
December 4, 2023

*Submitted via:* https://www.regulations.gov
*Courtesy Copy to:* UCPolicy-RegulatoryAffairs@acf.hhs.gov

Docket ID No. ACF-2023-0009-0001
RIN: 0970-AC93

Toby Biswas, Director of Policy
Unaccompanied Children Program
Office of Refugee Resettlement
Administration for Children and Families
Department of Health and Human Services
Washington, DC

Dear Mr. Biswas,

The Women's Refugee Commission (WRC) writes to comment upon proposed rulemaking issued by the Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS) on October 4, 2023, entitled "Unaccompanied Children Program Foundational Rule" (the "proposed rule").
.
WRC notes that the comments in this document may expand or supplement other submissions to comment on the proposed rule to which WRC has signed on.

**WRC's interest in commenting on the proposed rule**

The **Women's Refugee Commission** is a 501(c)(3) non-profit organization that advocates for the rights of women, children, and youth fleeing violence and persecution. Within WRC, the Migrant Rights and Justice Program focuses on the right to seek asylum in the United States and strives to

ensure that migrants and refugees are provided with humane reception in transit and in the United States, given access to legal protection, and are protected from exposure to gender discrimination or gender-based violence. We are leading experts on the needs of women, children, and families in situations of forced displacement, including unaccompanied children, and on the policies and programs that can protect and empower them.

The Migrant Rights and Justice program has longstanding and deep experience with researching, monitoring, and advocating for improved conditions of care in and support with release and reunification from ORR custody. Based on the information that we collect on our monitoring visits and our analysis of the laws and policies relating to these issues, we advocate for improvements, including by meeting with government officials and service providers and by documenting our findings through fact sheets, reports, backgrounders, and other materials.[1] We make recommendations to address identified or observed gaps or ways in which we believe the corresponding department or agency can improve its compliance with the relevant standards.

## 1. Overview

WRC offers two significant concerns with the proposed rule. First, the sections of the proposed rule that treat licensure and monitoring are deeply premature and present a significant defect to the proposed rule. These sections (including but not limited to within § 410.1001 and § 410.1302) fundamentally depend upon a second proposed rule entitled "Federal Licensing of Office of Refugee Resettlement Facilities" (RIN: 0970-AC94) – a rule that is, both at time of publication of the proposed rule and of our writing this comment, unavailable for public inspection. Because the "federal licensing" rules are unavailable, WRC is unable to determine the suitability of monitoring and oversight as they relate to (1) children's best interests and (2) compliance with the standards in the *Flores* Settlement Agreement ("FSA" or "Flores").

Further, in the licensure and monitoring text of the proposed rule, ORR's proposed language to require that a program "be licensed by an appropriate State or Federal agency, or meet other requirements specified by ORR" at § 410.1302(a) is insufficient to protect unaccompanied children. § 410.1302 places no limits on the circumstances in which a facility must be state licensed, that is, treating all of state licensure, federal licensure, or "other standards" as functionally equivalent. This construction appears to allow latitude for provider facilities to meet the lowest or the three standards, and to include unlicensed care-provider facilities in states that

[1] E.g., Women's Refugee Commission 2010. *Halfway Home: Unaccompanied Children in Immigration Custody*. Available at https://www.womensrefugeecommission.org/research-resources/halfway-home-unaccompanied-children-in-immigration-custody/; Women's Refugee Commission 2023, "Decreasing ORR's Dependence on Congregate Care: Four Recommendations for Progress." Available at https://www.womensrefugeecommission.org/research-resources/decreasing-orr-dependence-on-congregate-care-four-recommendations-for-progress/

do offer licensure to care for unaccompanied children. Nor does the construction contemplate any barrier to facilities that have had state licenses removed for cause for serious violations, or that have voluntarily returned their licenses to the licensing state just after serious violations have been alleged. Revocation of state licensure for cause may be relatively uncommon but has occurred in the ORR network even in 2022.[2] Finally, WRC also believes that "other standards" § 410.1001 and § 410.1302(a) run contrary to both the spirit and the text of *Flores.* State licensure – especially as state licensing agencies provide ongoing monitoring and oversight – is an essential condition to the health of the ORR system and to the ongoing safety and security of unaccompanied children, and any unspecified set of "other standards" that do not have to go through a formal rulemaking process are insufficient to protect children.

Second, the proposed rule would establish an Unaccompanied Children Office of the Ombuds ("Ombuds") at proposed Subpart K. WRC is deeply concerned that, as proposed, the Ombuds lacks critical enforcement mechanisms to rectify deficiencies in the care of unaccompanied children and, for this reason, that the proposed rule offers less protection to children when compared to the current status quo of *Flores* monitoring. Based on ORR's past performance – in which *Flores* monitoring via numerous motions to enforce has materially improved the well-being of thousands of unaccompanied children in ORR care[3] – we believe the need for robust and compelling oversight of ORR will be ongoing. The proposed Ombuds office does provide an important avenue through which to evaluate and oversee compliance and to receive and investigate complaints and concerns from children in care, families, providers, and other stakeholders. WRC welcomes the Ombuds and would applaud a stronger version of the office, especially outside of the proposed rule. But the proposed rule's preamble states clearly that "an ombud's office would not have authority to compel ORR to take certain actions." Given that the proposed rule contemplates the dissolution of the FSA, and given that much of the Ombuds-related text in the proposed rule uses permissive rather than mandatory language to discuss activities performed by the Ombuds Office, WRC is unclear what the fundamental purpose of the Ombuds is and, more to the point, what actual protection the Ombuds office provides for children.

WRC also supports and applauds key parts of the proposed rule, in particular the sections that affect the reproductive justice rights of unaccompanied children. With partner organizations,

---

[2] See Sher, Andy. "Tennessee, Baptiste Group end legal battle over Chattanooga migrant center" *Chattanooga Times Free Press,* June 13, 2022, available at https://www.timesfreepress.com/news/2022/jun/13/tennessee-baptiste-groend-legal-battle-over-c/.

[3] *See, e.g.,* Flores v. Barr, Case No. CV-85-4544-DMG, U.S. District Court, Central District of California, Notice of Motion and Motion to Enforce Settlement re Emergency Intake Sites [Dkt. 1256-1], August 9, 2021, https://youthlaw.org/sites/default/files/2022-10/1256-1%20Proposed%20Settlement.pdf; Order re Plaintiffs' Motion to Enforce Settlement as to "Title 42" Class Members [Dkt. 976], September 4, 2020, https://youthlaw.org/sites/default/files/2022-03/976-Flores-Order-re-Hotel-MTE.pdf; Order re Plaintiffs' Motion to Enforce Class Action Settlement [Dkt. 470], July 30, 2018, https://youthlaw.org/sites/default/files/wp_attachments/Flores-MTE-order.pdf.

WRC has submitted a separate comment that includes numerous specific recommendations for changes that affirm and strengthen ORR's commitment to reproductive care and access to abortion care for unaccompanied youth. We incorporate those comments here with a summary table and the whole of those comments by attachment.

Beyond these three key points, WRC offers additional regulatory analysis on the subsections of the proposed rule listed below, as well as specific recommendations. In Section 5 of this comment, WRC's comments include noting where we commend the inclusion of specific language or sections, as well as recommendations that propose specific edits to the regulatory text. We have underlined our recommended additional language, and added strike-throughs to language we recommend removing.

## 2. The proposed rule's changes to state licensing

### a. Overview on state licensing

The *Flores* Settlement Agreement (FSA) mandates that unaccompanied children must generally be placed in a facility "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children" and these facilities must "comply with all applicable state child welfare laws and regulations." State agencies set licensing standards to ensure child safety and wellbeing, monitor facilities' compliance through both onsite review and desk inspections, investigate potential violations of licensing and allegations of the mistreatment of children, and mandate corrective action.[4] States have developed both a necessary expertise and an equally necessary infrastructure for these duties, due in part to states' necessary oversight of domestic child-welfare facilities. State child-welfare authorities are also independent and retain enforcement authority. These features of state licensing are hard to replicate, and the state-licensing requirement is broadly understood as indispensable to the FSA and equally indispensable to the best interests of children in ORR custody.

Monitoring under the FSA has been critical in identifying conditions that put children's safety and welfare at risk. Flores counsel is empowered to interview unaccompanied children in facilities about their care, and can pursue legal recourse in federal court for any violations of FSA standards. Numerous motions to enforce across multiple presidential Administrations and the recent appointment of a Special Monitor attest to the need for rigorous and independent monitoring – as do reports from the Office of the Inspector General of the Department of Health

[4] See, e.g., Illinois's Licensing Standards for Child Care Institutions and Maternity Centers available at https://www2.illinois.gov/dcfs/aboutus/notices/Documents/rules_404.pdf; and Michigan's Licensing Rules for Child Caring Institutions, available at https://www.michigan.gov/documents/mdhhs/CWL-Pub-452_684825_7.pdf

and Human Services.[5] Flores monitoring exists alongside state licensure and state compliance work to ensure that children receive adequate care while in government custody.

