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Re: Comments on Proposed Rulemaking Regarding Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, DHS Docket No. ICEB-2018-0002

For nearly three decades, the Women's Refugee Commission (WRC) has worked to improve the lives and protect the rights of women, children, and youth displaced by conflict and crisis. WRC's work transforms the lives of women, their families, and their communities all around the world, including at the southern border of the United States. WRC submits these comments in response to the Department of Homeland Security and the Department of Health and Human Services' Proposed Regulations to the *Flores* Settlement Agreement (the "Proposed Regulations"), 83 Fed. Reg. 45,486 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R pts. 212 and 236, 45 C.F.R. pt. 410), to address their inherent flaws and to demonstrate that they are legally flawed in a myriad of ways: they violate international law, as well as United States constitutional and statutory law. As WRC has demonstrated for years, there is no humane way to detain families, and whenever families or children are in the care custody of the Federal Government, safeguards and basic minimum standards must not only be in place but met.

Unfortunately, the Government has failed consistently to honor the minimum standards governing the conditions of confinement of immigration children since the landmark *Flores* Settlement Agreement ("FSA") was agreed to in 1997.

In 2007 and again in 2014, WRC conducted two in-depth studies detailing the inhumane conditions for children and families in U.S. detention centers, titled *Locking Up Family Values* and *Locking Up Family Values, Again*, respectively.[1] In both studies—which included tours of many (more than 30) and various detention facilities in the United States and interviews with facility and Government officials, detained families, and legal and social service providers—WRC concluded that large-scale family detention does not comply with basic child welfare standards, results in egregious violations of our country's obligations under international law, undercuts individual due process rights, and sets a poor example for the rest of the world. The current family detention facilities, which are not licensed and secure, are not in compliance with the FSA for the detention of children beyond initial processing times. In this vein, WRC objects to the Proposed Regulations as they fail to conform to the FSA's basic safeguards for children in immigration custody. WRC steadfastly maintains that the Government's ongoing actions with respect to the detention of families and children violate the FSA, and advocates for the immediate reversal of family detention policies, dismantling of detention facilities, the release of families, and the prompt release of children with their accompanying parents or to another appropriately vetted adult. Where short-term custody is necessary, conditions must comply with basic child welfare standards and efforts for the release of children in compliance with the FSA.

As discussed in more detail below, the Proposed Regulations undermine the intent behind the provisions of the FSA in that they are unconstitutionally vague, ultra vires, overbroad, and generally lack enforcement and oversight of the Government's actions. The comments below are organized in the order of the Proposed Regulations, from beginning to end. Each section describes the deficiencies we have identified, along with relevant case and statutory citations, and concludes with a bulleted list of questions that we assert the Government has not adequately addressed and must legitimately address and resolve prior to publishing any final regulations relating to these Proposed Regulations. Given the wholesale infirmity of the Proposed Regulations, relevant law requires that the Proposed Regulations be withdrawn and a new notice

[1] *Locking Up Family Values*, Women's Commission for Refugee Women and Children & Lutheran Immigration and Refugee Service (Feb. 2007), https://www.womensrefugeecommission.org/images/zdocs/famdeten.pdf; *Locking up Family Values, Again*, Women's Refugee Commission & Lutheran Immigration and Refugee Service, (Oct. 2014), https://www.womensrefugeecommission.org/resources/document/1085-locking-up-family-values-again.

and comment period invoked to the extent that the Government seeks to implement regulations governing the conditions of confinement for children and families in immigration detention.[2]

III. Executive Summary

A. Purpose of the Regulatory Action & Legal Authority

83 Fed. Reg. at 45,487-88

The Proposed Regulations purport to implement the "relevant and substantive terms" of the FSA.[3] However, the Proposed Regulations are woefully deficient in specifying what these provisions are and how the Government determined what portions were relevant and substantive. In fact, the Proposed Regulations imperfectly address many *Flores* provisions and arbitrarily refuse to implement *all* provisions as required by the FSA. This is acknowledged in the Proposed Regulations themselves, which concede that they depart from the text of the FSA. For example, the licensing requirement in the Proposed Regulations creates an alternative federal licensing regime for facilities instead of state agencies specifically because the current facilities are unable to meet *Flores*' licensing requirements based on child welfare principles.

Furthermore, the regulations state they take into account "certain changed circumstances" without further explanation or examples. Instead, the Government's Proposed Regulations continue to purport that the FSA has been "extended" to apply to accompanied minors and that enactment of the Homeland Security Act of 2002 ("HSA") and the Trafficking Victims Protection Act ("TVPRA") have rendered some of the substantive terms outdated. Notably, these mirror the arguments the Government made before Judge Gee in *Flores*, and they were soundly rejected by the Court's previous Orders. Instead, Judge Gee ruled that the FSA applies to all minors, accompanied or otherwise, and that the HSA and TVPRA do not change the Government's obligations. These orders in relevant part have been affirmed by the Ninth Circuit.

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[2] A final rule is lawful only if its differences from the proposed rule are "in character with the original proposal" and a "logical outgrowth" of the original notice and comments. *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003) (citation omitted). The text of a final rule, therefore, may not be "distant" from that of what an agency initially proposed. *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017); *Nat. Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002).

[3] For the purposes of these comments only, WRC is using the definitions set forth in the Proposed Regulations to avoid confusion.

As a result, the Government should withdraw the Proposed Regulations, and if it decides to issue new regulations, it must provide the answers to the following questions:

- How did the Government determine what the relevant portions of the FSA are?
- What portions did it determine were not relevant? Why?
- What "changed circumstances" did the Government consider?
- What substantive terms of the FSA does the Government consider outdated? Why?
- Why was the alternative federal licensing scheme necessary? On what evidence was this decision based?
- How will the alternative licensing scheme ensure compliance with child welfare standards and principles of the FSA?
- Why was the "best interests" standard omitted?
- Why was the least restrictive placement requirement omitted?

