

Themed Comment #7: Oversight, Ombuds, Data, Training

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December 4, 2023

Submitted via: <https://www.regulations.gov>

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

Re: Comment on Notice of Proposed Rulemaking, Unaccompanied Children Program
Foundational Rule, 45 C.F.R. Part 410, RIN 0970-AC93

Dear Mr. Biswas,

We write on behalf of the 72 undersigned organizations, academics, and law firms in response to the Office of Refugee Resettlement's (ORR), Administration for Children and Families' (ACF), and the U.S. Department of Health and Human Services' (HHS) Notice of Proposed Rulemaking (proposed rule) to address the sections of the proposed rule regarding oversight (ORR's own reporting and monitoring (§ 410.1303, Subpart D), Unaccompanied Children Office of the Ombuds (Subpart K), and data and reporting requirements (Subpart F and certain parts of §§ 410.1001, 410.1210, 410.1303, 410.1306, 410.1308, and 410.1800)).

We appreciate the proposed rule's recognition of the importance of comprehensive oversight and data collection, and file the following comment to encourage ORR, ACF, and HHS to improve upon certain sections of the proposed rule, and to oppose or request significant revision of certain sections of the proposed rule.

1. Introduction

We applaud and strongly support the proposed rule's establishment of the Unaccompanied Children Office of the Ombuds (hereinafter "UC Office of the Ombuds" or "Ombuds"). For years, many of the undersigned organizations have been staunch advocates for its creation. As organizations that interact regularly with immigrant children in federal custody, we often learn and document significant issues such as the prolonged detention of children in restrictive settings, siblings separated when placed in different ORR facilities, lack of or delayed access to accommodations for children with disabilities, and physical, verbal or sexual abuse of children in ORR care. The creation of the UC Ombuds Office is a necessary and important step in protecting the rights of unaccompanied children in ORR care, including ensuring that standards of care are regularly monitored and promptly addressed when violated.

The importance of strong regulatory provisions regarding oversight cannot be overstated. For more than two decades, *Flores* monitors and counsel have played a vital role in

bringing to light violations of requirements in the *Flores* Settlement Agreement (FSA) and other legal obligations to ensure dignified care and treatment of children consistent with child welfare principles and children’s particular needs and vulnerability. Noncompliance with minimum standards, laws, and policies risk direct and often grave consequences for children in care—imperiling their physical, emotional, and psychological well-being; prolonging their detention and separation from family members; and impeding their ability to apply for humanitarian protections for which they may be eligible. Multiple motions to enforce the FSA highlight the enduring need for robust oversight and monitoring of ORR programs.¹

Increases in the numbers of children in care since the FSA’s entry into force, shifting immigration laws and policies, and the growth of ORR’s care provider network and programs only heighten the importance of rigorous monitoring and oversight, paired with enforcement mechanisms that can prevent recurrent violations and timely identify and remedy those that do occur. Absent such mechanisms, the foundational safeguards embodied in the FSA will not be fully implemented—and the wellbeing of children and progress achieved over decades to integrate basic child welfare protections within the immigration system will be at risk.

The proposed Ombuds Office provides an important avenue through which to evaluate and oversee compliance and to receive and investigate complaints and concerns from children in care, families, providers, and other stakeholders. We are concerned, however, that the proposed provisions lack critical enforcement mechanisms to help ensure that concerns and violations are not only promptly identified and elevated to the agency’s attention but responded to with consistent and meaningful corrective action. Repeated references to the non-binding nature of the Ombuds’ recommendations hamper the proposed office’s effectiveness and suggest a more limited advisory and consultative role, rather than ensuring that ORR will promptly consider and act on the Ombuds’ findings, including through implementation of appropriate accountability measures. Additionally, the use of permissive rather than mandatory language to address activities performed by the Ombuds Office and the access to children and care facilities that would be provided inject uncertainty about whether critical oversight functions will be routinely conducted or remain solely discretionary.

We also applaud the attention that the proposed rule gives to data safeguarding, including guarantees of privacy and confidentiality for children’s case files and other personally identifiable information (PII), and protections from unauthorized access or use, misuse, and improper disclosure. We have identified several areas where the rule requires further strengthening in this regard. First, the proposed rule should have uniformly high standards

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

for all providers who may encounter or keep records involving unaccompanied children's PII. The proposed rule does not. The sections contemplating data collection and safeguarding should be aligned to a high standard of protection and made consistent across different types of service providers—we offer multiple suggestions to assist in this process. Second, while the Rule contemplates information and data that ORR receives via its network of grantees and contractors, the proposed rule fails to contemplate information and data that arrives via other means and that implicates the continued well-being of children or safety and security of children's placements. Third, we are concerned that the proposed rule provides for the collection of important data for ORR's internal use, but it does not mandate the publication of aggregate data by ORR. Particularly in the absence of *Flores* monitoring, public data reporting is an important step towards transparency. It is critical that a revised rule mandates public reporting on the demographics of unaccompanied children, their status with respect to ORR programs, and the quality of care that ORR provides. Finally, the proposed rule currently fails to contemplate the data recording and safeguarding needs specific to children subject to involuntary family separation.

In this comment, we offer specific recommendations for **1)** strengthening monitoring and oversight of ORR care, **2)** the efficacy, independence, and reach of the proposed Ombuds Office to help meet its potential to ensure and improve the care and wellbeing of children in ORR custody and **3)** significant improvements to data and reporting.

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

The members of the following undersigned organizations who drafted this comment are well-positioned to offer feedback on the proposed rule:

- The **Florence Immigrant & Refugee Rights Project** (“Florence Project”) is a 501(c)(3) non-profit organization that provides free legal and social services to the thousands of adults and unaccompanied children detained in immigration custody in Arizona on any given day. In 2022, we provided 14,622 know your rights presentations to unaccompanied children facing removal in Arizona. Our staff also represented 688 unaccompanied children before Immigration Courts, U.S. Citizenship and Immigration Services, and/or local juvenile courts. 54 of the children offered services were five years old or younger.
- The **Women's Refugee Commission** is a 501(c)(3) non-profit organization that advocates for the rights of women, children, and youth fleeing violence and persecution. We are leading experts on the needs of women, children, and families in situations of forced displacement, including unaccompanied children, and on the policies and programs that can protect and empower them.
- The **Young Center for Immigrant Children's Rights** (“Young Center”) serves as the federally-appointed, best interests guardian *ad litem* (Child Advocate) for trafficking victims and other vulnerable unaccompanied children in government

custody as authorized by the Trafficking Victims Protection Reauthorization Act (TVPPRA). The Young Center is the only organization authorized by the Department of Health and Human Services' Office of Refugee Resettlement (ORR) to serve in that capacity. The role of the Child Advocate is to advocate for the best interests of the child. A child's best interests are determined by considering the child's safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity. Since 2004, ORR has appointed Young Center Child Advocates for thousands of unaccompanied children in ORR custody.

- **Acacia Center for Justice** (“Acacia”) delivers and advocates for meaningful and effective access to justice and freedom for immigrants at risk of detention or deportation in partnership with an accountable, independent network of immigrant legal service providers and community partners across the country. Acacia currently operates seven federally funded programs and one state-funded program. Acacia and its network provide services to all children in ORR custody through the HHS-funded Unaccompanied Children Program (UCP), managed in conjunction with the Vera Institute of Justice. UCP emphasizes zealous advocacy, cultural humility, and a trauma-informed approach to working with children.
- **Kids in Need of Defense** (“KIND”) envisions a world in which every unaccompanied child on the move has access to legal representation and has their rights and well-being protected as they migrate alone in search of safety. Founded fifteen years ago, KIND is the leading national nonprofit organization providing free legal and social services to unaccompanied or separated children who face removal proceedings in immigration court. Since January 2009, KIND has received referrals for more than 30,000 unaccompanied children from 80 countries. With sixteen locations across the United States, KIND serves children through a combination of direct legal services and the training and mentorship of pro bono attorneys from over 800 law firms, law departments, law schools, and bar associations. KIND's social services program facilitates support including counseling, educational support, medical care, and other services. KIND also works to address the root causes of child migration from Central America, and advocates for laws, policies, and practices to improve the protection of immigrant children in the United States.

At the end of this document, you will find a complete list of the 72 undersigned organizations, academics, and law firms submitting this comment.

2. ORR Reporting, monitoring, quality control, and recordkeeping standards [Proposed Rule Subpart D, § 410.1303]

a. Proposed Rule § 410.1303(a)

Comment: Consistent, comprehensive monitoring of every ORR facility is necessary to protect the safety and well-being of all children in ORR custody.

However, the proposed rule limits ORR’s monitoring to “care provider facilities,” and per the proposed rule’s own definition, ORR care provider facilities do not include out of network facilities (OON or OONs) (§ 410.1001). Children placed in OONs often have more significant needs and have relatively longer lengths of placement than children not placed in OON facilities. It is essential that ORR monitor OON facilities.

Most concerning, the proposed rule does not indicate the frequency, duration, or scope of ORR’s monitoring. Without these elements, the proposed rule’s ORR monitoring structure—and the protection that it is intended to provide—is essentially meaningless.

The proposed rule permits a lower and vaguer standard for ORR’s “desk monitoring” than is included in ORR’s current Policy Guide and the proposed rule’s preamble. The proposed rule states that ORR’s monitoring activities include “[d]esk monitoring that is ongoing oversight from ORR headquarters.” § 410.1303(a)(1). This does not indicate what “desk monitoring” or “ongoing oversight” entails, how often such oversight occurs, or who is part of such oversight. The ORR Policy Guide and preamble both state that desk monitoring requires “monthly check-ins” with ORR federal staff that include “regular record and report reviews,” “financial/budget analysis,” and “communications review.” *See* ORR Policy Guide § 5.5.1, P.R. p. 68939. In addition, the preamble includes “ongoing reviews of staff background checks and vetting employees, subcontractors, and grantees.” *Id.*

The proposed rule also permits a lower and vaguer standard for ORR’s “routine site visits” than is included in ORR’s current Policy Guide and the proposed rule’s preamble. The proposed rule provides for “[r]outine site visits that are daylong visits to facilities to review compliance for policies, procedures, and practices and guidelines.” § 410.1303(a)(2). Again, this language does not indicate how often such oversight occurs. The ORR Policy Guide and the preamble are identical in stating that these routine site visits occur “on a once or twice monthly basis, both unannounced and announced.” *See* Policy Guide § 5.5.1., P.R. 68939. In addition, the Policy Guide states that routine site visits occur at “every facility,” while the proposed rule only states that site visits occur at “facilities,” leaving open the possibility for ORR to *not* monitor facilities.

The proposed rule also permits a lower and vaguer standard for ORR’s “monitoring visits” than is included in ORR’s current Policy Guide and the proposed rule’s preamble. The proposed rule provides for “[m]onitoring visits that are part of comprehensive reviews of all care provider facilities.” § 410.1303(a)(4). Again, this language does not indicate how long or how often such oversight occurs. The ORR Policy Guide and the preamble both state that monitoring visits are “week-long” visits that occur “not less than every two (2) years.” *See* ORR Policy Guide § 5.5.1, P.R. p. 68939.

Recommendation:

(a) Monitoring activities. ORR monitors all care provider facilities and out-of-network facilities for compliance with the terms of the regulations in this part and 45 CFR part 411. ORR monitoring activities shall include:

(1) Desk monitoring that is ongoing oversight from ORR headquarters, which includes monthly check-ins by ORR Federal staff with the care provider or OON facility, regular record and report reviews, financial/budget statements analysis, ongoing reviews of staff background checks and vetting of employees, subcontractors, and grantees, and communications review;

(2) Routine site visits that are daylong visits to every facility facilities on a once or twice monthly basis, both unannounced and announced, to review compliance for policies, procedures, and practices and guidelines;

(3) Site visits in response to ORR or other reports that are for a specific purpose or investigation; and

(4) Monitoring visits that are weeklong visits that occur not less than every two (2) years as part of comprehensive reviews of all care provider facilities.

b. Proposed Rule § 410.1303(b)

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

However, we are concerned that the corrective actions and described process in proposed §410.1303(b) address violations only on a case-by-case basis. Troublingly, the proposed rule appears not to contemplate contractors or other actors who violate regulations regularly or systematically (unless the violations are criminal in nature) because it takes each violation as a singular event without relationship to other events or, potentially, to higher-level decisions. We find support in our view from the Senate Finance Committee, which wrote in 2021 that “because ORR’s monitoring is based on individual case management records, it is unable to track historical trends at either the facility or grantee/contractor level—including such critical data as facility security, facility safety, staff behavior, and abuse and assault (including incidents of a sexual nature).”² The first step towards the identification of problem actors—whose behaviors, in this context, lead to harm to children—is to collect data on incidents, particularly on the more serious incidents, and aggregate incidents at the facility level as well as the grantee / contractor level.

