, a federal court enjoined DHS from expelling unaccompanied children under the Title 42 order, finding the government was not likely to prevail on its assertion that Title 42 authorizes expulsions.[12] The government has repeatedly violated this injunction—expelling at least 70 unaccompanied children without a hearing or asylum interview *after* the injunction was in place.[13] While the court injunction prevents the government from expelling unaccompanied children, it does not apply to accompanied children arriving with parents or legal guardians. The government's appeal of this order is pending at the U.S. Court of Appeals for the District of Columbia.

Unaccompanied Children Encountered at the Southwest Border (2013-2021)



Data source: CBP[16]

Over the past decade, unaccompanied children have continued to arrive at the southern border of the United States, despite changes in presidential administrations and increasingly punitive policies intended to deter migration. The reasons for unaccompanied children's migration remain the same—they are fleeing war, persecution, abuse, and violence. In passing the 2008 Trafficking Victims Protection Reauthorization Act ("TVPRA") with broad bipartisan support, Congress recognized that unaccompanied children are especially vulnerable and that certain legal protections are required in order to protect their health, safety, and welfare.[14]

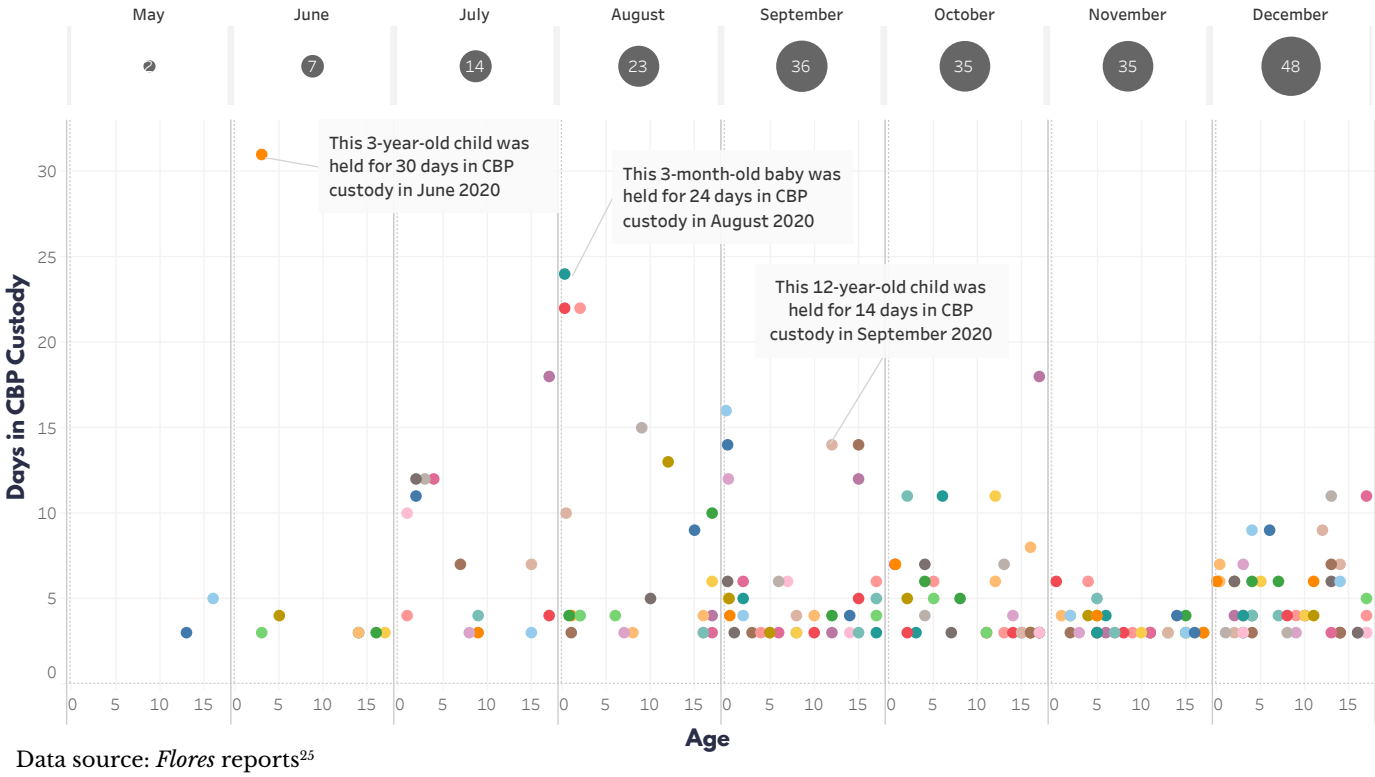
For the majority of 2020, the United States blatantly violated the rights of unaccompanied children, expelling them to grave harms. The Title 42 order reduced the children encountered at the southern border to the lowest number recorded in seven years. Given that this decrease in the number of children encountered was driven by the CDC order, it is probable that the number of children encountered in 2021 will be higher than in 2020—but that does not mean that the number of children arriving represents a "surge." The current numbers are far lower than prior historical "surges" in 2014 and 2019.

CBP detained increasing numbers of children for prolonged periods of time.

Customs and Border Protection facilities were designed to briefly detain single men migrating to the United States and are fundamentally inappropriate for children.[17] People detained in CBP custody consistently report the drinking water is not clean, the food is sometimes spoiled or frozen, and there is extremely limited access to showers and soap.[18] Although the infrastructure of CBP facilities varies, most facilities hold children and families in locked cinderblock cells, while other facilities separate groups of people with metal chain-link fences.[19]

Pursuant to the 2008 Trafficking Victims Protection Reauthorization Act ("TVPRA") and the *Flores* Settlement, the government is generally required to limit children's time in CBP custody to 72 hours.[20] Recently, however, CBP has held increasing numbers of children for more than the 72-hour maximum. CBP detained at least 200 children for more than 72 hours between May and December 2020, some for more than two weeks.

Children Held for Over 72 Hours in CBP Custody (May-December 2020)



Data source: *Flores* reports[25]

Note: This chart does not include children transferred to ICE ERO or HHS custody.

In November 2020, a *Flores* monitoring visit to the Weslaco Border Patrol Station revealed that children were being held in crowded conditions, with no ability to socially distance, and with no soap or sanitizer to wash their hands.[21] The attorney conducting interviews with children stated that "[e]very child [she] questioned regarding access to soap and hand sanitizer indicated that they did not receive these items" and "many children reported that they were very cold."[22] One 15-year-old boy described sleeping in a sitting position "because there were so many people in the room."[23]

> "When I want to wash my hands, there is only water. There is no soap. . . . My mask is dirty on the inside. Here, people do not practice social distancing. . . . When we are in line, we sit or stand close together. I think many people here will get sick from COVID. That makes me feel scared."
>
> *8-year-old child, M.N.A.G.*[24]

The government detained hundreds of children and families in motels for prolonged periods of time.

From March to September 2020, the government detained increasing numbers of children in motels throughout Texas, Arizona, and Louisiana.[26] While the majority of children subject to the Title 42 order were rapidly expelled at the border, at least 660 children were detained for various lengths of time—some for up to 38 days—in unmonitored and unlicensed motels before being expelled.[27] Additionally, children were frequently moved between multiple hotel placements before they were ultimately expelled.[28] The government had no formal age limit policy regarding which children were "too young" to be held in motels and did not impose any limit to the length of time that children could be detained in motels before being expelled from the country.[29]

The government's use of motels to detain children and families was shrouded in secrecy. Legal service providers faced extreme difficulty in locating children held pursuant to Title 42.[30] Children in motels were not told they had the right to speak to a lawyer and only permitted limited phone calls each day. Moreover, DHS officials were often unable to provide accurate information as to where children were located.[31]

> "I felt locked up. I felt alone and isolated . . . I didn't know what time of day it was. I didn't know what day it was. I felt utterly disconnected from society. I just felt anxiety and depression."
>
> *16-year-old J.B.B.C, detained in a motel for weeks*[51]

Children and families detained in motels were constantly surveilled by contracted "MVM Transportation Specialists" who were not required to have experience, training, or qualifications in childcare and were not supervised by any entity with such qualifications.[32] Children had "little to no access to recreation," no access to education, and were not permitted any visitors.[33] One unaccompanied 17-year-old girl, detained in a motel for over two weeks, told her attorney that she was "rarely allowed outside of her room," felt "isolated and anxious while she was detained in a hotel room" by unknown adults who "watched her at all times," and was warned by DHS officials that if she informed her mother of her location, she would no longer be allowed to call her.[34]

In September 2020, a federal court enjoined the government from holding children in motels for more than 72 hours, noting that the COVID-19 pandemic offered "no excuse for DHS to skirt the fundamental humanitarian protections that the *Flores* Agreement guarantees for minors in their custody."[35] The government's appeal of this order is pending at the U.S. Court of Appeals for the Ninth Circuit.

Children detained in congregate facilities faced a heightened risk of COVID-19.

In June 2020, U.S. District Court Judge Dolly Gee found that ICE family residential centers had failed to implement the "basics" of COVID-19 public health protocols and had "non-compliance or spotty compliance with masking or social distancing rules."[36] While the court set a deadline for ICE to release children in family residential centers who had been detained for 20 days or more,[37] the government refused to release families together—leaving parents with the Hobbesian "choice" of separating and allowing the child to be released to a sponsor, or staying in indefinite detention together.[38] As the *Flores* Settlement only applies to children and not parents, the court did not have the jurisdiction to order ICE to release parents with their children.[39] Over three hundred children, parents, and staff members at ICE family residential centers had tested positive for COVID-19 as of January 2021.[40]

In March 2020, ORR stopped releasing unaccompanied children from facilities in New York, California, and Washington, and also stopped releasing children to sponsors living in those

states.[41] Across the country, numerous children's releases were delayed by sponsors experiencing COVID-19-related barriers to obtaining fingerprints or a home study.[42] After *Flores* counsel filed emergency motions to expedite the release of children, Judge Gee ordered the release of detained unaccompanied minors to suitable family members and sponsors without unnecessary delay and the provisional release of children without fingerprinting in certain circumstances.[43]

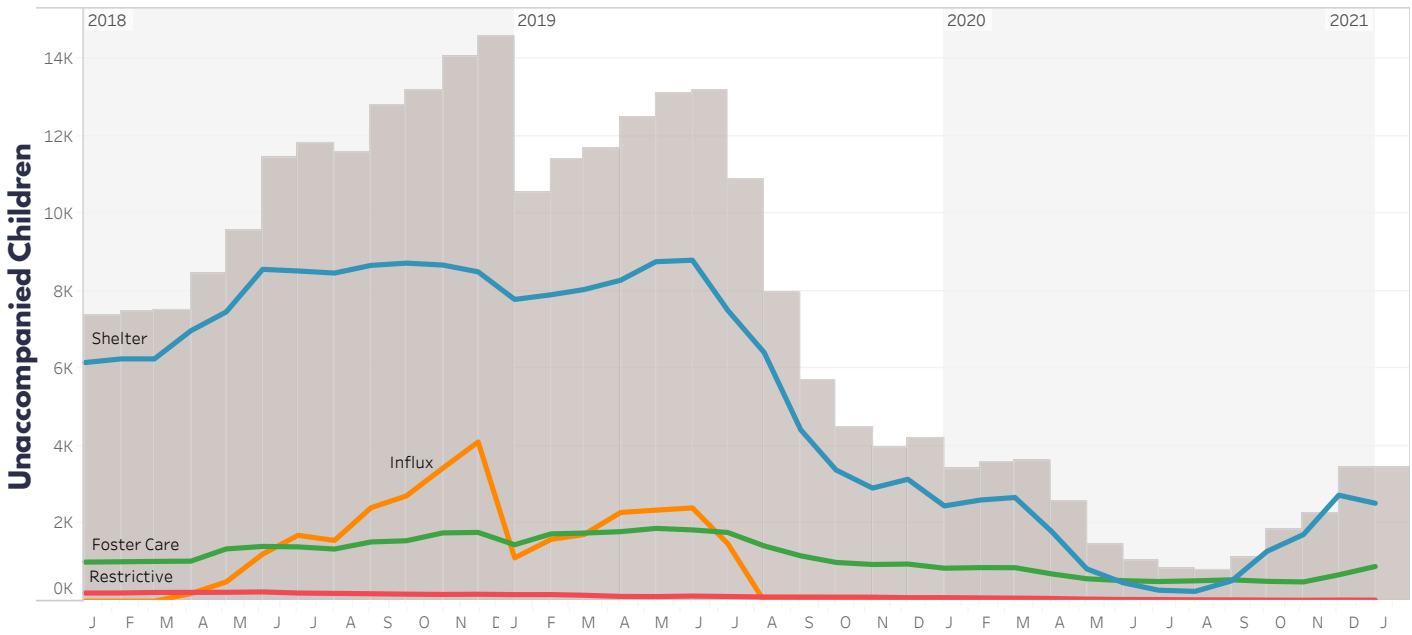
ORR initially issued only very limited guidance to its staff and care providers regarding COVID-19 protocols. Lawyers representing individual children in ORR custody reported an alarming lack of transparency, clarity, or consistency around these policies and persistent challenges in finding out basic information about their client's health, detention conditions, and barriers to release.[44]

In late November 2020, ORR issued more detailed field guidance. ORR states that it has taken a number of steps to safely house children during the pandemic, including quarantining newly arrived children and testing children for COVID-19 upon admission and prior to release from quarantine.[45] Although these steps may mitigate the risk of children introducing COVID-19 into ORR facilities, children remain vulnerable to contracting COVID-19 from staff members or other visitors to congregate facilities.

