

CRS Report for Congress

Unaccompanied Alien Children: Policies and Issues

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Summary

Unaccompanied alien children (UAC) are aliens under the age of 18 who come to the United States without authorization or overstay their visa, and are without a parent or legal guardian. Most arrive at U.S. ports of entry or are apprehended along the border with Mexico. With the passage of the Homeland Security Act of 2002 (HSA), UAC tasking was split between the newly created Department of Homeland Security (DHS) and the Department of Health and Human Services Office of Refugee Removal (ORR). DHS was delegated the task of apprehension, transfer and repatriation of UAC, while ORR was tasked to provide long-term detention and foster placement. The issue for Congress concerns whether the current system provides adequate protections for unaccompanied alien children.

The debate over UAC policy has polarized in recent years between two camps: child welfare advocates arguing that the UAC are largely akin to refugees by being victims of abuse and economic circumstances, and immigration security advocates charging that unauthorized immigration is associated with increased community violence and illicit activities. Consequently, these two camps advocate very different policies for the treatment of UAC. This polarization is to some degree reflected in the tension between DHS and ORR, which despite attempts and congressional urging have failed to produce a Memorandum of Understanding between the two agencies.

In FY2006, the DHS's Customs and Border Protection apprehended 101,952 juveniles. The majority of these children were from Mexico and were returned voluntarily without being detained. DHS detained 7,746 UAC in this same year. In FY2006, 74% of UAC were male and 26% female, with 80% being between the ages of 15 and 18 and the remaining 20% being ages 0 to 14 years old. Three countries — Guatemala, Honduras, and El Salvador — accounted for 85% of the UAC detained in ORR custody.

Despite the implementation of the *Flores Settlement Agreement* (FSA), which governs the policy for the treatment of alien juveniles in government custody, advocacy groups have charged that DHS has failed to comply fully with the FSA. Among the concerns raised by these groups are allegations of deliberate misclassifications of UAC as “accompanied,” inaccurate age determination techniques, the use of UAC as bait for apprehending unauthorized alien family members, and unsafe repatriation practices. Congress also expressed concerns over several of these issues in the FY2007 DHS Appropriations Act.

As an outgrowth of the debates regarding the treatment of UAC, child welfare advocates have contended that legal representation for UAC would prevent potential maltreatment and be in the best interests of the child. Security advocates argue that aliens should not be granted legal representation in civil proceedings at the government's expense, because it would drain valuable resources from the judicial system. Additionally, since the division of responsibility for handling UAC was divided between DHS and ORR, custodial disputes have occasionally surfaced. This report will be updated as warranted.

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Unaccompanied Alien Children: Policies and Issues

Introduction

Unaccompanied alien children (UAC) are aliens under the age of 18 who either come to the United States without authorization or overstay their visa, and are without a parent or legal guardian. They often arrive at United States ports of entry or are apprehended along the southwestern border with Mexico. Less frequently they are apprehended in the interior (usually on suspicion of illicit activity) and determined to be a juvenile and unaccompanied. In the past five years, immigration authorities have apprehended more than 80,000 juveniles (both accompanied and unaccompanied) annually, several thousand of whom are detained as UAC. The majority of these children are aged 15 or older, although a number of them are younger — some as young as infants.

Although individual circumstances dictate each juvenile's case, the motivations of economic need, persecution, or family unification have all been cited as the reason for UAC coming to the United States.¹ Detained UAC largely stem from less economically developed countries, such as El Salvador, Honduras, and Guatemala.² Frequently, families will save up money to pay for a child to travel to the United States to find work.³ U.S. wages and economic conditions generally offer better opportunities than the economy of the child's home country.⁴ In some UAC cases, children come to the United States attempting to flee the violence or natural disasters they are subjected to in their home countries.⁵ Other UAC cases may stem from parents or other family members who have settled in the United States and have sent for a child to be transported from the home country. In these latter cases, the parent or sibling sometimes entered the United States and established employment as an

¹ Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, The John D. And Catherine T. MacArthur Foundation, June 2006, pp. 20-23, at [http://www.humanrights.harvard.edu/conference/Seeking_Asylum_Alone_US_Report.pdf], visited Feb. 1, 2007 (hereafter, Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*).

² Based on CRS correspondence with Susana Ortiz-Ong, Deputy Director, Division of Unaccompanied Children's Services, Office of Refugee Resettlement, Dec. 13, 2006.

³ Sylvia Moreno, "A Set of Borders to Cross: For Children Seeking Immigrant Relatives in U.S., Journey is Twofold," *The Washington Post*, Oct. 23, 2006, pp. A1, A7.

⁴ Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, p. 20.

⁵ *Ibid*, p.13.

unauthorized immigrant.⁶ Thus, it is not uncommon for children categorized as UAC to actually have family living in the United States.⁷

The debate over UAC policy has polarized in recent years between two camps: child welfare advocates and immigration security advocates. The former group has for decades advocated a more refugee-oriented policy toward UAC, arguing that the UAC are largely victims of trafficking, abuse, and economic circumstances. Security advocates, by contrast, advocate a more restrictive policy of deportation and repatriation, charging that unauthorized immigration is associated with increased community violence and illicit activities such as gang memberships. The UAC policy question is how to provide for the security of the United States while simultaneously safeguarding the rights and safe treatment of unaccompanied alien children.

Background

During the 1980s, allegations of mistreatment of UAC by the former Immigration and Naturalization Service (INS) resulted in a series of lawsuits against the government. These lawsuits culminated with the Supreme Court case of *Reno v. Flores*, which has become the guiding case law for government agencies' handling of UAC. Although the Court ruled in favor of the INS's UAC policy, a settlement agreement was drafted between the parties. Known as the *Flores Settlement Agreement* (FSA), this document spelled out specific guidelines for the detainment, release and repatriation of UAC by the INS. The FSA remains the guiding document regarding the treatment of UAC for both the Department of Homeland Security (DHS) and the Department of Health and Human Services' (HHS) Office of Refugee Resettlement (ORR), which are the two agencies currently involved in handling UAC.

The implementation of the Flores Settlement Agreement stems from the U.S. Supreme Court's judgment in *Reno v. Flores*.⁸ The case was brought by human rights advocacy organizations against the INS charging that the release policy and conditions of detention violated the legal rights of alien juveniles. In 1993, the Supreme Court ruled that the INS' release policy was reasonable, as were the conditions of detention.⁹ Yet, three years later the plaintiffs in Flores negotiated a settlement agreement with the INS on the processing, detention and release of

⁶ It is not always the case that parents of UAC are unauthorized immigrants. In some cases, parents or legal guardians have failed to obtain authorizing documentation for their children prior to travel to the United States.

⁷ Based upon CRS discussions with officials at the Department of Health and Human Services' Office of Refugee Resettlement, Sept. 6, 2006

⁸ 507 U.S. 292 (1993).

⁹ The Supreme Court determined that the detention of alien juveniles fell within the scope of the government's interest under *parens patrie*. Additionally, striking down the former-INS' policy would endanger the government's role in a host of other *parens patrie* functions, including handling orphans. Also, the conditions of detention were deemed sufficient by the court, provided that they complied with regulations (507 U.S. 292 (1993)).

juveniles. The language of the agreement became the basis on which some of the new regulations were drafted.¹⁰ The agreement also provided procedural instructions to field officers for implementing the new policies.¹¹

For several years following the FSA, criticism continued over whether the INS had fully implemented the regulations that had been drafted.¹² Then, with the passage of the Homeland Security Act of 2002 (HSA),¹³ the task of handling UAC was split between the newly created DHS and ORR. DHS was delegated the task of apprehension, transfer and repatriation of UAC, while ORR was tasked to provide long-term detention and foster placement. The HSA additionally established a statutory definition of UAC as juveniles without the accompaniment of a parent or legal guardian. Despite the government's delegation of UAC responsibility between two agencies, the criticism of UAC handling (particularly concerning initial detention) has not subsided.¹⁴

Child welfare advocacy groups have continued to protest the detention conditions of DHS facilities and the agency's policies on UAC. In 2001, these protests led the Department of Justice (DOJ) Office of the Inspector General (OIG) to investigate the charges of continuing mistreatment of alien juveniles in custody. The report found that although the INS had developed a *Juvenile Protocol Manual*¹⁵ and strategic implementation plans for the FSA, the report concluded that there were ongoing deficiencies in the agency's handling of UAC with "potentially serious

¹⁰ U.S. Department of Justice, "Delegation of Authorities for Various Detention and Removal Authorities and the Parole, Detention, Care and Custody of Alien Juveniles," *Federal Register*, vol. 67, no. 110 (July 24, 1998), pp. 39255-39260.

¹¹ Center for Human Rights & Constitutional Law, *Flores v. Meese: Final Text of Settlement Establishing Minimum Standards and Conditions for Housing and Release of Juveniles in INS Custody*, Exhibit 2, at [<http://web.centerforhumanrights.net:8080/centerforhumanrights/children/Document.2004-06-18.8124043749>], visited Dec. 12, 2006.

¹² U.S. Department of Homeland Security, Office of the Inspector General, *Open Inspector General Recommendations Concerning the Former Immigration and Naturalization Service from Unaccompanied Juveniles in INS Custody, a Report by the Department of Justice Inspector General*, Executive Summary, Report No. OIG-05-45, Sept. 2005 (hereafter, DHS, *Open Inspector General Recommendations Concerning the Former Immigration and Naturalization Service from Unaccompanied Juveniles in INS Custody, a Report by the Department of Justice Inspector General*).

¹³ P.L.107-296.

¹⁴ Although a 2005 report by the DHS OIG found that the DHS had complied with its responsibility to treat apprehended UAC with dignity and concern, there were still outstanding issues for bringing the agency into compliance with the FSA. Advocacy groups have also continued to charge that DHS has failed to comply fully with the FSA, often citing anecdotal evidence of agency misconduct such as failing to inform juveniles of free legal services (DHS, *Open Inspector General Recommendations Concerning the Former Immigration and Naturalization Service from Unaccompanied Juveniles in INS Custody, a Report by the Department of Justice Inspector General*).

