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PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
Committee on Homeland Security and Governmental Affairs

Rob Portman, Chairman
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OVERSIGHT OF THE CARE OF UNACCOMPANIED ALIEN CHILDREN

STAFF REPORT

**PERMANENT SUBCOMMITTEE ON
INVESTIGATIONS**

UNITED STATES SENATE



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I. EXECUTIVE SUMMARY

Since 2015, the Permanent Subcommittee on Investigations has conducted extensive oversight of federal government programs designed to care for children who enter the United States without a parent or legal guardian and ensure they are not trafficked or abused. Although the Department of Health and Human Services (“HHS”) and Department of Homeland Security (“DHS”) have taken incremental steps toward improving the care of these children—called unaccompanied alien children (“UACs”) under federal law—they still do not take sufficient responsibility for guarding their safety and ensuring they appear at their immigration court proceedings.

Most significantly, no agency claims any legal responsibility for the children’s well-being once HHS places them with sponsors—including sponsors who are not their parents or legal guardians—and no agency makes any effort to ensure UACs placed with sponsors appear at their immigration court proceedings. And while DHS and HHS recently completed a Joint Concept of Operations (“JCO”)—some 17 months after it was due—the JCO only addresses current policy and fails to address any of the recommendations for improving the UAC system offered by the Subcommittee or the Government Accountability Office (“GAO”). Thus the JCO is largely a recitation of the status quo, and does little to offer hope that federal agencies are working effectively to improve UAC safety and ensure that the immigration system is functioning properly.

HHS, DHS, and the Department of Justice (“DOJ”) have taken some modest steps in the right direction, but major deficiencies persist that leave the children at significant risk for trafficking and abuse and undermine our immigration system. This report documents the Subcommittee’s findings over the past two and a half years since its initial hearing and report on UACs.

Over the past six years, more than 200,000 children unaccompanied by parents or legal guardians have entered the United States without legal status. This influx of children strains the federal government’s limited resources and poses significant challenges for immigration enforcement. When DHS apprehends UACs, it must transfer them to the HHS Office of Refugee Resettlement (“ORR”) within 72 hours. ORR then works to place those children with adult sponsors in the United States—typically a parent or other family member, but in some instances, non-family members—to await their immigration court proceedings. If ORR cannot place a child with a sponsor, ORR continues to house the child in the least restrictive environment appropriate for that specific child’s circumstances until completion of any removal proceedings in immigration court.

In 2015, the Subcommittee learned that over the course of four months in 2014, ORR placed eight children with members of a human trafficking ring. The traffickers lured the children into the United States with promises of education and a better life. After DHS apprehended the children and transferred them to HHS, members of the ring applied to serve as their sponsors by posing as family members or friends of the children. Once HHS placed the children with the traffickers, the traffickers put the children into forced labor on an egg farm in Marion, Ohio. The children worked for no pay for 12 hours a day, six to seven days a week, and lived in deplorable conditions. The traffickers threatened them and their families with violence if the children did not comply with them. Ultimately, DOJ charged seven defendants with a range of crimes, including human trafficking, forced labor, conspiracy, witness tampering, and encouraging another person to illegally enter the United States. As of this report, six of those defendants have been convicted for their roles in the scheme and sentenced to prison; the seventh case has not yet been decided.

In response to these tragic events, in 2015, the Subcommittee investigated HHS's process for screening potential UAC sponsors and other safeguards to protect UACs from trafficking and abuse. The Subcommittee found that HHS failed to conduct sufficient background checks of potential sponsors and other adult members of their households; failed to conduct site visits of the sponsors' homes; failed to recognize that a group of sponsors was accumulating multiple unrelated children; and, in one instance, permitted a sponsor to block a child-welfare case worker from visiting one of the victims. The Subcommittee also found that sponsors frequently failed to ensure that the children appeared for their immigration court proceedings, usually causing them to be ordered deported and to lose their opportunity to make their case to stay in the United States. And of particular significance, the Subcommittee found that once HHS places children with sponsors, no federal agency acknowledges any responsibility for the children's safety.

On January 28, 2016, the Subcommittee held a hearing and released a report detailing the deficiencies it found in HHS's processes for ensuring the safety of these children. One month after the hearing, HHS and DHS entered into a Memorandum of Agreement ("Agreement I") stating their commitment to protecting UACs both before and after HHS places them with sponsors. In Agreement I, DHS and HHS committed to establishing the JCO to define their respective responsibilities to protect these children within one year—by February 22, 2017.

Through continued oversight, the Subcommittee found that DHS and HHS failed to address many of the deficiencies the Subcommittee previously identified. Moreover, the departments failed to meet their own deadline for the JCO by more than 17 months. When Subcommittee staff asked DHS about the delay, DHS Assistant Secretary for Border, Immigration, and Trade Policy Michael Dougherty

responded that he did not see the point in finishing the JCO and did not understand why the Subcommittee cared about it because the JCO only would reduce current policies to writing. The Subcommittee explained the importance of putting policies in writing to provide accountability and transparency. It was evident that the departments did not regard the JCO as a high priority.

Following a Subcommittee hearing in April 2018 addressing the status of the JCO, DHS and HHS committed to completing the JCO by July 30, 2018. The departments completed the JCO on July 31, 2018. Completing the JCO represents progress: it commits to writing a process and assigns responsibilities for the transfer of UACs and sponsor background checks. This provides certainty to the departments and transparency to the public. But it only reflects longstanding protocol, not improvements in the system that would better guard the safety of UACs and ensure they appear for their immigration court proceedings.

The Subcommittee also learned of additional problems in the UAC program beyond what it observed in 2015. HHS testified that when it made 30-day follow-up telephone calls to UACs placed with sponsors over a three-month period in 2017, it “could not ascertain with certainty” the whereabouts of 1,475 of those children, and 28 had run away from their sponsors. HHS argues that it has no responsibility to track these children after placement and took no action based on the results of these calls to find those children.

According to DHS officials, HHS regularly fails to provide required post-placement plans to DHS for children in HHS care who turn 18 years old. Through these plans, HHS is supposed to update DHS on the child’s circumstances and recommend whether DHS should take the child into custody or release the child on his or her own recognizance once the child ages out of the UAC program. HHS also does not contract with appropriate residential treatment facilities to house children who need both significant psychiatric services and housing in a secure setting.

Although DOJ immigration courts have more than 700,000 backlogged cases—more than 80,000 of which are UAC cases—DOJ has failed to hire its allotted number of immigration court judges. It also has not explored options for making court proceedings more accessible to UACs to increase the likelihood that they will appear for their immigration court proceedings.

Furthermore, some steps DHS and HHS have taken to improve the UAC program may have unintended consequences. At midnight on the night before the Subcommittee’s April 2018 hearing, DHS and HHS released another Memorandum of Agreement (“Agreement II”) governing information sharing between the agencies regarding potential sponsors. Agreement II requires HHS to share the immigration status of potential sponsors and other adults in their households with DHS to facilitate HHS’s background checks. Agreement II may improve UAC safety in

some respects because HHS will have increased information about potential sponsors. Advocates for UACs have expressed concern, however, that Agreement II will deter potential sponsors from stepping forward to claim UACs because most potential sponsors are undocumented and will fear providing their information for use by DHS. If those concerns come to fruition, fewer sponsors will be available to claim UACs, and HHS will have to house a greater number of UACs for longer periods of time.

Although HHS and DHS have taken incremental steps toward improving the care of UACs, they still do not take sufficient responsibility for ensuring these children's safety and for ensuring they appear at their immigration court proceedings. DOJ also has not done all it can to reduce the backlog of immigration court cases. Most significantly, no agency claims any responsibility for the children's well-being once HHS places them with sponsors who are not their parents or legal guardians. These deficiencies compromise the well-being of children in the government's care, leave the children at significant risk for trafficking and abuse, and undermine our immigration system.

This report documents the Subcommittee's findings over the past two and a half years since its initial hearing and report in January 2016 on UACs. The Subcommittee has focused on weaknesses in the care of children who arrive in the United States unaccompanied and are placed with sponsors who are not their parents or legal guardians.

Most of these problems started under the Obama Administration and have continued into the Trump Administration. Over the past four months, however, the Trump Administration took steps that exacerbated these problems. Although this report does not address the ongoing family separation crisis in detail, it is important to note the strains that crisis currently is placing on the UAC program. On April 6, 2018, the Attorney General directed all U.S. Attorney's Offices along the Southwest Border to prosecute all DHS referrals of individuals under 8 U.S.C. § 1325(a), which prohibits both attempted illegal entry and illegal entry into the United States by an alien—the so-called “zero tolerance” policy.¹ One month later, DHS began referring adults who arrived in family units to DOJ for prosecution. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”)² and a 1997 consent decree called the *Flores* Agreement,³ the government must place

¹ U.S. Dep't of Justice, *Memorandum for Fed. Prosecutors Along the Southwest Border: Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)* (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

² Pub. L. No. 110-457, 122 Stat. 5044 (2008).

³ App. 001, Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-cv-4544 (C.D. Cal. 1997) [hereinafter *Flores* Agreement].

UACs in the least restrictive setting that is in the best interests of the child. In 2016, the U.S. Court of Appeals for the Ninth Circuit expanded that requirement to children arriving in the United States with their parents.⁴ Because those authorities limit detention of children with accompanying adults, when the U.S. Marshals Service took custody of parents, their children were separated from them and effectively became unaccompanied. DHS then transferred the children to ORR, which processed them as UACs.

By June 20, 2018, DHS stopped referring adult aliens traveling with children for prosecution.⁵ Over those 10 weeks, however, the Administration separated more than 2500 children from their parents.⁶ Once separated, the children became UACs and were transferred to HHS custody. Since June, the Administration has been working under a court order to reunite the families. As of this report, 1,569 of those children were reunited with their parents in ICE custody and 423 were discharged—most released to sponsors.⁷ Approximately 559 children, however, have not been reunited with their families and remain in HHS care.⁸

These burdens on HHS—processing and housing these additional UACs and working to reunite the families—have stretched thin its already-limited resources for the UAC program. For example, although the Subcommittee has repeatedly asked HHS to update its numbers regarding the results of its 30-day wellness check telephone calls, HHS told the Subcommittee that it can either work to reunite families or update data—but not both.⁹ Because of the toll the family reunification effort is taking on HHS's resources, HHS claims it is unable to respond to Congress regarding the thousands of other children who arrived in the country unaccompanied and who were placed with sponsors this year.

II. THE SUBCOMMITTEE'S INVESTIGATION

Since its January 2016 hearing and report, the Subcommittee has continued its oversight of the departments' processes for caring for unaccompanied alien children. On April 26, 2018, the Subcommittee held a follow-up hearing to inquire about the overdue JCO and allow the public to hear directly from DHS and HHS officials regarding how they protect these children.

⁴ *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

⁵ See Assoc. Press, *Customs and Border Protection Head Says Agency has Stopped Referring Immigrant Parents for Criminal Prosecution*, POLITICO (June 25, 2018), <https://www.politico.com/story/2018/06/25/customs-border-protection-immigrant-parents-criminal-prosecution-670358>.

⁶ S. Comm. on Homeland Sec. & Governmental Affairs briefing with Commander Jonathan White *et al.*, U.S. Dep't of Health & Hum. Servs. (Aug. 10, 2018).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

In the course of its continued oversight, the Subcommittee has received numerous briefings from HHS, DHS, and DOJ. The briefings addressed the agencies' processes for apprehending UACs, transporting them to HHS, placing them with sponsors, ensuring their safety and appearance at immigration court proceedings, and adjudicating immigration cases. The Subcommittee also received briefings from the DHS Office of Inspector General, HHS Office of Inspector General, and the GAO.

The Subcommittee has met or spoken with 16 organizations that provide services, such as legal representation and welfare services, to UACs, either on a pro bono basis or under an HHS grant. The Subcommittee also spoke with four state government officials regarding states' responsibilities to provide services to UACs, including public education and welfare and emergency services. Subcommittee staff visited the Shenandoah Valley Juvenile Center, a secure facility that houses about 30 UACs found guilty of a crime or deemed to be a risk to themselves or others.

III. FINDINGS OF FACTS AND RECOMMENDATIONS

Findings of Fact

- (1) **No federal agency claims legal responsibility or authority to ensure UACs are not being trafficked or abused once ORR places a child with a sponsor.** HHS officials recently offered conflicting testimony on this issue. HHS Director of the Administration for Children and Families Steven Wagner testified that that HHS is reviewing its policy. HHS Secretary Alex Azar testified that HHS's previous interpretation—that the department has no authority—stands. Current ORR leadership told the Subcommittee staff they recognize that prior administrations' interpretation of HHS's legal authority places these children in a "legal no man's land."
- (2) **DHS and HHS took 29 months to create a JCO governing their responsibilities for the care and safety of UACs and missed their own deadline by 17 months.** Moreover, one senior DHS official questioned why Subcommittee staff believed the JCO was important, implying that he did not see value in completing the JCO and committing DHS and HHS processes to paper.
- (3) **The JCO reflects the status quo and does not address any of the recommendations offered by the Subcommittee or the GAO.** The JCO offers no clarification of the federal government's responsibility for UACs once HHS places them with sponsors.

- (4) **No federal agency tracks UACs after ORR places them with sponsors.** Without a method to track UACs after placement, the federal government has few means to determine whether the children are safe or to ensure they appear at their immigration court proceedings.
- (5) **HHS's follow-up telephone calls to UACs placed with sponsors from October to December 2017 demonstrate that HHS does not know with certainty where approximately 20 percent of UACs are three months after placement.** ORR found that out of 7,635 attempted telephone calls, 28 UACs "had run away" and "ORR was unable to determine with certainty the whereabouts of 1,475 UAC." In response to those findings, HHS took no further action to determine their whereabouts.
- (6) **HHS has directed its legal service grantees to cease providing legal representation to new UACs placed with sponsors because it believes its authority to provide such services is "shaky."** According to UAC legal service providers, UACs represented by attorneys are significantly more likely to appear at their immigration court proceedings.
- (7) **No agency ensures UACs placed with sponsors appear at their immigration court proceedings or enforces the sponsorship agreement requiring sponsors to ensure the children's appearance at the proceedings.** If UACs fail to appear at their immigration court proceedings, the court typically will enter an *in absentia* removal order. Those children lose their opportunity to present a case for staying in the United States unless they petition to re-open their case, and if they leave the country, they likely will be barred from future entry.
- (8) **UACs are failing to appear for their immigration court proceedings at increased rates.** The percentage of UACs ordered removed in absentia increased from 41 percent in 2016 (6,089 out of 15,016 completed cases) to 48 percent in 2017 (6,634 out of 13,758 completed cases).
- (9) **According to UAC legal service providers, many UACs fail to appear for their immigration court proceedings because the courts are located far from where they live and they have no means to get to court.** Some UACs also fail to appear because their sponsors do not realize they need to file for a change of venue if they move.

