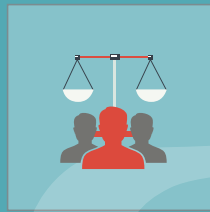
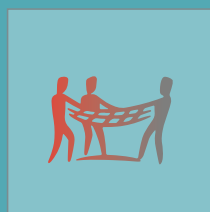


In the Best Interest of the Child

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In this paper, the U.S. Committee for Refugees and Immigrants offers its recommendations to provide for the best interests of unaccompanied immigrant children. USCRI's recommendations are based on its direct care for the children through its shelter, home studies and post-release program, and legal services.

Most Americans learned about unaccompanied immigrant children during the summer of 2018 when the U.S. Department of Homeland Security (DHS) began separating immigrant children from their parents at the southern border. Once separated from their parents, these children met the definition of “unaccompanied alien children” (UAC) under section 462(g) of the Homeland Security Act of 2002 and were transferred to the Office of Refugee Resettlement (ORR) under the U.S. Department of Health and Human Services (HHS).¹ The Homeland Security Act, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA of 2008), and the *Flores* settlement agreement then provided the legal framework for the required care and services for the children. That framework has stood for over ten years, with the key element—the *Flores* settlement agreement—guiding every decision of the federal government about UAC since it was agreed to in 1997 under the Clinton administration.

Tens of thousands of children have entered the United States across the southern border in recent years without parents or other family members. The arrival of these children presents significant challenges for their care. Some of these challenges include statutory gaps following the children's release from federal custody; length of stay in congregate care; permanent placements for children without family in the United States; and legal relief under the U.S. immigration system. Complicating the challenges are the legal framework for the care and services for the children through the courts and the U.S. Congress, as well as the role of HHS versus DHS. With all the moving parts, we ask the question: what is in the best interest of the child?

The Flores saga

In 1985, immigrant children filed a class action lawsuit against the former Immigration and Naturalization Service (INS) challenging their detention, treatment and release from federal

¹ An “unaccompanied alien child” is a “child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.” 6 U.S.C. § 279(g)(2). USCRI uses UAC, unaccompanied immigrant children or children throughout this document to refer to children who meet this definition.

custody. The case made its way through the courts over many years, including an appeal to the U.S. Supreme Court, until the parties reached a settlement in 1997. The settlement agreement required the government to release children from immigration detention without unnecessary delay. It provided an order of preference of the individuals to whom children could be released, beginning with parents and including other caregivers such as aunts, grandparents, and adult siblings. The settlement also instructed that children must be placed in the least restrictive setting appropriate to their age and special needs. And it included detailed standards for the children's care and services.

In 2001, the parties agreed to a modification to the settlement agreement, providing that the settlement agreement would continue until the INS published implementing regulations. But the INS never published implementing regulations, and in 2003, after the passage of the Homeland Security Act, the care of unaccompanied immigrant children transferred to ORR within the Administration for Children and Families (ACF).

The settlement agreement requirements for UAC care and services were transferred alongside the program. ORR found itself operating a new program for children under a court-ordered settlement agreement. The responsibility for accompanied immigrant children was transferred to the newly created DHS from the former INS.

Over the years, HHS and DHS attempted to publish regulations jointly. They also found themselves in enforcement actions brought by

the *Flores* plaintiffs. The lines of responsibility and the actions by each agency, although clear to the agencies, were not clear to the public or to the courts in many areas.

The *Flores* settlement agreement in 2019

Today, a significant shift has occurred. And USCRI believes it is time to facilitate a discussion on tangible improvements that take into account the best interests of the children from the perspective of the practitioner and caregiver.

What is the significant shift? The federal government, after numerous attempts over the past 20 years, published a final rule seeking to terminate the *Flores* settlement agreement. Under the terms of the settlement agreement, the agreement should terminate 45 days after implementing regulations are published. The keyword is "implementing." USCRI believes that HHS has published implementing regulations and the settlement agreement should terminate in relation to HHS.

Not so fast

USCRI believes that HHS did what it was supposed to do. HHS published a regulation outlining the ways it would provide care for UAC, consistent with the provisions of the *Flores* settlement agreement. However, on September 27, 2019, the judge in the *Flores* case issued an order declaring that HHS and DHS had failed to terminate the *Flores* settlement agreement and issued an injunction preventing the agencies from implementing the final regulations.²

² *Jenny L. Flores, et al. v. William P. Barr, et al.*, CV 85-4544-DMG (AGRx), September 27, 2019, U.S. District Court, C.D. CA, Civil Minutes—General.