¹⁵ When CRS checked the online version of the manual, on Dec. 12, 2006, the Manual had last been updated in November 2003. The manual also referred to INS duties and policies, rather than DHS and ORR.

consequences for the well-being of the juvenile.”¹⁶ The DOJ report additionally provided 28 open recommendations for complying with the FSA. In 2004, the DHS OIG wrote a report on the implementation of the DOJ recommendations.¹⁷ The OIG report found that several recommendations remained open due to uncertainty over responsibility between DHS and HHS.

According to one study on children in government custody, between January 2003 and July 2006, approximately 70% of adjudicated cases resulted in the deportation of the child.¹⁸ Furthermore, approximately 2% of the children in closed cases were granted asylum, while the majority of the remaining cases were closed because the juveniles requested to have their applications withdrawn.¹⁹

Standard Practices

When a juvenile is apprehended by a DHS officer, a standard set of procedures take effect. These procedures are listed in the flow chart presented in **Figure 1** below. First among these procedures is determining whether a juvenile is accompanied. 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.

¹⁶ U.S. Department of Justice, Office of the Inspector General, *Unaccompanied Juveniles in INS Custody*, Executive Summary, Report no. I-2001-009, Sept. 28, 2001.

¹⁷ U.S. Department of Homeland Security, Office of the Inspector General, *Open Inspector General Recommendations Concerning the Former Immigration and Naturalization Service from Unaccompanied Juveniles in INS Custody, a Report by the Department of Justice Inspector General*, Report no. OIG-04-18, Mar. 2004.

¹⁸ The figures are from a forthcoming study by the Vera Institute of Justice that analyzes 18,000 cases of children in government custody. The figures are cited in Cara Anna, “Few Aiding Children Facing Deportation,” *The Los Angeles Times*, Dec. 1, 2006, at [<http://www.latimes.com/news/nationworld/nation/wire/sns-ap-immigration-kids-in-court,1,1769838.story?coll=sns-ap-nation-headlines>], visited Dec. 8, 2006.

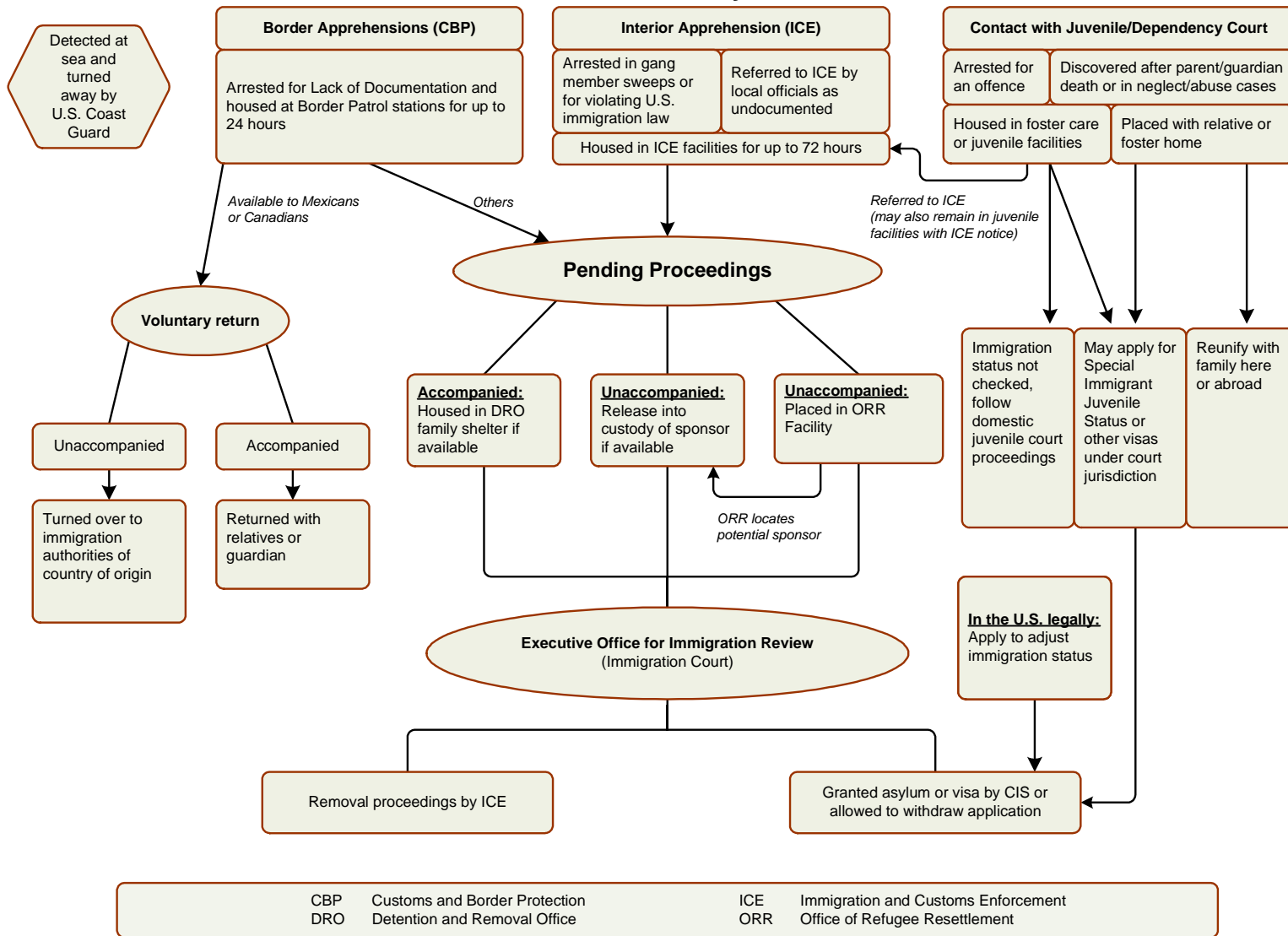
¹⁹ The article is unclear as to whether the 18,000 cases being analyzed are only for cases of UAC or if detained accompanied children are analyzed as well.

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 proximity²⁰ to quickly provide care for the juvenile, the juvenile alien is classified as “unaccompanied.”²¹ The statutes and regulations do not provide definitions for what constitutes a legally “accompanied” alien child.

²⁰ The term “geographical proximity” is not defined. CRS conversations with DHS officials suggested that there was some discretion for field officers to determine what constitutes a reasonable geographic proximity.

²¹ 8 CFR §236.3(b)(1)

Figure 1. General Process for Juvenile Aliens Involved with the Immigration and Juvenile Justice System



Source: CRS Presentation of chart from National Juvenile Justice Network, “Undocumented Immigrant Youth: Guide for Advocates and Service Providers,” *Policy Brief No. 2*, November 2006.

Apprehension

Unaccompanied alien children are generally apprehended at the border by the DHS Customs and Border Protection (CBP) or in the interior by DHS 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.²² ICE subsequently attempts to determine whether the minor has any family living in the United States. For cases that are ambiguous, the field officers²³ and regional juvenile coordinators may contact the National Juvenile Coordinator²⁴ in Washington, DC, for clarification. If a child is determined to be unaccompanied, he or she is usually transferred to Office of Refugee Removal (ORR) custody within 72 hours. The FSA allows for a 3-5 day time frame for transfer from DHS to ORR, although 72 hours has been established as the standard practice by DHS. However, if the juvenile is determined not to be “unaccompanied” then the juvenile remains in the custody of DHS, according to DHS officials.

Once an unaccompanied alien child is detained by DHS, the juvenile is held separately from adults in either a flexible use or continuous use facility.²⁵ During this time period, DHS authorities will determine the juvenile’s age, conduct background checks, ascertain the juvenile’s nationality, and notify the appropriate consulate that the juvenile is being detained by DHS.²⁶ At any point the juvenile may withdraw his or her application for admission and be allowed to return to his or her country of origin.²⁷ If the juvenile is from Mexico or Canada, consular officials from those countries are contacted to arrange for the transfer of the juvenile.²⁸ If the child is from another country, transportation is arranged in consultation with that country’s

²² In conversations with CRS, 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.

²³ The term “field officer” refers throughout this report to apprehending agents of either CBP or ICE.

²⁴ The DHS ICE Office of Detention and Removal (DRO) 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.

²⁵ DHS has three continuous use facilities, which all serve as family unity facilities. All other facilities used by DHS to detain UAC are flexible use, meaning the usage varies depending on whether DHS has a need for the available bed space.

²⁶ The FSA has established the right of an apprehended UAC to be informed of their rights to contact someone, to be represented by an attorney, to a hearing before an immigration judge, to judicial review of their case, and to a list of free legal services in the area. The only exception for these rights is for UAC that are eligible for expedited removal.

²⁷ 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.

²⁸ Ibid.

consulate. However, if the juvenile does not withdraw his application for admission, the child will be placed in removal proceedings.

Most unaccompanied children are placed in a removal proceeding under §240 of the Immigration and Nationality Act (INA).²⁹ However, there are a few circumstances which serve as exceptions. Generally, UAC are not eligible for expedited removal,³⁰ but 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.³¹ Additionally, DHS may detain any unaccompanied alien child that is deemed to be a security threat, and has some discretion in making such determinations.

This decision to place an unaccompanied alien child in expedited or formal removal is made by the field officers. A child erroneously placed in expedited removal (by mistakenly being identified as having a previous criminal conviction or final order of removal) may be transferred out of that process.³² Juveniles in expedited removal are placed under ORR's care and ORR is not allowed to release them.

Detention Facilities

Generally, a child who is classified as a UAC and has no previous criminal conviction or removal order issued against him is transferred into the custody of ORR within 72 hours. In the time-span between the apprehension and the transfer of the UAC, however, DHS must still provide safe and sanitary detention facilities for juveniles in compliance with the FSA.³³ For those juveniles that must be detained,³⁴

²⁹ 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)

³⁰ Under expedited removal, an alien who lacks proper documentation or has committed fraud or willful misrepresentation of facts to gain admission into the United States is inadmissible and may be removed from the United States without any further hearings or review unless the alien indicates either an intention to apply for asylum or a fear of persecution (CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem).