ORR can place children in non-congregate foster homes, but this option has been severely under-utilized throughout the pandemic. As of November 12, 2020, for example, ORR had filled just 8% of its transitional (temporary) foster care beds, with nearly 1,500 temporary foster care beds available.[46] In November 2020, the government stated that COVID-19 protocols had reduced ORR's capacity from over 13,000 beds to approximately 7,800 beds.[47] Even after this reduction in capacity, ORR retained hundreds of available unused foster care beds.[48] By strictly adhering to CDC-recommended COVID-19 protocols for congregate care, as well as fully utilizing non-congregate options, ORR has the ability to safely care for thousands more children than it currently has in its care.

As illustrated in the chart below, the number of children in ORR custody remains low compared to prior years. The current census is similar to ORR's population in February 2020, when about 3,600 minors were in custody, and dramatically lower than ORR's census in 2018 and 2019.[49] In March 2019, for example, ORR had nearly 12,000 children in custody.[50]

Type of Placement of Unaccompanied Children in ORR Custody (2018-2021)



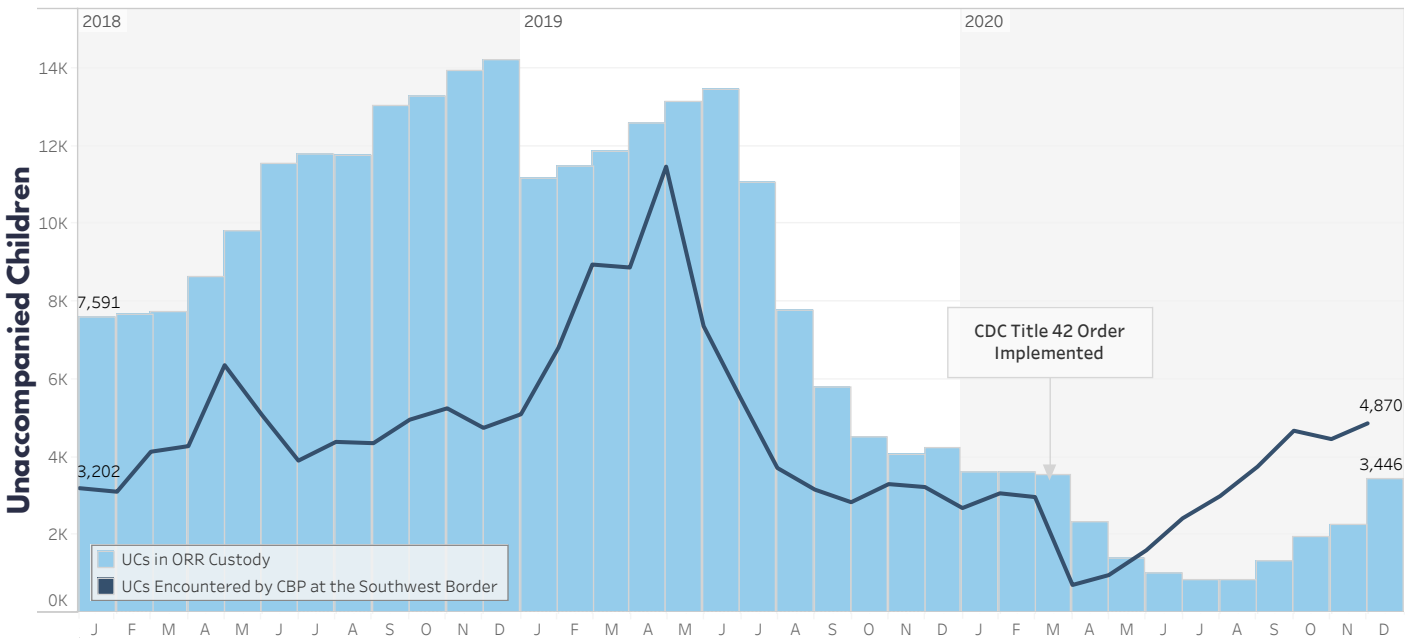
Data source: *Flores* Reports[52]

Throughout 2020, the number of children detained in ORR custody fluctuated dramatically.

The Title 42 order severely decreased the number of unaccompanied children referred to ORR from the southern and northern borders. While ORR took custody of 1,852 unaccompanied children in March, that number decreased to 39 children in May.[53] After a federal court enjoined the government from placing children in motels for more than 72 hours in September,[54] the number of ORR referrals started to increase.[55]

As of January 13, 2021, ORR had 3,452 children in custody, representing only 47% of its stated COVID-adjusted capacity.[56] The number of referrals to ORR custody has fluctuated over the past several months, increasing in the period from November 14, 2020, to December 13, 2020, and decreasing in the period from December 14, 2020, to January 13, 2021.[57]

Unaccompanied Children in ORR Custody compared to CBP Encounters at the Southwest Border (2018-2020)



Data source: *Flores* Reports, CBP[58]

Note: Children who were encountered by CBP at the border, expelled under Title 42, and tried to enter the country again are counted multiple times in CBP's "Encounters" data.

Part II: Recommendations

Immediate Priorities

- **End Title 42 expulsions of children and families.**

The CDC's Title 42 order manipulates the pandemic as a pretext for closing the United States to children and others seeking protection. Contrary to CDC's public assertions, the Title 42 order lacks a public health basis and is motivated by the Trump administration's anti-immigrant agenda rather than evidence-based science.[59]

As of mid-September 2020, DHS had expelled approximately 8,800 unaccompanied children and 7,600 accompanied children and family members under the Title 42 CDC order. While most of these children were rapidly expelled at the border, at least 660 were detained for various lengths of time in unlicensed motels.[60] Rather than fulfilling its legal and ethical obligations to children seeking protection, the United States is summarily returning children to the same dangers from which they fled—directly threatening their safety and welfare.

HHS must rescind the Title 42 order and reinstate the lawful processing of children and families.

- **End the "Migrant Protection Protocols."**

Since introducing the "Migrant Protection Protocols" in January 2019, the United States has forced nearly 70,000 asylum seekers and migrants—including at least 16,000 children and nearly 500 infants under the age of one—to return to Mexico to await their asylum hearing in immigration court.[61]

This policy has manufactured a massive humanitarian crisis at the southern border, as thousands of people have been forced to live in impromptu refugee camps or on the streets of Mexico, unprotected from the elements and without access to food, clean water, or medical care.[62] As of December 2020, there were more than 1,314 publicly documented cases of rape, kidnapping, assault, and other crimes committed against individuals sent back under MPP.[63] Accompanied children are not exempt from MPP, and many have been waiting with their families in Mexico for months until their court date. All hearings were suspended indefinitely in March due to COVID-19.

DHS must immediately rescind the Migrant Protection Protocols and reinstate the lawful processing of children and families.

- **Rescind the DHS/HHS final rule seeking to replace the *Flores* Settlement Agreement.**

In August 2019, DHS and HHS released final regulations intended to replace the *Flores* Settlement Agreement ("*Flores* Settlement").[64] These regulations were fundamentally inconsistent with the Settlement's terms and would have allowed, among other things, the indefinite detention of children in unlicensed facilities and the removal of key protections. Prior to the rule's finalization, tens of thousands of immigrant and child welfare advocates, nonprofit organizations, and concerned citizens submitted comments opposing the proposed regulations in the Federal Register.

In September 2019, U.S. District Court Judge Dolly Gee upheld the *Flores* Settlement and blocked the government from implementing its regulations, finding them to be inconsistent with the Settlement and noting that "throughout several presidential administrations, the Agreement has been necessary, relevant, and critical to the public interest in maintaining standards for the detention and release of minors arriving at the United States' borders."[65]

In December 2020, the U.S. Court of Appeals for the Ninth Circuit largely affirmed Judge Gee's ruling, finding key elements of the government's regulations to be inconsistent with the Settlement and finding that the lower court's refusal to terminate the agreement was not an abuse of discretion.[66]

HHS and DHS should rescind the enjoined August 2019 final rule and issue a new set of regulations that uphold and strengthen the protections required in the *Flores* Settlement.

- **Codify protections for children in federal immigration custody that align with child welfare protections.**

While the COVID-19 pandemic presents HHS and DHS with additional operational challenges, it also serves to highlight problems that were always present in the federal government's treatment of immigrant children and families. Federal law currently includes a patchwork of protections for immigrant children in federal custody. Now is the time to codify a comprehensive framework of legal protections for these children.

The next section outlines detailed recommendations for HHS and DHS regarding the length of time children spend in custody, where children should be placed, what due process protections should be afforded to children, what services children should receive, and the oversight necessary to ensure that children's rights are protected.

1. Release & Reunification

Children must be released from ORR custody as quickly as can be safely accomplished.

ORR is tasked with safely and expeditiously releasing unaccompanied children from federal custody. It is required to make "prompt and continuous efforts" toward family reunification and release children "without unnecessary delay" to their sponsors.[67] ORR facilities have reported that children with longer lengths of detention "experienced more stress, anxiety, and depression."[68] While prolonged detention is associated with increasing harm, even children detained for less than two weeks can experience lasting distress that negatively impacts their mental, physical, and emotional health and development.[69]

Over the past year, there has been significant variation in children's average length of detention in ORR custody. Throughout 2020, the average length of detention for all children discharged from ORR custody fluctuated from 51 to over 200 days.[70] The average length of detention for children not discharged from ORR custody, including children in long-term foster care placements, was much higher—ranging from 118 to 348 days.[71]

In prior years, inappropriate agency policies have bottlenecked the ORR system and delayed children's release from custody. For example, in 2018, ORR's expanded fingerprinting policy—which was later rescinded after ORR admitted it did not improve child safety—significantly delayed the release of children and led to ORR detaining tens of thousands of children in influx facilities.[72]

While the COVID-19 pandemic undoubtedly presents ORR with complex logistics, ORR must ensure that its policies do not unnecessary delay children's release from custody. As congregate care facilities pose a heightened risk of COVID-19 transmission, it is essential that children are released from ORR custody as expeditiously as possible.

Recommendations

- Increase case management and federal field specialist support to ensure sponsors are identified swiftly and children are released as quickly as possible.
- Minimize transfers between facilities, unless a transfer promotes the child's best interests.
- Eliminate burdensome sponsorship application requirements that do not have a substantial and direct impact on child safety.
- Require the identification and adoption of best practices to expedite children's reunification with sponsors and set a standard for releasing children from ORR custody in thirty days or less.
- Develop a mechanism through which ORR can track case reunification progress and timelines across the entire population of children in custody, such that common sources of delay within the facility network can be easily identified and promptly addressed.
- Require facilities whose average length of custody exceeds the average to undergo a review and implement corrective actions.

2. Influx Facilities

Children must be placed in state-licensed facilities and influx facilities must only be utilized when there is an unforeseen influx and with strict limitations and oversight in place.

With limited exceptions, the *Flores* Settlement requires that DHS and HHS place children in non-secure facilities that are "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children."[73] The Settlement requires children to be held in state-licensed facilities for a reason – namely that the federal government has no experience licensing and monitoring child welfare programs and does not have any child welfare standards. Licensed facilities must comply with all applicable state child welfare laws and regulations, which are designed to ensure that facilities housing children meet minimum health and safety requirements.

Between February 2018 and July 2019, ORR operated three unlicensed influx facilities: Homestead, Tornillo, and Carrizo Springs.[74] Tens of thousands of children passed through these facilities, none of which held a state child welfare license or were subjected to state child welfare inspections.[75] The lack of any external oversight or regulation for influx facilities left the health, safety, and welfare of these children to the unfettered power of an administration that was explicitly hostile to immigrant children.

Children in these influx facilities were detained in a restrictive environment—children were subjected to 24-hour surveillance, required to follow a regimented schedule, slept in rows of hundreds of bunk beds, and often threatened by staff with "reports" that would extend their time in custody if they did not follow the rules.[76] During interviews with attorneys, children shared feeling anxious, depressed, and fearful during their time at influx facilities.[77]

Additionally, influx facilities are substantially more costly than licensed facilities and have been historically mismanaged by ORR. In a December 2020 report, the HHS Office of Inspector General ("OIG") found that ORR did not follow federal regulations in awarding a no-bid influx contract for Homestead to Comprehensive Health Services, a private, for-profit company.[78] The OIG report also found that ORR did not effectively manage the Homestead contract—resulting in ORR paying approximately $67 million to operate the facility for three months after the last child had left and overpaying an additional $2.6 million throughout the contract.[79]

Recommendations

- Ensure children are safely and expeditiously released (see p. 13), such that influx facilities are only used in extreme and unforeseen circumstances.
- Require that influx facilities are in compliance with the standards set forth in Exhibit 1 of the *Flores* Settlement Agreement upon the first day of operation.
- Require that influx facilities are in compliance with state licensing requirements within 90 days of operation.
- Ensure influx facilities are only located in areas close to immigration courts and where legal service providers are already available to represent immigrant children.
  - » Ensure children have access to confidential communication and visitation with legal service providers.
- Ensure that each staff member of an influx facility who will have contact with children has been subjected to a Federal Bureau of Investigations background check, and in the states that allow them, a child abuse and neglect check before they are permitted to interact with children.

