

NOT LOOPHOLES! HOW THE FLORES SETTLEMENT & TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT (TVPRA) SAVE LIVES

A LEGAL OBLIGATION TO TREAT CHILDREN DIFFERENTLY FROM ADULTS

The 1997 Flores Settlement Agreement and the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA) exist because children are different from adults. Immigrant children are uniquely vulnerable and at high risk for trauma, trafficking, and abuse. As described below, Flores and the TVPRA provide critical protections designed especially for children in removal (deportation) proceedings. Yet the laws have been attacked as “loopholes” that are exploited by smugglers, parents and even *children*.

This false narrative must be rejected. For years, Flores and the TVPRA have protected children who were later granted asylum or status as trafficking survivors. Eliminating either one would end more than two decades of progress toward a more child-appropriate immigration system. Children would again be placed in prison-like conditions for prolonged periods, separated from their families. All children at the border could be turned away unless a Customs and Border Protection (CBP) officer, who is not a child-welfare expert, interviewed the child and decided he or she qualified for protection. And children would once again be forced to pursue asylum in immigration court, where they face cross examination by a government attorney often without an attorney of their own. In short, children would be sent back to the very same conditions that forced them to flee their homes in the first place.

FLORES SETTLEMENT AGREEMENT: BASELINE CHILD PROTECTION STANDARDS

Flores established the first national guidelines for the detention, release, and treatment of children in the immigration detention system. Before the agreement, children as young as four years old were held in prison-like conditions where they were at risk for further trauma and abuse. In response to these conditions, a federal court approved the Flores Settlement Agreement which created a presumption against child detention and requires that children be held in the “least restrictive setting” possible—either with family, a suitable adult, or in a facility licensed by a state child welfare agency for the long-term care of children.ⁱ The Flores Settlement Agreement also recognized that immigrant children should be treated “with dignity, respect and special concern for their particular vulnerability as minors.”ⁱⁱ

TVPRA: RECOGNIZES THAT IMMIGRANT CHILDREN ARE CHILDREN

Congress passed the TVPRA in 2008 with strong bipartisan support. In the TVPRA, Congress recognized that immigrant children’s welfare and safety should be paramount considerations. Section 235 (Enhancing Efforts to Combat the Trafficking of Children) provides specific protections regarding care, release, and due process that is child-appropriate.

Child-appropriate care and release to family. The TVPRA distinguishes legal procedures for unaccompanied children who are from countries that border the United States (Mexico and Canada) and those who are not. When the government identifies an unaccompanied child who is not Mexican or Canadian, that child must be promptly transferred to the Office of Refugee Resettlement (ORR) for short term protective custody until the child can be placed in the least restrictive setting possible—either with a parent, close relative, legal guardian, or in a shelter or foster home. Protections for Mexican and Canadian children are much more limited: CBP officials must screen them to determine whether they are trafficking victims, are eligible for asylum, or lack the capacity to make an independent decision to return. Children who do not meet these criteria are immediately sent back across the border. A UNHCR study conducted after this provision was

established found that CBP consistently failed to correctly identify child trafficking victims and asylum-eligible children from Mexico and instead returned them to dangerous situations.ⁱⁱⁱ

Due Process. The TVPRA provides critical legal protections for children. Children placed with ORR meet with attorneys who advise them of their rights and may represent them in their immigration cases. The law also authorizes the appointment of independent Child Advocates to the most vulnerable children: infants and toddlers, child trafficking victims, pregnant and parenting teens, children with disabilities and health concerns, and children taken from their parents at the border. Child Advocates ensure consideration of the child's best interests—safety and well-being—in every decision. Additionally, under the TVPRA children's claims for protection must be heard by asylum officers rather than immigration judges, so that children can present their claims in a non-adversarial environment that is sensitive to their status as children. Lastly, in cases where children do not qualify for legal relief, the State Department must safely repatriate children to an appropriate agency in their country of nationality at a time and location that ensures their safety.

THANKS TO FLORES AND THE TVPRA

- **Immigrant children who arrive alone at the U.S. border are placed in protective custody.**
 - Pre-Flores, children languished in DHS (then-INS) detention without guarantees of medical care, adequate nutrition, education, or access to attorneys or religious services.
 - Pre-TVPRA, many child trafficking victims and asylum-seekers found at the border were immediately sent back—often into the hands of smugglers or those who would do them harm.
- **Immigrant children in custody meet with attorneys, can be appointed an independent Child Advocate, may seek asylum through an interview, and if returning to home country, must be safely repatriated.**
 - Pre-TVPRA, there was no statute requiring children to be released from government custody to the least restrictive setting (their families) during their immigration case, and the government bore no obligation to safely repatriate children who could not remain in the US.

RECOMMENDATIONS FOR CONGRESS

- **Reject all legislative efforts to eliminate or reduce protections for immigrant children in the TVPRA or Flores Settlement Agreement.**
- **Increase protections so that all children at the border are treated fairly, have to access to government-funded counsel, and are not returned to unsafe situations.**
- **Ensure that federal agencies comply with laws regarding placement, services, release from custody, and safe repatriation for children.**
- **Require that the best interests of the child—safety and well-being—is a primary consideration in any decision about immigrant children.**

ⁱ *Flores v. Reno*, Case No. CV 85-4544-RJK (Px) ¶ 14 (CD Cal. Nov. 30, 1987). The Agreement mandated minimum standards for the detention of immigrant children, including (1) food and drinking water; (2) medical assistance in the event of emergencies; (3) toilets and sinks; (4) adequate temperature control and ventilation; (5) adequate supervision to protect children from others; and (6) separation of children from unrelated adults. Agreement ¶ 12.

ⁱⁱ Flores ¶ 11.

ⁱⁱⁱ U.N. High Comm'r for Refugees, Confidential Report, Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border 5 (June 2014), http://www.immigrantjustice.org/sites/immigrantjustice.org/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf (leaked to the media).