



Frequently Asked Questions About Separated Children and the Child Welfare System

The Trump administration's [enforcement and "zero tolerance" policy](#) separated thousands of children from their parents and then placed them in the custody of the [Office of Refugee Resettlement](#) (ORR). ORR is a program of the U.S. Department of Health and Human Services (HHS) that is charged with providing care and custody for [unaccompanied children](#) in immigration proceedings while reunifying them with family or sponsors in the community.

The placement of so-called "separated children" in the custody of ORR has resulted in confusion about the federal government's role and jurisdiction, and has raised many questions about the potential relevance of state child welfare laws, including questions about the risk of termination of parental rights and adoption for separated children and parents. This fact sheet seeks to answer those questions and clarifies that separated children in ORR custody have not gone through any of the required state procedural and jurisdictional processes for being in a state child welfare system. As a result, the parents of separated children should not be at risk of losing their parental rights under child welfare law and their children should not be eligible for adoption.

Instead, federal and state child welfare laws, as well as a recent federal court [decision](#), make clear that the vast majority of separated children must be reunited with their parents immediately. In this respect, although none of the children separated from their parents are in a state child welfare system, it is relevant to understand that child welfare law provides much of the basis for underlying legal principles and concepts that limit the government's ability to interfere with the parent-child relationship without procedural protections in place. These principles include the right to family integrity, presumptions that children's best interests are served by remaining with their parents, and parents' fundamental liberty interest in the care, custody and control of their children.

Who are separated children?

Separated children¹ are children who arrived at the southern border of the United States with a parent or legal guardian, and who were separated from their caregiver by U.S. immigration officials. The majority of separated children are from El Salvador, Guatemala, and Honduras, and were brought to the United States by parents who fled their home countries in an effort to save their children from endemic violence, [including that perpetrated by gangs and cartels who are targeting women and children](#) in the region. Since the "zero tolerance" policy began in May 2018, [somewhere between 2,600 and 3,000 children have been separated from their parents and placed in ORR custody](#). However, it is relevant to note that children were increasingly being separated in this manner for months before the "zero tolerance" policy was implemented.

¹ There is no definition of "separated child" in U.S. immigration law. The term is used to refer to various populations of children who have lost the care of a parent or other guardian because of immigration enforcement. In 2018, the term has been widely used to refer to children who arrived at the southern border of the U.S. with a parent or other guardian and who were separated from that adult as a result of the Trump administration's "zero tolerance" policy. However, family separation was also employed by the Obama administration and was in use by the Trump administration prior to the May 6, 2018 executive order. For more information, see <https://www.womensrefugeecommission.org/rights/resources/document/download/1454> and <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616>.

Where are separated children housed?

ORR, a federal program that provides care and custody for unaccompanied children, is also housing separated children. Separated children were rendered unaccompanied by virtue of the administration's decision to separate them from their parents at the border. In many cases, the separation of families was related to a decision to prosecute their parents for immigration violations. [Their situation differs](#) from that of unaccompanied children, who came to the U.S. alone.² However, none of the children in ORR custody are in the care of a state child welfare system.

Does the law provide any protection to ensure separated children will be reunified with their parents?

Yes. On June 26, 2018, the U.S. District Court for the Southern District of California issued a [preliminary injunction](#) finding that the federal government has an affirmative duty to track and reunify all children who were separated from their parents. The court required the federal government to reunify all children under the age of 5 within 14 days and all children 5 and older within 30 days. The court identified the injury of separation as an irreparable harm for children and their parents and reaffirmed that a parent's right to the care, custody, and management of his or her child is a fundamental liberty interest protected by the Constitution. The court also relied on one of the foundational principles of federal and state child welfare law: that it is generally in the [best interest of children to be with their parents](#), absent a finding of imminent risk of harm to the children.

Nothing in the order suggests that separated children will be transferred into the state child welfare system pending reunification with parents, nor would state child welfare laws permit such action without a state court adjudication determining that there is a specific safety threat to a child that provides a basis for child welfare involvement.³

Are children in ORR custody in the custody of a state child welfare agency?

