



Step-by-Step Guide on Apprehension and Detention of Juveniles in the United States

Part I: The U.S. Government's Immigration Enforcement Framework

The Department of Homeland Security (DHS) was created in 2001. Two of its agencies, the U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) are responsible for all immigration enforcement in the United States.¹

CBP is charged specifically with securing the U.S. borders and facilitating trade. Its primary mission is preventing terrorists and terrorist weapons from entering the United States. CBP is also responsible for apprehending individuals attempting to enter the United States illegally, as well as stemming the flow of illegal drugs and other contraband. It is the agency that initially apprehends and detains children who are trying to enter the United States without authorization.

The two components of CBP most likely to encounter immigrant children entering the United States are the Office of Field Operations (OFO) and Border Patrol (BP). OFO officers screen all foreign visitors, returning U.S. citizens and imported cargo that enters the U.S. at more than 300 land, air and sea ports. BP agents work along U.S. borders in the areas between ports of entry. Border Patrol is responsible for securing almost 7,000 miles of border between the U.S. and its Canadian and Mexican neighbors, as well as coastal areas.²

ICE is tasked with enforcing immigration laws in the interior of the country and ensuring that people living in the United States have authorization to do so. The agency devotes the majority of its resources to its two principal operating components—Homeland Security Investigations (HSI), responsible for de-

tecting criminal immigrants, and Enforcement and Removal Operations (ERO), dedicated to removing migrants without authorization to remain in the United States.³

Part II. How Migrant Children Arrive at the United States Southern Border Seeking Entry

Most migrant children attempting to enter the United States—traveling alone or with family—cross into the United States through the U.S./Mexico border. Once at the U.S./Mexico border, children may present themselves at an official port of entry and ask for asylum or protection, or they may attempt to cross into the country between ports of entry, usually in the desert. Children presenting themselves at the ports of entry are screened by OFO officers and if they do not have authorization to enter the United States, they are held in OFO facilities until they can be repatriated or sent to longer-term government custody. Children who are apprehended by BP agents as they attempt to enter between ports of entry are taken to BP short-term hold facilities until ICE transfers them to longer-term government facilities or until they can be repatriated.

Part III: The Process When an Unaccompanied Child Is Apprehended Trying to Enter the United States without Permission

A. Children from non-contiguous countries

As previously stated, CBP officials are the most likely enforcement officials to apprehend children attempting to enter the U.S. through the Mexican border. After apprehension, the children will be taken

to a CBP short-term hold facility for processing. Once DHS has determined that an individual is under the age of 18, it must then determine whether he or she meets the definition of an unaccompanied child (UAC). If the child meets the definition of UAC, he or she must be transferred to an appropriate facility within 72 hours of apprehension.⁴ ICE is responsible for these transfers.

B. Children from contiguous countries

Different rules apply to children coming to the United States from contiguous countries than to children coming from other parts of the world.

In 2008, Congress passed the Trafficking Victim Protection Reauthorization Act (TVPRA), which required CBP officials to determine during initial intake whether an unaccompanied child is a national of a contiguous country. If the child is from Mexico or Canada, CBP must screen him or her to ensure that the child is not a potential victim of trafficking, has no possible claim to asylum, and can and does voluntarily accept return. Unless all of these questions are answered in the affirmative, the child cannot be immediately returned, but rather must remain to be evaluated for a claim to protection in the United States.⁵

If it appears that the child does not have authorization to enter the United States, and can safely be returned, the child can be repatriated without ever being placed in immigration proceedings. If any of the answers to the inquiries the U.S. officials must make are no, or if no determination of all three criteria can be made within 48 hours, the TVPRA mandates that the child shall “immediately” be transferred to Office of Refugee Resettlement (ORR) custody. Once transferred to ORR, Mexican and Canadian children are treated like all other UACs in detention.⁶

Consular involvement

Mexican children found by CBP to be without protection concerns can be immediately repatriated. The mechanisms of their repatriation are governed by an umbrella agreement between DHS and the Secretary for Exterior Relations of Mexico, implemented by local agreements at different border areas.

Under the 1963 Vienna Convention and other agreements between the United States and Mexico, all Mexican nationals in the United States are guaranteed the right to speak with a consular official, and that the Mexican government will immediately be notified if a citizen is in U.S. government custody, and that a Mexican consular official has the right to visit a Mexican national in detention.⁷ CBP has given Mexican consular officials office space in many of the OFO and BP stations so that a local consular official can come to the facility to interview the migrant and help facilitate repatriation. When CBP wants to return a child to Mexico, the consular official will often coordinate the return of the child with Mexico’s national child welfare agency to ensure the safe repatriation of the child.