C. Costs and Benefits
83 Fed. Reg. at 45,488-89

The Government has outlined an incomplete estimate of costs and benefits for the Proposed Regulations, and it has declined to make estimates based on unknown factors, such as the number of persons detained, length of stay, etc. Specifically, the Government states that the primary source of new costs would be from the proposed alternative licensing process. The Government acknowledges the likelihood of increased costs paid by ICE based on the proposed changes to parole determinations (*see* Comments to Section 8 CFR 212.5 – Parole, *infra*), but nevertheless states that it is "unable to provide a quantified estimate of any increased FRC costs" relating to this change. 83 Fed. Reg. at 45,488. Independent groups have released detailed findings that show that the costs associated with the increased detention that would result from the Proposed Regulations (including the annual costs of detention beds and start-up costs of acquiring additional family residential centers) could increase costs between $201 million and $1.3 billion on an annual basis. *See* Philip E. Wolgin, *The High Costs of the Proposed* Flores *Regulation*, Center for American Progress (Oct. 19, 2018), https://cdn.americanprogress.org/content/uploads/2018/10/18054603/FloresHighCosts-brief-6.pdf. Separately and furthermore, the Proposed Regulations fail to account for the qualitative costs of failing to meet child welfare standards.

The failure of the Proposed Regulations to truly grapple with the potentially crippling additional costs associated with family detention is significant because there is little benefit to be recognized. Increased detention costs do not make sense in this context given the high compliance rates of children and adults with immigration court (and other) orders relating to release by immigration authorities. The Government outlines no cost-saving measures of its Proposed Regulations. Instead it only offers amorphous benefits such as implementing the FSA's provisions, terminating the Agreement in turn, and allowing for the purported sound administration of the detention and custody of alien minors in a way that violates the FSA.

The Government should withdraw the Proposed Regulations, and if it decides to issue new regulations, it must provide the answers to the following questions:

- What was the full accounting for costs and benefits?
- What are the bottom-line costs and benefits of the regulations?
- On what are these costs based?
- Why were alternatives to detention, such as the Family Case Management Program and others, not considered, especially those that are far more cost-effective than detention?
- How are length of stay and number of persons detained calculated?
- How is cost of detention calculated?
- How are costs related to quality of care and compliance with child welfare standards?

IV. Background and Purpose

C. Basis and Purpose of Regulatory Action

83 Fed. Reg. at 45,492-95

The Proposed Regulations state that the "practical implications" of the FSA, including the lack of state licensing for facilities, has effectively prevented the Government from detaining the family unit together at an appropriate facility during immigration proceedings. There are advantages, the Government asserts, of maintaining family unity during immigration proceedings, such as the best interests of the child. Additionally, the Government arbitrarily speculates that without these Proposed Regulations, adults with juveniles will be incentivized to continue trying to enter the country illegally.

However, the mere fact that the Government is struggling with the "practical implications" of compliance with the FSA does not mean that the standards agreed upon by the parties in the FSA can be unilaterally changed by the Government through these Proposed Regulations. To the contrary, a requirement of the FSA is that "The final regulations shall not be inconsistent with the terms of this Agreement." *Flores v. Reno*, No. 85-4544-RJK (Px), Stipulated Settlement Agreement (C.D. Cal., Jan 17, 1997).

The Government provides no support for its assertions that the Proposed Regulations will deter illegal entry into the country. Immigration experts have warned that the current administration's treatment of immigrant families which the Proposed Regulations will codify and perpetuate are ineffective as deterrents to illegal immigration. *See, e.g.*, Adam Isacson & Adeline Hite, *August Border Statistics Show that Trump's Policies are Not Deterring Migration*, Washington Office on Latin America (Sept. 13, 2018), https://www.wola.org/analysis/august-border-statistics-show-trumps-policies-not-deterring-migration/; Michael Hiltzik, *The truth about 'zero tolerance': It doesn't always work and always leads to disaster*, Los Angeles Times, June 22, 2018, http://www.latimes.com/business/hiltzik/la-fi-hiltzik-zero-tolerance-20180622-story.html; Jeh Charles Johnson, *Trump's 'zero tolerance' border policy is immoral, un-American — and ineffective*, Washington Post, June 18, 2018, https://www.washingtonpost.com/opinions/trumps-zero-tolerance-border-policy-is-immoral-un-american--and-ineffective/2018/06/18/efc4c514-732d-11e8-b4b7-308400242c2e_story.html?utm_term=.d257ad9c7fa8.

It is deeply troubling that the explicit purpose of the Proposed Regulations, as set forth by the Government, is to allow the government to deviate from specific provisions in the *Flores* Settlement Agreement that it has found difficult to implement and to discourage immigration. The FSA was focused on establishing procedures and conditions that meet approved and established child welfare principles. The Government's stated purpose demonstrates that the Proposed Regulations are in direct contrast to the FSA's intent and, thus, cannot be interpreted as a good faith attempt to be consistent with the FSA's provisions that go straight to the heart of ensuring child welfare.

V. Discussion of Elements of the Proposed Rule

A. DHS Regulations

8 CFR 212.5 – Parole

83 Fed. Reg. at 45,495, 45,524

There are two categories of changes that DHS proposed with respect to this parole provision. First, DHS proposes revisions to the persons to whom a minor may be released. As currently

written, a juvenile in custody may be released to a "relative (brother, sister, aunt, uncle, or grandparent) not in [] detention who is willing to sponsor a minor," and such a release can be had even if there is a relative of the minor in detention. DHS proposes to limit the persons to whom a "minor" may be released to "a parent or legal guardian not in detention" or, alternatively, "an accompanying parent or legal guardian who is in detention." DHS' proposal wholly removes the existing subsection, 8 CFR 212.5(b)(iii) that allowed a minor to identify and "on a case by-case basis" be released with a "non-relative in detention who accompanied him or her on arrival." DHS asserts that these changes are merely to align with the statutory authority, which provides DHS may only release a minor on parole to the custody of a parent or legal guardian. However, that approach undermines completely the negotiated settlement in *Flores* and is against all existing best standards for children's welfare.

The Proposed Regulations should be withdrawn. To the extent they are not or are proposed anew, the Government must answer the following questions:

- Under these revisions, can a minor be released to a parent or legal guardian not in detention even if the minor is an accompanied minor? If this is the intention, then why not follow the requirement in the FSA that a minor could be released to a non-custodial parent or legal guardian "notwithstanding that the [minor] has a [parent or legal guardian] who is in detention"? If this is not the intention, why is this limitation being imposed?

- Under these revisions, what happens where a minor is accompanied by a "relative," "brother," "sister," "aunt," "uncle," "or grandparent" who has not been formally appointed as the minor's "legal guardian"?

- Does the Government believe there is a practical way a "relative," "brother," "sister," "aunt," "uncle," "or grandparent" can be formally appointed as the minor's "legal guardian" such that minors may still be released on parole where otherwise authorized? What if the "relative," "brother," "sister," "aunt," "uncle," "or grandparent" is also in detention? Does the Government anticipate that this language change will create a logistical barrier to the parole release of minors?

