

**Senate Judiciary Committee**  
**Subcommittee on Border Security and Immigration**  
**May 23, 2018**  
**TVPPRA and Exploited Loopholes Affecting Unaccompanied Alien Children**  
**HHS Witness: Steve Wagner**  
**Questions for the Record**

Tillis

1. *Do you know how many UAC currently under the supervision of ORR are affiliated with, or are members of, MS-13 and other gangs? Do you have a rough estimate of how many?*

Answer: The Office of Refugee Resettlement (ORR) does not maintain this information in a reportable format. If an Unaccompanied Alien Child (UAC) has gang affiliation or suspected gang affiliation, this information is documented in a UAC's case file and other assessments. However, on June 9, 2017, ORR staff individually reviewed case files for the 138 UAC in staff secure and secure facilities (this is the total number of UAC placed in staff-secure or secure facilities that day and is often where gang affiliated youth would be placed due to a belief that a UAC affiliated with a gang is dangerous, *see* 8 U.S.C. § 1232(c)(2)(A)). Of the 138 in care on that day, 35 were voluntarily involved with gangs. Four of the UAC claimed they were coerced into gang involvement. ORR undertook this one-time review of secure and staff secure cases in response to Congressional inquiries on the subject.

2. *How do you determine affiliation? What sources of information do you pull from?*

Answer: ORR typically learns of gang affiliation from one of four possible sources: law enforcement, UAC self-disclosures, UAC family interviews, or information provided to ORR from schools.

At the time of a UAC's referral, the Department of Homeland Security (DHS) is typically able to provide information on whether a UAC is a suspected gang member based on disclosures or evidence collected by DHS or another law enforcement agency. This information is documented with a UAC's referral to ORR and considered by the office when making a placement decision for the UAC.

In other instances, UAC may disclose their gang affiliation during interviews or assessments with ORR care provider clinical staff. Other children may boast about their affiliation to ORR care provider staff or other UAC at the facility. When a UAC self-discloses gang affiliation, care providers report it to ORR via a significant incident report (SIR).

Additionally, ORR conducts case management services, which include contact with a UAC's family for information about the UAC's history. Family may report that the

UAC is or was previously involved with gangs in their home country or in the United States.

If a UAC was an “internal apprehension,” that is, not apprehended at the United States’ border, and has been living in the United States, they often have been going to public schools. As part of ORR’s case management program, the ORR care provider contacts school officials for any educational information or other school records that are relevant to a UAC’s case. These records may report that the UAC is suspected of being in or was involved with a gang at the school.

3. *Can you walk us through the screening protocol and removal procedures?*

Answer: ORR is not involved in UAC removal, and defers to DHS on questions related to removal procedures.

After a UAC is apprehended by DHS and referred to ORR, ORR makes a placement decision for that youth. Placement refers to the transfer of a UAC to an ORR care provider facility. ORR considers a number of factors when making a placement decision. See ORR Policy Guide, 1.2.1.

<https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2> If ORR receives information that a UAC poses a danger to self or others or has been charged with having committed a criminal offense, ORR considers the UAC for placement in a more restrictive setting, such as a secure or staff-secure facility, as opposed to placing the UAC in a residential shelter. Staff secure and secure facilities maintain higher security protocols than shelters to control disruptive behavior and prevent escape. These security protocols include measures such as a higher staff to UAC ratio. See ORR Policy Guide, sections 1.2.4 and 1.2.5. <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2>

After ORR makes a placement decision, DHS transports the child to the assigned ORR care provider facility. Within five days, the UAC is provided an assessment to gather preliminary information on his or her biographical information, trafficking/victimization, abuse history, family history, and criminal history. See ORR Policy Guide, section 3.3.1. <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.3.1> The child is reassessed every thirty days thereafter. While in ORR custody, the child receives all legally mandated services including case management, medical, educational, clinical and other services tailored to the UAC’s individual needs. See ORR Policy Guide, section 3.3. <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.3>

4. *How does ORR vet sponsors?*

Answer: A sponsor of a UAC must be able to provide for the child’s physical and mental well-being. See 8 U.S.C. 1232(c)(3)(A). ORR requires that a sponsor submit

an application, including submission of identity documents and other supporting documentation. ORR also conducts assessments of the sponsor, including a home study, if necessary; conducts interview of the sponsors, UAC, and the UAC's family members if sponsorship is based on the sponsor's relationship to the UAC's family; and requires background checks, including fingerprints of the sponsor and adult members of the sponsor's household.

