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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
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March 31, 2015

The Honorable Sylvia Mathews Burwell
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Secretary Burwell:

I am writing to you today to request information about your agency's conduct with respect to its treatment, care, and processing of unaccompanied alien children (UAC).¹ It has come to my attention that the Department is failing to provide for the health and safety of the UAC that have been entrusted to your care. Additional information is now needed in order to determine both the extent of the problem and what solutions can be implemented to solve the problem.

As you are aware, the United States has witnessed a substantial influx of alien minors (both accompanied and unaccompanied) from Guatemala, El Salvador, Honduras, and Mexico over the last few years, with an unprecedented spike in the number of illegal entries in 2014. Based on news accounts, it appeared that the sheer volume of alien minors who reached and entered the United States overwhelmed existing border security and infrastructure resources at the time, and that the Department became increasingly involved in the effort to address the UAC influx as the volume of alien minors entering the United States grew.² Recent news reports indicate that a similar, if not larger, influx of individuals from Central and South America is expected this year.³

I have been alerted to a number of specific problems regarding the manner in which the Department has handled, or mishandled, the UAC influx, including the potential failure to screen entrants for factors that might render them ineligible for entry into the United States, as well as potential, significant failures to properly care for and monitor the innocent children who have come into your custody. These problems appear to be serious and ongoing, and require the immediate attention of both the Department and Congress.

¹ The Department also now appears to be using the terms "unaccompanied child" and "unaccompanied children," and the corresponding "UC" acronym. For the sake of consistency, this letter will use UAC.

² See, e.g., Melissa del Bosque, *Obama: Spike in Children at Border 'Urgent Humanitarian Situation'*, TEXAS OBSERVER (Jun. 2, 2014) (noting White House domestic policy director Cecilia Munoz indicating that "the scale in the last few months caught the government off guard," and quoting Munoz as stating that "[t]he number of children coming [to the United States] is much larger than we anticipated").

³ See, e.g., Paul Bedard, *12,509 illegal kids already over border in second wave, just 1 in 6 returned*, WASHINGTON EXAMINER (Mar. 23, 2015) (noting that U.S. Border Patrol has seized 12,509 aliens under the age of 18 at the U.S.-Mexico border since October 2014); see also Caroline May, *Another Wave Begins: More Than 12,500 Illegal Minors, 11,130 Family Units Apprehended at Border*, BREITBART.COM (Mar. 23, 2015).

The specific issues are as follows:

Failure to Address Sexual Abuse and Other Incident Reports Involving Alien Minors. Perhaps the most disconcerting report received about the Department's apparent mishandling of the UAC influx is the allegation that the Department has failed to investigate or address literally thousands of allegations of unspecified but inappropriate incidents while under the supervision of the Department. The information available at this time indicates that at least some of these incidents involve sexual abuse or violence against the UAC referred to your care.

I understand that some UAC have reported abuse that had occurred at different stages of their journeys, including while en route to the United States. Some incidents of abuse, however, may have occurred while minors were in federal custody or in the custody of Department-selected contractors. In both instances, information exists that indicates the Department has been and is aware of these incidents but has chosen not to address them, or to not address them in any meaningful way.

I also understand that the Department maintains what are known as "Significant Incident Reports" (or "Serious Incident Reports")⁴ for internal use, and that there may be tens of thousands of these reports – some of which document instances of abuse or violence committed against UAC – that have yet to even be reviewed, much less investigated by the Department or referred to the Department of Justice or other appropriate authorities for further criminal inquiry. I have also been told that, despite all of the money the Department spends on infrastructure and information technology, many of these Significant Incident Reports are not digitally available, thus making it difficult to review, evaluate, and derive basic information from the reports, or even have an understanding of the total number of reports.

I hope you will agree that it is important to determine the degree to which the health and safety interests of these alien minors have been addressed, not just for the sake of basic decency or because these individuals have been living under the ostensible care of our government, but also because addressing these problems in the short and long terms will require taxpayer resources. It is incumbent upon you and the Department to have a clear understanding of exactly what has occurred on your watch, what care these individuals will require going forward, and who under your supervision must be held accountable for any oversights, errors, or crimes that have occurred.⁵

Inadequate Screening of Individuals for Disqualifying Conditions. In addition to the above, it is also my understanding that the Department is failing to conduct (or perhaps intentionally avoiding) thorough screenings of individuals who come into Department custody. The net effect of this inadequate screening process appears to be that individuals who are not minors, have criminal backgrounds in their home countries or other countries, or are affiliated with gangs or other criminal organizations are being processed by the Department as innocent minors. I have

⁴ It is my understanding that the same material is referred to, in different places, as either "Significant Incident Report" or "Serious Incident Report." For the sake of consistency, this letter will use Significant Incident Report.