- What has been DHS' practice in determining release with or to a "relative," "brother," "sister," "aunt," "uncle," "or grandparent"? How many minors were released on parole to a "relative," "brother," "sister," "aunt," "uncle," "or grandparent" who had not been formally appointed as the minor's "legal guardian" in the past year?

- What happens when a parent or legal guardian cannot be located for the minor?

- How does the Government believe these proposed changes limiting the ability of a minor to be released from detention comport with the spirit of the FSA?

Second, DHS proposes to limit the minors to whom the parole provision applies. As currently written, 212.5(b) provides that parole of juveniles who have been detained under 235.3(b) or 235.3(c) would be justified on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit." DHS proposes that 235.3(c) be removed from this section altogether. Accordingly, minors who are being detained in an expedited removal hearing (which only applies to accompanied minors) would be stripped of the ability to be paroled for an "urgent humanitarian reason" or a "significant public benefit" and would then instead face the strict standards of parole applied to adults in expedited removal proceedings. DHS suggests that the imposition of these stricter standards is the goal of the revision, stating that "[t]he current cross-reference to section 235.3(b) is confusing . . . because it suggests that the more flexible standard in section 212.5(b) might override [the provisions in 235.3(b)] when a minor is in expedited removal." 83 Fed. Reg. at 45,495. Initially, we note that there is nothing confusing about the current standard, and it is supported by best practices in standards governing child welfare. The proposed changes are arbitrary and capricious as they seek to circumvent international and U.S. law requirements that strongly prefer the least restrictive standard of confinement for children in immigration custody.

The Proposed Regulations should be withdrawn, and to the extent any regulations are proposed anew, the Government must answer the following questions about its approach:

- How large was the population of minors who were in detention under 235.3(c) and who were released on parole under 212.5(b) on a yearly basis for the past five years?

- Why is section 212.5(b) inappropriate for minors in removal under 235.3(c)? Why should accompanied minors not be permitted to be paroled on a case-by-case basis for an "urgent humanitarian reason" or a "significant public benefit"?

8 CFR 236.3(b) – Definitions
83 Fed. Reg. at 45,495-97, 45,525

Emergency and Influx

The Proposed Regulations vastly expand the FSA's definition of "emergency" and "influx," the results of which will be weakened protections for minors. Under the Proposed Regulations, "emergency" would mean "an act or event (including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or public health concerns at one or more facilities) that prevents timely transport or placement of minors, ***or impacts other conditions provided by this section***." 83 Fed. Reg. at 45,525 (emphasis added). "Influx" would be defined as "a situation in which there are, at any given time, more than 130 minors or UACs eligible for placement in a

licensed facility under this section or corresponding provisions of ORR regulations, including those who have been so placed or are awaiting such placement." *Id.* These proposed definitions could, and will almost certainly under this federal administration, be interpreted so broadly as to indefinitely suspend basic needs and standards for care of children and families in detention. Indeed, the Proposed Regulations provide an example of the type of requirement that might be waivable under this new, overly broad definition of "emergency;" namely, a meal or snack for a minor. *See* 83 Fed. Reg. at 45,496. Moreover, DHS is currently required by the TVPRA to transfer UAC's to ORR within 72 hours of determining that the child is a UAC and other minors within three to five days. 8 U.S.C. § 1232(b)(3) (2008). The demographics of arrivals at the southern border have changed drastically since the FSA. The number of child arrivals has increased over the years. It is no longer reasonable to consider 130 children to be an influx. Facilities, capacity, and norms have moved well beyond this number. Furthermore, these broad "emergency" and "influx" definitions will make longer stays more common and mean that detained children may not be provided with basic necessities, such as meals, or at the frequency that is developmentally recommended/necessary.

Particularly concerning is the fact that even without invoking "emergencies," CBP custody is often grossly negligent towards children and those in its custody. *See* University of Chicago Law School - International Human Rights Clinic, *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* (2018), https://chicagounbound.uchicago.edu/ihrc/1. Implementation of this rule would take away the ability to monitor or check the decision whether to deem a situation as an emergency as well as the conditions that would result from such a determination.

The suspension of protections for minors embedded in these definitions requires DHS to withdraw the Proposed Regulations. To the extent they are not or are proposed anew, the Government must respond to the following questions and comments:

- Provide the basis for which it arrived at these definitions that deviate greatly from those set forth in the FSA. As they currently stand, these proposed definitions provide for broad "emergency" loopholes for not meeting the standards of care set forth in the FSA.

- Who will review the determination of "emergency" or "influx"?

- Is there a maximum amount of time for any "emergency" to last?

- What would the consequence be—if any—for invoking the emergency when unwarranted?

- What is the current average daily number of UACs awaiting placement in a licensed ORR facility? What has the average number of UAC awaiting placement in a licensed ORR facility been for each of the past five years?

Licensed Facility

The Proposed Regulations create a federal licensing scheme for family facilities. The Proposed Regulations define "licensed facility" in a way that would enable DHS to select an auditor for its own family detention facilities, effectively allowing DHS to license itself and hold minors for the duration of their immigration cases. The Proposed Regulations include a provision in the definition of "licensed facility" that says, "[i]f a licensing scheme for the detention of minors accompanied by a parent or legal guardian is not available in the state, county, or municipality in which an ICE detention facility is located, DHS shall employ an ***entity outside of DHS*** that has relevant audit experience to ensure compliance with the family residential standards established by ICE." 83 Fed. Reg. at 45,525 (emphasis added).

Implementation of this section could and would result in the prolonged detention of children in family detention centers. If DHS can license itself, it can also indefinitely detain children in these facilities. WRC and numerous other organizations, including the American Academy of Pediatrics and ICE's own Advisory Committee on Family Residential Centers have long documented the harm of family detention, even for short periods of time. *See, e.g.*, *Locking Up Family Values*, Women's Commission for Refugee Women and Children & Lutheran Immigration and Refugee Service (Feb. 2007), https://www.womensrefugeecommission.org/images/zdocs/famdeten.pdf; Julie M. Linton et al., *Detention of Immigrant Children*, 139 Pediatrics (Mar. 13, 2017), http://pediatrics.aappublications.org/content/139/5/e20170483; and *Report of the ICE Advisory Committee on Family Residential Centers* (Oct. 7, 2016), https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf. These reports document the trauma and harm of family detention, including the absence of meaningful mental health and medical care in these facilities.