Our view is that both ORR and children’s interests are served when regulations are followed by care providers, when systematic problems are identified early and resolved, and when actors who have consistently acted contrary to the best interests of children no longer have access to federal contracts to care for children. The Senate Finance

² Staff of S. Comm. on Finance, *Exposing the Risks of Deliberate Ignorance: Years of Mismanagement and Lack of Oversight by the Office of Refugee Resettlement, Leading to Abuses and Substandard Care of Unaccompanied Alien Children* (Comm. Print 2021), available at <https://www.finance.senate.gov/download/102821-finance-committee-report-orr-uac-program>.

Committee's Recommendation 1 is that ORR utilize "drawdowns and the discontinuation or non-continuation of grants/contracts to providers that do not effectively safeguard children in their care." We agree.

Recommendation: additional text to 410.1303(b): "ORR will collect and aggregate data on violations and resulting corrective actions for both facilities and grantees. Such data shall be for use in ongoing monitoring and in consideration of the future composition of the ORR network, including to inform decisions regarding initiation, renewal, or discontinuation of contracts or cooperative agreements."

c. Proposed Rule § 410.1303(c)

Comment: Within ORR's network, secure placements have consistently facilitated and invited abusive, punitive, and traumatizing treatment of children. These facilities have been magnets for lawsuits and condemnation due to their failure to uphold basic standards. As such, ORR must increase its monitoring requirements for secure facilities, ensuring that routine site visits occur at a minimum of once per month and that weeklong monitoring visits are conducted yearly. We also recommend that ORR review children's case files at least every 14 days to determine if the child is ready for a less restrictive placement, instead of at 30-day intervals, which is in closer compliance with ORR's statutory and child welfare mandate.

Recommendation: "At secure facilities, ORR must conduct routine site visits - both announced and unannounced - monthly, and weeklong monitoring visits yearly. In addition to other monitoring activities, ORR must reviews individual unaccompanied child case files to make sure children placed in secure facilities are assessed at least every 14 ~~30~~-days for the possibility of a transfer to a less restrictive setting.

d. Proposed Rule § 410.1303(d)

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

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

monitoring. Upon request, care provider facilities must provide findings of such reviews to the designated ORR point of contact.”

e. Proposed Rule § 410.1303(f)

Comment: In our experience, ORR facilities often engage in over-reporting of incidents. Many Significant Incident Reports (“SIR” or “SIRs”) frequently document minor rule infractions or developmentally-appropriate child or adolescent behavior such as when children fail to follow facility rules, test boundaries, appropriately express frustration, or engage in horseplay or recreational activities. SIRs frequently fail to contextualize children’s behavior within the stressful circumstances they are navigating, conditions and length of time in government custody, or the trauma they have experienced.³ ORR’s own policy guide states that “an incident report is not intended to provide a complete context (such as trauma, other incidents) of the incident described or of the child’s experience in home country, journey, or time in care,” and that “information may not be fully verified” ORR Policy Guide § 5.8.⁴ As such, the regulatory language surrounding staff’s reliance on SIRs must clearly state that, not only is a report not sufficient to step up a child to a more restrictive placement, but also that even as an example of past behavior, ORR and care provider staff must consider that reports may not be complete or verified, lack context regarding the incident and the children’s experiences and background, and do not include the child’s perspective on the incident.

Recommendation: § 410.1303(f)(4): The existence of a report of a significant incident may not be used by ORR as a basis for an unaccompanied child’s step up to a restrictive placement or as the sole basis for a refusal to step a child down to a less restrictive placement. Care provider facilities are likewise prohibited from using the existence of a report of a significant incident as a basis for refusing an unaccompanied child’s placement in their facilities. Care provider facilities may deny a placement only on the basis of the reasons and in accordance with the procedures set forth in § 410.1103(f)-(g). To the extent ORR and provider staff rely on R-reports of significant incidents may be used as examples or citations of concerning behavior, ORR and provider staff should consider that these ; however, the existence of a reports are not complete or comprehensive and information in the reports may not be fully verified. Staff should also consider that ORR does not intend for an incident report to provide complete context of the incident described or a child’s experience in home country, journey, or time in care. itself is not sufficient for a step up, a refusal to step down, or a care provider facility to refuse a placement.

³ Young Center for Immigrant Children’s Rights and National Immigrant Justice Center, *Punishing Trauma, Incident Reporting and Immigrant Children in Government Custody*, September 2022, available at <https://www.theyoungcenter.org/overhaulsirreports>.

⁴ Section 5.8 also states that incident reports “are primarily meant as internal records whose purpose is to document and communicate incidents for ORR’s immediate awareness (and not, for example, as legal documents, medical or clinical records, or as dispositive decision documents regarding aspects of a child’s case management needs).” ORR Policy Guide § 5.8, updated August 2, 2023, <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-5#5.8>.

f. Proposed Rule § 410.1303(g) and (h)

Please refer to Section 4 in this comment (below), titled “Data and Reporting Requirements.”

**3. Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds)
[Proposed Rule Subpart K]**

**a. Establishment of the UC Office of the Ombuds, and policies,
procedures, and contact information (§§ 410.2000, 410.2001)**

As discussed above, the undersigned organizations widely support the creation of the UC Office of the Ombuds (Ombuds). We also support the location of the UC Office of the Ombuds as an independent and third party outside of ORR and within the Office of the ACF Assistant Secretary. However, we make the following recommendations to strengthen these sections: 1) add specificity to the Ombuds’ public reports and findings; 2) require the Ombuds to provide meaningful notice to unaccompanied children about how it will accept reports and how it will address retaliation; and 3) increase the independence of the office including by having the Ombuds report directly to the HHS Secretary.

i. Proposed Rule § 410.2000(b)

Comment: A core function of monitoring and oversight of the unaccompanied children’s system of care is the ability to receive data—including but not limited to confidential data—and to use that data to identify important trends. Such trends may include the emergence of best practices in the care of unaccompanied children, the use of such best practices, systematic safety or well-being concerns, policies or procedures that result in occasional but regular risks of harm to children, policies or procedures that correlate with risks of harm to children but which may operate indirectly, emerging subpopulations of children who are at greater risk or who have additional vulnerabilities not previously known, and risk factors associated with safety and stability post-release, among others.

In the preamble of the proposed rule, ORR notes that “it is important to maintain an independent mechanism to identify and report concerns regarding the care of unaccompanied children.” As written in §410.2000(b), the rule does not contemplate a role to receive and analyze system data, that is, without explicit reference to a mechanism of identification apart from reports already received. However, proposed §410.2001(a) and proposed §410.2001(c) contemplate a role for the Ombuds that appears to be similar or identical to what we suggest in this comment. We recommend more specificity in the definition.

Recommendation: “The UC Office of the Ombuds shall be an independent, impartial office with authority to receive reports, including confidential and informal reports, of concerns regarding the care of unaccompanied children; to investigate such reports; to receive and analyze data, including confidential data, in order to identify trends on the safe care and safe and stable reunification of unaccompanied children with sponsors; to work

collaboratively with ORR to potentially resolve such reports; and issue reports concerning its efforts.”

ii. Proposed Rule § 410.2001(b)

Comment: We strongly support requiring the Ombuds to make “its standards, practices, certain reports and findings, and policies and procedures” available to the public. In our experience, transparency is an essential mechanism to hold the Ombuds accountable to its mandate. To strengthen this section, we recommend that the rule require annual reporting on the types of cases it receives, case outcomes, and demographics. This information is critical to the undersigned organizations who can use the data to address trends, including identifying gaps in our own services and to have meaningful conversations with ORR and facilities about steps taken at a macro level to address recurring problems. For example, if the Ombuds report indicates an increase in reports of sexual abuse in a certain region, the legal service providers and child advocates for that region can provide targeted services, including revising how they provide information to UCs about their rights and addressing systemic problems in collaboration with ORR and the facilities.

We also urge you to require the Ombuds to define terms used in reporting case outcomes, including how it defines a resolved case. In our experience when filing complaints with oversight offices such as DHS’ Office for Civil Rights and Civil Liberties (CRCL) and the Office of the Immigration Detention Ombudsman (OIDO), CRCL and OIDO individual decisions often lack information about how they define resolution of a case. Similarly, OIDO’s annual report to Congress, which is available to the public, indicates that in 2022 it handled over 6,000 cases, but it does not provide a breakdown about outcomes. This is concerning, because Florence Project staff had documented cases that are presumably marked as resolved by the OIDO or CRCL when a person is deported; however, the issue brought up in the complaint, such as inadequate access to special accommodations for a person with disability, was never resolved prior to weeks or months in ICE detention. Thus, we urge that the Ombuds be required to define important terms such as outcome or resolved cases in the annual reports.

Recommendation: “The UC Office of the Ombuds shall make its standards, practices, certain reports and findings, and policies and procedures publicly available. This shall include publishing annually about the number and types of concerns the UC Office of Ombuds receives, case outcomes, and breakdown in demographics. The Ombuds shall define outcomes with specificity. A case shall not be marked as resolved on the basis that the unaccompanied child was released from custody or was removed.”

iii. Proposed Rule § 410.2001(c)

Comment: We support the requirement that the Ombuds give notice of their scope and responsibilities in languages spoken and understood by unaccompanied children in care and urge to go a step further and require that notice be both verbal and written, inform children that they can file while in care and post release, and include a section on retaliation that is age appropriate.

The undersigned organizations regularly encounter children in ORR care who will not be able to read and/or understand a notice. These populations include: tender-aged children, children who speak a third language of less dissemination such as a Mayan language, including languages that are not written, children with certain disabilities, and children with varying levels of education, including children who are illiterate. Because of these unique language, age, and educational factors, we recommend that the rule require both verbal and written notice.

In addition, ensuring that children understand notice and know that they can file complaints post-release is an important protection for children who are afraid of filing for fear of retaliation. Indeed, children may be considering filing a complaint against the person that cares for them every day at the facility and understandably, may not be ready to disclose until they feel safe with their sponsor or family. It is important that all information that the Ombuds makes available to unaccompanied children contain information about ability to access the reporting process while in custody and outside of custody. In addition, the Ombuds should have a process for reporting retaliation and inform children of said process.

Recommendation: “The UC Office of the Ombuds shall make information about the office and how to contact it publicly available, in both English and other languages spoken and understood by unaccompanied children in ORR care. The Ombuds shall give written and verbal notice to unaccompanied children in ORR care explaining in a child-friendly format how a child can file a report while in the facility and after release. Such notice must include a section on retaliation, with a method for contacting the Ombuds if retaliation does occur. The Ombuds ~~shall~~ may identify other preferred methods for raising awareness of the office and its activities, which may include, but not be limited to, visiting ORR facilities or publishing aggregated information about the type and number of concerns the office receives, as well as giving recommendations.”

b. UC Office of the Ombuds scope and responsibilities (§ 410.2002)

An overarching and significant concern held by the undersigned organizations is that the proposed rule does not give any authority to the UC Ombuds Office to compel ORR to take any corrective action. We have voiced similar concerns in reference to other oversight agencies such as OIDO and CRCL, and noted the ways in which limited authority hinders redress of systemic issues and concerns.