³¹ The term "expedited removal" refers to removal under INA §235(b). For more information on expedited removal, see CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

³² A "criminal alien juvenile" as referred to in this report is a juvenile who is removable on criminal grounds under INA §212(a)(2) or INA §237(a)(2).

³³ Prior to the HSA, the INS held juveniles in five different types of facilities: short-term housing, foster homes, shelter care facilities, medium-secure facilities, and secure detention facilities (U.S. Department of Justice, Office of the Inspector General, *Unaccompanied Juveniles in INS Custody*. Executive Summary, Report no. I-2001-009, Sept. 28, 2001). All (continued...)

ICE DRO is largely responsible for detentions, although CBP occasionally must hold UAC until they can be transferred to DRO. DHS currently has contracted with a number of flexible-use facilities, particularly in the southwestern United States, as temporary bed space for apprehended minors. DHS must detain children separately from unrelated adults.³⁵ Furthermore, the FSA held that a juvenile may only be held in secure facilities under one or more of the following conditions:

- A child is charged or chargeable with criminal or delinquent actions;
- A child threatens or commits violence;
- A child's conduct becomes unacceptably disruptive in a shelter facility;
- A child presents an escape risk;
- A child is in danger and is securely detained for their own safety; or
- An emergency, or influx of minors, results in insufficient bed space at non-secure facilities.³⁶

When under the care of ORR, UAC are placed in licensed facilities³⁷ that are contracted or under cooperative agreements.³⁸ These facilities are largely located near areas of high juvenile apprehension rates to minimize the transfer time from DHS custody. These facilities provide children with education, health care, mental health services, socialization/recreation, access to legal services, and family reunification services. There are also special needs services available for children with acute medical and mental health needs. The facilities range in level of security and openness, from nonsecure to staff secure³⁹ to secure detention.⁴⁰ Foster care

³³ (...continued)

of these facilities were licensed by state or local governments. ORR has since taken over foster care programs. CRS is not aware of whether DHS currently uses the other categorical distinctions for its facilities.

³⁴ It is the policy of DRO to transfer all UAC, including those with criminal convictions, to ORR custody within 72 hours. This transfer policy, however, does not extend to UAC that are deemed potential threats to national security; rather, such juveniles remain in the custody of DHS.

³⁵ The FSA stipulates that where such a separation is not possible, a juvenile may be held with an unrelated adult for no more than 24 hours.

³⁶ Center for Human Rights & Constitutional Law, *Flores v. Meese: Final Text of Settlement Establishing Minimum Standards and Conditions for Housing and Release of Juveniles in INS Custody*, Exhibit 2, at [<http://web.centerforhumanrights.net:8080/centerforhumanrights/children/Document.2004-06-18.8124043749>], visited Dec. 12, 2006.

³⁷ In addition to being licensed, these facilities must meet a number of ORR requirements.

³⁸ U.S. Department of Health and Human Services, Office of Refugee Removal, "Services." *Unaccompanied Alien Children*, May 8, 2006, at [<http://www.acf.hhs.gov/programs/orr/programs/uac.htm>], visited Dec. 13, 2006.

³⁹ A "staff secure" facility is generally understood as a group facility or home at which each juvenile is continuously under staff supervision and at which all services, including but not limited to education and treatment, are provided on site. A staff secure facility may or may not be a locked facility. These facilities are commonly used by ORR for children with
(continued...)

placement is also available for children with special needs through the refugee foster care program network.⁴¹

As **Table 1** shows, there are currently 42 facilities operated by ORR for the care of UAC.⁴² A significant majority of these facilities are located in states that have either major ports of entry into the United States or have large inflows of unauthorized aliens. ORR has strategically placed the largest number of facilities in the border states of Arizona, California, and Texas, which combined hold 56% of ORR's UAC facilities. Of the 42 facilities ORR operates, 36 are shelter care, group homes, and transitional foster care programs. Additionally, ORR operates three staff-secure facilities and two secure detention facilities. ORR also contracts with residential treatment centers for children with psychiatric and mental health needs on an as needed basis.⁴³

³⁹ (...continued)

behavioral management issues.

⁴⁰ The secure detention facilities are used by ORR for individuals with a criminal history. ORR has discontinued the use of county lock-down juvenile detention centers, and has reduced the number of secure detention centers from 32 in FY2003 to 2 in FY2006 (based on CRS correspondence with Susana Ortiz-Ong, Deputy Director, Division of Unaccompanied Children's Services, Office of Refugee Resettlement, Dec. 13, 2006).

⁴¹ ORR increased the number of annual foster care placements available to UAC to 100 in FY2006. These long-term foster care placements are performed through the Lutheran Immigrant and Refugee Services and the U.S. Conference of Catholic Bishops. (Ibid.)

⁴² Ibid.

⁴³ Ibid.

Table 1. ORR Facilities by Location and Type, December 2006

State	Facilities
Arizona	4 shelter and transitional foster care programs; 1 long-term foster care site
California	5 shelter programs; 1 secure program
Florida	2 shelter programs; 1 long-term foster care site; 1 residential treatment center
Illinois	1 shelter program
Indiana	1 staff-secure program; 1 secure program
Massachusetts	1 long term foster care site
Michigan	3 long-term foster care sites
New York	1 shelter program
Pennsylvania	1 long-term foster care site
Texas	11 shelter, group home and transitional foster care programs; 1 long-term foster care site
Virginia	1 long-term foster care site
Washington	2 shelter and transitional foster care programs; 1 staff-secure program; 2 long-term foster care sites

Source: CRS presentation of unpublished HHS ORR data (2006).

In terms of the facilities available to ICE DRO for juvenile detentions, there are currently 22 facilities in the United States, as displayed in **Table 2** below. Of these facilities, three are under continuous use, while the remaining 19 serve as flexible use facilities as needs for bed space arises. The three facilities under continuous use serve as family unity facilities. All DRO juvenile only facilities are under flexible use contracts, with no specific bed space reserved for DRO. The only states that have both DRO juvenile facilities and ORR facilities are Arizona, California, New York, Pennsylvania, Texas, and Washington. As a result of the 30 ORR facilities in these six states, a total of 73% of all ORR facilities have a DRO facility in the same state. By contrast, only 41% of DRO facilities have an ORR facility in the same state.

Table 2. ICE Juvenile Facilities, December 2006

State	Facility Name	Facility Type ^a	# Beds ^b
Alaska	McLaughlin Youth Center	Flexible	NA
Arizona	Gila County Juvenile Detention Center	Flexible	NA
<i>California</i>	<i>Casa San Juan</i>	<i>Continuous</i>	<i>As needed and as available</i>
Idaho	Snake River Juvenile Detention Facility	Flexible	NA
Kansas	Shawnee County Juvenile Detention	Flexible	NA
Minnesota	Anoka County Shelter	Flexible	NA
	Anoka County Juvenile Center	Flexible	NA
	Carver County Juvenile Detention Facility	Flexible	NA
	East Central Regional Juvenile Center	Flexible	NA
	Washington County LEC Juvenile Home	Flexible	NA
Montana	Ted Lechner Youth Services Center	Flexible	NA
New York	Compass House Shelter	Flexible	NA
	Casey House Shelter	Flexible	NA
	Equinox Youth Shelter	Flexible	NA
Nebraska	Sarpy County Juvenile Justice Center	Flexible	NA
	NE Nebraska Juvenile Service, Inc.	Flexible	NA
North Dakota	Grand Forks County Juvenile Detention Center	Flexible	NA
Oregon	NOROC Juvenile Detention Facility	Flexible	NA
<i>Pennsylvania</i>	Berks County Youth Center	Flexible	NA
	<i>Berks Family Shelter</i>	<i>Continuous</i>	<i>84</i>
<i>Texas</i>	<i>T. Don Hutto</i>	<i>Continuous</i>	<i>512</i>
Washington	Cowlitz County Juvenile Detention	Flexible	NA

Source: CRS presentation of unpublished ICE DRO data.

- a. Facilities deemed ‘flexible use’ are those facilities that are used on an as-needed basis, with no beds specifically reserved for ICE DRO. Facilities deemed “continuous use” are those facilities for which all beds are for the exclusive use of ICE DRO. These latter facilities are noted with *italics* in the table.
- b. Only family unity facilities are designated as “continuous use.” These family unity facilities are: T. Don Hutto Family Shelter, Berks Family Shelter, and Casa San Juan, a facility shared between ICE DRO and the U.S. Marshall’s Office. Casa San Juan houses only adult females and their minor children.

Some of the facilities for ORR and DRO are within four hour ground transportation⁴⁴ of each other, but a number of the facilities fall outside this range. For example, for juveniles detained at the six DRO facilities in Minnesota or North Dakota, the closest ORR facilities are located in Illinois. Therefore, the likelihood that a juvenile will be held for more than 72 hours by DHS increases, because arranging such transportation is not always possible.

Philosophical Tensions

An underlying tension in dealing with UAC is the philosophical positions of the government agencies involved in the handling of the children. Specifically, the dominant cleavage line from which many other issues spring is that of whether the UAC should be treated as humanitarian refugees or as unauthorized aliens subject to expedited removal. Those who advocate more of a refugee approach see the children as victims who have been forced to migrate across borders out of hardship circumstances.⁴⁵ Alternatively, those who focus on the enforcement issues tend to highlight the cost burden placed upon U.S. citizens and legal immigrants by creating incentives for unauthorized juvenile immigration, including detrimental spillover effects such as increased criminal enforcement costs.⁴⁶ These tensions have resulted in legislation pitting government agencies with conflicting missions against each other,⁴⁷ and generating confusion among advocates and government actors alike.⁴⁸

There are a few notable sources of these philosophical tensions, including the guiding principles and the agency tasking stemming from the HSA. ORR's experience with juvenile aliens prior to UAC had been the handling of unaccompanied refugees and Cuban-Haitian entrants.⁴⁹ These juveniles have been

⁴⁴ Four hours of ground transportation or less from DRO to ORR facilities is a transport time that DHS officials consider desirable.

