IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, and REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, INC., Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, and KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security, Defendants.	Civil Action No. 18-cv-2473-RC

PLAINTIFFS' MOTION FOR PRELIMIINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1, Plaintiffs Citizens for Responsibility and Ethics in Washington and Refugee and Immigrant Center for Education and Legal Services, Inc. respectfully move for a preliminary injunction against Defendants U.S. Department of Homeland Security and Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security. The requested injunction would require Defendants to create on a forward-going basis, pending final disposition of this case, records that (1) document every separation of a migrant child from an adult companion with whom the child is apprehended at the border; (2) include data sufficient to ensure that the child and adult can be linked together and tracked through the duration of their immigration proceedings; and (3) adequately describe the circumstances of and reasons for any separation of a parent or legal guardian from a child. In support of this motion, Plaintiffs submit the attached memorandum of

points and authorities; the Declarations of Jonathan Ryan, Kathrine Russell, Bianca Aguilera, and Noah D. Bookbinder; Exhibits 1-15; and a proposed order.

Pursuant to Local Civil Rule 65.1(d), Plaintiffs respectfully request a hearing on their motion at the Court's earliest convenience and not later than 21 days after the filing of this motion. As explained in the accompanying memorandum, expedition is essential to prevent likely and imminent irreparable harm to Plaintiffs caused by Defendants' ongoing failure to create records adequately documenting child separations in violation of the Federal Records Act.

Date: March 8, 2019

Respectfully Submitted,

/s/ Nikhel Sus
NIKHEL S. SUS
(D.C. Bar No. 1017937)
ANNE L. WEISMANN
(D.C. Bar. No. 298190)
Citizens for Responsibility and Ethics in Washington
1101 K St. NW, Suite 201
Washington, D.C. 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020
nsus@citizensforethics.org
aweismann@citizensforethics.org

MANOJ GOVINDAIAH
Refugee and Immigrant Center for Education and Legal Services
802 Kentucky Ave.
San Antonio, TX 78201
Telephone: (210) 787-3745
Fax: (210) 787-3745
manoj.govindaiah@raicestexas.org

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, and

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, INC.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, and

KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security,

Defendants.

Civil Action No. 18-cv-2473-RC

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

At the center of the Trump Administration's family separation crisis is a very basic problem: bad recordkeeping. The government now admits that when it implemented the Zero Tolerance immigration enforcement policy ("Zero Tolerance Policy"), the U.S. Department of Homeland Security ("DHS") had no system in place to properly track or document the thousands of migrant families it forcibly separated. As a result, when the court in *Ms. L. v. ICE*, No. 3:18-cv-428 (S.D. Cal.) ordered the government to reunify the families it tore apart, chaos ensued. Complying with the order posed immense challenges for the government, due largely to DHS's failure in the first instance to create adequate records linking the separated families. The government was thus forced to undertake an extensive forensic data analysis—which it has described as a "herculean," "complex," and "resource-intensive"—to piece together the information that DHS should have documented in the first place. And even these extensive efforts have not, to this day, yielded a complete accounting of all the families DHS forcibly separated, nor has the government reunified each of those families.

The problems have not stopped. Recent revelations make clear that child separations are ongoing, and at an alarming rate. While the Administration purportedly halted the practice in June 2018, it continues to separate children based on, among other things, findings of alleged parental criminal history, with the government recently reporting at least 245 new separations between June 27, 2018 and January 31, 2019. These ongoing separations are happening at "more than twice the rate . . . observed in 2016," and have included children ranging from "under 1 year old to 17 years old," according to a January 2019 report by the U.S. Department of Health and Human Services' Office of Inspector General ("HHS OIG").

To make matters worse, DHS's recordkeeping failures have continued as well. Recent reporting confirms that while DHS took steps between April and August 2018 to address its recordkeeping deficiencies, those changes have proven inadequate in several critical respects: (1) there is no indication that DHS has taken *any* steps to create records adequately documenting separations of migrant children from adults who are *not* parents or legal guardians (e.g., grandparents, uncles, aunts, older siblings, and other caretakers), with the agency apparently believing, incorrectly, that it has no legal obligation to document such separations; (2) there is still no centralized database accessible by both DHS and HHS that contains reliable, complete, and up-to-date records regarding child separations—the agencies instead use an amalgam of separate systems that are not fully integrated with one another; (3) DHS components are not properly utilizing new recordkeeping measures designed to document child separations, and DHS agents regularly fail to document child separations in each case file and provide a reason for the separation; and (4) DHS is failing to adequately document the grounds for separations based on, among other things, alleged parental criminal history.

Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW") and Refugee and Immigrant Center for Education and Legal Services, Inc. ("RAICES") brought this suit under the Administrative Procedure Act ("APA"), seeking redress for DHS's violations of the Federal Records Act ("FRA") in connection with its implementation of the Zero Tolerance Policy. Because the recent revelations of ongoing separations and recordkeeping failures demonstrate the need for immediate relief to prevent irreparable harm, Plaintiffs now move for a preliminary injunction. Each of the preliminary injunction factors weighs heavily in Plaintiffs' favor.

1. Plaintiffs are highly likely to succeed on their APA claim challenging DHS's failure to create records adequately documenting child separations in violation of the FRA. That law imposes a non-discretionary duty on agencies to create and maintain records sufficient to (1) "[p]rotect the . . . legal[] and other rights . . . of persons directly affected by the Government's actions"; (2) "[m]ake possible a proper scrutiny by the Congress or other duly authorized agencies of the Government"; (3) "[f]acilitate action by agency officials and their successors in office"; and (4) "[d]ocument the persons" or "matters dealt with by the agency." 36 C.F.R. § 1222.22(a)-(d); *see* 44 U.S.C. § 3101. DHS has indisputably violated each of these obligations, and continues to do so, by systematically failing to create records adequately documenting child separations.

2. DHS's FRA violations have irreparably harmed RAICES, its clients, and CREW, and will likely continue to do so absent a preliminary injunction. As to RAICES, DHS's recordkeeping failures have significantly impaired the organization's ability to fulfill its core mission of providing effective legal representation and services to vulnerable migrant families, forcing RAICES to divert substantial resources to counteract that harm. The recordkeeping deficiencies have also directly harmed RAICES's clients by, among other things, preventing or delaying reunification of separated children with their families (and, in turn, inflicting or exacerbating severe psychological and physiological trauma); prolonging detention of separated adults and children; impeding clients' ability to present information supporting their immigration cases; and impeding clients from obtaining relief to which they may be entitled under the *Ms. L* class settlement. Further, DHS's recordkeeping failures have harmed CREW by depriving it of critical documents and information it is currently seeking through pending Freedom of

Information Act ("FOIA") requests, that it intends to seek through future FOIA requests, and that it requires to fulfill its mission of promoting government transparency and accountability. These harms are, moreover, irreparable. Once they are inflicted, they cannot be undone. And as recent experience has shown, when DHS fails to create adequate and contemporaneous records documenting child separations in the first instance, an irretrievable loss of information is likely.

3. The balance of equities and public interest strongly favor a preliminary injunction. The risk of severe irreparable harm to RAICES, its clients, and CREW substantially outweighs any burden imposed on DHS by merely requiring it to create records adequately documenting child separations pending final disposition of this suit. Such an injunction may in fact *save* DHS from more burdensome work in the long term—i.e., by obviating the type of "herculean" and "resource-intensive" forensic data analysis the government was forced to undertake in *Ms. L*. And there is a substantial public interest in having agencies abide by the laws governing their existence and operations, including the APA and FRA.

For all these reasons, Plaintiffs are entitled to a preliminary injunction requiring DHS to create on a forward-going basis, pending final disposition of this case, records that (1) document every separation of a migrant child from an adult companion with whom the child is apprehended at the border; (2) include data sufficient to ensure that the child and adult can be linked together and tracked through the duration of their immigration proceedings; and (3) adequately describe the circumstances of and reasons for any separation of a parent or legal guardian from a child.

BACKGROUND

I. The Federal Records Act

The FRA is a collection of statutes governing the creation, management, and disposal of federal records. 44 U.S.C. §§ 2101, *et seq.*; §§ 2901, *et seq.*; §§ 3101, *et seq.*; and §§ 3301, *et seq*. Among other things, the Act is intended to ensure "[a]ccurate and complete documentation of the policies and transactions of the Federal Government." 44 U.S.C. § 2902(1).

Both the Archivist of the United States (the "Archivist") and the various federal agency heads share responsibility to ensure that an accurate and complete record of agencies' policies and transactions is compiled. *See* 44 U.S.C. §§ 2901-11; §§ 3101-07. The Archivist must "provide guidance and assistance to Federal agencies" and has the responsibility "to promulgate standards, procedures, and guidelines with respect to records management and the conduct of records management studies." 44 U.S.C. § 2904(b)-(c)(1). To that end, the National Archives and Records Administration ("NARA") has promulgated regulations governing the creation and maintenance of federal records. *See* 36 C.F.R. §§ 1222.22, *et seq.*

The key FRA provision at issue here is 44 U.S.C. § 3101, which provides that agencies "shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." NARA's regulations detail these obligations as follows:

> To meet their obligation for adequate and proper documentation, agencies must prescribe the creation and maintenance of records that:

> (a) Document the persons, places, things, or matters dealt with by the agency.
>
> (b) Facilitate action by agency officials and their successors in office.
>
> (c) Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.
>
> (d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.
>
> (e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.
>
> (f) Document important board, committee, or staff meetings.

36 C.F.R. § 1222.22.

The APA authorizes judicial review of claims that an agency has violated its non-discretionary obligations under the FRA, including the failure to create records required by 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. *See Armstrong v. Bush*, 924 F.2d 282, 291-94 (D.C. Cir. 1991); *CREW v. Pruitt*, 319 F. Supp. 3d 252, 257-58 (D.D.C. 2018).

II. DHS's History of Records Management Failures

DHS and its component agencies—including U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE")—have a history of non-compliance with their FRA obligations, which is well documented by NARA. *See* First Am. Compl. ("FAC") ¶¶ 23-25. Most recently, in a July 2018 inspection report of CBP, NARA found that "[i]n its current state, ***the records management program at CBP is substantially non-compliant with Federal statutes and regulations***, NARA policies, Office of Management and

Budget (OMB) Circular A-130, and DHS Records and Information Management policies." Ex. 1 at 2 (emphasis added). NARA's report identified the following deficiencies, among others:

- "CBP has not assigned records management responsibility to a person and office with appropriate authority within the agency to coordinate and oversee the creation and implementation of a comprehensive records management program." *Id.* at 3.
- Records management "directives establishing program objectives, responsibilities, and authorities for the creation, maintenance, and disposition of agency records are out of date or in draft form." *Id.* at 3-4.
- The structure governing its records officers "is not adequately implemented throughout each program to ensure incorporation of recordkeeping requirements and records maintenance, storage, and disposition practices into agency programs, processes, systems, and procedures." *Id.* at 4.
- "CBP does not integrate records management and recordkeeping requirements into the design, development, and implementation of its electronic systems." *Id.* at 5.
- "CBP does not require records management training for all CBP staff, and the [records management] training it offers does not meet records management training requirements" established by NARA regulations and directives. *Id.* at 6.
- CBP "does not conduct regular records management evaluations of agency components." *Id.* at 7.
- "CBP has no strategic plan for records management." *Id.* at 9-10.

- "Successful implementation of CBP plans for a Records Management Application and Electronic Records Management System [is] at risk of failure due to lack of basic records management fundamentals." *Id.* at 10.

Based on these findings, NARA concluded that CBP's records management program "lacks numerous basic elements of a compliant records management program as prescribed in 36 CFR Chapter XII, Subchapter B." *Id.* at 11. NARA added that it "will require careful strategic planning" for the program "to become effective and compliant in the many areas where it is currently underdeveloped," noting that "[p]rogram plans and studies to institute [records management] throughout the agency have been formulated since 2015, but limited progress has been made to date." *Id.*

It is unclear what steps, if any, CBP has taken to address NARA's findings. What is clear is that DHS's overall culture of non-compliance with its FRA obligations manifested acutely, with disastrous results, in its implementation of the Zero Tolerance Policy.

III. DHS's Failure to Create Records Adequately Documenting Child Separations

A. The Zero Tolerance Policy

From July to November 2017, DHS conducted a secret pilot program of the Zero Tolerance Policy in the "El Paso sector," which spans from New Mexico to West Texas. Ex. 2 at 14 (GAO Report). Under this program, federal prosecutors criminally charged adults who allegedly crossed the border unlawfully in the El Paso sector. *Id.* If accompanied by a minor child, the child would be separated from the adult. *Id.* Over 280 migrants were separated under this initiative. *Id.* at 15. Border Patrol ended the El Paso pilot program in November 2017. *Id.*

In April 2018, the Trump Administration formally announced the Zero Tolerance Policy, without advanced notice to or pre-planning by agency officials. *Id.* at 1, 12. Under the policy, all adults entering the United States illegally would be subject to criminal prosecution. Ex. 3 at 2-3 (DHS OIG Report). If the apprehended adult was accompanied by a minor child, the child would be separated from the adult. *Id.*

CBP, ICE, and HHS all play critical roles in implementing Zero Tolerance. *Id.* at 2-3. Within CBP, the Office of Field Operations ("OFO") inspects foreign visitors entering at established ports of entry, and Border Patrol apprehends individuals who enter the United States between ports of entry. *Id.* at 2. CBP transfers adult migrants in its custody to ICE, which detains certain migrants with pending immigration proceedings and deports migrants who receive final removal orders. *Id.* Children apprehended at the border who are separated from their parents and reclassified as "Unaccompanied Alien Children" ("Unaccompanied Children") are held in DHS custody until they can be transferred to HHS's Office of Refugee Resettlement, which is responsible for the long-term custodial care and placement of Unaccompanied Children. *Id.* at 3.[1]

The Zero Tolerance Policy "fundamentally changed DHS' approach to immigration enforcement." *Id.* Under prior policy, when CBP apprehended a migrant family unit attempting to enter the United States illegally, it usually placed the adult in civil immigration proceedings without referring the adult for criminal prosecution. *Id.* at 2. CBP only separated apprehended

[1] "Unaccompanied Alien Child" is defined by statute as one who has (1) "no lawful immigration status in the United States," (2) "has not attained 18 years of age," and (3) "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." 6 U.S.C. § 279(g)(2).

parents from children in limited circumstances, such as where the adult had a criminal history or outstanding warrant, or if CBP could not determine whether the adult was the child's parent or legal guardian. *Id.* Thus, in most instances, family units either remained together in ICE family detention centers while their civil immigration cases were pending, or they were released into the United States with an order to appear in immigration court on a later date. *Id.*; *see also* Ex. 4 at 3 (HHS OIG Report) ("Historically, [family] separations were rare . . ."). That changed after Zero Tolerance.

B. Fallout from Zero Tolerance

The fallout from Zero Tolerance was catastrophic, resulting in thousands of children being ripped from their families. Ex. 3 at 3 (DHS OIG Report). Amid intense public criticism and political pressure, President Trump purportedly halted child separations by Executive Order dated June 20, 2018. *See* Exec. Order No. 13841, 83 Fed. Reg. 29,435 (published June 25, 2018) ("EO 13841"). EO 13841 states that the Trump Administration will continue to criminally prosecute illegal entry offenses, but that the Secretary of Homeland Security "shall, to the extent permitted by law and subject to the availability of appropriations, maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members." *Id.* It adds that the "Secretary shall not, however, detain an alien family together when there is a concern that detention of an alien child with the child's alien parent would pose a risk to the child's welfare." *Id.* EO 13841's definition of "alien family" is limited to children and adults who have "a legal parent-child relationship." *Id.* Thus, the EO does not prevent DHS from separating children from adults who are not parents or legal

guardians, such as non-guardian grandparents, siblings, and other family members. Nor does EO 13841 require reunification of the thousands of children DHS had already separated.

On June 26, 2018, U.S. District Judge Dana Sabraw entered a preliminary injunction requiring DHS and HHS to reunify a certified class of migrant parents and separated children within 30 days (an order that still has not been fulfilled to this day). *Ms. L. v. ICE*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). On October 9, 2018, the court approved a class settlement in *Ms. L* and two related cases. *Ms. L. v. ICE*, No. 3:18-cv-428, ECF No. 256 (S.D. Cal. Oct. 9, 2018). Like EO 13841, the *Ms. L* class settlement applies only to separations of children from parents or legal guardians, and not to other family members or adult companions. *Id.* at 3. The class definition also excludes "alien parents with criminal histories or a communicable disease, or those encountered in the interior of the United States." *Id.*

C. DHS's Recordkeeping Failures During Zero Tolerance

During the government's family reunification efforts, DHS's recordkeeping failures became readily apparent. These failures are thoroughly documented in a series of reports issued by the DHS OIG, HHS OIG, and GAO, which make the following troubling findings:

1. DHS did "not take specific steps in advance of the April 2018 memo to plan for the separation of parents and children or potential increase in the number of children who would be referred to [HHS]," because the agencies "did not have advance notice" of the Zero Tolerance Policy. Ex. 2 at 12 (GAO Report). This is critical because before Zero Tolerance, "DHS and HHS data systems did not systematically collect and maintain information to indicate when a child was separated from his or her parents, and . . . such information was not always provided [to HHS] when children were transferred from DHS to HHS custody." *Id.* at 16.

2. Relatedly, contrary to DHS's public claims that DHS and HHS had a "central database" with up-to-date information regarding family separations, Ex. 5 at 3 (DHS Fact Sheet), the DHS OIG found "no evidence that such a database exists," and noted that DHS eventually "acknowledged to the OIG that there is no 'direct electronic interface' between DHS and HHS tracking systems," Ex. 3 at 2-3, 11. The HHS OIG and GAO made similar findings. *See* Ex. 4 at 5 (HHS OIG Report) ("[N]o centralized system existed to identify, track, or connect families separated by DHS"); Ex. 2 at 23 (GAO Report) (there is "no single database with easily extractable, reliable information on family separations"). As senior HHS officials have recently explained, DHS historically provided only "anecdotal information about their separation of children to [HHS] on a discretionary, *ad hoc* basis by transmitting the information into the child's record on" HHS's Unaccompanied Children Portal, and "did not track separations of children in an aggregated manner." Ex. 6 ¶¶ 12, 13 (White Decl.); *see also* Ex. 10 ¶ 14 (Sualog Decl.). Thus, "when the *Ms. L* court issued its orders on June 26, 2018, there was not an aggregated list of the children who had been separated by DHS and were then in [HHS] care." Ex. 6 ¶ 13 (White Decl.).

3. CBP officials told the DHS OIG that they "could not feasibly identify children who were separated before . . . April 19, 2018," Ex. 3 at 11 n.23, indicating that the agency failed altogether to create records documenting those separations. This would include the hundreds of migrant families separated during the El Paso pilot program. *See supra* Part II.A.

4. There was poor integration of recordkeeping systems internally within DHS, and externally between DHS and HHS. Internally, "ICE's system did not display data from CBP's systems that would have indicated whether a detainee had been separated from a child. . . . As a

result, ICE officers at the Port Isabel Detention Center stated that when processing detainees for removal, officials initially treated separated adults the same as other detainees and made no additional effort to identify and reunite families prior to removal." Ex. 3 at 9-10 (DHS OIG Report). Externally, CBP did not have a uniform, reliable system for creating records documenting family separations and transmitting them to HHS. CBP officers would instead "manually enter information into a Microsoft Word document, which they then send to HHS as an email attachment. Each step of this manual process is vulnerable to human error, increasing the risk that a child could become lost in the system." *Id.* at 10.

5. CBP does not create records documenting the information it transmits to HHS regarding children transferred to its custody. *Id.* at 10 n.21. CBP told the OIG "it does not store that data and therefore could not provide it to the OIG team." *Id.*

As Judge Sabraw observed in *Ms. L*, DHS's recordkeeping failures during Zero Tolerance are "startling" given that:

> [t]he government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainee's release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as property. Certainly, that cannot satisfy the requirements of due process.

Ms. L., 310 F. Supp. 3d at 1144.

Unsurprisingly, DHS's failure to create adequate records in the first instance significantly impaired the government's efforts to reunify separated families in accordance with the *Ms. L* order. Because "no centralized system existed to identify, track, or connect families separated by

DHS," complying with the *Ms. L* order "required HHS and DHS to undertake a significant new effort to rapidly identify children in [HHS] care who had been separated from their parents and reunify them." Ex. 4 at 5 (HHS OIG Report). This forensic data analysis entailed (1) "min[ing] more than 60 DHS and HHS databases to identify indicators of possible separation, such as an adult and child with the same last name apprehended on the same day at the same location"; (2) "manually review[ing] case files for all of the approximately 12,000 children in [HHS] care at that time"; and (3) asking all HHS-funded "shelters to attest to any separated children that grantees reasonably believed to be in their care." *Id.* at 7. HHS has described its efforts as "herculean," "complex, fast-moving, and resource-intensive." *Id.* at 19; *see also* Ex. 6 ¶ 15 (White Decl.).[2]

DHS's recordkeeping failures have also impeded OIG investigations. For instance, DHS could not fulfill the OIG's request for a "list of every alien child separated from an adult since April 19, 2018, as well as basic information about each child, including the child's date of birth; the child's date of apprehension, separation, and (if applicable) reunification; and the location(s) in which the child was held while in DHS custody." Ex. 3 at 11 (DHS OIG Report). DHS "struggled" to provide the OIG with "accurate, complete, reliable data on family separations and reunifications," and the data DHS did provide "was incomplete and inconsistent, raising questions about its reliability." *Id.* at 9, 11.

[2] The agencies' efforts in response to the *Ms. L* litigation are, of course, tailored to the certified class in that case, and the government has resisted efforts to provide information or otherwise grant relief as to individuals outside its limited interpretation of the class definition. *See* Ex. 7 at 2 (Pl.'s Mot. to Clarify Scope of Class in *Ms. L*); Ex. 8 at 12-13 (GAO Congressional Testimony).

IV. This Suit

CREW instituted this action on October 26, 2018, and filed its First Amended Complaint on December 14, 2018, adding RAICES as a co-plaintiff. Plaintiffs seek relief under the APA based on DHS's ongoing FRA violations. They assert three claims. Claim One alleges that DHS has failed to establish and maintain an FRA-compliant records management program in violation of 44 U.S.C. § 3102 and 36 C.F.R. §§ 1222.26, 1222.34. FAC ¶¶ 62-70. Claim Two, which is relevant to the present motion, alleges that DHS has repeatedly failed, and continues to fail, to create records sufficiently documenting child separations in violation of 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. *Id.* ¶¶ 71-80. And Claim Three alleges that DHS failed to create records of agency policy and decisions in violation of 44 U.S.C. § 3101 and 36 C.F.R. § 1222.22. *Id.* ¶¶ 81-87. DHS's response to the First Amended Complaint is due March 20, 2019. *See* Jan. 30, 2019 Minute Order.

V. DHS's Ongoing Child Separation Practices and Recordkeeping Failures

Despite the Trump Administration's supposed cessation of child separations in June 2018, recent reports reveal that DHS continues to separate families at an alarming rate. A January 17, 2019 report by the HHS OIG found that between June 26, 2018 and December 26, 2018, "***218 children*** . . . were separated by DHS and transferred to [HHS] care." Ex. 4 at 21 (emphasis added).[3] Later, in a February 20 court filing in *Ms. L*, the government revealed that the number of "new separations" had risen to ***245*** as of January 31, 2019. Ex. 9 at 11. The

[3] HHS disclosed the 218 "newly separated children" in its written response to the HHS OIG's report. Ex. 4 at 21. The HHS OIG noted this was "significantly higher than the 118 separated children listed in the tracking documents [the OIG] reviewed for the period of July 1 through November 7, 2018." *Id.* at 14.

government claims that 225 of these separations were based on alleged "[p]arent criminality, prosecution, gang affiliation, or other law enforcement purpose," and thus fall outside the *Ms. L* class settlement. *Id.* at 13.

These ongoing separations are happening at "more than twice the rate that [HHS] observed in 2016," and have included children ranging from "under 1 year old to 17 years old." Ex. 4 at 11 (HHS OIG Report). Although the separations are based on, among other things, alleged "parent criminality," the HHS OIG found that "DHS has provided [HHS] with limited information about the reasons for these separations." *Id.* Specifically, "tracking documents [the OIG] reviewed in November 2018 included multiple cases in which DHS had not responded to [HHS] intake staff requests for additional information about a child's separation." *Id.* This is problematic because "[i]ncomplete or inaccurate information about the reason for separation, and a parent's criminal history in particular, may impede [HHS's] ability to determine the appropriate placement for a child," as "not all criminal history rises to a level that would preclude a child from being placed with his or her parent." *Id.* at 12. Such incomplete or inaccurate information also "hamper[s]" the OIG's "efforts to identify and assess more recent separations." *Id.* at 13.

The HHS OIG's findings are consistent with the firsthand experience of Plaintiff RAICES, which has observed ongoing child separations that are based on poorly-documented and dubious findings of parental "criminal history." *See* Declaration of Kathrine Russell

("Russell Decl.") ¶¶ 5, 8-11, 15-16; Declaration of Bianca Aguilera ("Aguilera Decl.") ¶ 7. Other immigrant-advocacy groups have reported similar findings.[4]

The influx of recent family separations is particularly alarming given reports that DHS's recordkeeping practices remain woefully deficient. Although DHS and HHS "made changes to their data systems" between "April and August 2018" to "help notate in their records when children are separated from parents," Ex. 8 at 9 (GAO Congressional Testimony), those changes have been inadequate in several key respects. For instance:

- There is no indication that DHS has taken *any* steps to create records adequately documenting separations of migrant children from adults who are *not* parents or legal guardians (e.g., grandparents, uncles, aunts, older siblings, and other caretakers), including records necessary to link the children and adults through the duration of their immigration proceedings. Consistent with the government's overall focus on the *Ms. L* class, DHS's efforts appear to have focused exclusively on parental separations—even though DHS frequently separates migrant children from non-parental adult companions who possess information critical to the child's asylum claim. *See* Aguilera Decl. ¶¶ 9-10, 13; Russell Decl. ¶ 7.

[4] *See* Statement of Jennifer Podkul, Kids in Need of Defense, U.S. House Comm. On Energy & Commerce, at 7 (Feb. 7, 2019), *available at* https://bit.ly/2EpZjeT (noting "current policies and practices . . . require no justification or documentation" for child separations, and that the organization "continues to see cases in which neither [HHS] nor the attorney are notified that DHS separated a child from a parent," as well as "several recent cases, post-[Zero Tolerance], of children separated from their parents for unknown reasons"); Texas Civil Rights Project, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border*, at 10-15 (Feb. 2019), *available at* https://bit.ly/2STfyd7 (reporting several separations based on unsupported claims of criminal history, and other separations lacking any documented justification).

- There is still no centralized database accessible by both DHS and HHS that contains reliable, complete, and up-to-date records regarding child separations. The agencies instead use an amalgam of separate systems, which are not fully integrated with one another. *See* Ex. 4 at 13 (HHS OIG Report) (noting the "lack of an existing, integrated data system to track separated families across HHS and DHS").
- Although "Border Patrol modified its system on April 19, 2018, to include yes/no check boxes to allow agents to indicate that a child was separated from their parent(s)," Border Patrol officials told GAO "that information on whether a child had been separated is not automatically included in the referral form sent to [HHS]. Rather, agents may indicate a separation in the referral notes sent electronically to [HHS], but they are not required to do so." Ex. 8 at 9 (GAO Congressional Testimony).
- Similarly, while HHS updated its "Unaccompanied Children Portal" to "include a check box for indicating that a child was separated from his or her parents" that both DHS and HHS may utilize, HHS officials told GAO that "DHS components with access to the [Unaccompanied Children] Portal are not yet utilizing the new check box consistently." *Id.* at 10.
- "Border Patrol agents and CBP officers provide packets of information to [HHS] when unaccompanied children are transferred to [HHS] custody that include information about separation from a parent; however, [HHS] officials told [GAO] that [HHS] rarely receives some of the forms in the packets to which CBP officials referred. In addition, the forms themselves do not contain specific fields to indicate such a separation." Ex. 2 at 18-19 (GAO Report).

- As recently as February 2019, HHS officials and immigration attorneys have reported to the media that DHS agents "regularly fail" to "flag [child] separation[s] in each case file and provide a reason for the separation." Ex. 11 at 4.
- The above reports comport with the firsthand experiences of RAICES, whose staff have continued to observe inadequate recordkeeping of child separations that persists to this day. Russell Decl. ¶ 5; Aguilera Decl. ¶ 7.

An equally troubling revelation in the HHS OIG report was that that there are "thousands" of separated children not previously reported or accounted for who were released from HHS custody before the June 2018 *Ms. L* order, and thus "[t]he total number and current status of all children separated from their parents or guardians by DHS and referred to [HHS's] care" remains "unknown." Ex. 4 at 1, 13. The government claims these "thousands" of separated children are outside of the *Ms. L* class, an issue that is currently being litigated in that case. *See* Ex. 7 at 2; Ex. 8 at 12-13. The government argues that identifying and reunifying these children may be outside "the realm of the possible," partly because DHS failed to create proper records linking separated families in the first place and piecing together that information now would, in its view, be excessively burdensome or impossible. *See* Ex. 10 ¶¶ 13-20, 25 (Sualog Decl.).

Because these recent revelations of ongoing separations and recordkeeping failures demonstrate the need for immediate relief to prevent irreparable harm, Plaintiffs now move for a preliminary injunction.

ARGUMENT

"A party seeking a preliminary injunction must make a 'clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest.'" *League of Women Voters of United States v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). Here, each factor weighs heavily in Plaintiffs' favor: Plaintiffs are likely to establish that DHS has violated the FRA by failing to create records adequately documenting child separations; these violations have irreparably harmed RAICES, its clients, and CREW, and will likely continue to do so absent immediate injunctive relief; and the balance of equities and public interest weigh strongly in favor of granting a preliminary injunction.[5]

I. Plaintiffs Are Likely to Succeed on their APA Claim Challenging DHS's Failure to Create Records Adequately Documenting Child Separations in Violation of 44 U.S.C. § 3101

As pertinent to the present motion, Plaintiffs are likely to succeed on Claim Two of the First Amended Complaint, seeking relief under the APA for DHS's failure to create records adequately documenting child separations in violation of 44 U.SC. § 3101. *See* FAC ¶¶ 71-80;

[5] The continued validity of the "'so-called 'sliding-scale' approach to weighing the four preliminary injunction factors, which 'allow[s] that a strong showing on one factor could make up for a weaker showing on another,'" is an open question in this Circuit. *Newby*, 838 F.3d at 7. But because Plaintiffs "satisfy each of the four preliminary injunction factors, this case presents no occasion for the court to decide whether the 'sliding scale' approach remains valid." *Id.* Moreover, it is immaterial whether Plaintiffs' requested injunction is characterized as "mandatory" or "prohibitory" because the D.C. Circuit has "rejected any distinction between a mandatory and prohibitory injunction" and thus does not impose a "higher burden of persuasion" on movants seeking mandatory injunctions. *Id.*; *accord Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 944 (7th Cir. 2006); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998). And even if such a higher burden applied here, Plaintiffs would readily meet it.

see also M.G.U. v. Nielsen, 325 F. Supp. 3d 111, 118 (D.D.C. 2018) (party seeking preliminary injunction need only show likelihood of success on claim for which injunctive relief is sought).

A. The APA Provides a Cause of Action for Violations of § 3101

The APA provides a private cause of action to seek redress for certain FRA violations. *See Armstrong*, 924 F.2d at 291-94; *CREW v. Pruitt*, 319 F. Supp. 3d at 257-58. In *Armstrong*, the D.C. Circuit held that the "APA authorizes judicial review" of claims that an agency's "recordkeeping guidelines and directives" fail to comply with 44 U.S.C. § 3102, which requires agencies to establish and maintain an FRA-compliant records management program. 924 F.2d at 297. The court reasoned that "the FRA reflects a congressional intent to ensure that agencies adequately document their policies and decisions," and that "[a]llowing judicial review of the adequacy of an agency's recordkeeping guidelines will frustrate neither the intent of Congress nor the FRA statutory scheme designed to implement that intent." *Id.* at 292-93. It added that the "FRA provides sufficient law to apply," and there was "no reason to conclude that Congress intended to commit the development of recordkeeping guidelines and directives to the agencies' complete discretion." *Id.* at 294; *see also CREW v. Exec. Office of President ("EOP")*, 587 F. Supp. 2d 48, 57 (D.D.C. 2008) (noting that under *Armstrong*, a "district court is . . . authorized to review the adequacy of an agency's recordkeeping guidelines and directives," among other things).

The APA also authorizes judicial review where, as here, the plaintiff alleges that an agency failed to create records in violation of § 3101. Indeed, although *Armstrong* concerned § 3102, its reasoning applies equally to § 3101, as Judge Boasberg recently held in *CREW v. Pruitt*, 319 F. Supp. 3d at 257-59. There, as in *Armstrong*, the court found no "'clear and

convincing evidence' that Congress intended to preclude judicial review of a practice of refusing to create records," and determined that "[p]ermitting judicial review . . . comports with longstanding precedents concerning APA review generally." *Id.* at 259. Judge Boasberg thus concluded that an agency's policy or practice of failing to "'make . . . records' in accordance with the FRA is reviewable.'" *Id.* at 260; *see also id.* ("[F]uture plaintiffs may challenge the [agency's] actions, in the aggregate, of refusing to create certain records . . ."). Following the reasoning of both *Armstrong* and *CREW v. Pruitt*, then, Plaintiffs may pursue an APA claim here challenging DHS's failure to create records in violation of § 3101.

B. DHS Has Violated § 3101 by Systematically Failing to Create Records Adequately Documenting Child Separations

DHS has systematically failed to create records adequately documenting child separations in violation of § 3101 and its implementing regulation, 36 C.F.R. § 1222.22. The factual predicate for these violations is well established. To begin, there is no question that DHS failed to create adequate records documenting child separations starting at least from the inception of the El Paso pilot program in July 2017 until issuance of the *Ms. L* preliminary injunction in June 2018. That fact has been confirmed by the DHS OIG, the HHS OIG, GAO, and current HHS officials—all of whom have recognized that when Zero Tolerance was implemented, DHS "did not systematically collect and maintain information to indicate when a child was separated from his or her parents, and . . . such information was not always provided [to HHS] when children were transferred from DHS to HHS custody." Ex. 2 at 16 (GAO Report); *see also* Ex. 3 at 2-3, 11 (DHS OIG Report); Ex. 4 at 5 (HHS OIG Report); Ex. 6 ¶¶ 12, 13 (White Decl.); Ex. 10 ¶ 14 (Sualog Decl.). It is precisely because of these recordkeeping failures that DHS and HHS were forced to undertake, in response to the *Ms. L* reunification order, the "complex" and "resource-

intensive" forensic data analysis necessary to "identify children in [HHS] care who had been separated from their parents and reunify them." Ex. 4 at 5-7 (HHS OIG Report); Ex. 6 ¶ 15 (White Decl.). It is also due in part to these recordkeeping failures that the government is currently resisting efforts to reunify "thousands" of separated children released from HHS custody before June 2018, asserting that doing so would require an even more burdensome forensic data analysis than the one previously undertaken. *See* Ex. 10 ¶¶ 14-20 (Sualog Decl.). Had DHS complied with the FRA and created adequate records in the first instance, no such retrospective analysis would be necessary to reunite separated families. This is a problem entirely of DHS's own making.

Moreover, the facts show that DHS's recordkeeping failures have continued past June 2018, and will likely persist absent injunctive relief. It is undisputed that child separations are ongoing, with the government recently reporting at least "245 new separations" between June 27, 2018 and January 31, 2019. Ex. 9 at 11. Although DHS changed its data systems between April and August 2018 to "help notate in their records when children are separated from parents," Ex. 8 at 9, those changes have proven inadequate in several respects. First, there is no indication that DHS has taken *any* steps to create records adequately documenting separations of migrant children from adults who are *not* parents or legal guardians (e.g., grandparents, uncles, aunts, older siblings, and other caretakers), with the agency apparently believing, incorrectly, that it has no legal obligation to document such separations. *See* Aguilera Decl. ¶ 9; Russell Decl. ¶ 7. Second, there is still no centralized database accessible by both DHS and HHS that contains reliable, complete, and up-to-date records regarding child separations; the agencies instead use an amalgam of separate systems, which are not fully integrated with one another. *See* Ex. 4 at

13; Ex. 8 at 9. Third, HHS officials have reported as recently as February 2019 that DHS components are not properly utilizing new recordkeeping measures designed to document child separations, Ex. 8 at 8; Ex. 2 at 17, and that DHS agents "regularly fail" to "flag [child] separation[s] in each case file and provide a reason for the separation," Ex. 11 at 4. Fourth, DHS is failing to adequately document the grounds for separations based on, among other things, alleged parental criminal history. *See* Ex. 4 at 11-12; Russell Decl. ¶¶ 8-13, 16. These reports of ongoing failures are consistent with RAICES's firsthand experience. *See* Aguilera Decl. ¶ 7 (DHS's "recordkeeping failures have directly harmed RAICES's clients, have persisted even after the [*Ms. L* court] issued its preliminary injunction in June 2018, and they continue to this day."); Russell Decl. ¶ 5 (same).

DHS's past and ongoing conduct violates several of the recordkeeping obligations enumerated in 36 C.F.R. § 1222.22. Specifically:

1. DHS has indisputably failed to create records sufficient to "[p]rotect the . . . legal[] and other rights" of the migrant children and adults "directly affected by [DHS's] actions." 36 C.F.R. § 1222.22(d). Under the Due Process Clause of the Fifth Amendment, "parents have a fundamental liberty interest in family integrity, and in the care, custody, and control of their children." *Jacinto-Castanon de Nolasco v. ICE*, 319 F. Supp. 3d 491, 499 (D.D.C. 2018); *see Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) ("The liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."). To safeguard this fundamental right, the government must, at minimum, take the basic step of creating records necessary to ensure that any family it separates can eventually be reunified. DHS's failure to do so here has led to thousands of separated

migrant families whom the government is either unable or unwilling to reunite, causing irreparable harm to the families' due process rights. *See Ms. L*, 310 F. Supp. 3d at 1144 (government's lack of a "system in place to keep track of, provide effective communication with, and promptly produce alien children . . . cannot satisfy the requirements of due process"). Similarly, DHS's failure to create records sufficiently documenting the grounds for any separation based on a parent's alleged criminal history also implicates the due process right to family integrity, because it delays and otherwise complicates HHS's child placement decisions. *See* Ex. 4 at 12 (HHS OIG Report).

Proper recordkeeping is also necessary to protect migrants' rights in connection with their immigration proceedings. *See Ms. L*, 310 F. Supp. 3d at 1144 (noting, as part of due process analysis, family separation's "profoundly negative effect on the parents' criminal and immigration proceedings, as well as the children's immigration proceedings"). It bears emphasizing that this is an exceedingly vulnerable population. Aguilera Decl. ¶ 8. Indeed, DHS routinely separates very young children—including infants and toddlers—who are pre-verbal, lack knowledge or records relevant to a potential asylum claim, and are otherwise incapable of protecting their own rights. *Id*. Because these are individuals of limited means who are entangled in the complex machinery of the immigration process, they and their legal counsel often rely heavily on records or information supplied by the government. *Id.* DHS, in particular, has a critical role in creating such records, because it is the first agency that encounters and processes these individuals before they are separated and transferred to other components. *Id.*

Against this backdrop, it should come as no surprise that DHS's systematic failure to create proper records has significantly harmed migrant families in myriad ways. It prevents or

delays reunification of separated children, as well as HHS's placement of those children with sponsors. Russell Decl. ¶¶ 5-7; Aguilera Decl. ¶¶ 7, 9-11. It prolongs the detention of both separated adults and children, the latter of which increases the likelihood the child will face removal proceedings while still in HHS custody. Russell Decl. ¶¶ 5-7; Aguilera Decl. ¶¶ 10-12. It impedes migrants' ability to present information supporting their asylum claims, and to obtain relief to which they may be entitled under the *Ms. L* class settlement. Russell Decl. ¶¶ 5-6; Aguilera Decl. ¶ 13. And it impairs the ability of immigrants-rights group, such as RAICES, to protect the legal rights of separated migrant families. Declaration of Jonathan Ryan ("Ryan Decl.") ¶¶ 8-11; Aguilera Decl. ¶¶ 8-16; Russell Decl. ¶¶ 15-16. For all these reasons, DHS has plainly violated the FRA by failing to create records sufficient to "[p]rotect the . . . legal[] and other rights" of migrant children and adults "directly affected by [DHS's] actions." 36 C.F.R. § 1222.22(d); *see infra* Part II (explaining that these harms are irreparable).

2. DHS has also failed to create records that "[m]ake possible a proper scrutiny by the Congress or other duly authorized agencies of the Government," 36 C.F.R. § 1222.22(c), including agency inspectors general and the GAO. Both the DHS and HHS OIGs have stated as much. *See* Ex. 3 at 11 (DHS OIG Report) (finding that DHS could not adequately fulfill OIG's data requests, and data the agency did provide "was incomplete and inconsistent, raising questions about its reliability"); Ex. 4 at 13 (HHS OIG Report) (finding that DHS's failure to provide complete and accurate information about the reasons for child separations "hamper[s]" the OIG's "efforts to identify and assess more recent separations"). Congress's oversight efforts have likewise been frustrated by DHS's poor recordkeeping, as recent hearings have

demonstrated.[6] Moreover, "[t]he total number and current status of all children separated from their parents or guardians by DHS and referred to [HHS's] care" remains "unknown," Ex. 4 at 1, 13, and may never be known if the government succeeds in its efforts to exclude "thousands" of children from the *Ms. L* class. That means DHS's recordkeeping failures may prevent Congress and government agencies from ***ever*** understanding the true scope of the family separation crisis, precluding "proper scrutiny" of that critical issue. *See* 36 C.F.R. § 1222.22(c).

3. DHS has failed to create records that "[f]acilitate" legally required "action by agency officials." *Id.* § 1222.22(b). As noted, DHS's recordkeeping failures have significantly impeded the reunification efforts of DHS and HHS in response to the *Ms. L* litigation. *See* Ex. 4 at 5-7; Ex. 6 ¶ 15. Likewise affected are HHS's decisions concerning the care and placement of Unaccompanied Children. As one senior HHS official recently noted, "[t]he facts behind the separation may be important to know for case planning purposes, especially since they may mean the parent is unavailable or unable to take custody," and "may be important factors in determining the child's individual needs, which are then incorporated into service planning that [HHS] develops for and provides to the child." Ex. 12 at 3 (Statement of Scott Lloyd before U.S. House Comm. on Judiciary). HHS also needs these facts to fulfill its "responsibility to determine the suitability of potential sponsors" to which Unaccompanied Children may be

[6] For example, at a congressional hearing concerning family separations held on February 26, 2019, DHS and HHS officials could not answer basic questions about the number of children separated during the El Paso pilot program, with HHS official Jonathan White testifying that "neither I nor anyone at HHS knows" the number of children separated during the pilot program and released from HHS custody before June 2018, and noting that only DHS, if anyone, would have that information. *See* Video of Hearing Before House Comm. on Judiciary, Oversight of the Trump Administration's Family Separation Policy, *CSPAN* (Feb. 26, 2019), at 3:31:35-3:32:27, *available at* https://cs.pn/2HfuEmd.

released under the Trafficking Victims Protection Act of 2008, which requires HHS to determine if "a sponsor is capable of providing for the child's physical and mental well-being." *Id.* Critically "[t]he best way for HHS to determine whether a child was separated at the time of referral is if DHS provides this information," which it "[h]istorically . . . had not consistently" done. *Id.* at 4. The HHS OIG made similar findings. *See* Ex. 4 at 12 ("Incomplete or inaccurate information" from DHS "about the reason for separation, and a parent's criminal history in particular, may impede [HHS's] ability to determine the appropriate placement for a child," since "not all criminal history rises to a level that would preclude a child from being placed with his or her parent.").

4. DHS has also plainly failed to create records that adequately "[d]ocument the persons . . . dealt with by the agency," 36 C.F.R. § 1222.22(a)—namely, migrant children and adult companions who are apprehended together at the border, and later separated by DHS. This failure occurs not just with respect to separations of children from parents and legal guardians, but also non-parental adults accompanying the child at the time of apprehension.

For all these reasons, Plaintiffs are highly likely to succeed on their APA claim challenging DHS's failure to create records adequately documenting child separations in violation of § 3101 of the FRA.

II. Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction

"The party seeking a preliminary injunction must make two showings to demonstrate irreparable harm": (1) "the harm must be 'certain and great,' 'actual and not theoretical,' and so 'imminen[t] that there is a clear and present need for equitable relief to prevent irreparable harm'"; and (2) "the harm 'must be beyond remediation.'" *Newby*, 838 F.3d at 7-8. Here,

Plaintiffs have already been severely harmed by DHS's FRA violations, and will likely continue to be harmed absent a preliminary injunction. This harm is, moreover, "beyond remediation." The injuries to RAICES, its clients, and CREW cannot be undone. And as recent experience has shown, when DHS fails to create adequate and contemporaneous records documenting child separations in the first instance, an irretrievable loss of information is likely.

A. Irreparable Harm to RAICES

An organization can demonstrate an "injury for purposes both of standing and irreparable harm" by showing that the defendant's actions (1) "have 'perceptibly impaired' the [organization's] programs," and (2) "directly conflict with the organization's mission." *Newby*, 838 F.3d at 8-9; *see also PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (framing inquiry as "first, whether the agency's action or omission to act 'injured the [organization's] interest' and, second, whether the organization 'used its resources to counteract that harm'"). "[O]bstacles [that] unquestionably make it more difficult for [an organization] to accomplish [its] primary mission" suffice to show irreparable harm. *Newby*, 838 F.3d at 9.

RAICES readily meets this burden. RAICES's mission is to provide effective, free and low-cost legal services to underserved immigrant children, families, and refugees in Texas. Ryan Decl. ¶ 2. Founded in 1986 as the Refugee Aid Project by community activists in South Texas, RAICES has grown to be the largest immigration legal services provider in Texas, with offices in Austin, Corpus Christi, Dallas, Fort Worth, Houston, and San Antonio. *Id.* To further its mission, RAICES provides consultations, direct legal services, representation, assistance, and advocacy to communities in Texas and to clients after they leave the state. *Id.* RAICES has provided legal representation and services to hundreds of migrant families forcibly separated by

DHS. *Id.* ¶ 4; *see also id.* ¶¶ 4-7 (describing various RAICES programs created in response to family separation crisis).

As explained in the declarations of Jonathan Ryan, Bianca Aguilera, and Kathrine Russell, DHS's recordkeeping failures have perceptibly and irreparably impaired RAICES's efforts to provide legal services to separated migrant families—in direct conflict with its mission—and required RAICES to devote substantial resources to counteract that harm. To understand this impact, context is crucial. Because the migrant families with whom RAICES works are exceedingly vulnerable, have limited means, and are entangled in the complex machinery of the immigration process, RAICES often must rely on records or information supplied by the government in representing its clients. Ryan Decl. ¶ 8; Aguilera Decl. ¶ 8. As a result, DHS's failure to create records in compliance with the FRA has impeded RAICES's core functions in several respects. For instance:

1. When DHS separates migrant children from adult companions (including not only parents, but other adult family members or caretakers) and fails to create records sufficient to later identify and locate those adults, RAICES's representation of those children is frustrated. Aguilera Decl. ¶ 10. That is because migrant children apprehended at the border often lack information about family or potential sponsors in the United States to whom HHS might release the child; knowledge of the reasons why the family fled their home country that may support a potential asylum case, as well as documents or evidence supporting such a case; and the communicational abilities to fully protect their interests. *Id.* ¶¶ 10, 13. Typically, it is the separated adult companion who possesses any documents or information that would aid RAICES in representing the child. *Id.* So, when DHS fails to create records from which such a separated

adult companion can be readily located, it impedes RAICES's ability to, among other things, prepare applications for relief and obtain evidence for the children it represents in removal proceedings. *Id.* ¶ 13.

To take just one example, RAICES represents a six-year-old boy who DHS separated from his adult brother in December 2018 without documenting the separation. Aguilera Decl. ¶ 9. Although the older brother had knowledge that would have been instrumental to RAICES's representation of the child (including the language he spoke), DHS's records gave no indication that the child was apprehended with his brother, let alone where the brother was detained by DHS. *Id.* So RAICES had no opportunity to utilize the older brother as a resource in representing the six-year-old boy. *Id.* Such recordkeeping failures impede RAICES's ability to represent vulnerable migrant children and require it to expend efforts to independently track down separated adults to gather relevant information, which it must do quickly in order to protect the child's interests. *Id.* ¶¶ 9-10.

2. DHS's recordkeeping failures also impair RAICES's ability to timely refer detained Unaccompanied Children to federal foster care. Aguilera Decl. ¶ 14. In making these referrals, RAICES is typically required to corroborate certain facts provided by the child with an adult relative, preferably a parent. *Id.* But in numerous cases, DHS's poor recordkeeping has prevented or delayed RAICES's efforts to locate a knowledgeable adult who can provide such corroboration, which delays the entire referral process. *Id.*

3. DHS's recordkeeping failures also complicate RAICES's efforts to comply with certain grant requirements. Aguilera Decl. ¶ 15. RAICES receives federal funding from HHS to provide legal services to Unaccompanied Children. *Id.* In turn, RAICES is expected to provide

"know your rights" presentations and intakes to all Unaccompanied Children within a certain number of days after their arrival at an HHS detention center. *Id.* When working with children under 13, it is nearly impossible to accurately complete an intake without support or assistance from a parent or adult relative. *Id.* Here again, DHS's failure to create adequate records from which such adults can be readily identified has complicated RAICES's ability to complete this essential task. *Id.*

4. DHS's failure to adequately document the reasons for separations, particularly those based on alleged parental criminal history, has likewise impeded RAICES's representational efforts. Russell Decl. ¶ 15. When DHS separates a family based on a parent's alleged criminal history, RAICES must determine, among other things, whether DHS's finding has any basis and, if so, the circumstances of the alleged criminal offense. *Id.* RAICES needs this information to either contest the finding or determine whether it is severe enough to warrant parental separation. *Id.* These efforts are hindered when DHS's criminal history finding is cursory and poorly documented, and RAICES must expend extra time and effort investigating the issue. *Id.* RAICES's efforts are similarly impeded when DHS fails altogether to provide a reason for separation. *See id.* ¶¶ 8-12, 16 (identifying several cases where parental separations either had no documented basis or were based on poorly-documented findings of parental criminal history); Aguilera Decl. ¶ 16 (describing case where RAICES's efforts to reunify child with father were complicated by lack of records documenting basis for separation or identifying father's location).

5. DHS's recordkeeping failures and attendant delay in the release of Unaccompanied Children from HHS custody has had a ripple effect causing an increase in removal proceedings against detained migrant children. Aguilera Decl. ¶¶ 10-12. This is critical because removal

proceedings for *detained* Unaccompanied Children are demonstrably more difficult than they are for *released* Unaccompanied Children, as detained children undergo the proceeding without the support of their family, and, since they are detained at government expense, the immigration court process happens quickly, usually within just a few weeks. *Id.* ¶ 11. The increase in such proceedings has correspondingly increased RAICES's workload and required it to reallocate resources. *Id.* ¶ 12.

6. Finally, DHS's systematic recordkeeping failures have required RAICES to implement its own programs and initiatives to assist separated migrant families—all in an attempt to fill the void left by DHS's noncompliance with the FRA. Ryan Decl. ¶¶ 10-12. These include two new tools, launched in July 2018, to help "match" separated family members: the National Families Together Hotline and the Separated Parents Intake database. *Id.* ¶ 10. The National Families Together Hotline allows members of the public to call RAICES and seek assistance with locating their loved ones inside of DHS's detention system. *Id.* The Separated Parents Intake database allows lawyers working with separated children to seek assistance in locating their clients' parents who are detained by DHS. *Id.* Between July 2018 and today, RAICES has received over 1,350 calls to the National Families Together Hotline, and inquiries on over 600 separated parents through the Separated Parents Intake database. *Id.* ¶ 11. To run and maintain these new resources, RAICES diverted its staff away from their existing work so that they could create new systems, train volunteers, and maintain data. *Id.* RAICES has therefore devoted significant time and resources to these new efforts, which would not have been required if DHS had done its job and created adequate records in the first place. *Id.*

In sum, DHS's ongoing FRA violations have "unquestionably ma[d]e it more difficult for" RAICES "to accomplish [its] primary mission of" providing effective legal representation and services to migrant families. *Newby*, 838 F.3d at 9. This "provide[s] injury for purposes both of standing and irreparable harm," *id.*, as courts routinely find in analogous circumstances. *See, e.g.*, *id.* (voting-rights organization established irreparable harm and Article III injury in APA challenge to voter registration laws where laws imposed "new obstacles" that "unquestionably ma[d]e it more difficult for the [plaintiffs] to accomplish their primary mission of registering voters"); *Action All. of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (organization established Article III injury where "the challenged regulations den[ied]" plaintiffs, among other things, "access to information" that "they wish[ed] to use in their routine information-dispensing, counseling, and referral activities" and, in turn, inhibited their "daily operations"); *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 178 (D.D.C. 2017) (fair-housing organization established irreparable harm in APA challenge to agency's delay of rule governing calculation of housing vouchers, where "delay frustrate[d] [plaintiff's] ability to assist voucher holders gain access to greater opportunity in several ways"); *Beverly Enterprises v. Mathews*, 432 F. Supp. 1073, 1079 (D.D.C. 1976) (finding irreparable injury where health care provider's "ability to render effective medical services to those in need would be significantly hampered by the suspension of regular payments to which plaintiff would otherwise be entitled"); *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018-19, 1029 (9th Cir. 2013) (organizations established irreparable harm and Article III injury in challenge to state law criminalizing transporting undocumented immigrants, where organizations' "core activities

involve[d] the transportation and/or provision of shelter" to undocumented immigrants, and they "diverted resources" to counter the law's effects).

The harm to RAICES is, moreover, not merely theoretical—it has already been inflicted, and risks being further inflicted every time DHS forcibly separates a migrant child without creating adequate records documenting the separation. DHS's recent efforts to fix its deficient recordkeeping practices do not alter this conclusion. Given DHS's undisputed history of FRA noncompliance generally and relating to child separations specifically, as well as the facts outlined above showing that those violations continue to this day, *see supra* Part I.B, future FRA violations are likely, if not inevitable. That suffices to show irreparable harm. *See Newby*, 838 F.3d at 8-9 ("[A] preliminary injunction requires only a *likelihood* of irreparable injury.").

The harm is also beyond remediation, in two respects. First, the harm to RAICES's mission, and consequent diversion of resources, is by itself irreparable. *See Newby*, 838 F.3d at 9; *Valle del Sol*, 732 F.3d at 1029; *Open Cmtys. All.*, 286 F. Supp. 3d at 178. Second, recent experience demonstrates that DHS's failure to create records properly documenting child separations will likely lead to an *irretrievable* loss of records or information that RAICES requires for its organizational work, because the government is either unable or unwilling to create those records after the fact. *See* Aguilera Decl. ¶ 8 (it is "critical" for DHS to create proper records because it is the "first agency that encounters and processes migrant families before they are separated and transferred to other components," and the "failure to do so creates a significant risk that information will be irretrievably lost or otherwise cause hardship."); *id.* ¶ 17 (same). Just look to the *Ms. L* litigation, where the government was forced to undertake a self-described "herculean" and "resource-intensive" forensic data analysis to make up for DHS's

systematic failure to create proper records in the first instance. Even those efforts—which were compelled by court order—have not yielded a complete accounting of family separations. Requiring DHS to create adequate records pending resolution of this case is therefore necessary to prevent a likely unrecoverable loss of records or information that RAICES requires for its organizational work. *See Am. Friends Serv. Comm. v. Webster*, 485 F. Supp. 222, 233-34 (D.D.C. 1980) (threatened permanent loss of records qualifies as irreparable harm); *accord CREW v. Cheney*, 593 F. Supp. 2d 194, 227 (D.D.C. 2009); *CREW v. EOP*, 2008 WL 2932173, at *2 (D.D.C. July 29, 2008) (Report & Recommendation).

For all these reasons, RAICES has demonstrated that DHS's FRA violations have already caused it irreparable harm and will likely continue to do so absent a preliminary injunction.

B. Irreparable Harm to RAICES's Clients

RAICES's clients have also suffered severe and irreparable harm, which will likely persist absent an injunction. As noted, DHS's failure to create adequate records documenting child separations has had numerous harmful effects on the migrant families that RAICES represents, including: (1) preventing or delaying reunification of separated children with their parents or legal guardians; (2) prolonging detention of separated adults; (3) prolonging detention of separated children and, in turn, increasing the likelihood the children will face removal proceedings while still in HHS custody; (4) impeding the clients' ability to present information supporting their asylum claims; and (5) impeding the clients from obtaining relief to which they may be entitled under the *Ms. L* class settlement. *See* Russell Decl. ¶¶ 4-16 (describing several cases where DHS's recordkeeping failures have harmed RAICES's clients); Aguilera Decl. ¶¶ 9-11, 14. These effects, in turn, have grave and long-lasting consequences, including severe

psychological and physiological trauma associated with family separation and prolonged detention. *See* Exs. 13-15 (congressional testimony of medical professionals describing extensive evidence of harm caused by family separation). This Court and others have deemed such harms irreparable, including in cases where RAICES represented separated parents. *See M.G.U.*, 325 F. Supp. 3d at 121 (holding that "there can be no dispute" that mother separated from her child due to Zero Tolerance Policy "is likely to suffer irreparable harm" and citing "overwhelming evidence . . . from medical experts describing the grave and lasting consequences of separating parents from their young children");[7] *Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 502-503 (same); *Ms. L.*, 310 F. Supp. 3d at 1146-47 (same); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 155-56 (D.D.C. 2018) (Contreras, J.) (finding irreparable injury based on the "'major hardship posed by needless prolonged detention,'" and noting such detention "surely cannot be remediated after the fact"); *Ramirez v. ICE*, 310 F. Supp. 3d 7, 31 (D.D.C. 2018) (Contreras, J.) (same).

These considerations bolster a finding of irreparable harm here because the interests of RAICES and its clients are so closely intertwined. Courts routinely employ such reasoning in analogous circumstances, such as the healthcare context. *See Int'l Long Term Care, Inc. v. Shalala*, 947 F. Supp. 15, 18 (D.D.C. 1996) (finding irreparable harm to healthcare provider based partly on harm caused to its patients, because the "interests of health care providers and Medicare beneficiaries are closely intertwined"); *accord New Orleans Home for Incurables, Inc. v. Greenstein*, 911 F. Supp. 2d 386, 409 (E.D. La. 2012); *John E. Andrus Mem'l, Inc. v. Daines*, 600 F. Supp. 2d 563, 572 (S.D.N.Y. 2009); *Mediplex of Massachusetts, Inc. v. Shalala*, 39 F.