Of note, the Florence Project and its partner organizations who serve unaccompanied children have filed individual complaints with CRCL for years on behalf of unaccompanied children who suffer abuses while in the custody of the U.S. Customs and Border Protection (CBP). Unfortunately, we continued to document the same issues and abuses year after year. For example, in June 2014, Florence Project, National Immigrant Justice Center, Esperanza Immigrant Rights Project, Americans for Immigrant Justice (AI Justice), and the Border Litigation Project of the American Civil Liberties Union, filed a group complaint on behalf of 116 unaccompanied children with CRCL and the DHS Office of Inspector General (OIG) documenting the systemic abuse they endured while held in Border Patrol

custody, including lack of access to medical care, sexual assault and physical beatings, and being held in overcrowded and freezing-cold cells.⁵ Again in 2022, the Florence Project along with Kids in Need of Defense (KIND), AI Justice, and Immigrant Defenders Law Center (ImmDef) filed similar concurrent complaints with CRCL and OIG documenting the very same abuses by Border Patrol documented years prior.⁶

Because we have strong interest in the success of the Ombuds, we make the following recommendations to increase the Ombuds' scope and responsibilities. We urge that the final rule: strengthen reporting, including a newly proposed section on annual reports to Congress; expand investigative authority on several fronts; ensure that the Ombuds has access to tools it needs, such as confidential space and process to obtain reports from unaccompanied children in custody and ability to obtain documents from *all* facilities, and when it is denied access, that someone with authority, in this case, the HHS Secretary, will intervene; improve the Ombuds' ability to monitor out-of-network facilities; add procedural protections such as information on retaliation, paths to expedite urgent cases and seek review of complaint; give the Ombuds power to enforce violations under Section 504 of the Rehabilitation Act for discrimination against an unaccompanied child on the basis of a disability; and require that the Ombuds makes significant efforts to collaborate with its counterpart oversight agencies, OIDO and CRCL, who also receive complaints about issues and abuses of unaccompanied children in federal custody; among other recommendations described in detail below.

i. Proposed Rule § 410.2002(a)

Comment: We appreciate the scope and responsibilities of the UC Office of the Ombuds as laid out in this section. However, the proposed rule only states that the UC Office of the Ombuds “may” engage in the activities listed. We recommend that ORR make the list of activities provided in this section mandatory. Without that requirement, there is no guarantee that the UC Office of the Ombuds would engage in any of the listed activities.

Additionally, the proposed rule states that the UC Office of the Ombuds “may engage in activities consistent with § 410.2100...”. However, there is no § 410.2100 in the proposed

⁵ National Immigrant Justice Center, et al., *Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection*, June 11, 2014, <https://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf> (joint complaint filed with the Office of Civil Rights and Civil Liberties and Office of Inspector General on behalf of 116 unaccompanied immigrant children ages five to 17 detailing abuse and mistreatment when held under the custody of U.S. Customs and Border Protection).

⁶ Organizations file complaints with the Office of Civil Rights and Civil Liberties and Office of Inspector General which detail “excessive detention, verbal and physical abuse, deprivation of medical care, insufficient water, family separation, and other human rights violations” that unaccompanied children experience with in U.S. Customs and Border Protection Custody. Florence Immigrant & Refugee Rights Project, *Immigration Advocates File Complaints Protesting the Treatment of Children in CBP Custody*, April 7, 2022, available at <https://firrp.org/immigration-advocates-file-complaints-protesting-the-treatment-of-children-in-customs-and-border-protection-cbp-custody/>; See also Anna Flagg and Julia Preston, “No Place for a Child,” The Marshall Project, June 16, 2022, available at <https://www.themarshallproject.org/2022/06/16/no-place-for-a-child>.

regulations or other HHS regulations, so it is unclear what section this is meant to refer to. Without the text of this provision, *Flores* counsel and other stakeholders cannot fully and adequately respond to the Proposed Rule. We suggest that ORR clarify which section this was meant to refer to, or remove it entirely, as indicated in the recommended text below.

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

ii. Proposed Rule § 410.2002(a)(1), (2)

Comment: The current language in proposed rule sections 410.2002(a)(1) and 410.2002(a)(2) limits the Ombuds’ investigative authority to reports that are specifically directed to the UC Office of the Ombuds. We recommend that the final rule expands from “receiving reports” and “in response to reports it receives” to ensure the UC Office of the Ombuds can initiate investigations based on any information it becomes aware of, including, for example, media reports, NGO reports, or any other sources made publicly available, such as HHS Office of Inspector General (“OIG”) reports or DHS Office of the Immigration Detention Ombudsman (“OIDO”) reports and publications from the United Nations Special Rapporteur on Human Rights Defenders.

For example, earlier this year, The New York Times reported on the exploitation of migrant children reunified with sponsors and working brutal and dangerous jobs.⁷ Recent reports by the HHS OIG have found that ORR “faced challenges when making initial placements during an influx period,”⁸ “did not conduct or document all required background checks” on employees at ICFs and EISs,⁹ and faced significant case management challenges at Fort Bliss that raised “concerns related to children’s safe and timely release.”¹⁰ Clarifying the investigative authority of the UC Office of the Ombuds to include “information that it becomes aware of” would ensure that the Ombuds is not limited to investigating reports it directly receives, but also information, such as this, of which it becomes more generally aware.

⁷ Hannah Dreier, The New York Times, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, February 25, 2023, available at <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>.

⁸ U.S. Dep’t of Health & Human Services, Office of Inspector General, *The Office of Refugee Resettlement Needs To Improve Its Oversight Related to the Placement and Transfer of Unaccompanied Children*, May 23, 2023, available at <https://oig.hhs.gov/oas/reports/region6/62007002.asp#:~:text=What%20OIG%20Found,lack%20of%20intake%20specialist%20staff.>

⁹ U.S. Dep’t of Health & Human Services, Office of Inspector General, *The Office of Refugee Resettlement Needs To Improve Its Practices for Background Checks During Influxes*, May 2, 2023, available at <https://oig.hhs.gov/oas/reports/region6/62107003.asp>.

¹⁰ U.S. Dep’t of Health & Human Services, Office of Inspector General, *Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children*, September 27, 2022, available at <https://oig.hhs.gov/oei/reports/OEI-07-21-00251.asp#:~:text=Finally%2C%20staff%20reported%20acts%20of,and%20child%20safety%20to%20super%20visors.>

Similarly, the Ombuds may also become aware of reports from sister oversight agencies, such as an OIDO report indicating an increase of family separation by CBP. Based on this new information, the Ombuds should begin its own investigation about what efforts are being made to pursue family reunification and even investigate in collaboration with OIDO, if the separation was proper. This is important because the Ombuds would be in a better position, as an organization nestled within a federal agency with a background in child welfare, to conduct or provide OIDO advice on that investigation. Of note, later in this comment we also recommend a memorandum of understanding between the Ombuds, OIDO, and CRCL to strengthen this type of interagency collaboration for unaccompanied children who often pass through two (CBP and ORR), if not three (CBP, ORR, ICE), custodial settings.

Additionally, we recommend that the Ombuds' investigative authority expand from just "implementation of or adherence to Federal law and ORR regulations" to also include adherence to ORR policies and licensing requirements. The preamble to the proposed rule does not make clear how the ORR Policy Guide will interact with the final regulations. To the extent that the ORR Policy Guide remains in place and is a source of policies that facilities are required to follow, the UC Office of the Ombuds should maintain investigative authority to ensure ORR care provider facilities are adhering to those requirements.

As explained in more detail later in this comment, the undersigned organizations regularly speak with unaccompanied children who disclose issues or abuses while in custody and fear filing reports or complaints against the facility or staff. They often express fear that it will negatively impact their immigration case, their reunification process, or that they will be targeted for retaliation. Because of these concerns, children often elect not to file a complaint, or they file anonymously. Thus, we strongly recommend that you add specific language requiring the Ombuds to create a confidential and accessible space for detained unaccompanied children to file reports.

Finally, we urge modifications to add procedural safeguards assuring that the Ombuds Office will timely, meaningfully, and efficiently investigate reports, and ensure expeditious response to urgent cases. We strongly recommend that the proposed rule set timeframes for completing reports and require the Ombuds to identify a publicly available contact for expediting urgent reports, making status inquiries, and seeking review of the Ombuds' findings.

Some of the ongoing problems that undersigned organizations have identified with the way other oversight offices, including OIDO and CRCL, handle reports include significant delays in responding and no process or lack of clarity for expediting urgent cases. For example, it often takes several months, and sometimes over a year, for entities to communicate with the individual filing the report about the results of the investigation. This is particularly concerning when it comes to urgent cases that require swift assistance to address access to medical care, lack of accommodations for people with disabilities, or children whose immediate safety is threatened.

Organizations have reported poor communication from the oversight agencies about how reports were resolved, leaving individuals and their advocates in the dark about what steps to take next when their problem is ongoing. For example, communications by email or formal letter from OIDO and CRCL when a case is presumably marked as resolved frequently lack information about what steps the agency took to investigate. In addition, Florence Project staff reports that many of the people who have filed OIDO complaints, and whose complaints have presumably been marked as closed or resolved, often find that their problem was not addressed, or the problem resumes after a few weeks. For example, a man who had not been provided with a medically appropriate diet received the diet after filing an OIDO complaint, but weeks later did not receive the diet again (Florence Project). Of note, we are not aware of any publicly available information or easily available information for elevating cases like these for review within OIDO or CRCL. To this end, we recommend the creation of new subsections in the proposed rule containing timelines for response.

Recommendation:

“(1) Receiving reports from unaccompanied children, potential sponsors, other stakeholders in a child’s case, and the public regarding ORR’s adherence to its own regulations and standards. The Ombuds shall establish access to a confidential process and space for unaccompanied children to file reports at each of the facilities, including those who are placed in out-of-network facilities. This process must consider accessibility for children who cannot read or write, such as creation of a hotline.

The Ombuds will strive to complete an investigation within [90] days of receiving a report, and for urgent matters, will complete investigations as expeditiously as possible and no later than [30] days. The Ombuds will provide all interested parties, including community stakeholders, with a list of cases that will be automatically considered urgent and processed within those [30] days. At the completion of the investigation, the Ombuds will provide the reporting party with information regarding its findings, the steps it took to resolve the matter, and contact information for elevating cases for further review or follow up.”

“(2) Investigating implementation of or adherence to Federal law, ~~and~~ ORR regulations and policies, and any licensing requirements, in response to reports it receives and other information it becomes aware of, and meeting with interested parties to receive input on ORR’s compliance with Federal law, ~~and~~ ORR regulations and policy, and licensing requirements;”

iii. Proposed Rule § 410.2002(a)(3)

Comment: Per the proposed rule’s own definition, ORR care provider facilities do not include out-of-network facilities (OON or OONs) and emergency placements (§ 410.1001). Because children can often be placed with OON providers (§410.1105), we recommend that the section of the proposed rule referencing “[r]equesting and receiving information or documents ... from ORR and ORR care provider facilities” be expanded to encompass such placements.

We must ensure that the Ombuds can receive information from all facilities charged with care of unaccompanied children, including out-of-network (OON) facilities. In our past experience with OON facilities, especially with new OONs or emergency placements, staff in these facilities can lack substantial knowledge and training on how to serve unaccompanied children, including ORR policy and process, which can cause serious gaps or delays in services. When problems are identified with an OON facility, the Ombuds should be able to swiftly access information and documents needed for the investigation.

Recommendation: “Requesting and receiving information or documents, such as the Ombuds deems relevant, from ORR, ORR care provider facilities, and out-of-network provider facilities including hospitals and restrictive settings, to determine implementation of and adherence to Federal law and ORR regulations and policy, and licensing requirements.”

iv. Proposed Rule §§ 410.2002(a)(4) and (a)(12)

Comment: First, we note that Section 410.2002(a)(4) does not specify who will receive the “formal reports and recommendations on findings to publish or present, including an annual report describing activities conducted in the prior year.” For consistency and accountability, we suggest specifying that these reports and recommendations, including annual reports, will be made to the Director of ORR, Assistant Secretary for Children and Families, and the HHS Secretary. This is consistent with subsection (a)(12), which makes the Ombuds responsible for advising and updating the Director of ORR, Assistant Secretary, and the Secretary.

