December 4, 2023
Submitted via https://www.regulations.gov/commenton/ACF-2023-0009-0001

Toby Biswas
Director of Policy, Unaccompanied Children Program
Office of Refugee Resettlement
Administration for Children and Families
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Unaccompanied Children Program Foundational Rule, Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS); 88 Fed. Reg. 68908; RIN 0970-AC93; ACF-2023-0009

Dear Mr. Biswas,

We write on behalf of the undersigned organizations and individual experts in response to the Office of Refugee Resettlement's (ORR) Notice of Proposed Rulemaking on the Unaccompanied Children Program Foundational Rule[1] ("Proposed Rule") to address the sections of the proposed rule that relate to reunification and release of unaccompanied children.

We have extensive experience providing legal, child advocate, social, mental health or other services to and advocacy on behalf of unaccompanied children with respect to their release and/or reunification with sponsors. Collectively, we have deep experience in the areas of enforcing constitutional due process rights, the ORR release and reunification process, child development, child migration, language and cultural competency, and service provision for unaccompanied children prior to and following release from ORR custody, among other things. We have seen how important it is to children's wellbeing that children be released promptly to sponsors who then receive support to adapt to their new family and community environments. We are also aware of the risks of exploitation for unaccompanied minors, and the risks associated with government surveillance of immigrant families. In this comment, our recommendations balance safety and wellbeing concerns both within ORR custody and following release.

Importantly, our comments' narrow focus does not constitute an endorsement of other segments of the Proposed Rule, though we have joined or written separate comments providing stakeholder input on those sections. In the following comment, we express appreciation for aspects of the Proposed Rule, encourage ORR to improve upon certain sections of the Proposed Rule, and oppose or request significant revision of certain sections of the Proposed Rule.

I. Subpart A (§§ 410.1001; 410.1003(d))

[1] Unaccompanied Children Program Foundational Rule, 88 FR 68908 (Oct. 4, 2023) (to be codified at 45 C.F.R. pt. 410).

a. ORR should strengthen regulations providing for children's involvement in release decisions and the impact of continued custody on the best interests of the child.

i. Children's participation in decision-making

We are encouraged to see that ORR has explicitly included youth participation in decision-making as a foundational principle that applies to the care and placement of unaccompanied children in §410.1003(d). We agree that opportunities "to be active participants in ORR's decision-making process relating to their care and placement . . . allow for the recognition of each child's specific needs and strengths while providing opportunities for unaccompanied children to become more empowered, resilient, and self-efficacious." (p. 68916). This principle must also apply to reunification decisions, which is perhaps the most important decision that ORR makes for any individual child.

Recommendation 1
We urge ORR to provide specific regulations requiring the recorded participation of UCs in major decision-making processes as outlined in each subsection in addition to being listed as a foundational principle in Subpart A.

ii. Best interests of the child

The definition of the "best interest" standard in § 410.1001 includes many positive components, and it should be strengthened and clarified to be consistent with the "best interests of the child" standard established in the Convention on the Rights of the Child[2] and the Subcommittee on Best Interests of the Interagency Working Group on Unaccompanied and Separated Children's Framework for Considering the Best Interests of Unaccompanied Children (hereinafter "Best Interests Framework")[3], a document created with input from ORR officials. To effectuate meaningful consideration of children's best interests—specifically, their expressed wishes, their safety, and their rights to family integrity, liberty, development, and identity—we urge the agency to modify its Proposed Rule as follows.

First, although elaborated as a foundational principle, the regulations do not specify how UCs will be included in the decision-making process which is necessary to ensure consideration of their expressed interests, or how their well-being in care (both expressed and observed) will be assessed and weighed when making care, placement, and/or release decisions. Federal law governing state child welfare proceedings requires states to consult with children and in specific situations, to "ask the child

[2] Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3; Comm. on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), ¶ 76, U.N. Doc. CRC/C/GC/14 (May 29, 2013).

[3] Subcomm. on Best Interests, Interagency Working Grp. on Unaccompanied and Separated Children, Framework for Considering the Best Interests of Unaccompanied Children 5 (2016) (confirming that "the most widely accepted elements of best interests include: safety and well-being; the child's expressed interests, in accordance with the child's age and maturity; health; family integrity; liberty; development (including education); and identity) (internal citations omitted).

about the desired . . . outcome" at each hearing that is part of the state's decision to find a permanent placement for the child.[4] ORR's policies should follow suit.

Second, the regulations should specify that any best interests of the child determination must include consideration of the impact of ongoing or continued federal custody on the child's wellbeing.

Third, it is unclear what ORR proposes to evaluate when considering "the intimacy of relationship(s)" in its proposed "best interests" definition, or how this evaluation would be used. We ask ORR to clarify whether this component is used to make decisions about whom the child may be in contact with while in ORR custody, placement within ORR custody, sponsor identification, sponsor evaluation, or other reasons. The purpose of this component could be clarified in the definitions section or in each section as appropriate (placement, reunification, etc.), but must be made clear to ensure fair, culturally competent, and unbiased use of this component.

Fourth, the factor evaluating the child's "adjustment to the community" is overly vague and does not provide insight into what will be evaluated, and what the "community" consists of. Instead of this factor, we urge ORR to adopt a factor evaluating the impact of federal custody (or, in other words, of being part of the ORR community) on the child's well-being and functioning, particularly considering a child's right to liberty as a consideration in a best interests analysis. This is a more appropriate guide for using such a factor to make decisions about the child's placement, within ORR or with sponsors. In fact, evaluating the child's adjustment to federal custody may provide scant useful insight into the child's functioning and wellbeing once placed with a sponsor where they will be living in a community with caregivers familiar with their language and culture and without the restrictiveness that comes with federal custody.

Finally, it is unclear why ORR will consider the "length or lack of time the unaccompanied child has lived in a stable environment" in making a best interest determination. What does ORR consider to be a "stable environment," particularly when many families live, not by choice, in impoverished communities and are denied access to services based solely on their lack of citizenship or lawful permanent resident status? Is this factor a consideration of the child's experiences prior to ORR custody, and if so, how does ORR propose to carry out such an evaluation and under what standard? This component seems particularly unhelpful given the fact that many children are fleeing highly unstable environments. To the extent ORR would use this factor to place children in more restrictive settings and/or prolong their detention by lengthening the reunification process we urge ORR to either eliminate this component or use it simply as a trigger for additional support for the child in the form of child advocate appointment and/or post-release services (PRS).

Recommendation 2: § 410.1001

Best interest is a standard ORR applies in determining the types of decisions and actions it makes in relation to the care **[ADD]: <u>and release</u>** of an unaccompanied child. When evaluating what is in a child's best interests, ORR considers, as appropriate, the following inexhaustive list of factors: the unaccompanied child's expressed interests, in accordance with the unaccompanied child's age and

[4] 42 U.S.C. § 675a(a)(2).

maturity; the unaccompanied child's [ADD] safety, mental, and physical health **[ADD] and the impact of federal custody on those factors**; the wishes of the unaccompanied child's parents or legal guardians; family integrity and the ~~intimacy of~~ **[ADD] existence of** relationship(s) between the unaccompanied child and the child's family, including the interactions and interrelationship of the unaccompanied child with the child's parents, siblings, and any other person who may significantly affect the unaccompanied child's well-being; ~~adjustment to the community~~; the unaccompanied child's cultural background and primary language; ~~length or lack of time the unaccompanied child has lived in a stable environment~~; individualized needs, including any needs related to the unaccompanied child's disability; and the unaccompanied child's development and ~~identity~~ **[ADD] and the child's identity including but not limited to the child's race, religion, ethnicity, sexual orientation, and gender identity; and any best interests determination(s) submitted by the independent Child Advocate.**

b. ORR should strengthen regulations regarding providing trauma-informed care.

We appreciate ORR's stated commitment to providing trauma-informed care to the young people in its custody using the CDC and SAMHSA's info-graphic framework, as explained in the preamble to the Proposed Rule. (p. 68916). While helpful, the CDC/SAMHSA framework does not provide enough detail or information to understand how ORR will apply such a framework in the context of UC custody.

We urge ORR to provide a more specific definition of a trauma-informed approach in proposed § 410.1001 that includes not just the recognition of trauma and recovery paths and the avoidance of re-traumatization but also includes policies affirmatively aimed at reducing the short- and long-term impacts of trauma on the children in its care. A more specific definition or additional definition could include a definition of "traumatic stress".[5]

In addition, ORR's Final Rule should require that trauma-informed practices be evidence-based. Simply providing for a child's basic needs is insufficient to promote healthy development when there is not a reliable caregiver-child relationship as is the case in most "standard placements" as defined in the proposed regulations.[6] Because many, if not most, of the children in ORR care have experienced trauma, the regulation or implementing guidance should incorporate concrete practices reflecting a trauma-informed approach as it applies to unaccompanied children in the distinct contexts in which they interact with ORR.[7] For example, ORR should establish policies that avoid or reduce disruption to

[5] *See, e.g.*, Jack P. Shonkoff & Andrew S. Garner, Am. Acad. of Pediatrics, *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 Pediatrics 1 (2012), https://doi.org/10.1542/peds.2011-2663 (describing traumatic stress as being the excessive or prolonged activation of physiological stress response systems in the absence of, or insufficiency of protective relationships that reinforce adaptations to stress); Robert Sege & Lisa Amaya-Jackson, Am. Acad. of Pediatrics, *Clinical Considerations Related to the Behavioral Manifestations of Child Maltreatment*, 139 Pediatrics, https://doi.org/10.1542/peds.2017-0100; Substance Abuse & Mental Health Services Admin. (SAMHSA), *Understanding Child Trauma*, https://www.samhsa.gov/child-trauma/understanding-child-trauma.

[6] Ctr. on the Developing Child, Harvard Univ., InBrief: The Science of Neglect (2023), https://developingchild.harvard.edu/resources/inbrief-the-science-of-neglect/.

[7] *See, e.g.*, Julian D. Ford et al., *Etiology of PTSD: What causes PTSD?* in Posttraumatic Stress Disorder: Scientific and Professional Dimensions 81-132 (2nd ed. 2015); Julian D. Ford et al., *Treatment of Children and Adolescents*

trusting relationships with ORR caregivers and peers (e.g., by avoiding transfers of UCs between placements unless there is a compelling reason to transfer a child specifically related to that child's expressed or best interests such as transfer to a more integrated and/or less restrictive setting), in recognition of the guiding principles of trustworthiness and transparency, peer support, and empowerment and choice.

