



December 4, 2023

Mr. Toby Biswas, Senior Supervisory Policy Counsel
Unaccompanied Children Policy
Office of Refugee Resettlement
Administration for Children and Families
Department of Health and Human Services
Washington, DC

Submitted to <https://www.regulations.gov>.

Re: Notice of Proposed Rulemaking, Unaccompanied Children Program Foundational Rule, RIN 0970-AC93 (88 Fed. Reg. 68908)

Dear Mr. Biswas:

Kids in Need of Defense (KIND) respectfully submits this comment in response to the Federal Register notice of proposed rulemaking (“NPRM”) published by the Office of Refugee Resettlement (ORR) on October 4th, 2023, titled “Unaccompanied Children Program Foundational Rule,” 88 Fed. Reg. 68098. KIND appreciates ORR’s commitment to the wellbeing of unaccompanied children and its efforts to codify fundamental protections in the *Flores* Settlement Agreement (FSA) as well as best practices that have emerged since the FSA entered into force.¹

KIND is the preeminent international nongovernmental organization devoted to the protection of unaccompanied and separated children. Many of the children KIND serves are seeking legal protection from persecution, abandonment, abuse, or other threats to their lives and safety in their country of origin. The care and services provided to children, and the treatment and support they receive during and following release from ORR care, have significant implications for children’s safety and wellbeing, and their ability to access legal protection. Accordingly, the proposed foundational rule (“Proposed Rule”) is significant for KIND’s clients and for KIND’s work on behalf of unaccompanied and separated children across the U.S.

Since it took effect in 1997, the *Flores* Settlement Agreement has provided basic child welfare standards and safeguards, coupled with meaningful third-party oversight, to ensure fundamental protections for all minors in U.S. immigration custody. The Proposed Rule incorporates important protections from the FSA and formalizes additional policies that improve safe and appropriate placement, care, and release of

¹ U.S. Dep’t of Health and Human Servs., Unaccompanied Children Program Foundational Rule, 88 Fed. Reg. 68908 (Oct. 4, 2023) [*hereinafter* NPRM], at 68913-14 (“This NPRM proposes both to implement the protections set forth in the FSA and to broaden them consistent with the current legal and operational environment, which has significantly changed since the FSA was signed over 25 years ago.”).

children.² KIND is concerned, however, that several provisions do not implement the *Flores* Settlement or best practices, and instead, could risk harm or other detrimental consequences for children if not modified. KIND offers the following comments to assist the agency in developing a final regulation that both upholds and advances child welfare protections for unaccompanied children. We welcome the opportunity for continued engagement as these efforts proceed.

About KIND

KIND envisions a world in which every unaccompanied child on the move has access to legal representation and has their rights and well-being protected as they migrate alone in search of safety. Founded fifteen years ago, KIND is the leading national nonprofit organization providing free legal and social services to unaccompanied or separated children who face removal proceedings in immigration court. Since January 2009, KIND has received referrals for more than 30,000 unaccompanied children from 80 countries. With sixteen locations across the United States, KIND serves children through a combination of direct legal services and the training and mentorship of pro bono attorneys from over 800 law firms, law departments, law schools, and bar associations. KIND's social services program facilitates support including counseling, educational support, medical care, and other services. KIND also works to address the root causes of child migration from Central America, and advocates for laws, policies, and practices to improve the protection of immigrant children in the United States.

KIND's staff and pro bono attorneys serve children both during their time in ORR care and after their release. Many of the children we serve have fled threats to their lives and safety in the form of gang violence, violence in the home, gender-based violence, parental abandonment, human trafficking, persecution, and other forms of deprivation of rights. Many will pursue forms of relief including special immigrant juvenile status (SIJS), asylum, T or U nonimmigrant status, and adjustment of status. KIND's collective experience of advocating for thousands of young clients informs the comments we submit today.

Executive Summary

The NPRM outlines ORR's intention "to promulgate a final rule that would establish a foundation for the Unaccompanied Children Program (UC Program) that is consistent with its statutory duties, for the benefit of unaccompanied children and to enhance public transparency as to the policies governing the operation of the UC Program" and "for the purpose of implementing the 1997 *Flores* Settlement Agreement (FSA). . . ."³ It further references the terms by which the FSA would terminate--forty-five days after publication of final regulations implementing the settlement--and articulates ORR's understanding that finalization of the Proposed Rule would terminate the settlement only as to ORR.⁴

Although many of the Proposed Rule's provisions align with those of the FSA and reflect child welfare best practices, several provisions depart from those standards. Among these deficiencies are provisions

² *Id.* at 68914 ("The proposed provisions of this part would, in many cases, codify existing ORR policies and practices. Further, upon publication of a final rule, ORR would continue to publish subregulatory guidance as needed to clarify the application of these regulations.").

³ *Id.* at 68908 (Summary).

⁴ *Id.* ("ORR anticipates that any termination of the settlement based on the adoption of this proposal as a final rule would only be effective for those provisions that affect ORR and would not terminate provisions of the FSA for other Federal Government agencies."); *id.* at 68910 ("The purpose of this proposed rule is to codify policies, standards, and protections for the UC Program, consistent with the HSA and TVPRA, as well as with the substantive requirements of the FSA as they pertain to ORR.").

that incompletely implement the FSA's state licensing requirement, which is central to the Settlement.⁵ As a result, the Proposed Rule as drafted fails to meet the criteria necessary to terminate the FSA. Other provisions of the Proposed Rule fail to fully align with other court orders or settlements, including in *Lucas R.*, and still others codify existing ORR policies in ways that fail to uphold children's rights or that risk harmful unintended consequences for children.

KIND has joined with other organizations in submitting comments on specific topics within the Proposed Rule. These include comments addressing monitoring and oversight (UC Office of the Ombuds), conditions in facilities, and reproductive health care access. KIND's comments here supplement and build on those comments with the goal of ensuring a robust regulatory foundation for the UC program, inclusive of all FSA protections. This comment will focus on the following key areas.

- 1. Legal Services.** Although the Proposed Rule aims to expand access to legal services information and legal representation for unaccompanied children, provisions related to funding for legal services misstate TVPRA directives and impermissibly condition support for legal representation on practicability, the availability of appropriations, and agency discretion in ways that could undermine children's access to critical legal assistance and humanitarian protection.
- 2. State licensing.** The Proposed Rule could make state licensing of ORR programs optional and permit programs to comply either with state licensing *or* standards set by ORR or by a federal licensing framework referenced in this NPRM as under development but not currently available for review.
- 3. Oversight and compliance monitoring.** The Proposed Regulations take critical steps toward ensuring accountability for and oversight of children's care by ORR through the creation of a UC Ombuds Office. This office, and its proposed duties, can play a vital role in receiving and responding to complaints raised by children and others, and in identifying, preventing, and helping to address violations of laws and policies. However, as drafted, this office lacks sufficient authority and enforcement mechanisms to ensure effective third-party oversight approximating that currently provided by the FSA and related court oversight.
- 4. Community-based care model.** The NPRM recognizes the importance of family-based care for unaccompanied children and seeks comments on the inclusion of a community-based care model in a final rule. KIND strongly supports ORR's move away from congregate care facilities and toward the expansion of small-scale, family-based settings for children's care. Recognizing a longstanding need for such a model and current efforts already undertaken by the agency, KIND proposes that a final rule include timelines by which ORR will expand community-based placements to fully implement this approach.
- 5. Restrictive placements.** The Proposed Rule would codify critical due process protections established by the *Lucas R.* litigation for children placed by ORR in restrictive placements. The final rule should ensure full incorporation of *Lucas R.* protections and apply the same minimum standards of care and services across all programs, including standard.

⁵ *Flores v. Barr*, 407 F. Supp. 3d 909, 915 (C.D. Cal. 2019) (quoting a Dec. 7, 2001, stipulation providing, "All terms of this Agreement shall terminate 45 days following defendants' publication of final regulations implementing this Agreement[.] Notwithstanding the foregoing, the INS shall continue to house the general population of minors in INS custody in facilities that are state-licensed for the care of dependent minors.")(emphasis added).

6. **Release and Reunification.** The Proposed Rule includes important restrictions on information sharing that should be expanded to prevent ORR's sharing of children's mental health information and counseling notes in order to prevent harmful impacts contrary to children's best interests. We also urge that provisions be added to the Proposed Rule to direct ORR to conduct post-18 planning for youth aging out of ORR care to ensure their safety and wellbeing following release from ORR custody. Finally, we recommend that the Proposed Rule codify ORR's efforts to co-locate HHS professionals in CBP facilities to prevent unnecessary separations of children from extended family members and support safe and timely reunification of children.

We discuss each of these topics in turn in the comment below.

- I. **Section 410.1309 Codifies Several Positive Additions to Expand Legal Services, But Improperly Narrows ORR's Role in Funding These Critical Services.**

The FSA requires that licensed programs provide children "[l]egal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the government, the right to a deportation or exclusion hearing before an immigration judge, the right to apply for political asylum or to request voluntary departure in lieu of deportation."⁶ Additionally, the Homeland Security Act of 2002 (HSA) provides that ORR "shall be responsible for...coordinating and implementing the care and placement of unaccompanied [] children who are in Federal custody by reason of their immigration status, including developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on November 25, 2002."⁷ The Trafficking Victims Protection Act of 2008 (TVPA 2008) expands on these provisions and directs that "[t]he Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied [] children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge."⁸ Any final rule adopted by ORR must give effect to *all* of these mandates.

- A. The Proposed Rule Helpfully Expands the Legal Services Information to Be Provided to Children, Thus Promoting Access to Protection from Deportation, Trafficking, and Exploitation.

The NPRM acknowledges requirements in statute and the FSA, and the importance of legal representation for unaccompanied children.⁹ The Proposed Rule codifies in large part the FSA mandate to provide legal services information, and moreover, expands the scope of that information to encompass information about protections under child labor laws, and a child's right to apply for Special Immigrant Juvenile Status as well as asylum before USCIS in the first instance. The Proposed Rule clarifies that information must also be posted in an age-appropriate manner and available in each child's preferred language.

⁶ FSA Exh. 1, ¶ 14

⁷ See Homeland Security Act of 2002 § 462(b)(1)(A), 6 U.S.C. § 279(b)(1)(A).

⁸ 8 U.S.C. § 1232(c)(5).

⁹ See, e.g., NPRM at 68948-49.

These provisions help to ensure children’s awareness of vital forms of humanitarian relief for which they may be eligible. They also ensure provision of information that may help to mitigate child labor exploitation, trafficking, and other harm following a child’s release at a time in which they are especially vulnerable as they confront numerous transitions, often with limited resources and support. The Proposed Rule could serve these goals even further by incorporating directives to collaborate with legal services providers and other experts on aims such as creating child-friendly presentations that assist children in identifying and avoiding exploitative situations, understanding their legal rights, and learning of places they can turn to for assistance should concerns arise. (Additional discussion and specific recommendations are provided in Section G of this comment.) In addition to more general Know Your Rights information about child labor laws, children and their sponsors should be directed to location-specific community-based resources through the Legal Orientation Program for Custodians as well as in the Family Reunification Packet. This information can also be reiterated during any follow-up wellbeing check-ins or calls made by post-release providers.

B. The Proposed Rule Ensures Children’s Access to Confidential Legal Consultations and Codifies ORR’s Authority to Fund Legal Representation in a Range of Matters Crucial to Children’s Well-Being.