- Restrict the use of influx facility placements to children already in ORR custody who are over the age of 16, have an identified Category 1 or 2 sponsor, and do not have any temporary or permanent medical or mental health concerns.
- Prohibit the detention of any child in an influx facility for longer than 30 days before the child is released to a sponsor or transferred to a licensed facility.
- Conduct a minimum of one, in-person, comprehensive ORR monitoring visit each month that the influx facility is in operation.
  - » Require the HHS OIG to conduct an unannounced visit within the first 90 days of operation.
- Develop a strategic plan for expanding licensed bed capacity in the event an influx facility is open for more than 90 days.

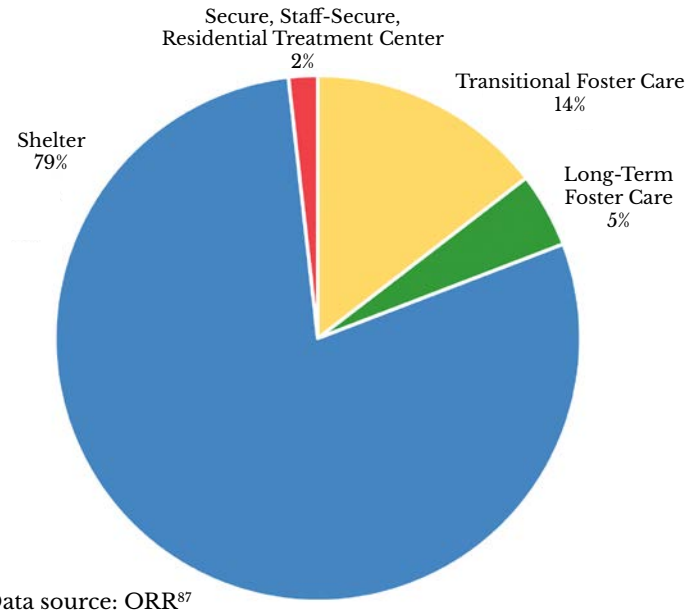
3. Community-Based Placements

Children must be placed in the most home-like setting possible.

ORR's network of over 170 state-licensed care providers stretches across the United States.[80] Within that network, there are a significant number of large congregate care facilities. Between January 2018 and September 2019, 33 ORR-contracted facilities regularly held more than 100 children at a time.[81] Although the number of children in ORR custody steeply declined throughout 2020 due to the Title 42 order closing the border, ORR has maintained contracts with large congregate care facilities. For example, over the past year and half, HHS paid more than $87 million to Sunny Glen Children's Home in Texas to build and operate a 500-bed shelter.[82]

Research has demonstrated that congregate care and institutionalized care settings have profound short- and long-term harm on children's growth and development, including impaired physical, social, and cognitive development.[83] Recognizing the harms of institutional placements, many state child welfare agencies have moved away from placing children in congregate settings.[84] Congress has also recognized the importance of family-based care for the long-term health and well-being of children. In 2018, the Family First Prevention Services Act instituted funding incentives for states to further reduce the use of congregate care facilities and increase the use of licensed family foster homes.[85]

While the ORR network does include some community-based placements, such as Transitional Foster Care ("TFC"), Long Term Foster Care ("LTFC"), and Unaccompanied Refugee Minor ("URM") placements, there are generally far more eligible children than placements available. Even when there are community-based placements available, they are often left vacant because ORR allows placements to reject children based on their prior history. For children that do not have any viable sponsors, known as Category Four children, LTFC placements are critical. Without the option of an LTFC placement, these children will remain in ORR congregate care facilities indefinitely.



Data source: ORR[87]

Recommendations

- Prioritize funding foster care placements[86] and expand the number of available foster care beds within the ORR network.
  - » Broaden the criteria for TFC, LTFC, and URM programs, such that more children are eligible for placement in community-based care.
- Cease granting contracts to large-scale facilities and immediately begin phasing out the use of large congregate care facilities.
- Incentivize contracts with small shelter facilities (under 25 beds).
- Require foster care providers to accept children, regardless of their prior histories (including complex mental health history and prior placement in restrictive facilities, etc.).
  - » Ensure that this requirement is reflected in the provider's contractual obligations.

4. Sponsor Vetting & Due Process Protections

Children and sponsors must be provided with due process protections in the sponsor vetting process.

ORR is required to release children "without unnecessary delay" to a sponsor, which may be a parent, relative, designate of the parent, or responsible adult, as deemed appropriate.[88] As such, "ORR performs a role similar to state child welfare systems in that it aims to move children safely and promptly from government custody, including congregate care settings, to stable placements with family members or other caregivers."[89]

Federal and state law provides procedural protections to children in the state child welfare system and charges juvenile courts with oversight and monitoring of state child welfare agencies' actions.[90] These protections include access to a qualified, neutral arbiter that makes decisions based on consistent judicial standards and timelines, formal hearings and notice of proceedings regarding placement, the right to appeal adverse decisions, and the assistance of a trained advocate (either a Guardian ad Litem or attorney). The involvement of juvenile courts and accompanying procedural protections are designed to ensure transparency, fairness, and to improve outcomes for vulnerable children.[91]

In comparison, ORR maintains virtually unfettered discretion in determining whether to release a child to a sponsor.[92] Sponsors are required to submit a comprehensive "Family Reunification Application" to the child's case manager, who then makes a recommendation as to whether the sponsor should be approved or denied. ORR does not require case managers to make this recommendation within a certain timeframe nor does ORR require case managers to allow sponsors or children the opportunity to address concerns raised by the sponsor assessment process before the sponsor's application is denied. It is not uncommon for ORR to deny sponsor applications for reasons not reasonably related to the child's health and safety.[93]

If ORR denies a sponsor's application, ORR policy does not require that sponsors other than parents or legal guardians (e.g., siblings, grandparents, etc.) be notified of the denial within any set time period. Only parents and guardians are allowed to "appeal" a denial, but there is no required timeline for appeals to be heard.[94] As a result, many children in ORR custody have no meaningful opportunity to challenge ORR's sponsor determinations, regardless of the length of time they have spent in custody.

Recommendations

- Require ORR facilities to make a decision on a sponsor's completed Family Reunification Application within one week of submission.
- Require ORR to afford sponsors the opportunity to address any concerns raised during the sponsor assessment process before his or her application is denied.
- Provide a right to counsel and due process protections to children and sponsors whose applications for sponsorship have been delayed or denied. At a minimum, these protections must include the following:
  - » Automatically provide a hearing before a neutral factfinder to children for whom ORR has failed to make a determination of sponsor fitness within 30 days of receiving a completed Family Reunification Application or determined that the child's sponsor is unfit to care for the child. Such hearing should conform the requirements of 5 U.S.C. §§ 554-57.
    - › Require that ORR bear the burden of production and the burden of proof by clear and convincing evidence to prove that the child's proposed sponsor is unfit, and that continued ORR custody is the least restrictive setting that is in the best interests of the child.

    - Require ORR to disclose all evidence supporting the sponsorship delay or denial and the child's entire case file to the child, sponsor, child's legal counsel, and sponsor's legal counsel prior to the hearing.
    - Provide the child and sponsor with the opportunity to confront, inspect, and rebut the evidence alleged to justify the sponsorship delay or denial.
- Require the neutral factfinder to issue a written decision either ordering release to the proposed sponsor or denying release of the child to the proposed sponsor. This decision must be binding upon ORR, set forth detailed, specific, and individualized reasoning for the decision, be provided in a language the child understands, and be reviewable in federal court.
- Require hearing proceedings and documentation to be kept separate from the child's ORR casefile and not shared outside of ORR except if requested by a child, sponsor, or legal counsel with the child or sponsor's consent.

5. Restrictive Placement & Due Process Protections

Children must not be transferred to restrictive facilities without legal justification and meaningful due process.

While the majority of children in ORR custody live in shelters licensed by the state to care for dependent children, some children in ORR custody are transferred—or "stepped-up"—to more restrictive placements, such as secure facilities, staff-secure facilities, therapeutic group homes, residential treatment centers, and "Out-of-Network" facilities.[95] Children detained in more restrictive facilities may experience 24-hour surveillance, physical restraint, limited time outdoors, and prolonged time in locked cells.[96]

Federal law requires that children in ORR custody "shall be promptly placed in the least restrictive setting that is in the best interest of the child" and "shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense."[97] While some children are stepped-up due to formal charges that have been filed against them in the juvenile justice system, others are stepped-up due to allegations by staff or clinicians that are arbitrary and unfounded. While the majority of state juvenile justice systems provide children with the right to counsel and a hearing before they are placed in a secure detention facility, ORR does not provide these basic due process protections.[98]

Children who are stepped-up to restrictive placements remain in ORR custody much longer on average than children in shelter settings and are less likely to be reunified with a proposed sponsor.[99] A longstanding body of research has established that detaining children in restrictive environments interferes with healthy development, exposes youth to abuse, undermines educational attainment, puts children at greater risk of self-harm and depression, and exacerbates pre-existing trauma.[100] Despite these profound consequences, ORR's current process allows for little to no oversight of decisions related to restrictive placement.

Recommendations

- Limit the use of restrictive facilities to narrow and enforceable criteria.
  - » Prohibit the placement of children in **secure** facilities unless the child has been adjudicated delinquent, there is clear and convincing evidence that the child's juvenile adjudication is probative of serious danger to others, and the child cannot be cared for in a less restrictive setting even with additional accommodations.
  - » Prohibit the placement of children in **staff-secure** facilities unless there is clear and convincing evidence that the child is a danger to self or others, and the child cannot be cared for in a less restrictive setting even with additional accommodations.
  - » Prohibit the placement of children in secure or staff-secure facilities based only on a risk of self-harm or behavior related to their trauma or mental health condition, which could be addressed in less restrictive settings with additional accommodations.
  - » Prohibit the placement of children in residential treatment centers, therapeutic placements, and "Out-of-Network" placements unless:
    - › The child has received a detailed evaluation by a licensed psychologist or psychiatrist trained in the care of children, and
    - › The licensed psychologist or psychiatrist has determined the child poses a substantial risk of harm to self or others; and that such placement is in the best interests of the child; and that a less restrictive placement, even with additional services or resources provided, cannot meet the child's needs.

- Provide due process protections to children before they are stepped-up to a restrictive placement. At a minimum, these protections must include the following:
  - » Require children receive a written detailed explanation of the reasons for the step-up and their right to a pre-transfer hearing and legal representation.
  - » Automatically provide children with a pre-transfer hearing before a neutral factfinder to contest step-up decisions, conforming to the requirements of 5 U.S.C. §§ 554-57.
    - › Require that ORR bear the burden of production and the burden of proof by clear and convincing evidence to prove that the child is a present danger to himself or herself or others, that a restrictive placement is consistent with the child's best interests, and the child's current, or other, non-restrictive placement cannot and will not provide services or resources that will allow the child to remain in a less restrictive placement.
    - › Require ORR to disclose all evidence supporting restrictive placement and the child's entire case file to the child and child's legal counsel prior to the hearing.
    - › Provide the child with the opportunity to confront, inspect, and rebut the evidence alleged to justify restrictive placement.
  - » Require the neutral factfinder to issue a written decision either approving or rejecting the child's transfer to a restrictive placement. Such decision must be binding upon ORR, set forth detailed, specific, and individualized reasoning for the decision, be provided in a language the child understands, and be reviewable in federal court.
    - › Require pre-transfer hearing proceedings and documentation to be kept separate from the child's ORR casefile and not shared outside of ORR except if requested by a child, their sponsor, or the child's counsel with the child or sponsor's consent.
- Provide due process protections to children after they are stepped-up to a restrictive placement. At a minimum, these protections must include the following:
  - » Automatically provide children with a periodic hearing before a neutral factfinder to review the placement of the child in a restrictive placement every 30 days, conforming to the requirements of 5 U.S.C. §§ 554-57.
    - › Require ORR to bear the burden of production and the burden of proof by clear and convincing evidence to prove that the child is a present danger to himself or herself or others, that a restrictive placement is consistent with the child's best interests, and the child's current, or other, non-restrictive placement cannot and will not provide services or resources that will allow the child to remain in a less restrictive placement.
    - › Require ORR to disclose all evidence supporting restrictive placement and the child's entire case file to the child and child's legal counsel prior to the hearing.
    - › Provide the child with the opportunity to confront, inspect, and rebut the evidence alleged to justify restrictive placement.
    - › Require hearings conducted for children's placement in residential treatment centers, therapeutic placements, or "Out-of-Network" placements to include a detailed and specific review prepared by a qualified, licensed psychologist or psychiatrist of the mental health needs of the child.
  - » Require the neutral factfinder to issue a written decision either approving or rejecting the child's step-down to a less restrictive placement. Such decision must be binding upon ORR, set forth detailed, specific, and individualized reasoning for the decision, provided in a language the child understands, and reviewable in federal court.
    - › Require periodic hearing proceedings and documentation to be kept separate from the child's ORR casefile and not shared outside of ORR except if requested by a child, their sponsor, or the child's counsel with the child or sponsor's consent.
- Increase oversight over and transparency regarding the use of "Out-of-Network" facilities and ensure that children placed in "Out-of-Network" facilities have access to legal representation and receive the services to which they are legally entitled.
- Review ORR's policies and practices regarding the use of force, such as those concerning physical restraint, seclusion, and pepper spray. Modify policies as needed such that they are consistent with best practices in the field of trauma-informed care.

