



September 23, 2019

Acting Secretary Kevin K. McAleenan  
Department of Homeland Security  
Washington, DC 20229

RE: Request for Comment on Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409  
(Jul. 23, 2019) Docket No. DHS-2019-0036-0001

Dear Acting Secretary McAleenan,

On behalf of the Children's Defense Fund (CDF), we write to express our strong opposition to Docket No. DHS-2019-0036-0001, the Department of Homeland Security (DHS) Notice on Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (Jul. 23, 2019) (hereinafter, the Rule). This immediately effective notice broadly expanded the scope of expedited removal to include individuals apprehended after residing in the United States for up to two years and/or in the interior of the United States. CDF appreciates the opportunity to submit comments on behalf of the well-being of immigrant children and children in immigrant families in the United States (U.S.).

CDF has been advocating for children for 45 years. We seek strong support for families through passage of laws and implementation of rules, programs and services in their best interest. CDF's Leave No Child Behind® mission is to ensure every child a *Healthy Start*, a *Head Start*, a *Fair Start*, a *Safe Start*, and a *Moral Start* in life and successful passage to adulthood with the help of caring families and communities. This mission includes migrant children who come to the U.S. whether their status is defined as alien minors, unaccompanied alien children, unaccompanied minors, or in other ways. This mission also includes children in immigrant families living within the U.S. This mission also includes children in immigrant families living within the U.S.

Since its initial implementation over 20 years ago, expedited removal has been rife with error, misconduct, and rights violations. It has hurt—and continues to hurt—children's healthy development in distressing ways due to the connection between expedited removal and family detention. There are also widespread flaws in the expedited removal process itself; problems span from DHS officers' improper interference with asylum claims, to failures in the credible fear process, to wrongful removal. The Rule's expansion of expedited removal would further worsen these problems, which have long gone unaddressed by DHS.

**For the following reasons, CDF requests that DHS immediately halt implementation of the expansion of expedited removal and take steps to ameliorate the well-documented problems in the expedited removal process as it existed prior to the Rule.**

- 1. The Use of Expedited Removal and Detention of Families is Inappropriate and Harms Children**

Expedited removal and family detention are connected.<sup>1</sup> DHS officers have elected to put many immigrant families through the expedited removal process and in detention as their cases progress. Family detention threatens child development and well-being. It compounds the trauma children and families have already suffered in their home countries, interferes with healthy parent-child relationships, and causes physical and mental harm that can follow children throughout their entire lives.

The research on detention and children is clear: Even a short amount of time in detention is profoundly harmful for children of any age,<sup>2</sup> and it is particularly harmful to young children whose physical and social environments have a significant impact on their development.<sup>3</sup> Detention also exacerbates trauma and its negative impacts.<sup>4</sup> Detention subjects children and families to additional stress that layers on top of the trauma they have likely already endured before reaching the border.<sup>5</sup> Persistent stress and unrelenting exposure to fear can cause “toxic stress” and interfere with the physical brain development of a child.<sup>6</sup> Detention facilities are simply not an appropriate place for children.

Further, the family detention setting undermines the parent-child relationship.<sup>7</sup> Family detention strips parents of their agency to make decisions about their children’s care and compromises the parent-child relationship at a time when children are especially looking for comfort, guidance and safety.<sup>8</sup> Parents lose their autonomy to fulfill their usual caretaking role; decisions related to diet and feeding, schedule, sleeping arrangements, medical care, education and more are subject to the authority of DHS.<sup>9</sup> Even when families are detained together, family structure is undermined. This interference with the parent-child relationship negatively affects children and parents’ mental and physical health.

Accelerating the use of expedited removal and expanding its reach will accelerate and broaden harms to children. DHS should halt implementation of the Rule immediately and exercise its authority and discretion to stop placing immigrant families in expedited removal proceedings and family detention facilities.

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<sup>1</sup> For a discussion of how family detention and due process intersect, see Catholic Legal Immigration Network, *Expedited Removal and Family Detention: Denying Due Process* (2015), <https://cliniclegal.org/sites/default/files/cara/Expedited-Removal-Backgrounder.pdf>.

<sup>2</sup> See Acer, E., Byrne, O, Human Rights First, *Family Detention: Still Happening, Still Damaging* (2015), <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf> (summarizing research and noting detention of less than two weeks is associated with negative health outcomes).

