



Where We Stand:

A 20-Year Retrospective
of the Unaccompanied
Children's Program in
the United States





Table of Contents

CHAPTER ONE: THE TRANSFER

The Basics2

The Numbers3

Afghan Unaccompanied Children6

Demographics and Countries of Origin6

Gender7

Age8

Budget Make-Up9

Facilities9

Federal Agencies11

The Law and Policies12

The Homeland Security Act12

Flores Settlement Agreement13

Agency Transition15

Culture16

Legal20



Where We Stand: A 20-Year Retrospective of the Unaccompanied Children's Program in the United States

By Jenny Rodriguez

CHAPTER ONE: THE TRANSFER

The U.S. Committee for Refugees and Immigrants and The Children's Village present the first installment of *Where We Stand: A 20-Year Retrospective of the Unaccompanied Children's Program in the United States*. The retrospective will review the Unaccompanied Children's Program from the passage of the Homeland Security Act of 2002 until today, assessing 20 years of legislation, policies, litigation, and, most importantly, the care of unaccompanied migrating children by the U.S. federal government, with a view towards next steps and improvements for the years ahead. This first installment looks at the years immediately following the passage of the Homeland Security Act. It covers three main areas: the basics, including demographics of the children and agency budgets; the law and policies in place to care for the children; and the agency transition, featuring interviews with government staff who were there during the transfer, specifically inside the U.S. Department of Health and Human Services, Office of Refugee Resettlement, as it took over care for the children from the former Immigration and Naturalization Service.

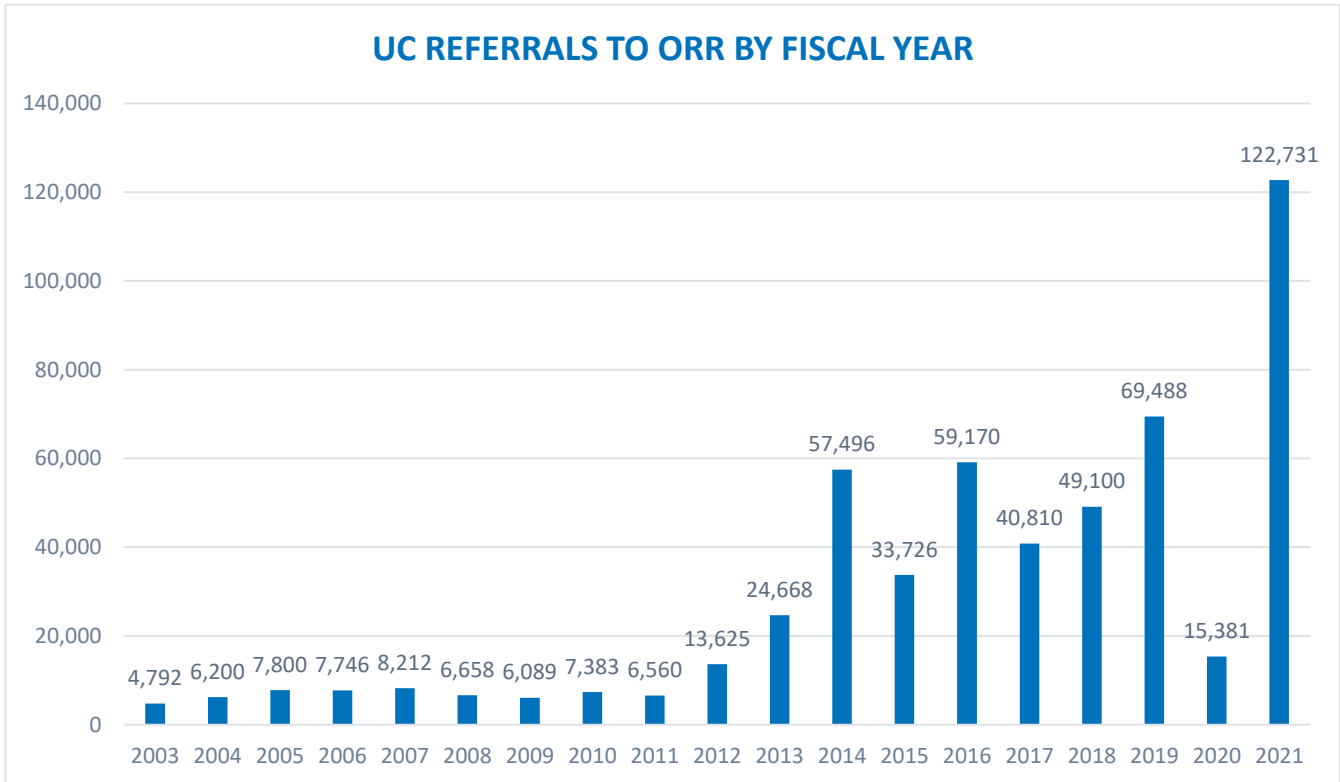
THE BASICS

As used in this retrospective, unaccompanied children are children who have fled their home countries and entered the United States without their parents and with no legal immigration status. They flee their home countries for many reasons. In some cases, they are fleeing poverty, violence, or abuse or neglect by a parent. Others are trying to reunite with their parents or other family members living in the United States, leaving behind situations that put them in danger or offer no future. Regardless of the reasons, which are not a subject of this retrospective, these children travel thousands of miles encountering dangers and the risks of smuggling and trafficking that no child should ever have to face. They are among the world's most vulnerable groups, and for the past 20 years, the United States has been attempting to improve their care once they arrive and are in the U.S. federal government's custody. One of the first steps in improving their care came from the passage of the Homeland Security Act of 2002, which transferred the care of unaccompanied children from the Immigration and Naturalization Service to the Office of Refugee Resettlement.



The Numbers

Over the past 20 years, the make-up of this group and the structures in place to protect them have changed, in some ways slightly but in others considerably. We note first the dramatic increase in the numbers of children over the years and the consequential need to have robust systems in place to care for them. In fiscal year (FY) 2021, 122,731 unaccompanied children were referred to the Office of Refugee Resettlement (ORR).¹ In comparison, in FY 2000, before the passage of the Homeland Security Act (HSA), the Immigration and Naturalization Service (INS) detained 4,136 unaccompanied children.² The INS typically had between 400 and 500 children in custody at any time.³ In FY 2003, after the HSA passage, 4,792 unaccompanied children were referred to ORR.⁴ Today, the entry of unaccompanied children into the United States is higher than ever before, more than 20 times the number of children that ORR was responsible for during the inception of the Unaccompanied Children's Program at ORR.



¹ Administration for Children and Families, FISCAL YEAR CONGRESSIONAL JUSTIFICATION 2022, https://www.acf.hhs.gov/sites/default/files/documents/olab/fy_2022_congressional_justification.pdf.
² US Department of Justice, Office of Inspector General, UNACCOMPANIED JUVENILES IN INS CUSTODY (2001), <https://oig.justice.gov/reports/INS/e0109/index.htm>.
³ *Id.*
⁴ *Id.*
⁵ Office of Refugee Resettlement, FACTS AND DATA THE ADMINISTRATION FOR CHILDREN AND FAMILIES, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.



