



MEMORANDUM

June 7, 2021

To: Subcommittee on Oversight and Investigations Members and Staff

Fr: Committee on Energy and Commerce Staff

Re: Hearing on “A Humane Response: Prioritizing the Well-Being of Unaccompanied Children”

On Wednesday, June 9, 2021, at 11:30 a.m. (EDT) via Cisco WebEx online video conferencing, the Subcommittee on Oversight and Investigations will hold a hearing entitled, “A Humane Response: Prioritizing the Well-Being of Unaccompanied Children.” The hearing will examine the Biden Administration’s efforts to care for unaccompanied children at the U.S. border.

I. BACKGROUND ON UNACOMPANIED CHILDREN PROGRAM

The Office of Refugee Resettlement (ORR), within the Department of Health and Human Services (HHS) Administration for Children and Families (ACF), is responsible for coordinating the placement and care of unaccompanied children.¹ Unaccompanied children are usually those who present themselves at the U.S. border without a parent or guardian, but can also be children who are separated from a parent or guardian.² Barring extraordinary circumstances, any unaccompanied child in the custody of a federal agency or department must be transferred to ORR within 72 hours.³

Upon receiving custody of an unaccompanied child, ORR places the child with residential care providers, who are to provide housing and care in the least restrictive environment possible given the child’s safety, emotional, and physical needs.⁴ ORR has a network of approximately 200 state-licensed facilities and programs in 22 states, using a mix of

¹ 6 U.S.C. § 279 (An unaccompanied child is defined by law as a child who has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody.).

² 6 U.S.C. § 279; Government Accountability Office, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border* (Oct. 2018) (GAO-19-163).

³ 8 U.S.C. § 1232(b)(3).

⁴ 8 U.S.C. § 1232(c)(2)(A).

“standard” beds that are available year-round, and “temporary” beds that can be added or reduced as needed to accommodate changing flows in unaccompanied children referrals.⁵

ORR maintains two types of temporary facilities: (1) Influx Care Facilities (ICFs), which are unlicensed facilities held to the same standards of care used in ORR’s permanent/licensed network; and (2) Emergency Intake Sites (EIS), which are temporary facilities with more limited services intended to safely process and care for these children until they can either be released to a sponsor or transferred to an appropriate ORR shelter for longer-term care.⁶

The care providers at ORR facilities are also responsible for finding and assessing the suitability of a potential sponsor, typically either a parent or some other relative already living in the United States, to care for the child once they leave ORR’s custody. This includes a background check, completion of a sponsor assessment process to identify risk factors and other potential safety concerns, and, where applicable, other actions such as fingerprinting, prior to placing an unaccompanied child with a sponsor.⁷ In more than 80 percent of cases, unaccompanied children have a family member in the United States and, in more than 40 percent of those cases, that family member is a parent or legal guardian.⁸

II. PRIOR FEDERAL ACTIONS

A. Trump Administration Actions

In April 2018, the Trump Administration announced a “Zero Tolerance” policy that directed federal prosecutors to charge and prosecute all immigration offenses relating to improper entry occurring along the Southwestern U.S. border.⁹ Because federal law requires that detained children be placed in the least restrictive setting, when adult migrants were detained for prosecution under “Zero Tolerance,” their children were then separated from them and placed in

⁵ Department of Health and Human Services, Administration for Children & Families, *Fact Sheet: Unaccompanied Children (UC) Program* (May 5, 2021) (press release).

⁶ Department of Health and Human Services, Administration for Children & Families, Office of Refugee Resettlement, *Policy & Guidance: Children Entering the United States Unaccompanied – Section 7* (Sept. 18, 2019); E-mail from Agency Staff, Department of Health and Human Services, to Committee Staff, House Committee on Energy and Commerce (Apr. 9, 2021); Department of Health and Human Services, Administration for Children & Families, *Fact Sheet: Unaccompanied Children (UC) Program* (May 5, 2021) (press release).

⁷ Department of Health and Human Services, Administration for Children & Families, *Fact Sheet: Unaccompanied Children (UC) Program* (May 5, 2021) (press release).

⁸ Department of Homeland Security, *Statement by Homeland Security Secretary Alejandro N. Mayorkas Regarding the Situation at the Southwest Border* (Mar. 16, 2021).

⁹ Department of Justice, *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry* (Apr. 6, 2018) (press release).

the care of ORR.¹⁰ Six weeks later, on June 20, 2018, former President Trump issued an Executive Order ending family separation,¹¹ but also indicated the “Zero Tolerance” policy remained intact.¹² During that six-week period, at least 2,816 children were separated from their families.¹³ Recent court filings indicate that the parents of 391 separated children still have not been located.¹⁴

In October 2018, the Government Accountability Office (GAO) released a report that found that HHS was unaware of the “Zero Tolerance” policy before it was publicly announced, and did not plan for this policy nor the resulting increase in children separated from their parents at the U.S. border and placed with ORR.¹⁵ GAO further found that HHS did not have a consistent method of identifying separated children and their parents, which presented difficulties in reunifying families.¹⁶ Furthermore, the HHS Office of Inspector General (HHS-OIG) released a report in January 2019, finding that thousands of additional children may have been separated beginning in 2017, significantly before the official start of the “Zero Tolerance” policy.¹⁷ HHS-OIG also reported that HHS did not have a centralized system to identify, track, and reunify families.¹⁸

B. Committee Oversight

The Committee has a long history across multiple Administrations of overseeing ORR and how the agency ensures the health and safety of children in its care. The Committee held hearings on the Trump Administration’s family separation policy and the ongoing effects of that

¹⁰ 6 U.S.C. § 251; 8 U.S.C. § 1232; *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) (stipulated settlement agreement); Government Accountability Office, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border* (Oct. 2018) (GAO-19-163).