This paper is not intended to be a legal retort to the judge’s decision on the regulations. So, we will not include an analysis here of the areas in which we believe the judge erred when addressing the HHS portions of the regulation. We wish to make two broader statements. First, calls for the settlement agreement to remain in place for HHS are calls for federal judges to make decisions about the best interests of UAC and the programs designed to provide them with care. Our system is designed for Congress to pass the laws and the executive branch to implement them. The judiciary branch is not designed to run federal programs.

Second, USCRI believes that HHS’ error was publishing its rule in conjunction with DHS. The DHS sections of the rule will not stand and will be litigated endlessly, dragging HHS along with it through the courts. USCRI believes that, in the best interests of the children, the DHS and HHS portions of the regulation should be separated, and the *Flores* settlement agreement terminated in relation to HHS. USCRI argues that the federal agency with expertise in the care of immigrant children—ORR within HHS—do its job without continued interference by the courts.

Recommendation 1



Make post-release services for all UAC a legal requirement

What exactly is ORR’s job? Listening to some members of Congress or the media, one would think ORR was a federal foster care program responsible for the continued well-being of the hundreds of thousands of UAC who have now been released into the United States.³ But Congress did not give clear statutory authority or funding to ORR to accomplish that task. In fact, Congress only specified that certain children should receive home studies and then the post-

release follow-up services, which presumably would allow the agency to monitor the safety and progress of UAC after their release from federal custody.

Statutory gaps

Congress did not specify that all children should receive post-release services. Section 235(c)(3)(B) of the TVPRA of 2008 requires HHS to conduct a home study for a child who is a victim of a severe form of trafficking in

³ “Over the past 2 years, HHS has placed about 90,000 migrant children—the vast majority from Central America—with adult sponsors in the United States. [...] But whatever your views on immigration policy, everyone should be able to agree that the Administration has a responsibility to ensure the safety of the migrant kids that have entered government custody **until their immigration court date.**” Opening Statement of Senator Portman, “Adequacy of the Department of Health and Human Services’ Efforts to Protect Unaccompanied Alien Children from Human Trafficking,” Thursday, January 28, 2016, Permanent Subcommittee on Investigations, of the Committee on Homeland Security and Governmental Affairs.

persons; a special needs child with a disability; 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; or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence. The section goes on to state that children receiving home studies must also receive follow-up services during the period of their removal proceedings. It provides authorization for the agency to conduct follow-up services in cases involving children with mental health or other needs. By singling out certain children to receive specialized follow-up services, Congress implicitly instructed that all children should not receive those services.

In any case, ORR cannot fulfill the demands of Congress, advocates, and other stakeholders under the current statutory provisions, nor can it ensure the safety and best interests of all children after release. If ORR releases UAC from care expeditiously, and the children end up in an unsafe situation, ORR is blamed for rushing releases, and not doing its due diligence to ensure children are safe.⁴ In some

cases, there are calls for children to remain in care longer, with accompanying statements of the high quality of ORR facilities.⁵ But if ORR conducts extensive background checks⁶, home studies, and assessments, and the checks require more time in care, ORR is blamed for keeping children in detention for such a long period of time that the children’s well-being is compromised.⁷ As noted above, ORR staff and its grantees are child welfare experts—social workers, clinicians, nurses, and doctors—qualified to provide care that is in the best interests of the children. Some of the grantees have been providing care and services for UAC for decades prior to the creation of the UAC program at HHS. To ensure that the agencies and organizations tasked with providing for those interests have the necessary tools and support to carry out their mission, USCRI recommends that Congress clarify in law and provide appropriations for ORR’s responsibility for the children’s on-going safety after release.

Congregate care

USCRI supports the often-quoted *Flores* settlement agreement requirement that release from ORR-funded care occur “without unnecessary delay.” To further clarify the

⁴ “Finally—and this is hard to believe—at the time of these cases, if a potential sponsor said on his application that he lived with three other adults, and that if anything happened to him, a backup sponsor could care for the child, which is sometimes required, HHS policy was not to conduct background checks of any kind on any of the sponsor’s roommates or the backup caregiver listed on the form. None. **Background checks were only run on the sponsor himself.**” *Id.*

⁵ “[ORR] reduced the time of home studies from 30 days to 10 days for one reason: Get them out of detention. Understand, these children, as we will hear today in this hearing, **are in caregiving facilities where they are visiting museums and they are playing soccer and they are getting three meals a day. What is wrong with keeping these children in detention longer in order to make sure that we are not placing them with someone who is going to illegally use them as child labor or in sex trafficking.**” Opening Statement of Senator McCaskill, “Adequacy of the Department of Health and Human Services’ Efforts to Protect Unaccompanied Alien Children from Human Trafficking,” January 28, 2016, Permanent Subcommittee on Investigations, of the Committee on Homeland Security and Governmental Affairs.