The Proposed Rule clarifies ORR’s authority to provide funding for representation not only in immigration matters but also in other critical matters, including Placement Review Panels related to restrictive placements, appeals of certain sponsor denials, risk determination hearings, and state juvenile court proceedings. Although we recommend below certain modifications to these provisions to prevent confusion and inadvertent de-prioritization of certain essential representation, KIND strongly supports regulations reflecting the breadth of legal services that may be necessary to promoting a child’s welfare. Conditions in care and placements significantly impact children’s overall wellbeing and their ability to apply for legal protections for which they may be eligible. The proposed provision takes important steps to give effect to the TVPRA’s expansive directive to “ensure, to the greatest extent practicable, that all unaccompanied children . . . have counsel to represent them *in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.*”¹⁰

The Proposed Rule also provides for confidential legal consultations for unaccompanied children, with additional legal consultations available where there are indications that a child may have been a victim of a severe form of trafficking; has been abused, abandoned, or neglected; has been a victim of a crime or domestic violence; or was persecuted or fears persecution on enumerated grounds. The Proposed Rule further provides for a child’s ability to communicate and meet privately in an enclosed area that allows for confidentiality. These provisions are vital for children in ORR custody, both to aid in better understanding how legal rights information applies in their particular case and to begin assisting children at the earliest point possible. We also support the Proposed Rule’s codification of ORR’s existing duties prohibiting nonretaliation against legal services providers for functions in the scope of their responsibilities.¹¹ These safeguards are essential to upholding children’s rights to receive independent legal counsel on matters of great sensitivity, and to ensuring that attorneys can exercise their professional and ethical obligations free of intimidation or interference.

¹⁰ 8 U.S.C. § 1232(c)(5) (emphasis added).

¹¹ NPRM at 68927.

C. The Proposed Rule Misinterprets TVPRA Authority Related to Children’s Access to Counsel and Erects Undue Barriers to Funding Legal Representation.

The NPRM acknowledges requirements in statute and the FSA, and the importance of legal representation for unaccompanied children.¹² Despite this, the Proposed Rule risks diminishing legal representation of unaccompanied children by elevating the INA’s provision on access to counsel for immigration court proceedings at no expense to the government above the TVPRA’s later and more comprehensive protections, enacted in recognition of unaccompanied children’s particular vulnerability in the immigration system. The NPRM asserts that the TVPRA:

does not describe an unaccompanied child’s ability to access legal counsel as a ‘right;’ and ORR cannot, by regulation, confer such a right. Rather, by reference to the Immigration and Nationality Act, the TVPRA describes unaccompanied children’s access to counsel as a ‘privilege,’ and also makes HHS responsible for ensuring such privilege ‘to the greatest extent practicable.’¹³

As to the words “right” and “privilege,” neither appears in the TVPRA provision on children’s access to counsel.¹⁴ While the word “privilege” does appear in INA section 292 (8 U.S.C. § 1362), which is referenced in the TVPRA, it appears beneath the heading “Right to Counsel.” The distinction the NPRM seeks to make through reference to this section is therefore misleading. ORR’s focus on these terms distracts from what the statute *does* in fact address—ORR’s responsibility for advancing legal representation of unaccompanied children. Although the NPRM contends that its “clarification” will not impact the expansion of legal services provided for elsewhere, the Proposed Rule in fact codifies an unjustifiably narrow and conditional role for ORR—one that would limit representation to “certain”¹⁵ unaccompanied children and make funding for legal representation contingent not only on ORR’s first determining that securing pro bono counsel is “not practicable,” but also on sweeping agency discretion and funding considerations. *See Proposed § 410.1309(a)(4) (“To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR shall fund legal service providers to provide direct immigration legal representation for certain unaccompanied children, subject to ORR’s discretion and available appropriations.”)* (emphasis added).

Repeated references to discretion, practicability, and available appropriations are not only unnecessary—as all federal programs implicitly require funding from Congress to operate—but project reticence on ORR’s part to commit to supporting representation of unaccompanied children. The

¹² 88 Fed. Reg. 68948 (“ORR believes that Legal Service Providers who represent unaccompanied children undertake an important function by representing such children while in ORR care and in some instances after release. The proposals under § 410.1309 build on current ORR policies, which articulate standards for legal services for unaccompanied children. ORR strives for 100% legal representation of unaccompanied children and will continue to work towards that goal to the extent possible.”).

¹³ NPRM at 68949 n. 121.

¹⁴ 8 U.S.C. 1232(c)(5).

¹⁵ The TVPRA addresses “all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A)” in discussing HHS’ responsibility in relation to access to counsel. 8 U.S.C. § 1232(c)(5). The referenced “subsection (a)(2)(A)” refers to unaccompanied children from contiguous countries. Importantly, CBP, rather than ORR, conducts initial screenings of unaccompanied children from Mexico and Canada pursuant to the TVPRA’s provisions on contiguous countries, and significant concerns remain about the adequacy of these screenings in identifying children at risk of severe trafficking, persecution, and other harm. Thus, the Proposed Rule’s vague reference to “certain” children leaves open the possibility that ORR will not only expansively exclude unaccompanied children from Mexico from its responsibility to ensure legal counsel, but potentially other children as well.

qualifying language unduly narrows the TVPRA’s counsel provision. This result would depart from the TVPRA’s and ORR’s aims of ensuring counsel for all unaccompanied children.

A straightforward reading of the TVPRA instead requires that ORR make its best efforts to provide legal counsel for unaccompanied children. The TVPRA references pro bono counsel as one key means to this end, not as a prerequisite that must be satisfied in order to justify the use of funding for other legal services. This reading is bolstered by the experience of practitioners and ORR in supporting pro bono representation, which requires sustained funding of experienced legal staff to support recruitment and training of pro bono attorneys as well as program oversight.¹⁶

RECOMMENDATION: Accordingly, we recommend that ORR modify the Proposed Rule as indicated below to more accurately implement relevant legal requirements and ORR policies.

*To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR shall **prioritize and make its best efforts** fund legal service providers to provide **ensure** direct immigration legal representation for **all** certain unaccompanied children. **These efforts shall include funding to support training, capacity building, and technical assistance; to maximize pro bono representation and to fund direct immigration representation by legal services providers as necessary to close representation gaps. subject to ORR’s discretion and available appropriations.” ORR shall monitor program needs and request all necessary appropriations from Congress to support direct legal representation for all unaccompanied children in and released from ORR care.**¹⁷*

D. The Proposed Rule’s Distinct Categories for Legal Services Funding Could Inadvertently Hinder Access to Protection.

The Proposed Rule creates two separate funding categories for legal services: direct immigration legal representation and “matters not involving direct immigration representation.” Although we strongly support codification of ORR’s authority to fund legal services outside of immigration proceedings, as presently drafted the proposed provisions complicate the delivery of legal services to unaccompanied children, exacerbating their vulnerability.

Effective legal representation requires holistically considering a child’s individual needs and experiences. Many factors influence a child’s ability to meaningfully participate in preparation of their immigration case and related proceedings. For example, a child’s placement in restrictive or out-of-network facilities or indefinite stay in ORR custody without an identified sponsor can significantly impact a child’s ability to discuss traumatic experiences underlying their claims for protection. Additionally, a child’s eligibility for one or more forms of legal relief will generally stem from harms or threats experienced in their country of origin, in their journey to safety, and/or once in the U.S. The applications relevant to a child’s case and the timing of these, including applications for employment authorization documents (EADs) that may be filed with primary applications, depend on the child’s specific circumstances and wishes as well as counsel’s independent assessment of the child’s legal case. Cases may take different trajectories and often do not fit neatly within ORR’s two enumerated categories, but often involve interrelated aspects of both.

The Proposed Rule also problematically excludes from potential funding for legal representation unaccompanied children in the Unaccompanied Refugee Minors (URM) Program who have reached the age of 18. Children often experience a variety of challenges in securing legal representation—a fact that

¹⁶ 6 U.S.C. § 279(b)(1)(A).

¹⁷ NPRM at 68995.

should lead to greater efforts to expand legal access for them, rather than limitations on such support. Indeed, the TVPRA’s access to counsel provision does not curtail representation based on a child’s age but instead encompasses all unaccompanied children “who are or have been in the custody of the Secretary [of HHS] or the Secretary of Homeland Security. . .”¹⁸ Many unaccompanied children enter URM programs after having been determined by the Office on Trafficking in Persons (OTIP) to be potential victims of severe trafficking, or based on their eligibility for other forms of relief. However, a child may turn 18 before being able to complete their applications for relief. This can occur, for example, where an OTIP eligibility letter was not issued until the child was nearly 18, or where law enforcement investigations and proceedings delay a child’s U visa or T visa case. The TVPRA expressly addresses ensuring counsel for unaccompanied children to “protect them from mistreatment, exploitation, and trafficking.”¹⁹ The Proposed Rule would oddly turn this directive on its head, failing to ensure funding for counsel for children already identified as potential trafficking victims, and rendering them to remain without status and vulnerable to being re-trafficked. To uphold both the TVPRA and the mission of the URM program, ORR should eliminate age-based restrictions on counsel for children in URM.

RECOMMENDATION: It is essential that funding for legal services never be restricted in ways that are contrary to a child’s best interests or that interfere with a child’s ability to access legal protection. To this end, we recommend the following modifications to Proposed Sections 410.1309(a)(4) and (b), in addition to those discussed above:

Section 410.1309(a)

...

(4) *Direct immigration legal representation services for unaccompanied children currently or previously under ORR care.*

...

Examples of direct immigration legal representation include, but are not limited to:

(i) For unrepresented unaccompanied children who become enrolled in ORR Unaccompanied Refugee Minor (URM) programs, provided they have not yet obtained immigration relief or reached 18 years of age at the time of retention of an attorney;

....

(b) *Legal services for the protection of unaccompanied children’s interests in certain **additional matters** not involving direct immigration representation—*

(1)-*Purpose.* This paragraph (b) provides for the use of additional funding for legal services, ~~to the extent that ORR determines it to be available,~~ to help ensure that the **rights, needs, and** interests of unaccompanied children are considered in certain matters relating to their care and custody, to the greatest extent practicable. **Recognizing that children’s individual cases and circumstances may vary, nothing in this section shall be construed to restrict ORR’s authority to fund legal representation where necessary to ensure a child’s safety or best interests, or to prevent harmful disruptions in legal services or other impacts for a child’s legal case or ability to access legal protection.**

(2) *Funding.* ~~To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel,~~ ORR may fund access to counsel for unaccompanied children, including for purposes of legal representation, **including in but not limited to** the following enumerated ~~non-immigration related matters, subject to ORR’s discretion and in no particular order of priority:~~

(i) ORR appellate procedures, including Placement Review Panel (PRP), under § 410.1902, and risk determination hearings, under § 410.1903;

¹⁸ 8 U.S.C. § 1232(c)(5).

¹⁹ 8 U.S.C. § 1232(c)(5).

- (ii) For unaccompanied children upon their placement in ORR long-term home care or in a residential treatment center outside a licensed ORR facility, and for whom other legal assistance does not satisfy the legal needs of the individual child;
- (iii) For unaccompanied children with no identified sponsor who are unable to be placed in ORR long-term home care or ORR transitional home care;
- (iv) For purposes of judicial bypass or similar legal processes as necessary to enable an unaccompanied child to access certain lawful medical procedures that require the consent of the parent or legal guardian under State law, and when the unaccompanied child is unable or unwilling to obtain such consent;
- (v) For the purpose of representing an unaccompanied child in state juvenile court proceedings, ~~when the unaccompanied child already possesses SIJ classification;~~ and
- (vi) For the purpose of helping an unaccompanied child to obtain an employment authorization document.

