

House Appropriations Subcommittee on Labor, Health and Human Services, Education, and
Related Agencies

Hearing entitled: “Reviewing the Administration’s Unaccompanied Children Program”

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Washington, DC
February 27, 2019

Good afternoon. Thank you for this opportunity to testify about this extremely important matter, which profoundly affects the lives of vulnerable migrant children seeking safety.

The Women’s Refugee Commission is a non-governmental, non-profit organization that works to identify gaps, research solutions, and advocate for change to improve the lives of crisis-affected women and children.¹ The Women's Refugee Commission is a leading expert on the needs of refugee women and children, and the policies that can protect and empower them.² For over two decades, the Women's Refugee Commission has monitored immigration detention facilities and migrant children’s facilities operated under the jurisdiction of Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and the Office of Refugee Resettlement (ORR), and interviewed facility staff, local service providers, asylum seekers, and migrant children about policies, practices, conditions of custody, and access to protection.³ The testimony submitted here is based on the Women's Refugee Commission’s expertise and accumulated knowledge (in addition to the specific sources cited).

The administration has implemented various policies designed to deter migrants – particularly migrant children – from seeking protection in the United States. Unfortunately, these policies serve only to endanger children and place additional, unnecessary burdens on ORR’s

¹ Women’s Refugee Commission, <https://www.womensrefugeecommission.org/about>.

² Women’s Refugee Commission, *Border Surge of Unaccompanied Children: Why They’re Coming and What the Government Should Do* (2014), available at <https://www.womensrefugeecommission.org/news/press-releases-andstatements/2080-an-administration-made-disaster-the-south-texas-border-surge-of-unaccompanied-alien-minors>.

³ Women’s Refugee Commission, *Forced From Home: The Lost Boys and Girls of Central America* (2012), available at <https://www.womensrefugeecommission.org/rights/resources/document/download/844>.

ability to provide safe care and custody for children while focusing on reunification with their families in accordance with best child welfare practices and our laws. The crisis at our border is a crisis of policy: Policies that are intentionally exposing children in government custody to lasting and irreparable harm.

Three intentional policies in particular have led to extended lengths of stay in custody and lack of appropriate facilities for children: 1) the policy of Family Separation; 2) a Memorandum of Agreement (MOA) between DHS and ORR that provides for information sharing and permits ICE to detain and place in removal proceedings sponsors and other members of a household applying to sponsor a child; and 3) the decision to cancel the Central American Minors (CAM) program. All three of these policies have led to an increased daily average number of children in ORR custody and an increased average length of stay in ORR custody, as well as the use of unlicensed facilities that house inappropriate numbers of children and do not meet child welfare standards.

Children and families seeking protection

Thousands of children migrate to the United States each year. Most of these children are fleeing war, violence, abuse, or natural disaster; others come to reunite with family members already here, or to seek a better life. It is critical to note that while the number of children and families seeking asylum over the past seven years has increased, the overall number of apprehensions and unauthorized arrivals at the US border has drastically decreased.⁴ The demographics of those arriving at our borders has shifted – to a larger percentage of people seeking protection such as asylum, and more families and children. CBP reported that 59 percent of those apprehended at the border in November 2018 were families or children.⁵ These families and children fleeing conflicts and crises are desperate—as are the parents and other family members who are sending them. Furthermore, despite claims by the administration, the number of unaccompanied children within this group of families and children apprehended at the US

⁴ See, e.g. “Trump says there’s a ‘crisis’ at the border. Here’s what the data says,” PBS NEWS (Jan. 8, 2019), <https://www.pbs.org/newshour/politics/trump-says-theres-a-crisis-at-the-border-heres-what-the-data-says>.

⁵ Commissioner Kevin McAleenan, Dec 11, 2018, <https://www.cnsnews.com/news/article/melanie-arter/cbp-commissioner-expects-see-more-double-last-years-record-number-family>

border has remained steady over the past two years.⁶ Despite this, the total population of children in ORR custody has steadily increased.⁷ The increased custody is directly related to US policy. Compliance with the *Flores* Settlement Agreement, prompt release, and border policies that do not create unaccompanied children by separating families, would result in fewer children in ORR custody and better conditions of care.