Recommendation 3: § 410.1001
Trauma-informed means a system, standard, process, or practice that realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in unaccompanied children, families, staff, and others involved with the system; and ~~responds by~~ fully ~~integrating~~ **[ADD] integrates evidence-based practices and** knowledge about trauma into policies, procedures, and practices~~, and seeks to~~ **[ADD] in order to promote healing and** actively resist retraumatization.

II. Subpart C (§§ 410.1200 *et seq.*)

a. ORR should keep families together by expediting the release of unaccompanied children to relatives with whom they traveled to the United States.

The regulations should incorporate the streamlined reunification/release process which, pursuant to *Ms. L v. Immigration and Customs Enforcement*, ORR must apply in cases of parents and children who are apprehended together, separated by federal government officials, and separation is no longer justified. In 2018, the court in *Ms. L v. ICE*, a lawsuit brought on behalf of parents to challenge the Trump Administration's Zero Tolerance and related family separation policies, held that the "detailed vetting process" that ORR applies for vetting sponsors "was not meant to apply to the situation presented in this case, which involves parents and children who were apprehended together and then separated by government officials."[8]

Relying on a process that ICE had already been using in past cases where parents and children had been apprehended together and separated by the government, the *Ms. L* court held that ORR does not need to "comply with the onerous policies for vetting child sponsors under the TVPRA" in these cases, and instead, reunification should occur upon a determination that (1) the individual is the parent or Legal Guardian of the child; and (2) the parent does not present a danger to the child's welfare.[9] The court held that applying this streamlined process in these cases, with a focus on these two issues (ensuring that the adult is the parent of the child, and ensuring that the parent does not present a danger to the child) promoted the best interests of children.[10]

---

with PTSD in Posttraumatic Stress Disorder: Scientific and Professional Dimensions 367-411 (2nd ed. 2015); Kristine M. Kinniburgh & Margaret E. Blaustein, Treating Traumatic Stress in Children and Adolescents: How To Foster Resilience through Attachment, Self-Regulation, and Competency (2nd ed. 2018).

[8] Order Following Status Conference, *Ms. L v. U.S. Immigration and Customs Enforcement*, Case No. 18-cv-00428 (S.D. Cal. Jul. 10, 2018), ECF No. 101, p. 3.

[9] *Id*. at 2-3.

[10] *Id*.

Notably, the court held that background checks on the parent(s) or on other adults in the household where the child and parent will reside, sponsor care plans, sponsor care agreements, and attendance of legal orientation programs are not required and should not delay reunification.[11] ORR has been required to apply this streamlined process in such cases since the court's ruling. Moreover, the *Ms. L* Settlement Agreement, which has been preliminarily approved by the court, requires ORR to apply this "streamlined *Ms. L* process" in future separations by the government.[12]

We further recommend that the proposed regulations include a provision codifying ORR's ability to quickly verify family relationships and release unaccompanied children with their adult relatives, approved as Category 2 sponsors. Protecting the safety and best interests of children should not begin when a child arrives at an ORR facility, but from the moment they reach the border. Many children arrive at the border with relatives who already care for them but are not their parent or legal guardian. Typically, unaccompanied children are immediately separated from their family members and transferred to ORR custody. ORR then looks for a family member to sponsor the child out of custody – sometimes the same family member from whom the child was initially separated. Instead of separating families and causing additional trauma, ORR staff can meet with children and relatives at the border and begin the process of qualifying the adult family member as a Category 2 sponsor. ORR staff should verify family relationships and ensure that the adult relative does not pose a risk of trafficking or other immediate danger to the child. If approved as a Category 2 sponsor, CBP would then be required to release the adult promptly to enable ORR to promptly release the child into the custody of the family member. Importantly, through this process, the child would maintain their designation as an unaccompanied child, which provides critical protections to children as they seek immigration relief. We also recommend the agency remove Proposed Section 410.1101(e) to provide ORR with the flexibility required to take custody of or facilitate the release of children consistent with statutory requirements and because the language is unnecessary in light of subsection (c).

Recommendation 4

We urge ORR to add regulations mandating the streamlined reunification process set forth in *Ms. L v. ICE* in cases of a parent and child who were apprehended together and then separated by federal government officials, resulting in the child being transferred to ORR custody. These streamlined procedures, which ORR has already been legally required to implement since the *Ms. L* court's ruling in 2018, are critical to mitigating the harm and trauma of government separations of families, ensuring prompt reunification, and advancing the best interests of children.

§ 410.1101 (c) ORR works with the referring Federal Government department or agency to accept transfer of custody of the unaccompanied child, consistent with the statutory requirements at 8 U.S.C. 1232(b)(3) . . .

[11] *Id*. at 3-4.

[12] Proposed Settlement Agreement, *Ms. L. v. ICE*, Case No. 18-cv-00428 (S.D. Cal. Oct. 16, 2023), ECF No. 711-1, pp. 5-6, 34-35.; Order Granting Preliminary Approval of Proposed Settlement; Preliminarily Certifying Settlement Classes; Approving Class Notice, *Ms. L. v. ICE*, Case No. 18-cv-00428 (S.D. Cal. Oct. 24, 2023), ECF No. 717.

~~(e) ORR takes legal custody of an unaccompanied child begins when it assumes physical custody from the referring agency.~~ (sic)

Recommendation 5: § 410.1203(b)

(b) **[ADD]: In the case of an unaccompanied child determined to have entered the United States or have been apprehended with a relative who is neither a parent nor guardian, the Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security or other appropriate agencies of the government, shall evaluate whether that unaccompanied child can be safely released from Federal custody to that relative as a sponsor. If the Secretary of Health and Human Services makes such a determination, they shall release the unaccompanied child to the relative. If an unaccompanied child is transferred to the custody of the Secretary of Health and Human Services, the non-parent relative described herein may continue to be evaluated as a potential sponsor to whom the child may be released from Federal custody as described in subsection, as necessary to ensure child well-being and safety.**

b. ORR should expand due process protections to all children with potential sponsors.

We strongly condemn ORR's reversion to unconstitutionally deficient processes for review and timing of reunification decisions. In the proposed regulation, ORR unacceptably reverts to a 2018 version of its reunification process. The proposed regulation does less than ORR's current policies provide for. It only codifies appeal rights for Category 1 sponsors and does not provide children with appeal rights following reunification denials. Additionally, it eliminates important deadlines for decisions following an appeal of a release denial and does not provide protections for UCs to inspect evidence underlying a release decision, nor does it provide notice for UCs who are denied reunification with non-parent or guardian sponsors (Category 1). These deficient procedures have been roundly rejected by every federal court that has considered them.

In its preamble, ORR references the *Lucas R.* decision,[13] referring to its current Policy Guide provisions providing additional due process rights to children and Category 2 sponsors. (p. 68931). However, the *Lucas R.* court is not the only federal court to have found ORR's pre-*Lucas R.* reunification policy unconstitutional. As the court in *J.E.C.M. v. Marcos* recently held, referring to pre-2019 reunification policies, "Three courts have now held that previous iterations of ORR's reunification policy violated procedural due process, suggesting the viability of plaintiffs' concerns at the time they were initially pleaded in this civil action."[14] The same court went on to find that *only* in light of the policies

[13] *Lucas R. v. Becerra*, 2022 WL 2177454 (C.D. Cal. Mar. 11, 2022); *Lucas R. v. Becerra*, 2022 WL 3908829 (C.D. Cal. Aug. 30, 2022).

[14] *J.E.C.M. by & through Saravia v. Marcos*, No. 118CV903LMBIDD, 2023 WL 5767321, at *9 (E.D. Va. Aug. 29, 2023) (hereinafter *J.E.C.M.*) (citing *Beltran v. Cardall*, 222 F. Supp. 3d 476, 489 (E.D. Va. 2016); *Santos v. Smith*, 260 F. Supp. 3d 598, 615 (W.D. Va. 2017); *Lucas R.,* 2022 WL 2177454, at *28.); *see also Maldonado v. Lloyd*, No. 18-CIV-3089, 2018 WL 2089348, at *6-10 (S.D.N.Y. May 4, 2018).

ORR adopted to comply with the *Lucas R.* injunction[15], "the current ORR policy and procedures governing the review of formal denials are sufficient."[16]

Although we recognize that the *Lucas R.* preliminary injunction's sponsor appeal rights are limited to parents, legal guardians, and close relatives (Category 1 and Category 2 sponsors) and children denied release on the basis of danger to self or others, the Final Rule should provide an appeal procedure for *all* children and their sponsors. The TVPRA requires that children be placed in the least restrictive setting that is in the best interest of the child, which in most cases is placement with a sponsor.

These constitutionally required protections are rooted in fundamental liberty interests both in the *child's* constitutional and statutory rights to freedom from confinement and in the child and sponsor's constitutional right to family unity – interests held by children *and* their sponsors.[17] Children also have a significant liberty interest in ensuring that ORR makes an accurate decision as to the least restrictive setting appropriate under the TVPRA.

Because children themselves hold each of these protections ("[ORR] do[es] not dispute that minors, just like adults, have a constitutional interest in being free from institutional restraints"),[18] ORR must not limit the right to appeal a reunification denial to children with Category 1 sponsors – that essential

---

[15] The court stated, "First, most proposed sponsors and minors are not provided notice of a denial of a sponsor application and an opportunity to appeal the denial, with the assistance of counsel. Second, the lack of timeframe by which ORR must decide a sponsorship application results in prolonged detention. Third, Case Managers' discretion to deny applications as "non-viable" and lack of evidentiary standard increase the likelihood that a minor remains in custody." *Lucas R.* at *2, *26. The *Lucas* court found that these deficiencies in ORR's procedures created a risk that minors would be deprived of interests in being free from institutional restraints and in family reunification, and it ordered ORR to implement additional procedures to safeguard these interests. These additional procedures, already found by another district court to mitigate almost identical concerns to those that plaintiffs have expressed in this civil action, now protect against the risk of erroneous denials and prolonged delays, and, as such, provide plaintiffs with all the due process to which they are entitled. *J.E.C.M.* at *9.

[16] *J.E.C.M.* at *14.

[17] The *J.E.C.M.* court held "The defendants do not dispute that minors, just like adults, have a constitutional interest in being free from institutional restraints, *Schall v. Martin*, 467 U.S. 253, 265, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984) ("[A] juvenile's ... interest in freedom from institutional restraints ... is undoubtedly substantial"); *see also Application of Gault*, 387 U.S. 1, 27, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); however, this "interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody." *Schall,* 467 U.S. 253, 265, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984). This qualification does not negate a minor's interest in being free from restraints, but, instead, relates to the balancing of the factors cited in *Mathews v. Eldridge*. . . Additionally, both UC and sponsor class members have a cognizable constitutional interest in family unity. . . Category 2 sponsors and the minor children seeking to be released to them have an interest in family unity because "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Moore v. City of East Cleveland*, 431 U.S. 494, 504, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)." *J.E.C.M.* at *10. The court further held, "The Court agrees with the reasoning of *Santos*, *Beltran*, and *Lucas*, and finds that the interest of family unity is implicated by ORR's reunification process as it applies to Category 1 and 2 sponsors, and finds that UCs and their proposed Category 1 and 2 sponsors share a constitutionally cognizable interest in family unity." *J.E.C.M.* at *11.