<sup>3</sup> See Harvard University Center on the Developing Child, *In Brief: Early Childhood Mental Health* (2013), <https://developingchild.harvard.edu/resources/inbrief-early-childhood-mental-health/>.

<sup>4</sup> See Australian Human Rights Commission, *The Forgotten Children: National Inquiry on Immigrant Children in Detention* (2015), <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>.

<sup>5</sup> See United Nations High Commissioner for Refugees (UNHCR), *Children on the Run* (2014), [http://www.unhcrwashington.org/sites/default/files/1\\_UAC\\_Children%20on%20the%20Run\\_Full%20Report.pdf](http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf) (finding that 48 percent of 404 children who were interviewed had reported how they were personally affected by violence in their home countries).

<sup>6</sup> See Shonkoff, J.P., Garner A.S., AAP Committee on Psychosocial Aspects of Child and Family Health, et al. *The Lifelong Effects of Early Childhood Adversity and Toxic Stress* 129:e232 (2012) <https://pediatrics.aappublications.org/content/pediatrics/129/1/e232.full.pdf>.

<sup>7</sup> See Lutheran Immigration and Refugee Service, Women’s Refugee Commission, *Locking Up Family Values, Again* (2014), <https://www.womensrefugeecommission.org/images/zdocs/Fam-Detention-Again-Full-Report.pdf>

<sup>8</sup> See Leila Schochet, Center for American Progress, *Trump’s Family Incarceration Policy Threatens Healthy Child Development* (2018), <https://www.americanprogress.org/issues/early-childhood/reports/2018/07/12/453378/trumps-family-incarceration-policy-threatens-healthy-child-development/>.

<sup>9</sup> See U.S. Dep’t of Homeland Sec. Advisory Comm. on Family Residential Ctrs., *Report of the DHS Advisory Committee on Family Residential Centers* 37, 115, 139-140 (2016).

## **2. Expedited Removal is a Flawed System That Routinely Deprives Individuals of Their Rights to Pursue Asylum Claims**

DHS officers, usually those employed by U.S. Customs and Border Protection (CBP), must inform individuals potentially subject to expedited removal of their rights and refer those with a fear of return to their countries of origin to asylum officers within U.S. Citizenship and Immigration Services (USCIS) for credible fear interviews (CFIs). These responsibilities are to be carried out without misinformation, harassment, or intimidation.

Multiple reports show that DHS officers have failed to carry out these responsibilities. Instead, the officers regularly fail to record statements by individuals subject to expedited removal that indicate a fear of return; fail to refer individuals who express fear of return for CFIs, fail to ask individuals in expedited removal proceedings about their fear of return, and subject these individuals to harassment and misinformation that actively interferes with their ability to pursue asylum claims.<sup>10</sup>

Should DHS continue to implement the Rule, the well-documented failure of immigration officers to fulfill their basic obligations to asylum seekers facing expedited removal is likely to expand as well. The Rule itself suggests that, now that DHS has expanded the scope of expedited removal, tens of thousands more individuals each year could be forced through this flawed system that routinely deprives individuals of their right to speak to an asylum officer for a credible fear interview.<sup>11</sup>