Moreover, neither the family residential standards nor a DHS-chosen entity to oversee compliance with these standards is the same as licensing in a state licensing scheme. "The purpose of the licensing provision is to provide class members the essential protection of regular and comprehensive oversight by an independent child welfare agency." *See Flores v. Johnson*, 212 F. Supp. 3d 864, 879 (C.D. Cal. 2015). In 2015, the *Flores* Court rejected the Government's argument that the licensing provision did not apply to family residential centers because there was no state licensing process available for facilities that held children in custody along with their parents or guardians. This proposed section of the regulations ignores these prior court orders by offering modifications previously rejected by the *Flores* Court in 2015.

For the reasons above, the Proposed Regulations should be withdrawn. Before they are proposed again, DHS must provide answers to the following questions:

- What is the legal basis for DHS to select an entity to monitor its own compliance with family residential standards? From where does this authority derive?
- What criteria would be used to select these outside entities?
- Who would these outside entities be?
- Would these outside entities have the legal authority to facilitate or recommend the opening of additional family detention facilities beyond the ones that currently exist? Or, conversely, would these outside entities have the legal authority to shut down facilities that are out of compliance? And who would audit their oversight?
- How would the independence and integrity of such an entity be guaranteed, especially considering the failure of DHS's current oversight mechanisms to ensure compliance with standards and child welfare norms?

Recently, DHS's Office of Inspector General ("OIG") found ICE's internal (Office of Detention Oversight) and external inspections regime in the context of adult detention to be woefully inadequate. *See* Office of Inspector General, OIG-18-67, ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements (2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf. In this instance, ICE was employing an independent contractor, Nakamoto, to conduct its inspections. *Id.* The OIG found the Nakamoto inspection practices "not consistently thorough." *Id.* The OIG also found a lack of integrity in these inspections, particularly with respect to how Nakamoto conducted its detainee interviews and instances where ICE refused to implement or enforce compliance with detention standards. One ICE employee even described Nakamoto inspections as "very, very, very difficult to fail." *Id.* Given OIG's recent findings and the frequency of repeat deficiencies in the same facilities, DHS must withdraw the Proposed Regulations. To the extent they are not or are again proposed, the Government must answer the following questions:

- Describe steps it will take to ensure the findings in OIG's report do not repeat themselves with respect to family residential inspections performed by third-party auditors.
- Confirm whether Nakamoto will participate or be considered as an "entity outside of DHS that has relevant audit experience."

- Confirm whether any independent contractor OIG identified as having insufficient inspection practices will serve as a third-party auditor to ensure compliance with family residential standards and whether OIG would have oversight over the external auditor(s).

- Identify how independent oversight and compliance with standards would be ensured when the oversight agency is contracted by DHS itself.

8 CFR 236.3(d) – Determining whether alien is a UAC
83 Fed. Reg. at 45,497, 45,525-26

The Proposed Regulations provide that even after an initial determination that a child is a UAC, immigration officers must redetermine whether someone is a UAC "each time" they encounter the child. The Proposed Regulations do not define "each time" and thus this provision is subject to great abuse. The Proposed Regulations further state that even though a child "may have been previously determined to be a UAC, [he or she] may no longer meet the definition if [he or she] reaches the age of 18, acquires legal status, or if a parent or legal guardian is available in the United States to provide care and physical custody. Once [a child] no longer meets the definition of a UAC, the legal protections afforded only to UACs under the law cease to apply." 83 Fed. Reg. at 45,497.

The Proposed Regulations also propose age determination decisions to be based upon the "totality of the evidence and circumstances." 83 Fed. Reg. at 45,525. A fundamental requirement for any agency's regulatory action is to provide definitions and criteria for consistent and nonarbitrary decision-making. *See, e.g.*, *S. Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974) (cautioning against "arbitrary and unequal application"); *W. Virginia Pub. Servs. Comm'n v. U.S. Dep't of Energy*, 681 F.2d 847, 863 n.75 (D.C. Cir. 1982) ("[A]n exercise of unfettered flexibility too often results in ad hoc judgments and arbitrary decisions, both of which are counterproductive to the greater regulatory goals of consistency in decisions and reasoned guidance upon which affected parties may rely."). This provision fails to set forth the guidelines immigration officers must follow to make these determinations and is utterly silent with respect to the level of training and or expertise required to conduct these determinations. This provision also fails to explain whether immigration officers will be required to submit recommendations to DHS headquarters about whether a child qualifies as a UAC.

This provision also fails to advance the public interest goal of effective administration of limited judicial resources. For example, under the Proposed Regulations, if a child's placement falls through, or the child goes back into the custody of ORR, he or she must then be reclassified as a UAC. Or, for a child who was classified as a UAC and began the asylum process with an

interview before an asylum officer, upon being stripped of UAC status, the child would then be back before an Immigration Judge.

Furthermore, constant re-evaluation and review with results that drastically affect a child's placement, rights, and access to protection create an unstable environment contrary to the intention and spirit of the FSA.

Given the due process concerns at stake with a child who loses UAC status, as well as both economic and judicial resources concerns, DHS should withdraw the Proposed Regulations, and to the extent they are proposed again, the Government must address the following questions:

- In an already backlogged system, how would this change advance the goal of effective administration of judicial resources?
- What guidelines must immigration officers follow to make UAC determinations? Are these guidelines consistent with current child welfare practice, the best interest of the child, and the FSA?
- What criteria will make up the "totality of the circumstances" judgment?
- How does re-evaluation and lack of stability affect the individual's vulnerability and best interest?
- How does a change in status affect the individual's need for any lost benefits or procedures?
- What level of training and/or expertise must the immigration officers have to make UAC determinations?
- Will immigration officers be required to submit recommendations to DHS headquarters concerning their UAC determinations?
- What input do child welfare professionals and ORR have in age determination and age determination mechanisms?

