Submitted Electronically via Regulations.gov

December 4, 2023

The Honorable Xavier Becerra
Secretary
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Ave, S.W.
Washington, D.C. 20201

RE: Notice of Proposed Rulemaking, "Unaccompanied Children Program Foundational Rule", RIN 0970-AC93, 88 FR 68908

Dear Secretary Becerra:

The United States Conference of Catholic Bishops (USCCB) and Catholic Charities USA (CCUSA) appreciate the opportunity to provide comments on the Department of Health and Human Services (HHS) Office of Refugee Resettlement's (ORR or the "Agency") Notice of Proposed Rulemaking regarding the "Unaccompanied Children Program Foundational Rule" (the "Proposed Rule"), published in the Federal Register on October 4, 2023.[1]

The USCCB is a nonprofit corporation whose members are the active bishops of the United States, representing nearly 200 autonomous dioceses in all 50 states and the U.S. Virgin Islands. The USCCB's Department of Migration and Refugee Services has operated programs, working in collaboration with the U.S. government, to help protect unaccompanied children from all over the world for more than 40 years. Since 1994, the USCCB has operated the Safe Passages program. This program serves undocumented noncitizen children apprehended by the Department of Homeland Security (DHS) and placed in the custody and care of ORR. Through cooperative agreements with ORR, and in collaboration with community-based social service agencies, the Safe Passages program provides residential care (i.e., foster care and small-scale shelter placements) to unaccompanied children in ORR custody, as well as home studies (HS) and post-release services (PRS) for children and their families. In the last year, the USCCB Safe Passages program served 2,057 children through its HS/PRS program, which includes providing home

[1] Unaccompanied Children Program Foundational Rule, 88 Fed. Reg. 68,908 (Oct. 4, 2023) [hereinafter Proposed Rule].

studies to 300 families and PRS to 1,757. In Fiscal Year (FY) 2023, the USCCB network served 474 unaccompanied children through foster care and shelter programs.

CCUSA is the voluntary, national membership organization for Catholic Charities agencies throughout the United States and its territories. Each agency is a separate legal entity under the auspices of its bishop. CCUSA's 168 member agencies operate in over 3,800 service sites across 50 states, Washington D.C., and the U.S. territories and have a long history of welcoming newcomers, including migrant and refugee children. Catholic Charities agencies throughout the country collaborate with the government at all levels to provide social services and trauma-informed care to migrant children to enable their integration. CCUSA does this work in fulfillment of the Gospel mandate of Matthew 25, which commands us to welcome the stranger.

Catholic ministries in the United States have also worked to support families who have experienced immigrant detention through the provision of legal assistance, visitation, and pastoral accompaniment for those in detention facilities, as well as social services for those released. The USCCB, working with Catholic Charities agencies, has also operated several alternatives to detention programs for families and individuals. Through all of this work, our organizations have seen firsthand the importance of the protections for unaccompanied children set forth in the Homeland Security Act,[2] the Trafficking Victims Protection Reauthorization Act (TVPRA),[3] the *Flores* Settlement Agreement (FSA),[4] and other measures, and we have worked to help implement and encourage government compliance with their requirements.

Consistent with Catholic social teaching, we believe children who come in contact with the Unaccompanied Children (UC) Program, like all children, are best served in the care of a loving family. Timely reunification of a child with his or her family, to the extent possible, should be a guiding principle of the program. However, the safety and well-being of children are of paramount concern, and the speed of their release from ORR care should never take precedence over these goals. Children should be released by ORR with every expectation that their placement will provide a safe and nurturing environment, following thorough and consistent vetting procedures, including home studies when warranted. Exploitation in its various forms is most likely to occur when a child is isolated from support or confronted by systemic barriers in accessing assistance. This is especially true for unaccompanied children as an inherently vulnerable population.

The USCCB and CCUSA applaud the Agency's efforts to codify protections that promote the health and well-being of unaccompanied children through this Proposed Rule. Nevertheless, given the ambitious and complex endeavor of codifying each element involved in the custody, care, release, and placement of an unaccompanied child, we appreciate ORR's request for feedback. While this Proposed Rule is a step in the right direction toward codifying the critical terms of the FSA, we note that not all elements of the Proposed Rule, as written, are consistent with the FSA.

[2] Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (2002).
[3] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232(a)(2).
[4] Settlement Agreement, *Flores, et al. v. Reno, et al.*, Case No. CV 85-4544 (C.D. Cal., Jan. 1, 1997) [hereinafter FSA].

Additionally, we are deeply concerned by and strongly oppose the Agency's attempts to codify through this Proposed Rule its policy of facilitating abortions. Relatedly, ORR's failure to adequately enshrine conscience protections within the regulatory text itself should be rectified in the final rule. We also note the use of ambiguous terminology throughout the Proposed Rule and affirm that these terms should not be construed so as to conflict with the religious beliefs and moral convictions of faith-based service providers.

Our feedback focuses on the following issues:

1. Proposed deviations from the FSA, specifically the proposed definitions of "influx," "emergency or influx facility," and "licensed programs," and the need for clarification regarding the categorization of sponsors;

2. Proposed changes and enhancements to the process of placement and release of children from ORR custody, with a particular emphasis on post-release services;

3. The scope of proposed legal services for unaccompanied children in ORR care;

4. Clarification on the proposed implementation of an ombuds for the UC Program, particularly oversight mechanisms; and

5. The Proposed Rule's disregard for the sanctity of human life and misinterpretation of the Hyde Amendment, use of ambiguous language, and lack of conscience provisions.

FEEDBACK ON PROPOSED RULE

1. Proposed regulatory language jeopardizes the integrity of key terms in the FSA and does not ensure minimum requirements for standards of care for unaccompanied children in ORR custody.