Second, subsection (a)(4) does not specify whether this information will be publicly available. As referenced throughout this comment, public reporting provides critical information about how federal agencies are or are not complying with their missions and legal obligations, how government resources are being utilized, and about any concerns or priorities that may require additional attention or resources. We strongly suggest that the reports and recommendations be made publicly available.

Third, we strongly suggest that you do not make the Ombuds’ responsibility to advise and update discretionary. As it stands, the Ombuds would only advise and update “as appropriate.” It is critical that the Ombuds keeps these three positions of leadership apprised of its formal reports and recommendations along with regular updates and advising to ensure that reports and systemic problems are being addressed.

Recommendation: § 410.2002(a)(4), “Preparing formal reports and recommendations for the ORR Director, Assistant Secretary, and the Secretary which are publicly available on findings to publish or present, including an annual report describing activities conducted in the prior year;”

Recommendation: § 410.2002(a)(12), “Advising and updating the Director of ORR, Assistant Secretary, and the Secretary, ~~as appropriate,~~ on the status of ORR’s implementation and adherence with Federal law or ORR policy.”

v. **Proposed Rule § 410.2002(a)(5)**

Comment: We strongly recommend that you consider expanding and strengthening this section. Typically, Ombuds offices conduct various types of investigations, including individual complaints brought to the Ombuds by one or more complainants, concerns that the Ombudsperson chooses to investigate without a complaint, or systemic problems. Investigations of single instances may resolve individual complaints while systemic issues remain. As such, a change in the law, regulation, policy or procedure may be needed to prevent additional rights violations.

The credibility of the Ombuds depends in large part on the strength of the investigations the office can conduct. The Ombuds must have sufficient powers to determine the facts and to compel agencies to produce the information required to complete the investigation. We further recommend that you consider specifying what the investigation shall entail, including: determining the facts, the laws or other legal bases governing the facts, analyzing the facts in light of Federal law, ORR regulations and policies and licensing requirements, making a finding on the allegations of the complainant and making recommendations to restore rights or prevent them from being violated in the future.¹¹

Recommendation: “Conducting investigations, interviews, and site visits at care provider facilities and out-of-network provider facilities as necessary to aid in the preparation of reports and recommendations. The Ombuds shall investigate issues including but not limited to: claims of abuse, neglect, or mistreatment of immigrant children, by the Government or any other entity, while in Government custody; complaints against foster care providers, including foster care providers under state oversight; complaints regarding the age determination process; a lack of timely access to professionals such as legal counsel, legal services providers, child advocates, and medical professionals; and complaints with respect to the conditions of custody or length of time in custody in any facility; and potential violations of part 411 of title 45, Code of Federal Regulations (relating to standards to prevent, detect, and respond to sexual abuse and sexual harassment involving unaccompanied children). If in the course of an investigation the Ombuds discovers a state licensing violation, the Ombuds shall report the violation to the state child welfare licensing agency. In the case of unlicensed facilities - whether delicensed by certain state governments or emergency facilities - the Ombuds shall report any violations to the Secretary of the Department of Health and Human Services for further action.”

¹¹ See United Nations Development Programme, *Guide for Ombudsman Institutions: How to Conduct Investigations*, February 5, 2014, available at <https://www.undp.org/eurasia/publications/guide-ombudsman-institutions-how-conduct-investigations> (describing “best practices on policies regarding the receipt of complaints, decisions to investigate or not, how they are investigated and how the results of those investigations are presented to the complainant, the subject of the investigation, the public and the media.”).

vi. Proposed Rule § 410.2002(a)(6)

Comment: We recommend that you expand this section to require frequent visits and monitoring of out-of-network facilities, as well as unlicensed facilities, including Influx Care Facilities (ICFs) and Emergency Intake Sites (EISs).

Unlike state-licensed ORR shelters, ICFs and EISs do not have state licenses to care for children. Monitoring by *Flores* counsel at two Influx Care Facilities in 2019 and 12 Emergency Intake Sites in 2021 raised profound concerns with children’s safety and welfare.¹² *Flores* counsel site visits revealed serious concerns regarding basic conditions such as inadequate food, limited access to showers and clean clothes, limited or a complete lack of education or recreation, and unmet medical and mental health needs.¹³ Children at EISs experienced panic attacks, self-harm, suicidal ideation, and other serious mental health concerns.¹⁴

These sites warrant required and frequent monitoring by the Ombuds. Frequent monitoring is necessary to ensure that issues identified in complaints, which may be marked as solved, do not reoccur, or if they do, that they are swiftly and adequately addressed. As mentioned above, organizations have documented repeated reoccurrence of abuses even after oversight agencies like OIDO or CRCL have issued findings that corrected the abuse.

Recommendation: “Visiting Monitoring ORR care providers and out-of-network provider facilities in which unaccompanied children are or will be housed, including by making frequent site visits for compliance with all applicable Federal and State laws, regulations, and standards relating to immigrant children in government custody. Monitoring visits to influx, emergency, or unlicensed facilities shall occur not less frequently than monthly during the period in which such facility is in operation.”

vii. Proposed Rule § 410.2002(a)(8)

Comment: As is, this section will allow the Ombuds office to ignore certain complaints and concerns. We are concerned about the Ombuds being able to cherry pick the reports and not addressing the most pressing needs as communicated by the children themselves or other interested parties such as family, sponsors, child advocates, and legal providers. We urge you to require the Ombuds office to resolve all complaints. We understand that there will be times when a matter is brought up where the Ombuds may not be able to take further action, but the Ombuds should be required at a minimum to communicate the results of the investigation to the complainant and whenever possible, provide information to the complainant about what agency or authority the complaint should be directed to. Of note, above we addressed the need for this rule to clarify what the term “resolved” will

¹² See Neha Desai, Diane de Gramont, & Allyson Miller, *Unregulated & Unsafe: The Use of Emergency Intake Sites to Detain Immigrant Children*, June 2021, <https://youthlaw.org/unregulated-unsafe-emergency-intake-sites>.

¹³ See Ryan Matlow, Melissa Adamson, Neha Desai, Julian Ford, *Guidance for Mental Health Professionals Serving Unaccompanied Children Released from Government Custody* (Nov. 2021), p. 19.

¹⁴ *Id.*

mean for the purpose of transparency in its reports and urged you to not mark cases resolved on the basis that the child left the facility or was removed. In addition, we encourage you to clarify that the Ombuds should also resolve complaints involving ORR regulations and HHS policy. As discussed above, the termination of the FSA will leave a critical gap in oversight. Thus, clarity as to what the Ombuds will be mandated to address is necessary.

Recommendation: “~~Making efforts to~~ Resolve complaints or concerns raised by interested parties as it relates to ORR’s implementation or adherence to Federal law or ORR regulations and policy, and HHS policy.”

viii. Proposed Rule § 410.2002(a)(10)

Comment: We recommend that you delete “non-binding,” add language inclusive of recommendations on draft policies and procedures, and add language requiring response and reporting to Congress, as follows.

Through monitoring of facilities, receipt and investigation of complaints, interviews with children, and engagement on systemic issues and concerns, the Ombuds’ role enables unique insight into the ways in which ORR’s policies and practices may be negatively impacting unaccompanied children, or conversely, advancing children’s safety and wellbeing. It is imperative that ORR timely consider and respond to the Ombuds’ recommendations to ensure that the new office’s oversight is not simply observational, but informs meaningful action to improve care and treatment of children consistent with their best interests. Recommendations should not be limited to the evaluation of existing policies, but also include draft policies in development or under consideration by ORR to aid in identifying opportunities to better respond to the experiences and unique needs of unaccompanied children and to address any deficiencies or unintended consequences of a given policy approach before it is finalized. We also urge the inclusion of a timeline by which ORR must respond to the Ombuds’ recommendations in order to prevent delays that unnecessarily prolong or leave unaddressed known harms and risks to children.

Additional layers of accountability, including the opportunity to elevate for the Secretary’s consideration any recommendations that ORR has not sufficiently addressed as well as regular reporting to Congress on ORR’s responses to the Ombuds’ recommendations, can safeguard against persistent failures to remedy concerns and apprise agency leadership and Members of Congress when further action and oversight may be necessary.

Recommendation: “~~Making non-binding~~ recommendations to ORR regarding its policies and procedures, specific to protecting unaccompanied children in the care of ORR, including draft policies and procedures in development or under consideration. ORR shall respond to each of the Ombuds’ recommendations in writing within [90] days, each response shall include sufficient reasoning, and shall promptly respond to any urgent requests. When recommendations are not addressed and resolved, the Ombuds may elevate them to the Secretary for resolution. The Ombuds will report all recommendations and

responses to Congress. The recommendations, ORR’s response, and/or outcome of elevation to the Secretary shall be made public with redactions as needed.”

c. Organization of the UC Office of the Ombuds (§ 410.2003)

i. Proposed Rule § 410.2003(a)

Comment: We recommend that the Ombuds be appointed by the HHS Secretary and not hired as a civil servant, and report directly to the HHS Secretary. This is essential for ensuring appropriate level of authority and impact. For comparison, the DHS CIS Ombudsman is appointed by the Secretary of DHS,¹⁵ and the CRCL Officer reports directly to the DHS Secretary.¹⁶ Alternatively, if a civil servant, the position should be term limited to help provide accountability and ensure perspective does not become outmoded.

Recommendation: “The UC Ombuds shall be appointed by and report directly to the Secretary of HHS ~~hired as a career civil servant.~~”

ii. Proposed Rule § 410.2003(b)

Comment: We ask that you consider streamlining the list of qualifications for the position to focus requirements on critical experience in child welfare, ORR policies, and immigration law that are central to the well-being and safety of children and the office’s functions while ensuring that highly qualified candidates are not unnecessarily excluded.

Recommendation: (b) The UC Ombuds should have the requisite knowledge and experience to effectively fulfill the work and the role, including membership in good standing of a nationally recognized organization, association of ombudsmen, or State bar association throughout the course of employment as the Ombuds, and to also include but not be limited to having demonstrated knowledge and experience in: (1) ~~Informal dispute resolution practices~~; (2) Services and matters related to unaccompanied children, and child welfare, and immigration law; (3) Oversight and regulatory matters; and (4) ORR policy and regulations.”

d. Confidentiality (§ 410.2004)

We appreciate and support the inclusion of requirements for maintaining the confidentiality of files and records in this section. We particularly support subsection (a), which includes the prohibition of “sharing information for any immigration enforcement related purpose.” If the Ombuds office was able to share information with immigration enforcement, it would have a chilling effect on reporting and any subsequent cooperation in the investigation.

¹⁵ See 6 U.S.C. § 205(a).

¹⁶ See 6 U.S.C. § 113(d)(3).

Based on our experience working with unaccompanied children, children are often concerned about how filing a complaint will impact their immigration case and/or how this may affect or delay their reunification with their sponsor. Similarly, undocumented family members or sponsors who learn about issues or abuse that occurred while the unaccompanied child was detained might be fearful of filing a complaint due to fear of their information being shared with Immigration and Customs Enforcement. This clear prohibition will promote reporting and cooperation with the Ombuds Office.

i. Proposed Rule § 410.2004(b)

Comment: The current language in subsection (b) only requires that the UC Office of the Ombuds “may” accept reports of concerns from anonymous reporters. We recommend that ORR mandate the Ombuds’ acceptance of anonymous reports. Without that requirement, there is no guarantee that the UC Office of the Ombuds will accept anonymous reports. As discussed further below, providing children, sponsors, and other interested parties with a process to file anonymously is an important protection against perceived or actual retaliation. This is especially important in order for detained children to report in a timely manner, so that the Ombuds and/or other enforcement agencies can investigate significant abuses promptly, such as physical or sexual abuse.

Other oversight agencies have a mechanism for anonymous reporting. For a number of years, CRCL has accepted anonymous complaints filed by many of the undersigned organizations on behalf of unaccompanied children who report issues and abuses while in Border Patrol custody.¹⁷ Similarly, OIDO created a process for individuals, including family members and advocates, to file complaints anonymously.¹⁸ This is an important oversight mechanism to allow the Ombuds to collect accurate data on systemic problems and create meaningful, data-driven reports and recommendations.

