



Where We Stand: A 20-Year Retrospective of the Unaccompanied Children's Program in the United States

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CHAPTER THREE: Protections for Unaccompanied Children in the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)

The U.S. Committee for Refugees and Immigrants (USCRI) and The Children's Village present chapter three of *Where We Stand: A 20-Year Retrospective of the Unaccompanied Children's Program in the United States*. The retrospective will review the Unaccompanied Children's Program from the passage of the Homeland Security Act (HSA) of 2002 until today. It assesses 20 years of legislation, policies, litigation, and, most importantly, the U.S. federal government's care of unaccompanied migrating children, with a view toward the next steps and improvements for the years ahead. The third chapter looks at the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. In this chapter, we will analyze critical provisions that govern the rights of unaccompanied immigrant children who enter the United States. It covers three main areas: background on how the TVPRA came to be, the key provisions included for unaccompanied children, and legal protections provided for in the TVPRA of 2008.

In 2000, Senator Feinstein introduced the Unaccompanied Alien Child Protection Act (UACPA),¹ portions of which were subsequently incorporated and passed into law in the Homeland Security Act of 2002 (HSA).² As a result, Congress transferred authority over the care and custody of unaccompanied immigrant children from the Immigration and Naturalization Service (INS) to the Department of Health and Human Services' (HHS) Office of Refugee Resettlement (ORR). Advocates anticipated that the transfer of the program to a social services agency would address gaps in care, offer better protection, and result in a program focused on child welfare and the particular vulnerabilities of children.

In the subsequent years, however, certain areas of the program, such as the screening of children at the border for human trafficking, legal representation of children in immigration proceedings, and the responsibilities of HHS versus the Department of Homeland Security (DHS), among other issues, remained problematic.

In 2007, Senator Feinstein again introduced the UACPA bill, which was incorporated in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).³ The TVPRA of 2008

¹ Unaccompanied Alien Child Protection Act of 2001. Bill.

² Homeland Security Act of 2002, Pub. L. No. 107-296, H.R. 5005, 107th Cong.

³ The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA, P.L. 110-457).



created and enhanced the means to address both forced labor and sex trafficking and established procedures for vulnerable unaccompanied immigrant children arriving at the border.

The bill required family reunification whenever possible, provided for pro bono legal representation for children, and required additional training for the Department of Homeland Security (DHS) personnel and other government officials who come into contact with unaccompanied children. Section 235 of the TVPRA increased many protections for unaccompanied children seeking relief from removal, including Special Immigrant Juvenile Status and asylum, and provided procedures for those in immigration custody and at risk for removal. The TVPRA of 2008 was sponsored by Sen. Joe Biden (D-DE), Rep. Berman (D-CA), and the late Rep. Tom Lantos (D-CA) and was passed by unanimous consent.

Section 235, Enhancing Efforts to Combat the Trafficking of Children

According to Senator Feinstein: “The TVPRA strengthened federal trafficking laws for unaccompanied immigrant children by requiring that unaccompanied children from Mexico and Canada who did not have claims of asylum be screened for trafficking. It ensured that appropriate steps would be taken before returning children to their home countries or placing them with sponsors.”

The TVPRA of 2008 added provisions that govern the rights of unaccompanied children. Section 235, Enhancing Efforts to Combat the Trafficking of Children, directly guides the treatment of unaccompanied children.

Section 235 directed the Secretary of DHS, in conjunction with other federal agencies, to develop policies and procedures to ensure that unaccompanied children in the United States who are removed are safely repatriated to their countries of nationality or of last habitual residence. This provision also outlined essential legal procedures for unaccompanied children from contiguous (countries sharing a common border) and non-contiguous countries. Children from Mexico and Canada must be screened within 48 hours of apprehension to determine whether the child has been subject to trafficking or is susceptible to being trafficked. The TVPRA also included other legal protections for unaccompanied children, including access to counsel, legal orientations, and child advocates. The law adjusted the requirements for Special Immigrant Juvenile Status (SIJS). The law also directed the Secretary of HHS to determine when to conduct a home study along with follow-up services for children. The TVPRA also directed ORR to consider the child's “best interest,” as opposed to only the child’s interest, as was written in the Homeland Security Act. This specific child welfare language put more emphasis on the needs of the child. In addition to offering more protections to children, the TVPRA of 2008 created specific guidelines for the different roles of HHS and DHS.

