



Memorandum

November 1, 2006

TO: House Judiciary Committee
Attention: Nolan Rappaport

FROM: Chad C. Haddal
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Domestic Social Policy Division

SUBJECT: Procedural Definition of “Unaccompanied” for Unauthorized Alien Children

This memorandum responds to your question concerning how alien children are classified as unaccompanied or accompanied by the Departments of Homeland Security (DHS) and Health and Human Services’ (HHS) Office of Refugee Resettlement (ORR) in five different scenarios alleged by advocacy groups to have occurred. The memorandum clarifies what the classification procedure is for the agencies involved in each of the alleged scenarios, as well as circumstances that may result in the agencies not conforming to standard practices. To fulfill your request, CRS analysts conducted interviews with officials at ORR and DHS Detention and Removal Office (DRO).¹ These interviews serve as the basis for discussion of the applied definition of “unaccompanied alien children” (UAC) in the five different scenarios, and the scenarios are provided in bullet points below. Additional discussion is included at the end of the memorandum to highlight concerns that the agencies have and issues they want addressed to overcome any existing difficulties in fulfilling their obligations to unauthorized juvenile aliens. If you have any further questions on this matter you may contact me at x7-3701 or by email at chaddal@crs.loc.gov.

Since the passage of the Homeland Security Act of 2002 (HSA),² several advocacy groups have expressed concerns over the treatment of unaccompanied alien children by federal authorities. Specifically, concerns have been expressed that children are being

¹ The interview with ORR was conducted on September 27, 2006, while the meeting with DHS occurred on October 6, 2006. At ORR, CRS interviewed Maureen Dunn, Director, Division of Unaccompanied Children’s Services; Susana Ortiz-Ang, Deputy Director, Division of Unaccompanied Children’s Services; and Ken Tota, Chief of Operations, Office of Refugee Removal. At DRO, CRS interviewed John Pogash, Chief, National Juvenile Coordination Unit; Ricardo Velazquez, Congressional Relations, Bureau of Immigration and Customs Enforcement; and Maria Stokes, Department Officer, National Juvenile Coordination Unit.

² P.L.107-296.

misclassified³ as “accompanied” or “unaccompanied” and are therefore in the custody of the wrong federal agency.⁴ According to regulation,⁵ DHS is responsible for any unauthorized juvenile alien not considered “unaccompanied.” Those unauthorized juveniles who are “unaccompanied” under the HSA statutory definition belong in the custody of the ORR, and any such juvenile must be transferred to their custody within 3-5 days of apprehension (with 72 hours being the standard practice).⁶ While both DHS and ORR maintain that they operate by the statutory definition of UAC, accusations of inconsistent policies have surfaced from several groups.⁷ Critics have charged that the definition of “unaccompanied alien child” has been selectively applied on a case-by-case basis to suit the DHS’ security agenda.⁸

Standard Practices

The standard practice of classifying an alien juvenile as “unaccompanied” is based upon the statutory definition of “unaccompanied alien juvenile” from the Homeland Security Act. The HSA amended the United States Code in 6 USC §279(g)(2) to provide the following statutory definition:

The term ‘unaccompanied alien child’ means 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.

If neither a parent or a legal guardian (with a court-order to that effect) is with the juvenile at the time of apprehension, or within a geographical proximity to quickly provide care for the juvenile, the juvenile alien is classified as “unaccompanied.”⁹ The statutes and regulations do not provide definitions for what constitutes a legally “accompanied” alien child.

³ The term “misclassified” refers throughout this memorandum to juveniles who are classified as UACs when they are in fact accompanied, and vice versa.

⁴ For example, see Vanderpool, Tim. “Alone on the Border: Border Patrol Neglect may Place Kids at Risk.” *Tucson Weekly*, December 8, 2005, at [http://www.tucsonweekly.com/gbase/Currents/Content?oid=76257], visited October 19, 2006.

⁵ 8 CFR §236.1.

⁶ This time-frame is stipulated by the Flores Settlement Agreement (*Reno v. Flores*, 507 U.S. 292 (1993)) and was detailed in U.S. Department of Justice, “Processing, Detention, and Release of Juveniles,” 63 Federal Register 39762, July 24, 1998.

⁷ For example, attorneys for both the National Center for Refugee and Immigrant Children and the Hebrew Immigrant Aid Society (HIAS) & Council Migration Service of Philadelphia have charged that such inconsistencies take place.