WRC believes that state licensing of facilities is a basic prerequisite for the well-being of unaccompanied children. As Texas and Florida have changed their regulations to delicense facilities that formerly had held licensure, ORR has had to step into the void to provide for some level of monitoring of care-provider facilities. Based on our current knowledge, we continue to believe that such ORR reviews lack the independence that parties external to the federal government provide, and we continue to have concerns that the monitoring, oversight, and compliance work provided may not be as rigorous as that formerly provided in those states. Finally, We note the reports of alleged or confirmed substandard conditions and procedures in recent years at ORR unlicensed sites at Homestead, Florida[6]; Tornillo, Texas[7]; and Ft. Bliss, Texas.[8] We also note that such reports are far more common at unlicensed sites than at ORR's standard care providers, and, because of the size of Influx Care Facilities and Emergency Intake Sites, these problems affect far more children.

**b. The proposed rule fails to provide necessary information about licensure for regulatory analysis from stakeholders and members of the public**

The proposed rule at § 410.1001 "Standard Program" and at § 410.1302(a) makes changes to the FSA to allow programs to care for unaccompanied children without state licensing (see further discussion below at 2d-2e). The common text between them is that programs may meet state licensing requirements or "other requirements specified by ORR." The preamble confirms that "ACF is currently developing a notice of proposed rulemaking that would describe the creation of a Federal licensing scheme for ORR care providers located in states where licensure is unavailable to programs serving unaccompanied children." This "federal licensing scheme" is

---

[5] U.S. Government Accountability Office 2020. *Unaccompanied Children: Actions Needed to Improve Grant Applications Reviews and Oversight of Care Facilities.* GAO-20-609, available at https://www.gao.gov/assets/gao-20-609.pdf.

[6] Amnesty International 2019. *No Home for Children: The Homestead "Temporary Emergency" Facility*. Available at https://www.amnestyusa.org/wp-content/uploads/2019/07/HomesteadReport_1072019_AB_compressed.pdf.

[7] Office of Inspector General, Department of Health and Human Services 2018. *The Tornillo Influx Care Facility: Concerns About Staff Background Checks and Number of Clinicians on Staff,* available at https://oig.hhs.gov/oas/reports/region12/121920000.pdf.

[8] Desai, N, de Gramont, D, and A. Miller 2021. *Unregulated & Unsafe: The Use of Emergency Intake Sites to Detain Immigrant Children*. National Center for Youth Law, available at https://youthlaw.org/unregulated-unsafe-emergency-intake-sites; Office of Inspector General, Department of Health and Human Services 2022. *Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children.* Available at https://oig.hhs.gov/oei/reports/OEI-07-21-00251.pdf

unavailable for public inspection. Indeed, the Proposed Rule does not offer *any* detail regarding this potential federal licensing scheme or any assurances that federal licensing will incorporate the minimum standards and oversight mechanisms of state licensure. Without information on federal licensing or any detail on the "other requirements specified by ORR," stakeholders cannot fully and adequately respond to the Proposed Rule.

Firstly, the proposed rule depends on the alternative to state licensure – encompassing a wide swath of rules that go beyond and complement those found in the proposed rule, in provisions such as those found in proposed Subparts B and D. Without this, any commenter is missing some portion of the necessary information. The asynchronous release of the two necessary parts prevents comments that might advise a provision be preferably included in one rule over another. A provision's placement might be arbitrary in the sense that it could fit meaningfully in one or the other rule, even while the choice of placement in one rule may have different effects and outcomes than placement in another rule.

Moreover, the sufficiency or insufficiency of many provisions can only be ascertained together with how those provisions will be monitored and enforced. Whether a lower speed limit on a road in front of a school is preferable to speed bumps on the same road depends in part on whether drivers believe police might ticket them, as well as how much the ticket would cost. Likewise the sufficiency or insufficiency of standard program conditions as described in Subpart D is only as good as the licensure (or accreditation) standards, the resultant monitoring, and compliance work to ensure that the regulation receives initial compliance, that compliance is ongoing, that deficiencies are promptly rectified, and that accountability exists for violations that put children at risk of harm.

Second, the two rules would interact. For provisions found solely in a single rule, the necessary standards may change based on what licensing regimes are available within the unavailable "federal licensing scheme." Again, in Subpart D, the sufficiency or insufficiency of the standard program conditions are different for providers in California if those providers might opt out of California's state licensing, which includes a foster youth bill of rights.[9] Provisions like those protecting privacy and personally identifiable information from misuse (subpart F, at § 410.1210(i), and at § 410.1303(g)) are sufficient to the extent that they are meaningfully connected to the data and record-keeping practices and those practices' attendant forms of risk. A prospective "federal licensing scheme" might and should treat youth's right to communication – California's foster youth bill of rights requires youth have access to communication with family[10] – and may require record-keeping to ensure the right is available, but without text

[9] California Foster Youth Bill of Rights, available at https://fosteryouthhelp.ca.gov/wp-content/uploads/sites/276/2020/10/Foster-Youth-Bill-of-Rights-WIC-16001.9_ADAComplaint.pdf

[10] From the California foster youth bill of rights: "(12) To visit and contact siblings, family members, and relatives privately, unless prohibited by court order, and to ask the court for visitation with the child's

available for how any records are created and what they might contain as well as what is impermissible, the proper forms of privacy protection cannot be determined because the two rules interact.

### c. Federal licensing cannot be an alternative to state licensing in states that have licensing framework available

At § 410.1302(a), the proposed rule offers three options for licensure for standard programs They include that the program:

> "Be licensed by an appropriate State or Federal agency, or meet other requirements specified by ORR if licensure is unavailable to programs providing services to unaccompanied children in their State, to provide residential, group, or foster care services for dependent children."

The language in this section seems to permit programs to choose between three options: (1) state licensing, (2) federal licensing, or (3) "if licensure is unavailable" to programs in a certain state, then the program is required to "meet other requirements specified by ORR." Among these, the text at § 410.1302(a) is ambiguous, leaving open the possibility that a provider in a state where licensing is available might opt instead for federal licensing – that is, choose the easier of the two. Federal licensure may be a necessary substitute for state licensure in states that decline to license all unaccompanied children's care, such as Texas and Florida; federal licensure is inappropriate as an alternative form of licensure to state licensing when state licensing is available. WRC strongly recommends that ORR clarify this text in any final rule.

WRC also opposes the "other requirements specified by ORR" but is prevented from offering deeper analysis as there is no information about such requirements. We are deeply concerned, however, that any ORR requirement could be weaker than current state licensing mechanisms, be subject to unpredictable changes that could weaken even prior ORR requirements, and lack the sufficient enforcement mechanisms to ensure meaningful oversight and accountability.

### d. The "standard program" definition should exclude placements that lack state licensure

WRC unconditionally opposes any definition of "Standard Program" that includes providers other than state-licensed facilities. "Standard program" should refer to state-licensed programs,

---

siblings. (13) To make, send, and receive confidential telephone calls and other electronic communications, and to send and receive unopened mail, unless prohibited by court order."

following the text and spirit of the FSA. Unlicensed programs are fundamentally distinct in their needs for oversight, monitoring, compliance, and accountability structures (see 2b above for further discussion). Defining "standard program" to include unlicensed programs is a conflation of provider types that must be differentiated. ORR cannot and should not treat state-licensed programs as equivalent to unlicensed programs, in part because doing so introduces perverse incentives into the structure of the rules (see also 2i below in this comment for further discussion). WRC recommends that the text at § 410.1001 "Standard Program", should categorically remove "other requirements specified by ORR," and an appropriate, separate definition for "unlicensed programs" be added.

**e. The proposed licensure is inconsistent in the number of options that shall be available to care-provider programs**

The proposed rule is inconsistent in how many options for licensure will be available after finalization of the rule. At § 410.1001 "standard program", the proposed rule offers two options for licensure for standard programs (state and "other requirements"):

> "Standard program means any program, agency, or organization that is licensed by an appropriate State agency, or that meets other requirements specified by ORR if licensure is unavailable in the State to programs providing services to unaccompanied children, to provide residential, group, or transitional or long-term home care services for dependent children, including a program operating family or group homes, or facilities for special needs unaccompanied children."

At § 410.1302(a), the proposed rule offers three options for licensure for standard programs (state licensing, federal licensing, "other requirements"):

> "Be licensed by an appropriate State or Federal agency, or meet other requirements specified by ORR if licensure is unavailable to programs providing services to unaccompanied children in their State, to provide residential, group, or foster care services for dependent children."

The lack of clarity in how the "federal licensure scheme" might operate, including the number of licensure options, is a significant defect in the proposed rule. ORR must clarify how it intends licensure to operate.