8 CFR 236.3(o) – Monitoring
83 Fed. Reg. at 45,504, 45,528

The Proposed Regulations suggest monitoring be performed by two Juvenile Coordinators—one for ICE and one for CBP. 83 Fed. Reg. at 45,504. The Proposed Regulations charge these

Juvenile Coordinators with "monitoring statistics about UACs and minors who remain in DHS custody for longer than 72 hours." *Id.* The Proposed Regulations allow the Juvenile Coordinators to collect hearing dates for aliens in DHS custody as well as "additional data points should they deem it appropriate given operational changes and other considerations." *Id.* This provision is extremely broad and ill defined. It does not provide meaningful standards necessary to implement adoption and ensure independent and meaningful monitoring. *See, e.g.*, *Checkosky v. SEC*, 139 F.3d 221, 226 (D.C. Cir. 1998) ("When an agency utterly fails to provide a standard for its decision, it runs afoul of more than one provision of the Administrative Procedure Act. . . . [A]n agency's failure to state its reasoning or to adopt an intelligible decisional standard is so glaring that we can declare with confidence that the agency action was arbitrary and capricious.") (internal quotations and citations omitted). To help avoid arbitrary and capricious action, DHS must withdraw this standard. If it does not or it proposes it again, the Government must answer the following questions:

- What are the additional data points and considerations the Juvenile Coordinators would be allowed to collect?
- To whom would the Juvenile Coordinators report this information?
- What are the "operational changes" to which this section refers?
- Who would determine what operational changes would necessitate the collection of "additional data" points?
- How would independence and accountability be ensured?
- What record keeping and data collection will be used to track performance, and how will those data points be used to ensure compliance?
- Will Juvenile Coordinators be provided with adequate resources and staffing to monitor these statistics in a meaningful and ongoing manner?
- Will CBP and ICE be required to provide data to Juvenile Coordinators, respectively, or will full, unfettered, and up-to-date access to internal databases, respectively, be required?
- What will the hiring process look like for Juvenile Coordinators? What qualifications would be required – e.g., some level of experience in each agency, child welfare training, or otherwise?

- Will there be a process by which Juvenile Coordinators can receive information and suggestions for additional data points or statistical lines of inquiry?

B. HHS Regulations

45 CFR 410 Subpart A – Care and Placement of Unaccompanied Alien Children

83 Fed. Reg. at 45,505, 45,529-30

This subpart provides for a "fluid" definition of an unaccompanied minor, in which "ORR's determination of whether a particular person is a UAC is an ongoing determination that may change based on the facts available to ORR." 83 Fed. Reg. at 45,505. It further proposes a definition for "secure facility," and states that the Department of Homeland Security will handle immigration benefits and enforcement. *Id.* There are three issues with this subpart, because it is 1) overbroad in failing to establish concrete guidelines with respect to ORR's "ongoing determination" of UAC qualifications; 2) unconstitutional because it lacks specific standards of care and due process protections with respect to deprivation of liberty and right to family in the placement of children in "secure facilities"; and 3) vague in that it fails to define implications of giving DHS the power to handle immigration benefits and enforcement. These deficiencies violate the important principle of clearly defined regulations that pass constitutional muster. *See generally Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–866 (1984); *see also Caruso v. Blockbuster-Sony Music Entm't Ctr. at Waterfront*, 193 F.3d 730, 733 (3d Cir. 1999) ("[G]iving substantive effect to . . . a hopelessly vague regulation . . . disserves the very purpose behind the delegation of lawmaking power to administrative agencies.") (citation omitted); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) ("[A]gency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.") (Thomas, J., dissenting).

First, the Government's proposed language regarding an "ongoing determination" of "UAC" gives the Government unchecked power to change and disrupt a UAC's processing with a mere flick of the wrist. To the extent the Proposed Regulations are withdrawn and proposed again, the Government should specify the criteria and define what qualifies as "facts available to ORR" that could trigger a reevaluation of a minor's status and how those triggering facts will ensure that detained minors are treated with "dignity, respect, and special concern for their particular vulnerability," per the *Flores* Settlement Agreement. *See* 83 Fed. Reg. at 45,505. The Government must also explain how changes in a determination of unaccompanied status impact the affected minor or individual's vulnerability and whether and how that change affects the individual's need for any lost benefits or procedures.

Next, the Government's proposed definition of "secure facilities" and subsequent discussion exceeds the scope of the Government's power because it fails to define any measures to keep families together. Such an oversight is impermissible under federal law. *See, e.g.*, *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018) ("The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as property. Certainly, that cannot satisfy the requirements of due process.").

Finally, as for benefits, the Government's proposed language does not discuss the implications of allowing DHS to handle benefits. For example, the language does not address whether benefits will impact a UAC's immigration proceedings, particularly as the Government is concurrently considering proposed changes to the regulations defining the meaning of a "public charge," which is grounds for "inadmissibility" under INA 212 (INA 212(a)(4)). Legislative history of the Homeland Security Act supports the concern of allowing the Department of Homeland Security to handle certain immigration issues. For example, a 2002 committee hearing expressed concern for "placing the immigration services functions into an organization with a paramilitary culture, designed to keep out terrorists." *See* Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002, at 45, Hearing before the Subcommittee on Immigration, Border Security, and Claims of the Committee of the Judiciary, June 27, 2002. This "[made] absolutely no sense" because, as the hearing noted, "the vast majority of people seeking immigration benefits on a day-to-day basis are already in the United States . . . [such as] young girls or women, already here, seeking protection from traffickers or smugglers . . . [or] unaccompanied minors seeking protection and support." *Id.* Therefore, should the Proposed Regulations be withdrawn and then proposed again, the Government should specify details regarding the processes DHS will use in issuing and determining benefits for UACs, including:

- Is there any limit to the ORR's "ongoing determination" of whether a person qualifies as a UAC?
- What specific criteria, or "facts available to ORR," could trigger a reevaluation of a minor's status as a UAC?
- Will there be any measures in place to ensure communication between siblings and family members when minors are placed in "secure facilities"?
- How is placement in a "secure facility" determined?
- How is review of justification and need for secure placement considered?

- How will the Government ensure that detained minors are treated with "dignity, respect, and special concern for their particular vulnerability"? Are there specific guidelines for concrete actions?

- How is the determination made to place a minor in a facility versus in foster care? Are there certain considerations or categories of minors that fall into either category?

- Does the provision of benefits, or application for the provision of benefits, harm or otherwise have any effect on a minor's case?

45 CFR 410 Subpart B – Determining the Placement of an Unaccompanied Alien Child

45 CFR 410.201 – Considerations generally applicable to the placement of a UAC

83 Fed. Reg. at 45,505, 45,530-31

While discussing this section regarding the generally applicable considerations to placement, the Government asserts that the Proposed Regulations recognize "the general principles of the FSA that while in custody, UACs shall be treated with dignity, respect, and special concern for their particular vulnerability" and that this section in particular "generally parallels the FSA requirements." 45 CFR at 45,505. The Government notes that "ORR makes reasonable efforts to provide placements in the geographic areas where DHS apprehends the majority of UACs" and asserts that it complies with this provision because "ORR maintains the highest number of UAC beds in the state of Texas where most UACs are currently apprehended." *Id.* The Government does not otherwise provide any explanation for its enumeration of the generally applicable considerations for UAC placement. Accordingly, the Proposed Regulations are unsupported should be withdrawn. To the extent they are not or are again proposed, HHS must answer the following questions:

- What specific measures are required and will be taken to ensure respect for the dignity and vulnerability of UACs?