⁸ For example, see Calderón, Sara Inés. “Children Caught in the Process: Unaccompanied Undocumented Youths Living in Border Patrol Station Awaiting Transfers.” *The Brownsville Herald*, March 27, 2006, at [http://www.brownsvilleherald.com/ts_comments.php?id=P69948_0_10_0_C], visited October 19, 2006, or Bernstein, Nina. “Girls Held as U.S. Fears Suicide Bomb.” *The New York Times*, April 7, 2005, p.B1.

⁹ 8 CFR §236.3(b)(1)

Unaccompanied alien children are generally apprehended at the border by the Customs and Border Patrol (CBP) or in the interior by Immigration and Customs Enforcement (ICE). If local law enforcement authorities contact ICE to notify them that a possible unauthorized alien minor is in their custody, ICE immediately places a detainer on that minor until the child can be transferred to a DHS facility.¹⁰ ICE subsequently attempts to determine whether the minor has any family living in the United States. For cases that are ambiguous, the field officers¹¹ may contact the National Juvenile Coordinator¹² in Washington, DC for clarification. If a child is determined to be unaccompanied, he or she is transferred to ORR within 72 hours. However, if the juvenile is determined not to be “unaccompanied” then the juvenile remains in the custody of DHS, according to DHS officials.

Once a UAC is detained, the juvenile may be held for 3-5 days by DHS before being transferred to ORR.¹³ The juvenile is held separately from adults in either a permanent or contracted facility. During this time period, DHS authorities will determine the juvenile’s age, conduct background checks, determine the juvenile’s nationality, and notify the appropriate consulate that the juvenile is being detained by DHS. At any point the juvenile may withdraw his or her application for admission and be allowed to return to his or her country of origin¹⁴. If the juvenile is from Mexico or Canada, the child is transported to the border for release.¹⁵ If the child is from another country, transportation is arranged in consultation with that country’s consulate. However, if the juvenile does not withdraw the application for admission, the child will be placed in the appropriate removal proceedings as determined by the responsible DHS field officer.

There are a few circumstances under which a UAC may remain in DHS custody for a longer period of time than the standard 72 hour period. If a child has previously been issued a final order of removal, or the child has a criminal record, that juvenile is not subject to the same procedural practices as other unaccompanied alien juveniles. Rather, those children may be placed in expedited removal.¹⁶ Determining whether a UAC should be placed in formal removal proceedings or in expedited removal may sometimes cause delays. Additionally, DHS may detain any UAC that is deemed to be a security threat, and has some discretion in

¹⁰ DHS officials noted that they have “strict standards” for any facility to operate as a secure juvenile facility under DHS contract which includes a list of 162 criteria.

¹¹ The term “field officer” refers throughout this memorandum to apprehending agents of either the CBP or ICE.

¹² The National Juvenile Coordinator has direct authority over DHS field personnel in decisions relating to the proper handling of juveniles, including the placement of juveniles in DHS-funded facilities, the transfer of juveniles to other facilities, or their release from DHS custody.

¹³ U.S. Department of Justice, “Processing, Detention, and Release of Juveniles,” 63 Federal Register 39762, July 24, 1998.

¹⁴ 8 CFR §236.3(g). The cited regulation also requires that all juveniles must establish contact with a parent, relative, friend, free legal services organization, or consular officer prior to being released.

¹⁵ Ibid.

¹⁶ The term “expedited removal” refers to removal under 8 CFR §235.2.

making such determinations. Most unaccompanied children are placed in a removal proceeding under §240 of the Immigration and Nationality Act (INA).¹⁷

This decision to place a UAC in expedited or formal removal is made by the field officers. A child erroneously placed in expedited removal may be transferred out of that process. Juveniles in expedited removal are placed under ORR's care and ORR is not allowed to release them. Thus, ORR's juvenile population contains both criminal and non-criminal alien juveniles.¹⁸

Misclassifications. The misclassifications of alien juveniles generally occur during the initial apprehension. DHS officials maintain that when a CBP officer arrests a juvenile, the officer has some discretion to either take the juvenile into federal custody, allow the child to voluntarily return across a border, or release the juvenile to an adult relative in the United States. However, it is mostly the case that a juvenile apprehended at the border is taken into federal custody by the CBP field officer. It is up to the field officer to make the determination of whether or not the juvenile is "unaccompanied."

