

Submitted via www.regulations.gov

Kyle McGowan
Office of the Chief of Staff
Centers for Disease Control and Prevention
1600 Clifton Road NE, MS H21-10
Atlanta, GA 30329
Telephone: 404-498-7000
cdcregulations@cdc.gov

April 23, 2020

RE: CDC-HHS Interim Final Rule, Docket No. CDC-2020-0033, RIN 0920-AA76, Titled “Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes”

To Whom It May Concern,

The Young Center for Immigrant Children’s Rights (Young Center) writes to comment on the interim final rule entitled “Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes” published Friday, March 24, 2020 by the Department of Health and Human Services (HHS).¹

The Young Center serves as the federally-appointed best interests guardian *ad litem* (Child Advocate) for trafficking victims and other vulnerable unaccompanied children in government custody as authorized by the Trafficking Victims Protection Reauthorization Act (TVPRA).² The Young Center is the only organization authorized by the Department of Health and Human Services’ Office of Refugee Resettlement (ORR) to serve in that capacity. The role of the Child Advocate is to advocate for the best interests of the child. A child’s best interests are determined by considering the child’s safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity. Since 2004, ORR has appointed Young Center Child Advocates for thousands of unaccompanied children in ORR custody, all of whom were referred to ORR according to the TVPRA and many of whom are seeking some form of legal protection in the United States.

The Young Center is deeply concerned about both the legality and the impact of this interim final rule (Rule), which authorizes the Director of the Centers for Disease Control and Prevention (CDC) to “prohibit the introduction into the United States of persons from designated foreign

¹ See Federal Regulation No. 57, Vol. 85 at 16559-16567.

² William Wilberforce Trafficking Victims Protection Act of 2008, 8 U.S.C.A. § 1232(c)(6)(A) (Westlaw through Pub. L. No. 115-171) [*hereinafter* TVPRA].

countries (or one or more political subdivisions and regions thereof), only for such period of time that the Director deems necessary for the public health,” through issuance of an order.³

On the same day the rule was issued, CDC issued an order (CDC order) invoking its authority under the rule to suspend the introduction of persons without documentation who seek to enter the United States via Mexico or Canada. Because the rule does not have an explicit exception for asylum-seekers, the CDC order effectively eviscerates asylum protections and safeguards specifically designed to extend safety and due process to unaccompanied children, while failing to further the public health justifications on which it is purportedly based.

The consequences of the rule and the CDC order are already clear—it has been reported that hundreds of unaccompanied children have been turned back at our border without any screening for risk of trafficking, fear of persecution, or whether the child can be safely repatriated to their home country.⁴ Referrals of unaccompanied children to ORR from the border have dropped to the single digits, and on some days, zero children have been referred.⁵

At the Young Center, we understand the particular vulnerability of immigrant children who fled persecution, trafficking, abuse and other violence in their countries. They have traveled hundreds if not thousands of miles to the United States, whether alone, with family, or in the company of strangers. They are, by international and federal law, entitled to screening at the border regarding their status as unaccompanied children and the right to seek protection from threats to their safety.

We are gravely concerned that the rule as written and as already applied will jeopardize the safety and well-being of immigrant children by forcing their return to persecution, their traffickers or their abusers or leaving them vulnerable to exploitation across the border in a country that is not their own, in violation of U.S. law and basic principles of child welfare and human decency. We therefore offer the following comments to persuade HHS to rescind the rule. Additionally, any future regulations regarding border restrictions during the COVID-19 pandemic must be informed by public health and be consistent with binding obligations under U.S. and international law, including the obligation to designate as unaccompanied those children who meet the legal definition so that they may have the opportunity to pursue protection in a manner that safeguards their best interests.

³ 85 FR 16559.

⁴ Ted Hesson & Mica Rosenberg, *U.S. Deports 400 Migrant Children Under New Coronavirus Rules*, REUTERS (Apr. 7, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-deportations/us-deports-400-migrant-children-under-new-coronavirus-rules-idUSKBN21P354>.