- (10) **The backlog of immigration court cases, including UAC cases, is significant, and DOJ does not have enough immigration court judges to process the cases.** Currently, 732,730 immigration cases total are pending; of those, 80,266 are UAC cases. More than 8,000 UAC cases have been pending for more than three years.
- (11) **DOJ has not hired its full allotted complement of immigration court judges.** Currently, 355 immigration judges handle all immigration court cases, including 29 judges invested on August 10, 2018. DOJ has authority to hire 129 additional judges.
- (12) **The median length of time UAC cases currently have been pending since the filing of a notice to appear is 480 days.** This significant lapse of time makes it less likely UACs will appear for their immigration proceedings.
- (13) **HHS does not notify state governments before placing UACs with sponsors in those states.** Without state notification, states are hamstrung in providing welfare and other services to the children or to ensure they attend public school.
- (14) **HHS has a plan to notify state governments before placing UACs previously held in secure facilities, but HHS has failed to implement that plan.** HHS explained it cannot implement the plan because it cannot determine whom to notify in the state governments.
- (15) **HHS regularly fails to submit required post-placement plans to DHS for UACs who turn age 18 while in HHS's care.** These plans are supposed to inform DHS about each UAC and recommend whether DHS should detain the UAC or release the UAC into the community.
- (16) **HHS does not contract with appropriate facilities to house UACs who must be held in a secure facility and who also have significant mental health or emotional issues.** Housing UACs who have significant mental health or emotional issues with the general population in secure facilities exposes those UACs, the facility staff, and other children to an increased risk of harm.
- (17) **Due to delays in ORR's internal review processes, some UACs are spending more time than necessary in secure facilities.** This is contrary to the statutory mandate that UACs should be placed in the least restrictive setting that is in the best interests of the child.

Recommendations

As discussed in detail below, HHS has not implemented most of the recommendations in the Subcommittee's 2016 report, *Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement*. The Subcommittee offers the following recommendations in addition to the recommendations in that report.

- (1) HHS should acknowledge that, under the TVPRA and the *Flores* Agreement, it has the legal responsibility to ensure that children it places with sponsors who are not the children's parents or legal guardians are not abused or trafficked. If HHS continues to refuse to acknowledge its responsibility, Congress should pass legislation clarifying HHS's obligations.
- (2) DHS and HHS should review their information-sharing processes and methods outlined in the JCO to ensure that email communications do not lead to errors in transferring UACs from DHS to HHS custody.
- (3) DHS and HHS should evaluate their information-sharing policies described in Agreement II to mitigate circumstances that could dissuade potential sponsors from claiming UACs because of fear of enforcement.
- (4) HHS should track UACs after it places them with sponsors to ensure that they are safe and appear at their immigration court proceedings.
- (5) If HHS cannot reach a UAC after the UAC is placed with a sponsor by telephone, HHS should make continued efforts to determine the location and living conditions of the UAC.
- (6) HHS should enforce the sponsorship agreement requirement that sponsors ensure that the UACs appear at their immigration court proceedings.
- (7) HHS should increase its efforts to enlist and coordinate pro bono legal services for children living with sponsors.
- (8) DOJ should hire its full allotted complement of 484 immigration court judges.
- (9) HHS should determine the appropriate point of contact in all 50 state governments to notify regarding the placement of UACs within each state.

- (10) HHS should notify state governments before placing UACs with sponsors in those states.
- (11) HHS should offer training to state and local government officials to educate them on their role, responsibilities, and authorities with regard to UACs.
- (12) HHS should always submit the required post-placement plans to DHS for UACs who turn age 18 while in HHS's care.
- (13) HHS should contract with a secure residential treatment facility to house UACs who must be held in a secure facility and who have significant mental or emotional issues.
- (14) HHS should streamline its decision-making process for determining whether children in secure or staff-secure facilities are eligible to move to a lower level facility or for release to a sponsor.

IV. BACKGROUND

Under the Homeland Security Act of 2002, “unaccompanied alien children” are children under 18-years-old who have “no lawful immigration status in the United States” who either do not have a parent or legal guardian in the United States or whose parent or legal guardian in the United States cannot care for them.¹⁰ When UACs enter the United States, two DHS agencies—Customs and Border Protection (“CBP”) and Immigration and Customs Enforcement (“ICE”)—are responsible for apprehending them. An immigration court run by the DOJ Executive Office for Immigration Review (“EOIR”) ultimately hears the child’s case.

Between a child’s apprehension and final immigration court proceedings, HHS is responsible for caring for the child and, typically, placing him or her with a sponsor in the United States. Two main authorities govern the treatment of UACs during that time: the TVPRA and the 1997 *Flores* Agreement. This section details the responsibilities of each agency from apprehension of a UAC through the UAC’s immigration court proceedings and the legal authorities governing the treatment of UACs throughout that process.

A. Department of Homeland Security: Apprehension and Transfer

DHS has an intermittent role in the UAC program. Two of its divisions, CBP and ICE, are charged with apprehending undocumented immigrants, including

¹⁰ 6 U.S.C. § 279(g)(2).

UACs—CBP at the country’s borders¹¹ and ICE within the country’s interior¹². CBP apprehends the majority of UACs.¹³ Once they apprehend a UAC, they hold the child in a DHS facility generally for no more than 72 hours.¹⁴ DHS then transports the child to an ORR facility and transfers physical custody of the child to ORR.¹⁵ In 2017, DHS referred 40,810 UACs into HHS’s care.¹⁶ As of March 31, 2018, HHS had received 21,574 referrals in FY2018.¹⁷

Recently, ICE, CBP, and ORR signed a Memorandum of Agreement (“Agreement II”) governing information sharing between the agencies regarding UACs.¹⁸ Agreement II provides that at the time of the initial transfer of a UAC from CBP or ICE to ORR, the apprehending agency will electronically transfer to ORR through the UAC Portal—an online information-sharing system—information about the UAC. That information includes basic biographical data such as name, date and country of birth, and potential sponsor information; situational factors, such as information about the UAC’s health and travel companions; human trafficking indicators; and known criminal or behavioral issues.¹⁹

Agreement II states that DHS “will normally include in the Transfer Packet” copies of relevant documents, including identity documents; immigration records; the record of the person and property transferred; the child’s notice to appear in immigration court; copies of any criminal records; and “CBP form 93, Unaccompanied Alien Child Screening Addendum (trafficking information), if conducted.”²⁰ Within 24 hours of receiving notification from CBP or ICE that a UAC needs placement, ORR sends an email notifying both ICE and CBP of the

¹¹ 8 U.S.C. § 1357; 8 C.F.R. § 287.5(c)(i).

¹² 8 U.S.C. § 1357; 8 C.F.R. § 287.5(c)(vi).

¹³ WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 4 (2017).

¹⁴ 8 U.S.C. § 1232(b)(3).

¹⁵ *Id.*

¹⁶ *Oversight of Immigration Enforcement and Family Reunification Efforts: Hearing before the S. Comm. on the Judiciary*, 115th Cong. (2018) (statement of Commander Jonathan White, U.S. Pub. Health Serv. Commissioned Corps, U.S. Dep’t of Health & Hum. Servs.).

¹⁷ *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse: Hearing before the S. Permanent Subcomm. on Investigations*, 115th Cong. (2018) (statement of Steven Wagner, Acting Assistant Sec’y, U.S. Dep’t of Health & Hum. Servs. Admin. for Children & Families).

¹⁸ App. 029, 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 (Apr. 13, 2018) [hereinafter Agreement II].

¹⁹ App. 030, Agreement II at 2.

²⁰ App. 031, Agreement II at 3. On August 13, 2018, DHS officials told Subcommittee staff that DHS always conducts trafficking screenings and, in this instance, Agreement II (signed April 13, 2018) reflects outdated policy.

placement location.²¹ ICE’s Enforcement and Removal Operations facilitates the physical transfer of UACs from DHS custody to HHS custody.²²

For children age 14 and older, a U.S. Border Patrol agent or CBP officer usually serves a Notice to Appear (“NTA”) on the child, which the child must sign.²³ If the child does not speak English, CBP provides a translator.²⁴ For children under age 14 or who are over age 14 and not capable of signing the NTA, CBP transfers the child to HHS and serves the NTA on HHS—usually via hand delivery, but sometimes by U.S. mail.²⁵ After service upon the child or HHS, an ICE Field Office Juvenile Coordinator files the NTA with the immigration court. ICE usually delays filing for up to 60 days to give HHS time to release the UAC to a sponsor to ensure the NTA is filed in the jurisdiction where the UAC lives with the sponsor.²⁶

B. Department of Health and Human Services: Care While Awaiting Immigration Court Proceedings

ORR, a division of the HHS Administration for Children and Family Services, is responsible for UACs until resolution of their immigration court proceedings or until they turn 18, whichever comes first. This report details below the two main authorities that govern HHS’s care of UACs during that time: the TVPRA and the 1997 *Flores* Settlement Agreement. It also describes the various HHS housing and care alternatives available for UACs.

²¹ *Id.* at 2.

²² App. 147–87, Unaccompanied Alien Children Joint Concept of Operations 8 (July 31, 2018) [hereinafter JCO].

²³ App. 168, JCO at 22; Briefing with policy staff, U.S. Dep’t of Homeland Sec. Off. of Strategy, Policy & Plans; Mellisa Harper, Enforcement & Removal Operations, Immigration & Customs Enforcement; Scott Lloyd, Dir., Off. of Refugee Resettlement; *et al.* (Aug. 2, 2018).

²⁴ Briefing with policy staff, U.S. Dep’t of Homeland Sec. Off. of Strategy, Policy & Plans; Mellisa Harper, Enforcement & Removal Operations, Immigration & Customs Enforcement; Scott Lloyd, Dir., Off. of Refugee Resettlement; *et al.* (Aug. 2, 2018).

²⁵ *Id.*

²⁶ *Id.*

1. Trafficking Victims Protection Reauthorization Act

Under the TVPRA, in general, within 72 hours of apprehension, DHS must transfer UACs to ORR.²⁷ The TVPRA provides that “the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.”²⁸ HHS is to “promptly place[]” the children “in the least restrictive setting that is in the best interest of the child.”²⁹

ORR places most UACs with adult sponsors in the United States who agree to care for them and ensure their appearance at immigration proceedings.³⁰ Between October 1, 2014 and June 30, 2018, HHS released 149,867 UACs to sponsors.³¹ According to HHS, in 2017, ORR released 49 percent of UACs to one of their parents (“Category 1 sponsors”). It released 41 percent to close relatives (“Category 2 sponsors”). And it released 10 percent to distant relatives or unrelated adults (“Category 3 sponsors”).³² This report describes how ORR accommodates children for whom sponsors are not available or appropriate in subsection (d) below.

Before placing a child with a sponsor, the HHS Secretary must determine that “the proposed custodian is capable of providing for the child’s physical and mental well-being.”³³ The Secretary also, “at a minimum,” must verify “the custodian’s identity and relationship to the child, if any,” and must make “an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.”³⁴ In practice, ORR Federal Field Specialists—

²⁷ 8 U.S.C. § 1232(b)(3).

²⁸ 8 U.S.C. § 1232(b)(1). Previously, the Immigration and Naturalization Service was responsible for the care of UACs, but the Homeland Security Act of 2002 transferred those responsibilities to HHS (“There are transferred to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services functions under the immigration laws of the United States with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization.” Pub. L. No. 107-296, 116 Stat. 2135 (2002); 2 U.S.C. § 279(a)).

²⁹ 8 U.S.C. § 1232(b)(2)(A).

³⁰ 8 U.S.C. § 1232(c).

³¹ DEP’T OF HEALTH & HUM. SERVS., UNACCOMPANIED ALIEN CHILDREN RELEASED TO SPONSORS BY STATE (last accessed Aug. 9, 2018), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>.

³² *Oversight of Immigration Enforcement and Family Reunification Efforts: Hearing before the S. Comm. on the Judiciary*, 115th Cong. (2018) (statement of Commander Jonathan White, U.S. Public Health Serv. Commissioned Corps, U.S. Dep’t of Health & Hum. Servs.). *C.f.*, STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 114TH CONG., REP. ON PROTECTING UNACCOMPANIED ALIEN CHILDREN FROM TRAFFICKING AND OTHER ABUSES: THE ROLE OF THE OFFICE OF REFUGEE RESETTLEMENT 13 (Comm. print. 2016) [*hereinafter* PSI 2016 REPORT].

³³ 8 U.S.C. § 1232(b)(3)(A).

³⁴ *Id.*

field staff located throughout the country, Case Managers, and contractor Case Coordinators carry out those duties.³⁵

The Secretary then must determine whether a home study—an in-depth review of the child’s potential living circumstances³⁶—is necessary. The Secretary must conduct home studies for children who meet certain criteria, such as children who have been the victim of a severe form of trafficking or physical or sexual abuse, special needs children, or children for whom the sponsor “clearly presents a risk of abuse, maltreatment, exploitation, or trafficking.”³⁷ In addition, the Secretary may conduct home studies for other children.³⁸

The Secretary must provide post-release services, such as mental health care and social services, for children for whom a home study is conducted.³⁹ HHS offers those services through grants to service providers.⁴⁰ Using its discretion, HHS also is offering post-release services to an expanded number of children.⁴¹ In Fiscal Year 2017, HHS received funding to provide post-release services to 11,000 children out of 41,000 children released to sponsors.⁴² Even in cases in which HHS is required to provide post-release services, however, sponsors are not required to accept those services. ORR Director Scott Lloyd characterized them as “merely a set of voluntary services” HHS makes available to sponsors.⁴³

In addition to governing the placement of UACs into appropriate living situations, the TVPRA requires the secretaries of HHS, DHS, and the Department of State, and the Attorney General to develop policies and programs to protect UACs in the United States from human traffickers.⁴⁴

³⁵ *ORR Policy Guide: Children Entering the United States Unaccompanied*, §§ 2.3.1–2.3.3, OFF. OF REFUGEE RESETTLEMENT (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied> [hereinafter *ORR Policy Guide*].

³⁶ *ORR Policy Guide: Children Entering the United States Unaccompanied: Guide to Terms*, OFF. OF REFUGEE RESETTLEMENT (Mar. 21, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms> [hereinafter *ORR Guide to Terms*].

³⁷ 8 U.S.C. § 1232(b)(3)(B).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Briefing with Scott Lloyd, Dir., Off. of Refugee Resettlement, and Jonathan White, Dep. Dir. for Children’s Programs, Off. of Refugee Resettlement, *et al.* (Jan. 17, 2018).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 8 U.S.C. § 1232(c)(1).

