

Congress of the United States

Washington, DC 20515

December 4, 2023

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

Re: ACF Docket No. ACF-2023-0009-0001, RIN: 0970–AC93, Comments in Response to Notice of Proposed Rulemaking: Unaccompanied Children Program Foundational Rule

Dear Mr. Biswas:

We submit this comment regarding the Department of Health and Human Services (HHS)’s Office of Refugee Resettlement (ORR)’s proposed rule, “Unaccompanied Children Foundational Rule,” published in the Federal Register on October 4, 2023.

Current U.S. laws provide an essential foundation for the care and custody of unaccompanied alien children (hereinafter, UC or unaccompanied children), given the unique vulnerabilities they face. These protections are governed by the *Flores Settlement Agreement* of 1997 (*Flores Agreement*), the Homeland Security Act of 2002, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).¹ As members of Congress, we have an interest in ensuring that federal regulations regarding unaccompanied children reflect congressional intent to ensure the safety and well-being of children in government custody. In addition, given that a final regulation could lead to the termination of parts of the *Flores Agreement* that relate to unaccompanied children in ORR custody, we have an interest in ensuring that any final regulation implements and properly enforces that agreement.² We write to offer our views on the proposed rule, as well as recommendations in furtherance of the aforementioned goals.

A. Building on Congressional Intent

In addition to the minimum standards set by the *Flores Agreement*, Congress subsequently enacted legislation establishing requirements for the UC program. In 2000, then-Senator Feinstein introduced the bipartisan Unaccompanied Alien Child Protection Act (UACPA).³ The Senate Judiciary Committee’s Subcommittee on Immigration held a hearing about the bill in February 2002, during which Senator Kennedy, the then-Chair of the Subcommittee, reported “that more than 30 percent of unaccompanied children detained . . .

¹ *Flores v. Meese—Stipulated Settlement Agreement* (U.S. District Court, Central District of California, 1997) (hereinafter *Flores Agreement*); 6 U.S.C. §279(g)(2); 8 USC § 1232(a)(5)(D) and 8 USC § 1232(b)(3); Immigration and Nationality Act (INA) § 235(a)(2)(A).

² *Flores Agreement*, ¶ 9.

³ S. 3117, 106th Congress.

were held in juvenile jails, often with dangerous criminals, subject to shackling and strip searches.”⁴ Portions of UACPA were subsequently incorporated into and enacted into law with the passage of the Homeland Security Act (HSA) of 2002.⁵ Specifically, the HSA divided responsibilities for UC between the Department of Homeland Security (DHS) and HHS’s Office of Refugee Resettlement (ORR). DHS would be responsible for the apprehension, transfer, and repatriation of UC. ORR would then be responsible for coordinating and implementing the care and placement of UC in appropriate custody.⁶ Concerns remained, however, after the passage of the HSA, about the screening of UC for human trafficking or persecution, as well as their legal representation in immigration proceedings.⁷ In 2007, Senator Feinstein introduced an updated version of the bipartisan UACPA, which was then incorporated into and enacted as part of the TVPRA, which passed the Senate unanimously and was subsequently signed into law by President George W. Bush.⁸

Pursuant to the TVPRA and consistent with the *Flores Agreement*, UC who remain in ORR custody must be placed in the least restrictive setting that is in their best interest.⁹ The TVPRA also requires that before placing a child with a sponsor, ORR must determine that a proposed sponsor is “capable of providing for the child’s physical and mental well-being.”¹⁰ This requires, at a minimum, “an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.”¹¹ Prior to placement, ORR is statutorily required to conduct a home study for the following children: trafficking victims, children with disabilities, certain victims of physical or sexual abuse, and any child whose “proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking” based on “all available objective evidence.”¹² Under the TVPRA, ORR is required to provide post-release follow-up services for all UC who received home studies prior to placement with a sponsor.¹³ ORR is also authorized to conduct follow-up services in cases involving UC who could benefit from ongoing assistance from a social welfare agency, such as “children with mental health or other needs.”¹⁴

We strongly support the proposed rule’s expanded implementation of statutory policies regarding pre-release home studies, sponsor vetting, and post-release services to provide additional safeguards and care to unaccompanied children. We welcome the codification of current ORR policy to conduct home studies not only on children in certain circumstances required by the TVPRA, but also for children in additional vulnerable situations.¹⁵ Specifically,

⁴ *Unaccompanied Alien Child Protection Act*, Hearing Before the Subcommittee on Immigration, Committee on the Judiciary, United States Senate, S. Hrg. 107-867 (Feb. 28, 2002), <https://www.govinfo.gov/content/pkg/CHRG-107shrg85520/html/CHRG-107shrg85520.htm>.