[7] RAICES represented M.G.U. during her immigration proceeding. Russell Decl. ¶ 12.

Supp. 2d 88, 98-99 (D. Mass. 1999); *Libbie Rehab. Ctr., Inc. v. Shalala*, 26 F. Supp. 2d 128, 132 (D.D.C. 1998); *Peak Med. Oklahoma No. 5, Inc. v. Sebelius*, 2010 WL 4809319, at *3 (N.D. Okla. Nov. 18, 2010). The same logic applies to organizations such as RAICES, which provide critical legal services to vulnerable and underserved migrant families.

C. Irreparable Harm to CREW

DHS's recordkeeping failures have also irreparably harmed CREW and will likely continue to do so absent a preliminary injunction. Under the "informational injury" doctrine, "a denial of access to information can work an 'injury in fact' for standing purposes, at least where a statute (on the claimants' reading) requires that the information 'be publicly disclosed' and there 'is no reason to doubt their claim that the information would help them.'" *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040–41 (D.C. Cir. 2016); *see FEC v. Akins*, 524 U.S. 11, 21 (1998). Applying this doctrine, judges of this Court have uniformly held that an FRA plaintiff—and CREW in particular—can establish an Article III injury sufficient to obtain injunctive relief where the plaintiff (1) has sought records from an agency (through FOIA requests or other means), (2) plans to do so again in the future, and (3) challenges an agency action that may deprive it of access to such records. *See CREW v. EOP*, 587 F. Supp. 2d at 58-61 (CREW established Article III injury in FRA suit seeking injunctive relief to recover, restore, and preserve White House emails, based on allegations that CREW "will request federal records in the future and the records are likely to be missing due to defendants' conduct"); *accord CREW v. SEC*, 858 F. Supp. 2d 51, 60 (D.D.C. 2012); *CREW v. Cheney*, 593 F. Supp. 2d at 227; *Public Citizen v. Carlin*, 2 F. Supp. 2d 1, 6 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999).

Such an injury qualifies as irreparable where it deprives the plaintiff of timely access to responsive documents. *See Elec. Privacy Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006) (finding irreparable harm where plaintiff would be "precluded, absent a preliminary injunction, from obtaining in a timely fashion information vital to [a] current and ongoing debate" on issue of public importance); *see also Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) ("The fact that Payne eventually obtained the information it sought provides scant comfort when stale information is of little value . . ."). The injury is also irreparable if it will likely result in an irretrievable loss of records or information. *See Am. Friends Serv. Comm.*, 485 F. Supp. at 233-34; *CREW v. Cheney*, 593 F. Supp. 2d at 227; *CREW v. EOP*, 2008 WL 2932173, at *2.

CREW can readily make this showing. As set forth in the Declaration of Noah Bookbinder, CREW's Executive Director, CREW's mission is to protect the right of citizens to be informed about the activities of government officials and to ensure the integrity of government officials. Declaration of Noah D. Bookbinder ("Bookbinder Decl.") ¶ 2. To further its mission, CREW frequently files FOIA requests, and disseminates the documents it receives through these requests on its website, www.citizensforethics.org, and on social media, and uses the documents as the basis for reports, complaints, litigation, blog posts, and other publications widely disseminated to the public. *Id.* ¶ 8. As a frequent FOIA requester, CREW has a unique operational interest in agencies' compliance with the FRA, because when an agency fails to create records documenting its functions, policies, decisions, procedures, and essential transactions in compliance with the FRA, CREW's FOIA requests yield fewer or no responsive documents. *Id.* ¶ 9. Deprivation of these records frustrates CREW's ability to fulfill its

organizational objectives, including its goal of shedding light on the formulation and implementation of agency policies, and to educate the public about those activities. *Id.*; *see also id.* ¶¶ 4-7 (discussing CREW's longstanding and demonstrated interest in FRA compliance).

CREW has a particularly strong interest in DHS records, and records relating to family separations. Since January 2017, CREW has submitted 18 separate FOIA requests to DHS, many of which remain outstanding. *Id.* ¶ 11. Those pending FOIA requests include two that bear directly on the records at issue in this case, *see id.* ¶¶ 12-17, and seek, among other things, documents identifying "(a) the number of alien minors who were apprehended at ports of entry following DHS's implementation of the Zero Tolerance Policy; (b) the number of such minors who were separated from their parents or legal guardians after being apprehended by DHS; (c) the number and locations of such minors who have been reunited with their parents or legal guardians, and the dates of those reunifications; and (d) the number and locations of such minors who remain, as of the date of th[e] FOIA request, separated from their parents or legal guardians," *id.* ¶ 12. CREW seeks these documents to "shed light on [the] 'serious deficiencies in DHS's record management policies and practices" documented in the DHS OIG's September 2018 report, and to determine "whether DHS currently possesses critical data relating to alien family separations that it should possess if it were complying with applicable law and records management requirements." *Id.* ¶¶ 13, 16. CREW has made clear that it will continue to submit FOIA requests to DHS, and other agencies, on matters relating to CREW's ongoing research, litigation, advocacy, and public education efforts, and has a continuing interest in agency compliance with the FRA. *Id.* ¶ 20.

As outlined above in Part I, DHS has indisputably failed, and continues to fail, to create records documenting child separations, including records that would be responsive to CREW's pending FOIA requests and requests CREW plans to submit in the future. Consequently, CREW's current and future FOIA requests will yield fewer or no responsive documents, depriving CREW of critical documents and information that it needs to fulfill its mission. *Id.* ¶ 18. This is a cognizable injury to CREW. *See CREW v. EOP*, 587 F. Supp. 2d at 58-61; *CREW v. SEC*, 858 F. Supp. 2d at 60; *CREW v. Cheney*, 593 F. Supp. 2d at 227; *Public Citizen v. Carlin*, 2 F. Supp. 2d at 6.

Moreover, the harm to CREW is irreparable in two respects. First, even if DHS later creates records that it failed to create in the first instance, and CREW eventually obtains those records, CREW will still be deprived of *timely* access to them. Bookbinder Decl. ¶ 19. Such a deprivation is itself harmful to CREW, because stale information has less value to CREW's public education and advocacy efforts. *Id.*; *see Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 41; *Payne Enterprises*, 837 F.2d at 494. Second, if the agency fails to create proper and contemporaneous records in the first instance, there is a significant risk that the agency will not be able to fully recreate those records after the fact, resulting in an irretrievable loss of records or information. Bookbinder Decl. ¶ 19; *see Am. Friends Serv. Comm.*, 485 F. Supp. at 233-34; *CREW v. Cheney*, 593 F. Supp. 2d at 227; *CREW v. EOP*, 2008 WL 2932173, at *2. As noted, such irretrievable loss is particularly likely in this case, where the government's efforts in the *Ms. L* litigation have demonstrated the difficulties of trying to create records documenting child separations *post hoc*. *See supra* Part II.A.

In sum, DHS's FRA violations have already caused CREW irreparable harm, and will likely continue to do so absent a preliminary injunction.

III. The Balance of Equities and Public Interest Favor a Preliminary Injunction

Finally, the balance of equities and public interest—which "merge" when "the [g]overnment is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009)—weigh heavily in favor of a preliminary injunction.

The risk of further irreparable harm to RAICES, its clients, and CREW substantially outweighs any burden a preliminary injunction would cause DHS. As outlined above, the likely harm to Plaintiffs—including the irrevocable effect on RAICES's mission of providing effective legal services to vulnerable migrant families, prolonged detention and separation of migrant families that RAICES represents, complications to those families' immigration cases, and permanent loss of records and information—is severe. By contrast, merely requiring DHS to create records adequately documenting child separations pending disposition of this suit would impose minimal burdens, if any. Such an injunction may in fact *save* DHS from far more burdensome work in the long term—i.e., by obviating the type of "herculean" and "resource-intensive" forensic data analysis the government was forced to perform in the *Ms. L* suit because of DHS's recordkeeping failures. At any rate, DHS "cannot suffer harm from an injunction that merely ends an unlawful practice." *Open Cmtys. All.*, 286 F. Supp. 3d at 179; *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015).

The public interest also strongly favors an injunction. "[T]here is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations,'" including the APA and FRA. *Newby*, 838 F.3d at 12; *Ramirez*, 310 F. Supp. 3d

at 33 (Contreras, J.); *Aracely*, 319 F. Supp. 3d at 156 (Contreras, J.). The "public also has an interest in ensuring that its government respects the rights of immigrants to family integrity while their removal proceedings are pending." *M.G.U.*, 325 F. Supp. 3d at 124. "The public interest in upholding and protecting such rights in the circumstances presented here is served by issuing the requested injunction." *Id.*

CONCLUSION

For the foregoing reasons, the Court should issue a preliminary injunction requiring DHS to create on a forward-going basis, pending final disposition of this case, records that (1) document every separation of a migrant child from an adult companion with whom the child is apprehended at the border; (2) include data sufficient to ensure that the child and adult can be linked together and tracked through the duration of their immigration proceedings; and (3) adequately describe the circumstances of and reasons for any separation of a parent or legal guardian from a child.[8]

Date: March 8, 2019

Respectfully Submitted,

/s/ Nikhel Sus
NIKHEL S. SUS
(D.C. Bar No. 1017937)
ANNE L. WEISMANN
(D.C. Bar. No. 298190)
Citizens for Responsibility and Ethics in Washington
1101 K St. NW, Suite 201
Washington, D.C. 20005
Telephone: (202) 408-5565
Fax: (202) 588-5020
nsus@citizensforethics.org
aweismann@citizensforethics.org

[8] The Declaration of RAICES's Bianca Aguilera outlines specific data points concerning child separations that there is a critical need for DHS to document. Aguilera Decl. ¶¶ 17-18.

MANOJ GOVINDAIAH
Refugee and Immigrant Center for
Education and Legal Services
802 Kentucky Ave.
San Antonio, TX 78201
Telephone: (210) 787-3745
Fax: (210) 787-3745
manoj.govindaiah@raicestexas.org

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, and

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, INC.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, and

KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security,

Defendants.

Civil Action No. 18-cv-2473-RC

INDEX OF EXHIBITS
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Exhibit 1: National Archives & Records Admin., *Records Management Inspection Report of Dep't Homeland Security, U.S. Customs and Border Protection Records Management Program* (July 16, 2018)

Exhibit 2: U.S. Gov't Accountability Office Report, *Unaccompanied Children, Agency Efforts to Reunify Children Separated from Parents at the Border*, GAO 19-163 (Oct. 2018)

Exhibit 3: U.S. Dep't of Homeland Security Office of Inspector General Report, *Special Review – Initial Observations Regarding Family Separation Issues under the Zero Tolerance Policy*, OIG-18-84 (Sept. 27, 2018)

Exhibit 4: U.S. Dep't of Health & Human Servs. Office of Inspector General Issue Brief, *Separated Children Placed in Office of Refugee Resettlement Care*, OEI-BL-18-00511 (Jan. 2019)

Exhibit 5: U.S. Dep't of Homeland Security, *Fact Sheet: Zero-Tolerance Prosecution and Family Reunification* (June 23, 2018)

Exhibit 6: Declaration of Jonathan White, *Ms. L. v. ICE*, No. 3:18-cv-428, ECF No. 347-1 (S.D. Cal. filed Feb. 1, 2019)

Exhibit 7: Pls.' Mem. of Law in Supp. of Mot. to Clarify Scope of the *Ms. L* Class, *Ms. L. v. ICE*, No. 3:18-cv-428, ECF No. 335-1 (S.D. Cal. filed Dec. 14, 2018)

Exhibit 8: Statement of U.S. Gov't Accountability Office, Before House Comm. on Energy & Commerce, Subcomm. on Oversight & Investigations, *Unaccompanied Children, Agency Efforts to Reunify Children Separated from Parents at the Border*, GAO-19-368T (Feb. 7, 2019)

Exhibit 9: Joint Status Report, *Ms. L. v. ICE*, No. 3:18-cv-428, ECF No. 360 (S.D. Cal. filed Feb. 20, 2019)

Exhibit 10: Declaration of Jallyn N. Sualog, *Ms. L. v. ICE*, No. 3:18-cv-428, ECF No. 347-2 (S.D. Cal. filed Feb. 1, 2019)

Exhibit 11: Alan Gomez, The Trump administration keeps breaking up migrant families. Here's how it does it, *USA Today* (Feb. 21, 2019), *available at* https://bit.ly/2GDKN5l

Exhibit 12: Statement of Scott Lloyd, U.S. Dep't of Health & Human Servs., Before House Committee on the Judiciary (Feb. 12, 2019)

Exhibit 13: Statement of Julie M. Linton, M.D., F.A.A.P., American Academy of Pediatrics, Before House Comm. on Energy & Commerce, Subcomm. on Oversight & Investigations (Feb. 7, 2019)

Exhibit 14: Statement of Jack P. Shonkoff, M.D., Center on the Developing Child at Harvard University, Before House Comm. on Energy & Commerce, Subcomm. on Oversight & Investigations (Feb. 7, 2019)

Exhibit 15: Statement of Cristina Muniz de la Pena, Ph.D., American Psychological Association, Before House Comm. on Energy & Commerce, Subcomm. on Oversight & Investigations (Feb. 7, 2019)

Exhibit 1

Department of Homeland Security
U.S. Customs and Border Protection
Records Management Program

Records Management Inspection Report

National Archives and Records Administration
July 16, 2018

TABLE OF CONTENTS

U.S. CUSTOMS AND BORDER PROTECTION
RECORDS MANAGEMENT PROGRAM

INSPECTION REPORT

INTRODUCTION

The National Archives and Records Administration (NARA) is responsible for assessing the proper management of records in all media within Federal agencies to protect rights, assure government accountability, and preserve and make available records of enduring value.[1] In this capacity, and based on authority granted by 44 United States Code (U.S.C.) 2904(c)(7) and 2906, NARA inspects the records management programs of agencies to ensure compliance with Federal statutes and regulations and to investigate specific issues or concerns. NARA then works with agencies, if necessary, to make improvements to their programs based on inspection findings and recommendations.

In January 2018, NARA inspected the Records Management (RM) program of the U.S. Customs and Border Protection (CBP) and its component offices. The purpose of this inspection was to examine how well CBP complies with Federal records management statutes and regulations and to assess the effectiveness of its RM policies and procedures.

In several key areas, the CBP Records Management program is not in compliance with 36 Code of Federal Regulations (CFR) Chapter XII, Subchapter B. It lacks records management fundamentals prescribed by the regulations and has other areas of weakness that need to be addressed. In addition, CBP does not follow records management policies prescribed by the Department of Homeland Security (DHS) Records Management program.

CBP is dependent on the proper management of information to document the movement of people, goods, and materials through the ports and borders of the United States. Records and information are essential for accountability relating to the seizure of illicit drugs, weapons, and other contraband that CBP is responsible for monitoring and enforcing. Failure to manage records in a compliant manner increases the risk that records will not be readily accessible to support the mission essential functions of CBP, as well as those of other Federal agencies, and for accountability to Congress and the public. It also increases the risk of loss of Federal data and records. Additionally, permanent records may not be retained for eventual transfer to the National Archives, as required by 44 U.S.C. 3101.[2]

To mitigate the risks associated with non-compliance with elements of 36 CFR Chapter XII – Subchapter B, this report makes 14 findings and 16 recommendations. Follow-up actions required for CBP are included in Appendix C.

[1] 44 U.S.C. Chapter 29, https://www.archives.gov/about/laws/records-management.html.
[2] 44 U.S.C. Chapter 31, https://www.archives.gov/about/laws/fed-agencies.html.

OVERVIEW OF THE CBP RECORDS MANAGEMENT PROGRAM

CBP's RM program is positioned within the Transformation Support and Management Division (TSMD) located within the Office of Information and Technology (OIT) under the Executive Assistant Commissioner for Enterprise Services. The RM program falls under the oversight of the Director of the TSMD who is an acquisition professional with limited records management experience. The Director is actively engaged in standing up a new RM organization through the CBP acquisition process. Currently, CBP has not assigned a person and office with appropriate authority to coordinate and oversee implementation of the agency records management program in accordance with 36 CFR 1220.34(a). There is a designated Senior Advisor who provides support to the RM program with the assistance of one full-time management analyst and five contract support staff. The contract support staff provide operational and planning support to the activities of the RM program.

CBP also has a network of Local Records and Information Managers (LRIMs) in place for a number of components throughout the agency. These staff members are assigned RM responsibilities as a collateral duty and work with Records Custodians (RC) whose duties are also collateral in individual offices. This structure oversees the documentation of the work of 65,000 employees throughout CBP. However, this structure is not consistent throughout the agency. Some important components, such as the Office of Intelligence, have not assigned LRIMs while others lack a robust RC structure. As an exception, it is important to note that the Border Patrol continues to employ a full time Records Manager (RM) who is a RM program manager for that component and also serves as an LRIM.

CBPs RM program is being reconfigured along the lines of Records and Information Governance (RIG) model that is being designed by a records management contractor. The name of the RM program has changed to CBP RIG. This program is in the very early stages of development but seeks to utilize technology and innovative business practices to integrate information security, risk management, data management, and knowledge management. CBP RIG also desires to integrate programs relating to legal discovery, privacy, and the Freedom of Information Act (FOIA). As this transformation is just starting NARA recommends that records management statutory requirements, NARA records management policies and other recordkeeping practices be included as an essential part of this reconfiguration.

FINDINGS AND RECOMMENDATIONS

RECORDS MANAGEMENT FUNDAMENTALS, STATUTES, AND REGULATORY COMPLIANCE

In its current state, the records management program at CBP is substantially non-compliant with Federal statutes and regulations, NARA policies, Office of Management and Budget (OMB) Circular A-130, and DHS Records and Information Management policies. There are additional areas of concern and risk as reflected in CBP's annual Records Management Self-Assessment (RMSA) reports to NARA, as well as the DHS Records Management program's annual assessment of its component agencies. To bring this program into compliance and ensure efficiency in implementation, substantial support from executive leadership at CBP is required.

Finding 1: CBP has not assigned records management responsibility to a person and office with appropriate authority within the agency to coordinate and oversee the creation and implementation of a comprehensive records management program.

Currently there is a Senior Advisor in the CBP RM office, but the individual assigned to this position does not have the authority to perform the management and oversight of records operations in the agency as defined in 36 CFR 1220.34(a) or those outlined by DHS Directives 141-01 and 141-01-001. There are plans to create a Chief Records Officer (CRO) position within CBP as well as institute a RIG Board comprised of component representatives, but these plans are in draft status within the TSMD. Additionally, the CBP RIG program has been assigned to the TSMD within OIT. The authority of the TSMD to enact policies and procedures to implement the RIG program throughout CBP is not clear.

36 CFR 1220.34(a) requires agencies to assign records management responsibility to a person and office with appropriate authority within the agency to coordinate and oversee implementation of a comprehensive records management program as outlined in 36 CFR 1220.32. It is also required that agencies officially notify and provide NARA with the name and contact information of the individual.

DHS Directives 141-01 and 141-01-001 also require Departmental component heads to designate a CRO whose duties align with 36 CFR Chapter XII, Subchapter B. Compliance with DHS 141-01 and 141-01-001 would allow CBP to meet the requirements of 36 CFR 1220.34(a). It would also allow CBP to comply with 36 CFR 1220.34(b) which requires agencies to notify NARA of the names of the individuals assigned operational responsibility for the agency RM program. Typically NARA identifies these individuals as Agency Records Officers (ARO).

Recommendation 1.1: CBP through policy and directives must provide the appropriate authority to an agency official or office to establish and maintain a records management program throughout the agency in accordance with 44 U.S.C. Chapter 31, 36 CFR 1220.34(a) and OMB Circular A-130(5)(h).

Recommendation 1.2: CBP must formally assign a Chief Records Officer or Agency Records Officer with the roles and responsibilities needed to coordinate and oversee an agency-wide records management program (36 CFR 1220.34(b), DHS Directive 141-01 and DHS Directive 141-01-001)

Finding 2: The CBP RIG program RM directives establishing program objectives, responsibilities, and authorities for the creation, maintenance, and disposition of agency records are out of date or in draft form.

36 CFR 1220.34(c)(h) and 36 CFR 1222.26(e) require agencies to establish program requirements, strategies, policies, procedures and directives for the creation, maintenance, and disposition of records.

The CBP RIG program provided NARA with a copy of the U.S. Customs Service RM handbook dated 2001. This handbook was updated in 2016, but is still in draft status and appears to be little

changed from 2001 version. In addition, the Border Patrol provided NARA with a copy of a U.S. Citizenship and Immigration Service Memorandum from 2005 regarding the use of the Uniform Subject Filing System, which was said to continue to serve as its handbook. Both the CBP RIG office and the Border Patrol RM program manager reported that they have handbooks in draft status, but the inspection team did not receive copies.

NARA is aware that CBP was created in 2003 by combining the U.S. Customs Service with the U.S. Border Patrol and that both entities had their own RM policies, procedures and records retention schedules. However, whenever a new agency is created, even one that stems from existing agencies, the agency must establish new policies, procedures and records retention schedules in accordance with 44 U.S.C. 3101 and 44 U.S.C. 3102 and the regulations cited above. Both handbooks should have been superseded and new agency handbooks or manuals with updated directives, policies and procedures issued within a reasonable period of time after the creation of the CBP. Even if CBP wants to keep these individual entities separate in regards to their policies and procedures, the handbooks in use by both are outdated and do not take into consideration numerous RM memoranda, directives, and bulletins issued by NARA, OMB, Congress, DHS, and other agencies.

Recommendation 2: CBP must create, maintain, update, and disseminate RM authorities, directives, handbooks and manuals for all staff. (CFR 1220.34(c)(h) and 36 CFR 1222.26(e))

Finding 3: The CBP's current LRIM and RC structure is not adequately implemented throughout each program to ensure incorporation of recordkeeping requirements and records maintenance, storage, and disposition practices into agency programs, processes, systems, and procedures.

In most instances, those appointed to act as LRIMs in CBP offices reported less than 10% of their time devoted to RM duties. In the Office of Intelligence, which handles classified records, there was no LRIM assigned to the program and no defined RM activities were being carried out in the office. In another case, the Branch Chief served as the LRIM and could not devote sufficient time to RM duties. In the Office of Field Operations, three LRIMS and 14 RCs were assigned to handle the RM needs of 25,000 employees. At Border Patrol, the RM serves as a program manager as well as a LRIM responsive to the CBP RIG program. The Border Patrol RM also works as a single point of contact to coordinate the activities of Records Management Liaisons (RMLs) across the organization, which comprises another 21,000 employees.

The CBP RIG program has been working to improve the performance and coverage of LRIMs throughout the agency. LRIMs typically oversee the activities of RCs in their organizations. New LRIMs have been appointed, a working group established, and training updated, but there are significant organizational issues to be overcome for these positions to become effective throughout CBP.

Recommendation 3: The CBP must review and update the current structure, assignment, training and duties of program managers, LRIMs, RCs, and RMLs across the agency to ensure adequate resources are assigned to meet the requirements of 36 CFR 1220.34(d).

Finding 4: CBP does not integrate records management and recordkeeping requirements into the design, development, and implementation of its electronic systems.

The CBP RIG program has not been integrated into strategic planning for new electronic systems and has not taken part in discussions concerning the creation, implementation, and management of existing electronic systems.

36 CFR Chapter XII, Subchapter B, and OMB Circular A-130 (5)(d) require agencies to incorporate records management into the design, development, and implementation of information systems. Currently CBP is not in compliance with these regulations.

Recent system development guidelines within CBP, such as Agile Governance Framework (AGF), approved in July 2017, seek to incorporate records management requirements more fully into the developmental lifecycle of electronic information systems (EIS). An integral part of the AGF was the development of an Enterprise Constraints List that incorporated some aspects of records management into the system development process. However, higher level coordination between the RIG program office and OIT was not included in the framework, nor were clear lines of communication between the offices outlined in the AGF.

Failure to incorporate the RIG program fully into systems development puts the CBP at risk of not ensuring that records are appropriately created, captured, or maintained, which in turn increases the risk of privacy and security breaches. The CBP also risks failing to be able to provide access to records for FOIA requests, for legal discovery, and for meeting the business needs of employees, immigrants, and others. Conversely, the CBP is also at risk of maintaining and releasing too much information through its lack or misuse of disposition authorities.

Recommendation 4.1: The CBP must update and implement its policies and procedures for IT management and systems development to include records management in the design, development, and implementation of EIS. (36 CFR 1220.34(e), 36 CFR 1236.6(b), 36 CFR 1236.10 and OMB Circular A-130)

Recommendation 4.2: The CBP OIT must maintain and make available to CBP RIG staff up-to-date documentation about EIS that specifies all technical characteristics necessary for reading and processing records contained in systems, defines the contents of the files and records, indicates restrictions on access and use, describes update cycles or conditions and rules for adding, changing, or deleting information in the system, and contains authorized disposition authorities. (36 CFR 1220.34(e) and 36 CFR 1236.26(b))

Finding 5: CBP does not require records management training for all CBP staff, and the RM training it offers does not meet records management training requirements under 36 CFR 1220.34(f), OMB/NARA Managing Government Records Directive (M-12-18), and NARA Bulletin 2017-01.

Throughout CBP, basic records management training is provided to agency staff using the suite of required Departmental training, which is taken each year by all DHS employees. This training provides a general overview of RM but does not address the specific needs of CBP employees. It is also being updated to meet the new training requirements outlined in NARA Bulletin 2017-01.[3] LRIMs within CBP received more in-depth training in 2017, but there is no requirement that they attend training. LRIMs are responsible for training RCs in their areas, but most of those interviewed stated that they did not have the resources or time to train staff in either headquarters or the field. Training is not standardized throughout the agency and does not include specific content on electronic records management. In addition it does not provide targeted training for senior officials upon their arrival and departure from the agency. The Border Patrol has developed its own RM training modules for staff of that component, but cannot conduct training on a regular basis due to budget and time restrictions. These training products could serve as possible models for the CBP program as a whole, but would need refinement to meet the needs of the agency. Ultimately, the RIG program should create a suite of standardized training modules that would be mandatory throughout CBP.

Recommendation 5: CBP must develop and require agency specific records management training for all staff and contractors that meets records management training requirements as outlined in 36 CFR 1220.34(f), OMB/NARA M-12-18, and NARA Bulletin 2017-01.

Finding 6: CBP has a large volume of unscheduled records, particularly those residing in electronic information systems.

OMB/NARA *Managing Government Records Directive*, M-12-18, goal 2.5, required agencies to identify and report unscheduled records to NARA by December 31, 2016. At that time, CBP reported almost 300 individual series of textual records in unscheduled status. Work has progressed in the scheduling of these records, but there are still a significant number of electronic systems that remain unscheduled, in some cases, decades after their initial creation dates. As CBP moves towards an electronic environment to perform its mission functions, all records must be scheduled in a timely manner.

With such a large number of unscheduled records, it is difficult for CBP to meet the requirements of 36 CFR 1220.34(i), which states that all records, regardless of format, must be classified or indexed, described, and made available for use by all appropriate agency staff. Additionally, with CBP records handbooks out of date, there is no centralized location to access and update CBP records control schedules and document filing codes. A shared intranet portal is available but is currently under development.

[3] https://www.archives.gov/records-mgmt/bulletins/2017/2017-01-html.

NARA recognizes that CBP is part of a DHS Department-wide records scheduling effort. However, some of its retention schedules are 30 to 40 years out of date. CBP continues to use legacy schedules and filing codes from the U.S. Customs Service and the U.S. Immigration and Naturalization Service. While the Border Patrol RM indicated that the agency was allowed to use legacy schedules and file codes under the authority of the Homeland Security Act Savings Clause of 2002 (Title 15, Paragraph 1512), the continued use of these schedules 15 years after the creation of the agency presents issues around access and control of those records that are not acceptable, including an increased risk of loss of records and other cost inefficiencies due to unaccounted for changes and new records for new programs created during the course of the last 15 years.

Recommendation 6: CBP must develop and implement a comprehensive plan to schedule all unscheduled textual records, electronic records and EIS in its custody. (36 CFR 1220.34(g)(i), 36 CFR 1225, 36 CFR 1236.6, and OMB/NARA M-12-18)

Finding 7: The CBP RIG program does not conduct regular records management evaluations of agency components.

The CBP RIG program has not conducted evaluations of agency components with any uniformity or regularity. At the time of the inspection, the CBP RIG program had no formal method in place to evaluate the implementation of RM policies and procedures among agency components. Ideally, results from these evaluations would be compiled by the agency RM program office and written reports provided to senior program officials to identify strengths and weaknesses in agency components. The RM program would then work with agency leadership to develop and monitor improvement plans and to use the information gathered from evaluations to make improvements on an agency-wide basis. RM oversight is also an area where the CBP could enhance coordination and cooperation between the RIG program and agency components.

Recommendation 7: The CBP RIG program must establish effective RM evaluation programs to monitor records management practices within all agency components to ensure compliance with Federal regulations. (36 CFR 1220.34j)

Finding 8: CBP does not identify or manage vital records in accordance with 36 CFR 1223.

CBP does not consistently identify or manage vital records. A vital records program provides an agency with information it needs to conduct business operations in other than normal circumstances and allows agency officials to identify and protect the most important records dealing with legal and financial rights of the agency.

While the CBP RIG program conducted an agency-wide inventory of records in 2015-2016, no concerted effort was made to identify vital records in these inventories. In addition, while the Border Patrol provided training in vital records, CBP training did not cover this area.

Recommendation 8: CBP must identify vital records throughout the agency and train staff on their roles and responsibilities in the handling of these records. (36 CFR 1223)

Finding 9: CBP offices are not routinely conducting records inventories.

CBP offices are not routinely conducting records inventories. Records inventories are the foundation of a records management program. Inventories detail what records an office creates and maintains. Accurate inventories are essential for ensuring access to records in order to meet business needs, respond to FOIA requests, respond to legal discovery, and to identify vital records. Inventories also help to identify unscheduled records. CBP conducted an agency-wide inventory in 2015-2016, but must establish this as a recurring activity by procedure or policy.

Recommendation 9: The CBP RIG program must conduct regular inventories of existing electronic and non-electronic records to identify scheduled, unscheduled, and vital records. (36 CFR 1223.14, 36 CFR 1224.10 and 36 CFR 1225.12)

Finding 10: CBP has not established policies and procedures for handling and reporting unauthorized disposals of records to NARA.

One of the consequences of an underdeveloped agency records management program is increased risk of unauthorized disposals of records. 36 CFR 1230.10 requires agencies to inform employees of the provisions of the law regarding unauthorized disposals, establish policies and procedures to insure against the unauthorized disposals of records, and notify NARA when unauthorized disposals occur. Agencies then must investigate such incidents, determine their cause, and explain how the situation will be mitigated to prevent future incidents. Currently, CBP has no established policies and procedures for preventing, investigating and reporting unauthorized disposals to NARA.

Recommendation 10: CBP must establish policies and procedures to protect from and report to NARA all unauthorized disposals of records and improve procedures for responding to NARA on open investigations in a manner consistent with regulations. (36 CFR 1230.10)

Finding 11: CBP has not developed procedures to conduct exit briefings for departing employees or senior officials.

CBP has not developed procedures to conduct exit briefings for departing employees or senior officials to ensure that Federal records are not being removed from agency custody. NARA interviews with agency LRIMS and offices revealed that exit briefings are not being conducted, particularly in the case of departing senior agency officials.

Recommendation 11: CBP RIG program must develop and implement procedures to ensure that exit briefings are conducted and documented for all senior officials and employees separating from the agency and ensure that records management is included in these briefings. (36 CFR 1222.24(a)(6))

SENIOR AGENCY MANAGEMENT AND LEADERSHIP

Finding 12: The CBP RIG program has not taken advantage of additional leadership, strategic direction, and support through engagement with the DHS Senior Agency Official for Records Management (SAORM).

One of the key elements of OMB/NARA M-12-18 requires agencies to appoint a SAORM to oversee and review records management programs. In keeping with OMB/NARA M-12-18, DHS approved Directive 141-01 that requires the appointment of a SAORM to ensure that the Department and its components efficiently and appropriately comply with all applicable records management statutes, regulations, and NARA policies.

NARA Bulletin 2017-02 further outlines the responsibilities of the SAORM.[4] Departments and agencies have flexibility in the appointment of these officials as long they are placed high enough in the organization to be able to directly engage with, if not report to, the agency head and other senior staff in strategic planning for the records management program. DHS has elected not to appoint SAORMs within each component agency; therefore, CBP does not have its own SAORM. Senior and executive leadership within CBP is not currently working with the DHS SAORM on the creation of the CBP RIG program, or in any other capacity related to records management.

One of the purposes for having a SAORM is to provide executive level support, strategic direction, and advocacy, particularly where there are areas that need improvement. In addition, the SAORM is charged with making adjustments to practices, personnel, and funding as may be necessary to ensure records management compliance and support the business needs of the Department. In an agency as large and complex as DHS, the SAORM may need the component agencies to take the lead in asking for the leadership and strategic input from the SAORM.

Recommendation 12: The senior executives within CBP should establish routine engagement with the DHS SAORM to create a plan to fully establish a compliant records management program within CBP in accordance with 36 CFR Chapter XII Subchapter B, OMB Circular A-130 and NARA Bulletin 2017-02.

STRATEGIC PLANNING

Finding 13: The CBP RIG program lacks a strategic plan necessary to develop and implement an effective agency-wide records management program.

Strategic planning is necessary to systematically and effectively establish all aspects of a functioning and compliant records management program. A strategic plan provides goals and objectives, creates a clear path for implementation, streamlines the efforts that are already being made, and helps prioritize efforts to establish a fully functioning RM program.

[4] https://www.archives.gov/records-mgmt/bulletins/2017/2017-02-html.

CBP has no strategic plan for records management. While the TSMD is developing a RIG program acquisition plan, this document only lays the groundwork for establishing a functional program that will enable the agency to meet the requirements of 36 CFR 1220 Subpart B. It does not provide CBP with a path forward to ensure that RM compliance is embedded throughout the agency in accordance with NARA regulations, OMB Circular A-123 and OMB Circular A-130. It also looks to create an electronic solution to RM problems without first ensuring the organizational structure is in place to guide the successful implementation of such a solution. Without a strategic plan, it is difficult for CBP to give clear direction or guidance about RM to agency components, and it hampers its ability to identify and prioritize goals and objectives.

Recommendation 13.1: The CBP RIG program staff and the SAORM, in coordination with CBP senior leadership, must develop and implement an RM strategic plan for the agency. (44 U.S.C. 3506 and OMB Circular A-130)

Recommendation 13.2: The SAORM and the CBP RIG program, in coordination with CBP senior leadership, must institute, by policy or procedure, a periodic review of the RM strategic plan. (44 U.S.C. 3506 and OMB Circular A-130)

ELECTRONIC RECORDS MANAGEMENT

Finding 14: Successful implementation of CBP plans for a Records Management Application and Electronic Records Management System are at risk of failure due to lack of basic records management fundamentals.

DHS handles email and other EIS at the Department level. However, CBP does maintain large EIS. Under the supervision of the TSMD Director, the RIG program has developed acquisition documents that provide a broad outline of the Division's desires to implement an RM program as well as an Electronic Records Management System (ERMS). Proper implementation of an ERMS is dependent on an agency understanding what information it creates, where it resides, what its purpose is, and how long it must be maintained for business needs. As indicated above, CBP has not identified what records it maintains, has a large number of unscheduled records, particularly those in electronic formats, and does not have the intellectual control over its records that is required for a successful implementation of either of these systems.

We are not making any formal recommendation regarding the acquisition of an ERMS at this time, because we feel successful attention to the other recommendations in this report will address this issue.

CONCLUSION

NARA understands that CBP's transformation to a RIG program is in its very early stages. Adherence to records management statutory requirements, NARA records management policies and other recordkeeping practices is essential to its success. Currently, the CBP RIG program lacks numerous basic elements of a compliant records management program as prescribed in 36 CFR Chapter XII, Subchapter B. It will require careful strategic planning for the CBP RIG program to become effective and compliant in the many areas where it is currently underdeveloped. Program plans and studies to institute RM throughout the agency have been formulated since 2015, but limited progress has been made to date. As noted in this report, CBP should begin with developing and implementing a strategic plan for the overall records management program. It is critical that CBP senior leadership, with the help of the DHS SAORM, foster a culture that includes records management in the regular and routine practices of all program functions within the CBP.

In addition, DHS has a number of records management program elements that would help CBP to re-establish its records management program. These include a Records Leadership Council, a Departmental Records Management Maturity Model, a tiered records information training program, and a SAORM. Seeking the advice and assistance of the DHS Department Records Officer and other AROs of DHS components would greatly benefit CBP and help bring it into compliance.

As a result of this inspection, CBP will be required under 36 CFR 1239 to create a plan of corrective action to address the recommendations in this report. However, given the complexity and scale of the improvements recommended, NARA intends to conduct follow-up inspections of the agency.

APPENDIX A
INSPECTION PROCESS

OBJECTIVE AND SCOPE

The objective of this inspection was to determine how well CBP complies with Federal records management statutes and regulations and to assess the effectiveness of its RM policies and procedures.

METHODOLOGY

NARA carried out this inspection by conducting interviews with CBP RIG program staff at CBP Headquarters and by reviewing CBP's program documentation. More specifically, the inspection team:

- reviewed records management policies, directives, and other documentation provided by CBP;
- interviewed RM representatives from the CBP RIG program;
- guided the course of the inspection using a detailed checklist of questions based on Federal statutes and regulations, and NARA guidance; and
- reviewed CBP responses to current and past annual Records Management Self-Assessments (RMSA).

OFFICES VISITED

CBP Headquarters, Washington, DC

- Office of the Commissioner:
  - Office of the Executive Secretary
- Office of Field Operations
- Laboratories and Scientific Services
- United States Border Patrol
- Office of Trade
- Office of Public Affairs
- Office of Intelligence
- Office of International Affairs
- Air and Marine Operations
- Office of Information and Technology

APPENDIX B
RELEVANT INSPECTION DOCUMENTATION

DHS Directive 141-01, *Records and Information Management,* August 11, 2014.

DHS Directive 141-001, *Records and Information Management,* June 8, 2017.

DHS Directive 4500.01, *DHS E-mail Usage,* March 1, 2003.

CBP Strategic Plan, *Vision and Strategy, 2020*. No date.

CBP Handbook 1400-05D, *CBP Information Systems Security Policies and Procedures Handbook,* Version 6.01, May 17, 2016.

CBP Handbook 2100-01A, *Organization Handbook,* August 2011.

CBP, *Records Handbook,* FY 2001. Draft Revision for 2016.

CBP Systems Scheduling Database, July 28, 2016.

USCIS, Interoffice Memorandum, *Uniform Subject Filing System*, April 1, 2005.

Transformation Support and Management Division, *RIG Preliminary Needs Statement*, Draft March 31, 2017.

Office of Information and Technology, *CBP OIT Agile Governance Process*, July 20, 2017.

Office of Information and Technology, *Data Management Plan Template*, Draft, No date.

NARA, *Record Group Allocation Statement for RG 568 (Bureau of Customs and Border Protection),* July 19, 2004.

NARA, *CBP Agency Records Holding Profile*, March 27, 2017.

APPENDIX C
AUTHORITIES AND FOLLOW-UP ACTIONS

AUTHORITIES

- 44 U.S.C. Chapter 29
- 36 CFR Chapter XII, Subchapter B
- 36 CFR 1239, Program Assistance and Inspections

OTHER GUIDANCE

- OMB/NARA *Managing Government Records Directive* (M-12-18)
- OMB/NARA *Guidance on Managing Email* (M-14-16)
- NARA Bulletin 2017-02: Guidance on Senior Agency Officials for Records Management
- Other NARA Bulletins currently in effect

STATUTES AND REGULATIONS

36 CFR Chapter XII, Subchapter B, specifies policies for Federal agencies' records management programs relating to proper records creation and maintenance, adequate documentation, and records disposition. The regulations in this Subchapter implement the provisions of 44 U.S.C. Chapters 21, 29, 31, and 33. NARA provides additional policy and guidance to agencies at its records management website - http://www.archives.gov/records-mgmt/.

At a high level, agency heads are responsible for ensuring several things, including:

- The adequate and proper documentation of agency activities (44 U.S.C. 3101);
- A program of management to ensure effective controls over the creation, maintenance, and use of records in the conduct of their current business (44 U.S.C. 3102(1)); and
- Compliance with NARA guidance and regulations, and compliance with other sections of the Federal Records Act that give NARA authority to promulgate guidance, regulations, and records disposition authority to Federal agencies (44 U.S.C. 3102(2) and (3)).

FOLLOW-UP ACTIONS

CBP will submit to NARA a Plan of Corrective Action (PoCA) that specifies how the agency will address each inspection report recommendation, including a timeline for completion and proposed progress reporting dates. The plan must be submitted within 60 days after the date of transmittal of the final report to the head of the agency.

NARA will analyze the adequacy of CBP's action plan, provide comments to CBP on the plan within 60 calendar days of receipt, and assist CBP in implementing recommendations.

CBP will submit to NARA progress reports on the implementation of the action plan until all actions are completed. NARA reserves the right to conduct future on-site evaluations of progress. NARA will inform CBP when progress reports are no longer needed.

APPENDIX D
ACRONYMS AND ABBREVIATIONS

AGF	Agile Governance Framework
ARO	Agency Records Officer
CBP	U.S. Customs and Border Protection
CFR	Code of Federal Regulations
CRO	Chief Records Officer
DHS	Department of Homeland Security
EIS	Electronic Information Systems
ERMS	Electronic Records Management System
FOIA	Freedom of Information Act
FY	Fiscal Year
IT	Information Technology
LRIM	Local Records and Information Managers
NARA	National Archives and Records Administration
OIT	Office of Information and Technology
OMB	Office of Management and Budget
PoCA	Plan of Corrective Action
RC	Records Custodian
RIG	Records and Information Governance
RM	Records Management
RML	Records Management Liaison
RMSA	Records Management Self-Assessment
RO	Records Officer
SAORM	Senior Agency Official for Records Management
TSMD	Transformation Support and Management Division
U.S.C.	United States Code


NATIONAL
ARCHIVES
OFFICE of the
CHIEF RECORDS
OFFICER

Exhibit 2

United States Government Accountability Office

Report to the Ranking Member, Committee on Energy and Commerce, House of Representatives

October 2018

UNACCOMPANIED CHILDREN

Agency Efforts to Reunify Children Separated from Parents at the Border

GAO Highlights

Highlights of GAO-19-163, a report to the Ranking Member, Committee on Energy and Commerce, House of Representatives

October 2018

UNACCOMPANIED CHILDREN

Agency Efforts to Reunify Children Separated from Parents at the Border

Why GAO Did This Study

On April 6, 2018, the Attorney General issued a memorandum on criminal prosecutions of immigration offenses, which, according to HHS officials, resulted in a considerable increase in the number of minor children whom DHS separated from their parents after attempting to cross the U.S. border illegally. On June 20, 2018, the President issued an executive order directing that alien families generally be detained together, and on June 26, 2018, a federal judge ordered the government to reunify separated families. DHS is responsible for the apprehension of individuals at the border, including families, and the transfer of UAC to HHS. HHS is responsible for coordinating the placement and care of UAC.

GAO was asked to examine processes for tracking and reunifying separated families. This report discusses DHS and HHS (1) planning efforts related to the Attorney General's April 2018 memo, (2) systems for indicating children were separated from parents, and (3) actions to reunify families in response to the June 2018 court order. GAO reviewed agency policies and procedures, filings in the relevant court case as of August 23, 2018, and interviewed DHS and HHS officials. GAO also visited four ORR shelters in July 2018 to interview staff responsible for the separated children.

What GAO Recommends

GAO is not making recommendations. GAO previously recommended that DHS and HHS improve their process for transferring UAC from DHS to HHS custody. DHS and HHS provided technical comments that were incorporated, as appropriate.

View GAO-19-163. For more information, contact Kathryn A. Larin at (202) 512-7215 or larink@gao.gov or Rebecca Gambler at (202) 512-8777 or gamblerr@gao.gov.

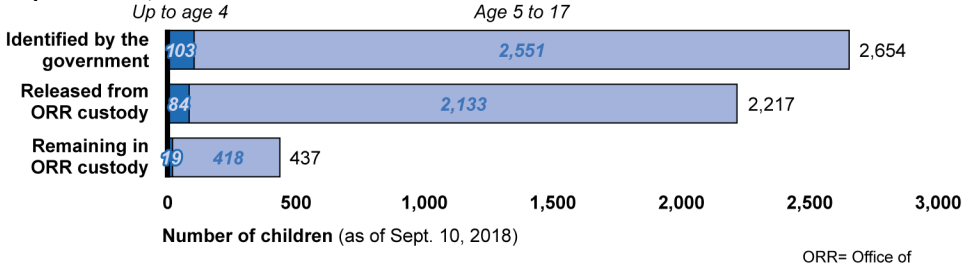
What GAO Found

Department of Homeland Security (DHS) and Department of Health and Human Services (HHS) officials we interviewed said the agencies did not plan for the potential increase in the number of children separated from their parent or legal guardian as a result of the Attorney General's April 2018 "zero tolerance" memo. These officials told GAO that they were unaware of the memo in advance of its public release. The memo directed Department of Justice prosecutors to accept for criminal prosecution all referrals from DHS of offenses related to improper entry into the United States, to the extent practicable. As a result, parents were placed in criminal detention, and their children were placed in the custody of HHS's Office of Refugee Resettlement (ORR). DHS and ORR treated separated children as unaccompanied alien children (UAC)—those under 18 years old with no lawful immigration status and no parent or legal guardian in the United States available to provide care and physical custody.

Prior to April 2018, DHS and HHS did not have a consistent way to indicate in their data systems children and parents separated at the border. In April and July 2018, U.S. Customs and Border Protection and ORR, respectively, updated their databases to allow them to indicate whether a child was separated. However, it is too soon to know the extent to which these changes, if fully implemented, will consistently indicate when children have been separated from their parents, or will help reunify families, if appropriate.

In response to a June 26, 2018 court order to quickly reunify children separated from their parents, HHS determined how many children in its care were subject to the order and developed procedures for reunifying these families. The government identified 2,654 children in ORR custody who potentially met reunification criteria. On July 10, 2018, the court approved reunification procedures for the parents covered by the June 2018 court order. This order noted that ORR's standard procedures used to release UACs from its care to sponsors were not meant to apply to this case, in which parents and children who were apprehended together were separated by government officials. DHS and HHS officials and staff at the ORR shelters GAO visited noted some challenges to reunification, including arranging communication between parent and child and coordinating transportation. As of September 10, 2018, 437 children remained in ORR custody for various reasons, such as ineligibility for reunification.

Number of Separated Children Potentially Eligible to Be Reunified with Parents as of September 10, 2018



Source: Ms. L. v. ICE, No. 18-0428 (S.D. Cal. Sept. 13, 2018) (joint status report). | GAO-19-163

ORR= Office of Refugee Resettlement

Note: GAO did not independently verify the accuracy of these data.

Contents

Abbreviations

CBP	U.S. Customs and Border Protection
DHS	Department of Homeland Security
DOJ	Department of Justice
ERO	Enforcement and Removal Operations
Flores Agreement	Flores v. Reno Settlement Agreement
HHS	Department of Health and Human Services
ICE	U.S. Immigration and Customs Enforcement
OFO	Office of Field Operations
ORR	Office of Refugee Resettlement
TVPRA	William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
UAC	unaccompanied alien child (or children)

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

October 9, 2018

The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

Dear Mr. Pallone:

In April 2018, the Attorney General issued a memorandum on criminal prosecutions of immigration offenses (also referred to as the "zero tolerance" policy) that directed Department of Justice (DOJ) prosecutors to accept all referrals of all improper entry offenses from the Department of Homeland Security (DHS) for criminal prosecution, to the extent practicable.[1] The April 2018 memo resulted in a considerable increase in the number of minor children who were separated from their parents or legal guardians after attempting to enter the United States illegally, according to DHS and Department of Health and Human Services (HHS) officials.[2] According to DHS officials, in implementing the April 2018

[1] *Memorandum for Prosecutors Along the Southwest Border. Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a). Office of the Attorney General*. April 6, 2018 (referred to in this report as the "April 2018 memo"). Specifically, the memo directed "each United States Attorney's Office along the Southwest Border—to the extent practicable, and in consultation with DHS—to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a)." 8 U.S.C. § 1325(a) establishes criminal penalties for improper entry by alien for (1) entering or attempting to enter the U.S. at any time or place other than as designated by immigration officers, or (2) eluding examination or inspection by immigration officers, or (3) attempting to enter or obtaining entry to the United States by willfully false or misleading misrepresentation or the willful concealment of a material fact. Generally, a first offense under section 1325(a) is a criminal misdemeanor, with a maximum sentence of 6 months.

[2] Prior to the April 2018 memo, DOJ had taken action in 2017 to prioritize the criminal prosecution of immigration-related offenses. *Memorandum for All Federal Prosecutors. Renewed Commitment to Criminal Immigration Enforcement. Office of the Attorney General*. April 11, 2017. Specifically, in April 2017, the Attorney General issued a memorandum prioritizing enforcement of a number of criminal immigration-related offenses, including misdemeanor improper entry. The memo prioritizes offenses under U.S. immigration law, which explicitly involve aliens (i.e., those who are not U.S. citizens or nationals), such as improper entry by alien (8 U.S.C. § 1325), illegal reentry of removed aliens (8 U.S.C. § 1326), and unlawfully bringing in and harboring certain removable aliens (8 U.S.C. § 1324), as well as offenses in relation to listed immigration offenses, such as aggravated identify theft (18 U.S.C. § 1028A) and fraud and misuse of visas, permits, and other documents (18 U.S.C. § 1546). For the purposes of this report, we refer to all of these crimes involving U.S. immigration enforcement, as "immigration-related offenses."

memo, DHS's U.S. Customs and Border Protection (CBP) began referring a greater number of individuals apprehended at the border to DOJ for criminal prosecution, including parents who were apprehended with children.[3] In these cases, referred parents were placed into U.S. Marshals Service custody and separated from their children because minors cannot remain with a parent who is arrested on criminal charges and detained by U.S. Marshals Service.[4] In cases where parents were referred to DOJ for criminal proceedings and separated from their children, DHS and HHS officials stated they treated those children as unaccompanied alien children (UAC)—a child who (1) has no lawful immigration status in the United States, (2) has not attained 18 years of age, and (3) has 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.[5] In such cases, DHS transferred these children to the custody of HHS's Office of Refugee Resettlement (ORR) and ORR placed them in one of their shelter facilities, as is the standard procedure the agencies use for UAC. Children traveling with related adults other than a parent or legal guardian—such as a grandparent or sibling—are also deemed UAC.

On June 20, 2018, the President issued an executive order that, among other things, directed the Secretary of Homeland Security to maintain custody of alien families during any criminal improper entry or immigration proceedings involving their members, to the extent possible.[6] This order

[3]When we use the term "children," we are referring to minor children under the age of 18. When we use the term "parent," we are referring to parents and legal guardians.

[4]While DOJ and DHS have broad authority to detain adult aliens, children, whether accompanied or unaccompanied, must be detained according to standards established in the Homeland Security Act of 2002, the Trafficking Victims Protection Reauthorization Act of 2008, and the 1997 *Flores v. Reno* Settlement Agreement (Flores Agreement). See Pub. L. No. 107-296, tit. IV, subtit. D, § 441, 116 Stat. 2135, 2192 ; Pub. L. No. 110-457, 112 Stat. 5044; Stipulated Settlement Agreement, Flores v. Reno, No. 85-4544 (C.D. Cal. Jan. 17, 1997). The Flores Settlement Agreement requires among other things, that children be placed in the least restrictive setting appropriate to the child's age and special needs and that children generally be detained separate from unrelated adults. See also Flores v. Reno, No. 85-4544 (C.D. Cal. July 24, 2015) (in chambers-order). The U.S. Marshals Service houses and transports individuals arrested by federal agencies, relying on federal, state, local and private jails throughout the U.S. for detention space. These facilities are not equipped to detain children in accordance with the standards described above.

[5]6 U.S.C. § 279(g)(2).

[6]Exec. Order No. 13841, 83 Fed. Reg. 29,435 (June 25, 2018). Although the executive order was announced on June 20, 2018, it was not published in the *Federal Register* until June 25, 2018.

stated that the policy of the administration is to maintain family unity, including by detaining alien families together where appropriate. In addition, on June 26, 2018, a federal judge ruled in the *Ms. L. v. ICE* case that certain separated parents must be reunited with their minor children (referred to in this report as the "June 2018 court order").[7] In this case, the American Civil Liberties Union filed a federal lawsuit on behalf of certain parents (referred to as class members) who had been separated from their children.[8] The government subsequently identified 2,654 children of potential class members in the *Ms. L. v. ICE* case, which we discuss in greater detail later in this report.[9] As of September 25, 2018, this litigation was ongoing. The Secretary of HHS directed HHS's Assistant Secretary for Preparedness and Response to lead family reunification efforts.

[7]For parents covered by the June 2018 order, the court ruled that the government may not detain parents apart from their minor children, subject to certain exceptions; that parents must be reunited with their minor children under 5 years of age within 14 days of the order; and parents must be reunited with their minor children age 5 and over within 30 days of the order. The order required these reunifications unless there is a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child. Ms. L. v. U.S. Immigration & Customs Enforcement (*Ms. L. v. ICE*), No. 18-0428 (S.D. Cal. June 26, 2018) (order granting preliminary injunction).

[8]This case was filed as a class action—class referring to individuals with a shared legal claim who are covered by the lawsuit. *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. March 9, 2018) (amended complaint). The court certified the following class: "All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child." *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting in part plaintiffs' motion for class certification). In that order, the court also noted that the class "does not include migrant parents with criminal history or communicable disease, or those who are in the interior of the United States or subject to the [June 20 executive order]."

[9]ORR did not provide us with information on the demographic characteristics of all 2,654 children they identified as being children of potential class members. However, ORR did provide us with data from its UAC Portal on 2,509 of the 2,654 children separated from their parents who were approved for an ORR placement from March 9, 2018, to June 27, 2018, which accounts for about 95 percent of the children potentially covered by the court order. ORR provided this data in response to our initial request; ORR was unable to provide updated data by our reporting deadline. Based on our review of relevant documentation, we determined that the data were sufficiently reliable to describe the ages of children that were separated from parents at the border. Our analysis of the 2,509 children separated from parents who were approved for an ORR placement from March 9, 2018, to June 27, 2018, found that approximately 3 percent of these separated children were ages 0 to 4, 53 percent were age 5 to 12, and 44 percent were age 13 and over.

This report discusses (1) DHS and HHS planning efforts related to the Attorney General's April 2018 memo, (2) DHS and HHS systems for indicating when children were separated from parents, and (3) DHS and HHS actions to reunify families in response to the June 2018 court order.

To address all three objectives, we interviewed DHS and HHS officials. Specifically, we interviewed CBP, U.S. Immigration and Customs Enforcement (ICE), and DHS's Office of Strategy, Policy, and Plans officials, as well as HHS officials from the offices of the Assistant Secretary for Preparedness and Response and ORR. In addition, we visited two ORR shelters in Arizona and two in Texas during the week of July 30, 2018, to interview staff responsible for the intake and release of separated children who had been in these shelters. We selected the shelters on the basis of various factors, including a range of shelter sizes, variation in shelter operator, and whether the shelters had at least 15 percent of total bed capacity occupied by separated children as of July 16, 2018. While our visits to four shelters are not generalizable to the about 100 ORR shelters, they provide examples of shelter staff experiences with children separated from parents at the border.

To describe DHS and HHS planning efforts, we reviewed agency documentation, such as relevant DHS memoranda. To examine DHS and HHS systems for indicating when children were separated from parents and for transferring custody between agencies, we reviewed DHS and HHS documentation related to these systems, including CBP's U.S. Border Patrol's training for referring UAC to HHS care and HHS's UAC policy guide. To examine DHS and HHS actions to reunify families, we reviewed relevant court filings in *Ms. L. v. ICE* as of August 23, 2018.[10] These court filings included information provided to the court by DHS and HHS on the processes used to reunify separated children and parents subject to the court order. The court filings also include information provided to the court by DHS and HHS on the number of children reunited with parents and those remaining in HHS custody. We used that information to describe the number of children reunited with their parents and the number of children remaining in HHS custody. However, we did not independently verify the accuracy of the numbers reported by the agencies to the court.

[10]Although the litigation is ongoing as of September 25, 2018, this report does not address any actions in the litigation beyond August 23, 2018, aside from providing information on the number of children reunited or remaining in HHS custody as reported in a September 13, 2018 court filing.

We conducted this performance audit from June 2018 to October 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Care and Custody of Unaccompanied Alien Children (UAC)

Under the Homeland Security Act of 2002, responsibility for the apprehension, temporary detention, transfer, and repatriation of UAC is delegated to DHS,[11] and responsibility for coordinating and implementing the placement and care of UAC is delegated to HHS's ORR.[12] CBP's U.S. Border Patrol (Border Patrol) and Office of Field Operations (OFO), as well as DHS's ICE, apprehend, process, temporarily detain, and care for UAC who enter the United States with no lawful immigration status.[13] ICE's Office of Enforcement and Removal Operations (ERO) is generally responsible for transferring UAC, as appropriate, to ORR, or repatriating them to their countries of nationality or last habitual residence. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), UAC in the custody of any federal department or agency, including DHS, must be transferred to ORR within 72 hours after

[11]Pub. L. No. 107-296, tit. IV, subtit. D, § 441, 116 Stat. 2135, 2192 (codified at 6 U.S.C. § 251). Repatriation is defined as returning unaccompanied children to their country of nationality or last habitual residence.

[12]Pub. L. No. 107-296, tit. IV, subtit. D, § 462, 116 Stat. 2135, 2202 (codified at 6 U.S.C. § 279).

[13]Border Patrol agents apprehend UAC between official U.S. ports of entry, and Office of Field Operations officers encounter these children at ports of entry. ICE apprehends UAC within the United States at locations other than borders or ports of entry. Ports of entry are facilities that provide for the controlled entry into or departure from the United States. Specifically, a port of entry is any officially designated location (seaport, airport, or land border location) where DHS officers or employees are assigned to clear passengers, merchandise and other items, collect duties, and enforce customs laws; and where DHS officers inspect persons seeking to enter or depart, or applying for admission into the United States pursuant to U.S. immigration law and travel controls.

determining that they are UAC, except in exceptional circumstances.[14] In addition, the 1997 *Flores v. Reno* Settlement Agreement (Flores Agreement) sets standards of care for UAC while in DHS or ORR custody, including, among other things, providing drinking water, food, and proper physical care and shelter for children.[15]

ORR has cooperative agreements with residential care providers to house and care for UAC while they are in ORR custody. The aim is to provide housing and care in the least restrictive environment commensurate with the children's safety and emotional and physical needs.[16] In addition, these care providers are responsible for identifying and assessing the suitability of potential sponsors—generally a parent or other relative in the country—who can care for the child after the child leaves ORR custody.[17] Release to a sponsor does not grant UAC legal immigration status. Children are scheduled for removal proceedings in

[14]8 U.S.C § 1232(b)(3). The TVPRA also provides special rules for UAC from Canada and Mexico who are apprehended at a land border or port of entry. On a case-by-case basis for UAC from Canada and Mexico, DHS may allow the child to withdraw his or her application for admission and return to his or her country of nationality or last habitual residence without further removal proceedings if the officers screen the UAC within 48 hours of being apprehended and determine that (1) the UAC is not a victim of a "severe form of trafficking of persons" (as that term is defined by statute); (2) there is no credible evidence that the UAC is at risk of being trafficked if repatriated; (3) the UAC does not have a fear of returning to his or her country owing to a credible fear or persecution; and (4) the UAC is able to make an independent decision to withdraw the application for admission to the U.S. and voluntarily return to his or her country of nationality or last habitual residence. 8 U.S.C. § 1232(a)(2)-(4). According to CBP, a UAC who meets the criteria to withdraw an application for admission or voluntarily return is generally returned by CBP with the close cooperation of the foreign government.