[18] *Id.*

procedural protection must be available to all children in the reunification process, with the assistance of their sponsors if desired.

Nor should ORR limit appeal rights of denials based on a determination that a child is a danger to self or others to children with Category 1 sponsors. Where the suitability of the sponsor is not in question and the child's risk to self or others is the only consideration, the child must have the right to appeal such a determination regardless of the type of sponsor ORR considers and denies. Furthermore, if a reunification is denied based on a child's danger to self or others, both the child and the sponsor must retain their appeal rights with respect to the sponsorship application. One party's constitutional right does not negate the other's, and insofar as the reunification and danger hearings will evaluate different aspects of those rights and address different evidence, they must both be available to children and sponsors. Both appeal processes must be simultaneously available to challenge the release denial and the dangerousness determination.

Advocates note that in addition to being constitutionally mandated, ORR should embrace these suggested protections for children and families as furthering the government and families' shared goal and "strong belief that, generally, placement with a vetted and approved . . . sponsor, as opposed to in an ORR care provider facility, whenever feasible, is in the best interests of the unaccompanied child." (p. 68928) These procedural protections provide *additional* vetting via additional avenues of information and analysis to assist in complex and high stakes reunification decisions, only where children or sponsors *opt in* to using them. In other words, these appeals would not be automatic and would not occur at all if a child or sponsor does not choose to appeal. There is no evidence that extending the process to all children and their sponsors is likely to result in any inundation of hearing requests or prolonged detention for children in already protracted reunification processes. Nor do additional procedural protections result in any automatic release, but instead would provide an even more thoughtful and considered decision about release than the child might otherwise have. Therefore, any concern that extending such processes beyond Category 1 sponsors and children would result in automatic release to dangerous or inappropriate sponsors is entirely misplaced.

c. ORR should align its release decision and appeal processes with constitutional due process requirements as articulated by courts across the country and in compliance with the preliminary injunction in *Lucas R*. (§§ 410.1205-06).

In addition to improperly limiting the categories of sponsors and children able to access ORR's appeal process, the procedures outlined in Proposed § 410.1206 fail to comply with the requirements of constitutional due process.

First, ORR is obligated to adjudicate sponsor applications within a defined time frame to avoid unreasonable delays in a child's release.[19] With limited exceptions, the *Lucas R.* preliminary injunction requires that applications from parents or legal guardians, siblings, grandparents, or other close relatives who previously served as the child's primary caregiver (Category 1 and Category 2A sponsors) be adjudicated within 10 days and that sponsorship applications from other immediate relatives (Category

[19] *See Lucas R.*, 2022 WL 2177454, at *27.

2B) be adjudicated within 14 days.[20] Proposed Rule § 410.1205(b), however, provides a deadline only for parents or legal guardians. The absence of a deadline to adjudicate other sponsorship applications permits unlawful delays to release in violation of due process.[21]

Second, the *Lucas R.* preliminary injunction requires that the ORR Director, or a designee who is a neutral and detached decision maker, review all denials of sponsorship applications submitted by Category 1 and Category 2 proposed sponsors.[22] This automatic review is an important protection against erroneous initial deprivation of the right to release and can help avoid the need for an appeal and the consequent delay in the child's release to a suitable sponsor. This safeguard should be included in the Final Rule.

Third, under the *Lucas R.* preliminary injunction, UCs must also be notified of ORR's decision to deny release to a sponsor and their right to inspect evidence underlying that decision.[23] Proposed Rule § 410.1205(c), by contrast, provides notice only to UCs denied release to parents or legal guardians and does not provide a right to inspect the evidence underlying ORR's decision. The Final Rule must include notice to children consistent with ORR's legal obligations. Although the notice rights in the *Lucas R.* preliminary injunction extend only to children with Category 1 and Category 2 sponsors, *all* children in ORR custody have a strong interest in learning the outcome of their sponsor application process. ORR's stated and codified goals related to including children in the important decision-processes affecting them (§ 410.1003(d)) and the trauma-informed care principles ORR cites in the preamble of the Proposed Rule further support codifying notice obligations for all children. (p. 68916, proposed § 410.1001) ORR must therefore provide this notice to all children with denied sponsors.

Given the vital interests at stake, there is no justification to limit written notification of a sponsorship denial to parents and legal guardian sponsors, or even to close relative sponsors. A written notice with an explanation of the reason for denial and evidence supporting the denial provides a key opportunity for unaccompanied children and their potential sponsors to correct any inaccuracies in ORR's record.[24] To the extent the denial is based on a factor that could change in the future (e.g., a sponsor's lack of adequate housing), a written reasoned denial can provide the sponsor clear notice that they may be able to re-apply if they remedy the problem underlying the denial.

Even if there is no error in ORR's release decision and no prospect for remedying the basis for denial, a sponsorship denial is hugely consequential for unaccompanied children and their families. In our experience working with unaccompanied children, we have repeatedly seen that uncertainty about the status of a sponsorship application and a lack of understanding of why a sponsorship application is

[20] *Lucas R.*, 2022 WL 3908829, at *1-2.
[21] *See J.E.C.M.* at *12 ("The deprivations of plaintiffs' interests can therefore occur not just when ORR makes a final determination denying a reunification application, but also before making a final decision if there are prolonged, unreasonable delays in releasing a minor."); *Maldonado*, 2018 WL 2089348, a *9 (finding that delay in ORR's suitability determination violated due process) *Santos*, 260 F. Supp. 3d at 613-14 (same).
[22] *Lucas R.*, 2022 WL 3908829, at *1-2.
[23] *See id.* at *2.
[24] *See, e.g., Santos*, 260 F. Supp. 3d at 603 (noting that ORR's reasons for sponsorship denial included errors regarding the child's criminal record and that sponsor identified this error after parts of the casefile were provided to her).

delayed or denied can have severe mental health consequences for children. Although children are informally told of sponsorship denials, this is not done in a uniform way and children often lack a clear understanding of what happened or whether there is any path forward for their sponsor to remedy the problem. Children and sponsors should receive formal notice of a sponsorship denial and—unless there are particularized child welfare reasons to withhold specific information—are entitled to understand the reasons underlying ORR's decision. The burden to ORR of providing a written notice of denial to all affected sponsors and unaccompanied children is minimal compared to the importance of adequate notice and accurate release decisions.

Fourth, Proposed Rule § 410.1205(c) fails to include critical procedural protections required to ensure a meaningful sponsor appeal process that complies with due process requirements. As noted above, a prolonged delay in adjudication can constitute a deprivation of due process.[25]

For this reason, the *Lucas R.* preliminary injunction requires that ORR acknowledge a request for an appeal within five days of receipt and complete the appeal process within 30 days of the request for appeal, unless an extension is warranted under reasonable guidelines established by ORR.[26] Proposed Rule § 410.1206 requires only that the Assistant Secretary, or their neutral and detached designee, "acknowledge the request for appeal within a reasonable time" and provides no timeline at all to complete the appeal process. The Final Rule must include deadlines compliant with ORR's legal obligations.

To ensure a meaningful appeal process, ORR is also required to deliver a minor's casefile, apart from legally required redactions, to the proposed sponsor's or the minor's counsel within a reasonable timeframe. Although Proposed Rule § 410.1309(c)(2) provides for release of a child's casefile to their counsel, it does not specify a timeframe for delivery. At a minimum, a child's casefile must be provided to counsel and/or the child advocate a reasonable time before the hearing.[27]

The Preamble (p. 68931) notes that ORR may consider providing language services to parents and legal guardians during the appeals process. Language access is critical to ensuring that sponsors are able to engage in the appeal process and ORR should provide interpretation to all potential sponsors and children who seek to access the appeal process.

Finally, the Proposed Rule does not provide for a written decision on the release appeal and does not include any guarantee that the sponsor and the child will even be notified of the outcome of the appeal process. As required by the *Lucas R.* preliminary injunction[28] the Final Rule must provide for (1) a written decision; (2) setting forth detailed, specific, and individualized reasoning for any denial; (3)

---

[25] *See Saravia v. Sessions*, 905 F.3d 1137, 1144 (9th Cir. 2018) ("[D]ue process requires 'the opportunity to be heard at a meaningful time.'" (*quoting* M*athews v. Eldridge*, 424 U.S. 319, 333 (1976))); *Lucas R.*, 2022 WL 2177454, at *22 ("Where deprivation is significant, and it is in all parties' interests to ensure that any deprivation is justified, a 'prompt' hearing should 'proceed and be concluded without appreciable delay.'" (*quoting Barry v. Barchi*, 443 U.S. 55, 66 (1979))).

[26] *Lucas R.*, 2022 WL 3908829, at *2.

[27] *Id.*

[28] *Id.*

notice of a denial to the child and the child's attorney; and (4) notice to the proposed sponsor and the child of any right to seek judicial review.[29]

Recommendation 6: § 410.1001

(b) [ADD]: The ORR Director, or a designee who is a neutral and detached decision maker, shall review denials of sponsor applications submitted by relatives. ORR shall adjudicate **[ADD]: the application of** a potential sponsor who is an unaccompanied child's parent, legal guardian, [ADD]: **sibling, grandparent, or other close relative who previously served as the minor's primary caregiver** within 10 calendar days of receipt of a completed sponsor application or Family Reunification Package (FRP). **[ADD]: ORR shall adjudicate the applications of other potential sponsors within 14 calendar days of receipt of a completed sponsor application or Family Reunification Package (FRP).** If ORR denies release of an unaccompanied child to a potential sponsor ~~who is a parent or legal guardian~~, it must notify the potential sponsor **[ADD] and the UC, if developmentally and psychologically appropriate,** of the denial in writing via a Notification of Denial letter, which includes:

. . .

