



Immigration Brief:

April 2021

# Eight Ways to Ease the Child Detention Crisis

More than a decade after the conditions in northern Central America led to increasing numbers of families and children arriving in the United States without their parents, the federal government has failed to build a humane system to ensure their welfare and safety. As a result, children as young as six are being detained in overcrowded U.S. Border Patrol stations and makeshift tent camps, going for days without being allowed outside to play or even shower.<sup>1</sup> This cruel and inhumane treatment of vulnerable children must end. The Vera Institute of Justice (Vera) offers the following recommendations so policymakers can better center the interests of unaccompanied children and adhere to best practices for child welfare. These eight recommendations reflect lessons Vera has learned over a decade and a half of advocating for unaccompanied children across three different presidential administrations.

## 1. Create child-friendly alternatives to reception by law enforcement

At present, law enforcement agencies like U.S. Customs and Border Protection (CBP) apprehend and conduct an initial interview with children who enter the United States without their parents. A better system would use U.S. Citizenship and Immigration Services (USCIS) staff trained in child- and trauma-informed interviewing techniques to greet unaccompanied children and begin gathering potential sponsor information, identifying preferred languages, evaluating immediate needs, and screening for potential abuses during children's journeys to the United States. If USCIS identifies children with heightened vulnerabilities or needs, officers can refer these children to local legal services providers and/or child advocates to help children be released to sponsors or transition to the custody of the Office of Refugee Resettlement (ORR), which is charged with caring for and swiftly reunifying children who arrive in the United States unaccompanied.

## The many agencies that impact unaccompanied children

**U.S. Customs and Border Protection**, (CBP) with its sub-office, the Border Patrol, is a federal law enforcement organization tasked with border management and control. It is a department of the U.S. Department of Homeland Security (DHS). CBP agents are often the first to encounter unaccompanied children and take them into custody.

**U.S. Department of Health and Human Services** (HHS) is a department of the federal government intended to protect the health of people in the United States and to provide essential human services. After CBP officers apprehend unaccompanied children, CBP transfers them to the HHS for care and placement.

**U.S. Citizenship and Immigration Services** (USCIS) is an agency of DHS that administers the U.S. naturalization and immigration system. Unaccompanied children must get approval from USCIS to remain in the country.

The **Office of Refugee Resettlement** (ORR) is a program of the Administration for Children and Families, a division of HHS. ORR has responsibility for the temporary care and swift release of unaccompanied children. When children are apprehended by DHS immigration officials, they are transferred to the care and custody of ORR, which is supposed to place “an unaccompanied child in the least restrictive setting that is in the best interests of the child, taking into consideration danger to self, danger to the community, and risk of flight.”<sup>a</sup> The agency is also supposed to provide legal services to every child who passes through ORR custody and legal representation for unaccompanied children facing deportation proceedings to the greatest extent practicable.

<sup>a</sup> Office of Refugee Resettlement, “Unaccompanied Children,” <https://perma.cc/A7SN-HHJN>.

## 2. Keep families together

Many children arrive in the United States with safe and trusted caregivers—aunts, uncles, adult cousins—who are not their biological parents.<sup>2</sup> Under current practice, these children are traumatically separated from these family members and placed in ORR custody. Weeks or even months later, ORR identifies adults to whom the child can be safely released. Often, the child is placed with the same adult with whom they arrived in the United States. A better model would use ORR officials at the border to immediately evaluate family relationships at the point of arrival in child-friendly, non-detention spaces. In many cases, related children and adults could be released together if ORR confirms the relationship and rules out risks of trafficking and other immediate dangers to the child.<sup>3</sup> All children released in this

way must be connected to legal services providers to ensure they fully understand their legal rights and obligations and can eventually be matched with legal counsel.

## 3. End expulsions of families

Title 42, an obscure public health code, allows the government to reject or expel people based on potential contagions like COVID-19.<sup>4</sup> The Trump administration used this code against unaccompanied children, single adults, and families, though a federal court order temporarily halted the process. The Biden administration has not continued to use Title 42 against unaccompanied children, but does still use the summary expulsion practice for adults and families.<sup>5</sup> Under no circumstances should this practice be resurrected as to children.

## 4. Quickly reunify children with family

ORR is supposed to take responsibility for children suspected of having entered the country without documentation after the children are transferred from U.S. Department of Homeland Security (DHS) custody. By law, this transfer must happen within 72 hours.<sup>6</sup> ORR must not only swiftly release children to relatives—or place them in a licensed childcare setting when no viable adult “sponsor” (family or family friend) is available—the agency must also ensure that these children, who are all charged by DHS as deportable, have access to legal counsel.<sup>7</sup> But the agency has relied heavily on large-scale congregate settings that are often harmful to children who have already suffered trauma. Children often face many weeks or months in ORR custody.<sup>8</sup>

It doesn't have to be this way. Most state child welfare agencies vet and place children with kin within 48 hours.<sup>9</sup> The federal government should get help from these experienced professionals. Instead of primarily relying on confined institutional settings for children, ORR should swiftly vet sponsors, focus on release, and ensure community follow-up. And instead of devoting money and staff to operate makeshift holding centers for children, ORR should pay for licensed social workers with child welfare expertise who can quickly trace kinship, verify family relationships, assist sponsors with paperwork, and release children to their families or community-based sponsors.