During this process, called the family reunification process, an ORR federal field specialist considers all the information gathered, including results of background checks and makes a suitability determination on the release after considering recommendations from the UAC's ORR care provider case manager and a third-party review of the case by a case coordinator. If the UAC is or was previously placed in a secure or staff-secure care provider facility, the ORR federal field specialist elevates the release decision to the ORR Director. Cases in which the ORR federal field specialist recommends denial to a parent or legal guardian are likewise elevated to the ORR Director for a final release decision.

5. *Does the Department check sponsors for alleged criminal activity or gang affiliation?*

Answer: ORR conducts public records checks, sex offender registry checks, and fingerprint based National Criminal History Check (Federal Bureau of Investigation) on all sponsors and adult household members. Additionally, sponsors' and adult household members' fingerprints are sent to the Department of Homeland Security for an immigration status check, a criminal background check of national databases and a biographic check for wants and warrants. A child abuse and neglect (CA/N) check is also conducted on a state-by-state basis in cases where a home study or special concern is identified or where the sponsor is unrelated or distantly related to the UAC.

6. *What databases does the Department source their information from?*

Answer:

- Public records checks using commercial-based web companies that check public records for criminal information.
- Sex offender registry checks through the Department of Justice's National Sex Offender Public Website.
- Immigration status checks and background checks through DHS.
- Fingerprint based criminal history checks through the Federal Bureau of Investigation's (FBI) National Crime Information Center (NCIC) database. Additionally, ORR may conduct further criminal history checks through state repositories where there are unresolved criminal arrests or issues that are still in process and would not necessarily be found in the NCIC check.
- CA/N checks, where applicable, obtained on a state-by-state basis as no national CA/N repository currently exists.

7. *Is there coordination between law enforcement and ORR as to whether the sponsor lives in a community plagued by gang activity?*

Answer: ORR notifies DHS of a sponsor's address before and after release. In addition, ORR published a new policy in October 2017, section 5.9, Sharing Information with Local Communities. Under the policy, ORR will notify local law enforcement when a UAC is released into that community from a staff-secure or secure facility. ORR is working to identify points of contact with local authorities and developing notification procedures.

8. *How many unaccompanied minors actually go to their birth parents when released, and not to a general sponsor?*

Answer: In fiscal year (FY) 2017, approximately 50 percent of all UAC releases were to a parent/legal guardian (Category 1 sponsor). In FY 2018, that number has dropped to approximately 40 percent.

9. *Mr. Wagner, in this [Washington Post article](#), the author cites to a Senate Committee hearing in which you mentioned DHHS had lost track of 1,475 children who had crossed the U.S.-Mexico border on their own.*

- a. *Can you please clarify the multiple press reports on this issue?*

Answer: HHS did not "lose track" of 1,475 UAC. Those were cases of children who were released to a sponsor who did not respond to follow-up safety and well-being phone calls from the UAC's case worker 30 days after a UAC was discharged from HHS' custody.

- b. *Are you aware of where these individuals are now?*

Answer: We have no reason to believe those UACs are anywhere other than with their sponsors.