Data on unaccompanied children is not robust and has been flawed for several decades. In 2001, the U.S. Department of Justice, Office of Inspector General (USDOJ/OIG), noted that "data entry errors were not always corrected and reconciled."⁶ The statistical database maintained by ORR is the most cited source about unaccompanied children. But in discussion with a federal employee at ORR with detailed knowledge of the system, the employee explained the difficulties in obtaining and maintaining the database and the staff to handle it. ORR had one data employee from 2003 until 2012, the year when the number of children doubled, and the need for a dependable database system became increasingly obvious. Right before the first major influx of unaccompanied children into the United States, ORR formed a data team to keep reliable records.

The Unaccompanied Children's Program housed fewer than 8,000 children per year from 2003 through 2011.⁷ Not until 2012 did the trajectory for the number of children entering the United States unaccompanied change. Although not discussed as a year for one of the major influxes, 2012 had a significant increase in unaccompanied children. To manage the first major increase in children, ORR coordinated with the Department of Defense (DOD) to temporarily house children on military bases. Lackland Air Force Base in San Antonio, Texas, was the first military base to house unaccompanied children.

The number of unaccompanied children apprehended by U.S. Customs and Border Protection (CBP) increased from 38,759 in FY 2013 to 68,542 in FY 2014, almost an 80% increase.⁸ The U.S. system was overwhelmed; CBP kept children in temporary facilities, and ORR once again turned to military bases for support. Military emergency facilities expanded to Fort Sill in Oklahoma, Naval Base Ventura County in California, and continued at Lackland Air Force Base in Texas.⁹ Over 7,700 children were housed on military bases, but the facilities were closed after four months.¹⁰ In response to the influx of unaccompanied children arriving at the border, President Obama declared "an urgent and humanitarian situation." The administration coordinated a federal response with representatives from key agencies, headed by the Administrator of the Federal Emergency Management Agency (FEMA). The Administrator's role was to "lead and coordinate the Federal response efforts to ensure that Federal agency authorities and the resources granted to the departments and agencies under Federal law ... are

This data comes from ORR's publicly available data published online. Data from the earlier days of the program comes from an internal memo provided by an ORR employee. It's important to note that both data sets did not have the same referral number per fiscal year but were still in the same range.

⁶ US Department of Justice, Office of Inspector General, UNACCOMPANIED JUVENILES IN INS CUSTODY (2001), <https://oig.justice.gov/reports/INS/e0109/index.htm>.

⁷ U.S. Department of Health and Human Services. Administration for Children and Families, LATEST UC DATA – FY2019 HHS.GOV (2019), <https://www.hhs.gov/programs/social-services/unaccompanied-children/latest-uc-data>

⁸ FY2008-FY2013: UNITED STATES BORDER PATROL, "JUVENILE AND ADULT APPREHENSIONS—FISCAL YEAR 2013." FY2014-FY2018: CUSTOMS AND BORDER PROTECTION, "U.S. BORDER PATROL SOUTHWEST BORDER APPREHENSIONS BY SECTOR FY2018." FY2019-FY2021: U.S. BORDER PATROL, "SOUTHWEST LAND BORDER ENCOUNTERS," <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>

⁹ Office of Refugee Resettlement Year in review - FY2014, THE ADMINISTRATION FOR CHILDREN AND FAMILIES, <https://www.acf.hhs.gov/orr/outreach-material/office-refugee-resettlement-year-review-fy2014>.

¹⁰ *Id.*



unified in providing humanitarian relief to the affected children, including housing, care, medical treatment, and transportation."¹¹

In 2015, HHS asked DOD again to help find bed space due to the influx of children. As the relationship between both agencies continued, HHS Secretary Sylvia Burwell made a request for assistance to DOD Secretary Ash Carter to accommodate more children. In 2016, an upward trend of unaccompanied children continued. In FY 2016, 59,170 children were referred to ORR. In January 2016, the Pentagon asked Holloman Air Force Base in New Mexico to accommodate unaccompanied children.¹²

In FY 2017, there was a downward trend in unaccompanied children arrivals, with ORR receiving 40,810 referrals. But on April 6, 2018, U.S. Attorney General Jeff Sessions announced a "zero-tolerance" policy intended to ramp up criminal prosecution of people caught entering the United States illegally.¹³ Nearly 3,000 children were separated from their parents as parents were detained and prosecuted or deported, and children were sent to ORR.

Also, in FY 2018, the Department of Homeland Security (DHS) issued a policy via memorandum, the Migrant Protection Protocol (MPP), or the "Remain in Mexico" policy.¹⁴ Under MPP, individuals who arrive at the southern border and ask for asylum (either at a port of entry or after crossing the border between ports of entry) are given notices to appear in immigration court and sent back to Mexico. Unaccompanied children were not themselves subject to MPP, but children were sent back with their parents. Due precisely to this policy, MPP did force some children apart from their parents and family members. In some cases, children's parents who were returned to Mexico disappeared due to widespread kidnappings and harm by criminal groups, effectively leaving affected children alone. Despite this policy, another increase in unaccompanied children was seen in FY 2018.¹⁵

In 2020, at the beginning of the COVID-19 pandemic, the Trump Administration temporarily restricted the entry into the United States of certain foreign nationals to limit the spread of coronavirus. The Centers for Disease Control and Prevention (CDC) published a notice referencing Title 42 (from the section of the U.S. Code dealing with public health) on March 21, 2020, which suspended certain foreign nationals from Mexico and Canada from entering into the United States.¹⁶ Under Title 42, border patrol

¹¹ Statement by Secretary Johnson on Increased Influx of Unaccompanied Immigrant Children at the Border. and The White House, Office of the Press Secretary, Presidential Memorandum., THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, PRESIDENTIAL MEMORANDUM—RESPONSE TO THE INFLUX OF UNACCOMPANIED ALIEN CHILDREN ACROSS THE SOUTHWEST BORDER (2014).

¹² Personal correspondence with ORR employees.

¹³ Attorney general announces Zero-tolerance policy for illegal criminal entry, THE UNITED STATES DEPARTMENT OF JUSTICE (2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

¹⁴ Secretary Kirstjen M. Nielsen announces historic action to confront illegal immigration, SECRETARY NIELSEN ANNOUNCES HISTORIC ACTION TO CONFRONT ILLEGAL IMMIGRATION | HOMELAND SECURITY, <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>.

