

# PRIORITIZING THE BEST INTERESTS OF ALL CHILDREN





# **PRIORITIZING THE BEST INTERESTS OF ALL CHILDREN**

---

## Introduction

---

Refugee and immigrant children travel to the United States from across the world to reunify with family and to find a safe place to grow up. However, what they often experience at our borders is family separation and detention-like conditions. For those who are able to enter the country, immigration proceedings are protracted and complex, and children are not guaranteed the right to an attorney. Instead, a child must prove that they deserve to stay in the country while the U.S. government uses its myriad resources to argue against them. If the child loses, they will be repatriated to their country of origin with little regard to their safety. Rather than prioritizing children's best interests, the government is largely free to adopt whatever approach it finds expedient to advance its political or bureaucratic goals, with little accountability.

Most significantly, there is no requirement in federal immigration law or policy that government officials prioritize what is good for children in all decisions affecting them. While immigration advocates have managed to carve out a few protections for unaccompanied children – children arriving at the border without parents or legal guardians – once they enter federal custody, these are limited in scope. The Flores Settlement Agreement, a consent decree which has been in force since 1997, was just terminated as to HHS in June 2024 and replaced with new regulations. While the consent decree is still in force as to children held in DHS custody, these regulations, known as the ORR Foundational Rule, set minimum standards for the care of children in ORR custody. The Trafficking Victims Protection Reauthorization Act (TVPRA 2008) allows the Office of Refugee Resettlement to appoint Child Advocates to particularly vulnerable unaccompanied children. Over the last 20 years, the Young Center has served as independent Child Advocate for thousands of unaccompanied children, making best interest determinations (BIDs) in each child's case. The government is not required to follow these BIDs and only a small percentage of children are appointed Child Advocates.

It is time for this gap in law, policy, and practice to end. Congress should amend the Immigration and Nationality Act and require government agencies to make immigrant children's best interests, grounded in the Convention on the Rights of the Child (CRC), a primary consideration in any decision that will affect them. They must apply the principle in a way that promotes both children's right to safety and family unity. Until then, every government agency with responsibility for immigrant children should establish policies and practices that ensure the consideration of a child's best interests in every decision.



## What is the “best interests of the child” standard?

The “best interests of the child” standard is a foundational principle of child protection in both international law and United States child welfare law. The Convention on the Rights of the Child (CRC) requires governments and other entities to make the “best interests of the child” a primary consideration in all actions regarding children.<sup>1</sup> As a signatory, the U.S. government should not act in contravention of this principle. In the United States, all 50 states, the District of Columbia and Puerto Rico have laws requiring courts to consider a child’s best interest in any decision “about a child’s custody or critical life issues.”<sup>2</sup> The 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), requires that unaccompanied children in the custody of the Office of Refugee Resettlement (ORR) “shall be promptly placed in the least restrictive setting that is in the best interest of the child.”<sup>3</sup> The TVPRA also authorizes independent child advocates, who are appointed to advocate for the best interests of the child.<sup>4</sup>

The term “best interests” has no exact definition. It encompasses both a substantive right – a child’s right to have their best interests considered in any decision about them– and procedural protections to ensure that there is “an evaluation of the possible impact” of decisions upon the child or a group of children.<sup>5</sup> In 2013, the CRC articulated seven specific elements for assessing a child’s best interests:

1. The child’s views.
2. The child’s identity.
3. Preservation of the family environment and maintaining relationships.
4. The care, protection, and safety of the child.
5. A situation of vulnerability.
6. The child’s right to health.
7. The child’s right to education.

Over the years, the Young Center has incorporated these elements into its best interests advocacy for children. In 2016, the federal Subcommittee on Best Interests of the Interagency Working Group on Unaccompanied and Separated Children released a proposal for considering the best interests of unaccompanied children from the moment of their apprehension until final resolution of their claim for protection. The Working Group adopted similar best interests factors to the Convention, including:

- safety and well-being;
- the child’s expressed interests, in accordance with the child’s age and maturity;
- health;
- family integrity;
- liberty;
- development (including education); and
- identity.

As a result of advocacy by the Young Center and others, in 2024 ORR included a definition of best interests in the foundational rule, and named specific decisions that must include an analysis of what is in a child’s best interest.

## When the Government Fails to Implement a Best Interests Standard, It Harms Children

Children arrive at our borders seeking protection. But before anyone hears their stories, the government charges these children with violating immigration laws, placing them in adversarial immigration court proceedings, and detaining them. The lack of a best interests standard in this process has led to absurd results, in many cases leading to long-term or permanent family separation. It has allowed government agencies to implement policies that hurt children without any accountability. Without a best interests standard applied in a culturally sensitive, trauma informed manner, these scenarios happen every day:

- Border patrol agents routinely separate children from trusted family members regardless of the trauma this may cause the child;
- Children are warehoused in large congregate care facilities which hold hundreds

or even thousands of children for days on end with little information about their case or when they will be released to family;

- Children with disabilities often spend prolonged periods in detention, sometimes in restrictive settings which are counterproductive to their needs;
- Children of any age – even babies – do not have a right to a government-funded attorney and must prove they should be allowed to stay in the United States;
- Children are forced into hearings while still detained, without representation or a Child Advocate.
- The ICE attorney prosecuting the case against an unaccompanied child, and the judge who hears it, do not have to consider if their decisions may permanently separate the child from a parent;
- Immigration judges do not have to consider whether a child has a parent or guardian to care for them in home country when deciding to remove (deport) a child.

### JUAN

Shortly after Juan was born in Honduras, his parents were murdered, leaving his grandmother to care for him. At 8 years old, he and his grandmother traveled to the U.S. fleeing violence, but upon crossing the border, they were separated, and Juan was taken into federal custody. Juan's grandmother was deported back to home country, despite providing all necessary birth and death certificates to prove their relationship. Juan was held in custody for three months and was desperate to be reunited with his grandmother. He was eventually granted voluntary departure and was returned to Honduras. Failing to consider Juan's best interests—his need to remain with the adult he trusted most in the world—meant that Juan spent months locked up in government custody separated from his family before he abandoned his legal right to seek protection and returned to a situation of danger without any consideration of his safety by government officials.

- An immigration judge may order a child's removal (repatriation) even when presented with uncontroverted evidence that the child will be unsafe upon return. This can happen when a child's case does not meet a technical definition of certain forms of protection, because there is no form of protection for children who face harm in home country unique to their status as children.

Without a federal best interests standard consistent in law, policy, or practice, decision-makers are under little obligation to consider the unique needs of children and face few repercussions if their decisions place a child in harm's way – even if that possibility was well known.