6. Children with Disabilities

Children with disabilities must receive services and accommodations in integrated settings and not be stepped up to more restrictive facilities or detained for prolonged periods of time due to their disability.

The government has a legal obligation to place all children in federal immigration custody "in the least restrictive setting" appropriate for the child's needs.[101] This requirement is especially important for children with disabilities, who may require certain services and accommodations due to their disability and must receive such services and accommodations in the most integrated and least restrictive setting possible. That said, it is critical that the provision of such services in no way delays a child's release, as has historically been the case.

Children with disabilities in ORR custody are at particular risk of being pushed out of shelter settings, segregated in inappropriately restrictive facilities, and detained for prolonged periods of time.[102] ORR has limited services and accommodations available to children in shelter settings, which leads to children being transferred to more restrictive placements in order to receive certain kinds of services.[103] Additionally, children in ORR custody are sometimes transferred to secure and staff-secure facilities because of behavior that is a direct manifestation of their disabilities.[104] Children in restrictive settings, and especially children in residential treatment centers and other mental health placements, are detained longer than other children in ORR custody.[105]

Children are sometimes denied release from ORR custody or denied placement in Long-Term Foster Care simply because they are not deemed sufficiently "mentally stable" for release.[106] This is profoundly counterproductive, as longer stays in detention, particularly in restrictive settings, are associated with deteriorating mental health.[107] ORR has also rejected otherwise qualified sponsors based on the sponsor's perceived lack of understanding of the child's mental health needs, without first making reasonable efforts to educate the sponsor about the child's mental health needs and assist the sponsor in setting up mental health services. These barriers to release disproportionately harm children with disabilities and prolong their time in government custody.

Recommendations

- Provide an individualized Section 504 assessment and service plan to children with identified disabilities.
  - » Require that Section 504 assessments are comprehensive, targeted to the individual child, performed in the child's native language, and conducted with the input of the child's parent, guardian, or sponsor, if possible.
  - » Require that Section 504 service plans are evidence-based, individualized to each child's needs, and include a plan for prompt release.
  - » Ensure that the development and/or implementation of these plans are never used to keep a child, who is otherwise ready to be released, in custody.
- Provide timely access for children with disabilities to trauma-informed services tailored to their needs.
- Contract with a range of placements to ensure that children with disabilities have access to services in integrated settings, and that children with disabilities are not stepped up to restrictive placements due to their disability.
  - » Require that a significant proportion of shelter and foster care placements in the ORR network maintain the appropriate state licensing and documented capability to house children with disabilities.

  - » Prohibit ORR-contracted facilities from refusing placement of a child based on a disability and/or mental or behavioral health-related need absent individualized documentation that state licensing requirements bar acceptance of a specific child and a request for a variance from such requirement has been denied or is unavailable under state law.
  - » Require that before placing a child with a Section 504 service plan in a restrictive placement, ORR must explicitly determine that the child's needs cannot be met in a more integrated setting with additional services/accommodations.
  - » Require an independent third-party mental health professional to review each decision to step up, or not step down, a child with a Section 504 service plan to determine whether the child could avoid step up or could be stepped down with additional accommodations or services.

- Provide additional due process before placing children with disabilities in more restrictive placements. At a minimum, these protections should include the following:
  - » Prohibit the placement of children with a Section 504 service plan in a facility that cannot provide access to the services and supports identified in their service plan.
  - » Require an independent, third-party mental health professional to review and evaluate each decision to step-up a child with a Section 504 service plan, making such an evaluation available to the child, child's counsel, and ORR before the pre-transfer hearing.
  - » Require ORR to make a written determination, supported by documentation of evidence-based services and supports that have already been provided, that the child's needs cannot be met in a more integrated setting.
  - » Require an independent, third-party mental health professional to review and evaluate each decision not to step-down a child with a Section 504 service plan, making such an evaluation available to the child, child's counsel, and ORR before the periodic hearing.

- Ensure that mental and/or behavioral health needs do not prolong a child's detention.
  - » Require that home studies are scheduled and completed promptly, such that they do not delay release. This may require alternate methods of conducting home studies, including by video.
  - » Require an independent, third-party mental health professional review any decision to not release a child to a sponsor based upon the child's behavior, mental health, or concerns regarding the sponsor's ability to meet the child's mental and/or behavioral health needs.
  - » Require ORR facilities to consider the serious harms of continued detention in any decision that prolongs the child's length of time in custody.
  - » Support and assist sponsors in accessing and coordinating post-release community-based services and supports (the lack of such supports may not form the basis of a sponsor's denial).
  - » Require ORR facilities to make every effort to place a child with a Section 504 service plan in a foster care or URM placement if all sponsors are denied, or no sponsor is identified.

- Develop and deliver a mandatory, periodic trauma-informed disability-related training to all case managers, front-line care provider staff, and Federal Field Specialists.

7. Mental Health Services

Children must have access to confidential, meaningful, and trauma-informed mental health services.

The majority of children in federal immigration custody have experienced complex trauma. In a recent report, the HHS OIG found widespread concern among ORR care providers and mental health clinicians that they are not equipped to address the severe trauma children have experienced.[108] As a result, children in ORR custody have been stepped up to more restrictive facilities, based solely on mental health concerns that should have been able to be accommodated in less restrictive settings with appropriate supports, increasing their overall length of detention.[109]

Even where mental health services are sufficiently staffed, the services provided are often not confidential.[110] Children have been stepped up to more restrictive facilities based on information disclosed to counselors, and immigration attorneys have observed the government using ORR files containing confidential medical and psychological records as evidence in immigration court.[111] In one case, notes from a youth's ORR therapy session were used to keep him in government custody for years after he had been granted asylum.[112] As stated by the American Psychological Association and 40 other national mental health organizations in a letter to Congress regarding this issue, "it is a fundamental ethical value of mental health professionals to maintain the confidentiality of mental health records."[113] Although legislation to end this practice was introduced in the House and Senate in March 2020, it has not been passed into law.[114]

Improving mental health services and requiring therapists to maintain confidentiality will help facilities avoid unnecessarily stepping up children to more restrictive facilities, decrease the amount of time that children spend in ORR custody, and ensure children are not impeded from accessing evidence-based mental health care.

Recommendations

- Increase the quality, quantity, and diversity of trauma-informed mental health services available to children in shelter settings.
- Increase ORR's capacity to provide mental health services in children's native languages.
- Ensure that children's medical and mental health records, including case notes, are not shared outside of ORR except if requested by a child, sponsor, or the child's counsel or child advocate with the child or sponsor's consent.
- Ensure that information shared by children in counseling sessions is not shared with the child's case managers or any other ORR, HHS, or DHS employees, unless the child presents a substantial and imminent threat to themselves or a third party and that threat has been documented.
- Require ORR's Division of Health for Unaccompanied Children to provide a mandatory, periodic trauma-informed mental health-related training to all case managers, front-line care provider staff, and federal field specialists.

8. Psychotropic Medication

Psychotropic medication must not be administered to children without informed consent, youth assent, procedural safeguards, data tracking, and rigorous independent oversight.

Children across the country are being prescribed psychotropic medications while in ORR custody. Although psychotropic medications may be beneficial for some children, they can have long-term adverse effects, including serious physical side-effects.[115] These potential side-effects increase when children are placed on anti-psychotics, multiple medications, and higher dosages of medication.[116] The administration of psychotropic medication to children should only occur in conjunction with evidence-based psychosocial interventions and concurrent mental health services.[117]

ORR lacks policies and procedures regarding informed consent, youth assent or ability to refuse medication, the identification and review of harmful prescription practices, tracking or aggregating data, and monitoring for side effects and efficacy of psychotropic medication.[118]

Historically, ORR has failed to obtain informed consent prior to administering psychotropic medications. Children in ORR-contracted residential treatment centers as well as "Out-of-Network" facilities have been compelled to take multiple medications and forcibly sedated.[119] Despite a 2018 federal court order finding a Texas facility in violation of the *Flores* Settlement for administering psychotropic medication without informed consent,[120] ORR has not improved its oversight or monitoring of children being administered psychotropic medications in ORR custody. For example, interviews with children in December 2020 revealed a youth in ORR custody who had been prescribed "20 pills per day" and another youth who "appeared to be so overmedicated he could barely talk or maintain eye contact" with the visiting attorney.[121]

Recommendations

- Provide confidential, meaningful, trauma-informed mental health services, such that psychotropic medications are not used as a substitute for therapeutic interventions (see p. 23).
- Require ORR facilities and/or medical providers to obtain informed consent from authorized consenters prior to administering psychotropic medication to children.
  - » Ensure that authorized consenters are not coerced and receive comprehensive information in order to weigh the risks and benefits of providing consent (e.g. child's diagnosis, psychiatric history, purpose of medication, possible side effects, ongoing monitoring requirements, alternative treatments, explanation of ability to withdraw consent in the future, etc.).
- Require ORR facilities and/or medical providers to seek youth assent before administering psychotropic medication and make efforts to explore alternative interventions if the child does not wish to take medication.
- Ensure that ORR facilities are not relying upon the emergency medication exception for the routine or ongoing administration of psychotropic medications to children.
  - » Track the emergency administration of psychotropic medication throughout the facility network, issue corrective actions as needed, and revisit contracts with facilities that have a pattern of using chemical restraints.
- Establish an entity that employs at least one licensed child and adolescent psychiatrist to track and monitor the administration of psychotropic medication throughout the ORR network, consult on individual cases when requested, provide secondary review for flagged cases, and perform an annual case review.
- Develop a data system to retrospectively and prospectively track the administration of psychotropic medications and acquisition of informed consent, to include red flags that would trigger secondary review (such as prescriptions for children of certain ages, at certain dosages, in certain combinations, etc.).

9. Legal Representation & Child Advocates

Every child must have meaningful access to free legal counsel and ORR must improve its communication and transparency with legal services providers.

Legal counsel is essential to ensuring that unaccompanied children can access the immigration relief for which they qualify. As noted by Kids in Need of Defense, a legal services provider for unaccompanied children, "it is virtually impossible for children to navigate protection systems without lawyers to assess their eligibility for humanitarian protection, assist with case preparation, and advocate for them during adversarial hearings."[122]

Based on a 2017 report, more than half of unaccompanied children lack representation,[123] and research shows that legal representation is critical for children's immigration cases. Data from 2018-19 shows that immigration judges were "70 times more likely to grant relief to unaccompanied children with representation than to those without it—making plain that attorneys mean the difference between relief and deportation, and by extension, safety and danger."[124] In addition to ensuring that children receive meaningful hearings, the presence of legal counsel improves the efficiency of immigration court hearings, conserving limited judicial resources.

ORR's policies—or lack thereof—sometimes serve to obstruct lawyers' ability to fully represent their clients. ORR does not require case managers, case coordinators, or federal field specialists to communicate with children's lawyers, which prevents lawyers from being fully informed about their client's cases.[125] Lawyers also report difficulty in obtaining their clients' ORR case records and the latest ORR policies impacting their clients.

Recommendations

- Provide all unaccompanied children with the right to counsel.
- Restore and expand children's access to legal services, direct representation, and independent child advocates.
  - » For detailed recommendations on expanding and improving legal representation for unaccompanied children, see Kids in Need of Defense, *KIND Blueprint: Concrete Steps to Protect Unaccompanied Children on the Move*, at 6-8, Nov. 2, 2020, https://bit.ly/2MURPal.
- Afford legal service providers the ability to use funds appropriated in furtherance of 8 U.S.C. § 1232(c)(5) to represent children with respect to their release, placement, or services received while in ORR custody.
- Increase ORR's communication and transparency with legal services providers regarding ORR policies, practices, and guidance.
- Ensure children's legal counsel are able to quickly obtain children's complete ORR case files and are provided with updated records as requested.

10. Facility Grant Applications, Oversight & Evaluation

ORR must improve the facility grant application process, strengthen oversight over grantees, and routinely re-evaluate grantee performance.

