Dear Ms. Reid and Mr. Davidson,

The Young Center for Immigrant Children’s Rights (Young Center) writes to comment on the proposed rule entitled “Security Bars and Processing” published Thursday, July 9, 2020 by the Departments of Justice (DOJ) and Homeland Security (DHS).

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). 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 proposed rule, which uses specious public health claims to justify a new mandatory bar to asylum in violation of U.S. law and treaty obligations to protect asylum seekers and unaccompanied children. The proposed rule repeats similarly unfounded claims that the government put forth in its interim final rule and the corresponding March 20, 2020 order from the Centers for Disease Control and Prevention (CDC) to suspend the introduction of persons without documentation who seek to enter the United States via Mexico or Canada. The interim final rule and the CDC order have resulted in thousands of unaccompanied children being turned back at our border without any screening for risk of trafficking, fear of persecution, or whether

1 See 85 Fed. Reg. 41201-41219 (July 9, 2020). Where this comment includes linked material in footnotes, we request that the agencies review the linked material in its entirety and consider it part of the record.
the child can be safely repatriated to their home country.3 Under this proposed rule, the administration could not only turn away children in search of protection at the border, but also deny asylum to children who enter the country because they have symptoms for certain diseases, have been merely exposed to such diseases, or were present in a country where such diseases are prevalent.

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, under both federal and international law, entitled to be designated as unaccompanied children so long as they meet the statutory definition and entitled to seek protection from threats to their safety.

Given the sweeping changes proposed in the rule, a 60-day comment period for the public, at the very least, would have been appropriate to fully address the impact that the rule would have on the right to seek asylum. Due to the shortened comment period, we have not been able to cover every problem with the proposed rule. However, we submit this limited comment to raise our concern that the proposed rule will jeopardize the safety and well-being of immigrant children by denying them asylum either at the border or once in the United States and returning them to their persecutors, traffickers or abusers in violation of U.S. law and basic principles of child welfare and human decency. For the reasons including but not limited to those that follow, DOJ and DHS should immediately withdraw the proposed rule and instead dedicate their efforts to ensuring that there is a robust asylum system for everyone, and policies within the system that are tailored to the specific needs and vulnerabilities of child asylum-seekers.

I. The Proposed Rule Violates U. S. and International Law, Which Require Continued Protection for Asylum Seekers During Emergencies and Specific Legal Protections for Unaccompanied Children

United States refugee and immigration law require the United States to guarantee individuals the right to seek asylum at the border or after crossing into the United States.4 The guaranteed right to seek asylum brings the United States into compliance with the United Nations Convention Relating to the Status of Refugees, to which the United States is party.5 The Convention and its 1967 Protocol are 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. Pursuant to the United Nations High Commissioner for Refugees (UNHCR), in order to give effect to the obligation of non-refoulement, countries must “grant individuals seeking international protection access to [their] territory.”

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.” Further, under other human rights instruments, such as the Convention Against Torture (to which the United States is a party), 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.

After COVID-19 was declared a pandemic, UNHCR issued guidance stating that “[u]nder international law, States have the sovereign power to regulate the entry of nonnationals.” However, “international law also provides that measures to this effect may not prevent [individuals] from seeking asylum from persecution.” It further noted that “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.” Sending asylum-seekers back to countries with limited public health infrastructure “may put them and others at risk when quarantine measures are not applied and health care is insufficient.” 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.

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8 Id. para. 12.
9 Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277; see 8 C.F.R. § 208.16(c)).
10 UNHCR Non-Refoulement Advisory Opinion, supra note 9, paras. 11, 17.
12 Id. paras. 1, 6 (emphasis added).
13 Id. paras. 1, 6 (emphasis added).
Federal law is unambiguous with respect to unaccompanied children. 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.\(^{16}\) 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.\(^{17}\) 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.\(^{18}\) Children from non-contiguous countries who meet one of these three criteria must be transferred to ORR’s custody.\(^{19}\) These legal requirements have no exceptions and are not optional.

International law and federal law therefore prohibit the United States from instituting a blanket ban on asylum-seekers and unaccompanied children. Yet the proposed rule is just that: a blanket measure that effectively bans all asylum-seekers and unaccompanied children from protection under the guise of “public health.”

The proposed rule reveals 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.\(^{20}\) Rather, the proposed rule allows the Administration to further its anti-immigrant policies in violation of clear Congressional intent and law.

II. The Rule Endangers Children’s Safety and Well-being—their Best Interests—by Eliminating Protections that Ensure Children’s Ability to Access Protection

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.\(^{21}\) The importance of best interests considerations were recognized in the Interagency Working Group on Unaccompanied and Separated Children’s Subcommittee on Best Interests’ “Framework for

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\(^{17}\) TVPRA, supra note 2, at (b)(1), (3).

\(^{18}\) Id. at (a)(2).

\(^{19}\) Id. at (b)(1), (3).


\(^{21}\) 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”).
Considering the Best Interests of Unaccompanied Children,“ released in 2016. 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. Working against children’s best interests, the proposed rule would deny children access to legal relief that is critical to ensure their safety and well-being if they pass through a country where certain diseases are prevalent, exhibit symptoms of diseases, or have “come into contact with” such diseases. The proposed rule would not only apply to COVID-19, but to other “communicable diseases of public health significance” including cholera, diphtheria, gonorrhea, Hansen’s disease (leprosy), pandemic influenza, plague, smallpox, SARS, syphilis, tuberculosis, viral hemorrhagic fevers, yellow fever, and Zika, as designated by DHS and DOJ.