Children traveling with family members

Family groups traveling with children raise unique issues for DHS. DHS has long struggled with how to treat family units apprehended at the border.

Until the summer of 2014, DHS maintained only one family facility, the Berks Family Residential Center in Leesport, Pennsylvania, which was opened in 2001 to accommodate immigrant families in ICE custody for usually short periods of time. When DHS apprehends a family, they have the discretion to release family units to sponsors so that they may pursue an asylum or other legal claim in immigration court, or they may place them into “expedited removal,” a fast-track deportation process without the right to

make a case before an immigration judge. Currently, DHS practice is to place families into expedited removal and detention as long as they have detention space and absent exigent circumstances. In these cases, families are detained and must first pass an initial screening interview, known as a credible fear interview, to be considered for release, avoid summary removal, and to make a full asylum case before an immigration judge. In 2014, in response to an increase in mothers with children arriving at the southern border, DHS dramatically expanded the detention of families in its custody, opening the (now closed) Artesia Detention Center, the South Texas (Dilley) Family Residential Center, and converting the Karnes County Detention Center into a family facility. The additional facilities represented a 30-fold increase in family detention.

Because CBP does not have authority to detain U.S. citizens, when U.S. citizen children are apprehended and detained with a family member who does not have authorization to enter the country, the children must be released. There is no formal and public CBP policy on how CBP releases these U.S. citizen children and whether or not they will release these children to an undocumented parent or caregiver in the United States.

Part IV. Overview of Detention Conditions of Immigrant Children in the United States

When a child entering the United States without authorization is apprehended, there are three kinds of detention they may be subject to: detention in a CBP short-term hold facility; longer-term ICE detention facilities designed for families traveling together; or shelters and programs specifically for unaccompanied children run by ORR/Department of Children's Services.

In 1997, a California federal court approved the *Flores* settlement agreement that sets national

policy regarding the detention, release, and treatment of children in INS custody. These standards are still in force today and apply to all children apprehended by DHS.⁸ The *Flores* settlement requires that juveniles be held in the least restrictive setting appropriate to their age and special needs to ensure their protection and well-being; that juveniles be released from custody without unnecessary delay to a parent, legal guardian, adult relative, individual specifically designated by the parent, licensed program, or, alternatively, an adult who seeks custody whom DHS deems appropriate; and that "juveniles will not be detained with an unrelated adult for more than 24 hours." Citing significant violations of the agreement in DHS's expanded family detention regime, in early 2015, the plaintiffs in *Flores* filed a motion to enforce the Settlement Agreement; although the judge ruled in the plaintiffs' favor, appeals are ongoing.⁹

A. Immigration and Customs Enforcement detention

While many detained immigrant children in immigration proceedings today are in the custody of ORR/DCS, DHS retains custody of some children. Preliminary court findings have determined that ICE does not have legal authority, other than for screening and processing and removal purposes, to detain children who are being detained as part of a family unit. In general, ICE should not have custody of any children other than those who have been ordered removed (and whom ICE is in the process of removing), those whom ICE is transferring within 72 hours, and those classified as a national security risk under the Patriot Act.¹⁰ There may be cases where children are wrongly detained due to faulty age determinations or because ICE has determined that they are not "unaccompanied."¹¹ These children are sometimes placed in ICE facilities that are not appropriate for children.¹²

Numerous studies have documented that family detention facilities are especially inappropriate for children, and that DHS should release families that pose no security risk. Although the length of detention for families has significantly decreased for many families, even short stays in family detention facilities are inappropriate for children and inhibit crucial access to counsel.

B. Detention in Border Patrol facilities

When a child is initially apprehended entering the United States without authorization, he or she may be encountered by CBP. CBP maintains short-term hold facilities along the border and at all official ports of entry to the United States, including airports and bridges. If CBP encounters a child, traveling alone or with family, and they do not believe that child has permission to enter the United States, they will put that child in a holding cell. If a child is traveling with family, the child will be held with their family members. If they are unaccompanied, they will be held with other juveniles.