Recommendation: “The UC Office of the Ombuds ~~may~~ shall accept reports of concerns from anonymous reporters and include data collected in its reports and recommendations.”

e. Suggested Additional Provisions

We also take this opportunity to recommend new sections to strengthen the Ombuds’ accountability structure, including a new section on annual reports to Congress and stakeholder engagement; ensure that the Ombuds has access and authority to carry out its mission, including making the HHS Secretary responsible for the Ombuds’ unobstructed access; a proposed new section on processes for coaching, mediation and dispute dissolution to avoid lengthy disputes and costly litigation; enforcement power for violations against individuals on the basis of disability to ensure ORR is not violating Section 504 of the Rehabilitation Act; and necessary protections against retaliation. Of note, some of these

¹⁷ See Dep’t of Homeland Security, Office for Civil Rights and Civil Liberties, *CRCL Complaints* (stating “You may submit anonymous reports or allegations, and submissions may be in any language.”).

¹⁸ See Dep’t of Homeland Security, Office of Immigration Detention Ombudsman, *Requesting Assistance from the Office of the Immigration Detention Ombudsman (OIDO)* (“Who Should Submit The OIDO Case Intake Form (DHS Form 405)...An individual submitting an anonymous concern.”).

recommendations, annual reports to Congress and making the HHS Secretary responsible for unobstructed access, are consistent with proposed legislation introduced by Senator Gillibrand and Congresswoman Jayapal: the Protection of Kids in Immigration Detention (PROKID) Act.¹⁹

i. Reports to Congress, reports to the public, and engagement with stakeholders

First, and of note, the proposed rule does not require mandatory annual reports to Congress. Public reporting is a critical mechanism for accountability and transparency. Other similarly positioned oversight agencies like OIDO and CRCL are required by statute to produce these reports²⁰ and make them publicly available through their websites.²¹

The treatment, care, and wellbeing of children in ORR custody are matters of significant public interest and concern. Public reporting provides critical information about how federal agencies are or are not complying with their missions and legal obligations, how government resources are being utilized, and about any concerns or priorities that may require additional attention or resources. In the context of a UC Ombuds office, such reporting can improve accountability and leverage additional monitoring and oversight to ensure that ORR promptly addresses conditions, practices, or policies that negatively impact the wellbeing of children; track agency progress and responses over time; alert policymakers and the public when appropriations or other legislative action or authority is needed; and highlight successful resolution of issues and best practices that can be replicated. Indeed, many of the undersigned organizations supported similar language in PROKID Act.²²

¹⁹ Protection of Kids in Immigrant Detention Act, H.R. 1238, 117th Cong. (2021-2022); *See also* S. 382, 117th Cong. (2021-2022).

²⁰ CRCL is required to report annually to Congress. *See* 6 U.S.C. § 345 (“The Secretary shall submit to the President of the Senate, the Speaker of the House of Representatives, and the appropriate committees and subcommittees of Congress on an annual basis a report of the implementation of this section [Establishment of Officer for Civil Rights and Civil Liberties], and detailing any allegations of abuses described under subsection (a)(1) and any actions taken by the Department in response to such allegations.”); *see also* 42 U.S.C. §2000 ee-1(f) (“(1) In general. The privacy officers and civil liberties officers of each department, agency, or element referred to or described in subsection (a) or (b) [including DHS and HHS] shall periodically, but not less than annually, submit a report on the activities of such officers.... (2) Contents. Each report submitted under paragraph (1) shall include information on the discharge of each of the functions of the officer concerned, including— (A) information on the number and types of reviews undertaken; (B) the type of advice provided and the response given to such advice; (C) the number and nature of the complaints received by the department, agency, or element concerned for alleged violations; and (D) a summary of the disposition of such complaints, the reviews and inquiries conducted, and the impact of the activities of such officer.”).. OIDO is also required to report annually to Congress. 6 U.S.C. § 205 (“...shall prepare a report to Congress on an annual basis on its activities, findings, and recommendations.”).

²¹ CRCL is required to make reports publicly available and report publicly on its activities. 42 U.S.C. §2000 ee-1(g) (“Each privacy officer and civil liberties officer shall— (1) make the reports of such officer, including reports to Congress, available to the public to the greatest extent that is consistent with the protection of classified information and applicable law; and (2) otherwise inform the public of the activities of such officer, as appropriate and in a manner consistent with the protection of classified information and applicable law.”)

²² *See Id., supra*, note 19.

Thus, we strongly recommend the following section be added to the final rule:

Recommendation (new subsection) § 410.2002(f): “The Ombuds shall submit to Congress on an annual basis a report on the accomplishments and challenges of the UC Office of the Ombuds. Reports shall also include summaries of: complaints, reports, and appeals made to the office and number of such complaints, reports, and appeals; site visits conducted; facility investigations and corrective actions taken or recommended; recommendations to ORR and ORR responses; and any other information the Ombuds considers relevant.”

Second, to further ensure accountability and transparency, community stakeholders and the general public require regular, frequent access to numerical data describing the demographics of unaccompanied children, their status with respect to ORR programs, the quality of care that ORR provides, and other matters, published on a more frequent cadence than the annual reports to Congress described above.

The UC Ombuds office can play at least two roles here. To begin, it should conduct ongoing oversight of ORR’s own public reporting of data regarding unaccompanied children. Part 4(d)(iii) of this comment recommends incorporating a new section into the proposed rule (§ 410.1503), which would require ORR to publish aggregated data on its website to facilitate public monitoring of the UC Program. Should ORR fail to uphold its obligation to publish such data regularly, the UC Ombuds Office should highlight this situation publicly and publish the specified data itself if possible. In addition, the UC Ombuds Office should also seek to publish its own useful views of data regarding unaccompanied children, to complement the data that ORR publishes, based on emerging or immediate situations.

Both roles will require the UC Ombuds Office to have authority to receive A-Number level data not only from ORR but also from other agencies and offices whose work touches unaccompanied children, including CBP, ICE, and EOIR. The UC Ombuds Office should also have authority to receive data from the recently established DHS Office of Homeland Security Statistics (OHSS),²³ so as to leverage OHSS’s expertise in ingesting, merging, and analyzing complex datasets maintained by different agencies.

For this purpose, we strongly recommend the following section be added to the final rule:

Recommendation: (new subsection) § 410.XXXX:

“(1) The Ombuds shall ensure the regular publication for the general public of reports and aggregate data regarding unaccompanied children, including their demographics and status with respect to ORR programs, the quality of care that ORR provides, and other matters. In addition to annual reports

²³ U.S. Dep’t of Homeland Security, Office of Homeland Security Statistics, available at <https://www.dhs.gov/ohss>.

submitted to Congress (specified in [new section] § 410.2002(f)), the Ombuds shall:

- a) Conduct ongoing oversight of ORR’s publication of data as described in [new section] § 410.1503, publicly highlighting any instances in which ORR fails to uphold its reporting obligations and publishing any missing data itself, to the extent possible.
- b) Publish at its discretion any aggregate data related to its own analyses pertinent to unaccompanied children. This may include information regarding the numbers and outcomes of age determinations, SIRs, arrest of children in custody, grievances filed by children, placement review panels, placement denials, and ORR denials of care provider requests for authorization to deny placement under § 410.1103(g).

2) To facilitate its ingestion and analyses of unaccompanied children data, the Ombuds shall have authority to receive disaggregated data from ORR, CBP, ICE, OHSS, USCIS, EOIR, and any other agency or office whose responsibilities involve unaccompanied children, including confidential data.”

Third, to ensure further accountability and transparency, we recommend mandatory engagement with community stakeholders. The Ombuds must regularly meet with stakeholders, to ensure the office’s awareness of stakeholder concerns and priorities, and to provide feedback on stakeholder requests.

Stakeholders, including nonprofit organizations and service providers working directly with unaccompanied children, often have deep expertise in issues affecting children in ORR care spanning a variety of professional disciplines, including immigration law, child welfare, social work, disability rights, juvenile justice, and pediatric medicine. Regular engagements can contribute to a preventative approach that allows the Ombuds Office to learn of and investigate concerning policies or practices before harm to children results, identify trends and recurring or systemic problems, and receive expert assistance and input on recommendations. Such engagements can also help to bring to light issues that may not otherwise be reported directly through complaint mechanisms due to children’s fear of raising concerns in custody or their inability to do so owing to trauma, age, or developmental stage.

Stakeholder engagements can also contribute to the efficiency and effectiveness of Ombuds investigations and facility visits by providing insight into priority areas or issues to focus on and background on concerns or issues that have arisen at other facilities. Additionally, they can ensure the Ombuds’ awareness of upcoming investigations or the issuance of reports by other oversight entities and organizations working on behalf of children. Knowledge of these efforts and collaboration among experts engaged in monitoring and oversight can help advance best practices and improvements across systems and maximize

limited resources.²⁴ Such collaboration must prioritize and ensure the ability of service providers working directly with unaccompanied children, and their partner organizations, the ability to access ORR care provider facilities to meet with children in care, and monitor conditions and ORR’s compliance with relevant laws, policies, and standards, to help safeguard children’s rights and wellbeing.

Recommendation: (new subsection) § 410.2002(d): “Not less frequently than quarterly, the Ombuds shall invite community stakeholders, Flores Settlement Agreement class counsel, and the Flores Settlement Agreement court-appointed monitor (if one is so appointed) to participate in a meeting to ensure that the Ombuds is aware of stakeholder concerns and priorities; and to provide feedback on stakeholder requests. Additionally, the Ombuds shall invite collaboration with and consider the findings of other oversight entities and nonprofit and international organizations with expertise in monitoring and protection of children’s rights and wellbeing. The Ombuds shall ensure that nonprofit organizations providing direct services to unaccompanied children, and such partner organizations as they and the Ombuds shall identify, are permitted to access ORR care provider facilities and to conduct private and confidential interviews with children for purposes of monitoring conditions and ORR’s compliance with relevant laws, policies, and standards.”

ii. Unobstructed access and authority (§ 410.2002(c))

It is essential that the UC Office of the Ombuds is ensured the access and authority it requires to carry out its responsibilities.

While ORR proposes in § 410.2002(c) that the Ombuds must have access to ORR facilities and records, including being able to meet with children and access the premises and case files, the proposed language does not identify who would be responsible if ORR does not comply. We recommend that the HHS Secretary be charged with this responsibility, which includes facilitating Ombuds access as needed. A similar function is served by the DHS Secretary for the CRCL Officer.²⁵

In order to understand complaints and conduct investigations, the Ombuds must be allowed to communicate with the immigrant child concerned, family members or sponsors of the child, the Child Advocate, legal counsel, and any relevant case managers or coordinators. In advance of communicating with a child or related individual, the Ombuds must inform the child or individual the purpose of the communication, the scope and role of the Ombuds office, and the right to refuse continued communication with the Ombuds.

²⁴ See, e.g., Defence for Children International (DCI) Belgium, Practical Guide: Monitoring places where children are deprived of liberty, at 58-59 (discussing communication and cooperation among visiting monitoring bodies), <https://defenceforchildren.org/wp-content/uploads/2016/02/DCI-Practical-GuideEN.pdf>.

²⁵ See 42 U.S.C. §2000 ee-1(d) (“The head of each department, agency, or element shall ensure that each privacy officer and civil liberties officer—(1) has the information, material, and resources necessary to fulfill the functions of such officer; (2) is advised of proposed policy changes; (3) is consulted by decision makers; and (4) is given access to material and personnel the officer determines to be necessary to carry out the functions of such officer.”)

Of note, legal service providers, including the Florence Project, have reported in the past problems with securing confidential space to meet with children in connection with their legal immigration matters. For example, Florence Project staff have been forced to conduct individual legal screenings in the children’s dormitory rooms with open doors and within earshot of facility staff. Florence Project staff have also reported delaying legal meetings because of lack of confidential space. Below is proposed language to ensure that someone with authority can step in when access is a problem.²⁶

Recommendation (new subsection) § 410.2002(d):

“(1) The HHS Secretary shall ensure unobstructed access by the Ombuds to any facility, and the ability of the Ombudsperson to monitor any facility and to meet confidentially with: staff of any facility; employees and contractors of ORR and other HHS offices; and any immigrant child in Government custody, after notification of the immigrant child’s counsel, as applicable.