10. *In 2015, the Senate Homeland Security & Governmental Affairs Committee found that 40 percent of unaccompanied minors failed to show for immigration hearings over an 18-month period. I am concerned about what happens in the time between when they are released and the day of their hearing, for which many seem not to show up. My concern is during that window, they are typically in communities already populated with MS-13 or other gangs such as the 18th Street Gang.*

- a. *What steps has your agency taken to improve follow-up procedures once these minors are released?*

Answer: Before a UAC is released to a sponsor, the care provider engages in after care planning with the sponsor, including helping the sponsor to identify resources for the UAC in the community. All sponsors are offered a legal orientation, which emphasizes the need for UAC to attend all of their court appearances. ORR also provides all sponsors with a sponsor's handbook that

also explains the need for UAC to go to court and other responsibilities the sponsor has for the UAC.

ORR conducts follow-up calls 30 days after a UAC's release from HHS custody. During this time, a case worker checks in with the sponsor and child to see how the sponsorship is going and, if requested to provide further assistance, including assigning post-release services for the child if the family could benefit from additional ongoing support from a post-release service case worker. ORR policy requires ORR contractors and grantees to report any concerns they may have about the safety of a child that has been released from ORR custody. The person reporting must notify ORR and the appropriate investigative agency (law enforcement or child protective services). The ORR National Call Center is available for grantees and contractors to seek advice and to report concerns. For more information about post-release services, including what specific types of services are provided, see ORR Policy Guide, section 6.2. <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-6#6.2>

Additionally, ORR has expanded the number of UAC who receive post-release services either at the time of release or after a safety and well-being call over the past several fiscal years. For example, ORR provided post release services in 8,618 cases in FY 2015, 10,546 cases in FY 2016, and 13,381 cases in FY 2017. The expansion of post-release services helps ensure better access to community resources for UAC and their sponsors, and more support to avoid sponsor disruption.

*b. Is it likely that during this window of time, between release and immigration hearing, these minors are pressured back into this life of crime and violence?*

Answer: ORR does not release UAC who are dangers to themselves or others. We note that the majority of UAC are not criminals and have had no involvement with gangs.

*c. How many UAC skip their immigration hearings?*

Answer: For questions regarding UAC attendance at immigration proceedings, please contact the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR). DOJ EOIR is the agency responsible for the administration of the immigration courts.

*d. How many do you expect will skip this year?*

Answer: For questions regarding UAC attendance at immigration proceedings, please contact DOJ EOIR. DOJ EOIR is the agency responsible for the administration of the immigration courts.

- e. *What tools does ORR need to improve attendance at immigration hearings?*

Answer: For questions regarding attendance of former UAC at immigration proceedings, please contact DOJ EOIR. DOJ EOIR is the agency responsible for the administration of the immigration courts.

While UAC are in ORR custody, ORR is responsible for transporting UAC to all hearings and proceedings to which they are a party. ORR currently has mechanisms and a process in place for ensuring children attend immigration hearings while in ORR custody. Before a UAC is released, the sponsor is provided a sponsor handbook that explains the sponsor's responsibilities and can attend a legal orientation program that also explains the responsibilities of a sponsor. Sponsors also sign a Sponsor Care Agreement that includes a provision about court attendance. Once a child leaves ORR custody, it is the sponsor's responsibility to ensure the individual attends immigration hearings. Finally, we note that sponsor identity and residence information is provided to DHS through discharge notifications.

- f. *What changes has ORR enacted since then to combat these problems?*

Answer: In December 2017, ORR made attendance at a Legal Orientation Program for Custodians (LOPC) one factor in the release assessment. LOPC is the DOJ EOIR's program about the importance of immigration proceedings. See ORR Policy Guide 2.4.1. <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.4.1>

- g. *Has the Department consulted with our law enforcement agencies to use best practices for following up with these minors after they're released?*

Answer: ORR and facility staff have received training on gang activities and preventing gang recruitment. ORR field staff also coordinate with gang prevention task forces. Under the policy, ORR will notify local law enforcement when a UAC is released from a staff-secure or secure facility. ORR is working to identify points of contact with local authorities and developing notification procedures. See ORR Policy Guide, Section 5.9 <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-5#5.9> We believe this information can be vital to help local law enforcement track UAC at risk for gang recruitment or contact with criminal organizations.