⁴⁵ For example, see Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*

⁴⁶ Stephen Johnson, "Immigration Plans Need a Foreign Policy Component," *The Heritage Foundation*, Webmemo #948, Dec. 19, 2005, at [<http://www.heritage.org/Research/Immigration/wm948.cfm>], visited Feb. 1, 2007.

⁴⁷ 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, Sept. 2005, pp. 23-24.

⁴⁸ Based on CRS discussions with attorneys from both the National Center for Refugee and Immigrant Children and the Hebrew Immigrant Aid Society (HIAS) & Council Migration Service of Philadelphia.

⁴⁹ The term "refugee" refers to those juveniles that were screened prior to their arrival in the United States. The term "entrants" in this context refers to juveniles arriving from Haiti or Cuba, and who are subsequently reclassified as unaccompanied refugee minors. For additional information on refugees and Cuban and Haitian entrants, see CRS Report RL31269, *Refugee Admission and Resettlement Policy*, by Andorra Bruno; CRS Report RS31349, *U.S. Immigration Policy on Haitian Migrants*, by Ruth Ellen Wasem; and CRS

provided with various forms of services and care governed by child welfare regulations. Thus, when absorbing the UAC detention program, ORR employed many of the policies and procedures that it uses in treating unaccompanied refugees and Cuban-Haitian entrants.⁵⁰ This same philosophy is reflected in the guiding principles the agency has for the UAC program, including (1) treating UAC with “dignity, respect, and a special concern for their particular vulnerabilities;” and (2) accounting for the unique nature of each child’s situation in making placement, case management, and release decisions.”⁵¹

As guided by the *Flores Settlement Agreement* (FSA), DHS is also concerned with the safety and well-being of juveniles that it apprehends. Yet, in contrast to ORR’s refugee-based mission, the Immigration and Customs Enforcement (ICE) Office of Detention and Removal (DRO) of DHS has the mission of enforcing U.S. immigration laws to ensure “the departure from the United States of all removable aliens.”⁵² This agency also has the difficult task, however, of balancing potential security threats alongside child welfare concerns. DHS and its subagencies operate under a strategic goal of identifying potential threats and vulnerabilities to the homeland (including terrorist and criminal risks).⁵³ The previous actions of DHS indicate that it does not rule out the potential use by terrorists of alien juveniles for terrorist actions against the United States.⁵⁴ DHS therefore must not only provide dignified care to a juvenile in their custody, but they simultaneously must evaluate the potential security and criminal risk that each apprehended UAC poses.

A significant result of these interagency philosophical tensions is the lack of a Memorandum of Understanding (MOU) between DHS and ORR.⁵⁵ Despite a number of contentious issues between the agencies, a previous effort was made by

⁴⁹ (...continued)

Report RS20468, *Cuban Migration Policy and Issues*, by Ruth Ellen Wasem.

⁵⁰ Based on CRS discussion with Maureen Dunn, Director of the Division of Unaccompanied Children’s Services at HHS ORR, Sept. 6, 2006.

⁵¹ Additional guiding principles for the ORR UAC program are (1) providing “care and services free from discrimination based on race, religion, national origin, sex handicap, or political beliefs,” as well as (2) placing a UAC “in the least restrictive setting appropriate for to their age and special need.” (U.S. Department of Health and Human Services, Office of Refugee Removal, “Services,” *Unaccompanied Alien Children*, May 8, 2006, at [<http://www.acf.hhs.gov/programs/orr/programs/uac.htm>], visited Dec. 13, 2006).

⁵² U.S. Department of Homeland Security. Immigration and Customs Enforcement. *ENDGAME: Office of Detention and Removal Strategic Plan*, 2003-2012, June 27, 2003.

⁵³ U.S. Department of Homeland Security, *Strategic Plan — Securing Our Homeland*, Sept. 23, 2006, at [<http://www.dhs.gov/xabout/strategicplan/index.shtm>], visited Dec. 20, 2006.

⁵⁴ Nina Bernstein and Eric Lichtblau, “Two Girls Held As U.S. Fears Suicide Bomb,” *The New York Times*, Apr. 7, 2005, p. B1.

⁵⁵ This lack of an MOU was highlighted in a report by the DHS Office of the Inspector General (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, Sept. 2005, p. 24).

the agencies to draft an MOU, but the negotiations resulted in a “stalemate.”⁵⁶ Issues such as information sharing, location of facilities, release notification, age determination, and UAC classification are some of the contentious points that have yet to be addressed by an MOU. At present, there is a *Statement of Principles* between DHS and HHS, but the statement is broad and does not address all of the interagency issues.⁵⁷ This *Statement of Principles* constitutes the only current, formal agreement between HHS and DHS on UAC.

Legal Representation

Providing UAC with legal representation has long been an important issue for child welfare advocates, and was one of the central tenets of the FSA. Legal representation is seen by many child welfare advocates as a necessary safeguard to not only prevent maltreatment, but also to secure the rights and protect the best interests of the children. According to the terms stipulated by the FSA, each unaccompanied alien child is to be provided with (1) a form I-770,⁵⁸ which explains the immigration process; (2) a list of free legal services; and (3) an explanation of the right to judicial review. Additionally, in accordance with terms from the decision in *Perze-Funez v. INS*, UAC are to be advised by DHS of their right to a hearing before being presented with a voluntary departure form.⁵⁹

Under the current regulations, the immigration courts and handling agencies are not required to provide UAC with legal representation. Removal proceedings are civil proceedings, and therefore aliens are allowed to have council but are not entitled to counsel at government expense as they are in criminal proceedings.⁶⁰ Reportedly, many alien juveniles appear at legal proceedings without representation.⁶¹ Immigration judges reportedly find this lack of legal representation frustrating because the juveniles are frequently unable to comprehend the proceedings.⁶² Juveniles often need the proceedings explained to them through a translator. In this respect, the difficulties for judges at juvenile proceedings mirror those of adult

⁵⁶ According to a 2005 DHS OIG report, ORR had been concerned with privacy and social services issues, while ICE DRO had security concerns. These contrasting concerns resulted in the agencies reaching an impasse on the MOU. (Ibid.)

⁵⁷ *Statement of Principles Between the Department of Homeland Security and the Department of Health and Human Services, Unaccompanied Alien Children’s Program*, Apr. 6, 2004.

⁵⁸ Form I-770 is the “Notice of Rights and Disposition.”

⁵⁹ 619 F. Supp. 656 (C.D. Cal. 1985). Additionally, the *Perez-Funez* decision ordered the INS to allow UAC apprehended near the Mexican or Canadian border, and who resided in the respective border country, to contact by telephone a parent, close relative, friend, or pro bono legal services agency.

⁶⁰ INA §240(b)(4)(A).

⁶¹ Cara Anna, “Few Aiding Children Facing Deportation,” *The Los Angeles Times*, Dec. 1, 2006, at [<http://www.latimes.com/news/nationworld/nation/wire/sns-ap-immigration-kids-in-court,1,1769838.story?coll=sns-ap-nation-headlines>], visited Dec. 8, 2006.

⁶² Ibid.

proceedings, since many adults facing removal experience linguistic and legal comprehension difficulties as well.⁶³ According to one news report, judges will occasionally ask volunteer lawyers to step in and assist on the juvenile's behalf.⁶⁴

To provide legal representation for UAC, many child welfare advocates have developed organizations that offer *pro bono* legal services.⁶⁵ To encourage more *pro bono* representation, some of these organizations provide training for attorneys on representing child clients,⁶⁶ as well as online reference materials and mentoring attorneys. However, since legal representation for UAC is not required, one of the difficulties cited by these groups for the *pro bono* services is getting juveniles to contact them. Despite available *pro bono* services, many children reportedly do not seek out legal representatives.⁶⁷

Custody

Since 1999, custody for UAC has become an increasingly complex issue. One complicating factor was the arrival of and subsequent tensions over Elian Gonzalez, which raised questions over a child's ability to claim asylum in the United

⁶³ For additional discussion of linguistic issues in adult removal proceedings, see Detention Working Group, Massachusetts Chapter of the National Lawyers Guild, *Give Me Your Tired, Your Poor...: A Report on Due Process Issues in the Handling of Immigration Detainees in Massachusetts*, June 29, 2005, at [<http://www.nlgmass.org/DWGreport070105.pdf>], visited Feb. 1, 2007.

⁶⁴ Cara Anna, "Few Aiding Children Facing Deportation," *The Los Angeles Times*, Dec. 1, 2006, at [<http://www.latimes.com/news/nationworld/nation/wire/sns-ap-immigration-kids-in-court,1,1769838.story?coll=sns-ap-nation-headlines>], visited December 8, 2006.

⁶⁵ For example, one such organization is The National Center for Refugee and Immigrant Children, which was established in 2005.

⁶⁶ Some recent child welfare efforts have proposed assigning *guardians ad litem* to each UAC that is detained. *Guardians ad litem* are individuals who are assigned to represent the best interest of the child. These individuals would in some cases be an immigration attorney, but other professionals could be used as well. Social workers and other trained professionals may also be used for these purposes (Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, pp.81-85).

⁶⁷ According to some accounts, the most likely reason these children do not seek out *pro bono* legal services could be attributed to the possibility that the children are intimidated by the process of taking such actions on their own (see Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, p. 6, or Cara Anna, "Few Aiding Children Facing Deportation," *The Los Angeles Times*, Dec. 1, 2006, at [<http://www.latimes.com/news/nationworld/nation/wire/sns-ap-immigration-kids-in-court,1,1769838.story?coll=sns-ap-nation-headlines>], visited Dec. 8, 2006). Furthermore, this pattern of lacking legal representation mirrors that of adult aliens in removal proceeding. In FY2005, the immigration courts completed 314,218 removal proceedings, and 65% of the aliens in these proceedings lacked representation (Executive Office of Immigration Review, *FY2005 Statistical Yearbook*, Feb. 2006, p. G1).