E. Section 410.1309(d)(3) Inadequately Considers Current and Evolving Representation Needs in Grant Funding for Legal Services by Relying Exclusively on Historic Data and Could Entrench Due Process Gaps.

To date, many if not most unaccompanied children lack attorneys to assist them in immigration court and with their legal cases. This gap in representation presents significant and longstanding concerns for due process and children’s ability to access protection. Absent legal assistance, children face grave risk of return to harm. KIND strongly supports ORR’s goal of ensuring legal representation for all unaccompanied children by 2027—an aim that necessitates reliance on real-time information regarding the number and distribution of children in need of representation. The Proposed Rule, however, would formalize funding determinations “based on the historic proportion of the unaccompanied child population in the State within a lookback period determined by the Director, provided annually by the State.”²⁰ Reliance on past proportions alone may fail to factor in current referrals of unaccompanied children or released children who have never obtained an attorney. Consequently, it could entrench representation disparities for the longer term and hamper ORR’s ability to meet current or projected needs.

RECOMMENDATION: For these reasons, we recommend the following changes to proposed Section 410.1309(d)(3):

~~“Subject to the availability of funds, g~~ Grants or contracts shall be calculated based on **through consideration of both** the historic proportion of the unaccompanied child population in the State within a lookback period determined by the Director and **current CBP and ORR referrals provided annually by the State.**”

F. Modifications Are Necessary to Section 410.1209 to Prevent Confusion and Ensure Timely Consideration of Specific Consent Requests.

The Proposed Rule incorporates the Immigration and Nationality Act’s “specific consent” requirement, which is specific to a subset of cases in which children in ORR care are pursuing Special Immigrant Juvenile status.²¹ The Proposed Rule clarifies that this requirement attaches when a child in ORR custody seeks a juvenile court’s jurisdiction to alter their custody or placement with ORR, but does not attach when seeking a juvenile court order that would not alter the child’s custody or placement with ORR.

²⁰ Proposed § 410.1309(d).

²¹ 8 U.S.C. § 1101(a)(27)(J).

RECOMMENDATION: We recommend minor revisions to clarify potentially confusing phrasing of these provisions. We further recommend narrowing the time frame in which ORR must consider such requests, mindful of the particular urgency and the impacts of delay for children nearing 18 who may age out of ORR care or of a state juvenile court's jurisdiction as a result.

§ 410.1209 Requesting specific consent from ORR regarding custody proceedings.

(a) An unaccompanied child in ORR custody is required to request specific consent from ORR if the child seeks **to have to invoke the jurisdiction of a juvenile court to alter the child's custody status or order the child's** release from ORR custody.

(b) An unaccompanied child in ORR custody need not request ORR's specific consent before a juvenile court exercises jurisdiction to enter findings or orders that do not alter the child's custody status or placement with ORR. If an unaccompanied child seeks to invoke the jurisdiction of a juvenile court for a dependency order to petition for SIJ classification or to otherwise permit a juvenile court to establish jurisdiction regarding a child's placement and does not seek the juvenile court's jurisdiction to determine or alter the child's custody status or release, the unaccompanied child does not need to request specific consent from ORR.

(c) A child who has been released by ORR to a sponsor is no longer in the actual or constructive custody of ORR, and therefore, ORR's specific consent is not required before a juvenile court exercises jurisdiction over the child's custody or placement.

~~(e)~~ (d) Prior to **requesting that** a juvenile court ~~determining or altering the~~ **an** unaccompanied child's custody status or **order the child's** release from ORR, attorneys or others acting on behalf of an unaccompanied child must complete a request for specific consent.

~~(d)~~ (e) ORR shall acknowledge receipt of the request within two business days.

~~(e)~~ (f) Consistent with its duty to promptly place unaccompanied children in the least restrictive setting that is in the best interest of the child, ORR shall consider whether ORR custody is **necessary** to:

(1) Ensure a child's safety; or

(2) Ensure the safety of the community.

~~(f)~~ (g) ORR shall make **a** determinations on **any** specific consent requests within ~~60~~ **30** business days of receipt of a request. **In cases in which a child is expected to age out of ORR care in 14 days or less, ORR shall make a determination within 72 hours of such request. ORR shall make its best efforts to expedite all other urgent requests.** ~~When possible, ORR shall expedite urgent requests.~~

~~(g)~~ (h) ORR shall inform the unaccompanied child, or the unaccompanied child's attorney or other authorized representative of the decision on the specific consent request in writing, along with the evidence utilized to make the decision.

~~(h)~~ (i) The unaccompanied child, the unaccompanied child's attorney ~~of record~~, or other authorized representative may request reconsideration of ORR's denial with the Assistant Secretary for ACF within 30 business days of receipt of the ORR notification of denial of the request. The unaccompanied child, the unaccompanied child's attorney, or authorized

representative may submit additional (including new) evidence to be considered with the reconsideration request.

~~(i)~~ (j) The Assistant Secretary for ACF or designee shall considers the request for reconsideration and any additional evidence, and sends a final administrative decision to the unaccompanied child, or the unaccompanied child's attorney or other authorized representative, within 15 business days of receipt of the request.

G. Recommendations Regarding Delivery of Legal Services and Required Information for Unaccompanied Children in ORR's Custody

We commend the codification of the requirement to notify children in ORR custody of certain legal rights in Proposed Rule § 410.1109, as well as the prohibition on retaliatory action against legal service providers because of advocacy in an action adverse to ORR.

Proposed Rule 410.1109(a)(1) requires that ORR provide each child in its custody with a State-by-State list of free legal service providers compiled and annually updated by ORR. This section could be strengthened by adding that information will *also* be made accessible by other means, and not solely via a printed list. Printed lists that require regular updating become quickly outdated and can prematurely frustrate a child's attempt to make contact with providers on the list. Furthermore, accessibility of written information may be hindered for children with limited literacy. Many unaccompanied children communicate and receive information via WhatsApp, Facebook Messenger, or other apps. Supplementary means of making information accessible, such as through The International Rescue Committee's ORR-funded Importamí program, have been very effective for ensuring children's greater access to critical information.

KIND appreciates the codification of critical information and specific legal services to be provided to unaccompanied children in its care in Proposed Rule § 410.1309. KIND offers the following recommendations in order to provide greater clarity and better align the rule with current ORR policy and best practices for legal service delivery:

1. Section 410.1309(a)(2)(i) - prioritize in-person orientations

Best practice standards and KIND's vast experience providing orientations to children inform our recommendation that Proposed Rule 410.1309(a)(2)(i) should prioritize the provision of *in-person* legal orientations. Telephonic and video orientations limit presenters' ability to gauge children's comprehension, engage children throughout the orientation, and minimize external extractions. A child's legal orientation is also often the child's first introduction to the concept of a lawyer and the lawyer's unique role. Orientations serve to inform children of critical information about the legal process and their rights, but also begin to lay a foundation for a child to begin to establish trust with the legal service provider. Therefore, KIND recommends that this section be revised to reflect that telephonic or video orientations are permissible, but should be reserved for exceptional circumstances (such as a public health concern), or where it is otherwise in the child's best interest.

2. Section 410.1309(a)(2)(v) - replace "paralegal" with "other legal professional working under the supervision of an attorney"

Section 410.1309(a)(2)(v) and the preamble state that a child must receive a confidential legal consultation "with a qualified attorney (or paralegal working under the direction of an attorney, or EOIR accredited representative)[.]" Many legal service providers serving unaccompanied children employ qualified non-attorney legal services professionals who do not carry the specific title of "paralegal."

Therefore, KIND recommends that the term “paralegal” be replaced with “other legal professional working under the supervision of an attorney,” which more accurately describes the range of attorney-supervised legal services professionals who regularly provide orientations and legal consultations to children.

3. Section 410.1309(a)(2) – content of orientations and legal consultations

KIND supports the inclusion of certain required legal services information that must be provided to unaccompanied children in legal services orientations in Proposed Rule §§ 410.1309(a)(2)(B)(ii)-(v). To consolidate all required content into one list, ensure that critical information is included in the final rule, and to allow for greater specificity or additions be determined by ORR policy, KIND recommends some additions and minor changes to those sections as reflected below. Furthermore, § 410.1309(a)(2)(B)(v) regarding confidential legal consultations provides that ORR “shall” request an additional legal consultation for several categories of children. The list of circumstances in § 410.1309(a)(2)(B)(v)(A)-(D) describes children who appear to qualify for certain forms of legal relief, including SIJ classification, asylum, or trafficking relief. Since children will have had an initial legal consultation to assess eligibility for such relief under this section, it would be duplicative to mandate an *additional* consultation in every such case. KIND therefore suggests making such additional consultations optional subject to ORR’s discretion. Furthermore, we recommend adding a fourth category to permit a follow-up legal consultation in other circumstances in which ORR learns of new information or particular vulnerabilities that suggest a child might benefit from additional information or advice about their legal options.

RECOMMENDATION: For these reasons, we recommend the following changes to and re-ordering of language in Section 410.1309:

(a)(2) *Orientation.* An unaccompanied child in ORR’s legal custody shall receive: (i) An in-person, ~~telephonic, or video~~ presentation concerning the rights and responsibilities of undocumented children in the immigration system, presented in the **preferred** language of the unaccompanied child and in an age appropriate manner. **Video or telephonic presentations may be provided in exceptional circumstances or when it is in the child’s best interest.**

Such presentation shall be provided by an independent legal service provider that has appropriate qualifications and experience, as determined by ORR, ~~to provide such presentation~~ and shall include information notifying the unaccompanied child of their legal rights and responsibilities, including ~~protections under child labor laws, and to services to which they are entitled, including educational services. The presentation must be delivered in the language of the unaccompanied child and in an age-appropriate manner.~~

(ii) Information regarding the availability of free legal assistance and that they may be represented by counsel at no expense to the government.

(iii) ~~Notification regarding the child’s ability to petition for SIJ classification, to request that a juvenile court determine dependency or placement in accordance with § 410.1209, and notification of the ability to apply for asylum or other forms of relief from removal.~~ **Information about forms of immigration legal relief for which children may eligible, including but not limited to Special Immigrant Juvenile classification, asylum, and relief for trafficking or crime victims;**

(iiiiv) Information regarding the unaccompanied child’s right to a removal hearing before an immigration judge, the ability to apply for asylum with USCIS in the first instance, and the ability to request voluntary departure in lieu of removal.

(iv) **Information regarding the unaccompanied child’s rights in ORR custody, including specific rights for children placed in restrictive placements;**

(v) **Information notifying children about** protections under child labor laws, and to services to which they are entitled, including educational services. ~~A confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or EOIR accredited representative) to determine possible forms of relief from removal in relation to the unaccompanied child's immigration case, as well as other case disposition options such as, but not limited to, voluntary departure.~~

Such presentation must occur within 10 business days of child's admission to ORR, within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care or ORR transitional home care), and every 6 months for unrepresented children who remain in ORR custody, as practicable. If the unaccompanied child is released before 10 business days, a legal service provider shall follow up as soon as practicable to complete the presentation, in person or remotely. Such consultation shall occur within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care or ORR transitional home care) or upon request from ORR.