No. The basis for ORR custody derives from immigration law and is separate from laws that provide a basis for state child welfare agency involvement. ORR operates a federal program that is responsible for the care and custody of unaccompanied children in U.S. immigration proceedings. An unaccompanied child is [defined](#) as a child who is under 18, has no lawful immigration status in the United States, and lacks a parent or legal guardian available to care for him or her.⁴ The separated children recently placed in ORR custody have been rendered "unaccompanied" by the federal government and will remain in federal custody until they are reunified with a parent in U.S. Immigration and Customs Enforcement (ICE) detention, are released to a parent or sponsor in the community, or are removed.

For the purpose of release to a sponsor or parent, children in ORR custody who have been separated from their parents at the southern border are not in the same situation as children who arrive in the U.S. as unaccompanied children. As a result, ORR's responsibility to evaluate a proposed custodian before releasing an unaccompanied minor [should not apply](#) to the process of reunification between parents and children who would not be unaccompanied but for the federal government's separation.

Is ORR's role different from that of a state child welfare agency?

Yes. ORR is a federal program that provides temporary shelter and care (including arrangements sometimes termed "foster care") to unaccompanied immigrant children while the federal government locates sponsors and works towards resolving a child's immigration case. Sponsors are generally parents, family members, or friends to whom ORR releases the child. Those sponsors then take over the child's care while he or she awaits immigration court hearings to determine whether he or she will be granted asylum or another form of permanent legal status in the United States. The release of the child to a sponsor does not involve any designation of legal guardianship. The parent/child relationship remains unchanged. After releasing a child to the sponsor, ORR's oversight of the care of the child ends. Children may remain in federal ORR custody throughout their immigration case (in either a federal

² An unaccompanied child is a child who— (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom— (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody. 6 U.S.C. § 379(g).

³ 8 U.S.C. s1101(a)(27)(J) (explaining that all dependency law matters are expressly state court matters and are not the purview of immigration law).

⁴ 6 U.S.C. 379(g)

foster home⁵, group arrangement, or residential care) if they do not have a sponsor available. When a child's immigration case ends (either with legal status or deportation) the basis for ORR custody also ends because ORR's custody arises from immigration law.

In contrast with ORR's federal immigration role, child welfare agencies are governed by state law and provide services and temporary care to children who have been abused or neglected, and who cannot remain safely with their parents or another primary caregiver. Children enter state foster care while their parents engage in court-approved plans to change the circumstances that led to abuse or neglect and to reduce the risk of future harm. There are specific procedural requirements in place in these cases and they are governed by state court jurisdiction. If parents are unable to improve the circumstances that led to the removal of the child from their home within a specified period of time, state child welfare agencies can ask a state court to terminate parental rights, which will allow children to be available for adoption.⁶ States cannot seek to terminate parental rights without a finding that the parent is unfit.⁷ This is not the role of ORR, and neither ORR nor any other federal agency is involved in termination of parental rights proceedings (TPR).

Can ORR terminate parental rights and place a child for adoption?

No. Federal agencies can deport a parent, but they cannot terminate parental rights or make a child available for adoption. Part of ORR's responsibility is to decide whether a child in its custody can be released to a parent or other sponsor so that the child can live in the community while they go through immigration proceedings. ORR can decide that it is not safe or appropriate to release a child, but this decision has no effect on parental rights.

Children involved with a state child welfare system at times are adopted if a state court has terminated their parents' rights. But both federal and state laws require that, except in very limited circumstances, when a child enters state child welfare custody, [reasonable efforts](#) be made to locate a parent and to work toward family reunification before termination of parental rights is considered. If a child separated from his or her parents at the border were to end up in the custody of a state child welfare agency, these same procedures and safeguards apply.

Are there scenarios in which a separated child who was previously in ORR custody could be placed into state child welfare custody and be adopted?

Yes. But it is not likely. A separated child who is released from ORR custody to a parent or sponsor in the community could find himself or herself involved with a state child welfare agency if the care arrangement becomes unsafe or disrupted and an allegation of abuse or neglect by the caregiver is made. However, the caregiver would be given opportunities to work toward reunification with the child. Before adoption by anyone else could occur, a state court would have to terminate parental rights. As explained above, the state court would need to determine the parent is unfit before terminating parental rights.