**f. The Proposed Rule fails to contemplate the role of placements in the context of released children**

At § 410.1201(a) the proposed rule discusses sponsor preference order, largely mirroring the text of the FSA. The fifth numbered category is "a **standard program** willing to accept legal custody" (§ 410.1201(a)(5), emphasis ours). However the "standard program" definition at § 410.1001 specifies that definition applies "to **programs providing services to unaccompanied children**" (emphasis ours). In a release context, this text is ambiguous when juxtaposed, and should be made more clear in a final rule. The subsection could allow for any of the following interpretations:

> (1) an indication that no child can be released to a provider that does not already serve unaccompanied children;
> (2) an indication that ORR may require that any long-term release facility also enter into a contract, cooperative agreement, or other pact with ORR;
> (3) the possibility that "standard" is the incorrect term at § 410.1201(a); or
> (4) tautological, such that any program where an unaccompanied child is present qualifies as "providing services to an unaccompanied child," and thus could qualify as a standard program by meeting "other requirements specified by ORR."

Generally, the proposed rule should better contemplate how licensure interacts with the release context for unaccompanied children who are unable to find placements with family or known and trusted adults. WRC notes that (4) in this list presents a risk to children, specifically that a child may end up in a long-term placement that is wholly unlicensed by any state. However, WRC is unable to provide a regulatory analysis to evaluate the level of risk because no text nor any detail on the federal licensure rule is available to the public.

**g. The proposed rule does not contemplate sovereign licensing regimes that are neither state-based nor federal**

Regardless of whether ORR aligns the final rule to two licensure options for care-provider programs (as at § 410.1001 "Standard program") or three licensure options (as at § 410.1302(a); see discussion above at 2e in this comment), WRC notes that a further option exists: a licensing regime from a sovereign body not listed. The primary example of this would be a sovereign tribal nation whose lands are circumscribed as an exclave from a state where no licensure option is available. Any final rule should contemplate such a possibility.

**h. WRC expresses concern that the proposed rule will create conflicts between state and federal licensing regimes**

The Proposed Rule includes multiple federal preemption provisions with identical or near identical text. These hold that (e.g.):

> "If there is a potential conflict between ORR's regulations in this part and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. It is important to note, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties." (§ 410.1307(c)(2); cf. § 410.1302, § 410.1401, and § 410.1401(d))

WRC reads such text as ORR's recognition that its regulations or rules may conflict with state law in advance of the event. Several states have attempted to legislate, directly and indirectly, over mundane aspects of ORR operations in recent years, such as transportation. ORR is correct to learn from these experiences. However, WRC expresses concern that the preemption provisions may be overbroad.

State standards and licensing vary widely across the U.S. states. It is very likely that mundane conflicts will arise between the prospective and unspecified federal licensure standards mentioned. WRC notes that state-federal conflicts are fundamentally conflicts over jurisdiction. Jurisdictional conflicts may do little to improve, or even harm child welfare; a party may win a jurisdictional conflict over the domain, scope, or content of prospective licensure but unaccompanied children may be worse off for the victory. WRC is concerned about outcomes for children that might arise from such cases, including and not limited to cases in which ORR may choose to place children in a facility to which state authorities have opted not to grant a license after deliberation, such as carceral-like settings that are inappropriate for any child.

WRC reiterates that we are unable to provide full and comprehensive regulatory analysis to ORR without text or detail on the proposed federal licensure scheme.

### i. WRC expresses serious concern that the proposed rule will lead to a race to the bottom

WRC expresses serious concern that ORR's conflation of licensed and unlicensed programs in the proposed rule (at § 410.1001 "standard program" and *passim*) creates perverse incentives and may lead to a race to the bottom. WRC strongly recommends that ORR makes clear that state-licensed shelters receive preferred consideration in contracting, including when state-licensed shelters are higher cost by reason of meeting higher standards for children's care and well-being. "Self-regulation" models and voluntary compliance models are insufficient for protecting children, full stop. Absent a clear preference in contracting and in the geographic

distribution of care providers, ORR will introduce a perverse incentive for shelters to cut costs and thereby decrease the quality of care for children.

Based on WRC's own research,[11] ORR's care provider programs face significant pressures, particularly in relation to finances. Providers regularly struggle to retain staff due to low wages, slow hiring processes, and the high emotional intensity of the work. Paperwork and regulatory compliance may be felt by staff to be unduly burdensome. All may be reasons that a shelter or its leadership might opt for the road of least resistance and minimal licensing and oversight of their activities.

We emphasize that our concern here is not notional but real. The proposed rule *already* de facto incentivizes unlicensed shelters at § 410.1103(e). Proposed § 410.1103(e) modifies the FSA with ORR's new terminology: "ORR shall make reasonable efforts to provide placements in those geographical areas where DHS encounters the majority of unaccompanied children" (§ 410.1103(e)) – a placement being the location of physical custodianship of the unaccompanied child. The FSA requires "*licensed* placements in those geographical areas where the majority of minors are apprehended" (emphasis ours) in the parallel section.[12] The vast majority of DHS encounters with unaccompanied children occur in Texas. By treating licensed and unlicensed facilities as equivalent for the purposes of the rule, ORR's rules interact to prefer unlicensed facilities.

We expect states that refuse licensing to unaccompanied children's programs will continue to be cheaper to operate, on the whole, based on the states that have successfully delicensed (Texas, Florida) or threatened to delicense (Nebraska, South Carolina, Tennessee). We likewise expect it to be cheaper to operate an unlicensed facility than a fully licensed and compliant facility. Thus three further incentive structures may arise from the proposed rule as written, that is, absent a preference for state-licensed placements. First, ORR may end up siting programs in states without a licensing regime because programs in those states can make more competitive bids due to lower operating expenses, lower-cost environments, or more online beds (if the surplus partially goes to improve staff salaries that meaningfully reduces turnover). ORR might also expand existing programs in non-licensing states for the same reason. Second, that shelters in states with state-licensing regimes will opt out of those regimes, in order to lower costs, increase returns, placate staff, or make bids that are more competitive with those coming from unlicensed states. Third, that even if costs are approximately equal, executive teams in states with available state licensing will opt for alternatives to state licensing, or will open new programs in states

---

[11] E.g., Women's Refugee Commission 2023, "Decreasing ORR's Dependence on Congregate Care: Four Recommendations for Progress." Available at https://www.womensrefugeecommission.org/research-resources/decreasing-orr-dependence-on-congregate-care-four-recommendations-for-progress/

[12] Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-4544 (CD Cal., Jan. 17, 1997), p. 5. Available at https://youthlaw.org/sites/default/files/wp_attachments/Flores_Settlement-Final011797.pdf.

without available licensing, because of perceived burdens to licensure. We caution that this "race to the bottom" can arise through contract renewals even if the current grouping of ORR grantees and contractors remains fixed.

3. **The proposed rule's creation of an Unaccompanied Children Office of the Ombuds**

**a. Overview of the role of the Ombuds**

The proposed rule would establish an Unaccompanied Children Office of the Ombuds ("Ombuds") at proposed Subpart K. As an "independent, impartial office" (§ 410.2000(b)),tThe Ombuds would review ORR's compliance with federal law as well as others' compliance with ORR regulations (however, note the caveats below), including via site visits to ORR facilities and review of ORR data and documents. The Ombuds would be empowered to review systematic conditions, facility-wide conditions, and individual treatment in care. It would meet with stakeholders and make recommendations to ORR for, as the preamble puts it, "new or revised UC Program policies and procedures, or other process improvements."

WRC supports the establishment of Ombuds. While the role should be more clearly articulated (as expanded on below), the scope and duties of the Ombuds are helpful to supporting the safety, well-being, and rights of unaccompanied children in ORR care. The proposed Ombuds provides an important avenue that does not yet currently exist through which to evaluate and oversee compliance and to receive and investigate complaints and concerns from children in care, families, providers, and other stakeholders. WRC supports the location of the UC Office of the Ombuds as an independent and third party outside of ORR and within the Office of the ACF Assistant Secretary. We support the ability of an Ombuds to receive information, initiate investigations based on complaints, scrutinize practices and policies, serve as an external monitor for the ORR network, and issue reports. We also strongly support the inclusion of requirements for maintaining the confidentiality of files and records (at § 410.2004). In this spirit, we offer several broad suggestions for improvements to the role of the Ombuds which include:

- Expand the Ombuds' investigative authority to go beyond a purely responsive model, as the proposed rule only authorize the Ombuds to investigate reports and complaints received;
- Clarify that the Ombuds can request and receive data, including confidential data, and can initiate investigations based on its own analysis of that data;
- Add paths to expedite urgent cases and seek review of complaint;
- Strengthen reporting, to include public annual reports to Congress as well as a mandate that the Ombuds publish ORR data should ORR fail to do so;
- Include authority to monitor out-of-network facilities; and

- Take steps to protect individuals from retaliation.