- What reasonable efforts will be made for the placement of UACs, including whether efforts to place UACs near family members is a factor?

- What is the exact geographic area that will be considered when making placements of UACs? On what is this information based?

45 CFR 410.202 – Placement of a UAC in a licensed program
83 Fed. Reg. at 45,505, 45,530

In the context of placement of a UAC, the Proposed Regulations then provide that ORR will place UACs into a licensed program "promptly" after the UACs are referred to ORR legal custody, except in enumerated circumstances, such as: in the event of an emergency influx; where the UAC meets criteria for placement in a secure facility; and as otherwise required by court decree or court-approved settlement. However, the Proposed Regulations fail to address the agency's practice that the *Flores* Court and others have identified fail to comply with relevant law, including but not limited to the FSA, and result in moving children "up" to secure facilities without any objectively valid documentation or support. Additionally, the Proposed Regulations inexplicably do not include the exception in the FSA that allows transfer within five days where an individual speaks an "unusual language."

The Proposed Regulations, therefore, should be withdrawn. To the extent they are not or are again proposed, HHS must answer the following questions:

- Will HHS consider any other exceptions when placing a UAC into a licensed program?
- Will the licensed programs have ongoing standards they must maintain? What are these criteria?
- Why was the transfer period exception omitted from the regulations?
- How does HHS define "unusual language"? What constitutes an "unusual language"?

45 CFR 410.205 – Applicability of Sec. 410.203 for placement in a secure facility
83 Fed. Reg. at 45,506, 45,531

The Proposed Regulations offer an unclear standard— "appropriate in the circumstances"—for placement in a secure facility, but it does not codify TVPRA's "least restrictive" language. The regulations also purport to remove the factor under the FSA of being an escape risk pursuant the TVPRA. Finally, the regulations do not include specific examples of behavior or offenses that could result in secure detention.

Therefore, the Proposed Regulations should be withdrawn. To the extent they are not or are proposed again, HHS must answer the following questions:

- How were these criteria selected?
- Will any other criteria be considered?
- How is a secure facility interpreted? How did HHS arrive at these criteria?
- How will any personal information learned about the UACs be stored? What privacy protections are available?

45 CFR 410.206 – Information for UAC concerning the reasons for his or her placement in a secure or staff secure facility
83 Fed. Reg. at 45,506, 45,531

The Proposed Regulations do not provide clarification of what the "reasonable time" is for transferring a UAC to a secured facility. As such, the Proposed Regulations should be withdrawn and to the extent they are proposed anew, HHS must answer the following questions before implementing the regulations:

- What is the "reasonable time" HHS considers when deciding a transfer?
- How were these criteria determined?

45 CFR 410.207 – Custody of a UAC placed pursuant to this subpart
83 Fed. Reg. at 45,506, 45,531

The Proposed Regulations provide that "upon release of an approved sponsor, a UAC is no longer in the custody of ORR." The explicit renunciation of responsibility for a UAC upon placement with a sponsor is problematic, particularly given known concerns about child trafficking. The omission of any follow-up mechanism creates a grave risk for dignity and vulnerability of a UAC who finds himself with an abusive sponsor. The Proposed Regulations should be withdrawn, and to the extent they are proposed again, HHS must answer the following questions:

- What criteria will HHS consider when releasing a UAC to an approved sponsor?
- What criteria will HHS consider when approving an individual as a sponsor?

- What protections will HHS take to ensure the UAC is safe with the sponsor, including post-placement and release?

- If HHS cites to its 30-day post-release follow-up call and/or its support hotline, do these constitute the universe of protections available post-release to children and, if so, how has HHS determined that these are sufficient?

45 CFR 410.208 – Special needs minors
83 Fed. Reg. at 45,506, 45,531

HHS offers this section without robust discussion and thus in an arbitrary and capricious manner. The Proposed Regulations should be withdrawn, and to the extent they are proposed anew, HHS must answer the following questions:

- How does HHS define a special needs minor?

- What considerations will HHS account for with respect to a special needs minor?

45 CFR 410.209 – Procedures during an emergency or influx
83 Fed. Reg. at 45,507, 45,531

The Proposed Regulations adopt the definition of "emergency" and "influx" from the FSA. Additionally, this section of the Proposed Regulations provides that UACs will be placed in a licensed program as "expeditiously as possible." However, the Proposed Regulations do not address meaningful and practical issues at play in these scenarios, such as where will the UAC be before this placement and what is the maximum timeframe before a UAC can be placed in a licensed program. These practical issues are relevant to understanding whether the Proposed Regulations comport with the requirements of the FSA.

The Proposed Regulations should be withdrawn, and to the extent they are proposed anew, HHS must answer the following questions:

- How will HHS determine if the "emergency influx" exception applies? What criteria will it consider?

- What is the time frame for placing UACs in a new licensed program if these procedures are invoked?

- What criteria or standards apply in an emergency or influx situation? How were these developed? What was considered in determining these factors?

45 CFR 410 Subpart C – Releasing a UAC from ORR Custody
83 Fed. Reg. at 45,507-08, 45,531-32

This subpart addresses the policies and procedures to release a UAC from ORR custody to an approved sponsor. *See* 83 Fed. Reg. at 45,507. Proposed 45 CFR 410.301 and 410.302 attempt to articulate a policy with respect to 1) when ORR will release a UAC and 2) to which individuals or entities ORR will release such UAC. *Id*. This subpart broadly states that ORR will release a UAC to a sponsor without "unnecessary delay" when ORR determines that the continued custody of the UAC is not required "either to secure the UAC's timely appearance before DHS or the immigration courts, or to ensure the UAC's safety or the safety of others." *Id*. This subpart goes on to propose several general factors that ORR will consider when determining whether a potential sponsor is "suitable" to take custody of the applicable UAC. The Proposed Regulations as drafted in this subpart are deficient for several reasons, including that the standard for releasing UACs and the determination of to which sponsors such UAC may be released are overly broad and vague. *See, e.g.*, *Chevron*, 467 U.S. at 865; *Checkosky*, 139 F.3d at 226 ("When an agency utterly fails to provide a standard for its decision, it runs afoul of more than one provision of the Administrative Procedure Act. . . . [A]n agency's failure to state its reasoning or to adopt an intelligible decisional standard is so glaring that we can declare with confidence that the agency action was arbitrary and capricious.") (internal quotations and citation omitted); *see also Shalala*, 512 U.S. at 525 (Thomas, J., dissenting) ("[A]gency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.").