## 5. Ensure legal representation

Children cannot be expected to navigate complex and confusing immigration proceedings alone, so it is imperative that every child facing deportation should have access to legal representation. This can be done through:

- › Increasing the number of attorneys who can work with unaccompanied children by adding federal funding for programs that provide direct representation to children. The federal government should provide sufficient funding so that every child who is threatened with deportation has a lawyer trained in protecting the rights of vulnerable children. Further, to build talent in the highly specialized children's immigration law field, the federal government should create a pipeline to recruit, place, and train new attorneys to work with experienced children's legal services providers. Using lessons learned from the successful Immigrant Justice Corps fellowship model and the justice AmeriCorps program, this program would grow legal talent in the field and increase the number of attorneys able to help children in less-resourced areas.<sup>10</sup> The federal government should link this capacity-building program with ORR-funded legal representation providers to mentor and support new attorneys, so they continue working in the field. With appropriate federal investment over the next five years, such a program could recruit, train, and place more than 4,000 new attorneys in the legal field to absorb pending cases of unaccompanied children.
- › Organizing special "released children" immigration court dockets equipped with child-friendly practices that also ensure effective court processes, including:
  - › **Dedicated specialized judges assigned to the children's docket** to allow for better coordination of parties and relevant stakeholders, including child advocates, while also ensuring familiarity with relevant law in children's cases and child-friendly court practices.
  - › **An attorney of the day program** at immigration courts and local USCIS offices to intake unrepresented children and provide referrals. This system could inform the court and DHS of local legal capacity and advise when there are no available attorneys, meaning children need more time to find counsel.
  - › **Funding social services as needed, which could also be coordinated with the help of a secure database.** Legal services providers, particularly if they have embedded social services staff, can act as a hub to and provide referrals to mental health care, social services, nutrition assistance, health care, and education.
- › Coordinating post-release referrals. ORR should share sponsor and release information for all children with the specialized legal services providers that conduct legal intakes and referrals for every child released from ORR custody. These providers could then refer children to independent child advocates if necessary. Such a system would ensure continued contact between the local legal defense provider and the child until it can take on the child's case.
- › Implementing concerted, federally funded recruitment, training, and mentoring of private volunteer attorneys to lighten the load on direct representation attorneys. The state court portions of children's Special Immigrant Juvenile Status cases, USCIS applications, and other discrete portions of a child's case are well-suited for mentored pro bono attorneys, regardless of their prior experience in immigration law and even if they cannot see children's immigration cases through to final order. With mentorship from expert removal defense attorneys, private attorneys from other fields can boost the capacity of the immigration legal defense bar.
- › Working with states and localities that already have dedicated legal defense funding for unaccompanied children or other immigrant populations to assess referral mechanisms and grow representation capacity. Vera currently works with the State of California to refer cases of children recently released from ORR custody to state-funded legal services providers. Where states are already investing in these types of legal and social service needs for unaccompanied children, the Biden administration can provide programmatic reimbursement to scale up legal representation and other critical post-release services.
- › Learning from best practices for unaccompanied child care at the local level. For example, California is working on a pilot program in three locations to provide wraparound services for unaccompanied children. This pilot is innovating ways to use school sites and nonprofits to provide children with a full range of services—from school registration and mental health services to legal representation. The federal government should partner with state and local innovators to ensure holistic support for unaccompanied children.



## 6. Provide immediate temporary relief for unaccompanied children

The Biden administration should grant unaccompanied children deferred enforced departure (DED) or “parole in place,” both of which would allow them to remain in the United States until the age of 21.<sup>11</sup> The administration could provide DED through an [executive order](#) or memorandum, or the DHS secretary could provide [parole in place](#) for urgent humanitarian reasons. For children with an approved application for Special Immigrant Juvenile Status who currently must wait years for a visa, the administration should provide Deferred Action status, as it has done for years in the U visa context. Taking these steps would allow children to remain in lawful status while pursuing more permanent forms of immigration relief without burdening the immigration courts. To make sure these children have representation to help them apply for permanent status by the time they turn 21, the agency should refer them to local legal service providers.

## 7. Amend asylum regulations to help kids pursue relief

The Trump administration issued more than 400 immigration-related policies and regulations, many of which made the asylum system more complex to navigate.<sup>12</sup> To respond more appropriately to the humanitarian claims of unaccompanied children and recognize the unique difficulties they face in presenting their cases, the Biden administration should revoke recent asylum regulations and issue new ones that recognize long-established precedents in U.S. and international law that protect people from persecution.