For decades, the FSA has ensured nationwide standards for the detention, release, and treatment of minors in government custody. Through different administrations and the implementation of changes to immigration law and policy, the FSA has upheld critical protections for children. As the Proposed Rule seeks to codify the FSA's provisions (and ultimately lead to its dissolution), it must do so in a way that adequately reflects the terms of the agreement. To that end, we recommend further consideration of the proposed changes to the terms "emergency or influx," "influx," and "licensed programs."

a. Proposed change to the definition of "influx" does not reflect current standards of practice.

The FSA provides an exception to the requirement for timely placement of children in licensed facilities by the government when there is an "emergency" or an "influx of minors into the United States."[5] The FSA further defines an "influx" as "circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program." As ORR

[5] *See* FSA, *supra* note 4, at ¶ 12.

rightly notes, the FSA standard set forth in 1997 does not reflect the realities of unaccompanied children awaiting placement that have been experienced in the last decade.[6] As the Agency also acknowledges, "to leave this standard as the definition of influx would mean, in effect, that the program was always in influx status."[7] To illustrate this point, as of November 6, 2023, the average number of children in Customs and Border Protection (CBP) custody in the last 30 days was 521, and the number of children in HHS custody exceeded 9,000.[8] While the conceptualization of an influx could certainly use updating, the proposed standard does not change the current status quo and would continue to allow overreliance on temporary unlicensed facilities that are detrimental to the well-being of unaccompanied children.

At § 1401.1101, the Agency proposes to change the FSA definition of "influx" to be a situation in which the net bed capacity of ORR's network "that is occupied or held for placement by unaccompanied children meets or exceeds 85 percent for a period of seven consecutive days," a definition that is consistent with the current ORR Policy Guide.[9] However, even while operating under this higher threshold for influx, ORR has consistently underutilized available licensed beds in its network and placed unaccompanied children in active influx care facilities.[10] Data from 2022 shows that ORR used less than 80 percent of its network capacity (shelter and transitional foster care beds) and at times occupied closer to 60 percent of its capacity.[11] In December of 2022, for example, despite there being 2,658 available shelter beds, 1,097 children were in custody at influx care facilities.[12] Moreover, this proposed definition would have an influx hinge entirely on ORR's network capacity, as opposed to the actual numbers of unaccompanied children entering the Agency's care. If ORR's net bed capacity were to decrease for any reason, ORR would have the power to declare an influx, even if there were not more unaccompanied children entering the country. In turn, ORR would have the authority to make wider use of its unlicensed influx care facilities.

Such a definition has the potential to be misused and should therefore not be adopted in the final rule. Proposing a change to the standard for influx for one that has been historically violated by ORR and could potentially be exploited is concerning. We fear that codifying the proposed definition would grant ORR license to continue misusing influx care facilities.

b. <u>Proposed addition of the term "emergency or influx facility" would go beyond the scope of what is intended by the FSA.</u>

The FSA applies the same exception to placement in a licensed facility in times of an "emergency." The proposal of the new term "emergency or influx facility" is ill-advised, and we

[6] Proposed Rule, *supra* note 1, at 68,915.
[7] *Id*.
[8] U.S. Dep't of Health and Human Serv. & U.S. Dep't of Homeland Sec., Unaccompanied Children Daily Report (Nov. 6, 2023) (on file with the USCCB).
[9] OFFICE OF REFUGEE RESETTLEMENT, ORR UNACCOMPANIED CHILDREN PROGRAM POLICY GUIDE, at § 7.2.2, https://bit.ly/4a76zJc (last updated Sept. 18, 2019) [hereinafter UC POLICY GUIDE].
[10] NEHA DESAI, EMMA MCGINN, & LAURA ALVAREZ, CORRECTING COURSE: RESTORING THE CRITICAL PROTECTION OF PLACEMENT IN LICENSED FACILITIES FOR CHILDREN IN FEDERAL IMMIGRATION CUSTODY 14 (April 2023), https://bit.ly/3uFpScp.
[11] *Id.* (citing data obtained by *Flores* counsel).
[12] *Id.*

are strongly opposed to its inclusion without the inclusion of more stringent safeguards.[13] Under our reading of this proposed addition, ORR would have the authority to place children in temporary, unlicensed facilities during events that are beyond the scope of what was considered an emergency in the FSA. Under the FSA, an emergency includes "natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil disturbances and medical emergencies."[14] While ORR states it is not proposing a change to the definition of "emergency," it includes language that is beyond that which is enumerated in the FSA that may not necessarily be an emergency under the FSA.[15]

At § 1410.1101(d)(3), ORR seeks to codify an emergency to include "a natural disaster, such as an earthquake or hurricane, *and other events*, such as facility fires or civil disturbances."[16] The addition of "and other events" creates a catch-all for anything the Agency chooses to deem an emergency in the future. This interpretation is further informed by ORR's creation of "Emergency Intake Sites" in the early months of 2021, in which over a dozen temporary facilities were created around the country in order to respond to the influx of unaccompanied children in the country following the effects of the policy commonly known as "Title 42".[17] While these sites were created in response to an influx, using the term "emergency" gave ORR leeway to establish a novel type of facility for children that did not meet minimum standards for even unlicensed influx facilities. Further, while ORR proposes implementing the same requirements for emergency and influx facilities, it would also allow for the exemption from minimum requirements for such facilities. While waivers currently exist for certain minimum requirements of an influx care facility, at § 1401.1801(d), this Proposed Rule would allow waivers for *all* minimum standards of care of an emergency or influx facility.[18] We advise against this. Under this proposed definition, ORR would have the authority to operate a temporary unlicensed facility for any number of situations it considers an emergency, including an influx, and such facilities could be eligible for a waiver of all minimum requirements of care. Emergency and influx shelters are large, often in remote areas, and child welfare advocates have long expressed their grave concerns with the treatment of children and the general conditions in such facilities.[19]