(3) Confidential Legal Consultation. An unaccompanied child in ORR's legal custody shall also receive a confidential legal consultation with a qualified attorney (or ~~paralegal~~ **other legal professional** working under the direction of an attorney, or ~~DOJ~~**EOIR** accredited representative) to determine possible forms of relief from removal in relation to the unaccompanied child's immigration case, as well as other case disposition options such as, but not limited to, voluntary departure. ORR ~~shall~~**may** request an additional legal consultation on behalf of a child, if the child has been identified as: (A) A potential victim of a severe form of trafficking; (B) Having been abused, abandoned, or neglected; or (C) Having been the victim of a crime or domestic violence; ~~or~~ (D) Persecuted or in fear of persecution due to race, religion, nationality, membership in a particular social group, or for a political opinion; **or (E) other circumstances suggest that a child is particularly vulnerable.** ~~(vi)~~ An unaccompanied child in ORR care shall be able to conduct private communications with their attorney of record, EOIR accredited representative, or legal service provider in a private enclosed area that allows for confidentiality for in-person, virtual, or telephone meetings.

H. ORR Should Dedicate Robust Resources to Support Collaborative Service Models and Training to Sustainably Increase Capacity for Legal Representation.

ORR has requested input on ways to expand legal representation for unaccompanied children. For more than a decade, nonprofit legal services providers have worked to leverage government resources to provide legal representation to thousands of unaccompanied children. These efforts entail extensive training, support, and mentorship of pro bono attorneys; capacity building to support both direct and pro bono representation; and developing holistic service models to connect children with social services. Services such as mental health counseling and medical care are essential to children's safety and wellbeing, and to their ability to participate in preparing their legal case. Successful legal representation has a lifesaving impact, resulting in protection from being returned to persecution and other harm. Executive Office for Immigration Review data demonstrate that unaccompanied children with counsel were nearly 100 times more likely to be successful in obtaining legal relief than children who were not represented.²²

Pro bono counsel have made invaluable contributions to meeting growing demand for legal representation. Building upon this foundation to reach all unaccompanied children will require a multipronged approach, sustained funding, and concerted efforts to train and retain high-quality attorneys and legal support staff.

²² Congressional Research Service, *Unaccompanied Alien Children: An Overview*, at 17, Sept. 2021 (addressing data covering completed immigration court cases from FY 2018 through the first half of FY 2021).

1. Targeted Capacity Building

In recent years, unprecedented numbers of unaccompanied children have sought protection in the U.S., reflective of historic forced displacement globally.²³ As many locations receive greater numbers of children released from ORR custody, including areas in which small numbers of children have historically been placed, capacity building and sustained funding remain a priority. Support of legal services must keep pace with referrals of unaccompanied children to the ORR to ensure both sufficient staffing at legal service providers working with children and the development of ongoing training, technical assistance, and resources to ensure continued awareness of shifting immigration policies and laws, and practices to assist the representation of children in immigration court proceedings.

Additional strategies should be focused on deepening and retaining pools of talented attorneys and legal staff, including partnerships and fellowships dedicated to public interest immigration representation. Such opportunities connect attorneys with organizations that can provide hands-on training and mentorship and nourish the development of a dedicated community of attorneys that can serve as resources to each other, by sharing experiences, tools, and support. These relationships can help to promote retention, ease workloads, and reduce vicarious trauma stemming from work on cases in which children's lives and safety have been placed at risk. Private practitioners also play an important role in providing legal representation to unaccompanied children, including in remote and rural areas. Enlisting the private bar, and sharing information about available opportunities and organizations that practitioners can consult for technical assistance, can help in maximizing this capacity.

Capacity building efforts must recognize and be responsive to the various factors that influence legal capacity in a given geographic area, and embrace a host of strategies tailored to the local context. For example, although it is often the case that rural areas lack a significant number of legal services providers or attorneys, a location may have made significant strides toward addressing past shortages through creative solutions and partnerships leading to an established and deeply expert network of providers. In contrast, an area closer to a highly-populated urban center may have a greater number of attorneys in total, but comparatively fewer who are dedicated to representation of unaccompanied children or serving in a pro bono capacity, due to the abundance of other legal offerings and opportunities, including pro bono projects. By convening regular stakeholder engagements with providers across states, cities, and regions, legal services providers and ORR can leverage the on-the-ground experience and knowledge of practitioners, better understand specific representation landscapes, barriers, and opportunities, and share strategies and approaches that have proven successful, or that have proven ill-adapted to particular contexts.

2. Robust Funding

Expansion of legal services to reach all unaccompanied children necessitates robust and consistent funding to actively leverage both direct and pro bono representation capacity. It is critical that ORR seek and allocate consistent and robust funds from Congress to address existing representation needs and gaps and to also anticipate and keep pace with referrals of unaccompanied children to ORR and any particular representation needs of children may have. Funding shortfalls or lapses present significant challenges for legal services providers and other practitioners, who may face difficulties recruiting and retaining highly qualified counsel to represent unaccompanied children if the duration of such positions is temporary or uncertain. We strongly support ORR's efforts to ensure legal representation for all children by 2027, and urge ORR to request sufficient funds to meet this aim through budget requests, regular appropriations, and supplementary requests as needed to make this goal a reality.

²³ UNHCR, <https://www.unhcr.org/> (stating "108.4 million people worldwide are forcibly displaced.").

3. Training and Cultural Responsiveness

Importantly, efforts to build capacity must go beyond merely ensuring that *more* attorneys are available to serve children, but also ensure that attorneys are equipped with the necessary training and skills. Trainings and outreach should be continuously available, with particular focus on trauma-informed interviewing techniques, child-centered practices, cultural responsiveness, and fluency or proficiency in languages commonly spoken by unaccompanied children.

4. Collaborative Representation Models

Through KIND's work with a diverse population of children across the United States, we recognize that legal services alone are not sufficient to address children's needs. Many unaccompanied children have survived traumatic events, and most have few resources for coping at their disposal. While approaching the start of a legal case, children may also be navigating multiple other challenges: language acquisition, changing family dynamics, interrupted education, and/or long-neglected medical, dental, and mental health needs.

KIND has witnessed the benefits of collaborative intake hubs for unaccompanied children. Such models reduce the need for children to engage in extensive outreach to numerous providers in order to access both legal and social services, and they enable efficiencies in referring cases and screening children for eligibility for relief. Hubs also facilitate the engagement of pro bono attorneys. Such approaches are beneficial even if a child is not ultimately eligible for legal representation, as organizations can provide helpful information to children that can reduce their vulnerability to unscrupulous actors and assist them in making decisions about their next steps.

Coordinated efforts and relationships among professionals in various disciplines can aid in identifying and serving children who may otherwise struggle to find legal and social services. Places that children already frequent, such as schools, social services providers, and medical clinics, can play a key role in the coordinated delivery of legal and social services. Schools have played an especially vital part in conveying information to children about how to find an attorney, the importance of attending immigration proceedings, and ways to connect with community-based providers who can assist them. All such efforts must take into account the distinct professional obligations that vary among roles, and ensure compliance with privacy requirements and federal, state, and local civil rights laws to prevent discrimination on the basis of a child's national origin or immigration status, or inappropriate disclosure or use of children's information for immigration enforcement or other purposes contrary to their best interests.

II. The Proposed Rule Fails to Fully Implement the FSA's State Licensing Requirement and Relies Upon a Potential Federal Licensing Scheme Not Available for Review as Part of the NPRM.

With limited exceptions, the FSA requires programs serving unaccompanied children to be state licensed for the care of dependent children.²⁴ This provision, which is foundational to the FSA, brings to bear the expertise and independence of states in overseeing and monitoring child welfare and childcare facilities

²⁴ FSA ¶¶ 1.6 (defining "licensed program"); VII, INS Custody ("Except as provided in Paragraphs 12 or 21, such minor shall be placed temporarily in a licensed program until such time as release can be effected in accordance with Paragraph 14 above or until the minor's immigration proceedings are concluded, whichever occurs earlier."); *see generally* FSA Exh. 1, Minimum Standards for Licensed Programs; *Stipulation Extending Settlement Agreement and for Other Purposes*; and *Order Thereon Flores v. Reno* (No. 85-5444 RJK) (C.D.Ca. Dec. 7, 2001) (modifying paragraph 40 of the FSA to read: "All terms of this Agreement shall terminate 45 days following defendants' publication of final regulations implementing this Agreement. Notwithstanding the foregoing, the INS shall continue to house the general population of minors in INS custody in facilities that are state-licensed for the care of dependent minors.").

to help ensure the safety and wellbeing of unaccompanied children in the federal government’s care throughout the country.²⁵

The NPRM acknowledges recent actions by some states to discontinue or deny licensing to ORR programs caring for unaccompanied children, and seeks to account for such situations with new regulatory standards and definitions.²⁶ Although it is crucial to ensure ORR programs operating in states where licensing is no longer available meet rigorous child welfare standards, the Proposed Rule’s recasting of the FSA’s definition of “licensed program”—and of related minimum standards—would in practice allow facilities to forgo state licensing even where licensing *is* offered by the state.

In substituting the term “standard program” for “licensed program,” the Proposed Rule elides one of the FSA’s most fundamental requirements for programs and effectively allows federal standards and self-monitoring to displace independent licensing and oversight by states. Proposed § 410.1302 similarly undermines the FSA’s state licensing requirement by providing that “[s]tandard programs shall: (a) be licensed by an appropriate state *or Federal agency, or* meet other requirements specified by ORR if licensing is unavailable to programs providing services to unaccompanied children in their State, to provide residential, group, or foster care services for dependent children.”²⁷ (emphasis added). The use of the disjunctive “or” transforms the FSA’s state licensing requirement into a mere option—one purportedly on equal footing with a potential federal licensing system or other requirements that ORR may specify.

Far from reinforcing the need for programs to comply with relevant licensing standards, the proposed changes could instead revive the system in place before the FSA—one in which the federal government could alone establish and oversee conditions for children in its care. This could result in widespread placement of children in facilities licensed exclusively by federal licensing in states such as Texas, where a significant number of ORR facilities currently exist but state licensing is no longer offered. It could also pave the way for programs to expansively elect to pursue federal licensing in lieu of available state licensing, including for facility types and sizes that states expressly decline to license, such as large-scale influx facilities or family detention facilities, due to significant child welfare concerns or inconsistency with congregate care reforms. The history of children’s care by the federal government before the FSA proves instructive on the grave risks of harm posed by a system in which independent, external standard-setting, monitoring, and oversight is lacking.

Prior to the *Flores* lawsuit—which challenged treatment, conditions, and processes for release of children from immigration custody—immigrant and refugee children were often detained indefinitely, with unrelated adults in hotel rooms and other facilities that were inappropriate for children’s safety and care. Children were shackled, subjected to strip searches, and deprived of access to basic necessities such as adequate food and water, recreation, and education.²⁸ The FSA’s state licensing requirement helps to ensure that children in federal immigration custody will receive care consistent with the same standards as children in domestic child welfare systems. Proposed changes that both in their plain language and in practice would undercut the FSA’s state licensing requirement cannot be said to implement the settlement.

²⁵ See *Flores v. Lynch*, 828 F.3d 898, 906 (9th Cir. 2016) (referencing the definition of “licensed program” and stating that “its obvious purpose is to use the existing apparatus of state licensure to independently review detention conditions.”).

²⁶ NPRM at 68915-16.

²⁷ *Id.* at 68989.

²⁸ See Temi Omilabu, *Detention of Immigrant Children amid a Global Pandemic: Jenny Flores’ America*, Am. Journal of Law and Medicine, Vol. 46, Issue 4 (Nov. 2020); Miriam Jordan, “The History of Migrant Children Protection in America Started with Two Girls in Los Angeles,” N.Y. Times (Aug. 20, 2019); NBC News, “When Migrant Children Were Detained Among Adults, Strip Searched” (July 24, 2014).

