



May 27, 2025

Mr. Toby Biswas
Director of Policy, Division of Unaccompanied Children Policy
Unaccompanied Children Bureau, Office of Refugee Resettlement
Administration for Children and Families
Department of Health and Human Services
Washington, DC
Submitted at <https://www.regulations.gov>

Re: **Interim final rule with comment period (IFR): Unaccompanied Children Program Foundational Rule; Update To Accord With Statutory Requirements, RIN 0970–AD16 (90 Fed. Reg. 13554, Mar. 25, 2025).**

Dear Mr. Biswas:

Kids in Need of Defense (KIND) respectfully submits the following comments in response to the request for public comment on the interim final rule (“IFR”) titled “Unaccompanied Children Program Foundational Rule; Update To Accord With Statutory Requirements,” published by the Department of Health and Human Service’s Office of Refugee Resettlement (“ORR”), on March 25, 2025 (“IFR Notice”).

KIND is the leading national organization working to ensure that no child faces immigration court alone. KIND has provided legal representation in immigration matters to more than 17,000 children in U.S. immigration proceedings, provided legal rights education to more than 78,000 children in the United States, and formed pro bono partnerships with nearly 900 corporations, law firms, law schools, and bar associations to provide children with pro bono representation. KIND’s social services program facilitates support for unaccompanied children, including counseling, educational support, medical care, and other services. KIND also works to address the root causes of child migration and to promote the safety and well-being of children at every phase of migration.

The IFR, which amends the ORR UC Program Foundational Rule (“Foundational Rule”), poses broad implications for unaccompanied children’s rights, safety, and wellbeing. Over decades, several laws, regulations, and legal settlements have created a framework of basic child welfare safeguards for children in the U.S. immigration system. First set forth in the *Flores* Settlement Agreement (FSA) in 1997 and followed by additional protections in the Homeland Security Act of 2002 (HSA), the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), and the Foundational Rule, these safeguards recognize the particular vulnerability of unaccompanied children and prioritize their release from

government custody “without unnecessary delay.”¹ They further mandate that ORR make and record “prompt and continuous efforts” toward family reunification and release of children in its custody² and that it place each child in the “least restrictive setting”³ in their best interests.

The IFR Notice conflicts with this critical framework, bluntly rescinding restrictions on ORR’s sharing of sponsors’ immigration status for immigration enforcement purposes to expand the consideration of immigration status in ways that directly impede ORR’s ability to comply with the above mandates by promptly reunifying children with safe and suitable parents and legal guardians, and other safe and suitable sponsors. Inappropriately prioritizing law enforcement goals above child welfare, the IFR Notice relies on a general provision of the Immigration and Nationality Act, 8 U.S.C. § 1373, that predates specific legal protections for unaccompanied children to conclude that the Foundational Rule’s restrictions on information sharing for immigration and law enforcement purposes are unlawful and must be eliminated without prior consideration of public comment. The IFR Notice lacks meaningful explanation for why ORR urgently seeks regulatory changes in relation to an INA section that has been in effect for decades and is unchanged from when ORR promulgated the Foundational Rule nearly a year ago. It further neglects to meaningfully consider the IFR’s potential impacts on unaccompanied children’s wellbeing, privacy, family unity, government resources, or ORR’s compliance with the specific legal protections designed to ensure that ORR rigorously assesses the suitability of children’s sponsors while preventing unnecessary delays in release that only exacerbate children’s trauma and vulnerability. Rather, as a solution to a perceived statutory conflict, the IFR Notice strikes an entire provision of the Foundational Rule, including matters regarding which the cited INA provision is wholly silent. This encompasses language reiterating ORR’s longstanding practice of not disqualifying sponsors based solely on their immigration status and language stating that ORR will not collect sponsors’ immigration status information for law or immigration enforcement-related purposes.

Contrary to specific protections for unaccompanied children in the FSA, TVPRA, and Foundational Rule, the IFR could be used in the future to effectively block children from being released to a parent or other family member, based not on a finding that the potential sponsor is unable to safely care for the child, but solely on a sponsor’s undocumented status. As occurred during the prior Trump Administration, the Administration could use information about sponsors’ immigration status to target, arrest, and deport children’s family members and other household members. In addition to causing widespread trauma to children, these results will indefinitely lengthen children’s detention in government custody and dramatically increase government costs. These harms are not merely speculative, but actually occurred when the prior Trump Administration created a broad information-sharing agreement between ORR and DHS to advance similar enforcement efforts.⁴ Indeed, length of stay in ORR custody recently began to increase dramatically in March, the month when the IFR and other policy changes took effect, and to

¹ See, e.g., *Flores v. Reno*, Case No. CV 85-4544-RJK(Px), Stipulated Settlement Agreement (C.D. Cal. 1997) ¶ 14 [hereinafter FSA]; 45 C.F.R. § 410.1201(a).

² FSA ¶ 18; 45 C.F.R. § 410.1203(a)

³ See 45 C.F.R. § 410.1103(a); 8 U.S.C. § 1232(c)(2)(A); see also FSA ¶ 11.

⁴ See generally National Immigrant Justice Center, Women’s Refugee Commission, American University Washington College of Law Clinical Program, *Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement* (Mar. 2019), <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2019-03/Children-as-Bait.pdf>.

some extent in February.⁵ Releases have also fallen,⁶ as many children in care face the disqualification or denial of their potential sponsors, including parents, as a result of the IFR coupled with other new and restrictive ORR policy changes. The IFR Notice failed to account for these known and foreseeable impacts.⁷

ORR's issuance of the IFR to impede and circumvent specific legal protections for unaccompanied children, including those codified in its own regulations, is arbitrary and capricious. By exceeding its authority, ORR violates the APA. This comment provides further detail about the IFR's harmful impacts. It urges ORR to immediately rescind the IFR to comport with existing standards on children's safe care, release, and access to protection, and to promote the public's ability to meaningfully provide input on these consequential proposals.