## Recognizing the Best Interests Standard's Racially Discriminatory Application

Before we elaborate further on the potential benefits of a federal best interests standard for immigrant children, it is important to recognize the term's difficult history in other contexts. The best interests standard emerged in the early 20<sup>th</sup> century when notions of family life and the value of children began to shift. As family law developed, the term "best interests" was routinely used in custody decisions.<sup>6</sup> However, the subjective nature of the best interests standard has resulted in uneven and discriminatory outcomes, particularly in cases where the state charges parents with inadequate care of their children. Racist and paternalistic attitudes have led many decision-makers to substitute their own judgment about what is in a child's best interests regardless of the child's or the parents' views. Black children, for instance, are particularly vulnerable to surveillance and family separation as a result of adults purportedly acting in their best interests.<sup>7</sup>

“

*The system perpetuates itself placing the blame on parents for hardships that are largely the result of racial discrimination and structural inequality, realities that lead to more Black children living in poverty.”*

Black children are significantly overrepresented in foster care, spend longer periods of time in out of home care than other children, have higher rates of child protective services investigations, and suffer higher rates of the termination of parental rights.<sup>8</sup> In most cases, this surveillance and separation from family is unnecessary. Even child welfare actors operating in good faith sometimes make decisions rooted in implicit biases about race, class, poverty, and culture.<sup>9</sup> The system perpetuates itself, placing the blame on parents for hardships that are largely the result of racial discrimination and structural inequality, realities that lead to more Black children living in poverty.<sup>10</sup> Today more and more practitioners are challenging the system of “family policing”.<sup>11</sup>

Given this history, should the best interests standard be discarded? In the immigration context, the few places where the best interests standard exists have largely brought benefits to immigrant children, pushing the Department of Health and Human Services to

place a child in the least restrictive setting that is in the child's best interests and to appoint Child Advocates for vulnerable children to ensure that a child's best interests are considered in decision-making.<sup>12</sup> Whether or not the term "best interests" is used, we believe that a child-centered, child's-rights based best interests standard is necessary to ensure the fair and just adjudication of children's claims to protection. Such a standard could prevent the government from placing children in custody unnecessarily and protect children without family in the U.S. from being harmed in government custody while requiring that the government foster children's safe and healthy development as they navigate the immigration process.

# 7

## The Young Center's Best Interests Paradigm - Best Interests + Guardrails

The Young Center has worked to ensure that its use of the best interests standard for unaccompanied immigrant children has guardrails to minimize explicit and implicit bias and ensure that a child's own voice is heard.

For almost two decades, the Young Center for Immigrant Children's Rights has served as independent Child Advocate for unaccompanied immigrant children in federal custody. We employ a best interests paradigm derived from the elements outlined in the UN Convention on the Rights of the Child, state child welfare laws, and our own experience working with immigrant children. That framework includes important guardrails to ensure the child's wishes are prioritized.

### Child's wishes

The Child Advocate should always advocate for the child's wishes unless there's a clear risk to the child's safety.

### Child's safety

The Child Advocate should always advocate for the child's safety.

### Family integrity

Child's right to be with parents, siblings, children.

### Liberty

Child's right to be free from detention.

### Development

Child's right to food, shelter, education, and medical care.

### Identity

Including religion, language, gender, sexuality.

In addition to this paradigm, the Young Center has worked to minimize opportunities for subjective bias around issues such as poverty, race, or cultural norms which could cloud decision-making. Staff include lawyers trained in the legal system in which children's rights are adjudicated and who are bound by the ethical obligation of zealous advocacy, and social workers who bring a holistic understanding of children's needs and who are steeped in principles of child development and family and community systems. Staff are trained in trauma-informed interviewing techniques, cultural sensitivity, and diversity, equity and inclusion principles. For particularly challenging cases, the Young Center follows the a process that United Nations High Commission for Refugees (UNHCR) established and convenes a panel of outside experts to guide its recommendations, which provides a space for people unrelated to the case to test assumptions and biases.<sup>13</sup> These panels can also offer children opportunities to participate in the process of discerning what might be in their own best interests.<sup>14</sup>

## **Pathways to a federally-mandated best interests standard**

Advocates for children have managed to include references to children's best interests in some legislation, offering a glimpse of the enduring potential a broad-based statutory standard could bring. Bills like the Children's Safe Welcome Act, which structures how children are treated in government custody around child welfare principles, would have an enormous impact on centering children's best interests in decision-making that affects them.<sup>15</sup> Other bills, such as the Fair Day in Court for Kids Act, which would mandate government-funded counsel for children, would ensure that children's expressed wishes for their lives are known and would give kids a fighting chance of obtaining protection in our complex legal landscape.<sup>16</sup> In the same way, Congress could mandate a federal best interests standard for all government agencies and officials making decisions that affect immigrant children, either in a standalone bill or as a part of other legislation. The Young Center will continue to take advantage of any opportunity to introduce a best interests standard into legislation. However, given the Congressional stalemate over any meaningful immigration reform, agency-level changes offer the most immediate path to improving protections for immigrant children.

## **Agency-level changes to prioritize children's best interests**

Federal agencies can adopt agency-wide changes in policy and procedure which would require officials to consider a child's best interests as a part of each decision along the continuum of a child's care – from apprehension, to custody, to release, to a decision on the child's legal claim, including the possibility of repatriation. To complement agency-wide policies, individual offices within an agency could develop procedures to consider a child's best interests and provide action-specific



check lists for government officials and contractors faced with making decisions that impact a child. Detailed examples of checklists and protocols can be found in the Framework for Considering the Best Interests of Unaccompanied Children, which was created by the Interagency Working Group on Unaccompanied and Separated Children in 2016.<sup>17</sup> The following pages outline some of the many, current gaps in agency policy towards children and provide illustrative examples of how a best interests standard could improve outcomes for children.

## Prioritizing Best Interests at the Border

### 9

Nothing about the current system to receive and process children at the border considers their best interests. U.S. Customs and Border Protection (CBP), which first encounters children at the border, is a law enforcement agency, and its primary mission is “to detect and prevent the illegal entry of individuals into the United States.”<sup>18</sup> While its mission does not include the protection of non-citizen children, CBP’s National Standards on Transport, Escort, Detention and Search<sup>19</sup> obligate the agency to consider the best interests of the child in all decisions. However, this is little evidence of compliance with these standards. On the contrary, children’s experiences in CBP custody are often traumatizing.

Most children arriving at U.S. borders receive no protections based on their status as children. If they are apprehended with their parents or legal guardians, they are treated in the same way as adults. At the moment, they can be denied entry under a border management policy the Biden administration introduced, which advocates call the “asylum transit ban.” Under the transit ban, potential asylum seekers must first seek protection in another country or must obtain an appointment to present themselves at a U.S. port of entry.<sup>20</sup> Failure to take these steps will result in a 5-year bar on admission to the country. Protections for children are largely limited to unaccompanied children from non-contiguous countries (i.e., not Mexico or Canada).

### Unaccompanied Children – excluded due to national origin

When Congress finalized the Trafficking Victims Protection Reauthorization Act (TVPPRA) in 2008, it included a harmful compromise: unaccompanied children from contiguous countries, that is, Canada and Mexico, would not receive the same protections as children from non-contiguous countries. The decision has had an enormous impact on the ability of Mexican children to seek safety in the United States. According to a recent report from Amnesty International, from November 2020 to April 2021, CBP referred only 465 Mexican children to the Office of Refugee Resettlement, which means that in approximately 95 percent of cases, the government returned unaccompanied Mexican children to Mexico.<sup>38</sup> While children from contiguous countries are supposed to be screened to ensure they are not being returned to danger, Amnesty’s report concludes, as many others have over the years, that this system doesn’t work.<sup>39</sup> Instead, each year the government denies thousands of Mexican children the opportunity to seek protection in the United States based solely on their national origin. It is time for this compromise to be removed from federal law. All children should receive the same access to protection regardless of where they are from.

The government gives Mexican children who arrive at the border without a parent or legal guardian cursory screens for trafficking or persecution. If they identify no concerns, the children are turned around at the border, unable to enter the United States to seek protection.<sup>21</sup> Children from non-contiguous countries who arrive without a parent or legal guardian are placed in the custody of CBP. Within 72 hours, CBP must determine whether a child in its custody is “unaccompanied” and transfer the custody of the child to the Office of Refugee Resettlement (ORR), in the Department of Health and Human Services.