The TVPRA set forth provisions respecting:

- (1) notification by DHS of unaccompanied children in its custody, and the transfer of those children to the Department of Health and Human Services (HHS);
- (2) age determinations;
- (3) safe placement with sponsors;
- (4) legal and child advocate access;



- (5) immigration status adjustment and asylum protections; and
- (6) assistance eligibility.

“In addition to creating protections for children who were victims of human trafficking, the TVPRA required that children from non-contiguous countries be transferred to the care and custody of Health and Human Services within 72 hours. Children were also given the ability to make their asylum claims to trained asylum officers or immigration judges. Perhaps most importantly, it established procedures to ensure that unaccompanied children received appropriate care while in the custody of the U.S. government, including counsel for legal proceedings and advocates to protect them from mistreatment and exploitation,” Senator Feinstein said.

Care and Custody

The TVPRA of 2008 set new standards for how children should be treated while in the custody of the federal government, the mental health and services they must receive, and the conditions under which they are repatriated. The TVPRA of 2008 marked for the first time how federal officials would be required to follow child welfare principles, including the "best interest of the child." As mandated by the TVPRA, ORR is required to place unaccompanied children in the least restrictive setting that is in the “best interest” of the child.⁴

When making a placement determination or recommendation, ORR and care providers consider the following factors as they pertain to the child:

- Trafficking or other safety concerns.
- Any special needs or issues requiring specialized services.
- Prior sexual abusiveness.
- Danger to self, danger to the community, and risk of flight.⁵

A child should not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility is reviewed, at a minimum, on a monthly basis.

Home Studies

⁴ TVPRA of 2008. § 235(c)(2)

⁵ Please click here for the full list. <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1#1.2.4>



Prior to the TVPRA, a home study was not required for unaccompanied children.⁶ A home study is an in-depth investigation of the potential sponsor’s ability to ensure the child’s safety and well-being.⁷ The process consists of background checks of the sponsor and adult household members, a home visit(s), a face-to-face sponsor interview and possibly interviews with other household members, and post-release services.

Pursuant to the TVRPA of 2008, the Secretary of HHS determines whether a home study is necessary. A home study must be conducted if:

1. The child is a victim of a severe form of trafficking in persons;
2. The child is a special needs child with a disability as defined by section 3 of the Americans with Disabilities Act of 1990;
3. The child has been a victim of physical or sexual abuse under circumstances that indicate that the child’s health or welfare has been significantly harmed or threatened; or
4. The child’s sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence.⁸

The Secretary of HHS is required to conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.⁹ These follow-up services are better known as post-release services (PRS).

For approximately 20% of the most vulnerable unaccompanied children in ORR care,¹⁰ PRS specialists provide additional assistance in locating, accessing, or connecting children and their sponsors to community resources. These resources may include education, health care, mental health services, and identifying legal representation. Post-release services are one part of the safety precautions for youth that includes home studies, sponsor verification, background checks, assessments, in-custody therapeutic services, and ORR wellness checks (well-being calls). Post-release services also are intended to follow the child in the event that the child changes addresses.

ORR offers post-release services to unaccompanied children that receive a home study. ORR also uses its discretion to offer post-release service delivery in some additional cases. Unaccompanied children who receive discretionary post-release services are limited to 90 days.

⁶ The *Flores* settlement agreement allowed for “suitability assessments” in certain situations at the discretion of the government.