⁵ Hamed Aleaziz, *The Trump Administration Is Now Deporting Unaccompanied Immigrant Kids Due to the Coronavirus*, BUZZFEED (Mar. 30, 2020), <https://www.buzzfeednews.com/article/hamedaleaziz/coronavirus-unaccompanied-minors-deported>; Arelis R. Hernández & Nick Miroff, *Facing Coronavirus Pandemic, Trump Suspends Immigration Laws and Showcases Vision for Locked-Down Border*, WASH. POST (Apr. 3, 2020), https://www.washingtonpost.com/national/coronavirus-trump-immigration-border/2020/04/03/23cb025a-74f9-11ea-ae50-7148009252e3_story.html.

I. The Rule Contradicts United States and International Law, Which Require Continued Protection for Asylum Seekers During Emergencies and Specific Legal Protections for Unaccompanied Children

United States refugee and immigration laws requires the United States to guarantee individuals the right to seek asylum at the border or after crossing into the United States.⁶ The guaranteed right to seek asylum in U.S. law brings the United States into compliance with the United Nations Convention Relating to the Status of Refugees, to which the United States is party.⁷ The Convention and its 1967 Protocol is clear that states shall not “expel or return” an asylum seeker to any place where they could face serious harm amounting to persecution, otherwise known as the principle of *non-refoulement*.⁸ The UN High Commissioner for Refugees (UNHCR) has stated that to give effect to the obligation of *non-refoulement*, countries must “grant individuals seeking international protection access to [their] territory.”⁹

While the Refugee Convention lists exceptions to the principle of *non-refoulement*, UNHCR’s own guidance declares that under the development of the law of international protection, the principle is “essential and non-derogable.”¹⁰ Further, under other human rights instruments, such as the Convention Against Torture (to which the United States is a party),¹¹ there is no exception to a state’s obligation to not return an asylum seeker to a territory where they may suffer harm that may rise to the level of persecution or torture.¹²

After COVID-19 was declared a pandemic and before the date that the March 20 interim rule and the corresponding CDC order went into effect, UNHCR issued guidance stating that “[u]nder international law, States have the sovereign power to regulate the entry of nonnationals.”¹³ However, “international law also provides that measures to this effect may not prevent [individuals] from seeking asylum from persecution,” and “imposing a blanket measure to preclude the admission of refugees or asylum seekers, or those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards.”¹⁴ UNHCR has also noted that sending asylum-seekers back to countries with limited public health

⁶ 8 U.S.C. § 1158(a)(1).

⁷ The United States acceded to the Refugee Convention via its 1967 United Nations Protocol Relating to the Status of Refugees. Its obligations are incorporated into domestic law in the Refugee Act of 1980. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

⁸ 1951 Convention Relating to the Status of Refugees art. 33(1), 189 U.N.T.S. 137, July 28, 1951.

⁹ U.N. HIGH. COMM’R FOR REFUGEES, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* para. 8. (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf> [*hereinafter* UNHCR Non-Refoulement Advisory Opinion].

¹⁰ *Id.* para. 12.

¹¹ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277; see 8 C.F.R. § 208.16(c).

¹² UNHCR Non-Refoulement Advisory Opinion, *supra* note 9, paras. 11, 17.

¹³ U.N. HIGH. COMM’R FOR REFUGEES, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response* para. 1 (Mar. 16, 2020), <https://www.refworld.org/docid/5e7132834.html> [*hereinafter* UNHCR COVID-19 Legal Considerations].