2. The *Flores* Agreement

In conjunction with the TVPRA and other statutory provisions, a 1997 consent decree known as the *Flores* Settlement Agreement (“*Flores* Agreement”) also governs HHS’s care of unaccompanied alien children.⁴⁵ The former Immigration and Naturalization Service (“INS”) originally entered into the *Flores* Agreement for the federal government. HHS inherited the INS’s responsibilities under the *Flores* Agreement in the Homeland Security Act of 2002, which transferred to ORR “functions under the immigration laws of the United States with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization.”⁴⁶

The *Flores* Agreement arose out of a class action lawsuit initiated in 1985 challenging INS’s policies to strip search unaccompanied alien children and to release them only to parents or legal guardians.⁴⁷ After more than a decade of litigation, the plaintiffs and the INS entered into a consent decree that set out “nationwide policy for the detention, release, and treatment of minors in the custody of INS.”⁴⁸ It established a policy that the INS would:

place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs, provided that such setting is consistent with its interests to ensure the minor’s timely appearance before the INS and the immigration courts and to protect the minor’s well-being and that of others.⁴⁹

It clarified that nothing in the agreement:

shall require the INS to release a minor to any person or agency whom the INS has reason to believe may harm or neglect the minor or fail to present him or her before the INS or the immigration courts when requested to do so.⁵⁰

If the INS could not place a child with a sponsor, the *Flores* Agreement outlines conditions for housing the child in government-contracted facilities.⁵¹

⁴⁵ App. 001, *Flores* Agreement.

⁴⁶ Pub. L. No. 107-296, 116 Stat. 2135 (2002); 2 U.S.C. § 279(a).

⁴⁷ See Complaint, *Flores v. Meese*, 681 F. Supp. 665, No. 85-cv-4544 (C.D. Cal. filed July 11, 1985).

⁴⁸ App. 003, *Flores* Agreement ¶ 9.

⁴⁹ App. 004, *Flores* Agreement ¶ 11.

⁵⁰ *Id.*

⁵¹ App. 004–05, *Flores* Agreement ¶ 12.A.

Under the *Flores* Agreement, sponsors must execute an agreement to, among other things:

- “provide for the minor’s physical, mental, and financial well-being”;
- “ensure the minor’s presence at all future proceedings before the INS and the immigration court”;
- “notify the INS of any change of address within five . . . days following a move”; and
- “in the case of custodians other than parents or legal guardians, not transfer custody of the minor to another party without the prior written permission of the District Director.”⁵²

The agreement states that “[a] positive suitability assessment may be required” before releasing a child to a sponsor, including investigation of the sponsor’s living conditions, verification of the sponsor’s identity and employment, interviews of household members, and a home visit.⁵³

The *Flores* Agreement makes clear that “[t]he INS may terminate the custody arrangements and assume legal custody of any minor whose custodian fails to comply with the agreement The INS, however, shall not terminate the custody arrangements for minor violations of [the provision requiring notification of the INS of change of address].”⁵⁴ HHS, however, reported to the Subcommittee that it did not inherit that authority under *Flores* and cannot terminate sponsorship.⁵⁵

⁵² App. 006, *Flores Agreement* ¶ 15.

⁵³ App. 007, *Flores Agreement* ¶ 17.

⁵⁴ App. 007, *Flores Agreement* ¶ 16.

⁵⁵ App. 036–38, Letter from Mark. H. Greenberg, Acting Assistant Sec’y, Admin. for Children & Families, U.S. Dep’t of Health & Hum. Servs. and Robert Carey, Dir., Off. of Refugee Resettlement, U.S. Dep’t of Health & Hum. Servs., to the Hon. Rob Portman, Chairman, S. Permanent Subcomm. on Investigations and the Hon. Claire McCaskill, Ranking Member, S. Permanent Subcomm. on Investigations (Sept. 13, 2016).

3. DHS and HHS Information Sharing While a UAC is in HHS Physical Custody

a) Background Checks

Under Agreement II, HHS and DHS committed to sharing resources to facilitate sponsor background checks. ORR is to request information from ICE on “all potential sponsors and adult members of potential sponsors’ households, in order to aid HHS in determining the suitability of a potential sponsor.”⁵⁶ The information-sharing process is supposed to proceed as follows: ORR notifies potential sponsors that ORR will give their information to ICE to run a background check.⁵⁷ ORR provides ICE with the “name, date of birth, address, fingerprints . . . and any available identification documents or biographic information regarding the potential sponsor and all adult members of the potential sponsor’s household.”⁵⁸

ICE then provides ORR with information about the potential sponsors and other adults in the household within 72 hours, including information regarding “citizenship, immigration status, criminal history, and immigration history.”⁵⁹ ORR remains responsible for searching other databases, including public records, the Sex Offender Registry, National Criminal History, Child Abuse and Neglect, State Criminal History Repository, and local police records.⁶⁰

b) UAC Incident Reporting

While UACs are in ORR care—either while awaiting sponsorship or living in one of the settings described below—ORR must report information regarding certain circumstances to various DHS components within 48 hours.⁶¹ Specifically, ORR must report a UAC’s unauthorized absence from the HHS facility; arrest of a UAC; alleged or suspected fraud, human smuggling, human trafficking, drug trafficking, weapons trafficking, or gang-related activity; abuse of a UAC while in ICE or CBP custody; violence by a UAC; or a change in the UAC’s level of care (*e.g.*, from a secure facility to a staff-secure facility).⁶²

If ICE or CBP becomes aware of any criminal information about a UAC that they did not have at the time of transfer, they are to notify ORR and provide supporting documentation as quickly as possible to help ORR determine if it should transfer the UAC to a different setting.⁶³

⁵⁶ App. 033, Agreement II at 5.

⁵⁷ See App. 039–43, ORR Authorization for Release of Information.

⁵⁸ App. 033, Agreement II at 5.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 3–4.

⁶² *Id.*

⁶³ *Id.* at 4.

4. Alternatives to Sponsorship

When sponsors are not available or appropriate to house a UAC, HHS houses those children with grantee organizations in a variety of settings. As of August 9, 2018, HHS was housing 11,423 UACs, although that number fluctuates daily.⁶⁴ The average length of stay for a UAC in HHS care is 41 days.⁶⁵

HHS places children in settings appropriate to each child's needs. For example, HHS houses children without an appropriate sponsor in either a foster-care setting or in shelters until resolution of their immigration proceedings or until a sponsor becomes available.⁶⁶ Those facilities also include specialized housing for children with specific needs, such as very young (or "tender-aged") children; pregnant girls or girls who have infant children with them; mentally or physically disabled children; and children who are victims of abuse.⁶⁷

HHS houses UACs who pose a risk to themselves or the community or who are flight risks in more restrictive settings, in accordance with the *Flores* Agreement. HHS places children who pose a moderate risk in staff-secure shelters, where they generally have freedom within the shelter, but are monitored by staff.⁶⁸ For children who present a higher risk, HHS contracts with three youth detention facilities, which house the children in a secure setting.⁶⁹ Children housed in staff-secure or secure settings have the right to have their placements reviewed by the care provider staff, the UAC's case coordinator, and ORR every 30 days to determine whether they can be moved down a level or released to a sponsor.⁷⁰

If a child turns 18 while living in an HHS facility, the child's case is transferred to DHS.⁷¹ At that point, HHS is required to provide a post-placement report to DHS about the former UAC with recommendations for handling the case.⁷²

⁶⁴ Briefing with Commander Jonathan White, U.S. Public Health Serv. Commissioned Corps, U.S. Dep't of Health & Hum. Servs. (Aug. 9, 2018) (572 of those children were separated from their parents from May to July 2018 under the Administration's zero-tolerance policy; the remainder are traditional UACs who arrived in the United States without an accompanying adult).

⁶⁵ *Oversight of Immigration Enforcement and Family Reunification Efforts: Hearing before the S. Comm. on the Judiciary*, 115th Cong. (2018) (testimony of Commander Jonathan White, U.S. Public Health Serv. Commissioned Corps, U.S. Dep't of Health & Hum. Servs.).

⁶⁶ *ORR Policy Guide* § 1.2.

⁶⁷ *Id.* § 1.2. *et seq.*

⁶⁸ *Id.* § 1.2.4.

⁶⁹ *Id.* § 1.2.

⁷⁰ *Id.* § 1.4.2.

⁷¹ Briefing with Michael Dougherty, Assistant Sec'y for Border, Immigration & Trade Policy, U.S. Dep't of Homeland Sec.; Mellissa Harper, Unit Chief, Juvenile & Family Residential Mgmt. Unit, Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., *et al.* (Feb. 16, 2018); *see ORR Policy Guide* § 3.3.2.

⁷² App. 168, JCO at 22; Briefing with Michael Dougherty, Assistant Sec'y for Border, Immigration & Trade Policy, U.S. Dep't of Homeland Sec.; Mellissa Harper, Unit Chief, Juvenile & Family

DHS then has the option to detain the former UAC or allow him or her to live in the community while awaiting his or her immigration court case.⁷³

C. Department of Justice: Adjudication of UAC Immigration Cases

As in adult civil immigration cases, the DOJ Executive Office for Immigration Review (“EOIR”) adjudicates UAC civil removal cases. ICE attorneys represent the government during immigration court proceedings.⁷⁴ As discussed above, after DHS serves the NTA upon either the child or HHS, an ICE Field Office Juvenile Coordinator files the NTA with an immigration court.⁷⁵ For UAC cases currently pending before the immigration courts, the median length of time the cases have been pending since the UAC’s notice to appear was filed is 480 days.⁷⁶ More than eight thousand cases have been pending for more than three years.⁷⁷

UACs typically argue that they are eligible to stay in the United States because they qualify for immigration relief, including asylum⁷⁸ or Special Immigrant Juvenile Status^{79,80}. USCIS officers have initial jurisdiction over UAC applications for asylum⁸¹ and Special Immigrant Juvenile Status.⁸² During the

Residential Mgmt. Unit, Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., *et al.* (Feb. 16, 2018); *see ORR Policy Guide* § 3.3.2.

⁷³ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4 § 1261(2)(B) (codified as amended at 8 U.S.C. § 1232(2)(B) (2018)).

⁷⁴ JCO at 5.

⁷⁵ App. 151, JCO at 23; Briefing with policy staff, U.S. Dep’t of Homeland Sec. Off. of Strategy, Policy & Plans; Mellisa Harper, Enforcement & Removal Operations, Immigration & Customs Enforcement; Scott Lloyd, Dir., Off. of Refugee Resettlement; *et al.* (Aug. 2, 2018).

⁷⁶ Exec. Off. for Immigration Review, *Current Median UAC Case Pending Time* (June 30, 2018), <https://www.justice.gov/eoir/page/file/1061551/download>.

⁷⁷ Exec. Off. for Immigration Review, *Current UAC Cases Pending More than Three Years* (July 6, 2018), <https://www.justice.gov/eoir/page/file/1078571/download>

⁷⁸ Asylum relief entitles asylum seekers to permanently remain in the United States if they establish they are a refugee—meaning they demonstrate they have a well-founded fear of persecution based on their race, religion, nationality, membership in a particular social or political group in their country of nationality or last habitual residence. 8 U.S.C. § 1101(a)(42); 8 U.S.C. § 1158.

⁷⁹ UACs are eligible for Special Immigrant Juvenile Status if they obtain a state court order stating that they cannot reunite with one or both of their parents because of abuse, neglect, or abandonment, and then apply to the United States Customs and Immigration Service for relief. Once granted, Special Immigrant Juvenile Status allows the UAC to apply for lawful permanent residency in the United States. 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 2014.11

⁸⁰ Briefing by James McHenry, Dir. of the Exec. Off. for Immigration Review, U.S. Dep’t of Justice (June 22, 2018).

⁸¹ 8 U.S.C. § 1158(b)(3)(C).

⁸² 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 2014.11

pendency of those proceedings, the immigration court may stay removal proceedings.⁸³

If a UAC fails to appear for his or her court date, the immigration court typically follows a two-step process.⁸⁴ First, the court determines whether the notice was proper, generally looking for proof that the address on file for the UAC matches the mailed notice.⁸⁵ If so, the court considers whether the UAC is removable. The ICE counsel submits evidence at this point to establish removability.⁸⁶ If the government meets its burden of proof on both steps, the court submits an *in absentia* removal order.⁸⁷ An *in absentia* removal order can have serious consequences for a UAC: if the UAC leaves the country and attempts to re-enter, the UAC may be ineligible for various forms of immigration relief for 10 years after entry of the final removal order.⁸⁸

V. THE SUBCOMMITTEE'S 2015–2016 INVESTIGATION AND IMMEDIATE AFTERMATH

A. Subcommittee Investigation, Report, and Hearing

In 2015, the Subcommittee learned that over four months in 2014, a human trafficking ring lured Guatemalan children and adults to the United States with promises of jobs and education.⁸⁹ ORR failed to conduct appropriate background checks,⁹⁰ and consequently, placed eight of those children with sponsors in the United States who were affiliated with the trafficking ring.⁹¹ ORR missed red flags, such as sponsors requesting to host multiple children and one sponsor preventing a

⁸³ See United States Citizenship & Immigration Servs., *Questions and Answers* (June 10, 2013), <https://www.uscis.gov/sites/default/files/USCIS/Refugee,%20Asylum,%20and%20Int%271%20Ops/Asylum/ra-qanda-determine-jurisdiction-uac.pdf>.

⁸⁴ Briefing by James McHenry, Dir. of the Exec. Off. for Immigration Review, U.S. Dep't of Justice (June 22, 2018).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 8 U.S.C. § 1229a(b)(5)(A); Briefing by James McHenry, Dir. of the Exec. Off. for Immigration Review, U.S. Dep't of Justice (June 22, 2018).

⁸⁸ See 8 U.S.C. § 1229a(a)(7).

⁸⁹ Press Release, U.S. Dep't of Justice, Leader of Human Trafficking Organization Sentenced to Over 15 Years for Exploiting Guatemalan Migrants at Ohio Egg Farms (June 27, 2016), <https://www.justice.gov/opa/pr/leader-human-trafficking-organization-sentenced-over-15-years-exploiting-guatemalan-migrants>; Emily Mills, *Fourth person charged in egg farm migrant trafficking scheme*, MARION STAR (Dec. 27, 2017), <https://www.marionstar.com/story/news/crime/2017/12/27/fourth-person-charged-egg-farm-migrant-trafficking-scheme/985614001/>.

⁹⁰ PSI 2016 REPORT at 1–2.

