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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

June 23, 2015

Dear Secretary Burwell:

I am writing today regarding troubling information provided to the Committee that indicates the Department of Health and Human Services (HHS) may be mischaracterizing its handling of unaccompanied alien children (UAC).¹ This information raises key questions about the functioning of the Department, its collaborative efforts with other federal agencies, and the degree to which the Department is adhering to federal law.

While I am grateful for the Department's recent disclosure of information regarding the UAC influx over the last few years,² I have received independent information indicating that the Department has, according to its own internal documentation, adopted practices and strategies that, at best, could be deemed ineffective, and at worst, do not accord with current federal law. The information also indicates not only creative (and questionable) bookkeeping practices, but also an intent to deceive the American people and Congress.

I have obtained an internal HHS PowerPoint slideshow presentation that appears to have been prepared for congressional appropriators in April 2014.³ I am concerned about the following specific information contained in the slideshow:

Use of Creative Strategies Suggests Deceptive Use of UAC Label. The most striking aspect of this slideshow is its revelation of the use of "Additional Strategies" to handle the UAC influx, some of which are arguably intended to deceive the American people and Congress. The slideshow discusses the use of a "Modified Approach to Children with Non-Parent Relatives" as part of a broader consideration of other, creative strategies for dealing with UAC.⁴ In the immediately following slide, the slideshow proposes "treating at least some [of the UAC who arrive with non-parent relatives] like children arriving with parents." That same slide also indicates that, "[w]hen children are apprehended throughout the interior of the United States, they may be treated as UACs even if residing with a relative at the time of apprehension." These two tactics appear to be suggested as possible avenues for reducing the costs of the UAC influx.⁵

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

² See Letter from Health and Human Services Secretary Sylvia Mathews Burwell to Senator Ted Cruz (May 15, 2015) (providing feedback about HHS's handling of UAC). I am still in the process of evaluating the sufficiency of the material you have provided pursuant to that request.

³ A copy of this slideshow, entitled "UAC Briefing for Appropriators" and dated April 22, 2014, is provided as an attachment to this letter (hereinafter ATTACHMENT).

⁴ *Id.* at 18.

⁵ *Id.* at 19.

These proposals, if they have in fact been adopted, could violate current immigration law, particularly with respect to congressionally established enforcement requirements. Additional information is needed about the Department's role in suggesting or implementing these proposals, as well as the legal support for these proposals.

Awareness of Unprecedented UAC Volume as of Early 2014. Despite frequent commentary by this Administration about how the increase in UAC during the summer months of 2014 was wholly unexpected and therefore caught relevant federal agencies off guard,⁶ this slideshow seems to completely contradict that narrative, and raises significant questions about whether the Administration has been truthful with the American people and Congress about its knowledge of the scope of the UAC problem. This slideshow – which is dated April 22, 2014, and purports to present the views of HHS, the Department of Homeland Security (DHS), the Department of Justice (DOJ), the Department of State, and the Office of Management and Budget (OMB)⁷ – clearly demonstrates that the federal government was cognizant of the exponential “increase” in UAC volume from 2011 through 2014. Beyond just general awareness of past skyrocketing UAC numbers, however, the slideshow also explicitly projects a UAC influx level of 60,000 for 2014.⁸ Far from being an unforeseen crisis, the high number of UAC that approached the United States-Mexico border last summer appears to have been calmly predicted, although not addressed. This raises additional questions about what actions were or were not taken, and whether federal agencies were fully sharing information with Congress at a time when the Administration was seeking supplemental funding to handle the influx.⁹ It also raises questions about the Administration's preparedness for an even larger influx in 2015, which also appears to have been calmly predicted in early 2014.¹⁰

Explanation of UAC Influx Differs Significantly from Federal Intelligence Reports. The slideshow offers discussion on the “Reasons for UAC Migration,” cites both “Push Factors” (meaning internal home country factors) and “Pull Factors” (meaning incentives outside of home countries), and draws statistical support from the United Nations Office of the High Commissioner for Refugees (UNHCR) in asserting that home country violence and displacement were among the primary drivers, if not *the* primary drivers, of UAC migration.¹¹ The slideshow

⁶ See, e.g., Melissa del Bosque, *Obama: Spike in Children at Border 'Urgent Humanitarian Situation,'* TEXAS OBSERVER (Jun. 2, 2014) (noting White House domestic policy director Cecilia Munoz indicating that “the scale in the last few months caught the government off guard,” and quoting Munoz as stating that “[t]he number of children coming [to the United States] is much larger than we anticipated”).