Currently, when CBP apprehends a child, alone or with family, it holds the child in jail-like conditions without child-friendly spaces, privacy, access to toys, or outdoor recreation. Most sites do not have proper bedding or clothing for children. Medical care is basic at best.<sup>22</sup> There are few personnel at these detention sites trained in the trauma-informed care of children and no one with professional training in evaluating family relationships to determine if the child would be safe in the custody of any relatives with which they arrived. Instead, if the child is traveling with a relative who is not a parent or legal guardian, such as a big brother, aunt, or grandmother, the government separates the child from their family and transports the child to an ORR shelter, often miles away. The government frequently puts the child's relatives in expedited removal and deports them. The agency could make adjustments, without legislative changes, to enhance the protection of children encountered by CBP. Priority recommendations include:

- Establish designated areas in all CBP facilities where independent child welfare experts can screen or interview children in a safe, private, and child-appropriate manner by independent child welfare experts.

### Keeping Kids with Kin

Many children arrive at the border with family members who have been caring for them. The longstanding practice of CBP officials is to separate the child from their family and transfer the child to an ORR shelter. ORR then begins the process of identifying family members with whom the child can be reunified, often including the same adults with whom the child arrived, unless they have already been deported. These separations are largely unnecessary and can further traumatize children and families.

Instead, ORR staff can assess family relationships in real time at the border and approve the child's release to family members prior to a prolonged or permanent separation. Children approved to remain in the care of family members (designated as Category 2 sponsors by ORR) must retain the legal designation of “unaccompanied,” to preserve the legal protections for children who arrive without a legal guardian. By keeping kids with family, we can minimize harm to both children and adults, preserve ORR's resources for children who arrive alone or with unrelated adults or suspected traffickers, and avoid the separation of weeks to months often needed to reunify families.

- Ensure that CBP identifies at least one Juvenile Priority Facility in each sector. Any CBP facility that houses children should include a dedicated physical environment (children's area) that is appropriate for children of all ages and stages of development. Staff each children's area with one or more individuals who are professionally trained and licensed to provide services to children, including childcare workers, pediatric health professionals, and child welfare professionals.

- Ensure that appropriate medical professionals provide healthcare to children, including pediatric care, and establish procedures for medical screenings and examinations that are consistent with guidelines set forth in the recommendations of the American Academy of Pediatrics.
- Designate some regional facilities as reception spaces within a 4-5 hour drive of points of entry that are appropriate for short-term custody of children and families with children.
- Bring the expertise of ORR to CBP reception spaces by co-locating staff to determine if an unaccompanied child in CBP custody can safely remain together with the relative with whom they arrived rather than be separated from family.
- Require CBP to consider a child's best interests before separating the child from family.
- Require CBP officials to perform robust screenings of unaccompanied Mexican children, document thorough consideration of any decision to return a Mexican child rather than transferring them to the custody of ORR.
- Prohibit the placement of a parent, legal guardian, or a nonparent family member who is apprehended with a child in expedited removal or any other fast-track removal proceedings. Adults apprehended with children should be placed in removal proceedings under section 240 of the Immigration and Nationality Act.<sup>23</sup>

### Ms. L Settlement Agreement

On December 11, 2023, a federal district court entered its final approval of the settlement in *Ms. L., et al. v. U.S. Immigration and Customs Enforcement, et al.* This lawsuit was filed by the American Civil Liberties Union on behalf of children and parents who were separated under the Trump administration's Zero Tolerance policy.<sup>40</sup> The settlement provides some benefits to families and prohibits the government from enacting a similar policy over the next eight years. It also creates mandatory procedures for tracking information around separated families and facilitating communication between parent and child. However, families will receive no compensation or damages for their suffering due to the policy and no access to permanent immigration relief. Nor does it include any access to government-funded legal representation for families to apply for legal relief.

### "De-licensing" of ORR shelters

The decision of state government actors decides the placements, quality of care and treatment of children in those placements, are also affected by the decisions of . In 2021, for example, the anti-immigrant governors of Texas and Florida "de-licensed" ORR facilities in their respective states.<sup>41</sup> In Florida, this led to children being suddenly re-located. In Texas, the state no longer investigates reports of abuse and neglect in ORR-grantee facilities. State licensing is a core protection for children held in ORR custody. State licensing agencies have the independence, administrative infrastructure, and specialized expertise to ensure that ORR complies with child welfare standards and investigates reported violations that endanger the safety and wellbeing of children. ORR has indicated that it plans to introduce a federal licensing regulation to provide oversight of "de-licensed" facilities, but so far nothing has been put forward. By failing to preserve state licensing as a baseline protection, these states and ORR have placed children at risk.



- Provide regular training to CBP staff on responding to the needs of children and families exposed to trauma and make every effort to ensure the safety and well-being of children in CBP custody.
- Treat any person who claims to be under the age of 18 as a child absent clear, compelling, and uncontradicted evidence to the contrary.

## Prioritizing Children's Best Interests While in Federal Custody

12

Unaccompanied children transferred to ORR custody can find themselves living in a variety of placements. ORR houses most children in large, congregate care facilities, often referred to as shelters. These shelters can have 100 or more beds; one such program houses 1,400 boys in what was once a “big box” store.<sup>24</sup> Younger children may be sent to transitional foster care placements where they stay with a family for several weeks while ORR evaluates potential sponsors for reunification. ORR also contracts with more restrictive facilities.<sup>25</sup>

Children with behavioral health needs may be transferred to residential treatment centers, so-called “therapeutic” treatment facilities which too often fail to provide individualized, evidence-based care and treatment.<sup>26</sup> For children who lack family or sponsors in the United States, ORR sometimes places them in long-term foster care. But even children found eligible may wait months or even years to be accepted for placement. ORR may transfer other children whose legal case meets certain requirements to the Unaccompanied Refugee Minors program, which is funded by ORR but run by state agencies. All of these placements are required by law to be state-licensed, meeting mandated requirements for children's health and safety.

Since July 2024, the ORR Foundational rule has governed the care and placement of unaccompanied children in the ORR system. This rule has the potential to improve current practice, prioritizing children's best interests and ensuring they are quickly reunified with family.

### Decoupling placement decisions from a child's immigration case.

From the moment immigration officials encounter a child, there is a simultaneous focus on the legal issue of whether the child may remain in the country and the placement decision about where the child will stay while that decision is made. Officials from different agencies will question the child—nearly always without an attorney present—and use those answers to inform placement decisions. They will also begin a legal case against the child, in which the child must defend themselves against the U.S. government's efforts to remove them. But before children can be expected to participate in such critical proceedings, they need to be in a safe space with adults they trust; not in government custody. While in custody everything a child says and does is recorded and could be used against them by government attorneys seeking their removal. Fair proceedings will only be possible by de-coupling the process of ensuring a child's safe placement from the child's immigration case.<sup>42</sup>



### Prioritize family unity

- Expand on opportunities to safely and efficiently release children to family upon arrival, avoiding congregate care. The government could fast-track children with parents living in the country and children arriving with family members through a family verification process in a matter of hours and spend little to no time in federal custody.
- For children transferred to ORR facilities, set specific time periods for sponsor verification, the completion of home studies, or the amount of time a child can spend in congregate care, rather than with family. Undertake prompt, active, and continuous efforts towards family reunification and release.<sup>27</sup>
- When concerns arise regarding a sponsor's ability to meet all the child's needs, but which do not rise to the level of imminent danger to the child, prioritize release and reunification with fully-funded, community-based services (instead of prolonged detention and separation) so that children and sponsors can receive needed services while living together.<sup>28</sup>

### Change the type, location, and duration of ORR placements

- Establish home-based care (either shelters or group homes with less than 25 children or foster placements) as the primary model for care of children; eliminate large facilities; establish clear limits for time in custody that prompt an external review of placement decisions.
- Eliminate or strictly limit the use of unlicensed facilities. Unlicensed facilities, such as Influx Care Facilities, lack state oversight and do not meet state standards for childcare facilities.
- Eliminate the use of secure detention and strictly limit placements in restrictive environments.
- Focus on developing or expanding facilities in resource-rich, metropolitan areas away from the border where there are more pro bono service providers (legal, health, and therapeutic service providers) and where family members can more easily visit children in custody.
- Develop policies for children's placement and transfer that require consideration of children's proximity to U.S.-based family; their access to counsel and child advocates; and their access to state, federal and immigration court.