⁵ 6 U.S.C. § 279.

⁶ CRS, *Unaccompanied Alien Children: An Overview* (Sept. 1, 2021), <https://sgp.fas.org/crs/homsec/R43599.pdf>.

⁷ *Id.*

⁸ See generally *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, P.L. 110-457.

⁹ 8 U.S.C. §1232(2).

¹⁰ 8 U.S.C. §1232(c)(3)(A)

¹¹ 8 U.S.C. §1232(c)(3)(A)

¹² 8 U.S.C. §1232(3)(C)(B)

¹³ 8 U.S.C. §1232(3)(B).

¹⁴ 8 U.S.C. §1232(3)(B).

¹⁵ HHS ORR, *Unaccompanied Children Program Policy Guide* at Section 2.4.2 Home Study Requirement (Revised Mar. 28, 2023) <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-2>.

the proposed rule requires home studies for children whose sponsor is not a relative and is seeking or has sought to sponsor multiple children¹⁶ (a circumstance that may indicate a risk to the child of human trafficking) and children aged 12 or younger to a sponsor who is not a relative.¹⁷ Such children would also be required to receive post-release services,¹⁸ consistent with the TVPRA.¹⁹ In addition, the proposed rule expands the sponsor suitability assessment to include an evaluation of the sponsor's previous relationship with the unaccompanied child and the child's family, as well as the sponsor's motivation for sponsorship,²⁰ factors that also mirror current ORR policy.²¹ Finally, we are pleased to see a proposed definition of "post-release services," among other key terms, as well as proposed guidelines for providing timely post-release release services for children statutorily required to receive such services.²²

B. Building on the Foundation of *Flores* – Improving Oversight Safeguards

Under its terms, the *Flores Agreement* will terminate when regulations consistent with the agreement are put in place.²³ Although the federal government has on several occasions attempted to publish relevant regulations, none of these efforts resulted in the promulgation of a final rule.²⁴ The proposed rule is accordingly intended to implement relevant provisions of the *Flores Agreement*, as well as codify policies and practices authorized by relevant statutes.²⁵ In addition to enacting laws that mirror certain protections within the *Flores Agreement*, members of Congress have explicitly affirmed the settlement's minimum health and safety requirements and have opposed past efforts to promulgate regulations counter to these requirements.²⁶ We strongly support the proposed rulemaking's efforts to implement and broaden the protections in the *Flores Agreement*. Consistent with these aims, we note below portions of the rule that should be strengthened prior to finalization.

The proposed rule creates a new Office of the Ombuds to allow UC and stakeholders to raise concerns with ORR policies and practices to an independent body to ensure ORR's adherence to law and policy. While we applaud the creation of such an office, a concept that has

¹⁶ 88 Fed. Reg. 68986 (2023) at Proposed Rule § 410.1204(b)(2) <https://www.federalregister.gov/d/2023-21168/p-882>.

¹⁷ 88 Fed. Reg. 68986 (2023) at Proposed Rule § 410.1204(b)(3) <https://www.federalregister.gov/d/2023-21168/p-883>.

¹⁸ 88 Fed. Reg. 68988 (2023) at Proposed Rule § 410.1210(a)(2) <https://www.federalregister.gov/d/2023-21168/p-924>.

¹⁹ 8 U.S.C. §1232(3)(B).

²⁰ 88 Fed. Reg. 68985 (2023) at Proposed Rule § 410.1202(d), § 410.1202(e) <https://www.federalregister.gov/d/2023-21168/p-843>.