RECOMMENDATION: KIND underscores that ORR’s definition of “licensed program” or “standard program” must make clear that ORR programs must comply with the state licensing requirements of the states in which they are located *as well as all* minimum standards for licensed programs described in Exhibit 1 of the FSA, even if a state does not offer licensing to ORR facilities.

We note with concern the NPRM’s reference to ORR’s current development of a separate NPRM that would create “a Federal licensing scheme for ORR care providers located in states where licensure is unavailable to programs serving unaccompanied children.”²⁹ Merely described as “in the spirit of current FSA requirements,”³⁰ the proposed federal licensing framework is not available for review concurrently with this NPRM, making it impossible for the public to discern how the two proposed regulations would interact and to evaluate their consistency with the FSA and other legal obligations applicable to ORR. This piecemeal rulemaking impedes public input not only as to provisions on state licensing and minimum standards for licensed programs, but also for other provisions, including those related to influx facilities, and to monitoring and oversight of ORR programs.

Lacking this important context, we can offer only preliminary recommendations here to underscore that state licensing of ORR programs must not be a discretionary option, as it is fundamental to the wellbeing of children. We recognize the concrete impacts of state policies discontinuing licensing of ORR programs on programs in certain states where large numbers of children are currently in care. However, the development of a separate federal licensing scheme for such cases may require vast resources, infrastructure, and funds, and is likely to result in large numbers of children being placed in non-state-licensed facilities, while diverting critical resources and expertise away from alternatives that could better leverage and expand ORR’s capacity in locations where rigorous state licensing is available. We urge ORR to continue engaging with stakeholders to help ensure that efforts undertaken as stop-gap safeguards do not have unintended consequences for children’s safety and care nor bring about the very erosion in standards of care that the safeguards were envisioned to prevent.

III. The Proposed Ombuds Office Can Advance Accountability for Children’s Safe and Appropriate Care, But Requires Additional Authority and Independence to Meet This Aim.

KIND strongly supports the codification of critical protections found in the FSA and other sources to promote children’s best interests and ensure that they are treated with “dignity, respect and special concern for their particular vulnerability” as children while in ORR’s care.³¹ Among these is the Proposed Rule’s creation of a UC Ombuds Office (Subpart K, §§ 410.2000-410.2004) to aid in oversight, investigation and resolution of complaints and violations, and the creation of responsive policies and solutions. Numerous violations of the FSA in recent decades as well as past policy changes that undermined, rather than advanced, children’s rights and protection³² establish the continued necessity of intensive and independent third-party monitoring. Harms to children could result if the rigorous oversight provided by *Flores* counsel and the federal district court overseeing the FSA terminates in the future without appropriate mechanisms to parallel these functions. KIND believes an Ombuds Office is

²⁹ NPRM at 68916, n. 52.

³⁰ *Id.*

³¹ FSA ¶ IV.11.

³² See, e.g., *Flores v. Sessions*, CV 85-4544 DMG (AGRx) (C.D. Cal.), Order re Plaintiffs’ Motion to Enforce Class Action Settlement [Dkt. 470], July 30, 2018, https://youthlaw.org/sites/default/files/wp_attachments/Flores-MTE-order.pdf; *Flores v. Garland*, Case No. CV-85-4544-DMG (C.D. Cal.), Notice of Motion and Motion to Enforce Settlement re Emergency Intake Sites [Dkt. 1161], Aug. 9, 2021, https://youthlaw.org/sites/default/files/wp_attachments/Flores-v-Garland-Pls-Motion-to-Enforce-8.9.2021.pdf; see generally, e.g., KIND, *Death by Thousand Cuts: The Trump Administration’s Systematic Assault on the Protection of Unaccompanied Children* (2018), [Death-by-a-Thousand-Cuts_May-2018.pdf](https://youthlaw.org/sites/default/files/wp_attachments/Death-by-a-Thousand-Cuts_May-2018.pdf) (supportkind.org).

an essential component of a multilayered and interdisciplinary approach that can help ensure the greatest protection possible for children in federal immigration custody. However, several modifications are necessary to provide the proposed office with the necessary authority and independence to engage proactively to prevent risks to children, and to ensure meaningful accountability and corrective action for harms and violations.

KIND has joined a sign-on comment urging specific modifications to the Ombuds provisions, and we incorporate by reference those comments here. In this comment, we summarize key changes discussed there and outline additional collaboration, considerations, and resources that can further strengthen this Office and better protect unaccompanied children.

A. The Proposed Rule Should Be Modified to Strengthen the Ombuds Office's Authority, Activities, and Reporting.

The Ombuds Office represents an important avenue, independent of ORR, through which unaccompanied children and other stakeholders can elevate and seek resolution of concerns about their care and treatment. Fulfilling these vital aims, however, necessitates that the Ombuds be permitted to perform all functions free of retaliation, and that the office remain truly independent of the department that is subject to Ombuds monitoring and oversight. Further, the paramount importance of children's wellbeing in care warrants that the Ombuds possess direct and necessary access to agency leadership to better enable continuous awareness of and response to the Ombuds' recommendations.

RECOMMENDATION: To this end, we recommend that the Proposed Rule be modified to direct that the Ombuds report to the Secretary of HHS, rather than the ACF Assistant Secretary as indicated in § 410.2000(a).

Section 410.2002(a) of the Proposed Rule describes several activities that "[t]he UC Office of the Ombuds *may* engage in."³³ Among other activities, these include receiving reports from children, potential sponsors, stakeholders, and the public regarding ORR's compliance with regulations and standards; investigating compliance with federal law and ORR regulations to prepare reports and recommendations; conducting investigations, interviews, and site visits at ORR facilities; and reviewing concerns related to children's access to services, ability to communicate with service providers, family members, and sponsors, and matters pertaining to transfers and release.³⁴ However, the Proposed Rule's use of non-directive language leaves open the possibility that these fundamental functions may be disregarded, subject to discretion, or not undertaken at all.³⁵

RECOMMENDATION: At minimum, to ensure the safety and wellbeing of children, all of the activities in § 410.2002(a)—several of which are currently performed by *Flores* class counsel and monitors—must be required. Additionally, we recommend that several activities and authorities of the Office be expanded and enhanced to enable a more proactive role, more comprehensive monitoring, and agency accountability for timely response to the Ombuds' requests, findings, and recommendations. For example, we recommend that § 410.2002(a)(1)-(3) be expanded to ensure that the Ombuds need not wait to receive a report or complaint before acting, but that they can undertake investigations on the basis of other information or concerns of which they become aware. These provisions, and the Ombuds'

³³ Proposed § 410.2002(a).

³⁴ *Id.*

³⁵ *Id.* ("The UC Office of the Ombuds *may* engage in activities consistent with 410.2100, including but not limited to" enumerated activities.).

activities more generally, should not be limited to ORR's compliance with federal law and ORR policies, but also encompass licensing requirements.

Additionally, we urge that § 410.2002(a)(10) be modified to remove the reference to the Ombuds' recommendations as "non-binding" to better ensure that these recommendations will be fully considered and implemented by ORR. Any final rule should also provide a timeline by which ORR must respond in writing to the Ombuds' recommendations to prevent any undue delays in ORR's acting on the Ombuds findings or in timely remediating risks to children. Providing the Ombuds with subpoena power in the Proposed Rule would be another mechanism to strengthen its authority.

Through the addition of more extensive reporting requirements, the Proposed Rule can provide for additional means of oversight and accountability for the wellbeing of children in ORR custody. Reporting to Congress provides valuable information to lawmakers about deficiencies and violations that pose risks to children, ORR system and resource needs, and areas where legislative action may be particularly critical. For this reason, we recommend that the Proposed Rule be modified to direct regular reporting of Ombuds recommendations and ORR's responses to Congress, as well as annual reports including a summary of complaints, reports, and appeals made to the office; site visits performed; and investigations and corrective actions recommended and implemented, among other information. All such reports and recommendations should also be made publicly available, and submitted to the ORR Director and Assistant Secretary and Secretary of HHS, to increase transparency and awareness. (Proposed § 410.2002(a)(4)).

As evidenced by the numerous topics addressed in the Proposed Rule, ORR care touches upon a broad array of children's rights, needs, and policy areas. Ensuring children's safety and protection necessitates that both ORR's internal monitoring and the Ombuds' oversight address not only violations of laws, standards, and policies, but also rights violation and threats to children's wellbeing more broadly. This is especially critical, as a child's time in care poses radiating effects for their long-term development and ability to grow in safety and stability. Moreover, some conditions or practices that pose severe consequences for the safety, protection, and rights of children across the ORR system may not yet be addressed in institutional policy or law.

Finally, it is imperative that the Ombuds' authority and monitoring visits encompass all placement types and facilities. We recommend, for example, that Sections 410.2002(a)(3) and (a)(6) specifically reference out-of-network facilities, including hospitals and restrictive placements, that are elsewhere excluded from the Proposed Rule's definition of "care provider facilities."³⁶

B. The Ombuds Office Should Embrace a Child-Centered, Rights-Based Approach to Monitoring and Oversight.

We appreciate the NPRM's thoughtful review of existing literature and models for ombuds offices and monitoring mechanisms. In summarizing common characteristics of federal ombuds offices, the NPRM notes the informality of such offices and that they "do not make decisions binding on the agency or provide formal rights-based processes for redress."³⁷ We believe that in the context of children's care it is essential to require ORR's timely and meaningful response to any risks and violations identified by the

³⁶ Proposed § 410.1001, Definitions, Care Provider Facilities ("*Care provider facility* means any physical site that houses unaccompanied children in ORR custody, operated by an ORR-funded program that provides residential services for children, including but not limited to a program of shelters, group homes, individual family homes, residential treatment centers, secure or heightened supervision facilities, and emergency or influx facilities. *Out of network (OON) facilities are not included within this definition.*")(emphasis added).

³⁷ NPRM at 68962.

Ombuds to protect children and prevent harm.³⁸ Given that the Proposed Rule, if finalized, could lead to termination of the FSA as to HHS and of related court oversight, the Ombuds role assumes even greater importance and responsibility. We urge that all activities of the Ombuds' Office be grounded in a child-centered approach focused on ensuring children's rights and holistic wellbeing. We recommend that specific language be added to Proposed Rule § 410.2001 requiring the Ombuds to embrace such an approach in all of the office's activities.

In contrast to a needs-based approach, a child-rights-centered approach can advance both protective and preventive actions to help ensure that children's needs are not addressed in isolation or through reactive responses alone. Rather, needs should be considered in concert with children's affirmative rights in a manner that supports children in advocating for their rights and seeking accountability for any violations or abuses, while promoting systems change to effectuate meaningful improvements to the care and protection of all children.³⁹

By embracing a child-centered approach, the Ombuds Office can foster more productive and trauma-informed engagement with children, and help advance child protection practice and knowledge among ORR and its providers, including identifying areas in which additional training and support may be necessary. Such an approach can also aid in promoting unaccompanied children's understanding of their rights and their self-advocacy skills, which can prove particularly important for children following release to identify and avoid risks, and to seek assistance when needed.

States have taken important steps to develop child-centered ombuds offices and processes, and we urge ORR to look to these efforts and resources, which may afford a more tailored focus on children's rights and needs than resources of federal agencies with distinct missions and scope.⁴⁰ Additionally, the United Nations' 1989 Convention on the Rights of the Child (CRC) sets forth the broad spectrum of rights that must be afforded to children, including when they are residing in alternative care.⁴¹ As the basis of

³⁸ See Defence for Children International (DCI)-Belgium, *Practical Guide: Monitoring places where children are deprived of liberty [hereinafter DCI]*, at 151 ("In practice, many Ombudspersons can often only issue non-binding recommendations to detention authorities and this can be an ineffective form of remedy if these recommendations are not then considered and implemented."), <https://defenceforchildren.org/wp-content/uploads/2016/02/DCI-Practical-GuideEN.pdf>.