[15]The court-approved settlement agreement in the case of *Flores v. Reno* was the result of a class action lawsuit filed against the former Immigration and Naturalization Service (INS) challenging the agency's arrest, processing, detention, and release of juveniles in its custody. The agreement sets out nationwide policy for the detention, release, and treatment of minors in the custody of legacy INS, the border security and immigration-related functions of which are now performed by CBP, ICE, and U.S. Citizenship and Immigration Services. Stipulated Settlement Agreement, *Flores v. Reno,* No. 85-4544 (C.D. Cal. Jan. 17, 1997). The Flores Agreement is currently the subject of ongoing litigation. See Flores v. Reno, No. 85-4544 (C.D. Cal. Sept. 6, 2018) (notice of appeal).

[16]ORR is required to promptly place UAC in its custody in the least restrictive setting that is in the best interest of the child. 8 U.S.C. § 1232(c)(2)(A).

[17]Qualified sponsors are adults who are suitable to provide for the child's physical and mental well-being and have not engaged in any activity that would indicate a potential risk to the child. See 8 U.S.C. § 1232(c)(3).

immigration courts to determine whether they will be ordered removed from the United States or granted immigration relief.[18]

Prior to the Attorney General's April 2018 memo, according to DHS officials, accompanied children at the border were generally held with their parents in CBP custody for a limited time before being transferred to ICE and released pending removal proceedings in immigration court. However, according to DHS and HHS officials, DHS has historically separated a small number of children from accompanying adults at the border and transferred them to ORR custody for reasons such as if the parental relationship could not be confirmed, there was reason to believe the adult was participating in human trafficking or otherwise a threat to the safety of the child, or if the child crossed the border with other family members such as grandparents without proof of legal guardianship. ORR has traditionally treated these children the same as other UAC.

Standard Processes and Procedures for the Transfer, Care, and Release of Unaccompanied Alien Children

In 2015 and 2016, we reported on DHS's and HHS's care and custody of UAC, including the standard procedures that DHS follows to transfer UAC to ORR (see fig. 1).[19] In general, DHS is to notify ORR that they have a child needing placement, and DHS is required to transfer the child to ORR custody within 72 hours of apprehension, except under exceptional circumstances.[20] According to ORR's UAC policy guide, ORR officials are to identify an appropriate shelter, based on the needs of the

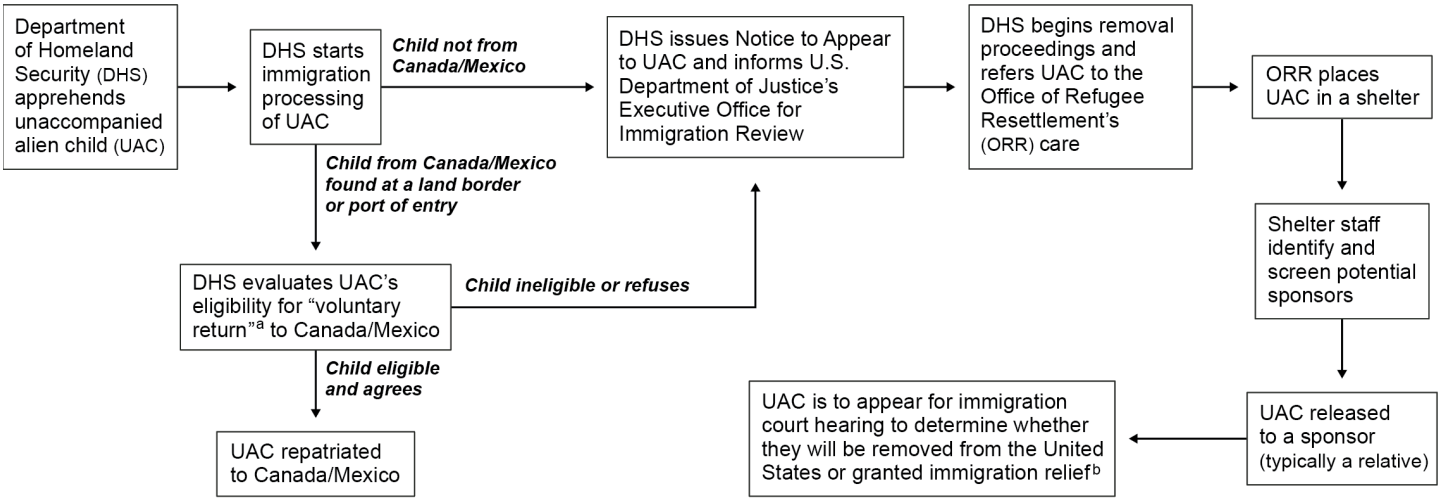
[18]There are several types of immigration relief that may be available to these children, for example, asylum or Special Immigrant Juvenile status. For more information, see GAO, *Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care*, GAO-16-180 (Feb. 5, 2016: Washington, D.C.)

[19]GAO, *Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody,* GAO-15-521 (Washington, D.C.: July 14, 2015) and GAO-16-180.

[20]See 8 U.S.C. § 1232(b).

child, with available space, and DHS generally transports the children to the ORR shelter.[21]

Figure 1: Transfer, Care, and Release of Unaccompanied Alien Children in Federal Custody



Sources: GAO analysis of DHS and ORR documents and interviews of officials from these agencies as previously shown in GAO-16-180. | GAO-19-163

[a]Voluntary return refers to (1) the process by which DHS evaluates the eligibility of a UAC from a contiguous country to withdraw his or her application for admission to the United States pursuant to section 8 U.S.C. § 1232(a)(2), or (2) in the case of UAC from non-contiguous countries, an immigration judge allowing an arriving alien to withdraw an application for admission during removal proceedings where certain requirements are met; followed, in both scenarios, by the unaccompanied child's decision to voluntarily withdraw and their return to home country.

[b]Immigration relief refers to various forms of relief or protection from removal that may be available to the children. There are several types of immigration relief that may be available to these children; for example, asylum or Special Immigrant Juvenile status.

According to ORR's UAC policy guide, the agency requests certain information from DHS when DHS refers children to ORR, including, for

[21]Office of Refugee Resettlement, *ORR Guide: Children Entering the United States Unaccompanied,* accessed August 23, 2018, *https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied.* ICE's Enforcement and Removal Operations provides long-distance travel for UAC within the United States via commercial airlines, charter aircraft, or bus. In some areas, CBP transports UAC to shelters that are within the local commuting area.

example, how DHS determined the child was unaccompanied.[22] Depending on which DHS component or office is referring the child to ORR, DHS may provide information on the child in an automated manner directly into ORR's UAC Portal—the official system of record for children in ORR's care—or via email.[23] As of August 2018, not all DHS offices were entering information directly into ORR's UAC Portal. In cases in which the information is sent via email, the ORR Intakes Team must manually enter it into the UAC Portal.[24]

Once at the shelter, shelter staff typically conduct an intake assessment of the child within 24 hours, and then are to provide services such as health care and education.[25] According to the policy guide, shelter staff are responsible for meeting with the child to begin identifying potential sponsors, which can include parents. Shelter staff ask the child to provide names and phone numbers of potential sponsors, where available.

To identify and assess the suitability of potential sponsors, including parents, ORR care providers collect information from potential sponsors to establish and identify their relationship to the child.[26] As we reported in 2016, the process begins during intake when staff ask children if there is

[22]Other information that ORR requests from DHS includes: biographical information such as name, gender, and date of birth; health information; identifying information and contact information for a parent, legal guardian, or other related adult providing care for the child prior to apprehension, if known. ORR also requests information concerning whether the child or youth is a victim of trafficking or other crimes; the child or youth was apprehended with siblings or other relatives; the child or youth is an escape risk; the child or youth has a history of violence, juvenile or criminal background, gang involvement, or is a danger to themselves or others; and, any special needs or other information that would affect care and placement for the child.

[23]CBP officials also told us that its officials included biographical information and details regarding the apprehension of the alien, in packets provided to ORR when UAC are transferred to ORR custody.

[24]The ORR Intakes Team is made up of ORR headquarter staff who receive referrals of UAC from federal agencies and make the initial placement of these children in ORR facilities.

[25]As previously discussed, ORR has cooperative agreements with residential care providers. For the purposes of this report, we refer to the staff of these providers as "shelter staff" or "care providers." By contrast, we refer to federal ORR officials as "ORR officials," "ORR staff," or "ORR field staff."

[26]According to an HHS official, ORR's process for placing UAC with sponsors is designed to comply with the 1997 Flores Agreement, the Homeland Security Act of 2002, and TVPRA.

someone in the United States they know or were planning to live with.[27] Potential sponsors must complete a family reunification application, which includes basic questions about the sponsor and child and their relationship to each other, as well as questions about where the family will live, who else lives at the address, who will care for the child if the sponsor is no longer able to do so, and the sponsor's financial information, among others. As part of the application, the potential sponsor must also provide other documents such as a sponsor care agreement that outlines the sponsor's responsibilities such as providing for the child's physical and mental well-being, education, medical care, and ensuring the child attends future immigration related hearings. Potential sponsors must also provide proof of identity, proof of address, and other documents and agree to be screened. The screening conducted on potential sponsors includes various background checks and the level of the background check depends on the relationship of the sponsor to the child. For example, public record checks are conducted on all potential sponsors. All potential sponsors who are not parents also receive a criminal history check through the Federal Bureau of Investigations database based on digital fingerprints; however, in certain cases, parents also receive this same check.[28] Similarly, immigration status checks and child abuse and neglect checks are conducted depending on the sponsor's relationship to the child and whether there are documented risks to the child.

In June 2018, ORR implemented increased background check requirements that were outlined in an April 2018 memorandum of agreement with DHS. These changes require ORR staff to collect fingerprints from all potential sponsors, including parents, and all adults in the potential sponsor's household. According to the April 2018 agreement between ORR and DHS, ORR is to transmit fingerprints of potential sponsors and others, as appropriate, to ICE to perform criminal and immigration status checks on ORR's behalf. ICE is to submit the results to

[27] GAO-16-180. According to ORR's UAC policy guide, if a child is either too young or there are other factors that prohibit the care provider from obtaining potential sponsor information from the unaccompanied alien child, the care provider may seek assistance from the child's home country consulate in collaboration with the ORR Federal Field Specialist or from a reputable family tracing organization.

[28] These cases included where there was a documented risk to the safety of the unaccompanied child, the child was especially vulnerable, and/or the case was being referred for a mandatory home study.

ORR, and ORR uses this information, along with information provided by, and interviews with, the potential sponsors, to assess their suitability.[29]

After reviewing results of all of the background checks, care providers make recommendations for release, which ORR officials approve or disapprove, according to ORR's UAC policy guide.[30] Sponsors are to sign a sponsor care agreement that acknowledges their responsibilities, including providing for the safety and education of the child and agreeing to ensure they appear at all immigration court hearings. ORR policy requires that home studies be conducted under certain circumstances, such as when releasing a child to a non-relative who is seeking to sponsor multiple children, and home studies may be recommended prior to placement in any case in which there are questions about the ability of the sponsor to meet the child's needs and provide a safe environment. The TVPRA also requires home studies be conducted for certain children, such as special needs children or children who are victims of a severe form of trafficking in persons.[31]

Timeline of Key Actions

Since 2017, there have been several key actions related to DOJ's prioritization of immigration offenses for criminal prosecution, DHS's referral of individuals apprehended along the border to DOJ for criminal prosecution, and court orders affecting separated parents and children. The textbox below provides information on some of these key actions.

[29]ORR continues to conduct the additional background checks, such as the child abuse and neglect checks as part of its screening process.

[30]In addition to the information ORR receives from shelter staff, a third party contractor also reviews the case and provides input to ORR regarding release decisions.

[31]Pursuant to the TVPRA, a home study is required to be conducted for (1) a child who is a victim of a severe form of trafficking in persons (as that term is defined by statute); (2) a special needs child with a disability; (3) a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, and (4) a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence. 8 U.S.C. § 1232(c)(3)(B).

Key Actions Related to Prioritization of Immigration Offenses for Criminal Prosecution and Separation of Parents and Children Apprehended at the Border

- **April 11, 2017**: Attorney General directs federal prosecutors along the southwest border to prioritize prosecutions of immigration-related offenses.
- **March 9, 2018:** The American Civil Liberties Union files an amended complaint in federal court on behalf of a class of alien parents who have been separated from their children by the government and whose children are detained in Office of Refugee Resettlement custody, asking the court to prohibit separation and require reunification of class members with their children.
- **April 6, 2018**: Attorney General directs federal prosecutors along the southwest border to adopt a "zero-tolerance policy" for improper entry immigration-related offenses.
- **April 6, 2018:** President Trump issues a memorandum titled 'Ending "Catch and Release" at the Border of the United States and Directing Other Enhancements to Immigration Enforcement.'
- **May 4, 2018:** The Secretary of Homeland Security approves prosecuting all adults apprehended crossing the border illegally, including those apprehended with minors, at the recommendation of leaders from three Department of Homeland Security (DHS) agencies.
- **June 20, 2018:** President Trump signed Executive Order 13841 directing DHS to maintain custody of alien families during any criminal improper entry or immigration proceedings involving their members, to the extent possible.
- **June 26, 2018:** A federal court order prohibits the government from detaining class members in DHS custody apart from their minor children and orders the government to reunite class members with their children, absent a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunified with the child.
- **June 27, 2018:** According to U.S. Customs and Border Protection (CBP) officials, CBP issued guidance halting referrals of parents who enter the country illegally as part of a family unit to the Department of Justice for "zero-tolerance" prosecutions and outlines the situations in which children and parents may still be separated.[a]
- **July 10, 2018:** Court-ordered deadline for the reunification of class members and children aged 0-4.
- **July 26, 2018:** Court-ordered deadline for the reunification of class members and children aged 5-17.

Source: GAO analysis of Department of Justice memos, Executive Order 13841, and federal court documents from *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. Aug. 23, 2018). | GAO-19-163

[a]CBP officials stated that a parent may still be separated from his or her child in certain circumstances, such as if the parent has a criminal history or communicable disease, or if the parent is unfit or presents a danger to the child.

DHS and HHS Planning for Family Separations

According to DHS and HHS officials we interviewed, the departments did not take specific steps in advance of the April 2018 memo to plan for the separation of parents and children or potential increase in the number of children who would be referred to ORR. DHS and HHS officials told us that the agencies did not take specific planning steps because they did not have advance notice of the Attorney General's April 2018 memo. Specifically, CBP, ICE, and ORR officials we interviewed stated that they became aware of the April 2018 memo when it was announced publicly.

Though they did not receive advance notice of the April 2018 memo, ORR officials stated that they were aware that increased separations of parents and children were occurring prior to the April 2018 memo, and

one Border Patrol sector[32] launched an initiative aimed at addressing increasing apprehensions of families in that sector.[33]

Specifically, during 2017, ORR officials noted an increase in the percentage of children in ORR's care who were separated from their parents, and ORR officials stated that they discussed this trend with DHS officials in November 2017. Specifically, according to ORR officials, the percentage of children referred to ORR who were known to be separated from their parents rose by more than a tenfold increase, from 0.3 percent in November 2016 to 2.6 percent by March 2017, and then to 3.6 percent by August 2017. In addition, the ORR shelter and field staff we interviewed at four ORR facilities in Arizona and Texas told us they started noticing an increase in the number of children separated from their parents in late 2017 and early 2018, prior to the introduction of the April 2018 memo. The DHS officials we interviewed stated that, in some locations across the southwest border, there was an increase in the number of aliens CBP referred to DOJ for prosecution of immigration-related offenses after the Attorney General's April 2017 memo[34], and CBP officials we interviewed stated that historically some separations have always occurred if a parent is referred for criminal prosecution. In addition, CBP officials stated that there may have been an increase in children separated from non-parent relatives or other adults fraudulently posing as the child's parents.[35]

[32]Border Patrol divides responsibility for border security operations geographically among sectors.

[33]As noted previously, Border Patrol officials stated that some family separations not related to prosecutions of violations of 8 U.S.C. § 1325(a) have always occurred, such as in cases in which the parent could be a threat to the health and safety of the child or the adult may not be the child's parent. Depending on the circumstances of the case, some parents and children may be reunited prior to leaving DHS custody, or the child could be transferred to ORR's care.

[34]As noted previously in this report, in April 2017, the Attorney General issued a memorandum prioritizing enforcement of a number of criminal immigration-related offenses, including misdemeanor improper entry. Historically, parents referred for prosecution were placed into U.S. Marshals Service custody and separated from their children because minors cannot remain with a parent who is arrested on criminal charges and detained by U.S. Marshals Service.

[35]In June 2018, DHS issued a press release noting an increase in the number of aliens using children to pose as family units to gain entry into the United States in 2017 and 2018. CBP officials we interviewed reported that, since 2017, Border Patrol agents and CBP officers have been focusing increased attention on the documents used to support the relationship of the parent and child.

According to ORR officials, in November 2017, ORR officials asked DHS officials to provide information about the increase. In response, DHS officials stated that DHS did not have an official policy to separate families, according to ORR officials. A few months prior to April 2018 memo, ORR officials said they saw a continued increase in separated children in their care. ORR officials noted that they considered planning for continued increases in separated children, but HHS leadership advised ORR not to engage in such planning since DHS officials told them that DHS did not have an official policy of separating parents and children.

From July to November 2017, one Border Patrol sector on the U.S. southwest border conducted an initiative to address an increase in apprehensions of families that sector officials had noted in early fiscal year 2017. Specifically, Border Patrol officials in the El Paso, Texas, sector reached an agreement with the District of New Mexico U.S. Attorney's Office to refer more individuals who had been apprehended, including parents who arrived with minor children, for criminal prosecution. Prior to this initiative, the U.S. Attorney's Office in this district had placed limits on the number of referrals it would accept from Border Patrol for prosecution of immigration offenses.[36] According to Border Patrol officials, under this initiative, the U.S. Attorney's Office agreed to accept all referrals from Border Patrol in the El Paso sector for individuals with violations of 8 U.S.C. § 1325 (improper entry by alien) and § 1326 (reentry of removed aliens), consistent with the Attorney General's 2017 memo directing federal prosecutors to prioritize such prosecutions.[37] For those parents placed into criminal custody, Border Patrol referred their children to ORR's care as UAC. According to a Border Patrol report on the initiative, the El Paso sector processed approximately 1,800

[36]According to a November 2017 Border Patrol memo, on July 6, 2017, the District of New Mexico, Acting United States Attorney removed all restrictions imposed on referrals from Border Patrol's El Paso Sector, which had previously been limited to 25 referrals for 8 U.S.C. § 1325 misdemeanor cases per month and 150 referrals for 8 U.S.C. § 1326(a)(1) felony cases per month.

[37]According to Border Patrol, all individuals apprehended, referred, and accepted for prosecution were generally prosecuted for criminal immigration violations such as improper entry by alien (8 U.S.C. § 1325), illegal reentry of removed aliens (8 U.S.C. § 1326). According to a DHS press release issued on June 15, 2018, parents prosecuted for illegal entry were transferred to DOJ custody for criminal proceedings, then subsequently transferred to ICE for immigration proceedings. The press release states that any individual subject to removal from the United States may seek asylum or other protections available under the law, including children who, depending on the circumstances, may undergo separate immigration proceedings.

individuals in families and 281 individuals in families were separated under this initiative. Border Patrol headquarters directed the sector to end this initiative in November 2017, and Border Patrol officials stated that there were no other similar local initiatives that occurred prior to the Attorney General's 2018 memo.

In an April 23, 2018, memo, CBP's Commissioner, U.S. Citizenship and Immigration Services' Director, and ICE's then-Acting Director sought guidance from the Secretary of Homeland Security regarding various approaches for implementing DOJ's April 2018 memo. In the April 23 memo, these officials recommended that DHS refer all adults who are apprehended between ports of entry to DOJ for prosecution for violations of 8 U.S.C. § 1325(a), including those arriving with minor children. The Secretary of Homeland Security approved the recommended approach on May 4, 2018, and on May 11, 2018 issued a memo directing DHS law enforcement officers at the U.S. southwest border to refer to DOJ for criminal prosecution all such individuals to the extent practicable.

Although ORR officials told us that they had not received advanced notice of the April 2018 memo, ORR field and shelter staff stated they made changes to daily operations as a result of the increased number of separated children being transferred to their care.[38] For example:

- HHS officials reported that their coordination calls with ORR field staff increased over time with daily calls starting in July 2018. ORR field staff also increased their coordination with ICE's Field Office Juvenile Coordinators to obtain information about the parents of separated children.[39]
- Staff in the two shelters we visited in Arizona told us that they modified their space to accommodate an increase in younger children. For example, the shelters converted space previously used for classrooms for older children to be space for children under age 5, with one shelter adding cribs, smaller tables and chairs, and toys appropriate for younger children. One shelter also provided additional training to staff to adequately care for the increased number of children under age 12. In past years, the majority of children in ORR

[38]According to HHS officials, ORR continually monitors its internal bed capacity for UAC as demand for bed capacity fluctuates seasonally and at times in unpredictable ways.

[39]ICE's Field Office Juvenile Coordinators are responsible for coordinating the placement of UAC with ORR.

care have been 13 to 17 years old, according to ORR data.[40] For example, ORR reported that in fiscal years 2015, 2016, and 2017, 82 percent of unaccompanied children in its care were ages 13 to 17.

DHS and HHS Systems for Indicating When Children Were Separated from Parents

Prior to the Attorney General's April 2018 memo, DHS and HHS data systems did not systematically collect and maintain information to indicate when a child was separated from his or her parents, and ORR officials stated that such information was not always provided when children were transferred from DHS to HHS custody. Specifically, prior to April 2018, CBP's and ORR's data systems did not include a designated field to indicate that a child was unaccompanied as a result of being separated from his or her parent.[41] According to agency officials, between April and August 2018, the agencies made changes to their data systems to help notate in their records when children are separated from parents.[42]

Regarding DHS, CBP agencies Border Patrol and OFO made changes to their data systems to allow them to better indicate cases in which children were separated from their parents; however, ORR officials stated, as of early September 2018, they were unaware that DHS made these systems changes.[43]

- Border Patrol's data system automatically populates a referral form from the information agents entered into their data system, which agents then send to ORR when referring an unaccompanied child.[44]

[40]Office of Refugee Resettlement, *ORR Facts and Data,* accessed August 22, 2018, *https://www.acf.hhs.gov/orr/about/ucs/facts-and-data*.

[41]ORR officials told us that this information might be recorded in various text box fields in the UAC Portal, but that there was no specific, searchable field specifically for this information.

[42]Throughout the remainder of this report, we use "unaccompanied children" rather than UAC, because this is the term used by HHS.

[43]DHS and ORR officials told us that DHS components provide information on children referred to ORR through various mechanisms such as via email to ORR's Intakes Team or by entering the information into the ORR's UAC Portal directly. According to ORR officials, Border Patrol can automatically push referral data into the UAC Portal; ICE ERO has access to enter data directly into the Portal and should include information about separation in its referral notes; and OFO generally submits referrals via email and the ORR Intakes Team enters the information into the Portal.

[44]According to Border Patrol officials, ORR's UAC Portal automatically uploaded the information transmitted by Border Patrol upon receipt. The Border Patrol referral form includes information such as a parent's name, phone number, and address, if known.

According to Border Patrol officials, Border Patrol modified its system on April 19, 2018, to include yes/no check boxes to allow agents to indicate that a child was separated from their parent(s).[45] Prior to this system modification, Border Patrol agents typically categorized a separated child as an unaccompanied child in its system, but did not include information to indicate the child had been separated from a parent. However, Border Patrol officials told us that information on whether a child had been separated is not automatically included in the referral form sent to ORR. Rather, agents may indicate a separation in the referral notes sent electronically to ORR, but they are not required to do so, according to Border Patrol officials. Therefore, while the changes to the system may make it easier for Border Patrol to identify children separated from their parents, ORR officials stated ORR may not receive information through this mechanism to help it identify or track separated children.

- CBP's OFO, which encounters families presenting themselves at ports of entry, also modified its data system[46] and issued guidance to its officers on June 29, 2018, to track children separated from their parents.[47] According to OFO officials, prior to that time, OFO designated children separated from their parents as unaccompanied. As of August 2018, OFO officials stated that while OFO has access to the UAC Portal, not all field staff input referrals directly in the UAC Portal. Rather, OFO officials typically email the referral request to ORR. OFO officials stated they have taken a phased approach to training OFO officers on the UAC Portal, and that they have ongoing efforts to ensure OFO officers make referrals to ORR directly in the UAC Portal.

Regarding HHS, ORR made changes to the UAC Portal for indicating that a child was separated from his or her parents.

[45]Border Patrol maintains the E3 data system, which Border Patrol agents use to transmit and store data collected when processing and identifying individuals apprehended at the border, including children who are unaccompanied due to separation from a parent.

[46]OFO uses the Secure Integrated Government Mainframe Access system to collect information about individuals in its custody.

[47]Families presenting themselves at ports of entry would typically not be in violation 8 U.S.C. § 1325(a), which establishes criminal penalties for improper entry into the United States. Rather, OFO officials stated that, both before and after the April 2018 memo, they separated parents and children due to circumstances such as a parent's criminal history or if the parent presents a potential danger to the child.

- ORR updated the UAC Portal to include a check box to indicate a child was separated from a parent. According to ORR officials, ORR made these changes on July 6, 2018, after the June 20 executive order and June 2018 court order to reunify families. According to ORR officials, prior to July 6, 2018, the UAC Portal did not have a systematic way to indicate whether a child was designated as unaccompanied as a result of being separated from a parent at the border. The updates allow those Border Patrol agents with direct access to the UAC Portal to check this box if a child was separated from a parent.[48]

Border Patrol issued guidance on July 5, 2018, directing its agents to use the new indicator for separated children in the UAC Portal and provide the parent's alien number in the UAC Portal when making referrals to ORR as of July 6, 2018. Border Patrol officials told us that agents began adding that information at that time. However, ORR officials also said that DHS components with access to the UAC Portal are not yet utilizing the new check box consistently and the ORR Intakes Team completes the box based on information in DHS's referral email, if DHS has not entered the information. Furthermore, staff at two ORR shelters we visited were not aware of these changes to the UAC Portal.

ORR officials stated that the amount of information provided by DHS about a child's separation from his or her parents varied from child to child. CBP officials stated that, in addition to the referral, Border Patrol agents and CBP officers provide packets of information to ORR when unaccompanied children are transferred to ORR custody that includes information about separation from a parent; however, ORR officials told us that ORR rarely receives some of the forms in the packets to which

[48]Border Patrol officials told us that most Border Patrol agents do not have access to ORR's UAC Portal, but that Border Patrol's Juvenile Coordinators do and they are responsible for entering this information directly into the Portal.

CBP officials referred. In addition, the forms themselves do not contain specific fields to indicate such a separation.[49]

Staff at three of the four shelters we visited in Arizona and Texas said that in most, but not all cases during the spring of 2018 DHS indicated in the custody transfer information that a child had been separated. For example, staff at one shelter said that, in most cases, custody transfer information it received from DHS for children separated from their parents indicated that separation, but estimated that for approximately 5 percent of the separated children in its care there was no information from DHS indicating parental separation. In these cases, shelter staff said they learned about the separation from the child during the shelter's intake assessment. Staff at the same shelter, which cares for children ages 0 to 4, noted that intake assessments for younger children are different from intake for older children, as younger children are unable to provide detailed information on such issues as parental separation. According to staff at three shelters we visited, if staff learned that any child was separated from a parent at the border and it was not already recorded by DHS, they completed a significant incident report. The significant incident report is uploaded to the UAC Portal and routed to ORR field staff so that they are aware that the shelter has a separated child in its care.

We have previously identified weaknesses in DHS and HHS's process for the referral of unaccompanied children. In 2015, we reported that the interagency process to refer and transfer unaccompanied children from DHS to HHS was inefficient and vulnerable to errors because it relied on emails and manual data entry, and documented standard procedures, including defined roles and responsibilities, did not exist.[50] As we reported, best practices of high-performing organizations include, among

[49]Specifically, the CBP officials said the packets may have included, among other forms, Form I-213, Record of Deportable/Inadmissible Alien. The Form I-213 documents an alien's biographical information, such as the alien's and parents' names, nationality, and contact information, if known; details regarding the apprehension of the alien; and key information Border Patrol agents and OFO officers learned while interviewing the alien. CBP officials reported that prior to May 5, 2018, the Form I-213 was provided to ORR on a case-by-case basis and CBP did not require agents to include this form in its transfer packet. However, in the weeks after the April 2018 memo, CBP heard from HHS and other DHS offices that the lack of a Form I-213 was, in some cases, an impediment to reunification. Border Patrol issued reminders to include this form in the transfer packet to its agents on May 31 and June 14, 2018 and OFO did the same on June 22, 2018, according to CBP officials.

[50]GAO-15-521.

other things, ensuring the compatibility of the standards, policies, procedures, and data systems to be used.[51] To increase the efficiency and improve the accuracy of the interagency unaccompanied children referral and placement process, we recommended that the Secretaries of DHS and HHS 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 unaccompanied children in HHS shelters. In response, DHS and HHS agreed to establish a joint collaborative process for the referral and transfer of unaccompanied children from DHS to ORR shelters.

As noted, beginning in April 2018, Border Patrol, OFO, and ORR have made updates to their data systems to better identify children who are unaccompanied as a result of being separated from parents at the border. However, it is too soon to know the extent to which these changes, if fully implemented, will consistently indicate when children have been separated from their parents, or will help reunify families, if appropriate. Furthermore, while these data system updates are a positive step, they do not fully address the broader coordination issues we identified in our previous work. In addition, officials from DHS's Office of Strategy, Policy, and Plans told us that DHS delivered a Joint Concept of Operations between DHS and HHS to Congress on July 31, 2018, which provides field guidance on interagency policies, procedures, and guidelines related to the processing of unaccompanied children transferred from DHS to HHS. DHS submitted the Joint Concept of Operations to us on September 26, 2018, in response to our recommendation. We are reviewing the extent to which the Joint Concept of Operations includes 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 unaccompanied children, including those separated from parents at the border, in HHS shelters. Moreover, to fully address our recommendation, DHS and HHS should implement such interagency processes.

[51]GAO, *Results-Oriented Government: Practices That Can Help Enhance and Sustain Collaboration among Federal Agencies*, GAO-06-15 (Washington, D.C.: October 2005).

DHS and HHS Actions to Reunify Families in Response to the June 2018 Court Order

DHS and HHS took various actions in response to the June 26, 2018, court order to identify and reunify children separated from their parents. As previously discussed, the June 2018 court order required the government to reunite class member parents with their children under 5 years of age within 14 days of the order, and for children age 5 and over, within 30 days of the order.[52] The actions taken by DHS and HHS included (1) identifying the children and their parents to be reunited per the court order and (2) developing and implementing plans for reunifying children with parents in ICE custody and parents no longer in ICE custody. HHS officials told us that there were no specific procedures to reunite children with parents from whom they were separated at the border prior to the June 2018 court order. Rather, the agency used its standard processes and procedures, developed to comply with the TVPRA, to consider potential sponsors for unaccompanied children in their custody; if a parent was available to become a sponsor, reunification with that parent was a possible outcome.[53]

DHS and HHS Efforts to Identify Potential Class Members. To create the list of potential class members (that is, those parents of a separated child covered under the lawsuit) eligible for reunification per the June 2018 court order, DHS and HHS officials told us that they generated the list based on children who were in DHS or HHS custody on that date. According to officials, this process was used because the class certification order limits membership to adult parents who have been or will be detained in immigration custody and who have a minor child who

[52] *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting preliminary injunction). The court certified the following class: "All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child." *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting in part plaintiffs' motion for class certification)." In that order, the court also noted that the class "does not include migrant parents with criminal history or communicable disease, or those who are in the interior of the United States or subject to the [June 20 executive order]."

[53] As noted previously, on June 20, 2018, President Trump issued Executive Order 13841, which stated that "[i]t is the policy of this Administration to rigorously enforce our immigration laws…It is also the policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources." The executive order directed DHS to maintain custody of alien families during any criminal improper entry or immigration proceedings involving their members, to the extent possible.

"is detained in ORR custody, ORR foster care, or DHS custody."[54] As a result, DHS and HHS officials told us that a parent of a separated child would only be a class member if his or her child was detained in DHS or HHS custody on June 26, 2018. After developing the class list, DHS and HHS officials told us that they next determined whether class members were eligible for reunification. In accordance with the June 2018 court order, a class member could be determined ineligible for reunification if it was determined that the parent was unfit or presented a danger to the child.[55] According to the June 2018 court order, "fitness" is an important factor in determining whether to separate parent from child and, in this context, could include "a class member's mental health, or potential criminal involvement in matters other than 'improper entry' under 8 U.S.C. § 1325(a), among other matters."[56]

Parents of children who were separated at the border but whose children were released by ORR to sponsors prior to the June 2018 court order were not considered class members, and according to HHS officials, the department was not obligated to reunite them with the parent or parents from whom they were separated. Further, HHS officials told us that they do not know how many such children separated from parents at the border were released to sponsors prior to the order and that the court order does not require the department to know this information. HHS officials stated that HHS policy has been that once ORR releases a minor to a sponsor, HHS's custodial relationship to that minor ends. Anecdotally, ORR field staff in Texas and staff at the two shelters we visited in Arizona said they had released children separated from parents

[54] *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting preliminary injunction). In addition to ORR shelters, children in ORR custody may also be placed in ORR foster care. There are different types of ORR foster care placements, depending on the circumstances, including transitional (short-term) foster care, long-term foster care, and therapeutic foster care. ORR's system for foster care placements is separate from state-run child welfare and foster care systems. See GAO-16-180 for more information.

[55] *Id.*; *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting in part plaintiffs' motion for class certification).

[56] *Id.* The court certified the following class: "All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child." In that order, the court also noted that the class "does not include migrant parents with criminal history or communicable disease, or those who are in the interior of the United States or subject to the [June 20 executive order]."

during the spring of 2018 to sponsors prior to the court order through their standard procedures for releasing children to sponsors. Staff at one shelter said they had released a few children to a grandparent, aunt, and uncle during that time period.

Because there was no single database with easily extractable, reliable information on family separations, HHS officials reported using three methods to determine which children in ORR's custody as of June 26, 2018, had been separated from parents at the border:

1. **Data Reviewed by an Interagency Data Team.** An interagency team of data scientists and analysts—led by HHS's Office of the Assistant Secretary for Preparedness and Response with participation from CBP, ICE, and ORR—used data provided by DHS and HHS, as well as other information on separated children provided by ORR field and shelter staff, to identify the locations of separated children and parents, according to HHS officials.[57] Specifically, agency officials told us the team compared records in multiple data sets, most notably ICE's Enforcement Integrated Database, which has information on adults apprehended at the border, and HHS's UAC portal, which has information on unaccompanied children, including children separated from their parents at the border.[58] Team members told us their goal was to identify patterns that could connect adults and children with records in the different datasets. According to officials, one example of a pattern officials identified that could indicate a possible separation was if an adult and child with the same last name were detained in the same location at the same time. Officials told us that ORR headquarters, field, and shelter staff provided manually tracked lists of children and parents that were possibly separated, and that they used those lists to supplement their review of the data. They told us that if there were discrepancies among data points, for example, if a piece of data was missing, they would work with agency personnel to resolve the conflict.

[57]HHS officials said the Interagency Data Team was initially formed after the June 20, 2018 executive order, but shifted its focus to respond to the June 26, 2018, court order.

[58]The Enforcement Integrated Database is a shared common database repository for several DHS law enforcement and homeland security applications. The database captures and maintains information related to the investigation, arrest, booking, detention, and removal of persons encountered during immigration and criminal law enforcement investigations and operations conducted by certain DHS components.

2. **Case File Review.** In response to the June 2018 court order, HHS reported that staff reviewed about 12,000 electronic case files of all children in its care as of June 26, 2018. HHS officials told us that for about 4 days, more than 100 HHS staff from across the agency—including ORR and the Public Health Service—reviewed electronic case files in ORR's UAC Portal. According to ORR officials, staff members conducting case file reviews were provided verbal training and a point of contact for questions, but there were no written training materials. The training instructed staff to look for indications of separation in specific UAC Portal sections of each child's case file. According to HHS officials, HHS staff were instructed to look for words such as "zero tolerance," "separated from [parent/mother/father/legal guardian]," and "family separation." Also, HHS staff were instructed to examine an intake question that specifically asks children "who did you travel with?" and a field that asks children to describe their parent's current whereabouts. HHS officials said if any of the case file materials contained indications of family separation, then staff flagged the case, and it was further investigated by other ORR staff.

   ORR field staff in Texas (who participated in the manual case file review) confirmed that they were instructed to review UAC Portal information. First, they looked to see if DHS identified the child as separated. If not, they reviewed intake information, significant incident reports, and case notes for indications of separation. The field staff said that because of their familiarity with the UAC Portal, they could look for indications of separation fairly quickly. However, for HHS staff not familiar with the UAC Portal, the review likely required more searching, according to the field staff. The field staff added that the UAC Portal does not allow for keyword searches so if the information was in a significant incident report or case note, staff would have to read through the notes or significant incident report to find the information.

3. **Review of Information Provided by Shelters.** According to HHS officials, shelter staff were asked to provide lists of children in their care who were known to be separated from parents based on the shelter's records. As previously noted, shelters may know that a child is separated if (1) that information is included in the UAC Portal at the time the child is placed or (2) the child tells shelter staff that he or she was separated from their parent at the border. Staff in the four shelters we visited told us that they provided information to ORR on children the shelters identified as potentially having been separated from their parents. There was a lot of back and forth with ORR headquarters to confirm which children were separated, according to

staff at two shelters. In addition, HHS officials and staff at two shelters said that during this process, shelter staff were required to certify the number of separated children in their care.

On the basis of its reviews, as of September 10, 2018, the government had identified 2,654 children of potential class members in the *Ms. L. v. ICE* case.[59] Of the 2,654 children, 103 were age 0 to 4 and 2,551 were age 5 to 17.[60] As described above, the number of children of potential class members does not include all children who were separated from parents at the border by DHS. For example, the 2,654 count of children does not include those who were separated from parents but released to sponsors prior to the June 2018 court order. This number also does not include more than 500 children who were reunified with parents by CBP in late June 2018 because these children were never transferred to ORR custody.[61] As of September 10, 2018, 2,217 of the 2,654 identified children had been released from ORR custody, according to a joint status report filed in the *Ms. L. v. ICE* case (see table 1).[62] About 90 percent of the released children were reunited with the parent from whom they were separated and the remaining children were released under other circumstances, such as to another suitable sponsor.

[59] *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. Sept. 13, 2018) (joint status report). According to the status report, filed September 13, 2018, the data presented reflects approximate numbers maintained by ORR as of at least September 10, 2018. We did not independently verify the accuracy of these data. For the purposes of this report, we use the term "government" to refer to the defendants in the *Ms. L. v. ICE* case.

[60] Children were grouped into two groups by age (0-4 years old and 5-17 years old), because the June 2018 court order required HHS to reunify children ages 0-4 years old before reunifying children ages 5-17 years old.

[61] According to CBP, following issuance of the June 20, 2018, executive order (directing DHS to maintain custody of alien families during any criminal improper entry or immigration proceedings involving their members, to the extent possible), the agency began reunifying children in its custody with parents, and by June 23, 2018, the agency had completed reunification of 522 children with parents. CBP officials also reported that the agency had reunified children and parents in its custody after the April 2018 memo and before the June executive order. According to officials, these reunifications occurred when parents completed court proceedings and returned to Border Patrol stations where children were still located because HHS had not yet been able to place them.

[62] *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. Sept. 13, 2018) (joint status report). According to the status report, the data presented reflects approximate numbers maintained by ORR as of at least September 10, 2018.

Table 1: Number of Children Separated from Potential Class Member Parents at the Border and Number Who Had Been Reunified in Response to the June 26, 2018 Court Order (as of September 10, 2018)

	Children age 0 to 4	Children age 5 to 17	Total children
Number of children separated from class member parents[a]	103	2,551	**2,654**
Number of children reunified with separated parent	72	1,913	**1,985**
Number of children released from Office of Refugee Resettlement (ORR) custody under other circumstances[b]	12	220	**232**
Number of children that remain in ORR custody, as of September 10, 2018[c]	19	418	**437**

Source: *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. Sept. 13, 2018) (joint status report). | GAO-19-163

Note: The "June 26, 2018 court order" refers to the order in the *Ms. L. v. ICE* class action lawsuit that required the government to reunite class member parents with their children under 5 years of age within 14 days of the order, and for children age 5 and over, within 30 days of the order, absent a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunified with the child. *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting preliminary injunction). We did not independently verify the accuracy of these data. According to the September 13, 2018 status report, the data presented reflects approximate numbers maintained by ORR as of at least September 10, 2018.

[a]Children separated from class member parents represents the total number of possibly separated children of potential class member parents originally identified by the government as being subject to the court order in the *Ms. L. v. ICE* case.

[b]Children released from ORR under other circumstances include discharges to other sponsors and children who turned age 18.

[c]According to the September 13, 2018 joint status report, this category includes children remaining in ORR care where the parent is in the class but not eligible for reunification or is not available for discharge at this time, including cases in which the parent is presently outside the United States; the parent is in other federal, state, or local custody; or there is an ongoing case review of a "red flag" related to safety and well-being. This category also includes cases in which the parent is not in the class, including cases in which: further review shows the child was not separated from parents by the Department of Homeland Security; a final determination has been made that the child cannot be reunified because the parent is unfit or presents a danger to the child; the parent is presently departed from the United States and the parent's intent not to be reunified has been confirmed by the American Civil Liberties Union; or the parent is in the United States and has indicated an intent not to reunify.

Plan for Reunifying Children with Class Member Parents Within and Outside ICE's Custody. The process used to reunify separated children with their class member parents in the *Ms. L. v. ICE* case evolved over time based on multiple court hearings and orders, according to HHS officials. After the June 2018 court order, HHS officials said the agency planned to reunify children using a process similar to their standard procedures for placing unaccompanied children with sponsors. However, according to agency officials, the agency realized that it would be difficult to meet the court's reunification deadlines using its standard procedures and began developing a process for court approval that would expedite reunification for class members. As a result, from June 26, 2018 to July

10, 2018, the reunification process was refined and evolved iteratively based on court status conferences, according to HHS officials. ORR field and shelter staff we interviewed noted the impact of the continually changing reunification process; for example, staff at one shelter told us there were times when she would be following one process in the morning but a different one in the afternoon.

On July 10, 2018, the court approved reunification procedures for the class members covered by the June 2018 court order.[63] In the July 10, 2018 order that outlined these procedures, the court noted that the standard procedures developed by ORR pursuant to the TVPRA were meant to address "a different situation, namely, what to do with alien children who were apprehended without their parents at the border or otherwise" and that the agency's standard procedures were not meant to apply to the situation presented in this case, which involves parents and children who were apprehended together and then separated by government officials.[64] The reunification procedures approved in the *Ms. L. v. ICE* case apply only to reunification of class members with their children and included the following general steps: (1) determining parentage and (2) determining whether the parent is fit to take care of the child or presents any danger to the child. Specifically:

1. **Determining Parentage.** Before July 10, 2018, to determine parentage for children ages 0 to 4, HHS officials said they initially used DNA swab testing instead of requiring documentation, such as birth certificates, stating that DNA swab testing was a prompt and efficient method for determining biological parentage in a significant number of cases. HHS officials told us that there were occasions in which they interacted with an individual claiming to be a parent who withdrew their claim of parentage when they learned they would be required to submit DNA. On July 10, 2018, the court approved the use

[63]See *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. July 10, 2018) (order following status conference); see also Ms. *L. v. ICE,* No. 18-0428 (S.D. Cal. July 13, 2018) (defendants' status report regarding plan for compliance and order following status conference); *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. July 15, 2018) (notice from defendants).

[64] See *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. July 10, 2018) (order following status conference). As previously discussed, the June 2018 court order required the government to reunite class member parents with their children under 5 years of age within 14 days of the order, and for children age 5 and over, within 30 days of the order, absent a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child. *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting preliminary injunction).

of DNA testing "only when necessary to verify a legitimate, good-faith concern about parentage or to meet a reunification deadline."[65] HHS officials told us that at that point, to determine parentage, ORR relied on the determinations made by DHS when the family was separated and information ORR shelter staff had already collected through assessments of the children in their care. Unless there were specific doubts about the relationship, ORR did not collect additional information or DNA to confirm parentage, according to HHS officials.

2. **Determining Fitness and Danger.** To reunify class members, HHS also followed the procedures approved by the court on July 10, 2018 for determining whether a parent is fit and whether a parent presents a danger to the child. HHS used the fingerprints and criminal background check of the parent conducted by DHS when the individual was first taken into DHS custody rather than requiring the parent to submit fingerprints to ORR, as potential sponsors are typically required to do for unaccompanied children. HHS did not require fingerprints of other adults living in household where the parent and child will live. According to HHS officials, ORR personnel reviewed each child's case file for any indication of a safety concern, such as allegations of abuse by the child. HHS did not require parents to complete an ORR family reunification application as potential sponsors are typically required to do for unaccompanied children.

Class Member Parents in ICE custody. DHS and HHS took steps to coordinate their efforts to reunify children with parents who remained in ICE custody, but experienced some challenges. For example, DHS and HHS officials told us that they facilitated telephone conversations between parents and their children. However, even though a call had been scheduled, DHS and HHS officials said there were instances when either the parent or the child was unavailable to talk. In addition, ORR shelter staff told us it was difficult contacting ICE detention centers and reaching the detained parents, especially when trying to establish the first contact. ICE officials said that they compiled a list of detention center contacts and distributed it to HHS to help ORR field and shelter staff

[65] *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. July 10, 2018) (order following status conference). According to agency officials, in general, the DNA testing process HHS used took about a week from when the DNA was collected to when the results were used to determine parentage. In its ordinary operations, HHS uses documentary evidence (e.g., birth certificates), but that process can take months, and would have been too long to comply with the reunification deadline in the June 2018 court order, according to the government. In limited instances for children 5-17, HHS also used DNA testing to affirmatively verify that an adult is a biological parent, as it did with the group of children ages 0-4.

arrange communication between children and parents; however, ICE officials later learned that not all ORR field and shelter staff were using the provided contact list. Also, during phone calls between the parent and the child, one ORR field staff person we interviewed said initially she was able to speak to the parent, but then the practice changed. Specifically, she told us that ICE personnel monitoring the phone calls between parents and children began terminating calls when they heard her speaking, explaining that the call was supposed to be between the child and the parent only. She said this was problematic because it inhibited her ability to determine if there were questions regarding parentage, parental fitness, or any possible danger to the child. According to ICE officials, they were concerned that ORR staff were consuming too much of the 10 minutes allotted for parents and children to speak and were also going over the allotted time. As a result, there was less time available for other parents to speak with their children in ORR custody.

DHS and HHS also coordinated the transportation of parents and children so they could be reunified. According to DHS officials, the agency was responsible for transportation to reunify parents with children ages 0-4. For children ages 5-17 who were reunified with their parents at reunification facilities, DHS was responsible for transporting parents and HHS was responsible for transporting children. HHS officials said there were challenges related to the transport and physical reunification of families, including children having to wait for parents for unreasonably long amounts of time and parents transported to the wrong facilities. However, an ICE official told us that ICE was unaware of any instances in which a parent had been transported to the wrong facility. Shelter staff we interviewed also told us there were times when the parent was not available because the parent was in transit, resulting in long waits for the children and the accompanying shelter staff. In one case, staff at one shelter told us that they had to stay two nights in a hotel with the child before reunification could occur.

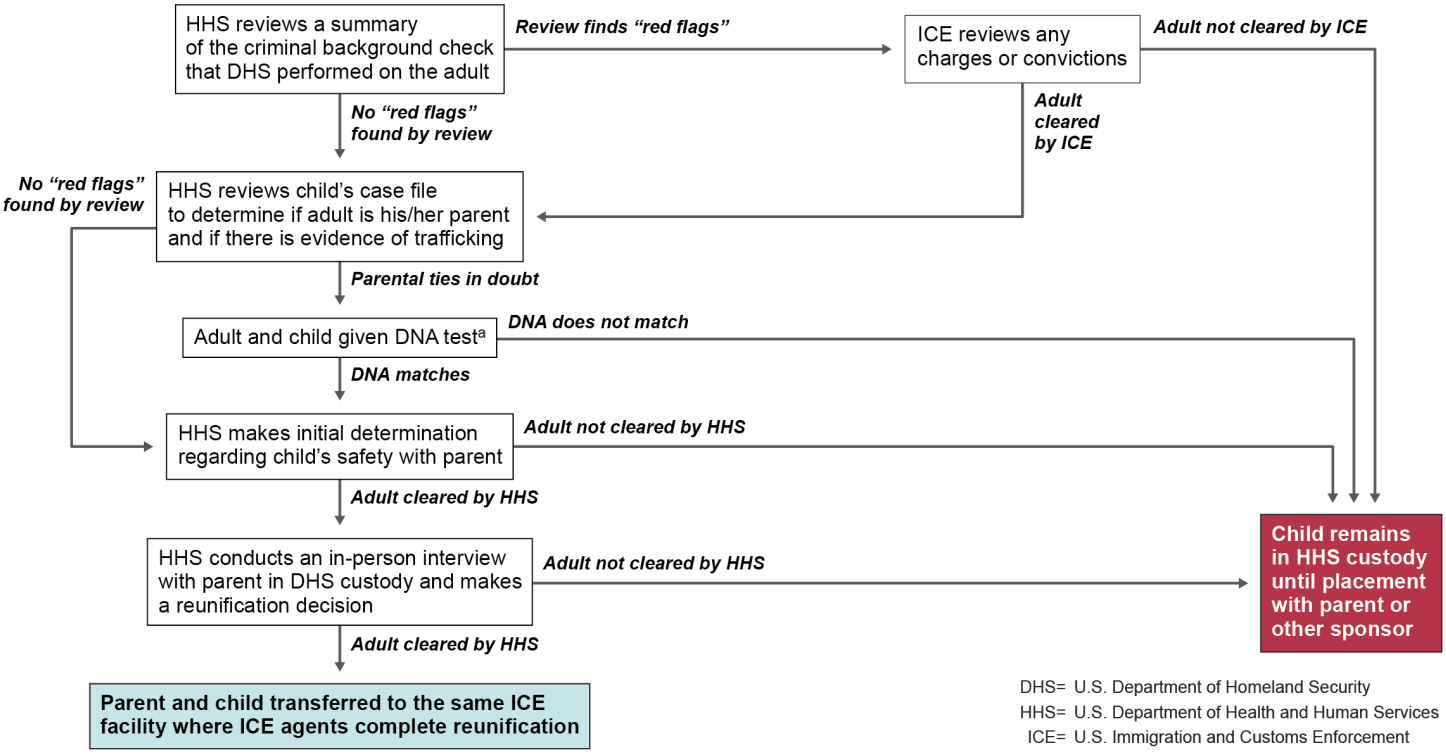
According to agency officials, to facilitate reunification, DHS moved detained parents to a detention facility close to their children.[66] Prior to transporting the child, ORR personnel conducted additional interviews with the parent to obtain verbal confirmation of parentage and the parent's desire to reunify with the child. After the interviews, HHS

[66]ORR's standard procedures for placing unaccompanied children with sponsors do not consider adults in ICE detention to be an available sponsor, according to ORR officials.

transferred custody of the child to ICE and provided ICE with documentation confirming parentage and that the parent did not present a danger to the child. ICE coordinated with a contractor to transport the family to a pre-identified release site. Finally, if an adult used a court-approved form to make an election to be removed without the child from whom they were separated, ICE was to notify HHS immediately.[67] In such cases, all supporting paperwork was to be sent to HHS or be made immediately available electronically between HHS and ICE. See figure 2, which shows the reunification process DHS and HHS developed to reunify children with parents in ICE custody, in response to the court order.

[67]See *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. July 24, 2018) (Exhibit Notice and Election Form). The form, entitled "Notice of Potential Rights for Certain Detained Alien Parents Separated from their Minor Children," provides notice of the *Ms. L. v. ICE* case to potential class members and outlines class membership eligibility and the rights of class members. On page 2 of the form, the form provides the following notice: "You DO NOT have to agree to removal from the United States in order to be reunified with your child. Even if you continue to fight your case, the government must still reunify you. IF YOU LOSE YOUR CASE AND THE GOVERNMENT IS GOING TO REMOVE YOU FROM THE UNITED STATES, you must decide at that time whether you want your child to leave the United States with you." The form then directs the parent to choose one option from the following: (1) If I lose my case and am going to be removed, I would like to take my child with me; (2) If I lose my case and am going to be removed, I do NOT want to take my child with me; (3) I do not have a lawyer, and I want to talk with a lawyer before deciding whether I want my child removed with me.

Figure 2: Department of Homeland Security (DHS) and Department of Health and Human Services' (HHS) Process to Reunify Children with Parents in U.S. Immigration and Customs Enforcement (ICE) Custody, Developed in Response to the June 26, 2018 Court Order



Source: GAO analysis of DHS and HHS process to reunify children separated from class member parents at the border. | GAO-19-163

Note: The "June 26, 2018 court order" refers to an order in the *Ms. L. v. ICE* class action lawsuit that required the government to reunite class member parents with their children under 5 years of age within 14 days of the order, and for children age 5 and over, within 30 days of the order, absent a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child. *Ms. L v. ICE*, No. 18-0428 (C.D. Cal. June 26, 2018) (order granting preliminary injunction). This process documented steps to reunify children ages 5-17 with their class member parents; in general, aspects of the process were also used to reunify children ages 0-4 with their class member parents. A "red flag" refers to a concern regarding the safety of the child if he or she is reunified with the parent. Red flags include the child's claim that the parent is abusive or if the parent has a criminal history involving child abuse, the sexual exploitation of children, human trafficking, or crimes of violence. According to HHS, while these offenses are among the clearest cases, most cases require more investigation to determine whether the parent's criminal history makes reunification unsafe.

[a]On July 10, 2018, the court approved the use of DNA testing "only when necessary to verify a legitimate, good-faith concern about parentage or to meet a reunification deadline." *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. July 10, 2018) (order following status conference). Prior to that date, according to agency officials, DNA testing was performed on many children ages 0 to 4 years old and their parents in order to help determine parentage.

Class Member Parents outside ICE custody. DHS and HHS efforts to reunify children with parents who were not in ICE custody differed based on whether or not the parents were in the United States. According to HHS officials, for families in which the parent was released into the interior of the United States, the reunification process involves the following steps:

- ORR and its shelter staff attempt to establish contact with the parents. HHS officials told us they have two resources to help determine the parent's location. One resource is the ORR Helpline for Unaccompanied Alien Children or Sponsors, which is a call center that collects information from separated parents, including their name and contact information. Also, HHS can contact ICE which may have the parent's contact information.
- ORR is to determine whether parents have "red flags" for parentage or child safety, based on DHS-provided criminal background check summary information and case review of the child's UAC Portal records. For those parents without red flags, ORR reunifies the family either by ORR transporting the minor to the parent or the parent picking up the child at the ORR care provider facility. For those with red flags, ORR will conduct further review to determine parentage or if it is safe for the child to be reunited with the parent.

For class member parents who are outside the United States, the government proposed a reunification plan, which includes the following steps: identify and resolve any concerns regarding parentage or the child's safety; establish contact with parents; determine parent's intention for child (whether to reunite with the child or waive reunification and have a relative or other individual in the United States to serve as the child's sponsor); resolve immigration status of minors to allow reunification; and transport minors to their respective countries of origin.[68] In September

[68]*Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. Aug. 16, 2018) (notice regarding implementation of plan for reunifications abroad). The Interagency Plan for Reunification of Separated Minors with Removed Parents filed on August 16, 2018 outlines the roles and responsibilities for the "UAC Reunification Coordination Group," which consists of individuals from DHS, DOJ, Department of State, and HHS. The plan also outlines coordination with the American Civil Liberties Union Steering Committee (ACLU/Steering Committee) throughout the process, such as the ACLU/Steering Committee's involvement in outreach to parents, establishing and maintaining a hotline phone number for removed parents, and determining and conveying the parents' wishes with regard to reunification to the government. *Id.*

2018, DHS officials told us that the plan has been provisionally approved by the court, and DHS has begun working on implementation plans.

Some separated children subject to *Ms. L. v ICE* have not been reunified with their parents and remain in ORR custody. As of September 10, 2018, 437 of the 2,654 children identified by the government as potentially covered by the June 2018 court order remain in ORR custody for various reasons, according to a joint status report filed in the *Ms. L. v. ICE* case (see table 2).[69] For example, about 64 percent of these children remain in ORR custody because their parent is presently outside the United States. According to ICE officials, in some circumstances, parents may have chosen to have their children remain in the United States, or some parents may have been excluded from class membership due to suitability determinations, criminal history, or parentage issues.

[69]*Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. Sept. 13, 2018) (joint status report). According to the September 13, 2018 status report, the data presented reflects approximate numbers maintained by ORR as of at least September 10, 2018.

Table 2: Number and Reasons Children Identified by the Government as Covered by the June 26, 2018 Court Order Remain in Office of Refugee Resettlement (ORR) Custody (as of September 10, 2018)

	Children age 0 to 4	Children age 5 to 17	Total children
Number of children that remain in ORR custody, as of September 10, 2018	19	418	**437**
Reasons children remain in ORR custody:			
Parent in class			
Parent presently outside the U.S.	5	160	**165**
Parent presently inside the U.S.	1	45	**46**
Parent not in class			
Children in care where further review shows they were not separated from parents by the Department of Homeland Security	5	50	**55**
Children in care where a final determination has been made that they cannot be reunified because the parent is unfit or presents a danger to the child	7	22	**29**
Children in care with parent presently departed from the United States whose intent not to reunify has been confirmed by the American Civil Liberties Union	1	113	**114**
Children in care with parent in the United States; parent has indicated an intent not to reunify	0	28	**28**

Source: *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. Sept. 13, 2018) (joint status report). | GAO-19-163

Note: The "June 26, 2018 court order" refers to an order in the *Ms. L. v. ICE* class action lawsuit that required the government to reunite class member parents with their children under 5 years of age within 14 days of the order, and for children age 5 and over, within 30 days of the order, absent a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunified with the child. *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting preliminary injunction). We did not independently verify the accuracy of these data. According to the September 13, 2018 status report, the data presented reflects approximate numbers maintained by ORR as of at least September 10, 2018.