The Government's language in Proposed 45 CFR 410.301 that it will release a UAC to a sponsor without "unnecessary delay" is problematic because the Proposed Regulations do not define what constitutes unnecessary delay or otherwise provide any standard for ORR to follow when it is making such determination. Considering the government's recent Memorandum of Agreement, it appears that the government is causing delay by adding unnecessary restrictions to the reunification process that not only delay the process but also discourage children from sharing all relevant information with authorities. *Backgrounder: ORR and DHS Information-Sharing Emphasizes Enforcement Over Child Safety*, Women's Refugee Commission & National Immigrant Justice Center (June 6, 2018), https://www.womensrefugeecommission.org/rights/gbv/resources/1642-backgrounder-memorandum-of-agreement-between-dhs-and-hhs-emphasizes-immigration-enforcement-over-child-safety.

Similarly, the Proposed Regulations do not provide any details regarding how ORR will determine that if a UAC were to be released, they would be at risk of not making a "timely appearance before DHS or the immigration courts." The Proposed Regulations should be withdrawn, and to the extent they are proposed anew, HHS must answer the following questions:

- What factors would militate against releasing a UAC due to such risk?
- How are those factors determined?
- Who is responsible for making such determinations?
- Is there a mechanism for mitigating that risk or an opportunity for a minor or sponsor to mitigate an identified risk?
- Conversely, how will ORR determine that a UAC's continued detention will ensure their own safety?
- How will ORR ensure that the information children share with their case managers and other ORR personnel is used for the children's best interest and that the children's privacy rights will not be violated (e.g., if this information is shared with DHS)?

The Proposed Regulations provide no guidance on the standard that ORR will use when making such determinations. There is nothing that provides clarity or definitiveness to UACs about the process or substance for determining whether the UAC should be released.

Proposed 45 CFR 410.302 attempts to outline the "process requirements leading to a release of a UAC from ORR custody to a sponsor." 83 Fed. Reg. 45,507. ORR may require a "suitability assessment" prior to releasing a UAC to a sponsor that would include a background check, investigation of the living conditions and the standard of care a UAC would receive, interviews with household members, a home visit and follow-up visits. *Id*. Furthermore, the Proposed Regulation would allow ORR to fingerprint potential sponsors and for background checks to be run "on their biometric and biographical data", which the Government asserts is consistent with "child welfare provisions." *Id*. Sponsors and other household members would also be subject to criminal record checks, including checking national criminal records/databases. While it is, of course, imperative that the UAC's safety is paramount, the process described in this subpart has, vis-à-vis the implementation of the FSA, led to undue delay in releasing the UAC from ORR's custody. Even more problematic is that the Proposed Regulations do not provide any mechanism for ensuring that the process for determining sponsor suitability isn't used by ORR (and DHS) to improperly arrest potential sponsors for solely administrative violations of law, such as being present in the country without valid immigration status. *Cf*. ORR, Children Entering the United States Unaccompanied (2015) at § 2.5.2 ("ORR does not disqualify potential sponsors on the

basis of their immigration status"). Proposed 45 CFR 410.302 also includes a statement, unsupported by any evidence, that in "many, if not most cases" the UAC has not lived with its biological parent for much or a significant portion of the UAC's life. *Id.* It is not clear why the Proposed Regulations include this naked assertion. The order of preference for releasing UAC's to sponsors provided that the parent or legal guardian of the UAC is the preferred sponsor. By asserting that the parent of the UAC may not be the preferred sponsor the Proposed Regulation conflicts with the order of preference set forth in the FSA.

45 CFR 410 Subpart D – What Standards Must Licensed Programs Meet?

45 CFR 410.403 – Ensuring that licensed programs are providing services as required by these regulations

83 Fed. Reg. at 45,508, 45,533

The history of the FSA has shown that monitoring and oversight are critical components to ensure compliance with the requirements that are being proposed in this regulation. However, the Government has not included any monitoring regarding center compliance with licensing standards. *See* 45 CFR 410.403 ("ORR monitors compliance with the terms of this regulation."). By merely identifying ORR as the entity with monitoring authority, the regulation does not require monitoring at all, much less set forth the standards by which such compliance would be measured, the time intervals at which such compliance would be monitored, or the reporting mechanism by which such monitoring could be verified. This issue is compounded by ORR's known monitoring shortfalls, including ORR's prior monitoring of unaccompanied minor facilities in the past being found to be incomplete. *See* GAO, Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care, GAO-16-180 (Washington, D.C.: February 5, 2016). The Government Accountability Office expressed concern that ORR's failure to conduct monitoring signifies that "ORR may not be able to identify areas where children's care is not provided in accordance with ORR policies and the agreements with grantees." *Id.* ORR's failure to employ an auditor for its PREA monitoring of all 100-plus ORR facilities, due in February 2019, until the fall of 2018, despite having a three-year period to conduct the audit, demonstrates conclusively that ORR must be given requirements and guidelines if any monitoring is to be effectively performed.

Current access for thorough independent monitoring (with private access to speak to children) is exclusively given under the FSA. The Proposed Regulations provide no reliable or reasonable alternative monitoring process.

The Proposed Regulations should be withdrawn, and to the extent they are proposed anew, HHS must answer the following questions:

- When setting forth this oversight provision, did HHS consider alternative language that would make clear that monitoring was required by ORR, such as "ORR shall monitor compliance with the terms of this regulation"? If so, why was mandatory language not included?

- When setting forth this oversight provision, did HHS consider mandating a time period within which monitoring must be accomplished (e.g., annually, twice a year, every two years)? Why was a time period ultimately not included?

- When setting forth this oversight provision, did HHS consider standards and evaluations that would be used to ensure compliance? Why are all such provisions absent from this proposal?

- Did HHS consider what records ORR should collect, create, and maintain as part of its monitoring program? Which were considered and why were they ultimately not included in this proposed provision?