## 8. Invest in post-release services

To minimize the risk that children will be released to inappropriate or potentially exploitative circumstances, ORR should coordinate legal representation for children released from custody as well as post-release services, such as home studies, where necessary to support the family or sponsor and ensure safe, stable placements. To accomplish this:

- › ORR should provide the Young Center for Immigrant Children’s Rights’s [child advocates program](#), Vera’s network of legal services providers, and post-release services providers with sufficient release information—including case identification number and contact information—so that all released children receive confidential follow-up from critical service providers.
- › ORR should provide sufficient funding for legal services and child advocate programs in every location where there is an immigration court or USCIS office, as well as child-friendly legal orientation presentations, legal screenings, full-scope representation, and [Young Center](#) child advocates.
- › ORR should provide sufficient funding for legal services providers to hire bilingual social workers to conduct outreach and case management services—in person where possible and remotely if necessary—to enable a coordinated response for children released from ORR custody.

Urgent change is needed to ensure the safety and protection of vulnerable children who arrive in the United States. These recommendations can help build a system that is responsive to their needs and safeguard their humanity.

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## Endnotes

- 1 Miriam Jordan, “No Place for a Child’: Inside the Tent Camp Housing Thousands of Migrant Children,” *New York Times*, March 30, 2021, <https://www.nytimes.com/2021/03/30/us/texas-border-facility-migrants.html>; Miriam Jordan, Simon Romero, and Zolan Kanno-Youngs, “Children Are Sleeping on Mats in Overcrowded Border Facilities,” *New York Times*, March 15, 2021, <https://www.nytimes.com/2021/03/15/us/border-migrant-children-texas.html?action=click&module=RelatedLinks&pgtype=Article>; and Adolfo Flores, “Unaccompanied Immigrant Children Say They’re Being Held Inside an Overcrowded Facility without Showers,” *Buzzfeed News*, March 15, 2021, <https://perma.cc/VJ4S-M52D>.
- 2 Camilo Montoya-Galvez, “U.S. Shelters Received More than 7,000 Migrant Children in February, Posing Early Border Test for Biden,” *CBS News*, March 6, 2021, <https://perma.cc/V45U-NXS5>; Ted Hesson and Mica Rosenberg, “Explainer: Why More Migrant Children Are Arriving at the U.S.–Mexico Border,” *Reuters*, March 18, 2021, <https://perma.cc/A8ZK-6BPW>; and Colleen Long and Amy Taxin, “‘And Now We Are Alone’: Extended Family Separated at Border,” *Associated Press*, July 2, 2019, <https://apnews.com/article/08d9f07b1bc54c5b982825bc1381b8d5>.
- 3 During this process, children should retain the “unaccompanied child” designation because they entered the country without a parent or legal guardian and require Trafficking Victims Protection Reauthorization Act protections. Victims of Trafficking and Violence Protection Act of 2000, P.L. 106-686, October 28, 2000, <https://perma.cc/JSF5-HXWT>.
- 4 42 U.S.C. § 265, <https://perma.cc/CP87-9WGU>.
- 5 For the court case, see *P.J.E.S. v. Wolf*, Civ. Action No. 20-2245 (EGS) [Order Granting Preliminary Relief, November 18, 2020], <https://perma.cc/C5H6-98HG>. For current practices, see Rebecca Morin, “Biden Continues to Use Title 42, a Trump-Era Immigration Policy. But He’s Made One Key Change,” *USA Today*, March 26, 2021, <https://perma.cc/E8YQ-9CNZ>.
- 6 8 U.S.C. § 1232, <https://perma.cc/X8CF-UN5N>.
- 7 *Ibid.*; and *Flores v. Reno*, No. CV-85-4544-RJK(Px) (C.D. Cal., November 13, 2014) [settlement agreement], <https://perma.cc/QPR2-T3T6>.
- 8 U.S. Department of Health and Human Services, Office of the Inspector General (HHS OIG), *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody* (Washington, DC: HHS OIG, 2019), 20, <https://perma.cc/KGY6-FYWX>.
- 9 See for example Jacob Leos-Urbel, Roseana Bess, and Rob Geen, *State Policies for Assessing and Supporting Kinship Foster Parents* (Washington, DC: Urban Institute, 1999), <https://perma.cc/W8K2-6YRY>; and Casey Family Programs, *Strong Families* (Seattle, WA: Casey Family Programs, 2020), <https://perma.cc/8ECS-VHUY>.
- 10 *Immigrant Justice Corps* identifies promising lawyers and advocates passionate about immigration, places them with legal services and community-based organizations where they can make the greatest difference, and supports them with training and expert insights as they directly assist immigrants. *Justice AmeriCorps* recruits people to provide legal services to unaccompanied children during immigration proceedings and facilitate the identification of unaccompanied children who have been victims of abuse, trafficking, or trauma or who may be abused, trafficked, or traumatized on return to their countries of nationality or last residence.
- 11 DED is a designation that protects a person from deportation from the United States, usually for a designated period. DED is in the president’s discretion to authorize as part of his constitutional power to conduct foreign relations. USCIS, “Deferred Enforced Departure,” <https://perma.cc/PHL5-SDEY>. For more information about parole in place, see USCIS, “Discretionary Options for Military Members, Enlistees, and their Families,” <https://perma.cc/3YAB-P83G>.
- 12 See Sarah Pierce and Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency* (Washington, DC: Migration Policy Institute, 2020), <https://perma.cc/RD5E-RL52>.

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## For more information

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