When ORR is transferred custody of a juvenile from DHS' care, ORR administers a screening questionnaire. Occasionally this screening has revealed that the juvenile is in fact accompanied and the child is transferred back to DHS. Children who would otherwise be considered "accompanied" may find themselves in ORR's care for several reasons, including the juvenile's parents may not come forward, the parents may have lost parental rights, or they have been mistakenly misclassified by DHS agents. In many cases these misclassifications occur because the alien has lied to officials, although officials at ORR attribute some misclassifications to insufficient training and a lack of staff at DHS. Although they did not perceive these mistakes as a systematic problem at DHS, ORR officials believe that there currently exists a pattern of "systematic reminders" in DHS/ORR communications.

Age Determination. In determining the age of a child (especially an individual unwilling to surrender his or her age), a forensic determination is conducted on the child. While this examination cannot yield an exact age for an individual, it does provide officials with an age-range. According to officials at ORR, DHS and ORR employ different assumptions about the alien's age within this forensic range: DHS assumes the highest number in the range is correct, while ORR assumes the lowest age is correct. These differing assumptions are important when the age of 18 falls within the forensic range. An individual with a forensic age range of between 16 and 18 is assumed to be a child by ORR, while DHS considers this same individual to be an adult.¹⁹ DHS officials disputed this interpretation of its forensic procedure, stating that its age determination process was more nuanced and the

¹⁷ Whenever an unaccompanied child is placed in removal proceedings, the child's relatives in the United States, if any, are contacted. If these relatives (individuals who are either parents, legal guardians, adult siblings, aunts, uncles, or grandparents) accept custody of the child, they sign documents acknowledging custody. Additionally, these relatives become responsible for producing the juvenile at any immigration proceedings (8 CFR §236.3).

¹⁸ A "criminal alien juvenile" as referred to in this memorandum is a juvenile who is removable on criminal grounds under INA §212(a)(2) or INA §237(a)(2).

¹⁹ If an alien is initially classified as a child, but later determined to be an adult, ORR then releases the alien back into DHS custody. The same action is taken for a child who turns 18 while in ORR's custody. If the alien at this point in time has a criminal history, he or she continues to be detained; otherwise the individual is often released.

forensic determination was only part of this process.²⁰ Despite differences in age determination, if an unaccompanied alien is determined to be an adult, ORR is not notified by DHS that such an alien is in their custody.²¹

Transfer Difficulties. There have been several cases where temporary misclassifications have occurred due to transfer difficulties. In cases where UACs have been held by DHS for more than 72 hours, DHS officials cite transportation difficulties as most often being the problem. DHS officials state that when a juvenile is apprehended without a legal custodian, their first priority is to locate a bed for the juvenile in a suitable facility. In a rural area there may be only secure facility beds available. These secure facilities, however, are used to temporarily hold the juvenile. DHS officials stated that their agency has “occasional use” contracts with many rural facilities around the country. Delays then arise in the transportation of the juvenile because ORR’s facilities are not located within a 4 hour ground proximity. Under such circumstances, other forms of travel must be arranged. DHS officials contend that if ORR would maintain “occasional use” contracts with facilities that are within 4 hours of ground transportation from most rural areas, the detention and custody-transfer problems would disappear.²²

DHS is responsible for the transportation and removal of any UAC from the United States. Unaccompanied juveniles who are to be deported from the United States must therefore be transferred back into DHS custody. Frequently, such removals take more than a month. According to DHS, the reason for the delay is due to the fact that it takes time to locate an adult in the return country to accept custody of the juvenile. Both DHS and ORR noted that consular officials can be particularly troublesome. Often times the consulates will change their documentation requests, or they will raise objections to a transfer (both with juveniles and adults). Furthermore, some foreign officials insist on meeting with the juvenile in person. Such visits often delay transfers and the consular travel expenses are paid for by DHS.²³

Transportation continues to be a source of tension between ORR and DHS, both at the front and back end of a child being in ORR’s custody. ORR and DHS often disagree on which agency should be transporting a juvenile to a given facility and when official transfer of custody should take place. ORR contends that such a transfer should only take place at an ORR facility, and thus DHS has the responsibility to transport any juvenile to and from an ORR facility. DHS has requested that ORR contract with rural detention centers and consider a child “placed” when deposited at a contracted detention center. Under such a

²⁰ In H.Rept.109-699 from P.L. 109-295, the conferees directed ICE to consider using more holistic age-determination methodologies. The methodologies would take into account a child’s physical appearance and psychological maturity, in addition to forensic evidence, when determining the age of a child when it is uncertain.