¹⁴ *Id.* paras. 1, 6.

infrastructure “may put them and others at risk when quarantine measures are not applied and health care is insufficient.”¹⁵ UNHCR’s guidance on COVID-19 provides countries with examples of reasonable measures to manage the public health risks of COVID-19 while still providing access to protection, such as testing and/or quarantine.¹⁶

For unaccompanied children, federal law is unambiguous. The Homeland Security Act (HSA) defines “unaccompanied alien children” as children who do not have lawful immigrant status, are under 18, and do not have a parent or legal guardian available to provide care and physical custody in the United States.¹⁷ Under the TVPRA, which passed with a large bipartisan majority, Customs and Border Protection (CBP) must designate children from non-contiguous countries who meet the definition as “unaccompanied” and transfer them to ORR within 72 hours.¹⁸ While there is a different standard for children from contiguous countries, the TVPRA still requires CBP to screen children from those countries for fear of persecution, risk of trafficking, or an inability to withdraw their application for protection.¹⁹ Children who meet one of these three criteria must be transferred to ORR’s custody.²⁰ These legal requirements under the TVPRA have no exceptions and are not optional.

International law and federal law therefore prohibit the United States from instituting a blanket policy of denying entry to asylum-seekers and unaccompanied children. Yet the CDC order implementing the rule is just that: a blanket measure that effectively bans all asylum-seekers and unaccompanied children from protection.

Together, the rule and the CDC order reveal a policy that is not about public health. In fact, a recent report examining continued migration during other influenza-like diseases, including the first months of the current COVID-19 pandemic, found that “there is no statistically significant relationship between persons requesting asylum and the prevalence of the flu” or flu-like communicable diseases within the United States.²¹ Rather, the rule and CDC order allow the Trump Administration to further its anti-immigrant policies in violation of clear Congressional intent and law. Earlier COVID-19-related travel restrictions imposed by the United States on

¹⁵ *Beware Long-Term Damage to Human Rights and Refugee Rights From the Coronavirus Pandemic*: UNHCR, U.N. HIGH. COMM’R FOR REFUGEES (Apr. 22, 2020), <https://www.unhcr.org/news/press/2020/4/5ea035ba4/beware-long-term-damage-human-rights-refugee-rights-coronavirus-pandemic.html>.

¹⁶ UNHCR COVID-19 Legal Considerations, *supra* note 13, para. 8. *See also* U.N. HIGH. COMM’R FOR REFUGEES, *The COVID-19 Crisis: Key Protection Messages* (Mar. 31, 2020), <https://www.icvnetwork.org/system/files/versions/UNHCR-COVID-19%20protection%20messaging%20final.pdf>.

¹⁷ Homeland Security Act of 2002 Pub. L. No. 107-296, § 462(a), 116 Stat. 2135, 2202 (2002).

¹⁸ TVPRA, *supra* note 2, at (b)(1), (3).

¹⁹ *Id.* at (a)(2).

²⁰ *Id.* at (b)(1), (3).

²¹ Tom K. Wong, *COVID-19 and the Remaking of U.S. Immigration Policy? Empirically Evaluating the Myth of Immigration and Disease*, U.S. IMMIGRATION POL’Y CTR. 6-8 (Apr. 22, 2020), <https://usipc.ucsd.edu/files/usipc-myth-immigration-disease-final.pdf>.

China, Iran, the Schengen zone, and the United Kingdom all include explicit exceptions for those seeking protection in the United States.²² In contrast, the rule and the CDC order issued on the same day fail to clearly state any exceptions for asylum-seekers or unaccompanied children.²³

Additionally, the order does not apply equally to all who might cross the border, including those traveling in congregate settings such as ships, aircraft, or airports; rather, the order only applies to those who travel by land without prior documentation from Canada and Mexico,²⁴ individuals who have long been a target of this Administration. This targeted policy makes clear that the rule's assertion that the CDC would coordinate with the Department of State regarding U.S. international obligations is ineffectual and ineffective, and the rule cannot stand without explicit exceptions for unaccompanied children and those seeking protection.

²² See *Proclamation on Suspension of Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus*, THE WHITE HOUSE (Jan. 31, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/>; *Proclamation on Suspension of Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus*, THE WHITE HOUSE (Feb. 29, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus/>; *Proclamation on Suspension of Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus*, THE WHITE HOUSE (Mar. 11, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/>; *Proclamation on Suspension of Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus*, THE WHITE HOUSE (Mar. 14, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus-2/> (“Nothing in this proclamation shall be construed to affect any individual’s eligibility for asylum, withholding of removal, or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consistent with the laws and regulations of the United States.”).