However, WRC expresses three significant concerns with the Ombuds. First, WRC is deeply concerned that, as proposed, the Ombuds lacks critical enforcement mechanisms to rectify deficiencies in the care of unaccompanied children. Second, the scope of the Ombuds authority is unnecessarily circumscribed, inclusive of its investigative authority, capacity to initiate investigations, and ability to compel cooperation with investigations of serious deficiencies in child welfare and care. And third, given that the proposed rule contemplates the dissolution of the FSA, the proposed rule offers less protection to children when compared to the current status quo of *Flores* monitoring.

### b. Under the proposed rule, the Ombuds lacks enforcement mechanisms critical to child well-being

In general, WRC welcomes the proposal of the Ombuds and would applaud a stronger version of the office, including outside of the proposed rule. However, WRC is deeply concerned that, as proposed in the rule, the Ombuds lacks critical enforcement mechanisms to rectify deficiencies in the care of unaccompanied children. The proposed rule at 410.2002(a)(10) also makes clear that any Ombuds recommendations are "non-binding." Likewise the preamble states clearly that "an ombud's office would not have authority to compel ORR to take certain actions." This construction, alongside a lack of affirmative language for ORR to take action based on Ombuds reporting or public findings, suggests that the Ombuds has a limited advisory and consultative role. Absent such mechanisms, the foundational safeguards embodied in the FSA will not be fully implemented—and the wellbeing of children and progress achieved over decades to integrate basic child welfare protections within the immigration system will be at risk.

The discussion about state licensing above has noted that regulations only function to the extent that they are complied with, and that compliance only functions to the extent that accountability exists for noncompliance. This absence of enforcement power for the proposed Ombuds runs deep. At § 410.2002(c), the proposed rule says that "the UC Office of the Ombuds may, as needed, have timely and direct access" to facilities. We note the permissive language in the proposed rule of "may" in lieu of "shall," leaving us deeply concerned that the Office of the Ombuds would have immense leeway as to whether to respond seriously, with urgency, or even at all to any given report, regardless of the severity of the report. Further, here the rule fails to contemplate situations in which the Ombuds' access to facilities and to children is partial, deliberately hampered, or impeded through forms of slow-walking, malicious compliance, or willful miscommunication. In other words, no procedural and enforceable mechanism is available for the Ombuds. By contrast, the DHS Privacy Officer, subject to the approval of the

DHS Secretary, may compel the production of information by subpoena.[13] We offer this as an example to serve our larger point. The Ombuds should be more than a paper tiger.

### c. The investigatory authority of the Ombuds should be expanded

WRC is concerned that the scope of the Ombuds authority for investigation is too limited and should be expanded. While the Ombuds is empowered to (choose, not be required to undertake) a wide range of activities (listed at § 410.2002(a)(1)-(12)), those referring to its investigative authority are smaller. We reproduce the relevant subsections here (all at § 410.2002(a)):

- "(2) Investigating implementation of or adherence to Federal law and ORR regulations, in response to reports it receives, and meeting with interested parties to receive input on ORR's compliance with Federal law and ORR policy";
- "(5) Conducting investigations, interviews, and site visits at care provider facilities as necessary to aid in the preparation of reports and recommendations"; and
- "(7) Reviewing individual circumstances, including but not limited to concerns about unaccompanied children's access to services, ability to communicate with service providers, parents/legal guardians of children in ORR custody, sponsors, and matters related to transfers within or discharge from ORR care."

At (2) above, the authority over "implementation of or adherence to Federal law and ORR regulations" is ambiguous. It is unclear if procedural directives such as the ORR Policy Guide and Manual of Procedures (UC MAP) – which are not regulations in the strict sense of federal rulemaking – fall under the Ombuds' authority. Moreover, while ORR presumably means to empower the Ombuds to investigate situations in which a provider is non-compliant with licensing requirements (as ORR rules generally require providers to follow state and local regulations), the proposed rule fails to state clearly the assignment of such authority to the Ombuds. This is an acute concern for out-of-network placements who lack a grantee or contracting relationship with ORR. Finally, (2) fails to contemplate investigations in which policy has been adhered to by a care provider or ORR itself, but in which the policy is insufficient to children's best interests and preventing harm.

The Ombuds should have a broad investigatory authority to investigate unaccompanied children's needs and well-being, as individuals and as a population, in addition to compliance with law and regulation. Further, § 410.2002(a) fails to include an explicit authority for the Ombuds to take action on information that it becomes aware of in a form distinct from a formal report. WRC notes, for example, some information may become known through news reports –

[13] See the U.S. Department of Homeland Security's *Authorities and Responsibilities of the Chief Privacy Officer*, available at https://www.dhs.gov/chief-privacy-officers-authorities-and-responsibilities.

such as the child labor reporting over the past year[14] – rather than formal and internal channels. Similarly, as written at § 410.2000(b), the proposed rule does not contemplate a role for the Ombuds to receive and analyze system data, in order to identify trends on the safe care and safe and stable reunification of unaccompanied children with sponsors. The proposed rule at § 410.2000(a)(7) refers explicitly to "individual circumstances" without a parallel provision for systemic findings, whether across a facility, provider, region, shelter type, or ORR network-wide The text of the current rule at § 410.2000(b) limits the Ombuds to mechanisms and methodologies that are downstream of reports already received. The identification of system trends is a critical part of the Ombuds' role to, in the preamble's words, "maintain an independent mechanism to identify and report concerns regarding the care of unaccompanied children."

### d. **The proposed rule would lessen the protections for children in practice**

Currently, *Flores* counsel serve as class counsel for unaccompanied children. In that capacity, *Flores* counsel perform a critical role that brings external oversight to the conditions and care of unaccompanied children. Flores counsel visit facilities, both in network and out of network, to determine whether conditions are sufficient and whether those conditions meet *Flores* and other standards. They ensure that unaccompanied children who have spent long durations in care have their needs identified and that cases are proceeding appropriately. When necessary, they bring motions to enforce to the court to compel ORR and HHS to rectify problems with the ORR network and individual providers.

In this role, Flores counsel has capacity to file a motion to enforce, that is, they have a relatively direct line from the identification of serious material concerns over the well-being of children in ORR care to obligatory steps that rectify issues. Given that the proposed rule contemplates the dissolution of *Flores,* and given that much of the Ombuds-related text in the proposed rule uses permissive rather than mandatory language to discuss activities performed by the Ombuds Office, WRC is unclear what actual guarantee of protection the Ombuds office provides for children. The Ombuds as conceived would not and cannot replicate such functions as *Flores* counsel currently provides for the ultimate well-being of children. Based on ORR's past performance – in which *Flores* monitoring via numerous motions to enforce has materially improved the well-being of thousands of unaccompanied children in ORR care[15] – we believe the

---

[14] For example, Dreier, H 2023, "Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.," *New York Times,* February 25. Available at https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html; and Dreier, H 2023, "Kids on the Night Shift," *New York Times,* September 18. Available at "https://www.nytimes.com/2023/09/18/magazine/child-labor-dangerous-jobs.html.

[15] *See, e.g.,* Flores v. Barr, Case No. CV-85-4544-DMG, U.S. District Court, Central District of California, Notice of Motion and Motion to Enforce Settlement re Emergency Intake Sites [Dkt. 1256-1], August 9, 2021, https://youthlaw.org/sites/default/files/2022-10/1256-1%20Proposed%20Settlement.pdf; Order re Plaintiffs' Motion

need for robust and compelling oversight of ORR will be ongoing, and that the currently envisioned Ombuds role will be insufficient to meet this need. For these reasons, WRC expresses our strongest concern that the proposed rule offers less protection to children when compared to the current status quo of *Flores* monitoring.

e. **Additional comments on the Ombuds**

i. **Proposed Rule § 410.2002(a)**

***Comment****:* WRC appreciates the scope and responsibilities of the Office of the Ombuds as contemplated at § 410.2002(a). However, the text of the rule uses permissive language, that the Ombuds "may" engage in the activities listed. Under such text, all Ombuds activities are discretionary – meaning that critical oversight work over child-caring facilities and over ORR policies and practices may be insufficient to address and remedy concerns or simply may not occur at all. It is critical that ORR make the list of activities provided in this section mandatory.

WRC also notes that the proposed rule at **§ 410.2002(a)** makes reference to a nonexistent § 410.2100

***Recommendation****:* "The UC Office of the Ombuds shall ~~may~~ engage in activities ~~consistent with § 410.2100,~~ including but not limited to:"

**ii. Proposed Rule § 410.2002(a)(6)**

***Comment****:* To the extent that the external monitoring of the oversight is meant to replicate the external monitoring of *Flores* counsel, the Ombuds should have access to the same facilities where unaccompanied children are housed and cared for. The Ombuds' ambit should include affirmative right to visit and monitor out-of-network and unlicensed in-network facilities, i.e, Influx Care Facilities (ICFs) and Emergency Intake Sites (EISs).