Office of Refugee Resettlement custody of children

When unaccompanied children from non-contiguous countries arrive at our border seeking protection, CBP – an agency under the Department of Homeland Security – must transfer them to ORR within 72 hours. Once children are in its custody, ORR is responsible for placing them in the least restrictive setting that is in their best interests, and for reunifying them with parents or family in the US as soon as possible. This process was designed to comply with existing US law and child welfare standards to serve the child’s best interest while also safeguarding the child’s rights to family unity and preventing long-term family separation. This is also in recognition of longstanding expert consensus that government custody is not in the best interest of children and that absent specific and extenuating circumstances or abuse and neglect, children are healthiest and safest when they are with their families.

Family Separation

It is important to note that ORR was designed to care for and reunify children who arrive unaccompanied – meaning children traveling alone. In the past two years, DHS has transferred to ORR custody thousands of additional children who came with a parent or guardian and were separated and thus “rendered unaccompanied” by the Department of Homeland Security’s family separation policy.

In March 2017, then-Secretary of Homeland Security John Kelly announced that the administration was considering a policy of separating families in order to deter them from

⁶ “Total Unaccompanied Children Apprehended at the Border” – CBP data (U.S. Customs and Border Protection, Southwest Border Migration FY2019, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration>).

⁷ National Center for Youth Law, *The Flores Settlement Agreement & Unaccompanied Children in Federal Custody*, February 2019.

arriving to seek asylum at the US-Mexico border.⁸ While he quickly changed course and announced that the policy was temporarily off the table, discussion of how to deter families through separation continued. In July 2017, CBP began a pilot⁹ of “zero tolerance” to prioritize the criminal prosecution of immigration-related offenses in order to deter migrants, which was then expanded nationally in May of 2018.¹⁰ The policy called for the referral for prosecution and transfer to US Marshals Custody of any migrant attempting to cross into the US without authorization, including those who turn themselves in to authorities, asylum seekers, and those traveling with children. With a parent transferred to Marshals custody, CBP classified children accompanying them as unaccompanied, and transferred them to ORR. By late July 2017, ORR noted an increase in cases of families separated at the border and of separated children transferred to ORR custody.¹¹

No system was implemented to track separations, inform families of the process for reunification, or even to identify children as having been separated when transferring them to ORR. The numbers were not insignificant. Between June and November 2017, at least 281 individuals in families were separated, with the children being transferred to ORR facilities. *The New York Times* reported that between October 2017 and April 20, 2018, ORR identified over 700 children placed in their care after separation from a parent at the border.¹² By June 2018, ORR identified 2,654 children in their care who had been separated from their parents by CBP at the border.¹³

More recent investigations have revealed additional children that ORR failed to identify in June, and that there were likely thousands of separated children who had been released from ORR prior to the June accounting. This means that between the summer of 2017 to the time of

⁸ Daniella Diaz, “Kelly: DHS is considering separating undocumented children from their parents at the border”, (March 7, 2017); <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>

⁹ Department of Homeland Security, Office of the Inspector General, HHS-OIG Issue Brief, January 2019 OEI-BL-18-00511, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>

¹⁰ Department of Homeland Security, Office of the Inspector General, HHS-OIG Issue Brief, January 2019 OEI-BL-18-00511, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>

¹¹ Department of Homeland Security, Office of the Inspector General, HHS-OIG Issue Brief, January 2019 OEI-BL-18-00511, page 6, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>

¹² “Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border,” *The New York Times* (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html?module=inline>.

¹³ *Ms. L. v. U.S. Immigration & Customs Enforcement (Ms. L. v. ICE)*, No. 18-0428 (S.D. Cal. June 26, 2018). GAO report, <https://www.gao.gov/assets/700/694918.pdf>

the court order in 2018, there were, at a minimum, over 3,000 children and potentially thousands more, who had been separated from a parent and placed into ORR custody, who did not arrive as unaccompanied children and should not actually have been in ORR custody at all.

This policy had consequences far beyond what is evident on the face of it. The children ripped from their parents' arms by CBP arrived at ORR severely traumatized¹⁴ and required attention. In addition, the separated children were on average considerably younger than the average age of unaccompanied children generally in ORR's care¹⁵ and many were toddlers or even babies: of the 2,700 separated children in ORR care on June 26, 2018, 103 were under five years of age.¹⁶ In a visit to the Ursula processing center in June 2018, I observed dozens of children under the age of 12, a cage full of children 5 and under, and even several babies who had been separated from a parent. One 5-year-old boy with whom I spoke was too distraught to even speak. He sobbed as he clung to a rolled-up photocopy of his mother's identification photo. That boy was lucky to have the photo compared to some I encountered who had no documentation of who their mother or father was.