⁹¹ Emily Mills, *Fourth person charged in egg farm migrant trafficking scheme*, MARION STAR (Dec. 27, 2017), <https://www.marionstar.com/story/news/crime/2017/12/27/fourth-person-charged-egg-farm-migrant-trafficking-scheme/985614001/>.

child-welfare case worker from visiting with one of the victims.⁹² For more than a year, the children were forced to work six or seven days a week, 12 hours per day on an egg farm in Marion, Ohio.⁹³ Their traffickers threatened physical harm to them and their families and withheld their paychecks to force them to work in deplorable conditions.⁹⁴

Six individuals were convicted and sentenced to federal prison for their participation in the trafficking scheme.⁹⁵ In December 2017, DOJ charged a seventh defendant for his participation in the labor trafficking scheme.⁹⁶

After learning about the Marion case in 2015, the Subcommittee investigated the circumstances that resulted in HHS placing these children with human traffickers, focusing on Category 3 sponsors—sponsors without a close relationship to the child, including distant relatives or unrelated adults. The Subcommittee reviewed HHS child placement case files, emails, and documents and interviewed ORR personnel.⁹⁷ On January 28, 2016, the Subcommittee released a report and held a hearing regarding the investigation.⁹⁸

The investigation “revealed that HHS has failed to take adequate steps to ensure that UACs are placed with safe and appropriate sponsors.”⁹⁹ The Subcommittee found systemic deficiencies in HHS’s UAC placement process, specifically:

- **HHS’s process for verifying relationships between UACs and Category 3 sponsors was unreliable and vulnerable to abuse.** HHS did not require Category 3 sponsors to provide any documentation of their relationship with the UACs they sought to sponsor.¹⁰⁰

⁹² PSI 2016 REPORT at 1–2.

⁹³ Press Release, U.S. Dep’t of Justice, Leader of Human Trafficking Organization Sentenced to Over 15 Years for Exploiting Guatemalan Migrants at Ohio Egg Farms (June 27, 2016), <https://www.justice.gov/opa/pr/leader-human-trafficking-organization-sentenced-over-15-years-exploiting-guatemalan-migrants>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Press Release, U.S. Dep’t of Justice, Indictment Unsealed Charging Additional Man for Labor Trafficking Conspiracy that Forced Minors to Work at Egg Farm Near Marion (Dec. 27, 2017), <https://www.justice.gov/usao-ndoh/pr/indictment-unsealed-charging-additional-man-labor-trafficking-conspiracy-forced-minors>.

⁹⁷ PSI 2016 REPORT at 3–4, 29.

⁹⁸ PSI 2016 REPORT; *Adequacy of the Department of Health and Human Services’ Efforts to Protect Unaccompanied Alien Children from Human Trafficking: Hearing before the S. Permanent Subcomm. on Investigations*, 114th Cong. (2016).

⁹⁹ PSI 2016 REPORT at 26.

¹⁰⁰ *Id.* at 27.

- **HHS was unable to detect when a sponsor or group of related sponsors was seeking custody of multiple unrelated children.** Acquiring multiple unrelated UACs can be a warning sign that a sponsor or group of sponsors may pose danger to those children.¹⁰¹
- **HHS failed to conduct adequate background checks on sponsors.** Throughout the time period examined by the Subcommittee, HHS did not conduct background checks on all relevant adults, including other adults living in the sponsor’s home. HHS policy at that time also did not disqualify sponsors based on criminal history.¹⁰²
- **HHS rarely conducted home studies.** The agency performed home studies—that is, an inspection and evaluation of the physical home in which a child will be placed—in less than 4.3 percent of cases from 2013 through 2015, and it failed to conduct home studies in even some statutorily-mandated cases. HHS did not conduct any home studies in the Marion cases.¹⁰³
- **After releasing a child to a sponsor, HHS allowed the sponsor to refuse post-release services offered to the child—and even to bar contact between the child and HHS care providers attempting to provide those services.** That policy caused HHS to miss a potential opportunity to uncover the crime perpetrated in the Marion cases when one of the victim’s sponsors refused to permit a social worker access to the child.¹⁰⁴
- **HHS policy allowed non-relatives with criminal histories to sponsor children.** HHS instructed care providers that no criminal offense was a *per se* bar to sponsorship.¹⁰⁵
- **Sponsors often failed to ensure UACs appear at immigration proceedings.** Failure to appear at an immigration hearing can have significant adverse consequences, and ensuring the child’s appearance at immigration proceedings is a principal task of a child’s sponsor. At the time of the Subcommittee’s 2016 report, 40 percent of completed UAC immigration cases over an 18-month period resulted in an *in absentia* removal order based on the UAC’s failure to appear.¹⁰⁶

¹⁰¹ *Id.* at 30.

¹⁰² *Id.* at 31–33.

¹⁰³ *Id.* at 33–40.

¹⁰⁴ *Id.* at 40–42.

¹⁰⁵ *Id.* at 44–45.

¹⁰⁶ *Id.* at 47–49.

- **No federal agency claimed to have authority or responsibility for the care of UACs after they are placed with non-parental sponsors in the United States.** HHS claimed it had no responsibility for the care and safety for UACs after it placed them with sponsors it selected, in tension with 8 U.S.C. § 1232, which makes the “care and custody” of all UACs the responsibility of HHS.¹⁰⁷
- **ORR never promulgated its policies as regulations or subjected them to notice-and-comment rulemaking.** Instead, ORR maintained most of its policies in a constantly-changing Policy Guide that gives no certainty to UAC care providers or to UACs, nor transparency to Congress or the public.¹⁰⁸

B. February 2016 Memorandum of Agreement

Shortly after the Subcommittee’s January 26, 2016 hearing, DHS and HHS entered a Memorandum of Agreement (“Agreement I”).¹⁰⁹ In Agreement I, the two agencies recognized their shared goals to ensure the “safe and expedited transfer and placement of UAC from DHS to HHS custody”; maximize efficiency in the use of resources; transmit information “to facilitate appropriate placement decisions”; “protect UAC in the custody of the United States or released to sponsors from mistreatment, exploitation, and trafficking”; and “promote the effective immigration processing and safe repatriation and reintegration of UAC.”¹¹⁰ Agreement I was to provide a “framework for interagency coordination” for the agencies’ respective responsibilities.¹¹¹

Under Agreement I, the agencies agreed to establish a Joint Concept of Operations (“JCO”) “that should be completed no later than one year following the signing of this MOA, which should include, but need not be limited to standard protocols for consistent interagency cooperation on the care, processing, and transport of UAC.”¹¹² The JCO was supposed to be completed by February 22, 2017; it was not finished until 17 months later, on July 31, 2018.

The agencies also agreed to establish a Senior Leadership Council to coordinate agency cooperation with regard to UACs and to establish an Interagency Work Group to develop policies and resolve complaints about the UAC process.¹¹³

¹⁰⁷ *Id.* at 49–50.

¹⁰⁸ *Id.* at 50–51.

¹⁰⁹ App. 044–48, Memorandum of Agreement Between the Department of Homeland Security and the Department of Health and Human Services Regarding Unaccompanied Alien Children (Feb. 22, 2016) [hereinafter Agreement I].

¹¹⁰ App. 044, Agreement I at 1.

¹¹¹ *Id.*

¹¹² App. 045, Agreement I at 2.

¹¹³ *Id.*

C. Limited HHS Reforms in 2015 and 2016

Following the 2015 indictment of the defendants in the Marion case and the January 2016 Subcommittee hearing and report, HHS announced limited changes to its UAC program policies, including:

- **Post-Placement Follow-Up Calls:** In 2015, HHS released a new policy providing that ORR must attempt to contact all UACs and their sponsors 30 days after release. According to the HHS Office of Inspector General, these calls allow ORR to identify and report concerns to local child welfare or law enforcement agencies.¹¹⁴
- **National Call Center:** In June 2015, HHS announced an ORR National Call Center—a 24-hour hotline available for UACs, parents, and sponsors to connect them to community resources.¹¹⁵
- **Enhanced Background Checks:** Under its prior policy, HHS only conducted background checks on potential sponsors. In January 2016, HHS changed its policies to require additional background checks on other adults living in the potential sponsor’s household and other caregivers.¹¹⁶
- **Additional Home Studies:** According to HHS policy, a home study is now required if an individual seeks to sponsor multiple UACs.¹¹⁷ HHS policy states that HHS will perform a home study and provide post-release services, such as mental health treatment, to a broader set of potentially vulnerable UACs, including children 12-years-old and under.¹¹⁸

¹¹⁴ *HHS’s Office of Refugee Resettlement Improved Coordination and Outreach to Promote the Safety and Well-Being of Unaccompanied Alien Children*, U.S. Dep’t of Health & Hum. Servs. Off. of Inspector Gen., OEI-09-16-00260, July 31, 2017, <https://oig.hhs.gov/oei/reports/oei-09-16-00260.asp>.

¹¹⁵ App. 050, Office of Refugee Resettlement National Call Center (June 25, 2015), <https://www.acf.hhs.gov/orr/resource/orr-national-call-center>.

¹¹⁶ *ORR Policy Guide* § 2.5.1.

¹¹⁷ *Id.* § 2.4.2.

¹¹⁸ *Id.*

VI. THE SUBCOMMITTEE’S ONGOING INVESTIGATION: DHS AND HHS FAILURE TO ADDRESS 2016 FINDINGS

After its initial report and hearing in January 2016, the Subcommittee continued its oversight of the executive branch’s care for UACs. The Subcommittee found that DHS and HHS took some steps to improve their care of UACs, such as running more consistent background checks on potential sponsors and other adults in the sponsors’ households. The Subcommittee supports those efforts. The Subcommittee also found, however, that DHS and HHS have failed to address many of its previous recommendations to ensure UAC safety. Problems that started under the Obama Administration persist today under the Trump Administration.

As discussed below, the Subcommittee found that HHS and DHS have not addressed one of the most significant findings from the Subcommittee’s investigation—that no federal agency claims responsibility for UACs placed with non-parental sponsors (Categories 2 and 3). HHS and DHS also failed to enter the JCO by February 22, 2017. In fact, they finally issued the JCO on July 31, 2018, 17 months beyond their own deadline, with no explanation for the delay. The JCO is limited to current, long-standing practice, and fails to address known deficiencies squarely within its scope. HHS still does not track UACs after HHS places them with sponsors, and the rate of UACs failing to appear at their immigration court proceedings is increasing. Neither HHS nor DOJ have taken meaningful steps to address those problems.

A. Continued Denial of Responsibility for Unaccompanied Alien Children After Placement

A decade ago, the HHS Office of Inspector General identified a foundational problem with the UAC program. After HHS places children with sponsors, no agency acknowledges that it has authority or responsibility for ensuring the children’s safety. In March 2008, the Inspector General found that there was no formal agreement between DHS and HHS delineating their responsibilities with regard to UACs. And without such an agreement, “it is not clear which Department is responsible for ensuring the safety of children once they are released to sponsors and which Department is responsible for ensuring sponsors’ continued compliance with sponsor agreements.”¹¹⁹ In December 2008, Congress passed the TVPRA, which states that “the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.”¹²⁰

¹¹⁹ DEP’T OF HEALTH & HUM. SERVS. OFF. OF INSPECTOR GEN., OEI-07-06-00290, DIV. OF UNACCOMPANIED CHILDREN’S SERVICES: EFFORTS TO SERVE CHILDREN (2008), <https://oig.hhs.gov/oei/reports/oei-07-06-00290.pdf>.

¹²⁰ 8 U.S.C. § 1232(b)(1).

In 2016, the Subcommittee confirmed that, in practice, nothing had changed since 2008. No agency believed it had responsibility for the care and safety for UACs after HHS places them with sponsors—a position in tension with the TVPRA, which places that responsibility on HHS.¹²¹ In its 2016 report, the Subcommittee explained that under the TVPRA, it is clear that the “care and custody” of all UACs are “the responsibility of HHS, without limitation.” The report highlighted that HHS’s interpretation is inconsistent with the *Flores* Agreement, which authorized the INS to terminate sponsorship in cases of abuse of neglect.¹²²

Over the past two and a half years, the Subcommittee has continued its oversight of the departments to ensure they made the recommended improvements—and, in particular, that HHS acknowledge its responsibility for UACs after HHS places them with non-parental sponsors. Some HHS officials at various points in time appear to be re-evaluating HHS’s responsibilities; others have continued to argue that HHS has no responsibility for these children. For example:

- In a February 2016 letter to Sen. Claire McCaskill, the then-Acting Assistant Secretary for the Administration for Children and Families wrote, “once a child is released to a sponsor, ORR’s legal and physical custody terminates.” He explained that the Homeland Security Act of 2002 and the TVPRA “set forth a system that is intended to be temporary in nature, with a focus on caring for children while in our physical custody, and releasing children to appropriate sponsors.” He argued that “if Congress had intended ORR’s legal custody to continue after a child is released to a sponsor, the TVPRA would not have needed certain of its post-release provisions.” He offered as an example that, had Congress intended HHS to have “continuing legal custody post-release,” “HHS would necessarily have the authority and responsibility to provide services to the child after release,” but, “[i]nstead, Congress specifically required follow-up services” in some cases, and “authorized follow-up services” in others. He also argued that the program would need to be “structured and resourced in a very different way” to accommodate long-term legal custody.¹²³
- In response to the Subcommittee’s questions for the record after the January 2016 hearing, HHS stated that “[t]he Flores consent decree cannot grant HHS any authority that it does not have by statute.” Thus, it is “HHS’s view . . . that ORR does not have the same ability to remove a

¹²¹ PSI 2016 REPORT at 50.