Further, while ORR states that emergency or influx facilities are to release a child as expeditiously as possible, it does not define "expeditiously." The Proposed Rule implies at § 410.1802(a)(1) that "expeditiously" is within a 30-day period.[20] Meanwhile, the court overseeing

[13] Proposed Rule, *supra* note 1, at 68,968.
[14] *See* FSA, *supra* note 4, at ¶ 12.
[15] Proposed Rule, *supra* note 1, at 68,982.
[16] I*d.* (emphasis added).
[17] *See* KIDS IN NEED OF DEFENSE, EMERGENCY INTAKE SITES FOR UNACCOMPANIED CHILDREN: RECOMMENDED STANDARDS AND BROADER SOLUTIONS (2021), https://bit.ly/46QRysw.
[18] *See* UC POLICY GUIDE, *supra* note 9, at § 7.6 (stating that ORR may grant an initial waiver to an influx care facility from standards in § 7.5.1 (5)–(8) and (11) if they are operationally infeasible and the facility is online for a period of less than six consecutive months; this would mean waivers are only applicable for recreational activity requirements, individual and group counseling requirements, acculturation service requirements, and visitation requirements).
[19] *See, e.g.*, KIDS IN NEED OF DEFENSE, ENSURING HUMANE AND ORDERLY PROCESSING OF UNACCOMPANIED CHILDREN AT THE U.S.-MEXICO BORDER 3 (2023), https://bit.ly/3RaVa2J ("ORR should continue its efforts to stand up new licensed, small-scale shelters positioned to provide appropriate care and services to unaccompanied children. . . . [M]ore ORR shelters will help minimize ORR's continued reliance on 'influx' facilities that are fundamentally unsuited to upholding unaccompanied children's safety and well-being.").
[20] Proposed Rule, *supra* note 1, at 69,000.

the FSA has opined that a 20-day extension may be "expeditious."[21] However, when children are detained 5 weeks (35 days) or more, the court concluded that the government was in substantial noncompliance with the FSA.[22] ORR's 30-day window for release from an "emergency or influx facility" borders on noncompliance, especially if the facilities can be unlicensed and minimum safety requirements can be waived based on need. The current proposal does not satisfy the minimum expediency and safety requirements of the FSA.

When drafting the FSA, situations of influx and emergency were clearly considered and negotiated by both parties and were made distinct for a reason. Conflating these terms and potentially expanding their use would result in situations that are detrimental to the health, safety, and well-being of unaccompanied children.

Given the increased number of unaccompanied children encountered over the last several years, influxes of unaccompanied children are now a predictable occurrence. Instead of reliance on influx shelter beds, we recommend reconsidering this contingency plan in favor of onboarding more licensed shelter beds and staff and focusing on the expansion of small-scale shelter models and community-based models.

c. <u>The requirement of state licensure and prioritized placement of children in state-licensed facilities is not included in the Proposed Rule.</u>

In addition, under § 410.1302, ORR is proposing a change from the FSA term "licensed program" to "standard program" to account for programs that are not eligible for licensure in their state. We believe that the term used to describe programs is less important than the intent and the practical effect of the regulation and any definition adopted should require placement in a state-licensed program to the greatest extent practicable. Unfortunately, the definition of "standard program" proposed by the Agency does not meet this specification. State licensure is arguably the cornerstone of the FSA and provides such essential protection for children that both parties agreed it should continue as a requirement, even after termination of the FSA.[23] We can presume that this proposed change is in response to the de-licensing of dozens of shelters in Texas and Florida, following orders from the states' respective governors.[24] ORR currently funds programs in 27 states, making licensure available in all but 2 states. It would be most prudent to continue with the current practice of providing state license exemption to Texas and Florida, rather than to alter the term and current practice entirely.

Further, the proposed language at § 410.1302(a) of "standard program" does not provide sufficient information for the acceptable alternatives to state licensure. The Agency proposes that a "standard program" shall "be licensed by an appropriate State or Federal agency, or meet other

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[21] *See* Order Re Response to Order to Show Cause at 10, *Flores v. Lynch*, No. 2:85-CV-04544 (C. D. Cal. Aug. 21, 2015).
[22] *See Flores v. Sessions*, No. 2:85-CV-04544, 2017 WL 6060252, at *20-21 (C. D. Cal. June 27, 2017).
[23] DESAI, MCGINN, & ALVAREZ, *supra* note 10, at 7 (citing the FSA).
[24] *See* Lauren Villagran, *Following Abbott Order, Texas Revokes Licenses for Unaccompanied Migrant Children's Shelters*, EL PASO TIMES (Aug. 31, 2021), https://bit.ly/3GpBIKy; *see also* Katie LaGrone, *Shelters for Migrant Children Challenge DCF's 'Emergency' Rule Keeping them from Getting Relicensed*, ABC ACTION NEWS (Feb. 03, 2023), https://bit.ly/484f31V.

requirements specified by ORR if licensure is unavailable to programs."[25] Under this definition, a program could be licensed by either the state, a Federal agency, or meet certain ORR requirements, but it does not provide any insight into a forthcoming federal licensing scheme or clarify what is meant by "other requirements by ORR." Further, per our interpretation of this definition, a program eligible for state licensure could effectively forgo state licensing in favor of a federal license, as federal licensing is not limited to the states where state licensing is unavailable, defying the requirement and intention of the FSA.

Lastly, the Proposed Rule does not require that ORR prioritize the placement of a child in a state-licensed facility. State licensure provides essential oversight to ORR programs and serves as a critical component of ensuring a child's well-being and safety while in ORR custody. Pursuant to the proposed language under § 410.1302, a child could be placed in any program meeting state or federal licensure without preference or consideration being given to placement in a state-licensed facility. This undermines a foundational principle of the FSA.