#### Lucas R. v. Becerra

The 2024 settlements in the *Lucas R. v. Becerra* case expand protections for children and youth in ORR custody. For the first time, ORR is required to identify and assess children with disabilities; create service plans to ensure children have the supports and accommodations they need in the most integrated and least restrictive placements; and secure informed consent before giving psychotropic medications to youth.<sup>43</sup>

- Prioritize the release of all youth 17 and older either to a sponsor or to a family-based placement by age 17.5; require robust post-18 planning to prevent children's transfer to adult detention on their 18<sup>th</sup> birthday.
- Place children who are likely to be in care for more than 30 days in a long-term foster care placement that most approximates a family, meets the child's linguistic, cultural, and religious identity, and is in the child's best interests.

### Ensure placements reflect best practice in child welfare and disability rights standards

- Align facility staff training and staff ratios, children's access to medical, mental health, and reproductive care, recreation time, education, access to religious services, and contact with family members with evidence-based best practices in child welfare.
- Ensure that children can access information in their preferred language.

### Next Steps on the Flores Settlement Agreement

Since 1997, the Flores settlement agreement has set basic standards of care for the custody, care, and release of all children in federal immigration custody, including unaccompanied immigrant children. On June 28, 2024, the court agreed that the consent decree could be terminated as to HHS with some exceptions, and replaced with the ORR Foundational Rule, which will now govern the care of unaccompanied children in the Department of Health and Human Services (HHS) Office of Refugee Resettlement's (ORR) custody. The final rule codifies — and in some respect expands — protections for unaccompanied children in ORR custody. Unfortunately, it also leaves critical gaps in oversight, transparency, and licensing. Advocates are concerned that, with the end of the Flores settlement agreement as to HHS, there will no longer be robust independent oversight of the conditions of custody for unaccompanied children in ORR's care. Without the settlement agreement in place, it will also be difficult to petition the court for corrective actions when ORR violates the new regulations.

### JULIO

Julio was in ORR custody for over a year and a half. During that time, he was in more than six different placements across the country, and had several hospital stays due to self-harm. Yet at no point did Julio receive consistent treatment for the trauma he experienced in his home country; or the trauma from the length of stay in federal custody, the multiple placement transfers, or the bullying he experienced while in custody. Julio expressed that all he wanted was to live with a family, yet he remained institutionalized for a prolonged period. Foster programs which had beds available would not accept Julio into the program due to his history of mental health needs and self-harm. And yet, it was clear that the institutionalization itself was contributing to Julio's mental health needs.

- Ensure ORR places children with disabilities in the most integrated, least restrictive environments, in compliance with Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and the Lucas R settlement (see page 13), and swiftly releases them to family.
- Evaluate children who present an indication of a disability for services under Section 504, and ensure they are provided with services (including accommodations) through an individualized plan that includes a plan for prompt release with services provided in the community at government expense.
- Reorient discipline standards to strengths-based restorative methods, rather than coercive disciplinary practices, and rely on trauma-informed de-escalation strategies.
- Overhaul the government's incident reporting system (SIRs or "write ups") to center the safety, permanency, and well-being of children.<sup>29</sup>
- End or severely limit calls to law enforcement to control children's behavior. If care provider staff call law enforcement as a last resort, this should trigger an evaluation of staff involved regarding their qualifications and training in trauma-informed de-escalation techniques.
- Provide culturally competent post-release case management services to all children to connect them to meaningful, high-quality supports and services in the communities where they live; explore and invest in resources including "community navigator" programs and other community-led services.

### Families First Prevention Services Act

The passage of the Family First Prevention Services Act (Family First or FFPSA) in 2018 included significant reforms to federal child welfare policy.<sup>44</sup> The legislation is a key step towards ensuring that children can thrive with their families by shifting federal funding and support to services that keep children safely at home and prevent the need for foster care.<sup>45</sup> The Administration for Children and Families of the Department of Health and Human Services, the same agency and office that administers ORR's program for unaccompanied children, has established a clearinghouse to review and rate research on programs that provide services to children and families.<sup>46</sup>

One way Family First reflects the value of keeping children connected with family is the law's prioritization of family-based care and support of a child's own family network.<sup>47</sup> The law also establishes new restrictions on the circumstances under which a child can be placed in congregate care, and for how long the child can remain there. Young people with recent experience in institutional placements in foster care have made the harms of large, institutional placements abundantly clear,<sup>48</sup> and Family First's change in federal funding incentives has the potential to significantly reduce their use.

### BILLY

Care provider staff often mistake trauma responses for "bad" behavior in adolescents. Unfortunately, this can lead to a never-ending cycle of placement transfers between restrictive settings for children in federal custody. This was the case for Billy: he was in nine different placements over two years, eight of which were secure and staff secure, meaning extremely restrictive. Our volunteer Child Advocate was appointed to Billy while he was in his 6th placement and was the only consistent presence in his life through three more transfers, a unique source of stability during a traumatizing time.

### Ensure access to counsel and Child Advocates

- Ensure the right of children who are or have been in custody to have government-funded legal counsel for their immigration case and to challenge conditions of custody or denials of release.
- Ensure that independent Child Advocate services are provided at all locations where unaccompanied children are detained or where they appear before immigration courts for removal proceedings.

### Oversight

- Ensure the new UC Office of the Ombudsperson is well-resourced, independent and able to provide oversight and accountability.
- Commit to robust oversight of Placement Review Panels, ensuring that children have access to government-funded counsel, Child Advocates, and due process. Collect and disseminate data regarding the effectiveness of these Panels.
- Ensure that children have access to government-funded counsel at Risk Determination Hearings and that ORR promptly provides the child and their legal representative with evidence upon a child's request for a hearing.

### Immigration proceedings – A fair process

The legal process for determining whether a child remains in the United States begins almost immediately upon the child's apprehension. Just as there are multiple forms of protection for which children may apply – asylum, protections for trafficking survivors and victims of certain crimes (“T” and “U” status), Special Immigrant Juvenile Status (SIJS) for children who have been abused, neglected, or abandoned, and others – there are a variety of applications, interviews, and procedures a child must endure. Furthermore, immigration court is not child-friendly. In immigration court, the child faces opposition from a government attorney and appears before an immigration judge in the same courtroom as adults, with nearly the same evidentiary and substantive standards. There is no right to government-funded counsel in immigration courts. Children have the right to an attorney to represent them, but only if they can find and retain one on their own.<sup>30</sup> Advocates for children have organized to provide free representation to some children, but demand far exceeds capacity.

In contrast, an attorney always represents the government in immigration court proceedings. Once the government demonstrates that the child lacks permission to be in the United States, the burden shifts entirely to the child.

“

*There is no right to government-funded counsel in immigration courts. Children have the right to an attorney to represent them, but only if they can find and retain one on their own.”*



Whether in court or in agency interviews and applications, children must repeat the details of traumatic events multiple times, subjected to each proceeding's adjudicators and fact-finding process.<sup>31</sup> In short, children confront a complex maze of options that can confound even experienced attorneys.