¹²² *Id.*

¹²³ App. 051–54, Letter from Mark Greenberg, Acting Assistant Sec’y, Admin. for Children & Families, U.S. Dep’t of Health & Hum. Servs., to the Hon. Claire McCaskill, Ranking Member, S. Permanent Subcomm. on Investigations (Feb. 22, 2016).

child from a home and reassume custody as the former INS had at that time.”¹²⁴

- In a January 2018 briefing, ORR Director Scott Lloyd told Subcommittee staff ORR’s current interpretation of the TVPRA is that HHS no longer has responsibility for UACs once they are placed with sponsors because the children are no longer “unaccompanied.”¹²⁵ He continued, however, that HHS was reviewing its interpretation of the statute. He said ORR had submitted a request to the HHS Office of General Counsel asking (1) whether anything prohibits HHS from asserting a custodial relationship over a UAC post-placement and (2) whether anything requires a formal custodial role for HHS over UACs post-placement.¹²⁶ ORR sent follow-up questions to the Office of General Counsel after Mr. Lloyd briefed the Subcommittee.¹²⁷ Despite repeated requests for information, HHS has not told the Subcommittee whether the Office of General Counsel has responded to those questions.
- At the Subcommittee’s April 26, 2018 hearing, HHS’s Acting Assistant Secretary of the Administration for Children and Families Steven Wagner confirmed that “we are taking a fresh look at that question as a matter of both legal interpretation and appropriate policy.”¹²⁸
- In a May 2018 briefing, current ORR leadership told Subcommittee staff they recognize that prior Administrations’ interpretation of HHS’s legal authority places these children in a “legal no man’s land.”¹²⁹
- On June 26, 2018, HHS Secretary Alex Azar testified that “once [UACs] are placed with a sponsor, they are no longer subject to our jurisdiction. We cannot . . . pull a child back from a relative. We don’t have the legal

¹²⁴ App. 036–38, Letter from Mark. H. Greenberg, Acting Assistant Sec’y, Admin. for Children & Families, U.S. Dep’t of Health & Hum. Servs. and Robert Carey, Dir., Off. of Refugee Resettlement, U.S. Dep’t of Health & Hum. Servs., to the Hon. Rob Portman, Chairman, S. Permanent Subcomm. on Investigations and the Hon. Claire McCaskill, Ranking Member, S. Permanent Subcomm. on Investigations (Sept. 13, 2016).

¹²⁵ Briefing with Scott Lloyd, Dir., Off. of Refugee Resettlement, and Jonathan White, Dep. Dir. for Children’s Programs, Off. of Refugee Resettlement, *et al.* (Jan. 17, 2018).

¹²⁶ *Id.*

¹²⁷ App. 055–57, Email from Off. of Legis. Affairs, U.S. Dep’t of Health & Hum. Servs., to Subcomm. Counsel, S. Permanent Subcomm. on Investigations, *et al.* (Feb. 4, 2018, 11:53 a.m.).

¹²⁸ *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse: Hearing before the S. Permanent Subcomm. on Investigations*, 115th Cong. (2018) (testimony of Steven Wagner, Acting Assistant Sec’y, U.S. Dep’t of Health and Hum. Servs. Admin. for Children & Families).

¹²⁹ Briefing with Scott Lloyd, Dir. of the Off. of Refugee Resettlement, *et al.* (May 2, 2017).

authority. . . . We don't have any authority to go out and pull a child back from a sponsor once they're in that sponsor's custody."¹³⁰

These interpretations of HHS's responsibilities and authorities do not account for the plain language of the definition of "unaccompanied alien child," at least with regard to children HHS places with Category 2 and 3 sponsors. Those children remain unaccompanied and under the HHS Secretary's care. The Homeland Security Act of 2002 defines "unaccompanied alien child" as:

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.¹³¹

Category 2 and 3 non-parental sponsors are not legal guardians of UACs unless they obtain an order from a state court. Thus, until the children are reunited with their parents or legal guardians, or until their sponsors obtain such an order, they remain unaccompanied alien children by definition, and still under the care and protection of HHS. Inferences drawn from grants of HHS's authority to provide services to these children do not alter the meaning of that provision. HHS's refusal to take responsibility for UACs throughout their immigration proceedings even in light of its statutory authority—particularly for those UACs it places with non-parental sponsors—undermines both UAC safety and the immigration system.

¹³⁰ *Prescription Drug Affordability and Innovation: Addressing Challenges in Today's Market: Hearing before the S. Comm. on Finance*, 115th Cong. (2018) (testimony of the Hon. Alex Azar, Sec'y, U.S. Dep't of Health and Hum. Servs.).

¹³¹ 6 U.S.C. § 279(g)(2).

B. Failure to Enter Joint Concept of Operations on a Timely Basis

1. GAO and HHS OIG Recommendation for Agreement

In 2008, the HHS Inspector General recommended that DHS and HHS enter an agreement to define their responsibilities with regard to UACs. The HHS Inspector General found that “[w]hen responsibilities were divided between HHS and DHS, no formal memorandum of understanding . . . was established to clarify each Department’s roles.” And as discussed above, the Inspector General continued, “[I]t is not clear which Department is responsible for ensuring the safety of children once they are released to sponsors and which Department is responsible for ensuring sponsors’ continued compliance with sponsor agreements.”¹³²

In 2015, the GAO also highlighted the need for such an agreement. The GAO found that the transfer process from DHS to HHS was “inefficient and vulnerable to errors.” From reviewing emails from a pair of three-day periods in 2014, the GAO “identified miscommunications between agencies, as well as errors during both time periods, including UAC who had to be redesignated to different shelters after initial placements and UAC who were assigned to multiple shelters simultaneously.”¹³³

The GAO echoed the HHS Inspector General’s recommendation, advising that DHS and HHS “should jointly develop and implement a documented interagency process with clearly defined roles and responsibilities, as well as procedures to disseminate placement decisions, for all agencies involved in the referral and placement of UAC in HHS shelters.”¹³⁴ In 2016, the Subcommittee found that, despite these recommendations, DHS and HHS had not established any agreement to govern their responsibilities for UACs.¹³⁵

¹³² U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. OF INSPECTOR GEN., OEI-07-06-00290, DIVISION OF UNACCOMPANIED CHILDREN’S SERVICES: EFFORTS TO SERVE CHILDREN ii (2008), <https://oig.hhs.gov/oei/reports/oei-07-06-00290.pdf>.

¹³³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-521, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY 51 (2015), <https://www.gao.gov/products/GAO-15-521>.

¹³⁴ *Id.*

¹³⁵ PSI 2016 REPORT at 49–50.

2. Agreement I and Joint Concept of Operations

On February 22, 2016, following the Subcommittee’s investigation and hearing, DHS and HHS signed Agreement I providing a framework for interagency coordination with respect to UACs. Agreement I recognized the two departments’ shared commitment to “protect UAC in the custody of the United States or released to sponsors from mistreatment, exploitation, and trafficking.”¹³⁶ Under Agreement I, the departments also planned to establish a Senior Leadership Council to coordinate interagency cooperation on UAC “care, processing, and transport,” as well as an Interagency Working Group.¹³⁷

In Agreement I, the departments agreed to “establish a Joint Concept of Operations (JCO) that should be completed no later than one year following the signing of this MOA [on February 22, 2016], which should include, but need not be limited to standard protocols for consistent interagency cooperation on the care, processing, and transport of UAC”¹³⁸ The agencies were supposed to complete the JCO by February 22, 2017.

According to the GAO, Agreement I identified priority issues for the departments to address related to UACs, including issues with chain of custody and the transport of UACs, but the JCO was to include the necessary operational specifics to address deficiencies identified by the GAO. To consider the recommendation closed, the GAO expects to see HHS and DHS complete and implement the JCO.¹³⁹

¹³⁶ App. 044, Agreement I at 1.

¹³⁷ *Id.* at 2.

¹³⁸ *Id.*

¹³⁹ *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse: Hearing before the S. Permanent Subcomm. on Investigations, 115th Cong. (2018)* (statement of Kathryn A. Larin, Dir., Educ., Workforce & Income Sec. Team, U.S. Gov’t Accountability Off.).

3. Deficiencies in Agreement II and the Joint Concept of Operations

Only after the Subcommittee repeatedly asked DHS and HHS why the JCO was delayed, DHS and HHS took two significant steps: first, they entered a new Memorandum of Agreement (“Agreement II”) on April 13, 2018; and second, on July 31, 2018, they completed the JCO.

a) Agreement II

Agreement II governs information-sharing between ICE, CBP, and ORR regarding UACs and their potential sponsors, as described in Section IV above. The primary purpose of the information sharing under Agreement II is to “provide HHS with information necessary to conduct suitability assessments for sponsors from appropriate federal, state, and local law enforcement and immigration databases.”¹⁴⁰

In 2016, the Subcommittee found that HHS’s failure to conduct sufficient background checks contributed to the circumstances that led HHS to place eight children with human traffickers.¹⁴¹ More comprehensive background checks of more adults who will be living with UACs likely will increase UAC safety, and in that regard, Agreement II is an improvement over the processes the Subcommittee observed in 2016.

Immigration advocacy groups and UAC care providers have pointed out, however, that Agreement II does not limit DHS’s use of the information HHS sends to it about potential sponsors and other adults in their households.¹⁴² Many of them have expressed concern that, unless it is clear DHS will not use that information for enforcement purposes, fewer potential sponsors will apply to sponsor UACs because many of them are undocumented and fear enforcement.¹⁴³ Indeed, ORR personnel estimated that roughly 90 percent of current sponsors are undocumented.¹⁴⁴ According to ORR, it is too early to determine whether the changes to the information-sharing process will dissuade a significant number of potential sponsors from stepping forward.¹⁴⁵ ORR Director Lloyd commented that

¹⁴⁰ App. 029, Agreement II at 1.

¹⁴¹ PSI 2016 REPORT at 27–30.

¹⁴² Briefings with UAC care providers; *see, e.g.*, Nat’l Immigrant Justice Ctr. Comment on HHS ACF Notice of Sponsorship Review Procedures for Approval for Unaccompanied Alien Children, OMB No. 0970–0278 (July 10, 2018), <http://www.immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2018-07/NIJC%20Comment%20on%20HHS%20revisions%20to%20UC%20sponsor%20forms.pdf>.

¹⁴³ *Id.*

¹⁴⁴ Briefing with Scott Lloyd, Dir., Off. of Refugee Resettlement; policy staff, Dep’t of Homeland Sec. Off. of Strategy, Policy & Plans; Deane Dougherty, Deputy Assistant Dir. Enforcement & Removal Operations, Immigration and Customs Enforcement, *et al.* (June 5, 2018).

¹⁴⁵ *Id.*

he believed “a motivated sponsor won’t let immigration status deter” him or her from coming forward for a child.¹⁴⁶

If the advocacy groups and care providers are correct, however, and fewer sponsors are available, ORR will have to house more UACs for longer periods of time. The National Immigrant Justice Center has commented that, in this case, “children will remain confined in federal facilities at taxpayer expense, exacerbating the trauma and distress of survivors of violence and abuse in particular.”¹⁴⁷

Furthermore, based on ORR briefings, it is not apparent that HHS has sufficient capacity or has made comprehensive contingency plans to house significantly more UACs.

b) Joint Concept of Operations

On July 31, 2018, DHS and HHS finalized the JCO—17 months after the departments’ own deadline and 10 years after the HHS Office of Inspector General first recommended they develop such an agreement. The JCO represents an initial step in improving UAC care. It is important to commit each department’s responsibilities to paper to clarify who is responsible for taking specific actions with regard to UACs when the departments interact with each other. It likely will reduce some errors created by miscommunications between the departments. It also sets standard procedures that allow department leadership and Congress to hold personnel accountable for fulfilling their responsibilities toward UACs—at least where DHS and HHS interact with each other.

Over the course of 10 years, however, the departments should have been able to create a comprehensive plan for ensuring UAC safety. Agreement I gestured toward the notion that the JCO might do more than recite the status quo. It discussed the departments’ shared goals to “protect UAC in the custody of the United States or released to sponsors” and “promote the effective immigration processing and safe repatriation and reintegration of UAC.”¹⁴⁸ It provided that the JCO “should include, *but need not be limited to*, standard protocols for consistent interagency cooperation on the care, processing, and transport of UAC”¹⁴⁹

The JCO is, in fact, limited to those standard protocols—and does not resolve longstanding problems with those protocols. The JCO states that it “memorializes current practices in accordance with” immigration laws and “[d]epartmental and

¹⁴⁶ *Id.*

¹⁴⁷ Nat’l Immigrant Justice Ctr. Comment on HHS ACF Notice of Sponsorship Review Procedures for Approval for Unaccompanied Alien Children, OMB No.: 0970–0278 (July 10, 2018), <http://www.immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2018-07/NIJC%20Comment%20on%20HHS%20revisions%20to%20UC%20sponsor%20forms.pdf>.

¹⁴⁸ App. 044, Agreement I at I.

¹⁴⁹ *Id.* at 2 (emphasis added).

agency guidelines, policies, and procedures.”¹⁵⁰ It defines its “purpose and scope” as follows:

The JCO provides field guidance and standardization of interagency policies, procedures, and guidelines related to the processing of UAC encountered by DHS, whose care will be transferred to HHS, after being placed in removal proceedings pursuant to section 240 of the Immigration and Nationality Act¹⁵¹

In a briefing with Subcommittee staff, DHS personnel emphasized that the JCO does not replace current policies or announce new policies; rather, it describes “what’s been happening for years” between the departments.¹⁵² They said that the departments already should be in full compliance with the protocols described in the JCO.¹⁵³

Even within the confines of its limited subject matter, the JCO does not address significant problems that the GAO previously identified in the DHS-HHS communication process. For example, in 2015, the GAO observed that “[t]he interagency process to refer UAC from DHS to HHS shelters is inefficient and vulnerable to error. DHS and HHS rely on e-mail communication and manual data entry to coordinate the transfer of UAC to shelters.”¹⁵⁴ Now, in 2018, the shelter placement process still relies on emails. According to the JCO, “ORR makes the placement determination and notifies both the Referring Agency [CBP or ICE] and the facility’s representative by email . . . when UAC placement has been obtained.”¹⁵⁵ When asked whether current processes address the problems the GAO found in 2015 with email communications, a DHS official responded that the “important thing is that the communications are happening.”¹⁵⁶ The departments do not appear to have changed their notification processes that the GAO found led to errors in placements in 2015.

Significantly, the JCO does not address care of UACs once HHS places them with sponsors. As discussed above, no agency takes responsibility for UACs after

¹⁵⁰App. 153, JCO at 7.

¹⁵¹ *Id.*

¹⁵² Briefing with policy staff, U.S. Dep’t of Homeland Sec. Off. of Strategy, Policy & Plans; Mellisa Harper, Enforcement & Removal Operations, Immigration & Customs Enforcement; Scott Lloyd, Dir., Off. of Refugee Resettlement; *et al.* (Aug. 2, 2018).

¹⁵³ *Id.*

¹⁵⁴ U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-521, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY 48 (2015), <https://www.gao.gov/products/GAO-15-521>.

¹⁵⁵App. 154, JCO at 8.

¹⁵⁶ Briefing with policy staff, U.S. Dep’t of Homeland Sec. Off. of Strategy, Policy & Plans; Mellisa Harper, Enforcement & Removal Operations, Immigration & Customs Enforcement; Scott Lloyd, Dir., Off. of Refugee Resettlement; *et al.* (Aug. 2, 2018).

HHS transfers them into a sponsor’s care. The JCO does not change that enormous gap in UAC care.