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<sup>10</sup> See, e.g., Human Rights Watch, *You Don't Have Rights Here* 6 (2014) (finding that fewer than half of individuals interviewed who claimed a fear of return were referred for credible fear hearings); Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border* 12 (2017) ("In 12% of the cases documented for this report, individuals expressing fear of violence upon return to their country of origin were not processed for credible fear screenings and instead, were placed into removal proceedings."); DHS Office of the Inspector General, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018) (describing CBP practices amounting to failure to properly refer asylum seekers for CFIs in order to "regulat[e] the flow of asylum-seekers at ports of entry"); Amnesty International, *Facing Walls: USA and Mexico's Violations of the Rights of Asylum-Seekers* (2017) (describing CBP agents' coercion of and threats to asylum seekers, including making them recant their claims of fear on video, claiming that they cannot seek asylum without a ticket from officials in Mexico, and claiming that there is no more asylum for individuals from certain countries); American Immigration Council, *Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants*, 1, 2, 5, 7-8 (Sept. 2017) (reporting that 55.7% of a survey of 600 deported Mexican migrants were not asked if they feared return to Mexico and describing numerous incidents of CBP interference with asylum claims); American Immigration Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, 9 (Aug. 2017) (reporting CBP's failure to act in response to complaints of misconduct, including complaints that agents ignored claims of fear or persecution); Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* (May 2017) (documenting CBP abuses towards asylum seekers, including ignoring asylum claims, providing false information—e.g., that the United States no longer provides asylum—mocking and intimidating asylum seekers, imposing procedures to deter asylum seekers from pursuing their claims, and coercing asylum seekers into giving up their claims); 2016 USCIRF Study at 20-32 (documenting examples of failure to properly screen for fear of return in CBP primary inspection interviews and noting "certain CBP officers' outright skepticism, if not hostility, toward asylum claims"); American Civil Liberties Union, *American Exile: Rapid Deportations That Bypass the Courtroom*, 4 (Dec. 2014) (reporting that 55% of 89 interviewed individuals who received summary removal orders, including expedited removal orders, were not asked about fear of persecution in language they could understand and 40% of those asked about fear were deported without CFI despite expressing fear of return); 2005 USCIRF Study at 4, 10, 64 (documenting numerous "serious problems" in the expedited removal process "which put some asylum seekers at risk of improper return" and describing expedited removal as "a [s]ystem with [s]erious [f]laws"), *id.* at 53-54 (finding that in 15% of observed cases, when a noncitizen expressed a fear of return to an immigration officer during the inspections process, the officer failed to refer the individual to an asylum officer for a credible fear interview).

<sup>11</sup> See 84 Fed. Reg. at 35411.

In order to safeguard asylum seekers' right to seek protection from persecution and torture, DHS should halt implementation of the Rule.

### **3. Officers Routinely Record Inaccurate or False Information on Expedited Removal Forms, Coerce Noncitizens into Signing Forms They Do Not Understand, And Fail to Advise Noncitizens of Their Rights**

The content of the paperwork that DHS officers complete during expedited removal proceedings has a profound impact on the individuals subject to expedited removal—for many, it will result in their immediate deportation; for others, the content of forms filled out during initial interviews will impact assessments of their credibility in subsequent proceedings. Yet this paperwork is often replete with errors.

Multiple reports document DHS officers' practice of including inaccurate information in expedited removal paperwork, failing to provide people in expedited removal proceedings with the opportunity to review and respond to information in the paperwork, using coercion to force people to sign forms they do not understand, and requiring individuals to sign paperwork despite interpretation failures that impact their ability to understand the proceedings.<sup>12</sup>

In addition, practitioners report that immigration officers routinely fail to advise noncitizens of their rights in expedited removal proceedings, including that they may request to withdraw their applications for admission, which allows noncitizens to leave the United States voluntarily and avoid penalties that include permanent inadmissibility to the country.<sup>13</sup> There is a significant risk that noncitizens subject to the Rule likewise will be erroneously denied this important opportunity, provided by statute, to withdraw their applications for admission.

Forcing tens of thousands more individuals, many of whom will have lived in the United States for significant periods of time and developed substantial ties, through this flawed and fast-tracked system is not appropriate. To avoid subjecting more individuals with claims to relief—or who never should have been subject to expedited removal even under the Rule's broad scope—to a system replete with coercion, factual errors, and inadequate translation, DHS should halt implementation of the Rule.

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<sup>12</sup> See, e.g., Borderland Immigration Council, *Discretion to Deny* at 13 (noting that “[i]ndividuals are forced to sign legal documents in English without translation” and “that CBP affidavits are often inconsistent with asylum-seekers’ own accounts”); 2016 USCIRF Study at 2, 20-22 (discussing “continuing and new concerns about CBP officers’ interviewing practices and the reliability of the records they create”); American Civil Liberties Union, *American Exile* at 34-36 (describing noncitizens who were required to sign forms in languages they do not understand); 2005 USCIRF Study at 74 (explaining that statements recorded by CBP officers “are often inaccurate and are almost always unverifiable”); *id.* at 55 (“Study observations indicate that paper files created by the inspector are not always reliable indicators” of whether a credible fear interview was merited.); *id.* at 53 (noting that expedited removal forms were routinely inaccurate); *United States v. Sanchez-Figuero*, No. 3:19-cr-00025-MMD-WGC, slip op. at 2, 9 (D. Nev. July 25, 2019) (dismissing unlawful reentry indictment where defendant, who had not slept for 36 hours at the time of apprehension, “was not informed of the charge against him and never received a meaningful opportunity to review the sworn statement”); *United States v. Raya-Vaca*, 771 F.3d 1195, 1205-06, 1210-11 (9th Cir. 2014) (holding that immigration officer’s failure during expedited removal process to advise the defendant of the charge of removability and to permit him to review the sworn statement prepared by the officer violated his due process rights to notice and an opportunity to respond).