Procedures for Children and Parents Separated after the June 2018 Court Order. The reunification procedures described above only apply to *Ms. L. v. ICE* class members. According to HHS officials, for those children separated from parents at the border after the June 2018 court order, ORR would use its standard procedures for placing that child with a sponsor since those parents would not be class members. As noted previously, according to CBP officials, on June 27, 2018, CBP issued guidance that halted referrals of adults entering the United States illegally as part of a family unit to the Department of Justice for prosecutions for misdemeanor improper entry offenses and outlined the situations in which children and parents may be separated moving forward. CBP officials stated that a parent may still be separated from his or her child in certain circumstances, such as if the parent has a criminal history or

communicable disease, or the parent is unfit or presents a danger to the child.[70] In September 2018, HHS officials stated that they will continue to use their standard process to determine potential sponsors for unaccompanied children in their custody, including those who had been separated from their parents.

Agency Comments

We provided a draft of this report to DHS and HHS for review and comment. We received written comments from DHS, which are reproduced in Appendix I. In its comments, DHS said that, in recent months, the department has identified further areas for interagency process improvement and coordination and the department plans to continue efforts to improve processes. HHS did not provide written comments. DHS and HHS provided technical comments that we have incorporated in the report as appropriate.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the Secretaries of Homeland Security and Health and Human Services and other interested parties. In addition, the report will be available at no charge on the GAO website at http://www.gao.gov.

[70]As previously discussed, the Attorney General's April 2017 memorandum prioritized enforcement of a number of criminal immigration-related offenses, including offenses that would generally be felony offenses, such as illegal reentry of removed aliens (8 U.S.C. § 1326), unlawfully bringing in and harboring certain removable aliens (8 U.S.C. § 1324), and assaulting, resisting or impeding certain officers or employees (18 U.S.C. § 111).

If you or your staff have any questions about this report, please contact us at (202) 512-7215 or larink@gao.gov or (202) 512-8777 or gamblerr@gao.gov. GAO staff who made key contributions to this report are listed in appendix II.

Sincerely yours,

Kathryn A. Larin, Director
Education, Workforce, and Income Security

Rebecca Gambler, Director
Homeland Security and Justice

Appendix I: Comments from the Department of Homeland Security

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

October 2, 2018

Kathryn A. Larin
Director, Education, Workforce, and Income Security
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Rebecca Gambler
Director, Homeland Security and Justice
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Management Response to Draft Report GAO-19-163, "UNACCOMPANIED CHILDREN: Agency Efforts to Reunify Children Separated from Parents at the Border"

Dear Ms. Larin and Ms. Gambler:

Thank you for the opportunity to review and comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO) work in planning and conducting its review and issuing this report.

DHS performs an essential role in securing our Nation's borders at and between ports of entry and enforcing U.S. immigration law in the interior of the country. In the course of securing our borders and enforcing immigration laws, DHS is committed to treating all people we encounter with dignity and respect. DHS officers and agents uphold the utmost professionalism while maintaining efficient operations.

In April 2018, the President directed several Federal agencies, including DHS, to report on their efforts to end a practice developed under prior administrations of releasing certain aliens who violated U.S. immigration law into the United States pending resolution of their immigration proceedings. On the same day, the Attorney General issued a memorandum on criminal prosecutions of immigration offenses that directed Department of Justice prosecutors to accept referrals of all aliens apprehended after

illegally crossing the border, including those accompanied by children, for criminal prosecution for improper entry offenses, to the extent practicable. As noted in the draft report, this resulted in an increase during May and June 2018 in the number of minor children who were separated from their parents or legal guardians after attempting to enter the United States illegally.

On June 20, 2018, President Trump issued Executive Order 13841, mandating family unity during any improper entry criminal prosecution or immigration proceedings involving their members, to the extent permitted by law. On June 26, 2018, a Federal court ordered the Government to reunify certain children and parents separated under the policy within 30 days. In partnership with the Department of Health and Human Services (HHS), DHS has made significant progress reunifying families. Additionally, U.S. Customs and Border Protection (CBP) continues to provide a safe, clean, and healthy temporary environment for arrived unaccompanied alien children who are in CBP's custody awaiting transfer to HHS. Furthermore, CBP complies with all requirements of the court-approved *Flores* Settlement Agreement, and takes many actions to document such compliance, including internal inspections and automated reporting via the electronic systems of record.

It is also important to highlight that during recent months we have identified further areas for interagency process improvement and coordination. For example, CBP has enhanced data fields within its own electronic systems of record to better account for separations of family units for child welfare and the time in custody of unaccompanied alien children, as well as transfer to U.S. Immigration and Customs Enforcement and HHS. We are pleased with GAO's recognition of DHS's comprehensive efforts to increase communication and standardized information sharing with HHS. DHS will continue efforts to improve its processes and maintain the high standards expected of our agency.

Again, thank you for the opportunity to review and comment on this draft report. Technical comments were previously provided under separate cover. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Sincerely,

JIM H. CRUMPACKER, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

2

Appendix II: GAO Contacts and Staff Acknowledgments

GAO Contacts

Kathryn A. Larin, (202) 512-7215 or larink@gao.gov

Rebecca Gambler, (202) 512-8777 or gamblerr@gao.gov

Staff Acknowledgments

In addition to the contacts named above, Kathryn Bernet (Assistant Director), Elizabeth Morrison (Assistant Director), Andrea Dawson (Analyst-in-Charge), David Barish, Jason Palmer, and Leslie Sarapu made key contributions to this report. In addition, key support was provided by James Bennett, Linda Collins, Sarah Cornetto, Joel Green, Marissa Jones, Michael Kniss, Sheila McCoy, Jean McSween, Jan Montgomery, Heidi Nielson, David Reed, Minette Richardson, Almeta Spencer, and Kathleen van Gelder.

GAO's Mission	The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.
Obtaining Copies of GAO Reports and Testimony	The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's website (https://www.gao.gov). Each weekday afternoon, GAO posts on its website newly released reports, testimony, and correspondence. To have GAO e-mail you a list of newly posted products, go to https://www.gao.gov and select "E-mail Updates."
Order by Phone	The price of each GAO publication reflects GAO's actual cost of production and distribution and depends on the number of pages in the publication and whether the publication is printed in color or black and white. Pricing and ordering information is posted on GAO's website, https://www.gao.gov/ordering.htm. Place orders by calling (202) 512-6000, toll free (866) 801-7077, or TDD (202) 512-2537. Orders may be paid for using American Express, Discover Card, MasterCard, Visa, check, or money order. Call for additional information.
Connect with GAO	Connect with GAO on Facebook, Flickr, Twitter, and YouTube. Subscribe to our RSS Feeds or E-mail Updates. Listen to our Podcasts. Visit GAO on the web at https://www.gao.gov.
To Report Fraud, Waste, and Abuse in Federal Programs	Contact: Website: https://www.gao.gov/fraudnet/fraudnet.htm Automated answering system: (800) 424-5454 or (202) 512-7700
Congressional Relations	Orice Williams Brown, Managing Director, WilliamsO@gao.gov, (202) 512-4400, U.S. Government Accountability Office, 441 G Street NW, Room 7125, Washington, DC 20548
Public Affairs	Chuck Young, Managing Director, youngc1@gao.gov, (202) 512-4800 U.S. Government Accountability Office, 441 G Street NW, Room 7149 Washington, DC 20548
Strategic Planning and External Liaison	James-Christian Blockwood, Managing Director, spel@gao.gov, (202) 512-4707 U.S. Government Accountability Office, 441 G Street NW, Room 7814, Washington, DC 20548

Exhibit 3

OFFICE OF INSPECTOR GENERAL

Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy

Homeland Security

September 27, 2018

OIG-18-84

DHS OIG HIGHLIGHTS

Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy

September 27, 2018

Why We Did This Special Review

In light of the heightened public and congressional interest in the Department of Homeland Security's separation of families at the southern border pursuant to the Government's Zero Tolerance Policy, the DHS Office of Inspector General (OIG) conducted unannounced site visits to U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement facilities in and around El Paso and McAllen, Texas on June 26–28, 2018. The following report describes OIG's observations in the field and its analysis of family separation data provided by the Department.

What We Recommend

This report is observational and contains no recommendations.

For Further Information:
Contact our Office of Public Affairs at (202) 981-6000, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov.

What We Observed

DHS was not fully prepared to implement the Administration's Zero Tolerance Policy or to deal with some of its after-effects. Faced with resource limitations and other challenges, DHS regulated the number of asylum-seekers entering the country through ports of entry at the same time that it encouraged asylum-seekers to come to the ports. During Zero Tolerance, CBP also held alien children separated from their parents for extended periods in facilities intended solely for short-term detention.

DHS also struggled to identify, track, and reunify families separated under Zero Tolerance due to limitations with its information technology systems, including a lack of integration between systems.

Finally, DHS provided inconsistent information to aliens who arrived with children during Zero Tolerance, which resulted in some parents not understanding that they would be separated from their children, and being unable to communicate with their children after separation.

DHS' Response

Appendix B provides DHS' management response in its entirety.

OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

September 27, 2018

MEMORANDUM FOR: The Honorable Kevin K. McAleenan
Commissioner
U.S. Customs and Border Protection

Ronald D. Vitiello
Senior Official Performing the Duties of
the Director
U.S. Immigration and Customs Enforcement

FROM: John V. Kelly
Senior Official Performing the Duties of the
Inspector General

SUBJECT: Special Report – *Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*

For your action is the final special report *Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*. This special report reflects work undertaken pursuant to our authorities and obligations under Section 2 of the *Inspector General Act of 1978*, as amended. Specifically, the Department of Homeland Security (DHS) Office of Inspector General performed this work for the purpose of promoting economy, efficiency, and effectiveness in the administration of, and preventing fraud, waste, and abuse in, DHS' programs and operations. This final special report addresses the technical comments and incorporates the management response provided by your offices. This report is observational and contains no recommendations.

Consistent with our responsibility under the *Inspector General Act of 1978*, as amended, we will provide copies of our report to Congress and will post it on our website for public dissemination.

Please call me with any questions, or your staff may contact Jennifer Costello, Chief Operating Officer, at (202) 981-6000.

Attachment

Background

On April 6, 2018, President Trump directed several Federal agencies, including the Department of Homeland Security (DHS), to report on their efforts to end a practice developed under prior administrations of releasing certain individuals suspected of violating immigration law into the United States pending resolution of their administrative or criminal cases — a practice sometimes referred to as "catch and release."[1] The same day, Attorney General Jeff Sessions directed all Federal prosecutors along the Southwest Border to work with DHS "to adopt immediately a zero-tolerance policy" requiring that all improper entry offenses be referred for criminal prosecution "to the extent practicable" (referred to throughout this report as the Zero Tolerance Policy).[2]

Within DHS, U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) played critical roles in implementing the Administration's Zero Tolerance Policy. CBP's Office of Field Operations (OFO) inspects all foreign visitors and goods entering at established ports of entry, while U.S. Border Patrol is responsible for apprehending individuals who enter the United States illegally between ports of entry. CBP transfers aliens in its custody to ICE, which is responsible for, among other duties, detaining certain aliens with pending immigration proceedings and deporting all aliens who receive final removal orders.

Before implementation of the Zero Tolerance Policy, when CBP apprehended an alien family unit attempting to enter the United States illegally, it usually placed the adult in civil immigration proceedings without referring him or her for criminal prosecution. CBP only separated apprehended parents from children in limited circumstances — *e.g.*, if the adult had a criminal history or outstanding warrant, or if CBP could not determine whether the adult was the child's parent or legal guardian. Accordingly, in most instances, family units either remained together in family detention centers operated by ICE while their civil immigration cases were pending,[3] or they were released into the United States with an order to appear in immigration court at a later date.

---

[1] Presidential Memorandum for the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services, and the Secretary of Homeland Security, April 6, 2018.

[2] Dept. of Justice, *Memorandum for Federal Prosecutors Along the Southwest Border*, April 6, 2018. Entering the United States without inspection and approval is a civil offense and may also result in criminal charges. *See* 8 United States Code (U.S.C.) §§ 1227 (civil grounds for removal), 1325 (crime of improper entry), 1326 (crime of reentry). The Department of Justice has the authority to decide whether and to what extent to prosecute Federal crimes.

[3] A Federal court has interpreted the *Flores* Agreement — a 1997 settlement that establishes minimum conditions for the detention, release, and treatment of children — to generally limit

The Zero Tolerance Policy, however, fundamentally changed DHS' approach to immigration enforcement. In early May 2018, DHS determined that the policy would cover alien adults arriving illegally in the United States with minor children. Because minor children cannot be held in criminal custody with an adult, alien adults who entered the United States illegally would have to be separated from any accompanying minor children when the adults were referred for criminal prosecution. The children, who DHS then deemed to be unaccompanied alien children,[4] were held in DHS custody until they could be transferred to the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement, which is responsible for the long-term custodial care and placement of unaccompanied alien children.[5]

The Administration's Zero Tolerance Policy and the resulting family separations sparked intense public debate. On June 20, 2018, President Trump issued Executive Order 13,841, halting the practice of family separation. On June 26, 2018, a Federal court ordered the Government to reunify separated children and parents within 30 days.[6] On September 20, 2018, the Government reported to the court that it had reunified or otherwise released 2,167 of the 2,551 children over 5 years of age who were separated from a parent and deemed eligible for reunification by the Government.[7] The Government also

---

the time children can stay at such family centers to 20 days. *Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015). In July 2018, that Federal court denied the Government's request to modify the *Flores* Agreement to allow it to detain families for longer. *Flores v. Sessions*, 85-cv-4544 (C.D. Cal. July 9, 2018). However, in August 2018, another Federal court permitted families to remain in Government facilities together longer than 20 days if the adult waives the child's rights under the *Flores* Agreement. *Ms. L. v. ICE*, 18-cv-428 (S.D. Cal. Aug. 16, 2018). DHS and HHS recently proposed regulations that, if implemented, would terminate the *Flores* Agreement. 83 Fed. Reg. 45,486 (Sept. 7, 2018).

[4] An unaccompanied alien child is a child under 18 years of age with no lawful immigration status in the United States who has neither a parent nor legal guardian in the United States nor a parent nor legal guardian in the United States "available" to provide care and physical custody for him or her. 6 U.S.C. § 279(g)(2). As such, children traveling with a related adult other than a parent or legal guardian — such as a grandparent or sibling — are still deemed unaccompanied alien children.

[5] DHS must transfer unaccompanied alien children to HHS within 72 hours unless there are "exceptional circumstances." 8 U.S.C. § 1232(b)(3). There are special requirements for unaccompanied alien children from Mexico and Canada that may permit a different process, 8 U.S.C. § 1232(a)(2)(A), but if those requirements are not met, CBP must follow the same process established for unaccompanied alien children from other countries. 8 U.S.C. § 1232(a)(3).

[6] *Ms. L. v. ICE*, 18-cv-428 (S.D. Cal. June 26, 2018). The order required the Government to reunite children under the age of 5 with their families within 14 days, and children 5 years old and older within 30 days.

[7] The Government can also release a child to another family member or sponsor, or if the child turns 18. *Ms. L. v. ICE*, 18-cv-428 (S.D. Cal. Sept. 20, 2018). According to the Government, the remaining 402 children involved in the lawsuit that are still in HHS' care include 182 children

reported that it had reunited 84 of the 103 children under 5 years of age who were separated and initially deemed eligible for reunification.

In response to significant congressional and public interest related to the Zero Tolerance Policy, a multi-disciplinary team of DHS Office of Inspector General (OIG) attorneys, inspectors, and criminal investigators deployed to areas in and around El Paso and McAllen, Texas, to conduct unannounced visits at CBP and ICE facilities between June 26 and June 28, 2018.[8] This report describes the OIG team's observations in the field, as well as the team's review of family separation data provided by the Department. This report does not evaluate the merits of the Zero Tolerance Policy or family separations. Further, the report does not evaluate the Department's efforts to reunify separated families because those efforts took place after the OIG team's field visits. Observations from specific locations in the field are not necessarily generalizable. Appendix A provides more information on the scope and methodology of the review.

Results of Review

The OIG's observations indicate that DHS was not fully prepared to implement the Zero Tolerance Policy, or to deal with certain effects of the policy following implementation. For instance, while the Government encouraged all asylum-seekers to come to ports of entry to make their asylum claims, CBP managed the flow of people who could enter at those ports of entry through metering, which may have led to additional illegal border crossings. Additionally, CBP held alien children separated under the policy for long periods in facilities intended solely for short-term detention.[9] The OIG team also observed that a lack of a fully integrated Federal immigration information technology system made it difficult for DHS to reliably track separated parents and children,

---

where the adult associated with the child is not eligible for reunification or is not currently available for discharge, and 220 children where the Government has determined the parent is not entitled to reunification under the lawsuit. In 134 of those 220 cases, the adult is no longer in the United States and has indicated an intent not to reunify with his or her child. *Ms. L. v. ICE*, 18-cv-428 (S.D. Cal. Sept. 20, 2018).

[8] In the Rio Grande Valley sector, which encompasses McAllen, the OIG team went to facilities operated by Border Patrol (McAllen Station and Ursula Central Processing Center), CBP OFO (Gateway International Bridge, Brownsville and Matamoros International Bridge, and Hidalgo ports of entry), and ICE Enforcement and Removal Operations (ERO) (Port Isabel Detention Center). In the El Paso sector, the team went to facilities operated by Border Patrol (Clint Station, Paso Del Norte Processing Center, and El Paso Station), CBP OFO (Paso del Norte International Bridge port of entry), and ICE ERO (El Paso Processing Center and Tornillo Processing Center).

[9] Notwithstanding this observation, OIG observed that the DHS facilities it visited appeared to be operating in substantial compliance with applicable standards for holding children. The detailed results of OIG's unannounced inspections of these facilities are described in a separate OIG report titled *Results of Unannounced Inspections of Conditions for Unaccompanied Alien Children in CBP Custody*.

raising questions about the Government's ability to accurately report on separations and subsequent reunifications. Finally, inconsistencies in the information provided to alien parents resulted in some parents not understanding that their children would be separated from them, and made communicating with their children after separation difficult.

Although this report does not make formal recommendations for corrective action, it highlights issues with DHS' handling of alien families that warrant the Department's attention. OIG anticipates undertaking a more in-depth review of some of these issues in future work.

CBP Faced Resource and Other Challenges in Responding to the Effects of the Zero Tolerance Policy

Under the Zero Tolerance Policy, the Government encouraged asylum-seekers to come to U.S. ports of entry. At the same time, CBP reported that overcrowding at the ports of entry caused them to limit the flow of people that could enter. This may have led asylum-seekers at ports of entry to attempt illegal border crossings instead. Additionally, CBP officials said that because of limited processing capacity at HHS facilities and other factors, CBP held unaccompanied alien children for long periods in facilities intended for short-term detention.

CBP Regulated the Number of Asylum-Seekers Entering at Ports of Entry, Which May Have Resulted in Additional Illegal Border Crossings

While the Zero Tolerance Policy was in effect, Government officials — including the DHS Secretary and the Attorney General — publicly encouraged asylum-seeking adults to enter the United States legally through a port of entry to avoid prosecution and separation from their accompanying children.[10] However, at the same time, CBP was regulating the flow of asylum-seekers at ports of entry through "metering," a practice CBP has utilized at least as far

[10] *See*, *e.g.*, Press Briefing by Press Secretary Sarah Sanders and DHS Secretary Kirstjen Nielsen, June 18, 2018, https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-department-homeland-security-secretary-kirstjen-nielsen-061818/ ("And finally, DHS is not separating families legitimately seeking asylum at ports of entry. If an adult enters at a port of entry and claims asylum, they will not face prosecution for illegal entry. They have not committed a crime by coming to the port of entry."); Dept. of Justice, *Attorney General Sessions Addresses Recent Criticisms of Zero Tolerance By Church Leaders*, June 14, 2018, https://www.justice.gov/opa/speech/attorney-general-sessions-addresses-recent-criticisms-zero-tolerance-church-leaders ("[I]f the adults go to one of our many ports of entry to claim asylum, they are not prosecuted and the family stays intact pending the legal process.").

back as 2016 to regulate the flow of individuals at ports of entry.[11] Although DHS asserts that the Zero Tolerance Policy and metering at ports of entry are distinct issues, a CBP official reported that the backlogs created by these competing directives likely resulted in additional illegal border crossings.

At the ports of entry the OIG team visited, pedestrian footbridges link the United States and Mexico, with the international line dividing the two countries running across the middle of the bridges. CBP's processing facilities are stationed on the U.S. side at the north ends of the bridges. To reach these facilities, an alien must cross the international line and walk a short distance across U.S. soil. When an asylum-seeker arrives at the processing facility, CBP officers examine the individual's identification and travel documents, conduct an initial interview, obtain fingerprints and photographs, and then seek placement of the individual with ICE, or HHS if an unaccompanied alien child is involved.

When metering, CBP officers stand at the international line out in the middle of the footbridges. Before an alien without proper travel documents (most of whom are asylum-seekers) can cross the international line onto U.S. soil,[12] those CBP officers radio the ports of entry to check for available space to hold the individual while being processed. According to CBP, the officers only allow the asylum-seeker to cross the line if space is available.[13] When the ports of entry are full, CBP guidance states that officers should inform individuals that the port is currently at capacity and that they will be permitted to enter once there is sufficient space and resources to process them. The guidance further states officers may not discourage individuals from waiting to be processed.

---

[11] CBP officials informed the OIG team that CBP instituted metering to address safety and health hazards that resulted from overcrowding at ports of entry. Whether this practice is permissible under Federal and/or international law is currently being litigated and OIG expresses no opinion here on the legality or propriety of the practice. *See*, *e.g.*, *Washington v. United States*, 18-cv-939 (W.D. Wash. 2018); *Al Otro Lado, Inc. v. Nielsen*, 17-cv-2366 (S.D. Cal. 2017).

[12] By law, once an individual is physically present in the United States, he or she must generally be allowed to apply for asylum, regardless of immigration status. *Immigration and Nationality Act*, 8 U.S.C. § 1158(a)(1). Federal law also generally prohibits the return of an alien to a country where he or she may face torture or persecution. *See* 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 208.16-.17.

[13] The head of a nongovernmental organization who is familiar with the flow of asylum-seekers suggested to the OIG team that CBP meters individuals even when there is available space. Although OIG observed asylum-seekers being turned away at some of the ports of entry we visited, CBP claimed that the processing facilities were full at those times. During our visits, OIG did not observe CBP turning away asylum-seekers while there was available space.

However, some officers in El Paso informed the OIG team that they advise individuals to return later.[14]

Although the OIG team did not observe severe overcrowding at the ports of entry it visited, the team did observe that the space designated for holding asylum-seekers during processing is limited. Additionally, CBP policies limit how and whether certain classes of aliens can be detained in the same hold room, which further constrains the available space. For instance, mothers and their young children must be held separately from unaccompanied minors, who must be held separately from adult men. Depending on who is being held on a given day and the configuration of the hold rooms, the facility can reach capacity relatively quickly. At one port of entry the OIG team visited, CBP staff attempted to increase their capacity by converting former offices into makeshift hold rooms.

While the stated intentions behind metering may be reasonable, the practice may have unintended consequences. For instance, OIG saw evidence that limiting the volume of asylum-seekers entering at ports of entry leads some aliens who would otherwise seek legal entry into the United States to cross the border illegally. According to one Border Patrol supervisor, the Border Patrol sees an increase in illegal entries when aliens are metered at ports of entry. Two aliens recently apprehended by the Border Patrol corroborated this observation, reporting to the OIG team that they crossed the border illegally after initially being turned away at ports of entry. One woman said she had been turned away three times by an officer on the bridge before deciding to take her chances on illegal entry.[15]

CBP Detained Unaccompanied Alien Children for Extended Periods in Facilities Intended for Short-Term Detention

Absent "exceptional circumstances," the law generally permits CBP to hold unaccompanied alien children in its custody for up to 72 hours before transferring them to the HHS Office of Refugee Resettlement pending resolution of their immigration proceedings.[16] Moreover, CBP policy dictates, "[e]very effort must be made to hold detainees for the least amount of time" possible.[17] As a result, CBP facilities are not designed to hold people for long periods of time.

[14] Some media reports alleged that CBP was threatening asylum-seekers and giving them false information while metering. The OIG team was unable to confirm these allegations.
[15] The fact that both aliens and the Border Patrol reported that metering leads to increased illegal border crossings strongly suggests a relationship between the two. Based on the limited scope of this review, the OIG team could not corroborate these anecdotal observations with data or evaluate the effects in other sectors it did not visit.
[16] *See* 8 U.S.C. § 1232(b)(3).
[17] CBP, *National Standards on Transport, Escort, Detention, and Search* § 4.1 (October 2015).

The OIG team determined that CBP exceeded the 72-hour period in many instances. Data provided by CBP to OIG indicates that, during the week of the OIG's fieldwork (June 25 to June 29, 2018), 9 out of the 21 unaccompanied alien children (42 percent) who approached the ports of entry visited by OIG were held for more than 72 hours. The data further indicates that 237 out of 855 unaccompanied alien children (28 percent) apprehended by Border Patrol between ports of entry were detained for more than 72 hours at the facilities the OIG team visited. Although the average length of time unaccompanied alien children spent in custody during this period was 65 hours, one unaccompanied alien child remained in custody for 12 days (over 280 hours).

OIG also obtained a broader data set from CBP showing how long separated children were held in Border Patrol custody during the entire period the Zero Tolerance Policy was in effect (May 5 to June 20, 2018). As discussed further in the following section, OIG has concerns about the quality and reliability of this data set. Notwithstanding these concerns, the Border Patrol's data shows that the Rio Grande Valley sector exceeded the 72-hour time period for at least 564 children (44 percent of children detained during this time). This sector also held a child for 25 days, nearly three times longer than any other Southwest Border Patrol sector. The El Paso sector exceeded the 72-hour period for 297 children (nearly 40 percent of children detained in the sector during this time). All other sectors exceeded that period 13 percent of the time.[18]

Figure 1: Length of Custody of Separated Unaccompanied Alien Children in Border Patrol Custody during Zero Tolerance Policy (May 5 – June 20, 2018)

	0–3 Days	4 Days	5+ Days	Max. Days in Custody
Rio Grande Valley, TX	56.0%	16.9%	27.1%	25
El Paso, TX	60.2%	16.9%	22.9%	9
All Other Southwest Border Sectors	86.8%	9.6%	3.6%	8
Total – All Sectors	67.1%	14.5%	18.4%	25

Source: OIG-generated figures based on data obtained from Border Patrol

According to many Border Patrol officials with whom the OIG team met, HHS' inability to accept placement of unaccompanied alien children promptly

[18] The number of children held for more than 72 hours may be even higher than these figures, as the data received shows the dates — not the specific hours — that a child was apprehended and transferred from Border Patrol. A child held for 3 days could actually have been held for more than 72 hours depending on the time that he/she was apprehended and transferred. For example, if an unaccompanied alien child was booked in at 8:00 a.m. on June 1 and booked out at 9:00 a.m. on June 4, the unaccompanied alien child was in CBP custody for 73 hours, but would be identified in the data provided as having been in custody for just 3 days.

resulted in unaccompanied alien children remaining in CBP custody for extended periods. CBP officials also cited other possible reasons for extended detention, including the need to provide an unaccompanied alien child with medical care or delays in transportation arrangements provided by ICE. However, other evidence indicates that CBP officials may have inadvertently omitted critical information from unaccompanied alien children placement requests submitted to HHS, which could have also contributed to delays. For instance, one CBP juvenile coordinator in the Rio Grande Valley sector, who is responsible for assisting with the placement of unaccompanied alien children with HHS, recalled HHS contacting him several times per day for necessary information CBP failed to provide when initially submitting particular placement requests. Another CBP juvenile coordinator in El Paso recalled a similar experience. One Border Patrol official stated it would have been useful to have an HHS employee on site to assist with the care and placement of unaccompanied alien children.

Senior Border Patrol and OFO officials also reported that detaining unaccompanied alien children for extended periods resulted in some CBP employees being less able to focus on their primary mission. For instance, instead of patrolling and securing the border, officers had to supervise and take care of children.

Information Technology and Data Issues Make It Difficult for DHS to Identify, Track, and Reunify Separated Families

The United States does not have a fully integrated Federal immigration information technology system. As a result, Federal agencies involved in the immigration process often utilize separate information technology systems to facilitate their work. The OIG team learned that the lack of integration between CBP's, ICE's, and HHS' respective information technology systems hindered efforts to identify, track, and reunify parents and children separated under the Zero Tolerance Policy. As a result, DHS has struggled to provide accurate, complete, reliable data on family separations and reunifications, raising concerns about the accuracy of its reporting.

Lack of Integration between Critical Information Technology Systems Undermines the Government's Ability to Efficiently Reunite Families

ICE officers reported that when the Zero Tolerance Policy went into effect, ICE's system did not display data from CBP's systems that would have indicated

whether a detainee had been separated from a child.[19] They explained that although CBP enters this family separation data into certain fields within its own system, those particular fields are not visible in ICE's system.[20] As a result, ICE officers at the Port Isabel Detention Center stated that when processing detainees for removal, officials initially treated separated adults the same as other detainees and made no additional effort to identify and reunite families prior to removal. Eventually, in early June 2018, Port Isabel officials began taking manual steps — such as interviewing detainees — to identify adults separated from their children.

Further compounding this problem, DHS' systems are not fully integrated with HHS' systems. For instance, while the Border Patrol's system can automatically send certain information to HHS regarding unaccompanied alien children who are apprehended after illegally crossing the border, OFO's system cannot.[21] Instead, for unaccompanied alien children who arrive at ports of entry, OFO officers must manually enter information into a Microsoft Word document, which they then send to HHS as an email attachment. Each step of this manual process is vulnerable to human error, increasing the risk that a child could become lost in the system.

On June 23, 2018, DHS announced that DHS and HHS had "a central database" containing location information for separated parents and minors that both departments could access and update.[22] However, OIG found no evidence that such a database exists. The OIG team asked several ICE employees, including those involved with DHS' reunification efforts at ICE Headquarters, if they knew of such a database, and they did not. Two officials suggested that the "central database" referenced in DHS' announcement is actually a manually-compiled spreadsheet maintained by HHS, CBP, and ICE personnel. According to these officials, DHS calls this spreadsheet a "matching table."

---

[19] ICE uses a system called the ENFORCE Alien Removal Module (EARM). CBP has two separate systems: (1) the Border Patrol uses a system called e3, and (2) OFO uses a system called SIGMA.

[20] At some point, CBP officials began using a free text field to record family separation information because that field is visible in ICE's system. However, that information was apparently not consistently recorded and is not searchable. Therefore, without reviewing individual files, ICE was unable to determine which aliens had been separated from their children.

[21] Although the Border Patrol's system can automatically send certain information to HHS, the Border Patrol apparently cannot later retrieve what it sent to HHS. To better understand the data inconsistencies discussed later in this report, the OIG team requested the data that the Border Patrol sent when it placed certain children with HHS. The Border Patrol said it does not store that data and therefore could not provide it to the OIG team.

[22] *See* DHS Fact Sheet: *Zero-Tolerance Prosecution and Family Reunification* (June 23, 2018), https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification.

This matching table, however, was not created until after June 23, suggesting that it is not the "central database" referenced in the Department's June 23 announcement. Moreover, when the OIG team asked ICE for information that should have been accessible to ICE via the central database (*e.g.*, information on the current location of separated children), ICE did not have ready access to the information. Instead, ICE had to request the information from HHS. DHS has since acknowledged to the OIG that there is no "direct electronic interface" between DHS and HHS tracking systems.

Lack of Access to Reliable Data Poses an Obstacle to Accurate Reporting on Family Separations

In the course of this review, OIG made several requests to DHS for data relating to alien family separations and reunifications. For example, OIG requested a list of every alien child separated from an adult since April 19, 2018,[23] as well as basic information about each child, including the child's date of birth; the child's date of apprehension, separation, and (if applicable) reunification; and the location(s) in which the child was held while in DHS custody. It took DHS many weeks to provide the requested data, indicating that the Department does not maintain the data in a readily accessible format. Moreover, the data DHS eventually supplied was incomplete and inconsistent, raising questions about its reliability.

For instance, when DHS first provided family separation data from its own information technology systems, the list was missing a number of children OIG had independently identified as having been separated from an adult. When OIG raised this issue with the Department, CBP officials stated that they believed the errors were due to agents in the field manually entering data into the system incorrectly. Additionally, the data provided from DHS' systems was not always consistent with the data on the matching table that DHS and HHS use to track reunifications. For example, the DHS systems do not contain the date (if any) that each separated child and adult were reunited, while the matching table does.

Similarly, OIG identified 24 children who appeared in the DHS data set, but not on the matching table. When OIG requested additional information from the Department about these 24 children, the information provided revealed inaccuracies in the data DHS had previously provided to OIG. For example, the initial data set indicated that ICE had not yet removed a particular adult. The new information revealed that ICE had in fact removed the adult several weeks before it provided the initial data set to OIG. Additionally, while the initial data

[23] OIG selected this date because Border Patrol officials stated that they could not feasibly identify children who were separated before that date.

set identified two particular minors as having been separated from an adult, the new information indicated the minors entered the country unaccompanied. Nevertheless, CBP's and ICE's systems both continue to identify the minors as having been separated from an adult.

Despite these issues with the reliability of some of DHS' data, OIG was able to determine from other data maintained by ICE that 23 of the 24 children were properly left off the matching table. For example, the list derived from the DHS data contained separated families where the child had since been placed with a sponsor out of Office of Refugee Resettlement custody, as well as children who were separated from adults who were not parents or legal guardians. None of these cases met the criteria for inclusion on the matching table.

Regarding the one remaining child identified by OIG, OIG learned that DHS reunited the child with his parent in September. The circumstances surrounding the September reunification of this child with his parent raise questions about the accuracy of the Department's previous reporting on family separations and reunifications. For instance, on July 26, 2018, DHS declared that it had reunified all eligible parents in ICE custody with their children; yet this eligible parent was in ICE custody on that date, but was not reunified with his child until September.[24]

Dissemination of Inconsistent or Inaccurate Information Resulted in Confusion among Alien Parents about the Separation and Reunification Process

The OIG team observed inconsistencies in the information provided to aliens who arrived with children, resulting in some parents not understanding that their children would be separated from them and/or being unable to communicate with their children after separation.

Alien Parents Were Provided Inconsistent or Incorrect Information about Being Separated from Their Children

CBP officials reported that, prior to separation, adult aliens accompanied by children were given an HHS flyer providing information about a national call

[24] *See* Tal Kopan, "Hundreds of Separated Children Not Reunited By Court-Ordered Deadline," *CNN*, July 26, 2018, https://www.cnn.com/2018/07/26/politics/family-separations-deadline/index.html.

center[25] and/or a "Next Steps for Families" flyer[26] produced jointly by DHS and HHS. In English and Spanish, the Next Steps flyer explains the separation process in four steps, and provides information on how to locate and speak with one's child after separation. However, at the Port Isabel Detention Center, one of the four detainees interviewed by the OIG team reported that she had never seen the Next Steps flyer. The other three detainees reported that they were only provided a copy *after* they had been separated from their children and transferred to the ICE facility.

The OIG team also asked six individuals about the information provided to them before or at the time they were separated from their children. Five of the six said they did not receive any information. The sixth stated that when he left the Border Patrol facility to appear in court for prosecution, a Border Patrol Agent told him that his 5-year-old daughter would still be at the Border Patrol facility when he returned. When he arrived at court, however, he was given a short flyer that explained for the first time that he would be separated from his child. After his court hearing, he was driven back to the same Border Patrol facility, but not taken inside. Instead, he was placed on a bus to be transferred to an ICE detention facility without his daughter.

Detained Parents Reported Mixed Results in Locating and Speaking with Their Children after Separation

HHS maintains a toll-free number for aliens to call to obtain information about their separated children. Although the OIG team observed flyers containing the toll-free number at the Port Isabel Detention Center, staff reported that, at least in one area with female detainees, ICE posted the flyer for the first time on June 27, 2018 (a week after the Executive Order ending family separations). In addition, posted flyers at Port Isabel and another detention facility in El Paso failed to indicate that detainees must dial a unique code assigned to each individual by the detention facility before dialing the HHS toll-free number.

One mother with whom the OIG team spoke stated she had previously tried to call the toll-free number, but had not been able to get it to work. The team assisted her with making the call, and she was able to speak with an operator after holding for a couple of minutes. The HHS operator told the mother, however, that she could not release information about the child because the operator could not ascertain parentage over the telephone. The operator

[25] HHS's flyer (English version) is available at https://www.acf.hhs.gov/sites/default/files/orr/orr_national_call_center_english_508.pdf.
[26] The "Next Steps for Families" flyer is available at https://www.dhs.gov/sites/default/files/publications/18_0615_CBP_Next-Steps-for-Families.pdf.

informed the mother that the child's aunt, who apparently had been identified as the child's sponsor in HHS' system, had information about the child.

While onsite at the Port Isabel Detention Center, the OIG team witnessed early efforts to facilitate enhanced communication between separated families. The Detention Center had begun offering free phone calls for separated parents trying to reach their children and had started installing computer tablets for video calls. While OIG spoke with several detainees who confirmed that they were permitted to make free phone calls to their children, a group of separated mothers in one dorm had not yet had a chance to make free calls. In addition to these efforts, ICE had contracted social workers to come to the Detention Center to prepare ICE officers for assisting parents as they reconnected with their children. The OIG team also observed HHS personnel at the Detention Center interviewing detainees and collaborating with ICE employees working on reunification efforts.

The team spoke with 12 adult aliens — some who were in ICE detention and others who had been released — about their experiences locating and communicating with their children after separation.[27] These individuals reported mixed results:

- Only 6 of the 12 individuals reported being able to speak with their children while in detention.
- Of the 6 who were able to speak with their children, 2 reported receiving assistance from ICE personnel and 4 reported receiving assistance from non-detained family members, legal representatives, or social workers.
- Of the 6 who were unable to speak with their children, none of them reported receiving any assistance from ICE. Five of the 6 also reported being unable to reach an operator on HHS' toll-free number or were told the number was not working. One of the 6 reported that he never received any information on how to make the call.

Several factors may have contributed to these mixed results. For instance, the OIG team observed that some adults expressed hesitation about requesting information from ICE officers. Some adults appeared to be unable to read Spanish or English, while others spoke indigenous dialects. In addition, important information about how to contact separated children was not always available. For example, a poster appearing throughout an ICE facility in El Paso directed detainees to a particular document on reunifications in the law library, but no ICE personnel could locate the document when OIG asked for it.

[27] The experiences of these adults reflect the types of issues some alien parents separated from children faced while in detention. This is not a statistical sample, and these individuals' experiences are not necessarily representative of what other alien parents encountered.

Additionally, ICE personnel reported they were often unaware that adults in their custody had been separated from children, which likely impacted their ability to provide more assistance.

Additional Observations

In addition to the issues identified previously, the OIG team made the following noteworthy observations during its fieldwork:

- A senior Border Patrol official stated that the resources required to increase prosecutions under the Zero Tolerance Policy hampered the Border Patrol's ability to screen possible fraudulent claims of parentage. In particular, it limited the resources that could be devoted to conducting interviews and other behavioral analyses typically undertaken by the Border Patrol to verify that an adult and child are related.

- Border Patrol does not currently conduct DNA testing to verify that an adult claiming to be the parent of an accompanying child is, in fact, the parent. As a result, Border Patrol is limited to confirming parentage with documentation provided by an adult or obtained from consular officials from the adult's home country, making detecting fraud and definitively proving parentage more difficult.

- Border Patrol agents do not appear to take measures to ensure that pre-verbal children separated from their parents can be correctly identified. For instance, based on OIG's observations, Border Patrol does not provide pre-verbal children with wrist bracelets or other means of identification, nor does Border Patrol fingerprint or photograph most children during processing to ensure that they can be easily linked with the proper file.

- CBP may have been able to avoid separating some families. In McAllen, Texas, many adults prosecuted under the Zero Tolerance Policy were sentenced to time served and promptly returned to CBP custody. Several officers at CBP's Central Processing Center in McAllen stated that if these individuals' children were still at the facility when they returned from court, CBP would cancel the child's transfer to HHS and reunite the family. However, CBP officials later arranged to have adults transferred directly from court to ICE custody, rather than readmitting them where they might be reunited with their children. According to a senior official who was involved with this decision, CBP made this change in order to avoid doing the additional paperwork required to readmit the adults.

OIG Analysis of DHS' Management Response

We have included a copy of DHS' Management Response in its entirety in appendix B. In its response, DHS raised concerns that the draft report conflated actions the Department took under the Zero Tolerance Policy with separate CBP efforts to manage the flow of asylum-seekers at ports of entry. In the final report, we have clarified how even though the two policies may have been implemented separately, their effects are interrelated. Similarly, to address DHS' comment that the draft report did not adequately account for factors that may have caused CBP to detain unaccompanied alien children beyond the 72-hour period generally permitted by Federal law, we have included additional factors that we observed during our fieldwork. The Management Response also states that the draft report failed to recognize the Department's efforts to reunify families separated under the Zero Tolerance Policy. However, as we note, the observations in this report are limited to June 26–28, 2018, before reunification efforts were underway. DHS also provided technical comments that OIG incorporated as appropriate.

Appendix A
Objective, Scope, and Methodology

DHS OIG was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*.

The objective of this special report is to detail some of our observations from field visits to CBP and ICE facilities in and around McAllen and El Paso, Texas, that pertain to the separation of alien adults and children who entered the United States at or between ports of entry together in order to claim asylum. We selected facilities in and around McAllen, Texas, because the Rio Grande Valley Border Patrol sector had more apprehensions of family units and unaccompanied alien children than any other sector in April–May 2018. We selected facilities in and around El Paso, Texas, because the El Paso Border Patrol sector had the third-most apprehensions during that time as well as active ports of entry. We conducted our unannounced field visits between June 26 and 28, 2018, at the following facilities:

Rio Grande Valley, Texas

CBP Border Patrol facilities:
- McAllen Station;
- Ursula Central Processing Center;

CBP OFO facilities:
- Gateway International Bridge POE;
- Brownsville and Matamoros International Bridge POE;
- Hidalgo POE.

ICE ERO Facility:
- Port Isabel Detention Center.

El Paso, Texas

CBP Border Patrol facilities:
- Clint Station;
- Paso del Norte Processing Center;
- El Paso Station;

CBP OFO facility:
- Paso del Norte International Bridge POE;

ICE ERO facilities:
- El Paso Processing Center;
- Tornillo Processing Center.

Throughout our visits, we spoke with approximately 50 CBP and ICE employees, including line officers, agents, and senior management officials. We

met with 17 alien detainees (both adults and children) as well as parents who had been separated from their children and subsequently released from ICE custody. We also spoke with people in Mexico waiting for CBP officers to permit them to enter the United States to make asylum claims. Additionally, we spoke with CBP and ICE headquarters personnel in Washington, D.C., regarding statistical tracking, Department policies, and the computer systems those entities use to track individuals in their custody. We also reviewed relevant directives, guidance, policies, and procedures, as well as documents and communications related to the Zero Tolerance Policy implemented by DHS and the Department of Justice in May 2018.

This special report was prepared according to the *Quality Standards for Federal Offices of Inspector General* issued by the Council of the Inspectors General on Integrity and Efficiency, and reflects work performed by the DHS OIG Special Reviews Group and the Office of Inspections and Evaluations pursuant to Section 2 of the *Inspector General Act of 1978*, as amended. Specifically, this observational report provides information about CBP and ICE actions during and after the implementation of the Zero Tolerance Policy for the purpose of keeping the Secretary of DHS and Congress fully and currently informed about problems and deficiencies relating to the administration of DHS programs and operations and the necessity for corrective action. This report is designed to promote the efficient and effective administration of, and to prevent and detect fraud, waste, and abuse in, the programs and operations of DHS.

Appendix B
DHS' Management Response to the Draft Report

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

September 14, 2018

MEMORANDUM FOR: John V. Kelly
Senior Official Performing the Duties of the
Inspector General

FROM: Jim H. Crumpacker, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

SUBJECT: Management's Response to OIG Draft Report: "Special Report Observations Regarding Family Separation Issues Based on Field Visits to Texas on June 26–28, 2018" (Project No. 18-095-ISP-CBP)

Thank you for the opportunity to review and comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) perform an essential role in securing our Nation's borders at and between ports of entry, and enforcing U.S. immigration law in the interior of the country. As part of securing our borders and enforcing immigration laws, both are committed to treating all people humanely. CBP and ICE officers and agents continually uphold the utmost professionalism while maintaining efficient border operations.

While the OIG's draft report provides valuable insights, including observations about the lack of information technology integration across key immigration systems, the report makes a critical category error by conflating prosecutions of adults crossing the border illegally between ports of entry ("Zero Tolerance Policy") with operational actions to manage the flow of asylum seekers at Ports of Entry through the process known as "queue management." These policies and operations are separate and distinct.

It is also important to note that the queue management practices the OIG assessed were undergoing pilot evaluation as directed by the Secretary of Homeland Security during the OIG field visits for this report. The OIG's repeated conflation of the Zero Tolerance

Policy and queue management throughout the draft report, however, detracts from an accurate understanding of either issue. The incorporation of results or findings in the section of the report titled "Lack of Resources Caused CBP to Limit the Number of Asylum-Seekers Entering at Ports of Entry" does not relate to or support "Observations Regarding Family Separation." The practice of queue management does not result in Zero Tolerance-based prosecution or family separation at ports of entry, as it is lawful for family units to present themselves without documentation at ports of entry to claim asylum. Family units presenting themselves at ports of entry are only separated in limited circumstances, such as those acknowledged by the OIG in the introduction as predating Zero Tolerance—including an adult having criminal history or outstanding warrant, or a communicable disease, or if CBP cannot determine that the adult is a child's parent or legal guardian.

As noted in the draft report, CBP's processes and policies at ports of entry may require some individuals who do not have travel documents to wait at the International Boundary prior to entering the United States. These processes are in place to protect the health and safety of both travelers and CBP employees in the port area and to ensure appropriate balance of resources across CBP's multiple critical missions at ports of entry. CBP policy does not require that the individual leave the line and prohibits officers from requiring individuals to leave or turning individuals seeking admission away. At its discretion, CBP may prioritize certain individuals with urgent needs such as those traveling with children, or individuals who may be pregnant or have other medical emergencies, to be processed, even when there otherwise may not be processing resources or holding capacity absent those urgent needs.

The report notes that "CBP exceeded the 72-hour limit in many instances," referring to the statutory time frame for CBP to transfer an unaccompanied alien child to the custody of the Department of Health and Human Services (HHS). By doing so, the report implies that CBP did not perform its duties in a timely manner. However, the report does not recognize that in all but the rarest cases, CBP has completed all of its duties including processing unaccompanied alien children and making referrals to HHS, as appropriate. In fact, CBP sometimes performs custodial duties beyond the 72-hour limit due primarily to lack of available and timely placement on the part of HHS, and, in rare cases other extenuating circumstances, such as transportation delays or medical concerns – factors that OIG's report does not acknowledge. Indeed, the report omits many factors that might provide context to the larger issue of custodial responsibility, instead suggesting lack of diligence by CBP based solely on one official's recollection of HHS requests for more information. In reality, the care and transfer of unaccompanied alien children is a critical operational priority that is carefully and robustly managed by CBP.

In addition, the draft report provides no mention of the Department's significant accomplishments to reunify families. DHS coordinated with HHS, which deployed HHS staff to ICE detention locations to ensure that communication between the parents and

2

their children occurred. Despite the fact that the two Departments' tracking systems have no direct electronic interface, the government took exhaustive efforts to overcome this challenge and stand up a process to safely reunify families expeditiously in compliance with the June 26, 2018, decision in *Ms. L. v. ICE*.[1] These efforts included establishing a Special Operations Center staffed with personnel from both Departments. The Court in *Ms. L* also acknowledged the government's strides in facilitating communication.

Concerning the 24 children that were identified by your team, CBP and ICE further analyzed CBP and ICE data systems and worked with HHS to determine that the 24 children are appropriately not included in the data set because they were determined not to be the children of *Ms. L* class members based on valid reasons, as provided for in the *Ms. L* court order. These reasons included the parent's criminal history the fact that the child entered either unaccompanied or with a relative who was not their parent or legal guardian, the child was separated because the parent presented a danger to the child, or the child was reunified with his or her parents or legal guardians before the date of the court order.

Again, thank you for the opportunity to review and comment on this draft report. Technical comments were provided under separate cover. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

[1] *Ms. L. v. ICE*, No. 18-cv-428 (S.D. Cal.).

Appendix C
Report Distribution

Department of Homeland Security

Secretary
Deputy Secretary
Under Secretary for Management
Chief of Staff
Deputy Chiefs of Staff
General Counsel
Executive Secretary
Director, GAO-OIG Liaison Office
Assistant Secretary for Office of Policy
Assistant Secretary for Office of Public Affairs
Assistant Secretary for Office of Legislative Affairs
Chief Human Capital Officer

Office of Management and Budget

Chief, Homeland Security Branch
DHS OIG Budget Examiner

Congress

Congressional Oversight and Appropriations Committees

Additional Information and Copies

To view this and any of our other reports, please visit our website at: www.oig.dhs.gov.

For further information or questions, please contact Office of Inspector General Public Affairs at: DHS-OIG.OfficePublicAffairs@oig.dhs.gov.
Follow us on Twitter at: @dhsoig.

OIG Hotline

To report fraud, waste, or abuse, visit our website at www.oig.dhs.gov and click on the red "Hotline" tab. If you cannot access our website, call our hotline at (800) 323-8603, fax our hotline at (202) 254-4297, or write to us at:

Department of Homeland Security
Office of Inspector General, Mail Stop 0305
Attention: Hotline
245 Murray Drive, SW
Washington, DC 20528-0305

Exhibit 4

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
OFFICE OF INSPECTOR GENERAL

HHS OIG Issue Brief • January 2019 • OEI-BL-18-00511

Separated Children Placed in Office of Refugee Resettlement Care

Why OIG Did This Review

In the spring of 2018, the Department of Justice (DOJ) and Department of Homeland Security (DHS) implemented a "zero-tolerance policy" for certain immigration offenses. As a result, DHS separated large numbers of alien families, with adults being held in Federal detention while their children were transferred to the care of the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS).

On June 26, 2018, in a class action lawsuit, *Ms. L v. U.S. Immigration and Customs Enforcement (ICE),* a Federal District Court ordered the Federal Government to identify and reunify separated families who met certain criteria.

Given the potential impact of these actions on vulnerable children and ORR operations, the Office of Inspector General (OIG) conducted this review to determine the number and status of separated children (i.e., children separated from their parent or legal guardian by DHS) who have entered ORR care, including but not limited to the subset of separated children covered by *Ms. L v. ICE*. In a separate review, OIG is examining challenges that ORR-funded facilities have faced in reunifying separated children. On the basis of those findings, OIG plans to recommend solutions to improve ORR program operations.

What OIG Found

- In the summer of 2017, prior to the formal announcement of the zero-tolerance policy, ORR staff and officials observed a steep increase in the number of children who had been separated from a parent or guardian by DHS ("separated children") and subsequently referred to ORR for care.[1] Officials estimated that ORR received and released thousands of separated children prior to a June 26, 2018, court order in *Ms. L v. ICE* that required ORR to identify and reunify certain separated children in its care as of that date.

Key Takeaway

The total number of children separated from a parent or guardian by immigration authorities is unknown. Pursuant to a June 2018 Federal District Court order, HHS has thus far identified 2,737 children in its care at that time who were separated from their parents. However, thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court, and HHS has faced challenges in identifying separated children.

- In July 2018, ORR certified a list of 2,654 children that ORR believed to be separated from parents who met the *Ms. L v. ICE* class definition. ORR determined that an additional 946 children had some indication of separation in one or more data sources used to compile the certified list but did not meet all criteria for inclusion at that time.
- Between July and December 2018, ORR staff received new information indicating that some children who had been in ORR's care as of June 26, 2018, and whom ORR had not included on the certified list had, in fact, been separated from a parent. In October and December 2018, ORR conducted formal reviews that resulted in adding 162 children to the list reported to the *Ms. L v. ICE* court; ORR

How OIG Did This Review

We analyzed HHS internal data and reviewed court filings and other public documents. We also conducted multiple interviews with HHS senior leadership, agency officials, and staff.

also determined that 79 previously reported children had not actually been separated from a parent, for a new total of 2,737 separated children of class members.

- From July 1 through November 7, 2018, ORR received at least 118 children identified by DHS as separated when referring the child to ORR care. However, DHS provided ORR with limited information about the reasons for these separations, which may impede ORR's ability to determine appropriate placements.

What OIG Concludes

- HHS faced significant challenges in identifying separated children, including the lack of an existing, integrated data system to track separated families across HHS and DHS and the complexity of determining which children should be considered separated. Owing to these and other difficulties, additional children of *Ms. L v. ICE* class members were still being identified more than five months after the original court order to do so.
- It is not yet clear whether recent changes to ORR's systems and processes are sufficient to ensure consistent and accurate data about separated children, and the lack of detail in information received from DHS continues to pose challenges.
- OIG encourages continued efforts to improve communication, transparency, and accountability for the identification, care, and placement of separated children.

BACKGROUND

Exhibit 1. Family Separation and Reunification: Key Events

April 2017
Attorney General issues memorandum prioritizing prosecution of immigration offenses

July 2017
El Paso sector of CBP implements policies resulting in increased family separations

February 2018
Ms. L v. ICE lawsuit filed

April 2018
Attorney General issues memorandum instituting zero-tolerance policy

May 2018
Attorney General gives speech reiterating DHS and DOJ implementation of zero-tolerance policy

June 2018
President issues Executive Order directing DHS to detain alien families together

June 2018
Judge Sabraw orders Federal Government to cease certain family separations and reunite eligible families

July 2018
HHS certifies list of 2,654 separated children of potential class members to be reunified

October 2018
HHS adds 13 children to the list reported to the Court

December 2018
HHS adds 149 children to the list reported to the Court

Source: OIG Analysis of Memoranda, Court Filings, and Other Public Documents, 2018

ORR Care of Unaccompanied Alien Children (UAC)

ORR, a Program Office of the Administration for Children and Families (ACF) within HHS, manages the UAC Program. A UAC is a minor who has no lawful immigration status in the United States (U.S.) and does not have a parent or legal guardian in the country available to provide care and physical custody.[2] ORR funds a network of over 100 shelters for UAC; these facilities provide housing, food, medical care, mental health services, educational services, and recreational activities.

Federal law requires the safe and timely placement of UAC in the least restrictive setting that is in the best interest of the child.[3] ORR is also charged with identifying suitable "sponsors" living in the U.S. who can care for the child when he or she leaves ORR custody. Most sponsors are a parent or close relative of the child.[4] Where no appropriate sponsors are found, children remain in ORR custody and may be placed in long-term foster care, including community-based foster care or a group home. Children who turn 18 years old while in ORR care are transferred to DHS custody.[5] Regardless of where they are placed, UAC await judicial resolution of their immigration status.

The majority of children referred to ORR have surrendered to or been apprehended by immigration authorities while entering the U.S. without a parent or legal guardian. However, some children are referred to ORR after being separated by DHS from a parent or legal guardian with whom the child arrived. Historically, these separations were rare and occurred because of circumstances such as the parent's medical emergency or a determination that the parent was a threat to the child's safety.[6] ORR is not a law enforcement agency and has no role in the decision to separate families or prosecute immigration law violations.

Federal Policies Resulting in Family Separation

In recent years, the Department of Justice (DOJ) and DHS have taken a variety of actions to increase enforcement of immigration laws. (See Exhibit 1.) On April 11, 2017, the Attorney General issued a memorandum instructing Federal prosecutors to prioritize prosecution of certain immigration offenses.[7] From July through November 2017, the El Paso sector of Customs and Border Protection (CBP), an agency within DHS, implemented new policies that resulted in 281 individuals in families being separated.[8] On April 6, 2018, the Attorney General formally instituted a "zero-tolerance policy" for offenses under 8 U.S.C. § 1325(a), which addresses attempts by an individual who is not a U.S. citizen to enter the country at an improper time or place.[9] The Attorney General described this

policy in a May public speech, announcing that DHS was now referring all adults making illegal Southwest Border crossings to DOJ for prosecution and that DOJ would accept those cases.[10]

Under these policies, when a child and parent were apprehended together by immigration authorities, DHS separated the family, with the parent being placed in the custody of the U.S. Marshals Service within DOJ to await prosecution for immigration offenses. With the detained parent unavailable to care for his or her child, the child was treated as a UAC and transferred to ORR.

In June of 2018, two actions resulted in curtailment of the zero-tolerance policy. First, on June 20, 2018, the President issued Executive Order 13841, directing DHS to detain alien families together whenever "appropriate and consistent with the law and available resources."[11] Second, on June 26, 2018, District Court Judge Dana Sabraw preliminarily enjoined the Federal Government from detaining parents in immigration custody without their minor children and required reunification of families already separated on that date, provided they met the Court's criteria.[12]

Ms. L v. ICE

Judge Sabraw's June 26, 2018, order was issued in response to a class action lawsuit—*Ms. L v. ICE*—filed in February of 2018 in Federal District Court in California. The class was defined as:

> All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the [DHS], and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody absent a determination that the parent is unfit or presents a danger to the child.[13]

Parents are excluded from the class if they have a criminal history or communicable disease.

With respect to this open-ended class, the Court preliminarily enjoined DHS from continuing to separate families, subject to certain exceptions. A preliminary injunction is a temporary order prohibiting a party from specified actions; it is intended to maintain the status quo until the issues at trial are resolved. For those *Ms. L v. ICE* class members who were separated from their children as of the date of the ruling, Judge Sabraw ordered the Federal Government to reunify class members with their minor children in ORR custody within 14 days for children under the age of 5 and 30 days for those aged 5-17. Reunification is not required if there is a determination that the parent is unfit or presents a danger to their child or if the parent voluntarily declines to be reunited with the child. Parties to the lawsuit file regular joint status updates with the Court describing progress of the

reunification effort and an ongoing count of the number of possible children of potential class members who have been identified, the number of children whose parents have been found to be class members, and the number of children reunified or otherwise discharged from ORR care.[14]

HHS Efforts to Identify and Reunify Separated Children

In June of 2018, no centralized system existed to identify, track, or connect families separated by DHS. Compliance with the *Ms. L v. ICE* court order therefore required HHS and DHS to undertake a significant new effort to rapidly identify children in ORR care who had been separated from their parents and reunify them. To facilitate this effort, the Office of the Assistant Secretary for Preparedness and Response (ASPR) led a reunification Incident Management Team within HHS, drawing on ASPR's experience in crisis response and data management and analysis, to assist ORR in identifying and reunifying separated children.