The IFR Notice Eliminates Key Safeguards Without a Reasoned Explanation and Arbitrarily Fails to Consider Conflicts Between the IFR and the Framework of Legal Protections for Unaccompanied Children.

The IFR Notice assumes without meaningful analysis that 8 U.S.C. § 1373 overrides other federal statutes and requirements bearing on ORR, citing this provision of the Immigration and Nationality Act (INA) as the "governing legislation."⁸ The IFR justifies eliminating the entirety of 45 C.F.R. § 410.1201(b) of the Foundational Rule based on a perceived conflict between the statute and the Foundational Rule's language prohibiting "shar[ing] any immigration status information relating to potential sponsors with any law enforcement or immigration enforcement related entity at any time."⁹ ORR provides no reasoned explanation for how the remaining language of 45 C.F.R. § 410.1201(b) prohibiting disqualification of sponsors based on immigration status and collection of sponsors' immigration status

⁵ ORR, Fact Sheets and Data (see Data → Average Monthly Data → Average Length of Care (for those discharged) (current as of May 12, 2025), <https://acf.gov/orr/about/ucs/facts-and-data>.

⁶ *Id.* (see Released to Sponsors)

⁷ See, e.g., U.S. Dep't of Homeland Security Office of Inspector General, ICE Cannot Effectively Monitor the Location and Status of All Unaccompanied Alien Children After Federal Custody (Mar. 25, 2025), at 2-3, <https://www.oig.dhs.gov/sites/default/files/assets/2025-03/OIG-25-21-Mar25.pdf>. ("Various Memoranda of Agreement (MOA) between DHS and HHS outline each agency's responsibilities for UACs. The most recent MOA was signed in 2021. Under the current MOA, UACs remain in HHS custody for shorter periods of time. An ICE official said the 2018 MOA negatively affected the sponsorship applications submitted to HHS and increased UACs' overall length of stay in ORR custody. In FY 2023, the average length of time a UAC was in HHS ORR custody was 27 days, down from 61 days in FY 2019. As of December 2024, a new MOA was in draft."). In a related notice proposing revisions to the family reunification application, authorization for release of records and other forms, ORR includes the following statement demonstrating awareness of the likely impacts of its removal of information sharing restrictions and other new sponsor policies: "Revise the burden estimate to account for a decrease in the number of sponsors applying to sponsor a child, an increase in the number of individuals required to undergo fingerprint checks, and an increase in the number of care provider facilities." See ORR, Proposed Information Collection Activity: Unaccompanied Alien Children Sponsor Application Packet (Office of Management and Budget #0970-0278), 90 Fed. Reg. 17438 (Apr. 25, 2025).

⁸ 90 Fed. Reg. 13554 ("ORR is amending a regulation so that it comports with the express language of the governing legislation.").

⁹ *Id.*

for enforcement purposes conflicts with the INA.¹⁰ ORR's failure to do so while nevertheless rescinding these critical safeguards violates the APA.

ORR also fails to adequately consider the adverse consequences of the IFR for ORR's ability to comply with statutory and other safeguards for unaccompanied children that are more recent in time, including the requirement to ensure each unaccompanied child's placement consistent with their best interests.¹¹

The *Flores* Settlement sets forth national minimum standards for the treatment, placement, and release of children in federal immigration custody. Among its provisions is a general policy favoring release of children from government custody "without unnecessary delay"¹² to the care of a parent, legal guardian, close relative, or other sponsor. Additional provisions require the federal government to "make and record the prompt and continuous efforts on its part toward family reunification and the release" of children in immigration custody consistent with enumerated priorities.¹³ In 2002, Congress enacted the Homeland Security Act of 2002, which transferred responsibility for the care and placement of unaccompanied children from the former Immigration and Naturalization Service to the Office of Refugee Resettlement. Legislative history indicates that Congress urged this shift in functions based on recognition of ORR's experience in child welfare,¹⁴ as distinct from the Department of Homeland Security's core mission.

The TVPRA codifies and builds on this framework by directing U.S. Customs and Border Protection and any federal agency encountering an unaccompanied child to transfer the child to ORR within 72 hours.¹⁵ Expanding on provisions of the FSA, the TVPRA further requires that unaccompanied children "shall be promptly placed in the least restrictive setting that is in the best interest of the child."¹⁶ It includes express provisions addressing suitability assessments of sponsors and requires HHS to ensure caregivers are "capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child."¹⁷ These safeguards are also substantively reflected in the UC Program Foundational Rule promulgated in April 2024 as part of ORR's efforts to implement the *Flores* Settlement Agreement.¹⁸ ORR should have fully addressed the IFR's interaction with this framework of

¹⁰ ORR summarily states in a footnote that the remaining language of 45 C.F.R. § 410.1201(b) must be stricken as a result of non-severability concerns. 90 Fed. Reg. at 13555 n.1.

¹¹ See, e.g. 8 U.S.C. § 1232(c)(2)(a).

¹² FSA ¶ 14; 45 C.F.R. § 410.1201(a).

¹³ FSA ¶ 18; see 45 C.F.R. § 410.1203(a).

¹⁴ Statement of Sen. Dianne Feinstein, [148 Cong. Record 119](#), at S. 8887 (Sept. 19, 2002) ("The unaccompanied alien child protection provisions would transfer the care and custody of these children to the Department of Health and Human Services. Its Office of Refugee Resettlement office has real expertise in dealing with both child welfare and immigration issues. . . . These changes would guarantee that the proposed Department of Homeland Security is not burdened with functions that do not relate to its core mission. Second, it would ensure that the INS dedicate itself to its central functions and not suffer mission overload. And finally, the move would ensure that the interests of unaccompanied alien children are protected.").