⁶ USCRI is not commenting on the types of background checks or what ORR does with the information after it receives it. A statement on those issues is too long for this paper.

⁷ “They began fingerprinting all members of the household beyond those individuals applying to be sponsors, thereby discouraging sponsors from coming forward, **leaving children languishing in federal custody.**” Statement by Chairwoman Rosa DeLauro (D-CT), “Oversight of the Unaccompanied Children Program: Ensuring the Safety of Children in HHS Care,” July 24, 2019, Labor, Health and Human Services, Education, and Related Agencies Appropriations Subcommittee.

phrase “without unnecessary delay,” USCRI emphasizes that the stay in ORR care is a short-term bridge, taking children from their entry to the United States to the next step in their journey. The ORR-funded “congregate care” setting should be no more than a transitional step in moving a child toward a family setting and providing services to support successful outcomes, whether in the United States or in their home country.⁸ Although there is no definitive research that sets parameters for length of stay in congregate care and positive outcomes, USCRI believes that anything over three months may produce more negative outcomes, and therefore, three months should be the outer limit for the period of time in ORR care.⁹ At the same time, USCRI recognizes that every case cannot fit into a specific time period and that the situation for UAC is not the same as that for American-born children in congregate care settings.¹⁰

A balanced solution

If releases are completed expeditiously, all UAC should receive post-release services. Post-release services would serve as a safety net to ensure that all releases are safe and

remain safe. The most realistic way to ensure safe releases is to follow up. If post-release services were provided for all children, case managers would go into all UAC homes—they would be able to identify child welfare concerns, problems with placements and, if necessary, could remove children from unsafe situations. The services also would connect all children and their families to resources in their communities, as opposed to the low percentage connected under the current system. The key to providing post-release services to all UAC is that it must be written into the law, and Congress must provide funding.

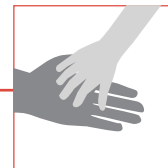
In addition to providing post-release services for all UAC, the time period for post-release services should be left to the discretion of each child’s case manager. In some instances, post-release services until a child turns 18 or receives immigration status are not necessary. In other cases, a limit of three months, such as the limit for discretionary post-release services under current ORR policy, may be too short for many children. Post-release services case managers are best positioned to make the decision.

⁸ “It is important to distinguish between group care used for a limited time as a respite, ‘cooling off’ period or a time-limited therapeutic intervention with specific goals and the use of group care as a place to live.” *American Journal of Orthopsychiatry* 2014, Vol. 84, No. 3, 219–225.

⁹ Reducing Congregate Care: Worth the Fight, posted April 4, 2012, Annie E. Casey Foundation.

¹⁰ We want to learn from the lessons in the system for American-born children. But there are differences between the two systems. First, unaccompanied immigrant children are not removed from their parents’ homes because of problems in the home. The children cross the southern border without a parent or legal guardian. Their family history is unknown when Customs and Border Patrol detains them and refers them to ORR. Second, there is no expectation that children should remain in ORR care as a long-term solution or a place to live.

Recommendation 2



Appoint child advocates for the most vulnerable children

USCRI recommends that ORR appoint child advocates for the most vulnerable UAC. USCRI recognizes that complications in some children's cases may signal that they will remain in care for longer than 90 days. For example, children without parents or other close family members in the United States may have sponsors that require more vetting (e.g., category #3 children, defined by ORR as having other sponsors, "such as distant relatives or unrelated adults"). Some children may not have any viable sponsors (i.e., category #4 children). If that is the case, USCRI recommends that those children have

a child advocate assigned at their 60th day in care. The child advocate would be mandated to search for long-term solutions for these children. Using the TVPRA of 2008 as a guide, USCRI also recommends that ORR be required to appoint a child advocate for children meeting the current requirements for a home study. *See* 8 U.S.C. § 1232(c)(3)(B).