***Recommendation****:* "~~Visiting~~ Monitoring ORR care providers, including Influx Care Facilities and Emergency Intake Sites, and out-of-network provider facilities in which unaccompanied children are or will be housed."

**4. Reproductive and abortion care, and treatment of parenting youth**

---

to Enforce Settlement as to "Title 42" Class Members [Dkt. 976], September 4, 2020, https://youthlaw.org/sites/default/files/2022-03/976-Flores-Order-re-Hotel-MTE.pdf; Order re Plaintiffs' Motion to Enforce Class Action Settlement [Dkt. 470], July 30, 2018, https://youthlaw.org/sites/default/files/wp_attachments/Flores-MTE-order.pdf.

### a. Overview

WRC applauds ORR's decision to include protections for reproductive care and for abortion access in the Proposed Rule. ORR's Field Guidance 21 (implementing *Garza)* and the *J.D. v. Azar* settlement govern reproductive and abortion care for current unaccompanied youth.[16] We are encouraged by ORR's recognition in the Preamble that pregnant and parenting youth are "best served in family settings" at § 410.1103. We appreciate and strongly support the commitment to the confidentiality of private medical information at § 410.1307(c). We strongly support the incorporation of their provisions into the proposed rule, including but not limited to the codification of the requirement that an unaccompanied minor seeking an abortion be granted a transfer within three business days if abortion is unavailable in their area at § 410.1307(c). The transfer requirement ensures the functional access to a foundational right to bodily autonomy. Like all people, unaccompanied immigrant youth have the right to make their own decisions about their medical care, their bodies, and their future.

In a comment submitted separately, WRC and partners have expressed our support for the abortion-care and reproductive-care provisions in the proposed rule. We have also recommended changes to further strengthen ORR's commitment to the health and well-being of youth in custody. Among these recommendations is a modification to the definition of "Medical services requiring heightened ORR involvement" at § 410.1001. We recall that during the Trump Administration, the ORR director inappropriately impeded access to abortion.[17] While additional ORR involvement may be needed to facilitate interstate transit for a youth seeking adequate abortion care, guardrails are necessary. We recommend ORR make clear that the heightened involvement requirement is *only* to ensure quick transportation or transfer, if needed.

Finally, we also recommend that ORR improve guardrails against the separation of parenting unaccompanied youth from their children. We welcome and highlight the proposed rule recognition at § 410.1108 of a parenting youth's "right to make informed choices about their child's care, including, but not limited to, decisions about the child's health care, diet, clothing, hygiene, religious and cultural practices, education, recreation, and daily activities." However, § 410.1108(a)(3) would allow ORR to separate an unaccompanied parenting youth from their children and transfer the child to another facility if the parenting youth is the "subject of allegations of abuse or neglect against the child of the unaccompanied child (or temporarily in urgent cases where there is sufficient evidence of child abuse or neglect warranting temporary separation for the child's protection)." Given that the parenting youth is already in an ORR

---

[16] https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf; Joint Stipulation of Dismissal Without Prejudice, *J.D.* v. *Azar,* No. 1:17–cv–02122 (D.D.C. Sep. 29, 2020), ECF No. 168.

[17] Siegel, R. 2017. "The Trump official who tried to stop a detained immigrant from getting an abortion," The *Washington Post,* October 26. Available at https://www.washingtonpost.com/news/post-nation/wp/2017/10/26/the-trump-official-who-tried-to-stop-a-detained-immigrant-from-getting-an-abortion/

shelter, their access to justice in a dependency hearing would be severely limited. WRC strongly recommends that an "immediate danger" standard be used here to prevent unnecessary and harmful separations. ORR must, given its custodial role, play an active part to guarantee a parenting youth's access to competent counsel in any dependency hearings that occur while a youth is in ORR custody. Finally, as currently written, § 410.1108 also has no provisions to ensure that ORR make reasonable efforts to prevent separation and to facilitate prompt reunification of parenting youth and their children when separation is no longer necessary. ORR must ensure that reunifications are swift, with clear guidance and processes in place to facilitate these, and offer supportive services

### b. Summary of Recommendations

In a separate comment on the proposed rule, WRC and numerous partners offer a series of recommendations on how ORR can strengthen its commitment to reproductive and abortion care further. We reproduce the table of summary recommendations from that comment here for ease of reference.

**Summary of Recommendations**

| Proposed Rule Section | Recommendations |
|---|---|
| § 410.1001 "Definitions" (family planning services) | ● Amend the list of family planning services to include abortion.<br>● Change "pregnancy testing and counseling" in the list of family planning services to "pregnancy testing and non-directive pregnancy counseling."<br>● Add "comprehensive, evidence-based, medically accurate sex education" to the list of family planning services. |
| § 410.1001 "Definitions" (Medical services requiring heightened ORR involvement) | ● Clarify the narrow purpose of including abortion in "Medical services requiring heightened ORR involvement." |
| § 410.1103 "Considerations generally applicable to the placement of an unaccompanied child" | ● Add a new subsection (h) in § 410.1103 that explains pregnant and parenting youth "shall be given priority to community-based care placements" or "transitional and long-term home care." |
| § 410.1108 "Placement | ● Amend the title to state: "Placement and services for |

| | |
|---|---|
| and Services for Children of Unaccompanied Children" | children of unaccompanied **~~children~~, parenting youth** ~~children~~"<br>● Add, to the beginning of the section, an affirmative statement recognizing a parenting youth's "right to make informed choices about their child's care, including, but not limited to, decisions about the child's health care, diet, clothing, hygiene, religious and cultural practices, education, recreation, and daily activities."<br>● Amend § 410.1108(a) to state: "Placement. If unaccompanied, parenting youth ~~children~~ and their children are referred together to ORR, ORR shall place the unaccompanied, parenting youth children and their children in the same facility~~, except in unusual or emergency situations~~. **ORR must make all reasonable efforts to prevent unnecessary separation, and where separation is necessary, to facilitate reunification as soon as possible**."<br>● Amend § 410.1108(b) to state: "**Separation. The separation of an unaccompanied, parenting youth from their children requires prior authorization of ORR. ORR should immediately notify the unaccompanied, parenting youth's legal services provider and Child Advocate, if one has been appointed, of any separation. ORR may only separate an unaccompanied, parenting youth from their child** ~~except in unusual or~~ **in emergency situations where keeping the parenting youth and child together poses an immediate danger to the children's safety**. ~~Unusual or~~ **E**mergency situations **that may but do not necessarily pose an immediate danger to the children's safety** include~~, but are not limited to~~:<br><br>(1) The unaccompanied**, parenting youth**~~child~~ **or their children** require~~s~~ alternate placement due to hospitalization or need for a specialized care or treatment setting that **requires separation of the unaccompanied, parenting youth from their children in order to receive treatment** ~~that cannot provide appropriate care for the child of the Unaccompanied child~~;<br><br>(2) **After consulting with counsel specializing in the rights of unaccompanied children,** the unaccompanied**, parenting youth** ~~child~~ requests alternate placement for their child **and ORR agrees to document and, to the extent practicable, follow the parent's wishes for their** |

| | |
|---|---|
| | **child's placement;** ~~of the unaccompanied child~~; or<br><br>(3) **An adjudication using the clear and convincing evidence standard determines that the unaccompanied, parenting youth child poses an immediate danger to their children's safety, and that the risk cannot be mitigated by care provider staff, for example, by providing additional support to the unaccompanied, parenting youth or their child.** ~~The unaccompanied child is the subject of allegations of abuse or neglect against the child of the unaccompanied child (or temporarily in urgent cases where there is sufficient evidence of child abuse or neglect warranting temporary separation for the child's protection)~~."<br><br>● Amend § 410.1108(c)(2) to state: "(2) U.S. citizen children of unaccompanied, parenting youth children are eligible for public benefits and services to the same extent as other U.S. citizens. Application(s) for public benefits and services shall be submitted on behalf of the U.S. citizen children of unaccompanied children by care provider facilities **after consulting with the unaccompanied parenting youth's legal services provider**. Utilization of those benefits and services shall be exhausted to the greatest extent practicable before ORR-funded services are utilized." |
| § 410.1307 "Health care services" | ● Amend the list of services in § 410.1307(b) to state that care providers shall be responsible for "prenatal and postnatal care."<br>● Add a new subsection (e) to § 410.1307 to incorporate certain requirements from the "Notification" section of the Sept. 29, 2020 Policy Memorandum on Medical Services Requiring Heightened ORR Involvement, and add requirement of obtaining the youth's informed consent prior to disclosure. |

5. **Additional Analysis and Recommendations**

In addition to the above comments on critical features of the rule, WRC offers a series of technical comments and regulatory analysis to inform ORR of how the proposed rule might be modified to better serve the well being of children. We proceed in order, and note again that the

present comments may expand or supplement other submissions to comment on the proposed rule to which WRC has signed on, but no submission supersedes any other in our commenting.