Proceedings governed by a best interests standard would not subject children to repeated inquiry about past, traumatic events. Instead, children who wish to remain in the United States could participate in a coordinated procedure tailored to their needs. Congress and federal agencies can make children's immigration proceedings more child-friendly and ensure due process. Some examples of changes that would center children's best interests include:

- Ensure all children have access to government-funded counsel whenever they are subject to an adjudicatory process that determines whether they may stay or must return, and which could result in a limitation of their liberty or other rights. These attorneys should be trained in trauma-informed immigration and child protection practice.
- Ensure that every decision-maker in a child's case, including the presiding judge, the attorney representing the child, the independent Child Advocate, and the government attorney, has specialized training in working with children.
- Ensure Child Advocates have the right to review all records and information necessary to effectively advocate for the best interests of the child, to obtain independent evaluations of the child, to be present at all hearings and interviews involving the child (other than interviews between the child and attorney), and to submit Best Interests Determinations (BIDs) for consideration by any individual including immigration judges, DHS officials, ORR officials, attorneys and Legal Services Providers, and state court judges.
- Ensure children with disabilities can access accommodations and supports throughout their immigration proceedings and that immigration officials, judges, and attorneys are trained in disability rights.
- Create specialized children's dockets that use child appropriate proceedings.<sup>32</sup> These include employing a less adversarial approach than traditional court proceedings, utilizing child-appropriate questioning, and promoting an understanding of children's limited ability to comprehend court directives. Develop procedures whereby immigration judges who have concerns about a child can refer the child for appointment of a Child Advocate.

## ANA

Baby Ana, just 13 months old, was discovered when the government caught a smuggler bringing her into the United States. Ana's mother had been killed only weeks before. Prior to that, her mother and maternal grandparents had raised Ana and desperately wished for her return to their country. Despite Ana's age and the fact that she was still preverbal, the Department of Homeland Security (DHS) decided to charge Ana with entering the United States without permission and require her to appear in immigration court to defend against these charges. For Ana to be reunified with her family—her grandparents in her home country—Ana would have to make that request through an attorney she would have to retain, in formal immigration-removal proceedings. Pro bono counsel was recruited for this case, and ultimately Ana was sent home, but only after spending additional time in custody and going through the charade of an adversarial proceeding. This proceeding was certainly not in her best interests nor in the interest of government efficiency.

- Ultimately, eliminate adversarial proceedings for children, allowing the adults involved in the case to prioritize the abilities and the needs of the child facing removal. Hold a preliminary conference where all the participants in the child's immigration case meet to ensure the child understands the proceedings and their rights, and to set a time frame for the child's case. Appoint a presiding judge who is trained to work with children to oversee a child's case until its conclusion. Ensure that each child has a government-funded attorney. The attorney should submit applications for all forms of legal relief the child wishes to pursue at the same time to reduce the likelihood that children will have to appear in different venues at different times to pursue different types of relief, requiring the child to tell their story multiple times. The attorney's submission of a child's applications for protection will prompt a reasonable but limited window for each agency responsible for adjudicating a petition to grant, deny or request additional information for the petition. For additional details on specialized proceedings for children please see the *Reimagining Children's Immigration Proceedings*.<sup>33</sup>

### Impact of family separation on children's access to legal protection

The impacts of family separation on a child's mental health and physical well-being are well-documented. But family separation, whether at the border, or when family members are trapped in custody or on the other side of the border, can also weaken a child's chances at achieving legal protection in the United States. Adults often hold information that is vital to a child's case. Sometimes adults intentionally keep sensitive information from children to protect them from persecution or traumatic events they may not know about. When a child must explain their case for protection alone, without their parent or adult relative, they may be missing critical details or have little information about why the family fled their home country. Separation from family can even endanger children's access to counsel. Since the demand for representation exceeds available attorneys, many attorneys are forced to screen for the most meritorious cases. In some cases, it is the adults who were separated from the child who hold the information essential to the child's case. If the attorney cannot access these adults, the separation could weaken a child's chance for representation and their ability to earn protection for which they may qualify.

## No repatriation to unsafe situations

Under existing laws, once charged by the government, a child carries the burden of proving his eligibility to remain in the United States. If the child fails, they are removed. While under federal law the government is required to ensure children's safe repatriation, this almost never happens. Instead, Child Advocates and attorneys scramble to facilitate children's safe return. A best interests standard would require that a decision to return a child to their home country would only be made if the government could demonstrate that the child would be safe upon return. To do this, the government must develop and implement procedures to ensure independent decision-making which reflects children's best interests:

- Establish a designated unit within DHS to accept referrals of cases—from attorneys, child advocates, immigration judges, or children—where there is no relief or relief was denied, but there are clear safety concerns or a fear of return, so that the agency can consider exercising its discretion through deferred action or administrative closure to stop the child's repatriation.
- Establish policies encouraging trial attorneys to actively participate in, and not object to, inquiries into the child's safety when a child requests voluntary departure.
- Collaborate with other government agencies, including the Department of Health and Human Services, the Department of State and United States Agency for International Development (USAID) to develop relationships with and provide support to government agencies and NGOs in receiving countries so that children can be referred for appropriate reintegration services prior to the child's return.

### Transit Ban: Threats to Asylum are Threats to Children's Safety

U.S. refugee and immigration law requires our government to ensure people can seek asylum in the United States. The Trump administration relied on an obscure part of the code in 42 U.S.C. § 265 (commonly known as Title 42) to push any child who arrived with a parent right back to the danger they just fled. The Biden administration ended Title 42 only to immediately replace it with a rule on the "circumvention of lawful pathways" which is known as the asylum transit ban to advocates.

Like previous policies aimed at limiting access to asylum, the asylum transit ban penalizes people for how they enter the U.S. and whether they applied for protection in a country they traveled through on their way to seek safety. It forces people to wait in dangerous conditions in Mexico while they try to obtain one of a few, lottery-based appointments to present themselves at a port of entry via the CBP One smart phone app, which itself has many limitations. All these policies have devastating impacts on children. Policymakers must reject efforts to limit access to asylum via illegal, deterrence-based policies which cause known harm to children.

- Establish a form of protection in cases in which a child is not granted any form of legal relief, but in which the government cannot establish that a child would be safe if repatriated to ensure no child is returned to danger—such as a best interests visa or protective status.

## 20

## All children share the same rights and protections

The few protections that currently exist for children in immigration proceedings were carved out of a system that otherwise treats children as adults and where the rules for adults are grounded in deterrence and punishment rather than welcome and protection. In general, these protections apply only to unaccompanied children, that is children who arrive without a parent or legal guardian. This inconsistency, however, can result in families making desperate choices to separate so that their children, now unaccompanied by a parent or legal guardian, can seek protection. When this happens, children sacrifice their right to family unity in order to pursue their right to safety.