States without a parent's consent.⁶⁸ Additional complications occurred when the INS was dissolved following the HSA transferring responsibilities for UAC to ORR. Apprehensions became the duty of both CBP and ICE, and ICE DRO became responsible for transferring UAC to ORR. Consequently, these DHS agencies were responsible for determining whether an individual was an unaccompanied alien child or an adult — a responsibility resulting in occasional age determination and custodial disputes between DHS and advocacy groups.⁶⁹

Legal Custody. Numerous issues pertaining to which agency has legal custody have yet to be resolved. One example of such ambiguity is when an unaccompanied alien child is under ORR care. There is no memorandum of understanding between the two agencies on such matters, only a broad statement of principles. Furthermore, age determination methods and assumptions play an important role in who takes custody of a potential unaccompanied alien child, since current scientific methods do not offer precise age results.⁷⁰ Some child welfare advocates believe that a significant number children may be placed in the custody of the wrong agency because they are misclassified as adults.⁷¹

According to DHS officials, the overriding principle in determining custody of a juvenile for DHS is HSA.⁷² Generally, if a juvenile is determined to be unaccompanied as defined by HSA, then the juvenile is transferred to ORR's custody. Such transfers also include juveniles with a criminal conviction or who are under expedited removal proceedings.

Occasionally, state or local jurisdictions will have custody of an unaccompanied alien child. If a child is apprehended by local or state authorities for some type of criminal action,⁷³ and the child is suspected of being an unauthorized alien, DHS is notified by the authorities to come and make a determination. If a child is determined by DHS to be an unaccompanied alien child, DHS will not take that child into custody until the state or local authorities have determined that their

⁶⁸ For a discussion on the Elian Gonzalez case, see CRS Report RL30570, *Elian Gonzalez: Chronology and Issues*, by Ruth Ellen Wasem and Barbara A. Salazar; and CRS Report RS20450, *The Case of Elian Gonzalez: Legal Basics*, by Larry M. Eig.

⁶⁹ Jennifer Smythe, "Age Determination Authority of Unaccompanied Alien Children and the Demand for Legislative Reform," *Interpreter Releases*, vol. 81, no. 23 (June 7, 2004), pp. 753-763.

⁷⁰ *Ibid.*

⁷¹ Based on CRS discussions with attorneys from both the National Center for Refugee and Immigrant Children and the Hebrew Immigrant Aid Society (HIAS) & Council Migration Service of Philadelphia.

⁷² Based on CRS discussion with John Pogash, Chief of the National Juvenile Coordination Unit in DHS ICE's Office of Detention & Removal, Dec. 19, 2006.

⁷³ Since a juvenile may be apprehended by local officials for delinquent activities (e.g. violating curfew), a delinquent juvenile could potentially be reported to ICE DRO by state and local officials as well.

proceedings are complete.⁷⁴ This may mean that an unaccompanied alien child has to serve a state sentence in a county juvenile detention facility or juvenile shelter care facility before being transferred to DHS custody. Some localities, however, choose to terminate their proceedings when a juvenile is determined to be an unaccompanied alien child, in order to expedite the transfer to DHS. Such state and local proceeding terminations means that DHS has no record of the criminal charges in their database if the juvenile is apprehended in the future.⁷⁵ Consequently, DHS would have no information in its records to indicate whether the individual represented a criminal threat upon a future inspection or apprehension.

Claiming Asylum. For those UAC who wish to claim asylum in the United States, the asylum process is broadly similar to the adult process, but with some key distinctions. While the general statutory requirements for children remain the same as adults,⁷⁶ both the DHS guidelines and case law provide an unclear picture of the qualifying requirements. For example, to qualify for asylum, a child does not need to show that his or her persecutor had malicious intent, nor that he or she sought government protection.⁷⁷ Yet simultaneously, there is ambiguity as to how old a child separated from a parent must be before that child can apply for asylum without parental consent. The cases of Walter Polovchak⁷⁸ and Elian Gonzalez⁷⁹ established that while a 12-year-old minor was old enough to independently seek asylum, a six year old needed to be represented by an adult in immigration matters. The lack of a definitive age for asylum is further complicated by the fact that these two cases were decided in the context of highly charged foreign affairs considerations, concerning the former-Soviet Union and Cuba, respectively.

Gangs and Smuggling

Recent years have seen a rise in gangs with cross-national affiliations, particularly ties from the regions of Central America and East Asia to the United States.⁸⁰ Observers have been concerned with the growing involvement of these gangs in human smuggling of unauthorized individuals across U.S. borders. A number of these smuggled individuals are juvenile aliens; some are smuggled with family members and others come unaccompanied. The increased border security

⁷⁴ A detainer is placed on the UAC so that the child is not released from custody when proceedings are complete, but is instead transferred to DHS. This is similar with alien adults who, under statute, must complete their criminal sentences prior to being taken into ICE custody.

⁷⁵ Based on CRS discussion with John Pogash, Chief of the National Juvenile Coordination Unit in DHS ICE's Office of Detention & Removal, Dec. 19, 2006.

⁷⁶ Generally see Section 208 of the Immigration and Nationality Act.

⁷⁷ Memorandum from Jeff Weiss, Office of International Affairs, to all INS Asylum Officers, File NO. 120/11.26, Guidelines for Children's Asylum Claims (Dec. 10, 1998).

⁷⁸ *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985).

⁷⁹ *Gonzalez v. Reno*, 212 F3d 1338 (11th Cir. 2000).

⁸⁰ For discussion on Central American gang violence, see CRS Report RS22141, *Gangs in Central America*, by Claire M. Ribando.

along the southwestern border with Mexico has made the smuggling of persons both more difficult and more profitable.⁸¹ Some have maintained that children have become especially lucrative for smugglers, who frequently charge twice as much to smuggle a child than an adult.⁸² Reportedly, gangs have become a common link in the smuggling of UAC and are charging as much as \$6,000 per child in Central America.⁸³

In regard to the issues of UAC and gang involvement in migration, there are two concerns for policy makers. Mirroring the broader debate, the gang-related discussions divide the refugee advocates against the security advocates. These two issues concern the (1) UAC as impoverished victims that are easily exploited during smuggling operations, and (2) the inflow of UAC as potential or existing gang members.⁸⁴ The first of these issues represents a view largely held by refugee agencies, as well as a position largely reflected in policies of ORR. Advocates of treating all UAC as victims point to the allegedly significant levels of physical and sexual abuse⁸⁵ that occurs en route to the United States by smugglers and gang members.⁸⁶ Additionally, a number of these children reportedly do not travel of their own accord. Instead, they are sent by impoverished families to find work in the United States and send remittance payments to their home country. According to advocacy groups, these mitigating circumstances, along with their legal juvenile

⁸¹ An article highlighted the fact that the smuggling of persons was both less risky (due to less punitive sentences) and more profitable than drug trafficking, making the transition to such illicit activity appealing for many criminal organizations (Patrick Radden Keefe, "The Snakehead," *The New Yorker*, June 24, 2006, at [http://www.newyorker.com/fact/content/articles/060424fa_fact6], visited Feb. 1, 2007).

⁸² Tim Gaynor, "Children Cross U.S. Border Solo as Security Rises." *Reuters*, Dec. 4, 2006.

⁸³ Sylvia Moreno, "A Set of Borders to Cross: For Children Seeking Immigrant Relatives in U.S., Journey is Twofold," *The Washington Post*, Oct. 23, 2006, pp. A1, A7.

⁸⁴ Recent news accounts have noted that the number of immigrants seeking asylum on the basis of gang activity in their home country has increased. These asylum claims include children, who claim they are threatened to be killed by gang members in their home country if they do not join the gang (N.C. Aizenman, "More Immigrants Seeking Asylum Cite Gang Violence," *The Washington Post*, Nov. 15, 2006, p. A8.

⁸⁵ According to ORR officials, human smuggling through criminal organizations has become especially troublesome because of the physical and psychological effects it has upon children. Increasingly, the children have become targets for physical and sexual abuse by traffickers on their journey to the United States. According to ORR officials, it is not uncommon that children arrive in the United States with special needs requiring professional services. These special needs cover a wide range of issues, but include teenage pregnancy, acute mental illness, severe depression, and other physical illnesses. Also, the physical and psychological damage caused to children by human smuggling may be compounded by the fact that some children have experienced trauma or domestic abuse in their country of origin (Based upon CRS discussions with officials at ORR, Sept. 6, 2006).

⁸⁶ Jennifer Smythe, "Age Determination Authority of Unaccompanied Alien Children and the Demand for Legislative Reform," *Interpreter Releases*, vol. 81, no. 23 (June 7, 2004), pp.754-763.

status, warrants a refugee paradigm for UAC policy similar to how the U.S. treats refugees.⁸⁷

Some border security proponents contend, however, that despite what the UAC may endure en route to the United States, from an immigration perspective they are not victims; rather, these UAC are participants in human smuggling. These advocates assert that participation in human smuggling is a criminal action and should be treated with expedited removal.⁸⁸ Other security proponents further point out the connection of some UAC to violent crimes, noting that there have been cases of UAC committing criminal acts after being released in the United States.⁸⁹ Of particular concern are the potential links that some UAC may have to both gangs and terrorism.⁹⁰ Gangs such as MS-13⁹¹ have strong ties to Central America and have sought to bring members to the United States.⁹² The gangs are increasingly involved in the trafficking of guns, arms, and people, thereby increasing the likelihood that youth gang members would promote these trafficking activities in the United States.⁹³ Finally, security proponents have noted the high rate of foreign-born members in these more violent gangs.⁹⁴

Some security proponents believe that such gangs may eventually court terrorist connections in order to raise revenues for their gang activity.⁹⁵ The arrests of two unaccompanied alien children arriving from East Asia on suspicion of terrorist

⁸⁷ Christine M Gordon, “Are Unaccompanied Alien Children Really Getting a Fair Trial? An Overview of Asylum Law and Children,” *Denver Journal of International Law and Policy*, vol. 33, no. 4, (Sept. 22, 2005), pp. 641-674.