⁷ Administration for Children and Families (ACF) (2022), ORR Guide: Children Entering the United States Unaccompanied. Washington DC: Office of Refugee Resettlement, section 2.4.2. Available at <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-2#2.4.2>

⁸ *Id.*

⁹ TVPRA of 2008. § 235(c)(3)

¹⁰ Office of Refugee Resettlement (2021), “Facts and Data.” Available at: <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.



It is common for youth in the UC provider network to have weakened interpersonal connections. A core principle of both trauma-informed care and trauma-responsive care is that youth benefit from positive interactions with adults. The roles of case managers (in shelters) and PRS specialists (after release) present opportunities for youth and sponsors to form strong therapeutic alliances based on trust and stability. For the most vulnerable youth, PRS support is critical as most unaccompanied children who enter care have suffered some level of traumatic exposure. Given the heightened rates and risk of trauma before, during, and after migration,¹¹ the provision of post-release support is important to children’s immediate needs as well as their long-term developmental outcomes.

While the provision of home studies and post-release services for vulnerable children was a step in the right direction, there is minimal policy from ORR for PRS specialists to follow. Essentially PRS providers are borrowing policy and care practices from child welfare organizations. Current post-release services for some children may be too limited in scope and do not necessarily meet the therapeutic needs of unaccompanied children. USCRI has recommended in the past and continues to recommend that Congress pass additional requirements for home studies and post-release services. In addition, to the extent possible under the current law and budget constraints, ORR should increase flexibility in PRS eligibility and access to case support so that individual needs determine the length and intensity of support.

Special Immigrant Juvenile Status

The Immigration Act of 1990 established Special Immigrant Juvenile Status (SIJS) for children: who were declared dependent on a juvenile court in the United States; who were eligible for long-term foster care; and for whom it would not be in their best interest to return to their country of origin. SIJS is legal relief made available to unaccompanied children who have been abandoned, neglected, or fleeing an abusive parent in their home country.

The TVRPA of 2008 made significant changes to SIJS.

- Removed the need for a juvenile court to deem a child eligible for long-term foster care and replaced it with a requirement that the juvenile court finds that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law
- Expanded eligibility to include children whom a juvenile court has placed under the custody of a person or entity appointed by a state or juvenile court
- Provided age-out protections so that SIJ classification may not be denied to anyone, based solely on age, who was under 21 years of age on the date that he or she properly filed the SIJ petition, regardless of the petitioner’s age at the time of adjudication

¹¹ Sarah A. Maclean et al. (2019), “Mental Health of Children Held at a United States Immigration Detention Center.” *Social Science and Medicine* 230, pp. 303-308, <https://doi.org/10.1016/j.socscimed.2019.04.013>; Allen Keller et al. (2017), “Pre-Migration Trauma Exposure and Mental Health Functioning among Central American Migrants Arriving at the U.S. Border.” *PLOS One* 12(1): e0168692, <http://doi.org/10.1371/journal.pone.0168692>



- Simplified the consent requirement: The Secretary of Homeland Security now consents to the grant of SIJ classification instead of expressly consenting to the juvenile court order.
- Altered the "specific consent" function for those children in federal custody by vesting this authority with the Secretary of Health and Human Services rather than the Secretary of the Department of Homeland Security
- Added a timeframe for adjudication: USCIS shall adjudicate SIJ petitions within 180 days of filing.

The TVPRA of 2008 expanded the definition of SIJS to the following:

- (i) A child who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to or placed under the custody of an agency or department of a State, or an individual or entity appointed by a state or juvenile court located in the United States, and whose reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
- (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence.¹²

The expansion of this definition allowed for the court to consider family reunification with one or both of the child's parents and allowed for more vulnerable and mistreated children to qualify for this form of legal relief. Once someone with SIJS has been a lawful permanent resident for five years, they may be eligible to become a U.S. citizen. Although U.S. citizens can petition for their spouse, children, and parents, if you obtained your legal status through SIJS, you will not be able to petition for your parents.