²¹ ORR officials informed CRS that they are only aware of the children that are referred to them. They will on occasion receive phone calls from human rights organizations and advocacy groups searching for certain individuals. Such unsolicited phone calls, however, are the only manner in which ORR is made aware that potential non-transferred juveniles are held in DHS custody.

²² DHS officials claim that any transport beyond 4 hours of ground transportation requires special arrangements, such as air travel.

²³ ORR and DHS officials believe that covering consular expenses creates a perverse incentive for foreign officials to take advantage of free travel within the United States.

contracting arrangement, ORR would be charged with the responsibility of transporting the juvenile from a rural contract center to a permanent facility.

Despite such placement difficulties, DHS maintains that it makes every effort to keep unaccompanied children separate from criminal juvenile aliens. In some exceptional cases, due to a shortage of facilities, non-criminal juveniles are placed in the same facility as criminal juveniles.²⁴ Such placements are generally brief in duration. While the juveniles are allowed to interact, they are only allowed to do so during the daytime under the supervision of trained professionals. Non-criminal juveniles are never housed at night with criminal juveniles. DHS officials stress that such mixed-detention circumstances are rare, and that the system allows for housing criminal and non-criminal juveniles together even under ORR's care. Currently, ORR must accommodate all unaccompanied minors, even if they have a criminal record.²⁵

Resources. DHS claims a significant reason why there have been difficulties with processing juveniles is that DHS did not foresee the amount of effort they would have to expend in this area. With the passage of the Homeland Security Act, the former-Immigration and Naturalization Service (INS) transferred a number of experienced staff members over to HHS in an effort to smooth the transition. DRO anticipated a 60% reduction in its workload as a direct result of the UAC program being transferred to ORR. According to DHS officials, however, the DRO workload has remained the same as under the former-INS. In large part, this sustained workload is due to the training of new officers who were brought in to replace officials that transferred to ORR. DHS also reports that a high turnover amongst its field officers further contributes to its workload problem. DHS states that these issues are currently being addressed.

Scenarios and Agency Procedure

Listed below in bullet points are the scenarios where alleged inconsistencies in applying the statutory definition have occurred:

- *It has been alleged that when DHS arrests a child along with alien adults with no demonstrable or verified familial or legal relationship to the child, the child is sometimes designated as "accompanied" for immigration enforcement purposes and placed in expedited removal.*

The definition of "unaccompanied" has been altered by DHS officials in the last few months. According to DHS officials, beginning in May of 2006, DHS began enforcing an interpretation of custody that extends only to those individuals who are the parent or legal guardian of the minor. This interpretation, DHS officials believe, aligns with the interpretation of ORR and the statutory definition of UAC. Previously, DHS had attempted

²⁴ The contracting and development of additional facilities have alleviated some of the pressures to house non-criminal juveniles with criminal juveniles. Furthermore, DHS has worked to alleviate the shortage of "family unity" housing that sometimes forces family members to be sheltered separately. DHS now has a 512 bed facility in Taylor, TX and 84 beds available for "family unity housing" at their facility in Berks County, PA. At the most recent count, 423 of the beds in the Taylor, TX facility were in use. DHS officials also stated that additional facilities are under construction.

²⁵ Officials at DHS believe that ORR's responsibility to accommodate unaccompanied juvenile offenders is problematic because their facilities are "not secure." Consequently, there have been several escapes of criminal juveniles from ORR facilities.

to keep individuals with close family ties together.²⁶ DHS officials added that under this previous interpretation, if an individual could show that he or she was a parent, adult sibling, legal guardian, or grandparent, DHS would detain the individual together with the child. Yet, this broader interpretation has been abandoned, DHS officials said, because of litigation fears, false claims by traffickers, and a desire for less ambiguity in the application of the law. Under the current system, if the legal custody is in question the adult must demonstrate forensic ties or legal guardianship through a court order to qualify as the accompanying adult.²⁷ If neither of these criteria is met, the child is removed from the adult's care and transferred to ORR.