(c) ORR shall inform the unaccompanied child, the unaccompanied child's child advocate, and the unaccompanied child's counsel (or if the unaccompanied child has no attorney of record or EOIR accredited representative, the local legal service provider) **[ADD] and the sponsor** of a denial of sponsorship ~~involving an unaccompanied child's parent or legal guardian~~ **[ADD] and shall inform the sponsor, child, and the child's counsel that they have the right to inspect the evidence underlying ORR's decision upon request**

(d) If the sole reason for denial of release is a concern that the unaccompanied child is a danger to self or others, and the potential sponsor is the unaccompanied child's parent or legal guardian, ORR must send the unaccompanied child **[ADD] and their sponsor, if appropriate and requested by the child,** a copy of the Notification of Denial described at paragraph (b) of this section. If the parent or legal guardian is not already seeking an appeal, ~~t~~ **[ADD] The unaccompanied child *also* may seek an appeal of the denial as described in § 410.1206(c).**

Recommendation 7: § 410.1206

(a) Denied ~~parent or legal guardian~~ sponsors to whom ORR must send Notification of Denial letters pursuant to § 410.1205 may seek an appeal of ORR's decision by submitting a written request to the Assistant Secretary of ACF, or the Assistant Secretary's neutral and detached designee.

(b) The requestor may seek an appeal with a hearing or without a hearing. The Assistant Secretary, or their neutral and detached designee, will acknowledge the request for appeal within ~~a reasonable time~~ **[ADD]: five days.**

. . .

[ADD] (d) ORR must issue a written decision within 30 days of a request for appeal, unless an extension is granted upon a showing of good cause. If ORR denies release to the proposed sponsor, the decision must set forth detailed, specific, and individualized reasoning for the decision. ORR

[29] *Id.*

shall also notify the minor and the minor's attorney of the denial. ORR shall inform the proposed sponsor and the minor of any right to seek review of an adverse decision in the United States District Court.

d. ORR should strengthen the 90-day review process by adding additional components more aligned with the current 90-day review process as articulated in the Policy Guide.

The process described in the proposed regulations for a 90-day review of pending release decisions weakens the review process upon which a recent federal district court relied to satisfy children's due process rights to be free from confinement.[30] In Proposed Rule § 410.1207(a), rather than providing review of UC detention of any child in custody for 90 days, ORR would only review cases pending 90-days after a completed FRP or sponsor application has been submitted. The Proposed Rule dangerously weakens this oversight mechanism and fails to meaningfully address cases where UCs are subjected to prolonged custody. This weakening contradicts ORR's recognition that prolonged custody is harmful to children, and that it is generally in a child's best interests to be released to a vetted sponsor.[31]

We suggest the following revisions to ensure the 90-day review reduces instances of prolonged federal custody. We suggest that ORR add time-requirements and additional follow-up actions it must take beyond "review" at the first and any subsequent review. To better address and avoid prolonged custody, the reviews of reunification cases should occur at increasingly frequent intervals if not resolved within a reasonable time following the first 90-day review. In addition, to provide additional oversight and potential support to those working to resolve a reunification case, the Federal supervisory staff member conducting the review should provide documentation and results of that review to the Office of the Ombudsperson. Finally, after the second review (or when a UC has been in ORR custody for six months), UCs and their sponsors should be notified of their right to challenge their prolonged detention in federal court and should be provided (again) with a list of legal service providers who can assist them.

Notably, Proposed Rule § 410.1207(a) does not comply with the requirement by the *Lucas R.* preliminary injunction that ORR supervisory staff conduct the 90-day review. The *Lucas R.* Court discussed "ORR supervisory staff" as distinct from the role of a Federal Field Specialist, who ordinarily

[30] *J.E.C.M.* at *15 ("Because there is a clear deadline in place whereby ORR will review the detention of *any UC in custody for 90 days*, the Court finds that ORR's process does not create a risk of undue delays . . .") (emphasis added).

[31] *See, e.g.*, Office of Inspector General, U.S. Dep't of Health and Human Services, *Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody* (Sept. 3, 2019), https://oig.hhs.gov/oei/reports/oei-09-18-00431.asp. *See also, J.E.C.M. v. Lloyd*, Dkt. Nos. 240, Ex. 12 at 3 ("The best practice in child welfare would be to discharge the UAC within 30 days of admission. In ordinary cases, ORR generally does not recommend keeping UAC in care for longer than 60 days") (ORR Operational Directive issued Dec. 18, 2018, under seal for different reasons); 242-8 (Deposition of ORR Deputy Director Jallyn Sualog, stating "the literature shows that children should not be in car probably longer than 60 days in congregate care, and then they start to have adverse effects . . . I do understand those impacts to be long lasting.").

oversee case management services performed by ORR grantees and contractors.[32] The Proposed Rule, by contrast, appears to provide for the same FFS who oversee care providers to review their own (possibly failed) oversight of UC cases. FFS directly overseeing case management should already have deep insight into the cases on their docket and a 90-day review by those staff will fail to elevate issues beyond those individuals already working on each individual reunification case. The Final Rule must make clear that the 90-day review will be conducted by ORR staff with supervisory responsibilities over the program's assigned FFS.

Recommendation 8: § 410.1207

(a) ORR Federal **[ADD]** **supervisory** staff who supervise **[ADD]** **federal staff overseeing** ~~supervising the~~ case management services performed by ORR grantees and contractors shall review all pending sponsor applications or Family Reunification Packets (FRP) for unaccompanied children who are in ORR custody for 90 days ~~after the complete sponsor application or FRP has been submitted~~ to identify and resolve in a timely manner the reasons that a release application remains pending and to determine possible steps to accelerate the unaccompanied child's safe release.

(b) **[ADD]** **The initial 90-day review must be completed within 5 days of the child's 90th day in custody.** Upon completion of the initial 90-day review, **[ADD]** **Federal supervisory staff must provide the Office of the Ombudsperson a report of findings for each child in custody longer than 90 days, and at each subsequent review. In addition,** unaccompanied child case managers or other designated agency or care provider staff shall update the potential sponsor and unaccompanied child on the status of the case, explaining the reasons that the release process is incomplete. Case managers or other designated agency or care provider staff shall work with the potential sponsor, relevant stakeholders, and ORR to address the portions of the sponsorship application or FRP that remain unresolved.

(c) For cases that are not resolved after the initial 90-day review, ORR Federal **[ADD]** **staff overseeing** ~~supervising the~~ case management process shall conduct additional reviews at **[ADD]** **increasingly frequent intervals as follows: 60 days following the 90-day review; 30 days following the 60 day review; 14 days following the 30 day review; and at least every [ADD] 14 days thereafter** ~~90 days~~ until the pending sponsor application or FRP is resolved. ORR may in its discretion and subject to resource availability conduct additional reviews on a more frequent basis ~~than every 90 days~~. **[ADD]:** **After the second review or when a UC has been in ORR custody for six months, whichever comes first, ORR must provide UCs and their sponsors notice of the child's right to challenge their prolonged detention in federal court. At that time, ORR must also provide the child and sponsor a list of legal service providers who can assist them.**

[32] *See Lucas R.,* 2022 WL 2177454, at *28 ("Similar to the requirement that FFS consult with ORR supervisory staff regarding placements of minors in secure facilities for over 90 days, the case management team must also consult with ORR supervisory staff about pending sponsor applications every 90 days to determine what steps are needed to accelerate the minor's safe release."); *see also Lucas R*., 2022 WL 3908829, at *2 (corresponding provision of preliminary injunction).

e. Sponsor suitability considerations are vague and fail to consider suitability in comparison to the UCs functioning and well-being in ORR custody.

i. ORR should clarify whether sponsor categories will remain as designated in the ORR Policy Guide. (§ 410.1201).

Advocates request clarification about if and how current sponsor categories will change based on the proposed regulations. Under proposed § 410.1201, priorities for release reflect the priorities outlined in the *Flores* Settlement Agreement (FSA). However, appeal rights in the current Policy Guide and policies outlined in the Policy Guide generally reflect different categorical divisions of sponsors.

ii. ORR must explicitly consider a child's best interests in making reunification decisions.

As part of ORR's ongoing obligation to act in the child's best interests, ORR must consider the harm to the child's wellbeing of continued federal custody and the benefits of release to a community placement as factors relevant to the child's best interests and the sponsor's ability to provide for the child's welfare. ORR recognizes that prolonged custody is harmful to children[33], and therefore must consider the impact of prolonging a child's custody throughout the reunification process and in making any reunification decision. Explicitly referencing this obligation will ensure that the impact of continued custody on each child's wellbeing is properly considered and balanced in the reunification analysis.

iii. ORR should codify a more detailed explanation of sponsor suitability criteria.

We appreciate ORR's firm stance that a sponsor's immigration status will not disqualify them from sponsorship and that ORR will not collect or share immigration status information with law enforcement or immigration enforcement entities. (§ 410.1201(b)). We encourage ORR to clarify that it will share non-immigration status information with law enforcement or immigration enforcement entities only as required to conduct background checks or under subpoena.

We urge ORR to clarify how the sponsor suitability considerations in proposed § 410.1202 will be used, because as written many are overly vague and unclear. For example, consideration of the "physical environment of the sponsor's home" does not explain what about the physical environment is relevant. Additionally, it is unclear what ORR is investigating when evaluating the sponsor's motivation for sponsorship. The sponsor suitability considerations should provide clear and predictable criteria through which to assess reunification applications and lead to clear and predictable decisions. We provide suggested language in the recommendation below.

Additionally, some criteria raise deep equity and cultural competency concerns. First, ORR should make clear that a sponsor's poverty cannot be a disqualification for a child to be released to a sponsor unless it is so severe as to raise concerns about the sponsor's ability to meet the child's basic needs. Second, ORR must recognize the ways in which the criminal justice system in the United States is

[33] *See supra* n. 31.

racially discriminatory and disproportionately impacts people of color[34] particularly given that most adults trying to sponsor children in ORR custody are themselves people of color. ORR must incorporate training for all staff about the ways in which systemic racism impacts sponsor communities and skews histories of criminal justice system involvement, making that information both less reliable and less informative for use in reunification decisions.

Additionally, considering a child to be at risk for trafficking based solely on a child's expressed need or desire to work or earn money disregards the widely documented and understood reasons for children's migration and lived experiences in many American communities (immigrant and not) where children work legally and safely. Including that factor here creates an overly broad (and therefore useless) risk assessment that is culturally incompetent and ignorant of the way many families live and survive across vast swaths of the country. Instead, we urge ORR to identify and adopt a verified assessment tool to determine whether a child is at risk for trafficking, especially if such a determination would result in prolonged reunification decision-making processes leading to prolonged federal custody. We provide one example of such a tool below.[35]

Next, the FSA specifies that a parent or legal guardian can designate an adult individual or entity to sponsor their child, regardless of whether there is a pre-existing relationship between that person/entity and child and also provides for release to an adult individual or entity "when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility."[36] ORR has proposed to incorporate this understanding elsewhere in the Proposed Rule (e.g., § 410.1201) and envisions release to ORR foster families or another adult who has come to know the child through ORR care as some examples where such a release might occur. (p.68928). This is with the understanding that such a sponsor would have to go through the normal vetting process and through that process, sponsorship could be denied. It is therefore unnecessary to include a disclaimer that ORR may deny sponsors with no pre-existing relationship with a UC in § 410.1202(d) and its inclusion may cause confusion. Furthermore, including this disclaimer could also undermine ORR's consideration of unrelated sponsors who with caregiving strengths like sharing a child's culture, language, background, and/or customs, all of which can contribute to successful sponsorship. We therefore suggest removing that sentence from the proposed regulation.