¹⁵ Facts and Data, THE ADMINISTRATION FOR CHILDREN AND FAMILIES, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

¹⁶ U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, "Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or



expelled most unaccompanied children to Mexico or their country of last transit instead of processing them under immigration law. The use of Title 42, combined with the pandemic's restrictive impact on migration, contributed to a drop in referrals of unaccompanied children that ORR received from 69,488 in FY 2019 to 15,381 in FY 2020.¹⁷ In November 2020, a federal judge halted the application of the March CDC order to unaccompanied children, ruling that it violated the Trafficking Victims Protection Reauthorization Act (TVPRA).¹⁸ In February 2021, the Biden Administration formally exempted unaccompanied children from Title 42 expulsions.¹⁹

Afghan Unaccompanied Children

In 2021, the Taliban took over Afghanistan, leading to a major humanitarian and displacement crisis. As of January 27, 2022, more than 1,485 Afghan children have arrived in the United States without a parent; the number of unaccompanied Afghan children is expected to increase.²⁰ Unaccompanied children from Afghanistan are coming into the United States under parole, a temporary tool that authorizes the entry of immigrants without visas on humanitarian grounds. Because humanitarian parole is not a lawful immigration status, Congress will need to create a long-term solution for Afghans. According to an internal memo, ORR issued field guidance instructing officials to expeditiously release Afghan children who arrived without a parent to non-parental caregivers who were evacuated from Afghanistan.²¹ What the United States does next with Afghan unaccompanied children will determine the rest of their lives.

Demographics and Countries of Origin

The countries the children come from have changed. In FY 2001, unaccompanied children represented 64 different nationalities, with the largest percentages coming from Central America, China, and Mexico.²² In FY 2021, the largest percentages came from Guatemala, Honduras, and El Salvador.

Places for Public Health Purposes," 85 Federal Register 16559, March 24, 2020; and U.S. Department of Health and Human Services, Center for Disease Control and Prevention, "Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists," 85 Federal Register 17,060, March 26, 2020.

¹⁷ Facts and Data, THE ADMINISTRATION FOR CHILDREN AND FAMILIES, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

¹⁸ P.J.E.S v. Wolf 1:20-cv-02245 (D.D.C.)

¹⁹ U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, "Notice of Temporary Exception From Expulsion of Unaccompanied Non-citizen Children Pending Forthcoming Public Health Determination," 86 Federal Register 9942, February 17, 2021. CDC reaffirmed that exemption in July. See U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, "Title 42 Order Reassessment and Exception for Unaccompanied Noncitizen Children," media statement, July 16, 2021.

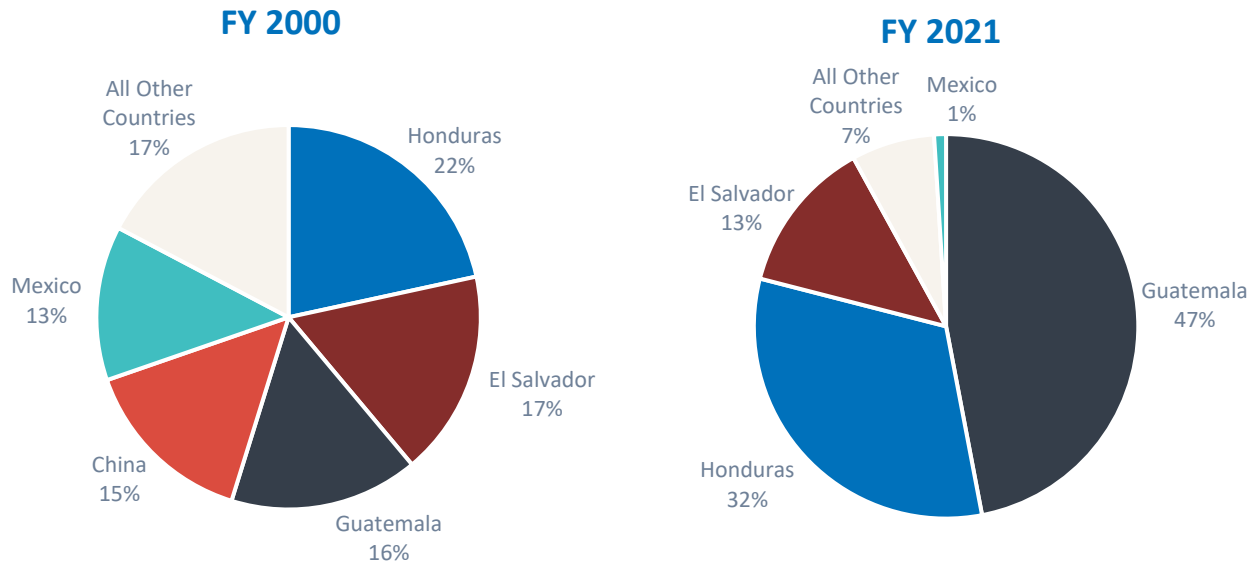
²⁰ Personal correspondence with ORR officials.

²¹ *Id.*

²² *Id.*



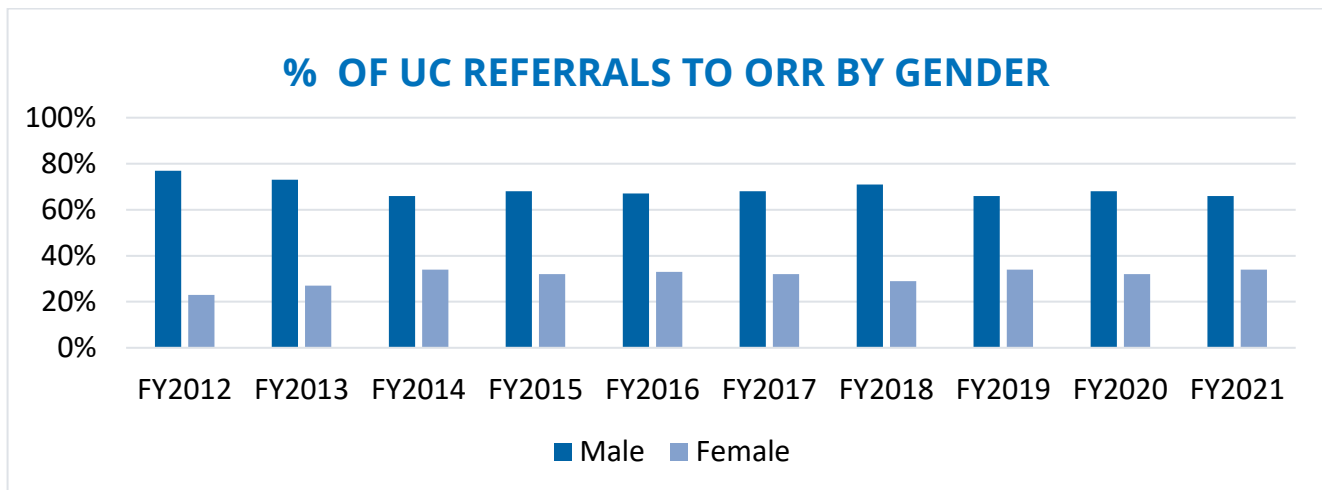
NATIONALITY OF UNACCOMPANIED CHILDREN



23

Gender

The gender of UC arrivals is largely unchanged. In FY 2000, 75% were male, and 25% were female. In FY 2021, 66% were male, and 34% were female.²⁴ Since 2014, the proportion of arriving male and female unaccompanied children has been remarkably stable, with more girls beginning to arrive. FY 2022 continues this trend.