2. <u>Recommendations for the proposed changes and enhancements made to the process of placement and release of a child from ORR custody.</u>

We commend ORR for taking proactive measures to adopt best practices from the child welfare system to address the needs of children who have experienced traumatic circumstances on their journey to the United States. It is important to provide support and care for these vulnerable children, and we applaud the Agency for taking this initiative to codify the processes and policies that govern their care and the services they receive.

a. <u>Considerations Generally Applicable to the Placement of an Unaccompanied Child (§ 410.1103)</u>

We welcome the proposal in this section to ensure children are placed in settings that promote their safety and development. However, we believe that the primary relevant factors to consider when determining children's placement should be the best interests of the child, which we believe should be a mix of the factors laid out in both §§ 410.1001 and 410.1103. ORR should separate the safety and immigration enforcement considerations, the latter of which is arguably secondary to the best interests of the child and should be considered separately. We believe that ORR may decide to consider additional factors, based on each child's individual circumstances to ensure that child's safety and individualized needs, but we maintain that the prevailing factors for this determination, which should be reflected in the regulations, are the best interest factors.

b. <u>Placement and Services for Children of Unaccompanied Children (§ 410. 1108)</u>

We appreciate ORR's commitment to supporting parenting youth and their children. To the extent possible, we believe that parenting youth should be kept together with their children and family separation should be avoided. ORR should make clearer in the rule that parenting youth will be encouraged to keep and advocate for their children. Parenting youth should be able to

[25] Proposed Rule, s*upra* note 1, at 68,989.

continue to develop as parents and protect the best interests of their children while they are in ORR custody.

Experiencing parental autonomy is essential for adolescent parents to build healthy relationships with their children. For example, experiences associated with better outcomes for adolescent parents and their children include: (1) understanding and appreciating the attitudes, knowledge, and behaviors necessary to be a responsible and responsive parent; (2) achieving and maintaining a positive sense of self as an individual and as a young parent; and (3) having confidence and a sense of control over one's life. It would benefit parenting youth and their children if the final rule expressly recognized and supported the parenting youth's role in decision-making about their child's care.

In the event of separations between the parenting youth and their children, ORR needs to provide further guidance on the circumstances under which the government can separate parenting youth in ORR custody from their children, the basis for separating parenting youth from their children, how long that separation could last, and whether the parenting youth can challenge the separation. As proposed, the regulations do not explain who will make the determinations that lead to separation or how such determinations will be made. We fear that this may lead to improper family separations. In the event of separation, unaccompanied parenting youth are also not offered any mechanism to challenge a separation under § 410.1108(a) or § 410.1108(a)(3). Finally, there is no language within the Proposed Rule regarding reunification of unaccompanied parenting youth separated from their children. We recommend ORR amend the Proposed Rule to better conform with legal protections and standards commonly found in state child welfare laws and that ORR add protections to prevent the unnecessary separation of unaccompanied parenting youth from their children while in ORR custody.

ORR needs to make clear in the final rule that, while the Agency has custody of a parenting youth, it is the parenting youth who retains the custody of his or her child, even if both are held in an ORR facility. As the custodial parent, the unaccompanied youth has a right to determine what is in his or her child's best interests. Federal and care provider staff must actively consider and document the youth's choices as a parent. All children are best served in the care of a loving family. Keeping together parenting youth and their children and timely reunification of a child with his or her family in the event of separation should be guiding principles of the UC Program.

Family unity is a cornerstone of Catholic social teaching and family bonds are crucial for child development, especially for infants and younger children, which is why unaccompanied parenting youth and their children should be placed and kept together to the greatest extent possible. We urge ORR to amend the proposed language to reduce the risk of unjust family separations and minimize the likelihood or the harm of separating unaccompanied parenting youth and their children. In addition, we recommend that at the beginning of § 410.1108, ORR include an affirmative statement recognizing a parenting unaccompanied child's "right to make informed choices about their child's care, including, but not limited to, decisions about the child's health care, diet, clothing, hygiene, religious and cultural practices, education, recreation, and daily activities."

c. Sponsors to Whom ORR Releases an Unaccompanied Child (§ 410.1201)

We support the proposal mentioned in this section and are particularly appreciative of § 410.1201(b), which proposes that ORR will not disqualify any sponsor from taking custody of a child based solely on the sponsor's immigration status and that ORR will not disclose the sponsor's immigration status to any law enforcement agency. Disclosing a sponsor's immigration status to immigration authorities or other law enforcement agencies could have a chilling effect on an eligible individual who wants to sponsor a child and may even lead to a situation where a child must stay in ORR custody for a longer period because qualified sponsors would be discouraged from coming forward to care for him or her. This proposal would encourage more suitable individuals, including relatives, with cultural competency to sponsor a child without fear of adverse immigration action.

d. Sponsor Suitability (§ 410.1202)

We support the suitability assessment proposed by ORR in this section. We believe that conducting a detailed sponsor assessment is necessary to determine the standard of care that the sponsor can provide the child, ensure the safety of the environment where the child will reside, and identify any adverse information or concerns that would disqualify the individual as someone suitable to care for the child. We commend the proposal to consider the child's wishes and concerns in the process, as it gives the child agency in determining matters that impact him or her and empowers the child to speak up when he or she feels unsafe.

e. Home Studies (§ 410.1204)

We believe that a home study may be necessary in certain situations to assess the suitability of the environment in which a child would reside with a prospective sponsor. Therefore, we welcome ORR's codification of the TVPA's conditions for required home studies. We also commend the requirement to conduct a home study prior to releasing a child to a non-relative sponsor who intends to sponsor multiple children, has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children, and for tender age (12 and under) children. This not only ensures a suitable environment for multiple children but also promotes sponsor compliance with the child welfare standards of ORR and state jurisdictions and helps to prevent trafficking and other exploitative situations.

f. Post-Release Services (§ 410.1210)