We also suggest adding in language similar to ORR's current Policy Guide § 2.2.4 providing that ORR will offer an unrelated sponsor the opportunity to build a relationship with the child through regular contact while the child is in ORR care prior to making a release recommendation. This opportunity is referenced in the preamble (p. 68929) but not in the Proposed Rule. Similarly, ORR should

[34] *See, e.g.*, National Conference of State Legislatures, *Racial and Ethnic Disparities in the Criminal Justice System*, (May 4, 2022), https://documents.ncsl.org/wwwncsl/Criminal-Justice/Racial-and-Ethnic-Disparities-in-the-Justice-System_v03.pdf.

[35] For example, Westcoast Children's Clinic uses a validated Commercial Sexual Exploitation Identification Tool (CSE-IT) to identify if a child is at risk of or is being subjected to commercial sexual exploitation. *Available at* https://www.westcoastcc.org/wp-content/uploads/2020/01/WCC_CSE-IT_2.0andmanual_3.19.19.pdf.

[36] Flores Settlement Agreement ¶ 14(D), (F).

ensure that where sponsors are unaware of a child's specific needs, ORR will provide explanation of those needs and support understanding them prior to a sponsorship decision being made.

Finally, several of the considerations related to the child's behavior are overly broad, redundant, and/or highly speculative. For example, gang involvement would be encompassed within considerations of a history of violence, harmful behavior, or juvenile or criminal justice system involvement. If none of those considerations arise, any suspicion or assertion of gang involvement is too speculative to be included in the sponsor evaluation process.

The inclusion of "behavior" as a separate factor is also duplicative. In our experience, behavioral issues exhibited by children are often manifestations of stress, detention fatigue, and trauma, and typically indicate a child's need for additional support and services. To the extent that ORR would want to consider a child's need for behavioral supports, this is already captured under 410.1103(b)(9), which includes "[a]ny specialized services or treatment required or requested by the unaccompanied child" as a factor for consideration in placement. Because it is already captured under other factors, ORR should remove Proposed Rule § 1202(f)(3) ("History of behavior issues") as a separate consideration. This should complement a broad effort to move the ORR system of care away from a punishment and behavioral management mindset towards a comprehensive system of trauma-informed care that recognizes that a child's behavior is often connected to other needs, such as mental health needs, or may be appropriate in light of the child's stage of development and the circumstances the child is facing. In the alternative, if ORR insists on including "behavior" as a factor for consideration in placement, we recommend that the language at least be amended to "the child's need for behavioral supports and services."

When considering a history of violence, and/or criminal or juvenile justice system involvement, we urge ORR to only consider these items if they implicate the sponsor's ability to provide for the safety and wellbeing of the child, and we urge ORR to apply a more trauma-informed and child-centered approach by considering mitigating circumstances and protective supports that could be put in place to enable safe release to a sponsor.

iv. ORR should clarify how a child or sponsor's disability is considered throughout the reunification process.

Several provisions (§§ 410.1202(f), 410.1202(h)) require consideration of a child's disability as part of ORR's evaluation of a potential sponsor. Without more context and explanation of what it means to consider a child's disability, these provisions could lead care providers to unintentionally discriminate against children with disabilities by adding obstacles to release not faced by children without disabilities. ORR has a legal obligation to ensure children with disabilities have an equal opportunity to obtain the benefit of prompt release and may not use methods of administration that have the effect of impairing the release of children with disabilities.[37]

[37] *See* 29 U.S.C. § 794(a); 45 C.F.R. § 85.21(b)(1), (3).

The Final Rule should specify that ORR's consideration of the impact of a child's disability or disabilities must also include explicit consideration of the potential benefit to the child of release to a community placement with a sponsor and the potential harm of continued ORR custody.[38]

As noted in the Preamble (p. 68929), the Final Rule should explicitly state that the risks and concerns listed in § 410.1202 are not necessarily disqualifying. The Final Rule should further make clear that a child's disability is not a reason to delay or deny release to a sponsor unless the sponsor is determined to be incapable of providing for the child's physical and mental well-being despite documented efforts by ORR to educate the sponsor about the child's needs and to assist the sponsor in accessing and coordinating post-release services and supports. Although we welcome references to ORR support for sponsors elsewhere in the Proposed Rule (e.g. §§ 410.1203(f), 410.1311(e)(2)) this assistance must also be directly tied to the sponsor evaluation process to make clear that sponsors should not be denied prior to such support being offered.

Similarly, both the ADA and Section 504 of the Rehabilitation Act prohibit discrimination against prospective sponsors who have disabilities.[39] If a prospective sponsor has a disability that raises a child welfare concern, ORR must work with the sponsor to identify accommodations and supports that could mitigate concerns and allow the sponsor to adequately provide for the child's physical and mental wellbeing.[40] ORR must clarify that failing to provide reasonable accommodations and reasonable modifications for sponsors, including parents and legal guardians, during investigations, sponsor assessments and evaluations, and reunification, constitutes ORR's failure to make reasonable efforts to preserve the family.

Sponsor assessments must be fully accessible. They should have a narrow focus on what is essential to caregiving. Sponsor assessment tools should not be worded in any way that disadvantages broad swaths of the disability community without addressing the actual caregiving task. For example, sponsors need to ensure that their children attend school and get to medical appointments, but there

---

[38] *See Olmstead v. L.C.*, 527 U.S. 581, 600 (1999) ("[U]njustified institutional isolation of persons with disabilities is a form of discrimination. . . [C]onfinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.").

[39] *See, e.g.*, U.S. Dep't of Justice, Civil Rights Division, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act* (June 20, 2020), https://www.ada.gov/resources/protecting-parent-rights/.

[40] *Id.* ("services must be adapted to meet the needs of a parent or prospective parent who has a disability to provide meaningful and equal access to the benefit. In some cases, it may mean ensuring physical or programmatic accessibility or providing auxiliary aids and services to ensure adequate communication and participation, unless doing so would result in a fundamental alteration to the nature of the program or undue financial and administrative burden. For example, a child welfare agency must provide an interpreter for a father who is deaf when necessary to ensure that he can participate in all aspects of the child welfare interaction. In other instances, this may mean making reasonable modifications to policies, procedures, or practices, unless doing so would result in a fundamental alteration to the nature of the program. For example, if a child welfare agency provides classes on feeding and bathing children and a mother with an intellectual disability needs a different method of instruction to learn the techniques, the agency should provide the mother with the method of teaching that she needs.") (internal citations omitted).

are many ways a family might handle those things besides one or more adults in the household having a car and driver's license. This is especially important for people with disabilities, such as epilepsy, that can restrict their ability to drive. Using ridesharing or public transportation, living in a walkable community, or getting rides from consistently available loved ones or friends should be treated as equally acceptable provided they achieve the purpose of meeting the child's needs. Using decision-making support in making abstract decisions in the life of a child may also be necessary for some parents. The goal in making these decisions is the child's wellbeing, and supported decision-making should be regarded as an equally acceptable way to achieve that goal.

Sponsor assessments must evaluate caregiving ability in light of any reasonable accommodations, auxiliary aids and services, and natural supports the parent uses or is willing to use to complete caregiving tasks. Parents involved in child welfare systems should be provided with accessibly formatted documents (complying with current Section 508 and WCAG standards) if that is a disability-related need, not penalized for using or requesting them. Where a sponsor (with or without) a disability has independently found ways to meet their child's needs, such as relying on a service animal to take a child out in public or seeking help with household tasks from natural supports, sponsor assessments should note this as resourcefulness that will promote the family's wellbeing. Where sponsors have not found the necessary supports on their own, ORR agencies should be required to connect parents to all available tools.

All aspects of the sponsor evaluation and release processes must also be accessible. ORR should make clear that this includes caregiving classes and their written materials, any forms or assessments parents are required to fill out, and any information provided to parents. HHS should state that accessibility includes but is not limited to meeting the written communication needs of people with sensory disabilities. Plain language and easy to read materials are also essential. Some parents may require other learning accommodations. These may include taking more time to explain certain concepts, repetition in training caregiving skills, hands-on demonstrations, and individualized attention as opposed to group instruction.

Reasonable modifications for sponsors include:

- Hands-on training during a child's medical and early intervention services appointments
- Plain language training materials at appropriate literacy levels
- Adaptations in the manner in which specific training is conducted
- More frequent support from a social worker
- Assistance in understanding and applying behavioral supports for a child who needs these supports
- Training in how to attend IEP meetings and ensure that a child's educational needs are being met
- Modified action planning
- Assessment by a professional who is expert on working with parents with disabilities
- Other modified family preservation and reunification services

Recommendation 9: § 410.1202(c)-(h)

(c) As part of its suitability assessment, ORR may also require such components as an investigation of the living conditions in which the unaccompanied child would be placed and the standard of care the unaccompanied child would receive, verification of the employment, income, or other information provided by the potential sponsor as evidence of the ability to support the child, interviews with members of the household, a home visit or home study as discussed at § 410.1204, background and criminal records checks, which may include a fingerprint based background check, on the potential sponsor and on adult residents of the potential sponsor's household. Any such assessment also takes into consideration the wishes and concerns of the unaccompanied child. **[ADD]: In making a reunification decision, ORR shall also consider the best interests of the child and shall balance concerns about risks associated with release with consideration of the benefits of release and the risk of (or knowledge of actual) harms to the child's wellbeing stemming from continued federal custody.**

(d) ORR shall assess the nature and extent of the potential sponsor's previous and current relationship with the unaccompanied child, and the unaccompanied child's family, if applicable. ~~ORR may deny release to unrelated individuals who have applied to be a sponsor but who have no preexisting relationship with the child or the child's family prior to the child's entry into ORR custody.~~ **[ADD]: If a potential sponsor does not have a pre-existing relationship with the child or the child's family prior to the child's entry into ORR custody, ORR may take this into account as part of its evaluation of sponsor suitability but may not rely on it as the only factor in determining suitability. If ORR determines that the lack of pre-existing relationship precludes a safe release in an individual case, it shall require that the potential sponsor, the UC, and the child's family, if applicable, have the opportunity to establish ongoing regular contact prior to a release recommendation.**

(e) ORR shall consider the potential sponsor's **[ADD]: stated** motivation for sponsorship **[ADD]: to ensure that the motivation for sponsorship does not create an unacceptable risk that the child will be subjected to exploitation and to assess whether the sponsor is prepared to ensure that the child has consistent support and care at least until the child reaches 18 years of age;** the unaccompanied child's preferences and perspective regarding release to the potential sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the potential sponsor, as applicable.