⁸⁸ For discussion, see CRS Report RL33200, *Trafficking in Persons in Latin America and the Caribbean*, by Clare M. Ribando.

⁸⁹ Based on CRS discussion with John Pogash, Chief of the National Juvenile Coordination Unit in DHS ICE’s Office of Detention & Removal, Dec. 19, 2006.

⁹⁰ Nina Bernstein and Eric Lichtblau, “Two Girls Held as U.S. Fears Suicide Bomb,” *The New York Times*, Apr. 7, 2005, Section B, Column 5, p. 1.

⁹¹ MS-13 is shorthand for *Mara Salvatrucha*.

⁹² The *Mara Salvatrucha* was originally formed in Los Angeles, California, by immigrants and refugees from El Salvador. Having recently spread to become significant threats to the Washington, DC, and Baltimore metropolitan area, the gang is estimated to have between 8,000 and 10,000 dedicated members. (For further discussion see CRS Report RL33400, *Youth Gangs: Legislative Issues in the 109th Congress*, by Celinda Franco.)

⁹³ CRS Report RL33200, *Trafficking in Persons in Latin America and the Caribbean*, by Clare M. Ribando.

⁹⁴ Monisha Bansal, “Chertoff: Street Gangs a Threat to National Security,” *Cybercast News Service*, March 13, 2006, at [<http://www.cnsnews.com/ViewNation.asp?Page=%5CNation%5Carchive%5C200603%5CNAT20060313b.html>], visited Dec. 21, 2006.

⁹⁵ The Associated Press, “Immigrant Gang Suspected of Al-Qaida Ties,” Sept. 3, 2005, at [<http://www.terrorismknowledgebase.net/NewsStory.jsp?storyID=84214>], visited Dec. 21, 2006.

intentions further elevated the concerns of security advocates.⁹⁶ There has been no evidence to date, however, of any such gang-terrorist connection.⁹⁷ The subsequent release of these juveniles, however, has provoked refugee paradigm advocates to further condemn the security paradigm.⁹⁸ These advocates further believe that UAC are more likely to be victims of gang activity than complicit actors.

Apprehensions, Detentions, and UAC Characteristics

The data on UAC are important for evaluating the current policies toward UAC by both ORR and DHS. Prior to the HSA, the former-INS was responsible for all aspects of handling UAC. Since the dissolution of the INS, UAC statistics have been collected by ORR, CBP, and ICE. These data are not consolidated into any publically available database, although they are made available upon request from the various agencies.

CBP Apprehensions

Figure 2 below depicts the apprehensions of unauthorized alien juveniles (and not UAC specifically) by CBP for the time period FY2001-FY2006. The number of apprehensions has exceeded 86,000 annually since FY2001. The highest rate of apprehensions came in FY2005, when the CBP apprehended 114,563 juveniles. This number represented a 17% higher rate than that of FY2001, which had 97,954 juvenile apprehensions. FY2006 did see a decline of nearly 11% from FY2005 in juvenile apprehensions. The FY2006, CBP apprehension rate constitutes an average of 279 juvenile apprehensions per day. CBP does not keep separate apprehension figures on UAC. Furthermore, the data do not delineate how many children were released to border patrol authorities in Mexico or Canada, rather than being detained. Official numbers from the CBP's Enforcement Case Tracking System (ENFORCE) indicate that in recent years approximately four out of every five juveniles apprehended in the border sectors are nationals of Mexico.⁹⁹

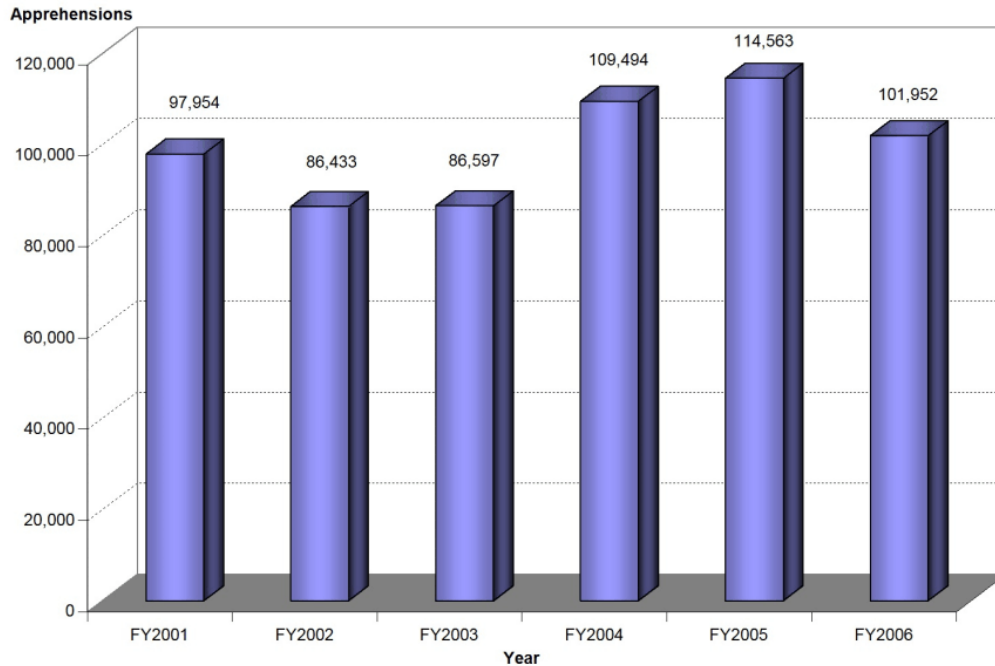
⁹⁶ Nina Bernstein and Eric Lichtblau, "Two Girls Held as U.S. Fears Suicide Bomb," *The New York Times*, Apr. 7, 2005, Section B, Column 5, p. 1.

⁹⁷ For additional discussion, see CRS Report RL33400, *Youth Gangs, Legislative Issues in the 109th Congress*, by Celinda Franco.

⁹⁸ Nina Bernstein, William Krashbaum, and Souad Mekhennet, "Questions, Bitterness, and Exile for Queens Girl in Terror Case," *The New York Times*, June 17, 2005, p. A1.

⁹⁹ 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, Sept. 2005, p. 3.

Figure 2. Apprehensions of Unauthorized Juveniles by Customs and Border Protection, FY2001-FY2006



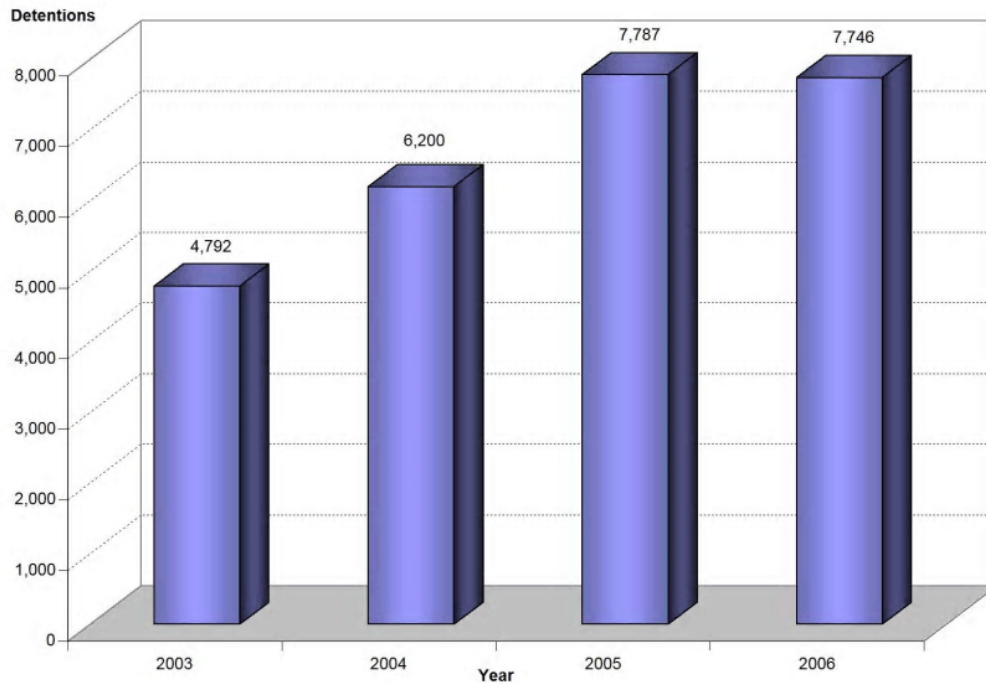
Source: CRS presentation of unpublished Department of Homeland Security Customs and Border Protection (2006).

Note: FY2003 includes combined data from the CBP and INS. FY2001 and FY2002 data are INS statistics.

Juveniles Held by ORR

As demonstrated in **Figure 3** below, FY2006 ORR detentions of 7,746 are a 25% increase over the FY2004 total of 6,200, the first fiscal year for which complete data is available. In FY2005, a total of 7,787 UAC were detained by ORR. This detention total constitutes a 26% increase over FY2004, while the decline experienced in FY2006 represented a decrease of less than 1%.

Figure 3. ORR Detentions of Unaccompanied Alien Children, FY2003-FY2006



Source: CRS presentation of unpublished HHS ORR data (2006).

Note: FY2003 data do not include all detentions by the INS.

The children detained by ORR have held relatively steady demographic patterns in the past several years. **Table 3** provides statistical breakdowns of UAC that show that the majority of juveniles in detention are males. Between FY2004 and FY2006, the gender proportion of UAC males that were detained by ORR held almost constant at between 73% and 74%. For this same time period, the proportion of UAC in ORR's custody that were in the age range of 15 to 18¹⁰⁰ also remained nearly constant, fluctuating between 80% and 81%. For FY2006, the proportions of UAC were 74% male and 26% female, with 80% being from the ages of 15 to 18 and the remaining 20% being ages 0 to 14 years old.

¹⁰⁰ Even though 18 year olds are no longer considered UAC, they may be held beyond their 18th birthday by ORR due to transfer delays.