⁷ It is worth noting that, while interagency collaboration on this issue is not necessarily problematic, and may even be desirable, several of the agencies listed as lead agencies in the slideshow – specifically, DHS, DOJ, and the State Department – have denied involvement in any aspect of UAC handling or strategy. The slideshow unequivocally states, however, that HHS, DHS, DOJ, and the State Department have been engaged in “[i]nteragency coordination” on an “ongoing” basis, and that these agencies have, at the direction of appropriators, been “meeting ... to develop an *interagency strategy* to address the growing number of UAC.” ATTACHMENT, *supra* note 3, at 11 (emphasis added). Additional information is needed to review the interagency coordination.

⁸ See *id.* at 5. The projected 60,000 figure is close to the 67,339 CBP ultimately reported for all of FY 2014. See U.S. Customs and Border Protection, Southwest Border Unaccompanied Children, *available at* <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last viewed Jun. 23, 2015).

⁹ See Letter from President Barack Obama to Speaker John Boehner (Jul. 8, 2014) (citing the UAC surge generally and a letter from OMB Acting Director Brian Deese as the basis for a \$3.7 billion supplemental appropriation for FY 2014).

¹⁰ See ATTACHMENT, *supra* note 3, at 10 (noting that “UAC arrivals increased 815 percent between FY 2011 and FY 2014,” and that, “[i]f these growth rates continue[,] we could see 127,000 UAC arrivals in FY 2015”).

¹¹ See *id.* at 8 (citing UNHCR data to support claims that approximately 58% of UAC came to the United States after being “forcibly displaced because they suffered or faced harms” and that approximately 48% of UAC were

mentions “Opportunity Differential” as the main, overarching pull factor, and cites UNHCR data in support of the claim that 51% of UAC cite economic opportunity “as a reason for migrating [to the United States], but it is seldom the only reason.”¹² Bluntly stated, this slideshow differs sharply with a leaked, unclassified federal intelligence assessment, which claims that hundreds of UAC have attested, upon reaching the United States, that their perceptions of changes to U.S. immigration law were the primary motivators for their journeys to the United States.¹³ While it is true that this federal intelligence assessment was compiled after the date on this slideshow, the contrast in analysis raises questions about the degree to which the relevant agencies are accessing or presenting relevant information, or are tailoring the information they are providing for specific federal and non-federal audiences.

Emphasis on “Streamlined” UAC Referral Process Raises Questions about Corner-Cutting. The slideshow makes multiple references to streamlining the UAC referral process, including what it refers to as “family reunification procedures,” and how this streamlining has, as of the date of the slideshow, resulted in significant savings for HHS’s Office of Refugee Resettlement (ORR).¹⁴ While cost reduction efforts are theoretically positive, it is unclear if savings have been achieved by either releasing individuals that should not be released at all, releasing individuals prematurely, engaging in the previously discussed creative strategies, or otherwise bypassing statutory or other requirements. Additional information is needed regarding the means by which the Department has achieved these cost savings, particularly because the degree of savings seems almost improbable in light of the dramatic rise in UAC levels over the cited time period.¹⁵

Possible Inappropriate Use of DHS Resources for HHS Purposes. The slideshow raises questions about potential misuse of DHS resources for HHS responsibilities. Specifically, the slideshow indicates that the resources of DHS components are being used to manage the tracking, logistics, and transportation of UAC.¹⁶ It also suggests the possibility that the Department has been able to unload many of its own costs onto DHS, which arguably is designed to conceal the true cost of

“victims of or came in close contact with violent acts perpetrated by organized armed criminal actors”); *but see* El Paso Intelligence Center, EPIC Intelligence Assessment, *Misperceptions of U.S. Policy Key Driver in Central American Migrant Surge*, 3 (Jul. 7, 2014) (hereinafter EPIC REPORT) (citing declining incidence of violence in El Salvador, Guatemala, and Honduras).

¹² ATTACHMENT, *supra* note 3, at 8.

¹³ See EPIC REPORT, *supra* note 11, at 2 (noting how, in interviews with CBP personnel, hundreds of “migrants” informed their CBP interviewers that “the primary reason for migrating to the United States was the perception of U.S. immigration laws granting free passes or *permisos* to UAC and adult female [other than Mexicans] traveling with minors,” and that in-country media outlets were claiming that the availability of *permisos* would end after June 2014) (emphasis in original). The report subsequently clarifies that UAC who mentioned *permisos* were referring to “the Notice to Appear documents issued to undocumented aliens, when they are released on their own recognizance, pending a hearing before a U.S. immigration judge.” *Id.* at 3.