25

²³ US Department of Justice, Office of Inspector General, UNACCOMPANIED JUVENILES IN INS CUSTODY (2001), <https://oig.justice.gov/reports/INS/e0109/index.htm>.

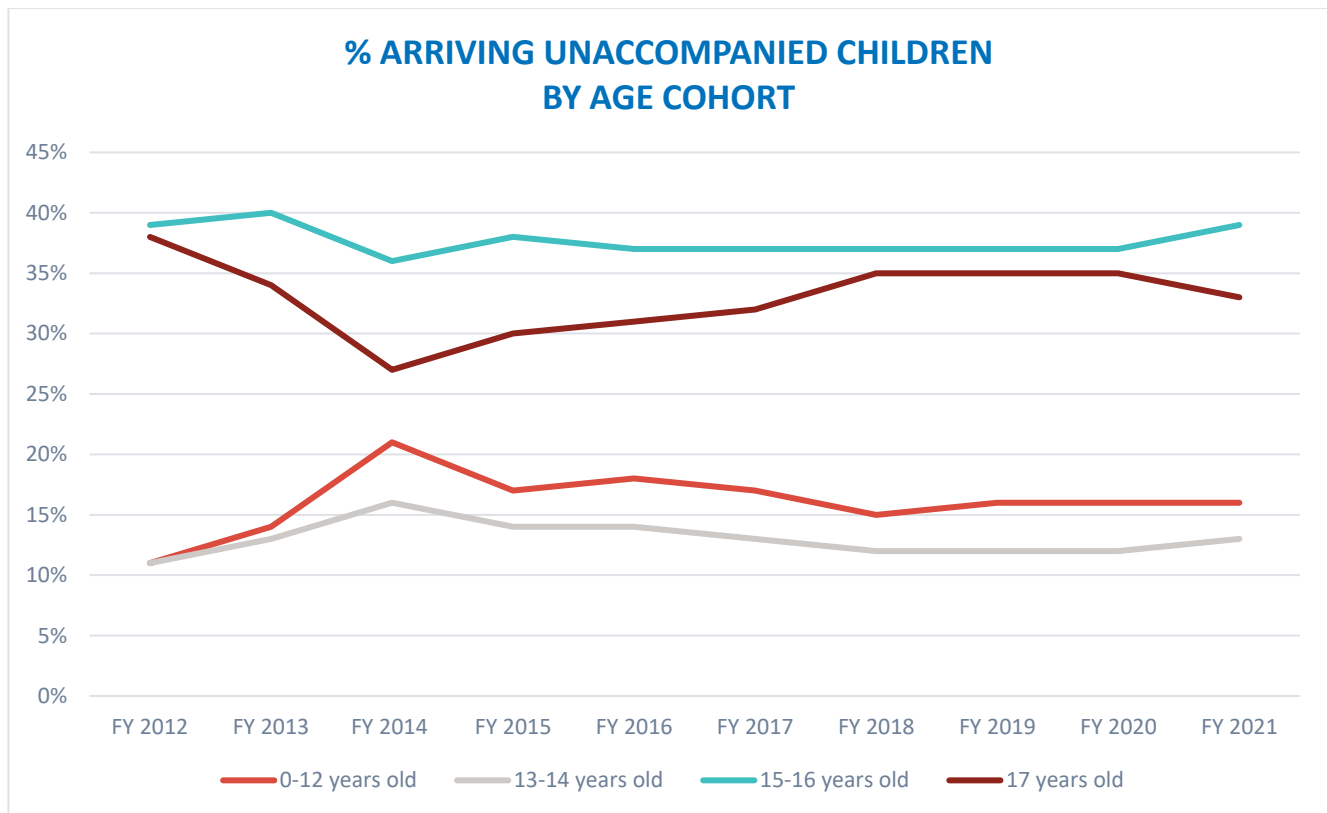
²⁴ Facts and Data, THE ADMINISTRATION FOR CHILDREN AND FAMILIES, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

²⁵ Office of Refugee Resettlement, FACTS AND DATA THE ADMINISTRATION FOR CHILDREN AND FAMILIES,



Age

The ages of arriving children have been relatively stable in the last couple of years. All age groups are arriving in the same proportions as in other years. In FY 2000, their average age was 15 years, and the median age was 16 years.²⁶ In FY 2021, the age breakdown of the children was 16% tender-age children (ages 0-12), 13% were 13 and 14 years old, 39% were 15 and 16 years old, and 33% were 17 years old.²⁷ Most children were nationals of Honduras (32%), Guatemala (47%), and El Salvador (13%).²⁸ FY 2022 continues this trend.



29

<https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

²⁶ U.S. Department of Justice, Office of Inspector General, UNACCOMPANIED JUVENILES IN INS CUSTODY (2001),

<https://oig.justice.gov/reports/INS/e0109/index.htm>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*



Budget Make-Up

Unlike the age and gender of the children, the budget for the Unaccompanied Children's Program has increased dramatically, certainly a reflection of the increased number of children. In early 2003, when the Unaccompanied Children's Program was housed at INS, the program was funded at \$32.2 million, and \$21 million was transferred to ORR in March 2003.³⁰ In 2003, the budget request for the program was \$33 million, with the final enacted budget of \$37 million. After the passage of the HSA, eight full-time INS employees transferred to ORR.³¹ In strong contrast, for FY 2021, the Unaccompanied Children's Program was funded at \$1.3 billion with roughly 500 employees.³² For FY 2022, the Administration for Children and Families requested an increase of \$1.98 billion from the FY 2021 appropriation of \$1.3 billion to care for children referred by DHS.³³ The increase includes a \$30 million set aside for no-year funding to establish a Separated Families Services Fund to provide mental health and other supportive services for children, parents, and legal guardians separated at the United States-Mexico border under the previous administration.³⁴ In 2022, President Biden signed off on the federal spending for FY 2022, which included \$8 billion for the Unaccompanied Children's Program.³⁵ This helps provide more certainty for the program to allow ORR to improve and expand services for children referred to their care, including mental healthcare, legal assistance, and child welfare services.

Facilities

In 2000, the INS had contracts with more than 100 facilities for shelter care, group homes, foster homes, and detention centers.³⁶ The bed space included 400 non-secure beds comprised of shelter, group, and foster beds, as well as 100 secure beds. Notably, one-fifth of the beds were in secure detention. The bed space at the time generally was plentiful enough to manage the number of children being apprehended. But if a child entered INS custody and beds were unavailable, the child would be housed

³⁰ U.S. Department of Health and Human Services, Administration for Children and Families, FY 2004 ACF CONGRESSIONAL JUSTIFICATION (2004), https://www.acf.hhs.gov/sites/default/files/documents/olab/2004cj_refugee_and_entrant_assistance.pdf.

U.S. Department of Health and Human Services, Administration for Children and Families, FY 2006 ACF CONGRESSIONAL JUSTIFICATION (2004), https://www.acf.hhs.gov/sites/default/files/documents/olab/sec2e_refugees_2006cj.pdf

This number was confirmed with personal correspondence with ORR officials.