As direct service providers of PRS, we are acutely aware of the benefits they provide to unaccompanied children and their families, and we have long advocated for making such services available to all children released from ORR care. PRS provides essential ongoing support for the health and success of these children and their families. The USCCB and CCUSA applaud many of the proposed enhancements to the PRS model. The USCCB looks forward to continuing our work with ORR to ensure that PRS is made accessible to all children in our network. We also offer the following comments and recommendations on elements on which the Agency has requested specific feedback.

i. PRS Home Visits

Under the proposed language at § 410.1210(a)(2), ORR states that a child who receives a home study and PRS *may also* receive home visits by a PRS provider,"[26] seemingly making home visits an option. We are opposed to this approach and recommend making such home visits a requirement. Currently, home visits are a requirement of PRS provision for all children, with the exception of Level 1 PRS recipients, who receive virtual check-ins (in some instances, our providers will conduct an initial visit within 14 days). Further, Level 2 requires a home visit at 14 days, 90 days, and again at 6 months for case closure. TVPRA PRS services receive home visits at the same frequency and include semi-annual visits until case closure. Home visits play an integral role in ensuring the well-being of children and sponsors. The proposed language should be more exact in its intention—if it means to create an exception for the virtual Level 1 visits, it should state so explicitly. We strongly recommend including language that would continue requiring home visits by a PRS provider.

Otherwise, the proposal at § 410.1210(a)(3) to extend PRS home visits to children with mental health or other needs who could benefit from ongoing assistance from a community-based service provider (even if they did not receive a home study, per the preamble) is a welcome addition that we believe will be beneficial for children and sponsors. However, the language should include that ORR means for this service to include children who did not receive a home study. Further, we are in full support of ORR's goal to make PRS available to 100% of children, regardless of whether they received an initial home study.

While ORR recognizes that issues relating to procedures for non-parent relatives are currently under litigation and are not subject to this Proposed Rule,[27] we believe that it is particularly critical that non-parent sponsors receive the same or similar assistance as parent sponsors. Non-parent sponsors need help securing signed powers of attorney from parents, or they may need additional assistance complying with educational and medical consent laws to allow them to act on behalf of the child in their care. In states without consent laws, sponsors need assistance securing a court order of custody or guardianship, which can be a very cumbersome legal process. As a result, we would like to propose to ORR that it establish non-parent sponsor access to PRS in the Final Rule, or through new rulemaking after related litigation is resolved.

ii. Service Areas

In order to comply with the requirements proposed at § 410.1210(b) and provide services in a manner that is sensitive to a child's individual needs and in a way he or she is able to understand, regardless of language or ability, we recommend that ORR develop standardized training for PRS grantees as a way to ensure that PRS is consistent and is meeting each child's needs.

We welcome the inclusion of requiring PRS providers to assist children and families with enrollment in school, obtaining medical insurance for children, referring children and sponsors to relevant legal services and resources, and referring children and sponsors to relevant mental health

[26] *Id*. at 68,988 (emphasis added).
[27] *See Lucas R. v. Becerra*, Case No. 2:18–cv–5741 (C.D. Cal. filed Jun. 29, 2018).

resources. Further, taking funding considerations into account, we recommend allocating funds for specific services. For instance, rather than only providing referrals for mental health services, PRS could include funded mental health services to children who are most at-risk and are not eligible or able to access health insurance programs.

iii. Ongoing Check-Ins and Home Visits

Per § 410.1210(e)(1), PRS providers would, in consultation with the child and sponsor, determine the methods, timeframes, and schedule for ongoing contact with the released child and sponsor, based on the level of need. ORR has requested specific feedback on whether it should consider limiting the minimum monthly contact to children and sponsors receiving Level 2 and/or Level 3 PRS. While it does not clearly delineate what that limitation would be in practice, we strongly recommend continuing with the monthly minimum contact for Level 2 PRS. Further, Level 3 PRS should include weekly contact for 45-60 days, or longer, if necessary.

We also appreciate the requirement for service providers to make monthly contact with released children for up to six months. The use of technology to facilitate these check-ins is also commendable. These check-ins are crucial to ensure that the sponsor is complying with the standards set by ORR and child welfare and to identify cases where the care provided falls below those standards. Furthermore, these check-ins are necessary to prevent and detect child labor, abuse, and trafficking. Assessing whether support needs adjustment, to ensure children are receiving the best care to promote their integration and development, could also be ascertained from these check-ins. Given that there are many new providers serving unaccompanied children, these check-ins are also critical to ensuring their compliance with ORR standards and that they are providing timely and relevant case management support to children and their sponsors.

In addition, we recommend that ORR determine whether these services could be provided for a longer period, as children may need these services longer in order to be best prepared for self-sufficiency and integration into the country. As such, we invite ORR to consider whether post-release services should be made available to a child until he or she becomes 21-years-old, consistent with the definition of a child under INA § 101(b)(1)(A), or the child is granted voluntary departure or an order of removal, whichever occurs first.

iv. Timeframes for PRS

At § 1401.1210(g), ORR suggests PRS timelines it hopes would prevent delays in release if PRS is not immediately available. Unfortunately, there is currently not enough capacity within the network to accept PRS cases in real time, and providers are working on an extensive backlog of waitlisted cases. To meet the 30-day deadline, we recommend continued efforts to clear the backlog of waitlisted cases to make room for new cases to be accepted as close to release as possible. ORR shelters should also make referrals for PRS prior to release. Currently, most cases are being referred for services on the day of release. It is important to consider network capacity.