Under ASPR's direction, HHS coordinated closely with DHS and DOJ to develop a Tri-Department Plan, submitted to the Court on July 18, 2018, which describes ongoing processes to reunify *Ms. L v. ICE* class members with their children. These steps include conducting and reviewing background checks of the parent, confirming parentage, assessing parental fitness and child safety, conducting a parent interview, and reuniting the family.[15] This process, as directed by the Court, is a more streamlined version of ORR's standard procedure for vetting a sponsor for a UAC. For example, ORR conducts background checks on all adults who will reside in a household with a UAC and requires a prospective sponsor to submit a Sponsor Care Plan. For *Ms. L v. ICE* class members, Judge Sabraw ruled that those procedures were designed for children who had entered the U.S. unaccompanied and were unnecessarily onerous when applied to parents and children who were apprehended together but separated by Government officials.[16]

If ORR determines that a child subject to the *Ms. L v. ICE* reunification order cannot be reunified with the parent from whom he or she was separated (for example, due to parental unfitness or danger to the child), ORR follows its usual sponsorship procedures for UACs. For all placements, ORR prioritizes parents and close relatives when selecting sponsors.

RESULTS

In the summer of 2017, ORR officials observed a steep increase in the number and proportion of separated children referred from DHS

According to ORR officials and staff, in the summer of 2017, staff observed a significant increase in the number and proportion of separated children (i.e., children separated from their parent or legal guardian by DHS) relative to other UACs. Staff had begun informally tracking separations in 2016, recognizing that additional information and effort was required to locate parents of separated children. Although this tracking was not comprehensive, it provided adequate information to alert ORR intake staff to significant trends. ORR officials noted that, according to this tracking, the proportion of separated children rose from approximately 0.3 percent of all UAC intakes in late 2016 to 3.6 percent by August 2017.

The increase in separated children posed operational challenges for the UAC program. In a November 2017 email that OIG reviewed, an ORR official stated that separated children were often very young, that these younger children required placement at specially licensed facilities, and that "the numbers of these very young UAC resulting from separations has on some dates resulted in shortfalls of available beds."

Due to these operational concerns, ORR staff continued to informally track separations. For example, staff initially recorded separated children on an Excel spreadsheet if they were identified by DHS as separated at intake; this was later replaced by a SharePoint database with greater ability to incorporate information from field staff, including reports from shelters when they identified separated children in their care. However, use of these tools was not formalized in procedures, and access was limited.

Overall, ORR and ASPR officials estimate that thousands of separated children entered ORR care and were released prior to the June 26, 2018, court order. Because the tracking systems in use at that time were informal and designed for operational purposes rather than retrospective reporting, ORR was unable to provide a more precise estimate or specific information about these children's placements (for example, whether the children were released to sponsors who were relatives, sponsors who were nonrelatives, foster care, etc.). These children did not have parents covered by the court order; therefore, they were not included in the *Ms. L v. ICE* reunification process.[17] Rather, in general, placement and release decisions would have followed the same procedures as for other UAC, i.e., ORR seeks to identify a qualified sponsor, including a parent or other close relative if one can be located and vetted in a timely way.

In July 2018, ORR certified 2,654 children of potential *Ms. L v. ICE* class members; an additional 946 children had some indication of separation but did not meet all criteria

In the absence of an existing, integrated HHS-DHS system to identify and track separated families, the HHS Incident Management Team leading the reunification effort took three approaches to collecting information about this population, with the goal of identifying every possible child of a *Ms. L v. ICE* class member in ORR care as of June 26, 2018. First, an ASPR-led data team (with the support of ORR, other HHS operating and staff divisions, and DHS sub-agencies) mined more than 60 DHS and HHS databases to identify indicators of possible separation, such as an adult and child with the same last name apprehended on the same day at the same location.[18] Additionally, ORR and other HHS staff, agency officials, and senior leadership manually reviewed case files for all of the approximately 12,000 children in ORR care at that time. Finally, ORR asked all ORR-funded shelters to attest to any separated children that grantees reasonably believed to be in their care. This effort resulted in an initial list of 3,600 potentially separated children, i.e., children for whom HHS found any information, in any data source reviewed, indicating that the child had been separated from a parent.

On July 11, 2018, after conducting additional reviews to resolve inconsistencies, ORR certified for the Court a list of 2,654 possible children of potential *Ms. L v. ICE* class members.[19] However, an ASPR official explained that even as ORR certified this list, some ASPR staff believed that between 50 and 100 additional children should have been included. At the same time, the Court's deadline for reunification was only 2 weeks away and extensive effort would be needed to comply. On July 15, the ASPR team made an internal decision to accept ORR's certification of 2,654 children, cease efforts to confirm the number of separations, and focus on the time-sensitive task of reuniting the 2,654 children with their parents.

Overall, from the initial list of 3,600 potentially separated children, 946 were not included on the list that ORR certified in July. Of these, approximately 300 were excluded because they had been released through normal ORR procedures between the date of the Court order (June 26, 2018) and the date that ORR certified the list (July 11, 2018). OIG's analysis of ORR data showed that approximately 90 percent of these children were released to sponsors, who are usually close relatives.[20]

ORR officials provided 3 other reasons why children may have appeared in the initial count of 3,600 potentially separated children but not the certified list reported to the Court in July:

- Some children were apprehended with and separated from a nonparent relative, such as a grandparent or older sibling. These children appeared on the initial list of 3,600 because CBP identified these scenarios as family unit separations. However, the *Ms. L v. ICE* court order applies only to separations of parents from their children.

- Some children were found to have a fraudulent birth certificate or other evidence indicating that the adult with whom they were apprehended had made a fraudulent claim of parentage.
- Some children had conflicting or unclear information in their case file. These cases were elevated to the ORR Director, who made a determination, in consultation with senior ORR staff, as to whether the balance of evidence supported including the child on the certified list.

ORR was not able to provide OIG with the specific number of children excluded from the certified list for each of the above reasons.

Between July and December 2018, ORR determined that 162 children not previously reported should be recategorized as possible children of potential *Ms. L v. ICE* class members

In the months after the list of 2,654 children was certified in July 2018, ORR staff became aware of new information indicating that some children who were not on the list had, in fact, been separated from a parent by DHS. In October and December 2018, ORR conducted two formal reviews of subsets of children and, as a result, added 162 children to the list reported to the *Ms. L v. ICE* court. Additionally, ORR determined that 79 children previously reported to the Court had not actually been separated from a parent; accordingly, the total number of separated children of *Ms. L v. ICE* class members currently stands at 2,737.

Between July and October 2018, ORR Staff Learned of "Fewer Than 50" Separated Children Not Included on the *Ms. L v. ICE* List. In an October interview, ORR staff stated that since July, they had sometimes received new information indicating that some children who had been excluded from the certified list for *Ms. L v. ICE* had, in fact, been separated from a parent by DHS. For example, in some cases, children who had not previously been willing to speak about their situations became more comfortable with shelter staff and reported that they had been separated. In other cases, parents' legal representatives contacted ORR regarding children that they believed to be separated.

ORR staff stated that as a result of this new information, between July and October 2018, they had become aware of "fewer than 50" children who had been in ORR care as of June 26 and were not included on the list reported to the Court in July, but whom ORR now believed to be separated. ORR was not able to provide an exact number or list of these children, and at the time of our interview, these children had not been formally determined to be children of class members or reported in joint status updates to the Court. However, ORR staff explained, and an ASPR official reiterated, that efforts to reunite these children with their parents were pursued on a case-by-case basis.

OIG could not determine whether the 50-100 children about whose status ASPR staff had expressed concern in July (described in the previous finding) encompassed the "fewer than 50" that ORR staff said they identified, because ORR was not able to provide a list of these children. However, an ASPR official we interviewed stated that it is likely these groups overlap.

In October 2018, HHS Added 13 Children to the List Reported to the *Ms. L v. ICE* Court. On October 1, 2018, at the request of the HHS Office of the General Counsel (OGC), ASPR asked ORR to conduct an additional review of 170 children who:

- had appeared on the initial list of 3,600 potentially separated children, but not the July 11 certified list, and
- were still in ORR care as of October 2018.

ASPR, ORR, and HHS-OGC officials we spoke to cited several reasons for initiating this new review. These included continued concerns from staff regarding the accuracy of the July 2018 list of separated children reported to the Court for *Ms. L v. ICE*, new CBP data, and the September 2018 publication of a DHS OIG report on family separations that included numbers that differed from those that HHS had reported to the Court.

Based on the October review, ORR recategorized 13 additional children as possible children of potential *Ms. L v. ICE* class members, bringing the total to 2,667. Information about these children was first included in a joint status update to the Court on October 25, 2018.[21] The following month, in a November 29, 2018, joint status update, HHS reported that it had determined that 79 of the 2,667 previously reported children had not, in fact, been separated from a parent.

In December 2018, HHS Added 149 Children to the List Reported to the *Ms. L v. ICE* Court. On December 12, 2018, HHS reported to the Court that ORR had conducted an additional review of case management records for some children who had been in ORR's care on June 26, 2018. According to court filings and HHS-OGC staff, the new review concerned children who:

- had appeared on the initial list of 3,600 potentially separated children but not the July or October lists reported to the Court, and
- had been released from ORR's care on or between June 26 and October 25, 2018.

Because the December 12, 2018, joint status update to the Court was filed as OIG was finalizing our report, we were unable to obtain and review any underlying data HHS relied upon in generating the update. However, we note that the joint status update was filed approximately one week after OIG first shared with HHS our draft report on this topic, including our finding that approximately 300 potentially separated children had been discharged between the date of the Court order and the date that the *Ms. L v. ICE* list was reported to the Court (as described on page 7).

As a result of the December review, ORR determined that 149 additional children should be re-categorized as possible children of potential *Ms. L v. ICE* class members, for a new total of 2,816 children reported to the Court, of whom 2,737 had been separated from a parent. ORR also determined that 11 of the 149 children had parents with criminal histories, which would have precluded reunification. Of the remaining 138 children, whose parents did not have criminal histories and so may have been eligible for reunification if identified before they were discharged:

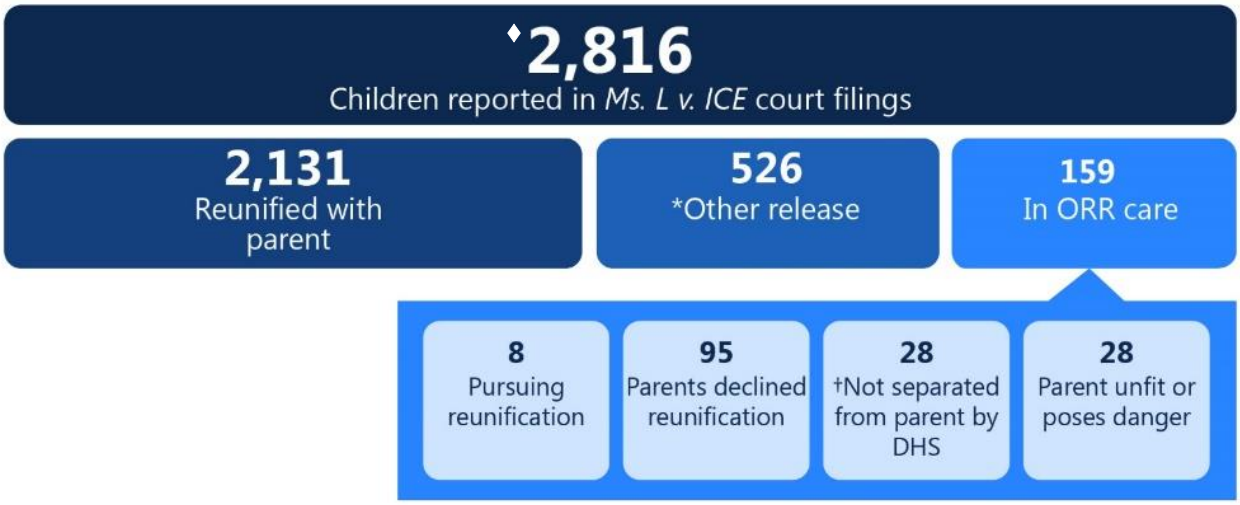
- 52 had been released to a sponsor who was a parent or legal guardian;
- 71 had been released to a sponsor who was an immediate relative, such as a sibling or grandparent;
- 9 had been released to sponsors who were distant relatives or unrelated adults;
- 5 had been discharged through voluntary departure to their country of origin; and
- 1 had turned 18 while in ORR's care, which typically results in transfer to DHS custody.

As of December 2018, Most Separated Children of Class Members Had Been Reunified. On December 12, 2018, HHS reported to the Court that of the 2,816 possible children of potential *Ms. L v. ICE* class members (including 79 whom HHS ultimately determined not to have been separated), 2,131 children had been reunified with a separated parent, and 526 children had been released under other circumstances, typically to a sponsor. Another 159 children remained in ORR care. Of these 159 children in care, 8 were categorized as children of class members and proceeding towards reunification or other appropriate discharge. ORR determined that the other 151 children in care were either not, in fact, children of class members or were otherwise not eligible for reunification. Specifically:

- for 95 children, the parent declined to be reunified;
- for 28 children, ORR determined that the child had not been separated from a parent by DHS; and
- for 28 children, ORR determined that the parent was unfit or posed a danger to the child.

For these 151 children, ORR is pursuing placement through its usual sponsorship procedures for UAC. (See Exhibit 2 on page 11.)

Exhibit 2. Status of Children Included in *Ms. L v. ICE* Court Filings as of December 2018



♦ *Includes 2,737 children separated from a parent and 79 children whom HHS has determined were not separated from a parent. As of December 2018, HHS continues to report to the Court on the status of all 2,816 children.*
**Includes children released to sponsors or remanded to DHS custody after turning 18.*
†*Includes children found to have entered the U.S. unaccompanied, separated from a nonparent relative, or otherwise determined not to have been separated from a parent.*
Source: OIG Analysis of Ms. L v. ICE *Court Filings, 2018*

From July 1 through November 7, 2018, ORR received at least 118 newly separated children; DHS has provided ORR with limited information about the reasons for these separations

According to ORR tracking documents that we reviewed, ORR received at least 118 children separated by DHS and referred to ORR care from July 1 through November 7, 2018. This number includes only children identified by DHS as separated at the time the child was transferred to ORR care.

The proportion of separated children increased steadily from 0.47 percent in July 2018 to 0.91 percent in the first week of November 2018. (See Exhibit 3 on page 12.) Overall, 0.69 percent of all ORR intakes from July 1 through November 7, 2018, were separated children. This is more than twice the rate that ORR observed in 2016, but far lower than the peak of the zero-tolerance policy.

The newly separated children ranged in age from under 1 year old to 17 years old. Of the 118 children, 82 were under the age of 13 when transferred to ORR care, including 27 who were under the age of 5.

As previously noted, DHS sometimes separates children from parents for the child's safety and well-being, such as when the parent is found to pose a danger to the child or cannot care for the child because of illness or injury. Based on our review of ORR tracking data, DHS reported to ORR that 65 of the 118 children were separated because the parent had a criminal history. In some cases, DHS did not provide ORR with details about the nature of the criminal history. Other reasons DHS provided to explain the family separation included the parent's gang affiliation (18 children), illness or hospitalization (13 children), immigration history only (3 children), or other factors (19 children), such as a parent presenting a fraudulent passport or an

adult claiming to be a legal guardian without proof; in some cases, little detail was provided.[22] The reason for separation is pertinent to *Ms. L v. ICE*, because the June 26, 2018, Court order preliminarily enjoined separations of parents from minor children except for specific reasons.

Exhibit 3. Separated Children Referred from DHS to ORR, July 1–November 7, 2018

Month	All Children Entering ORR Care	Number of Newly* Separated Children	Proportion of Separated Children
July	3,864	18	0.47%
August	3,773	25	0.66%
September	4,059	29	0.71%
October	4,339	36	0.83%
November 1–7	1,104	10	0.91%
Total	17,139	118	0.69%

** Indicates children separated by DHS and referred to ORR care from July 1 through November 7, 2018.*
Source: OIG Analysis of ORR Data, 2018

Incomplete or inaccurate information about the reason for separation, and a parent's criminal history in particular, may impede ORR's ability to determine the appropriate placement for a child. When a proposed sponsor (including a parent) has a criminal history, ORR policy is to evaluate the severity and type of crime and the length of time that has passed since the criminal act, along with any mitigating factors. ORR officials and staff noted that from a child welfare perspective, not all criminal history rises to a level that would preclude a child from being placed with his or her parent. ORR officials stated that when DHS provided insufficiently detailed explanations for a child's separation, ORR staff would contact DHS for followup information. However, the spreadsheet we reviewed indicated that DHS did not always respond to these requests for followup information.

ORR staff noted that although the spreadsheet OIG reviewed included only separations reported by DHS, ORR's tracking procedures have evolved to incorporate information from other sources. In July 2018, ORR modified its online case management system to include an indicator that staff can use to record that a child was separated, regardless of whether that information came from DHS or was reported by a facility caring for the child. ORR staff stated that from November 2018 onward, the tracking spreadsheet would include all children with the separation indicator.

CONCLUSION

The total number and current status of all children separated from their parents or guardians by DHS and referred to ORR's care is unknown. As a result of the *Ms. L v. ICE* lawsuit, there has been an extensive public accounting of the status of 2,737 separated children whose parents meet the class definition for this litigation. HHS devoted considerable resources to this effort but faced significant challenges in identifying separated children, including the lack of an existing, integrated data system to track separated families across HHS and DHS and the complexity of determining which children should be considered separated. Owing to these and other difficulties, additional children of *Ms. L v. ICE* class members were still being identified more than five months after the original court order to do so.

There is even less visibility for separated children who fall outside the court case. The Court did not require HHS to determine the number, identity, or status of an estimated thousands of children whom DHS separated during an influx that began in 2017 and whom ORR released prior to *Ms. L v. ICE*. Additionally, efforts to identify and assess more recent separations may be hampered by incomplete information.

ORR staff and officials cited efforts to improve tracking of separated children, such as modifying ORR's online case management system to more easily identify such children and creating a consolidated spreadsheet to track separated children. Maintaining accurate and comprehensive information about separated children would improve ORR's ability to monitor for future influxes and to ensure the most appropriate placement for these particularly vulnerable children. However, it is not yet clear whether ORR's recent changes are sufficient to ensure consistent and accurate data about separated children, and the lack of detail in information received from DHS continues to pose challenges. OIG encourages continued efforts to improve communication, transparency, and accountability for the identification, care, and placement of separated children.

OIG is conducting a review to explore challenges that ORR-funded facilities have faced in reunifying separated children. On the basis of those findings, OIG plans to recommend solutions to improve program operations. In addition, OIG is engaged in multiple reviews to assess the care and well-being of children residing in ORR-funded facilities. Future work will address facilities' efforts to protect all children in their care from harm and to provide needed physical and mental health services, including efforts to address trauma.

Agency Comments and OIG Response

In its comments on OIG's draft report, ACF stated that it generally agrees with OIG's findings regarding the number of separated children that HHS reported to the court in *Ms. L v. ICE*. ACF asserted that HHS has now identified all separated children who were in ORR care when the *Ms. L* court issued its preliminary injunction and whose parents are potential *Ms. L* class members. OIG notes that HHS has revised this number several times since the initial certification to the Court in July, most recently adding 149 children in December 2018.

ACF noted that the scope of OIG's review was broader than the subset of separated children covered by *Ms. L v. ICE* and stated that statutes governing ORR operations do not define or require ORR to track separated children. ACF also stated that the Court has never instructed ORR to determine the number of separated children whom ORR received and discharged before the June 26, 2018, Court order.

ACF stated that ORR's processes for identifying and tracking newly separated children "are effective and continuing to improve," citing changes to ORR's online case management system and its case management process. In particular, ACF stated that ICE and CBP staff can now directly enter information about a child into ORR's online case management system when referring the child to ORR, including marking a "checkbox" to indicate that a child has been separated.

ACF also provided updated information regarding the number of newly separated children. Specifically, ACF stated that as of December 26, 2018, ORR has identified a total of 218 children who were separated by DHS and transferred to ORR care after June 26, 2018. OIG notes that this number is significantly higher than the 118 separated children listed in the tracking documents we reviewed for the period of July 1 through November 7, 2018.

In response to OIG's finding that DHS has provided ORR with limited information regarding the reasons for family separations, ACF offered comments with respect to family separations attributed to parental criminal history. Specifically, ACF cited the *Ms. L* court's determination that parents with criminal history are not entitled to reunification and stated that ACF defers to and accepts DHS's attestations of criminal history. ACF also stated that in cases in which DHS initially omitted confirmation of parental criminal history, DHS has provided confirmation upon request. ACF did not describe the level of detail that DHS has provided in these instances, and OIG notes that the tracking documents we reviewed in November 2018 included multiple cases in which DHS had not responded to ORR intake staff requests for additional information about a child's separation. We further note that the utility of criminal history information is not limited to meeting the requirements of *Ms. L v. ICE*. ORR's policy for assessing potential sponsors includes evaluating the severity and type of any criminal history; sufficient

detail about criminal history is therefore necessary to inform placement decisions.

ACF concluded by stating that the Agency agrees with OIG that continued efforts to improve communication, transparency, and accountability for the identification, care, and placement of separated children are warranted. OIG will continue to monitor ORR operations and conduct future reviews as appropriate. (See Appendix A for the full text of ACF's comments.)

METHODOLOGY

We reviewed data compiled by ASPR and ORR in August, September, and November 2018 to facilitate the reunification effort, as well as followup data produced by those agencies in response to OIG requests. We analyzed these data to identify the numbers of children with certain characteristics (for example, discharge date, type of release, and inclusion on the list of children reported to the Court for *Ms. L v. ICE*).

We reviewed ORR tracking data for children identified by DHS as separated and transferred to ORR care from July 1 through November 7, 2018, including information that DHS provided to ORR regarding reasons for family separation. We analyzed these data to determine the number of separated children recorded by ORR and the primary reasons DHS provided ORR to explain the separations.

Between September and December 2018, we conducted multiple interviews with ASPR, ORR, and HHS-OGC officials and staff, and with HHS senior leadership. We conducted qualitative analysis of these interviews to identify key issues and events and to clarify our understanding of the data that HHS provided.

We reviewed public documents regarding the reunification effort, including legal documents filed for *Ms. L v. ICE* from March through December 2018, congressional testimony by HHS and DHS officials, and relevant reports issued by DHS-OIG and GAO.

Standards

We conducted this study in accordance with the *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency.

APPENDIX A

COMMENTS FROM THE ADMINISTRATION FOR CHILDREN AND FAMILIES

ADMINISTRATION FOR CHILDREN & FAMILIES
Office of the Assistant Secretary | 330 C Street, S.W., Suite 4034
Washington, DC 20201 | www.acf.hhs.gov

January 3, 2019

Ms. Ann Maxwell
Assistant Inspector General for Evaluation and Inspections
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Ms. Maxwell:

I am writing to thank the Office of Inspector General (OIG) for its work on the report entitled *Separated Children Placed in ORR Care* (OEI-BL-18-00511), and to submit the formal response of the Administration for Children and Families (ACF) to the report.

ACF is committed to the accurate and transparent reporting of data on the programs operated by the Office of Refugee Resettlement (ORR). For that reason, ACF welcomed the opportunity to cooperate with OIG's investigation into the number of alien children who the U.S. Department of Homeland Security (DHS) has separated and transferred to ORR care. ACF also appreciated OIG's willingness to consider ACF's prior technical comments on the report.

ACF generally agrees with OIG's findings regarding the number of separated children which the U.S. Department of Health and Human Services (HHS) reported to the Court in *Ms. L. v. ICE*, No. 18-0428 (S.D.Cal.). Nevertheless, ACF believes that further explanation of the differences between OIG's investigation and HHS' reporting in *Ms. L.* may enhance the public's understanding of OIG's findings. Further explanation of ORR's new processes for newly-separated children may likewise help the public to understand the effectiveness of those processes. ACF's views on these three issues are detailed below.

1. HHS has reported all separated children who were in ORR care when the *Ms. L.* Court issued its preliminary injunction, and whose parents are potential *Ms. L.* class members

In its report, OIG discusses the federal policies that have resulted in family separation, and the procedural history of *Ms. L. v. ICE*. OIG then makes findings regarding the number of separated children which HHS reported to the *Ms. L.* Court.

ACF generally agrees with OIG that:

- ORR "is not a law enforcement agency and has no role in the decision to separate families or prosecute immigration law violations." Rather, ORR is "a Program Office of [ACF]" that "funds a network of over 100 shelters for [Unaccompanied Alien Children (UACs)]," which in turn "provide housing, food, medical care, mental health services, educational services, and recreational activities" to UACs.

- On June 26, 2018, the *Ms. L.* Court "preliminarily enjoined the Federal Government from detaining parents in immigration custody without their minor children and required reunification of families already separated on that date, provided they met the Court's criteria." The Court set forth its criteria in its class definition: "'All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the [DHS], and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody absent a determination that the parent is unfit or presents a danger to the child.'" Parents with criminal histories or communicable diseases are outside the class.

- To comply, HHS had "to undertake a significant new effort to rapidly identify children in ORR care who had been separated from their parents and reunify them."

- The HHS Incident Management Team (IMT) staffed by the Office of the Assistant Secretary for Preparedness and Response (ASPR) and ORR spearheaded the new effort for HHS. The IMT had "the goal of identifying every possible child of a *Ms. L. v. ICE* class member in ORR care as of June 26, 2018." To that end, the IMT conducted a rigorous review to identify any and all indicators of potential separation for every child in ORR care as of June 26, 2018. The review encompassed: ORR case management records for every child in ORR care; sworn testimony from each ORR grantee on the separated children at the grantee's shelters; and dozens of data sets from DHS.

- In July 2018, the IMT completed its review and HHS reported 2,654 possible children of potential class members to the *Ms. L.* Court.[1]

- ORR continued caring for the other children who were in ORR custody as of June 26, 2018. In September 2018, the IMT began a second record review of all such children who still remained in ORR care to determine whether HHS should re-categorize any of them as possible children of potential class members. The second record review looked at new information about the children that ORR had received from ORR shelters and DHS through ordinary program operations.

- On October 25, 2018, HHS reported to the *Ms. L.* Court that it was re-categorizing 13 of the children in the second record review as possible children of potential class members. This increased the total number of possible children of potential class members to 2,667.

- The *Ms. L.* Court indicated that it wanted ORR to provide updated, final numbers of separated children. So ORR conducted a third record review to determine whether any of the children in ORR care as of June 26, 2018 who were not previously identified as possible children of potential class members, and who were discharged to sponsors before October 25, 2018, should be re-categorized. The third record review looked at new information about the children that ORR had received from ORR shelters and DHS through ordinary program operations before discharge.

---

[1] The ASFR and ORR career staffs maintain that this number was certified internally on July 10, 2018.

- On December 12, 2018, HHS reported to the *Ms. L.* Court that it was re-categorizing 149 of the discharged children in the third record review as possible children of potential class members. This increased the total number of possible children of potential class members to 2,816.

During the course of the Ms. L. litigation, HHS has determined that some children categorized as possible children of potential class members were not separated from parents. HHS reported to the Ms. L. Court on November 29, 2018 that the total number of such children is 79.[2] Thus, 2,737 of the 2,816 possible children of potential class members were separated from parents.

HHS' data reporting to the *Ms. L.* Court has now accounted for all separated children who were in ORR care as of June 26, 2018, and whose parents are potential *Ms. L.* class members. That is, HHS has accounted publicly for all children who were separated from a parent at the border by DHS, and who were in ORR care as of June 26, 2018, regardless of whether they are still in ORR care or have been reunified with their parent or otherwise appropriately discharged.

ACF agrees with OIG that "HHS has faced challenges in identifying separated children." The "significant new effort" undertaken by HHS was complex, fast-moving, and resource-intensive. OIG's report provides a window into the herculean work of the HHS career staff to "rapidly identify children in ORR care who had been separated from their parents and reunify them." ACF greatly appreciates the career staff's work in response to the challenges noted by OIG.

In addition, ACF is pleased that OIG's report identifies *no evidence whatsoever* suggesting that ORR lost track of children in its care. OIG's report corroborates what HHS has said all along: HHS can determine the location and status of any child in ORR care at any time by accessing the case management records for the child on the ORR online portal.

2. The scope of OIG's investigation is broader than HHS' reporting to the *Ms. L.* Court

OIG indicated in its report that it investigated a larger population of children than HHS reported to the *Ms. L.* Court. OIG Report at page 1 ("OIG conducted this review to determine the number and status of separated children (i.e., children separated from their parent or legal guardian by DHS) who have entered ORR care, including but not limited to the subset of separated children covered by *Ms. L. v. ICE*"). ACF understands that OIG looked at children who DHS separated from a parent or legal guardian at any time, regardless of whether the separation occurred at the border, and regardless of whether (or when) ORR discharged the child.

The scope of OIG's investigation is important for the public to understand because the Trafficking Victims Protection Reauthorization Action (TVPRA)—which governs ORR operations—does not define the term "separated children." Nor does it set forth a statutory requirement to track the number of children who DHS separates from a putative parent or guardian and transfers to ORR.

The Court in *Ms. L. v. ICE* did not define the term "separated children" either. As discussed above, the Court defined the *Ms. L.* class to include parents whose children were separated by DHS at the border and were in ORR care as of June 26, 2018. After class certification, ORR reported the

[2] Subsequent court filings reported that smaller numbers of such children were in ORR care at the times of those filings due to discharges.

number of possible children of potential class members to the *Ms. L.* Court, as well as the results of ORR's analyses of class membership, and completed reunifications and other appropriate discharges. The *Ms. L* Court has never instructed ORR to determine the number of children who DHS separated and ORR discharged before June 26, 2018. Nor has ORR tried to make such a determination, as ORR has only limited resources, and counting prior DHS separations would take away from ORR's primary focus on caring for the children currently in ORR care and promptly discharging them to appropriate sponsors.

Moreover, even if ORR were to invest a substantial part of its limited resources in a count of prior DHS separations, the count would not fulfill any current operational needs or enable HHS to provide any form of relief to discharged children. ORR's custodial authority over a child ends when ORR discharges the child to a sponsor. ORR does not have authority over the sponsor either. Even if ORR did have such authority, most sponsors are parents, legal guardians, or close family members. Any intervention by ORR after discharge would run the risk of disrupting the child's home environment, which is not a recommended child welfare practice.

For these reasons, ACF is pleased that OIG has not recommended that ORR devote its limited resources to conducting a count of prior DHS separations.

3. ORR's processes for newly-separated children are effective and continuing to improve.

Historically, U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) have been responsible for most referrals of UACs to ORR. CBP's database has pushed referral information on UACs directly into the ORR portal's referral page. ICE has had access to the referral page, and has directly entered UAC information into it.

As OIG notes in its report, ORR has now added a checkbox to the ORR portal's referral page so that the referring DHS sub-agency can indicate whether a child has been separated from a putative adult family member. And the referral page now has a "notes" section where CBP and ICE can type in the name and other information of the separated adult, including their alien number. CBP and ICE can also enter this information into the parent/relative information section of the referral. These new features enable ORR to identify potentially separated children promptly upon referral from DHS.

To help ensure that all potentially separated children are identified promptly, ORR has also modified its case management process. The case managers at ORR care provider facilities are now using interviews of children during the admissions and case assessment process to look for any indicators of potential separation. If the case manager finds such indicators during the interview—or at any time thereafter in the case management process—they may now flag the potential separation in the ORR portal using a checkbox. The upshot is that potential separations are captured in the ORR portal in the ordinary course of program operations, regardless of whether DHS or HHS has the information about the potential separation.

As OIG also notes, ORR now has data personnel responsible for consolidating and tracking the individualized information on potentially separated children that resides in the ORR portal. In addition, ORR receives weekly data from ICE on potential *Ms. L.* class members who are in ICE custody and who have children in ORR care. ORR reviews this data together with the consolidated

tracking information from the ORR portal when analyzing whether the criteria for class membership and reunification in *Ms. L* are met.

In its report, OIG raises concerns about the parental criminal history information that DHS provides to ORR. At present, such information is not an operational constraint for ORR because the *Ms. L.* Court has stated that "the class of parents entitled to reunification with their children pursuant to this Court's orders does not include parents with criminal history." Order on Reunification of Ms. Q and Mr. C., *Ms. L. v. ICE*, No. 18-0428 (S.D. Cal. Sept. 18, 2018), ECF No. 236. So long as DHS attests that the parent has criminal history, ORR defers to DHS' law enforcement judgment. When DHS has omitted confirmation of the parent's criminal history in its referral, DHS has provided ORR with such confirmation upon request.

As of December 26, 2018, ORR has identified 218 children who were separated by DHS and transferred to ORR care after June 26, 2018. One hundred fifty-three of the 218 children are in ORR custody, while ORR has appropriately discharged 65.

ACF believes that ORR's new processes and operations are compliant with the *Ms. L.* Court's orders. Nevertheless, ACF agrees with OIG that "continued efforts to improve communication, transparency, and accountability for the identification care, and placement of separated children" are always warranted. ORR will continue to look for opportunities to improve inter-departmental data-sharing and operations with DHS.

***

Thank you again for OIG's thorough investigation and reporting on this important issue. Please direct any follow-up inquires to Scott Logan in our Office of Legislative Affairs and Budget at (202) 401-4529.

Sincerely,

Lynn A. Johnson

Lynn A. Johnson
Assistant Secretary
for Children and Families

ACKNOWLEDGMENTS

Louise Schoggen, Assistant Regional Inspector General in the Baltimore regional office, served as the team leader for this study. Others in the Office of Evaluation and Inspections who conducted the study include Bahar Adili, Heather Barton, Michael Kvassay, Seta Hovagimian, and Brianna So.

We would also like to acknowledge the contributions of other Office of Inspector General staff, including Laura Canfield, Blaine Collins, Abigail Cummings, Amitava Mazumdar, Diana Merelman, Mike Novello, Lyndsay Patty, and Jessica Swanstrom.

This report was prepared under the direction of David Tawes, Regional Inspector General for Evaluation and Inspections.

To obtain additional information concerning this report or to obtain copies, contact the Office of Public Affairs at Public.Affairs@oig.hhs.gov.

ENDNOTES

[1] The term "separated children" is not defined in Federal law, and no law stipulates when a family separation must occur. Because there is no fixed legal definition, OIG cannot be certain that the term was used identically by all individuals we interviewed and in all documents we reviewed. We were advised that, in practice, ORR uses the term to mean children who are separated from a parent or legal guardian. The *Ms. L. v. ICE* class is narrower, applying only to children separated from a parent who meets the class definition. Where possible, we have specified the scope of the term as we use it throughout the report.

[2] 6 U.S.C. § 279(g)(2).

[3] 8 U.S.C. § 1232(c).

[4] *Flores v. Reno*, No. 85-4544 (C.D. Cal. Jan. 17, 1997). This Stipulated Settlement Agreement sets out an order of priority for sponsors with whom children should be placed. The first preference is for placement with a parent, followed by a child's legal guardian, then other adult relatives.

[5] 6 U.S.C. § 279(g)(2), in part, defines UAC as a child who "has not attained 18 years of age." *Also see,* Office of Refugee Resettlement, *ORR Guide: Children Entering the United States Unaccompanied*, Introduction. Accessed at https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied on November 18, 2018.

[6] No statute dictates the circumstances under which families must be separated upon apprehension by immigration authorities, and no historical records of the number or cause of family separations exist. However, the Government Accountability Office (GAO) reports that Border Patrol officials stated that some family separations not related to prosecutions of violations of 8 U.S.C. § 1325(a) have always occurred, such as in cases in which the parent could be a threat to the health and safety of the child or the adult may not be the child's parent. (See GAO, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border*, GAO-19-163, October 9, 2018, p. 13. Accessed at https://www.gao.gov/assets/700/694918.pdf on November 18, 2018.) ORR staff we interviewed confirmed that historically, ORR had received small numbers of separated children, citing reasons such as the parent experiencing a medical problem that precluded caring for their child.

[7] *Memorandum for All Federal Prosecutors. Renewed Commitment to Criminal Immigration Enforcement.* Office of the Attorney General, April 11, 2017. Accessed at https://www.justice.gov/opa/press-release/file/956841/download on November 18, 2018.

[8] GAO, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border*, GAO-19-163, October 9, 2018, p. 14-15. Accessed at https://www.gao.gov/assets/700/694918.pdf on November 18, 2018.

[9] *Memorandum for Prosecutors Along the Southwest Border. Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a).* Office of the Attorney General, April 6, 2018. Accessed at https://www.justice.gov/opa/press-release/file/1049751/download on November 18, 2018.

[10] DOJ Office of Public Affairs, *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, May 7, 2018. Accessed at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions on November 18, 2018.

[11] Exec. Order 13841, 83 Fed Reg 29435, dated June 20, 2018, and published on June 25, 2018.

[12] *Ms. L v. ICE*, No. 18-0428 (S.D. Cal. June 26, 2018) (Order Granting Plaintiffs' Motion for Classwide Preliminary Injunction).

[13] *Ms. L v. ICE*, No. 18-0428 (S.D. Cal. June 26, 2018) (Order Granting in Part Plaintiffs' Motion for Class Certification)

[14] On November 15, 2018, Judge Sabraw entered an order approving a final settlement of a portion of the *Ms. L* litigation, as well as two other cases challenging the DHS family separation practice. The settlement establishes procedures for how separated parents and their children may apply for asylum and ensures that those families will remain together pending the outcomes of immigration proceedings. The settlement did not lift the ongoing preliminary injunction ordered in *Ms. L* on June 26, 2018. Thus, the preliminary injunction against involuntarily separating families unless the parent is unfit or a danger to the child remains in place. *Ms. L v. ICE*, No. 18-0428 (S. D. Cal., November 15, 2018) (Order Granting Final Approval of Class Action Settlement).

[15] HHS, DHS, DOJ, *The Tri-Department Plan for Stage II of Family Reunification,* July 18, 2018. Accessed at https://www.hhs.gov/sites/default/files/UAC-Tri-Department-Process.pdf on November 18, 2018.
[16] *Ms. L v. ICE*, No. 18-0428 (S.D. Cal. July 10, 2018) (Order Following Status Conference).
[17] On December 14, 2018, Plaintiffs in the *Ms. L* case filed a motion to expand the scope of the class in that litigation to include parents whose separated children were released from ORR custody before June 26, 2018. As of release of this report, the Government has not responded to this Motion and the Court has not ruled. See *Ms. L v. ICE*, No. 18-0428 (S.D. Cal. December 14, 2018) (Motion to Clarify Scope of the *Ms. L* Class).
[18] According to ASPR officials, the large number of databases was primarily due to DHS's decentralized information systems. For example, CBP and ICE provided ASPR with separate data, and datasets were often specific to one sector or office.
[19] HHS continued to refer to "possible children of potential class members" even after the list of children was certified, because the Agency might later determine that some parents or children did not qualify. For consistency, OIG uses the same terminology in this report.
[20] Examples of other types of releases include transfer to DHS after turning 18 and voluntary departure to country of origin.
[21] The joint status update filed on October 25, 2018, states that HHS had identified and recategorized 14 children. However, the Agency later determined that one of those 14 was already included on the certified list reported to the Court in July 2018 and corrected the number to 13 in the November 8, 2018, joint status update. *Ms. L v. ICE*, No. 18-0428 (S.D. Cal. November 8, 2018) (Joint Status Report at footnote 2).
[22] HHS-OIG has referred these data to DHS-OIG for followup as appropriate.

Exhibit 5

Fact Sheet: Zero-Tolerance Prosecution and Family Reunification

Release Date: June 23, 2018

The Department of Homeland Security (DHS) and Health and Human Services (HHS) have a process established to ensure that family members know the location of their children and have regular communication after separation to ensure that those adults who are subject to removal are reunited with their children for the purposes of removal. The United States government knows the location of all children in its custody and is working to reunite them with their families.

As part of the apprehension, detention and prosecution process, illegal aliens, adults and children, are initially detained by U.S. Customs and Border Protection (CBP) before the children are sent to HHS' Office of Refugee Resettlement (ORR) and parents to Immigration and Customs Enforcement (ICE) custody. Each entity plays a role in reunification. This process is well coordinated.

U.S. Customs and Border Protection

- CBP has reunited 522 Unaccompanied Alien Children (UAC) in their custody who were separated from adults as part of the Zero Tolerance initiative. The reunions of an additional 16 UAC who were scheduled to be reunited on June 22, 2018 were delayed due to weather affecting travel and we expect they will all be reunited with their parents within the next 24 hours. There will be a small number of children who were separated for reasons other than zero tolerance that will remain separated: generally only if the familial relationship cannot be confirmed, we believe the adult is a threat to the safety of the child, or the adult is a criminal alien.
- Because of the speed in which adults completed their criminal proceedings, some children were still present at a United States Border Patrol (USBP) station at the time

their parent(s) returned from court proceedings. In these cases, the USBP reunited the family and transferred them, together, to ICE custody as a family unit.

U.S. Immigration and Customs Enforcement

- U.S. Immigration and Customs Enforcement (ICE) has dedicated the Port Isabel Service Processing Center (https://www.ice.gov/detention-facility/port-isabel-service-processing-center) (PIDC) in the San Antonio Field Office area as the primary facility to house alien parents or legal guardians going through the removal process. No children will be housed at the facility.
- PIDC is intended to serve the unique needs of detained parents and legal guardians of minors in HHS/ORR custody by helping to facilitate communication with their children and to help parents make informed decisions about their child.
- ICE will work with the adults to provide regular communication with their children through video teleconferencing, phone, and tablets at PIDC and other detention locations where these parents are detained.
- Where a child is in the care and custody of HHS/ORR, ICE works with ORR to reunite the parent and child at the time of removal and with the consulate to assist the parent to obtain a travel document for the child.
- Once the parent's immigration case has been adjudicated by U.S. Citizenship and Immigration Services (USCIS) and/or the Executive Office for Immigration Review (EOIR), ICE will seek to reunite verified family units and link their removal proceedings so that family units can be returned to their home countries together.

ICE has completed the following steps toward reunification:

- Implemented an identification mechanism to ensure on-going tracking of linked family members throughout the detention and removal process;
- Designated detention locations for separated parents and will enhance current processes to ensure communication with children in HHS custody;
- Worked closely with foreign consulates to ensure that travel documents are issued for both the parent and child at time of removal; and
- Coordinated with HHS for the reuniting of the child prior to the parents' departure from the United States.

U.S. Health and Human Services Office of Refugee Resettlement

- Minors come into HHS custody with information provided by DHS regarding how they illegally entered the country and whether or not they were with a parent or adult and, to the extent possible, the parent(s) or guardian(s) information and location. There is a central database which HHS and DHS can access and update when a parent(s) or minor(s) location information changes.
- As of June 20th HHS has 2,053 separated minors being cared for in HHS funded facilities, and is working with relevant agency partners to foster communications and work towards reuniting every minor and every parent or guardian via well-established reunification processes. Currently only 17% of minors in HHS funded facilities were placed there as a result of Zero Tolerance enforcement, and the remaining 83% percent arrived to the United States without a parent or guardian.
- Parent(s) or guardian(s) attempting to determine if their child is in the custody of the Office of Refugee Resettlement (ORR) in HHS Administration for Children and Families should contact the ORR National Call Center (www.acf.hhs.gov/orr/resource/orr-national-call-center (http://www.acf.hhs.gov/orr/resource/orr-national-call-center)) at 1-800-203-7001, or via email information@ORRNCC.com (mailto:information@ORRNCC.com) . Information will be collected and sent to HHS funded facility where minor is located. The ORR National Call Center has numerous resources available for children, parent(s), guardian(s) and sponsors.
- Within 24 hours of arriving at an HHS funded facility minors are given the opportunity to communicate with a vetted parent, guardian or relative. While in HHS funded facilities' care, every effort is made to ensure minors are able to communicate (either telephonic or video depending on the circumstances) with their parent or guardian (at least twice per week). However, reasonable safety precautions are in place to ensure that an adult wishing to communicate with a minor is in fact that minor's parent or guardian.
- Minors in HHS funded facilities are permitted to call both family members and/or sponsors living in the United States and abroad. Attorneys representing minors have unlimited telephone access and the minor may speak to other appropriate stakeholders, such as their consulate, the case coordinator, or child advocate. Additional information on telephone calls, visitation, and mail policies are available in the policy guide. (https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied)

- Under HHS' publicly available (https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied) policy guide for Unaccompanied Alien Children, the Office of Refugee Resettlement (ORR) releases minors to sponsors in the following order of preference: parent; legal guardian; an adult relative (brother, sister, aunt, uncle, grandparent or first cousin); an adult individual or entity designated by the parent or legal guardian (through a signed declaration or other document that ORR determines is sufficient to establish the signatory's parental/guardian relationship); a licensed program willing to accept legal custody; or an adult individual or entity seeking custody when it appears that there is no other likely alternative to long term ORR care and custody.

Topics: Border Security (/topics/border-security), Immigration and Customs Enforcement (/topics/immigration-enforcement)

Keywords: Border Security (/keywords/border-security), Family detention (/keywords/family-detention), immigration enforcement (/keywords/immigration-enforcement), UAC (/keywords/uac), Unaccompanied Alien Children (/keywords/unaccompanied-alien-children)

Last Published Date: June 26, 2018

Exhibit 6

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MS. L, et al. Petitioners-Plaintiffs, vs. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, et al., Respondents-Defendants.	Case No. 18-cv-428 DMS MDD Hon. Dana M. Sabraw

DECLARATION OF JONATHAN WHITE

I, Jonathan White, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my testimony below is true and correct:

1. I am a Commander with the United States Public Health Service Commissioned Corps, and have served at the Department of Health and Human Services (HHS) in three successive presidential administrations. I am presently assigned to the Office of the Assistant Secretary for Preparedness and Response (ASPR), and previously served as the Deputy Director of the Office of Refugee Resettlement (ORR).

2. I am HHS' agency lead in the Unaccompanied Alien Children (UAC or UACs) Reunification Coordination Group for removed parents with minor children in ORR care. *See* ECF No. 182.

3. The statements in this declaration are based on my personal knowledge, information acquired by me in the course of performing my official duties, information supplied to me by federal government employees, and government records.

4. I am providing this declaration for use in *Ms. L. v. ICE*, No. 18-cv-428 (C.D. Cal.). Specifically, I am providing it to support HHS compliance with the Court's order that HHS file a response to the HHS OIG report entitled "Separated Children Placed in Office of Refugee Resettlement Care," OEI-BL-18-00511 (January 2019).

5. The OIG report includes a response from Lynn Johnson, the Assistant Secretary for Children and Families for HHS. Assistant Secretary Johnson oversees the Administration for Children and Families (ACF). ORR is an ACF program office.

6. I reviewed Assistant Secretary Johnson's response to the OIG report before she submitted it. I concurred generally with her response at that time, and still do.

7. Given that HHS has already responded formally to the OIG report through Assistant Secretary Johnson, my testimony below seeks to answer questions regarding the OIG report that class counsel noted for the Court.

A. HHS' reporting in July 2018 of possible children of potential class members in ORR care was based on good-faith, reasonable programmatic judgment

8. This Court granted the Plaintiffs' Motions for Class Certification and Preliminary Injunction on June 26, 2018. *See* ECF Nos. 82 and 83.

9. The Court defined the class as "All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child ***who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody***, absent a determination that the parent is unfit or presents a danger to the child." ECF No. 82 (emphasis added). The Court added that "the class does not include migrant parents with criminal history or communicable disease, or those who are in the interior of the United States or subject to the EO." *Id.*

10. To comply with the Court's orders, HHS undertook a significant new effort to rapidly identify children in ORR care who had been separated from *Ms. L.* class members and reunify them. As part of that effort, HHS first sought to identify every *possible* child of a *Ms. L.* class member in ORR care as of June 26, 2018.

11. As OIG correctly observed, the effort was challenging because the data that were available for use in identifying possible children of class members were kept by multiple government agencies in different systems. Some of the data were aggregated. Some were not. Indeed, some of the most critical data were individualized.

12. By way of example, HHS knew and knows the name, location, and clinical status of each child in ORR care and custody at all times because ORR maintains that data in the individualized case management record for the child in the ORR online case management portal. The case management records on the ORR portal include data about each child that the U.S. Department of Homeland Security (DHS) provided when DHS transferred the child to ORR care. Historically, certain DHS components provided any anecdotal information about their separation of children to ORR on a discretionary, *ad hoc* basis by transmitting the information into the child's record on the ORR portal. For instance, certain Customs and Border Patrol (CBP) stations created notes in the records of children on the ORR Portal, using terms such as "separation" in order to identify separation cases. Sometimes, but not always, such CBP notes described the basis for separations, such as criminality or health problems. When DHS provided such information, ORR generally used it for ordinary program operations, such as identifying and vetting the parents or their close relatives as potential sponsors for the child under the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), and consulting and involving the parents in case management decisions for the child.

13. The ORR portal was not originally designed for aggregated tracking of separated children in ORR care. Instead, it was designed to enable ORR to care for children by conducting case management activities for the children. Such activities include: locating children in care; accessing records documenting the status of releases; accessing records and notes relating to specific services and care plans for children; creating and assessing case reviews for each child; and creating and assessing reports regarding health conditions, acts of aggression or violence, or other significant incidents. Historically, the ORR portal did not have the functionality to generate lists of separated children based on the information (if any) transmitted by DHS. To my knowledge, DHS did not track separations of children in an aggregated manner either. So when the Ms. L. Court issued its orders on June 26, 2018, there was not an aggregated list of the children who had been separated by DHS and were then in ORR care.

14. Another complicating factor was that class membership is not static. It can change due to transfers of putative parents from Immigration and Customs Enforcement (ICE) to the Bureau of Prisons (BOP) (or vice-versa). It can also change based on new information related to the health, social, or criminal history of the parent.

15. To overcome these challenges—and exhaust all reasonable efforts to comply with the Court's orders—HHS conducted a rigorous, forensic data review to identify any and all indicators of potential separation for every child in ORR care as of June 26, 2018. The review encompassed the following: more than 60 sets of aggregated data regarding potentially separated children provided by DHS; ORR case management records for *every* child in ORR care as of June 26, 2018; and sworn testimony from each ORR grantee on the separated children at the grantee's shelters as of June 26, 2018.

16. HHS initially identified approximately 3,600 children in ORR care as of June 26, 2018 for whom there was at least some information, in any data source reviewed, that indicated potential separation from a parent. On July 10, 2018, following further data analysis, ORR certified internally that the number of possible children of potential class members was 2,654—comprised of 103 children aged zero to four, and 2,551 children aged five to seventeen. The 2,551 children aged five to seventeen were reported to the Court in the Joint Status Report filed on July 19, 2018. *See* ECF No. 124.

17. Class counsel points out that the OIG report states that "even as ORR certified this list, some ASPR staff believed that between 50 and 100 additional children should have been included." My best recollection is that some ASPR staff believed that the available data supported the inclusion of additional children in the count of children that HHS reported to the Court in July 2018. The data, however, were sometimes ambiguous and open to different interpretations. ORR's decision to include some children but not others in the count was a good-faith, reasonable exercise of programmatic judgment under the circumstances (which included the need to begin quickly reunifying thousands of children nationwide within the Court's deadlines). Indeed, that is why the leadership of ASPR (including me) accepted ORR's internal certification of the count.

The professional debate about the count within HHS was consistent with a rigorous forensic data analysis and robust administrative process.

18. Moreover, any lingering internal debates about the count of possible children of potential class members from July 2018 was fully resolved by subsequent reviews of the data, including new data that ORR received after July 10, 2018. Those subsequent reviews are discussed below.

B. HHS updated its reporting of possible children of potential class members after considering new information and re-categorizing 162 children

19. After counting 2,654 possible children of potential class members in July 2018, HHS amassed new case management information regarding children who were in ORR care as of June 26, 2018. It collected some of the new information in the ordinary course of ORR program operations (*e.g.*, case management at ORR shelters). In addition, HHS received new information through DHS, class counsel and other plaintiffs' attorneys, and other reports (*e.g.*, the September 2018 report issued by the DHS OIG).

20. As OIG noted, HHS has twice updated its reporting of possible children of potential class members after considering new information. These two re-categorizations of children were for only the limited purpose of litigation reporting to the Court. It is critical to understand that HHS knew the identity, location, and clinical condition of all re-categorized children at all times during their stays in ORR shelters. HHS did not "lose" any of them. The OIG found no evidence to the contrary.

21. First, as explained in the Declaration of Jallyn Sualog (attached hereto as Exhibit 1), HHS conducted a data analysis to determine whether any children from its initial list of approximately 3,600 children who were not included in the count of 2,654 children—and who were still in ORR care as of October 1, 2018—should be re-categorized as possible children of potential class members.

22. There was a delta of approximately 946 children between the initial list of approximately 3,600 children and the count of 2,654. Of those approximately 946 children, 176 children remained in ORR care as of October 1, 2018. HHS reviewed its

updated data for all 176 children and determined that it should re-categorize 13 (7.39%) as possible children of potential class members. My understanding from the ORR staff is that many of re-categorizations resulted from ORR grantees changing their prior conclusions after determining through the case management process that the children were likely separated. HHS reported the re-categorization of the 13 children to the Court in the October 25, 2018 Joint Status Report. *See* ECF No. 291.

23. Second, HHS conducted a data analysis to determine whether children from its initial list of approximately 3,600 children who were not included in the count of 2,654 children—and who were discharged to sponsors before October 25, 2018—should be re-categorized as possible children of potential class members. Based on that analysis, HHS re-categorized 149 discharged children as possible children of potential class members. My understanding from the ORR staff is that some re-categorizations occurred after ORR grantees changed their conclusions and found, in hindsight, that the children were likely separated. In some cases, the re-categorizations occurred after DHS provided new information to HHS. HHS reported the 149 re-categorizations to the Court on December 12, 2018. *See* ECF No. 334.

24. One hundred and thirty one (131) of the 149 re-categorized children (87.92%) were discharged to sponsors on or between June 26 and July 10, 2018, when HHS was still determining the initial count of possible children of potential class members (2,654), and during which time the inter-agency reunification plans that provided detailed frameworks for compliance with the Court's orders were evolving.

25. Eleven (11) of the 149 children had parents who were excluded from the *Ms. L.* class due to criminal history. HHS reported to the Court that one hundred and twenty three (123) of the remaining 137 children (89.78%) were discharged by ORR to a parent or a close relative (*e.g.*, aunt or uncle). Returning the child to the family system is a positive child welfare outcome, consistent with the best interests of the child, as a parent or close relative vetted to the TVPRA standard by ORR has been determined to be capable

of providing for the needs of the child and is in a strong position to facilitate contact with other members of the family system (including any separated parent).

26. Altogether, HHS concluded that a total of 162 children who were in ORR care as of June 26, 2018, but whom HHS did not initially count as possible children of potential class members in July 2018, should be re-categorized and added to the count of possible children of potential class members. This increased the total to 2,816 possible children of potential class members, which is a complete and accurate reporting of those who were in ORR care as of June 26, 2018. The reporting is complete and accurate because HHS has now reviewed both original and new data for children who were in ORR care as of June 26, 2018.

C. HHS has not tried to identify separated children who were discharged by ORR before June 26, 2018 for good reasons

27. Class counsel posits that OIG concluded that "it is likely that the Government separated thousands more families than it previously reported." Class counsel seems to suggest that HHS' reporting to the Court is inaccurate.

28. The OIG states in its report only that "the total number of children separated from a parent or guardian by immigration authorities is unknown," and "thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court."

29. HHS has not tried to determine the "total number of children separated from a parent or guardian by immigration authorities," much less reported such a total to the Court. HHS has reported the possible children of potential class members to the Court, and the class (as I understand it) includes only certain parents of separated children in ORR care on or after June 26, 2018. The parents of separated children who ORR discharged before June 26, 2018 are not members of the *Ms. L.* class.

30. In my view, the OIG's statements do not bear on the accuracy of HHS' reporting because the parents of children separated by DHS and discharged by ORR "before the accounting required by the Court" are not *Ms. L.* class members.

31. I have reviewed Jallyn Sualog's attached declaration regarding the burden associated with trying to identify the separated children who ORR discharged before June 26, 2018. I concur generally with her testimony.

32. It also bears noting that the identification of separated children in ORR care as of June 26 required a time-intensive and coordinated effort within HHS and with DHS. It was operationally feasible because the children were still in ORR custody, and ORR grantees were able to talk with them about separation and share the information with HHS. HHS has no statutory authority over discharged children, much less routine contact with all of them. ORR grantees would face significant hurdles if they tried to collect information from separated children who were discharged before June 26, 2018.

33. Regardless of how many separated children ORR discharged before June 26, 2018, ORR would have discharged each of them within the framework established by the Homeland Security Act of 2002 and the TVPRA. That framework protects child welfare by: prioritizing releases to closely related sponsors; requiring safety and suitability assessments of sponsors, including criminal and sexual abuse background checks; and providing for home studies.

34. My understanding from the ORR staff is that in FY 2018, 86% of children discharged were released to an individual sponsor. Of those, ORR discharged 42% to parents, 47% to close relatives, and 11% to more distant relatives or family friends. Similarly, in FY 2019, 89% of children discharged were released to an individual sponsor. Of those sponsors, 46% were parents, 45% were close relatives, and 9% were more distant relatives or family friends. These statistics suggest that if a separated child who ORR discharged before June 26, 2018 remains in the United States then he or she is probably with their family.

35. HHS has no statutory authority to resume custody over a discharged child absent a referral from another federal government agency. Typically, such referrals come from DHS. To reunify a discharged child with their separated parent, HHS would have to obtain the consent of the sponsor or the discharged child (or both), or intervene over their

objections. A forcible intervention would likely have to involve DHS because neither ACF nor ASPR is a law enforcement agency, and both lack the field personnel required to separate the child from the sponsor, reassume custody of the child, and reunify the child with their separated parent.

36. Moreover, my professional opinion as a social worker, and based on my years of experience working with the UAC population, is that entering households to remove previously-separated minors, bring them back into ORR custody, and reunify them with separated parents would present grave child welfare concerns. It would destabilize the permanency of their existing home environment, and could be traumatic to the children. The option more consistent with the best interest of the child would be to allow the child to remain with their sponsor, and focus instead on the ongoing work of reunifying parents with separated children presently in ORR care.

37. I reserve the right to amend my opinions based on any new information that becomes known to me in the future.

Executed on February 1, 2019.