WRC's recommendations include specific edits to the regulatory text. We have underlined our recommended additional language, and added strike-throughs to language we recommend removing.

a. **Proposed Rule § 410.1001**

i. **Proposed Rule § 410.1001 - "Case File"**

***Comment***: WRC applauds the inclusion of home study and post-release services (HS / PRS) records as part of the case file definition and, by so doing, including such records as protected information. We agree with ORR's expectation that unaccompanied children's case files and related information should receive strong safeguards from unauthorized access, misuse, and inappropriate disclosure.

The inclusion of "correspondence" without further definition at § 410.1001 invites ambiguity as to the meaning of the term and to what materials it covers. WRC's presumption is that ORR means the definition of "correspondence" at § 410.1001 to cover a limited set of materials regarding the child's reunification, such as any correspondence with parents and sponsors done by ORR staff or provider case managers. However, this is not consistent with the other use of "correspondence" in the proposed rule. At § 410.1304(a)(2)(ii), the word "correspondence" appears to be meant to include *personal* correspondence between the unaccompanied child and whomever the child wishes to correspond with – a friend, relative, parent, attorney, child advocate or anyone else. Such materials should be the child's personal property (cf. ORR's assertion at § 410.1303(g)(2) that "the records included in unaccompanied child case files are the property of ORR"). WRC recommends that ORR clarify the definition of "correspondence" within the definition of "case file" at § 410.1001.

***Recommendation***: ORR should clarify the definition of "correspondence" within the definition of "case file" at § 410.1001.

ii. **Proposed Rule § 410.1001 - "Heightened supervision facility"**

***Comment:*** WRC notes that the definition of "heightened supervision facility" includes the following text:

> "It [a heightened supervision facility] provides 24-hour supervision, custody, care, and treatment. It maintains stricter security measures than a shelter, such as intensive staff supervision, in order to provide supports, manage problem behavior, and prevent children from running away."

WRC welcomes the recognition that heightened supervision facilities "provide supports" to children with higher needs. ORR has not always made such a recognition. However, we

encourage ORR to go further towards established best practices in the child-welfare field with its definition. Specifically, ORR should eliminate the definition's focus on security and replace text with reference to additional personalized and intensive service provision.

***Recommendation:***

> "*Heightened supervision facility* means a facility that is operated by a program, agency or organization licensed by an appropriate State agency and that meets the standards for standard programs set forth in § 410.1302.~~, and that~~ A heightened supervision facility is designed for an unaccompanied child who requires additional personalized and more intensive service provision than available in a standard program ~~close supervision~~ but does not need placement in a secure facility, including a residential treatment center (RTC). It provides 24-hour supervision~~, custody,~~ care, and treatment to mitigate identified mental health issues and trauma responses, to assist to change behavioral patterns, and to increase opportunity for stable reunification with family and non-family sponsors. ~~It maintains stricter security measures than a shelter, such as intensive staff supervision, in order to provide supports, manage problem behavior, and prevent children from running away.~~ A heightened supervision facility may have a secure perimeter but shall not be equipped internally with major restraining construction or procedures typically associated with juvenile detention centers or correctional facilities."

### iii. Proposed Rule § 410.1001 - "*LGBTQI*+ "

***Comment*:** The proposed rule defines "*LGBTQI+:* "*LGBTQI*+ means lesbian, gay, bisexual, transgender, queer or questioning, and intersex." WRC notes that there is a "plus" included but the definition in the proposed rule ends at intersex, or "I," without reference to the "plus."

### iv. Proposed Rule § 410.1001 - "Standard Program"

***Comment:*** WRC reiterates our opposition to the vagueness of language on facility licensure in the definition of "standard program." We note two instances of this vagueness at § 410.1001 (emphasis ours):

- "*Standard program* means any program, agency, or organization that is licensed by an appropriate State agency, **or that meets other requirements specified by ORR if licensure is unavailable in the State**"; and
- "However, a facility for special needs unaccompanied children may maintain that level of security permitted under State law, or u**nder the requirements specified by ORR if licensure is unavailable in the State.**"

Any non-State-licensed program should be known by a distinct term and fall under clear guidelines promulgated at the level of a federal rule. Because these "other requirements" are not available for public inspection, we consider any finalization of a rule with such a loophole to have a significant defect. Our comments in Section 2 (above) contain a more detailed discussion.

***Recommendation***: Remove language relating to "other requirements" from the definition of "standard program."

#### v. Proposed Rule § 410.1001 – Additional definition: "Disposition"

***Comment***: The proposed rule uses the term "disposition" as a term of art but fails to define what disposition signifies, includes, or excludes. WRC notes that in discussions with partners, there is not always a commonly shared understanding and interpretation of "disposition". The uses of "disposition" in the proposed rule include:

- At § 410.1001 "case file": the definition of "case file" includes "case disposition" within "Case file materials," suggesting that the referent is concrete information about the child largely external to the child's control;

- At § 410.1309(a)(v), "case disposition" is used as an adjective in the phrase "case disposition options such as, but not limited to, voluntary departure," suggesting that the disposition is solely in reference to an unaccompanied child's immigration case; and

- At § 410.1501(e) "disposition" is used in context of information specifically provided by the care provider to ORR: "The disposition of any actions in which the unaccompanied child is the subject." This use suggests a more expansive reading of "disposition" than that restricted to an immigration case, since a care provider is not the child's attorney, but the proper reading remains expansive and vague.

It is incumbent on ORR to define ambiguous or unclear terms in the text of the rule, rather than leaving these definitions to care providers, legal service providers, or others for individual- or program-specific interpretation.

***Recommendation***: ORR should make clear what it means by "disposition." This is most easily accomplished by adding a definition for "disposition" at § 410.1001.

### b. Proposed Rule § 410.1101

#### i. Proposed Rule § 410.1101 - General Comment

***Comment:*** § 410.1101 concerns referrals and establishes the maximum time periods allowed for ORR to find a placement for each unaccompanied child. However, WRC notes ambiguity in the proposed rule's language in this section.

At § 410.1101(b), the proposed rule establishes that (emphasis ours):

> "ORR identifies an appropriate placement for the unaccompanied child and notifies the referring Federal agency within 24 hours of receiving the referring agency's notification whenever possible, and no later than within 48 hours of receiving notification, **barring exceptional circumstances**."

The phrasing here is imprecise. "Exceptional circumstances" may be valid explanations for slower-than-required placements, but an exceptional circumstance should not give license for ORR to place a child in care more slowly after a referral. For example, an influx is included among "exceptional circumstances"at § 410.1101(d)(2), and "medical emergency, such as a viral epidemic or pandemic among a group of unaccompanied children" at § 410.1101(d)(2). ORR should move with all due haste to place children in safe placements during either event. ORR should refine the rule to state that it always attempts to identify an appropriate placement within 48 hours but that such a timeframe may not be possible to achieve during exceptional circumstances.

***Recommendation***: At § 410.1101(b):

> "ORR identifies an appropriate placement for the unaccompanied child and notifies the referring Federal agency within 24 hours of receiving the referring agency's notification whenever possible, and no later than within 48 hours of receiving notification, ORR shall always attempt to maintain these timeframes, although ~~barring~~ exceptional circumstances may require adjusted timeframes for placement."

***Comment***: ORR's preamble for this subsection of the proposed rule notes that "the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR." This assurance is minimally burdensome and should be binding on ORR. WRC suggests that ORR add language to this effect to any final rule.

***Recommendation***: New subsection § 410.1101(f): "The unavailability of documents does not necessarily prevent the prompt transfer of a child to ORR nor prevent ORR from placing a child."

### c. **Proposed Rule § 410.1102**

***Comment***: At § 410.1102 the proposed rule says that "ORR may place unaccompanied children in out-of-network (OON) placements under certain, limited circumstances" but does not list the circumstances nor does it list a cross-reference. The preamble for § 410.1102 lists relevant parts of the rule as § 410.1103-410.1109 and § 410.1901 but this information does not appear in the proposed rule's text.

***Recommendation***: ORR should add a cross reference to the relevant limited circumstances, which in the proposed rule's preamble are found at § 410.1103–1109 and § 410.1901.

### d. Proposed Rule § 410.1103

#### i. Proposed rule § 410.1103 – General comment

***Comment***: WRC appreciates that § 410.1103 defines the principles and considerations pertinent to placement decisions and processes for unaccompanied children. (We provide more detailed feedback on individual subsections below.)