- h. *Is it fair to say that improving follow-up procedures are not enough when more needs to be done in the individual communities to prevent a gang-stronghold?*

Answer: Yes, crime is a multifaceted problem. ORR vetting and notifications cannot change these root causes of crime, which are out of the agency's control.

- i. *What should we be doing to limit the influence criminals have in these communities?*

Answer: I defer to DOJ and DHS to respond to this question.

- j. *Is there a system of checking in with any ORR personnel?*

Answer: Sponsors and UACs placed with a sponsor have an opportunity to reach ORR for assistance. An ORR contractor administers the ORR National Call Center (ORR/NCC). The ORR/NCC has case workers who are on standby to assist UACs placed with a sponsor and sponsors with issues that may arise post-release. If the ORR/NCC becomes concerned about potential abuse or if the UAC placed with a sponsor appears to be in immediate danger, a case worker will contact state child protective services and local law enforcement as necessary. See ORR Policy Guide, section 6.4.

<https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-5#5.9>

- k. *Has ORR requested help from other agencies?*

Answer: ORR works in collaboration with Federal agency partners such as DOJ and DHS.

### Hirono 9

*The Trump Administration has been very aggressive in using the separation of families as a scare tactic, designed to deter immigration from Central America, where children are being targeted by gangs and sex traffickers. With the new "zero tolerance" policy, this can only get worse. Already this fiscal year, according to the New York Times, more than 700 children have been separated from their parents, including more than 100 under the age of four.*

- a. *If parents in the families that are separated at the border are criminally prosecuted and convicted, won't the children be held in ORR custody indefinitely?*

Answer: ORR releases the overwhelming majority of unaccompanied alien children (UAC) in its custody to sponsors. According to its statutory requirements, ORR has a general policy favoring release of UAC to sponsors, rather than keeping UAC in its custody. ORR recognizes three categories of potential sponsors. In order of preference: Category 1 sponsors are parents and legal guardians; Category 2 sponsors are immediate relatives; and Category 3 sponsors are distant relatives or unrelated adults. See ORR Policy Guide (ORR Guide) Section 2.2.1, available at

<https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.2.1>.

If a UAC's parent is detained on criminal charges, ORR will both seek to establish contact between the parent and their separated child, and attempt to identify another suitable sponsor for the child (with the parent's involvement, to the extent possible), or plan for reunification with the parent under appropriate circumstances. As a result, although ORR may not release a separated minor to his or her parent who is in custody, ORR nevertheless does make efforts to release the UAC to another qualified individual. All prospective sponsors, including parents, are subject to criminal background checks, relationship verification, and vetting for suitability.

To the extent ORR is unable to identify a prospective sponsor for a UAC, then it retains custody.

#### Hirono 10

*In April 2018, HHS and DHS announced the creation of a Memorandum of Agreement (MOA) gave HHS responsibility for gathering biographic and biometric (fingerprinting) information from potential sponsors and other adults living in the potential sponsor's home. This is a dangerous break with precedent, and violates the Flores agreement, which was designed to separate the law enforcement side from the care and best interests of the children.*

- a. *How will HHS address, or has the agency planned for, the inevitable increase in length of stay and capacity issues that will result from sponsors and other adults fearing coming forward for children in ORR custody?*

Answer: ORR is always looking for ways to expand capacity in its shelters by working with current grantees to increase bed capacity at existing shelters and by looking for new grantees that meet ORR's criteria to provide care to UAC. Additionally, we note that sponsor information has always been shared with DHS through discharge notifications. We also understand that FBI shared data during a fingerprint check using the DHS Central Index System.

The background check policy updates are not a break from historical precedent. This is not the first time ORR has required parents to provide fingerprints. ORR required fingerprints from all sponsors as far back as 2013. In addition, ORR already required fingerprinting and FBI checks for some sponsors and household members prior to the MOA. Prior to the MOA, parents and legal guardians needed fingerprints if there was a documented risk to the safety of the child, if the child was especially vulnerable, and/or if the case was referred for a home study. If those factors were present in sponsors of any sponsor category, household members and other adults identified in the sponsor care plan would need fingerprints. ORR required all potential sponsors who were not parents or legal guardians to get fingerprints. The new policy requires fingerprints in all sponsor categories and for all household members.