45 CFR 401 Subpart F – Transfer of a UAC
83 Fed. Reg. at 45,508, 45,533

This subpart provides that ORR may need to change the placement of a UAC for various reasons, including changes in placement availability and fluctuations in a UAC's immigration case. 83 Fed. Reg. at 45,508. However, the rule is unconstitutionally vague because it offers no specifications or limitations for how many times the ORR may change the placement of a UAC. Under the current language, this means that a UAC can be transferred every day, separated from family members, and subject to the traumatic effects of constant displacement. Frequent relocation also increases the challenges behind family reunification and identification, tracking of UACs, and the ability of children and adults to access counsel, including the network of pro bono lawyers around the country who have been trained in representing UACs and their parents. *See Ms. L.*, 310 F. Supp. 3d at 1144 (rejecting a system with no "effective … procedure for (1) tracking the children after they were separated from their parents"). These unaddressed obstacles implicate the Government's promise to treat UACs with "dignity, respect, and special concern for their particular vulnerability," as per the *Flores* Settlement Agreement. The Government should provide limitations and guidelines for ORR's ability to change the placement of a UAC, as well as clarify the details of how the safety determination will be made to trigger the 24-hour notice to the UAC's attorney.

Furthermore, the proposed language in this subpart states that ORR must take "all necessary precautions for the protection of UACs during transportation with adults" but does not otherwise address protection of UACs during transfer. 83 Fed. Reg. at 45,508. For example, if the transfer of UACs occurs without adults, the Government does not specify the relevant precautions. Unless the Government can show that minors are never transported without adults, such vagueness cannot stand. *See generally Chevron*, 467 U.S. at 865; *see also Shalala*, 512 U.S. at 525 ("By giving substantive effect to such a hopelessly vague regulation, the Court disserves the very purpose behind the delegation of lawmaking power to administrative agencies, which is to resolve . . . ambiguity in a statutory text.") (Thomas, J., dissenting) (quotation marks omitted), citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). The Proposed Regulations should be withdrawn, and to the extent they are proposed anew, HHS must answer the following questions:

- Is there a rule or limitation as to how many times the ORR may change the placement of a UAC?
- What measures will the Government take to ensure that frequent transfers do not obstruct UAC's communication with counsel or the ability to obtain or retain counsel?
- How is the safety determination made to trigger the 24-hour notice to the UAC's attorney?
- What steps will the Government take to ensure that frequent relocation does not hinder or obstruct immigration proceedings?
- How, if at all, does an upcoming hearing or proceeding before an immigration court affect transfer determinations?
- Is there any notification of transfer to the minor's family? What if that family is also in custody? What about minor siblings that may also be in custody?
- What specific measures will be taken to ensure that "all necessary precautions for the protection of UACs during transportation with adults"? Are there any guidelines to these precautions?
- What about the transportation of UACs without adults?
- Under what circumstances are minors transported with adults, and by whom?
- Who is transporting the children?

- If a contractor in the main mode of transport, can the Government specify which contractors it uses, including their names?
- How are the drivers who transport the UACs selected and vetted?
- Are records kept of which drivers transported UACs?
- Is there a time limit on travel?
- Are there requirements regarding access to food, water, bathroom stops, rest breaks, or other measures during transport of UACs?

45 CFR 410 Subpart G – Age Determinations
83 Fed. Reg. at 45,508, 45,533

The Proposed Regulations take into account "multiple forms of evidence" when determining a UACs age, including non-exclusive use of radiographs, and "may involve medical, dental, or other appropriate procedures to verify age." HHS has failed to explain why and how the current system, based in science, to determine age needs to be or should be modified. HHS has not set forth any advantage in expanding beyond scientifically-based evidence and the obvious drawback is the introduction of subjectivity to such determinations.

The Proposed Regulations should be withdrawn, and to the extent they are proposed anew, HHS must answer the following questions before implementing the Proposed Regulations:

- What other evidence will HHS use to determine age?
- Are these evidentiary mechanisms accurate and accepted in medical circles and child welfare practice as appropriate and accurate indicators?
- How will HHS preserve and store this information to ensure the individual's private information is kept confidential?
- Will this evidence be shared with the UAC?

45 CFR 410 Subpart H – UACs' Objections to ORR Determinations
83 Fed. Reg. at 45,508, 45,533

This subpart is intended to address the process and procedures for UACs objecting to ORR's placement decisions. However, in the Proposed Regulations, HHS intentionally omits processes for objecting to ORR placement that are analogous to Paragraphs 24(B) and 24(C) of the FSA. *Id*. By excluding analogous provisions for these paragraphs, the Proposed Regulations materially weaken and undermine the FSA despite the requirement to implement the terms of the settlement agreement through the regulations. *Id*. at 45,486; *Flores v. Reno*, No. 85-4544-RJK (Px), Stipulated Settlement Agreement (C.D. Cal., Jan 17, 1997) ("The final regulations shall not be inconsistent with the terms of this Agreement."). The ability for UACs to challenge ORR determinations under the Proposed Regulations is significantly weaker than UAC's rights under the Settlement Agreement. The reasoning in this subpart that sovereign immunity would bar the right of a UAC to seek judicial review of ORR's placement decision with respect to such UAC is misplaced. Suits against the Government that seek prospective equitable relief are not barred by the doctrine of sovereign immunity. *See Ex Parte Young*, 209 U.S. 123 (1908). The Proposed Regulations should be withdrawn, and to the extent they are proposed anew, HHS must answer the following questions:

- Is HHS and ORR's intention to eliminate the right of UACs to commence judicial review of ORR's placement decision with respect to such UAC?

- Is HHS and ORR's view that UACs would be barred from challenging ORR's placement decision due to sovereign immunity?

- What standard of review would be applicable with respect to judicial review of a UAC's placement?

- Will the Proposed Regulations include any minimum standards for licensed programs as set forth in the FSA?

This subpart also provides that when a UAC is placed in a more "restrictive level of care", the UAC will receive a notice—within a reasonable period of time—explaining the reasons for "housing" such UAC in the more restrictive environment (the "Restrictive Housing Notice"). Furthermore, ORR will promptly provide each UAC not released with a list of free legal services compiled by ORR (unless such a list was previously given to the UAC). Given the unsettled and transitory nature of detention and placement in a facility, ORR should provide a list of free legal services to every UAC regardless of whether they've previously been provided with such a list. The Proposed Regulations should be withdrawn, and to the extent they are proposed anew, HHS must answer the following questions:

- What constitutes a reasonable period of time for delivery of the Restrictive Housing Notice to the UAC in a language that such UAC understands?
- If the UAC cannot yet read or speaks an uncommon language, what accommodations will ORR and HHS make to communicate the contents of the Restrictive Housing Notice?
- Does ORR intend to prevent UACs from challenging the placement decision?
- With respect to the list of free legal services to be provided by ORR to the UAC, why does ORR intend to give a list of free legal services to UACs only once?