WRC strongly advises revisions to § 410.1103 to take into account holistic children's well-being concerns that are absent from the current text. For example, proposed § 410.1103 *in toto* does not significantly contemplate the role of transfers. Transfers are inherently destabilizing for unaccompanied children and should be minimized. Moreover, transfers are not equally disruptive for all children. For significant subpopulations of unaccompanied children – including tender-age children, children with identified autism-spectrum disorders (cf. proposed § 410.1103(d)), and children whose journeys or other life circumstances have led to impaired functioning in emotional domains related to the formation of stable attachments – ORR should have a strong preference for the use of a single placement and explicitly weigh the disruption of a transfer as part of any evaluation for transfer suitability. Finally, the geography of unaccompanied children's reunification is also pertinent at intake (cf. proposed § 410.1103(e)). Case managers, other care provider staff, and legal service providers describe manifold benefits when a child receives a placement near the prospective sponsor, including improved sponsor response to the Family Reunification Packet (FRP), decreased stress for the unaccompanied child, and improved efficiencies in legal representation.[18] Geolocation of children in placements near prospective sponsors is especially relevant for children whose prospective sponsors are parents or legal guardians ("Category 1" sponsors).

***Recommendation***: Revise § 410.1103 to include text that ORR will minimize transfers for unaccompanied children to the greatest reasonable extent possible, to recognize that transfers may be less suitable for explicitly named populations (including but not limited to the populations named above), and to include possible reunification location in placement location (see below regarding § 410.1103(e)).

#### ii. Proposed rule § 410.1103(d)

***Comment***: WRC welcomes the proposed rule's commitment at § 410.1103(d)(8) to "provide children with disabilities equal access to community-based placements such as individual family homes." We encourage ORR's list in this regard to consider inclusion of therapeutic foster family homes, which are not listed in the facilities types at § 410.1102.

---

[18] See Women's Refugee Commission 2023. *Decreasing ORR's Dependence on Congregate Care: Four Recommendations for Progress.* Available at https://www.womensrefugeecommission.org/wp-content/uploads/2023/08/Decreasing-ORR-Dependence-on-Congregate-Care.pdf.

### e. Proposed rule § 410.1107

#### i. Proposed rule § 410.1107 – General Comment

***Comment*:** WRC strongly advocates that § 410.1107 be wholly reconceived. The evaluative criteria for "runaway risk" are inappropriate, at times illogical, exceed ORR's mandate and expertise, and are overbroad. Runaway risk must be an evaluation of the totality of circumstances.

First, proposed § 410.1107 conflates two different risks of flight. A "runaway risk" from a shelter program is different from risk of flight in immigration proceedings – the latter of which greatly exceeds ORR's purview, authority, and expertise. Indeed, in the preamble to the proposed rule ORR recognizes that it is "not a law enforcement agency." Second, the rule conflates actions taken by others on the child's behalf (e.g. § 410.1107(b)(1) and (b)(2)) with actions taken by the child (e.g. § 410.1107(c)). Appearances at immigration court hearings are not fully in any child's control, and the slow timelines of immigration court make this point especially salient: a child who is currently in ORR custody with a full or substantially full immigration court history (as the rule seems to contemplate in this subsect) would have had to go immigration court as a tender-age youth or early teen. Third, the criteria at § 410.1107(d) – for when a child "has displayed behaviors indicative of flight or has expressed intent to run away" – are overbroad. A child who says to a youth care worker the statement "I hate it here and I am going to leave" does not require a step up but better services and a better care environment. Finally, WRC cannot emphasize strongly enough that indebtedness is uncorrelated with flight risk (contra § 410.1107(b)(3) and § 410.1107(e)). All references in the rule to indebtedness as a rationale for placing a child in a restrictive placement are categorically unacceptable.

***Recommendation*:** ORR should substantially reconsider and revise § 410.1107. A revised § 410.1107(a) should include text to the effect that "<u>Runaway risk determinations must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away.</u>"

All references to indebtedness in § 410.1107 (currently, at § 410.1107(b)(3) and § 410.1107(e)) should be removed.

#### ii. Proposed rule § 410.1107(b)(3)

***Comment*:** See § 410.1107(b) – General comment (above) for discussion.

***Recommendation*:** Remove § 410.1107(b)(3).

#### iii. Proposed rule § 410.1107(e)

***Comment*:** See § 410.1107(b) – General comment (above) for discussion on indebtedness.

In addition, we note that the term "trauma bond" has "no medical standard for diagnosis . . . nor any agreed upon definition."[19] According to the U.S. Department of State, "there is no definitive understanding of trauma bonding's prevalence within trafficking situations and not all trafficking victims experience it."[20] ORR should not incorporate such a standard into the rule for purposes of increasing restrictiveness of a child's placement.

***Recommendation*:** Remove § 410.1107(e).

### f. Subpart D § 410.1300 et seq. – General Comment

***Comment*:** WRC urges ORR to use Subpart D to strengthen its standard of care and go beyond *Flores* in any final rule. The FSA reflects a view of child welfare best practices that is of its era, that is, the 1990s. While we comment here on only a small subset of subpart D, other areas of subpart D will also benefit from updating, and we encourage ORR to carefully review and comprehensively respond to comments that attempt to do so.

First, § 410.1300 et seq. – and in particular § 410.1302 and § 410.1304 – should recognize both the rights and needs of unaccompanied children to privacy. For older teens, who make up the bulk of the unaccompanied child population, increased privacy is a common need appropriate to their developmental stage, along with increased autonomy (see below). WRC notes that at § 410.1801(b)(12) the proposed rule includes such a guarantee for children placed in EIFs by ensuring that such children enjoy a reasonable right to privacy, including the right to generally wear their own clothes, have a private space for storage of personal belongings, talk privately on on the phone and visit privately with guests,. Unaccompanied children's best interests will be served by inserting a parallel provision to § 410.1801(b)(12) at § 410.1302, and by specifying at § 410.1304 that privacy rights should not be routinely used as incentive or punishment for behavior management because such use is ineffective.

Second, we encourage ORR to recognize within § 410.1300 *et seq.* that increasing autonomy is a developmental need as children get older.[21] WRC staff have observed in site visits that many providers heavily regulate the autonomy of unaccompanied children even in the facilities considered "least restrictive" by ORR, even while it is more developmentally appropriate, and healthier for unaccompanied children, to provide more freedom rather than less. Proposed § 410.1302 (c)(10) and proposed § 410.1801(b)(11) both require that facilities have their policies and programming "structured to encourage such visitation" between child and family members, in person. ORR should consider a parallel construction, that policies and programming be

---

[19] Office to Monitor & Combat Trafficking in Persons, U.S. Department of State 2020. "Trauma Bonding in Human Trafficking" available at https://www.state.gov/wp-content/uploads/2020/10/TIP_Factsheet-Trauma-Bonding-in-Human-Trafficking-508.pdf.
[20] *Ibid.*
[21] Boykin McElhaney, K., Allen, J.P., Stephenson, J.C., and A. Hare 2009. "Attachment and Autonomy During Adolescence." *Handbook of Adolescent Psychology, Volume 1: Individual Bases of Adolescent Development*. John Wiley & Son, pp. 358-376.

"structured to encourage a level of autonomy in a child's everyday activities that is appropriate to the child's age, development, and individual needs."

Third, the provisions on family communication in subpart D should also make clear that these standards also apply to children whose parents and legal guardians, family members, and caregivers are in federal government (e.g. ICE or U.S. Marshal Service) custody. Such an amendment would also ensure that ORR is complying with its obligations under the settlement agreement in *Ms. L v. Immigration and Customs Enforcement*, which requires HHS to coordinate with federal, state, and local agencies to facilitate communication between parents in those agencies' custody and children in ORR custody, in cases where the parent and child were apprehended together and then separated by the federal government. Under the settlement agreement, which has been preliminarily approved by the court, ORR is required to "offer separated children information about how to request telephone contact with their parent or Legal Guardian." In cases where the parent is detained in ICE custody, ORR is required to "coordinate [with ICE] to facilitate contact between a parent or Legal Guardian and their child within 48 hours of the child arriving to the ORR care provider." Given the benefit to children in ORR custody from regular contact with parents and other family members, ORR should similarly facilitate communication and ensure contact within 48 hours for all children with parents and other family members who are detained in federal government custody.

### g. Proposed Rule § 410.1303(b)

*Comment:* Proposed rule § 410.1303(b) concerns ORR's role in ensuring that all applicable child-welfare regulations are followed and that violations are remedied when found, whether through proactive disclosure of a care-provider facility or via monitoring. Compliance and corrective actions are necessary for the well-being of children, and we thank ORR for considering this need.

However, we are concerned that the corrective actions and described process in proposed §410.1303(b) address violations only on a case-by-case basis. Troublingly, the proposed rule appears not to contemplate contractors or other actors who violate regulations regularly or systematically (unless the violations are criminal in nature) because it takes each violation as a singular event without relationship to other events or, potentially, to higher-level decisions. We find support in our view from the Senate Finance Committee, which wrote in 2021 that "because ORR's monitoring is based on individual case management records, it is unable to track historical trends at either the facility or grantee/contractor level—including such critical data as facility security, facility safety, staff behavior, and abuse and assault (including incidents of a sexual nature)."[22] The first step towards the identification of problem actors – whose behaviors, in this context, lead to harm to children – is to collect data on incidents, particularly on the more serious incidents, and aggregate incidents at the facility level as well as the grantee / contractor level.

