Safe Processing and Transport of Arriving Unaccompanied Children in a Public Health Emergency

This brief is adapted from a USCRI report on safe UC care during the pandemic that will be released in full later this month.

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Overview

At the outset of the COVID-19 pandemic, the Centers for Disease Control and Prevention (CDC) issued an order to limit entry at the U.S. southern border. The CDC invoked a comprehensive quarantine power based in an expansive reading of Title 42 of U.S. Code[1]—added in the 1940s—to override protections that Congress explicitly required, such as those for unaccompanied children via 2008's Trafficking Victims Protection Reauthorization Act (TVPRA). Implicitly, the rationale of the Title 42 order is that the U.S. could not both protect public health and at the same time safeguard the rights of asylum seekers, including unaccompanied children. The argument that the U.S. cannot both protect public health and safeguard UCs was and is a false choice. The U.S. can do both.

DHS is not and has never been a child-welfare or family-welfare agency. For this reason, Congress explicitly mandated that UCs be transferred from DHS to HHS custody in the Homeland Security Act of 2002. DHS has repeatedly shown that it lacks adequate child-welfare protocols, protections, and expertise, including the family separations that became widely known in the summer of 2018.

Nonetheless, DHS must adopt and implement key health and safety measures for receiving UCs. Here, USCRI contributes guidance towards the safe processing of UCs, and specific recommendations relevant to UC processing by DHS in a longer period of uncertain public health.

Principles for DHS Custody and Transfer in a Continuing Public Health Emergency

For the duration of the COVID-19 pandemic, the following principles should guide DHS response in the care for UCs. These three principles apply to DHS policy, practice, and procedures, and are likely to be applicable in any future public health emergency involving infectious disease. They are:

(I) Restoring and Exceeding the Legal Protections Owed to Unaccompanied Children by the TVPRA, PREA, and the *Flores* Settlement Agreement. Public health emergencies should never be weaponized to deny UCs safety and protection from harm. When UCs are expelled, as under Title 42 processing, they do not disappear. Instead, border exclusions send children into danger—dramatically increasing the dangers of violence, abuse and infectious disease, such as COVID-19. Similarly, all DHS processing for UCs must exceed the minimal standards for protection and care of children set forth under the TVPRA, Prison Rape Elimination Act of 2003 (PREA), and *Flores*

[1] 85 FR 16559. Available at: https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-of-communicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into.

Settlement Agreement. *Has DHS satisfied TVPRA, PREA, and Flores?* is the wrong question to ask. In a public health emergency, UCs are more vulnerable and require more careful treatment and more extensive services. Primary considerations must be the best interests of the child and that the U.S. government does not send children into danger.

(II) A Coordinated and Institutional Response Across the Chain of Custody. DHS lacks institutional expertise on public health and should not be leading discussions on best practices during a public health crisis. Safe processing requires deliberate consideration and attention to systematic risk across the UC chain of custody from DHS to HHS. Epidemiologists and other health experts, possibly including experts in congregate care who are outside of government, must organize a coordinated response across agencies to keep UCs, government employees, and shelter care-provider staff safe during the crisis. DHS must follow expert guidance of other agencies and be consistent in the processing of UCs moving forward.

(III) Minimize Possible Exposures to COVID-19 in Custody. The Title 42 order asserts that epidemiological risk is one-directional, originating from UCs. One-directional risk is an incorrect framework. Risk of infection in a pandemic is two-way, and DHS agents may equally endanger UCs. Indeed, some reports indicate that CBP agents are less likely to properly wear masks than those waiting in ports-of-entry, and thereby are potential vectors for superspreader events in which a single person infects many others.[2] COVID-19 outbreaks are a risk anywhere that many people are near each other in large numbers. DHS must prioritize steps that minimize exposures to the coronavirus by all parties, following the expert guidance given across the chain of custody. Further, DHS must not assume without guidance that exposure events—such as transfer by vehicle to an ORR facility—pose more risk than additional exposure periods, such as an additional hour spent in DHS secondary inspection facilities.