³⁹ See, e.g., *id.* at 29-30. DCI explains the benefits and dual purposes of a child's-rights approach to monitoring as follows:

A right-based approach of monitoring, consisting of the consideration of children's rights and needs as a starting point, is the reference from which monitors should perform their monitoring task in order to control the effective upholding of these rights, safeguarding and enforcing on the one hand (protective / investigative role), and ensuring that they are not violated or abused on the other hand (preventive role).

A right-based approach aims to strengthen – on a long term basis – the capacity of right-holders (the children) to call for respect of their rights and to legally and legitimately claim for redress and reparation in case of damages caused by the abuse or violation. In contrast, an approach based solely on needs will aim to address – on a short term basis – unfulfilled needs and to provide immediate satisfaction without necessarily reinforcing the position of the people in need for the future.

Id.

⁴⁰ See, e.g., Nat'l Conference of State Legislatures, *Children's Ombudsman Offices: Office of the Child Advocate*, <https://www.ncsl.org/human-services/childrens-ombudsman-offices-office-of-the-child-advocate>

⁴¹ See DCI, *supra* note 38, at 13 ("When deprived of their liberty, children are still entitled to all the other rights under the Convention on the Rights of the Child (CRC) recognised to them. However, the conditions of and treatment they receive in the places where they are deprived of liberty do not always fulfill the specific needs and particular rights of children. This includes access to appropriate education, contact with family and the outside world, the need for privacy, physical exercises, leisure activities and recreation, right to health, and access to

child's rights internationally, the CRC provides an important lens through which to evaluate children's care by ORR, collaborate with children, and improve protection.⁴² In the course of implementing an Ombuds model, we urge the Ombuds to also consult international resources and efforts that can provide a helpful lens through which to develop monitoring tools and frameworks integrating a children's rights approach.⁴³ Several guides and manuals have been developed on the implementation of a child's rights approach to monitoring of detention settings that consider the role of Ombuds offices in these efforts.⁴⁴

C. The Proposed Rule Must Provide for Routine Engagement with and Support of Complementary Monitoring by Stakeholder Organizations and Related Entities.

Engagement with stakeholders is key to ORR's implementation of a child-centered approach to monitoring. In addition to international organizations and counterparts, it is critical that the Ombuds support ongoing engagement and complementary monitoring by stakeholder organizations working with and on behalf of unaccompanied children. Working across disciplines can prove invaluable in leveraging and assisting the Ombuds' work and in ensuring ORR's accountability for children's safe and appropriate care. From providers and professionals working in mental health and medical care, education, disability rights, child welfare, and juvenile justice, among other fields, the Ombuds Office can learn from diverse and comprehensive perspectives and approaches. Concerns that pose significant risk but that may not be readily apparent to the Ombuds can be promptly identified and remedied.

The Proposed Rule should require that the Ombuds meet at least quarterly with stakeholder organizations as well as FSA class counsel and any related court-appointed monitors, to provide an opportunity to learn of and provide feedback on concerns and priority issues. It should also require that the Ombuds invite collaboration from organizations with expertise in monitoring and protection of children's rights, and the rights, care, and treatment of children and other vulnerable populations. To facilitate additional and independent third-party monitoring and better leverage the Ombuds' time and resources, the Proposed Rule should require the Ombuds to provide nonprofit organizations providing direct services to unaccompanied children, and other organizations that they and the Ombuds identify, access to facilities to monitor conditions and compliance, including through private and confidential interviews with children in care as well as program staff.

KIND notes that attorneys and legal services providers serving unaccompanied children in ORR custody often have knowledge of conditions, trends, and general concerns that could be informative to the Ombuds in advance of facility monitoring. To this end, we recommend that the Proposed Rule require the Ombuds to provide legal services providers serving ORR's care network, as well as attorneys and the legal services provider serving the particular facility, timely notice of any announced visits or inspections to enable the submission of input and observations beforehand, in addition to the opportunity to meet with the Ombuds during any such visits. With such notice, attorneys can help their clients understand

justice."); UN Convention on the Rights of the Child (Nov. 20, 1989), <https://www.unicef.org/media/52626/file>. The United States signed the CRC in 1995, but has not ratified it.

⁴² See generally DCI, *supra* note 38, at Annex 1, pp. 154-157 (providing an accessible summary of Convention provisions).

⁴³ See generally *id.*, at 20 (noting the cited resource's development as "a practical tool with a child sensitive and preventive perspective, taking into account all the particular needs and aspects that make the children even more vulnerable to any violations of their rights when they are deprived of their liberty"); UNICEF ECARO, *NHRIS [Nat'l Human Rights Institutions] and Monitoring Children's Rights in Closed Settings* (Nov. 2020) <https://www.unicef.org/eca/media/15326/file>.

⁴⁴ See, e.g. UNICEF ECARO, *NHRIS [Nat'l Human Rights Institutions] and Monitoring Children's Rights in Closed Settings* (Nov. 2020) <https://www.unicef.org/eca/media/15326/file>.

the Ombuds' role and can help alleviate fears that may arise due to the presence of unknown observers in the facility. The Proposed Rule should similarly require notice to legal services providers regarding requests to interview children in ORR custody to support a child's ability to have an attorney present, if desired, and to ensure counsel's awareness, given that such interviews may involve matters relevant to a child's legal case or within the scope of legal representation.

D. The Ombuds Office Should Support the Participation of Unaccompanied Children as Experts on ORR Custody.

In the course of providing legal representation and social services to thousands of unaccompanied children, KIND has witnessed the importance of a safe and supportive environment in helping children to heal from trauma and develop the trust needed to share the facts giving rise to their legal case for protection. Many children have fled severe violence, abuse, and neglect at the hands of adults before arriving in ORR custody, and they remain particularly vulnerable to further harm and exploitation while in custody and following release. Detained settings often compound fear and anxiety and inhibit a child's ability to raise concerns or problems, as the same personnel receiving complaints may be the subject of them or have authority over decisions about release, a child's daily care, and behavioral reports. These realities underscore the paramount importance of ensuring the Ombuds Office's independence—both in appearance and practice—from ORR.

The lived experiences of children as the true experts on their lives and ORR custody are essential to informing the creation of meaningful and independent avenues for elevating concerns, and to the development of monitoring and oversight mechanisms tailored to ensuring children's protection. We support the NPRM's and Proposed Rule's recognition of the benefit of collaborative approaches and its proposal to encourage children "as developmentally appropriate and in their best interests, to be active participants in ORR's decision-making process relating to their care and placement."⁴⁵ Comparable efforts in the child welfare system, such as former foster youth engagement through The National Foster Care Youth & Alumni Policy Council, serve as valuable models.⁴⁶ We believe the participation of children with lived experience in ORR custody can greatly enhance monitoring and oversight.

Unaccompanied children frequently demonstrate unparalleled resilience, despite innumerable systemic barriers, and possess far-reaching recommendations for improving care and protection in ORR custody. These essential perspectives should be proactively sought through voluntary opportunities in which children can share views and provide input on the development of policies, monitoring tools, and corrective measures. Such opportunities can include consultation with unaccompanied children released from ORR custody who express an interest and should provide for a range of options and safeguards to ensure children's ability to participate as they feel most comfortable and without fear of adverse consequences for themselves, their family, or their immigration case. For example, children can share feedback (attributed or anonymously as desired) in informal convenings or through written means coordinated by the Ombuds Office or organizations working with unaccompanied children. The Ombuds can also provide stakeholder opportunities in which unaccompanied children may share their expertise together with organizations working on behalf of unaccompanied children and other experts to advise on prevalent problems and concerns in ORR facilities, consider monitoring tools and propose issues to look out for on future monitoring visits, and suggest policy changes that may be beneficial. The Ombuds could also invite former unaccompanied children who are interested to serve as part of monitoring teams.⁴⁷

⁴⁵ NPRM at 68916; Proposed § 410.1003(d).

⁴⁶ See, e.g., The National Foster Care Youth and Alumni Policy Council, [FosterClub | The National Network for Youth in Foster Care \(nationalpolicyCouncil.org\)](https://www.fosterclub.org/).

⁴⁷ See *supra* note 38, at 54-55.

E. Information about the Ombuds' Services Must be Provided to All Children through Orientations and Additional, Accessible Means.

Similar emphasis must be placed on ensuring children receive high-quality and accessible information about their rights and ways to confidentially report concerns while in custody. To this end, children must be afforded confidential locations in which to submit complaints and a breadth of accessible ways for doing so that provide for individual needs, age, language access, and anonymity. The Proposed Rule takes steps to this end by providing for information about the Ombuds' services as part of comprehensive orientations and through the provision of public information about how to contact the Ombuds in languages spoken and understood by children.⁴⁸ Recognizing the importance of complaint mechanisms and independent oversight--and the significant volume of information children receive in such orientations--we recommend that information about Ombuds services be made readily available throughout and after a child's time in care. The Proposed Rule should explicitly provide for both verbal and written notice to children about how to utilize these mechanisms to lodge concerns and seek assistance, as well as confidentiality protections and safeguards against retaliation. As drafted, Proposed Rule § 410.1302(c)(8)(iii) provides that standard programs shall [provide] unaccompanied children with a comprehensive orientation which includes, among other information "services from the Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds) in simple, non-technical terms and in a language and manner that the child understands, *if practicable*" (emphasis added). Receipt of this information in accessible, child-appropriate form should be mandatory for all programs and not limited to programs meeting the definition of "standard program."

F. The Ombuds Office Should Collaborate with Complementary Oversight Agencies at Both the Federal and State Levels.

Unaccompanied children often interact with several federal agencies and departments within the U.S. immigration system, including U.S. Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HSI), and ORR. However, many children do not feel comfortable disclosing risks they are facing or reporting concerns with conditions or treatment while still in the immediate custody of an agency, or until some time after their release to a sponsor. For example, KIND has served numerous children who shared complaints of mistreatment and rights violations they experienced in CBP custody—from mental and physical harm to lacking access to basic necessities such as food, water, and medical attention—only after being transferred to or subsequently released from ORR custody.⁴⁹ It is critical that monitoring and oversight embrace a holistic view of children's experiences in federal immigration custody to ensure understanding of the ways in which cumulative time in federal custody and chronic conditions or harms that span agencies can affect unaccompanied children's wellbeing and access to protection. Although the Proposed Rule is issued exclusively by ORR/HHS, we urge over the longer term that a UC Ombuds Office have purview over both ORR and DHS custody, reflective of the FSA's coverage of both DHS and ORR custody of children.

Recognizing the multiagency nature of children's care, we recommend that the Proposed Rule direct that the Ombuds Office develop collaborative relationships with peer oversight agencies within DHS to ensure appropriate investigation, response, and agency accountability of complaints and concerns even as custodial placements change, so complaints and investigations are not overlooked or prematurely

⁴⁸ Proposed Rule § 410.1302(c)(8)(iii); Proposed Rule § 410.2001(c).