Table 3. Gender, Age and Country of Origin of Unaccompanied Alien Children in ORR Custody, FY2004-FY2006

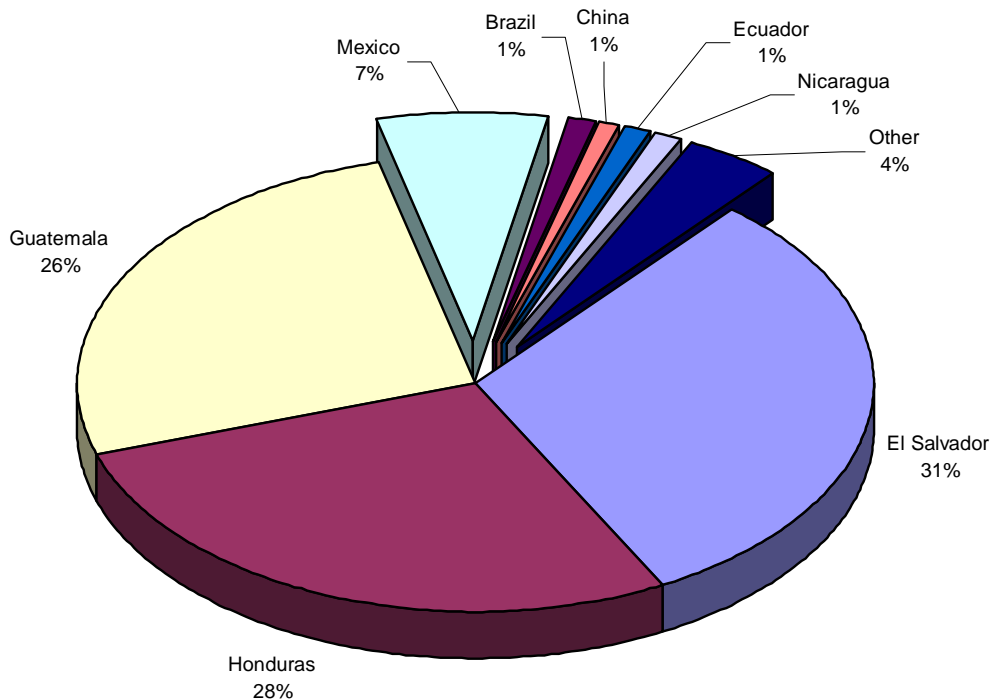
Category	FY2004	FY2005	FY2006
Gender			
Male	74%	73%	74%
Female	26%	27%	26%
Age			
15-18	80%	81%	80%
0-14	20%	19%	20%
Countries of Origin			
El Salvador	26%	24%	31%
Honduras	30%	35%	28%
Guatemala	20%	23%	26%
Mexico	10%	6%	7%
Brazil	3%	3%	1%
China	2%	1%	1%
Ecuador	2%	2%	1%
Nicaragua	0.8%	0.9%	1%
Other	6.2%	5.1%	4%

Source: CRS presentation of HHS ORR data (2006).

Note: For FY2006 data, countries of origin rounded to the nearest percent.

Most UAC in ORR's custody come from three countries: El Salvador, Honduras, and Guatemala. **Figure 4** demonstrates that in FY2006, these three countries accounted for 31%, 28%, and 26% of the ORR detainees, respectively. Thus, these countries combined for 85% of the UAC detained by ORR. The only other country with more than 1% of detainees was Mexico, which in FY2006 accounted for 7% of the UAC total. China is the only non-Latin American country accounting for 1% or more of UAC in ORR custody. When comparing these statistics to those in **Table 3** for FY2005 and FY2004, a few points are worth noting. First, according to data from ORR the top four sending countries of UAC have remained in the top four from FY2004 through FY2006. Guatemala's share of UAC detainees has increased by 6% since FY2004, whereas Honduras has decreased by 2% (and down by 7% from FY2005). El Salvador's detainee share increased by 5% since FY2004, whereas Mexico's share has decreased by 3%. All of these four countries represent sending totals that are multiple times higher than any other sending country with UAC in ORR custody.

Figure 4. Country of Origin of Detained Unaccompanied Alien Children in ORR Custody, FY2006



Source: CRS presentation of unpublished HHS ORR data (2006).

Juveniles Held by DHS

Contrary to the data on the longer term juvenile detentions by ORR, data from ICE DRO depicts apprehended UAC that were detained by the agency in excess of 72 hours. **Table 4** displays the number of UAC held in DRO facilities by fiscal year and month, and identifies the number of UAC that were held by DRO both under and in excess of 72 hours. The total number of UAC held by this agency during FY2005-FY2006 was 2,707, of which 1,365 were held in FY2005 and 1,342 were held in FY2006. As the table demonstrates, the number of juveniles held by DRO for a period of 72 hours or longer in FY2005 was 142, representing 10.4% of the total UAC detentions for the fiscal year. By FY2006, this proportion had dropped significantly to a level of 2.8%, or 37 UAC. The highest rates of extended detentions occurred in the summer months of FY2005. In the months of July, August, and September of FY2005, the extended detention rate of UAC in DRO custody was 49%, 37.9%, and 19.5%, respectively. Subsequently, the rates of extended detention dropped significantly, although in August of FY2006 the rate began to increase again. For September of FY2006, the rate was at 9.5%.¹⁰¹

¹⁰¹ Statistically, there is little evidence of any relationship between the number of juveniles held in a month and the number that were held for over 72 hours. Pearson correlation scores are a measure of the strength of the relationship between two variables. It is measured on a continuous scale between -1 to 1, with -1 indicating a linear inverse relationship, 1 (continued...)

Table 4. UAC in ICE DRO Custody by Hours Held, FY2005-FY2006

FY2005	# of Juveniles Held Under 72 Hours	# of Juveniles Held 72 Hours or Longer	FY2006	# of Juveniles Held Under 72 Hours	# of Juveniles Held 72 Hours or Longer
October	111	11	October	102	8
November	126	2	November	75	6
December	150	0	December	82	4
January	67	0	January	76	1
February	85	0	February	79	0
March	131	1	March	131	0
April	123	0	April	76	0
May	119	17	May	177	1
June	119	8	June	171	1
July	98	48	July	134	0
August	103	29	August	113	4
September	133	26	September	126	12
Total	1365	142	Total	1342	37

Source: CRS presentation of unpublished DRO data (2006).

Table 5 displays the number of unaccompanied alien juveniles (UAC) held longer than 72 hours in DRO facilities by fiscal year and month, and indicates the explanation (see legend) for extended detention. It is clear from the data in **Table 5** that despite a 74% drop from FY2005 to FY2006 in the number of UAC held in excess of 72 hours, there continues to be a geographic disconnect between the placement of some ORR facilities and DRO facilities. As the table demonstrates, the predominant reason for a UAC being held in excess of 72 hours was the lack of ORR bed space or no beds available in a “reasonable”¹⁰² commuting area. For FY2005, the 79 cases that were categorized in this manner accounted for 55.6% of juveniles held in excess of 72 hours for that fiscal year. The corresponding 22 cases in FY2006 accounted for 59.5% of the extended detentions for FY2006. Consequently, while the absolute numbers of such difficulties decreased, difficulties in transferring

¹⁰¹ (...continued)

indicating a direct linear relationship, and 0 indicating no relationship.

The Pearson correlation scores for FY2005 and FY2006 were -.11 and -.1, respectively. Not only does their proximity to zero indicate a very weak relationship, but the negative sign on the correlation indicates that the two data columns actually had an inverse relationship. Thus, as the number of juveniles held by DRO increased, the proportion of juveniles held 72 hours or longer would show a tendency to slightly decrease. One possible explanation for this lack of correlation would be that ORR bed space openings varied in relation to where juveniles were apprehended. A random variation in bed space location would drive down the correlation.

¹⁰² The term “reasonable” was not defined by DHS in the data they provided to CRS.

UAC from DRO to ORR remained the principal reason for the majority of extended detentions.

The second highest cause of extended DRO detention in FY2005 was escorting staff shortages in conjunction with the lack of ORR bed space within reasonable proximity, with 27 cases (or 19%) being classified as such. In FY2006, a total of two cases were attributed to such difficulties. A similar pattern is evident with the number of UAC held in excess of 72 hours due to being in the custody of CBP. The decline from 24 cases in FY2005 to 2 cases in FY2006 represents a 95% reduction in absolute terms. Cases of UAC being held in excess of 72 hours for voluntary return dropped from eight cases in FY2005 to four cases in FY2006. The only two categories which saw absolute increases in the number of juveniles held for extended duration were cases with escorting staff shortages and unavailable flights. The former category had five cases, whereas the latter had two cases in FY2006. Neither category had any cases in FY2005.

Table 5. UAC Held by ICE DRO 72 Hours or Longer by Reason for Extended Detention, FY2005-FY2006

FY2005	# of Juveniles Held 72 Hours or Longer (see legend below)							Total		FY2006	# of Juveniles Held 72 Hours or Longer (see legend below)							Total
	Month	A	B	C	D	E	F				A&D	Month	A	B	C	D	E	
October		3				8		11		October	7	1					8	
November	2							2		November	5	1					6	
December										December	4						4	
January										January	1						1	
February										February								
March		1						1		March								
April										April								
May	3	14						17		May						1	1	
June		4			4			8		June	1						1	
July	38						10	48		July								
August	12						17	29		August	1			1		1	1	4
September	24	2						26		September	3		2	4		2	1	12
Total	79	24	0	0	4	8	27	142		Total	22	2	2	5	0	4	2	37

Source: CRS presentation of unpublished DRO data (2006).

Legend:

A=Lack of ORR Bed Space and/or No Beds Available in a "Reasonable" Commuting Area

B=Juveniles in CBP (Border Patrol) Custody

C=Flights Unavailable

D=Lack of Escorts/Transportation Officers

E=Quarantined Due to Chicken Pox - No Facility Available for Quarantined Juveniles

F=Held for Voluntary Return

Current Issues

Although policy changes regarding UAC treatment and procedures have responded to the concerns of both security and child welfare advocates, criticism continues to be leveled against the various agencies. Advocates for both security and refugee paradigms for UAC policy point to several practices that they claim violate existing agreements and laws. Consequently, some advocates wish to see additional involvement by Congress to address these policy and compliance issues.