¹¹ Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018).

¹² *Trump Signs Executive Order on Family Separation but Says ‘Zero Tolerance’ to Stay*, CBS News (updated Oct. 19, 2018).

¹³ Congressional Research Service, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy* (updated Feb. 2, 2021) (R45266).

¹⁴ *Ms. L, et al. vs. U.S. Immigration and Customs Enforcement, et al.*, No. 3:18-CV-00428 DMS MDD (S.D. Cal. May 19, 2021) (joint status report).

¹⁵ Government Accountability Office, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border* (Oct. 2018) (GAO-19-163).

¹⁶ *Id.*

¹⁷ Department of Health and Human Services, Office of Inspector General, *Issue Brief: Separated Children Placed in Office of Refugee Resettlement Care* (Jan. 17, 2019) (OEI-BL-18-00511).

¹⁸ *Id.*

and other Trump Administration policies in February 2019 and September 2019.¹⁹ The Committee also sent a series of letters to HHS requesting documents and communications regarding family separations, among other things, and it conducted an investigation into the Trump Administration’s family separation policy.²⁰

III. RECENT TRENDS

Department of Homeland Security (DHS) Secretary Alejandro Mayorkas stated earlier this year that the United States was on pace to encounter more individuals on the Southwest U.S. border than any other period in the last 20 years.²¹ As a result, ORR has had record numbers of children sent into its care from U.S. Customs and Border Protection (CBP). As of June 2, 2021, there were approximately 16,874 unaccompanied children in HHS care and, at the end of May 2021, the average length of care was 33 days.²² Additionally, coronavirus disease of 2019 (COVID-19) protocols have caused a reduction of available beds at ORR’s licensed care facilities, which are all near full capacity.²³

The record numbers of migrants have been a result of a combination of factors, some of which have propelled migration for years—such as poverty, high levels of violence, and corruption in Mexico and Northern Triangle countries—and other more recent events, including two devastating hurricanes in Honduras that caused many children and families to flee deteriorating living conditions.²⁴ The Biden Administration is working to humanely process the unaccompanied children.²⁵ While the number of unaccompanied children being detained by CBP and referred to ORR has declined since its peak in March 2021, ORR still faces challenges in caring for and reunifying the large number of children in its care.²⁶

¹⁹ House Committee on Energy and Commerce, *Hearing on Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy*, 116th Cong. (Feb. 7, 2019); House Committee on Energy and Commerce, *Hearing on Protecting Unaccompanied Children: The Ongoing Impact of the Trump Administration’s Cruel Policies*, 116th Cong. (Sep. 19, 2019).

²⁰ See, e.g., Letter from Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce, to Secretary Alex M. Azar (Jan. 18, 2019).

²¹ Department of Homeland Security, *Statement by Homeland Security Secretary Alejandro N. Mayorkas Regarding the Situation at the Southwest Border* (Mar. 16, 2021).

²² E-mail from Agency Staff, Department of Health and Human Services, to Committee Staff, House Committee on Energy and Commerce (Jun. 2, 2021).

²³ *HHS Secretary Talks Unaccompanied Minors At The Border, Addresses Criticisms*, NPR (Apr 22, 2021); E-mail from Agency Staff, Department of Health and Human Services, to Committee Staff, House Committee on Energy and Commerce (Jun. 2, 2021).

²⁴ Department of Homeland Security, *Statement by Homeland Security Secretary Alejandro N. Mayorkas Regarding the Situation at the Southwest Border* (Mar. 16, 2021).

²⁵ *Id.*

²⁶ *Border apprehensions rose slightly in April, but number of unaccompanied minors dropped*, NBC News (May 11, 2021).

IV. BIDEN ADMINISTRATION ACTIONS

The Biden Administration has repeatedly stated that the U.S. border is not open,²⁷ and, with limited exception, it has continued to expel all individuals and families under 42 U.S.C. § 265 (Title 42), which authorizes the Centers for Disease Control and Prevention (CDC) to suspend all rights of entry into the United States in order to manage the public health crisis of the COVID-19 pandemic.²⁸ The Biden Administration has taken certain actions to more humanely address migrant children and families, including exempting unaccompanied children from expulsion under Title 42 and rescinding the Trump Administration’s “Zero Tolerance” policy, which resulted in thousands of family separations.²⁹

Earlier this year, HHS and DHS also announced the termination of a 2018 information-sharing agreement that had a “chilling effect” on potential sponsors, such as a parent or close relative, from coming forward to sponsor an unaccompanied child.³⁰ In its place, HHS and DHS signed a new agreement that “promotes the safe and timely transfer of children” to appropriately vetted sponsors who can “safely care for them while they await immigration proceedings.”³¹

CDC has issued COVID-19 related guidance to facilitate the movement of unaccompanied children from CBP custody to ORR facilities.³² During the COVID-19 pandemic, ORR has modified operations in accordance with CDC guidelines, which include quarantining and testing newly arrived children, and adhering to social distancing principles in

²⁷ *Mayorkas says ‘the border is closed,’ defends Biden’s immigration strategy*, Washington Post (Mar. 21, 2021).