⁵ I would point out that the Department was likely aware of sexual abuse among UAC contractors and grantees in light of the fact that it issued an interim final rule on the subject, although it did so without public notice or comment, on Christmas Eve of last year. *See generally* U.S. Department of Health and Human Services, "Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children; Final Rule," 79 Fed. Reg. 77,768 (Dec. 24, 2014). *See also* Penny Starr, *HHS Will Require Caretakers of Unaccompanied Children to Provide Abortion-Inducing Drugs*, CNSNEWS.COM (Feb. 20, 2015).

also received information raising questions about the degree to which the Department is accurately determining whether people who are entering the United States as parent-child family units are in fact family units, or even related. More information is needed about the Department's existing screening procedures, as well as any information you have about the efforts of aliens to bypass these screening procedures.

Inadequate Policies and Procedures for Placement and Post-Release Monitoring. It is also my understanding that the Department has focused significant Department resources on the rapid processing of UAC (i.e., increasing the speed with which these minors are rotated out of the Department's custody). While the goal of efficiency is laudable, ensuring that these minors receive proper care and supervision while in the United States is more important, and should trump any interest the Department has in speed. A related concern is the possibility that the Department may be loosening or ignoring standards and procedures for placement determination, which may have resulted (and could continue to result) in the Department releasing UAC into the custody of inappropriate or even dangerous individuals. I have also been told that, pursuant to Department policy and with a few minor exceptions, the Department conducts little or no post-release monitoring of UAC, which raises many questions about the safety and security of minors that have been and will be released from your care. More information is needed to determine the adequacy of the Department's placement and post-release monitoring policies and procedures.

Inadequate Coordination of Intrastate Placement with State and Local Governments. At least one congressional delegation has publicly expressed frustration with the Administration for its failure to effectively communicate with state and local governments about where and how the Department is placing alien minors within their state.⁶ It is reasonable to believe that this communication failure may not be limited to one state, and may also be part of a conscious strategy to keep state and local officials in the dark about these alien minor placements. To address the Department's failures and help state and local officials better serve their citizens, more information is needed to help determine if or how the Department is working with state and local governments to help them prepare for these placements.

In order to gain a better understanding of the Department's handling of this important issue, the Subcommittee requests that the Department engage in the following preservation efforts, effective immediately:⁷

1. Preserve all documents, records, and logs, including paper-based documents, e-mail, e-mail-based calendar appointments, electronic documents, and other electronic data (electronic records), created since January 1, 2009, that relate to any and all aspects of the UAC issue or the Department's⁸ response to, or handling of, the UAC issue, or otherwise include the phrases "unaccompanied alien child", "unaccompanied alien children", "unaccompanied child", "unaccompanied children", the acronyms "UAC" or "UC", or any related phrases, terms, or acronyms. For the purposes of this request, "preserve"

⁶ See Letter from Tennessee Congressional Delegation to President Barack Obama (Jul. 30, 2014) (expressing concern about the Administration's failure to alert state government officials about the release of approximately 760 unaccompanied children into Tennessee to that point in calendar year 2014, and requesting additional information from the Administration about the status of those children).

⁷ I would remind you, the Department, and its officials, personnel, contractors, grantees, and consultants that violation of this preservation order is a violation of federal criminal law. See generally 18 U.S.C. § 1505.

⁸ Please note that all references to the "Department" include the Department's Administration for Children & Families (ACF) and ACF's Office of Refugee Resettlement (ORR).

means taking any and all reasonable steps to prevent the partial or full destruction, alteration, overwriting, formatting, deletion, shredding, incineration, wiping, relocation, migration, theft, revision, or mutation of electronic and non-electronic documents, records, and logs, as well as negligent or intentional handling that would make such records incomplete or inaccessible.

2. Exercise any and all reasonable efforts to identify and notify former Department employees, contractors, subcontractors, grantees, subgrantees, and consultants who may have access to such electronic or non-electronic records that these records are also to be preserved.
3. If it is a practice of the Department, any Department component, any federal employee, any contract employee, any grantee or subgrantee, or any consultant to destroy or otherwise alter such electronic or non-electronic records, either halt such practices immediately, or arrange for the preservation of complete and accurate duplicates or copies of such records, suitable for production if requested.

Please also provide the following documents and information for the time period from January 1, 2009, to the present (unless a different time period is specified below):⁹

1. The following information about the Department's UAC-related Significant Incident Reports:
 - a. The overall number of Significant Incident Reports that in any way relate to UAC or facilities that have housed or currently house UAC (broken down by month and year, beginning with January 2009);
 - b. The number of Significant Incident Reports that suggest the possibility of any form of sexual abuse committed against a UAC (whether substantiated or unsubstantiated, or verified or unverified);
 - c. The number of Significant Incident Reports that suggest the possibility of some sort of violence or harm committed against, or physical or psychological injury to, a UAC (whether substantiated or unsubstantiated, or verified or unverified);
 - d. The number of Significant Incident Reports that suggest the possibility of any sort of gang-related activity committed against, or in any way involving, a UAC (whether substantiated or unsubstantiated, or verified or unverified);
 - e. The number of Significant Incident Reports that suggest the possibility of any sort of drug or controlled substance possession or activity that in any way involves a UAC (whether substantiated or unsubstantiated, or verified or unverified);

⁹ It is important to note that this is a request for a document production *to* the Committee, and is not a request for *in camera* review of documents in the Department's possession. The requested documents are to be *physically* transferred in *unredacted* form to the Committee. Similarly, this is also not a request for the provision of previously released versions of similar or redacted information that may have been made available via Freedom of Information Act requests, since congressional document requests are not restricted by either the Freedom of Information Act or the Privacy Act.