Further, we request that ORR make clear in the regulatory text that PRS can be provided to a child for six months from the time his or her case is accepted by a provider. Per § 410.1210(h)(2), for a released child "who is not required to receive PRS under the TVPRA at 8

U.S.C. § 1232(c)(3)(B) but who receives PRS as authorized under the TVPRA, PRS for the unaccompanied child shall presumptively continue for not less than six months or until the unaccompanied child turns 18, whichever occurs first; or until the PRS provider assesses the unaccompanied child and determines PRS are no longer needed but in that case for not less than six months." However, as mentioned, due to capacity issues, a child's case is not always immediately accepted. The regulations should make clear that PRS can be provided to a child from the time his or her case is *accepted* by a provider. Regardless of the time of referral, a child should be offered a full six months of services.

v. Safety and Well-Being Follow-Up Calls

Currently, the releasing shelter provides the child's Safety and Well-Being Follow-Up Calls. If the releasing shelter is unable to get in touch with the child, either the ORR hotline or the active PRS provider is contacted. We do not recommend integrating Safety and Well-Being Calls into the services provided in PRS, as this would create a significant capacity concern. The onus of Safety and Well-Being Calls should not fall on the PRS provider. Codifying these calls could be a welcome addition to the proposed regulations, so long as they clearly delineate that they are to be carried out by ORR and not the PRS provider. Further, as ORR continues toward its goal of providing PRS to 100% of children, the scope of Safety and Well-Being Calls should focus on the interim time between a child's placement and the start of PRS.

vi. Level Categorizations

We agree with ORR's current level categorization. This model provides sufficient fluidity for children to be able to move between levels. In addition, we recommend revisiting the current policy for Level 3 providers and aligning requirements with available resources. Specifically, the current policy loosely insinuates that the preferred intervention for Level 3 is to be done by providers with Trauma-Focused Cognitive Behavioral Therapy (TFCBT) training. Unfortunately, this demand is often unattainable for providers when training for this type of intervention is not funded by ORR. Requiring TFCBT is an aspirational model; it is not always applicable to every situation, as some matters fall on the state and are outside of the scope of services provided. If this requirement should continue, ORR should consider funding the necessary training, as well as providing the necessary funding to hire qualified staff, as this level of intervention requires clinical supervision.

vii. Reporting Case Closures

With regard to case closures, we request further clarification on case closure report submissions to ORR. Current policy states that PRS providers must upload case closure reports to ORR's case management system within 30 calendar days of case closure. However, per the Proposed Rule's preamble, ORR may require case closure reports to be uploaded within 72 hours,[28] while the regulation states at § 410.1210(i)(1)(ii) that providers will upload all PRS documentation within 7 days of case closure.[29] We advocate for keeping the original 30-day policy to allow time for internal review of reports before they are ultimately submitted to ORR.

[28] *Id.* at 68,936.
[29] *Id*. at 68,989.

viii. Records and Reporting Requirements

Given the requirements that ORR is setting forth regarding recordkeeping, we request that the Agency consider providing technological support for the submission and maintenance of files, as well as addressing any questions or complications that may arise. Further, we request that ORR consider the additional burden of storing hard files for the relevant duration of time.

3. The administrative implementation of legal service provision must be age-appropriate and trauma-informed.

Unaccompanied children have often experienced severely traumatic experiences in their countries of origin and *en route* to the United States. These experiences, combined with other salient obstacles to the full comprehension and therefore attainment of due rights and privileges (impediments such as language barriers, cultural differences, the child's stage of physical and psychological development, and lack of certitude in the trustworthiness and legitimacy of U.S. civil authorities, given prior experiences with potentially dubious actions by government actors in the nations from which they have fled), reduce the likelihood that the provision of legal information required by the FSA and the discretionary legal services provided by ORR, can reasonably have their intended effect. The Proposed Rule and FSA articulate the preeminence of the child's best interests and the necessity of service delivery that is tailored to his or her particular needs. Wherein the Proposed Rule and FSA intend to offer legal representation and services, respectively, to achieve the end of the child's best interest, this goal is impeded without additional special consideration of every practicable means to ensure that services are delivered and utilized.

a. *Pro Bono* Legal Assistance

As noted in the Proposed Rule and in 8 U.S.C. § 1232(c)(5), "to the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of *pro bono* counsel who agree to provide representation to such children without charge". ORR should develop public solicitations to recruit legal service providers and *pro bono* practices across the nation and to therefore broaden its network of legal service providers.

The Proposed Rule instructs ORR to provide information regarding the availability of free legal assistance and permits ORR to use funds (as available) for direct legal representation when *pro bono* assistance cannot be secured. Express language regarding ORR's commitment to and responsibility for making every effort to ensure access to *pro bono* counsel should be included. Further, in addition to providing a *pro bono* legal services provider list with information about potential assistance,[30] the Proposed Rule should describe the steps ORR will take to directly facilitate access to *pro bono* counsel for unaccompanied children. This could include the implementation of a procedure following the initial legal consultation that requires care provider staff to contact a known legal services provider in order to connect the child with *pro bono* assistance wherever it is available and possible to do so. Contact with the provider should be made with the child's consent. Attempts to facilitate access to counsel would ensure that ORR is compliant with its statutory responsibility to make every effort to utilize *pro bono* counsel.

[30] *See Services Provided*, OFF. OF REFUGEE RESETTLEMENT, https://bit.ly/4193pAD (last updated May 16, 2019).

b. Legal Services Consultation

To ensure that ORR "service delivery is . . . accomplished in a manner which is sensitive to the age, culture, native language and . . . complex needs of each minor", as required by the FSA,[31] we encourage ORR to consider at least one additional legal consultation for all unaccompanied children to the extent practicable, with priority given to those children who have been identified as having experienced the sufferings identified in proposed § 410.1309(B)(v). In MRS' programmatic experience, a substantial number of contacts with a child may be necessary to establish the rapport and trust needed for the child to feel safe enough to disclose the difficult details of the events that may make them eligible for various forms of relief. Attention to the "complex needs of unaccompanied children" must consider the reality of the traumatic experiences they have often endured.

c. Equitable Access to Legal Services

Given the need for service provision to be executed via a trauma-informed lens, ORR-funded grants or contracts to legal service providers as delineated in proposed § 410.1309(2)(d) should be free of stipulations that limit the provision of services to unaccompanied children who are initially perceived to have a viable form of relief. A child may disclose additional significant details of importance to their case once they obtain counsel and have established a rapport. ORR should facilitate access to *pro bono* counsel and any agency-funded counsel for direct immigration legal representation to the extent practicable, universally rather than conditionally. Language should be added to the Proposed Rule to ensure this.