¹⁵ 8 U.S.C. § 1232(b)(3).

¹⁶ 8 U.S.C. § 1232(c)(2)(A).

¹⁷ 8 U.S.C. § 1232 (c)(3)(A).

¹⁸ See, e.g., 45 C.F.R. § 410.1003(f) (Considerations generally applicable to the placement of an unaccompanied child); 45 C.F.R. § 410.1203 (Release approval process).

protections in the IFR Notice. It not only fails to do so but creates direct conflicts with these provisions, mischaracterizing its own role and regulations.

The TVPRA, HSA, FSA, and Foundational Rule do not require lawful immigration status as an eligibility criterion for sponsorship. Indeed, the TVPRA was enacted in part to codify protections contained in the settlement of the *Flores* lawsuit, which challenged among other things the government’s prior practice of withholding children’s release to family members, including where parents lacked lawful immigration status. By prioritizing placement in the “least restrictive setting in the child’s best interests,” the TVPRA recognizes that government custody and placements pose psychological, emotional, and physical developmental impacts for children. It reflects a basic child welfare principle that children are generally best served not through institutional or congregate care, but in family settings.¹⁹ ORR acknowledged its distinct role in the preamble to the Foundational Rule, stating:

ORR notes that it is not an immigration enforcement agency, and does not have statutory authorization to investigate the immigration status of potential sponsors. The HSA and the TVPRA do not make any mention of a sponsor’s potential immigration status as a prerequisite to receive an unaccompanied child into their custody and do not imbue ORR with the authority to inquire into immigration status as a condition for sponsorship.²⁰

The IFR Notice, however, seeks to normalize the expanded use of immigration status information in the sponsorship process by pointing to language in the preamble to the Foundational Rule recognizing that “[t]o the extent ORR does collect information on immigration status of a potential sponsor, it would be only for the purposes of evaluating the potential sponsor’s ability to provide care for the child.”²¹ The IFR Notice mischaracterizes this as meaning that “in the process of vetting potential sponsors for unaccompanied children, the potential sponsor’s immigration status is one factor that bears on the potential sponsor’s *suitability* to care for the child.”²² (emphasis added).

¹⁹ See, e.g., Annie E. Casey Foundation, Overview of the Family First Prevention Services Act (Mar. 2025), <https://www.aecf.org/blog/overview-of-the-family-first-prevention-services-act> (“FFPSA places strict limitations on the use of congregate care and group homes for children. Instead, the law encourages placements in family-like settings or kinship care, which is shown to provide better emotional and developmental outcomes for kids.”); William Wilberforce Trafficking Victims Protection Reauthorization Act, Cong. Rec. Vol. 154 No. 185 (Dec. 10, 2008) (“Today, Congress will pass the Unaccompanied Alien Child Protection Act to remedy this by requiring that children who pose no danger to themselves or others be placed in the least restrictive setting possible; requiring the Office of Refugee Resettlement to do a suitability assessment before placing the child with any agency or person; and prohibiting placing children, who have committed no crimes, in a prison with hardened criminals. This legislation also requires, whenever possible, family reunification or other appropriate placement in the best interest of the unaccompanied alien children.”); see generally HHS, A National Look at the Use of Congregate Care in Child Welfare (May 2015), https://acf.gov/sites/default/files/documents/cb/cbcongregatecare_brief.pdf (“Although there is an appropriate role for congregate care placements in the continuum of foster care settings, there is consensus across multiple stakeholders that most children and youth, but especially young children, are best served in a family setting. Stays in congregate care should be based on the specialized behavioral and mental health needs or clinical disabilities of children. It should be used only for as long as is needed to stabilize the child or youth so they can return to a family-like setting.”).

²⁰ 89 Fed. Reg. 34384, 34442.

²¹ 90 Fed. Reg. 13544 citing 89 Fed. Reg. 34442.

²² 90 Fed. Reg. 13554.

This characterization is inaccurate, as ORR has not historically used immigration status as a suitability requirement. Consistent with longstanding legal protections, ORR evaluates the safety of placements and generally prefers to place children with parents and other close relatives. Making lawful immigration status a requirement would upend this framework and impede ORR’s ability to release thousands of children to caregivers who are safe and suitable for them, on the sole basis of being undocumented. Historically, a significant percentage of sponsors of unaccompanied children have been undocumented. For example, ICE leadership testified to Congress in 2018 that nearly 80 percent of sponsors or their household members lacked lawful immigration status.²³ As ORR states in the Foundational Rule’s preamble, to the extent ORR collects sponsors’ immigration status information “it would be only for the purposes of evaluating the potential sponsor’s ability to provide care for the child (*e.g., whether there is a plan in place to care for the child if the potential sponsor is detained*)” (emphasis added).²⁴ Significantly, ORR’s recasting of the Foundational Rule term “ability” as “suitability” in the IFR represents a notable departure from past practice. In the Foundational Rule, “ability” is utilized to reference supporting a released child’s continued and safe care through preparedness measures. In the IFR Notice’s characterization, immigration status is transformed into a potential precondition for sponsorship—a position unsupported by law.