Jonathan White

Exhibit 7

Lee Gelernt*
Judy Rabinovitz*
Anand Balakrishnan*
Daniel Galindo (SBN 292854)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad St., 18th Floor
New York, NY 10004
T: (212) 549-2660
F: (212) 549-2654
lgelernt@aclu.org
jrabinovitz@aclu.org
abalakrishnan@aclu.org
dgalindo@aclu.org

Attorneys for Petitioners-Plaintiffs
**Admitted Pro Hac Vice*

Bardis Vakili (SBN 247783)
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131
T: (619) 398-4485
F: (619) 232-0036
bvakili@aclusandiego.org

Stephen B. Kang (SBN 292280)
Spencer E. Amdur (SBN 320069)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-1198
F: (415) 395-0950
skang@aclu.org
samdur@aclu.org

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Ms. L., et al.,

Petitioners-Plaintiffs,

v.

U.S. Immigration and Customs Enforcement ("ICE"), et al.

Respondents-Defendants.

Case No. 18-cv-00428-DMS-MDD

Date Filed: December 14, 2018

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO CLARIFY SCOPE OF THE *MS. L.* CLASS

INTRODUCTION

Plaintiffs respectfully request that the Court clarify that the *Ms. L.* class includes parents whose separated children were released from ORR custody before June 26, 2018. The issue is an important one: without this clarification, parents who were separated from their children pursuant to the government's zero-tolerance policy will be denied due process rights to family integrity based on an arbitrary distinction that finds no support in the Court's Class definition.

ARGUMENT

I. Parents Whose Separated Children Were Released from ORR Custody Before June 26 are Members of the *Ms. L.* Class.

This Court's June 26, 2018 order certified the following class:

> All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child.

Order Granting in Part Plaintiffs' Motion for Class Certification, *Ms. L., et al., v. ICE*, Dkt. 82 at 17. On the same date, the Court issued a preliminary injunction that granted class members a right to be reunified with their children. In relevant part, the Court enjoined the government (1) from detaining class members apart from their children, and (2) from "removing any Class Members without their child, unless the Class Member affirmatively, knowingly, and voluntarily declines to be reunited with the child prior to the Class Members' deportation, or there is a determination that the parent is unfit or presents a danger to the child." PI Order, Dkt. 83 at 24.[1]

[1] On August 16, 2018, in order to ensure that the government respected the asylum rights of Ms. L. class members and their children, the Court entered a Temporary Restraining Order in the companion *MMM* case further prohibiting removal of Ms. L. class members and their children. *See* Order Granting Temporary Restraining Order, *M.M.M., et al. v. Sessions*, 18-cv-1832, Dkt. No. 55 at 15.

The government interprets the Court's class definition to include only those parents who (1) are or were detained in immigration custody, (2) have a minor child who was separated from them by DHS and (3) *whose child was in ORR custody on or after June 26, 2018*. Thus, the government would exclude from the class, and from any right to reunification, parents whose children happened to be released from ORR custody before June 26, 2018.

This is wrong for three reasons:

First, the text of the Ms. L. class definition itself contains no date on which children must be in ORR custody. In relevant part, the class definition includes adult parents who (1) "have been, are, or will be detained in immigration custody" and (2) "have a minor child who is or will be separated from them by DHS and detained in ORR custody . . . ." The government points to the present tense "is" in the second part to contend that the definition includes only those parents whose children were in custody on June 26. However, the government places too much weight on the tense of the provision while completely ignoring the intent of the parties. Notably, Plaintiffs did not propose that the class definition turn on the date on which a child must be in ORR custody. Nor did the government argue for that limitation in opposing class certification. Indeed, the text of the class definition that the Court adopted is in relevant part identical to that proposed by Plaintiffs in the Amended Class Complaint, see Dkt. 32 at 12, and Motion for Class Certification, see Dkt. 35-1 at 1. Thus, there is no evidence that the Court ever intended to exclude from the class—and thereby deny any right to reunify with their children—those parents whose children happened to have been moved out of ORR custody by the time the Court entered its orders.

Second, imposing an artificial date limitation into the class definition would make no sense because both of the class representatives—Ms. L. and Ms. C.—would be excluded from the Class if the government were correct. The government separated Ms. L. from her seven-year-old daughter on November 5, 2017. Ms. L.'s daughter was

in ORR custody when plaintiffs filed an individual action seeking reunification on February 26, 2018. Dkt. 1 at 1. The government subsequently released Ms. L., but her daughter was still in ORR custody when plaintiffs sought class certification on March 9, 2018. Dkt. 32 at 6. Two and a half months later, however, when the Court granted the motion for class certification, Ms. L.'s daughter had been released from ORR custody and the family was reunited. Ms. C.'s son was similarly in ORR custody at the time class certification was sought, but released by the time class certification was granted. *See Brazilian mother reunites with 14-year-old son 8 months after separation at U.S. border*, ABC News, June 5, 2018, *available at* https://abcn.ws/2LoIdia (last accessed Nov. 20, 2018) (reporting that Ms. C.'s son was released from ORR to her care on June 5, 2018). The class definition was designed to include the named representatives, not exclude them.

Third, the government's June 26 cut-off date would create an artificial distinction between two classes of parents who were subject to the same illegal practice and suffered the exact same injuries, and arbitrarily deny relief to one of those classes. There is no relevant difference between the two groups. Parents whose children were released from ORR custody before June 26 were subject to the same "brutal, offensive" policy as the other class members. MTD Order, Dkt. 70 at 22. They were similarly "unlikely to know whether [they may] be deported before, simultaneous to, or after their child." PI Order, Dkt. 83 at 15. They and their children experienced the same agonizing trauma of separation. *Id*. at 18-19. Their substantive due process rights to family integrity were identically violated. And they all have the same right to be reunified as other parents. There is no reason why they would be excluded from the Class definition. And there is no reason why they should now be deported without any opportunity to reunify with their children, who, under the government's theory, would remain stranded in the United States simply because of the date on which ORR happened to place them with a sponsor.

II. In the Alternative, the Court Can Modify the Class Definition to Include Parents Whose Children Were Released from ORR Custody Before June 26, 2018.

If the Court were to conclude that the class definition as currently written excludes parents like Ms. L. and Ms. C., then the Court may modify the Class. Rule 23(c)(1)(C) provides that an "order that grants or denies class certification may be altered or amended before final judgment." Rule 23 gives courts "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *United Steel v. ConocoPhillips Co.*, 593 F.3d 802, 810 (9th Cir.2010) (internal quotation marks omitted).

For the reasons stated above, a modified class definition that explicitly includes all qualifying parents—without exceptions based on the date their children left ORR custody—would be appropriate and would meet Rule 23's requirements. *See Lyon v. U.S. Immigration & Customs Enf't*, 308 F.R.D. 203, 210-11 (N.D. Cal. 2015).

CONCLUSION

For the foregoing reasons, Plaintiffs requests the court clarify the *Ms. L.* class does not exclude parents who were separated from their children and whose children were released from ORR custody before June 26, 2018.

Dated: December 14, 2018

Respectfully Submitted,

/s/Lee Gelernt

Bardis Vakili (SBN 247783)
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131
T: (619) 398-4485
F: (619) 232-0036
bvakili@aclusandiego.org

Stephen B. Kang (SBN 2922080)
Spencer E. Amdur (SBN 320069)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Lee Gelernt*
Judy Rabinovitz*
Anand Balakrishnan*
Daniel Galindo (SBN 292854)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad St., 18th Floor
New York, NY 10004
T: (212) 549-2660
F: (212) 549-2654
lgelernt@aclu.org
jrabinovitz@aclu.org

IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-1198
F: (415) 395-0950
samdur@aclu.org
abalakrishnan@aclu.org
dgalindo@aclu.org

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2018, I electronically filed the foregoing with the Clerk for the United States District Court for the Southern District of California by using the appellate CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Lee Gelernt

Lee Gelernt, Esq.

Dated: December 14, 2018

Exhibit 8

United States Government Accountability Office

Testimony

Before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives

For Release on Delivery
Expected at 10:30 a.m. ET
Thursday, February 7, 2019

UNACCOMPANIED CHILDREN

Agency Efforts to Identify and Reunify Children Separated from Parents at the Border

Statement of Kathryn A. Larin, Director, Education, Workforce, and Income Security and

Rebecca Gambler, Director, Homeland Security and Justice

GAO Highlights

Highlights of GAO-19-368T, a testimony before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives

February 7, 2019

UNACCOMPANIED CHILDREN

Agency Efforts to Identify and Reunify Children Separated from Parents at the Border

Why GAO Did This Study

On April 6, 2018, the Attorney General issued a memorandum on criminal prosecutions of immigration offenses. According to HHS officials, this resulted in a considerable increase in the number of minor children whom DHS separated from their parents after attempting to cross the U.S. border illegally. On June 20, 2018, the President issued an executive order directing that alien families generally be detained together, and on June 26, 2018, a federal judge ordered the government to reunify separated families. DHS is responsible for the apprehension and transfer of UAC to HHS. HHS is responsible for coordinating UAC placement and care.

This testimony discusses DHS and HHS (1) planning efforts related to the Attorney General's April 2018 memo, (2) systems for indicating children were separated from parents, and (3) actions to reunify families in response to the June 2018 court order. It is based on a report GAO issued in October 2018. This testimony also includes updated data reported by the government on the number children separated from their parents subject to the court's reunification order and the number of those children in ORR custody as of December 11, 2018.

What GAO Recommends

GAO recommended in 2015 that DHS and HHS improve their process for transferring UAC from DHS to HHS custody. DHS and HHS concurred and have taken action, but have not fully implemented the recommendation.

View GAO-19-368T. For more information, contact Kathryn A. Larin at (202) 512-7215 or larink@gao.gov or Rebecca Gambler at (202) 512-8777 or gamblerr@gao.gov.

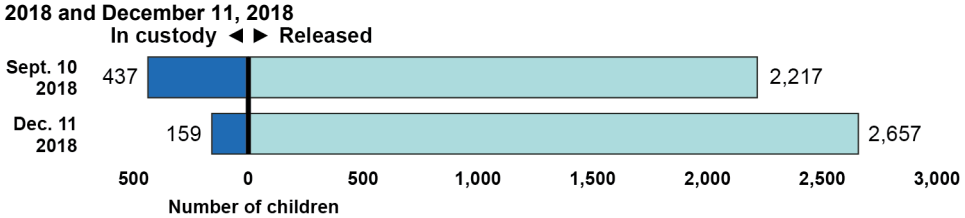
What GAO Found

Department of Homeland Security (DHS) and Department of Health and Human Services (HHS) officials GAO interviewed said the agencies did not plan for the potential increase in the number of children separated from their parent or legal guardian as a result of the Attorney General's April 2018 "zero tolerance" memo because they were unaware of the memo in advance of its public release. The memo directed Department of Justice prosecutors to accept for criminal prosecution all referrals from DHS of offenses related to improper entry into the United States, to the extent practicable. As a result, parents were placed in criminal detention, and their children were placed in the custody of HHS's Office of Refugee Resettlement (ORR). DHS and ORR treated separated children as unaccompanied alien children (UAC)—those under 18 years old with no lawful immigration status and no parent or legal guardian in the United States available to provide care and physical custody.

Prior to April 2018, DHS and HHS did not have a consistent way to indicate in their data systems children and parents separated at the border. In April and July 2018, U.S. Customs and Border Protection's Border Patrol and ORR updated their data systems to allow them to indicate whether a child was separated. However, it is too soon to know the extent to which these changes, if fully implemented, will consistently indicate when children have been separated from their parents, or will help reunify families, if appropriate.

In response to a June 26, 2018 court order to quickly reunify children separated from their parents, HHS determined how many children in its care were subject to the order and developed procedures for reunifying these families. As of September 2018, the government identified 2,654 children in ORR custody who potentially met reunification criteria, which does not include separated children released to sponsors prior to the June 2018 court order. On July 10, 2018, the court approved reunification procedures for the parents covered by the June 2018 court order. This July 10, 2018 order noted that ORR's standard procedures used to release UAC from its care to sponsors were not meant to apply in this circumstance, in which parents and children who were apprehended together were separated by government officials. Since GAO's October 2018 report, the government identified additional children separated from parents subject to the court's reunification order and released additional children from its custody (see figure).

Number of Possible Children of Potential Class Members Who Were Released from Office of Refugee Resettlement (ORR) Custody and Remaining in ORR Custody as of September 10, 2018 and December 11, 2018



Source: Ms. L v. ICE , No. 18-0428 (S.D. Cal. Sept. 13, 2018 and Dec. 12, 2018) (joint status reports). | GAO-19-368T

Note: GAO did not independently verify the accuracy of these data.

February 7, 2019

Chair DeGette, Ranking Member Guthrie, and Members of the Subcommittee:

Thank you for the opportunity to discuss the efforts of the Department of Homeland Security (DHS) and Department of Health and Human Services (HHS) to plan for and respond to family separations that occurred during the spring of 2018 at the southwest border. On April 6, 2018, the Attorney General issued a memorandum on criminal prosecutions of immigration offenses, which officials said resulted in a considerable increase in the number of minor children whom DHS separated from their parents or legal guardians after attempting to cross the U.S. border illegally.[1] On June 20, 2018, the President issued an executive order directing that alien families generally be detained together,[2] and on June 26, 2018, a federal judge ordered the government to reunify certain separated families.[3]

My statement today will focus on (1) DHS and HHS planning efforts related to the Attorney General's April 2018 memo, (2) DHS and HHS systems for indicating children were separated from parents, and (3) DHS and HHS actions to reunify families in response to the June 2018 court order. My statement is based on the findings from our October 2018 report, which provides a detailed description of our methodology.[4] To obtain updated data on the number of children affected by the federal court order to reunify families, we reviewed the December 12, 2018 joint

[1] *Memorandum for Prosecutors Along the Southwest Border. Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a). Office of the Attorney General*. April 6, 2018 (referred to in this testimony statement as the "April 2018 memo"). Specifically, the memo directed "each United States Attorney's Office along the Southwest Border—to the extent practicable, and in consultation with DHS—to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a)." See GAO, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border,* GAO-19-163 (Washington, D.C.: October 9, 2018) for more information on 8 U.S.C. § 1325(a).

[2] Exec. Order No. 13841, 83 Fed. Reg. 29,435 (June 25, 2018). Although the executive order was announced on June 20, 2018, it was not published in the Federal Register until June 25, 2018.

[3] Ms. L. v. U.S. Immigration & Customs Enforcement (*Ms. L. v. ICE*), No. 18-0428 (S.D. Cal. June 26, 2018) (order granting preliminary injunction).

[4] GAO, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border*, GAO-19-163 (Washington, D.C.: October 9, 2018).

status update. The work upon which this statement is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Family Separations at the Southwest Border

According to DHS and HHS officials, DHS has historically separated a number of children from accompanying adults at the border and transferred them to HHS custody, but these separations occurred only in certain circumstances. For example, DHS might separate families if the parental relationship could not be confirmed, if there was reason to believe the adult was participating in human trafficking or otherwise a threat to the safety of the child, or if the child crossed the border with other family members such as grandparents without proof of legal guardianship. HHS has traditionally treated these children as unaccompanied alien children (UAC)—children who (1) have no lawful immigration status in the United States, (2) have not attained 18 years of age, and (3) have 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.[5]

The Attorney General's April 2018 memorandum, also referred to as the "zero tolerance" policy, directed Department of Justice (DOJ) prosecutors to accept all referrals of all improper entry offenses from DHS for criminal prosecution, to the extent practicable. According to DHS officials, in implementing the April 2018 memo, DHS's U.S. Customs and Border Protection (CBP) began referring a greater number of individuals apprehended at the border to DOJ for criminal prosecution, including parents who were apprehended with children.[6] In these cases, referred parents were placed into U.S. Marshals Service custody and separated from their children because minors cannot remain with a parent who is

[5]6 U.S.C. § 279(g)(2).

[6]When we use the term "children," we are referring to minor children under the age of 18. When we use the term "parent," we are referring to parents and legal guardians.

arrested on criminal charges and detained by U.S. Marshals Service.[7] In cases where parents were referred to DOJ for criminal proceedings and separated from their children, DHS and HHS officials stated they treated those children as UAC. In such cases, DHS transferred these children to the custody of HHS's Office of Refugee Resettlement (ORR) and ORR placed them in one of their shelter facilities, as is the standard procedure for UAC.

The President's executive order issued on June 20, 2018, directed, among other things, that the Secretary of Homeland Security maintain custody of alien families during any criminal improper entry or immigration proceedings involving their family members, to the extent possible. This order stated that the policy of the administration is to maintain family unity, including by detaining alien families together where appropriate. In addition, on June 26, 2018, a federal judge ruled in the Ms. L. v. ICE case that certain separated parents must be reunited with their minor children (referred to in this testimony statement as the "June 2018 court order").[8] In this case, the American Civil Liberties Union filed a federal lawsuit on behalf of certain parents (referred to as class members) who had been

[7]While DOJ and DHS have broad authority to detain adult aliens, children, whether accompanied or unaccompanied, must be detained according to standards established in the Homeland Security Act of 2002 (Pub. L. No. 107-296, tit. IV, subtit. D, § 441, 116 Stat. 2135, 2192) the Trafficking Victims Protection Reauthorization Act of 2008 (Pub. L. No. 110-457, 112 Stat. 5044), and the 1997 Flores v. Reno Settlement Agreement (Flores Agreement) (Stipulated Settlement Agreement, Flores v. Reno, No. 85-4544 (C.D. Cal. Jan. 17, 1997)).

[8]For parents covered by the June 2018 order, the court ruled that the government may not detain parents apart from their minor children, subject to certain exceptions; that parents must be reunited with their minor children under 5 years of age within 14 days of the order; and parents must be reunited with their minor children age 5 and over within 30 days of the order. The order required these reunifications unless there is a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child. Ms. L. v. U.S. Immigration & Customs Enforcement (*Ms. L. v. ICE*), No. 18-0428 (S.D. Cal. June 26, 2018) (order granting preliminary injunction).

separated from their children.[9] As of September, 10, 2018, the government had identified 2,654 children of potential class members in the Ms. L. v. ICE case, which we discuss in greater detail later in this statement. As of January 31, 2019, this litigation was ongoing.

Care and Custody of Unaccompanied Alien Children (UAC)

Under the Homeland Security Act of 2002, responsibility for the apprehension, temporary detention, transfer, and repatriation of UAC is delegated to DHS,[10] and responsibility for coordinating and implementing the placement and care of UAC is delegated to HHS's ORR.[11] CBP's U.S. Border Patrol (Border Patrol) and Office of Field Operations (OFO), as well as DHS's ICE, apprehend, process, temporarily detain, and care for UAC who enter the United States with no lawful immigration status.[12] ICE's Office of Enforcement and Removal Operations (ERO) is generally responsible for transferring UAC, as appropriate, to ORR, or repatriating them to their countries of nationality or last habitual residence. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), UAC in the custody of any federal department or agency, including DHS, must be transferred to ORR within 72 hours after determining that they are UAC, except in exceptional circumstances.[13] In addition, the 1997 Flores v. Reno Settlement Agreement (Flores Agreement) sets standards of care for UAC while in DHS or ORR

[9]This case was filed as a class action—class referring to individuals with a shared legal claim who are covered by the lawsuit. Ms. L. v. ICE, No. 18-0428 (S.D. Cal. March 9, 2018) (amended complaint). The court certified the following class: "All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child." Ms. L. v. ICE, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting in part plaintiffs' motion for class certification). In that order, the court also noted that the class "does not include migrant parents with criminal history or communicable disease, or those who are in the interior of the United States or subject to the [June 20 executive order]."

[10]Pub. L. No. 107-296, tit. IV, subtit. D, § 441, 116 Stat. 2135, 2192 (codified at 6 U.S.C. § 251). Repatriation is defined as returning unaccompanied children to their country of nationality or last habitual residence.

[11]Pub. L. No. 107-296, tit. IV, subtit. D, § 462, 116 Stat. 2135, 2202 (codified at 6 U.S.C. § 279).

[12]Border Patrol agents apprehend UAC between official U.S. ports of entry, and Office of Field Operations officers encounter these children at ports of entry. ICE apprehends UAC within the United States at locations other than borders or ports of entry.

[13]8 U.S.C. § 1232(b)(3).

custody, including, among other things, providing drinking water, food, and proper physical care and shelter for children.[14]

In 2015 and 2016, we reported on DHS's and HHS's care and custody of UAC, including the standard procedures that DHS follows to transfer UAC to ORR.[15] ORR's UAC policy guide states that the agency requests certain information from DHS when DHS refers children to ORR, including, for example, how DHS determined the child was unaccompanied.[16] Depending on which DHS component or office is referring the child to ORR, DHS may provide information on the child in an automated manner directly into ORR's UAC Portal—the official system of record for children in ORR's care—or via email.[17]

ORR has cooperative agreements with residential care providers to house and care for UAC while they are in ORR custody. The aim is to provide housing and care in the least restrictive environment commensurate with the children's safety and emotional and physical needs.[18] In addition, these care providers are responsible for identifying and assessing the suitability of potential sponsors—generally a parent or other relative in the country—who can care for the child after the child leaves ORR custody.[19] Release to a sponsor does not grant UAC legal

[14]Stipulated Settlement Agreement, *Flores v. Reno,* No. 85-4544 (C.D. Cal. Jan. 17, 1997).

[15]GAO, *Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody,* GAO-15-521 (Washington, D.C.: July 14, 2015) and GAO, *Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care*, GAO-16-180 (Feb. 5, 2016: Washington, D.C.).

[16]Office of Refugee Resettlement, *ORR Guide: Children Entering the United States Unaccompanied,* accessed August 23, 2018, *https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied*.

[17]As of August 2018, not all DHS offices were entering information directly into ORR's UAC Portal. CBP officials also told us that its officials included biographical information and details regarding the apprehension of the alien, in packets provided to ORR when UAC are transferred to ORR custody. In cases in which the information is sent via email, the ORR Intakes Team must manually enter it into the UAC Portal. The ORR Intakes Team is made up of ORR headquarter staff who receive referrals of UAC from federal agencies and make the initial placement of these children in ORR facilities.

[18]ORR is required to promptly place UAC in its custody in the least restrictive setting that is in the best interest of the child. 8 U.S.C. § 1232(c)(2)(A).

[19]Qualified sponsors are adults who are suitable to provide for the child's physical and mental well-being and have not engaged in any activity that would indicate a potential risk to the child. See 8 U.S.C. § 1232(c)(3).

immigration status. Children are scheduled for removal proceedings in immigration courts to determine whether they will be ordered removed from the United States or granted immigration relief.[20]

Once at the shelter, shelter staff typically conduct an intake assessment of the child within 24 hours, and then are to provide services such as health care and education. According to ORR's UAC policy guide, shelter staff are responsible for meeting with the child to begin identifying potential sponsors, which can include parents. To assess the suitability of potential sponsors, including parents, ORR care providers collect information from potential sponsors to establish and identify their relationship to the child.[21] For example, the screening conducted of potential sponsors includes various background checks and in June 2018, ORR implemented increased background check requirements that were outlined in an April 2018 memorandum of agreement with DHS. These changes required ORR staff to collect fingerprints from all potential sponsors, including parents, and all adults in the potential sponsor's household and transmit the fingerprints to ICE to perform criminal and immigration status checks on ORR's behalf. ICE was to submit the results to ORR, and ORR used this information, along with information provided by, and interviews with, the potential sponsors, to assess their suitability.[22] However, in December 2018, ORR revised its background check policy to limit criminal and immigration status checks conducted by ICE to the potential sponsor, unless concerns about other adult household members are raised via a public records check, there is a documented risk to the safety of the child, the child is particularly vulnerable, or the case is referred for a home study.

[20]There are several types of immigration relief that may be available to these children, for example, asylum or Special Immigrant Juvenile status. For more information, see GAO-16-180.

[21]According to an HHS official, ORR's process for placing UAC with sponsors is designed to comply with the 1997 Flores Agreement, the Homeland Security Act of 2002, and TVPRA. For more information on ORR's process for identifying and screening sponsors, see GAO-19-163.

[22]ORR conducts other additional background checks, such as the child abuse and neglect checks, as part of its screening process.

HHS and DHS Planning for Family Separations

According to HHS and DHS officials we interviewed, the departments did not take specific steps in advance of the April 2018 memo to plan for family separations or a potential increase in the number of children who would be referred to ORR because they did not have advance notice of the memo. Specifically, ORR, CBP, and ICE officials we interviewed stated that they became aware of the April 2018 memo when it was announced publicly.

Though they did not receive advance notice of the April 2018 memo, ORR officials stated that they were aware that increased separations of parents and children were occurring prior to the April memo. According to ORR officials, the percentage of children referred to ORR who were known to have been separated from their parents rose by more than tenfold from November 2016 to August 2017 (0.3 to 3.6 percent). In addition, the ORR shelter and field staff we interviewed at four ORR facilities in Arizona and Texas told us they started noticing an increase in the number of children separated from their parents in late 2017 and early 2018, prior to the April 2018 memo. The DHS officials we interviewed stated that, in some locations across the southwest border, there was an increase in the number of aliens CBP referred to DOJ for prosecution of immigration-related offenses after an Attorney General memo issued in April 2017.[23] This memo prioritized enforcement of a number of criminal immigration-related offenses, including misdemeanor improper entry. In addition, CBP officials stated that there may have been an increase in children separated from non-parent relatives or other adults fraudulently posing as the child's parents.[24]

According to ORR officials, in November 2017, ORR officials asked DHS officials to provide information about the increase in separated children. In response, DHS officials stated that DHS did not have an official policy to separate families, according to ORR officials. A few months prior to the April 2018 memo, ORR officials said they saw a continued increase in separated children in their care. ORR officials noted that they considered planning for continued increases in separated children, but HHS leadership advised ORR not to engage in such planning since DHS

[23]*Memorandum for All Federal Prosecutors. Renewed Commitment to Criminal Immigration Enforcement*. Office of the Attorney General. April 11, 2017.

[24]In June 2018, DHS issued a press release noting an increase in the number of aliens using children to pose as family units to gain entry into the United States in 2017 and 2018.

officials told them that DHS did not have an official policy of separating families.

From July to November 2017, the Border Patrol sector in El Paso, Texas conducted an initiative to address an increase in apprehensions of families that sector officials had noted in early fiscal year 2017. [25] Specifically, Border Patrol officials in the sector reached an agreement with the District of New Mexico U.S. Attorney's Office to refer more individuals who had been apprehended, including parents who arrived with minor children, for criminal prosecution. Prior to this initiative, the U.S. Attorney's Office in this district had placed limits on the number of referrals it would accept from Border Patrol for prosecution of immigration offenses.[26] According to Border Patrol officials, under this initiative, the U.S. Attorney's Office agreed to accept all referrals from Border Patrol in the El Paso sector for individuals with violations of 8 U.S.C. § 1325 (improper entry by alien) and § 1326 (reentry of removed aliens), consistent with the Attorney General's 2017 memo directing federal prosecutors to prioritize such prosecutions.[27] For those parents placed into criminal custody, Border Patrol referred their children to ORR's care as UAC. According to a Border Patrol report on the initiative, the El Paso sector processed approximately 1,800 individuals in families and 281 individuals in families were separated under this initiative. Border Patrol headquarters directed the sector to end this initiative in November 2017, and Border Patrol officials stated that there were no other similar local initiatives that occurred prior to the Attorney General's 2018 memo.

[25]Border Patrol divides responsibility for border security operations geographically among sectors.

[26]According to a November 2017 Border Patrol memo, on July 6, 2017, the District of New Mexico, Acting United States Attorney removed all restrictions imposed on referrals from Border Patrol's El Paso Sector.

[27]According to Border Patrol, all individuals apprehended, referred, and accepted for prosecution were generally prosecuted for criminal immigration violations such as improper entry by alien (8 U.S.C. § 1325) and illegal reentry of removed aliens (8 U.S.C. § 1326). According to a DHS press release issued on June 15, 2018, parents prosecuted for illegal entry were transferred to DOJ custody for criminal proceedings, then subsequently transferred to ICE for immigration proceedings. The press release states that any individual subject to removal from the United States may seek asylum or other protections available under the law, including children who, depending on the circumstances, may undergo separate immigration proceedings.

DHS and HHS Systems for Indicating When Children Were Separated from Parents

When the April 2018 memo was released, there was no single database with easily extractable, reliable information on family separations. DHS and HHS subsequently updated their data systems in the spring and summer of 2018, but it is too soon to know the extent to which these changes, if fully implemented, will consistently indicate when children have been separated from the parents or will help reunify families, if appropriate. Specifically, prior to April 2018, CBP's and ORR's data systems did not include a designated field to indicate that a child was unaccompanied as a result of being separated from his or her parent, and ORR officials stated that such information was not always provided when children were transferred from DHS to HHS custody. According to agency officials, between April and August 2018, the agencies made changes to their data systems to help notate in their records when children are separated from parents.

Regarding DHS, CBP's Border Patrol and OFO made changes to their data systems to allow them to better indicate cases in which children were separated from their parents; however, ORR officials told us in September 2018, that they had been unaware that DHS had made these systems changes.

- According to Border Patrol officials, Border Patrol modified its system on April 19, 2018, to include yes/no check boxes to allow agents to indicate that a child was separated from their parent(s).[28] However, Border Patrol officials told us that information on whether a child had been separated is not automatically included in the referral form sent to ORR. Rather, agents may indicate a separation in the referral notes sent electronically to ORR, but they are not required to do so, according to Border Patrol officials. While the changes to the system may make it easier for Border Patrol to identify children separated from their parents, ORR officials stated ORR may not receive information through this mechanism to help it identify or track separated children. Prior to this system modification, Border Patrol agents typically categorized a separated child as an unaccompanied child in its system and did not include information to indicate the child had been separated from a parent.

[28]Border Patrol maintains the E3 data system, which Border Patrol agents use to transmit and store data collected when processing and identifying individuals apprehended at the border, including children who are unaccompanied due to separation from a parent.

- CBP's OFO, which encounters families presenting themselves at ports of entry, also modified its data system[29] and issued guidance to its officers on June 29, 2018, to track children separated from their parents.[30] OFO officials have access to the UAC Portal but typically email this information to ORR as part of the referral request.[31] According to OFO officials, prior to that time, OFO designated children separated from their parents as unaccompanied.

ORR updated the UAC Portal to include a check box for indicating that a child was separated from his or her parents. According to ORR officials, ORR made these changes on July 6, 2018, after the June 20 executive order and June 2018 court order to reunify families. According to ORR officials, prior to July 6, 2018, the UAC Portal did not have a systematic way to indicate whether a child was designated as unaccompanied as a result of being separated from a parent at the border. The updates allow those Border Patrol agents with direct access to the UAC Portal to check this box, and Border Patrol issued guidance on July 5, 2018, directing its agents to use the new indicator for separated children in the UAC Portal and provide the parent's alien number in the UAC Portal when making referrals to ORR as of July 6, 2018.[32] However, ORR officials also said that DHS components with access to the UAC Portal are not yet utilizing the new check box consistently.

Staff at three of the four shelters we visited in Arizona and Texas in July and August of 2018 said that in most, but not all cases during the spring of 2018, DHS indicated in the custody transfer information that a child had been separated. Staff at one shelter estimated that for approximately 5 percent of the separated children in its care there was no information from DHS indicating parental separation. In these cases, shelter staff said they

[29]OFO uses the Secure Integrated Government Mainframe Access system to collect information about individuals in its custody.

[30]Families presenting themselves at ports of entry would typically not be in violation of 8 U.S.C. § 1325(a), which establishes criminal penalties for improper entry into the United States. Rather, OFO officials stated that, both before and after the April 2018 memo, they separated parents and children due to circumstances such as a parent's criminal history or if the parent presents a potential danger to the child.

[31]As of August 2018, OFO officials stated they had taken a phased approach to training OFO officers on the UAC Portal, and that they had ongoing efforts to ensure OFO officers make referrals to ORR directly in the UAC Portal.

[32]DHS and ORR officials told us that DHS components provide information on children referred to ORR through various mechanisms such as via email to ORR's Intakes Team or by entering the information into the ORR's UAC Portal directly.

learned about the separation from the child during the shelter's intake assessment. Staff at the same shelter, which cares for children ages 0 to 4, noted that intake assessments for younger children are different from intake for older children, as younger children are unable to provide detailed information on such issues as parental separation.

While the updates that OFO and ORR have made to their data systems are a positive step, they do not fully address the broader coordination issues we identified in our previous work. Specifically, we identified weaknesses in DHS and HHS's process for the referral of UAC. In 2015, we reported that the interagency process to refer and transfer UAC from DHS to HHS was inefficient and vulnerable to errors because it relied on emails and manual data entry, and documented standard procedures, including defined roles and responsibilities, did not exist.[33] To increase the efficiency and improve the accuracy of the interagency UAC referral and placement process, we recommended that the Secretaries of DHS and HHS 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. In response, DHS officials told us DHS delivered a Joint Concept of Operations between DHS and HHS to Congress on July 31, 2018, which provides field guidance on interagency policies, procedures, and guidelines related to the processing of UAC transferred from DHS to HHS. DHS submitted the Joint Concept of Operations to us on September 26, 2018, in response to our recommendation. We are reviewing the extent to which the Joint Concept of Operations includes 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 unaccompanied children, including those separated from parents at the border, in HHS shelters. Moreover, to fully address our recommendation, DHS and HHS should implement such interagency processes.

[33]GAO-15-521.

DHS and HHS Actions to Reunify Families in Response to the June 2018 Court Order

DHS and HHS took various actions in response to the June 26, 2018, court order to identify and reunify children separated from their parents. The June 2018 court order required the government to reunite class member parents with their children under 5 years of age within 14 days of the order, and for children age 5 and over, within 30 days of the order.[34] HHS officials told us that there were no specific procedures to reunite children with parents from whom they were separated at the border prior to the June 2018 court order. Rather, the agency used its standard procedures, developed to comply with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), to consider potential sponsors for unaccompanied children in their custody; if a parent was available to become a sponsor, reunification with that parent was a possible outcome.

DHS and HHS Efforts to Identify Potential Class Members. To create the list of potential class members (that is, those parents of a separated child covered under the lawsuit) eligible for reunification per the June 2018 court order, DHS and HHS officials told us that they generated the list based on children who were in DHS or HHS custody on that date. As a result, DHS and HHS officials told us that a parent of a separated child would only be a class member if his or her child was detained in DHS or HHS custody on June 26, 2018. After developing the class list, DHS and HHS officials told us that they next determined whether class members were eligible for reunification, as a class member could be determined ineligible for reunification if it was determined that the parent was unfit or presented a danger to the child.

Parents of children who were separated at the border but whose children were released by ORR to sponsors prior to the June 2018 court order were not considered class members, and according to HHS officials, the department was not obligated to reunite them with the parent or parents from whom they were separated. Further, HHS officials told us that they

[34]Ms. L. v. ICE, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting preliminary injunction). The court certified the following class: "All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child." Ms. L. v. ICE, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting in part plaintiffs' motion for class certification). In that order, the court also noted that the class "does not include migrant parents with criminal history or communicable disease, or those who are in the interior of the United States or subject to the [June 20 executive order]."

do not know how many such children separated from parents at the border were released to sponsors prior to the order and that the court order does not require the department to know this information.

Because there was no single database with information on family separations, HHS officials reported using three methods to determine which children in ORR's custody as of June 26, 2018, had been separated from parents at the border:[35]

1. **Data Reviewed by an Interagency Data Team.** An interagency team of data scientists and analysts—led by HHS's Office of the Assistant Secretary for Preparedness and Response with participation from CBP, ICE, and ORR—used data and information provided by DHS and HHS to identify the locations of separated children and parents, according to HHS officials.[36]
2. **Case File Review.** HHS reported that more than 100 HHS staff reviewed about 12,000 electronic case files of all children in its care as of June 26, 2018 for indications of separation in specific sections of each child's case file, such as the phrases "zero tolerance," "separated from [parent/mother/father/legal guardian]," and "family separation."
3. **Review of Information Provided by Shelters.** According to HHS officials, shelter staff were asked to provide lists of children in their care who were known to be separated from parents based on the shelter's records.

On the basis of its reviews, as of September 10, 2018, the government had identified 2,654 children of potential class members in the Ms. L. v. ICE case.[37] Of the 2,654 children, 103 were age 0 to 4 and 2,551 were age 5 to 17. As previously discussed, the number of children of potential class members does not include those who were separated from parents but released to sponsors prior to the June 2018 court order or the more

[35]For additional information on the three methods used by HHS to determine which children had been separated from parents, see GAO-19-163.

[36]HHS officials said the Interagency Data Team was initially formed after the June 20, 2018 executive order, but shifted its focus to respond to the June 26, 2018, court order.

[37]Ms. L. v. ICE, No. 18-0428 (S.D. Cal. Sept. 13, 2018) (joint status report). According to the status report, filed September 13, 2018, the data presented reflects approximate numbers maintained by ORR as of at least September 10, 2018. We did not independently verify the accuracy of these data. For the purposes of this report, we use the term "government" to refer to the defendants in the *Ms. L. v. ICE* case.

than 500 children who were reunified with parents by CBP in late June 2018, because these children were never transferred to ORR custody.[38]

As of September 10, 2018, 2,217 of the 2,654 identified children had been released from ORR custody, according to a joint status report filed in the Ms. L. v. ICE case.[39] About 90 percent of the released children were reunited with the parent from whom they were separated and the remaining children were released under other circumstances. Children released under other circumstances could include those released to another sponsor such as a parent already in the United States, another relative, or an unrelated adult, or children who turned 18. Staff at one ORR facility we visited told us they planned to release some children under these circumstances. As of December 11, 2018, the government had identified additional possible separated children of potential class members for a total of 2,816. It had released 2,657 and 159 remained in ORR custody.[40] However, the government has also reported that 79 of the children it initially identified as separated had not been separated from

[38]Parents of children who were separated at the border but whose children were released by ORR to sponsors prior to the June 2018 court order were not considered class members, and according to HHS officials, the department was not obligated to reunite them with the parent or parents from whom they were separated. Additionally, according to CBP, following issuance of the June 2018 executive order, the agency began reunifying children in its custody with parents, and by June 23, 2018, the agency had completed reunification of 522 children with parents. CBP officials also reported that the agency had reunified children and parents in its custody after the April 2018 memo and before the June executive order. According to officials, these reunifications occurred when parents completed court proceedings and returned to Border Patrol stations where children were still located because HHS had not yet been able to place them.

[39]Ms. L. v. ICE, No. 18-0428 (S.D. Cal. Sept. 13, 2018) (joint status report). According to the status report, the data presented reflects approximate numbers maintained by ORR as of September 10, 2018.

[40]Ms. L. v. ICE, No. 18-0428 (S.D. Cal. Dec. 12, 2018) (joint status report). The government determined that eight of these 159 children were children of *Ms. L*. class members.

a parent.[41] Excluding those 79 children from the 2,816 total would bring the total number of children separated to 2,737.[42]

Plan for Reunifying Children with Class Member Parents Within and Outside ICE's Custody. The process used to reunify separated children with their class member parents in the Ms. L. v. ICE case evolved over time based on multiple court hearings and orders, according to HHS officials.[43] After the June 2018 court order, HHS officials said the agency planned to reunify children using a process similar to their standard procedures for placing unaccompanied children with sponsors. However, according to agency officials, the agency realized that it would be difficult to meet the court's reunification deadlines using its standard procedures and began developing a process for court approval that would expedite reunification for class members. As a result, from June 26, 2018 to July 10, 2018, the reunification process was refined and evolved iteratively based on court status conferences, according to HHS officials. ORR field and shelter staff we interviewed noted the impact of the continually changing reunification process; for example, staff at one shelter told us there were times when they would be following one process in the morning but a different one in the afternoon.

On July 10, 2018, the court approved reunification procedures for the class members covered by the June 2018 court order.[44] In the July 10, 2018 order that outlined these procedures, the court noted that the

[41]Ms. L. v. ICE, No. 18-0428 (S.D. Cal. Nov. 29, 2018) (joint status report).

[42]See also HHS Office of Inspector General (OIG) Issue Brief, *Separated Children Placed in Office of Refugee Resettlement Care* (January 2019, OEI-BL-18-00511) (reporting a total of 2,737 separated children). A motion was filed on December 14, 2018 to clarify the scope of the *Ms. L.* class to include parents who were separated from children who were released from ORR custody prior to June 26, 2018. Ms. L. v. ICE, No. 18-0428 (S.D. Cal. Dec. 14, 2018) (notice of motion and motion to clarify scope of the *Ms. L.* class). In its recent report, the OIG found that thousands of children may have been separated prior to the zero-tolerance policy during an influx that began in 2017, before the accounting required by the court, and HHS has faced challenges in identifying separated children. HHS OIG Issue Brief, *Separated Children Placed in Office of Refugee Resettlement Care* (January 2019, OEI-BL-18-00511).

[43]For more information on reunifying children and parents separated after the June 2018 court order, see GAO-19-163.

[44]See Ms. L. v. ICE, No. 18-0428 (S.D. Cal. July 10, 2018) (order following status conference); see also Ms. L. v. ICE, No. 18-0428 (S.D. Cal. July 13, 2018) (defendants' status report regarding plan for compliance and order following status conference); Ms. L. v. ICE, No. 18-0428 (S.D. Cal. July 15, 2018) (notice from defendants).

standard procedures developed by ORR pursuant to the TVPRA were meant to address "a different situation, namely, what to do with alien children who were apprehended without their parents at the border or otherwise" and that the agency's standard procedures were not meant to apply to the situation presented in the Ms. L. v. ICE case, which involves parents and children who were apprehended together and then separated by government officials.[45] The reunification procedures approved in the Ms. L. v. ICE case apply only to reunification of class members with their children and included determining (1) parentage and (2) whether the parent is fit to take care of the child or presents any danger to the child.[46] Specifically:

1. **Determining Parentage.** Before July 10, 2018, to determine parentage for children ages 0 to 4, HHS officials said they initially used DNA swab testing instead of requiring documentation, such as birth certificates, stating that DNA swab testing was a prompt and efficient method for determining biological parentage in a significant number of cases. On July 10, 2018, the court approved the use of DNA testing "only when necessary to verify a legitimate, good-faith concern about parentage or to meet a reunification deadline." HHS officials told us that at that point, to determine parentage, ORR relied on the determinations made by DHS when the family was separated and information ORR shelter staff had already collected through assessments of the children in their care. Unless there were specific doubts about the relationship, ORR did not collect additional information to confirm parentage, according to HHS officials.
2. **Determining Fitness and Danger.** To reunify class members, HHS also followed the procedures approved by the court on July 10, 2018 for determining whether a parent is fit and whether a parent presents a danger to the child. HHS used the fingerprints and criminal background check of the parent conducted by DHS when the individual was first taken into DHS custody rather than requiring the

[45]See Ms. L. v. ICE, No. 18-0428 (S.D. Cal. July 10, 2018) (order following status conference). As previously discussed, the June 2018 court order required the government to reunite class member parents with their children under 5 years of age within 14 days of the order, and for children age 5 and over, within 30 days of the order, absent a determination that the parent is unfit or presents a danger to the child, or the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child. Ms. L. v. ICE, No. 18-0428 (S.D. Cal. June 26, 2018) (order granting preliminary injunction).

[46]The specific reunification procedures varied depending on whether the parents were inside or outside of ICE custody. For more information on DHS and HHS reunification procedures for class members, see GAO-19-163.

parent and other adults living in the household to submit fingerprints to ORR, as potential sponsors were typically required to do for unaccompanied children.[47] According to HHS officials, ORR personnel also reviewed each child's case file for any indication of a safety concern, such as allegations of abuse by the child. HHS did not require fingerprints of other adults living in the household where the parent and child will live. HHS also did not require parents to complete an ORR family reunification application as potential sponsors are typically required to do for unaccompanied children.

The specific procedures for physical reunification varied depending on whether the parents were inside or outside of ICE custody. DHS and HHS took steps to coordinate their efforts to reunify children with parents who were in ICE custody, but experienced challenges. Generally, for parents in ICE custody, DHS transported parents to a detention facility close to their child and HHS transported the child to the same facility. At the facility HHS transferred custody of the child to ICE for final reunification. HHS officials said that in some instances children had to wait for parents for unreasonably long amounts of time and parents were transported to the wrong facilities. In one case, staff at one shelter told us that they had to stay two nights in a hotel with the child before reunification could occur.

According to HHS officials, for families in which the parent was released into the interior of the United States, the reunification process involves ORR officials and shelter staff attempting to establish contact with the parent and determining whether the parent has "red flags" for parentage or child safety. These determinations are based on DHS-provided criminal background check summary information and case review of the child's UAC Portal records. In cases where no red flags are found, HHS transports the child to the parent or the parent picks the child up at the ORR shelter. For more information on DHS and HHS reunification procedures for class member parents inside and outside ICE custody, see GAO-19-163.

[47]As noted, in December 2018, ORR revised its background check policy to conduct criminal and immigration status checks of adults in the potential sponsor's home only in certain circumstances.

Chair DeGette, Ranking Member Guthrie, and Members of the Subcommittee, this concludes our prepared remarks. We would be happy to answer any questions that you may have.

GAO Contacts and Staff Acknowledgments

For further information regarding this testimony, please contact Kathryn A. Larin at (202) 512-7215 or larink@gao.gov or Rebecca Gambler at (202) 512-8777 or gamblerr@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement.

Individuals who made key contributions to this testimony include Kathryn Bernet (Assistant Director), Elizabeth Morrison (Assistant Director), David Barish (Analyst-in-Charge), Andrea Dawson, Jason Palmer, and Leslie Sarapu. In addition, key support was provided by Susan Aschoff, James Bennett, Sarah Cornetto, Michael Kniss, Sheila R. McCoy, Jean McSween, Jan Montgomery, Heidi Nielson, and Almeta Spencer.

GAO's Mission	The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.
Obtaining Copies of GAO Reports and Testimony	The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's website (https://www.gao.gov). Each weekday afternoon, GAO posts on its website newly released reports, testimony, and correspondence. To have GAO e-mail you a list of newly posted products, go to https://www.gao.gov and select "E-mail Updates."
Order by Phone	The price of each GAO publication reflects GAO's actual cost of production and distribution and depends on the number of pages in the publication and whether the publication is printed in color or black and white. Pricing and ordering information is posted on GAO's website, https://www.gao.gov/ordering.htm. Place orders by calling (202) 512-6000, toll free (866) 801-7077, or TDD (202) 512-2537. Orders may be paid for using American Express, Discover Card, MasterCard, Visa, check, or money order. Call for additional information.
Connect with GAO	Connect with GAO on Facebook, Flickr, Twitter, and YouTube. Subscribe to our RSS Feeds or E-mail Updates. Listen to our Podcasts. Visit GAO on the web at https://www.gao.gov.
To Report Fraud, Waste, and Abuse in Federal Programs	Contact: Website: https://www.gao.gov/fraudnet/fraudnet.htm Automated answering system: (800) 424-5454 or (202) 512-7700
Congressional Relations	Orice Williams Brown, Managing Director, WilliamsO@gao.gov, (202) 512-4400, U.S. Government Accountability Office, 441 G Street NW, Room 7125, Washington, DC 20548
Public Affairs	Chuck Young, Managing Director, youngc1@gao.gov, (202) 512-4800 U.S. Government Accountability Office, 441 G Street NW, Room 7149 Washington, DC 20548
Strategic Planning and External Liaison	James-Christian Blockwood, Managing Director, spel@gao.gov, (202) 512-4707 U.S. Government Accountability Office, 441 G Street NW, Room 7814, Washington, DC 20548

Exhibit 9

JOSEPH H. HUNT
Assistant Attorney General
SCOTT G. STEWART
Deputy Assistant Attorney General
WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
WILLIAM C. SILVIS
Assistant Director
Office of Immigration Litigation
SARAH B. FABIAN
Senior Litigation Counsel
NICOLE MURLEY
Trial Attorney
Office of Immigration Litigation
U.S. Department of Justice
Box 868, Ben Franklin Station
Washington, DC 20442
Telephone: (202) 532-4824
Fax: (202) 616-8962

ADAM L. BRAVERMAN
United States Attorney
SAMUEL W. BETTWY
Assistant U.S. Attorney
California Bar No. 94918
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, CA 92101-8893
619-546-7125
619-546-7751 (fax)

Attorneys for Federal Respondents-Defendants

Lee Gelernt*
Judy Rabinovitz*
Anand Balakrishnan*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Floor
New York, NY 10004
T: (212) 549-2660
F: (212) 549-2654
lgelernt@aclu.org
jrabinovitz@aclu.org
abalakrishnan@aclu.org

Bardis Vakili (SBN 247783)
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131
T: (619) 398-4485
F: (619) 232-0036
bvakili@aclusandiego.org

Stephen B. Kang (SBN 292280)
Spencer E. Amdur (SBN 320069)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-1198
F: (415) 395-0950
skang@aclu.org
samdur@aclu.org

Attorneys for Petitioners-Plaintiffs
**Admitted Pro Hac Vice*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MS. L, et al.,

Petitioners-Plaintiffs,

vs.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, et al.,

Respondents-Defendants.

Case No. 18cv428 DMS MDD

JOINT STATUS REPORT

The Court ordered the parties to file a joint status report on February 20, 2019, in anticipation of the status conference scheduled at 3:00pm PST on February 21, 2019. The parties submit this joint status report in accordance with the Court's instruction.

I. DEFENDANTS' POSITIONS

A. Update on Reunifications

As of February 13, 2019, Defendants have discharged 2,735 of 2,816 possible children of potential class members.[1] *See* Table 1: Reunification Update. This is

[1] As explained in the data table below and in prior status reports, Defendants have determined that some children originally counted in this number are not, in fact, children of class members. Defendants continue to report this number to allow for transparency in their data reporting, and to minimize confusion.

an increase of 12 discharges reported in Table 1 since the Joint Status Report (JSR) filed on February 6, 2019. All 12 children were discharged under other appropriate circumstances, such as discharges to other appropriate sponsors or discharges of minors who turned 18 years old.

There are now five children in ORR care proceeding towards reunification or other appropriate discharge. The current status of these five children is as follows:

- One child has a parent who is in the United States, but who is unavailable because the parent is in other federal, state, or local custody (e.g., state criminal detention). Defendants are working to appropriately discharge the child, and to identify any possible barriers to discharge, meeting and conferring with Plaintiffs where appropriate for resolution.
- Four children have parents presently departed from the United States. The Steering Committee has not yet provided notice of parental intent regarding reunification (or declination of reunification). Defendants are supporting the efforts of the Steering Committee to obtain statements of intent from those parents. Once Defendants receive the notices from the Steering Committee, Defendants will either reunify the children or move them into the TVPRA sponsorship process, consistent with the intent of the parent. The Steering Committee has advised that resolution on four of the five children will be delayed due to unique circumstances.

The current reunification status for the 2,816 children ages 0 through 17 who have been the focus of Defendants' reporting to date is further summarized in Table 1 below. The data in Table 1 reflects approximate numbers on these children maintained by ORR at least as of February 13, 2019. These numbers are dynamic and continue to change as more reunifications, determinations on class membership, and/or discharges occur.[2]

Table 1: Reunification Update

Description	**Phase 1 (Under 5)**	**Phase 2 (5 and above)**	**Total**
Total number of possible children of potential class members	107	2709	2816
Discharged Children			
Total children discharged from ORR care:	106	2629	2735
• Children discharged by being reunified with separated parent	82	2073	2155
• Children discharged under other appropriate circumstances (these include discharges to other sponsors [such as situations where the child's separated parent is not eligible for reunification] or children that turned 18)	24	556	580

[2] Please note that ORR's database experienced technical problems and was inaccessible from approximately February 8, 2019 until February 12, 2019. Due to this outage, it is possible that additional reunifications took place since the last JSR, but were not updated in the database in time for this report. The ORR database is now functional again, and the next JSR will include all reunifications to date.

Children in ORR Care, Parent in Class			
Children in care where the parent is not eligible for reunification or is not available for discharge at this time:	0	5	5
• Parent presently outside the U.S.	0	4	4
o Steering Committee has advised that resolution will be delayed	0	3	3
• Parent presently inside the U.S.	0	1	1
o Parent in other federal, state, or local custody	0	1	1
o Parent red flag case review ongoing – safety and well being	0	0	0
Children in ORR Care, Parent out of Class			
Children in care where further review shows they were not separated from parents by DHS	1	13	14
Children in care where a final determination has been made they cannot be reunified because the parent is unfit or presents a danger to the child	0	18	18
Children in care with parent presently departed from the United States whose intent not to reunify has been confirmed by the ACLU	0	39	39
Children in care with parent in the United States who has indicated an intent not to reunify	0	5	5

Additional Information Regarding 149 Children Identified in the Previous JSR

Table 1 incorporates discharge information relating to the 149 separated children reported for the first time in the last two JSRs. *See* ECF Nos. 334 and 349. These children were in ORR care on June 26, 2018, and were all discharged by October 25, 2018. At the time of discharge:

- 64 children had potential class member parents who departed the United States. Seven of these 64 children departed the United States with their

separated parents. ORR discharged 57 children under other appropriate circumstances. At the request of the Steering Committee, ORR will provide the Steering Committee with the last known contact information for the parents of these 57 children.

- 73 children had potential class member parents in the United States. ORR reunified 10 of these 73 children with their separated children, and discharged 63 under other appropriate circumstances.
- 11 children had parents who were determined to be excluded from the class due to criminality. However, one parent from this group was later reunified with his separated child.
- 1 child was found not to have been separated from a parent.

On February 8, 2019, Defendants provided a spreadsheet to Plaintiffs identifying these 149 children, and providing information available to Defendants about the status of the children and their parents. Other than as noted above, Defendants have not received any follow-up inquiries from Plaintiffs about this data.

B. Update on Removed Class Members

The current reunification status of removed class members is set forth in Table 2 below. The data presented in this Table 2 reflects approximate numbers maintained by ORR as of at least February 13, 2019. These numbers are dynamic and continue to change as the reunification process moves forward.

Table 2: Reunification of Removed Class Members

REUNIFICATION PROCESS	REPORTING METRIC	NO.	REPORTING PARTY
STARTING POPULATION	Children in ORR care with parents presently departed from the U.S.	43	Defs.
PROCESS 1: Identify & Resolve Safety/Parentage Concerns	Children with no "red flags" for safety or parentage	43	Defs.
PROCESS 2: Establish Contact with Parents in Country of Origin	Children with parent contact information identified	43	Defs.
	Children with no contact issues identified by plaintiff or defendant	43	Defs. & Pls.
	Children with parent contact information provided to ACLU by Government	43	Defs.
PROCESS 3: Determine Parental Intention for Minor	Children for whom ACLU has communicated parental intent for minor:	40	Pls.
	• Children whose parents waived reunification	39	Pls.
	• Children whose parents chose reunification in country of origin	1	Pls.
	• Children proceeding outside the reunification plan	0	Pls.
	Children for whom ACLU has not yet communicated parental intent for minor:	3	Pls.
	• Children with voluntary departure orders awaiting execution	0	Defs.
	• Children with parental intent to waive	0	Defs.

	reunification documented by ORR		
	• Children whose parents ACLU has been in contact with for 28 or more days without intent determined	0	Pls.
PROCESS 4: Resolve Immigration Status of Minors to Allow Reunification	Total children cleared Processes 1-3 with confirmed intent for reunification in country of origin	1	Pls.
	• Children in ORR care with orders of voluntary departure	0	Defs.
	• Children in ORR care w/o orders of voluntary departure	1	Defs.
	o Children in ORR care whose immigration cases were dismissed	0	Defs.

Separately, Plaintiffs' have requested that the government submit to Plaintiffs and to the Court a "baseline" total number of removed parents. Counsel for Defendants has spoken with counsel for Plaintiffs in an effort to better understand what Plaintiffs are seeking in making this request, and following that discussion, Defendants are now working with their data team to compile the number that they understand Plaintiffs to be referring to in requesting a "baseline." Defendants are reviewing their records and expect to be able to calculate this number in time for the next status report. Defendants note that since the preliminary injunction was issued they have regularly updated the Steering Committee regarding the status of departed

parents who have children remaining in ORR care, including updates and explanations about why their calculation of that number has continued to change over time. Defendants sent the last such update on February 8, 2019, and plan to send another update later this week.

C. Update Regarding Government's Implementation of Settlement Agreement

SETTLEMENT PROCESS	DESCRIPTION	NUMBER
Election Forms[3]	Total number of executed election forms received by the Government	**340 (217 Parents/123 Children)**[4]
	• Number who elect to receive settlement procedures	**185 (119 Parents/66 Children)**
	• Number who waive settlement procedures	**155 (98 Parents/57 Children)**[5]

[3] The number of election forms reported here is the number received by the Government as of February 13, 2019.

[4] The number of children's election forms is lower than the number of parent election forms because in many instances a parent electing settlement procedures submitted an election form on his or her own behalf or opposing counsel e-mailed requesting settlement implementation for the entire family, but no separate form was submitted on behalf of the child.

[5] The number of children's waivers is lower because some parents have submitted waivers only for themselves and some parents who have waived reunification also waived settlement procedures and have therefore not provided a form for the child.

Interviews	Total number of class members who received interviews	**137**[6]
	• Parents who received interviews	**71**
	• Children who received interviews	**66**
Decisions	Total number of CFI/RFI decisions issued for parents by USCIS	**63**[7]
	• Number of parents determined to establish CF or RF upon review by USCIS	**63**[8]
	• Number of parents whose CF or RF finding remains negative upon review by USCIS	**0**
	Total number of CFI decisions issued for children by USCIS	**73**[9]

[6] Some individuals could not be interviewed because of rare languages; these individuals were placed in Section 240 proceedings.

[7] This number is the aggregate of the number of parents whose negative CFI/RFI determinations were reconsidered, number of parents whose negative CFI/RFI determination was unchanged, and individuals who were referred to 240 proceedings without interview because of a rare language. This number excludes 12 cases where a parent already had an NTA from ICE or was already ordered removed by an IJ (which are included in the interview totals).

[8] This number includes parents who received positive CF/RF determinations upon reconsideration, parents who received a Notice to Appear based on their child's positive CF determination, and parents who were placed in Section 240 proceedings due to a rare language.

[9] This number is the aggregate of the number of children who received a positive CF

	• Number of children determined to establish CF by USCIS	**73**[10]
	• Number of children determined not to establish CF by USCIS	**0**
Removals	Number of class members who have been returned to their country of origin as a result of waiving the settlement procedures	**95 Parents**[11]

D. Children Awaiting Placement.

On February 12, 2019, Plaintiffs provided Defendants a list of 22 children who Plaintiffs believed were awaiting placement with a sponsor after their parent waived reunification. On February 16, 2019, Defendants provided Plaintiffs with information about each of these 22 children. In summary: 8 of those children have been released to a sponsor; 5 have possible sponsors, but necessary information has

---

determination, the number of children who received a negative CF determination, and children who were referred to 240 proceedings without interview because of a rare language.

[10] This number includes children who received a positive CF determination, children who received a Notice to Appear as a dependent on their parent's positive CF determination, and children who were placed in Section 240 proceedings due to a rare language.

[11] This number is as of February 9, 2019.

not been submitted by those sponsors; 1 has a possible sponsor, but necessary information has not been received from the consulate; 7 have no sponsor available; and 1 child was discharged from ORR custody because he turned eighteen.