---

[22] Senate Finance Committee, *Exposing the Risks of Deliberate Ignorance: Years of Mismanagement and Lack of Oversight by the Office of Refugee Resettlement, Leading to Abuses and Substandard Care of Unaccompanied Alien Children,* October 28, 2021, available at https://www.finance.senate.gov/download/102821-finance-committee-report-orr-uac-program.

Both ORR and children's interests are served when regulations are followed by care providers, when systematic problems are identified early and resolved, and when actors who have consistently acted contrary to the best interests of children no longer have access to federal contracts to care for children. The Senate Finance Committee's Recommendation 1 is that ORR utilize "drawdowns and the discontinuation or non-continuation of grants/contracts to providers that do not effectively safeguard children in their care." We agree.

*Recommendation:* "If ORR finds a care provider facility to be out of compliance with the regulations in this part and 45 CFR part 411 or sub-regulatory policies such as its guidance and the terms of its contracts or cooperative agreements, ORR will communicate ~~the concerns~~ findings of non-compliance in writing to the care provider facility director or appropriate person through a written monitoring or site visit report, with a list of corrective actions and child welfare best practice recommendations, as appropriate. ORR will request a response to the corrective action findings from the care provider facility and specify a time frame for resolution and the disciplinary consequences for not responding within the required timeframes. ORR will collect and aggregate data on violations and resulting corrective actions for both facilities and grantees. Such data shall be for use in ongoing monitoring and in consideration of the future composition of the ORR network, including to inform decisions regarding initiation, renewal, or discontinuation of contracts or cooperative agreements."

### h. Proposed Rule § 410.1303(d)

*Comment:* In the preamble, ORR states that "In addition to ORR monitoring, ORR proposes that ORR long-term home care and transitional home care facilities that provide services through a subcontract or sub-grant be responsible for conducting annual monitoring or site visits of the sub-recipient, as well as weekly desk monitoring." P.R. 68939-40. However, the drafted language does not repeat clearly the "In addition to ORR monitoring" phrase of the preamble, the "in addition to other monitoring activities" phrase of 1303(c), or other similar phrases in the proposed rule. This opens ambiguity about whether monitoring by a prime contractor supplements or instead replaces ORR's monitoring of subcontracted long-term home care and transitional home care facilities.

*Recommendation:* "ORR directly monitors long-term home care and transitional home care facilities ~~are subject to the same types of monitoring as other care provider facilities,~~ with the activities described in §410.1303(a) but which may be ~~the activities are~~ tailored to the foster care arrangement. Additionally, ORR long-term home care and transitional home care facilities that provide services through a subcontract or sub-grant are responsible for conducting annual monitoring or site visits of the sub-recipient, as well as weekly desk monitoring. Upon request, care provider facilities must provide findings of such reviews to the designated ORR point of contact."

### i. Proposed rule § 410.1303(f)

#### i. Proposed rule § 410.1303(f)(4)

***Comment*****:** WRC applauds and supports the inclusion at § 410.1303(f)(4) of the protection of unaccompanied children from the misuse or misapplication of Significant Incident Reports: "The existence of a report of a significant incident may not be used by ORR as a basis for an unaccompanied child's step up to a restrictive placement or as the sole basis for a refusal to step a child down to a less restrictive placement." Historically, SIRs have frequently documented minor rule infractions and developmentally- and age-appropriate misbehavior. WRC recognizes the recent and important changes that ORR has made to SIRs (captured partially but not wholly in the Guide and MAP at 5.8), and supports the inclusion of those changes in any proposed rule.

### j. Proposed rule § 410.1303(g)

#### i. Proposed rule § 410.1303(g)(1)

***Comment***: In all locations where the proposed rule uses the phrase "unauthorized use or disclosure" or a similar phrase, WRC recommends a small but important revision. The proposed rule contemplates two forms of data breach – unauthorized use, unauthorized disclosure – when it should contemplate four: unauthorized access, unauthorized use, misuse, and improper disclosure. Authorized users fulfilling job-related functions can still misuse private and sensitive data about children, and improper disclosure of the protected information in a case file (or elsewhere) does not require access to the file itself. WRC recommends a revision to this language: "protect from unauthorized access or use, misuse, and improper disclosure."

***Recommendation***: "Care provider facilities and PRS providers must preserve the confidentiality of unaccompanied child case file records and information, and protect the records and information from unauthorized ~~use or disclosure~~ unauthorized access or use, misuse, and improper disclosure"

### k. Proposed rule § 410.1304(e)

#### i. Proposed rule § 410.1303(e)(2)

***Comment*****:** The provision at § 410.1303(e)(2) is confusing and should be revised. The provision reads, in full, "[Secure facilities, except for RTCs ] may restrain an unaccompanied child for their own immediate safety or that of others during transport to an immigration court or an asylum interview." There is no clear nexus between the clauses of this provision. If a child presents a danger or possible risk such that the use of restraints is necessary during transport, then that risk obtains no matter the destination.

### l. Proposed § 410.1307(b)

#### i. Proposed § 410.1307(b)(2)

***Comment*:** The text at § 410.1307(b)(2) appears to have two separate issues with ambiguous construction. The proposed text reads (emphasis ours):

> "A complete medical examination (including screening for infectious disease) within 2 business days of admission, excluding weekends and holidays, unless **the unaccompanied child was** recently examined at another facility and if **unaccompanied children are** still in ORR custody **60 to 90 days** after admission, an initial dental exam, or sooner if directed by State licensing requirements;"

First, the construction of " unless the unaccompanied child was…if unaccompanied children are" would appear to be different groups of children and so should be clarified. Second, the period "60 to 90 days" will likely simply default to 90 days. WRC suggests that the initial dental exam be given earlier and recommends that 60 days be the standard here. Finally, the clock should be made more clear: the 60-day period should begin with referral, not admission to a program, since transfers might mean that children spend many months in care but (under the current version of the text) never a continuous 90-day period that would mandate dental care.

***Recommendation***: "A complete medical examination (including screening for infectious disease) within 2 business days of admission, excluding weekends and holidays, unless the unaccompanied child was recently examined at another facility ~~and,~~ if unaccompanied children are ~~still~~ in ORR custody 60 ~~to 90~~ days after referral ~~admission~~, an initial dental exam, or sooner if directed by State licensing requirements;"

### m. Proposed rule § 410.1401(b)

***Comment*:** The preamble and rule text are inconsistent. The preamble for proposed § 410.1401(b) reads:

> "ORR would codify a requirement in the FSA that it assist without undue delay in making transportation arrangements where it has approved the release of an unaccompanied child to a sponsor, pursuant to proposed §§ 410.1202 and 410.1203. ORR also proposes that it would have **the authority to require the care provider facility** to transport an unaccompanied child." (emphasis ours)

However, the text of the rule uses the word "request" instead of "require" ("In its discretion, ORR may **request** the care provider facility to transport an unaccompanied child."). WRC supports the use of "require" in this instance.

***Recommendation***: "When ORR plans to release an unaccompanied child from its care to a sponsor under the provisions at subpart C of this part, ORR assists without undue delay in making transportation arrangements. In its discretion, ORR may ~~request~~ require the care provider facility to transport an unaccompanied child. In these circumstances, ORR may, in its discretion,

reimburse the care provider facility or directly pay for the child and/or sponsor's transportation, as appropriate, to facilitate timely release."

### n. Proposed rule § 410.1801(b)

#### i. Proposed rule § 1801(b)(17)

***Comment***: In all locations where the proposed rule uses the phrase "unauthorized use or disclosure" or a similar phrase, WRC recommends a small but important revision. The proposed rule contemplates two forms of data breach – unauthorized use, unauthorized disclosure – when it should contemplate four: unauthorized access, unauthorized use, misuse, and improper disclosure. Authorized users fulfilling job-related functions can still misuse private and sensitive data about children, and improper disclosure of the protected information in a case file (or elsewhere) does not require access to the file itself. WRC recommends a revision to this language: "protect from unauthorized access or use, misuse, and improper disclosure."

***Recommendation***: "The emergency or influx facility maintains records of case files and makes regular reports to ORR. Emergency or influx facilities must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized ~~use or disclosure.~~ unauthorized access or use, misuse, and improper disclosure"

## 6. Conclusion

We thank ORR for the opportunity to comment on the Proposed Rule. We appreciate ORR's, ACF's, and HHS's efforts to codify the policies and requirements to ensure safe placement and well-being of unaccompanied children in the care of ORR across standard and non standard programs. We further encourage you to consider our proposed changes in this comment to improve and strengthen the rule.