ORR Fails to Consider the Impacts of the IFR on Children’s Wellbeing and Family Unity

As a consequence of the IFR, the government could seek to restructure ORR’s processes to prioritize immigration enforcement without regard for its impact on children in ORR custody. Children could be held indefinitely in congregate settings that are not designed to meet their long-term developmental, emotional, and physical needs—even when suitable, loving relatives are available to care for them. Health experts have underscored that “[a]lthough data are limited regarding the effects of a short detention time on the health of children, there is no evidence indicating that any time in detention is safe for children.”²⁵ Children in custody frequently experience significant distress amid uncertainty about if and when they will be reunified with family and due to limited ability to communicate with family or with staff making reunification decisions. Delays in release only compound these circumstances and deepen the trauma of children who have fled persecution, abuse, or other harm in their country of origin and who have come to the United States in search of safety.²⁶

In some cases, delays in release could negatively impact a child’s ability to access humanitarian protection, for example, where a child approaches the age limit for state court jurisdiction and is impeded from pursuing Special Immigrant Juvenile Status. In other cases, children will have to appear for hearings or other court proceedings while still in government care, and without the support of a parent or other family member as they prepare their cases or testify about past harms underlying their protection cases. In addition to risking re-traumatization, these circumstances undermine due process

²³ See, e.g., Avery Anapol, *ICE arrested dozens of immigrants who tried to sponsor undocumented migrant children*, The Hill, Jan. 20, 2018, <https://thehill.com/latino/407669-ice-arrested-dozens-of-immigrants-who-tried-to-sponsor-undocumented-migrant-children/>.

²⁴ 89 Fed. Reg. at 34442.

²⁵ Am. Academy of Pediatrics, *Detention of Immigrant Children*, PEDIATRICS, Vol. 139, no. 4 (Apr. 2017; reaffirmed Nov. 2022), at 6.

²⁶ See, e.g., Rhitu Chatterjee, *Lengthy Detention Of Migrant Children May Create Lasting Trauma, Say Researchers*, NPR, Aug. 23, 2019, <https://www.npr.org/sections/health-shots/2019/08/23/753757475/lengthy-detention-of-migrant-children-may-create-lasting-trauma-say-researchers>.

and risk permanently separating families by jeopardizing the child's claim for relief. Owing to distress and detention fatigue, some children may ask to abandon their legal claims and to return to their country of origin, notwithstanding dire protection needs.²⁷ Far from advancing the TVPRA's aim to ensure children's physical and mental wellbeing upon release from ORR care, the IFR thus risks returning children to grave danger and harm in their countries of origin.

The reorientation of ORR's role to prioritize immigration enforcement will also deter many parents, legal guardians, and other family members from coming forward to care for children or from engaging with ORR out of fear that it will elevate them or others in their households as immigration enforcement priorities. As a result, children may no longer have loved ones available to care for them after release and could ultimately be released to less suitable sponsors, with the potential for increased risk of trafficking and other harm.

Parents and other family members who seek to sponsor children may face additional barriers, including requests for documentation or proof of immigration status that routinely shift, grow more stringent, and differ from requirements stated in government forms. A prolonged sponsorship process will demand additional time and expense, as families seek to comply with requirements that may require numerous office visits, the services of professionals to obtain documentation, and in some cases, communication with other countries. By keeping parents and other close relatives at a distance from children for whom they seek to provide loving care and support, the IFR will undermine family reunification and parental rights by increasing the likelihood that children will remain for lengthy periods in the government's, rather than in their family's, care. It could also directly impact thousands of parents, legal guardians, and other close relatives who currently sponsor or reside with an unaccompanied child family member and whose personal information, without warning and contrary to ORR policy, could become available to DHS or other agencies for use in immigration enforcement. Detention or deportation of children's family members and other household members through immigration enforcement could threaten financial insecurity and loss of income that helps support families and further heighten children's vulnerability.²⁸

The harms of the IFR and related policies are already apparent. The average length of stay for children in ORR custody before discharge has dramatically increased in recent months, from an average of 49 days in February 2025 to 112 days in March 2025 and 217 days in April 2025.²⁹ Releases to sponsors have fallen dramatically, with 5,151 releases in January 2025; 1,858 in February 2025; 343 in March 2025; and only 45 children released in April 2025.³⁰ Sponsors too have faced immediate impacts from the IFR and

²⁷ See generally Nat'l Immigrant Justice Center, et. al, The ORR and DHS Information Sharing Agreement and Its Consequences (last updated Apr. 2019) (discussing impacts from the 2018 MOA between DHS and ORR on children), <https://justiceforimmigrants.org/wp-content/uploads/2019/05/Updated-formated-MOA-backgrounder-4.29.19.pdf>.

²⁸ See, e.g., Akash Pillai, Drishti Pillai, and Samantha Artiga, Potential Impacts of Mass Detention and Deportation Efforts on the Health and Well-Being of Immigrant Families, KFF (Feb. 6, 2025), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/potential-impacts-of-mass-detention-and-deportation-efforts-on-the-health-and-well-being-of-immigrant-families/>.

²⁹ ORR Fact Sheet, Fact Sheets and Data (Average Monthly Data→ Average Length of Care (for those discharged), <https://acf.gov/orr/about/ucs/facts-and-data> (current as of May 12, 2025).

³⁰ *Id.* (Released to sponsors) (current as of May 12, 2025).

other recent policy changes, including denials of their applications or delays in securing approval to serve as the sponsor of their child or family member.³¹

Moreover, ORR provides potential sponsors with a Family Reunification Packet approved by the Office of Management and Budget that includes language limiting DHS's use of sponsors' immigration status information for immigration enforcement purposes.³² ORR recently proposed revisions to the Family Reunification Application packet that would align with the IFR and eliminate these restrictions, among other modifications. However, these changes were issued for public consideration and comment only *after* the IFR had already taken effect. As a result, some sponsors have received from ORR and relied upon application forms that may misstate and mislead them about how ORR uses their information. Sponsors have also faced potential disqualification on the basis of their immigration status, despite the fact that the current application includes language clarifying that "ORR prefers to release a child to a parent or legal guardian, regardless of [their] immigration status. ORR is not an immigration enforcement agency."³³ The promulgation and implementation of the IFR with an immediate effective date, in circumvention of requirements under the Paperwork Reduction Act, thus violates the APA and impedes procedural due process.