The previous DHS interpretation of UAC is compatible with other sections of the *Code of Federal Regulations*, and may contribute to confusion among child advocacy groups. For example, 45 CFR §400.111 defines an unaccompanied minor as an individual “*who entered the United States unaccompanied by and not destined to... a close nonparental adult relative who is willing and able to care for the child.*”²⁸ This regulatory definition is intended for child welfare agencies, but it seemingly falls in line with the former DHS practices as well. Furthermore, the release criteria for UACs listed in 8 CFR §236.3 may also provide confusion. According to this section, a juvenile may be released to an adult relative (such as an uncle or grandparent) who is not in DHS detention.²⁹ However, if these adult relatives are accompanying the unauthorized child across the border, but are not a parent or legal guardian, the child may be detained as a UAC. Thus, the fact that a juvenile may be released to an adult relative who would not qualify as making the child “accompanied” at the time of apprehension may contribute to procedural confusion.

- *It has been alleged that sometimes DHS separates arrested family units so as to then designate individual children "unaccompanied" for placement with ORR.*

DHS officials discussed circumstances when despite being accompanied by a parent or legal guardian a child will be designated as unaccompanied by DRO. One of the scenarios discussed is when the parent or legal guardian is a criminal alien and must be housed in detention units for criminal aliens. In such cases, DHS officials stated, DRO is legally unable to keep the child with the parent or legal guardian and places the child under the care of ORR, since such facilities are not considered “suitable” under 8 CFR §236.3. In other cases, the DHS officials stated, the separation of children from their family is based upon a shortage of bed space. DHS has noted in reports by the Office of Inspector General (OIG) that longer-term care facilities are frequently not readily available to accommodate families. Under such

²⁶ The previous policy appears to have stemmed from the *Flores* settlement guidelines for detained juveniles (*Reno v. Flores*, 507 U.S. 292 (1993)).

²⁷ 8 CFR §236.3.

²⁸ According to 45 CFR §400.111: “Unaccompanied minor means a person who has not yet attained 18 years of age; who entered the United States unaccompanied by and not destined to (a) a parent or (b) a close nonparental adult relative who is willing and able to care for the child or (c) an adult with a clear and court-certifiable claim to custody of the minor; and who has no parent(s) in the United States.”

²⁹ According to 8 CFR §236.3: “Juveniles shall be released in order of preference to (i) A parent; (ii) Legal guardian; or (iii) An adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service [DHS] detention, unless a determination is made that the detention of such juvenile is required to secure his or her timely appearance before the Service or the Immigration Court or to ensure the juvenile's safety or that of others.”

circumstances the juveniles are treated as unaccompanied minors and placed under ORR's jurisdiction.³⁰

DHS and ORR consider these children (listed in the above scenario) to be unaccompanied pursuant to the UAC statutory definition since the parent or legal guardian, although present in the United States, is not available to provide care and physical custody for the child. Furthermore, both agencies consider the child unaccompanied if in the custody of a relative upon apprehension that is not a parent or legal guardian, although the actual decision is made by DHS. DHS and ORR are not aware of any cases where there have been adults who have presented documentation to successfully back a claim of legal guardianship.

Some children that are designated as "unaccompanied" actually have parents or legal guardians in the United States, but for various reasons the custodian does not come forward. Regardless of whether a UAC is picked up by CBP or ICE, it is sometimes the case that parents who are unlawfully present will not come forward out of fear of facing removal.³¹ Other times there is confusion with the family over where they are to appear or find their child, since DHS often transfers juveniles from the original locations. Linguistic barriers can also make communication especially difficult.

- *It has been alleged that sometimes DHS arrests a child and designates the child "accompanied" by virtue of the fact that the child had been living previously in the United States with a parent or legal guardian and thus subject to DHS and not ORR care and custody.*

DHS officials indicated to CRS that such a scenario is not part of their practice, and the opposite outcome is more likely to occur. The DHS criteria for a juvenile being considered "anything other than unaccompanied"³² is that the parent or legal guardian must be able to provide care to a child. DHS interprets this criterion in a "very strict" manner, according to DHS officials, and if a parent or legal guardian is not present to provide care (or cannot be present within a short period of time) that child is technically considered unaccompanied and processed accordingly. Children with parents in the United States may therefore still be classified as unaccompanied. DHS claims that this subset of unaccompanied alien children constitutes a very small percentage of the alien juveniles the agency apprehends.