- f. The number of sexual abuse-related Significant Incident Reports that involve a federal employee, or an employee of a contractor, subcontractor, grantee, subgrantee, or consultant (whether substantiated or unsubstantiated, or verified or unverified);
 - g. The number of sexual abuse-related Significant Incident Report referrals that have been made to the Department of Justice for criminal investigation and prosecution;
 - h. An explanation for any discrepancies between the number of sexual abuse-related Significant Incident Reports in the Department's possession and the number of sexual abuse-related Significant Incident Report referrals made by the Department to the Department of Justice;
 - i. The number of incidents discussed in these Significant Incident Reports that were referred to other state or local law enforcement authorities for investigation;
 - j. The number of alien minors who were rotated out of Department custody into a custodial or guardian arrangement before any issue documented in a Significant Incident Report was reviewed, addressed, or resolved; and
 - k. The names of any and all contractors, subcontractors, grantees, subgrantees, and/or consultants who were implicated in substantiated or unsubstantiated allegations of UAC sexual abuse, but still retain their federal contracts or grant funding;
2. The following information about the Department's management of its Significant Incident Report infrastructure:
 - a. The information technology system or systems that are used to process, manage, or support Significant Incident Reports and/or UAC case files;
 - b. The number of Significant Incident Reports (both raw number and percentage) that are digitally accessible;
 - c. The number of Significant Incident Reports (both raw number and percentage) that are not digitally accessible;
 - d. The state of the Department's efforts to digitize all Significant Incident Reports;
 - e. If the Department is not attempting to digitize all Significant Incident Reports, an explanation as to why; and
 - f. Detailed information regarding the accidental or intentional destruction of Significant Incident Reports, including the dates of Significant Incident Report destruction and the names of the individuals involved in said destruction;
 3. All internal Department information about the Department's development and release of its interim final rule entitled "Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children; Final Rule" (dated December 24, 2014), including:

- a. The basis for the development and issuance of this rule;
 - b. Why this rule was released without the required notice and comment period; and
 - c. Why this rule was published on December 24, 2014;
4. All internal Department information relating to UAC-related interagency coordination, collaboration, and/or strategy development, particularly with respect to the U.S. Department of Defense, the U.S. Department of Homeland Security, the U.S. Department of Justice, the U.S. Department of State, the U.S. General Services Administration, and the Office of Management and Budget;
5. All internal Department information about its efforts to ensure that the Department has been, and is now, placing alien minors into adequate, appropriate, and legal custody or guardianship situations, including:
 - a. Its efforts to ensure that alien minors were and are being transferred to the custody of people who do not have criminal backgrounds;
 - b. Its efforts to ensure that alien minors were and are being transferred to the custody of people who are either legitimate family members or otherwise legitimate guardians; and
 - c. The information technology system or systems that allow Department personnel the ability to vet the backgrounds, records, and suitability of family members and guardians for potential placement;
6. All internal Department information about its efforts to ensure that the Department has not been, and is not now, receiving the following ineligible individuals into Department custody and/or subsequently placing such ineligible individuals in others' control or custody (as well as evidence that those efforts have been effective):
 - a. Aliens who are not minors;
 - b. Aliens who have criminal backgrounds in their home countries or other countries; and
 - c. Aliens who are affiliated (or suspected of being affiliated) with gangs or other criminal organizations; and
7. All internal Department information about the Department's efforts to coordinate UAC transfers and placements (or failures to coordinate UAC transfers and placements) with state and local governments and officials around the country, including specific UAC transfer or placement efforts initiated in coordination with governor, state legislature, mayor, city council, or county executive offices.

I would also request that you provide to the Committee any additional materials that fall into the above categories on a continuing basis but are created, written, or otherwise produced after the Department's initial receipt of this request.

Please provide the requested documents and information as soon as possible, but **no later than 9:00 a.m. on Tuesday, April 14, 2015**. When producing documents to the Committee, please deliver separate production sets to both the Majority Staff in Room 224 of the Dirksen Senate Office Building and the Minority Staff in Room 152 of the Dirksen Senate Office Building.

I appreciate your cooperation in this very important matter and look forward to your response and receipt of the requested material at the stated date and time. Please contact us at (202) 224-5922 if you have any additional questions about how to comply with the terms of this production request.

Sincerely,



Ted Cruz
Chairman
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts

cc: The Honorable Charles E. Grassley
Chairman
Senate Committee on the Judiciary

The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Christopher Coons
Ranking Member
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts

The Honorable Daniel R. Levinson
Inspector General
U.S. Department of Health and Human Services

The Honorable Jon T. Rymer
Inspector General
U.S. Department of Defense

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice

The Honorable John Roth
Inspector General
U.S. Department of Homeland Security

The Honorable Steve A. Linick
Inspector General
U.S. Department of State and the Broadcasting
Board of Governors

The Honorable Robert C. Erickson, Jr.
Deputy Inspector General
U.S. General Services Administration