The IFR Does Not Satisfy the "Good Cause" Exception to Notice and Public Comment

The IFR Notice cites to the "good cause" exception to justify ORR's issuance of the IFR with an immediate effective date and without prior consideration of public comments. The IFR Notice states that "ORR had no authority to promulgate such a rule; revoking it immediately is in the public interest; and notice and comment is unnecessary and contrary to the public interest because no amount of public input could give ORR the power to contravene a duly-enacted law of Congress via regulation."³⁴

In focusing almost exclusively on compliance with 8 U.S.C. § 1373, the Notice fails to meaningfully consider a range of *other* federal statutes and legal requirements that govern ORR's unaccompanied children program and the sponsorship process.³⁵ Section 1373 was enacted in 1996. In the intervening decades, significant substantive and procedural protections related to unaccompanied children have been developed to recognize and appropriately provide for children's unique needs and vulnerabilities. The

³¹ See *Angelica S. v. HHS*, No. 1:25-cv-01405, Motion for Preliminary Injunction (D.D.C. 2025).

³² See, e.g., ORR, Family Reunification Packet, available at <https://acf.gov/orr/policy-guidance/unaccompanied-children-program>. The Family Reunification Application [FRP-3, OMB 0970-0278 (valid through 08/31/2025)] begins with an FAQ stating the following: "Can I sponsor my child if I am undocumented? Yes. ORR prefers to release a child to a parent or legal guardian, regardless of your immigration status. ORR is not an immigration enforcement agency." Additionally, the Authorization for Release of Records [FRP-2, OMB 0970-0278 (valid through 08/31/2025)] includes the following affirmation for signature: "I also understand that DHS cannot use my information for immigration enforcement actions, including placement in detention, removal, referral for a decision whether to initiate removal proceedings, or initiation of removal proceedings, unless I have been convicted of a serious felony, am pending charges for a serious felony, or I have been directly involved in or associated with any organization involved in human trafficking," *citing* the Consolidated Appropriations Act, 2023, Pub. L. 117-328, Division F, Title II, § 217 and stating in related footnote, "Please note that DHS is restricted from using this information through September 31, 2023."

³³ *Id.*

³⁴ 90 Fed. Reg. at 13555.

³⁵ The IFR notice states that ORR is "amending a regulation so that it comports with the express language of the governing legislation," seemingly referencing 8 U.S.C § 1373. Yet it omits meaningful discussion of the statutes that serve as the foundation of the Unaccompanied Children Program, including 8 U.S.C. § 1232 and 6 U.S.C. § 279.

Foundational Rule itself aims to codify and implement many of these foundational safeguards, principally those in the FSA, the HSA, and the TVPRA. Although the IFR Notice suggests that no public comment could negate the need to rescind restrictions on sharing of information, as previously discussed, the very protections for children underpinning the Foundational Rule itself merit consideration by ORR and the public.

Despite ORR's assertions in the IFR Notice, providing notice and an opportunity to comment is not unnecessary here. To the contrary, public notice and comment are especially warranted when ORR seeks a significant shift in policy with no explanation less than a year after promulgating the Foundational Rule, which was the subject of more than 73,000 public comments.³⁶ Further, the IFR poses significant consequences for potential sponsors currently in the process, given the IFR's inconsistency with forms and instructions that are currently approved for use and provided to sponsors as part of ORR's Family Reunification Packet. Use of the "good cause" exception is inappropriate in the context of these infringements on procedural due process and the APA and in light of the IFR's impacts on matters of significant public interest. ORR does not explain how providing notice and comment would be impracticable, and indeed, it is not.

The IFR Notice appears to interpret 8 U.S.C. § 1373 to mean that ORR may not implement any provisions in the Foundational Rule that touch upon immigration status information. This conclusion, however, is overbroad and unsupported by the text and nature of the cited INA section as well as ORR's longstanding practices and the Foundational Rule. Section 1373 of the INA, by its terms, prohibits federal, state, or local governments or officials from "prohibit[ing], or in any way restrict[ing]" any officials or agencies from "sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."³⁷ It further provides that no person or agency may prohibit, or in any way restrict, a government entity from sending, requesting, receiving from INS, maintaining, or exchanging with another government entity "information regarding the immigration status, lawful or unlawful, of any individual."³⁸ Importantly, this provision does not itself require ORR or any other agency to actively and affirmatively share information with DHS of its own accord; rather, it prohibits agencies or officials from barring or making policies that prohibit these actions. This provision makes no mention of ORR and includes no requirement that ORR use immigration status in evaluating sponsors for unaccompanied children or collect immigration status information for immigration enforcement purposes.

Nevertheless, the IFR Notice summarily states that Section 1373 "unambiguously limits ORR's authority" and that the cited information sharing provision of the Foundational Rule "obviously and directly contravenes that statutory limit," concluding that as a result, "ORR must update the Foundational Rule to strike 45 CFR 410.1201(b) immediately."³⁹ Far from unambiguous, Section 1373 has been the subject of extensive federal court litigation, including regarding its constitutionality in relation to the Tenth

³⁶ See ORR, UC Program Foundational Rule (Docket ID ACF-2023-0009), <https://www.regulations.gov/document/ACF-2023-0009-0001>.

³⁷ 8 U.S.C. § 1373.

³⁸ *Id.*

³⁹ 90 Fed. Reg. at 13555.

Amendment.⁴⁰ As such, this statutory provision remains an issue of active debate. Indeed, how it should be interpreted in the context of specific legal protections for unaccompanied children and ORR's Unaccompanied Children Program is a matter that should have been presented for public comment.