E. Government Processes, Procedures, and Tracking, for Separations Since June 26, 2018.

1. Data Requested by Plaintiffs

Defendants are providing Plaintiffs with a report containing information regarding families separated since the Court's June 26, 2018 preliminary injunction order. Defendants have identified 245 new separations of children and parents that occurred between June 27, 2018 and January 31, 2019, and four cases which require more time to assess.[12] Even counting these four cases as parent-child separations, these (249) referrals account for approximately 0.78% of the 31,876 total referrals ORR received over the same period. Further, of these 249 children, 62 are no longer in ORR care.

Based on the information available to date, in the 245 identified separations the parent was either excluded from the *Ms. L* class or was separated for a reason consistent with the Court's preliminary injunction. In some of these cases, the parent

[12] Defendants have excluded from this count of 245 separations a situation in which DHS encountered a UAC mother, adult father, and their UAC infant child, and in which the UAC mother and infant were both transferred to ORR together, while the infant's adult father was transferred to ICE custody. Defendants coordinated with Plaintiffs' counsel on the disposition of this case.

has since become eligible for reunification with their child, and reunification is proceeding under the Court's procedures, as outlined in Table 3 below.

Table 3 below sets forth the number of new separations identified, the bases for those separations, and the status of those children who have been discharged from ORR care. Defendants note that the count presented here is accurate as of February 20, 2019, and is based on information known to the Defendants as of that date. This information is, in some cases, different than the information that was known at the time of the actual separation. For instance, some of these 245 cases reflect a situation in which CBP separated a child from an accompanying adult because, based on the information available to CBP at the time of apprehension, and in light of the short period of time in which CBP must make a processing determination, CBP did not have information to indicate that the adult was the parent or legal guardian of the child. However, since the time of apprehension, Defendants have developed additional information that shows that the child was, in fact, separated from his or her parent or legal guardian. As outlined below in Section I.E.2, in that case DHS and ORR would work together to reunify that parent and child under the expedited *Ms. L* reunification process. In light of changes in information known to Defendants as well as factual circumstances regarding the parent and child, any count of separations reflects only a snapshot in time, and is subject to change based on changed or updated information.

Table 3: New Separations

Description	Total
Total number of possible children separated from their parents and placed in ORR custody between June 26, 2018 and February 5, 2019	249
• Separations verified by DHS and HHS	245
• Separations requiring additional review	4
Basis for Separation	
• Parent criminality, prosecution, gang affiliation, or other law enforcement purpose	225
• Parent health issues/hospitalization	17
• DHS unable to verify familial relationship	3
Total number of children discharged from ORR care (out of the 249 identified above):	62
• Children discharged by being reunified with separated parent	17
• Children discharged under other appropriate circumstances (these include discharges to other sponsors [such as situations where the child's separated parent is not eligible for reunification] or children that turned 18)	45

2. Processes and Procedures

Defendants have met and conferred with counsel for class members as well as counsel for separated children, and have considered all issues raised by counsel in these discussions, as well as issues identified in the course of this litigation, in developing the outline below. The below summary memorializes the processes, procedures, tracking, and communication between the agencies that have been adopted by the agencies since June 26, 2018, in accordance with the requirements of

the Court's preliminary injunction order. It also provides an outline of the options for separated parents and children to obtain information and assess their options for reunification. Defendants are willing to meet and confer with Plaintiffs as needed regarding any remaining issues.

Outline of Processes and Procedures

- DHS initiates separation based on a parent's: 1) criminal history; 2) communicable disease; 3) unfitness or dangerousness (including hospitalizations); or 4) some other criteria that do not automatically exclude the parent from being treated as a *Ms. L.* class member at a later point in time (i.e., referral for criminal prosecution or as a material witness).
    - Understanding that initial separations must be made based on the information that is available at the time to those agents encountering an adult and child, DHS will, if appropriate, relay the basis for separation to the adult, or to the adult's attorney, upon request. CBP will not generally provide reasons to the adult if doing so would create a risk to the child's safety or would not otherwise be in the child's best interests, and will not do so in situations in which CBP suspects fraud, smuggling, and/or trafficking.
    - DHS will communicate the basis for separation to HHS, and will, as soon as practicable, provide HHS with available and appropriate information about the reason for the separation (taking into account any restrictions on the sharing of such information). DHS and HHS have designated points of contact to assist HHS in obtaining information about the reasons for the separation. HHS will ensure that information about the separation is communicated to the field so that attorneys representing the children can obtain information about the separations from the FFS or case managers.
    - Where separation is based on 1) criminal history, 2) communicable disease, or 3) a determination of unfitness or dangerousness by DHS, HHS will accept the child and consider reunification under the processes discussed below (either expedited *Ms. L* procedures or procedures consistent with the TVPRA.).

- Where separation is based on communicable disease or a determination of unfitness based on hospitalization, HHS will accept the child, and consider reunification under the processes discussed below, consistent with the TVPRA, while remaining cognizant that the parent may become available for reunification pursuant to the expedited *Ms. L* procedures during such period. If a parent completes medical treatment or the communicable disease is resolved while the parent remains in DHS custody, DHS will notify HHS as soon as practicable whether there is a continued basis for separation (either (1) criminal history, or (2) a determination of unfitness or dangerousness by DHS). HHS will notify DHS if it has determined that there is a basis for separation (including a determination of unfitness or dangerousness by HHS). If there is a continued basis for separation, the procedures discussed below will apply. If there is no continued basis for separation, and the child has not already been released consistent with the TVPRA, then DHS will work with HHS to facilitate reunification under the expedited *Ms. L* procedures.
- Where the separation is based on a transfer to criminal custody for a criminal prosecution or as a material witness, but no other basis for separation has been identified, HHS will accept custody of the child during the course of that parent's criminal custody. When the parent returns to DHS custody, DHS will notify HHS as soon as practicable whether there is a continued basis for separation (i.e., (1) criminal history, (2) communicable disease, or (3) a determination of unfitness or dangerousness by DHS). HHS will notify DHS if it has determined that there is a basis for separation including communicable disease or a determination of unfitness or dangerousness by HHS. If there is a continued basis for separation, the procedures discussed below will apply. If there is no continued basis for separation, then DHS will work with HHS to facilitate reunification under expedited *Ms. L* procedures.

- For parents who are separated because of: 1) criminal history, 2) communicable disease, or 3) a determination of unfitness or dangerousness by DHS, DHS will make a detention determination for the parent.
    - If the adult is detained, then DHS will work with HHS to facilitate communication between the parent and child for as long as both the parent and child remain in DHS and HHS custody, respectively.
        - A parent who is separated on the basis of criminal history will be excluded from the class (the only exception to this would be if DHS receives information that the original criminal history determination was in error, in which case DHS should take steps to treat the parent as a *Ms. L*. class member and should work with HHS to facilitate reunification). HHS will work toward release of the child with a suitable sponsor consistent with the TVPRA.
            - If a parent in this category requests reunification for removal, DHS and HHS will consider such requests on a case by case basis, notwithstanding the fact that the parent remains excluded from the *Ms. L*. class.
        - A parent who is separated on the basis of having a communicable disease and who remains in DHS custody is excluded from the *Ms. L.* class and is not entitled to be reunified with their child so long as the medical condition remains in place, and HHS will work toward release of the child with a suitable sponsor consistent with the TVPRA.
            - If DHS becomes aware that the parent no longer has a communicable disease, then DHS will notify and work with HHS to reassess class membership and, if appropriate, facilitate reunification for children not yet released from HHS.
        - A parent who is separated on the basis of unfitness (including hospitalization) or dangerousness and who remains in DHS custody is not entitled to be reunified with their child so long as the factual basis for the original unfitness or dangerousness determination remains in place.
            - If DHS becomes aware that such factual basis no longer exists, then DHS will notify and work with HHS to reassess whether reunification is appropriate and, if appropriate, facilitate reunification.

- If HHS becomes aware that the factual basis for the original unfitness or dangerousness determination no longer exists then HHS will notify and work with DHS to reassess whether reunification is appropriate and, if appropriate, facilitate reunification.
- If a parent who remains in DHS custody was separated on the basis of unfitness or dangerousness, and DHS determines that the factual basis for the unfitness or dangerousness determination still exists, and the parent is subject to a final order of removal, DHS will determine whether the parent requests to be removed with his or her child. If the parent requests reunification for removal, DHS will notify HHS before the parent is removed. HHS will then determine whether the parent has any fitness or dangerousness issues that preclude reunification for removal. If HHS finds no fitness or dangerousness problem that precludes reunification for removal, then DHS and HHS will facilitate reunification for removal.

o If DHS makes the decision **not** to detain an individual who was originally separated and excluded from the class for 1) criminal history, 2) communicable disease, or 3) a determination of unfitness or dangerousness by DHS (or if release of such an individual is ordered by an immigration judge), DHS will communicate this release determination to HHS and will work with HHS to provide information necessary for HHS to determine whether the parent has an issue that requires continued exclusion from the class or would require continued separation. If HHS concludes that no such issue requires continued separation or class exclusion, then, notwithstanding the fact that the parent is excluded from the *Ms. L.* class, HHS will facilitate reunification by, in its discretion, applying the expedited *Ms. L.* reunification procedures. Otherwise, the child will proceed towards release consistent with the TVPRA.

II. *MS. L.* PLAINTIFFS' POSITION

1. The Creation of a Centralized Database to Track Further Separations

The parties are meeting and conferring on how to addressing continuing separations. Prior to the shutdown, Plaintiffs sent the government a set of threshold requirements that an interagency database should meet. Plaintiffs have asked to see a written proposal by government agencies so as to provide detailed responses, informed by the views of stakeholders, including groups representing immigrant children and families. As of Friday, February 15, the government stated they are in the process of developing a written proposal; Plaintiffs have not yet received it or had a chance to review it with stakeholders in order to provide further input.

2. Information Regarding Parents Separated from Children After June 26

Plaintiffs have requested the government provide a list of parents separated from their children after June 26 (the date of the PI Order), along with the reasons why the family was separated in order to ensure this Court's injunction is properly implemented and assist the reunification of families where it is not. Plaintiffs requested this information by e-mail to government's counsel on Dec. 6, 2018, raised the request in the February 6 JSR, and at the February 8 status hearing. The government indicated it was putting the information together. 2/8/19 Tr. at 12. Plaintiffs have not yet received the list.

C. Steering Committee Progress

The Steering Committee has successfully contacted and confirmed the preferences of nearly all removed parents with respect to reunifications. On February 8, the government reported that, as of February 2, 49 children with removed parents remained in ORR custody.[13] The Committee has delivered

[13] As discussed at the October 25 Status Conference, in this Joint Status Report

preferences for the parents of 45 of those children, and those children are awaiting either reunification with their parents or placement with sponsors in accordance with their parents' submitted preferences. For the remaining four children, the parent of one is seeking to return to the United States under the Settlement Agreement and the other three are cases where the Steering Committee has advised the government that additional time will be required due to complex and individualized circumstances.

The status of efforts based on the government's January 28 list of 49 children in ORR custody with removed parents appears in the table immediately below.[14]

Removed parents identified by the government to the Steering Committee as of 2/2/2019	49
Parent's final preference has been communicated to the government	45[15]
• Parent has elected reunification in Country of Origin	0
• Parent has elected to waive reunification in Country of Origin	45
Total number of cases that the Steering Committee has indicated to the government should be set aside.	3
Total number of cases where the parent seeks to return to the U.S. under the Settlement Agreement and has thus not yet made an election.	1

Plaintiffs are reporting a set of detailed numbers based only on the government's most recent list of children in ORR custody with removed parents.

[14] This table is shortened from the version in past status reports. We have omitted a breakdown of the 49 removed parents that focuses on how many separated parents have been contacted. All but two removed parents have been contacted, which is unchanged from the Feb. 6 status report.

[15] As noted above, for one child, the Steering Committee has determined that, due to its inability to reach the removed parent, reporting the preference of the non-removed parent is appropriate.

1. Children Whose Parents Have Submitted Preferences Who Are Still Detained

On February 12, the Steering Committee provided to the government information regarding 22 children who had been in ORR custody for at least five months following the submission of a final reunification election. The government provided detailed information regarding these children on February 16, which the Steering Committee appreciates. Eight of these 22 children have now been discharged to a sponsor; one child turned 18 and was transferred out of ORR care. The Steering Committee will continue to meet and confer with the Government regarding the remaining children.

2. Identifying the Population of Removed Parents

At the November 30 Status Conference, the Court requested the parties to agree upon a baseline of the total number of parents who were removed following separation from their children, so as to provide the Court with a complete accounting of the reunification process. Although the Steering Committee has conferred with the government regarding how to calculate the baseline, the government has not yet provided the proposed baseline to the Steering Committee.

With respect to the 149 additional separated children in ORR custody, identified by the government in the December 12 Joint Status Report, the Government has provided initial information to the ACLU and Steering Committee, showing that 64 of these separated children have a parent that was removed from the United States following separation. None of these children remain in ORR custody; however the Steering Committee intends to contact these parents to ensure that their reunification preferences have been satisfied and to identify any parents whose cases counsel may raise with the government as

warranting return to the United States to pursue asylum. The government has told the Steering Committee that it will provide contact information for these families later this week.

III. *MMM-Dora* Plaintiffs' Report Regarding Settlement Implementation

The parties continue to work together to implement the settlement agreement approved on November 15, 2018. Counsel for Plaintiffs are providing the government with signed waiver forms as they are received from class members (detained and released). The parties are meeting and conferring on settlement implementation issues as they arise. Since the last status report, the parties met and conferred on a range of issues. The parties are working together to resolve the discrepancy between the number of waiver forms submitted by class counsel and the number of forms reported by the Government. The parties are also working together to identify and resolve settlement issues for the remaining class members who are still in detention but who have not submitted waiver forms. The parties will alert the Court of any issues that require the Court's guidance.

.

DATED: February 20, 2019

Respectfully submitted,

/s/ Lee Gelernt

Lee Gelernt*
Judy Rabinovitz*
Anand Balakrishnan*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Floor
New York, NY 10004
T: (212) 549-2660
F: (212) 549-2654
lgelernt@aclu.org
jrabinovitz@aclu.org
abalakrishnan@aclu.org

Bardis Vakili (SBN 247783)
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131
T: (619) 398-4485
F: (619) 232-0036
bvakili@aclusandiego.org

Stephen B. Kang (SBN 292280)
Spencer E. Amdur (SBN 320069)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-1198
F: (415) 395-0950
skang@aclu.org
samdur@aclu.org

Attorneys for Petitioners-Plaintiffs
**Admitted Pro Hac Vice*

JOSEPH H. HUNT
Assistant Attorney General
SCOTT G. STEWART
Deputy Assistant Attorney General
WILLIAM C. PEACHEY
Director
WILLIAM C. SILVIS
Assistant Director

/s/ Sarah B. Fabian
SARAH B. FABIAN
Senior Litigation Counsel
NICOLE MURLEY
Trial Attorney
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4824
(202) 616-8962 (facsimile)
sarah.b.fabian@usdoj.gov

ADAM L. BRAVERMAN
United States Attorney
SAMUEL W. BETTWY
Assistant U.S. Attorney

Attorneys for Respondents-Defendants

Exhibit 10

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MS. L, et al., Petitioners-Plaintiffs, vs. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, et al., Respondents-Defendants.	Case No. 18cv428 DMS MDD **DECLARATION OF JALLYN SUALOG**

DECLARATION OF JALLYN N. SUALOG, DEPUTY DIRECTOR FOR CHILDREN'S PROGRAMS, OFFICE OF REFUGEE RESETTLEMENT, ADMINISTRATION FOR CHILDREN AND FAMILIES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

I, Jallyn Sualog, for my declaration pursuant to 28 U.S.C. § 1746, hereby state and depose as follows, based on my personal knowledge and information provided to me in the course of my official duties:

1. I am presently the Deputy Director for Children's Programs for the Office of Refugee Resettlement ("ORR"), an Office within the Administration for Children and Families ("ACF"), U.S. Department of Health and Human Services ("HHS").

1. I have held the position of Deputy Director since June of 2018. I have been the Director of Children's Services since September 2013. I have worked at ORR since February of 2007. I have a Masters of Arts in Clinical Psychology. Prior to starting at ORR, I worked as a mental health professional and I managed the child welfare and social services programs for Hawaii's largest non-profit organization.

2. I was personally involved in HHS' efforts to reunify children with class members in compliance with the orders by the Court in the *Ms. L.* case, though I was not a not a member of the Incident Management Team ("IMT"), led by the Assistant Secretary for Preparedness and Response ("ASPR"). The IMT coordinated and managed the data for the *Ms. L.* case. As the IMT begins to de-mobilize, ORR is resuming primary responsibility for reunifying separated children in accordance with the Court's orders, and I am leading ORR's efforts in that regard.

The HHS Effort to Identify Possible Children of Potential Class Members Required Significant Resources and Time

3. I understand that the Court has defined the plaintiff class as "All adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child." The court added a footnote, stating: "As discussed in text, *infra*, the class does not include migrant parents with criminal history or communicable disease, or those who are in the interior of the United States or subject to the EO." *See* ECF No. 82. I understand that Plaintiffs in this case seek to broaden the Court's definition of the class to include parents and legal guardians of alien children whom the Department of Homeland Security ("DHS") separated and transferred to ORR, and whom ORR released from custody before June 26, 2018.

4. When HHS previously identified possible children of potential class members for the Court, HHS applied the Court's current class definition and followed the extensive process described in declarations submitted by Jonathan White. *See* ECF No. 227 and ECF No. 86-1.

5. As explained in Commander White's declarations, the process initially included ORR staff working up to 12-18 hours per day, 7 days per week. However, the Secretary quickly

deployed "surge personnel" from ASPR to assist ORR with reunification efforts, such that ORR could continue performing its core program functions. On June 22, 2018, the Secretary also activated the Secretary's Operation Center, which included activation of a 53-person Incident Management Team ("IMT"), working 12-16 hours per day, 7 days per week, in order to provide necessary logistical and administrative support. The activation of such a large team also allowed ORR to continue to perform core program functions for minors who cross the border without parents (and who far outnumber the separated children in ORR care).

6. The IMT had the goal of identifying every possible child of a *Ms. L. v. ICE* class member in ORR care as of June 26, 2018. To that end, the IMT conducted a rigorous review to identify any and all indicators of potential separation for every child in ORR care as of June 26, 2018. The review encompassed: manual review of ORR case management records for every child in ORR care (approximately 12,000 at the time); sworn testimony from each ORR grantee on the separated children at the grantee's shelters; and dozens of data sets produced by DHS (approximately 60 data sets in all were reviewed).

7. DHS apparently collected the large number of data sets from the numerous information systems maintained by its various components, sectors, and offices. As a result, there were many data sets from Customs and Border Patrol ("CBP"), Immigration and Customs Enforcement ("ICE"), and specific sectors or offices of DHS that were neither de-conflicted nor integrated. The IMT therefore had to analyze and reconcile the DHS data sets, together with the information maintained by ORR.

8. This complex data analysis resulted in an initial list of approximately 3,600 potentially separated children, i.e., children for whom HHS found any information, in any data source reviewed, indicating that the child might have been separated from a parent. Following

the IMT's review of the list of 3,600 children, and further reconciliation and analysis, HHS reported to the Court a total of 2,654 possible children of potential class members.

9. In September 2018, the IMT began a second record review to determine whether any of the other children from the list of 3,600 children who were still in ORR care should be re-categorized as possible children of potential class members. The second record review looked at new information about those children that ORR had received from ORR shelters and DHS through ordinary program operations. On October 25, 2018, HHS reported to the Court that it was re-categorizing 13 of the children in the second record review as possible children of potential class members.

10. In December 2018, ORR then conducted a third record review to determine whether any of the children from the list of 3,600 who were not previously identified as possible children of potential class members, and who were discharged from ORR care before October 25, 2018, should be re-categorized. The third record review looked at new information about the children that ORR had received from ORR shelters and DHS through ordinary program operations before discharge. On December 12, 2018, HHS reported to the Court that it was re-categorizing 149 of the children in the third record review as possible children of potential class members.

11. HHS has also determined through further data analysis and program operations that some children reported to the *Ms. L.* Court as possible children of potential class members were not, in fact, separated from parents. HHS reported to the *Ms. L.* Court on November 29, 2018 that the total number of such children is 79.

12. The experience of HHS in the *Ms. L* case has been that confirming whether a child was separated from a parent by DHS at the border often requires a fact-intensive and time-

consuming analysis that involves the reconciliation of data from multiple sources and the exercise of programmatic judgment to interpret the data.

HHS Would Have to Deploy Even More Resources to Identify Possible Children of Potential Class Members Under Plaintiffs' Proposed Expansion

13. There is no start date included in Plaintiffs' proposal to expand the scope of the class. So to project the resources that HHS would need to identify possible children of potential class members under Plaintiff's proposed expansion, I used a hypothetical start date of July 1, 2017. And I had my data team pull the number of unaccompanied alien children (UACs) in ORR care and custody for the time period of July 1, 2017 through June 25, 2018. The data team identified a total of 47,083 UACs in ORR care and custody for the period.

14. During the hypothetical class period (July 1, 2017 through June 25, 2018), DHS did not consistently report potential separations to ORR using a specified data field that automated the tracking of potential separations by ORR. Rather, DHS reported anecdotal information regarding potential separations to ORR on an *ad hoc* basis by entering it into any one of the potentially relevant fields in the UAC's case management record on the ORR online portal. ORR conducted informal, manual tracking of any potential separations indicated in the ORR online portal. But such tracking was for program operations purposes only. ORR did not conduct forensic data analyses of potential separations for legal or public reporting purposes because at that time, there was no legal obligation or programmatic reason to do so.

15. To identify possible children of potential class members under Plaintiffs' expanded class definition, ORR would have to conduct a forensic data analysis of all 47,083 UACs in ORR care and custody during the period of June 17, 2017 to July 25, 2018. That is, ORR would have to conduct an analysis similar to what the IMT did for the 12,000 children in ORR care as of June 26, 2018. And ORR would have to conduct that analysis on a population of

UACs four times as large, while still executing all the day-to-day program operations required to care for the many thousands of children presently in ORR custody.

16. First, ORR would have to review each case management record for each one of the 47,083 UACs to identify any indicators of potential separation. Then ORR would have to try to collect corroborating information from ORR grantees, as well as data sets from DHS, and reconcile that data with what ORR obtains from UAC case management records.

17. It is difficult to provide an exact estimate of how long it would take to manually pull the case management records for each child from the portal in order to determine whether there are indicia of separation. At a minimum, logging on to the portal and then accessing the page for a particular minor takes approximately 15 to 30 minutes, as the analyst must access the online data system, locate the child and then start downloading document files. To analyze indicia of separation, I would expect our analysts to download such documents as: the intakes page, the 30-day case review for each minor, the individualized assessment, the assessment for risk, the significant incident reports, and then individualized documentation housed in a special part of the portal (this might include psychological records, home studies, and other more individualized documents where a report would have noted a separation). Analysts would most likely need to look through 10 to 20 documents per child. I expect that each document would take approximately 5 to 15 minutes to download (with some downloads taking as long as 30 minutes), and then approximately 15 to 30 minutes to review. Compiling the data for the individual UAC in a spreadsheet would take another 15 to 30 minutes.

18. Assuming that the work described above takes 4 to 8 hours per UAC case management record, it would take 188,332 to 376,664 hours (4 to 8 hours per case multiplied by 47,083 children in ORR care between July 1, 2017 and June 25, 2018) for ORR analysts to

review all of the UAC case management records for indicia of separation. This would translate into 100 ORR analysts working 8 hours per day, for between 235 and 471 consecutive calendar days, before they could even begin reconciling the information from the UAC case management records with any testimony from grantees or data sets from DHS. In my judgment, ORR does not have the requisite staff for such a project. ORR has approximately 150 contract and federal staff in the "division for children's services," some of whom are devoted to the refugee, and not the UAC program.

19. Factors that could increase the time it takes for ORR to identify possible children of potential class members include any: testimony received from grantees; data sets received from DHS; additional work required to verify the parent-child relationship.

20. Further class membership analysis may be necessary in some cases, and would impose additional burden on ORR. Such analysis may include: review of criminal history and parental fitness or dangerousness; and determination of the parent's wishes regarding reunification.

Plaintiffs' Proposed Expansion of the Class Presents Child Welfare Concerns

21. The vast majority of minors released from ORR custody are released to relatives. For example, in fiscal year 2017, ORR released 93 percent of children to a sponsor. Of those, ORR released 49 percent to parents, 41 percent to close relatives such as an aunt, uncle, grandparent, or adult sibling, and 10 percent to more distant relatives such as a cousin or non-relatives such as a family friend. *See* https://www.hhs.gov/about/agencies/asl/testimony/2018-07/oversight-of-immigration-enforcement-and-family-reunification-efforts.html

22. "Once a child is released to a sponsor, ORR's custodial relationship with the child terminates." *See* ORR Guide, Children Entering the United States Unaccompanied at § 2.8.3

(available at: https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.8.3). ORR would have no authority to require or force a sponsor to transfer custody of a child to a separated parent to effectuate reunification. Nor would ORR have the field personnel needed to forcibly transfer and reunify the child.

23. Even if ORR had the authority and resources to intervene in the familial relationship between the sponsor and child, doing so would be disruptive and harmful to the child (especially if the intervention was contrary to the sponsor's or the child's wishes). Disrupting the family relationship is not a recommended child welfare practice.

24. The child welfare concerns presented by Plaintiffs' proposed expansion of the class are significant given the potentially large number of children involved.

Conclusion

25. Even if performing the analysis Plaintiffs seek were within the realm of the possible, it would substantially imperil ORR's ability to perform its core functions without significant increases in appropriations from Congress, and a rapid, dramatic expansion of the ORR data team. ORR would not have the authority or resources to forcibly reunify minors who are no longer in ORR custody. Finally, reunification of minors already residing with close relatives, parents or family friends could interfere with the child's routine and currently established relationships.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 17, 2019.

Jallyn Sualog, *ORR Deputy Director*

Exhibit 11

Despite ban, separating migrant families at the border continues in some cases

Alan Gomez, USA TODAY Published 6:00 a.m. ET Feb. 21, 2019 | **Updated 3:50 p.m. ET Feb. 22, 2019**

The Trump administration has been blocked (/story/news/politics/2018/06/27/judge-orders-families-separated-border-reunited-within-30-days/737194002/) from systematically breaking up migrant families, but hundreds of children crossing the border continue to be separated (/story/news/politics/elections/2018/11/27/donald-trump-zero-tolerance-policy-border-migrants-families-separated-immigration/2132426002/) from their parents in a process requiring none of the oversight used to remove children in the United States from their homes, according to a USA TODAY review of the system.

Separating a child from a family in most communities requires a child welfare specialist and involvement of the judicial system, often with a judge scrutinizing the case for months or even years.

At the border, the decision is made solely by U.S. Customs and Border Protection agents in the field. No child welfare specialist is required, and no judge is involved in a decision that cannot be appealed.

Rebekah Fletcher, a supervising attorney at Kids in Need of Defense, a group that provides lawyers to migrant children in U.S. courts, says the removal of a child from a family in the U.S. is, by design, a difficult, multi-layered process involving people from multiple branches of government. But not so for children at the border.

“To put those similar types of determinations solely in CBP’s hands … the room for error and the room for misinterpretation is dangerously high,” she said.

Even the border protection agency characterizes its family separation process as "brief and expeditious in nature," according to a statement provided to USA TODAY.

President Donald Trump (/story/news/politics/2018/06/20/homeland-security-drafts-plan-end-separations-border/717898002/) and U.S. District Judge Dana Sabraw (/story/news/politics/2018/06/27/judge-orders-families-separated-border-reunited-within-30-days/737194002/) both ordered the Department of Homeland Security to stop separating migrant families as a systemic practice in June.

There is an exception, however: When a parent presents a danger to a child.

What constitutes a "danger" is not clearly defined, but it can include obvious cases of abuse, where the child is covered in bruises, and harder-to-detect cases, where immigration agents believe a child is in peril.

In the seven months after Trump and Sabraw issued their orders, Homeland Security separated at least 245 children from their parents in part by using the danger exception, according to a Department of Justice estimate filed in court on Wednesday. Immigration attorneys believe the number is far higher, with the Texas Civil Rights Project releasing a report (https://texascivilrightsproject.org/familyseparations-report/) on Thursday that found 272 separations in that time period in the McAllen, Texas, area alone.

A Border Patrol agent speaks with Central American immigrants after they crossed the border from Mexico on on Feb. 1, 2019, in El Paso, Texas. *(Photo: John Moore, Getty Images)*

Immigration attorneys and family law experts say the process used to separate children, most commonly carried out by Customs and Border Protection agents, has been shrouded in mystery, provides no due process for the parents and is vulnerable to abuse or mistakes.

The agency defended its family separation process as one that balances the desire to "maintain family unity to the greatest extent operationally feasible" with strong protections for children who may be in danger.

"When handling children it is a practice to always err on the side of caution and to act in the best interest of the child," a statement from the agency said. "The moment of suspicion that a threat to a child exists, it becomes an inquiry and potentially an investigation into the welfare of that child."

More: Democrats grill Trump administration officials over family separation policy on the border (/story/news/politics/2019/02/07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/)

More: Watchdog: Thousands more migrant children may have been separated at border than previously reported (/story/news/politics/2019/01/17/hhs-inspector-general-family-separations/2603282002/)

'An end run' around the courts?

Democratic and Republican lawmakers alike expressed shock over the process during a committee hearing (/story/news/politics/2019/02/07/democrats-trump-administration-family-separation-policy-border-immigration/2794324002/) in the House Energy and Commerce Committee this month. The separation process will be further scrutinized in a House Judiciary Committee hearing on Tuesday.

The ACLU briefly raised the question in federal court on Thursday, when lawyers appeared before Sabraw as he continues to monitor (/story/news/nation/2018/09/13/separated-migrant-families-get-second-chance-asylum/1288273002/) the reunification of more than 2,800 children separated under the Trump administration's "zero tolerance" policy. But lawyers spent the majority of that hearing debating whether the government should be required to identify potentially thousands of other families (/story/news/2019/02/21/judge-sabraw-may-order-trump-reunite-thousands-more-separated-families-homeland-security/2946509002/) that were separated before the "zero tolerance" policy was officially announced.

Sabraw has allowed the government to continue separating more families under the exception to ensure that migrant children are not being trafficked or abused.

ACLU attorney Lee Gelernt said the most recent separation cases have shown that the government may be abusing that exception.

"The government appears to be doing an end run around the court order by unilaterally declaring parents a danger and failing to give parents the ability to rebut that charge," Gelernt said.

When a migrant family crosses the border, either legally at a port of entry or illegally between ports, an immigration agent processes the case. That includes taking down basic information – names, birth dates, country of origin, whether families are applying for asylum or other forms of protection.

The family members are given a medical check and entered into various databases to determine if they have immigration violations or criminal backgrounds, Customs and Border Protection said. The immigration agent also tries to verify the parent-child relationship to ensure the child isn't being trafficked by a smuggler posing as a parent.

All the while, the agent observes the family to gauge whether the parent poses a danger to the child. But no clear-cut definition of such danger exists to guide Border Patrol agents when making that determination. Complicating the decision are language barriers or children too young to offer information.

Agency officials said their decisions are based on multiple U.S. laws and regulations that govern the treatment of migrant children in government custody. None of those lays out a process for separating a migrant parent from his or her child.

Is child 'afraid of parent ... or Border Patrol?'

The separation process, which is being challenged in court, was explained to USA TODAY by a senior Border Patrol official who was authorized to speak only if his name was withheld.

The official said his agents can generally determine if a child has been abused based on the agents' experience as law enforcement officers and history of interviewing suspects. Agents don't receive any training on identifying child trauma. "We're not trained behavioral scientists," the official said.

But the Border Patrol official said agents' experience as a father or mother can help them make the determination. The official said agents can orderan additional medical examination of the child to identify signs of injuries and can interview the parent and child separately to ensure that their stories line up.

"You size up people with their demeanor and you can tell if they're angry, if they're upset, if they had an altercation," he said. "There's a lot of non-verbals that stand out."

Throughout the U.S., that kind of analysis is usually done by child welfare experts who studied the field and are working for state or local child welfare agencies.

Vivek Sankaran, a clinical professor of law and director of the Child Advocacy Law Clinic at the University of Michigan Law School, said identifying child trauma, and the cause of it, requires years of education and training.

"It is universal among mental health professionals that the idea of removing a child from a parent is one of the most traumatic things we as a society can do to the child," he said. "So you want somebody who has been very well-trained to make sure that we need to inflict (a separation) on the child."

Even a former Customs and Border Protection commissioner questioned whether agents should be conducting the child welfare investigations alone.

Gil Kerlikowske, who headed the agency in the Obama administration, said in an interview that migrants are being screened at one of the most stressful moments of their lives, having just completed an exhausting journey across Mexico during which they are frequently victims of robberies, kidnappings and sexual assaults.

Kerlikowske said agents are operating without information that is available in normal child abuse investigations, including a list of official visits to the home and interviews with neighbors and relatives.

"How do you determine whether the child is afraid of the parent, or afraid of the Border Patrol agent in the green uniform?" he asked.

Criminal history matters, but what crimes?

Another factor contributing to the evaluation is a parent's criminal history, either in the U.S. or in their home country. The U.S. government shares criminal databases with Central American countries and can identify whether there are warrants out for their arrest.

But the border protection agency did not specify what kinds of crimes it's researching.

Michelle Brané, director of the Migrant Rights and Justice Program at the Women's Refugee Commission, said she has seen cases where a parent is found to be a danger over immigration violations or minor criminal convictions that do not indicate whether the parent may abuse the child.

"There's a lot of people (in the U.S.) with all sorts of convictions and it doesn't even trigger a child protective services investigation," Brané said. "If you have a shoplifting conviction, or didn't pay child support, or you stole a car, does that really put the child at risk?"

The border agency says officers are allowed to get assistance from child welfare specialists from local and state agencies, but that is not a requirement, and the agency does not track how often such requests are made.

The final decision to separate a family is made by the front-line officer with approval from a supervisor. The decision is final and cannot be reviewed by a judge.

Once the decision to separate is made, the child is sent to the Department of Health and Human Services' Office of Refugee Resettlement, which takes custody of the child and starts searching for a suitable sponsor in the U.S.

Customs and Border Protection says its agents are required to flag the separation in each case file and provide a reason for the separation, but HHS officials and immigration attorneys say agents regularly fail to so do so.

HHS spokesman Mark Weber said caseworkers ask all incoming children about their parents to make sure separated children are properly identified.

Fletcher, supervising attorney for Kids in Need of Defense, said the group gets the full picture of a child's separation only after filing a federal Freedom of Information Act request, which can take weeks or months to come back.

Bipartisan support for improving the process

Though it has been difficult for any kind of immigration bill to pass Congress in recent years, Democrats and Republicans alike are starting to look into ways to improve the family separation process.

In the congressional hearing this month, Rep. Diana DeGette, D-Colo., said that there need to be clear guidelines to separate a family and that child welfare professionals need to be involved. Rep. Susan Brooks, R-Ind., agreed.

"We don't have a terrific system, we don't have standards, we don't have procedures," Brooks said. "What should we be doing?"

Suggestions are plentiful. Cristina Muñiz de la Peña, a mental health expert who testified before the committee, said the guidelines and practices that should be imposed on Homeland Security already exist in child welfare agencies around the country.

"We could adapt those guidelines in the immigration context and bring those professionals to really counsel the people on the ground," she said.

Kerlikowske, the former border protection commissioner, said the agency could hire a dozen child welfare experts in the four border states who could be on call and required to step in to evaluate any migrant parent suspected of abusing a child.

Sankaran, the University of Michigan Law School professor, suggested taking things a step further: Place all migrant families where abuse is suspected directly into the state juvenile court system.

Anything short of that, Sankaram said, would only tinker with a Homeland Security process that is fatally flawed and prolong the anguish of family separations that should have been put to rest last summer.

"None of us would tolerate this process for our own families," he said.

DIG DEEPER

You may also be interested in

- ISIS bride Hoda Muthana's family files lawsuit against Trump (https://www.usatoday.com/story/news/world/2019/02/22/hoda-muthana-isis-brides-family-file-lawsuit-against-trump-pompeo/2948575002/?utm_source=oembed&utm_medium=news&utm_campaign=storylines)
- Is the American Autobahn next? How states are pushing highway speeds past the limit (https://www.usatoday.com/story/news/nation/2019/02/22/america-autobahn-california-legislator-proposes-no-speed-limit-plan/2946374002/?utm_source=oembed&utm_medium=news&utm_campaign=storylines)
- How long should it take to get my tax refund this year? (https://www.usatoday.com/story/money/2019/02/21/where-my-tax-refund-2019-how-long-does-take-irs/2938220002/?utm_source=oembed&utm_medium=news&utm_campaign=storylines)

Read or Share this story: https://www.usatoday.com/story/news/politics/2019/02/21/trump-administration-breaks-up-some-migrant-families-heres-how-cbp-border-sabraw-separate/2836085002/

Exhibit 12

Statement of
Scott Lloyd
U.S. Department of Health and Human Services

Before the

Committee on the Judiciary
United States House of Representatives
February 12, 2019

Chairman Nadler and Ranking Member Collins, thank you for the opportunity to speak to you today regarding my past efforts as Director of the Office of Refugee Resettlement (ORR). It is an honor to appear before you today. ORR is a program office within the Administration for Children and Families (ACF) within the U.S. Department of Health and Human Services (HHS). While I was Director of ORR, I coordinated refugee resettlement efforts for HHS and oversaw the Unaccompanied Alien Children's (UAC) Program. I left ORR in December 2018 to take a position with the HHS Center for Faith and Opportunity Initiatives as a Senior Advisor. My testimony today focuses on how ORR cares for UAC and places them with sponsors, as well as how ORR reunifies children separated from their parents by DHS.

Referrals of UAC to ORR--Historically

The UAC Program operated by ORR provides care, food, shelter, and services to alien children who are in ORR custody before release to a suitable sponsor, usually a parent or close relative. ORR does not enforce the immigration laws or apprehend families or children who cross the border illegally. Rather, ORR assumes care and custody of alien children who are referred to ORR care by other federal agencies. Most referrals of alien children to ORR are made by the U.S. Department of Homeland Security (DHS). To be clear, HHS typically does not separate alien children from their adult parents. HHS makes no recommendations and is not consulted by DHS as it makes decisions to separate children. ORR did not under my direction separate a child from his or her adult parent for any purpose, law enforcement or otherwise.

ORR can receive referrals of alien children from DHS and other federal agencies under a variety of different circumstances, but a majority of alien children referred to ORR were encountered by

DHS when entering the country at or between a port-of-entry without a parent. Children entering the United States illegally with a parent who is too ill to care for that child have been separated from that parent by DHS and referred to ORR. DHS may also separate a parent and child who have entered illegally if the parent has criminal history, or there is evidence that the parent is unfit or dangerous. A child who enters the United States illegally with an adult who claims to be the parent may be referred to ORR if DHS doubts that the adult is in fact the parent. In addition, a child may be referred to ORR care if the U.S. Department of Justice (DOJ) prosecutes the parent for violating the immigration laws. Referrals can happen under other circumstances, and these examples are merely representative of what ORR has seen in the UAC program.

In cases where an alien child is separated from his or her parent after apprehension by DHS officials – for example due to parents needing to be hospitalized indefinitely or when the parent clearly presents a risk of abuse, maltreatment, or neglect – knowing the identity of that parent may be part of proper case management. The facts behind the separation may be important to know for case planning purposes, especially since they may mean the parent is unavailable or unable to take custody. Moreover, the facts of the separation may be important factors in determining the child's individual needs, which are then incorporated into service planning that ORR develops for and provides to the child. With regard to ORR's responsibility to determine the suitability of potential sponsors, the TVPRA specifically requires that a sponsor is capable of providing for the child's physical and mental well-being. In fact, the child's best interest in some cases is placement with another relative who is not the parent based on child welfare concerns.

The best way for HHS to determine whether a child was separated at the time of referral is if DHS provides this information. Historically, DHS has sometimes included indicators of the separation in the referral notes that are put into the ORR online case management portal along with the child's biographic and apprehension information. However, because DHS had not consistently adhered to this practice, we have worked with DHS to simplify the process.

DHS's U.S. Border Patrol (USBP) and U.S. Immigration Customs Enforcement (ICE) are responsible for the majority of UAC referrals to ORR. Electronic changes have recently been made so that USBP's database can transfer UAC biographic, apprehension, and other referral information into the ORR portal's referral page. ICE has access to this referral page, and directly enters information related to a UAC into ORR's system. In the summer of 2018, ORR added a checkbox to the referral page to indicate whether a child has been separated from his or her parent. This checkbox is a significant addition, as it offers a consistent format for DHS to provide information on the status (separated or non-separated) of each referral case. The referral page also has a "notes" section where USBP and ICE can type in the name and other information of the separated family member, including their alien number. Additionally, USBP and ICE can enter this information into the "parent/relative information" section of the referral.

HHS can learn of a child's separation after a child's admission into an ORR care provider facility. Shortly after admission, a case manager interviews the child. The interview includes questions about whether a child travelled alone or was apprehended with a parent. In both circumstances, ORR records any information uncovered regarding a separation into the child's case management record on the ORR portal.

Prior to the summer of 2018, there was no automated means for aggregating the individualized indicators of potential separation in the case management records for the children through the ORR portal. To be clear: this is not the same as saying there is no information about separations in UAC case files. This is just to say that, before the summer of 2018, in order to create a comprehensive record of cases where a separation occurred, it was necessary to go into each of the thousands of case files and manually retrieve that information case file by case file.

ORR treats all alien children referred to its care, including children separated from their parents, in accordance with its policies and procedures. This includes placing a child in the least restrictive setting and finding a suitable sponsor to whom ORR could safely release the child.[1] In a limited number of cases, ORR worked directly with DHS to release a child to a parent detained at an ICE family residential center if the parent became available to provide care (for instance, parents with a medical issue that is subsequently resolved or alleviated).

Zero Tolerance Policy

On April 6, 2018, DOJ announced a zero tolerance policy (ZTP) for the crime of improper entry, which applied to all adults crossing the border illegally, including parents who crossed illegally with their children.[2] At the subsequent direction of the Secretary of Homeland Security, the U.S. Border Patrol referred both individual adults and parents who entered the country illegally to DOJ for prosecution for improper entry into the United States. The parents were transferred to custody of the U.S. Marshals Service, and incarcerated during their criminal proceedings. Per the

[1] *See,* 6 U.S.C. §279; 8 U.S.C. §1232.
[2] Department of Justice, Office of Public Affairs, April 6, 2018.

TVPRA's requirement that unaccompanied children be transferred to HHS custody within 72 hours absent exceptional circumstances, DHS transferred these children to HHS.

On June 20, 2018, President Trump issued an Executive Order directing the Secretary of Homeland Security to maintain custody of alien families during the pendency of any criminal illegal entry or immigration proceedings involving their family members, to the extent permitted by law and subject to the availability of appropriations, unless there was a concern that detention of the alien child with the child's alien parent would pose a risk to the child's welfare.[3] This Order meant that parents and children would no longer be separated during prosecution for unauthorized entry.

In *Ms. L. v U.S. Immigration and Customs Enforcement*[4], U.S. District Judge Dana Sabraw certified a class of adult parents who enter the U.S. at or between designated ports of entry who have been, are, or will be detained in immigration custody by DHS and whose minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody absent a determination that the parent is unfit or presents a danger to the child. Judge Sabraw ordered the federal government to reunify those class member parents with their children who had been separated from them by DHS. HHS took a leading role in creating an interagency plan for such reunification. To accomplish this rapid reunification, HHS Secretary Azar created an Incident Management Team and tasked personnel from the office of the Assistant Secretary for Preparedness and Response and ORR to focus on the children of *Ms. L* class members. I supported the Incident Management Team while managing the rest of ORR's programs,

[4] *Ms. L. v U.S. Immigration and Customs Enforcement*, Case 3:18-cv-00428 (S.D. Cal. 2018).

including the operations of the UAC Program, which continued to care for more than 10,000 other alien children who were not separated from parents by DHS, and who were then residing in ORR shelters.

I am grateful for the efforts of the HHS staff to identify the children in ORR care who were separated from their parents by DHS, and to reunify those children with their parents. Their efforts were nothing short of herculean. My understanding is that ORR has now reunified nearly all of the children of potential *Ms. L.* class members.

I am aware that ORR has taken additional steps to enhance its processes for complying with Judge Sabraw's orders and going forward. Those steps are described by Lynn Johnson, the Assistant Secretary for Children and Families at HHS, in response to the report on separated children issued by the HHS-OIG. I am no longer involved in ORR operations, and so I am not able to discuss current ORR processes in further detail. However, I do have great confidence in the ability of Assistant Secretary Johnson, Acting ORR Director Jonathan Hayes, and the ORR career staff to serve the UAC population compassionately.

Closing

Thank you for this opportunity to discuss the UAC program, and for your commitment to the safety and well-being of alien children. I will be happy to answer any questions.

Exhibit 13

American Academy of Pediatrics

DEDICATED TO THE HEALTH OF ALL CHILDREN™

Testimony of Julie M. Linton, MD, FAAP
On Behalf of the American Academy of Pediatrics

Before the U.S. House of Representatives
Committee on Energy and Commerce Subcommittee on Oversight and Investigations

"Examining the Failures of the Trump Administration's Inhumane Family Separation Policy"

February 7, 2019

Chairwoman DeGette and Ranking Member Guthrie, thank you for the opportunity to speak here today. I am Dr. Julie M. Linton, a practicing pediatrician from Greenville, South Carolina, and my clinical work is focused on the care of children in immigrant families and families who prefer to speak Spanish. I am testifying today on behalf of the American Academy of Pediatrics (AAP) where I serve as co-chair of its Immigrant Health Special Interest Group (SIG) and am a member of the Executive Committee for the AAP Council on Community Pediatrics. I am also a co-author of the AAP's 2017 policy statement entitled *Detention of Immigrant Children.* The AAP is a non-profit professional membership organization of 67,000 primary care pediatricians and medical and surgical pediatric subspecialists dedicated to the health and well-being of all infants, children, adolescents, and young adults.

The AAP is non-partisan and pro-children. Pediatricians care about the health and well-being of **all** children—no matter where they or their parents were born. The AAP supports comprehensive health care in a medical home for all children in the U.S. As pediatricians, we know that children do best when they are together with their families. When we read media reports in March of 2017 that the Department of Homeland Security (DHS) was considering a policy that would separate immigrant mothers from their children when they arrived at the U.S. border, we were compelled to immediately speak out against this proposed policy. We urged federal authorities to exercise caution to ensure that the emotional and physical stress children experience as they seek refuge in the U.S. is not exacerbated by the additional trauma of being separated from their siblings, parents, or other relatives and caregivers.

We subsequently wrote to DHS six times to urge the agency to reject a policy that would separate immigrant children from their parents at the border. In addition to these letters, the AAP issued roughly half a dozen statements, and pediatricians across the country, myself included, penned countless op-eds about why family separation devastates the most basic human relationship we know — that of child and parent.

The AAP has said repeatedly that separating children from their parents contradicts everything we stand for as pediatricians—protecting and promoting children's health. In fact, highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children. Today I'd like to speak more about the health effects of separation, both what we know from the scientific literature and what I know from caring for my patients.

When I consider the harms of the family separation crisis, I think about a boy I saw in my clinic in North Carolina in early June of 2018. This boy and his mother, who was pregnant, had fled a Northern Triangle country in search of safe haven in the U.S. After I learned that they had recently arrived and knowing that we were in the midst of the Zero Tolerance policy, I gently asked the boy and his mother if they had been separated at the border. With my question, a chilling silence arose. Both this mother and her child became tearful, and their angst was palpable. The boy's mother shuddered, whispering, "Seven days." For seven days, this boy and his pregnant mother did not know where the other one was. Rather than being comforted by his mother, this boy was left to lie alone on a mat on the floor, covered by an aluminum blanket, wondering if he would ever see his mother again. His future baby brother or sister

was exposed to seven days of continuous stress hormones while trying to grow in the body of a mother yearning for her son, placing the baby at risk for preterm delivery and low birth weight.[1]

Writing about her experience visiting a "tender age" shelter run by ORR in April 2018, then-president of the AAP Dr. Colleen Kraft described a little girl:

> A toddler, her face splotched red from crying, her fists balled up in frustration, pounding on a play mat in the shelter for unaccompanied children run by the Department of Health and Human Services (HHS)' Office of Refugee Resettlement. No parent was there to scoop her up, no known and trusted adult to rub her back and soothe her sobs. The staff members at the center tried their best, and shared my heartbreak while watching this child writhe on the floor, alone.
>
> We knew what was wrong, but we were powerless to help. She wanted her mother. And the only reason she could not be with her mother was because immigration authorities had forcibly separated them when they crossed the border into the United States. The mother was detained, and the little girl was handed over to the shelter as an "unaccompanied" child.[2]

The co-chair of AAP's Immigrant Health, SIG Dr. Marsha Griffin, and SIG member Dr. Rita Agarwal, told the story of a child they encountered during a visit to an ORR shelter for unaccompanied children in the spring of 2018. This child had been separated from her mother. They wrote:

> In a walled-in courtyard, we saw a 5-year-old girl chasing iridescent bubbles blown by two adults. Staff said she tried to run away any time she played outside, so she was limited to the courtyard. She would bite anyone who approached her, so she was kept away from other children and distracted with bubbles. Biting and seeking to run are signs of acute distress in a child of this age — a normal reaction to extreme fear. This girl did not need bubbles and a walled courtyard but rather her mother or her father to calm her — someone who could hold her and make her world right again.[3]

Studies overwhelmingly demonstrate the irreparable harm caused by breaking up families.[4] We know that children who have been separated can have a host of health challenges, including developmental

---

[1]Novak NL, Geronimus AT, Martinez-Cardoso AM. Change in Birth Outcomes among Infants Born to Latina Mothers After a Major Immigration Raid. *Int J Epidemiol*. 2017;46;839-49.
Krieger N, Huynh M, Li W, Waterman PD, Van Wye G. Severe sociopolitical stressors and preterm births in New York City: 1 September 2015 to 31 August 2017. J Epidemiol Community Health. 2018;72(12):1147-1152.

[2] Kraft C. Separating parents from their kids at the border contradicts everything we know about children's welfare. LA Times. https://www.latimes.com/opinion/op-ed/la-oe-kraft-border-separation-suit-20180503-story.html. Published May 3, 2018. Accessed February 1, 2019.

[3] Agarwal R, Griffin M. Taking immigrant kids from parents shows contempt for families. Houston Chronicle. https://www.houstonchronicle.com/opinion/outlook/article/Taking-immigrant-kids-from-parents-shows-contempt-12963039.php. Published June 3, 2018. Accessed February 1, 2019.

[4] Shonkoff JP, Garner AS. The Lifelong Effects of Early Childhood Adversity and Toxic Stress. *Pediatrics*. 2012;129(1):e232-46.
Masten AS. Global perspectives on resilience in children and youth. *Child Dev*. 2014;85(1):6-20.
Bouza A, Camacho-Thompson DE, Carlo G, et al. Society for Research in Child Development. The Science Is Clear: Separating Families Has Long-Term Damaging Psychological and Health Consequences for Children, Families, and

delays like those in gross and fine motor skills, regression in behaviors like toileting and speech, as well as constant stomach and headaches. Prolonged exposure to highly stressful situations — known as toxic stress — can disrupt a child's brain architecture and affect his or her short- and long-term health. A parent or a known caregiver's role is to mitigate these dangers. When robbed of that buffer, children are susceptible to a variety of adverse health impacts including learning deficits and chronic conditions such as depression, post-traumatic stress disorder and even heart disease.

The government's practice of separating children from their parents at the border counteracts every science-based recommendation I have ever made to families who seek to nurture and protect their children's physical, intellectual, and emotional development. Children, who have often experienced terror in their home countries and then additional trauma during the journey to the US,[5] are often re-traumatized through processing and detention in Customs and Border Protection (CBP) facilities not designed for children. This trauma is profoundly worsened by forced separation from their parents. It can lead to long term mental health effects such as developmental delays, learning problems and chronic conditions such as hypertension, asthma, cancer and depression. Children who have been separated may also be mistrusting, questioning why their parents were not able to prevent their separation and care for them. A child may show different behaviors in response to exposure to traumatic events like separation from parents depending on their age and stage of development. Some of these signs of distress are listed in the chart below:[6]

Preschool children	**Elementary school children**	**Middle and high school-aged youth**
• Bed wetting • Thumb sucking • Acting younger than their age • Trouble separating from their parents • Temper tantrums • Aggressive behavior like hitting, kicking, throwing things, or biting • Not playing with other kids their age • Repetitive playing out of events related to trauma exposure	• Changes in their behavior such as aggression, anger, irritability, withdrawal from others, and sadness • Trouble at school • Trouble with peers • Fear of separation from parents • Fear of something bad happening	• A sense of responsibility or guilt for the bad things that have happened • Feelings of shame or embarrassment • Feelings of helplessness • Changes in how they think about the world • Loss of faith • Problems in relationships including peers, family, and teachers • Conduct problems

Communities. https://www.srcd.org/policy-media/statements-evidence/separating-families. Published June 20, 2018. Accessed February 1, 2019.

[5] Kadir A, Shenoda S, Goldhagen J, Pitterman S. The Effects of Armed Conflict on Children. *Pediatrics*. 2018;142(6).

[6] The National Child Traumatic Stress Network. Effects. https://www.nctsn.org/what-is-child-trauma/trauma-types/refugee-trauma/effects. Published September 4, 2018. Accessed February 1, 2019.

Some have suggested that an alternative to separating families is to increase the use of Immigration and Customs Enforcement (ICE) family detention. However, family detention is not a safe or effective solution to address the forced separation of children and parents at the border. I co-authored the AAP Policy Statement entitled *Detention of Immigrant Children,* which recommends that immigrant children seeking safe haven in the United States should never be placed in ICE detention facilities. There is no evidence that any amount of time in detention is safe for children.[7] In fact, even short periods of detention can cause psychological trauma and long-term mental health risks for children.[8] Studies of detained immigrants have shown that children and parents may suffer negative physical and emotional symptoms from detention, including anxiety, depression and posttraumatic stress disorder.[9] Detention itself undermines parental authority and the capacity to respond to their children's needs; this difficulty is complicated by parental mental health problems.[10] Parents in detention centers have described regressive behavioral changes in their children, including decreased eating, sleep disturbances, clinginess, withdrawal, self-injurious behavior, and aggression.[11]

Specifically, detention of youth is associated with physical and mental health symptoms that appear to be caused and/or worsened by detention. A study of children ages 3 months to 17 years in a British immigration detention center revealed physical symptoms that may include somatic complaints (*e.g.*, headaches, abdominal pain), weight loss, inability to manage chronic medical problems, and missed follow-up health appointments including those for vaccinations, developmental and educational problems, and mental health symptoms including anxiety, depression, and reemergence of post-traumatic stress disorder.[12] In a systematic review that explored risk and protective factors for the psychological wellbeing of children and youth who were resettled in high-income countries, the authors indicate that adverse events during and after migration may be more consequential than pre-migration events. Specifically, the authors conclude that detention of immigrant children and youth is particularly detrimental to mental health and an example of trauma for which impact is cumulative.[13]

Conditions in CBP processing facilities, which include forcing children to sleep on cement floors, open toilets, constant light exposure, insufficient food and water, no bathing facilities, and extremely cold temperatures, are traumatizing for children.[14] No child should ever have to endure these conditions. Tragically, two children have now died in CBP custody. The AAP has called on CBP to implement specific meaningful steps to ensure that all children in CBP custody receive appropriate medical and mental health screening and necessary follow-up care by trained providers. We can and must do better to protect children in our country.

Children are not just small adults. To untrained eyes, they can appear quite healthy even while their systems begin to shut down. We urge our federal agencies to apply a child-focused lens when

[7] Linton JM, Griffin M, Shapiro AJ. Detention of Immigrant Children. *Pediatrics*. 2017;139(5).
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Lorek A, Ehntholt K, Nesbitt A, et al. The Mental and Physical Health Difficulties of Children Held within A British Immigration Detention Center: A Pilot Study. *Child Abuse Negl*. 2009;33(9):573-85.
[13] Fazel M, Reed RV, Panter-Brick C, Stein A, Mental health of displaced and refugee children resettled in high-income countries: risk and protective factors, *Lancet*, 379(9812):266-282 (2012).
[14] Linton, Griffin, Shapiro. Detention. 2017.

considering policies that could have an impact on child health and well-being. AAP remains committed to working with federal agencies to offer its expertise as medical providers for children to protect and promote child well-being.

Additionally, AAP has repeatedly called upon the federal government to appoint an independent team comprised of pediatricians, pediatric mental health providers, child welfare experts, and others to conduct unannounced visits to federal facilities including ORR shelters, CBP processing centers, and ICE family detention centers to assess their conditions for children and capacity to respond to medical emergencies involving a child and to ensure that immigrant children receive optimal medical and mental health care. Further, DHS and HHS should consider remoteness of such facilities as that can impact proximity and access to trained pediatric providers.

We must remember that immigrant children are, first and foremost, children. Protections for children in law or by the courts exist because children are uniquely vulnerable and are at high risk for trauma, trafficking, and violence. In September, DHS and HHS proposed regulations regarding the Flores Settlement Agreement (FSA) that strip vulnerable children of vital protections, jeopardizing their health and safety. The FSA set strict national standards for the detention, treatment, and release of all minors detained in the legal custody of the federal government. It requires that children be held in the least restrictive setting appropriate for a child's needs and that they be released without unnecessary delay to a parent, designate of the parent, or responsible adult as deemed appropriate.

The proposed regulations are inconsistent with the FSA by allowing DHS to expand family detention centers, increase the length of time children spend in detention, and create an alternative licensure process that undermines state child welfare laws and basic protections for children. Proposals like this that seek to override the FSA in order to allow for the longer-term detention of children with their parents or to weaken federal child trafficking laws strip children of protections designed for their safety and well-being. We urge Congress to reject these proposals.

The operation of unlicensed facilities where children are housed poses a risk to the health and safety of children. According to the HHS Office of Inspector General, "because of the temporary and emergency nature of influx care facilities, they may not be licensed or they may be exempt from licensing requirements. In addition, influx care facilities like Tornillo may be opened on federally owned or leased properties, in which case the facility is not subject to State or local licensing standards."[15] As such, we urge extreme caution. The circumstances that led to the opening of Tornillo, a tent city with capacity to house roughly 3,800 children, are concerning. The findings of the HHS Office of Inspector General (OIG) about clinician staffing and background checks at Tornillo are troubling. The Memorandum of Agreement signed between DHS and HHS, among other things, forced children to languish in Tornillo for months awaiting reunification with a parent or legal guardian. We applaud the work of dedicated ORR staff who work day and night to ensure the expeditious and safe placement of children with parents or sponsors. We urge all relevant federal agencies to address the findings of the HHS OIG in its recent report, particularly around the transfer of data on separated children to HHS.