These children – and even those over 5 who were in many cases still much younger than the average age ORR was accustomed to care for – required different licensing requirements and standards of care than older children, including: different staffing ratios, different accommodations, different education needs, medical needs, nutritional needs, and recreational needs.

In addition to causing extreme trauma, separations put multiple burdens on ORR, a system already facing a challenging mission. These large numbers of separated children in ORR custody required a sudden and immediate increase in bed spaces. While ORR has plans in place in preparation for an emergency influx – this should not have been an emergency. The administration had been considering and planning the implementation of a family separation

¹⁴ Colleen Kraft, "Separating parents from their kids at the border contradicts everything we know about children's welfare," Los Angeles Times (May 3, 2018); <https://www.latimes.com/opinion/op-ed/la-oe-kraft-border-separation-suit-20180503-story.html>

¹⁵ GAO, *UNACCOMPANIED CHILDREN: Agency Efforts to Reunify Children Separated from Parents at the Border*, Report to the Ranking Member, Committee on Energy and Commerce, House of Representatives, (October 2018); <https://www.gao.gov/assets/700/694918.pdf>

¹⁶ Office of the Inspector General, Department of Health and Human Services, *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, (September 27, 2018); <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>
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policy for over a year. They knew – as it would be impossible not to understand – that implementing a family separation policy would result in a dramatic need for additional ORR bed-space and resources. Yet, it appears that ORR was not prepared. They scrambled to find space and had to open several emergency influx facilities¹⁷ and issue emergency measures to allow for waiving maximum capacity requirements in existing shelters.

These emergency facilities are unlicensed, extremely expensive, and are not in full compliance with *Flores* Settlement agreement requirements and child welfare standards. While we recognize the need for ORR to have flexibility in opening emergency facilities and accommodating an influx of children, we are concerned that this flexibility is being overused and abused – with the result of harming children. Problematic failures to comply with protections include: failure to conduct required background checks on employees; inadequate staffing ratios; inadequate mental health care; inadequate or non-existent education access; and limited or non-existent access to counsel.¹⁸

Child welfare principles have long established that large institutional facilities are an inappropriate setting for children. In 2009 the Women's Refugee Commission expressed concern at the increasing size and capacity of shelters that were expanding beyond 100 children.¹⁹ Larger facilities necessarily rely on greater institutionalization as a means of maintaining control, have a higher staff to child ratio, and are less able to adapt services to the needs of individual children. Both care and safety are compromised by this reliance on large facilities. The influx facilities used by ORR are drastically larger than what is appropriate. Tornillo, located in Texas, before it closed, held in its custody up to 3,800 children. Homestead, located in Southern Florida, is

¹⁷ Memorandum from Daniel Levinson, Inspector General to Lynn Johnson, Asst. Secretary, Admin. For Children and Families, The Tornillo Influx Care Facility: Concerns About Staff Background Checks and Number of Clinicians on Staff (A-12_19-20000) Nov. 27, 2018,

<https://oig.hhs.gov/oas/reports/region12/121920000.pdf>. The Tornillo facility opened on June 14, 2018.

¹⁸ WRC site visit to Tornillo, Leah Chavla, September 24, 2018; Leah Chavla visit to Homestead, May 15, 2018. See also, Office of the Inspector General, Department of Health and Human Services, memo, The Tornillo Influx Care Facility: Concerns About Staff Background Checks and Number of Clinicians on Staff (A-12-19-20000), November 27, 2018; <https://oig.hhs.gov/oas/reports/region12/121920000.pdf>;

See also Declaration of Leah Chavla in *Jenny L. Flores, et al. v. Jefferson B. Sessions, III, et al*

¹⁹ *Halfway Home: Unaccompanied Children in Immigration Custody*, Women's Refugee Commission, Orrick Herrington & Sutcliffe LLP, February 2009, p. 15, Footnote 105.

<https://www.womensrefugeecommission.org/rights/resources/196-halfway-home-unaccompanied-children-in-immigration-custody>

contracted to hold 2,350 children.²⁰ No facility of this size is an appropriate setting for children. To the extent they exist, any facility of this size should at a minimum be required to comply with more stringent standards of accountability and protection. Yet, even though Tornillo operated from June – December 2018 and Homestead has been online for almost a year, neither is licensed or in compliance with the *Flores* standards. Facilities in operation for these extended periods are not truly “emergencies.”