Procedural Protections

The TVPRA distinguished legal procedures for unaccompanied children from contiguous (Mexico and Canada) countries and non-contiguous countries. Children from contiguous countries are residents or nationals of Mexico and Canada. They must be screened within 48 hours of apprehension to determine if:

1. The child has been trafficked.
2. The child has a credible fear of returning to their home country.
3. The child is able to make an independent decision to withdraw an application for admission into the United States, also known as voluntary departure.

If an immigration officer determines that the child must be returned to Mexico or Canada, they must be returned to appropriate employees or officials, such as a child welfare agency. Furthermore, the United

¹² TPVRA of 2008. § 235(d)(1)-(d)(6)



States must enter into agreements with those countries to ensure that children who are repatriated will not be trafficked.

Children from non-contiguous countries are:

1. Referred to the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) within 72 hours for screening and placement in the least restrictive setting possible;
2. Placed in removal proceedings;
3. Placed in the care of a family member, ORR shelter, or foster home pending a removal hearing; and
4. Provided access to counsel, to the greatest extent practicable, to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.¹³

The rules for children from non-contiguous countries added needed clarity to the responsibilities of DHS versus HHS. It placed more responsibility with HHS, and gave stricter guidelines, such as the requirement to transfer children to HHS within 72 hours of their apprehension, on how the agencies should coordinate their roles.

Other Services Provided in the TVPRA

In addition to clarifying agency roles, modifying the SIJS requirements, and ensuring child welfare protections, the following services were also provided for in the TVPRA:

- **Legal Orientation Presentations:** The Secretary of HHS must cooperate with the Executive Office of Immigration Review (EOIR) to ensure children receive legal orientation presentations that provide information on due process rights and highlight the importance of appearing in immigration proceedings.¹⁴
- **Access to Counsel:** HHS must ensure that all unaccompanied children in its care are provided with counsel “to the greatest extent practicable” to ensure legal representation and make every effort to utilize the services of pro bono counsel.¹⁵
- **Child Advocates:** The Secretary of HHS was authorized to appoint independent “child advocates” for trafficked and unaccompanied children to promote the child’s best interest.¹⁶

Children’s Safe Welcome Act

While the TVPRA of 2008 brought improvements to the unaccompanied children’s program in the United States, Congress has the legislative ability to keep improving the program. On July 13, 2022,

¹³ *Id.* at § 235(a)(5)(D), § 235 (c)(5).

¹⁴ *Id.* at § 235 (c)(4), § 235 (c)(5), § 235 (c)(6).

¹⁵ TVPRA of 2008 § 235(c)(5)

¹⁶ TVPRA of 2008 §235(c)(6)



congressional leaders introduced the Children’s Safe Welcome Act. This bill would, among other things, codify minimum children welfare protections, prohibit family separation with very few exceptions, increase minimum health and safety standards for children in custody and guarantee legal representation for unaccompanied immigrant children at every stage of removal proceedings. This bill begins to reimagine how children are treated in government custody.

USCRI Recommendations

USCRI continues to advocate for Congress to pass legislation making post-release services for all unaccompanied children a legal requirement. USCRI also recommends that ORR be required to appoint child advocates for the most vulnerable children, specifically those expected to be in custody longer than 90 days and children who meet the current requirements for a home study. And for children without family or appropriate sponsors in the United States, USCRI recommends an expansion of the Unaccompanied Refugee Minors program to create additional placements and more appropriate services for unaccompanied children.

USCRI wants to surround and strengthen unaccompanied immigrant children with quality care and services that are in their best interests.¹⁷ We want these children to feel supported and cared for by trained and compassionate caregivers. We want to provide opportunities to help the children overcome the obstacles they have faced and will face as they continue their journey to a dignified life.

¹⁷ “In the Best Interest of the Child,” USCRI policy paper, October 2019.