(2) The HHS Secretary shall ensure unobstructed access by the Ombuds to information including: the case files, records, reports, audits, documents, papers, recommendations, or any other pertinent information relating to the care and custody of an immigrant child; and the written policies and procedures of all ORR facilities.”

In addition, a procedural and enforceable mechanism is needed if ORR care providers or out-of-network providers do not comply with regulatory requirements regarding the UC Office of the Ombuds’ access to records. For example, the DHS Privacy Officer, subject to the approval of the DHS Secretary, may compel the production of information by subpoena.²⁷ To the extent that subpoena authority may be granted via regulation, we strongly urge ORR to grant the Ombuds Office subpoena authority.

Recommendation (new subsection) § 410.2002(e): “The Ombuds may issue a subpoena to require the production of all information, reports, and other documentary evidence necessary to carry out the duties of the UC Office of the Ombuds.”

iii. Collaboration with interested parties

Comment: Part of the Ombuds’ mandate in Section 410.2000 is to work collaboratively with ORR to resolve reports. We strongly encourage the final rule to strengthen this section to be more in line with accepted standards²⁸ and require the Ombuds to work collaboratively with the reporting party(s) and the unaccompanied child(s) at the center of the report. For example, literature from the International Ombudsman Association, which was reviewed by ORR in creation of this proposed rule (Page 55), lists coaching, mediation, and dispute resolution as part of the Ombuds’ responsibilities. This can include

²⁶ This language is also similar to one proposed in the PROKID Act. *See Id., supra*, note 19.

²⁷ U.S. Dep’t of Homeland Security, *Authorities and Responsibilities of the Chief Privacy Officer*, <https://www.dhs.gov/chief-privacy-officers-authorities-and-responsibilities>.

²⁸ International Ombuds Association, *Welcome to the Ombuds Toolkit*, available at https://www.ombudsassociation.org/assets/docs/docs_2022/IOA%20External%20Audience%20Toolkit%20.pdf.

bringing interested parties together for a phone, virtual or in-person meeting where they can discuss their concerns. We believe that if the Ombuds was able to utilize mediation or arbitration options to resolve issues as they arise, it would save years of litigation, and more importantly, facilitate children's access to protection under the law. It would be an effective, efficient, and non-adversarial route. Thus, the regulation must include all interested parties in the collaborative process. Of note, bringing the unaccompanied child into the collaborative process to resolve reports is also in line with other sections of the proposed rule that involve the child in other aspects of their care such as placement (§ 410.1003(d)).

Recommendation: § 410.2000(b), “The UC Office of the Ombuds shall be an independent, impartial office with authority to receive reports, including confidential and informal reports, of concerns regarding the care of unaccompanied children; to investigate such reports; to work collaboratively with ORR, interested parties, and unaccompanied children affected to potentially resolve such reports, and issue reports concerning its efforts.”

Recommendation: (new subsection), § 410.2002(a)(13), :”The Ombuds shall create processes for conducting coaching, mediation and dispute resolution for reports it receives that invite participation by all interested parties, including but not limited to, ORR, affected unaccompanied children, legal service provider, legal counsel, and child advocate.”

iv. Binding remedies for violations under Section 504 of the Rehabilitation Act

Comment: We strongly recommend giving the Ombuds enforcement power for violations under Section 504 of the Rehabilitation Act (“Section 504”), 29 U.S.C. § 794, which bars the federal government from discriminating against any individual on the basis of a disability. “No qualified individual with a disability in the United States, shall, by reason of his or her disability, be excluded from the participation in, be denied benefits, or otherwise be subjected to discrimination under any program or activity conducted by the Department.”²⁹ This would create a similar power to that of DHS’s CRCL under 6 C.F.R. § 15.70. This section regulates the process by which DHS receives, investigates, and resolves complaints under Section 504 and it makes CRCL responsible for the implementation of this section.

When the UC Office of the Ombuds receives a report or takes notice of an individual being discriminated against on the basis of a disability, this rule should require the Ombuds to take specific steps to remedy each Section 504 violation, including an appeal process. This is a critical protection for children in care who because of that disability and/or other factors such as tender age, spoken language of lesser dissemination, will not be able to advocate for themselves to be given access to disability accommodations, available to them by law. Because of the significance of the complaint, this process should include a path for the party to appeal the Ombuds’ initial decision to ensure Section 504 is not being violated.

²⁹ 6 C.F.R. § 15.30(a) (2008).

Recommendation: (new subsection) § 410.2002(a)(14), “When the Ombuds receives a report or takes notice of a report or information concerning discrimination against an individual on the basis of disability, the Ombuds shall investigate and issue a letter of findings of fact and conclusions of law and a description of a remedy for each violation found and notice of review process.”

v. Actual and perceived retaliation

In our experience, fear of retaliation is a longstanding obstacle for children to access oversight agencies like CRCL and OIDO. Actual or perceived fear of negative consequences or retaliation often stands in the way of children filing complaints using their biographical information, or filing complaints at all. For example, children often express concern about how filing a complaint will affect their reunification, immigration case, and/or fear of other retaliation by the people involved in the complaint who often hold positions of power or authority (i.e. border patrol agents, facility staff). Moreover, many children often migrate from areas where there are high levels of systemic oppression and violence by their local and federal government actors and lack meaningful or functional systems for reporting abuses. Without addressing these important factors, the Ombuds will not be able to uncover the very problems it seeks to address. Thus, we urge you to incorporate our recommendations below.

- Require the Ombuds to accept anonymous reports (*See* recommendation under section § 410.2004(b));
- Create a process for accepting reports post-release and give meaningful notice to children and sponsors that they can file reports post-release (*See* recommendation under Section § 410.2001(c));
- Provide notice regarding retaliation and a publicly available contact where people can report retaliation such as an email within the Ombuds office (*See* recommendation under Section § 410.2001(c));
- Ensure the Ombuds has access to confidential space and process for children to file complaints that is not within earshot of others (*See* Section § 410.2002);
- Create a hotline for post-release reports available to released children, sponsors and URM providers.

vi. Formal agreements with agencies that hold unaccompanied children (CBP, DHS) and oversight agencies (CRCL, OIDO)

While the undersigned organizations would like UC Office of the Ombuds to provide oversight of unaccompanied minors in DHS custody because of the longstanding systemic issues and abuses documented when children are in the custody of CBP, we understand that the instant rule is promulgated by ORR and ACF, not DHS. To the extent it is possible, we urge you to consider oversight of unaccompanied children in CBP custody. For example, we urge ACF to require the Ombuds to make significant efforts to establish a memorandum of understanding with CBP, DHS, OIDO, and CRCL in order to facilitate a close working relationship and ensure visibility, real-time communication, and include policy and procedures for those children in temporary DHS custody.

We urge that you include mechanisms to enable collaboration with other oversight agencies and require that the Ombuds office must transfer an ongoing complaint to the corresponding office if the child leaves ORR custody. For example, if a child challenging an age determination via a complaint to the Ombuds office is transferred to ICE custody, the ORR Ombuds must transfer the case to ICE’s OIDO and collaborate with that office until the case is resolved. Likewise, if a child in ORR custody discloses abuse that occurred while the child was previously in CBP custody, the Ombuds shall track those reports of abuse and can collaborate with OIDO to make an individual or group report regarding the CBP abuse. Without such collaboration, reported abuse or other issues will fall through the cracks, go unaddressed, and leave systemic issues unrectified.

Recommendation: (new subsection) § 410.2002(a)(15), “The Ombuds will make significant efforts to establish a memorandum(s) of understanding with DHS, OIDO, and CRCL to address oversight of unaccompanied children in federal custody. This should include information about how the Ombuds will collaborate with agencies in cases where the unaccompanied child is transferred from one agency to the other and a complaint is ongoing.”

4. Data and Reporting Requirements [Proposed Rule Subparts A (in part), C (in part), D (in part) and F]

a. Overview of comment and broad recommendation on data protections and reporting

Comment: We applaud ORR’s expectation that unaccompanied children’s case files and related information receive strong safeguards from unauthorized access, misuse, and inappropriate disclosure. Because these records include children’s sensitive personal identifiable information (PII), it is incumbent upon ORR to protect them from improper disclosure and misuse.

The proposed rule scatters the requirements for data protection and procedures to ensure confidentiality across multiple subsections, including those that refer to:

- Definitional information about the case file (§ 410.1001);
- Home Study / Post-Release Services providers (§ 410.1210(i));
- Care providers (§ 410.1303(g)-(h));
- Language interpreters (§410.1306(i));
- Child Advocates (§ 410.1308(e)-(f));
- Care provider facilities (§ 410.1501); and
- Influx Care Facilities and Emergency Intake Sites (§ 410.1801(b)).

Although some subsections would mandate welcome and necessary protections, the proposed rule does not have uniformly high standards for all providers who may encounter or keep records involving unaccompanied children’s PII. For example:

- 1303(g) states that it applies to care provider facilities responsible for the care and custody of unaccompanied children. This excludes other types of service providers that would benefit from similar guidelines, in whole or in part. In contrast to the requirements listed in 1303(g), the proposed rule’s guidelines for the handling of PII by child advocates (1308(f)) and the providers of language access services (1306(i)) are sparse.
- The proposed guidelines for the management, retention, and privacy of records maintained by PRS providers (1210(i)(1)-(3)) are both stronger and more detailed than 1303(g)-(h)’s more general rules for how care providers should safeguard children’s information. Non-PRS providers of care and other services should be expected to uphold these standards, as well.
- The proposed rule requires emergency and influx facilities to have “accountability systems in place” for preserving the confidentiality of children’s information and protecting their records from unauthorized use or disclosure (1801(b)(17)). It does not explain what these accountability systems should involve, and it is unclear how this short section specific to emergency facilities should be integrated with 1303(g)-(h)’s similar requirements of all care providers (which includes emergency facilities).

We encourage ORR to consolidate and expand the protections of § 410.1210(i) and § 410.1303(g)-(h), as described in the broad recommendation below. Additionally, in Part 4(c) of this comment, we offer feedback on specific elements of the proposed text of the individual sections listed in bullet points above.

Broad Recommendation: To ensure that all service providers handling unaccompanied children’s PII are held to similarly and sufficiently high standards, we recommend that ORR:

- 1) Consolidate the general guidelines of 1303(g)-(h) with the more robust and detailed provisions of 1210(i)(1)-(3), as applicable.
- 2) Expand the scope of this consolidated section so that it covers other types of service providers beyond care providers and PRS providers, as appropriate. If there are programmatic considerations requiring adjustments away from these consolidated standards for particular services, the individual sections of the proposed rule describing the relevant services should state any exceptions to the guidelines of the consolidated section as well as any necessary amendments, rather than reduplicating provisions of the consolidated section (in whole or in part).

b. Ownership of records (§ 410.1001 and § 410.1303(g))

Comment: At proposed § 410.1001 and at proposed § 410.1303(g)(2), ORR describes its ownership of certain records including case files of unaccompanied children. Although we generally recommend strong, universal standards governing children’s records in order to consistently protect the confidentiality of their PII, we note that the ownership of children’s records is a more complicated issue. At proposed § 410.1001, the definition of “case file”

incorrectly assumes that the federal government owns and controls all information about the child. However, as one example to the contrary, when a child brings documents such as a birth certificate into custody, the federal government holds that document, but does not own it. The birth certificate belongs to the child and the child's parent and legal guardian, and the document and its content can be shared with the child's or parent's consent.

We agree that there is good reason for ORR to have ultimate responsibility for securing the safeguarding of some of unaccompanied children's records, such as case files maintained by care provider facilities and PRS providers. However, the same approach may not be appropriate for ownership of other types of records. Many of the undersigned organizations are direct providers of different types of services for unaccompanied children. As such, we recognize that different providers are subject to different laws and best practices concerning the ownership of children's records. For instance, some records maintained by legal services providers are protected by attorney-client privilege and cannot be shared with ORR; likewise, national and state policies may apply to children's medical information to preserve the confidentiality of sensitive personal information.

