



October 4, 2021

Ms. Cindy Huang
Director, Office of Refugee Resettlement
Administration for Children and Families
U.S. Department of Health and Human Services
Washington, DC
Via regulations.gov

Re: ACF-2021-0001, Request for Information (RFI) from Non-Federal Stakeholders: Federal Licensing of ORR Facilities

Dear Director Huang:

Kids in Need of Defense (KIND) submits this comment in response to the above Request for Information (RFI). KIND is the preeminent U.S.-based nongovernmental organization devoted to protection of unaccompanied and separated children. KIND provides pro bono legal representation and coordinated social services to unaccompanied children in removal proceedings, advocates for laws and policies to improve the well-being of unaccompanied children, and promotes protection of children in countries of origin and transit countries to address the root causes of child migration. KIND has offices across the United States and in Mexico that provide unaccompanied children with holistic care that includes legal assistance and social services. Since its inception, KIND has received referrals for more than 27,000 cases and now serves over 5,900 children annually in partnership with nearly 700 law firm, corporate, law school and bar association partners.

The questions in the RFI pose significant implications for the wellbeing and safety of unaccompanied children. Over decades, a framework of legal protections has aimed to ensure children are treated with dignity and regard for their particular vulnerability as children in the immigration system. Despite this progress, significant work remains to realize a system that assures children's wellbeing and best interests at every point. KIND is troubled by recent measures in Texas that undermine the ORR system by withdrawing state licenses and oversight from ORR providers. We share ORR's desire to ensure children receive appropriate care amid these setbacks. We believe the best course lies not in creating a federal licensing system to bridge gaps created by these unlawful actions, but instead in the federal government's challenging these actions and any other measures that discriminate against ORR in exercising its legal obligations to care for unaccompanied children. The comments below detail our concerns and recommendations.

Potential Impact on Existing Protections

At the core of the RFI is a recognition of ORR's responsibility to care for unaccompanied children. This authority, provided by the Homeland Security Act of 2002 (HSA) and the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), stems from longstanding advocacy to address improper treatment of children. Decades ago, children were detained indefinitely with unrelated adults, denied access to basic services, and subjected to strip searches. Negotiations between child advocates and the federal government led to the *Flores* Settlement Agreement (FSA), which establishes

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minimum standards of care, a requirement that facilities generally be state licensed, family reunification procedures, and third-party monitoring and oversight. The HSA and TVPRA in part codified and expanded these safeguards.

The RFI states that “[h]istorically, ORR has not developed or implemented a Federal licensing or approval system and instead has funded State-licensed care facilities.”¹ However, the use of state licensing is not simply a policy decision, but a binding legal requirement. The court overseeing *Flores* has explained that the “purpose of the licensing provision is to provide class members the essential protection of regular and comprehensive oversight by an independent child welfare agency.”²

ORR does not explain how federal licensing can substitute for *Flores*’ state licensing requirement, and we believe it cannot. While mindful of the urgencies created by the actions of Texas and potentially other states, we are concerned that a system of standards set by the federal government and self-monitored by a federal agency or ORR-selected contractor would violate the FSA, which deliberately relies on state expertise in regulating child safety and wellbeing, and the independence of state licensing from the federal government. It also undermines the spirit of the FSA in ensuring that children in federal government custody receive care consistent with the same standards that govern care of children in state child welfare systems. In addition to inherent conflicts of interest, we fear that federal licensing could undermine care and compliance nationally and lead to additional discrimination by states against the federal government and its contractors.

Quality of Care for Children

Systemwide compliance depends on routine communication between ORR and state licensing entities, and action to prevent and respond to violations of the FSA, ORR policies, and state licensing requirements. Persistent problems in the ORR network--from incidents of sexual abuse by facility staff to inappropriate mental health treatment—highlight the harmful impacts of current oversight deficiencies. A federal licensing system, which lacks the independence and on-the-ground capacity and oversight mechanisms of state licensing, could further exacerbate these weaknesses.

State licensing brings to bear the experience and expertise of states in addressing child welfare and health matters, among others, to protect children in residential facilities and care. Generally, programs applying for licensing must undergo review and on-site inspections before licensing; on-site monitoring and visits after licensure; and be subject to corrective action plans, follow-up, and potential enforcement for any violations. State licensing entities also receive complaints and conduct investigations. These mechanisms provide a critical, independent means of monitoring and oversight to protect children in care.

Although the RFI presents federal licensing as a stopgap measure for when state licensing is unavailable, such a system could be used more broadly, potentially for facility types previously denied state licensing. ORR currently operates several large-scale emergency intake and influx facilities. ORR has not historically obtained state licensing for these facilities due either to their location on federal land or the unavailability of state licensing for large-scale facilities. Indeed, recent reforms, such as the Family First Prevention Services Act, have ushered a shift away from congregate care and prioritized federal funding for family-based settings to reflect best practices and children’s best interests.

The use of federal licensing for facilities deemed contrary to children’s best interests would run counter to the FSA and risk the wellbeing of children. We are also concerned that the existence of such a system, without challenge to state actions that discriminate against the federal government in its exercise of its legal obligations, could be read by other

¹ See Dep’t of Health and Human Services, Federal Licensing of Office of Refugee Resettlement Facilities Request for Information, 86 Fed. Reg. 49549, 49550 (Sept. 3, 2021).

² See Nat’l Center for Youth Law, Center for Human Rights and Constitutional Law, and the University of California Davis School of Law Immigration Clinic, *The Flores Settlement Agreement & Unaccompanied Children in Federal Custody* (Feb. 2019), at 6 *citing* Order Re: Plaintiff’s Motion to Enforce Settlement, *Flores v. Lynch*, at 14 (C.D. Cal. July 24, 2015).

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states to permit discrimination against ORR or its contractors, with the effect of undermining state licensing of ORR programs and care of unaccompanied children. Rather than create a licensing system that could generate confusion about applicable standards or undermine national progress in child protection, ORR should redouble its efforts to expand state licensed capacity and challenge any discrimination by states against it in its efforts to care for unaccompanied children.

We have previously shared our concerns about the government's efforts to terminate the FSA, and we renew those concerns here. We urge ORR not only to uphold the FSA but to work from it as a baseline for establishing even higher standards for child protection. Such efforts should include rescinding the final *Flores* rule and reopening a new rulemaking process that enables dialogue among states, child wellbeing experts, and other stakeholders about ways to ensure alignment between ORR standards and advances and innovations urged by states, Congress, and children's rights experts.

Significant improvements should similarly be made to ORR's monitoring policies. We recommend that ORR establish a third-party review board with access to ORR facilities and data as needed to ensure compliance. In addition to *Flores* attorneys, ORR should permit oversight by other qualified third parties and create clear mechanisms for timely receiving and addressing complaints from children. Safeguards, such as attorneys, independent counseling services, and appropriate transfer and release procedures, should be developed to assist any children who have experienced harm in care.

Legal Services for Unaccompanied Children

Pursuant to the TVPRA, ORR must provide attorneys to unaccompanied children to the greatest extent practicable. ORR should dedicate the greatest funds possible to legal representation and seek additional appropriations to meet this need. We also urge ORR to train programs on the importance of legal services and to create policies and include in program contracts provisions requiring dedicated, confidential, and appropriate space for attorney-client meetings; unimpeded access for legal services providers; and mechanisms for timely referring children for legal assistance while in care and following release.

Conclusion

We appreciate the opportunity to share comments on federal licensing and welcome continued engagement as ORR considers these significant changes.

Sincerely,

/s/

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