Disregarding this context, the IFR Notice overstates the reach of this provision as applied to the Foundational Rule. As illustrated by the implementation of a 2018 information sharing agreement between ORR and DHS, the sharing of sponsors' immigration status information for immigration enforcement purposes directly impedes ORR's ability to comply with its legal responsibilities under the HSA, FSA, TVPRA, and Foundational Rule related to children's safe and timely release and reunification.⁴¹ Mindful of these impacts, Congress has previously enacted restrictions within federal appropriations law prohibiting DHS's use of information shared by ORR about children's sponsors, potential sponsors, or other household members for immigration enforcement purposes.⁴² ORR itself issued a Systems of Record and Privacy Notice in December 2024 underscoring restrictions on sharing of information for immigration enforcement purposes, stating:

Because ORR is not an immigration enforcement agency— but rather is responsible for placing unaccompanied children with vetted and approved sponsors, providing care and services to unaccompanied children who are in Federal custody by reason of their immigration status, and identifying and assessing the suitability of a potential sponsor for each child—it is incompatible with ORR's program purposes to share information in a system of records, particularly confidential mental health or behavioral information in children's case files, for immigration enforcement purposes.”

In addition, consistent with TVPRA 8 U.S.C. 1232(c) and HSA, 6 U.S.C. 279(b), information shared by HHS, with certain limited exceptions, cannot be used to enforce immigration laws against an unaccompanied child's sponsor, potential sponsor or a member of their household. Accordingly,

⁴⁰ U.S. v. California, 921 F.3d 86 (9th Cir. 2019), at n.19 (“Because we agree with the district court’s conclusion, we need not address whether § 1373 is itself unlawful, though we note that various district courts have questioned its constitutionality. See, e.g., City and County of San Francisco v. Sessions, 349 F. Supp. 3d 924, 949–53 (N.D. Cal. 2018), appeal docketed, No. 18-17308 (9th Cir. Dec. 4, 2018); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 873 (N.D. Ill. 2018); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 329–31 (E.D. Pa. 2018), *aff’d in part*, vacated in part on other grounds sub nom. City of Philadelphia v. Attorney Gen., 916 F.3d 276 (3d Cir. 2019).”).

⁴¹ See, e.g., Nat’l Immigrant Justice Center, et. al, The ORR and DHS Information Sharing Agreement and Its Consequences (last updated Apr. 2019) (discussing impacts from the 2018 MOA between DHS and ORR on children), <https://justiceforimmigrants.org/wp-content/uploads/2019/05/Updated-formated-MOA-backgrounder-4.29.19.pdf>; U.S. Dep’t of Homeland Security Office of Inspector General, ICE Cannot Effectively Monitor the Location and Status of All Unaccompanied Alien Children After Federal Custody (Mar. 25, 2025), at 2-3 (“An ICE official said the 2018 MOA negatively affected the sponsorship applications submitted to HHS and increased UACs’ overall length of stay in ORR custody.”), <https://www.oig.dhs.gov/sites/default/files/assets/2025-03/OIG-25-21-Mar25.pdf>.

⁴² See Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, Div. D, § 216(a) (2019) (“None of the funds provided by this Act or any other Act, or provided from any accounts in the Treasury of the United States derived by the collection of fees available to the components funded by this Act, may be used by the Secretary of Homeland Security to place in detention, remove, refer for a decision whether to initiate removal proceedings, or initiate removal proceedings against a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor of an unaccompanied alien child (as defined in section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. 279(g))) based on information shared by the Secretary of Health and Human Services.”). These restrictions were continued in several continuing resolutions.

SORN 09–80–0321 mentions at the start of the ‘Routine Uses’ section that disclosures for immigration enforcement purposes will not be made under routine uses, but would be made only with the subject individual’s prior written consent.⁴³

INA section 1373 should not be read to overtake and eliminate broader legal protections for unaccompanied children that are later in time.

Moreover, the IFR Notice’s stated remedy—striking all of 45 CFR § 410.1201(b)—does not merely “remove[] the prohibition on sharing immigration status information,” as the Notice states, but also eliminates language on matters about which 8 U.S.C. § 1373 is wholly silent: whether lawful immigration status is necessary to qualify for sponsorship of an unaccompanied child in ORR custody and whether ORR must collect sponsor immigration status information for immigration enforcement related purposes. The language in the Foundational Rule clarifies that “ORR shall not disqualify potential sponsors based solely on their immigration status and shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes.”⁴⁴ This language facilitates ORR’s compliance with the *Flores* Settlement, the TVPRA, and the Foundational Rule. It further helps to underscore the distinct roles of ORR and DHS, as articulated in the HSA. The IFR Notice includes no reasoned explanation for how this sentence conflicts with Section 1373, and indeed, it does not.

ORR’s Arguments on Non-Severability Are Misplaced

ORR argues in a footnote that “45 CFR 410.1201(b)’s parts are inextricably linked and there was no indication in the Foundational Rule that it was intended to treat the information-sharing and the eligibility issues as distinct.”⁴⁵ The agency alternatively argues that “severability runs—at most—to provisions, not to portions of provisions. Thus, for this alternative reason as well, the entirety of 45 CFR 410.1201(b) must be removed due to the conflict with 8 U.S.C. 1373.”⁴⁶ These arguments are unavailing.

Severability clauses in regulations help to inform courts about how and whether an agency intends for the remainder of a regulation to remain in effect if the court invalidates any aspects of the regulation. In the IFR Notice, however, ORR suggests that it is hampered by its own severability clause as it seeks to remedy a perceived statutory conflict with the Foundational Rule. Contrary to these assertions, nothing in the Foundational Rule’s severability clause restricts ORR’s ability to leave undisturbed language that poses no statutory conflict and that facilitates ORR’s statutory responsibilities for care, placement, and release of unaccompanied children.