Consequently, we recommend that the statement in the proposed rule's § 410.1303(g)(2), which identifies ORR as the owner of unaccompanied children's case files, should *not* be included in the consolidated section described in Section 4(a) of this comment (which we have proposed would apply to records kept by all types of service providers). Records ownership should instead be addressed by a separate section not intended to establish a single rule for all records kept by all types of providers.

Lastly, we wish to observe that in the proposed regulations, the ownership of children's records is unnecessarily tied to restrictions on how providers may access or share information about a child. As discussed in Part 4(a) of this comment, while we encourage ORR to adopt rules establishing uniform standards to protect confidentiality and safeguard children's PII, we also recognize that the provision of services by particular providers may require explicit carve-outs from certain aspects of the uniform standards. For example, because the role of a Child Advocate is to advocate for the best interests of a child through best interests determinations (BIDs) submitted to decision-makers in the child's case—which may include ORR grantees, contractors, federal staff, state courts, and others—they must have authority to include information from children's case files during these communications when the child consents to the disclosure or disclosure is necessary to advance the child's best interests.

Recommendation:

- 1) When consolidating sections covering data protection, confidentiality, and safeguarding of children's records (as proposed in Section 4(a) above), ORR should remove discussion of the ownership of children's case files and other records from the consolidated section.
- 2) The proposed rule should include a new section, separate from the consolidated text described above, which addresses the ownership of records maintained by different types of service providers. This section should affirm ORR's ultimate responsibility

for case files and other records kept by care provider facilities and PRS providers and its right to oversee and to regulate its grantees' and contractors' policies and procedures. This section should also explicitly state that records maintained by legal services providers are not the property of ORR and address relevant issues raised by providers of other types of services in a manner that preserves their ability to efficiently serve unaccompanied children according to the relevant legal regimes and best practices of their field.

c. Comments on individual sections relating to data protections and reporting

i. Data privacy related to the provision of post-release services (§ 410.1210)

1. Proposed Rule § 410.1210(i) – General Comment

Comment: As described in Section 4(a) of this comment, we recommend that the text of § 410.1210(i) be consolidated into an expanded § 410.1303(g), so that its detailed guidelines may apply more broadly to other types of services providers, for ease of reference, and to eliminate ambiguity. To some extent the location of the consolidated text is arbitrary. Here we offer comments on some portions of the text of 1210(i) as currently proposed, to facilitate ORR's incorporation of this section into 1303(g).

2. Proposed Rule § 410.1210(i)(1)

Comment: As written, the timing described in proposed § 410.1210(i)(1)(ii) is ambiguous. The requirement that PRS providers upload documentation on provided services to ORR's case management system "within seven (7) days of completion of the services" should refer to the completion of individual service activities, not the overall completion of the PRS provider's services to a child (i.e., the point at which the PRS provider closes the child's case).

Recommendation: "PRS providers shall upload all PRS documentation on services provided to unaccompanied children and sponsors to ORR's case management system within seven (7) days of completion of ~~the services~~ those service activities."

3. Proposed Rule § 410.1210(i)(2)(i)

Comment: Proposed § 410.1210(i)(2)(i) addresses providers' policies and procedures for organizing and maintaining case files. While we agree that it is important to preserve key records such as a child's case file, we favor policies that encourage the conversion of physical records into secure electronic records to the greatest extent possible. This is better for long-term storage, access, and information sharing.

Recommendation: "PRS providers shall have written policies and procedures for organizing and maintaining the content of active and closed case files, which incorporate ORR policies

and procedures. The PRS provider's policies and procedures shall also encourage the conversion of key physical records to secure electronic formats and address preventing the physical damage or destruction of records."

4. Proposed Rule § 410.1210(i)(2)(ii)

Comment: We wish to highlight the importance of this section and raise it up as an example of the strong protections in proposed § 410.1210(i) that are missing in, and should be consolidated into, § 410.1303(g)'s treatment of children's case files and related records. Requiring that service providers of all types "have established administrative and physical controls to prevent unauthorized access to both electronic and physical records" is critically important, and the specific controls detailed here are a good example of the proactive steps we recommend that § 410.1303(g) include.

Nevertheless, we also find room for improvement in 1210(i)(2)(ii). The "controls" referenced here should be tied to external, national standards describing best practices for securely handling and maintaining sensitive and restricted information.

Recommendation: "Before providing PRS, PRS providers shall have established administrative and physical controls to prevent unauthorized access to both electronic and physical records, in accordance with federal laws requiring national standards for protecting sensitive and restricted data."

5. Proposed Rule § 410.1210(i)(2)(iii)

Comment: Proposed § 410.1210(i) contains similar language to that found in proposed § 410.1303(g). Compare:

- 1210(i)(2)(iii): "PRS providers may not release records to any third party without prior approval from ORR."
- 1303(g)(2): "...and care provider facilities and PRS providers may not release [the records included in unaccompanied child case files] without prior approval from ORR except for limited program administration purposes."

Section 4(a) of this comment encourages ORR to consolidate 1210(i) with 1303(g) so that provisions currently focused solely on records management by PRS providers will also apply to other types of service providers. As it does so, ORR should seek to use the strongest versions of similar passages. The language in proposed § 410.1210(i)(2)(iii) provides stronger privacy and confidentiality protection for unaccompanied children than the alternative language, and for that reason we favor it.

Recommendation: Use the text of proposed 1210(i)(2)(iii) – rather than the text of proposed 1303(g)(2) – when aligning privacy protections.

6. Proposed Rule § 410.1210(i)(3)(i)

Comment: It is unclear how proposed § 410.1210(i)(3)(i) differs from proposed § 410.1210(i)(2)(ii). Compare:

- 1210(2)(ii): “Before providing PRS, PRS providers shall have established administrative and physical controls to prevent unauthorized access to both electronic and physical records.”
- 1210(3)(i): “PRS providers shall have written policy and procedure in place that protects the sensitive information of released unaccompanied children from access by unauthorized users.”

Recommendation: ORR should say whether the two passages have distinct meanings; if their meanings are distinct, ORR should clarify how.

7. Proposed Rule § 410.1210(i)(3)(iii)

Comment: Proposed § 410.1210(i)(3)(iii) states that PRS providers’ controls on information-sharing within the PRS provider network shall extend to subcontractors. The explicit inclusion of subcontractors is an important clarification that should be incorporated into other sections that safeguard children’s information.

Recommendation: When aligning privacy protections, extend safeguards from unauthorized access, inappropriate access, misuse, and inappropriate disclosure to subcontractors of all agencies.

ii. ORR Reporting, monitoring, quality control, and recordkeeping standards (§ 410.1303)

1. Proposed Rule § 410.1303(g) – General Comment

Comment: As described in Section 4(a) of this comment, we recommend that the proposed text of 1303(g) be expanded and consolidated with the proposed text of 1210(i). Here we offer comments on some portions of the proposed text of 1303(g).

Comment: As written, the requirements of proposed § 410.1303(g) apply to “all care provider facilities responsible for the care and custody of unaccompanied children.” However, this phrasing is inconsistent with items (g)(1) through (4), which extend to PRS providers as well as care provider facilities. Moreover, as noted in our broader comment in Section (4)(a) above, service providers that are not care provider facilities or PRS providers should also be subject to the guidelines established here.

Recommendation: ORR should revise any text describing what organizations are subject to the guidelines of 1303(g), to ensure consistent inclusion of PRS providers and to ensure that other types of service providers that encounter or handle records involving unaccompanied children’s PII are following best practices for developing, maintaining, and safeguarding them.

2. Proposed Rule § 410.1303(g)(1)

Comment: Proposed § 410.1303(g)(1)'s requirements that providers preserve the confidentiality of unaccompanied children's records and protect them from unauthorized use or disclosure are laudable. We offer two further recommendations.

First, best practices in the secure handling of sensitive information require proactive steps to avoid adverse outcomes. That is, the proposed rule should not only prohibit mishandling of unaccompanied children's information but also require organizations to implement policies and procedures to reduce the risk of mishandling. These issues are addressed in detail by multiple national standards, which may be voluntary (e.g., the National Institute of Standards and Technology's privacy framework) or required by federal law (e.g., HIPAA for health information).

Second, we also suggest clarifying that the requirement of 410.1303(g)(1) extends not only to prime contractors or grantees of ORR but also subcontractors and subgrantees.

Recommendation: “All ORR contractors, grantees, and subcontractors ~~Care provider facilities and PRS providers~~ must proactively ensure the privacy, security, and ~~preserve the confidentiality of program data, including unaccompanied child case file records and information, and protect the records and information~~ from unauthorized use or disclosure, in accordance with federal laws requiring national standards for protecting sensitive and restricted data;”

3. Proposed Rule § 410.1303(g)(4)

Comment: The language prohibiting certain individuals from disclosing sensitive information “to anyone for any purpose, except for purposes of program administration, without first providing advanced notice to ORR...” is appropriately strong and wide-ranging. We commend ORR for including this broad prohibition.

However, the term “program administration” is ambiguous. This should refer only to the administration of ORR's own programs, and not to the administration of programs of other agencies, such as those operated by DHS's Immigration and Customs Enforcement. Individuals affiliated with ORR-funded service providers should not be allowed to communicate sensitive information about a child or their family for purposes other than the care and well-being of a child.

Recommendation: ORR should specify here that the named exception applies only to its own programs; see summary recommendation (below) for recommended text.

Comment: We are also pleased to see that proposed § 410.1303(g)(4) applies to both current employees as well as contractors and former employees of ORR-funded care or service providers. However, there are other individuals who may be affiliated with these organizations who encounter sensitive information about a child or their family, to whom this section should also apply. A preliminary list would include volunteers and others who may learn sensitive information about an unaccompanied child, their sponsor, their family,

or household members. Case coordinators, while not typically onsite at care providers, also have access to the case file but are not employed directly by ORR.

Recommendation: We recommend that the language of proposed § 410.1303(g)(4) be extended; see summary recommendation (below) for recommended text.

Comment: We applaud proposed § 410.1303(g)(4)'s protections against unauthorized *disclosure* of sensitive information by certain individuals. However, these protections do not explicitly limit the unauthorized *use* of such information. In contrast, (g)(1)'s guidelines for organizations as a whole seek to protect children's information from "unauthorized use or disclosure."

Recommendation: We recommend that (g)(4) be expanded to address both unauthorized use and unauthorized disclosure of the sensitive information it describes; see summary recommendation (below) for recommended text.

Summary recommendation: "Employees, former employees, or contractors of All individuals who work in or are affiliated with a care provider facility, PRS provider, or other ORR-funded service provider, including current or former employees, volunteers, or contractors, must not use or disclose case file records or information about unaccompanied children, their sponsors, family, or household members to anyone for any purpose, except for the purpose of ~~program administration~~ administering ORR programs related to the care and well-being of a child, without first providing advanced notice to ORR to allow ORR to ensure that use or disclosure of unaccompanied children's information is compatible with program goals and to ensure the safety and privacy of unaccompanied children.

iii. Language Access Services (§ 410.1306)

1. Proposed Rule § 410.1306(i)

Comment: We applaud the proposed rule for contemplating the role of language access services and applying privacy and confidentiality requirements to providers of these services. Proposed § 410.1306(i) requires that language access services providers "keep all information about the unaccompanied children's cases and/or services... confidential from non-ORR grantees, contractors, and Federal staff." We recommend that proposed § 410.1306(i) be amended to reference the consolidated section on data safeguarding described in Section 4(a) of this comment, and that such consolidated section also apply to records kept by language access services providers.

Recommendation: We recommend that proposed § 410.1306(i) be amended to reference a consolidated section on data safeguarding, and that such consolidated section also apply to records kept by language access services providers.

Comment: As written, the proposed text of § 410.1306(i) is ambiguous. It is unclear whether the phrase "non-ORR grantees, contractors, and Federal staff" should be read as extending to non-ORR contractors and non-ORR Federal staff.

Recommendation: We recommend clarifying the list of entities to whom language access services providers are prohibited from disclosing information about children’s cases and/or services.