⁴⁹ See generally KIND, Complaint to DHS Office of Inspector General and DHS Office for Civil Rights and Civil Liberties Re: Widespread infringement of the civil rights and civil liberties of Unaccompanied Noncitizen Children held in the custody of CBP: January – December 2021, <https://supportkind.org/wp-content/uploads/2022/04/2022.04.6-FINAL-Public-CRCL-OIG-Complaint.pdf>.

discontinued due to transfers into or out of an agency's custody. We also urge the Ombuds to engage with the new Children's Interagency Coordinating Council, to be led by HHS, that was provided for and funded through FY2023 appropriations legislation to inform policymaking related to children across government agencies.⁵⁰

We similarly recommend that the Proposed Rule direct the Ombuds to coordinate and maintain regular communication with relevant state ombuds offices overseeing care of children and youth, including children who may be placed by ORR into state-licensed foster care homes.⁵¹ State ombuds offices and the proposed federal UC Ombuds Office are complementary to one another, and access to services from all such offices is critical and should be made available to children. Such collaboration can facilitate shared awareness of findings and reports relevant to the care, rights, and wellbeing of unaccompanied children in ORR custody and timely response by ORR to complaints and concerns that can be rectified and addressed through both federal and state oversight mechanisms.

G. ORR Should Allocate Robust Funding for UC Legal Representation to Expand This Critical and Independent Means of Overseeing Respect for Children's Rights and Safe and Appropriate Care of Children by ORR.

Attorneys providing legal orientations and representation to children in ORR custody can play an important role in identifying risks to children, including violations of applicable laws, policies, regulations, and children's rights. Through interactions with and representation of children in care, attorneys often develop trust and rapport with children that is critical to a child's feeling safe and able to disclose concerns or harms they are experiencing. In some regions, legal service providers might be the only outside entity that has regular contact with children at that facility. With children's consent, in individual cases attorneys can bring issues they observe or that are shared by children to the attention of care providers and ORR staff, the Ombuds Office, or administrative agencies and courts, as needed, to protect children and uphold their rights. Attorneys can also elevate general risks and concerns, or patterns they observe more generally in a facility or throughout the ORR system. We strongly support the Proposed Rule's clarification that ORR may fund legal representation for matters beyond a child's immigration case—a provision that, if further strengthened, can maximize this important aspect of legal representation to best ensure children's protection "from mistreatment, exploitation, and trafficking."⁵²

H. The Ombuds Office Should Be Empowered to Request Additional Authority and Resources As Needed to Ensure Rigorous Oversight and Accountability for Children's Safety and Wellbeing.

Robust monitoring and oversight by the Ombuds Office requires consistent access to facilities and necessary ORR records as well as sustained and consistent appropriations. In addition to regular

⁵⁰ See Committee Print, Joint Explanatory Statement accompanying Consolidated Appropriations Act, 2023, Book 2 G-N (H.R. 2617 / Pub. L. 117-328), at 1957 ("Children's Interagency Coordinating Council. - The agreement includes \$3,000,000 for the Children's Interagency Coordinating Council to foster greater coordination and transparency on child policy across agencies. The Council shall enter into agreement with NASEM to prepare a report to Congress analyzing federal policies that have affected child poverty. The study should rely on the U.S. Census Bureau Supplemental Poverty Measure, among other sources of information. The Council will also examine and periodically report on a broad array of cross-cutting issues affecting child well-being."), <https://www.congress.gov/117/cprt/HPRT50348/CPRT-117HPRT50348.pdf>.

⁵¹ See, e.g., California Office of the Foster Care Ombudsperson, <https://fosteryouthhelp.ca.gov/about/>; see also State of California, Welfare and Institutions Code § 16164 (addressing the Foster Child Ombudsman Program), [Law section \(ca.gov\)](http://law.ca.gov); see also the Child Protection Ombudsman of Colorado, <https://coloradocpo.org/>; see also Colorado Revised Statutes in Title 19, Art. 3.3 (addressing the Office of the Child Protection Ombudsman).

⁵² 8 U.S.C. § 1232(c)(5).

reporting to Congress on the Ombuds' recommendations and ORR's responses, it is critical that the Ombuds be empowered to recommend to the HHS Secretary and to inform requests to Congress for any additional resources and authority needed to fulfill its mission. We also urge ORR to support efforts by Congress, including previously introduced legislation that would create an Ombuds Office and codify many duties similar to those of the proposed office,⁵³ to further formalize the authority and independence of this office to exercise critical functions on behalf of children's protection, rights, and wellbeing.

I. ORR Must Ensure Regular and Rigorous Monitoring of All Care Placements and Facilities.

Proposed Ombuds provisions do not override the need for regular and robust monitoring of all care placements and facilities by ORR. The Proposed Rule partially incorporates several internal monitoring policies from the ORR Policy Guide, but omits from them key detail to provide for consistent implementation of these requirements across all facility types and placements to ensure that risks to children and corrective action will be timely addressed. Indeed, in introducing these activities the Proposed Rule does not use directive language requiring them, but instead employs descriptive language stating that "ORR monitors all care provider facilities for compliance with the terms of the regulations in this part and 45 CFR part 411."

IV. **KIND Strongly Supports ORR's Use of a Community-Based Care Model, and Urges That Any Final Rule Include Timelines for Implementing Such a Model and Prioritize Children's Best Interests in All Placements.**

The NPRM requests comments on ORR's consideration of a community-based care model for the final rule.⁵⁴ KIND strongly supports ORR's transition away from the broad use of congregate care settings and toward family- and small group care placements consistent with best practices in the U.S. and globally.

Child protection research and practice have demonstrated the importance of family care for children's development and best interests, and the need to prioritize such models if a child must be placed in alternative care.⁵⁵ These basic principles reflect understanding that child protection must address a child's wellbeing holistically, including the opportunity to participate in and become part of a community. From fostering friendships to going to school, exploring interests, and developing a trusted network of people to whom they can turn for assistance and support, community-based care is integral to children's rights and development.

In contrast, institutional care often lacks the individualized attention and interactions that are possible in family-based and small group home care settings. By their very nature congregate settings often involve provision of care to a large number of children and an array of infrastructure, policies, and rules to manage day-to-day activities. Program needs, efficiency, staffing, and other concerns can too often eclipse the individual needs of a child. Many of the children KIND serves have survived significant trauma and harm in their countries of origin and during their journey in search of safety, and report a sense of isolation and disconnectedness while in congregate care. Release from government custody and reunification with family and other sponsors are common and prevailing concerns of children in care. However, owing to the large number of staff and the differing federal agencies with which they come into contact once in the U.S., children commonly experience confusion about to whom they may

⁵³ See, e.g., Protection of Kids in Immigrant Detention Act, H.R. 1238, 117th Cong. (2021-2022); see also S. 382, 117th Cong. (2021-2022).

⁵⁴ NPRM at 68919-20.

⁵⁵ See UNICEF, Building Bridges for Every Child: Reception, Care, and Services to Support Unaccompanied Children in the United States (2021), at 23-26, available at <https://www.unicef.org/reports/building-bridges-every-child>.

turn for assistance and fear that they may have to stay in facilities for longer if they inadvertently violate extensive but unfamiliar program rules. In addition to proving harmful for children’s wellbeing, prolonged stays in congregate settings also undermine children’s access to legal protection. In some cases, children accept voluntary departure from the U.S. and decline to pursue humanitarian protections for which they are eligible and which they desperately need due to “detention fatigue”—risking their return to harm.

During the last decade the domestic child welfare system, and federal law, have advanced broad congregate care reforms. Learnings from these efforts can assist ORR in its own efforts to ensure its placements are truly the least restrictive and most approximate a family setting.⁵⁶ This includes ensuring sustained recruitment and support of qualified providers, routine monitoring and oversight of placements to ensure quality and safety, robust training on trauma-informed care for all ORR staff and providers; and consistent and robust funding for holistic services to support children while in care and after release, and to minimize placement disruptions and transition. Although a community-based care model is discussed in largely aspirational terms in the NPRM, it is imperative that ORR put such a model into practice without delay to reduce reliance on large-scale and congregate facilities and to increase capacity of foster-care and group home placements. These placement types should not only be embraced for the most vulnerable children in care, but scaled to ensure availability for all children in care consistent with their best interests.

Recognizing that these reforms are already long overdue, we recommend that the final rule require ORR to articulate timelines for expanding and implementing community-based placements across its network. Inclusion of such a provision is consistent with prior federal appropriations directives requiring ORR to prioritize community-based placements and can help ensure accountability for achieving such reforms.⁵⁷

Additionally, KIND appreciates ORR’s plans to consider “a child’s eligibility for or access to legal relief (including, for example, a special immigrant juvenile predicate order) in a specific jurisdiction as part of the placement decision” under a community-based care model.⁵⁸ Through KIND’s representation of unaccompanied children, we have witnessed the ways in which sudden placement transfers, denials, or changes, without consultation with or notice to the child and their attorney, can detrimentally impact a child’s ability to access legal protection. In some cases, children have been transferred out of care while applications for legal relief or state court cases are underway—hindering the child’s ability to attend or otherwise comply with procedural requirements of pending state court proceedings, meet with their attorney, and ultimately apply for Special Immigrant Juvenile (SIJ) or other legal protection.

Although federal law provides that children may apply for SIJ classification before they turn 21, this form of relief in practice requires a juvenile court order including relevant findings, specifically, that a child’s “reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;” and “that it would not be in the [child’s] best

⁵⁶ See generally, e.g., American Academy of Pediatrics & Chapin Hall at Univ. of Chicago, Family First Implementation: A One-Year Review of State Progress in Reforming Congregate Care, [Family First Implementation: A One-Year Review of State Progress in Reforming Congregate Care](https://www.familyfirstact.org/wp-content/uploads/2023/07/Family-First-Implementation-A-One-Year-Review-of-State-Progress-in-Reforming-Congregate-Care-2023.pdf), [FamilyFirstAct.org](https://www.familyfirstact.org/).

⁵⁷ See Committee Print, Joint Explanatory Statement accompanying Consolidated Appropriations Act, 2023, Book 2 G-N (H.R. 2617 / Pub. L. 117–328), at 1952 (“State-Licensed Shelters.-The agreement continues to direct HHS to prioritize licensed, community-based shelters and programs (including foster care and small group homes) over large-scale shelters, and to notify the Committees prior to all new funding opportunity announcements, grants or contract awards, or plans to lease, rent, or acquire real property. Further, the agreement strongly encourages ORR to more consistently and predictably post funding opportunity announcements, and to provide training and technical assistance to potential new providers with the goal of increasing the percentage of HHS’ capacity in such small, community-based programs”), <https://www.congress.gov/117/cprt/HPRT50348/CPRT-117HPRT50348.pdf>.

⁵⁸ NPRM at 68920.

interest to be returned to the [child's] or parent's previous country of nationality or country of last habitual residence."⁵⁹ However, state laws pertaining to eligibility for juvenile court jurisdiction vary by state. Consequently, a child who has turned 18 and who is eligible for SIJ under federal law could be denied access to such relief if they are unexpectedly transferred to or initially placed by ORR in a state in which a SIJ predicate order is not available after 18.

KIND underscores that a child's access to legal relief in a specific jurisdiction should be considered by ORR not solely in the context of a community-based care model still in development, but when determining placements (including transfers) for all children, even before such a model is fully implemented.⁶⁰ Given the impact on a child's legal case and to ensure a child's rights and best interests, it is imperative that ORR consult with the child and their attorney or legal services provider and provide notice whenever a transfer from one placement to another is considered on this basis.

KIND notes with concern the omission of state licensing in the Proposed Rule's reference to the reasonable efforts the agency will make "to provide placements in those geographical areas where DHS encounters the majority of unaccompanied children."⁶¹ This provision, which derives from language in the FSA's definition of "licensed program,"⁶² cannot be voided of this critical term or reformulated to in practice permit prioritization of placements in such areas without regard for state licensing of ORR programs more generally. Recognizing current challenges related to licensing of ORR programs in several states, KIND recommends that the Proposed Rule incorporate the requirement of state licensing in this provision and require consideration of a child's best interests whenever a placement outside of the geographic areas of DHS encounters is indicated.