“

*Litigation has highlighted the ways in which unequal treatment can result when the government categorizes children differently based on the location of their apprehension, the manner of their entry, or the adults accompanying them.”*

Litigation has highlighted the ways in which unequal treatment can result when the government categorizes children differently based on the location of their apprehension, the manner of their entry, or the adults accompanying them. In 2015, Flores class counsel challenged DHS’s refusal to extend Flores protections, including release from ICE detention, to accompanied children in their custody, that is, children arriving with their parents. The court rightly held that Flores protections apply equally to all children regardless of whether they are accompanied or unaccompanied.<sup>34</sup>

In 2020, the Trump Administration closed the border to all asylum-seekers using the pandemic as an excuse. The ACLU successfully sued on behalf of unaccompanied children, who were not exempted from the border closure.<sup>35</sup>

### JULIA

At the age of 11, Julia fled to the United States to escape a home in which she witnessed her grandmother sexually assaulted by a police officer and where she feared further violence. Julia’s hope was to find safety with her mother in the United States. After more than six months in an ORR shelter where she had just a weekly, 10-minute phone calls with her mother, Julia told her lawyer she would rather return to Honduras, than remain in detention, separated from her mother. The lawyer knew that when Julia went to court and asked for permission to go back to her country, the judge would have no obligation to ask any questions about whether Julia would be safe or who would care for her in her home country. Nor would the court have any obligation to speak to Julia’s mother or include her in the proceedings before deciding whether to repatriate Julia. Because Julia’s attorney was obligated to tell the court Julia’s expressed interests (her desire to return), there was no one to advise the court of the risks of return to Julia’s safety and well-being.



But the border remained closed to family members until May 2023, when the use of Title 42 ended.<sup>36</sup> Many children were forced to separate from trusted family members in order to access protection.

As we argue in more detail in our report *Reimagining Children's Immigration Proceedings*, a best interests standard would ensure that all children receive the same protections and would incentivize decision-making which upholds children's rights to family unity, safety, liberty, identity, and development.<sup>37</sup> To prioritize children's best interests, no matter how or with whom they arrive:

- Apply all protections for immigrant children—both procedural and substantive—to all immigrant children, regardless of the location, time, or manner in which immigration authorities apprehend them. This should extend to children from countries which are both contiguous and non-contiguous to the United States.
- If extending these protections to children will impact the immigration case of a parent or other accompanying family member, the child's right to family unity should be prioritized and preserved.

## JAIME

Multiple administrations have put border restrictions in place that force families to choose between staying together in danger or separating in hopes that children will find safety if they cross alone and are designated unaccompanied. These policies fail to consider children's best interests. In one example, the Young Center was appointed to a child who was separated from his mother as a result of the Migrant Protection Protocols ("MPP"), the unlawful policy that forced asylum-seekers to remain in Mexico for months or years while awaiting hearings on their claims for immigration relief. Jaime, a five-year-old Honduran boy, fled Honduras with his mother after a man stalked and threatened her. After being sent to Matamoros under MPP, Jaime and his mother stayed in a makeshift encampment. At one point cartel members kidnapped them for two months. They were released but remained terrified that cartel members would attempt to kidnap them again. With no other option to save her son, she separated from Jaime, and sent him to seek protection alone at the U.S. border. But for Jaime, the trauma did not end; while in custody after their separation, he constantly cried, called for his mother to return, and showed other signs of lasting trauma.

## The Path Forward

The government has a moral responsibility towards children, and it is both possible and practical to make children's best interests a primary consideration in every decision that will affect a child. Ideally, Congress should take steps to institutionalize a best interests standard across the federal government. It could amend the Immigration and Nationality Act and require government agencies to make immigrant children's best interests a primary consideration in any decision that will affect them. Until that time, federal agencies could make many of the recommended changes now, without Congressional action. While some suggestions here will require investments in infrastructure and training, others require a shift in culture and practice—shifts that address the history of paternalism, deterrence, and racism that underlie many aspects of immigration policy. The Young Center is ready to work with any federal agency interested in implementing a best interests standard in its policies and practices to ensure that immigrant children are protected and given the best opportunity to thrive.

### Vital Protections for Immigrant Youth with Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS) is an important form of humanitarian protection that explicitly considers children's best interests.<sup>49</sup> For children who were abused, abandoned, or neglected, by a parent and who cannot return to home country to reunify with that parent, SIJS is an important step to forging a path toward safety and permanency. Yet despite this protection, young people spend years in limbo, waiting for the opportunity to become lawful permanent residents—and for the opportunity to work, marry, and build lives in the U.S.—due to an administrative backlog over which they have no control.<sup>50</sup>

In March 2021, the Biden administration announced a final rule clarifying SIJS eligibility criteria and evidentiary requirements and providing other long-awaited updates.<sup>51</sup> At the same time, the United States Citizenship

and Immigration Services (USCIS) announced new policy providing guidance for consideration of deferred action to immigrant youth currently experiencing SIJS backlogs. These welcome changes came after years of advocacy by groups like the End SIJS Backlog Coalition, a national group of directly impacted youth and allied advocates.<sup>52</sup> The regulations offer immigrant youth relief from the fear of deportation and expectations for what comes next, including young people's ability to support themselves and contribute to their communities. Nevertheless, until Congress acts to remove arbitrary caps on children's access to protection, children will continue to spend unnecessary years waiting for the protection they've earned.

### Keeping families together through best interests advocacy: Bernard's story

At the height of COVID-19, Bernard and his three siblings came to the United States fleeing gang violence in their home country. A local gang viciously attacked Bernard, resulting in severe injuries. When they arrived at the border, Bernard's three younger siblings were taken into government custody, but because Bernard was 18 and considered an adult, he was expelled to Mexico under Title 42, a public health law used to unlawfully turn away asylum-seekers at our borders. In Mexico, he was not only separated from his family but also could not access medical treatment.

Meanwhile, the Young Center was appointed to Bernard's three siblings. We advocated for their best interests, including for their brother Bernard's entry to the United States through humanitarian parole. Approval for humanitarian parole, a program for those facing emergencies or threats to their lives, is extremely rare. Initially, Customs and Border Protection (CBP) denied our request, but our Child Advocates didn't give up. We resubmitted and escalated our request until it was accepted. A Young Center Child Advocate met Bernard at the entry port and helped him manage travel arrangements to the city where his siblings lived, where he was finally reunited with them and his mother.