In addition to new emergency facilities, ORR took measures to expand capacity at existing shelters. Because – prior to the family separation and zero tolerance policy – ORR did not have large numbers of children under 12 years old, most of these shelters were not equipped or licensed for the children now arriving in their care. ORR implemented the emergency clause to allow for more children to be placed in facilities for young children than they were licensed for. For example, a facility that had a license to accommodate 6 children to a room had extra beds brought in and was authorized to house 8 children to a room. These exceptions to licensing are appropriate for short-term emergencies, where the alternative is a child staying in a border patrol station for over 72 hours. However, they cannot become the norm and should not be used for children who should not be separated from their parents in the first place. Separation as a deterrent is illegal.

The separation of children placed a significant burden on ORR and negatively impacted all the children in their care (not just those who were separated from a parent or guardian), and undermined ORR’s ability to adequately care for the children in their custody.

ICE/ORR Memorandum of Agreement and Children’s Length of Stay in ORR Custody

In May 2018, ORR and DHS/ICE entered into a Memorandum of Agreement (MOA) mandating continuous information-sharing on unaccompanied immigrant children beginning when CBP or ICE takes them into custody through their release from ORR custody.²¹ This

²⁰ John Burnett, “Inside The Largest And Most Controversial Shelter For Migrant Children In The U.S.”, NPR, February 13, 2019, 10:13am; <https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u->

²¹ Copy of Memorandum of Agreement among The Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information-Sharing in Unaccompanied Alien Children Matters, available at <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf>

included information on the children’s potential sponsors, usually family members, as well as anyone else living with the sponsor. The MOA represents a dramatic change from past practice — replacing the best interests of children with the operational expediency of immigration enforcement. One of its intended objectives is to identify, detain, and remove adults who come forward to sponsor unaccompanied children.²² The administration was aware that this policy would delay reunifications and result in longer stays in ORR facilities. It was expected that this would result in a deterrence effect and reduce the number of children seeking safety in the United States.²³ In essence, this policy is one in which the US government is using children as bait with the clear intent of punishing parents and deterring them from protecting their children.

The MOA is undermining family reunification, the fundamental principle of child welfare law, by turning safe placement screening into a mechanism for immigration enforcement. This contradicts ORR’s goal of placement with the most appropriate caregiver. The agreement exploits the natural desire of children to seek protection with family and the fundamental desire of family to protect their children to elicit information for law enforcement rather than family reunification purposes. ORR is sharing with ICE a broad range of information on children in its custody and providing DHS access to ORR’s internal case database. In doing so the MOA transforms child welfare professionals into probation officers—without the due process protections that would normally come with such actions.

Other enforcement policies in place that targeted sponsors and parents of arriving unaccompanied children had already reduced the pool of potential parents and family members willing to come forward to sponsor children.²⁴ The Women’s Refugee Commission and the National Immigrant Justice Center (NIJC), surveyed 47 individuals involved in the sponsorship application and vetting processes, including attorneys, biometric technicians, and counselors, in order to map the full impact of this new MOA on the sponsorship vetting and application process.²⁵ While arrival numbers indicate that the MOA did not succeed in its objective of

²² 83 FR 20844 (May 8, 2018), <https://www.regulations.gov/document?D=DHS-2018-0013-0001>

²³ See Policy Options to Respond to Border Surge of Illegal Immigration, cited in J.E.C.M. et al. v. Scott Lloyd, No. 1:18-CV-903-LMB (E.D. Vir. 2019).

²⁴ See Nat’l Immigrant Just. Ctr., *NIJC And Immigrant Rights Advocates Demand Civil Rights Investigation Into ICE Raids That Targeted Sponsors Of Unaccompanied Children* (Dec. 6, 2017), <https://www.immigrantjustice.org/index.php/press-releases/nijc-and-immigrant-rights-advocates-demand-civil-rights-investigation-ice-raids>

²⁵ Women’s Refugee Comm’n & Nat’l Immigrant Just. Ctr., *Survey: Impacts of ORR-DHS Memorandum of Agreement (MOA)* (hereinafter “Survey.”) (Anonymized.) “Children as Bait” report forthcoming.

detering children from seeking protection, the results confirm that the MOA has succeeded in reducing reunifications; survey participants reported that fewer parents or legal guardians are stepping forward to sponsor their children due to the fear that their information will be sent to CBP or ICE for immigration enforcement purposes, that some sponsors withdrew sponsorship applications due to fear, and that the processing time of sponsorship applicants and slowed down – leading to an exponential increase in the time children spend in ORR custody and an increased potential of children remaining in ORR custody.²⁶ An HHS official reported in October 2018 that the average length of stay in ORR custody was 74 days, which is more than double what it was in 2016.²⁷ As of earlier this month, advocates reported that children averaged 67 days in Homestead, in addition to time the children may have spent in other shelters.²⁸