As with post-release services, the key to providing child advocates for certain children and mandating specific responsibilities for those advocates is that it must be written into the law, and Congress must provide funding.

Recommendation 3



Expand the Unaccompanied Refugee Minors (URM) program

The Refugee Act of 1980 provided child welfare services for refugee children. Among the services created was the Unaccompanied Refugee Minors (URM) program, which allowed refugee children unaccompanied by a parent or other close relative to receive services through the states' foster care programs.

USCRI recommends that ORR expand the URM program to create additional placements and more appropriate services for UAC without family in the United States who receive an immigration status making them eligible for URM care.¹¹ In some cases, these youth,

often receiving Special Immigrant Juvenile (SIJ) status or a trafficking eligibility letter, have had particularly traumatic backgrounds and present behavioral problems while in ORR custody. Their unique circumstances make them difficult to place in regular URM programs. Their lack of family in the United States puts them at risk for remaining long-term in ORR custody. Although ORR has foster care programs for UAC, it would be more beneficial for the children to enter a URM program specifically designed for their special behavioral and developmental needs, and it would allow them to exit federal custody, transfer to a long-term placement,

¹¹ Asylees, Cuban and Haitian entrants, victims of human trafficking, Special Immigrant Juveniles, and U visa recipients are eligible for the URM program, provided they meet other program eligibility requirements. *See* ORR URM Program Policy Guide, section 1.1, Eligible Populations. <https://www.acf.hhs.gov/orr/policy>

and benefit from the state-funded programs available for foster youth.

This recommendation does not need a legislative change. The ORR Director is authorized “to provide assistance, reimbursement to States, and grants to and

contracts with public and private nonprofit agencies, for the provision of child welfare services...” 8 U.S.C. § 1522(d)(2)(A). Currently, with the low number of refugees coming into the country, this legal authority and funding could be targeted to care for the most at-risk in the UAC population.

Recommendation 4



Provide benefits like a refugee to children with Special Immigrant Juvenile status

Under current law, children granted SIJ status are eligible for the URM program. 8 U.S.C. § 1232(d)(4). To ensure comprehensive care for these children as they grow older, we recommend that they receive “benefits and services...to the same extent as...a refugee,” similar to children who have been victims of a severe form of trafficking. 22 U.S.C. § 7105(b). Although children in many states may remain in the URM program well after their 18th birthday, in states where they cannot or in cases where the youth voluntarily leave the program, refugee social services programs could offer them assistance that would lead to their self-sufficiency and later success. In addition, ensuring access to benefits like a refugee would offer a safety net of federal public benefits.

From an immigration standpoint, children with an approved SIJ case, but waiting for adjustment, should not fear deportation. SIJ status is an immigration benefit given to children who have suffered abuse, abandonment or neglect by one or both parents. It provides a pathway to lawful permanent residence. INA § 245(h).

An SIJ status approval means that the Secretary of DHS has consented to the grant of status, thus recognizing that the child

should not be returned to his/her home country. Section 245(h)(1) of the Immigration and Nationality Act states that an SIJ status holder is deemed “paroled” for purposes of adjusting status in the United States. Therefore, an SIJ status holder’s Notice to Appear charge of being in the United States without being admitted or paroled is no longer applicable after the SIJ status grant. In the case of an SIJ status parolee, parole is recognized “for purposes of” applying for adjustment of status, INA § 240(h)(1); 8 C.F.R. § 1245.1(a), and would be meaningless unless the parole remains in effect until the SIJ status beneficiary completes the adjustment of status adjudication process. Further, the framework and context of the SIJ provision demonstrates congressional intent that SIJ status beneficiaries should not be removed, and thereby denied the ability to seek adjustment of status, based on an INA § 212(a)(6)(A)(i) charge.

Children who have been approved for SIJ status are able to take the second step and apply for adjustment of status once their priority date (the date they filed the I-360 petition) becomes current. Because of the cap, or limit, on these cases, the priority date is well in the past. To move these cases forward, USCRI recommends that DHS lift the cap.

Recommendation 5



Create a Children's Corps

USCRI recommends that U.S. Citizenship and Immigration Services create a Children's Corps, like the Asylum Corps, but with officers trained both in immigration law and child welfare. The Children's Corps, which would only hear cases of UAC, not children as part of a family case, would meet with children in a non-adversarial setting while they are still in ORR custody. The Children's Corps officers could make determinations about all types of immigration relief, not only asylum.