- <sup>1</sup> Convention on the Rights of the Child art. 3, G.A. Res. 44/25, U.N. GAOR, Supp. No. 49, U.N. Doc A/44/49 (Nov. 20, 1989).
- <sup>2</sup> JENNIFER NAGDA & MARIA WOLTJEN, YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, BEST INTERESTS OF THE CHILD STANDARD: BRINGING COMMON SENSE TO IMMIGRATION DECISIONS 107 (2015), <https://firstfocus.org/wp-content/uploads/2015/04/Best-Interests-of-the-Child-Standard.pdf>.
- <sup>3</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232(c)(2)(A) (2008) [hereinafter TVPRA].
- <sup>4</sup> *Id.* § 1232(c)(6).
- <sup>5</sup> JENNIFER NAGDA & MARIA WOLTJEN, YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, BEST INTERESTS OF THE CHILD STANDARD: BRINGING COMMON SENSE TO IMMIGRATION DECISIONS 107 (2015), <https://firstfocus.org/wp-content/uploads/2015/04/Best-Interests-of-the-Child-Standard.pdf>, (citing U.N. Committee on the Rights of the Children, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), ¶16, U.N. Doc. CRC/C/GC/14 (May 2013), [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf) ("the child's best interests is a threefold concept . . . (a) A substantive right . . . (b) A fundamental, interpretative legal principle . . . (c) A rule of procedure"))).
- <sup>6</sup> Janet L. Dolgin, *Why Has the Best Interest Standard Survived?: The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2 (1996), [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/433](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/433).
- <sup>7</sup> See DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES--AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022).
- <sup>8</sup> CHILDREN'S BUREAU, ADMIN. FOR CHILDREN & FAMILIES, CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY & DISPARITY 3 (Apr. 2021), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf).
- <sup>9</sup> Krista Ellis, *Race and Poverty Bias in the Child Welfare System: Strategies for Child Welfare Practitioners*, ABA CHILD LAW PRACTICE TODAY (Dec. 17, 2019), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/january---december-2019/race-and-poverty-bias-in-the-child-welfare-system---strategies-f/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/race-and-poverty-bias-in-the-child-welfare-system---strategies-f/).
- <sup>10</sup> See ROBERTS, *supra* note 7; see also Janell Ross, *One in Ten Black Children in America Are Separated from Their Parents by the Child-Welfare System. A New Book Argues That's No Accident*, TIME, Apr. 22, 2022, <https://time.com/6168354/child-welfare-system-dorothy-roberts/>.
- <sup>11</sup> *Id.*
- <sup>12</sup> TVPRA, 8 U.S.C. § 1232(c). The "best interests of the child" standard is also a factor in the immigration benefit known as "Special Immigrant Juvenile Status." See INA § 101(a)(27)(J); 8 C.F.R. § 204.11
- <sup>13</sup> This practice is in line with guidance put forth by the UN High Commissioner for Refugees. See UN HIGH COMMISSIONER FOR REFUGEES, 2021 UNHCR BEST INTERESTS PROCEDURE GUIDELINES: ASSESSING AND DETERMINING THE BEST INTERESTS OF THE CHILD (May 2021), <https://www.refworld.org/docid/5c18d7254.html>; UN High Commissioner for Refugees, Guidelines on Assessing and Determining the Best Interests of the Child (Provisional Release), Nov. 2018.
- <sup>14</sup> To learn more about the Young Center's Child Advocate program visit our website: <https://www.theyoungcenter.org/child-advocate-program-young-center>.
- <sup>15</sup> Children's Safe Welcome Act, H.R. 8349, S. 4529, 117th Cong. (2022).
- <sup>16</sup> Fair Day in Court Act, S. 3108, 117th Cong. (2021).
- <sup>17</sup> The Interagency Working Group was a collaboration between federal agencies and non-governmental organizations. See *generally* INTERAGENCY WORKING GRP. ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN (2016), <https://static1.squarespace.com/static/597ab5f3beabfb0a625aaf45/t/5c19cb386d2a738d43742361/1545194298896/Best-Interests-Framework.pdf>.
- <sup>18</sup> *Border Patrol Overview*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/border-security/along-us-borders/overview> (last visited Sept. 28, 2022).
- <sup>19</sup> U.S. Customs & Border Protection, National Standards on Transport, Escort, Detention and Search § 1.6 (Oct. 2015), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf>
- <sup>20</sup> See *generally* NAT'L IMMIGR. PROJECT, PRACTICE ADVISORY: BIDEN'S ASYLUM BAN (May. 15, 2023), [https://nipnl.org/sites/default/files/2023-05/2023\\_26May-Asylum-Ban-PA.pdf](https://nipnl.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf); Young Ctr. for Immigrant Children's Rights, *President Biden's Asylum Ban Shuts the Door on Families and Children, Returns Countless People to Danger*, <https://www.theyoungcenter.org/media-press-releases/2023/5/10/president-bidens-asylum-ban-shuts-the-door-on-families-and-children-returns-countless-people-to-danger> (May 10, 2023).



- <sup>21</sup> MIRIAM ABAYA, YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, CURRENT BORDER SCREENING OF UNACCOMPANIED CHILDREN FROM MEXICO HAS FAILED AND SHOULD NOT BE A MODEL FOR "REFORM" (July 2019), [https://static1.squarespace.com/static/597ab5f3beabfb0a625aaf45/t/5d6e8040e8fd10000177f1fd/1567522881009/Young+Center+Explainer\\_CBP+Contiguous+Country+Screening+Has+Failed.pdf](https://static1.squarespace.com/static/597ab5f3beabfb0a625aaf45/t/5d6e8040e8fd10000177f1fd/1567522881009/Young+Center+Explainer_CBP+Contiguous+Country+Screening+Has+Failed.pdf).
- <sup>22</sup> See, e.g., Noy R. Halevy-Mizrahi & Ilana Harwayne-Gidansky, *Medication Con iscation: How Migrant Children Are Placed in Medically Vulnerable Conditions*, 145 PEDIATRICS 1 (2020); Julie M. Linton et al., *Detention of Immigrant Children*, 139 PEDIATRICS 1 (2017); Robert Moore, *Internal Investigation Confirms Border Patrol Failures Leading Up to a 16-Year-Old's Death on the Floor of His Cell*, PROPUBLICA, Feb. 8, 2022, <https://www.propublica.org/article/internal-investigation-confirms-border-patrol-failures-leading-up-to-a-16-year-olds-death-on-the-floor-of-his-cell>.
- <sup>23</sup> See 8 U.S.C. § 1229a.
- <sup>24</sup> Manny Fernandez, *Inside the Former Walmart That Is Now a Shelter for Almost 1,500 Migrant Children*, N.Y. TIMES (July 14, 2018), <https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html>
- <sup>25</sup> ORR uses a variety of restrictive placements for children including secure (locked facilities or out of network beds rented from juvenile jails), heightened supervision facilities (with higher staff to child ratios) and residential treatment centers (which provide therapeutic treatment). The TVPRA requires ORR to place children in the least restrictive setting that is in the child's best interest. We work to reunify children with family in the first instance and if family is not available, to provide children with the support they need to remain in the least restrictive setting. It is important to note that children placed in secure detention have not been adjudicated delinquent, nor convicted of any crime. The decision to lock a child in secure detention is based on no more than the reasoning of the staff member interviewing the child.
- <sup>26</sup> Residential treatment centers are disfavored by mental health practitioners for anything other than short-term stabilization. See, e.g., Casey Family Foundations, *What are the outcomes for youth placed in group and institutional settings?* (June 29, 2022), <https://www.casey.org/group-placement-impacts/> ("While short-term, clinically indicated mental and behavioral health treatment may need to be provided in group or institutional settings, federal policy stipulates that those settings be time-limited, trauma-informed, judicially reviewed, and focused on engaging the young person's family during and after treatment, with the goal being a swift return to family and community life."); Casey Family Foundations, *How are some child protection agencies attending to Quali ied Residential Treatment Program requirements?* (Feb. 15, 2022), <https://www.casey.org/implementing-qrrp-requirements/>.
- <sup>27</sup> See Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (1978).
- <sup>28</sup> See generally JONATHAN BEIER & KARLA FREDRICKS, AM. ACAD. OF PEDIATRICS & MIGRATION POL'Y INST., A PATH TO MEETING THE MEDICAL AND MENTAL HEALTH NEEDS OF UNACCOMPANIED CHILDREN IN U.S. COMMUNITIES (APR. 2023); JONATHAN BEIER ET AL., UNICEF & MIGRATION POL'Y INST., FOUR STRATEGIES TO IMPROVE COMMUNITY SERVICES FOR UNACCOMPANIED CHILDREN IN THE UNITED STATES (DEC. 2022); MARK GREENBERG ET AL., MIGRATION POL'Y INST., STRENGTHENING SERVICES FOR UNACCOMPANIED CHILDREN IN U.S. COMMUNITIES (JUNE 2021).
- <sup>29</sup> See generally YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS & NAT'L IMMIGRANT JUSTICE CTR., PUNISHING TRAUMA: INCIDENT REPORTING AND IMMIGRANT CHILDREN IN GOVERNMENT INCIDENT REPORTING AND IMMIGRANT CHILDREN IN GOVERNMENT CUSTODY (2022).
- <sup>30</sup> See, e.g., 8 U.S.C. §1232(c)(5) ("The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the [INA] ..., that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not nationals or habitual residents of countries contiguous with the United States, have counsel to represent them in legal pro-ceedings or matters and protect them from mistreatment, exploitation, and trafficking."); INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT (Sept. 2016); <https://www.americanimmigrationcouncil.org/research/access-counselimmigration-court>; KATE M. MANUEL, CONG. RESEARCH SERV., R43613, ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF (Mar. 2016), <https://fas.org/sgp/crs/homesecc/R43613.pdf>; ACLU, RIGHT TO COUNSEL (undated), [https://www.aclu.org/sites/default/files/field\\_document/right\\_to\\_counsel\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/right_to_counsel_final.pdf).
- <sup>31</sup> For more on the effect of asylum interviews, see Katrin Schock et al., *Impact of Asylum Interviews on the Mental Health of Traumatized Asylum Seekers*, 6 EUR. J. PSYCHOTRAUMA. 26286 (2015) (study which found a "significant increase in the posttraumatic intrusions and significant decrease in posttraumatic avoidance and hyperarousal symptoms after the asylum interview. . . [The asylum hearing process] may evidently remind them of life-threatening experiences in their home country—and thus may stimulate and reactivate the associated feelings of helplessness. The feeling of being ruthlessly exposed to a situation and helpless to change it has been identified as a factor determining how traumatic a situation is perceived to be.").