Advocacy Group Criticisms and DHS Responses

DHS Transfers. Advocacy groups have leveled charges against DHS that the agency is not complying with the terms of the Flores Agreement governing the rights and treatment of UAC.¹⁰³ DHS is responsible for the transportation and removal of any unaccompanied alien child from the United States, as well as the transportation and transfer of any unaccompanied alien child into ORR's care. Those unauthorized juveniles who are "unaccompanied" under the HSA statutory definition belong in the custody of the ORR, and under the FSA any such juvenile must be transferred to their custody within 3-5 days of apprehension (with 72 hours being the standard practice).¹⁰⁴ Critics charge that DHS frequently fails to achieve this task, and that children are detained at DHS facilities for longer than 72 hours. Additionally, UAC under ORR's care who are to be deported from the United States must be transferred back into DHS custody. Frequently, such removals take more than a month. Congress has taken notice of these transfer issues, and has directed ICE to contact ORR immediately upon apprehension of an unaccompanied alien child, and ensure that the UAC is transferred to ORR within 72 hours.¹⁰⁵

Officials at DRO have contended that many such transfer difficulties arise from staff shortages or on the difficulties in arranging transportation to ORR facilities that require anything other than standard ground transportation.¹⁰⁶ 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 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

¹⁰³ Based on CRS discussions with attorneys from both the National Center for Refugee and Immigrant Children and the Hebrew Immigrant Aid Society (HIAS) & Council Migration Service of Philadelphia.

¹⁰⁴ This time-frame is stipulated by the Flores Settlement Agreement (*Reno v. Flores*, 507 U.S. 292 (1993)) and was detailed in the proposed rules presented in U.S. Department of Justice, "Processing, Detention, and Release of Juveniles," *Federal Register*, no. 63, vol. 142 (July 24, 1998), pp. 39759-39763.

¹⁰⁵ H.Rept.109-699.

¹⁰⁶ Based on CRS discussion with John Pogash, Chief of the National Juvenile Coordination Unit in DHS ICE's Office of Detention & Removal, Dec. 19, 2006.

difficulties, DHS maintains that it makes every effort to keep unaccompanied children separate from criminal juvenile aliens.¹⁰⁷

Defining “Unaccompanied”. A related issue to the transfer criticism has been the procedural definition of “unaccompanied” in classifying UAC. Specifically, critics charge that DHS has misclassified many juveniles as either “accompanied” or “unaccompanied,” and that in a number of cases these misclassifications are deliberate. The critics charge that DHS is separating children from their parents and classifying the children as UAC in order to avoid spending additional resources on “family unity” housing. Additionally, some advocacy groups have claimed that children who have no accompanying adult have on occasion been declared “accompanied” by virtue of having previously lived in the United States with a parent or legal guardian. Critics of these practices contend that it is unnecessary and harmful to the juveniles to separate them from their parents if they are available, and that DHS should prevent such separations from occurring.¹⁰⁸ In certain cases, critics have argued that DHS has classified juveniles as UAC and used the juvenile as bait to draw out parents who are suspected of being unauthorized. In other cases, the critics charge, DHS has misclassified juveniles as “accompanied” in order to keep the juveniles in secure DHS facilities on suspicion of criminal intent.

Although children who are apprehended with a parent or legal guardian are not legally unaccompanied, they are sometimes separated from the adult and detained as an unaccompanied alien child.¹⁰⁹ Such a scenario may occur when the parent or legal guardian is a criminal alien and must be housed in a detention unit for criminal aliens. In such cases, 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” for juveniles under 8 CFR §236.3. In other cases, the separation of children from their family is based upon a shortage of bed space. DHS’ Office of Inspector General (OIG) has noted that longer-term care facilities are frequently not readily available to accommodate families. Under such circumstances the juveniles are treated as unaccompanied minors and placed under ORR’s jurisdiction.¹¹⁰ In each of these above cases, the children involved default to a status of “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.

¹⁰⁷ Ibid.

¹⁰⁸ Based on CRS discussions with attorneys from both the National Center for Refugee and Immigrant Children and the Hebrew Immigrant Aid Society (HIAS) & Council Migration Service of Philadelphia.

¹⁰⁹ U.S. Department of Homeland Security, Office of the Inspector General. *Open Inspector General Recommendations Concerning the Former Immigration and Naturalization Service from Unaccompanied Juveniles in INS Custody, a Report by the Department of Justice Inspector General*. Report no. OIG-04-18, Mar. 2004.

¹¹⁰ 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, Sept. 2005, pp. 19-20.

Investigations by DHS and DOJ of some of these charges of deliberate juvenile misclassifications have confirmed that some charges are correct, although they have yet to be shown to result from any malicious intent. In some cases, DHS has deliberately separated juveniles from their parents because of shortages of beds in family unity facilities. Regulations dictate that the facility must meet a number of criteria in order to allow the housing of juveniles (e.g. juveniles may not be detained in a facility with adult criminal offenders). In some cases where facilities were not available to provide for proper family unity detainment, DHS did separate the family and place the children in juvenile facilities as UAC. But despite DHS' construction of new family unity facilities in Texas, advocacy groups charge that these misclassifications continue to occur.

In addition, 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 unaccompanied alien child 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.¹¹¹ 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 detention or apprehension locations. Linguistic barriers can also make communication especially difficult.

Age Determination. Another issue that has concerned advocacy groups has been the age determination of UAC by DHS. Critics charge that the DHS age determination methodologies are too reliant on forensic techniques.¹¹² Child advocacy groups argue that the forensic techniques such as bone and dental analysis are not scientifically rigorous, and are prone to error.¹¹³ These critics have further charged that the findings of the individuals conducting the bone analysis are skewed heavily towards adult ages, and therefore reflect an investigatory bias. DHS officials disputed this interpretation of its forensic procedure, stating that its age determination process was more nuanced and the forensic determination was only part of this process.¹¹⁴ Congress has expressed concern over DHS' forensic techniques in the report language of several appropriations bills, and in so doing has urged DHS to employ more holistic methodologies including psychological evaluations.¹¹⁵

Repatriation. There have been concerns expressed about the repatriation practices conducted by DHS of UAC. What has concerned many advocacy groups

¹¹¹ 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.

¹¹² Jennifer Smythe, "Age Determination Authority of Unaccompanied Alien Children and the Demand for Legislative Reform," *Interpreter Releases*, vol. 81, no. 23 (June 7, 2004), p.754-763.

¹¹³ According to critics, factors such as bad nutrition may result in forensic estimates that deviate significantly from those of a healthy child.

¹¹⁴ Based on CRS discussion with John Pogash, Chief of the National Juvenile Coordination Unit in DHS ICE's Office of Detention & Removal, Dec. 19, 2006.

¹¹⁵ H.Rept.109-476.

are reports that some children are not safely repatriated back to their homelands to the care of a parent, legal guardian, or sponsoring agency.¹¹⁶ The standard procedure for DHS and ORR is to contact the juvenile's appropriate consulate in order to facilitate a safe repatriation. With nationals of Mexico and Canada apprehended along the border, CBP officials may contact their respective Mexican or Canadian border protection counterparts and transfer the juvenile to their custody for further processing. Advocacy agencies have charged that many juveniles are caught within the United States and released across the border without any sponsor to care for them nor any official notification of foreign officials. They have also charged that DHS does not properly verify that a juvenile will be safely repatriated.¹¹⁷ Congress has expressed concern in both committee and conference report language about the dearth of repatriation services, and has urged DHS to work with DOS and ORR to develop policies and procedures for the safe repatriation of juveniles.¹¹⁸

DHS has contended that the responsibility for safe repatriation should lie at least in part with the appropriate consulate for the alien juvenile.¹¹⁹ Both DHS and ORR noted that consular officials can be particularly troublesome for the repatriation process by regularly changing their documentation requests or raising objections to a juvenile transfer. Both of these actions serve as drains on DHS resources. Despite such difficulties with resources and foreign consulates, DHS maintains that it makes every effort to safely repatriate all UAC.¹²⁰

Legislation

During the 109th Congress, there were several efforts at addressing the issues and charges advocates have raised surrounding UAC. In the Senate, Senator Diane Feinstein and Senator Sam Brownback co-sponsored the Unaccompanied Alien Child Protection Act of 2005 (S. 119). This legislation included many provisions, including the rights of UAC to consult with a consular officer prior to repatriation, criteria for treatment and detention of UAC, and the preference order of child placement. The legislation additionally would have granted ORR access to children in DHS' custody to determine the child's age. Notably, the legislation also would have provided for the appointment of child advocates for UAC, including counsel for all children in the custody of DHS that are not being repatriated to a contiguous country. These advocates would have served on a *pro bono* basis. S. 119 was passed in the Senate and subsequently referred to the House Subcommittee on Immigration, Border Security, and Claims. In the House, Representative Zoe Lofgren sponsored the Unaccompanied Alien Child Protection Act of 2005, which became H.R. 1172.

¹¹⁶ American Immigration Lawyers Association, "Sign On Letter Advocating Reform for Children Seeking Asylum," July 1, 2004, at [<http://www.aila.org/content/default.aspx?docid=10988>], visited February 1, 2007.

¹¹⁷ Ibid.

¹¹⁸ H.Rept.109-476.

¹¹⁹ Based on CRS discussion with John Pogash, Chief of the National Juvenile Coordination Unit in DHS ICE's Office of Detention & Removal, Dec. 19, 2006.

¹²⁰ Ibid.

In the conference report for the FY2007 Department of Homeland Security Appropriations Act,¹²¹ the conferees outlined a number of concerns related to UAC. These concerns included issues such as the age determination methodologies employed by DHS, the safe repatriation of UAC back to their home country, and the separation of juveniles from their parents in DHS facilities. This report language also directed DHS to provide monthly statistics on apprehensions and detention of UAC to the committee.

¹²¹ P.L.109-295; H.Rept.109-699.