²³ See CTFS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERV., *Order Suspending Introduction of Certain Persons From Countries Where A Communicable Disease Exists* (Mar. 20, 2020), https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf [hereinafter CDC Order]; U.S. CUSTOMS & BORDER PROTECTION, *COVID-19 CAPIO*, available at <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html> (last visited Apr. 15, 2020).

²⁴ CDC Order, *supra* note 23, at 2; See also Charlie Martel & Grace Meng, *Trump Administration Using Pandemic as Excuse to Target Asylum Seekers*, HUM. RTS. WATCH (Apr. 7, 2020), <https://www.hrw.org/news/2020/04/07/trump-administration-using-pandemic-excuse-target-asylum-seekers#>.

II. The Rule Endangers Children's Safety and Well-Being (their Best Interests) by Eliminating Protections that Ensure Children's Designation as Unaccompanied and their Ability to Access Protection as Established in Law

The “best interests of the child” principle has no single definition but encompasses consistently accepted factors. One of the most significant of these is the child’s health and safety.²⁵ These best interests “factors” were recognized in the Interagency Working Group on Unaccompanied and Separated Children’s Subcommittee on Best Interests’ “Framework for Considering the Best Interests of Unaccompanied Children,” released in 2016.²⁶ Access to legal protection, to the extent it will prevent serious risks to a child’s safety, is generally in the best interest of the child.²⁷ Against children’s best interests, the rule in combination with the CDC order puts children in grave danger by denying them access to legal relief that is critical to ensure their best interests—their safety and well-being.

Given the highly contagious nature of the COVID-19 virus, the government must put in place reasonable public health measures to contain the spread of the virus as children exercise their right to seek protection. However, the rule’s justification falsely assumes that border detention is necessary for both adults and children, and that an order suspending entry is therefore necessary to avoid border detention. Through the CDC order, the rule applies only to non-citizens without permanent immigration status who arrive at a land port of entry or who have crossed into the United States, including asylum-seeking individuals, families, and unaccompanied children. The order assumes that these individuals lack places where they could quarantine and that they must be held in congregate settings at the border. However, a recent study showed that 92 percent of surveyed asylum seekers have family in the United States with whom they could live and quarantine for the period recommended by health officials.²⁸ Detention is not required to process asylum seekers and unaccompanied children—it is simply a policy choice of this administration.

In the case of children encountered at the border, without exception, they must be properly screened and designated as “unaccompanied” when they meet the statutory definition set forth in the HSA. Designation as an unaccompanied child leads to several specific protections, including transfer to ORR custody and the ability to seek protection from removal—which can be done in a manner consistent with public health guidance on limiting the transmission of COVID-19.

²⁵ See e.g., CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD (2016) at p.2, available at https://www.childwelfare.gov/pubPDFs/best_interest.pdf (identifying the “health, safety and/or protection of the child” as a “guiding principle of best interests determinations”).

²⁶ SUBCOMM. ON BEST INTERESTS, INTERAGENCY WORKING GRP. ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 5, 9-11 (2016).

²⁷ See UN HIGH COMM’R FOR REFUGEES, *UNHCR Guidelines on Determining the Best Interest of the Child* 70 (May 2008), <https://www.unhcr.org/4566b16b2.pdf>.