³¹ This number comes from personal correspondence with former ORR officials.

³² *Id.*

³³ U.S. Department of Health and Human Services. Administration for Children and Families, FY 2022 JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES ADMINISTRATION FOR CHILDREN AND FAMILIES (2022),

https://www.acf.hhs.gov/sites/default/files/documents/olab/fy_2022_congressional_justification.pdf.

³⁴ *Id.*

³⁵ H.R.2471 - 117th Congress (2021-2022) (Enacted)

³⁶ US Department of Justice, Office of Inspector General, UNACCOMPANIED JUVENILES IN INS CUSTODY (2001), <https://oig.justice.gov/reports/INS/e0109/index.htm>.



in hotel rooms secured by contract guards in a few instances.³⁷ The facilities were classified as secure, medium secure, and non-secure.³⁸ Secure facilities were state or county-licensed detention facilities or facilities that INS had contracts with.³⁹ Medium secure facilities were state-licensed facilities designed for children who required close supervision but not secure detention.⁴⁰ Non-secure facilities consisted of shelters, foster programs, or group homes.⁴¹

In 2003, when the program transferred to ORR, the program had approximately 550 beds, and grants for shelter care totaled \$30 million.⁴³ Inter-governmental service agreements with local county detention centers totaled \$5.7 million.⁴⁴ Detention facilities were used throughout the country, 30% were in Southern border states, and 70% were located on the East or West coast.⁴⁵ The type of care provided included foster care, shelter care, and secure detention.⁴⁶ Annual placements were roughly around 4,800.⁴⁷ Soon after the transfer of the program and in the years after, ORR significantly reduced the number of unaccompanied children placed in secure detention. And although the transition was not immediate, ORR expanded the types of facilities to care for unaccompanied children, creating facilities to address the special circumstances of each child, such as long-term foster care for children who may remain in custody for an extended period of time, mommy-and-me facilities for pregnant and parenting teens, and transitional foster care for children of tender age or with special needs.

“Secure [INS facility] is a terrible place. It’s a place for criminals. No immigrant should be in there. I wish nobody to go there. They humiliate you every minute, every day. You can’t do anything they didn’t tell you to do, and they restrain you. They throw you down on the floor and hold you there. I had to go to the dentist one time. They took me there in shackles with handcuffs that were connected to a chain around my waist.” This quote is from a letter from Ernst, a 17-year-old boy from Haiti who wrote to advocacy groups detailing his experiences under INS custody. Ernst arrived in the United States in December 2001, hoping to reunite with his mother, a lawful permanent resident who had filed a visa petition and was approved by the INS in 1995. Instead, Ernst was shackled, handcuffed, and sent to a facility in Pennsylvania. Ernst described the facility as “the valley of death.”⁴²

³⁷ *Id.*
³⁸ *Id.*
³⁹ *Id.*
⁴⁰ *Id.*
⁴¹ *Id.*
⁴² CHARU NEWHOUSE AL-SAHIL, CHRIS KLEISER & CHERYL LITTLE, I RUNNING OUT OF HOPELY: PROFILES OF CHILDREN IN INS DETENTION FLORIDA (2002), <http://www.aijustice.org/docs/reports/ChildrensReport.pdf>.
⁴³ This number comes from personal correspondence with former ORR officials.
⁴⁴ *Id.*
⁴⁵ *Id.*
⁴⁶ Department of Health and Human Services, Administration for Children and Families, FY 2004 ACF CONGRESSIONAL JUSTIFICATION (2004), https://www.acf.hhs.gov/sites/default/files/documents/olab/2004cj_refugee_and_entrant_assistance.pdf.
⁴⁷ *Id.*



Federal Agencies

As noted above, the HSA transferred the care and custody of unaccompanied children from INS to ORR. The HSA delineated certain responsibilities for processing unaccompanied children to the newly created DHS. The law assigned responsibility for the apprehension, transfer, and repatriation of unaccompanied children to DHS. While dissolving the former INS, the HSA transferred the immigration and enforcement functions into three separate divisions of DHS: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP).⁴⁸

To ORR, the law assigned responsibility for coordinating and implementing the care and placement of unaccompanied children. At the time the HSA was passed, ORR was a small office with approximately 40 staff and contractors working on refugee resettlement and the newly created trafficking in persons program.⁴⁹ It was part of HHS and was housed in the Administration for Children and Families (ACF), which included other social services support offices, such as the Office of Head Start, the Children’s Bureau, and the Office of Family Assistance. ORR mainly issued grant awards to nonprofit organizations and states that resettled incoming refugees. In 2002, ORR staff were in Washington, DC, with no regional offices in other parts of the country. Staff in its three main divisions processed and monitored grant awards with little to no regular contact with the recipients of this federal aid and no direct service to children.

One of ORR's divisions operated the Unaccompanied Refugee Minors (URM) Program. The URM Program had close ties to the U.S. Department of State, which identified children overseas who were eligible for refugee resettlement but did not have a parent or close relative to provide care. These children received refugee foster care and benefits funded by ORR and implemented by States and nonprofit organizations. Again, ORR had no direct contact with the children and provided no direct care.

In 2003, with the transfer of the program for unaccompanied children, the ORR director, Nguyen Van Hanh, senior HHS, and ACF leadership recognized the need to reorganize and create a division in ORR to implement the responsibilities transferred by the HSA specifically. As part of the reorganization, the ORR director created and designated the Division of Unaccompanied Children's Services (DUCS) to be responsible for the care and placement of unaccompanied children. The DUCS operational structure covered four areas of responsibility: case management, project management, intakes, and field operations. DUCS staff consulted with child welfare professionals and DHS and developed initial and rudimentary placement policy, decisions, and recommendations to ensure that children received the appropriate care. With the inclusion of DUCS, ORR consisted of four divisions:

- The Division of Community Resettlement

⁴⁸ *Id.*
⁴⁹ Victims of Trafficking and Violence Protection Act of 2000, Public Law 106-386 [H.R. 3244], 28 October 2000; Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003), Public Law 108-193 [H.R. 2620], 19 December 2003; Trafficking Victims Protection Reauthorization Act of 2005, Public Law 109-164 [H.R. 972], 10 January 2006; The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110-457 [H.R. 7311], 23 December 2008;

- The Division of Refugee Assistance
- The Division of Budget, Policy, and Data Analysis
- The Division of Unaccompanied Children's Services (DUCS)⁵⁰

THE LAW AND POLICIES

The Homeland Security Act

Section 462 of the HSA, the specific section that addressed unaccompanied children, was the product of years of advocacy from human rights organizations, the immigration legal community, refugee and religious groups, and political leaders.⁵¹ Section 462 transferred the care of "unaccompanied alien children" from the former INS to ORR. The term "unaccompanied alien child" or "UAC" appeared in the HSA in 2002 and was defined as: a child who—

- (A) has **no lawful immigration status** in the United States;
- (B) has **not attained 18 years of age**; and
- (C) with respect to whom—
 - (i) there is **no parent or legal guardian** in the United States; or
 - (ii) no parent or legal guardian in the United States is available to provide care and physical custody.⁵²

UAC was a new term. When the children had been under the purview of the INS, the agency referred to "juveniles" and "minors." During the Obama Administration, ORR ceased using the terms "unaccompanied alien child" and "UAC" and began referring to children who met the definition in the HSA as "unaccompanied children" or "UC." However, some agency officials still use the term "minor" during regular business. This report uses the terms unaccompanied children, UC, child/children, or unaccompanied migrating children.