The preamble to the Foundational Rule repeatedly expresses a preference for severability if aspects of the rule are found invalid by a court.⁴⁷ Although it specifically cites as examples what should happen in

⁴³ ORR, Privacy Act of 1974; System of Records, Notice of a modified system of records, 89 Fed. Reg. 100500 (Dec. 12, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-12-12/pdf/2024-29113.pdf>.

⁴⁴ See 89 Fed. Reg. at 34591 (45 C.F.R. § 410.1201(b)).

⁴⁵ 90 Fed. Reg. at 13555 n. 1.

⁴⁶ *Id.*

⁴⁷ 89 Fed. Reg. at 34389:

This is a comprehensive rule containing many subparts that address many distinct aspects of the UC Program. To the extent any subpart or portion of a subpart is declared invalid by a court, ORR intends for

the event that Parts, Subparts, or provisions or portions of Subparts are found invalid, neither the preamble nor the Foundational Rule would preclude severability of sentences within a given provision.

In evaluating whether regulatory provisions are severable, courts routinely consider both the intent of the agency and whether severability would be workable. Although ORR presently asserts that the Foundational Rule does not distinguish between sponsor eligibility criteria and information sharing, this argument is countered by the plain language of 45 C.F.R. § 410.1201(b) and ORR's own policies, which have referenced these issues separately, belying ORR's argument that they are inextricably linked.

For example, Section 2.6 of the ORR Policy Guide (Sponsor Immigration Status and Release of Unaccompanied Alien Children) states: "ORR does not disqualify potential sponsors based solely on their immigration status or for law enforcement purposes. ORR does not collect information on immigration status directly from the sponsor. . . . In addition, ORR does not use or share any information for immigration enforcement purposes (see Section 5.10 Information Sharing)."⁴⁸ The issues of eligibility, collection of immigration status information, and information sharing each appear in separate sentences here, undermining any suggestion that mention of any of these elements in the same sentence in the Foundational Rule makes these issues inextricably one. Further, Section 2.6 itself references a wholly separate section of the ORR Policy Guide pertaining to information sharing—Section 5.10 (Information Sharing), where language restricting this is reiterated and expanded upon: "ORR is not an immigration enforcement agency and does not share information with the U.S. Department of Homeland Security, U.S. Department of Justice, or similar governmental entity for immigration enforcement purposes."⁴⁹ ORR does not directly address how it would be unworkable to excise any portions of 45 C.F.R. § 410.1201(b) related to information sharing that a court may find invalid and to retain language prohibiting disqualification of sponsors based solely on immigration status and the collection of sponsors' immigration status for immigration and law enforcement related purposes. These sections of the Policy Guide, which are substantively similar to those in the Foundational Rule, suggest that it is not.

Further, in its attempt to remedy a perceived statutory conflict related to information sharing, ORR fails to consider meaningful alternatives in the IFR Notice, such as not collecting any immigration status

all other subparts to remain in effect. For example, ORR expects that if a court were to invalidate Subpart B (or any of Subpart B's discrete provisions) relating to the placement of a child, all other subparts—such as Subpart C (release of the child), Subpart D (minimum standards and services), Subpart E (transportation), etc.—may continue to operate and should remain operative independently of the invalidated subpart.

Additionally, each Subpart also contains many distinct provisions, many of which may also operate independently of one another; thus, the invalidation of one particular provision within a particular subpart would not necessarily have implications for other aspects of that subpart. For example, within Subpart D, the provision of access to routine medical and dental care, and other forms of healthcare at § 410.1307 would not be impacted by the invalidation of the provision of structured leisure time activities at § 410.1302(c)(4) or provision of legal services under § 410.1309. ORR intends that if one or more provisions within a subpart are invalidated, that all other provisions of that subpart (and all other subparts of the rule) remain in effect.

Id.

⁴⁸ See ORR, ORR UAC Policy Guide, Sec. 2.6, <https://acf.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-2#2.6>.

⁴⁹ See ORR UAC Policy Guide, Sec. 5.10, <https://acf.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-5#5.10>.

information from sponsors and others during the family reunification process, minimizing any need to consider sharing that could adversely impact its ability to safely and timely release unaccompanied children to suitable caregivers.⁵⁰

The IFR Notice Fails to Consider the Impacts of the IFR in the Context of Other Recent Administrative Changes

Although described by ORR as simply aligning the Foundational Rule with existing INA provisions, the IFR in practice threatens to negatively impact the entire framework of legal protections for unaccompanied children. It cannot be viewed in isolation from numerous other actions undertaken by the Administration in recent months. As part of broader efforts to advance the removal of people without lawful immigration status, the Administration has instructed people to self-deport, or face detention, deportation, and other consequences.⁵¹ DHS has rescinded policies that restrict immigration enforcement in sensitive locations, such as schools, hospitals, and churches, and launched an enforcement initiative targeting certain unaccompanied children, including children and youth with prior removal orders and children who have been released to non-relative sponsors.⁵² As part of this new initiative, DHS is also conducting “wellness checks” for unaccompanied children released from ORR care. These checks, often performed by armed Immigration and Customs Enforcement and Homeland Security Investigations officers, have stoked widespread fear of immigration enforcement against sponsors or others in their households.⁵³ They threaten to create a broad chilling effect on sponsorship of unaccompanied children, contrary to the TVPRA and the Foundational Rule’s provisions.

For its part, ORR recently updated its policies to restrict the kinds of documents that potential sponsors and household members may provide to prove their identity, address, and relationship to a child.⁵⁴ It also recently revised policies and proposed form changes requiring sponsors to provide extensive information about their income and financial ability to care for an unaccompanied child as a suitability criteria for release.⁵⁵ These policies have already begun to deter or foreclose sponsorship by potential

⁵⁰ See, e.g., ORR Policy Guide 2.6 (“ORR does not collect information on immigration status directly from the sponsor.”).