4. Limited Post-Release Services and Failure to Track UACs After Placement

Over the last decade, HHS has had limited ability to track UACs after HHS places them with sponsors and provides post-release services in only a small number of cases. Post-release services in the form of social work, wellness checks, and legal aid provide HHS the best window into UAC-sponsor relationships, but HHS provides post-release services in few cases—and recently has eliminated legal services for children released to sponsors. These deficiencies continue to hamper HHS’s care of UACs and leave these children at risk for trafficking and abuse.

In 2008, the HHS Office of Inspector General found that ORR’s precursor, the Division of Unaccompanied Children’s Services:

does not have a method to track children after they are released to sponsors and therefore is unable to determine whether the processes facilities use to screen sponsors are effective and whether sponsors continue to provide for children’s physical, mental, and financial well-being.¹⁵⁷

In 2016, the Subcommittee found that HHS still did not have a mechanism to track UACs after their placements with sponsors.¹⁵⁸ The Subcommittee observed that post-release services were HHS’s best means of tracking UACs and developing insight into their circumstances—but HHS provided post-release services in only about 10 percent of cases each year.¹⁵⁹ The Subcommittee noted that every UAC care provider it interviewed recommended that HHS provide post-release services to all UACs placed with Category 3 sponsors.¹⁶⁰

Similarly, later in 2016, the GAO found that HHS had very little information about UACs after HHS released them to sponsors, and no means by which to collect such information systematically.¹⁶¹ The GAO observed that “[w]ithout processes to ensure that the data from its activities are reliable, systematically collected, and compiled in summary form, ORR may be missing an opportunity to provide useful

¹⁵⁷ U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. OF INSPECTOR GEN., OEI-07-06-00290, DIVISION OF UNACCOMPANIED CHILDREN’S SERVICES: EFFORTS TO SERVE CHILDREN ii (2008), <https://oig.hhs.gov/oei/reports/oei-07-06-00290.pdf>.

¹⁵⁸ PSI 2016 REPORT at 44.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-180, UNACCOMPANIED ALIEN CHILDREN: HHS CAN TAKE FURTHER ACTIONS TO MONITOR THEIR CARE (2016), <https://www.gao.gov/products/GAO-16-180>.

information about [the UAC] population for the use of other government agencies.”¹⁶²

This situation largely remains the same today, with a few notable changes. HHS still has limited ability to track UACs after HHS places them with sponsors in the United States. HHS has reported to the Subcommittee, however, that it has made at least three significant changes to its post-release service practices, although they are of mixed effect.

First, HHS reported to the Subcommittee that it is offering post-release services to an increased number of UACs, both for the total number of UACs served and as a percentage of UACs referred to HHS by fiscal year.¹⁶³ In FY 2016, ORR provided 10,546 UACs with post-release services—which represents 17.8 percent of the 59,170 UACs DHS referred to HHS that year. In FY 2017, ORR provided 13,381 UACs with post-release services—representing 32.7 percent of UACs referred by DHS that year.¹⁶⁴

During that same time, ORR reduced the total number of home studies it conducted. It conducted 3,540 home studies in FY 2016, for 5.9 percent of all UACs DHS referred to HHS. It conducted 3,173 home studies in FY 2017, for 7.7 percent of UACs referred that year.¹⁶⁵ As discussed in more detail in the Subcommittee’s 2016 report, home studies are universally performed before placing a child in foster care. Particularly for children placed with Category 3 sponsors, sponsorship placements are substantially similar to foster care placements.¹⁶⁶

Post-release services frequently provide HHS its only insight into the children’s well-being, and the children’s best shot at receiving help if their living situations prove to be unsafe.¹⁶⁷ The Subcommittee supports ORR’s increase in post-release services, but cautions that the increase should not come at the expense of thorough home studies prior to placement.

Second, in August 2015, HHS began calling each UAC 30 days after placement with a sponsor to check on their welfare.¹⁶⁸ The Subcommittee observed in 2016 that “[t]hat process appears to have limited utility” because HHS had no means to follow up with a child with whom it had failed to make contact.¹⁶⁹ The data bear out that observation. At the Subcommittee’s April 2018 hearing, Steven

¹⁶² *Id.* at 36

¹⁶³ Briefing with Scott Lloyd, Dir., Off. of Refugee Resettlement, and Jonathan White, Dep. Dir. for Children’s Programs, Off. of Refugee Resettlement, *et al.* (Jan. 17, 2018).

¹⁶⁴ App. 058–59, Off. of Refugee Resettlement, *Facts and Data*.

¹⁶⁵ *Id.*

¹⁶⁶ PSI 2016 REPORT at 2, 19–20, 35–36.

¹⁶⁷ *Id.* at 42–44.

¹⁶⁸ ORR Policy Guide § 2.8.4; *see* PSI 2016 REPORT at 43.

¹⁶⁹ PSI 2016 REPORT at 44.

Wagner, the HHS Acting Assistant Secretary for the Administration for Children and Families, testified regarding those 30-day wellness check calls:

From October to December 2017, ORR attempted to reach 7,635 UAC and their sponsors. Of this number, ORR reached and received agreement to participate in the safety and well-being call from approximately 86 percent of sponsors. From these calls, ORR learned that 6,075 UAC remained with their sponsors. Twenty-eight UAC had run away, five had been removed from the United States, and 52 had relocated to live with a non-sponsor. ORR was unable to determine with certainty the whereabouts of 1,475 UAC. Based on the calls, ORR referred 792 cases, which were in need of further assistance, to the National Call Center for additional information and services.¹⁷⁰

Although the Subcommittee views the follow-up calls as a small step in the right direction, it is concerning that HHS apparently takes no action to address the alarming situations it discovers when it makes those calls. In many of the cases Mr. Wagner described above, HHS should have taken further action to ensure the children's welfare. For example:

- **HHS either could not reach or did not get sponsors' consent to participate in 14 percent, or about 1,070, of these calls.** HHS should have a mechanism to reach sponsors and UACs, and sponsors should be required to communicate with HHS when contacted. It should be a significant red flag if a sponsor refuses to speak with HHS on the telephone 30 days after HHS releases a child to that person.
- **HHS found that 28 UACs had run away from their sponsors.** It does not appear that HHS took any action in response to those discoveries or had any means by which to determine their location. HHS should develop a mechanism to track those children and to inform local authorities when children run away from their sponsors.
- **HHS found that 52 UACs were no longer living with their sponsor.** In these situations, HHS has no way of knowing whether those 52 UACs are living in safe conditions. Furthermore, under both the sponsor agreement¹⁷¹ and the *Flores* Agreement,¹⁷² sponsors are required to proactively notify the government if UACs change households—but HHS does not enforce that

¹⁷⁰ *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse: Hearing before the S. Permanent Subcomm. on Investigations, 115th Cong. (2018)* (statement of Steven Wagner, Acting Assistant Sec'y, U.S. Dep't of Health and Hum. Servs. Admin. for Children & Families).

¹⁷¹ App. 071–72, Office of Refugee Resettlement Sponsor Handbook at 12–13.

¹⁷² App. 006, *Flores Agreement* ¶ 15(C).

portion of the agreement. UAC care providers told the Subcommittee that a UAC's parents or other relatives often fear making themselves known to the government because they are also in the country without authorization. In those cases, they sometimes hire or persuade someone else to act as the child's sponsor, and once HHS releases the child to the sponsor, the child leaves the sponsor's care to live with her parents or other relatives.¹⁷³ This scenario endangers these children and prevents HHS from being able to ensure their safety, provide follow-up services where necessary, or ensure they appear at their immigration court proceedings.¹⁷⁴

- **HHS “could not ascertain with certainty the whereabouts of 1,475 UAC.”** To date, the Subcommittee is not aware that HHS has taken any follow-up action to determine where those children are, with whom they are living, and if they are safe. It is inexcusable that the government places children with adults to await their immigration court proceedings and, within 30 days, has lost track of 20 percent of those children. HHS must develop measures to track these children and hold sponsors accountable to their sponsorship agreements.

The 30-day follow-up wellness call is a positive measure—but its results ultimately highlight the deficiencies in the current system. Moreover, the Subcommittee has repeatedly asked HHS to update the numbers with the results of the calls it has made in 2018. As of this report, HHS failed to provide those numbers. HHS officials told the Subcommittee that it could either focus its resources on reuniting families separated under the zero-tolerance policy or on providing new data.¹⁷⁵ The Subcommittee supports reuniting the families quickly. It is concerning, however, that HHS is not tracking the results of its 30-day wellness check calls, reducing the already-limited visibility HHS and Congress have into the lives of children who arrived in the United States unaccompanied and who HHS placed with sponsors.

Third, and finally, HHS has directed its grantee legal service providers to stop accepting new clients from the population of UACs already released to sponsors. According to ORR Director Scott Lloyd, HHS's authority to provide legal services to children released to sponsors is “shaky.”¹⁷⁶ This interpretation is contrary to law. The TVPRA provides that the HHS Secretary:

¹⁷³ Briefing with UAC care providers (Apr. 4, 2018).

¹⁷⁴ *Id.*

¹⁷⁵ S. Comm. on Homeland Sec. and Governmental Affairs staff briefing with U.S. Dep't of Health and Hum. Servs. (Aug. 10, 2018)

¹⁷⁶ Briefing with policy staff, U.S. Dep't of Homeland Sec. Off. of Strategy, Policy & Plans; Mellisa Harper, Enforcement & Removal Operations, Immigration & Customs Enforcement; Scott Lloyd, Dir., Off. of Refugee Resettlement; *et al.* (Aug. 2, 2018).

shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of [HHS or DHS] . . . have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.¹⁷⁷

Under the TVPRA, HHS still has an obligation to help those children obtain counsel. Given its decision to eliminate representation by its grantees for children placed with sponsors, ORR should increase its support for pro bono legal services for children living with sponsors. UAC legal service providers have testified about the positive effects legal representation has on UAC court attendance and welfare, noting that attorneys can provide an additional point of contact to help ensure UAC well-being.¹⁷⁸

The limitations on HHS's ability to track UACs and its engagement with UACs post-placement have significant consequences. The Subcommittee has learned of allegations of at least one additional case of a child being placed into forced labor that perhaps could have been caught earlier if the child had been receiving post-release services. A UAC care provider reported to the Subcommittee:

The limited use of home studies and post-release services has resulted in children being released to situations of abuse, abandonment, neglect, and trafficking. These are youth like Juan,¹⁷⁹ who was released from ORR care without services to his half-uncle in Florida. Shortly after his reunification, Juan's uncle withdrew him from school and sent him to work in the fields with his two cousins (who had not been in the care of ORR). This forced labor continued until Juan's cousin was injured and brought, with Juan, to the Emergency Room, where the injury raised abuse and trafficking concerns. [Child Protective Services] investigated the situation and removed the children from the home, placing the children in state custody.¹⁸⁰

Other care providers relayed similar, anecdotal scenarios of UACs they had seen put into forced labor.

¹⁷⁷ 8 U.S.C. § 1232(c)(5).

¹⁷⁸ See, e.g., *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse: Hearing before the S. Permanent Subcomm. on Investigations*, 115th Cong. (2018) (statement of Jessica A. Ramos, Staff Attorney, Advocates for Basic Legal Equality, Inc.).

¹⁷⁹ Children's names are changed to protect their identities.

¹⁸⁰ App. 110, Email from UAC care provider to Subcommittee Staff (Aug. 3, 2018, 2:56 p.m.).

Another UAC care provider testified at the Subcommittee’s April 2018 hearing about a case involving a 17-year-old Honduran girl who entered the country and was apprehended in 2016. The care provider testified:

ORR found Anabel’s mother in Cincinnati, Ohio and released Anabel to her mother. Anabel’s mother did not receive a home study before Anabel was released from ORR, and Anabel did not receive post-release services. Before reunifying with her mother, Anabel had not seen her mother in over 10 years . . . For reasons unclear, Anabel’s mother kicked Anabel out of the house approximately 5 months after Anabel was released to her care by ORR. Anabel was forced to move-in [sic] with an uncle, who provided Anabel with very little supervision.¹⁸¹

5. Increased Rates of Failure to Appear for Immigration Court Proceedings

It is critically important for UACs to appear at their immigration court proceedings. Appearing at their proceedings gives UACs the opportunity to apply for immigration relief or protection from removal, such as asylum or Special Immigrant Juvenile Status, and it upholds the orderly functioning of the country’s immigration system. Failure to appear, on the other hand, usually results in the court ordering the child removed *in absentia*, which bars subsequent immigration relief for a period of 10 years if the child leaves and then attempts to re-enter the United States.¹⁸²

In 2016, the Subcommittee found that a substantial number of UACs failed to appear for their immigration court proceedings from July 2014 through December 2015.¹⁸³ The Subcommittee now has found that over the intervening two and a half years since its last report, UACs are failing to appear at their immigration court proceedings at increased rates, as demonstrated in the table below. And of UACs ordered removed from the country, more than 80 percent of them are ordered removed *in absentia*.¹⁸⁴

¹⁸¹ *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse: Hearing before the S. Permanent Subcomm. on Investigations, 115th Cong. (2018)* (testimony of Allison E. Herre, Catholic Charities of Southwestern Ohio).

¹⁸² PSI 2016 REPORT at 47–48; see 8 U.S.C. § 1232(c)(4); 8 U.S.C. §§ 1229 (b)–(c); 8 U.S.C. § 1225; and 8 U.S.C. § 1258.

¹⁸³ PSI 2016 REPORT at 47–49.

¹⁸⁴ Exec. Off. for Immigration Review, *UAC Statistics* (July 2, 2018), <https://www.justice.gov/eoir/file/1083086/download> (6,303 UACs ordered removed in FY2018; of those 5,109 were ordered removed *in absentia*).

Fiscal Year	Pending UAC Cases	UAC Initial Case Completions	UAC <i>In Absentia</i> Removal Orders	<i>In Absentia</i> Percentage ¹⁸⁵
2014	18,852	3,552	1,856	52%
2015	31,621	13,357	6,386	48%
2016	51,691	15,016	6,089	41%
2017	71,534	13,758	6,634	48%
2018 (through 6/30/18)	80,266	9,621	5,109	53%

Because failure to appear at their proceedings can have significant consequences for UACs, by law, HHS must cooperate with DOJ “to ensure that custodians receive legal orientation programs” and that such programs “address the custodian’s responsibility to attempt to ensure the child’s appearance at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking.”¹⁸⁶ Before HHS releases a UAC to a sponsor, the sponsor must sign a form agreeing to attend the legal orientation program and to “ensure the minor’s presence at all future proceedings before DHS/Immigration and Customs Enforcement . . . and DOJ/EOIR.”¹⁸⁷ Given the rates of non-appearance, it is clear that a majority of sponsors are not upholding that obligation, and no government agency is enforcing the agreement.