- *It has been alleged that sometimes when DHS arrests family members who are not the parent or legal guardian, DHS treats the child as "accompanied" for placing both the adult and child in their family shelter (e.g. adult sibling-child sibling).*

When DHS arrests an unauthorized alien juvenile with an adult, they question both the adult and the juvenile on their relationship. If there is reason to doubt that the adult is the

³⁰ U.S. Department of Homeland Security, Office of Inspector General, Office of Inspections and Special Reviews, *A Review of DHS' Responsibilities for Juvenile Aliens*, OIG-05-45, September 2005, pp. 19-20.

³¹ According to ORR, DHS does not apprehend the families in many such cases because of lack of resources. DHS officials admitted that a shortage of resources sometimes prevents them from fulfilling all the agency's obligations.

³² This phrase is not included in the regulations. Rather, it was a term used by DRO officials during the interview.

parent of the accompanying juvenile, forensic tests may be conducted. If the adult claims to be the legal guardian of the child, the adult must have a court order to that effect. If the juvenile is found not to be the child or legal charge of the accompanying adult, the child is transferred to ORR within 72 hours.³³

DHS officials acknowledge that there are sometimes difficulties in establishing the relationship between a child and an accompanying adult. Officials state that unauthorized juveniles occasionally lie to field officers, claiming that the adult is their parent. In actuality, DHS and ORR maintain, these adults may be human traffickers or extended relatives. The cases of extended relatives pose particular difficulties because of differing cultural interpretations of what “legal guardian” actually means. From DHS’s standpoint, however, a *de facto* guardian must still have the appropriate legal documentation.

- *It has been alleged that sometimes when DHS has a UAC in custody, DHS arrests parents or legal guardians, reclassifies the child as "accompanied," and places both parent and child in the DHS family shelter.*

DHS officials stated that it is the policy of DHS to run background checks on adults seeking to claim detained alien juveniles. The officials also maintain that if DHS determines that the adult is a criminal or an unauthorized alien, then the alien is placed into detention. At this time, if the adult is deportable for non-criminal reasons, DHS will keep the family unit together (provided that space is available in a “family unity” facility)³⁴ and the child will be classified as “accompanied.” However, if the adult is deportable on criminal grounds, DHS must keep that adult separate from the non-criminal adult population,³⁵ and consequently the family unit cannot be housed together in the family detention center (and the juvenile remains classified as “unaccompanied”). DHS subsequently consolidates the immigration proceedings of both the parent and the child. If the parents are placed in expedited removal, the juvenile is subject to these same proceedings since they are now considered a part of the family unit. The “accompanied” juvenile does, however, have the option of withdrawing his or her application for admission and voluntarily departing the United States (as do UACs).³⁶

As discussed previously, if it is not feasible to place the child and parent in the family detention unit, the child is unaccompanied because the parent while detained is not available to provide care and physical custody. The child will remain within ORR’s custody until the child is either removed from the United States with the parent, or DHS releases the parent. If DHS releases the parent, the child is released to the parent.

One claim made by DHS is that ORR is releasing juveniles to unauthorized aliens. DHS officials stated that their agencies have a policy that any adult coming to claim a juvenile must be a legally present alien or a United States citizen. ORR’s requirements are that the adult

³³ As mentioned previously, if the child is Mexican or Canadian, the child may be taken to the border and allowed to voluntarily return to his or her home country.

³⁴ If space at a “family unity” facility is unavailable, DHS reverts to the scenario listed above, where the child is separated from the family and classified as a UAC.

³⁵ U.S. Department of Justice, “Processing, Detention, and Release of Juveniles,” 63 Federal Register 39762, July 24, 1998.

³⁶ 8 CFR §240.25 and U.S. Department of Justice, “Processing, Detention, and release of Juveniles,” 63 Federal Register 39761, July 24, 1998.

must only demonstrate their legal relationship to the juvenile, which stands in contrast to the DHS background check and detention of removable aliens.³⁷

Agency Concerns

At present, there is a Statement of Principles between DHS and ORR, but both DHS and ORR officials believe it is general and does not address all of the interagency issues. ORR officials told CRS that they support the creation of a Memorandum of Understanding (MOU) between DHS and ORR to address differing release policies and other operational issues. ORR argued that it is important, for the successful completion of the MOU, to have DHS and ORR represented by a team of senior level agency officials. ORR specifically wishes that an MOU would produce the following outcomes:

- ORR receiving greater input from DHS field agents;
- higher political backing within DHS;
- clarification for determinations on who is an unaccompanied minor;
- a resolution of transportation issues and disputes;
- sharing of information and documentation between DHS and ORR;
- multilateral communications with DHS officials in Washington, DC, as opposed to only bilateral communications with the National Juvenile Coordinator.³⁸

Despite ORR's strong call for an MOU, DHS officials showed some reluctance towards the idea when questioned by CRS. According to DHS officials, there are currently a series of joint operations between DHS and ORR, as well as individual operations by each agency related to unaccompanied alien children. In DHS's opinion, these operations should be allowed to develop further to eventually serve as the backbone of an MOU. Despite such reluctance for an immediate MOU, DHS official asserted that several issues need to be addressed:

- ORR must reform its release criteria so that juveniles are only released to legally present aliens or United States citizens;
- ORR needs to have more facilities, including facilities in rural areas and "occasional use" contracts;
- ORR must alter their definition of "consultation with DHS" in relation to releasing a juvenile from ORR's custody.³⁹ DHS would like to have more active consultation, but stated it would need to receive more information for each case in order to give substantive advice regarding disposition of a case or a child's release to foster care;

³⁷ Given the differing documentation requirements, it is more likely that a parent or legal guardian would come and claim a juvenile from ORR's custody than from DHS', as interactions with ORR entail less risk for unauthorized aliens.

³⁸ ORR's concern is similar to a recommendation made in the U.S. Department of Homeland Security, Office of Inspector General, *A Review of DHS Responsibilities For Juvenile Aliens*, OIG-05-45, September, 2005, pp. 33-37. This report recommended that the National Juvenile Coordinator should be positioned higher up in DHS and not just under DRO. Such a vertical repositioning would enable the National Juvenile Coordinator to represent and coordinate DHS juvenile policy more effectively.

³⁹ Officials at DHS believe that "consultation" in its current state constitutes "notification" rather than active participation .

- the Executive Office for Immigration Review (EOIR) system needs reform to accommodate minors. DHS believes that there should be special guidelines developed by the Department of Justice (DOJ) for handling juvenile cases in a more expedited manner.

Regarding ORR's stated concerns, DHS officials acknowledged that there has been a shortage of information sharing from field officers, particularly with ORR. According to DHS, the issue arose largely from a lack of officer training and officials claim that DHS is currently taking steps to address this issue. ORR's request for shared documentation is more problematic, however, since DHS claims that some documents are either difficult to get or unavailable. DHS claims that some of these desired documents are held by local, state or federal agencies or courts and should be requested directly from these agencies or courts. Furthermore, officials stated that there are some documents they may not be permitted to share with other agencies. Such restricted documents are from criminal records and national security databases for which HHS/ORR may not have authorized access.⁴⁰

DHS and ORR maintain that despite differing philosophies and agency cultures they are both addressing past procedural uncertainties, mistakes and differences. Although a series of memoranda clarifying the agency roles and definitions would prevent some of the aforementioned issues from reoccurring, the most significant hurdle is resources. Both agencies have expressed a strong desire to stay within the parameters of their statutory obligations. However, shortages of beds, insufficient staff, inadequate training, transportation disagreements, and mistaken classifications have led to difficulties.⁴¹ Resolving these issues will be necessary before a consistent definition of "unaccompanied" can be applied. Until such a resolution is reached, field officers will likely continue to adjust classifications according to the circumstances and available resources.

⁴⁰ DHS has now been directed in H.Rept.109-699 to cooperate more transparently with ORR (Conference Report to P.L. 109-295, which became effective October 4, 2006.) The conferees directed ICE to notify ORR immediately upon apprehension of an unaccompanied minor, and to resolve differences over the transfer and processing of such children. Furthermore, the conferees directed ICE to submit monthly figures from FY2005 and FY2006 on the number of UAC's held for less than and more than 72 hours to the Committees on Appropriations.

⁴¹ One significant resource expenditure for ORR is for hiring trained professionals to care for the children in ORR's custody. ORR has asserted that the majority of unaccompanied alien children arriving in the United States have special needs. These special needs cover a wide range of issues, but include teenage pregnancy, acute mental illness, severe depression, and other physical illnesses. Frequently, these children have experienced trauma or domestic abuse in their country of origin. Increasingly, the children have become targets for physical and sexual abuse by traffickers on their journey to the United States. ORR officials stated that nearly all unaccompanied children have been sexually abused at some point prior to reaching the United States.