Children should not be blocked from asylum in the United States and deported to persecution based on determinations by agencies that lack relevant expertise. Yet neither DHS nor DOJ has the medical and public health expertise to declare a vast array of communicable diseases as national security threats, determine the countries experiencing outbreaks, decide the periods of “incubation and contagion” of covered diseases, and block, bar and deport asylum seekers on the basis of these determinations. Many of these diseases are treatable, do not present a risk of widespread transmission, and/or are not subject to U.S. quarantine laws. Further, the regulations leave undefined many key terms, including the level of disease required to trigger a finding that a disease is “prevalent” in a country or sub-national region. While the agencies are required to “consult” with the Department of Health and Human Services (HHS), DHS and DOJ would have final authority to make public health determinations with potential life-or-death consequences for asylum seekers.

Additionally, the proposed rule is not clear about whether children will be designated as unaccompanied and transferred to ORR custody if they are assessed have been exposed to covered diseases, which could allow the administration to turn children away at the border in violation of the TVPRA. Children encountered at the border, without exception, 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.

As a point of contrast, UNHCR guidance on COVID-19 outlines reasonable measures to address public health concerns while still ensuring asylum-seekers’ and unaccompanied children’s access

22 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).
23 Id; see also U.N. High Comm’r for Refugees, UNHCR Guidelines on Determining the Best Interest of the Child 70 (May 2008), https://www.unhcr.org/4566b16b2.pdf.
25 Id.
to safety and protection in the United States, such as the use of personal protective equipment, health screening and quarantine. 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 protective equipment and sanitation materials for migrants and government officials, and distancing on modes of transportation. 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. These guidelines are applicable to any similar communicable disease that might fall under the proposed rule.

ORR can also put in place measures to protect the health of children in its custody. ORR has capacity for 13,000 children and as of July 9 reported that it had approximately 850 children in care. Given its current capacity, ORR can continue to accept 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 while the agency assesses the safety of their sponsors and evaluates their health consistent with public health guidance.

In short, 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.

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27 The COVID-19 Crisis: Key Protection Messages, supra note 16.
29 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 (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 Psaropoulous, 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).
The proposed rule’s expansive scope would also empower the administration to categorically deny protection to unaccompanied children based on their travel route to the United States, regardless of whether a child was actually infected or exposed to a covered disease. Denying children the ability to seek asylum based on their journey to the United States ignores the realities of childhood. Children who travel with adults are subject to the decision-making of those adults—including how they come to the U.S. border. Those adults may be well-intentioned parents or adult family members. But children also travel to the United States under the control of smugglers or traffickers. Children traveling alone are even more unlikely to know or control just how they will journey to a new country. Rather than take those realities into account, the proposed rule would likely deny children asylum—including those who have legitimate claims of persecution or fear persecution upon return to their country of origin—simply because of the route of arrival into the United States, factors that are rarely under their control.

The Young Center was appointed to Juan*, an indigenous, teenage child from Guatemala. Juan fled his home country as a teenager and journeyed to the United States alone. At the U.S. border, Juan was apprehended by CBP and sent to an ORR shelter. Juan had been ill in Guatemala, and his health had deteriorated significantly by the time he arrived in the United States. After multiple tests and hospitalizations, Juan was diagnosed with end stage renal disease. His physicians determined that without a kidney transplant, he would need dialysis for the rest of his life. Without dialysis, Juan would die within weeks. Juan feared for his health and also told his Child Advocate that he was terrified to return to his home country. He began dialysis at the same time that he began the legal process for seeking asylum. After many months, Juan was granted asylum. Today he continues dialysis while he hopes to someday undergo a transplant.

Under the proposed rule, Juan would have been turned away at the border—undiagnosed and at risk of returning to persecution in home country. Under the proposed rule, even if admitted as an unaccompanied child, Juan would be denied the opportunity to petition for asylum because of the route he took to the United States, or even conditions in his home country. In short, under the proposed rule, Juan would be denied both protection and life-saving medical services—both of which have brought him safety and permanency. *Pseudonym

The proposed rule’s broad scope to would lead to other absurd, mandatory denials of asylum. For example, the proposed rule does not set limits on its application to individuals based on the time in which they were infected or exposed. The proposed rule would likely result in near automatic, mandatory denials of children who were ever in ORR custody, who might have been exposed to or exhibit symptoms of COVID-19 or other covered diseases because of their placement in congregate care settings. Yet children have no control over their placement or release, which is governed by federal law and policy. It would be illogical to bar children from receiving asylum because of their placement in ORR custody, which is outside of their control.
The proposed rule also does not require a positive diagnosis or a covered disease before prohibiting an individual from receiving asylum, allowing the denial of asylum for symptoms that could apply to many diseases not covered by the proposed rule. Whenever children are grouped together, as they are in ORR custody, child care facilities or schools, there is a chance that they will get ill. This is especially true for young children, who have lower resistance to infection and communicable disease, and children who experience heightened trauma or stress, as is the case for many unaccompanied children who have journeyed many miles to seek safety. The proposed rule would allow an adjudicator without any public health expertise or qualifications to assume a child is having symptoms related to a covered disease and deny that child asylum. Rather than penalize children for their developmental stages and varying immune responses to disease, the government should ensure that children in need of protection from persecution have access to asylum.

III. Conclusion

The Young Center opposes the adoption of any rule that denies children access to legal protection on the assumption that they pose a risk to public health. Given that there is clear public health guidance to ensure the safety of immigrant 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 imposing a blanket public health asylum ban in contravention of U.S. and international law, the proposed rule puts children in grave danger and deprives them of any opportunity to pursue 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 DOJ and DHS to rescind the proposed rule.

Respectfully submitted,

Miriam Abaya     Jennifer Nagda
Policy Analyst     Policy Director

33 Id.
34 Effects, THE NATIONAL CHILD TRAUMATIC STRESS NETWORK, https://www.netsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects (last visited August 4, 2020) (stating that when a child is under extreme stress, their immune system may not develop normally).