<sup>13</sup> See 8 U.S.C. § 1225(a)(4) (providing that noncitizen seeking admission “may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission”).

#### **4. There Are Well-Documented Failures in the Credible Fear Process, Particularly for Parents and Children**

Furthermore, even those individuals who receive credible fear interviews after DHS inspection in expedited removal face significant barriers to fair adjudication of their claims. As multiple reports indicate, individuals who must establish a credible fear—rather than immediately being placed in immigration court proceedings to pursue their asylum claims—may not receive adequate consideration of their claims.

Instead, they face erroneous denials of credible fear, denials of access to counsel, and inadequacies in interpretation.<sup>14</sup> Several reports have noted the many ways families in detention are particularly vulnerable to these failures in the credible fear process.<sup>15</sup> Many parents and children in detention are in remote, isolated facilities far from nonprofit organizations and pro-bono attorneys.<sup>16</sup> Further, interviews can go very badly because rapport between interviewer and interviewee is not established, lines of questioning are not developed, and children are questioned like adults.<sup>17</sup> Parents can find it difficult to present their claims for protection with focus and detail when competing demands and mental and health issues make it exceedingly difficult to share their experiences and establish eligibility for relief.<sup>18</sup>

Rather than placing additional strain on the CFI system and vulnerable children and families, DHS should halt implementation of the Rule.

#### **5. DHS Officers Have Wrongfully Removed Unaccompanied Children and Numerous Other Protected Individuals through Expedited Removal**

Expedited removal's emphasis on quick removals and no opportunity for a case to be reviewed before an immigration judge has allowed DHS officials to deport unaccompanied children, who are meant to be protected from expedited removal, as well as genuine asylum seekers, people whose lawful status can be easily verified, U.S. citizens, and others.

Protections for unaccompanied children can only be triggered when (1) a child is correctly identified as an unaccompanied minor and (2) DHS officers follow the law. Unfortunately, this is not always the case. To the first point, there are several ways the current administration is trying to limit or eliminate protections for unaccompanied migrant youth,

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<sup>14</sup> See Borderland Immigration Council, *Discretion to Deny* at 13 (describing interpretation failures during CFIs); 2016 USCIRF Study at 28 (describing case of a detained Ethiopian asylum seeker who was denied an interpreter); American Civil Liberties Union, *American Exile* at 34 (“Most of the individuals interviewed . . . stated that they were given forms to sign in English, which most did not speak or read, and often were not interviewed by an immigration officer who fluently spoke their language or through an interpreter.”); *Interior Immigration Enforcement Legislation: Hearing Before the H. Judiciary Subcomm. on Immigration & Border Sec. 5* (Feb. 11, 2015) (statement of Eleanor Acer, Dir., Refugee Protection, Human Rights First) (“In some cases, interviews are sometimes rushed, essential information is not identified due to lack of follow up questions, and/or other mistakes are made that block genuine asylum seekers from even applying for asylum and having a real chance to submit evidence and have their case fully considered”).

<sup>15</sup> See U.S. Dep’t of Homeland Sec. Advisory Comm. on Family Residential Ctrs., *Report of the DHS Advisory Committee on Family Residential Centers* at 96-100 (discussing inadequate or nonexistent interpretation services during credible fear interviews and immigration judge reviews of negative credible fear determinations)

<sup>16</sup> *Id.* at 40 (noting location of Berks, Dilley, and Karnes limits access to attorneys, interpreters, as well as health providers); American Immigration Council, *The Perils of Expedited Removal* (May 2017) (using original testimony to show how expedited removal in conjunction with detention results in disadvantaging women and children held in family detention centers).

<sup>17</sup> American Immigration Council, *The Perils of Expedited Removal* at 9-22.