According to legal service providers, one of the main reasons UACs fail to appear for their proceedings is the significant amount of time between a UAC’s apprehension and his or her first court appearance. The median length of time UAC cases currently have been pending since the filing of a notice to appear is 480 days.¹⁸⁸ This significant lapse of time can cause UACs to miss their court dates.¹⁸⁹ The GAO also has observed that if a significant amount of time passes before a respondent’s hearing, witnesses are less likely to be available and pro bono attorneys are less inclined to accept cases scheduled far into the future.¹⁹⁰ Similarly, DHS attorneys told the GAO that it is difficult to assign one attorney to

¹⁸⁵ Exec. Off. for Immigration Review, *Unaccompanied Alien Child Cases* (July 6, 2018), <https://www.justice.gov/eoir/page/file/1060871/download>;

¹⁸⁶ 8 U.S.C. § 1232(c)(4).

¹⁸⁷ App. 071–72, Office of Refugee Resettlement Sponsor Handbook at 12–13.

¹⁸⁸ Exec. Off. for Immigration Review, *Current Median UAC Case Pending Time* (June 30, 2018), <https://www.justice.gov/eoir/page/file/1061551/download>.

¹⁸⁹ Briefing with UAC legal provider (Apr. 18, 2018).

¹⁹⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 28–29 (2017).

the entire life of a case, which increases the amount of time and money necessary for new attorneys to prepare for the case.¹⁹¹

The delay is largely attributable to DOJ EOIR's substantial backlog of immigration cases, including UAC cases.¹⁹² The GAO examined trends in EOIR's backlog last year. From FY 2006 through FY 2015, the number of EOIR's open cases grew 44 percent, from approximately 517,000 cases to 747,000 cases.¹⁹³ According to the GAO, the rate of new cases filed each year remained relatively steady, but the backlog gradually increased because the immigration courts completed cases at a reduced rate.¹⁹⁴ In FY 2006, the immigration courts completed about 287,000 cases, and in FY 2015, they completed about 199,000.¹⁹⁵ This was so even though the number of immigration court judges increased from 212 to 247 over that same period of time.¹⁹⁶ EOIR explained that new judges process cases more slowly than experienced judges.¹⁹⁷ Furthermore, cases began taking longer. In FY 2015, the median case completion time was 43 days; in FY 2015, it was 286 days.¹⁹⁸ EOIR attributed this increase to changes in the complexity of the cases filed—cases for relief such as asylum and removal withholdings increased and voluntary departure applications decreased.¹⁹⁹ And the 2014 surge of UAC cases—which tend to be more complex—also contributed to the backlog.²⁰⁰

As of July 2, 2018, 80,266 UAC cases were pending²⁰¹—roughly 11 percent of the total 733,730 immigration cases pending across the country.²⁰² Currently, 355 immigration judges handle these cases, including 29 new immigration judges invested on August 10, 2018.²⁰³ DOJ has authority to hire 129 additional judges.²⁰⁴ To reduce this backlog, it is critical that DOJ make full use of the resources and authorities Congress has given it to conduct these proceedings. The GAO also has recommended that EOIR develop and implement a workforce plan that accounts for

¹⁹¹ *Id.* at 30.

¹⁹² *Id.* at 22.

¹⁹³ *Id.* at 20.

¹⁹⁴ *Id.* at 22.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 23.

¹⁹⁷ *Id.* at 23–24.

¹⁹⁸ *Id.* at 25.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 27.

²⁰¹ Exec. Off. for Immigration Review, *UAC Statistics* (July 2, 2018), <https://www.justice.gov/eoir/file/1083086/download>.

²⁰² Exec. Off. for Immigration Review, *Pending Cases* (July 6, 2018), <https://www.justice.gov/eoir/page/file/1060836/download>.

²⁰³ S. Comm. on Homeland Sec. & Governmental Affairs staff briefing with Kate Sheehy, Chief of Staff, Exec. Off. of Immigration Review, U.S. Dep't of Justice (Aug. 10, 2018).

²⁰⁴ *Id.*

long-term staffing needs, the complexity of cases, and EOIR’s performance goals.²⁰⁵ This planning is especially critical given that as of 2017, 39 percent of immigration court judges were eligible for retirement.²⁰⁶

At the Subcommittee’s April 26, 2018 hearing and in briefings, legal service and care providers have offered the Subcommittee several additional observations about why they believe UACs fail to appear at their court proceedings in some cases:

- **UACs struggle to appear in person at courts far from where they live.** Only 29 states, Puerto Rico, and the Northern Mariana Islands have immigration courts,²⁰⁷ and in many cases, even courts in-state are far from where UACs live. In Ohio, for example, only one court—located in Cleveland—hears juvenile removal proceedings.²⁰⁸ Similarly, in Delaware, the nearest juvenile immigration court is in Philadelphia.²⁰⁹ According to a legal service provider, in the past, some of these courts allowed UACs to appear by telephone, but now, they require UACs to appear in person. The legal service providers explained that the UACs have to drive as far as four hours to attend their proceedings, and often the UACs do not have the resources or ability to travel.²¹⁰ They suggested that it would be helpful if the court would hold hearings in multiple locations or allow children to appear via telephone or videoconference.²¹¹
- **UACs are unaware of the need to request a change of venue.** One legal service provider testified before the Subcommittee that she frequently represents UACs placed into immigration court proceedings in one jurisdiction and released to sponsors in another jurisdiction, sometimes across the country. She said that many UACs and their sponsors do not know they need to request a change of venue in order to proceed with the case in the sponsor’s home jurisdiction.²¹²

²⁰⁵ U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 34 (2017).

²⁰⁶ *Id.*

²⁰⁷ Exec. Off. of Immigration Review, *Immigration Court Listing* (June 2018), <https://www.justice.gov/eoir/eoir-immigration-court-listing#OH>.

²⁰⁸ *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse: Hearing before the S. Permanent Subcomm. on Investigations*, 115th Cong. (2018) (statement of Jessica A. Ramos, Staff Attorney, Advocates for Basic Legal Equality, Inc.); briefing with legal service provider (Apr. 6, 2018); briefing with legal service provider (Apr. 10, 2018).

²⁰⁹ Briefing with legal service provider (Apr. 18, 2018).

²¹⁰ Briefing with legal service provider (Apr. 10, 2018).

²¹¹ *Id.*

²¹² *See, e.g., Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse: Hearing before the S. Permanent Subcomm. on Investigations*, 115th Cong. (2018) (statement of Laura Carothers Graham, Deputy Dir., Community Legal Aid Soc., Inc.).

- **ICE priorities.** The service providers explained that sponsors—who are frequently undocumented immigrants themselves—are afraid to take the children to court because they fear ICE will arrest them at the courthouse.²¹³
- **Language barriers and unclear instructions.** UACs and their sponsors receive a packet of information about the responsibilities they undertake with the placement. The legal service providers told Subcommittee staff that UACs and their sponsors often struggle to understand the legal requirements and the materials in the languages provided without the help of counsel, and, in some cases, an interpreter.²¹⁴

²¹³ Briefing with legal service provider (Apr. 9, 2018); *see also* App. 119, *USCIS Asylum Div. Quarterly Stakeholder Meeting Agenda* (Aug. 11, 2017) (question and answer portion addresses question regarding sponsor fear: “Sponsors and other adult caregivers are expressing increasing fear of attending child asylum interviews as witnesses or ‘trusted adults’ because of increasing fear of immigration enforcement efforts. Does the Asylum Division have a policy regarding the sharing of witness and other adults’ information with Immigration and Customs Enforcement?”); App. 127, U.S. Conf. of Catholic Bishops Migration & Refugee Servs. and Lutheran Immigration & Refugee Servs., *Post-Release Services: Family Preservation Services for Immigrant Children Released from Federal Custody Frequently Asked Questions*.

²¹⁴ Briefing with legal service provider (Apr. 18, 2018).

VII. ADDITIONAL PROBLEMS PROTECTING UACS AND ENSURING APPEARANCE AT REMOVAL PROCEEDINGS

While reviewing HHS and DHS's progress in addressing the deficiencies the Subcommittee described in its January 2016 report, the Subcommittee identified several additional problems in the UAC program. As discussed in more detail below, despite relying on state agencies to ensure UAC welfare, HHS does not notify state governments of UACs' placements. The Subcommittee learned that HHS frequently fails to provide required age-out plans to DHS when UACs in HHS's custody turn 18. And HHS has not enlisted services from the appropriate providers to care for children who need to be in a secure setting who also have significant mental health issues, putting both those children and the children with whom they are housed at risk.

A. Lack of Notification to States of UAC Placement

HHS believes that once ORR releases UACs into their sponsors' care, their well-being is in the purview of local authorities.²¹⁵ Even if an HHS-contracted care provider has concerns about a UAC's care or safety, those providers report the problems to state and local authorities, not HHS.²¹⁶ When state agencies call ORR with concerns about UACs, HHS refers them to ICE.²¹⁷ HHS does not take responsibility for UACs under any of those circumstances,²¹⁸ nor does HHS track the number of UACs placed into state welfare programs²¹⁹.

Although HHS places enormous responsibility on state governments to ensure UAC welfare, HHS generally does not notify state or local governments when it places children with sponsors in those communities. The GAO found that representatives from city governments were unaware that UACs were living in their cities.²²⁰

²¹⁵ PSI 2016 REPORT at 26; Briefing with Scott Lloyd, Dir., Off. of Refugee Resettlement, and Jonathan White, Dep. Dir. for Children's Programs, Off. of Refugee Resettlement, *et al.* (Jan. 17, 2018).

²¹⁶ App. 130–32, Letter from Mark Greenberg, Acting Assistant Sec'y, Admin. for Children & Families, U.S. Dep't of Health & Hum. Servs., and Robert Carey, Dir., Off. of Refugee Resettlement, to the Hon. Rob Portman, Chairman, S. Permanent Subcomm. on Investigations, and the Hon. Claire McCaskill, Ranking Member, S. Permanent Subcomm. on Investigations (Sept. 6, 2016).

²¹⁷ Briefing with Scott Lloyd, Dir., Off. of Refugee Resettlement, and Jonathan White, Dep. Dir. for Children's Programs, Off. of Refugee Resettlement, *et al.* (Jan. 17, 2018).

²¹⁸ App. 051–54, Letter from Mark Greenberg, Acting Assistant Sec'y, Admin. for Children & Families, U.S. Dep't of Health & Hum. Servs., to the Hon. Claire McCaskill, Ranking Member, S. Permanent Subcomm. on Investigations (Feb. 22, 2016).

²¹⁹ Briefing with Scott Lloyd, Dir., Off. of Refugee Resettlement, and Jonathan White, Dep. Dir. for Children's Programs, Off. of Refugee Resettlement, *et al.* (Jan. 17, 2018).

²²⁰ U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-180, UNACCOMPANIED ALIEN CHILDREN: HHS CAN TAKE FURTHER ACTIONS TO MONITOR THEIR CARE 37 (2016), <https://www.gao.gov/products/GAO-16-180>.

The Subcommittee interviewed 16 UAC care and legal service providers. Most of them agreed that it would be “wonderful”²²¹ and “very helpful”²²² if HHS were to notify state and local governments when it places UACs in a state. They explained that it would help the care providers to have lists of UACs in their communities so they could proactively reach out to offer services to the UACs and to connect them with other pro bono service providers, such as attorneys to represent them in their immigration court proceedings.²²³ Some cautioned, however, that guardrails would need to be in place to protect the UAC and sponsor information privacy.²²⁴

The care providers also frequently mentioned that state and local governments do not understand their obligations and authorities with respect to UACs. One said that a state’s child welfare services personnel were reluctant to get involved in helping UACs who had been abused.²²⁵ All agreed that it would be “incredibly helpful” for ORR to provide trainings to state and local governments.²²⁶

The Subcommittee also spoke with state and local government officials. Those officials all also agreed that it would be useful for them to receive information about the UACs living in their communities for a variety of reasons. For example, Dr. Pattiva Cathell, an English Language Learner Counselor at Sussex Central High School in Delaware, observed that UACs frequently need special resources, such as language interpreters—but the school district cannot plan for those resources or even know to prepare for the additional number of students until the UACs arrive at school throughout the year.²²⁷

Furthermore, unless they are notified, local governments are not aware that UACs are living in their school districts and should be attending school. In that case, if UACs do not come to school, the local government has no reason to check on them or raise concerns about their welfare, negating a significant opportunity to learn of problems in a sponsorship situation.²²⁸ Dr. Cathell testified before the Subcommittee that schools frequently are the first to observe problems. She said her school identified many incidents in which UACs under the age of 18 work while

²²¹ Briefing with UAC care provider (Apr. 10, 2018).

²²² Briefing with UAC legal services provider (Apr. 10, 2018).

²²³ Briefing with UAC care provider (Apr. 10, 2018).

²²⁴ *E.g.*, briefing with UAC legal services provider (Apr. 9, 2018); briefing with UAC care provider (Apr. 23, 2018).

²²⁵ Briefing with UAC care provider (Apr. 10, 2018).

²²⁶ *E.g.*, briefing with UAC care provider (Apr. 6, 2018); briefing with UAC care provider (Apr. 9, 2018).

²²⁷ Briefing with Dr. Pattiva Cathell (Apr. 17, 2018).

²²⁸ *Id.*

attending school, often to pay rent to their sponsors, to pay the cost of their travel to the United States, or to send money back to family in their home country.²²⁹

On October 30, 2017, HHS changed its policy to provide that ORR would notify states regarding one population of UACs: it planned to notify local law enforcement when releasing UACs from a secure or staff secure facility to sponsors in those communities.²³⁰ Currently, HHS houses about 180 UACs in secure or staff-secure settings, so this policy has the potential to affect only a miniscule portion of the UAC population. Moreover, HHS told Subcommittee staff that, in January 2018, the Department had not implemented the policy change because it was struggling to identify the appropriate point of contact at local law enforcement agencies across the country.²³¹ As of this report, HHS has begun a pilot program in two areas—Suffolk County, New York, and Los Angeles, California—to notify states regarding placement of these children.²³²

B. HHS Failure to Submit Post-Placement Plans

Under the JCO—which represents longstanding policy, according to the departments—HHS is required to provide “post-placement,” or “post-18” plans when UACs in HHS care turn 18-years-old.²³³ Once a UAC in HHS’s care turns 18, ORR refers the UAC to ICE’s Enforcement and Removal Operations (“ERO”), which is responsible for evaluating a UAC’s immigration status.²³⁴ HHS must provide post-placement plans to ERO prior to the child’s 18th birthday.²³⁵ These plans need to include information to allow ICE to evaluate the individual’s circumstances and decide whether to detain the individual, release him or her on bond, or release him

²²⁹ *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse: Hearing before the S. Permanent Subcomm. on Investigations, 115th Cong. (2018)* (statement of Dr. Pattiva Cathell, ELL School Counselor, Sussex Central High School).

