

United States Senate
WASHINGTON, DC 20510

November 21, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Xavier Becerra
Secretary
Health and Human Services

The Honorable Jeff Hild
Acting Assistant Secretary
Administration for Children and Families

The Honorable Robin Dunn Marcos
Director
Office of Refugee Resettlement

Dear Secretary Becerra, Acting Assistant Secretary Hild, and Director Marcos:

I write to you today regarding serious concerns that a Health and Human Services (HHS) Office of Refugee Resettlement (ORR) proposed Unaccompanied Children (UAC) Program Foundational Rule, ORR's current policy prohibiting certain disclosures, and ORR's volunteer form non-disclosure provision seek to unlawfully chill whistleblowers from making lawful disclosures.¹ The ORR proposed rule and non-disclosure policies appear to run afoul of the statutory text and Congress's intent in passing the Whistleblower Protection Act, its subsequent amendments, other whistleblower protection statutes, and the "anti-gag" provision included in almost every appropriations bill since 1988.²

Section 410.1303(g)(4) of the proposed rule provides that employees, former employees, or contractors of care or post-release service providers are prohibited from disclosing any "case file records or information about unaccompanied children, their sponsors, family, or household members to anyone for any purpose, except for purposes of program administration, without first providing advanced notice to ORR," for ORR to determine if the disclosure is appropriate.³

¹ 88 FR 68908; §410.1303(g)(4) at 68991 <https://www.federalregister.gov/documents/2023/10/04/2023-21168/unaccompanied-children-program-foundational-rule>; Office of Refugee Resettlement, *Unaccompanied Children Program Field Guidance: ORR Agreement with Volunteers*, (Jul. 5, 2023) <https://www.acf.hhs.gov/sites/default/files/documents/orr/volunteer-agreement-with-orr.pdf>.

² Pub. L. No. 117-328.

³ 88 FR 68908; §410.1303(g)(4) at 68991 <https://www.federalregister.gov/documents/2023/10/04/2023-21168/unaccompanied-children-program-foundational-rule>; Office of Refugee Resettlement, *Unaccompanied*

According to the proposed rule, many of its provisions will formalize current HHS policies, and therefore section 410.1303(g)(4) appears to formalize ORR's current blanket prohibition on certain personnel from releasing information without ORR's prior approval and without consideration for whistleblower protection and disclosure laws.⁴ ORR's proposed rule and the restrictive non-disclosure provisions appear to violate the Whistleblower Protection Act, its subsequent amendments, and they fail to recognize 5 U.S.C. § 7211 and the right of employees "to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

ORR's volunteer form also contains a non-disclosure agreement that fails to include the anti-gag provision as required by appropriations laws.⁵ The anti-gag provision provides that no funds appropriated may be used to implement or enforce any "nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain" specific language notifying the signer that the non-disclosure agreement doesn't prohibit them from communicating with Congress and reporting violations of "any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" to an inspector general or the Office of Special Counsel.⁶

Simply put, ORR's non-disclosure policies are a blatant attempt to discourage and silence whistleblowers from making legally protected disclosures of misconduct and wrongdoing.

Indeed, ORR's failures are well known which makes disclosures to Congress even more important. A bipartisan Finance Committee investigation, initiated by then-Chairman Grassley and then-Ranking Member Wyden, analyzed six years of data, and concluded that, "HHS, via ORR, fails to provide the basic oversight needed to ensure the safety of children in its care due to extensive record-keeping deficiencies and the lack of a clear framework for taking action when serious incidents occur."⁷ It is unacceptable that after this oversight and congressional effort to

Children Program Field Guidance: ORR Agreement with Volunteers, (Jul. 5, 2023)

<https://www.acf.hhs.gov/sites/default/files/documents/orr/volunteer-agreement-with-orr.pdf>.

⁴ 88 FR 68908 at 68909; ORR Unaccompanied Children Program Policy Guide: Section 5, 5.3.3 *Prohibition on Release of Records Without Prior Approval*, (revised Aug. 7, 2023) <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-5#5.3>.

⁵ Office of Refugee Resettlement, *Unaccompanied Children Program Field Guidance: ORR Agreement with Volunteers*, (Jul. 5, 2023) <https://www.acf.hhs.gov/sites/default/files/documents/orr/volunteer-agreement-with-orr.pdf>.

⁶ Pub. L. No. 117-328.

⁷ See e.g., Senators Grassley and Wyden, Senate Finance Committee, *Exposing the Risks of Deliberate Ignorance: Years of Mismanagement and Lack of Oversight by the Office of Refugee Resettlement, Leading to Abuses and Substandard Care of Unaccompanied Children* (Oct. 28, 2021),

https://www.grassley.senate.gov/imo/media/doc/finance_committee_report_-_orr_unaccompanied_children_program.pdf ;

Senators Portman and Carper, United States Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, *Oversight of HHS Shelter Grants For Unaccompanied Alien Children* (Aug. 12, 2020), <https://www.hsgac.senate.gov/wp->

put HHS on notice of deficiencies in its care for migrant children, HHS now has proposed a rule that not only freezes in place its deficient practices, but that will also illegally interfere with whistleblowers pointing out these shortcomings to Congress and the inspectors general.