²¹ HHS ORR, *Unaccompanied Children Program Policy Guide* at Section 2 <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-2>

²² 88 Fed. Reg. 68989 (2023) at Proposed Rule § 410.1001, § 410.1210(g) <https://www.federalregister.gov/d/2023-21168/p-957>.

²³ *Flores Agreement*, ¶ 11 - 12A.

²⁴ 88 Fed. Reg. 68911 (2023) <https://www.federalregister.gov/d/2023-21168/p-87>.

²⁵ 88 Fed. Reg. 68913 (2023) <https://www.federalregister.gov/d/2023-21168/p-125>.

²⁶ *Duckworth, Durbin, Bicameral Congressional Leaders Call on Ninth Circuit to Uphold Protections for Migrant Children in Flores Amicus Brief* (Jan. 28, 2020) [https://www.duckworth.senate.gov/news/press-releases/duckworth-durbin-bicameral-congressional-leaders-call-on-ninth-circuit-to-uphold-protections-for-migrant-children-in-flores-amicus-brief-;](https://www.duckworth.senate.gov/news/press-releases/duckworth-durbin-bicameral-congressional-leaders-call-on-ninth-circuit-to-uphold-protections-for-migrant-children-in-flores-amicus-brief-) see generally 88 Fed. Reg. 68911-68912 (2023) <https://www.federalregister.gov/d/2023-21168/p-92>.

been included in legislation introduced to strengthen protections for children in ORR custody,²⁷ we are concerned that the structure for the office proposed in the rule lacks sufficient independence. Counsel and court-appointed monitors have played a critical role in enforcing the protections of the *Flores Agreement*.²⁸ An independent Office of Ombuds will be key to ensuring that the protections included in the *Flores Agreement*—and any final regulation implementing such agreement—continue to be properly enforced. To ensure this, we strongly recommend improvements to protect the independence of the Office of Ombuds, including requiring that the Ombuds be appointed by and directly report to the Secretary of HHS and that the Ombuds be required to issue annual, public reports on the accomplishments, challenges, and recommendations of the Office. We also recommend you consider additional authorities to ensure the Ombuds has unobstructed access to necessary information to conduct investigations and resolve complaints.

Furthermore, the *Flores Agreement* generally requires that any children who cannot be released from government custody be transferred to state-licensed facilities appropriate for housing dependent children.²⁹ The settlement defines a “licensed program” as “any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors.”³⁰ This requirement is intended to provide appropriate standards for children’s care, education, and well-being, as well as the ability of an independent third party to investigate alleged abuses.³¹ We strongly support housing children in such state-licensed facilities.

Given that some states have recently refused to license facilities housing UC, instead of “licensed program,” the proposed rule includes a definition of a “standard program.”³² The proposed rule requires such “standard programs” to “[b]e 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”³³ State licensure is essential to providing a baseline of safety requirements to which facilities must adhere and a vital structure for oversight and accountability. We also note the proposed rule’s reference to a future proposed rulemaking regarding the creation of a federal licensing scheme for providers located in states that do not license programs serving UC.³⁴ Without any information on this potential federal licensing scheme, we cannot opine on whether these options would adequately

²⁷ Protection of Unaccompanied Children Act (S. 382, 118th Congress), Protection of Kids in Immigrant Detention Act or PROKID Act (S. 3323, 118th Congress; H.R. 1238, 117th Congress), Children’s Safe Welcome Act (S. 4529, 117th Congress).

²⁸ Center for Human Rights and Constitutional Law & National Center for Youth Law, *Practice Advisory: Appointment of Independent Monitor in the Flores Settlement Agreement*, (Jul. 2018) <https://law.ucdavis.edu/sites/g/files/dgvnsk10866/files/media/documents/flores-pa-monitor.pdf>.

²⁹ *Flores Agreement*, ¶ 11 - 12A.

³⁰ *Flores Agreement*, ¶ 6.

³¹ See generally HHS ACF, *FY 2024 Justification of Estimates for Appropriations Committees*, <https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2024-congressional-justification.pdf>.

³² 88 Fed. Reg. 68915-68916 (2023) <https://www.federalregister.gov/d/2023-21168/p-145>.