Along with the definition, the statute included the necessary language to transfer the program's main elements. Section 462 of the HSA stated that the ORR director's responsibilities included:

- Coordinating and implementing the care and placement of unaccompanied children who are in Federal custody by reason of their immigration status, including developing a plan to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding the appointment of counsel;

⁵⁰ 68 FR 11566

<https://www.federalregister.gov/documents/2008/01/29/E8-1466/statement-of-organization-functions-and-delegations-of-authority>

⁵¹ For more information on the background of The Homeland Security Act of 2002, see U.S. Committee for Refugees and Immigrants et al. 2021, *Prequel to The Homeland Security Act of 2002*. Washington, DC: USCRI. Available at:

<https://www.flipsnack.com/ECFE5B5569B/uscric-policy-and-advocacy-report-12-20-21/full-view.html>

⁵² 6 U.S.C. § 279(g)(2).



- Ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied child;
- Making placement determinations for all unaccompanied children who are in Federal custody by reason of their immigration status;
- Implementing the placement determinations;
- Implementing policies with respect to the care and placement of unaccompanied children; and
- Reuniting unaccompanied children with a parent abroad in appropriate cases.

Section 462 also included a requirement that the ORR director consult with DHS when deciding on the placement of a child. It stated:

In making determinations [for the placement of a child], the Director of the Office of Refugee Resettlement—

(A) shall consult with appropriate juvenile justice professionals, the Director of the Bureau of Citizenship and Immigration Services, and the Assistant Secretary of the Bureau of Border Security to ensure that such determinations ensure that unaccompanied alien children described in such subparagraph—

- (i)** are likely to appear for all hearings or proceedings in which they are involved;
- (ii)** are protected from smugglers, traffickers, or others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitive activity; and
- (iii)** are placed in a setting in which they are not likely to pose a danger to themselves or others; and

(B) shall not release such children upon their own recognizance.

The HSA also stated, "[t]he Director of ORR is encouraged to use the refugee children foster care system established according to section 412 of the Immigration and Nationality Act (8 USC 1522 (d)) for the placement of unaccompanied alien children."⁵³ The Director was encouraged but not obligated to follow the URM program. Today, children eligible for the URM program are under 18 years of age, are unaccompanied, and are refugees, Cuban and Haitian entrants, asylees, victims of trafficking, U visa holders, and children with Special Immigrant Juvenile Status. Most of these children are placed in licensed foster homes.

Flores Settlement Agreement

Another significant section of the HSA was section 1512, which covered the savings provisions and transferred responsibilities under the *Flores* settlement agreement to ORR. The legal history of the *Flores* settlement agreement started in 1985 when immigrant children filed a class-action lawsuit against

⁵³ Homeland Security Act of 2002, Pub. L. No. 107-296, HR 5005, 107th Cong.



the former INS challenging their detention, treatment, and release from federal custody.⁵⁴ 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 1997.⁵⁵ 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 of the settlement agreement, providing that the settlement agreement would continue until the INS published implementing regulations. However, INS never published implementing regulations. Although it had a regulation governing the release of minors, it never fully incorporated the *Flores* settlement agreement requirements into its regulation.⁵⁶

So, when the HSA was passed, the savings provisions in section 1512 transferred the settlement agreement requirements to ORR, right alongside the rest of the program. ORR found itself operating a new program for children under a court-ordered settlement agreement. This meant that plaintiffs could bring an enforcement action against ORR if they believed ORR was not meeting the required standards. The *Flores* settlement agreement and its repercussions on the program will be discussed in another installment of this retrospective.

The *Flores* settlement agreement required the federal government to place children in programs licensed by the states, except in exceptional circumstances. Along with following all applicable state child welfare laws and regulations and all state and local building, fire, health, and safety codes, those licensed shelters had to provide:

1. Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items.
2. Appropriate routine medical and dental care, family planning services, and emergency health care services.
3. An individualized needs assessment, including various initial intake forms.
4. Educational services appropriate to the minors' level of development and communication skills in a structured classroom setting.
5. Activities according to a recreation and leisure time plan, including daily outdoor activities.
6. At least one (1) individual counseling session per week conducted by trained social work staff.
7. Group counseling sessions at least twice a week.
8. Acculturation and adaptation services, including information regarding the development of social and interpersonal skills.

⁵⁴ Stipulated Settlement Agreement, *Flores v Reno*, No. CV 85-4544- RJK(Px) (CD Cal 1997).

⁵⁵ *Id.*

⁵⁶ 8 CFR Part 236 (1998)



9. Upon admission, a comprehensive orientation regarding program intent, services, rules, expectations, and the availability of legal assistance.
10. Whenever possible, access to religious services of the minor's choice.
11. Visitation and contact with family members (regardless of immigration status).
12. A reasonable right to privacy, including the right to (a) wear his or her own clothes; (b) retain a private space in the residential facility; (c) talk privately on the phone; (d) visit privately with guests; (e) receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.
13. Family reunification services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the minor.
14. Legal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense of the government, the right to a deportation or exclusion hearing before an immigration judge, the right to apply for political asylum or to request voluntary departure in lieu of deportation.

The *Flores* settlement agreement imposed several obligations onto the federal government, including, among other things, that children:⁵⁷

- are placed in the least restrictive setting appropriate to the child's age and special needs.
- are segregated from unrelated adults during transport and temporary detention.
- are transferred out of a temporary location to a permanent location within 72 hours.
- are treated with "dignity, respect, and with special concern" due to vulnerabilities.
- have free and ready access to drinking water, food, and snacks.
- are permitted attorney-client visits in facilities; and
- are placed in a licensed program within 3 to 5 days, and such facilities must be non-secure as required by state law, except that those children deemed to be delinquents, criminals, or meeting other specific factors under the *Flores* settlement agreement may be placed in secure facilities.

AGENCY TRANSITION

On March 1, 2003, ORR, along with its counterparts at DHS, began officially implementing section 462 of the HSA, which required the transfer of the care and placement of unaccompanied children from the former INS to the Director of ORR. This transfer was extraordinary for the legal issues it presented, the number of offices involved, the operational complexities to be sorted, and most importantly, the need to provide seamless care for some of the world's most vulnerable children. By all accounts, the transition was incremental and took over a year. The DHS OIG put the operational transfer of the program in August 2004.⁵⁸ The contrasting missions of DHS and HHS – one an enforcement agency, the other a

⁵⁷ Stipulated Settlement Agreement, *Flores v Reno*, No. CV 85-4544- RJK(Px) (CD Cal 1997).