It is clear that by increasing the likelihood that children will remain in custody, and at the very least increasing their length of stay in custody, the MOA again runs counter to the *Flores* Settlement Agreement and the Trafficking Victims Protection Reauthorization Act's (TVPRAs) recognition that it is in a child's best interests—as well as the government's fiscal interests—to be with a family member rather than remain detained. And, this policy, like the Family Separation policy, has jeopardized the quality of care and compliance with general child welfare standards and practices in ORR custody. In doing so, this policy endangers children's well-being.

Termination of Central American Minors Program

In addition, the administration has terminated the Central American Minors Program (CAM)²⁹ – a program that provided a safe and orderly mechanism for children to apply for and relieve legal

²⁶ See Women's Refugee Comm'n & Nat'l Immigrant Just. Ctr., *ORR and DHS Information-Sharing Emphasizes Enforcement Over Child Safety*, *1, *1, accessible at <https://www.womensrefugeecommission.org/images/zdocs/Backgrounder-ICE-MOA.pdf>.

²⁷ John Burnett, *Inside the Largest and Most Controversial Shelter for Migrant Children in the U.S.*, National Public Radio, Feb. 13, 2019, <https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u-s>

²⁸ Jonathan Blitzer, *To Free Detained Children, Immigrant Families are Forced to Risk Everything*, *The New Yorker*, Oct. 16, 2018, <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything>.

²⁹ U.S. Department of State, *Status of Central American Minors Program*, Nov. 8, 2017, <https://www.state.gov/r/pa/prs/ps/2017/11/275415.htm>; U.S. Citizenship and Immigration Services, DHS, *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)*, Nov. 15, 2017.

access to the United States from overseas, thus saving thousands of children from making the dangerous journey through Mexico and making ORR custody and efforts for reunification unnecessary. It is reasonable to assume that many children who would have qualified for the CAM program are now forced to make the journey and request protection at the US border, adding more unnecessary unaccompanied children to ORR's roster.

CONCLUSION

The current system, and implementation of these three policies – family separation, the MOA between DHS and ORR, and the termination of the CAM program – has directly resulted in an increased need for emergency bed-space and increased length of stay that compromises children's well-being and results in violations of child welfare standards. These policies use the custody and suffering of children as a deterrent and are turning ORR into an enforcement agency that runs counter to ORR's responsibility and mandate to care for children and to place children in the least restrictive setting that is in their best interests.

Recommendations

We believe that ORR can and should be able to handle the care and custody of the children in their care – in accordance with child welfare standards and current law. DHS should not be separating children and placing them in ORR custody. At the same time, ORR should not be engaging in practices that discourage reunification, separate families, and endanger children. ORR can strengthen its family reunification procedures in order to ensure a child's access to family unity and protection. ORR has the expertise and knowledge to implement better family reunification procedures and Congress should support these efforts by adequately funding ORR so that every child is protected.

We recommend the following:

- Investigate and end the inappropriate separation of children from a parent or guardian at the border. Ensure thorough due process and reunification efforts in any separation cases. All separations must be documented and tracked.

<https://www.uscis.gov/CAM>. *See also*, Women's Refugee Comm'n, *Women's Refugee Commission Condemns Termination of Central American Minors Program*, Sept. 29, 2017 <https://www.womensrefugeecommission.org/news/press-releases-and-statements/2671-wrc-condemns-termination-of-cam-program>.

- Ensure full compliance with the *Flores* Settlement and TVPRA, including appropriate transfer policies, placement in the least restrictive setting appropriate for the child's care, use of only licensed and non-secure facilities, and prompt reunification practices.
- Support policies that encourage sponsors to come forward and promote family reunification. ORR should terminate the information-sharing agreement (MOA) with DHS as it compromises the safety and well-being of children and undermines ORR's child protection responsibilities. ORR must refrain from participation in law enforcement actions that compromise children's privacy and safety. Immigration status of a parent or guardian should not be a consideration in reunification.
- Provide robust funding for federal programs serving the best interests of unaccompanied immigrant children, including community-based residential care, home studies, post-release services, legal representation, and child advocates.
- Protect unaccompanied children by legislating due process protections that support the *Flores* Settlement Agreement, including meaningful due process for both children in ORR custody contesting their placement and sponsors denied custody of an unaccompanied child.