Whistleblowers are brave men and women who perform an invaluable public service. Whistleblowers help enhance government transparency and root out waste, fraud, and abuse. It's critically important that HHS whistleblowers know their rights and are not intimidated into silence by federal agency gag provisions. Without whistleblowers, we would likely not have discovered the mismanagement that occurred at the ORR facility at Fort Bliss in El Paso, Texas, the alleged exploitation of children transferred from HHS to the custody of ill-vetted sponsors, or HHS allegedly sending children to human traffickers.⁸ Federal agencies cannot hide behind illegal non-disclosure and similar agreements to conceal their misconduct. It's critically important that whistleblowers know they have the right and are encouraged to disclose government fraud, waste, abuse, and wrongdoing. These whistleblower disclosures are responsible for saving lives.⁹

So that Congress may conduct objective and independent oversight concerning ORR's non-disclosure policies and the protection of legally protected whistleblower disclosures, please provide answers to the following no later than December 5, 2023.

1. Prior to the publication of the proposed rule, its current policies, and the ORR volunteer form, did ORR consult with the HHS Office of Inspector General or the Office of Special Counsel concerning the protection of whistleblower disclosures, compliance with whistleblower laws, and the inclusion of the anti-gag provision? If not, why not?

[content/uploads/ipo/media/doc/2020-12-08%20PSI%20Staff%20Report%20-%20Oversight%20of%20HHS%20Shelter%20Grants%20for%20UACs.pdf](https://www.hhs.gov/ipo/media/2020-12-08/PSI%20Staff%20Report%20-%20Oversight%20of%20HHS%20Shelter%20Grants%20for%20UACs.pdf)

⁸ Health and Human Services Office of the Inspector General, *Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children*, (Sept. 2022) <https://oig.hhs.gov/oei/reports/OEI-07-21-00251.pdf>; Adam Shaw, *Whistleblower tells Congress that govt is delivering migrant children to human traffickers*, (Apr. 26, 2023) <https://www.foxnews.com/politics/whistleblower-tells-congress-that-govt-delivering-migrant-children-human-traffickers>; Julia Ainsley, *Whistleblowers say U.S. government's poor oversight may have led to migrant kids' working in unsafe and illegal jobs*, NBC News (Sept. 21, 2023) <https://www.nbcnews.com/politics/immigration/whistleblowers-hhs-child-labor-slaughterhouses-migrant-children-rcna105842>; Government Accountability Project, *Government Accountability Project Raises Ongoing Concerns About ORR Emergency Operations for Unaccompanied Immigrant Minors Amidst News of New Influx Site*, (Jun. 29, 2023) <https://whistleblower.org/press-release/government-accountability-project-raises-ongoing-concerns-about-orr-emergency-operations-for-unaccompanied-immigrant-minors-amidst-news-of-new-influx-site/>.

⁹ See Priscilla Alvarez, *Whistleblowers allege poor conditions at Fort Bliss facility for migrant children*, CNN (Jul. 28, 2021) <https://www.cnn.com/2021/07/28/politics/fort-bliss-whistleblowers-immigration/index.html>; Julia Ainsley, *Whistleblowers say they were told to downplay Covid outbreak among migrant kids at shelter*, NBC News (Jul. 28, 2021) <https://www.nbcnews.com/politics/immigration/whistleblowers-say-they-were-told-downplay-covid-outbreak-among-migrant-n1275261>.

2. Since including the non-disclosure provision in the volunteer form, how many times has ORR enforced the provision? Provide records¹⁰ of each time ORR enforced the non-disclosure provision.
3. Prior to updating its policy on August 7, 2023, to prohibit care providers from releasing records without ORR approval, did ORR consult with the Office of Inspector General or the Office of Special Counsel concerning the protection of whistleblower disclosures or the inclusion of the anti-gag language? If not, why not?
4. Since updating its policy on August 7, 2023, to prohibit care providers from releasing records without ORR approval, how many times has ORR enforced this policy? Provide records of each time ORR enforced this policy.

Thank you for your prompt review and responses. In addition to the questions above, I request that you immediately make the necessary changes to all HHS policy, including the proposed rule, guidance, and non-disclosure agreements to properly recognize whistleblower protections and laws. If you have any questions, please contact Brian Randolph of my Committee staff at (202) 224-0642.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Budget

cc: The Honorable Christi A. Grimm
Inspector General
Health and Human Services

¹⁰ "Records" include any written, recorded, or graphic material of any kind, including letters, memoranda, reports, notes, electronic data (e-mails, email attachments, and any other electronically-created or stored information), calendar entries, inter-office communications, meeting minutes, phone/voice mail or recordings/records of verbal communications, and drafts (whether or not they resulted in final documents).