³³ 88 Fed. Reg. 68989 (2023) at Proposed Rule § 410.1302(a).

<https://www.federalregister.gov/documents/2023/10/04/2023-21168/unaccompanied-children-program-foundational-rule#sectno-reference-410.1302>.

³⁴ 88 Fed. Reg. 68916 at FN52 (2023) <https://www.federalregister.gov/d/2023-21168/p-147>.

incorporate the minimum standards and oversight mechanisms of state licensure. We urge the incorporation of additional language in the final rule to indicate that unlicensed placements, such as emergency and influx sites, should only be utilized as a last resort.

C. Access to Counsel

As noted in the proposed rule, the TVPRA requires the Secretary of HHS to ensure that UC have counsel to represent them in legal proceedings and protect them from mistreatment, exploitation, and trafficking. The Secretary is also required to make every effort to utilize the services of pro bono counsel. Both of these provisions are required to the greatest extent practicable.³⁵ Experts have long lamented that federal law does not guarantee government-appointed counsel for UC. Without an attorney, it is virtually impossible for unaccompanied children to navigate the complex U.S. immigration system. As envisioned in the TVPRA, attorneys can help screen children for protection needs and assist them in accessing lifesaving protections to prevent their return to trafficking and other harm and provide assistance to protect children from situations of exploitation.³⁶ Members of Congress have introduced several legislative proposals attempting to address gaps in current law by providing legal counsel appointed by or funded by the federal government.³⁷

We applaud ORR's recently stated goal of achieving universal legal representation for unaccompanied children by FY 2027.³⁸ However, we are concerned that the proposed rule conditions the provision of such services on ORR's discretion and practicability, allowing for broad latitude to decline to provide legal representation to vulnerable children even when sufficient resources for such representation are available.³⁹ We urge you to consider amending these conditions to more closely mirror the provisions of the TVPRA. Such changes would bring this regulation in line with congressional intent for ORR to make its best effort to provide legal representation for every unaccompanied child.

D. Responding to Today's Challenges

Years after enactment of the HSA and TVPRA, many new challenges have arisen for the federal government's system for caring for unaccompanied children. As we face the worst global refugee crisis in recent history, the number of unaccompanied children has increased as well, with 137,275 encountered at our southern border in fiscal year 2023.⁴⁰ As noted earlier, some

³⁵ 8 U.S.C. 1232(c)(5).

³⁶ Kids in Need of Defense, *Protecting Unaccompanied Children from Labor Exploitation* (Mar. 2023), <https://supportkind.org/wp-content/uploads/2023/03/Protecting-UCs-From-Labor-Exploitation.pdf>

³⁷ Protection of Unaccompanied Children Act (S. 382, 118th Congress), Fair Day in Court for Kids Act of 2023 (S. 3065, 118th Congress), Protection of Kids in Immigrant Detention Act or PROKID Act (S. 3323, 118th Congress), Children's Safe Welcome Act of 2022 (S. 4529, 117th Congress), Funding Attorneys for Indigent Removal Proceedings Act or the FAIR Proceedings Act (S. 901, 117th Congress).

³⁸ HHS ACF, *Fiscal Year 2024 Administration for Children and Families Justification of Estimates for Appropriations Committees* ://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2024-congressional-justification.pdf.

³⁹ 88 Fed. Reg. 68996 (2023) <https://www.federalregister.gov/d/2023-21168/p-1124>.

⁴⁰ U.S. Customs and Border Protection, *Southwest Land Border Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

states refuse to license ORR facilities serving unaccompanied children, limiting the ability of children and staff in those facilities to report safety violations to local child welfare authorities.⁴¹ Furthermore, since 2018 alone, the Department of Labor (DOL) has seen a 69 percent increase in child labor violations, including many unaccompanied children who may be placed with exploitative sponsors or labor trafficking situations after they leave ORR custody.