⁵¹ DHS, Press Release, [DHS Releases New Nationwide and International Ads Warning Illegal Aliens to Self-Deport and Stay Out | Homeland Security](#) (Apr. 21, 2025).

⁵² See DHS, Unaccompanied Alien Children Joint Initiative Field Implementation, *available at* <https://nipnlg.org/sites/default/files/2025-04/2025-ICFO-22246-001.pdf> (made public through [SIJS FOIA and USCIS Data — End SIJS Backlog](#)).

⁵³ See Andrea Castillo and Melissa Gomez, Goal of welfare checks: Protect children or launch deportations?, L.A. Times (May 7, 2025), <https://www.latimes.com/politics/story/2025-05-07/welfare-checks-land-migrant-children-back-in-federal-custody>.

⁵⁴ See ORR Policy Guide Sec. 2.2.4 (Required Documents for Submission with the Sponsor Application), <https://acf.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-2>.

⁵⁵ See *id.* (proof of income); see also ORR, Proposed Information Collection Activity: Unaccompanied Alien Children Sponsor Application Packet (Office of Management and Budget #0970–0278), 90 Fed. Reg. 17438 (Apr. 25, 2025) (“Finally, the current Administration has requested more comprehensive information on sponsor income to support suitability assessments as part of the sponsorship application. In addition to the information already collected in form SAP-3, ORR is planning to prepare an Affidavit of Support that will be completed by the sponsor and provide certification that the sponsor has the financial means to provide for the child’s physical and mental well-being (per 45 CFR 410.1202(c)). This new instrument will be incorporated into the information collection in time for the second Federal Register notice, to ensure proper notification to the public and solicitation of comments.”).

caregivers, including parents and legal guardians, and have delayed children’s release from ORR care. Additionally, in March 2025, ORR, through the Department of Interior, terminated funding of a federal contract supporting vital legal and social services for more than 26,000 unaccompanied children.⁵⁶ Although this funding was recently restored following court orders in related litigation, its future remains uncertain, further imperiling due process and access to protection for unaccompanied children and increasing children’s vulnerability.

The rescission of the Foundational Rule’s information sharing restrictions, then, cannot properly be characterized as a perfunctory policy realignment. Instead, it reflects concerted efforts to narrow protections for unaccompanied children and to create additional barriers for their release and for their family members, including targeted immigration enforcement. The IFR Notice’s silence on these recent policy actions, coupled with the piecemeal nature of ORR’s rulemaking and policy changes, impede the public’s ability to meaningfully evaluate and comment on the proposed changes.

ORR Fails to Analyze and Consider the Significant Costs of the IFR

By deterring and disqualifying potential sponsors, the IFR risks the prolonged and indefinite custody of thousands of children in ORR programs and facilities. In its subsequent notice proposing changes to the Sponsor Application, ORR directs that the burden estimate for select forms be revised “to account for a decrease in the number of sponsors applying to sponsor a child, an increase in the number of individuals required to undergo fingerprint checks, and an increase in the number of care provider facilities.”⁵⁷ Yet ORR fails in the IFR Notice to evaluate or address the cost implications of the IFR for the agency and the federal government at large. In 2015, the Government Accountability Office reported that the “average daily cost per bed in basic [ORR] shelters rose from a low of \$153 per bed in fiscal year 2009 to a high of \$248 per bed in fiscal year 2014, an increase of about 63 percent. The \$248 average cost per bed in fiscal year 2014 equates to over \$90,000 per bed on an annual basis.”⁵⁸

With the passage of nearly a decade since that report, it is likely that costs imposed by delays in release from the IFR will be far greater. This could include new costs from ORR’s addition of new care provider facilities, as ORR alluded to in its Federal Register notice proposing changes to sponsor forms, and potentially also include new or expanded influx or emergency facility capacity. A news article from 2018 discussing ORR’s creation of a tent city in Texas to relieve overcrowding following from ORR’s then-restrictive sponsor policies stated: “The latest estimates from Congress suggest that it costs about \$750 a day to house a child in the tent city — about three times as much as the cost of a single placement in a shelter — even though conditions there are comparatively austere.”⁵⁹

⁵⁶ The termination of this contract is currently the subject of litigation and a federal court order. See *Community Legal Services in East Palo Alto, et al. v. Dep’t of HHS, et al., Order Granting Plaintiff’s Motion for Temporary Restraining Order*, Case No. 25-cv-02847-AMO (N.D. Ca. 2025), gov.uscourts.cand.447078.33.0.pdf.

⁵⁷ See, e.g., HHS, ACF, Proposed Information Collection Activity: Unaccompanied Alien Children Sponsor Application Packet (Office of Management and Budget #0970–0278), 90 Fed. Reg. 17438 (Apr. 25, 2025), at 17438 & 17439.

⁵⁸ GAO, *Unaccompanied Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody* (July 2015), at 66-67, <https://www.gao.gov/assets/gao-15-521.pdf>.

⁵⁹ Caitlin Dickerson, *The Government Is Moving Migrant Children to a Texas Tent City. Here’s What’s Behind It*, N.Y. Times, Oct. 1, 2018, <https://www.nytimes.com/2018/10/01/us/migrant-children-tent-city-camp-texas.html>.

ORR's omission of any cost analysis, particularly in light of the magnitude and likelihood of delays in release resulting from the IFR, is contrary to the APA.

Conclusion

KIND is deeply concerned about the confusion and widespread harms that will result from application of the IFR and related policy changes. We urge the Administration to rescind the IFR and to ensure full compliance with the HSA, TVPRA, FSA, and Foundational Rule to ensure the safety and wellbeing of unaccompanied children. Please feel free to contact KIND with any questions or if we can be of assistance in these efforts.

Sincerely,

/s/

Jennifer Podkul

Chief, Global Policy and Advocacy