The Children's Corps officers would screen all incoming UAC for potential legal relief before release from a shelter and before issuance of a Notice to Appear. If a potential form of relief were identified during the interview process, the Children's Corps officer would request that ORR assign an attorney to navigate the relief process. These children would not enter removal proceedings in front of immigration judges. Children's Corps officers would decide their cases. If a child were denied relief by a Children's Corps officer, the child could then appeal to an immigration judge.

Children initially determined to have no potential legal relief would be placed in removal proceedings after receiving information about voluntary departure and removal. They also could still choose to pursue legal relief through the traditional immigration court process.

This process would move initial adjudication from the adversarial immigration court system to an administrative process. It would ensure that child-sensitive interview techniques would be standardized, thus minimizing the chances of re-traumatizing the children. The best interest of the child would be the central component of the interview process. It would also decrease the workload and backlogs for the Executive Office for Immigration Review, which oversees the immigration judges, because it would decrease the number of children in removal proceedings.

Recommendation 6



Exempt UAC from the interim final rule on safe third countries

The interim final rule "Asylum Eligibility and Procedural Modifications" forbids asylum seekers, including UAC, from applying for asylum in the United States if they enter or seek to enter through the southern border, unless they were first denied asylum in Mexico or another third country. *See* 84 Fed. Reg. 33829 at 33835, 33840. The rule applies to

UAC; however, it also states that UAC "will not be returned to the transit country for consideration of these protection claims." *See* 84 Fed. Reg. 33829, footnote 7. The rule appears to suggest that UAC will not be removed from the United States, but they will also not be able to apply for asylum if their actions fall under those described in

the rule. This will leave children whose only immigration relief is asylum in limbo.

As an initial matter, USCRI opposes this rule.¹² USCRI also recommends that children be completely, not partially, exempt from this rule. The rule, which USCRI does not believe complies with international or national law on asylum, presumes that children will understand U.S. federal regulations. According to the rule's preamble, its purposes include reducing the incentive for individuals without an urgent or genuine need for asylum to cross the border. It suggests that the rule will deter meritless asylum claims and de-prioritize the applications of individuals who could have obtained protection in another country. It also states that the rule aims to aid the United States in its negotiations with foreign nations on migration issues. Children fleeing their home countries because of violence and unsafe conditions will not stop to assess the nuances of the new federal regulations on transit countries or international negotiations.

The regulation is not a deterrent from migration for these children. It means nothing to them. It will simply have the affect of leaving these children in immigration legal limbo.

Conclusion

USCRI wants to surround and strengthen unaccompanied immigrant children with quality care and services that are in their best interests. We want UAC to feel supported and cared for by trained and compassionate caregivers. We want to provide opportunities to help the children overcome the obstacles they have faced and will face as they continue their journey to a dignified life.

USCRI also recognizes the immediate need for the organizations that provide care for UAC to share their time-tested expertise on child welfare matters and to enhance each organization's capacity to provide excellent care. These organizations are the subject matter experts and are most able to advocate for the best interests of the children. Care providers in ORR-funded shelters are not border patrol agents. And the shelters are not border patrol stations or detention centers. They are temporary homes for children to receive supportive services, begin their recovery, and ultimately connect with family and sponsors that can provide long-term care for them. These organizations need to help change the public and media perception—the confusion that chain link fences, cement floors and unsanitary conditions make up ORR-funded care. Most importantly, care providers need to be a voice for the children and ensure the children receive the care and services that are in their best interests.

¹² "Groundhog Day for Asylum Seekers," USCRI Policy and Advocacy Report, September 16, 2019. <https://refugees.org/wp-content/uploads/2019/09/FINAL-Groundhog-Day-for-Asylum-Seekers-formatted.pdf>

ABOUT THE AUTHOR

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The U.S. Committee for Refugees and Immigrants (USCRI), established in 1911, is a nongovernmental, not-for-profit international organization dedicated to addressing the needs and rights of refugees and immigrants. Through its network of field offices and affiliates, USCRI provides America's newcomers with a comprehensive package of essential services to meet their basic needs upon arrival. USCRI protects immigrant children who arrive in the U.S. without parents or resources, ensuring that the children receive the legal, social and health services they require. In addition, USCRI works with survivors of human trafficking across a multi-regional network of service providers in every state—providing emergency assistance including: access to housing; healthcare; education; employment opportunities; legal assistance; and language training. USCRI advocates for the rights of refugees and immigrants both nationally and globally, helping to drive policies, practices and law.

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