Finally, KIND supports the Proposed Rule's inclusion of a provision updating the definition of influx to reference situations in which existing ORR capacity that is occupied or held for unaccompanied children meets or exceeds an 85 percent threshold for seven consecutive days.⁶³ This change will help to ensure that influx facilities are used only when truly necessary and do not become a default placement for children, while encouraging ORR's continued expansion of community-based placements to further reduce reliance on large-scale, unlicensed facilities.

V. The Proposed Rule Should Reinforce the Standards of Care Across All Placement Types, and Add Measures to Reduce Time Spent in Out-of-Network or Restrictive Placements.

The Proposed Rule addresses the placement of children in restrictive settings in various sections, codifying the criteria for placement in restrictive programs,⁶⁴ transfers to restrictive placements,⁶⁵ behavior management standards,⁶⁶ and placement appeal procedures,⁶⁷ among others.

⁵⁹ 8 U.S.C. § 1101(a)(27)(J).

⁶⁰ See ORR Policy Guide at 1.2.1 (Placement Considerations) (including among numerous factors to be considered "immigration issues (for example, legal representation needs, immigration proceedings.)")

⁶¹ Proposed § 410.1103(e).

⁶² Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-4544 (C.D. Cal. Jan. 17, 1997), at I. Definitions, ¶. 6 ("The INS shall make reasonable efforts to provide licensed placements in those geographical areas where the majority of minors are apprehended, such as southern California, southeast Texas, southern Florida and the northeast corridor.")

⁶³ See NPRM at 68955; Proposed Rule § 410.1001.

⁶⁴ Proposed Rule § 410.1105.

⁶⁵ Proposed Rule § 410.1601(b).

⁶⁶ Proposed Rule § 410.1304.

⁶⁷ Proposed Rule § 410.1902.

In our experience, children who are placed in restrictive programs are often those who have suffered the most serious – often unimaginable – harms. Many have diagnosed and/or undiagnosed trauma-related mental health needs, which are commonly exacerbated by the conditions of restrictive placements. Further, there is a high correlation between children who have suffered significant traumas and eligibility for humanitarian forms of immigration legal relief - yet children in restrictive custody face additional barriers to participation in their legal cases for reasons that directly relate to their placement. For example, many such children are transferred multiple times between placements, which disrupts the relationship with and access to legal representation. Frequent transfers also result in loss of critical time to prepare and file applications for relief. Sometimes, detention fatigue or coping with the day-to-day challenges of a difficult placement setting impacts a child’s ability to meaningfully participate in their legal case.

KIND commends ORR’s shift toward ceasing use of the most restrictive placements – secure care facilities – in recent years. With regard to restrictive placements and heightened supervision facilities as contemplated in the Proposed Rule, KIND offers ORR two recommendations. First, KIND cautions against ORR’s overreliance on out-of-network placements, including Residential Treatment Centers (RTCs) or out-of-network programs that would meet the definition of heightened supervision facilities as defined in Proposed Rule § 410.1001. In KIND’s experience, children placed in out-of-network care tend to face even more challenges directly and negatively impacting their well-being and legal case. Staff and providers at out-of-network facilities usually lack experience serving migrant populations or unaccompanied children, which diminishes their ability to meet children’s needs. Children frequently face additional language access barriers in out-of-network care, which can delay their access to critical information and services. Additionally, out-of-network programs are diffusely located, often far from any legal service provider, making children’s access to in-person legal meetings infrequent or entirely infeasible.

Second, consistent with our recommendation that ORR adopt a community-based care model, KIND urges ORR to prioritize locating any restrictive programs in geographic locations where there exists a continuum of care that includes all levels of placement, including community-based care. This allows for children placed in restrictive care who are ready to transition to less restrictive setting – including community-based care -- to be easily and quickly stepped-down. It also enables co-located programs in the same region to share resources, build expertise in the needs of unaccompanied children, and gain greater familiarity with local programs in ways that can better support children’s timely transfer to less restrictive care settings.

Additionally, KIND urges ORR to adopt the following considerations as it engages in final rulemaking:

1. Ensure the same standards of care across all placement levels

The Proposed Rule defines “restrictive placement” to include “a secure facility, including RTCs, or a heightened supervision facility.”⁶⁸ Although the rule defines Residential Treatment Centers and heightened supervision facilities, “secure facility” is not separately defined. However, Proposed § 410.1001 entirely exempts secure facilities from the requirements for minimum standards of care and services applicable to all other standard programs under § 410.1302. Exempting children in secure facilities from the right to receive the minimum standards of care afforded to children in all other placement types is unwarranted and would formalize differential treatment of children as to their basic needs. KIND therefore recommends the Proposed Rule be modified to require that *all* placement types meet the same minimum standards of care and services set forth in § 410.1302.

⁶⁸ Proposed Rule § 410.1001, 88 Fed. Reg. 68981.

2. Codify the full procedural protections established by *Lucas R.*

We support ORR's codification of language and procedures set out in the *Lucas R.* preliminary injunction and settlement agreements, as the litigation established critical and long overdue procedural due process protections for children in ORR restrictive placements, including out-of-network care. In final rulemaking, ORR should take care to confirm full adherence to the terms of the preliminary injunction and *Lucas R.* settlement agreements, and that no section either violates nor renders ineffective such orders. For example, as currently drafted, section 410.1902 of the Proposed Rule would violate portions of the *Lucas R.* preliminary injunction – specifically as it relates to the requirements that ORR schedule a Placement Review Panel (PRP) within 7 days from a child's request, and issue a decision within 7 days of a hearing, or within 7 days of receipt of a child's statement if no hearing is held.⁶⁹

3. Adjust language that contributes to the undue risk of criminalization of children placed in restrictive settings.

KIND has observed that some unaccompanied children placed in restrictive settings are inaccurately determined to pose a danger to others based solely on ORR or a care providers' incorrect assessment of a child's former contact with the criminal or juvenile justice system. This can lead to a child's wrongful placement or transfer to a restrictive setting or prolonged stay in such placements. Consistent with its child welfare mandate, in final rulemaking ORR should take care to eliminate or adjust terminology relating to a child's "criminal history" to protect against inadvertent or unfair criminalization of children in its care.

We similarly recommend the removal of "criminal background" as a standalone factor listed in § 410.1103(b)(10) to prevent confusion about what is encompassed by this consideration, given that children who have contact with criminal or juvenile justice systems are typically charged with juvenile offenses that are adjudicated in family or juvenile courts, rather than crimes. Additionally, care providers may possess only incomplete or partial criminal or juvenile delinquency records and lack the training or expertise to accurately assess them. Any prior contact with the criminal or juvenile justice system that gives rise to a perceived risk of danger to self or others would be encompassed in § 410.1103(b)(1) (danger to the community/others).

VI. KIND Supports the Proposed Rule's Safeguards Limiting Sharing of Information for Immigration Enforcement Purposes, and Urges the Addition of Provisions Directing Post-18 Planning for Children Aging Out of ORR and Supporting Co-location of HHS Professionals in CBP Facilities to Further Aid Safe Release.

A. The Proposed Rule's Important Safeguards Limiting Information Sharing Should Be Further Expanded (§ 410.1201(b)).

KIND strongly supports § 410.1201(b) of the Proposed Rule, providing that ORR will not disqualify potential sponsors based on their immigration status alone, and will not collect or share immigration status information with law enforcement or immigration enforcement. These provisions will prohibit use of sponsors' information in ways that are contrary to children's best interests and enable ORR to remain focused on the wellbeing and safety of unaccompanied children and its child protection mission, rather than diverting this critical attention to immigration enforcement purposes that are the purview of DHS. In the past, the lack of firewalls between these distinct functions, and the use of such information for

⁶⁹ See Preliminary Injunction, *Lucas R. v. Beccera*, 2:18-cv-05741-DMG-PLA, Dkt. # 391.

enforcement actions targeting potential sponsors, led to a broad chilling effect on sponsorship and prolonged delays in release of children from ORR custody.⁷⁰

We similarly urge the addition of provisions codifying restrictions on the sharing of information or notes from mental health counseling provided to children in ORR custody. Past sharing of ORR information with ICE or EOIR has undermined children's rights, including the right to due process, as information collection intended to help identify children's protection needs and to aid them in healing from trauma were misused against children in removal proceedings.

B. The Proposed Rule Must Require Post-18 Planning to Ensure the Safety and Wellbeing of Children Aging Out of ORR Custody.

For children nearing 18 years of age while in ORR custody who do not have a sponsor identified, release poses additional considerations, including potential transfer to ICE custody. Pursuant to the TVPRA, upon a child's aging out of ORR custody, DHS must consider placing the child in the "least restrictive setting," not to include direct transfer to ICE detention unless DHS determines that the child is a danger to themselves or others.⁷¹ No later than two weeks before the child's 18th birthday, ORR must create a post-18 plan for the child to "at a minimum identify an appropriate non-secure placement for the child and identify any necessary social support services for the child."⁷² Delays in such planning or the failure to do so can have grave impacts on children. In KIND's experience, in addition to causing significant anxiety for children, insufficient planning can lead to a patchwork of temporary or inappropriate placements for children that exacerbate risks such as homelessness, exploitation, truancy, and instability following release. Despite the importance of such planning for children's safety, wellbeing, and stability, the Proposed Rule is silent on it. We urge ORR to include in the Proposed Rule provisions requiring ORR to conduct post-18 planning, specifying sufficient lead time to prevent any child 17 or older from aging out of ORR custody without a concrete and actionable post-18 plan that takes into account the child's resources and needs.

C. The Proposed Rule Should Codify ORR's Efforts to Co-locate HHS Professionals in CBP Facilities to Preserve Family Unity and Facilitate Safe and Timely Reunification of Children.

The TVPRA and FSA prioritize release of unaccompanied children "without unnecessary delay"⁷³ and their placement in the least restrictive setting that is in their best interest.⁷⁴ By assigning qualified personnel to be co-located at CBP facilities, HHS can help initiate the sponsor review and family reunification process as soon as possible, prevent unnecessary separations of children from trusted non-parent or guardian relatives, and timely identify any individual needs and ORR placements for children waiting to be reunified with family. Under this approach, which has been successfully piloted in key respects, HHS personnel can evaluate the safety and suitability of a nonparent family member accompanying a child to serve as a potential sponsor for the child through their joint release together, rather than the child's transfer into ORR care. We recommend that ORR expand these efforts to maximize safe and timely release for unaccompanied children.

⁷⁰ See generally KIND, *Targeting Families: How ICE Enforcement Against Parents and Family Members Endangers Children* (Dec. 2017), https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families_-December-2017.pdf.

⁷¹ 8 U.S.C. § 1232(c)(2)(B).

⁷² See H. Rept. 116-450; ORR, Field Guidance #9, Interim Guidance – Age Outs and Post-18 Planning, <https://www.acf.hhs.gov/sites/default/files/documents/orr/FG-9%20Interim%20Guidance%20Age%20Outs%20and%20Post-18%20Planning%202021%2002%2017.pdf>.

⁷³ FSA at ¶ 14.

⁷⁴ 8 U.S.C. § 1232(c)(2)(A).

Conclusion

KIND appreciates the opportunity to provide input on the ORR UC Program Foundational Rule. Please feel free to contact KIND at cshindel@supportkind.org if you have any questions or we can be of further assistance.

Sincerely,

/s/

Jennifer Podkul
Vice President for Policy and Advocacy