[15] Levinson D. The Tornillo Influx Care Facility: Concerns About Staff Background Checks and Number of Clinicians on Staff. https://oig.hhs.gov/oas/reports/region12/121920000.pdf. Published November 27, 2018. Accessed February 1, 2019.

As a pediatrician, my job is to apply science to advocate for children's health. Evidence affirms that parental separation and family detention are not healthy for children. Instead of detention, AAP recommends the use of community-based alternatives for children in family units. Community-based case management should be implemented for children and families, thus ending both detention and the placement of electronic tracking devices on parents. Community release with case management has been shown to be cost-effective and can increase the likelihood of compliance with government requirements.[16] We urge Congress to provide funding to support case management programs. AAP also advocates for expanded funding for post-release services to promote the safety and well-being of all previously detained immigrant children and to facilitate connection and access to comprehensive services, including medical homes, in the community. All immigrant children seeking safe haven in the U.S. should have comprehensive health care and insurance coverage, which includes access to qualified medical interpretation covered by medical benefits, pending immigration proceedings. Children and families should have access to legal counsel throughout the immigration pathway. Unaccompanied children should have free or pro bono legal counsel with them for all appearances before an immigration judge.

When I consider the health impact of systematic family separation, I consider my young patient and his pregnant mother, both of whom continued to show signs and symptoms of stress weeks after their seven days of forced separation. This boy, this mother, and this unborn baby were the lucky ones, reunited after seven days of separation. Yet, their physical and emotional reactions, which I witnessed in my pediatric office, exposed the scars of detention and family separation that will remain with them forever.

It is critical that all children who have been reunited with their parents receive appropriate medical care to help them recover from the traumatic experience of separation from their families. As a pediatrician, I also know that children and families who have faced trauma, with trauma-informed approaches and community support, can begin to heal from trauma. As such, immigrant children seeking safety should have access to health care, education, and other essential services that support their growth, development, and capacity to reach their full potential. We must continue to support all immigrant children and families seeking safe haven in the U.S. and treat them with dignity and respect.

[16] Edwards, A. Measures of first resort: alternatives to immigration detention in comparative perspective. The Equal Rights Review. 2011;7:117-142.
U.S. Immigration Customs and Enforcement. Report of the DHS Advisory Committee on Family Residential Centers. https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf. Published September 30, 2016. Accessed February 1, 2019.
Lutheran Immigration & Refugee Service, Women's Refugee Commission. Locking Up Family Values, Again. https://www.womensrefugeecommission.org/resources/document/1085-locking-up-family-values-again. Published October 28, 2014. Accessed February 1, 2019.

Exhibit 14

Center on the Developing Child HARVARD UNIVERSITY

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTE ON OVERSIGHT AND INVESTIGATIONS

HEARING ON "EXAMINING THE FAILURES OF THE TRUMP ADMINISTRATION'S INHUMANE FAMILY SEPARATION POLICY"

February 7, 2019

Testimony Submitted by:

Jack P. Shonkoff, M.D.

Director, Center on the Developing Child at Harvard University.
Julius B. Richmond FAMRI Professor of Child Health and Development,
Harvard T. H. Chan School of Public Health and Harvard Graduate School of Education.
Professor of Pediatrics, Harvard Medical School and Boston Children's Hospital.

SUMMARY

This testimony is based on strong scientific consensus supported by extensive research across multiple disciplines. A century of countless studies across the behavioral and social sciences provide extensive evidence of the consequences of separating children from their parents, especially if that separation is unexpected, abrupt, or in a frightening context. Recent advances in 21st-century biology are now providing a deeper understanding of the disruptions that occur in the developing brain and other biological systems, which explain ***why*** and ***how*** traumatic, parent-child separation can have such devastating effects.

The broad overview of peer-reviewed literature summarized in the section that follows this summary illustrates the depth of knowledge available to inform a credible, science-based analysis of the policies and actions that have separated thousands of children from their parents or other caregivers at the U.S.-Mexico border.

Sudden, forcible separation of children from their parents is deeply traumatic for both. Above and beyond the distress we see "on the outside," separating a child from his or her parents triggers a massive biological stress response "*inside"* the child, which remains activated until the parent returns and provides comfort. Continuing separation removes the most important resource a child can possibly have to prevent long-term damage—a responsive adult who's totally devoted to his or her well-being.

The results of thousands of studies converge on the following two core scientific concepts:

(1) A strong foundation for healthy development in young children *requires* a stable, responsive, and supportive relationship with at least one parent or primary caregiver.

(2) High and persistent levels of stress activation (known as "toxic stress") can disrupt the architecture of the developing brain and other biological systems with serious negative impacts on learning, behavior, and lifelong health.

Early experiences are literally built into our brains and bodies, and the experiences that are most important in driving positive development are the care and protection provided by parents and other primary caregivers. Stable and responsive relationships promote healthy brain architecture, establish well-functioning immune, cardiovascular, and metabolic systems, and strengthen the building blocks of resilience.

If these relationships are disrupted, young children are hit by the "double whammy" of a brain that is deprived of the positive stimulation it needs and assaulted by a stress response that disrupts its developing circuitry. When any of us feels threatened, our body's stress response systems are activated. Heart rate and blood pressure go up, stress hormone levels are elevated, blood sugar rises, and inflammatory responses are mobilized. This is the "fight or flight" response. We all know what that feels like physically when we're really stressed out! This response is automatic and essential for survival, but it is designed to go back to normal when the threat is over.

If the sense of danger continues, ongoing activation of the stress response shifts from protection to disruption or outright damage. For example:

- Persistently elevated stress hormones can disrupt brain circuits that affect memory and the ability to focus attention and regulate behavior.

- Excessive inflammation and metabolic responses to stress in childhood increase the risk of heart disease, diabetes, depression, and many other chronic illnesses in the adult years.

Unlike "positive" or "tolerable" stress, which can build resilience, the excessive and prolonged nature of what we call "toxic stress" increases the risk of lifelong problems.

The scientific principles described above provide a powerful framework for assessing the damage caused by the current family separation policy. All children who were abruptly separated from their parents or primary caregivers experienced substantial stress and we must bear the responsibility for their well-being. Will some of these children survive without significant problems? The answer is yes. Will many be seriously impaired for the rest of their lives. The answer again is yes. The biology of adversity suggests three factors that are particularly important for understanding who is at greatest risk.

The first is age. Younger children are the most vulnerable to long-term impacts, both because their brain circuitry and other biological systems are relatively under-developed and because they are most dependent on adult caregivers.

The second is previous harm from adversity. The pile-up of stress on children who are already compromised shifts the odds against them even further. The intentional withholding of the most powerful healing intervention we could possibly offer—the care and protection that parents provide for their children when they're in danger— goes against everything science tells us.

The third reason for variation in outcomes is the duration of separation. Toxic stress is a ticking clock—and prolonged separation inflicts increasingly greater harm as each week goes by.

From a scientific perspective, both the initial separation and the lack of rapid unification are indefensible. Forcibly separating children from their parents is like setting a house on fire. Prolonging that separation is like preventing the first responders from doing their job.

PEER-REVIEWED LITERATURE ON THE SCIENCE OF CHILD HEALTH AND DEVELOPMENT AND THE BIOLOGY OF ADVERSITY

The remaining sections of this testimony provide a more detailed review of peer-reviewed evidence that reflects the cutting edge of 21st-century science. This content has been excerpted from almost two decades of working papers and related materials produced by the National Scientific Council on the Developing Child, which I have chaired since its founding in 2003. The following four documents (each of which has been subjected to intensive, scientific peer review) provide a wealth of complex scientific knowledge that has been synthesized and translated for non-scientists.

Excessive Stress Disrupts the Architecture of the Developing Brain: Working Paper 3 (2005, updated 2014)

Early Experiences Can Alter Gene Expression and Affect Long-Term Development: Working Paper 10 (2010)

The Science of Neglect: The Persistent Absence of Responsive Care Disrupts the Developing Brain: Working Paper 12 (2012)

Supportive Relationships and Active Skill-Building Strengthen the Foundations of Resilience: Working Paper 13

These and other relevant materials are available on the website of the Center on the Developing Child at Harvard University (www.developingchild.harvard.edu).

The Critical Importance of the Parent-Child Relationship

Nurturing and stable relationships with caring adults are essential to healthy development beginning from birth. These relationships affect virtually all aspects of development—intellectual, social, emotional, physical, and behavioral—and their quality and stability in the early years lay the foundation that supports a wide range of later outcomes.[1-6] These outcomes include self-confidence and sound mental health, motivation to learn, achievement in school and later in the workplace, the ability to control aggressive impulses and resolve conflicts in nonviolent ways, behaviors that affect health risks, lifelong physical and mental health outcomes, and the capacity to develop and sustain friendships and close relationships and ultimately become a responsible citizen and successful parent of the next generation.[7]

"Serve and return" interactions (i.e., mutually responsive vocalizing, facial expressions, and gestures back and forth between young children and the adults who care for them) build sturdy brain architecture, beginning at birth, and create strong relationships in which the child's experiences are affirmed and new abilities are nurtured. Children who have healthy relationships with their parents and other important caregivers are more likely to develop insights into other people's feelings, needs, and thoughts, which form a foundation for cooperative interactions with others and an emerging conscience. Sensitive and responsive parent-child relationships also are associated with stronger cognitive skills in young children and enhanced social competence and work skills later in school, which illustrates the connection between social-emotional development and intellectual growth.[8-17]

The gradual acquisition of higher-level skills, including the ability to focus and sustain attention, set goals, follow rules, solve problems, and control impulses, is driven by the development of the prefrontal cortex (the large part of the brain behind the forehead) from infancy into early adulthood.[18-21] A significant part of this formative development begins during early childhood and is refined and made more efficient during adolescence and the early adult years.[22,23] Although these capabilities (known as executive function and self-regulation) do not emerge automatically, children are born with the potential to acquire them within the context of responsive relationships that model the skills and scaffold their development. Acquiring the

building blocks of executive function and self-regulation is one of the most important and challenging tasks of early childhood, and the opportunity to build on these foundational capacities is critical to healthy development through middle childhood, adolescence, and into adulthood.[23]

The stability and predictability of the caregiving environment affects the health and development of young children through its effect on the consistency, quality, and timing of daily routines which shape developing regulatory systems. Beginning in the earliest weeks of life, the predictability and nature of these experiences influence the most basic biological rhythms related to waking, eating, eliminating, and sleeping.[24,25] When positive experiences are repeated regularly in a predictable fashion, the complex sequences of neural stimulations create pathways that become more efficient (i.e., "neurons that fire together wire together.") For example, infants who learn that being soothed and comforted occurs shortly after they experience distress are more likely to establish more effective physiological mechanisms for calming down when they are aroused and are better able to learn to self-soothe after being put down to sleep.[24,26] In contrast, when eating and being put to bed occur at different times each day and when comforting occurs unpredictably, the organization and consolidation of sleep-wake patterns and self-soothing responses do not develop well, and biological systems do not "learn" healthy routines and self-regulation.[27]

Just as early experiences affect the architecture of the developing brain, they also shape the development of other biological systems that are important for both physical and mental health. For example, responsive caregiving plays a key role in the normal maturation of the neuroendocrine system.[28-30] A wealth of animal research that is now being replicated in humans demonstrates that caregiving behavior also shapes the development of circuits that regulate how individuals respond to stressful situations.[31,32] Genes involved in regulating the body's stress response are particularly sensitive to caregiving, as early maternal care leaves a signature on the genes of her offspring that carry the instructions for the development of physiological and behavioral responses to adversity. That signature (known as an epigenetic marker) is a lasting imprint that affects whether the offspring will be more or less likely to be fearful and anxious

later in life.[33] Consequently, early overloading of the stress response system can have a range of adverse, lifelong effects on learning, behavior, health, and longevity.

Regulatory mechanisms that manage stress also influence the body's immune and inflammatory responses, which are essential for defending against disease. Young children cared for by individuals who are available and responsive to their emotional and material needs develop well-functioning immune systems that are better equipped to deal with initial exposures to infections and to keep dormant infections in check over time.[34] Conversely, inadequate caregiving and limited nurturance very early in life can have long-term (and sometimes permanent) effects on immune and inflammatory responses, which increase the risk of chronic impairments such as asthma, respiratory infections, and cardiovascular disease.[35,36]

The Biology of Adversity and Resilience

When faced with an acute challenge or threat, the body's stress response systems shift into immediate action mode. Heart rate and blood pressure go up, stress hormone levels are elevated, blood sugar rises, inflammation is increased, and blood flow is diverted preferentially to the brain and muscles. This is the classic "fight or flight" response and it is essential for survival.

S**tressful experiences for children can be positive, tolerable, or toxic depending on their duration, intensity, and timing, and on whether protective relationships are available to help the child feel protected and thereby restore the biological activation to baseline levels**. The National Scientific Council on the Developing Child created three categories of stress response that provide a framework for understanding the underlying biology of each.[37]

- ***Positive stress*** refers to moderate, short-lived stress responses, such as brief increases in heart rate or mild changes in the body's stress hormone levels. This kind of stress is a normal part of life and learning to adjust is an essential feature of healthy development. Adverse events that provoke positive stress responses tend to be those that a child can learn to control and manage well with the support of caring adults, and which occur against the backdrop of

generally safe, warm, and positive relationships. Examples include meeting new people, dealing with frustration, or getting an immunization. This is an important part of the normal developmental process.

- ***Tolerable stress*** refers to stress responses that have the potential to negatively affect the architecture of the developing brain but generally occur over limited time periods that allow for the brain to recover and thereby reverse potentially harmful effects. Tolerable stress responses may occur as a result of the death or serious illness of a loved one, a frightening accident, an acrimonious parental separation or divorce, or persistent discrimination, but always in the context of ongoing, supportive relationships with adults. Indeed, the presence of supportive adults who create safe environments that help children learn to cope with and recover from adverse experiences is one of the critical ingredients that make serious stressful events such as these tolerable. In some circumstances, tolerable stress can even have positive effects, but in the absence of supportive relationships, it also can become toxic to the body's developing systems.

- ***Toxic stress*** refers to strong, frequent, or prolonged activation of the body's stress management system. ***Stressful events that are chronic, uncontrollable, and/or experienced by children who do not have access to support from caring adults tend to provoke these types of toxic stress responses.*** Studies indicate that toxic stress can have an adverse impact on brain architecture. In the extreme, such as in cases of severe, chronic abuse, especially during early, sensitive periods of brain development, the regions of the brain involved in fear, anxiety, and impulsive responses may overproduce neural connections while those regions dedicated to reasoning, planning, and behavioral control may produce fewer neural connections. Extreme exposure to toxic stress can change the stress system so that it responds at lower thresholds to events that might not be stressful to others, and, therefore, the stress response system activates more frequently and for longer periods than is necessary, like revving a car engine for hours every day. This wear and tear effect increases the risk of stress-related physical and mental illness later in life.[38]

Protective relationships play a central role in building resilience by buffering children from sources of stress and providing the support needed to build their own capacities to cope with adversity. Decades of research have produced a rich knowledge base that explains why some people develop the adaptive capacities to overcome significant adversity and others do not. ***Whether the burdens come from the hardships of poverty, the challenges of parental substance abuse or serious mental illness, the stresses of war, the threats of recurrent abuse or chronic neglect, or a combination of factors, the single most common finding is that children who end up doing well have had at least one stable and committed relationship with a supportive parent, caregiver, or other adult.*** These relationships provide the personalized responsiveness, scaffolding, and protection that buffer children from the sources of disruption. They also build key capacities—such as the ability to plan, monitor and regulate behavior, and adapt to changing circumstances—that enable children to overcome adversity and thrive as they get older. This combination of supportive relationships, adaptive skill-building, and positive experiences constitutes the foundations of what is commonly called resilience. On a biological level, resilience protects the developing brain and other organs from the damage that can be produced by excessive activation of stress response systems. Stated simply, resilience transforms potentially toxic stress into tolerable stress.

Resilience requires relationships, not rugged individualism. There is no "resilience gene" that determines the life course of any individual irrespective of the experiences that shape genetic expression. The capacity to adapt and thrive despite adversity develops through the interaction of supportive relationships, gene expression, and adaptive biological systems.[39-41] ***Despite the widespread belief that individual grit, extraordinary self-reliance, or some in-born, heroic strength of character can triumph over calamity, science now tells us that it is the reliable presence of at least one supportive relationship and multiple opportunities for developing effective coping skills that are essential building blocks for the capacity to do well in the face of significant adversity.***

Extensive evidence indicates that deprivation or neglect—defined broadly as the ongoing disruption or significant absence of caregiver responsiveness—can cause more harm to a young child's development than overt physical abuse.[42-44] The clearest findings that support

this conclusion come from studies of children who have experienced severe neglect while being raised in institutions.[45] This research has provided an opportunity to investigate the distinctive consequences of extreme psychosocial deprivation apart from the impacts of other forms of maltreatment. Additional knowledge comes from studies involving institutionalized children whose life circumstances have been positively transformed through foster care placements or permanent adoption.[46-50]

There is extensive evidence that severe neglect in institutional settings is associated with abnormalities in the structure and functioning of the developing brain. Children who experience extreme levels of social neglect early in life show diminished electrical activity in the brain, as measured through electroencephalography (EEG).[47,50] Institutionally reared children also show differences in the neural reactions that occur when looking at faces to identify different emotions.[48,49] These findings are consistent with behavioral observations that neglected children struggle to correctly recognize different emotions in others.[44,51] Children who experience severe neglect in institutional settings also exhibit decreased brain metabolism and poorer connections among different areas of the brain that are important for focusing attention and processing information, thereby increasing the risk for emotional, cognitive, and behavioral disorders later in life.[46,52]

The impact of severe neglect can be manifested in different ways across different periods of development. At younger ages, maltreated children show impairments in their ability to discriminate different emotions, yet these difficulties are not observed at older ages.[44,53,54] Conversely, antisocial behavior may be more salient among adults or older adolescents with early childhood histories of neglect.[55,56] Given the fact that interpersonal relationships and life challenges (e.g., dealing with peers, becoming involved in romantic relationships, entering parenthood, achieving financial stability) change across the lifespan, it is essential that the adverse consequences of significant deprivation are addressed in a developmentally appropriate manner.

Early adversity can affect long-term health and development by chemically altering the expression of genes. Extensive research has demonstrated that the healthy development of all

organs, including the brain, depends on how much and when certain genes are expressed. When scientists say that genes are "expressed," they are referring to whether they are turned on or off—essentially whether and when genes are activated to do certain tasks. Research has shown that there are many non-inherited environmental factors and experiences that have the power to chemically mark genes and control their functions. These influences create a new genetic landscape, which scientists call the epigenome. Some of these experiences lead to chemical modifications that change the expression of genes temporarily, while increasing numbers have been discovered that leave chemical signatures that result in an enduring change in gene expression. Research tells us that some genes can only be modified epigenetically during certain periods of development, defined as *critical periods* of modification.[57-62] In some cases, very early experiences and the environments in which they occur can shape developing brain architecture and strongly affect whether children grow up to be healthy, productive members of society.

Modification of the epigenome caused by stress during early childhood affects how well or poorly we respond to stress as adults and can result in increased risk of adult disease. Some of our genes provide instructions for how our bodies respond to stress, and research has shown that these genes are clearly subject to epigenetic modification. For example, research in animals has shown that stressful experiences soon after birth can produce epigenetic changes that chemically modify the receptor in the brain that controls the stress hormone cortisol and, therefore, determines the body's response to threat (the fight-or-flight response).[63-65] Healthy stress responses are characterized by an elevation in blood cortisol followed by a return to baseline to avoid a highly activated state for a prolonged period of time. If young children experience toxic stress as a result of serious adversity in the absence of protective relationships, persistent epigenetic changes can result.[66] These modifications have been shown to cause prolonged stress responses, which can be likened to revving a car engine for long periods of time. Animal studies have shown correlations between excessive stress and changes in brain architecture and chemistry as well as behaviors that resemble anxiety and depression in humans.[67-72] Human studies have found connections between highly stressful experiences in childhood and increased risk for later mental illnesses, including generalized anxiety disorder and major depressive disorder.[73-75] Atypical stress responses over a lifetime can also result in increased risk for physical ailments, such as asthma, hypertension, heart disease and diabetes.[73-82]

Children who have experienced serious deprivation in infancy are at risk for abnormal physical development and impairment of the immune system. Severe neglect is associated with significantly delayed growth in head circumference (which is directly related to brain growth) during infancy and into the toddler years.[83] More extreme conditions of deprivation, such as those experienced in institutional settings that "warehouse" young children, are associated with even more pervasive growth problems, including smaller body size, as well as impairments in gross motor skills and coordination.[84-86] Children who are raised in institutional settings also have more infections and are at greater risk of premature death than children who live in supportive homes.[87] One possible explanation for these findings is that chronically disrupted cortisol levels suppress immunologic reactivity and physical growth, thereby leading to a greater risk for infection and chronic, stress-related disease throughout life.[88]

Chronic neglect over time can alter the development of biological stress response systems in a way that compromises children's later ability to cope with adversity. Extensive research indicates that the two primary stress response systems in humans—the sympathetic-adrenal-medullary (SAM) system, which produces adrenaline and affects heart and respiration rates, and the hypothalamic-pituitary-adrenal (HPA) axis, which elevates cortisol, a key stress hormone—are both disrupted by significant deprivation. For example, years after adoption, children who experienced extreme neglect in institutional settings show abnormal patterns of adrenaline activity in their heart rhythms, which can indicate increased biological "wear and tear" that leads to greater risk for anxiety, depression, and cardiovascular problems later in life.[89]

The consequences of severe neglect can be reduced or reversed through appropriate and timely interventions. The capacity for recovery in children who are removed from neglectful conditions and placed in nurturing environments in a timely fashion has been well-documented.[90-94] However, improvement often requires more than simply the cessation of neglectful caregiving. Rather, systematic, empirically supported, and often long-term (six to nine months or longer) interventions are needed to promote effective healing. Successful treatments have been shown to reduce behavioral difficulties and attachment problems in previously neglected young children who have been placed in foster homes[90,91,93] as well as to promote

secure attachments in young children who continue to live with their families, while being monitored by child welfare agencies because of previous allegations of neglect.[94] On a biological level, systematic interventions targeting the social-emotional needs of young children living in foster care settings (the majority of whom were victims of neglect rather than physical abuse) have shown evidence of improved stress-regulatory capabilities with patterns of cortisol production that are indistinguishable from those of non-neglected, healthy children.[17,91,92,94-96] With appropriate intervention, previously institutionalized children have also demonstrated improvements in brain activity as measured by EEG.[97,98]

Children's recovery rates are influenced by the severity, duration, and timing of the deprivation as well as by the timing and type of the intervention that is provided. Children who experience more severe neglect, especially during the early childhood years, are more likely to withdraw when stressed and show more anxiety and difficulties regulating their mood than children whose experiences of deprivation are less severe.[99] Longer periods of deprivation have also been associated with greater deficits in attention and cognitive control,[100] academic achievement,[101,102] brain activity,[103] and dysregulation of the HPA axis.[104] Previously institutionalized children who experienced the most extreme levels of deprivation often continue to struggle with problems in attention and behavioral regulation even after intervention has been provided.[105-109]

Concluding Thoughts

The scientific knowledge base available to inform policies that affect the health and development of children is extensive and accessible. Any policy that involves separating children from their families raises serious questions that require thoughtful reflection. When decisions are made that do not draw on authoritative knowledge for guidance, the well-being of children can be jeopardized and lead to serious, lifelong consequences. The evidence provided in this testimony is offered in the hope that it can be used to guide science-informed policies going forward. With respect to the children who remain separated from their families today, science is telling us that excessive stress activation will continue for as long as the separation persists—and the longer these children are deprived of the healing effect of supportive caregiving, the worse the consequences will be.

References

1. Dawson, G., & Fischer, K. (Eds.) (1994). *Human behavior and the developing brain.* New York, NY: Guilford Press.

2. Berscheid, E., & Reis, H. T. (1998). Attraction and close relationships. In D. T. Gilbert, S. T. Fiske, & G. Lindzey (Eds.), *Handbook of social psychology, Vol. 1* (2nd Ed.).

3. Collins, W. A., & Laursen, B. (1999). Relationships as developmental contexts. *The Minnesota Symposia on Child Psychology, Vol. 30.*

4. Dunn, J. (1993). *Sage series on individual differences and development, Vol. 4. Young children's close relationships: Beyond attachment.* Thousand Oaks, CA: Sage Publications, Inc.

5. Reis, H. T., Collins, W. A., & Berscheid, E. (2000). Relationships in human behavior and development. *Psychological Bulletin, 126*(6), 844-872.

6. Panksepp, J. (1998). *Series in affective science. Affective neuroscience: The foundations of human and animal emotions.* New York, NY: Oxford University Press.

7. National Scientific Council on the Developing Child. (2004). *Young children develop in an environment of relationships. Working paper no. 1.* Retrieved from http://www.developingchild.net.

8. Shonkoff, J. P., & Phillips, D. (Eds.) (2000). *From neurons to neighborhoods: The science of early childhood development.* Committee on Integrating the Science of Early Childhood Development.

9. Bradley, R. H., Caldwell, B. M., Rock, S. L., & Ramey, C. T. (1989). Home environment and cognitive development in the first three years of life: A collaborative study involving six sites and three ethnic groups in North America. *Developmental Psychology, 25*(18), 217-235.

10. Bradley, R. H., Caldwell, B. M., & Rock, S. L. (1988). Home environment and school performance: A ten-year follow-up and examination of three models of environmental action. *Child Development, 59*(2)*,* 852-867.

11. Estrada, P., Arsenio, W. F., Hess, R. D., & Holloway, S. D. (1987). Affective quality of the mother-child relationship: Longitudinal consequences for children's school-relevant cognitive functioning. *Developmental Psychology, 23*(2)*,* 210-215.

12. Gottfried, A. W., & Gottfried, A. E. (1984). *Home environment and early cognitive development.* Cambridge, MA: Elsevier.

13. Peisner-Feinberg, E. S., Burchinal, M. R., Clifford, R. M., Culkin, M. I., Howes, C., Kagan, S. I., Yazejian, . . . Zelazo, J. (2000). *The children of the Cost, Quality, and Outcomes Study go to school: Technical report.*

14. Pianta, R. C., Nimetz, S. L., & Bennett, E. (1997). Mother-child relationships, teacher-child relationships, and school outcomes in preschool and kindergarten. *Early Childhood Research Quarterly, 12*(3)*,* 263-280.

15. Kochanska, G., & Thompson, R.A. (1997). The emergence and development of conscience in toddlerhood and early childhood. In J.E. Grusec & L. Kuczynski (Eds.), *Parenting and children's internalization of values* (pp. 53-77).

16. Thompson, R. A., Meyer, S., & McGinley, M. (2006). Understanding values in relationship: The development of conscience. In M. Killen & J. Smetana (Eds.), *Handbook of moral development.*

17. Kochanska, G. (2002). Mutually responsive orientation between mothers and their young children: A context for the early development of conscience. *Current Directions in Psychological Science, 11*(6)*,* 191-195.

18. Diamond, A. (1988). Abilities and neural mechanism underlying AB performance. *Child Development, 59*(2), 523-527.

19. Goldman-Rakic, P. S. (1987). Circuitry of primate prefrontal cortex and regulation of behavior by representational memory. In F. Plum (Ed.), *Handbooks for physiology: A Spectrum of physiological knowledge and concepts: Section 1: Nervous system: Vol. V, 2 parts: Higher functions of the brain* (pp. 373-417).

20. Rothbard, M. K., & Posner, M. I. (2005). Genes and experience in the development of executive attention and effortful control. In L. A. Jensen & R. W. Larson (Eds.), *New horizons in developmental theory and research* (pp. 101-108).

21. LeDoux, J. (1996). Emotional networks and motor control: A fearful view. *Progress in Brain Research, 107,* 437-446.

22. National Scientific Council on the Developing Child. (2007). *The timing and quality of early experiences combine to shape brain architecture: Working paper no. 5.* Retrieved from http://www.developingchild.harvard.edu.

23. Center on the Developing Child at Harvard University. (2011). *Building the brain's "air traffic control" system: How early experiences shape the development of executive function: Working paper no. 11.* Retrieved from http://www.developingchild.harvard.edu.

24. Burnham, M. M., Goodlin-Jones, B. L., Gaylor, E. E., Anders, T. F. (2002). Nighttime sleep-wake patterns and self-soothing from birth to one year of age: A longitudinal intervention study. *Journal of Child Psychology and Psychiatry*, *43*, 713-725.

25. Heraghty, J. L., Hilliard, T. N., Henderson, A. J., & Fleming, P. J. (2008). The physiology of sleep in infants. *Archives of Disease in Childhood, 93*, 982-985.

26. Spruyt, K., Aitken, R. J., So, K., Charlton, M., Adamson, T. M., & Horne, R. S. (2008). Relationship between sleep/wake patterns, temperament and overall development in term infants over the first year of life. *Early Human Development, 84*, 289-296.

27. Rosen, L. A. (2008). Infant sleep and feeding. *Journal of Obstetric Gynecologic, & Neonatal Nursing*, *37,* 706-714.

28. Coe, C. L., Lubach, G. R., Schneider, M. L., Dierschke, D. J., & Ershler, W. B. (1992). Early rearing conditions alter immune responses in the developing infant primate. *Pediatrics, 90*, 505-509.

29. Hanson, L., Silfverdal, S. A., Stromback, L., et al. (2001). The immunological role of breast feeding. *Pediatric Allergy Immunology, 12*(14), 15-19.

30. McGowan, P. O, Sasaki, A., D'Alessio, A. C., et al. (2009). Epigenetic regulation of the glucocorticoid receptor in human brain associates with childhood abuse. *Nature Neuroscience, 12*, 342-348.

31. Gunnar, M. R., & Donzella, B. (2002). Social regulation of the cortisol levels in early human development. *Psychoneuroendocrinology, 27*, 199-220.

32. Tarullo, A. R., & Gunnar, M. R. (2006). Child maltreatment and the developing HPA axis. *Hormones and Behavior, 50*, 632-639.

33. Caldji, C., Tannenbaum, B., Sharma, S., Francis, D., Plotsky, P. M., & Meaney, M. J. (1998). Maternal care during infancy regulates the development of neural systems mediating the expression of fearfulness in the rat. *PNAS, 95*, 5335-5340.

34. Shirtcliff, E. A., Coe, C. L., & Pollak S. D. (2009). Early childhood stress is associated with elevated antibody levels to herpes simplex virus type 1. *PNAS,106*, 2963-2967.

35. Danese, A., Pariante, C. M., Caspi, A., Taylor, A., & Poulton, R. (2007). Childhood maltreatment predicts adult inflammation in a life-course study. *Proceeding National Academy of Sciences of the United States of America, 104*(4), 1319-1324.

36. Chen, E., Hanson, M. D., Paterson, L. Q., Griffin, M. J., Walker, H. A., & Miller, G. E. (2006). Socioeconomic status and inflammatory processes in childhood asthma: The role of psychological stress. *Journal of Allergy and Clinical Immunology,117*, 1014-1020.

37. National Scientific Council on the Developing Child. (2005). *Excessive stress disrupts the architecture of the developing brain* (Working Paper No. 3). Retrieved from http://www.developingchild.net

38. Shonkoff, J. P., Boyce, W. T., & McEwen, B. S. (2009). Neuroscience, molecular biology, and the childhood roots of health disparities: Building a new framework for health promotion and disease prevention. *Journal of the American Medical Association, 301*(21), 2252-2259.

39. Masten, A. S. (2012). Risk and resilience in development. In P.D. Zelazo (Ed.), *The Oxford Handbook of Developmental Psychology, Vol. 2*. *Self and other.* New York: Oxford University Press, 579-607.

40. Russo, S. J., Murrough, J. W., Han, M.H., Charney, D. S., & Nestler, E. J. (2012). Neurobiology of resilience. *Nature Neuroscience, 15*(11), 1475–1484.

41. Cicchetti, D. (2010). Resilience under conditions of extreme stress: A multilevel perspective. *World Psychiatry, 9*(3), 145–154.

42. Bruce, J., Fisher, P. A., Pears, K. C., & Levine, S. (2009). Morning cortisol levels in preschool-aged foster children: Differential effects of maltreatment type. *Developmental Psychobiology, 51*(1), 14-23.

43. Egeland, B., Sroufe, A., & Erickson, M. (1983). The developmental consequence of different patterns of maltreatment. *Child Abuse & Neglect, 7*(4), 459-469.

44. Pollak, S. D., Cicchetti, D., Hornung, K., & Reed, A. (2000). Recognizing emotion in faces: Developmental effects of child abuse and neglect. *Developmental Psychology, 36*(5), 679-688.

45. Provence, S & Lipton, R. (1962). *Infants in Institutions*. Oxford, England: International University Press.

46. Eluvathingal, T. J., Chugani, H. T., Behen, M. E., Juhasz, C., Muzik, O., Maqbool, M., … & Makki, M. (2006). Abnormal brain connectivity in children after early severe socioemotional deprivation: A diffusion tensor imaging study. *Pediatrics, 117*(6), 2093–2100.

47. Marshall, P. J., Fox, N. A. & the BEIP Core Group. (2004). A comparison of the electroencephalogram between institutionalized and community children in Romania. *Journal of Cognitive Neuroscience, 16*(8), 1327-1338.

48. Parker, S. W., Nelson, C. A., & the BEIP Core Group. (2005a). An event-related potential study of the impact of institutional rearing on face recognitions. *Development and Psychopathology, 17*(3), 621-639.

49. Parker, S. W., Nelson, C. A. & the BEIP Core Group. (2005b). The impact of early institutional rearing on the ability to discriminate facial expressions of emotion: An event-related potential study. *Child Development, 76*(1), 54-72.

50. Tarullo, A., Garvin, M. C., & Gunnar, M. (2011). Atypical EEG power correlates with indiscriminately friendly behavior in internationally adopted children. *Developmental Psychology, 47*(2), 417-431.

51. Wismer-Fries, A. B., & Pollak, S. D. (2004). Emotion understanding in post institutionalized Eastern European children. *Developmental Psychopathology, 16*(2), 355–369.

52. Sheridan, M. S., Fox, N. A., Zeanah, C. H., McLaughlin, K., and Nelson, C.A. (2012). Variation in neural development as a result of exposure to institutionalization early in childhood. *Proceedings of the National Academy of Sciences of the United States of America, 109*(32), 12927-12932.

53. Maheu, F. S., Dozier, M., Guyer, A. E., Mandell, D., Peloso, E., Poeth, K., … & Ernst, M. (2010). A preliminary study of medial temporal lobe function in youths with a history of caregiver deprivation and emotional neglect. *Cognitive Affective and Behavioral Neuroscience, 10*(1), 34-49.

54. Luntz, B. K., & Widom, C. (1994). Antisocial personality disorder in abused and neglected children grown up. *The American Journal of Psychiatry, 151*(5), 670-674.

55. Maxfield, M. G., & Widom, C. S. (1996). The cycle of violence: Revisited six years later. *Archives of Pediatrics Adolescent Medicine, 150*(4), 390–395.

56. Pine, D. S., Mogg, K., Bradley, B. P., Montgomery, L., Monk, C. S., McClure, E., ... & Kaufman, J. (2005). Attention bias to threat in maltreated children: Implications for vulnerability to stress-related psychopathology. *The American Journal of Psychiatry, 162*(2), 291-296.

57. Szyf, M. (2009a). Early life, the epigenome and human health. *Acta Paediatrica, 98*(7), 1082-1084.

58. Szyf, M. (2009b). The early life environment and the epigenome. *Biochimica Biophysica Acta (BBA), 1790*(9), 878-885.

59. Isles, A. R. & Wilkinson, L. S. (2008). Epigenetics: What is it and why is it important to mental disease? *British Medical Bulletin, 85*(1), 35-45.

60. Jirtle, R. L. (2008). Randy L. Jirtle, PhD: Epigenetics a window on gene dysregulation, disease. Interview by Bridget M. Kuehn. *Journal of the American Medical Association (JAMA), 299*(11): 1249-1250.

61. Nafee, T. M., Farrell, W. E., Carroll, W. D., Fryer, A. A., & Ismail, K. M. (2008). Epigenetic control of fetal gene expression. *BJOG: An International Journal of Obstetrics & Gynaecology, 115*(2), 158-168.

62. Sinclair, D. A. & Oberdoerffer, P. (2009). The ageing epigenome: Damaged beyond repair? *Ageing Research Reviews, 8*(3), 189-198.

63. McGowan, P. O., Sasaki, A., D'Alessio, A. C., Dymov, S., Labonte, B., Szyf, M. … & Meaney, M. J. (2009). Epigenetic regulation of the glucocorticoid receptor in human brain associates with childhood abuse. *Nature Neuroscience, 12*(3), 342-348.

64. Meaney, M. J., Szyf, M., & Seckl, J. R. (2007). Epigenetic mechanisms of perinatal programming of hypothalamic-pituitary-adrenal function and health. *Trends in Molecular Medicine, 13*(7), 269-277.

65. Weaver, I. C. G., Cervoni, N., Champagne, F. A., D'Alessio, A. C., Sharma, S., Seckl, J. R., & Meaney, M. J. (2004). Epigenetic programming by maternal behavior. *Nature Neuroscience, 7*(8), 847-854.

66. Shonkoff, J. P., Boyce, W. T., & McEwen, B S. (2009). Neuroscience, molecular biology, and the childhood roots of health disparities: Building a new framework for health promotion and disease prevention. *JAMA, 301*(21), 2252-2259.

67. Champagne, F. A. & Curley, J. P. (2009). Epigenetic mechanisms mediating the long-term effects of maternal care on development. *Neuroscience and Biobehavioral Reviews, 33*(4), 593-600.

68. Champagne, F. A., Weaver, I. C., Diorio, J., Dymov, S., Szyf, M., & Meaney, M. J. (2006). Maternal care associated with methylation of the estrogen receptor-alpha1b promoter and estrogen receptor-alpha expression in the medial preoptic area of female offspring. *Endocrinology, 147*(6), 2909-2915.

69. Chen, Y., Dube, C. M., Rice, C. J., & Baram, T. Z. (2008). Rapid loss of dendritic spines after stress involves derangement of spine dynamics by corticotropin-releasing hormone. *The Journal of Neuroscience, 28*(11), 2903-2911.

70. Moriceau, S. & Sullivan, R. M. (2006). Maternal presence serves as a switch between learning fear and attraction in infancy. *Nature Neuroscience, 9,* 1004-1006.

71. Rice, C. J., Sandman, C. A., Lenjavi, M. R., & Baram, T. Z. (2008). A novel mouse model for acute and long-lasting consequences of early life stress. *Endocrinology, 149*(10), 4892-4900.

72. Thompson, J. V., Sullivan, R. M., & Wilson, D. A. (2008). Developmental emergence of fear learning corresponds with changes in amygdala synaptic plasticity. *Brain Research, 1200,* 58-65.

73. Bradley, R. G., Binder, E. B., Epstein, M. P., Tang, Y., Nair, H. P., Liu, W. ... & Ressler, K. J. (2008). Influence of child abuse on adult depression: Moderation by the corticotropin-releasing hormone receptor gene. *Archives of General Psychiatry, 65*(2), 190-200.

74. Gillespie, C. F., Bradley, B., Mercer, K., Smith, A., Conneely, K., Gapen, M. … & Ressler, K. (2009). Trauma exposure and stress-related disorders in inner city primary care patients. *General Hospital Psychiatry, 31*(6), 505-514.

75. Hovens, J. G., Wiersma, J. E., Giltay, E. J., van Oppen, P., Spinhoven, P., Penninx, B. W. & Zitman, F. G. (2009). Childhood life events and childhood trauma in adult patients with depressive, anxiety and comorbid disorders vs. controls. *Acta Psychiatrica Scandinavica.* Oct 30 [epub]

76. Swanson, J. M., Entringer, S., Buss, C., & Wadhwa, P. D. (2009). Developmental origins of health and disease: Environmental exposures. *Seminars in Reproductive Medicine, 27*(5), 391-402.

77. Shonkoff, J. P., Boyce, W. T., & McEwen, B S. (2009). Neuroscience, molecular biology, and the childhood roots of health disparities: Building a new framework for health promotion and disease prevention. *JAMA, 301*(21), 2252-2259.

78. Jovanovic, T., Blanding, N. Q., Norrholm, S. D., Duncan, E., Bradley, B., & Ressler, K. J. (2009). Childhood abuse is associated with increased startle reactivity in adulthood. *Depression and Anxiety, 26*(11), 1018-1026.

79. Krupanidhi, S., Sedimbi, S. K., Vaishnav, G., Madhukar, S. S., & Sanjeevi, C. B. (2009). Diabetes-role of epigenetics, genetics, and physiological factors. *Zhong Nan Da Xue Xue Bao Yi Xue Ban, 34*(9), 837-845.

80. Quas, J. A., Carrick, N., Alkon, A., Goldstein, L., & Boyce, W. T. (2006). Children's memory for a mild stressor: The role of sympathetic activation and parasympathetic withdrawal. *Developmental Psychobiology, 48*(8), 686-702.

81. Weidman, J. R., Dolinoy, D. C., Murphy, S. K., & Jirtle, R. L. (2007). Cancer susceptibility: Epigenetic manifestation of environmental exposures. *Cancer Journal, 13*(1), 9-16.

82. Wilson, A. G. (2008). Epigenetic regulation of gene expression in the inflammatory response and relevance to common diseases. *Journal of Periodontology, 79*(8): 1514-1519.

83. Strathearn, L., Gray, P. H., O'Callaghan, F., & Wood, D. O. (2001). Childhood neglect and cognitive development in extremely low birth weight infants: A prospective study. *Pediatrics, 108*(1), 142-151.

84. Johnson, D. E., & Gunnar, M. R. (2011), IV. Growth failure in institutionalized children. *Monographs of the Society for Research in Child Development, 76*(4), 92–126.

85. Macovei, O. (1986). *The medical and social problems of the handicapped in children's institutions in Iasi Bucharest, Romania.* Bucharest, Romania: Institutl de Igiena si Sanatate Publica.

86. Miller, L. C., Kiernan, M. T., Mathers, M. I., & Klein-Gitelman, M. (1995). Developmental and nutritional status of internationally adopted children. *Archives of Pediatrics & Adolescent Medicine, 149*(1), 40-44.

87. De Bellis, M. D. (2005). The psychobiology of neglect. *Child Maltreatment, 10*(2), 150-172.

88. McEwen, B. S., Biron, C. A., Brunson, K. W., Bulloch, K., Chambers, W.H., Dhabhar, F. S., …& Weiss, J. M. (1997). Neural-endocrine-immune interactions: the role of adrenocorticoids as modulators of immune function in health and disease. *Brain Research Review, 23*(1-2), 79-133.

89. Gunnar, M. R., Frenn, K., Wewerka, S. S., & Van Ryzin, M. J. (2009). Moderate versus severe early life stress: Associations with stress reactivity and regulation in 10-12-year-old children. *Psychoneuroendocrinology, 34*(1), 62-75.

90. Dozier, M., Lindhiem, O., Lewis, E., Bick, J., Bernard, K., & Peloso, E. (2009). Effects of a foster parent training program on young children's attachment behaviors: Preliminary evidence from a randomized clinical trial. *Child & Adolescent Social Work Journal, 26*(4), 321-332.

91. Dozier, M., Peloso, E., Lindhiem, O., Gordon, M., Manni, M., Sepulveda, S., ... & Levine, S. (2006). Developing evidence-based interventions for foster children: An example of a randomized clinical trial with infants and toddlers. *Journal of Social Issues, 62*(4), 767-785.

92. Fisher, P. A., Gunnar, M. R., Chamberlain, P., & Reid, J. B. (2000). Preventive intervention for maltreated preschool children: Impact on children's behavior, neuroendocrine activity, and foster parent functioning. *Journal of the American Academy of Child & Adolescent Psychiatry, 39*(11), 1356-1364.

93. Fisher, P. A., & Kim, H. K. (2007). Intervention effects on foster preschoolers' attachment-related behaviors from a randomized trial. *Prevention Science, 8*(2), 161-170.

94. Fisher, P. A., Stoolmiller, M., Gunnar, M. R., & Burraston, B. O. (2007). Effects of a therapeutic intervention for foster preschoolers on diurnal cortisol activity. *Psychoneuroendocrinology, 32*(8-10), 892-905.

95. Dozier, M., Peloso, E., Lewis, E., Laurenceau, J., & Levine, S. (2008). Effects of an attachment-based intervention of the cortisol production of infants and toddlers in foster care. *Development and Psychopathology, 20*(3), 845-859.

96. Fisher, P. A., Gunnar, M., Dozier, M., Bruce, J., & Pears, K. C. (2006). Effects of a therapeutic intervention for foster children on behavior problems, caregiver attachment, and stress regulatory neural systems. *Annals of the New York Academy of Sciences, 1094*, 215-225.

97. Moulson, M. C., Fox, N. A., Zeanah, C. H., & Nelson, C. A. (2009). Early adverse experiences and the neurobiology of facial emotion processing. *Developmental Psychology, 45*(1), 17-30.

98. Vanderwert, R. E., Marshall, P. J., Nelson, C., Zeanah, C. H., & Fox, N. A. (2010). Timing of intervention affects brain electrical activity in children exposed to severe psychosocial neglect. *PLoS ONE, 5*(7), e11415.

99. Manly, J., Kim, J. E., Rogosch, F. A., & Cicchetti, D. (2001). Dimensions of child maltreatment and children's adjustment: Contributions of developmental timing and subtype. *Development and Psychopathology, 13*(4), 759-782.

100. Colvert, E., Rutter, M., Kreppner, J., Beckett, C., Castle, J., Groothues, C., ... & Sonuga-Barke, E. S. (2008). Do theory of mind and executive function deficits underlie the adverse outcomes associated with profound early deprivation?: Findings from the English and Romanian adoptees study. *Journal of Abnormal Child Psychology, 36*(7), 1057-1068.

101. Beckett, C., Maughan, B., Rutter, M., Castle, J., Colvert, E., Groothues, C., … & Sonuga-Barke, E. (2007). Scholastic attainment following severe early institutional deprivation: A study of children adopted from Romania. *Journal of Abnormal Child Psychology, 35*(6), 1063-1073.

102. Van IJzendoorn, M. H. & Juffer, F. (2006). The Emanuel Miller Memorial Lecture 2006: Adoption as intervention. Meta-analytic evidence for massive catch-up and plasticity in physical, socio-emotional, and cognitive development. *Journal of Child Psychology and Psychiatry, 47*(12), 1228-1245.

103. Marshall, P. J., Reeb, B. C., Fox, N. A., Nelson, C., & Zeanah, C. H. (2008). Effects of early intervention on EEG power and coherence in previously institutionalized children in Romania. *Development and Psychopathology, 20*(3), 861-880.

104. Gunnar, M., Morison, S. J., Chisholm, K., & Schuder, M. (2001). Salivary cortisol levels in children adopted from Romanian orphanages. *Development and Psychopathology, 13*(3), 611-628.

105. Hodges, J., & Tizard, B. (1989). IQ and behavioural adjustment of ex-institutional adolescents. *Journal of Child Psychology and Psychiatry, 30*, 53-75.

106. Kreppner, J., Kumsta, R., Rutter, M., Beckett, C., Castle, J., Stevens, S. & Sonuga-Barke, E. J. (2010). IV. Developmental course of deprivation-specific psychological patterns: Early manifestations, persistence to age 15, and clinical features. *Monographs of the Society for Research in Child Development, 75*, 79–101.

107. Rutter, M. and the English and Romanian Adoptees (ERA) study team. (1998). Developmental catch-up, and deficit, following adoption after severe global early privation. *Journal of Child Psychology and Psychiatry, 39*(4), 465-476.

108. Verhulst, F. C., Althaus, M., & Versluis-den Bieman, H. J. (1990). Problem behavior in international adoptees: II. Age at placement. *Journal of the American Academy of Child and Adolescent Psychiatry, 29*(1), 104-111.

109. Verhulst, F. C., Althaus, M., & Versluis-den Bieman, H. J. (1992). Damaging backgrounds: Later adjustment of international adoptees. *Journal of the American Academy of Child and Adolescent Psychiatry, 31*(3), 518-524.

Exhibit 15

AMERICAN PSYCHOLOGICAL ASSOCIATION

Statement

Of

Cristina Muñiz de la Peña, Ph.D.

Terra Firma Mental Health Director

Center for Child Health and Resiliency

On behalf of the American Psychological Association

Hearing on

Examining the Failures of the Trump Administration's Inhumane Family Separation Policy

Before

The U.S. House Committee on Energy and Commerce

Subcommittee on Oversight and Investigations

February 7, 2019

750 First Street, NE
Washington, DC 20002-4242
(202) 336-5500

Web: www.apa.org

Chairwoman DeGette, Ranking Member Guthrie, and Members of the Subcommittee, thank you for the opportunity to share my thoughts related to the adverse health impact of immigrant family separation. I am Dr. Cristina Muñiz de la Peña, a licensed clinical psychologist at the Center for Child Health and Resiliency (CCHR) and co-founder and director of mental health services at the Terra Firma Immigrant Youth Clinic in New York City. I am also speaking today on behalf of the American Psychological Association (APA).

I am here to offer over 10 years of experience providing mental health services to vulnerable children and families, including immigrants and trauma survivors in both the United States and abroad. As Terra Firma's director of mental health since 2012, I am responsible for the design, coordination, and management of mental health services for recently-arrived immigrant youth. Terra Firma is a program specifically serving unaccompanied immigrant youth, since its inception in September 2013. CCHR is a Federally Qualified Community Health Center (FQHC) of The Children's Hospital at Montefiore and the Children's Health Fund.

We offer individual, family, and group therapy interventions that aim at healing the impact of traumatic experiences, alleviating the levels of acute stress associated with immigration and adjustment to a new culture, and facilitating healthy reunification of children and caretakers. During psychotherapy sessions with immigrant children, I gather in-depth psycho-social histories and observe the emotional, cognitive, interpersonal, and behavioral problems arising from the traumatic experiences children endure during the process of entering this country. Over the past six months, Terra Firma has received increased requests for mental health services from foster care agencies and immigration attorneys caring for children separated at the border, hence rendered "unaccompanied," as well as from parents who have recently been reunited with their children but still worry about the psychological sequelae of the separation experience for them.

APA is a scientific and professional organization representing psychology, with 115,700 members and affiliates across the United States and internationally. APA works to advance the creation, communication, and application of psychological knowledge to benefit society and improve people's lives. Many APA members serve immigrant youth and adults in a wide range of settings, including schools, community centers, hospitals and refugee resettlement centers.

I have been asked today to share what I have learned and experienced about the health impacts on immigrant children and families who have been separated. In this testimony, I include both my own professional observations in my work with recently-arrived children and parents who were separated at the border, as well as what the research tells us about the psychological effects that these experiences have. I will focus on four areas of specific impact separation has on children and families.

Anxiety and Distress Severely Impact Developmental and Psychosocial Functioning

Unwanted and unexpected separation from parents may have severe consequences in a child's developmental processes and psychosocial functioning. When separated from their parents, high levels of anxiety and distress occur which impair the developmental trajectories in otherwise healthy children. The intense fear, sense of helplessness, and vulnerability for the child associated with forced separation from their parent can lead to a state of hyperarousal, attention deficits, depressive symptoms, and interference in their ability to communicate and relate to others. These observations based on my own clinical work are reflected in research findings as well.

Negative Impacts of Sustained Parent- Child Separation (Post Traumatic Stress Disorder, Depression, Anxiety)

Research shows that the longer parents and children are separated, the greater the reported symptoms of anxiety and depression are for children.[1] According to the APA's Presidential Task Force on Immigration, sustained parental separation also predicts ongoing difficulty trusting adults and institutions, as well as reduced educational attainment.[2] These negative outcomes of separation reflect largely the disruption of the parent-child relationship – a relationship that is a central part of healthy psychological development and a necessary protective source for children, particularly when they are exposed to traumatic life experiences.[3] Sudden and unexpected family separation is also associated with stress and emotional trauma for children, housing instability, food insecurity, interrupted schooling, and behavioral/emotional responses such as fear, anxiety, aggression and changes to sleep and appetite. Parental separation can have a long-term negative impact on children into adulthood.[4]

It is my observation that the difficulties associated with parent-child separation are evident in the greater rate observed in these children of post-traumatic stress symptoms, depression and anxiety disorders, attention and hyperactivity, interpersonal challenges, poorer performance in school, and greater vulnerability to re-victimization and abuse than in the general population. Even living under the threat of separation has been shown to have a negative effect on children and their development. There

[1] Suarez-Orozco, C., Bang, H.J., & Kim, H.Y. I felt like my heart was staying behind: Psychological implications of family separations and reunifications for immigrant youth. *Journal of Adolescent Research.* 2010, *26*(2), 222-257.
[2] American Psychological Association, Presidential Task Force on Immigration. Crossroads: The psychology of immigration in the new century,2012.
[3] Lustig, S.L., Kia-Keating, M., Knight, W.G., Geltman, P., Ellis, H., Kinzie, J.D., & Saxe, G.N. Review of child and adolescent refugee mental health. *Journal of American Academy of Child & Adolescent Psychiatry*. 2004, *43*(1), 24-36.
[4] Dávila, S. (2019). Immigration Policy: A Psychological Perspective, *American Psychological Association*, https://www.apa.org/advocacy/immigration/fact-sheet.pdf.

is the constant sense of vulnerability to losing a parent and the threat to the foundational needs for protection, safety, and nurturance that only the main attachment figure can provide.

Terra Firma Traumatic Separation Psychotherapy Session Examples

In my observations of children who experience traumatic separation from a parent, the impact is prevalent, multilayered, and varies depending on several critical factors and the complex interplay among them. These include: the child's age and gender; the way separation was enforced; the length of the separation; the level of communication with the parent; and the level of predictability or availability of information for the child during the separation. Overall, it has been my observation that children who endured separation at the border are more likely to develop symptoms of post-traumatic stress and depression which are reflected in their negative perceptions of the world as unsafe and uncontrollable and their self-perceptions as helpless and endangered. These perceptions affect how children navigate the world, how they communicate with others, how they learn, and how they develop relationships with peers and other adults in their life.

The following case examples illustrate some of the adverse circumstances and outcomes of parent-child separations:

1. The youngest child referred to our program was a 2-year-old who had been separated from his mother while asleep and was kept separated for two months. The mother had been told to leave the detention area and when she asked to wake her son to take him with her, the officers told her to not bother because she was going to come right back. After two months of desperation, the mother was reunited with her son in New York. At the time she came to our program for assistance, the boy had turned 3 and demonstrated separation anxiety and hypervigilance.

2. In the case of a 4-year-old Salvadorian boy, I observed severe symptoms of dissociation triggered specifically when recalling the separation from his father. This boy had been yanked from his father without any explanation or opportunity to say goodbye. At the time of the assessment, the boy had been separated for over 2 months and waited in foster care for the reunification with his father with total uncertainty of when or if this would ever take place.
3. Similarly, a 16-year-old girl from Honduras who had been separated from her mother was referred to our program due to depressive symptoms. The girl appeared to struggle with the deep confusion about the separation and severe feelings of depression and acute stress. The experience of total lack of control and terror during the separation had left her with severe helplessness, which she described as feeling like others would always have control over what happens to her, and hopelessness, which she described as feeling like her life would never get better.

The Rupture of the Emotional Bond

In my clinical observations, the impact that separation from the primary caregiver at Immigration and Customs Enforcement (ICE) detention had on the child was two-fold: 1. the manner of separation and 2. the act of separating the parent from the child. First, the manner in which these separations were enforced was traumatic in itself due to the harsh ICE protocols. Most children reported post-traumatic stress symptoms from the terror experienced by the yelling, insults, and aggressive manners of the officers who handled the separations. A 6-year-old girl described feeling terrified because of the officer who yelled at her for crying after being separated which she explained caused her to try her best to contain her tears and comfort the other children around her.

Second, after the act of separating the child from the parent, the period of separation causes another set of potential ruptures in the attachment trajectory of these children. For example, when a 9-year-old

child with developmental delays was reunited with his mother after a month, he displayed ambivalent attachment toward his mother, who herself was struggling with post-traumatic stress since the separation.

It is evident from the reports of many immigrant children that there is a steep difference between ICE-run and Health and Human Services (HHS)-run facilities. Children describe the ICE processing centers as inhumane both in their conditions as well as in the attitudes of the officers. On the other hand, children tend to describe their time at the Office of Refugee Resettlement (ORR) facilities, an office within HHS, as positive, productive, and peaceful. They describe the shelters as pleasant and comfortable and the staff as caring, and nurturing.

Attachment is the emotional bond that typically forms between infant and caregiver. It is the means by which helpless infants get their primary needs met. It then becomes the engine of subsequent social, emotional, and cognitive development. Healthy attachment is the foundation from which the child can develop and survive independently. When this foundation is ruptured, this ability is severed, and it is likely to lead to adverse long-term personality, interpersonal, cognitive, and emotional sequelae.[5]

As reflected in some of the examples above, the ruptures in attachment and the impact of separation are not only evident in children but also in the parents, which ultimately further affects the child's outcomes. For example, the mother of the 2-year-old that was described earlier requested therapy to help her with feelings of profound anxiety and depression because she feared connecting emotionally with her son then being deported, causing him a second trauma of separation. In response, she kept her emotional distance to protect him.

[5] Bowlby, J.(1988). A secure base: Parent-child attachment and healthy human development. New York:US: Basic Books.

Over the past five years directing the mental health services at Terra Firma, I have observed the impact of recent immigration policies on children and families, both positive and negative. I have seen an increase in anxiety in children and families due to potential separation, detention, and deportation. It is worth noting here that separation of children and parents continues to take place under unjustified circumstances; two of the examples described above happened recently, in November of 2018.

Ending Family Separations

Over the past year, many families have reported to me increased fear of opening the door at the possibility of ICE officers being on the other side. Several parents have complained about their children's fear reactions when the doorbell rings, and some have reported an increased fear and mistrust of institutions and agencies in general.

In sum, decades of psychological research have determined that it is in the best interest of the child and the parents to keep families together. Research also suggests that the longer that parents and children are separated, the greater the reported symptoms of anxiety and depression are for children.[6] My experiences described in this statement working with immigrant children and families as a psychologist and director of mental health services corroborate the findings that past studies report on the negative impact of separation. As a result of my observations and well documented research findings, meaningful access to trauma-informed mental health care is critical to ensure that both adult and child survivors of trauma heal and ultimately achieve psychological wellbeing. I would urge this committee to consider the serious mental health impact of parent-child separation on both children and parents and put an end to the practice of family separation and help to ensure that immigrant children and their parents receive needed mental health care.

[6] Suarez-Orozco, C., Bang, H.J., & Kim, H.Y.(2010).