We are not aware of any of the more than 2,600 children separated under the "zero tolerance" policy for whom adoption is even a consideration at this time.

⁵ Note that a "foster home" is a type of custody placement that both ORR and state child welfare agencies use. At times, the same agency that provides foster homes may have contracts with both ORR and with a state child welfare agency. However, the processes and purposes of the two systems are distinct and a child in ORR custody is not available for adoption even if they are living in a foster home.

⁶ The Adoption and Safe Families Act ([Public Law 105-89](#)) requires that state child welfare agencies and courts move to terminate parental rights if a child has been out of a parent's care for 15 of the last 22 months (or less, for very young children), unless compelling reasons exist to not terminate a parent's rights. For analysis see <https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/2999>.

⁷ *In re Doe*, 281 P.3d 95 (Idaho 2012) (overturning a termination of parental rights decision involving a Mexican father where the child welfare agency never asserted the father had abused or neglected his child, and no evidence suggested he was unfit as a parent); *In re Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009) (overturning a termination of parental rights decision involving a Guatemalan mother where the agency had never shown that the mother was unfit and had failed to rebut the presumption that it was in the children's best interests to reunite with their mother in Guatemala).

What if a separated child is a U.S. citizen?

Most separated children are not citizens of the United States. However, at times, U.S. immigration officials apprehend a family at the southern border [with some members who are U.S. citizens and others who are not](#). There is no protocol for how such cases should be handled. U.S. immigration authorities legally cannot detain or remove a U.S. citizen because their custody authority arises solely from federal immigration law. Sometimes these mixed status families are released or enrolled in an alternative to detention program. Other times, an immigration officer allows the parent to contact a relative or friend who is willing to assume care of a U.S. citizen child while the parent and any children who do not have legal status are detained. If neither of these options is possible, or if an immigration officer declines to utilize them, immigration authorities may contact a state child welfare agency to assume custody of a U.S. citizen child. U.S. citizen children cannot legally be held in ORR facilities.

Can parents lose their parental rights because of their detention or deportation?

No. In the child welfare context, TPR arises when there is a substantiated case of abuse or neglect by the caregiver that has been adjudicated by a court with jurisdiction to handle state child welfare cases. For separated children, there is almost no reason they should enter the child welfare system in the first instance. As a result, there should be very little risk that parents who are detained or have been deported after separation from their children could lose their parental rights. Even if there were a basis for state court jurisdiction and a separated child entered the state child welfare system, courts across the country have held that detention and deportation are not grounds for TPR without other factors that support findings of parental unfitness.⁸

Are parental rights terminated if a child receives Special Immigrant Juvenile Status ?

No. Some children are eligible to apply for Special Immigrant Juvenile Status (SIJS) if they cannot reunify with one or both parents due to abuse, abandonment, or neglect and meet other eligibility criteria. Children who seek SIJS status may have been released from ORR custody to a non-parent sponsor or to the non-offending parent prior to beginning the SIJS process, or they may still be in ORR custody with no family reunification options. It is possible that some children who were separated from parents under the “zero tolerance” policy may be eligible for SIJS. But SIJS is a complex process that can take years. Click [here](#) for more information about SIJS.

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⁸ See, e.g., *State of New Mexico ex rel. Children, Youth and Families Dep’t v. Alfonso*, 366 P.3d 282 (New Mex. 2015) (overturning a termination of parental rights decision involving a deported father because the father expressed a legitimate desire to take responsibility for the child and his deportation could not be considered abandonment and there was no other basis for TPR); *In re Mainor T. and Estela T.*, 674 N.W. 2d 442 (Neb. 2004) (overturning a termination of parental rights decision involving a deported mother because there were no allegations of abuse or neglect and deportation could not be considered abandonment); see also See, e.g., *In re Doe*, 281 P.3d 95 (Idaho 2012), *In re ENC, et al.*, 384 S.W. 3d 796 (Tex. 2010), *In re Angelica L.* 767 N.W.2d 74 (Neb. 2009). (overturning TPR decisions where parents made remedial efforts and/or no continued threat of harm to the child existed).