²⁸ Tom K. Wong, *Seeking Asylum: Part 2*, U.S. IMMIGRATION POL’Y CENTER 13 (Oct. 29, 2019), <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

UNHCR guidance on COVID-19 outlines reasonable measures to address public health concerns while still ensuring asylum-seekers' and unaccompanied children's access to safety and protection in the United States, such as the use of personal protective equipment, health screening and quarantine.²⁹ U.S.-based public health experts have also outlined procedures to ensure safe transportation from the border into the United States, such as access to personal protection equipment and sanitation materials for migrants and government officials, and distancing on modes of transportation.³⁰ Other similarly situated countries are also finding ways to strike this balance—the European Commission released guidance with best practices on receiving asylum seekers, and is actively resettling dozens of children into countries using these safety measures.³¹

ORR can also put in place measures to protect the health of children in its custody. ORR has capacity for 13,000 children,³² and as of April 1 reported that it had 3,100 children in care.³³ Given its current capacity, ORR can continue to take referrals of unaccompanied children at the border, ensuring appropriate physical distancing and conditions that are safe for children and care providers. Children can remain in ORR care for as long as required to assess the safety of their sponsors and to evaluate their health consistent with public health guidance. Using children's best interests and guidance from public health experts as primary considerations, the government can adhere to the law and continue to allow unaccompanied children into the United States while protecting health of the children and the public.

²⁹ *The COVID-19 Crisis: Key Protection Messages*, *supra* note 16.

³⁰ Joanna Naples-Mitchell, *There is No Public Health Rationale for a Categorical Ban on Asylum Seekers*, JUST SECURITY (Apr. 17, 2020), <https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers/>.

³¹ *COVID-19: Guidance on the Implementation of Relevant EU Provision in the Area of Asylum and Return Procedures and on Resettlement*, Communication from the Commission, 126 OFF. J. OF THE EUROPEAN UNION 12, 18-20 (Apr. 17, 2020), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0417\(07\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0417(07)&from=EN) (describing measures such as initial and daily symptom screening at areas of reception, proper information on the virus and measure to prevent infection, requiring 14-day quarantine, releasing people to alternative housing options as ways to protect public health while ensuring compliance with the right to protection). Unlike the CDC order, the Commission's guidance calls for special protection for asylum seekers and vulnerable populations: "Particular attention should be paid to the situation of vulnerable persons, families and minors (including unaccompanied minors), and all applicants for international protection must be treated with dignity, and be, at a minimum, able to access, and exercise their basic rights." *Id.* at 13. *See also* John Psaropoulos, *Pandemic Pushes Harder Greek Refugee Policy, But Also Solidarity*, AL JAZEERA (Apr. 20, 2020), <https://www.aljazeera.com/news/2020/04/pandemic-pushes-harder-greek-refugee-policy-solidarity-200420201314090.html> (explaining that a coalition of EU member states agreed to take at least 1,600 unaccompanied children from Greece in light of the pandemic).

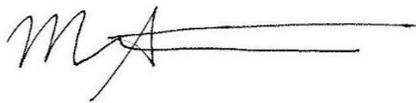
³² *Frequently Asked Questions Regarding Unaccompanied Alien Children*, DEP'T OF HEALTH & HUMAN SERV., <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/faqs/index.html> (last updated Aug. 7, 2018).

³³ DEP'T OF HEALTH & HUMAN SERV., *Fact Sheet: Unaccompanied Alien Children (UAC) Program 2* (Apr. 1, 2020), <https://www.hhs.gov/sites/default/files/unaccompanied-alien-children-program-fact-sheet-01-2020.pdf>.

III. Conclusion

The Young Center opposes the adoption of any rule that denies children access to legal protections on the assumption that they pose a risk to public health. Given that there is clear public health guidance to protect the safety of children and the adults with whom they come in contact, the government must continue to ensure that children are not returned to persecution, trafficking, abuse or other violence, as is their right under immigration laws. By allowing the CDC order to include unaccompanied children in a blanket suspension of entry to the United States, in contravention of international and U.S. law, the rule puts children in grave danger and deprives them of any opportunity to articulate a protection claim. The United States can both protect public health and ensure continued protections for the most vulnerable in our world and is in fact obligated to do so. We therefore urge HHS to rescind the rule and ensure that any future regulation of a similar nature include a clear exception for unaccompanied children to any suspension of entry to the United States related to communicable diseases.

Respectfully submitted,



Miriam Abaya
Policy Analyst



Jennifer Nagda
Policy Director