¹⁴ See ATTACHMENT, *supra* note 3, at 2 (listing on the meeting agenda discussion of “Efforts to Reduce Length of Stay and Save Costs in HHS Custody”); *see also id.* at 9 (discussing how, “between FY 2011 and 2014, ORR has reduced length of stay and costs, producing a 56% reduction in per capita shelter costs from 2011 to 2014”); *see also id.* at 16 (noting how “ORR has cut the average amount of time UAC spend in care in half since FY 2011, from 75 days to 35 days”).

¹⁵ The cost reduction dimension is of particular concern because it seems remarkable that HHS could achieve substantial savings during a four-year window of time that essentially witnessed a tenfold increase in the volume of UAC entering the United States.

¹⁶ See, e.g., ATTACHMENT, *supra* note 3, at 12 (discussing, in a “Gained Efficiencies” section, how HHS and DHS engage in “Regular and Ongoing Data Sharing,” and how HHS “[uses] ICE charter flights to transport large numbers of UAC to ORR facilities”) (emphasis added).

the UAC management effort. Additional information is needed from the Department to determine the propriety of DHS resource application for UAC handling.

Expenditure of Resources Internationally for UAC Influx. This slideshow raises questions about whether and how the Department is spending federal dollars overseas in order to address the UAC influx. The slideshow specifically references the State Department's efforts to address the UAC influx,¹⁷ and such international efforts are not only expected, but have been acknowledged by the Administration. It is unclear from the slideshow, however, if the Department is *also* involved in the expenditure of funds internationally. A range of international activities that are also mentioned in the slideshow are not specifically attributed to the State Department.¹⁸ More information is needed to determine if the Department is spearheading some of these efforts, and the legal support for these efforts.

In light of the information in, and the concerns raised by, the Department's slideshow, I request that the Department engage in the following preservation efforts, effective immediately:¹⁹

1. Preserve all documents, records, and logs, including paper-based documents, e-mail, e-mail-based calendar appointments, electronic documents, and other electronic data (electronic records), created since October 1, 2009, that relate to any and all aspects of the UAC issue or the Department's²⁰ response to, or handling of, the UAC issue, or otherwise include the phrases "unaccompanied alien child," "unaccompanied alien children," "unaccompanied child," "unaccompanied children," the acronyms "UAC" or "UC," the words "permiso" or "permisos," or any related phrases, terms, or acronyms. For the purposes of this request, "preserve" means taking any and all reasonable steps to prevent the partial or full destruction, alteration, overwriting, formatting, deletion, shredding, incineration, wiping, relocation, migration, theft, revision, or mutation of electronic and non-electronic documents, records, and logs, as well as negligent or intentional handling that would make such records incomplete or inaccessible.
2. Exercise any and all reasonable efforts to identify and notify former Department employees, contractors, subcontractors, grantees, subgrantees, and consultants who may have access to such electronic or non-electronic records that these records are also to be preserved.
3. If it is a practice of the Department, any Department component, any federal employee, any contract employee, any grantee or subgrantee, or any consultant to destroy or otherwise alter such electronic or non-electronic records, either halt such practices immediately, or arrange for the preservation of complete and accurate duplicates or copies of such records, suitable for production if requested.

¹⁷ See *id.* at 3 (noting that the State Department "has actively worked with the home countries").

¹⁸ See *id.* at 13 (discussing unspecified information campaign, border security, and anti-trafficking efforts).

¹⁹ I would remind you, the Department, and its officials, personnel, contractors, grantees, and consultants that violation of this preservation order is a violation of federal criminal law. See *generally* 18 U.S.C. § 1505.

²⁰ Please note that all references to the "Department" include the Department's Administration for Children & Families (ACF) and ACF's Office of Refugee Resettlement (ORR).

Please also provide the following unredacted documents and information for the time period from October 1, 2009, to the present (unless a different time period is specified below):²¹

1. The following documents and information relevant to the scope of the anticipated UAC influx up to and including April 22, 2014:
 - a. All data or statistics (whether created or obtained by HHS) projecting the UAC influx for Fiscal Years and Calendar Years 2014 and 2015;
 - b. All internal and/or external communications regarding projections of the UAC influx for Fiscal Years and Calendar Years 2014 and 2015;
 - c. All documents or information provided by federal, state, or local law enforcement agencies regarding their projections of the UAC influx for Fiscal Years and Calendar Years 2014 and 2015;
 - d. All documents or information provided to federal, state, or local law enforcement agencies regarding the Department's projections of the UAC influx for Fiscal Years and Calendar Years 2014 and 2015;²²
 - e. All communications with El Paso Intelligence Center (EPIC) personnel regarding the UAC influx for Fiscal Years and Calendar Years 2014 and 2015;²³ and
 - f. All communications regarding justifications for requests for UAC-related supplemental appropriations for Fiscal Years 2014 and 2015.
2. The following documents and information regarding the Department's discussion of the factors driving the UAC influx:
 - a. All internal and/or external communications regarding federal intelligence assessments of the factors driving the UAC influx, including those supplying information to other federal agencies about the Department's perception of the factors driving the UAC influx;
 - b. All internal and/or external communications regarding the impending release of EPIC's July 2014 unclassified report entitled "Misperceptions of U.S. Policy Key Driver in Central American Migrant Surge";²⁴