- b. *How does enforcement against potential sponsors and other adults in the home affect the agency's ability to provide for the best interests of the children?*

Answer: As noted above, HHS traditionally shared sponsor information with DHS, as such information is necessary in order to ensure the child is properly served with notices to appear for immigration court. HHS believes that a comprehensive fingerprint check will assist the agency to ensure that those claiming to be relatives of the child have properly identified themselves, as well as to determine the full criminal background for all sponsors.

#### Hirono 11

*It has been reported that ORR directed shelters across the country to share an inaccurate Texas brochure about abortion called "A Woman's Right to Know" with minors in their care. A 2016 Rutgers University study evaluated the Texas brochure and found that it was rife with medically inaccurate statements. It also contains information specific to Texas law, which has particularly harsh abortion restrictions, so distributing the pamphlet nationwide seems designed to mislead and deceive minors about their rights.*

- a. *Why did ORR decide to put this Texas-specific pamphlet in shelters nationwide?*

Answer: The majority of ORR's bed capacity is located in the state of Texas. This brochure was readily available and at the time deemed appropriate for use to provide consistent information throughout the network.

- b. *What reason is there to tell a minor in California, for example, about Texas abortion requirements other than to mislead her about her rights?*

Answer: Please see above response.

#### Hirono 12

*Mr. Wagner, as you know, HHS is required by the Homeland Security Act of 2002 to "ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child" (6 U.S.C. 279(b)(1)(A)). In both Republican and Democratic administrations, HHS has continuously met this obligation through an independent network of qualified legal service providers.*

*Are you currently complying with the law? If so, can you explain in detail how?*

Answer: The Homeland Security Act of 2002 outlines the responsibilities of ORR in caring for unaccompanied alien children. Under 6 U.S.C. 279(b)(1)(A), ORR is responsible for "coordinating and implementing the care and placement of unaccompanied alien children who are in federal custody by reason of their immigration status, including developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely

appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on November 25, 2002.” ORR has provided care and custody to UAC, and has provided access to legal services, particularly pro bono services, to children since it assumed responsibility for UAC in 2003.

Following the Homeland Security Act of 2002, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), included the following: “the Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.” (8 U.S.C. 1232(c)(5)).

The TVPRA language instructs ORR that legal services are to be provided to the “greatest extent practicable,” and that in accordance with 8 U.S.C. 1362, ORR cannot be mandated to pay for such services. Accordingly, ORR supports pro bono representation and currently provides ORR-funded legal representation for some UAC. All UAC receive a legal resource guide that provides information about the child’s rights and the immigration process as well as contact information for legal service providers.

#### Leahy

*I believe that we should debate important issues like immigration based on the facts. President Trump and some members in Congress would have the public believe that MS-13 gang members are pouring into our borders by the thousands every year, representing a sizeable portion of the children attempting to enter the U.S. The reality is, the vast majority of children desperately seeking refuge within our borders are fleeing gang violence. In an August 2017 memo to the White House, DHHS acknowledged that less than two percent – 1.6% percent, precisely – of the all unaccompanied children in its care have any gang history.*

*Q. In that same memo, your agency acknowledged that the “great majority” of unaccompanied children “do not pose a safety risk to the public” and “come to the U.S. to escape violence and gangs in their home communities.” Do you stand by that statement, regardless of how the specific percentage may have changed?*

Answer: ORR continues to observe that most UAC in its custody are not gang members, and that many in fact came to the United States in order to flee gang violence. Some of this quote, however, appears to be taken out of context, as it is not correct that the quote stated that a “great majority” of UAC are here to escape violence or gangs. At the same time, in our experience, gang affiliation is a complicated issue, and minors may have varying degrees of exposure to and involvement with gangs, both in their home countries and in the United States.