(f) ORR shall evaluate the unaccompanied child's current functioning and strengths in conjunction with any risks or concerns **[ADD]: to determine how ORR can support a safe release,** such as:

(1) Victim of sex or labor trafficking or other crime, or is considered to be at risk for such trafficking **[ADD]: based on results from validated trafficking risk assessment tools appropriate for use with UCs in federal custody**[41] ~~due to, for example, to observed or expressed current needs, e.g., expressed need to work or earn money~~;

(2) History of criminal or juvenile justice system involvement (including evaluation of the nature of the involvement, for example, whether the child was adjudicated and represented by counsel,

[41] *Id*.

and the type of offense **[ADD]: and any mitigating circumstances, including the impact of continued federal custody on the child's wellbeing** ~~or gang involvement~~**;**

~~(3) History of behavioral issues~~

~~(4)~~ **[ADD] (3)** History of violence **[ADD]: not stemming from detention fatigue and/or the child welfare impact of being in a federal custodial setting.**

~~(5)~~ **[ADD] (4)** Any individualized needs, including those related to disabilities or other medical or behavioral/mental health issues**. [ADD]: Consideration of the impact of a child's disability or disabilities must also include explicit consideration of the potential benefit to the child of release to a community placement with a sponsor and the potential harm of continued ORR custody on the child;**

~~(6)~~ **[ADD] (5)** History of substance use; or

~~(7)~~ **[ADD] (6)** Parenting or pregnant unaccompanied child.

(g) For individual sponsors, ORR shall consider the potential sponsor's strengths and resources in conjunction with any risks or concerns that could affect their ability to function as a sponsor including:

(1) Criminal **[ADD]: convictions that implicate the sponsor's ability to safely care for the child** ~~background~~;

(2) **[ADD]: Current verified illegal** substance use **[ADD]: that is likely to endanger the unaccompanied child** or **[ADD] a substantiated** history of **[ADD]: child** abuse or neglect;

(3) [ADD]: Whether ~~T~~the physical environment of the home **[ADD]: is safe and sanitary;** and/or

(4) Other child welfare concerns **[ADD] insofar as they impact whether a sponsor is capable of providing for the child's physical and mental wellbeing;**

(h) ORR shall assess the potential sponsor's:

(1) Understanding of the unaccompanied child's needs **[ADD]. ORR will ensure that a sponsor who is unaware of a child's needs is provided an explanation and support in understanding those needs prior to ORR making a sponsorship decision;**

(2) Plan to provide adequate care, **[ADD]: age- and developmentally appropriate** supervision, and housing to meet the unaccompanied child's needs;

(3) Understanding and awareness of responsibilities related to compliance with the unaccompanied child's immigration court proceedings, school attendance, and U.S. child labor laws; and

(4) Awareness of and ability to access community resources.

(i) ORR shall develop a release plan that will **[ADD]: address identified concerns or risks either with the child or the sponsor, and that will** enable a safe release to a potential sponsor through the provision of post-release services if needed.

[ADD]: (h) ORR shall not

(1) Discriminate against a sponsor based on national origin, immigration status, preferred language, religion, disability, sexual orientation, sex, gender identity, or race;

(2) Deny sponsorship due to poverty, employment status, insurance status, disability, or health conditions that do prohibit the sponsor from meeting the child's basic needs;

(3) Deny sponsorship to a parent absent a determination supported by clear and convincing evidence that the child is reasonably certain to suffer serious emotional or physical harm if released to the parent sponsor.

v. ORR cannot compel sponsors or UCs to remain in contact after release (§ 410.1203(c))

ORR has authority over unaccompanied children in ORR custody. Once a child is released, ORR has historically maintained that it ceases to have authority over that child. ORR can and should offer voluntary services and support that extend beyond release. But ORR cannot compel sponsors to notify ORR of changes in custody, dependency proceedings, contact information, or any other information. Instead, ORR can provide an easy way for sponsors (and UCs) to voluntarily provide such information in order to receive support and PRS as desired[42]

We note that at the time of release, sponsors are already responsible for updating children's information with a variety of entities, both local and federal. Adding ORR to the list creates an undue burden. Further, ORR has no authority to demand such contact of sponsors once a child is no longer in ORR custody. Instead, if ORR provides useful services, resources, and support to families sponsoring UCs, ORR may be able to more meaningfully ensure the welfare of children it releases beyond their time in its custody and may build trust with sponsors and children alike. These services could include assistance updating contact and address information with the various immigration-related entities that legally require children to do so.

Recommendation 10: § 410.1203(c)

(c) (5) Provide notice of initiation of any dependency proceedings or any **[ADD]: known** risk to the unaccompanied child as described in the Sponsor Care Agreement; and
(6) In the case of sponsors other than parents or legal guardians, **[ADD]: a sponsor may** notify ORR of a child moving to another location with another individual or change of address. Also, in the event of an emergency (e.g., serious illness or destruction of the home), a sponsor may transfer temporary physical custody of the unaccompanied child to another person who will comply with the Sponsor

[42] The HHS Secretary has faced questions in the past regarding whether 85,000 children have "disappeared" upon their release. This characterization is deeply problematic and disregards the fact that a lack of response on the families' part has no bearing on the health and safety of released children. The 85,000 number refers to children and/or sponsors who did not answer a phone call from an ORR staff member conducting a check-in. There are many reasons sponsors and/or children may not answer phone calls. Like anyone, families may not answer because they do not recognize the number calling, phone numbers change, they miss the call because they are working, etc. Adults may also be afraid of immigration enforcement consequences, and not want to connect with the U.S. government. This was a real possibility under the previous administration and failure to answer safety and well being calls may be in part due to the chilling effect of the previous administration's weaponization of immigrant children against their sponsors. Furthermore, families have *no* obligation to respond to these calls. Further family surveillance will be harmful to children and families seeking to build bonds and integrate into communities. After weeks, months, or years of distance or separation, families are eager to reconnect and care for their children following their long-awaited reunification.

Care Agreement, but the sponsor ~~must~~ **[ADD]: may** notify ORR as soon as possible and no later than 72 hours after **[ADD]: of** the transfer.

f. ORR should not adopt any law enforcement role when evaluating release of a UC.

i. Praise for not sharing sponsor's immigration information.

Advocates applaud ORR's clear statement that it will not share "any immigration status information relating to potential sponsors with any law enforcement or immigration enforcement related entity at any time." (§ 410.1201(b)). We urge ORR to strengthen this important protection by clarifying that it will not share *any* sponsor information with law enforcement or immigration enforcement entities except as needed to complete background checks or by subpoena.

In addition, ORR should make clear that both UC and sponsor's personal information and ORR case files will be maintained separately from the child or sponsor's immigration files ("A-files") and will be provided to law enforcement or immigration enforcement only at the request of the principle individual (child or sponsor) or by subpoena. This protection must include counseling and case management notes and records. Without these important protections, children and their sponsor's vulnerability and openness to engage with ORR in the reunification process can easily be weaponized and/or could be used to undermine sponsor placements that would otherwise be safe and stable. Such protections will codify ORR's clear mandate as a child welfare entity rather than as an arm or extension of law or immigration enforcement entities.

Recommendation 11: § 410.1201(b)

(b) ORR shall not disqualify potential sponsors based solely on their immigration status and shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes. ORR will not share any ~~immigration status~~ information relating to potential sponsors with any law enforcement or immigration enforcement related entity at any time **[ADD]: unless necessary to conduct standard sponsor background checks, at the request of the sponsor or principle subject of the information, or by subpoena. ORR shall maintain all reunification records separate from a child or sponsor's immigration file ("A-file") and only share the file or information with other entities at the request of the sponsor or child, or by subpoena.**

ii. ORR should not consider UC's past immigration history when making release determinations

As ORR itself recognizes, it is "not a law enforcement agency, unlike the former INS." (pp. 68923, 68975). Inasmuch as the former INS had responsibility for placing class members in appropriate facilities prior to the TVPRA,[43] it is clear that HHS is the INS's successor solely regarding the *placement and care* of unaccompanied children.[44] For this reason, it is wholly inappropriate (and in many cases illogical) for

[43] Flores Settlement Agreement ¶¶ 12A and 19.

[44] *See Flores v. Barr*, 934 F.3d at 912 n.2 ("[T]he Immigration and Naturalization Service's obligations under the Agreement now apply to the Department of Homeland Security and the Department of Health and Human

ORR to adopt the "immigration law context" to define and evaluate "risk of flight" as it proposes to do in the preamble to the Proposed Rule (p. 68915) and in Proposed Rule § 410.1107.[45]

Such a division is also reflected in the TVPRA. Under ORR's child welfare authority, the TVPRA *permits* HHS to consider a young person's danger to self, danger to the community, and risk of flight when making placement decisions.[46] In contrast, the TVPRA instructs that *Department of Homeland Security* (DHS) "shall consider placement in the least restrictive setting after taking into account . . . danger to self, danger to the community, and risk of flight" for children who reach 18 years of age and are transferred to DHS custody.[47]

Because HHS does not have any law enforcement authority, "risk of flight" in this context must be understood exclusively as flight from custodial ORR facilities or placements. In proposed regulation §410.1001 which defines "runaway risk", ORR recognizes the limits of its role, and appropriately defines "runaway risk" exclusively in relationship to the likelihood that a child will "attempt to abscond from ORR care." (p. 68981, § 410.1001).

Here, however, ORR's adoption of immigration enforcement considerations reunification decisions under § 410.1201(a) is deeply troubling and should be removed from the proposed regulation. ORR is not charged with holding children who have suitable sponsors in order to secure their appearance in immigration proceedings or before DHS. That is DHS's role and falls squarely under their authority, not ORR's.

Recommendation 12: § 410.1201(a)
(a) Subject to an assessment of sponsor suitability, ~~when ORR determines that the detention of the unaccompanied child is not required either to secure the child's timely appearance before DHS or the immigration court~~, or to ensure the minor's safety or that of others, ORR shall release a minor from its custody without unnecessary delay, in the following order of preference, to: . . .

g. ORR must include a provision in the Final Rule regarding release planning for 17-year-olds at risk of aging out

The proposed regulation does not require consideration of imminent release and/or transfer to ICE because of age-out in planning and placement decisions. A portion of unaccompanied children in ORR custody will turn age 18 while still in ORR custody, thereby aging out of UC status as defined in statute. When that occurs, ORR's legal authority to retain custody of the children ends. Abrupt

Services"); *Flores v. Johnson*, 212 F. Supp. 3d at 885 (after an unaccompanied child is transferred from CBP to HHS custody, "it is then HHS's responsibility to comply with the provisions" of the Settlement governing transfer to a licensed program and release to sponsors).