4. The Unaccompanied Children Office of the Ombuds should be scaled up and staffed sufficiently to ensure its effectiveness.

We welcome ORR's proposed creation of the Unaccompanied Children Office of the Ombuds as an additional means to promote the safety and well-being of unaccompanied children and to provide oversight akin to, though necessarily different from, the role of the *Flores* monitor. The Proposed Rule states that the Ombuds will receive reports from unaccompanied children, potential sponsors, stakeholders, and the public regarding ORR's adherence to federal law and internal policies. The Ombuds will investigate reports, refer reports to the appropriate law enforcement agencies as indicated, and offer recommendations to the Agency to improve the care of unaccompanied children.

Measures should be taken to ensure that the office is staffed sufficiently to respond to reports received across the national network within a reasonable timeframe. Given the fluidity of the UC Program, prolonged delays may impact the effectiveness of the Agency's attempts to investigate matters and intervene appropriately. Children may transition to other care provider facilities or out of ORR care entirely, bed capacity may fluctuate, new care providers will be onboarded, while others may close.

Specific policies and procedures must be created to ensure that reports received of any harm or potential harm to an unaccompanied child are acted upon swiftly. This will require the

[31] FSA, *supra* note 4, at ¶ 24.D.

establishment of a relationship with state and local law enforcement, CPS agencies, and other local actors. Consideration should also be given to how the Unaccompanied Children Office of the Ombuds will relate to the ORR National Call Center. Education should be given to sponsors, unaccompanied children, and care provider staff on when to use the ORR National Call Center, rather than contacting the Unaccompanied Children Office of the Ombuds. Some connection between the ORR National Call Center and the Unaccompanied Children Office of the Ombuds (such as an option upon reaching the National Call Center to be connected to the Ombuds) may prove beneficial in streamlining the process for reporting concerns and reducing the potential for confusion.

5. <u>The Proposed Rule's attempted codification of ORR's efforts to facilitate abortion is unlawful; further clarification is needed for ambiguous terminology; and conscience protections should be included as part of the regulatory text.</u>

a. <u>Facilitation of Abortion</u>

The Proposed Rule would prioritize the taking of preborn human life by defining "medical services requiring heightened ORR involvement" to specifically include abortion and then, *inter alia*, requiring the provision of interstate transportation for such "services."[32] The regulations would continue and formalize ORR's practice of transferring pregnant minors to ORR facilities in states that allow abortion, circumventing state laws that protect preborn human life, and providing or paying for transportation to abortion providers.[33] We offer four comments on the abortion-related provisions of the Proposed Rule.

First, Congress has not directed the federal government to promote or facilitate abortion, either in this program or any other. Quite the contrary, by barring use of federal funds for abortion, Congress has adopted an HHS-wide policy in favor of legal protection for preborn human life. Any pre-*Dobbs* court orders or stipulations[34] that require the government to provide unaccompanied children with access to abortion should be modified or vacated, and ORR should immediately seek such relief, as they rely on decisions about abortion—*Roe v. Wade* and *Planned Parenthood v. Casey*—that the Supreme Court has since repudiated.[35] There is no federal constitutional right to abortion, and because Congress had made the express policy judgment not to provide or pay for abortion, ORR should not facilitate abortion in programs serving unaccompanied children.

Second, insofar as ORR might attempt to argue that Congress' aforementioned policy is limited to the act of abortion itself, ORR cannot provide or pay for *transportation* for abortions either. To be sure, the Hyde Amendment prohibits use of federal funds for "abortion," but, as common sense would dictate, this necessarily includes services intended to directly facilitate the procedure. By comparison, if a local school district were to cut funding for student "basketball," no one would think that government funds could then be used to pay for team uniforms, practice space, basketball coaches, or bus rides to the games. "Paying for the basketball team's uniforms,

[32] Proposed Rule, *supra* note 1, at 68,980, 93–94.
[33] *Id*. at 68,994.
[34] *See J.D. v. Azar*, No. 1:17-cv-02122 (D. D.C. Sept. 29, 2020) (joint stipulation) (ECF No. 168), and related orders.
[35] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

practice space, coaches and bus ride to a basketball game is effectively paying for basketball. Likewise, paying for travel to receive an abortion is effectively paying for abortion."[36]

Third, facilitating abortion not only directly contravenes Congress' decision not to facilitate abortion with federal funds but often (especially relative to childbirth) harms those who undergo the procedure. Immediate physical complications include hemorrhage, retained tissue, infection, uterine perforation, cervical laceration, and immediate psychiatric morbidity.[37] It is estimated that, in the United States, "at least 45,000 women a year experience physical complications" from abortion.[38] There are also long-term complications, such as placenta previa and pre-term delivery in subsequent pregnancies.[39] Abortion is also associated with a host of adverse mental health outcomes.[40] One might imagine that some of these existing risks may be even higher for unaccompanied children, having likely had relatively less access to care in their lives or potentially been subjected to traumatic experiences, than for the general population.

Fourth, even if ORR were to retain and formalize its policy of facilitating abortion, which we believe is a serious mistake, it should adopt measures to ensure that children are also provided with information and counseling about abortion *alternatives*. ORR should facilitate and pay for such counseling and alternatives.

b. Ambiguous Terminology

Throughout the proposed regulatory text, we note the use of ambiguous terminology and seek clarification. We maintain that the proposed factors for the placement of a child or post-release services should avoid any interpretation that intrudes upon the sincerely held religious or moral beliefs of a faith-based provider.