<sup>32</sup> In December 2023, the Department of Justice's Executive Office of Immigration Review (EOIR) released a memo providing some guidelines on handling children's cases and announcing specialized children's dockets. As of the date of this publication, we do not have any details on the implementation of these changes. EOIR Director's Memorandum 24-01, Children's Cases in Immigration Court (Dec. 21, 2023), <https://www.justice.gov/d9/2023-12/dm-24-01.pdf>.

<sup>33</sup> See generally YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, REIMAGINING CHILDREN'S IMMIGRATION PROCEEDINGS: A ROAD-MAP FOR AN ENTIRELY NEW SYSTEM CENTERED AROUND CHILDREN (Oct. 2020).

<sup>34</sup> YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, REIMAGINING CHILDREN'S IMMIGRATION PROCEEDINGS: A ROADMAP FOR AN ENTIRELY NEW SYSTEM CENTERED AROUND CHILDREN 36-37 (Oct. 2020).

<sup>35</sup> *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492 (D.D.C. 2020); *J.B.B.C. v. Wolf*, No. 20-cv-01509 (D.D.C. June 24, 2020) (order); *G.Y.J.P. v. Wolf*, No. 20-cv-01511 (D.D.C. Dec. 11, 2020) (order).

<sup>36</sup> See, e.g., Migration Pol'y Inst., *U.S. Border Asylum Policy Enters New Territory Post-Title 42*, <https://www.migrationpolicy.org/article/border-after-title-42> (May 25, 2023); Adam Isacson, WOLA, *10 Things to Know About the End of Title 42*, <https://www.wola.org/analysis/end-title-42/> (May 9, 2023).

<sup>37</sup> See generally YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, REIMAGINING CHILDREN'S IMMIGRATION PROCEEDINGS: A ROAD-MAP FOR AN ENTIRELY NEW SYSTEM CENTERED AROUND CHILDREN (Oct. 2020).

<sup>38</sup> AMNESTY INT'L, PUSHED INTO HARM'S WAY: FORCED RETURNS OF UNACCOMPANIED MIGRANT CHILDREN TO DANGER BY THE USA AND MEXICO (2021), <https://www.amnesty.org/en/documents/amr51/4200/2021/en/>.

<sup>39</sup> *Id.*; see also ABAYA, *supra* note 20.

<sup>40</sup> See generally Settlement Agreement, *Ms. L v. ICE*, No. 18-cv-00428, ECF No. 721-1 (S.D. Cal. Dec. 1, 2023), <https://www.aclu.org/documents/ms-l-v-ice-settlement-document-dec-1-2023>.

<sup>41</sup> See generally YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, REIMAGINING CHILDREN'S IMMIGRATION PROCEEDINGS: A ROAD-MAP FOR AN ENTIRELY NEW SYSTEM CENTERED AROUND CHILDREN (Oct. 2020).

<sup>42</sup> Gregor Noll, *Junk Science? Four Arguments Against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum*, Working Paper (Jan. 7, 2015), available at <https://ssrn.com/abstract=2546221>.

<sup>43</sup> See generally: Disability Settlement, *Lucas R. v. Becerra*, No. 18-05741, ECF No. 408-5 (C.D. Cal. Nov. 14, 2023); Psychotropic Medications Settlement, *Lucas R. v. Becerra*, No. 18-05741, ECF No. 408-3 (C.D. Cal. Nov. 14, 2023), <https://youthlaw.org/cases/lucas-r-v-azar>

<sup>44</sup> See *Family First Prevention Services Act*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/systemwide/laws-policies/federal/family-first/> (last viewed Sept. 29, 2022).

<sup>45</sup> See *Family First Prevention Services Act*, CHILD. DEF. FUND, <https://www.childrensdefense.org/policy/policy-iorities/child-welfare/family-first/> (last viewed Sept. 29, 2022).

<sup>46</sup> *Title IV-E Prevention Services Clearinghouse*, ADMIN. FOR CHILD. AND FAM., U.S. DEP'T OF HEALTH AND HUM. SERV., <https://preventionservices.acf.hhs.gov/> (last viewed Sept. 29, 2022).

<sup>47</sup> See Children's Def. Fund, *Implementing the Family First Prevention Services Act 1* (2020), <https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf>.

<sup>48</sup> See *Think of Us, Away from Home* 13-16 (2021), [https://assets.website-files.com/60a6942819ce8053cefd0947/60f6b1eba474362514093f96\\_Away%20From%20Home%20-%20Report.pdf](https://assets.website-files.com/60a6942819ce8053cefd0947/60f6b1eba474362514093f96_Away%20From%20Home%20-%20Report.pdf).

<sup>49</sup> The INA also applies the "best interest" standard in its definition of a special immigrant juvenile. 8 U.S.C. § 1101(a)(27)(J) (eligibility for Special Immigrant Juvenile Status depends in part on a finding that returning the child to his/her home country is not in the "best interest" of the child).

<sup>50</sup> See End SIJS Backlog Coal., *"Any Day They Could Deport Me": Over 44,000 Immigrant Children Trapped in the SIJS Backlog* 9-10 (2021), <https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/61a7bceb18795020f6712eff/1638382830688/Any+Day+They+Could+Deport+Me+-+Over+44%2C000+Immigrant+Children+Trapped+in+the+SIJS+Backlog+%28FULL+REPORT%29.pdf>.

<sup>51</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13066, 13066-13113 (U.S. Dep't of Homeland Sec. Apr. 7, 2022). <https://www.federalregister.gov/documents/2022/03/08/2022-04698/special-immigrant-juvenile-petitions>.

<sup>52</sup> More about SIJS and the advocacy campaign for reform can be found on the *End SIJS Backlog Coalition's* website, <https://www.sijbacklog.com/>.

<sup>53</sup> Brief for Young Ctr. for Immigrant Children's Rights *et al.* as Amicus Curie Supporting Respondents at 19-20, *Wolf v. Innovation Law Lab*, 141 S.Ct. 2842 (2021) (No. 19-1212), 2021 WL 294291, [https://www.supremecourt.gov/DocketPDF/19/19-1212/167044/20210122180800456\\_19-1212%20Amici%20Curiae.pdf](https://www.supremecourt.gov/DocketPDF/19/19-1212/167044/20210122180800456_19-1212%20Amici%20Curiae.pdf).





# PRIORITIZING THE BEST INTERESTS OF **ALL CHILDREN**

---