[45] In fact, The TVPRA only explicitly addresses ensuring a child's appearance at immigration proceedings in the context of the legal orientation presentations provided to children's custodians in cooperation with the Executive Office of Immigration Review (EOIR), provided to sponsors with whom UCs have been reunified.

[46] 8 U.S.C. § 1232(C)(2)(a) ("In making such placements, the Secretary *may* consider danger to self, danger to the community, and risk of flight") (emphasis added).

[47] 8 U.S.C. § 1232(C)(2)(b) (emphasis added).

transitions out of a child welfare setting without sufficient planning and support can further traumatize children and leave them vulnerable to homelessness, exploitation, and trafficking. The regulations must therefore include a provision specifically requiring that ORR and providers engage in planning for youth who will "age out" of ORR custody at age 18.

While § 410.1302 requires providers to "develop a comprehensive and realistic individual service plan" for each child, it does not include post-18 planning as a requirement. Either within § 410.1302 or as a stand-alone provision, the regulations should require that ORR develop a tangible post-18 plan for every 17-year-old unaccompanied child in ORR care at least one month in advance of his or her 18th birthday. Each post-18 plan should at a minimum identify an appropriate non-secure placement for the child and identify any necessary social support services for the child. The transition plan must also include arrangements for safe transportation. Too often, transportation planning has fallen on advocates rather than incorporated into the age out planning. ORR should also provide programs with funding for transportation where necessary. In addition, § 410.1103(b) should be amended to add "the child turning 18 years old within the next six months" as a factor to consider in placement decisions.

The need for prompt and timely post-18 planning is particularly important, because children in ORR custody who age out face the possibility of being transferred to adult detention in an Immigration and Customs Enforcement (ICE) facility. As a result of the *Garcia Ramirez* litigation, the U.S. Department of Homeland Security (DHS) may only detain former unaccompanied children who age out directly from ORR custody if they are determined to be a danger to self or others or an immigration enforcement flight risk, and such danger and flight risk cannot be mitigated by an alternative to detention, including release to a sponsor, shelter, or group home. Because DHS will no longer detain youth aging out of ORR custody unless they meet these conditions post-18 planning is even more important to ensure a safe release to the community.

Recommendation 13: New Section § 410.1211

[ADD] § 410.1211

- **a) The agency must immediately refer a child for appointment of counsel and an independent Child Advocate if a youth is within 6 months of turning 18 upon arrival in an ORR facility.**
- **b) All programs must engage in individualized planning and develop a transition plan for every youth in ORR custody who is likely to age out of ORR custody within one month, in coordination with the child's attorney of record, if any. The attorney of record may elect to communicate this individualized plan directly to DHS in the place of ORR.**
- **c) The plan at minimum must include the following:**
  - **1) Identification of an appropriate non-secure placement option such as a family member, shelter, or licensed facility capable of caring for an adult, or other appropriate alternative.**
  - **2) Assessment and recommendation of any ongoing supporting social services the youth may require.**
  - **3) Identification of any disability-related or other individualized needs and a plan to connect the youth to community resources to meet those needs.**

4) Arrangements for transportation after the youth ages out to either the non-secure placement option or discharge plan for transfer to DHS where appropriate.

5) If the UC is a parent of a child, the plan must take that into consideration and include a Medicaid application for the child, if he or she is eligible.

d) ORR must consider the best interests of the child when considering a 17-year-old's request for release to a sponsor, whether a family member or institutional sponsor, including the impact of detention on the child if the child is not released to a sponsor before turning 18.

e) Youth over 17 years who are unlikely to have a sponsor should be prioritized for transfer into foster care.

f) ORR shall not attach, reference, or incorporate any reference to the child's Significant Incident Reports or other portions of the child's case file without the child and attorney of record's, if any, prior informed consent.

III. Subpart J: Risk determination hearings (§ 410.1903)

a. Risk determination hearings must be available to children determined to pose a risk to themselves.

Proposed § 410.1903 establishes a risk determination hearing process for UCs in restrictive placements, referencing dangerousness determinations. The section does not provide that these procedures are available to children determined by ORR to pose a danger to themselves. A child should never be denied release to a sponsor based solely on posing a danger to themself, especially given ORR's obligation to put services and supports in place to enable children with disabilities to live safely with their sponsors. The Final Rule should explicitly state that a child will not be denied release based on posing a danger to themself. If ORR does place a child in a restrictive setting and/or deny release based on posing a danger to themself, however, that child must have access to a risk determination hearing under this section, just as a child whom ORR determines to be a risk to the community must have access to such a hearing.[48]

b. ORR should appoint counsel to represent UCs at risk determination hearings.

To benefit from this hearing process and to comport with due process, children need representation. Proposed § 410.1903(c) provides that the child "may be represented by a person of their choosing." We urge ORR to guarantee appointment of counsel to represent the child in risk determination adjudication. ORR should include funding for representation at these hearings.

If children are not represented, they will be unable fully and meaningfully access or benefit from the due process protections afforded by risk determination hearings. They may be limited in their ability to communicate with experts or other witnesses, review evidence against them, and present evidence

[48] *See Flores v. Sessions*, 862 F.3d 863, 871 (9th Cir. 2017) (explaining that the TVPRA "requires that children not be placed in secure facilities absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. This is, significantly, precisely the determination that can best be made in a bond hearing.") (internal citation omitted).

at the hearing. Furthermore, there is too great a power imbalance for children to represent themselves in a risk determination hearing. Without counsel, children may be required to question or challenge the authority figures of the facility in which they are detained and other adults who they may not know. Fear of retaliation and deference to authority figures, among other things, will limit a child's ability to challenge the allegations presented by the facility.

a. Risk determination hearings should take place in a neutral setting.

We appreciate that ORR established a way to appeal a determination that a child is a risk to self or others via an independent hearing in Proposed Rule § 410.1903. However, the current language in the Proposed Rule does not articulate how such an independent HHS hearing officer will be selected. Such officers should undergo a vetting process and background check in addition to specialized training to ensure that they have knowledge and training in child development, trauma and trauma-informed practices, cultural competency, and child migration. To ensure that this position is truly neutral, we recommend that ORR seek input from varied branches of HHS with child welfare expertise and with LSPs and/or allow for comment from the immigration bar before selection of such officers.

The Rule states such hearings take place at HHS rather than the DOJ. Such hearings should take place outside of the facility in which the child is detained, in a neutral setting in which an unaccompanied child is able to present evidence and be heard consistent with due process. The hearing should be translated into a language the child understands. To allow for accurate credibility findings, and a thorough and complete presentation of evidence, ORR should require or strongly favor that the parties appear in person. In addition, such hearings should be recorded or transcribed to allow for an accurate appellate record and consideration of the issues on appeal.

Recommendation 14: § 410.1903(a)

(a) All unaccompanied children in restrictive placements **[ADD]** **and any other unaccompanied children who ORR asserts present a risk of danger to the community** shall be afforded a hearing before an independent HHS hearing officer to determine, through a written decision, whether the unaccompanied child would present a risk of danger to the community, unless the unaccompanied child indicates in writing that they refuse such a hearing. **[ADD]: Such hearing shall be automatically provided unless the child refuses the hearing or requests to postpone the hearing in writing. ORR shall notify the child, their counsel, and their child advocate if one has been appointed, of ORR's determination within 24 hours of making the determination, of the right to challenge such determination through a risk determination hearing, and of the procedures under this section. Unaccompanied children may use a form provided to them to decline or delay a hearing under this section, at any time, including after consultation with counsel.** All other unaccompanied children in ORR custody may request such a hearing.

(ADD) (1) ORR shall refer any child determined to present a danger to the community for appointment of a child advocate. If appointed, the child advocate shall receive notice of all evidence and procedures, may appear at the hearing, and may assist with identifying counsel for the child. The child advocate may submit evidence, attend the hearing, and testify at the hearing.

~~(1)~~ [ADD] (2) Requests under this section must be made in writing by the unaccompanied child, their attorney of record, **[ADD] their child advocate,** or their **[ADD] sponsor** ~~parent or legal guardian~~ by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form.

[ADD] (3) Independent and neutral HHS hearing officers shall be legally trained and thoroughly vetted. They shall also be trained in child development, trauma and trauma-informed practices, cultural competency, and child migration in addition to any other training and qualifications required to serve in the role.

~~(2) Unaccompanied children placed in restrictive placements based on a finding of dangerousness shall be provided a risk determination hearing automatically, whether or not they request one, unless they refuse the hearing in writing. Unaccompanied children placed in restrictive placements shall receive a notice of the procedures under this section and may use a form provided to them to decline a hearing under this section. Unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel.~~

b. ORR must clarify that the government bears the burden to prove dangerousness.

The Final Rule should further clarify that ORR bears the burden under a proof beyond a reasonable doubt standard to issue a finding of dangerousness. It is inappropriate to place the burden on the child to establish that they would not be a danger. The Ninth Circuit has explained that *Flores* bond hearings "compel [ORR] to provide its justifications and specific legal grounds for detaining a minor."[49] Proposed Rule § 410.1903(b), however, places"[t]he burden of persuasion . . . on the unaccompanied child to show that they will not be a danger to the community if released, using a preponderance of the evidence standard."

This is inconsistent with the FSA's mandate that minors be placed in the least restrictive placement and be treated with special concern for their particular vulnerabilities.[50] Further, because children who ORR contends are a danger to self or others are generally placed in restrictive settings, due process requires that ORR, not the child, bear the burden of proof by at least clear and convincing evidence that a child must remain detained.[51]

As currently written, the Proposed Rule fails to understand the impact that a finding of dangerousness will have on a child and, potentially, on the child's immigration case. Such a finding is not part of or the result of a criminal proceeding in which a child is ultimately sentenced to a certain amount of time in custody and is then released. Instead, a finding of dangerousness allows the government to detain a child indefinitely for the duration of their childhood. In addition, such a finding is likely to impact a child's eligibility for relief from removal and may result in a child electing to be removed from the United States rather than apply for relief for which they are eligible, in order to be released from custody. In

[49] *Flores v. Sessions*, 862 F.3d at 868.
[50] FSA ¶ 11.
[51] *See, e.g., Lucas R. v. Becerra*, No. , 2022 WL 2177454, at *20 (C.D. Cal. March 11, 2022).

light of these severe consequences of a dangerousness finding, the Final Rule should establish a presumption that the child is not dangerous, and a parallel presumption in favor of release.