²³⁰ *ORR Policy Guide* § 5.9.

²³¹ Briefing with Scott Lloyd, Dir., Off. of Refugee Resettlement, and Jonathan White, Dep. Dir. for Children’s Programs, Off. of Refugee Resettlement, *et al.* (Jan. 17, 2018).

²³² U.S. Comm. on Homeland Sec. & Governmental Affairs staff briefing with Commander Jonathan White, U.S. Public Health Serv. Commissioned Corps, U.S. Dep’t of Health & Hum. Servs., and Toby Biswas, Supervisory Program Specialist, Div. of Policy, Off. of Refugee Resettlement (Aug. 10, 2018).

²³³ App. 163, JCO at 17; Briefing with Michael Dougherty, Assistant Sec’y for Border, Immigration & Trade Policy, U.S. Dep’t of Homeland Sec.; Mellissa Harper, Unit Chief, Juvenile & Family Residential Mgmt. Unit, Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., *et al.* (Feb. 16, 2018).

²³⁴ 8 U.S.C. § 1232(c)(2)(B).

²³⁵ Briefing with Michael Dougherty, Assistant Sec’y for Border, Immigration & Trade Policy, U.S. Dep’t of Homeland Sec.; Mellissa Harper, Unit Chief, Juvenile & Family Residential Mgmt. Unit, Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., *et al.* (Feb. 16, 2018).

or her into the community after turning age 18.²³⁶ The information includes familial and community ties, any criminal activity, and indications of flight risk.²³⁷

According to DHS, however, HHS frequently fails to provide those plans.²³⁸ In Fiscal Year 2017, 731 UACs turned 18 while in HHS’s physical and legal custody.²³⁹ ICE only received post-placement plans for 230 of those UACs—just over 31 percent of cases.²⁴⁰

C. Secure Facilities

In addition to ongoing concerns about HHS’s ability to ensure the safety of UACs after they are placed with sponsors, recent allegations in media reports and lawsuits raise concerns about the treatment of UACs in HHS’s custody at secure facilities. Subcommittee interviews of staff at two of these facilities highlighted the efforts the staff undertake to protect the UACs, but also the difficulties of managing the UAC population with too few employees at one facility, and caring for UACs better suited for a secure residential treatment facility at the other. Staff at both facilities recommended that ORR provide secure facilities with policies tailored to their function. Currently, ORR applies the same policies to shelters, staff secure, and secure facilities.

By law, HHS must place UACs in the least restrictive setting appropriate for the child’s needs.²⁴¹ There are three primary settings for UACs in HHS’s care: shelters, staff secure facilities, and secure facilities.²⁴² Shelters are the least restrictive.²⁴³ Staff secure facilities provide a heightened level of staff supervision for UACs with behavioral or mental health needs or UACs who pose a flight risk.²⁴⁴ Secure facilities are juvenile detention facilities for UACs who require the highest level of supervision, such as UACs who pose a danger to themselves or others, or if they have been charged with a crime.²⁴⁵ HHS contracts with state and local juvenile correctional facilities for beds in three secure facilities: Shenandoah Valley Juvenile Center (“SVJC” or “the Center”) and Northern Virginia Juvenile Detention

²³⁶ *Id.* DHS must place individuals in the least restrictive setting available. 8 U.S.C. § 1232(c)(2)(B)

²³⁷ Briefing with Michael Dougherty, Assistant Sec’y for Border, Immigration & Trade Policy, U.S. Dep’t of Homeland Sec.; Mellissa Harper, Unit Chief, Juvenile & Family Residential Mgmt. Unit, Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., *et al.* (Feb. 16, 2018).

²³⁸ *Id.*

²³⁹ U.S. Dep’t of Homeland Sec. responses to the Subcomm. (Mar. 27, 2018) [on file with the Subcommittee]

²⁴⁰ *Id.*

²⁴¹ 8 U.S.C. § 1232(c)(2)(A).

²⁴² *ORR Policy Guide* § 1.1.

²⁴³ *Id.*; *ORR Guide to Terms*.

²⁴⁴ *ORR Policy Guide* § 1.2.4.

²⁴⁵ *ORR Policy Guide* § 1.2.4.

(“NOVA”) in Virginia, and the Yolo County Juvenile Detention Center in California. As of February 28, 2018, 67 UACs were in secure facilities.²⁴⁶

1. Shenandoah Valley Juvenile Center

Because several lawsuits have focused on SVJC’s care of UACs and because it houses the highest number of UACs in a secure facility—34 at last count— Subcommittee staff visited the Center on April 16, 2018. Since that visit, two recent investigations have yielded findings of no abuse or neglect at the Center. Shenandoah Valley Social Services investigated complaints alleging child abuse and neglect at SVJC and “did not find any clear evidence of abuse or neglect as defined by Virginia State Policy.” It therefore “made an ‘Unfounded’ disposition,” but offered several recommendations for improving UAC care at the Center.²⁴⁷ Similarly, the Virginia Department of Juvenile Justice released a report of its own review of SVJC finding that SVJC was “in compliance with applicable regulations and certification standards” and recommended “areas where SVJC could improve programming for the youth in the custody of ORR.”²⁴⁸

Subcommittee staff interviewed five staff members and several UACs regarding: (1) use of force and restraints; (2) mental health care; and (3) prolonged release time.

a) Use of Force and Restraints

Prior to visiting SVJC, attorneys for UACs told Subcommittee staff that they had observed children with serious injuries following altercations with SVJC staff, including one child who suffered a broken foot.²⁴⁹ One said she saw marks on UACs wrists after the staff had used “soft restraints”—similar to seatbelt material—on them.²⁵⁰ A UAC class action lawsuit filed in October 2017 raises similar allegations.²⁵¹

During the Subcommittee staff visit, the Center personnel explained that the Center rarely uses physical restraints (meaning using their hands to physically hold a child) or mechanical restraints (meaning handcuffs or a restraint chair). The Center’s policy is to do so only when children pose a risk to themselves or others, and only until the child calms down. They noted that, unlike a mental health

²⁴⁶ U.S. Dep’t of Health & Hum. Servs. briefing (Feb. 28, 2018).

²⁴⁷ App. 133–34, Letter from Shenandoah Valley Social Servs. (Aug. 1, 2018).

²⁴⁸ App. 135–46, Virginia Dep’t of Juvenile Justice *Report of Findings: Shenandoah Valley Juvenile Center* (Aug. 13, 2018).

²⁴⁹ Legal services provider interview (Apr. 9, 2018).

²⁵⁰ *Id.*

²⁵¹ Class Action Complaint at 2, *Doe v. Shenandoah Valley Juvenile Ctr. Comm’n*, No. 5:17-cv-00097-EKD, (W.D. Va. Oct. 4, 2017).

residential treatment facility, they are unable to administer medication to calm a child, so they have limited options if a child is a danger to himself or others.²⁵²

b) Mental Health Care

Both SVJC staff and other UAC care and legal service providers told the Subcommittee that UACs coming into the United States over the past several years are significantly more traumatized and in need of mental health services than children who came to the country previously.²⁵³ SVJC staff explained to Subcommittee staff that the SVJC is not a residential treatment center and, as a juvenile detention facility, they are not equipped to deal with youth who have severe mental health issues. On-staff clinicians focus on keeping the UACs stable until their immigration proceedings, not on full-fledged psychiatric care, although a psychiatrist is available to work with the UACs.²⁵⁴

Several of the SVJC staff recommended that HHS contract with a secure residential treatment facility to house UACs who need significant mental health treatment and who also must be in a secure setting. They explained that HHS already contracts with residential treatment facilities, but because they are not secure settings, those facilities reject UACs referred by SVJC.²⁵⁵

The Subcommittee supports this recommendation. The *Flores* Agreement provides that a “facility for special needs minors . . . or others in appropriate circumstances,” such as cases in which “a minor has drug or alcohol problems or is mentally ill,” “may maintain that level of security permitted under state law which is necessary for the protection of the minor or others.”²⁵⁶ The ORR Policy Guide also accounts for such a need, stating, “[i]f a child has a mental health issue in addition to behavioral concerns or criminal history warranting placement into a restrictive level of care, ORR may place the youth in a residential treatment center or other therapeutic setting.”²⁵⁷

ORR should contract with an appropriate secure residential treatment center to house and treat children with significant mental health issues who also must be in a secure setting.

²⁵² Shenandoah Valley Juvenile Center interviews (Apr. 16, 2018).

²⁵³ *E.g.*, interview with Brent Cardall, Yolo County, California Chief Probation Officer (Apr. 11, 2018); briefing with legal services provider (Apr. 9, 2018).

²⁵⁴ Shenandoah Valley Juvenile Center interviews (Apr. 16, 2018).

²⁵⁵ *Id.*

²⁵⁶ App. 002, *Flores* Agreement ¶ 6.

²⁵⁷ *ORR Policy Guide* § 1.2.4.

c) Prolonged Confinement

In June 2017, ORR changed its policy to require that the Director of ORR sign off on the release of UACs from secure or staff secure facilities.²⁵⁸ Care providers, including SVJC staff, told Subcommittee staff they had observed an increase in the amount of time UACs are detained in these facilities. These providers suggested the delays may be due in part to this new policy. The SVJC staff said the delays and uncertainty increased UACs' sense of hopelessness, which sometimes contributes to deterioration in their behavior.²⁵⁹ Furthermore, keeping UACs in a secure setting longer than necessary violates their right to live in the least restrictive setting that is in their best interests established in the *Flores* Agreement.

A 2017 federal district court case illustrates the problems prolonged condition can cause. The court held that ORR and SVJC violated a Honduran UAC's due process rights after case workers recommended that the child be reunified with his mother, and—14 months later—ORR summarily denied his release.²⁶⁰ The court identified multiple deficiencies in ORR's detention review procedures, but held that ORR's significant and unexplained delay in responding to the mother's reunification request alone amounted to a violation of due process.²⁶¹ The court noted that psychological and behavioral reports regarding the UAC's condition during his confinement "reflect a worsening of [the child's] psychological condition in some respects. Perhaps if the reunification had been addressed more expediently, [the child] would not have had some of the behavioral problems that he has had, which ORR is now relying upon to deny reunification."²⁶² The court attributed these behavioral problems to his prolonged detention.²⁶³

²⁵⁸ *ORR Policy Guide* § 2.7.

²⁵⁹ Shenandoah Valley Juvenile Center interviews (Apr. 16, 2018).

²⁶⁰ *Santos v. Smith*, 260 F. Supp. 3d 598, 601 (W.D. Va. June 1, 2017).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

2. Yolo County Juvenile Detention Center

At the Yolo County Juvenile Detention Center in California, the Chief Probation Officer, Brent Cardall, recently asked the County to terminate its contract with ORR to house UACs because of UAC assaults on staff, as well as concerns about the staff-to-UAC to ratio.²⁶⁴ He highlighted the severe trauma and mental illness he has observed among youth in the secure facility.²⁶⁵ He raised further concerns that ORR officials were not present at recent discussions to renew the county's contract and said that the federal government is "not a great partner" on the contract.²⁶⁶

Cardall estimated that to improve security at the facility, the contract would have to increase from \$3 million annually to \$4.3 million annually, or ORR would have to reduce the number of UACs it sends to the facility from 24 down to 16.²⁶⁷ The Yolo County Board voted three-to-one to seek an amended contract reducing the number of UACs in the facility.²⁶⁸ Ultimately, Yolo received an additional \$2.2 million to hire nine more full-time staff at the detention center,²⁶⁹ and in July 2018, ORR provided \$150,000 to the Yolo facility to pay for the UACs' summer educational programs.²⁷⁰

VIII. CONCLUSION

In 2015, the Subcommittee learned that HHS placed eight children with human traffickers, who sent them into forced labor in Ohio. The Subcommittee's oversight demonstrated that HHS disregarded basic standards of child welfare by failing to conduct background checks on those sponsors and to follow up on situations that should have raised concerns immediately.

Only after that tragedy did HHS begin improving its background check process. And only after the Subcommittee published a report and held a public hearing did DHS and HHS agree to create a structure for coordinating their UAC operations, even though the HHS Inspector General and GAO had been recommending they create such a structure for almost a decade.

²⁶⁴ Anne Ternus-Bellamy, *County to keep immigrant-youth detention contract for now*, DAVIS ENTER., Apr. 4, 2018, <https://www.davisenterprise.com/local-news/county-to-keep-immigrant-youth-detention-contract-for-now/>.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Anne Ternus-Bellamy, *Supervisors Vote to Keep Housing Refugee Minors at Juvenile Hall*, DAVIS ENTER., June 27, 2018, <https://www.davisenterprise.com/local-news/supervisors-vote-to-keep-housing-refugee-minors-at-juvenile-hall/>.

²⁷⁰ Cintia Lopez, *\$150,000 Granted to Supplement Education of ORR Youths*, WOODLAND DAILY DEMOCRAT, July 25, 2018, <http://www.dailydemocrat.com/article/NI/20180725/NEWS/180729910>.

It then took another two and a half years for the departments to put pen to paper and create the JCO—and it appears that the departments had no intention of completing that document until the Subcommittee began asking questions again. Once the JCO was finished, it demonstrated that the departments have not tried to improve their processes, but, instead, simply documented the status quo.

In the interim, while waiting for the JCO, the Subcommittee has received more allegations of children placed with sponsors who put them into forced labor—discovered not because HHS followed up with those children, but because a school counselor or emergency room personnel caught the problem. Still no one in the federal government accepts any responsibility for children once it places those children with sponsors who may be complete strangers to them. Furthermore, since the Subcommittee’s 2016 report and hearing, the Administration has been reducing home studies and legal services provided to children living with sponsors. During that same time, the backlog of UAC cases before the immigration courts has been steadily increasing, causing more UACs to linger longer in a “legal no-man’s land.” And then when their court dates finally arrive, more than half of UACs do not appear for their court proceedings and are ordered removed *in absentia*, frequently costing them their opportunity to argue for immigration relief and causing them to be subject to a ban on entry for 10 years if they leave the country.

These problems are in addition to those the Subcommittee observed in the secure detention facilities. And this report does not address concerns about other HHS-grantee facilities that house UACs still in HHS’s physical custody.

The current circumstances surrounding the UAC system are untenable. The Subcommittee will continue its oversight efforts to identify gaps in the care of this vulnerable population and deficiencies in the U.S. immigration system, and it will work with the departments to improve these conditions.