²¹ It is important to note that this is a request for a document production *to* the Committee, and is not a request for *in camera* review of documents in the Department's possession. The requested documents are to be *physically* transferred in *unredacted* form to the Committee. Similarly, this is also not a request for the provision of previously released versions of similar or redacted information that may have been made available via Freedom of Information Act requests, since congressional document requests are not restricted by either the Freedom of Information Act or the Privacy Act.

²² Please inform me if any of the documents or information provided either to or by the Department regarding projections of the UAC influx for 2014 were classified, so that I can make arrangements for a classified document review.

²³ Please inform me if any of the communications between the Department's personnel and EPIC personnel were classified, so that I can make arrangements for a classified document review.

²⁴ See generally EPIC REPORT, *supra* note 11.

- c. All internal and/or external communications containing the terms “permiso” or “permisos”; and
 - d. All communications with White House domestic policy advisor Cecilia Munoz or her staff.
3. The following documents and information regarding the interagency collaboration discussed in the slideshow:
- a. A list of all federal agencies involved in the effort to coordinate the federal response to the UAC influx (i.e., the “interagency effort”);
 - b. The names of all officials and/or other personnel who have represented and/or currently represent the respective agencies during this interagency effort;
 - c. A list of the dates and locations of all interagency meetings relating to this interagency effort;
 - d. The minutes from the interagency meetings described in 2.c.;
 - e. Prior and current versions of the interagency strategy that has been developed by or as a result of this interagency effort;²⁵ and
 - f. All copies of the interagency monthly reports prepared for appropriators.²⁶
4. The following documents and information regarding the “Modified Approach to Children with Non-Parent Relatives”:
- a. Whether the proposal to “treat[] at least some [of the UAC who arrive with non-parent relatives] like children arriving with parents” was ever implemented and, if so, the date on which it was implemented;
 - b. How the Department defines the newly created group of “Children with Non-Parent Relatives”;
 - c. If the proposal discussed in 4.a. was implemented, the names of all Department officials and/or other personnel who recommended and/or approved its implementation;

²⁵ See ATTACHMENT, *supra* note 3, at 11 (stating that, “[a]s directed by the Appropriations Committees, HHS, OMB, DHS, and State have been meeting, along with DOJ, to develop an *interagency strategy* to address the growing number of UAC”) (emphasis added).

²⁶ See *id.* at 24 (listing “[m]onthly reporting to appropriators on numbers, trends, [and] developments” in the slideshow’s “Next Steps” section).

- d. If the proposal discussed in 4.a. was implemented, the number of UAC who have been so categorized since the proposal's implementation, broken down by state and fiscal year;
 - e. The statutory or regulatory authority for the proposal discussed in 4.a.;
 - f. Whether the proposal to treat "children ... apprehended throughout the interior of the United States" as if they were UAC was ever implemented and, if so, the date on which it was implemented;
 - g. If the proposal discussed in 4.f. was implemented, the names of all Department officials and/or other personnel who recommended and/or approved its implementation;
 - h. If the proposal discussed in 4.f. was implemented, the number of UAC who have been so categorized since the proposal's implementation, broken down by state and fiscal year; and
 - i. The statutory or regulatory authority for the proposal discussed in 4.f.
5. The following documents and information regarding the Department's streamlining of the UAC referral process:
- a. All documents or information governing the Department's UAC referral process, including all internal Department employee manuals or instructional materials that reference the UAC referral process;
 - b. All documents or information governing the Department's UAC "family reunification procedures," including all internal and/or external communications discussing UAC family reunification procedures;
 - c. All documents or information discussing the costs of the UAC referral process, including all internal and/or external communications discussing cost savings generated from reductions of UAC length of stay in Department custody;
 - d. All documents or information discussing the transfer of UAC-related duties, responsibilities, or expenses from the Department to other federal agencies; and
 - e. The statutory or regulatory authority for the transfer of UAC-related duties, responsibilities, or expenses discussed in 5.d.
6. The following documents and information regarding the leveraging of DHS funds or assets for the Department's management of the UAC influx:
- a. With respect to Immigration and Customs Enforcement (ICE), documents or information providing:

- i. The date of implementation of the program authorizing the use of ICE charter flights to transport UAC;
 - ii. The names of all Department officials and/or other personnel who recommended and/or approved the implementation of the program discussed in 6.a.i.;
 - iii. The total number of ICE charter flights that have transported UAC under the program discussed in 6.a.i.;
 - iv. The total number of UAC who have been transported throughout the United States under the program discussed in 6.a.i.;
 - v. The destinations of the UAC who have been transported throughout the United States under the program discussed in 6.a.i., broken down by state, locality within the state, and fiscal year;
 - vi. The state or local authorities and/or officials who were notified in these respective states about the transportation of UAC to their states, if any were notified;
 - vii. An explanation as to why UAC are being transported via charter flights at all;
 - viii. What funding, if any, the Department contributes to ICE to defray the costs of the program discussed in 6.a.i.;
 - ix. If the Department contributes funding to ICE to defray the costs of the program discussed in 6.a.i., the specific Department account from which those funds are drawn;
 - x. Whether the Department considers the transportation costs borne by ICE to be "savings" that can be attributed to the Department; and
 - xi. The statutory or regulatory authority for the program discussed in 6.a.i.;
- b. With respect to Customs and Border Protection (CBP), documents or information providing:
- i. The date of implementation of the program or programs authorizing joint database access or information sharing between the Department and CBP;
 - ii. The names of all Department officials and/or other personnel who recommended and/or approved the implementation of the program or programs discussed in 6.b.i.;
 - iii. Copies of all Memoranda of Understanding or other documents authorizing the program or programs discussed in 6.b.i.;
 - iv. What funding, if any, the Department contributes to CBP to defray the costs of the program or programs discussed in 6.b.i.;

- v. If the Department contributes funding to CBP to defray the costs of the program or programs discussed in 6.b.i., the specific Department account from which those funds are drawn;
 - vi. Whether the Department considers the information technology and other logistical costs borne by CBP to be "savings" that can be attributed to the Department;
 - vii. The statutory or regulatory authority authorizing the program or programs discussed in 6.b.i.; and
 - viii. The statutory or regulatory authority for the program discussed in 6.b.i.; and
- c. With respect to the Federal Emergency Management Agency (FEMA), documents or information providing:
- i. Information about coordination efforts with FEMA officials to house UAC in close proximity to the United States-Mexico border; and
 - ii. Information explaining why FEMA has not played a larger role in the housing of UAC during past influxes.
7. The following documents and information regarding the Department's UAC-related international expenditures:
- a. Whether the Department is spending any funding in Mexico, Guatemala, El Salvador, and/or Honduras, for any reason;
 - b. If the Department is spending any of its funding in Mexico, Guatemala, El Salvador, and/or Honduras:
 - i. The specific Department account or accounts from which this funding has been drawn or is being drawn;
 - ii. How much funding is being spent in each of these four countries, broken down by country and fiscal year;
 - iii. A line-item breakdown of how funding is being spent in each country;
 - iv. All documents and information regarding the Department's financial support for any public relations, public service, or other information or advertising campaigns in each of these four countries;
 - v. An explanation as to why the Department, rather than the State Department, is spending funding on such diplomatic engagement; and
 - vi. The statutory or regulatory authority authorizing the Department to engage in the above international expenditures.

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

Please provide the requested documents and information as soon as possible, but **no later than 9:00 a.m. on Wednesday, July 8, 2015**. When producing documents to the Committee, please deliver separate production sets to both the Majority Staff in Room 224 of the Dirksen Senate Office Building and the Minority Staff in Room 152 of the Dirksen Senate Office Building.

I appreciate your cooperation in this very important matter and look forward to your response and receipt of the requested material at the stated date and time. Please contact Committee staff at (202) 224-5225 if you have any additional questions about how to comply with the terms of this production request.

Sincerely,



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

Attachment

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

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

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

The Honorable Jeff B. Sessions
Chairman
Subcommittee on Immigration and
the National Interest

The Honorable Charles E. Schumer
Ranking Member
Subcommittee on Immigration and
the National Interest

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

The Honorable Loretta E. Lynch
Attorney General
U.S. Department of Justice

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

The Honorable Jeh Johnson
Secretary
U.S. Department of Homeland Security

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

The Honorable John F. Kerry
Secretary of State
U.S. Department of State

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

The Honorable Shaun Donovan
Director
Office of Management and Budget
Executive Office of the President