Recommended Steps for Safe DHS Processing of UCs

Public health experts have recommended measures to reduce the risk of COVID-19 transmission in settings where many people are present at the same time. DHS agents and other authorities at the border should use measures recommended by public health experts. We stress that denial of protections to unaccompanied children is not justified from a public health perspective and that Title 42 expulsions are unlawful and put children in danger. The following steps are necessary to keep UCs safe—as well as keeping safe those with whom UCs will later come into contact—during any period in which UCs are in DHS custody. A recent collaborative report from public health experts also provides border-processing recommendations, and we recommend that interested readers seek it out.[3]

The following steps should be included in any comprehensive response that follows the principles listed above:

(a) Minimal Time in the Custody of DHS and CBP. DHS and CBP facilities are not equipped for childcare nor staffed by individuals with expertise in child welfare. As a rule, UCs should only be held within DHS and CBP facilities for the absolute minimum amount of time necessary to transfer them safely to ORR. Given the seriousness of the pandemic, a principle to minimize possible COVID-19 exposure in some circumstances may slightly increase the time to be spent in DHS custody. However, no child should ever be left for extended periods in DHS custody under a spurious rationale of preventing the spread of disease.

(b) Freely Available Masks and other PPE for UCs. DHS should maintain a stock of PPE and distribute it to UCs as necessary in DHS custody. Masks and other equipment should be freely available, and UCs should be able to replace disposable masks at their own discretion. N95 or KN95 should be used if necessary, whether in DHS custody or for transport, based on expert guidance.

(c) Child- and Adolescent-appropriate Information on COVID-19. Ports of entry and other similar locations are important opportunities for health communication and trust-building. Public health experts should collaborate with country experts for UCs' countries of origin to develop written information about COVID-19 and how to minimize transmission and risk, in and out of custody. Because many UCs have limited literacy, and because ORR serves children with a variety of native languages, ORR should consider using mixed formats, such as comics, instruction texts, arts and crafts, or other activities. All UCs should receive these materials.

(d) COVID-19 Testing of All UCs, even if Test Results are Unavailable Before Transfer to HHS. Prior to wide availability of a vaccine, containment of communicable disease relies on

[2] Human Rights First et al. 2020. *Public Health Recommendations for Processing Families, Children and Adults Seeking Asylum or Other Protection at the Border.* December. Available at: https://www.publichealth.columbia.edu/sites/default/files/public_health_recommendations_for_processing_families_children_and_adults_seeking_asylum_or_other_protection_at_the_border_dec2020_0.pdf

[3] Ibid.

widespread testing, exposure tracking, and minimizing possible exposures, the latter accomplished in part with PPE (see above). Because many coronavirus-positive individuals are asymptomatic, and because available tests only accurately register a positive result several days after infection, exposure tracking is available for any UCs who test negative upon DHS admission but positive upon reception at a UC care provider. In addition, early testing allows for immediate isolation of UCs who have contracted coronavirus. Finally, a single test used across DHS processing is preferable to multiple tests, as UC care providers must make decisions based on overall test reliability. Test reliability rests on the frequency of diagnostic errors; the rate of diagnostic error results from a combination of protocol failure, testing error, lab error, test sensitivity, rate of false negatives, and rate of false positives. The fewer tests, the easier it is for providers to work with testing.

(e) Child-appropriate Health Screenings for UCs with COVID-19 Symptoms or Reported Exposures. As COVID-19 tests may take several days to return lab results, UCs should receive health screenings upon arrival. Preferably all screenings should be made by medical professionals who are not DHS staff. Professionals who perform screenings should use age-appropriate language and protocols, as well as the child's native language when possible. Accommodations should be made based on the age and developmental stage of the child. Where medical professionals believe a child may have COVID-19 or any other serious medical condition, transfer to HHS custody should be immediate because HHS is better equipped to appropriately isolate COVID-positive individuals and provide needed medical care. Throughout the chain of custody, UCs should receive proper medical care and mental health support.

(f) Policies to Maintain Family Unity When a Child's Traditional Caregiver is not a Parent. Children apprehended by CBP who have an adult, non-parent caregiver—such as a grandparent, aunt or uncle, or older sibling—are legally treated under the Homeland Security Act of 2002 and the TVPRA as unaccompanied children. When a child is apprehended near the border with a non-parent caregiver, most commonly the caregiver is deported or removed swiftly as an adult. DHS should use its discretion to parole non-traditional caregivers rather than immediately deporting those caregivers, as long as family ties are clear and no suspicion of trafficking exists. Adult parole of UCs' caregivers allows quicker reunification, maintains the integrity of UC screening, and will provide for better outcomes for children because children will maintain a continuity of family connections and care.[4]

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[4] Young Center for Immigrant Children's Rights 2020. *Reimagining Children's Immigration Proceedings: A Roadmap for an Entirely New System Centered around Children.* October. Available at: https://www.theyoungcenter.org/reimagining-childrens-immigration-proceedings.