<sup>18</sup> *Id.*

including being more strict with who may receive the “Unaccompanied Alien Child” designation such that fewer children are classified as UACs and can be subject to expedited removal without seeing an immigration judge.<sup>19</sup> On the second point, there are numerous examples of how unaccompanied children who are to be screened for asylum are being wrongfully removed without ever receiving a hearing.<sup>20</sup>

Widespread flaws in the expedited removal process have also resulted in U.S. citizens’ wrongful removal.<sup>21</sup> Additionally, the rushed system of expedited removal causes DHS to wrongfully subject immigrants to the expedited removal process when they have credible fears of persecution or have lived in the U.S. for many years.<sup>22</sup>

These errors are likely to increase under the Rule. Proving two years of continuous physical presence, while detained and alone, will be unfeasible for many people detained under the Rule, particularly within the short timeframe provided for expedited removal proceedings. In order to prevent improper deportation of unaccompanied children, long-time residents, and citizens of the United States, including to countries where those individuals face persecution or torture, DHS should halt implementation of the Rule.

## **6. Deportations Achieved through Expedited Removal are a Form of Family Separation that Devastate Children and Communities**

Expedited removal and deportation is used against people whose lives and families are rooted in the United States. When a parent is removed but his children are left behind in the U.S., that parent’s lack of income and physical and emotional support is devastating. Families are left with severe financial hardship, struggling to make rent at the end of the month and to put food on the dinner table. Children experience increased mental health issues, behavioral changes and disruptions in school performance.<sup>23</sup>

Expansion of the Rule could also lead states to see an increase in children entering foster care, which will lead to additional pressure on an already overburdened child welfare system. Immigration and Customs Enforcement (ICE) data show that roughly half a million U.S.-citizen children experienced the apprehension, detention and deportation of at least

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<sup>19</sup> See Children’s Defense Fund—New York, *Unaccompanied Migrant Youth: Service Needs and Gaps in the New York Metropolitan Area 37* (March 2018), <https://www.childrensdefense.org/cdfny/wp-content/uploads/sites/3/2018/07/unaccompanied-migrant-youth.pdf>.

<sup>20</sup> See American Civil Liberties Union, *American Exile* at 6 (stating an estimated 95 percent of Mexican unaccompanied children are returned Mexico without seeing a judge).

<sup>21</sup> See, e.g., *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1272-73 (M.D. Ga. 2012); *Maria de la Paz v. Jeh Johnson*, No. 1:14-CV-016 (S.D. Tex. habeas petition filed Jan. 24, 2014); Ian James, *Wrongly Deported, American Citizen Sues INS for \$8 Million*, L.A. Times (Sept. 3, 2000) (recounting expedited removal of U.S. citizen Sharon McKnight).

<sup>22</sup> See, e.g., *American Exile* at 63 (describing erroneous expedited removal of Mexican citizen who had lived in the United States for 14 years); *id.* at 38 (recounting case of a Guatemalan citizen and mother of four U.S. citizen children who was removed under an expedited removal order even though she told the CBP officers that she was afraid to be deported to Guatemala, where her father had been murdered and her mother had been the target of extortion by gangs); *id.* at 39 (describing 22-year-old woman who fled domestic violence removed to El Salvador without being provided a credible fear interview); *United States v. Mejia-Avila*, No. 2:14-CR-0177-WFN-1, 2016 WL 1423845, at \*1 (E.D. Wash. Apr. 5, 2016) (dismissing indictment where defendant was not subject to expedited removal because the record was “clear” that he had lived in the United States for more than two years).

<sup>23</sup> For a discussion of the direct impacts on detention and deportation on family finances, health, and well-being, see Kaiser Family Foundation, *Family Consequences of Detention/Deportation: Effects on Finances, Health, and Well-Being* (Sept. 2018).

one parent between 2011 and 2013 and those numbers have grown in the last several years.<sup>24</sup>

We request that DHS considers the Rule's ramifications on children and communities and halts expansion the scope of expedited removal.

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We appreciate your consideration of our comments. The Children's Defense Fund believes the Rule's expansion of expedited removal unacceptably expands widespread problems with the pre-July 23, 2019 expedited removal system and must be halted immediately. Please do not hesitate to contact us if you have questions regarding our comments.

Sincerely yours,



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<sup>24</sup> See American Immigration Council, *Factsheet: U.S. Citizen Children Impacted by Immigration Enforcement* (May 2018); Randy Capps et al.; Migration Policy Institute and Urban Institute, *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families* 9 (2015), <https://www.urban.org/sites/default/files/alfresco/publicationexhibits/2000405/2000405-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-inImmigrant-Families.pdf>.