CBP facilities are intended to be short-term hold areas for children while BP officers determine the child's authorization to enter the United States, to process a credible fear claim or while they are waiting for another agency to transfer the child to another facility (such as an ICE or ORR facility). Children should not be held in those facilities for longer than 72 hours.¹³ After 72 hours, if CBP deems it necessary to continue the detention of a child, ICE must transfer that child to a long-term ORR or ICE facility.¹⁴ Often, due to delays in transport or a lack of long-term immigration detention capacity around the country, children have been held for much longer, up to two weeks.¹⁵ Despite the *Flores* and TVPRA standards for the treatment of children in CBP facilities, in practice, these facilities are not appropriate places to hold children.

C. Detention in ORR facilities

If it is deemed necessary for a child to be sent to an ORR facility because they are unaccompanied and are not able to be returned directly to Mexico, ICE will transfer the child from the short-term CBP facility to an ORR facility.

ORR has four kinds of detention facilities to hold unaccompanied immigrant children. These facilities operate along a continuum of care from least restrictive settings to more penal-like settings. From least to most restrictive, the types of facilities are: short-term and long-term foster care; shelters and group homes; therapeutic foster care and residential treatment centers; and staff-secure and secure facilities. The placement determinations for each child are made based on information regarding the child's best interests and security risk. The *Flores* agreement and the TVPRA of 2008 mandate that children should be housed in the least restrictive setting possible and the DCS continuum of care is reflective of this principle.

Part V: Release from Detention

Once a child is determined eligible for placement in an ORR facility, the federal government makes a determination as to whether or not that child can be reunified with an adult sponsor in the United States while their immigration court case is pending. A sponsor for a child may be a parent, legal guardian, family member, or other responsible adult willing to care for the child. Of the children who are eventually reunified, the majority go to live with a parent or legal guardian.

For children in custody with their parents, they may be released, at ICE's discretion. In most circumstances, ICE does not consider a family for release until after a parent has passed a credible fear interview. In some cases, ICE denies release. In other

cases, ICE often attaches conditions to release, such as placement on an ankle monitor, enrollment in a case management program, or a bond. If a parent wishes to appeal a bond determination, they may ask an immigration judge to reconsider.

Part VI: Unaccompanied Refugee Minor Program

The children in ORR custody who are never reunited with a sponsor, have received legal status and will remain in the country will be transferred to the Unaccompanied Refugee Minor Program (URM) within ORR. The URM program establishes legal responsibility, under state law, to ensure that unaccompanied minor refugees and entrants receive the full range of assistance, care, and services that are available to all foster children in that State. It acts like a federal foster care system for refugee youth, victims of human trafficking, and other unaccompanied children who have permanent legal status to remain in the country.

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Family Members” for a discussion on the concerns caused by the definition of unaccompanied alien child as it relates to non-parent family members.

5 Ibid.

6 Betsy Cavendish & Maru Cortazar, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors*, Appleseed (2011) (“*Children at the Border*”).

7 United Nations Vienna Convention on Consular Relations, April 24, 1963, 596 U.N.T.S. 261.

8 Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV85-4544-RJK (C.D. Cal. 1996) (*Flores* agreement).

9 For more information, see Family Detention & the Flores Settlement Agreement. Women's Refugee Commission and Lutheran Immigration and Refugee Service. August 2015. http://lirs.org/wp-content/uploads/2015/08/LIRSWRC_FloresSettlementandFamilyDetention_150812.pdf

10 Women's Refugee Commission, *Halfway Home: Unaccompanied Children in Immigration Detention* (2009), p. 12. http://wrc.ms/Halfway_Home.

11 Ibid.

12 During the research for *Halfway Home*, the Women's Refugee Commission staff encountered several children in ICE custody. They have not encountered any since the implementation of the TVPRA. DHS had expressed confusion on the proper placement for unaccompanied children with criminal or juvenile records. The TVPRA clarified that they should be transferred to ORR/DCS.

13 TVPRA.

14 Ibid.

15 Women's Refugee Commission, *Forced From Home: The Lost Boys and Girls of Central America* (October 2012) (“*Forced From Home*”). <http://wrc.ms/Forced-background>.

Notes

1 Prior to the creation of DHS, the Immigration and Nationality Services (INS), which was established on June 10, 1933 as part of the Department of Justice, protected and enforced the U.S Immigration and Naturalization laws. The INS also addressed illegal entrance into the United States, prevented receipt of benefits such as social security or unemployment by those ineligible to receive them, and investigated, detained, and deported those illegally living in the United States.

2 www.cbp.gov

3 www.ice.gov

4 See discussion in Part III, Section C “Children Traveling with



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