It is unclear what is considered "significant surgical or medical procedures" or what is covered under "medical services necessary to address threats to the life of or serious jeopardy to the health of an unaccompanied child" within the definition of "medical services requiring heightened ORR involvement." Mindful of this terminology, we reiterate that a "gender-affirming approach" and related medical interventions are not in the best interests of a child, nor do they support the child's overall health and well-being.[41]

In listing "gender" and "LGBTQI+ status" as considerations for placement, the Proposed Rule fails to give any indication as to how this would be carried out in a "least restrictive setting" and how enforcement may impact faith-based providers. Similarly, it is uncertain how considering

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[36] Rachel N. Morrison & Natalie Wood, *Should Taxpayers Pay for Abortion Travel?*, THE HILL (Nov. 24, 2022), https://bit.ly/47Tp4iM.
[37] ANGELA LANFRANCHI, *ET AL.*, COMPLICATIONS: ABORTION'S IMPACT ON WOMEN 96 (2013).
[38] *Id*. at 97.
[39] John J. Thorpe, Jr., M.D., *et al*., *Long Term Physical and Psychological Consequences of Induced Abortion: Review of the Evidence*, 58 OBSTETRICAL & GYNECOLOGICAL SURVEY 67, 70–72, 75 (2002); *see also* Brent Rooney & Byron C. Calhoun, M.D., *Induced Abortion and Risk of Later Premature Births*, 8 J. AM. PHYSICIANS & SURGEONS 46 (2003) (identifying 49 studies that have demonstrated a statistically significant increase in premature births or low birth weight in subsequent pregnancies in women with prior induced abortion).
[40] *See Fact Sheet: Abortion and Mental Health*, CHARLOTTE LOZIER INST. (Sept. 13, 2023), https://bit.ly/3T9vyFK.
[41] *See* USCCB Comments on Proposed Foster Care Regulations, at 3–12 (2023), https://bit.ly/46FE2HT.

"LGBTQI+ status" for post-release services would impact faith-based organizations that provide such services to unaccompanied children. The Proposed Rule also fails to clarify how the best interests of the child are evaluated in the context of "the unaccompanied child's expressed interests" and the "unaccompanied child's development and identity." The Catholic Church teaches that people who experience same-sex attraction "are to be fully respected in their human dignity."[42] Upholding the dignity of each child requires that his or her best interests not be evaluated according to a false and narrow view of the human person based on "sexual identity." Considering their vulnerable condition, unaccompanied children are best served when treated as whole persons and should have access to "age-appropriate professional counseling services that respect Church teaching in matters of human sexuality."[43]

c. Conscience Protections

The preamble implicitly acknowledges that certain aspects of the Proposed Rule may raise religious liberty concerns, noting the applicability of federal statutory protections for religious liberty.[44] To be sure, these and similar statements in the preamble are helpful, but they do not go far enough. First, they should also acknowledge that faith-based providers may be protected not only under federal statutes but also under the First Amendment to the U.S. Constitution. Second, they are relegated to the preamble and not actually replicated in the text of the Proposed Rule. Statements in a regulatory preamble are not themselves legally enforceable, functioning much like legislative history in relation to statutory text.[45] Third, simply noting that ORR is obligated to comply with applicable statutes is trivially true. No regulation could possibly assert otherwise.

In order to actually incorporate constitutional and statutory protections for conscience and religious freedom in a meaningful way, the Agency should incorporate into the regulatory text the conscience and religious freedom protections that Congress has afforded to grantees, subgrantees, and ORR's own employees, including the protections enshrined in the Religious Freedom Restoration Act and Title VII of the Civil Rights Act of 1964. Furthermore, the Agency should say in the regulatory text what those protections require in this context. Namely, the regulatory text should include provisions that (a) require the Agency to accommodate the religious exercise of faith-based providers and (b) prohibit the Agency from discriminating against or disadvantaging faith-based providers in the process of awarding or administering grants or contracts in relation to the UC Program.

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[42] COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH no. 228.

[43] USCCB, MINISTRY TO PERSONS WITH A HOMOSEXUAL INCLINATION: GUIDELINES FOR PASTORAL CARE, at 22–23 (2006), https://bit.ly/4164vx8; *see also* ARCHDIOCESE OF PORTLAND IN OREGON, A CATHOLIC RESPONSE TO GENDER IDENTITY THEORY: CATECHESIS AND PASTORAL GUIDELINES (Jan. 25, 2023), https://bit.ly/3GupEYq.

[44] *See, e.g.*, Proposed Rule, *supra* note 1, at 68,938 ("ORR notes that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations"); *id.* at 68,944 (noting the same "with respect to the obligations of care provider facilities"); *id.* at 68,946 (noting the same in the context of UC access to abortion).

[45] *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (declining to defer to agency views set out in the preamble to a regulation as opposed to the regulation itself).

CONCLUSION

We appreciate much of what ORR has put forward in the Proposed Rule. However, for the reasons set forth above, it falls short of adequately implementing cornerstone protections of the FSA and also fails to set forth sufficiently clear regulatory language for various other elements governing a child's placement, care, and release while in ORR custody. Additionally, the Agency's harmful efforts to facilitate the taking of human life, which it seeks to codify here, run afoul of federal law. Further, the lack of clear conscience protections in the Proposed Rule is problematic. We urge ORR to revise this Proposed Rule to better mirror the terms of the FSA, as well as our recommendations. We welcome the opportunity to further discuss our feedback with ORR to better align this Proposed Rule with our shared goal of providing quality care and protection to this most vulnerable of populations.

Respectfully submitted,

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