With limited exceptions, ORR is required to place unaccompanied children in non-secure facilities that are "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children.[126] As noted by a federal court, "[t]he purpose of the licensing provision is to provide [children in federal immigration custody] the essential protection of regular and comprehensive oversight by an independent child welfare agency."[127]

Every state enforces certain licensing requirements to ensure that all facilities housing children meet minimum health and safety standards.[128] However, prior to November 2019, HHS did not require care provider facility grant applicants to disclose prior licensing violations or revocations, did not conduct independent research on grant applicants' prior licensing history, and did not have a policy in place to restrict funding for grantees that failed to obtain state licensing.[129]

In December 2020, the U.S. Homeland Security & Government Affairs Permanent Subcommittee on Investigations issued a report regarding these "key gaps" in the HHS grant application and oversight process, calling them "failures in HHS's processes to ensure the safety of children in the care of the federal government."[130] As a result of these gaps, the Subcommittee found that HHS had awarded multiple grants to companies with histories of state licensing violations and facility closures. Two companies received over $32 million to open six facilities but were unable to obtain state licenses due to previous licensing violations and never opened the facilities—it is unclear if HHS will be able to recover those funds.[131]

The problems extend beyond the grantmaking process. There is significant unexplained variation in children's average length of detention between different ORR facility grantees, as well as significant variation in children's average length of detention between shelter facilities operated by the same contractor.[132] Further, multiple facility grantees have been in violation of state licensing requirements and yet ORR continues to renew their contracts, endangering children's safety and welfare.[133]

Recommendations

- Implement the recommendations of the U.S. Homeland Security & Government Affairs Permanent Subcommittee on Investigations "Majority and Minority Staff Report - Oversight of HHS Shelter Grants for Unaccompanied Alien Children,"[134] listed below:
  - "[P]ermanently require ORR grant applicants to disclose any prior or current adverse governmental action taken against them regarding the care of children in their grant applications."
  - "[P]ermanently require ORR grant applicants to be licensed at the time of application."
  - "[P]roactively check state databases for information on previous adverse governmental actions regarding the care of children taken against applicants for ORR funding."
- Strengthen ORR monitoring of grantees' compliance with ORR policies and state licensing standards and make monitoring findings and reports available to relevant congressional committees.
- Require comprehensive, on-site monitoring visits to all grantee facilities on an annual basis.
- Require that ORR facility grantee contracts are routinely re-evaluated based on compliance with state law and priorities around expeditious release, and that grants are renewed or cancelled taking these factors into consideration.

11. Independent HHS & DHS Oversight

Children's rights must be monitored and protected through robust independent oversight.

Consistent, independent oversight is necessary to protect the rights of children in federal immigration custody. Federal and state law recognize the importance of independent oversight for agencies serving vulnerable populations, such as children in out-of-home placements and adults in long-term institutional care. Over half of the states have established independent programs that investigate and advocate on behalf of children in state custody.[135] Beginning in 1978, the Older Americans Act required every state to develop a Long-Term Care Ombudsman program to provide institutionalized residents with access to effective advocacy.[136]

Under the *Flores* Settlement, *Flores* counsel can interview children detained in federal immigration custody to monitor compliance with the Settlement. Since 1997, *Flores* counsel have routinely visited facilities throughout the country, interviewed children, and reviewed children's case files. This monitoring has brought to light critical information regarding violations of children's rights under the Settlement and has proven essential to the protection of detained children. Although this monitoring will continue for as long as the Settlement remains in effect, no mechanism exists for this oversight to continue permanently.

Recommendations

- Monitor compliance with relevant statutory law and governmental standards regarding children in federal immigration custody and conduct any investigations it deems necessary.
- Evaluate DHS and HHS policies and practices to ensure that they do not create unnecessary barriers to release.
- Possess unobstructed access to all children in federal immigration custody. This includes the ability to: conduct unannounced visits of any facility where children are detained; communicate privately and without restriction with any child, caregiver, facility staff, or volunteers; obtain the policies and procedures, administrative records, and documents of all facilities where children are located, including "Out-of-Network" facilities; obtain licensing records for government-contracted facilities maintained by federal or state agencies; and obtain children's case files (with the child or sponsor's consent).
- Offer individual case assistance for children in custody, as requested.
- Review sponsor denials, appeals, and placement decisions that are contested by a child, the child's attorney or child advocate, and/or the child's parent or sponsor, and may recommend that agency change a decision on placement or sponsorship.
- Establish a toll-free phone hotline and email address to allow for the confidential receipt of complaints, issues for investigation, and requests for review of placement decisions. This contact information must be made available and accessible to all children, sponsors, facility staff and volunteers, legal services providers, and child advocates.
- If necessary, issue a subpoena to require the production of information, reports, and other documentary evidence.
- Possess access to real-time data for each child in federal immigration custody as well as systems-wide data and analysis.
- Issue an annual public report summarizing: accomplishments, challenges, and the upcoming year's priorities; complaints and investigations performed; facility site visits and interviews with children, sponsors, and staff; detailed analysis of census data; and recommendations regarding agency policies and whether DHS and HHS should renew or cancel contracts with certain grantees.
- Issue additional reports, data, or findings at any time as it deems necessary.

12. Data Collection, Analysis & Publication

HHS must significantly improve its data tracking and collection, consistently publish data, and use data analysis to improve its policies.

HHS currently publishes limited data regarding the thousands of children in its custody.[137] While the *Flores* Settlement requires the government to provide monthly data reports to *Flores* counsel that list certain information for children in DHS and HHS custody, these reports are subject to certain confidentiality requirements. These reports, as well as the government's court filings regarding data on the children in its custody, have at times included inconsistent, incorrect, and incomplete information.[138] Although the *Flores* data collection and reporting requirement will continue for as long as the *Flores* Settlement remains in effect, no mechanism exists for this data reporting to continue permanently.

Federal law recognizes the vital importance of data collection for child welfare systems. The Adoption and Safe Families Act of 1997 ("ASFA") requires HHS to issue an annual report assessing state performance on a number of child welfare outcomes.[139] These include multiple measures relevant to children in immigration detention – including data related to the length of time in care, placement stability, placement of children in group homes or institutions, and child abuse and neglect while in state custody.[140]

Child welfare agencies need consistent and comprehensive data to properly evaluate their services and ensure the well-being of children in their care.[141] Data collection enables child welfare agencies to track a child's pattern of placements, length of time in custody, and experiences in care. Requiring ORR to perform similar data collection and analysis would enable the agency to identify issues and implement targeted solutions within the ORR system, further improving child safety and welfare.

Recommendations

- Develop a systematic data collection system modeled on the ASFA Child Welfare Outcomes Report.
- Significantly improve and expand the analysis and publication of comprehensive data metrics regarding children in custody.
- At a minimum, HHS should publish the following data each month:
  - Number of referrals to HHS
  - Number of children in HHS custody
  - Number and percentage of children in each placement type (shelter, transitional foster care (TFC), long-term foster care (LTFC), Unaccompanied Refugee Minor (URM), influx, staff-secure, secure, therapeutic, residential treatment, medical, and "Out-of-Network" placements)
  - Average and median length of total time in custody by placement type and by facility
  - Average and median length of time at current placement by placement type and by facility
  - Number and percentage of children in HHS custody for more than 30, 60, 90, 120, and 150 days
  - Number of operational beds by placement type and at each facility
  - Percentage filled capacity by placement type and at each facility
  - Number and percentage of discharges to sponsors by category (Categories 1, 2, and 3)
  - Sponsor categories of children in custody (percentage Categories 1, 2a, 2b, 3, 4) as of the last day of the month
  - Number and percentage of children placed in facilities with more than 25 children
  - Number of tender age children (0-12) by placement type
  - Number and percentage of children with disabilities (as defined by the ADA)

- Number and percentage of children receiving mandatory home studies, discretionary home studies, or post-release services
- Census breakdown by age, gender, and country of citizenship

- HHS should share the following data with the independent monitoring entity for each child in HHS custody on a monthly basis:
  - Biographical information (full name, date of birth, country of citizenship, A#)
  - Date apprehended and placed in CBP custody
  - Each date placed, transferred, released, or removed
  - Status of sponsor reunification process
  - If applicable, reason for placement in restrictive setting (e.g., residential treatment center, therapeutic group home, therapeutic staff secure, staff secure, secure facility, and "Out-of-Network" placements)
  - To whom and where placed, transferred, released, or removed
  - Reasons for discharge (e.g., age-out, age redetermination, reunification, voluntary departure, running away, etc.)

13. CBP Detention

DHS must significantly limit children's detention in CBP facilities and incorporate child welfare principles and protections into its policies and practices.

When children are detained in the custody of Customs and Border Protection, their length of detention is generally not supposed to exceed 72 hours. The *Flores* Settlement requires that all children—both unaccompanied and children arriving with parents or legal guardians—must be transferred to a licensed placement within three days of their apprehension, unless there is an emergency, influx, or the child was apprehended in a remote area or speaks unusual languages that requires the location of interpreters.[142] The TVPRA requires CBP to transfer unaccompanied children to ORR within 72 hours of determining that the child is unaccompanied, unless there are "emergency circumstances."[143]

These limitations reflect the understanding that CBP custody is not appropriate for children and that children's time in CBP facilities should be minimized. However, over the past few years, children in CBP custody have continued to experience prolonged and unsafe detention. In the spring of 2019, hundreds of children and families, including infants, were held for extended periods of time in severely overcrowded and unsanitary CBP border stations. Children and families were held for weeks in dangerous conditions, without access to soap, clean water, showers, clean clothing, toilets, toothbrushes, adequate nutrition, or adequate sleep.[144] The influenza virus quickly spread—compromising the health and safety of all detained in CBP custody, including newborn babies and young children.[145]

In July 2019, the DHS OIG issued a report regarding "dangerous overcrowding and prolonged detention of children" in CBP custody, and found that certain CBP facilities were holding approximately 30% of children detainees for longer than 72 hours, and children had limited or no access to showers, hot food, or a change of clothes.[146] In November 2020, a *Flores* monitoring visit to a CBP facility revealed that children were being held in crowded conditions, with no ability to socially distance, and with no soap or sanitizer to wash their hands.[147] In December 2020, an unaccompanied 13-year-old child was held for more than 280 hours in CBP custody.[148]

Recommendations

- Decrease the length of time that children may be detained in CBP custody and make that requirement legally enforceable.
- Work with medical and child welfare professionals to improve the facilities in which children are detained.
- Implement recommendations for CBP standards developed by the Women's Refugee Commission, Kids in Need of Defense, and Young Center for Immigrant Children's Rights[149] including:
  - » Locating state-licensed child welfare professionals at the border to evaluate children's needs and conduct screenings
  - » Improving children's medical screening
  - » Prohibiting CBP from separating children from their parent or legal guardian except in limited circumstances and as overseen by the child welfare professional
  - » Ending the metering of unaccompanied children at ports of entry
  - » Making CBP's Transport, Escort, Detention, and Search (TEDS) standards enforceable, and ensuring that any new processing centers are child-friendly.

14. ICE Family Residential Centers

DHS must end the use of family detention and reinstate community-based alternatives.

Research confirms what common sense dictates—there is no humane way to detain families. Specifically, research establishes that the incarceration of children, even with parents, has long-lasting psychological, developmental, and physical effects.[150] Detaining children and families in family residential centers harms children's health and well-being, undermines the parent-child relationship, obstructs children and families from accessing legal counsel, and runs contrary to basic principles regarding the protection of children.[151]

In 2016, ICE's own Advisory Committee on Family Residential Centers—a committee of subject matter experts created to provide guidance on how to improve family detention—recommended that DHS "should discontinue the general use of family detention" and make every effort to "place families in community-based case-management programs that offer medical, mental health, legal, social, and other services and supports, so that families may live together within a community."[152]

There is no situation in which the government *must* detain families; it is an entirely discretionary practice. Historically, the United States exercised discretion to release families while their eligibility for asylum or other relief from removal was decided, which is common practice internationally. Prior to 2014, the federal government only detained a small number of families for a limited amount of time and instead prioritized community-based alternatives such as the family case management program. Multiple studies have shown that community-based alternatives are effective (over 99% of enrolled families attended check-ins and immigration court hearings)[153] and cost-efficient (costing between 70 cents and $17 a day versus the $373 daily cost of detention).[154]

Recommendation

- End family detention and reinstate community-based alternatives.

15. DHS/HHS Information Sharing

DHS and HHS must rescind the 2018 Memorandum of Agreement regarding information sharing.

In April 2018, ORR, ICE, and CBP signed a Memorandum of Agreement agreeing to vastly expand the information collected from sponsors and household members and to share that information between the agencies.[155] Thus far, ICE has arrested at least 170 people who came forward to sponsor children in ORR custody, based upon shared information.[156] Due to this policy change and subsequent arrests, potential sponsors are now afraid of being detained or deported as a result of coming forward to sponsor a child, leaving children without any viable sponsors to take care of them.[157]

Recommendations

- Rescind the May 2018 Memorandum of Agreement between HHS and DHS in its entirety.
- Ensure that ICE does not have access to children's information to pursue enforcement actions against families or children.

Conclusion

First and foremost, we must do no further harm to immigrant children seeking protection in the United States, most of whom have already experienced profound trauma by the time they arrive at our borders. We cannot maintain the status quo or even simply return to the baseline from four years ago. It is time to acknowledge the consequential mistakes of the past and forge a new way forward—one that is based in child welfare principles and protects the dignity, health, and safety of immigrant children.

Endnotes

1. *See* Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 FR 17060; 42 U.S.C. §§ 265, 268.

2. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Declaration of Raul L. Ortiz, Defendants' Exhibit 1, Defendants' Ex Parte Application to Stay Order, ECF 985, at ¶ 6 (C.D. Cal. Sept. 17, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/985_Govt-Ex-Parte-App-to-Stay-with-Exhibits.pdf.

3. *See* Centers for Disease Control & Prevention, Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, Oct. 13, 2020, https://www.cdc.gov/coronavirus/2019-ncov/order-suspending-introduction-certain-persons.html.

4. *See* Michelle Hackman, Andrew Restuccia & Stephanie Armour, *CDC Officials Objected to Order Turning Away Migrants at Border*, Wall Street Journal, Oct. 3, 2020, https://www.wsj.com/articles/cdc-officials-objected-to-order-turning-away-migrants-at-border-11601733601; Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, New York Times, May 3, 2020, https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html.

5. *See* Jason Dearen & Garance Burke, *Pence ordered borders closed after CDC experts refused*, Associated Press, Oct. 3, 2020, https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health4ef0c6c5263815a26f8aa17f6ea490ae.

6. *See, e.g.*, Physicians for Human Rights, Ban on Asylum Seekers at the Border Is Illegal and Lacks Basis in Public Health Re: Comment on 42 CFR 71 [Docket No. CDC-2020-0033] RIN 0920-AA76 Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, Apr. 23, 2020, https://phr.org/wp-content/uploads/2020/05/Physicians-for-Human-Rights-Public-Comment-on-Border-Closure-April-23-2020.pdf; Joanna Maples-Mitchell, *There is No Public Health Rationale for a Categorical Ban on Asylum Seekers*, Just Security, Apr. 17, 2020, https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categoricalban-on-asylum-seekers/.

7. Letter to HHS Secretary Azar and CDC Director Redfield Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions, May 18, 2020, https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers.

8. *See* Women's Refugee Comm'n, *Request for Comments: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, Mar 24, 2020, HHS Docket No. CDC-2020-0033, 85 FR 16559*, Apr. 23, 2020, https://s33660.pcdn.co/wp-content/uploads/2020/04/WRC-Comments-on-CDC-IFR.pdf; National Immigrant Justice Center, *The Latest Brick in the Wall: How the Trump Administration Unlawfully 'Expels' Asylum Seekers & Unaccompanied Children In The Name Of Public Health*, Apr. 15, 2020, https://immigrantjustice.org/staff/blog/latest-brick-wall-how-trump-administration-unlawfully-expels-asylum-seekers; Human Rights First, *Humanitarian Disgrace: U.S. Continues to Illegally Block, Expel Refugees to Danger*, Dec. 2020, https://www.humanrightsfirst.org/sites/default/files/HumanitarianDisgrace.12.16.2020.pdf.

9. *See generally* Human Rights First, *Humanitarian Disgrace: U.S. Continues to Illegally Block, Expel Refugees to Danger*, Dec. 2020, https://www.humanrightsfirst.org/sites/default/files/HumanitarianDisgrace.12.16.2020.pdf.

10. Caitlin Dickerson, *Migrant Children From Other Countries Are Being Expelled Into Mexico*, New York Times, Nov. 30, 2020, https://www.nytimes.com/2020/10/30/us/migrant-children-expulsions-mexico.html.

11. Caitlin Dickerson, *10 Years Old, Tearful and Confused After a Sudden Deportation*, New York Times, May 20, 2020, https://www.nytimes.com/2020/05/20/us/coronavirus-migrant-children-unaccompanied-minors.html.

12. *See PJES v. Wolf*, No. 1:20-cv-02245-EGS, Memorandum Opinion, ECF 80 (D.D.C. Nov. 18, 2020). Available at http://cdn.cnn.com/cnn/2020/images/11/18/pjes_v_wolf_et_al__dcdce.pdf.

13. *See PJES v. Wolf*, No. 1:20-cv-02245-EGS, Notice to the Court Regarding Compliance with Preliminary Injunction, ECF 96 (D.D.C. Jan. 13, 2020); *PJES v. Wolf*, No. 1:20-cv-02245-EGS, Notice to the Court Regarding Compliance with Preliminary Injunction, ECF 91 (D.D.C. Dec. 12, 2020).

14. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act, Congressional Record – Senate 154:185, at S10886, Dec. 10, 2008, https://beta.congress.gov/crec/2008/12/10/CREC-2008-12-10-pt1-PgS10886.pdf.

15. Letter to HHS Secretary Azar and CDC Director Redfield Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions, May 18, 2020, https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers.

16. U.S. Customs & Border Protection, *Southwest Land Border Encounters*, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (as listed on January 19, 2021).

17. *See* U.S. White House Press Briefings, *Press Briefing by Acting CBP Commission Mark Morgan*, Oct. 8, 2019, https://www.whitehouse.gov/briefings-statements/press-briefing-acting-cbp-commissioner-mark-morgan/?utm_source=google&utm_medium=google&utm_term=(not%20provided)&utm_content=undefined&utm_campaign=(not%20set)&gclid=undefined&dclid=undefined&GAID=1114369147.1555082066.

18. *See, e.g.,* Scott Neuman, *Migrants Allege They Were Subjected to Dirty Detention Facilities, Bad Food and* Water, NPR, July 18, 2018, https://www.npr.org/2018/07/18/629998961/lawsuit-charges-migrants-subjected-to-dirty-detention-facilities-bad-food-and-wa; Human Rights Watch, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Custody*, Feb. 28, 2018, https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells#; Americans for Immigrant Justice, *Do My Rights Matter? The Mistreatment of Unaccompanied Children in CBP Custody*, Oct. 2020, https://aijustice.org/wp-content/uploads/2020/10/Do-My-Rights-Matter-The-Mistreatment-of-Unaccompanied-Children-in-CBP-Custody.pdf.

19. *See* Office of the Inspector General, U.S. Department of Homeland Security, *Capping Report: CBP Struggled to Provide Adequate Detention Conditions During 2019 Migrant Surge*, OIG-20-38, at 12, June 12, 2020, https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-38-Jun20.pdf.

20. *See* 8 U.S.C. § 1232(b)(3); *Flores v. Reno*, No. CV 85-4544-RJK, ¶ 12 (C.D. Cal. Jan. 17, 1997) [hereinafter "*Flores* Settlement"].

21. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Plaintiffs' Response to Juvenile Coordinators' Interim Reports, ECF 1039, at 3-6 (C.D. Cal. Nov. 23, 2020). Available at https://youthlaw.org/wp-content/uploads/1997/05/1039_Response-to-ICE-ORR-JC-Report-November-2020.pdf.

22. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Exhibit E, Declaration of Denise Rosales, ECF 1039, at ¶¶ 8, 9 (C.D. Cal. Nov. 23, 2020). Available at https://youthlaw.org/wp-content/uploads/1997/05/1039_Response-to-ICE-ORR-JC-Report-November-2020.pdf.

23. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Exhibit B, Declaration of E.J.L.A., ECF 1039, at ¶ 7 (C.D. Cal. Nov. 23, 2020). Available at https://youthlaw.org/wp-content/uploads/1997/05/1039_Response-to-ICE-ORR-JC-Report-November-2020.pdf.

24. *Id*.

25. Dep't of Justice Monthly *Flores* Reports, *U.S. Border Patrol (USBP) Children with Time In Custody (TIC) Hours More than 72 Hours (Excludes Transfers to ERO or HHS)*, May – Nov. 2020. Note: This data report excludes children transferred to ERO or HHS custody.

26. *See Flores v. Barr*, Case No. 2:28-cv-04544-DMG, Exhibit A, Adamson Declaration and Title 42 Data Summary, Reply to Opposition to Motion to Enforce Settlement re "Title 42" Class Members, ECF 960-1 (C.D. Cal. Aug. 28, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/960_Reply-to-Opp.-to-Motion-to-Enforce-the-Settlement-re-_Title-42_-Class-Members.pdf.

27. *See Flores v. Barr*, Case No. 2:28-cv-04544-DMG, Order re Plaintiffs' Motion to Enforce Settlement as to "Title 42" Class Members, ECF No. 976, at 3 (C.D. Cal. Sept. 4, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/976- Flores-Order-re-Hotel-MTE.pdf.; *Flores v. Barr*, No. 20-55951, Plaintiffs-Appellees' Opposition to Renewed Emergency Motion for Administrative Stay and Stay Pending Appeal, ECF 16-1, at 16 (C.D. Cal. Sept. 25, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/16-1-Plaintiffs-Appellees-Opp.-to-Renewed-Emergency-Mot.-forAdmin.-Stay-and-Stay-Pending-Appeal.pdf.

28. *See Flores v. Barr*, Case No. 2:28-cv-04544-DMG, Exhibit A, Adamson Declaration and Title 42 Data Summary, Reply to Opposition to Motion to Enforce Settlement re "Title 42" Class Members, ECF 960-1 (C.D. Cal. Aug. 28, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/960_Reply-to-Opp.-to-Motion-to-Enforce-the-Settlement-re-_Title-42_-Class-Members.pdf.

29. *Id.*; *see also Flores v. Barr*, Case No. 2:28-cv-04544-DMG, Interim Report on the Use of Temporary Housing for Minors and Families under Title 42 by Independent Monitor, ECF 873, at 17 (C.D. Cal. July 22, 2020).

30. *See Flores v. Barr*, Case No. 2:85-cv-04544, Order re Plaintiffs' Motion to Enforce Settlement as to "Title 42" Class Members, ECF 976, at 16 (C.D. Cal Sept. 4, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/976-Flores-Order-re-Hotel-MTE.pdf.

31. *Id.*

32. *Id.* at 14.

33. *See Flores v. Barr*, Case No. 2:28-cv-04544-DMG, Interim Report on the Use of Temporary Housing for Minors and Families under Title 42 by Independent Monitor, ECF 873, at 14 (C.D. Cal. July 22, 2020).

34. *Flores v. Barr*, Exhibit 1, Declaration of Taylor Levy, Plaintiffs' Opposition to Ex Parte Application to Stay Order, ECF 988, at ¶ 9 (C.D. Cal. Sept.18, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/985_Govt-Ex-Parte-App-to-Staywith-Exhibits.pdf.

35. *See Flores v. Barr*, Case No. 2:85-cv-04544, Order re Plaintiffs' Motion to Enforce Settlement as to "Title 42" Class Members, ECF 976, at 17 (C.D. Cal Sept. 4, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/976-Flores-Order-re-Hotel-MTE.pdf.

36. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Order re Updated Juvenile Coordinator Reports, ECF 833, at 7 (C.D. Cal. June 26, 2020).

37. *Id.* at 3-4.

38. *See* Julia Ainsley, *Faced with choice, migrant parents in ICE detention refuse to separate from children, NBC News, May 18, 2020, https://www.nbcnews.com/news/us-news/faced-choice-migrant-parents-ice-detention-refuse-separate-children-n1209841*.

39. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Order re Defendants' Ex Parte Application to Stay, ECF 837, at 2 (C.D. Cal. July 25, 2020).

40. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, ICE Juvenile Coordinator Report, ECF 1064-1, at 5 (C.D. Cal. Jan. 19, 2021).

41. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Order re Plaintiffs' Motion to Enforce, ECF 784, at 8 (C.D. Cal. Apr. 24, 2020).

42. *Id*. at 10.

43. *Id*. at 18-9.

44. *See, e.g., Flores v. Barr*, No. 2:85-cv-04544-DMG, Declaration of Hannah P. Flamm, ECF 1039-7, at ¶¶ 5-10 (C.D. Cal. Nov. 23, 2020); *Flores v. Barr*, No. 2:85-cv-04544-DMG, Declaration of Ana Devereaux, ECF 823, at 23-26 ¶¶ 6-13 (C.D. Cal. June 17, 2020); *Flores v. Barr*, No. 2:85-cv-04544-DMG, Declaration of Anthony Enriquez, ECF 759-4, at ¶¶ 5-10.

45. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, ORR Juvenile Coordinator Report, ECF 1060-1, at 18 (C.D. Cal. Jan. 15, 2021).

46. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, ORR Juvenile Coordinator Report, ECF 1029-2, at 3 (C.D. Cal Nov. 16, 2020); *see also Flores v. Barr*, No. 2:85-cv-04544-DMG, ORR Juvenile Coordinator Report, ECF 932-2, at 3 (C.D. Cal Aug. 24, 2020) (transitional foster care at 5% capacity with 1,903 transitional foster care beds available as of August 22, 2020); *Flores v. Barr*, No. 2:85-cv-04544-DMG, ORR Juvenile Coordinator Interim Report, ECF 788-2, at 2 (C.D. Cal. May 15, 2020) (transitional foster care at 8% capacity with 1,849 beds available as of May 14, 2020).

47. *See PJES v. Wolf*, No. 1:20-cv-02245-EGS, Exhibit D, Declaration of Nicole Cubbage, ECF 82-4, at ¶ 5 (D.D.C. Nov. 25, 2020).

48. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, ORR Juvenile Coordinator Report, ECF 1060-1, at 14 (C.D. Cal. Jan. 15, 2021) (under ORR's COVID-adjusted capacity, 309 transitional foster care beds and 285 long-term foster care beds unoccupied).

49. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Declaration of Jallyn Sualog, ECF 736-1, at ¶ 13 (C.D. Cal. March 27, 2020).

50. *Id*.

51. Hamed Aleaziz, *"I Felt Alone": The Story Of How An Immigrant Teenager Fought To Stay In The US While Under Guard In A Texas Hotel*, BUZZFEED, July 24, 2020, https://www.buzzfeednews.com/article/hamedaleaziz/immigrantteenager-successfully-fights-to-stay-in-us.

52. Dep't of Justice Monthly *Flores* Reports, *HHS Flores Data*, Jan. 2018 – Dec. 2020. As provided by the DOJ, these monthly reports reflect a snapshot of the ORR census on a particular day of the month.

53. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Notice of Motion and Motion to Enforce Settlement re "Title 42" Class Members, ECF 920, at 2 n2 (C.D. Cal. Aug. 14, 2020).

54. *See Flores v. Barr*, Case No. 2:85-cv-04544, Order re Plaintiffs' Motion to Enforce Settlement as to "Title 42" Class Members, ECF 976, at 14 (C.D. Cal. Sept. 4, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/976-Flores-Order-re-Hotel-MTE.pdf; *Flores v. Barr*, Case No. 2:85-cv-04544, Order re Defendants' Ex Parte Application to Stay, ECF 990 (C.D. Cal. Sept. 21, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/990_Order-Denying-Govt-Ex-Parte-Application-to-Stay.pdf.

55. *See* Dep't Health & Human Servs., *Latest UAC Data – FY 2020*, https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2020/index.html; Dep't Health & Human Servs., *Latest UAC Data – FY 2021*, https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2021/index.html.

56. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, ORR Juvenile Coordinator Report, ECF 1060-1, at 14 (C.D. Cal. Jan. 15, 2021).

57. *Id*. at 13.

58. U.S. Customs & Border Protection, *Southwest Land Border Encounters*, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (as listed on January 19, 2021); Dep't of Justice Monthly *Flores* Reports, HHS, Jan. 2018 – Dec. 2020. As provided by the DOJ, these monthly reports reflect a snapshot of the ORR census on a particular day of the month.

59. *See* Jason Dearen & Garance Burke, *Pence ordered borders closed after CDC experts refused*, Associated Press, Oct. 3, 2020, https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health4ef0c6c5263815a26f8aa17f6ea490ae.

60. *See Flores v. Barr*, Case No. 2:28-cv-04544-DMG, Order re Plaintiffs' Motion to Enforce Settlement as to "Title 42" Class Members, ECF 976, at 3 (C.D. Cal. Sept. 4, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/976- Flores-Order-re-Hotel-MTE.pdf.; *Flores v. Barr*, No. 20-55951, Plaintiffs-Appellees' Opposition to Renewed Emergency Motion for Administrative Stay and Stay Pending Appeal, ECF 16-1, at 16 (9th Cir. Sept. 25, 2020). Available at https://youthlaw.org/wp-content/uploads/2020/07/16-1-Plaintiffs-Appellees-Opp.-to-Renewed-Emergency-Mot.-forAdmin.-Stay-and-Stay-Pending-Appeal.pdf.

61. *See* Human Rights First, *Delivered to Danger: Trump Administration sending asylum seekers and migrants to danger*, Dec. 15, 2020, https://deliveredtodanger.org/.

62. *See* Kids in Need of Defense, *Forced Apart: How the "Remain in Mexico" Policy Places Children in Danger and Separates Families*, Feb. 24, 2019, https://supportkind.org/wp-content/uploads/2020/02/MPP-KIND-2.24updated-003.pdf.

63. Human Rights First, *Delivered to Danger*, https://deliveredtodanger.org/.

64. *See* Dep't Homeland Security, *DHS and HHS Announce New Rule to Implement the Flores Settlement Agreement; Final Rule Published to Fulfill Obligations under Flores Settlement Agreement*, Aug. 21, 2019, https://www.dhs.gov/news/2019/08/21/dhs-and-hhs-announce-new-rule-implement-flores-settlement-agreement.

65. *Flores v. Barr*, No. 2:85-cv-04544-DMG, Order re Plaintiffs' Motion to Enforce Settlement and Defendants' Notice of Termination and Motion in the Alternative to Terminate the Flores Settlement Agreement, ECF 688, at 21 (C.D. Cal. Sept. 27, 2019).

66. *Flores v. Rosen*, No. 19-56326, ECF 83-1 (9th Cir. 2020). Available at https://youthlaw.org/wp-content/uploads/2021/01/CA9-Opinion-2.pdf.

67. *Flores* Settlement ¶¶ 14, 18.

68. *See* Office of Inspector General, Dep't of Health & Human Servs., OEI-09-18-00431, *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody*, at 12, Sept. 2019, https://oig.hhs.gov/oei/reports/oei-09-18-00431.asp [hereinafter "HHS OIG Mental Health Needs of Children in HHS Custody"].

69. *See* Leila Schochet, *Trump's Family Incarceration Policy Threatens Healthy Child Development*, Center for American Progress, July 12, 2018, https://www.americanprogress.org/issues/early-childhood/reports/2018/07/12/453378/trumps-family-incarceration-policy-threatens-healthy-child-development/ (citing Rachel Kronick, Cecile Rousseau, & Janet Cleveland, *Asylum-seeking children's experiences of detention in Canada: A qualitative study*, 85 Am. J. Orthopsychiatry 287 (2015)).

70. *See* Dep't Health & Human Servs., *Latest UAC Data – FY 2020*, https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2020/index.html.

71. *Id.*

72. *See* New York Civil Liberties Union, *Under Pressure: Trump Administration Reverses Key Aspect of Policy Delaying Release of Migrant Children*, Dec. 18, 2018, https://www.nyclu.org/en/press-releases/under-pressure-trump-administration-reverses-key-aspect-policy-delaying-release.

73. *Flores* Settlement, Exhibit 1, ¶¶ 6, 19.

74. *See* Neha Desai, Melissa Adamson, Elizabeth Pirrotta, Lewis Cohen & N. Ewen Wang, *Child Welfare & Unaccompanied Children in Federal Immigration Custody: A Data and Research Based Guide for Federal Policymakers*, at 10-11, Dec. 2019, https://youthlaw.org/wp-content/uploads/2019/12/Briefing-Child-Welfare-Unaccompanied-Children-in-Federal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf [hereinafter "Child Welfare & Unaccompanied Children in Federal Immigration Custody Guide"].

75. *Id*. at 11.

76. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Notice of Motion and Motion to Enforce Settlement Agreement; Memorandum of Points and Authorities, ECF 547-2, at 14-22 (C.D. Cal. May 31, 2019).

77. *Id*.; *see also* Child Welfare & Unaccompanied Children in Federal Immigration Custody Guide, *supra* note 74, at 10-12.

78. Dep't Health & Human Servs., *The Office of Refugee Resettlement Did Not Award and Manage the Homestead Influx Care Facility Contracts in Accordance With Federal Requirements*, Dec. 18, 2020, https://oig.hhs.gov/oas/reports/region12/122020001.pdf.

79. *See id*.

80. *See* Dep't Health & Human Servs., *Fact Sheet: Unaccompanied Alien Child Shelter at Homestead Job Corps Site, Homestead, Florida*, Aug. 6, 2019, https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Sheltered-at-Homestead.pdf.

81. Child Welfare & Unaccompanied Children in Federal Immigration Custody Guide, *supra* note 74, at, at 9.

82. *See* Fernando Del Valle, *Sunny Glen to run 500-children shelter in Raymondville*, Valley Stay, Aug. 24, 2019, https://www.valleymorningstar.com/2019/08/24/sunny-glen-to-run-500-children-shelter-in-raymondville/; Sarah Posner, *A Christian Foster Home Had a Troubling Past. Trump Gave it Millions to House Immigrant Kids Anyway*, TypeInvestigations, Nov. 2, 2020, https://www.typeinvestigations.org/investigation/2020/11/02/a-christian-foster-home-had-a-troubling-past-trump-gave-it-millions-to-house-immigrant-kids-anyway/.

83. *See* Mary Dozier, et al., *Institutional care for young children: Review of literature and policy implications*. 6 Social Issues & Policy Rev. 1–25 (2012), https://doi.org/10.1111/j.1751-2409.2011.01033.x; Manius H. van IJzendoorn, et. al., *Children in institutional care: Delayed development and resilience*, 76 Monographs for the Society for Research in Child Development 8–30 (2011), https://doi.org/10.1111/j.1540-5834.2011.00626.x.

84. *See* Children's Bureau, U.S. Department of Health & Human Services, *A national look at the use of congregate care in child welfare*, 2015, https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare_brief.pdf

85. *See* Family First Prevention Services Act of 2018, H.R. 253, 115th Cong., Pub. L. 115-123.

86. "Foster care placements" include Transitional Foster Care, Long-Term Foster Care, and Unaccompanied Refugee Minor programs. *See* U.S. Dep't of Health & Human Servs., Office of Refugee Resettlement, *Children Entering the United States: Guide to Terms*, https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms.

87. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, *October 2, 2020 ORR Juvenile Coordinator Report*, ECF 996-2, at 2 (C.D. Cal. Oct. 2, 2020) (reflecting bed capacity by residence type as of September 30, 2020).

88. *Flores* Settlement ¶ 14.

89. *See Lucas R. v. Azar*, No. 2:18-cv-05741-DMG, Exhibit 53, Report of Judge Leonard Edwards, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, ECF 271-2, at 23 (C.D. Cal. Oct. 2, 2020).

90. *Id*. at 3-11.

91. *Id*. at 3.

92. *See* Dep't Health & Human Servs., *ORR Policy Guide: Children Entering the United States Unaccompanied*, § 2.1, https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied; *see also Lucas R. v. Azar*, No. 2:18-cv-05741-DMG, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, ECF. 271-1, at 7-8 (C.D. Cal. Oct. 2, 2020).

93. *See Lucas R. v. Azar*, No. 2:18-cv-05741-DMG, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, ECF 271-1, at 32 (C.D. Cal. Oct. 2, 2020); *J.E.C.M. v. Hayes*, Third Amended Class Action Complaint and Petition for a Writ of Habeas Corpus, ECF 93 (E.D. Va. Feb. 22, 2019); *see also* National Center for Youth Law, U.C. Davis Immigration Law Clinic, & Center for Human Rights & Const. Law, *The Flores Settlement Agreement & Unaccompanied Children in Federal Custody*, at 10, Feb. 2019, https://youthlaw.org/wp-content/uploads/2019/02/Flores-Congressional-Briefing.pdf.

94. Dep't Health & Human Servs., *ORR Guide: Children Entering the United States Unaccompanied*, § 2.8, https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-2#2.8.

95. Secure facilities are state or county juvenile detention centers. Staff-secure facilities and residential treatment centers place varying levels of restriction on children's movement. "Out-of-network facility" means a facility at which an immigrant child is placed as a result of an ORR determination that there is no care provider available among in-network facilities to provide specialized services required by the immigrant child, such as mental health or medical support.

96. *See, e.g., See Lucas R. v. Azar*, No. 2:18-cv-05741-DMG, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, ECF 271-1, at 9-10 (C.D. Cal. Oct. 2, 2020); Disability Rights California, *The Detention of Immigrant Children with Disabilities in Cali¬fornia: A Snapshot*, 14-17, July 26, 2019, https://www.disabilityrightsca.org/system/files/file-attachments/DRC-ORR-Report.pdf [hereinafter "Disability Rights California Report"].

97. 8 U.S.C. § 1232(c)(2)(A).

98. *See Lucas R. v. Azar*, No. 2:18-cv-05741-DMG, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, ECF 271-1, at 48-51 (C.D. Cal. Oct. 2, 2020).

99. *See Lucas R. v. Azar*, No. 2:18-cv-05741-DMG, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, ECF 271-1, at 12 (C.D. Cal. Oct. 2, 2020); Child Welfare & Unaccompanied Children in Federal Immigration Custody Guide, *supra* note 74, at 16 ("In September 2019, the average length of detention for discharged children who were placed only in ORR shelters was 52 days. In comparison, discharged children who had any placement in staff-secure or secure facilities were detained an average of 198 days, and discharged children who had any placement in residential treatment centers or therapeutic placements were detained an average of 243 days.").

100. *See, e.g.*, Barry Holman & Jason Ziedenberg, *The Dangers of Detention; The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute (2006), http://www.jus¬ticepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf.; Carol Koplan & Anna Chard, *Adverse Early Life Experiences as a Social Determinant of Mental Health*, 44 Psychiatric Annals 39, 40-41, 44 (2014); Julie M. Linton, Marsha Griffin & Alan J. Shapiro, *Detention of Immigrant Children, Policy Statement*, 139 Pediatrics 1, 6 (2017), https://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.short; Richard A. Mendel, *No Place for Kids: The Case for Reduc¬ing Juvenile Incarceration*, The Annie E. Casey Foundation, 34-35 (2011).

101. *See* 8 U.S.C. § 1232(c)(2)(A); *see also Flores* Settlement ¶ 11.

102. *See* Disability Rights California Report, *supra* note 96, at 14-17.