⁵⁸ Department of Homeland Security. Office of Inspector General, *A REVIEW OF DHS' RESPONSIBILITIES FOR JUVENILE ALIENS* (2005), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_05-45_Sep05.pdf.



health and social services agency – shadowed the interagency work and policy development throughout and after the transition, making the already-present challenges thornier to resolve.

Culture

Staff who were there at the time of the transfer recall the differences in the agencies' missions, the operational complexities, the lack of sufficient statutory clarity, and the interagency issues. Ken Tota, who now serves as the deputy director of ORR, was, at the time of the transfer, a senior program specialist at INS, where he provided oversight for the children's program (referred to as the juvenile program in INS).⁵⁹ Ken noted the differences in the agencies' cultures.

"Eight full-time employees from INS transferred to ORR. When we first arrived, it was interesting being the new guys in the office. How exactly were we to fit into this new culture? It took time to adjust to the new environment, but the staff was extremely supportive. Leadership reinforced moving the program forward by focusing on the child's best interest, which differed from the culture at INS that focused on detention and removal. In contrast, ORR had a more humanitarian approach."

While the transfer of custody of unaccompanied children from INS to ORR was a positive step towards a more humanitarian approach to the care of these children, ORR was not accustomed to implementing an operational program responsible for the actual care and custody of children, and that led to obstacles in effective implementation. In the HSA, the Director of ORR had custody of the children and was responsible for decisions about their placement in certain types of facilities and their release from federal custody. While children were presumably better off in the care of a social services agency like ORR, the incomplete remodeling of the program left gaps and challenges in implementing the program. Ken, as a programmatic staff person, recognized the operational complexities even prior to arriving at ORR.

"After the passage of The Homeland Security Act, there was a level of uncertainty. What staff would transfer? What services would transfer? How would the program restart? A lot of time was spent trying to work through the mechanics of what the transition would look like.

At the INS, the structure of the juvenile program was a part of a much larger infrastructure that included the adult population. When the program got transferred, we had to figure out who would transition and how the program would function outside of this larger infrastructure. That was one of the biggest challenges at the time because you had to separate a tiny component out of this larger infrastructure and then place the program into an office that didn't have the infrastructure around it to support it. The program didn't benefit from a regional structure or have a database in place."

⁵⁹ Ken Tota gave this interview based on his personal experience and reflections on the earlier days of the program during the initial transfer. Ken did not speak on behalf of the Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services.



AnnaMarie Bena, who is now vice president of the U.S. Committee for Refugees and Immigrants, was, at the time of the transfer, an immigration specialist in ORR. She echoed Ken's remarks about the operational challenges that ORR faced.

"When the program first transferred, ORR had no staff with experience in these kinds of operations and no staff with hands-on experience running a national program to provide care for children. The INS staff that transferred were familiar with how the program had worked, but at ORR, we didn't have the infrastructure. We didn't even have a database to record information about the children. We had no procedures in place for many things that needed to be done for the children."

Former and current federal workers, who were involved in the program at the time and either asked not to be identified or needed to speak anonymously because of their current government roles, shared similar stories about the operational complexities. They noted: the day-to-day challenges of decision-making for this vulnerable population, including making major medical decisions for the children; communicating with border patrol agents who initially took custody of the children; conveying ORR's humanitarian mission to former INS detention centers still caring for the children; and making decisions about the safety of the release to certain sponsors, including what background checks to run and information to collect.

According to Ken Tota,

"There was no established infrastructure or procedures in place when the program was transferred. . . We tried to build up policies around initial referrals [from DHS] and trying to figure out how to execute reunification requests [from parents]. In the early days, we were such a small program and lacked the infrastructure and database that we kept track of most of the unaccompanied children via spreadsheet."

AnnaMarie Bena also noted the interplay of the law with the operational challenges.

"When the program transferred, we had the *Flores* settlement agreement, which we had to become familiar with quickly. But we had very little legislative direction from Congress. Everyday questions came up, and we looked at each other and asked, 'are we legally allowed to do that?' For example, the *Flores* settlement agreement and the HSA said nothing about releasing a child to a parent who had immigration issues. DHS told us we couldn't release those children, but ORR wanted children to be released to their parents. And there was no law, policy, or procedures to guide us."

Because of the legal questions, ORR worked closely with the Office of the General Counsel (OGC) at HHS for legal advice. AnnaMarie, who was an immigration specialist in ORR, transferred to OGC as a staff attorney to work directly on the legal issues. Her boss was Robert "Bob" Keith, former Associate General Counsel at HHS. Bob, like AnnaMarie, became familiar with the operational and the legal questions of transferring the Unaccompanied Children's Program from INS to ORR. On the operational factors, Bob noted:



"This transfer was something we had never done before. In the 80s, the Social Security Administration (SSA) was separated from the Department of HHS and became a stand-alone agency. Social welfare programs previously under SSA (e.g., welfare, child welfare, and child support enforcement) were transferred to a newly created Family Support Administration within HHS. But we [HHS] had never handled a new program transition of this magnitude. We had familiarity with funding and setting guidelines for foster care and other state programs for families, but we never had responsibility for the direct care of children.


"It was relatively easy for Congress to apportion and divide the money between both DHS and HHS, but we had an overwhelming number of practical questions. Interagency-wise, how long and where would DHS hold the children until transfer to ORR? How would children be transported to shelters? Who would cover the cost of transportation? What care and services would be provided for the children while in DHS custody? What would be ORR's responsibilities once they received the children? How would we handle the identification and vetting of potential sponsors and release of the children? What about follow-up services for children after their placement? These were just a few of a huge variety of complicated and complex issues the agency had to address despite never having had any significant experience providing physical care for children. The HSA opened up a whole new realm for ORR to navigate."

AnnaMarie Bena offered another example of the interplay between law and policy and the lack of legislative guidance:

"Congress noted in section 462 that ORR should use the Unaccompanied Refugee Minors Program (URM) for unaccompanied children. It was so unrealistic. The URM program didn't have the capacity and didn't care for children in the situations that many unaccompanied children were in. And ORR didn't have custody of kids in URM. Those children went into the state's custody or a nonprofit, not the federal government. Even though ORR was involved in the URM program's funding, they did not have the concept of operationalizing the care for unaccompanied children. ORR could oversee if the funding was being used properly for a program, but they didn't have the experience to care for the children."

Ken Tota also noted the misguided idea of using the URM program. He summed up his thoughts on what he has seen from the transfer and over the past twenty years:

"Having to build up this large infrastructure and rebuild the program away from the culture at INS. Early in the transfer, it was apparent that ORR could not rely on the URM framework for unaccompanied children. Over the past twenty years, ORR has gone through a tremendous amount of growth. The Unaccompanied Children's Program is now a multi-billion-dollar program. We had very few children in shelters in the early days, and now we've experienced caring for thousands of children. The capacity for this program has to be ongoing, and you cannot reduce capacity when the number of unaccompanied children is low. It's taken many years, but interagency, there's finally this realization that you can't build this capacity overnight, something that wasn't the mindset in the earlier days. Enhancements have been made for services for



children, shelter care, and post-release legal services have been expanded since the early days. There's been a positive direction in growth and accountability to maintain oversight."