Recommendation 15: § 410.1903(b)
(b) In hearings conducted under this section, ORR bears the ~~initial~~ burden of **[ADD] proof by clear and convincing evidence** ~~production~~ to support its determination that an unaccompanied child would pose a danger if discharged from ORR's care and custody. ~~The burden of persuasion is then on the unaccompanied child to show that they will not be a danger to the community if released, using a preponderance of the evidence standard.~~

c. ORR must provide children and their advocates meaningful notice and a meaningful opportunity to be heard at risk determination hearings.

The Proposed Rule does not sufficiently address notice and the opportunity to be heard. ORR should clarify that the government or facility must provide any documentation or evidence in support of the contention that the child is a danger in advance of the hearing with enough time to allow the child and counsel to investigate the government's claims. If the child requests more time to review and respond to or rebut such evidence, the hearing officer should grant the child a continuance to allow for a reasonable amount of time for such review.

Moreover, rather than require the child, the attorney of record, or the parent or legal guardian to make a request in writing for the notifications and requests related to risk determination hearings, these notifications and requests should be provided automatically to the child, the attorney of record, or the parent or legal guardian within two weeks of ORR's decision to deny release based on a determination that the child presents a danger to the community. Consistent with basic principles of due process, and to put the child on notice, the child and the child's attorney, parent or legal guardian should be provided with a charging document that lays out the allegations the government must establish to show dangerousness resulting in denial of release.

Paragraph 24(A) of the FSA has been interpreted by the Ninth Circuit to include the right to examine and rebut the government's evidence.[52] As explained, the Proposed Rule does not require ORR to provide the child with the right to examine evidence in advance of the bond hearing. Rather, Proposed Rule § 410.1903(c) states that "[t]he unaccompanied child may present oral and written evidence to the hearing officer and may appear by video or teleconference," and that "ORR may also present evidence at the hearing, whether in writing, or by appearing in person or by video or teleconference." This leaves unaccompanied children in the impossible position of being required to prove a negative, without the opportunity to adequately prepare a rebuttal of the government's evidence.

In order to comply with due process requirements and in order to comply with the Ninth Circuit's interpretation of Paragraph 24(A) of the FSA, the Final Rule must include clear language stating that a child has a right to review ORR's evidence within a reasonable time in advance of a hearing.

[52] *Flores v. Rosen*, 984 F.3d at 734.

Alternatively, the Final Rule could specify that ORR's evidence at the risk determination hearing will be limited to the evidence that was provided to the child as part of their Notice of Placement.

Recommendation 16: 410.1903(c)
(c) In hearings conducted under this section, the unaccompanied child **[ADD]** **shall be represented under the provisions in paragraph (a) of this section and/or** may be represented by a person of their choosing. **[ADD]** **ORR shall provide the child, their counsel, and their advocate if one has been appointed, an opportunity to review ORR's evidence within a reasonable time in advance of a hearing.** The unaccompanied child may present oral and written evidence to the hearing officer and may appear by video or teleconference. ORR may also present evidence at the hearing, whether in writing, or by appearing in person or by video or teleconference.

d. ORR must articulate the factors that will be considered when determining "dangerousness"

To ensure the risk determination proceedings comport with due process, including clear notice of what constitutes dangerousness, ORR must articulate the criteria for establishing "dangerousness." The criteria should be narrow and relate to imminent risk of danger to the community. The finder of fact should also consider the following non-exhaustive list of mitigating factors when making such a finding:

- Evidence that concerns of dangerousness arise from a history of trauma and/or from a disability
- Evidence of rehabilitation.
- Evidence that the child's risk to the community could be mitigated through the provision of post-release services, including mental health and behavioral support services.
- Evidence that the child has appropriate community and/or family support should they be released from custody.

Recommendation 17: § 410.1903
ORR should articulate criteria and mitigating considerations required for a finding of dangerousness sufficient to deny release to an otherwise qualified sponsor.

e. ORR must establish the opportunity for recurrent risk determination hearings for the duration of a child's custody pursuant to a dangerousness determination.

Paragraph 14 of the FSA clearly states that there is a general policy favoring release. Given this policy, children should have the right to recurring bond hearings if they remain detained long-term. Proposed Rule § 410.1903(f) undermines this policy by allowing an unaccompanied child who was determined to pose a danger to the community if released to seek another hearing *only if* the child can demonstrate "a material change in circumstances." Such a narrow basis for requesting another hearing permits long-term detention of children in violation of the FSA's stated policy favoring release.

Moreover, Proposed Rule § 410.1903(f) provides that "[s]imilarly, ORR may request the hearing officer to make a new determination under this section if at least one month has passed since the

original decision, and/or ORR can show that a material change in circumstances". There is no justification for permitting ORR to request reconsideration of a child's danger to the community every month while barring the child from requesting reconsideration absent a material change in circumstances, especially in light of the FSA's policy favoring release.

Furthermore, requiring a child to show "a material change in circumstances" to request a new risk determination hearing inappropriately adopts a standard and procedure from the adult immigration enforcement context.[53] Such a standard and procedure should not apply in a child welfare context or to children who continue to grow and develop.

Recommendation 18: § 410.1903(f)

(f) Decisions under this section are final and binding on the Department~~, and a~~ **[ADD] . ORR or** an unaccompanied child who was determined to pose a danger to the community if released may ~~only~~ seek another hearing **[ADD] for a new determination** under this section ~~if the unaccompanied child can demonstrate a material change in circumstances. Similarly, ORR may request the hearing officer to make a new determination under this section~~ if at least one month has passed since the original decision~~, and/or ORR can show that a material change in circumstances means the unaccompanied child should no longer be released due to presenting a danger to the community.~~

f. The appellate process should provide for *de novo* review by a neutral and independent hearing officer.

The unaccompanied child must be able to appeal the decisions made by the hearing officer at the risk determination hearing to a neutral officer, rather than a politically appointed official like the Assistant Secretary of ACF. Such neutral officer should engage in *de novo* review which would require the officer to conduct a hearing, review evidence, and be the ultimate finder of fact. We are deeply concerned that a politically appointed official would feel pressured to reach a certain outcome depending on the political climate of the day and the administration that appointed them, rather than the facts of the case before the official. This is of particular concern in the context of immigration cases because immigration is a politically contentious issue in the United States and has been for some time.

Finally, if a child does not prevail upon appeal, ORR must provide the child with notice of the right to challenge their continued confinement in federal court, along with a list of legal service providers who can assist with such matters.

Recommendation 19: § 410.1903 (e)

(e) A hearing officer's decision under this section may be appealed by either the unaccompanied child or ORR to ~~the Assistant Secretary of ACF~~, **[ADD] a senior neutral and independent appellate officer** ~~or the Assistant Secretary's designee~~.

(1) Any such appeal request shall be in writing and must be received by ACF within 30 days of the hearing officer decision.

[53] *See* Part II(f), *supra*.

(2) The **[ADD] appellate officer** ~~Assistant Secretary, or the Assistant Secretary's designee~~, shall review the **[ADD] determination *de novo* based on the underlying record.** ~~record of the underlying hearing, and will reverse a hearing officer decision only if there is a clear error of fact, or if the decision includes an error of law.~~

g. Conclusion

We thank ORR for the opportunity to comment on the Proposed Rule. We are encouraged by the provisions that support the prompt reunification and release of unaccompanied children. The changes we offer to the Proposed Rule would further strengthen these provisions. We urge ORR to adopt our recommendations and improve protections for youth in the Final Rule.

Sincerely,

Advocates for Basic Legal Equality, Inc. (ABLE)
Alianza Americas
American Immigration Council
Americans for Immigrant Justice
Angry Tias and Abuelas of the RGV
Asian Pacific Institute on Gender-Based Violence
Bazelon Center for Mental Health Law
Capital Area Immigrants' Rights (CAIR) Coalition
Catholic Charities Baltimore, Esperanza Center
Center for Law and Social Policy
Central American Resource Center (CARECEN) of California
Central American Resource Center of Northern California (CARECEN SF)
Church World Service
Community Legal Services in East Palo Alto
Diocesan Migrant and Refugee Services Inc./Estrella del Paso
Empowering Pacific Islander Communities
Florence Immigrant & Refugee Rights Project
Florida Legal Services, Inc.
Freedom Network USA
Galveston-Houston Immigrant Representation Project
Grassroots Leadership
HIAS Pennsylvania
Hope Border Institute
Houston Immigration Legal Services Collaborative
Human Rights Initiative of North Texas
Immigrant Defenders Law Center (ImmDef)
Immigrant Justice Task Force, Wellington United Church of Christ
Immigrant Legal Defense

Immigrant Rights Clinic, Morningside Heights Legal Services, Inc., Columbia Law School
Immigration Center for Women and Children
Immigration Counseling Service
International Rescue Committee
JFCS Pittsburgh
Just Neighbors
Justice Action Center
Justice in Motion
Juvenile Law Center
La Raza Centro Legal
Law Office of Daniela Hernandez Chong Cuy
Law Office of Helen Lawrence
Law Office of Miguel Mexicano PC
Lawyers for Good Government
Legal Aid Justice Center
Legal Services for Children
Los Angeles Center for Law and Justice
LSN Legal, LLC
Lutheran Social Services of the National Capital Area (LSSNCA)
Martinez & Nguyen Law, LLP
Michigan Immigrant Rights Center
Migration matters
National Immigrant Justice Center
National Immigration Law Center (NILC)
OneAmerica
Physicians for Human Rights - Student Advisory Board
Project Lifeline
Public Counsel
Rocky Mountain Immigrant Advocacy Network
Safe Passage Project
Save the Children
South Asian Public Health Association
South Dakota Voices for Peace
The Immigration Project
UC Davis Immigration Law Clinic
United We Dream
VECINA
Witness at the Border
Young Center for Immigrant Children's Rights

****

Signing in their individual capacities:

Anna Welch, University of Maine School of Law
Annalise.Keen, M.D., Child and Adolescent Psychiatrist
Andrew Schoenholtz, Professor from Practice, Georgetown University Law Center
Aradhana Tiwari, Sunita Jain Anti-Trafficking Initiative, Loyola Law School
Denise Gilman, Co-Director, University of Texas School of Law Immigration Clinic
Elissa Steglich, Clinical Professor and Co-Director, Immigration Clinic, University of Texas School of Law
Estelle McKee, Clinical Professor of Law, Cornell Asylum & Convention Against Torture Appellate Clinic, Cornell Law School
Jacqueline M. Brown, Director & Associate Professor, USF School of Law Immigration & Deportation Defense Clinic