103. *See id*. at 6.

104. *See id*. at 7.

105. *See Lucas R. v. Azar*, No. 2:18-cv-05741-DMG, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, ECF 271-1, at 12 (C.D. Cal. Oct. 2, 2020); Child Welfare & Unaccompanied Children in Federal Immigration Custody Guide, *supra* note 74, at 16.

106. *See Lucas R. v. Azar*, No. 2:18-cv-05741-DMG, First Amended Complaint for Injunctive Relief, Declaratory Relief, and Nominal Damages (Class Action), ECF 81, at ¶¶ 33, 56, 65, 83, 93 (C.D. Cal. Sept. 7, 2018). Available at https://youthlaw.org/wp-content/uploads/2018/06/Lucas-R.-First-Amended-Complaint.pdf.

107. *See* Linton et al., *supra* note 100, at 6; HHS OIG Mental Health Needs of Children in HHS Custody, *supra* note 68, at 12-13.

108. HHS OIG Mental Health Needs of Children in HHS Custody, *supra* note 68, at 9-10.

109. *See Lucas R. v. Azar*, No. 2:18-cv-05741-DMG, First Amended Complaint for Injunctive Relief, Declaratory Relief, and Nominal Damages (Class Action), ECF 81 (C.D. Cal. Sept. 7, 2018). Available at https://youthlaw.org/wp-content/uploads/2018/06/Lucas-R.-First-Amended-Complaint.pdf; Disability Rights California Report, *supra* note 96, at 7.

110. *See* Hannah Dreier, *Trust and Consequences*, Washington Post, Feb. 15, 2020, https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/ ("A year later, in April 2018, ORR went a step further and entered into a formal Memorandum of Agreement with ICE to share details about children in its care. Explaining the strategy to Congress, Steven Wagner, who was overseeing ORR at that point, testified that among other things, the agency would be asking its therapists to "develop additional information" about children during "weekly counseling sessions where they may self-disclose previous gang or criminal activity to their assigned clinician.").

111. *See id*.; *see also* Ella Nilsen, *Kids who cross the border meet with therapists and social workers. What they say can be used against them*, Vox, June 19, 2018, https://www.vox.com/policy-and-poli¬tics/2018/6/18/17449150/family-separation-policy-immigration-dhs-orr-health-records-undocu¬mented-kids.

112. *See* Hannah Dreier, *Bill would end practice of using confidential therapy notes against detained immigrant children*, Washington Post, Mar. 4, 2020, https://www.washingtonpost.com/national/bill-would-end-practice-of-using-confidential-therapy-notes-against-detained-migrant-children/2020/03/04/0ab73d52-5e46-11ea-9055-5fa12981bbbf_story.html.

113. *See* Mental Health Liaison Group, *Letter to Congress*, Feb. 28, 2020, https://www.apa.org/news/press/releases/2020/02/confidentiality-immigration-letter.pdf; *see also* Amer. Psychol. Assoc., *Letter to HHS & DHS*, Feb. 21, 2020, https://www.apa.org/news/press/releases/2020/02/confidentiality-immigration-letter.pdf.

114. *See* S.3392, Immigrants' Mental Health Act of 2020, https://www.congress.gov/bill/116th-congress/senate-bill/3392; *Rep. Napolitano & Sen. Merkley Introduce the Immigrants' Mental Health Act*, Mar. 4, 2020, https://napolitano.house.gov/media/press-releases/rep-napolitano-sen-merkley-introduce-immigrants-mental-health-act.

115. Amer. Acad. Child & Adolescent Psychiatry, *A Guide for Community Child Serving Agencies on Psychotropic Medications for Children and Adolescents*, Feb. 2012, http://www.aacap.org/app_themes/aacap/docs/press/guide_for_community_child_serving_agencies_on_psychotropic_medications_for_children_and_adolescents_2012.pdf.

116. *See id*.

117. *See* Amer. Acad. Child & Adolescent Psychiatry, *Recommendations about the Use of Psychotropic Medications for Children and Adolescents Involved in Child-Serving Systems* (2015), https://www.aacap. org/App_Themes/AACAP/docs/clinical_practice_center/systems_of_care/AACAP_Psychotro-pic_Medication_Recommendations_2015_FINAL.pdf.

118. *See* Dep't Health & Human Servs., *ORR Policy Guide: Children Entering the United States Unaccompanied*, § 3.4.4., https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied.

119. *See* Matt Smith & Aura Bogado, *Immigrant children forcibly injected with drugs, lawsuit claims*, Reveal, June 20, 2018, https://revealnews.org/blog/immigrant-children-forcibly-injected-with-drugs-lawsuit-claims/.

120. *See Flores v. Sessions*, No. 2:85-cv-04544-DMG, Order re Plaintiffs' Motion to Enforce Class Action Settlement (C.D. Cal. July 30, 2018).

121. *See* Keegan Hamilton, *Immigrant Teens Say They're Being Forcibly Drugged in US Custody*, Vice, Dec. 9, 2020, https://www.vice.com/en/article/93w3ey/migrant-teen-describes-forced-injections-in-us-custody-my-body-feels-desperate.

122. Kids in Need of Defense, *KIND Blueprint: Concrete Steps to Protect Unaccompanied Children on the Move*, at 6-8, Nov. 2, 2020, https://supportkind.org/wp-content/uploads/2020/11/KIND-Blueprint-Concrete-Steps-to-Protect-Unaccompanied-Children-on-the-Move-FINAL-2.pdf.

123. TRACImmigration, *Children: Amid a Growing Court Backlog Many Still Unrepresented*, Sept. 28, 2017, https://trac.syr.edu/immigration/reports/482/.

124. Kids in Need of Defense, *KIND Blueprint: Concrete Steps to Protect Unaccompanied Children on the Move*, at 6, Nov. 2, 2020, https://supportkind.org/wp-content/uploads/2020/11/KIND-Blueprint-Concrete-Steps-to-Protect-Unaccompanied-Children-on-the-Move-FINAL-2.pdf.

125. *See Lucas R. v. Azar*, No. 2:18-cv-05741-DMG, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, ECF. 271-1, at 16 (C.D. Cal. Oct. 2, 2020)

126. *Flores* Settlement ¶ 6.

127. *See Flores v. Johnson*, No. cv-85-04544-DMG,Order re Plaintiffs' Motion to Enforce Settlement of Class Action and Defendants' motion to Amend Settlement Agreement, at 14 (C.D. Cal. July 24, 2015).

128. *See* 42 U.S.C. § 671(a)(10) (requiring that states receiving funding under Title IV-E of the Social Security Act adopt licensing standards).

129. *See* U.S. Homeland Security & Gov't Affairs Permanent Subcommittee on Investigations, *Majority and Minority Staff Report - Oversight of HHS Shelter Grants for Unaccompanied Alien Children*, Dec. 8, 2020, https://www.hsgac.senate.gov/imo/media/doc/2020-12-08%20PSI%20Staff%20Report%20-%20Oversight%20of%20HHS%20Shelter%20Grants%20for%20UACs.pdf. In July 2020, HHS required grant applicants to disclose prior licensing violations and possess a license at the time of application, but as of December 2020, HHS officials "expressed uncertainty" as to whether this information would be required in the future. *Id*. at 4.

130. *Id*. at 1.

131. *Id*. at 55.

132. *See* Child Welfare & Unaccompanied Children in Federal Immigration Custody Guide, *supra* note 74, at 6.

133. *See* Blake Ellis, Melanie Hicken & Bob Ortega, *Handcuffs, assaults, and drugs called 'vitamins': Children allege grave abuse at migrant detention facilities*, CNN, June 21, 2018, https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html.

134. U.S. Homeland Security & Gov't Affairs Permanent Subcommittee on Investigations, *Majority and Minority Staff Report - Oversight of HHS Shelter Grants for Unaccompanied Alien Children*, Dec. 8, 2020, https://www.hsgac.senate.gov/imo/media/doc/2020-12-08%20PSI%20Staff%20Report%20-%20Oversight%20of%20HHS%20Shelter%20Grants%20for%20UACs.pdf.

135. Nat'l Conf. State Legislatures, *Children's Ombudsman Offices | Office of the Child Advocate*, July 15, 2020, https://www.ncsl.org/research/human-services/childrens-ombudsman-offices.aspx.

136. *See* Older Americans Act, Pub. L. No. 89-73, 79 Stat. 218 (1965).

137. *See* Dep't Health & Human Servs., *Latest UAC Data – FY 2021*, https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2021/index.html.

138. *See, e.g., Flores v. Barr*, No. 2:85-cv-04544-DMG, Order re Plaintiffs' Motion to Enforce Settlement as to "Title 42" Class Members, ECF 976, at 4 n2 (C.D. Cal. Sept 4, 2020); *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Order re Defendants Ex Parte Application to Stay, ECF 990, at 3 n2 (C.D. Cal. Sept 21, 2020).

139. *See* Adoption and Safe Families Act, Pub. L. No. 105-89, § 203(a), 111 Stat. 2115 (1996).

140. Children's Bureau, Dep't Health & Human Servs., *Child Welfare Outcomes 2016: Report to Congress*, Sept. 9, 2019, https://www.acf.hhs.gov/cb/resource/cwo-2016.

141. North Carolina Div. Social Servs. & Family and Children's Resource Prog., *Child Welfare Prac¬tice and Data: Making the Connection*, 14 Children's Service Practice Notes 2 (April 2009), http://www.practicenotes.org/v14n2.htm.

142. *See Flores* Settlement ¶ 12.

143. *See* 8 U.S.C. § 1232(b)(3).

144. *See Flores v. Barr*, Case No. CV-85-4544-DMG, Memorandum of Points and Authorities in Support of Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction and Contempt Order Should Not Issue, ECF 572-1 (C.D. Cal. June 26, 2019).

145. Meagan Flynn, *Three dozen migrants with flu virus quarantined at Texas processing facility*, Washington Post, May 22, 2019, https://www.washingtonpost.com/nation/2019/05/22/mcallen-detention-center-flu-outbreak-teenage-migrant-died-custody/.

146. *See* U.S. Dep't Homeland Security, Office of the Inspector General, *Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley (Redacted)*, July 2, 2019, https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf.

147. *See Flores v. Barr*, No. 2:85-cv-04544-DMG, Plaintiffs' Response to Juvenile Coordinators' Interim Reports, ECF 1039 (C.D. Cal. Nov. 23, 2020). Available at https://youthlaw.org/wp-content/uploads/1997/05/1039_Response-to-ICE-ORR-JC-Report-November-2020.pdf.

148. Dep't of Justice Monthly *Flores* Reports, *U.S. Border Patrol (USBP) Children with Time In Custody (TIC) Hours More than 72 Hours (Excludes Transfers to ERO or HHS)*, Dec. 2020.

149. Women's Refugee Commission, Kids in Need of Defense, Young Center for Immigrant Children's Rights, *Recommendations for CBP Standards When Detaining Children*, Mar. 28, 2019, https://static1.squarespace.com/static/597ab5f3bebafb0a625aaf45/t/5ce419146070c6000188aadc/1558452500801/Recommendations+For+CBP+Standards+While+Detaining+Children.pdf.

150. *See* Katharina Obser, Women's Refugee Commission, *Locking Up Family Values, Again: The Detention of Immigrant Families*, Oct. 30, 2014, https://www.womensrefugeecommission.org/resources/document/1085-locking-up-family-values-again; *Flores v. Johnson*, No. cv-85-04544-DMG, Declaration of Dr. Luis Zayas, ECF 101-7, at ¶¶ 1-6 (C.D. Cal. Dec. 10, 2014).

151. *See* Wendy Cervantes, *Family Detention: The Harmful Impact on Children*, First Focus Center for the Children of Immigrants, Dec. 2015, https://firstfocus.org/wp-content/uploads/2015/07/Family-Detention.pdf.

152. *See* Immigration & Customs Enforcement, Advisory Committee on Family Residential Centers (ACFRC), *Report on the DHS Advisory Committee on Family Residential Centers*, at 2, Oct. 7, 2016 https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf.

153. Office of Inspector General, Department of Homeland Security, *U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program Contract (Redacted)*, at 5, Nov. 30, 2017, https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22- Nov17.pdf.

154. *See* Wendy Cervantes, *Family Detention: The Harmful Impact on Children*, First Focus Center for the Children of Immigrants, Dec. 2015, https://firstfocus.org/wp-content/uploads/2015/07/Family-Detention.pdf (citing The National Immigration Forum, The Math of Immigration Detention, 2013, http://immigrationforum.org/blog/themathofimmigrationdetention/.).

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

156. *See* Danielle Silva, *ICE Arrested 170 Immigrants Seeking to Sponsor Migrant Children*, NBC News, Dec. 11, 2018, https://www.nbcnews.com/news/amp/ncna946621?__twitter_impression=true&fbclid=IwAR 2GIylVz6scXpWu6Xh_zux3MFNWmDE5e2TqZoRam9oshAbl53_XcP210mE.

157. *See* Women's Refugee Commission, Nat'l Immigrant Justice Center, American College Washington University College of Law, *Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement*, Mar. 2019, https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2019-03/Children-as-Bait.pdf.