The operational and legal challenges in the program were wrapped up in interagency issues between ORR and DHS. ORR had been tasked with the care and placement of unaccompanied children, but they could not operationalize their responsibility. In that void, DHS exerted its abilities and continued to make decisions that were no longer under its legal purview. The agencies, with their contrary missions, disagreed about the decisions and how they should be carried out.

AnnaMarie Bena explained one of the interagency challenges.

"One of the interagency issues in the transfer was the consultation provision in the Homeland Security Act that required the ORR director to consult with DHS offices before the ORR director determined where and when to release a child. This raised a lot of questions. Who was HHS supposed to consult with before the ORR director decided where to place the child? How involved do both agencies need to be involved in consultations? DHS believed they had a veto power over releases. They wanted to tell ORR when they could and couldn't release a child. And ORR and DHS didn't agree on the criteria for release."

She raised another interagency issue that may have continued long after the transfer of the program.

"The statute defined an unaccompanied child, but there was still confusion because both agencies interpreted the term differently. In the beginning, DHS argued that if a child came across the border by themselves but had a parent in the U.S., that child was not unaccompanied, and they would deal with those children separately and refused to transfer those children to ORR. This was a tremendous deal because the HSA intended to move children away from the DHS infrastructure and be taken care of by ORR. This issue was clarified in the Trafficking Victims Protection Reauthorization Act (TVPA) of 2008, which made the language very clear about transferring children to ORR."

Other staff who were there at the time of the program transfer raised the transportation of unaccompanied children as an issue. ORR did not have the capacity to transport children. So, DHS wanted to make the decisions about the shelter or facility the children should be placed in. DHS insisted on transporting children only to shelters that were close to the southern border. But ORR, with little shelter capacity other than what had transferred from the INS, was growing its shelter capacity (away from detention centers) in different parts of the country. Staff also discussed the need to provide privacy for the children in many aspects of their care, which DHS disagreed with.

Programmatic, operational, and interagency disagreements plagued the transfer of the program and created a lack of understanding on each department's role and responsibilities in the earlier days.



Legal

When the responsibilities for unaccompanied children were divided between ORR and DHS, there was no formal memorandum of understanding (MOU) established to clarify each department’s roles.⁶⁰ Due to difficulties in agreeing to an MOU in 2004, one year after the transfer, the two agencies developed a statement of principles as an interim agreement that stated “[t]his document does not resolve all outstanding issues.” As such, both departments lacked a specific agreement on exchanging information when children were transferred from DHS to HHS custody.⁶¹ Additionally, it was not clear which department was responsible for ensuring the safety of children once they were released to sponsors or which department was responsible for ensuring sponsors’ continued compliance with sponsor agreements.⁶²

Bob Keith was one of the negotiators who assisted with the memorandum and statement of principles between HHS and DHS.

“One of the more intractable problems was coming to terms with a formal black and white memorandum of understanding. Both agencies couldn’t agree on every detail, how to go about identifying sponsors, or what criteria would be used. We had the *Flores* agreement, which provided broad criteria, but we couldn’t go along with everything that DHS wanted. The DHS wanted HHS to be more involved in post-placement for children after release, ensuring that the children showed up for immigration hearings. Our position was that we would basically take care of the kids and identify and vet the sponsors, but that we had very limited responsibility after they were released to an adult relative or other approved sponsor. We couldn’t agree on the basics. We argued about who would pay for transporting the children and trying to come up with a statement of principles.”

In a 2005 report, the DHS OIG reported concerns about ORR’s release of children to sponsors.⁶³ These concerns implied that DHS believed that it was ORR’s responsibility to ensure the post-release safety of children. ORR had stated that its statutory mandate to ensure the well-being of unaccompanied children ended when children were released from ORR's care.⁶⁴ Neither agency appeared to be monitoring or taking responsibility for children or sponsors post-release, which prompted the OIG’s recommendation that HHS enter into an MOU with DHS to layout each department's roles and responsibilities.

The DHS OIG stated, "DHS and HHS have failed to delineate their respective organizational functions regarding unaccompanied children who are apprehended, transported, and initially detained by the DHS

⁶⁰ Daniel R Levinson, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES. OFFICE OF INSPECTOR GENERAL (2008), <https://oig.hhs.gov/oei/reports/oei-07-06-00290.pdf>

⁶¹ *Id.*

⁶² *Id.*

⁶³ Department of Homeland Security. Office of Inspector General, A REVIEW OF DHS' RESPONSIBILITIES FOR JUVENILE ALIENS (2005), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_05-45_Sep05.pdf.

⁶⁴ *Id.*



– but who are subsequently transferred to the ORR. In addition, the responsibilities with the DHS for program oversight of UCs require further definition."⁶⁵

In 2008, the MOU was still an issue between both departments. HHS OIG recommended that HHS and DHS build upon the statement of principles and, at a minimum, have an MOU that would address the following:

- Each entity’s specific responsibilities for gathering and exchanging information when a child comes into Federal custody and is placed into a DUCS [ORR] facility.
- Each entity’s specific responsibilities for gathering and exchanging information about children who have been reunified with a sponsor to ensure that children are safe and that sponsors are adhering to agreements.

In February 2016, HHS and DHS entered into a Memorandum of Agreement (MOA) that further outlined each department’s role and responsibilities with a shared goal to protect unaccompanied children from mistreatment, exploitation, and trafficking.⁶⁶ In the MOA, the agencies agreed to establish a coordination structure to monitor and resolve issues and share information. The MOA also established a Senior Leadership Council comprised of high-level staff across various agencies that serves as the coordinating body for interdepartmental cooperation on children's care, processing, and transport.⁶⁷ ORR reported that the Senior Leadership Council meets about every other month and serves as a forum to discuss broader policy issues arising from operational concerns.⁶⁸ One activity that the Council had undertaken was developing a Joint Concept of Operations to formalize the working relationship between HHS and DHS, establish procedures for consistent interdepartmental coordination regarding unaccompanied children, and identify other areas that needed to be addressed.⁶⁹

While the HSA was a significant step toward protecting rights and providing appropriate care for unaccompanied children, ORR had inherited a flawed system and weak statutory guidance and struggled initially without the infrastructure to make needed changes. The transfer left gaps and interagency challenges between DHS and ORR. But over the years, the agencies, Congress, and nonprofit and advocacy organizations have worked to make changes as the program continued to have tremendous growth. Although the implementation of the changes was often slow, it was made, and many of those changes have resulted in a better system of care for unaccompanied children. Future installments of this retrospective on the program will explore the changes in law, operations, and policies that have occurred over the last 20 years and their impact on the well-being of unaccompanied children who receive care from the federal government.

⁶⁵ *Id.*

⁶⁶ Daniel R Levinson, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES. OFFICE OF INSPECTOR GENERAL (2008), <https://oig.hhs.gov/oei/reports/oei-07-06-00290.pdf>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*