Therefore, we welcome the proposed rule's increased focus on the vulnerability of UC to child labor exploitation. The proposed rule codifies the legal orientation presentation that UC receive in ORR custody and explicitly requires that it inform children of their legal rights and responsibilities, including regarding child labor protections and educational services.⁴² In addition, we appreciate that the proposed regulation requires an unaccompanied child's potential sponsor to demonstrate understanding and awareness of the sponsor's responsibilities related to compliance with the child's immigration court proceedings, school attendance, and U.S. child labor laws⁴³ and to adhere to existing federal and state child labor laws as part of the Sponsor Care Agreement.⁴⁴ These new requirements would take much-needed steps toward ensuring that UC and their sponsors are informed of their rights with respect to safe and appropriate work for children. We strongly encourage their inclusion in the final rule.

E. Information Sharing

Congress has expressed concerns with information-sharing between the Departments of Health and Human Services and Homeland Security for purposes of immigration enforcement through recently enacted appropriations legislation.⁴⁵ The sharing of information from HHS to DHS for immigration enforcement purposes has had a chilling effect on sponsor engagement and contributed to delayed release and therefore prolonged government custody of UC.⁴⁶ We therefore strongly encourage you to include strict prohibitions on information-sharing for immigration enforcement purposes.

F. Conclusion

Implementing regulations consistent with the HSA, the TVPRA, and the *Flores Agreement* are long overdue, and we appreciate ORR's efforts to provide a comprehensive framework for upholding and improving key protections to provide for the safety and well-being of unaccompanied children that reflect their unique vulnerabilities upon arrival to the United States, as well as their release from ORR custody. We welcome the opportunity to comment on

⁴¹ See, e.g., Proclamation by the Governor of the State of Texas, May 31, 2021, available at: https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf (directing the Texas Health and Human Service Commission (HHSC) to amend its regulations to “discontinue state licensing of any child-care facility in this state that shelters or detains [UC] under a contract with the Federal government.”); see also Fl. Executive Order No. 21–223 (Sep. 28, 2021), available at: https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-223.pdf.

⁴² 88 Fed. Reg. 68995 (2023) <https://www.federalregister.gov/d/2023-21168/p-1106>.

⁴³ 88 Fed. Reg. 68985 (2023) <https://www.federalregister.gov/d/2023-21168/p-860>.

⁴⁴ 88 Fed. Reg. 68986 (2023) <https://www.federalregister.gov/d/2023-21168/p-868>.

⁴⁵ House Report 116-450 at 184 <https://www.congress.gov/116/crpt/hrpt450/CRPT-116hrpt450.pdf>; HHS ORR, *Unaccompanied Children Program Policy Guide* at 5.10.2 (Effective August 21, 2023) <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-5#5.10.2>

⁴⁶ House Report 116-450 at 185 <https://www.congress.gov/116/crpt/hrpt450/CRPT-116hrpt450.pdf>.

this rule and strongly support many of its proposals to improve safeguards and services to ensure children are safe and thrive upon release from ORR custody.

Sincerely,



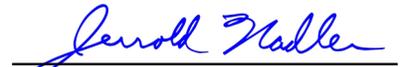
Richard J. Durbin
Chair
Senate Committee on the Judiciary



Jeffrey A. Merkley
United States Senator



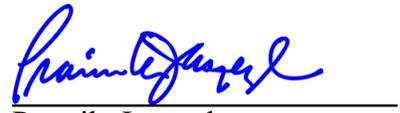
Alex Padilla
Chair
Senate Committee on the Judiciary
Subcommittee on Immigration,
Citizenship, and Border Safety



Jerrold Nadler
Ranking Member
House Committee on the Judiciary



Mazie K. Hirono
United States Senator



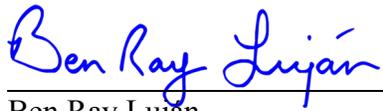
Pramila Jayapal
Ranking Member
House Committee on the Judiciary
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Integrity, Security, and Enforcement



Cory A. Booker
United States Senator



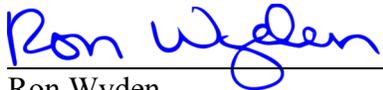
Henry C. "Hank" Johnson, Jr.
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Ben Ray Lujan
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J. Luis Correa
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Ron Wyden
United States Senator



Veronica Escobar
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