²⁸ *See* Department of Homeland Security, *Statement by Homeland Security Secretary Alejandro N. Mayorkas Regarding the Situation at the Southwest Border* (Mar. 16, 2021); *see also* 42 U.S.C. § 265; *see also* Centers for Disease Control and Prevention, *Order Under Sections 362 & 365 of the Public Health Services Act (42 U.S.C. 265, 268): Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists* (updated Oct. 13, 2020).

²⁹ Centers for Disease Control and Prevention, *Notice of Temporary Exception From Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination*, 86 Fed. Reg. 9942 (Feb. 17, 2021) (notice); Memo from the Acting Attorney General to all Federal Prosecutors, *Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a)* (Jan. 26, 2021).

³⁰ Department of Health and Human Services, *HHS and DHS Joint Statement on Termination of 2018 Agreement* (Mar. 12, 2021) (press release).

³¹ *Id.*

³² Department of Health and Human Services, *COVID-19: Interim Guidance for Shortening Quarantine Duration and Increasing Testing for Office of Refugee Resettlement Facilities* (Mar. 12, 2021).

ORR care-provider facilities.³³ The prevention and control measures for general communicable disease that are already in place across ORR care provider programs—which include, among other activities, travel assessments, initial medical examinations, disease screening, and routine childhood vaccinations—may also help mitigate the spread of COVID-19 in ORR facilities.³⁴

Currently, ORR has 9,382 licensed beds, which are at or near full occupancy.³⁵ To address the increasing number of referrals from CBP, ORR established 14 temporary facilities with current potential capacity of more than 18,000 beds.³⁶ ORR subsequently closed certain temporary facilities and expanded others to better accommodate unaccompanied children.³⁷

Although concerns have been raised about the conditions at these temporary facilities,³⁸ HHS Secretary Xavier Becerra has emphasized that these facilities are meant to be temporary and should not house children for a “long time,” and that they are necessary to get children out of ill-suited and overcrowded CBP facilities.³⁹ HHS has indicated it is working toward the long-term goal of acquiring enough state-licensed beds in its care provider network to reduce the need in the future for Influx Care Facilities or Emergency Intake Sites.⁴⁰

The Administration’s efforts to add temporary ORR capacity enabled more children to be transferred out of CBP custody, reducing the average time spent at CBP to approximately 20 hours by the beginning of May.⁴¹ In addition, HHS has worked with case managers from the U.S. Citizenship and Immigration Services (USCIS) to increase capacity to vet sponsors and

³³ Department of Health and Human Services, *Carrizo Springs Influx Care Facility* (Apr. 12, 2021) (press release).

³⁴ *Id.*

³⁵ E-mail from Agency Staff, Department of Health and Human Services, to Committee Staff, House Committee on Energy and Commerce (Jun. 2, 2021).

³⁶ *Id.*

³⁷ *Dallas and San Antonio sites used to house migrant children set to close within weeks*, CNN (May 13, 2020).

³⁸ *Migrant children describe poor conditions at makeshift U.S. shelters in interviews with attorneys*, CBS News (May 19, 2021); *Biden administration scraps plans to house “tender age” migrant children at Texas Army base*, CBS News (May 24, 2021).

³⁹ *Biden administration scraps plans to house “tender age” migrant children at Texas Army base*, CBS News (May 24, 2021).

⁴⁰ *Record number of unaccompanied minors being held at border: report*, The Hill (Mar. 10, 2021).

⁴¹ Senate Committee on Homeland Security & Governmental Affairs, Testimony of Alejandro N. Mayorkas, Secretary, Department of Homeland Security, *Hearing on DHS Actions to Address Unaccompanied Minors at the Southern Border*, 117th Cong. (May 13, 2021); E-mail from Agency Staff, Department of Health and Human Services, to Committee Staff, House Committee on Energy and Commerce (Jun. 2, 2021).

safely reunify children.⁴² As a result, ORR has safely reunified more than 39,000 children with vetted sponsors since January 2021, and is averaging approximately 4,000 reunifications on a weekly basis.⁴³

V. WITNESS

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⁴² Senate Committee on Homeland Security & Governmental Affairs, Testimony of Alejandro N. Mayorkas, Secretary, Department of Homeland Security, *Hearing on DHS Actions to Address Unaccompanied Minors at the Southern Border*, 117th Cong. (May 13, 2021).

⁴³ E-mail from Agency Staff, U.S. Department of Health and Human Services, to Committee Staff, House Committee on Energy and Commerce (Jun. 2, 2021).