Comment: As detailed in Section 4(b) of this comment, ownership of children’s records is a complicated issue requiring a nuanced approach. This includes records kept by language access services providers, who may be called upon to assist in a wide range of other services that children receive, each with its own legal requirements and best practices regarding the ownership of records.

Recommendation: The new section on ownership of records proposed in Section 4(b) of this comment should address the different types of records kept by language access services providers, including that some may be protected by attorney-client privilege.

iv. Child Advocates (§ 410.1308)

1. Proposed Rule § 410.1308(e)-(f)

Comment: We applaud the proposed rule for recognizing the invaluable role of child advocates and applying privacy and confidentiality requirements to individuals serving in that role. To further streamline the data protection safeguards established in the proposed rule, we recommend that proposed § 410.1308(e)-(f) be amended to reference a consolidated section on data safeguarding, as described in Part 4(a) of this comment.

However, there are also specific considerations relevant to the work of child advocates that require carve-outs from the unified standards in the consolidated section we have proposed. These relate both to child advocates’ access to children’s case files and their authority to share pertinent information with third parties:

- Proposed § 410.1308(e) authorizes child advocates to access case file information. But Child Advocates may need to act urgently when a situation impacting a child's safety or well-being arises, which means they must be able to access relevant records promptly, even outside of business hours. The proposed rule’s statement that Child Advocates may request copies of a child’s records from a care provider, rather than going through ORR’s standard case file request procedure, is a welcome example of a carve-out from broader safeguards that acknowledges the specific role of Child Advocates.
- Proposed § 410.1308(f) requires that child advocates “keep the information in the case file, and information about the unaccompanied child's case, confidential” in addition to further specific requirements. This requirement is inconsistent with a child advocate’s responsibility to submit best interest determinations to decision-makers in a child’s case, which may include ORR grantees, contractors, federal staff, state courts, and others. It is necessary for child advocates to have the authority to include information from a child’s case file during these communications, so long as this is done as securely as possible and when the child

consents to the disclosure or disclosure is necessary to advance the child's best interests.

Recommendation:

- 1) We recommend that proposed § 410.1308(e)-(f) be amended to reference a consolidated section on data safeguarding, as described in Part 4(a) of this comment. This consolidated section should apply in general to records kept by Child Advocates; however, § 410.1308(e)-(f) must include carve-outs (as described above) to these general guidelines that are necessary for child advocates to perform their duties.
- 2) If ORR disagrees with our suggested reference to a consolidated section on data safeguarding and opts to instead retain the text of § 410.1308(e), we suggest that text be revised as follows: “After a child advocate is appointed for an unaccompanied child, the child advocate shall be provided access to all materials to effectively advocate for the best interest of the unaccompanied child. Child advocates shall be provided access to their clients children to whom they are appointed at an ORR care provider facility during normal-business hours or on evenings or weekends when not unduly disruptive at an ORR care provider facility and shall be provided access to all ~~their client’s~~ case file information and may request copies of the case file directly from the unaccompanied child’s care provider without going through ORR’s standard case file request process.”
- 3) If ORR disagrees with our suggested reference to a consolidated section on data safeguarding and opts to instead retain the text of § 410.1308(f), we suggest that text be revised as follows: “Child Advocates must keep the information in the case file, and information about the unaccompanied child’s case, confidential. Child Advocates may only disclose information about the child with the child’s consent, or when it is in the child’s best interests after applying a best interests analysis. ~~Child advocates shall not disclose case file information to other parties, including parties with an interest in a child’s case.~~ With regard to an unaccompanied child in ORR care, ORR shall allow the Child Advocate of that unaccompanied child to conduct private communications with the unaccompanied child, in a private area that allows for confidentiality for in-person and virtual or telephone meetings.”

v. Data on unaccompanied children (§ 410.1501)

1. Proposed Rule § 410.1501 – General Comment

Comment: We welcome ORR’s commitment to codifying the minimum data that care providers are required to maintain and report to ORR. We note that ORR’s data protections are found elsewhere in the proposed Rule, and in Part 4(a) of this comment we recommend that ORR consolidate the divergent but generally strong data protections of § 410.1303(g) and § 410.1210(i) into a single location for ease of reference and to eliminate ambiguity.

However, we are concerned that the proposed Rule *in toto* fails to contemplate data that does not originate from care providers but is of sufficient importance that it is appropriate to be specified in the Foundational Rule. We are also concerned that the proposed Rule fails to require the public availability of data on the ORR network as a whole, which by contrast is contemplated in introduced Congressional legislation such as the Children’s Safe Welcome Act (S.B 4529 / H.R. 8349).

2. Proposed Rule § 410.1501(a)

Comment: The list of required data from care provider facilities should align with requirements elsewhere in the proposed rule. Proposed § 410.1302(c)(2)(iv) requires providers to assess “whether [the child is] an indigenous language speaker”; proposed § 410.1501(a) should align so that preferred language can be aggregated and captured population-wide. ORR may have intended to capture this data with the existing requirement to indicate “whether of indigenous origin” at proposed § 410.1501(a) but indigenous origin and preferred (indigenous) language are non-identical categories.

Recommendation: “Biographical information, such as an unaccompanied child's name, gender, date of birth, country of birth, whether of indigenous origin, preferred language, and country of habitual residence.”

3. Proposed Rule § 410.1501(b)

Comment: Proposed § 410.1501(b) contemplates a basic data input for the duration of a child’s stay in custody, operationalized by “date on which the unaccompanied child came into Federal custody.” We are concerned that the proposed rule starts the clock at time of DHS apprehension, which would make HHS-specific and ORR-specific metrics for time in custody both more volatile and less accurate. For transparency, the rule should include both DHS apprehension and date of placement into HHS custody.

Recommendation: “The date on which the unaccompanied child came into Federal custody by reason of the child's immigration status and the date on which the child’s custody transferred to the Department of Health and Human Services.”

4. Proposed Rule § 410.1501(d)

Comment: We appreciate that proposed § 410.1501(d) requires documentation for when an “unaccompanied child is placed in detention or released,” but note that internal transfers to specialty placements (termed “heightened supervision facilities” at proposed § 410.1001), restrictive placements, and out-of-network facilities should also require documentation of the justification.

In addition, proposed § 410.1501(d) should add “removals”, to ensure data fidelity for a future circumstance in which another agency (such as DHS) effectuates a removal that it believes does not meet the definitional requirements for detention.

Recommendation: “In any case in which the unaccompanied child is placed in detention, released, or removed, or in any case in which a child is transferred to a heightened supervision facility, restrictive placement, or out-of network placement, an explanation relating to the detention or release”

vi. Data use in the minimum standards for emergency and influx facilities (§ 410.1800 et seq.)

1. Proposed Rule § 410.1800(c)(3)

Comment: Proposed § 410.1800(c) describes ORR activities during an emergency or influx. Proposed § 410.1800(c)(3) requires ORR to “maintain a list of unaccompanied children affected by the emergency or influx.” This list is a creation of ORR, and since the extant privacy protections and policies specify the requirements of contractors and grantees, the proposed Rule fails to specify which data protections apply to this information. ORR should specify how long the information in proposed § 410.1800(c)(3) is retained, and whether this information is part of the case file, included in the case file but separate, or altogether separate from the case file.

Recommendation: ORR should specify how long the information in proposed § 410.1800(c)(3) is retained, and whether this information is part of the case file, included in the case file but separate, or altogether separate from the case file.

2. Proposed Rule § 410.1801(b)(17)

Comment: Proposed § 410.1801(b)(17) requires emergency or influx facilities to have “accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.” Proposed § 410.1001 defines emergency or intake facilities as care providers. Proposed § 410.1303(g) includes a paragraph on data protections that “applies to all care provider facilities responsible for the care and custody of unaccompanied children.” At first glance, proposed § 410.1801(b)(17) appears duplicative. If ORR intends to use this subsection to emphasize that emergency or influx facilities are subject to the minimum requirements of proposed § 410.1303(g) or the proposed consolidated section on data safeguarding described in Part 4(a) of this comment, it should add a cross reference; if some other meaning is intended, ORR should clarify the text of proposed § 410.1801(b)(17).

Recommendation: If ORR intends to use this subsection to emphasize that emergency or influx facilities are subject to the minimum requirements of proposed § 410.1303(g) or the proposed consolidated section on data safeguarding described in Part 4(a) of this comment, it should add a cross reference; if some other meaning is intended, ORR should clarify the text of proposed § 410.1801(b)(17).

d. Suggested additional provisions

i. Care provider facility records on separations from parents/guardians

Comment: We recommend that ORR require care provider facilities to keep detailed records of any circumstance in which they believe an unaccompanied child to have been apprehended with, but separated from, a parent or legal guardian at the time of apprehension into federal custody. We recommend language that closely mirrors the requirements of the *Ms. L v ICE* Executed Settlement³⁰, noting that any finalized settlement will impose requirements on ORR and HHS.

Recommendation (new subsection) § 410.1501(h): “For any case in which a child gives direct or indirect information to allege or imply that the child was separated from a parent or legal guardian with whom the child was present at the time of apprehension into federal custody, even if the separation cannot be substantiated, all available information relating to the biographical information of the separated parent or legal guardian, the specific facts of the separation, documentation of notification to the child of the child’s rights, and documentation of the referral for a Child Advocate;”

ii. Care provider facility records on separations from other family members

Comment: We recommend that ORR require care provider facilities to keep detailed records of any circumstance in which they believe an unaccompanied child to have been apprehended with, but separated from, a family member, who is not their parent or legal guardian, at the time of apprehension into federal custody. Although we understand that ORR and its care provider facilities do not consistently receive notice of such separations from CBP, ORR should nevertheless strive to document such occurrences to the extent that it becomes aware of them.

Recommendation (new subsection) § 410.1501(i): “For any case in which a child gives direct or indirect information to allege or imply that the child was separated from a family member who is not their parent or legal guardian, but with whom the child was present at the time of apprehension into federal custody, even if the separation cannot be substantiated, all available information relating to the separated family member, the specific facts of the separation, documentation of notification to the child of the child’s rights, and documentation of the referral for a Child Advocate;”

³⁰ While the *Ms. L* Settlement cannot be finalized until after the close of the comment period for the present NPRM, we strongly encourage ORR to mirror the *Ms. L* text in any final Foundational Rule. *Ms. L v. ICE*, Case No. 18-cv-00428, U.S. District Court, Southern District of California, Settlement Agreement, pp. 26-8 [Dkt. 711-1], October 16, 2023, <https://www.aclu.org/documents/ms-l-v-ice-executed-settlement>.

iii. Care provider facility records on children with disabilities

Comment: We recommend that ORR require care provider facilities to keep detailed records regarding unaccompanied children with identified disabilities. In addition to the complete list of a child’s physical or mental disabilities, the records that facilities should be required to submit to ORR should include information pertinent to a child’s placement and supervisory level, needs for reasonable modifications or other services, the services and supports actually receive due to their disability, and information related to release planning. These details are necessary for ORR’s ongoing oversight to ensure that children with disabilities are receiving appropriate care while in ORR custody.³¹

Recommendation (new subsection) § 410.1501(j):

(j) For any unaccompanied child in ORR custody identified as having one or more disabilities:

- (1) all identified physical or mental disabilities,
- (2) information pertinent to a child’s placement, including but not limited to a rationale for any request to step up, step down, or otherwise modify the supervision given to a child, and an explanation of whether the child could be placed in a more integrated setting with additional services and supports or reasonable modifications. For children who are stepped up, stepped down, or have otherwise modified supervision within a single provider facility, the facility shall record disaggregated lengths of stay for each supervisory level;
- (3) the child’s need for reasonable modifications or other services, and information related to release planning;
- (4) a description of services and supports provided to the child due to his or her disability, as well as any modifications made based on information in the case file.

iv. Additional case file data

Comment: We are concerned that the proposed rule does not contemplate how ORR should handle information about unaccompanied children that it learns through routes other than its own service providers, contractors, and grantees, nor the necessity of recording, codifying, and protecting such information.

We suggest that the proposed rule include a new section addressing information that arrives from these other sources. This may include, but is not limited to, information implicating a parent-child separation that may arise from direct or indirect information included in a referral from CBP; information regarding age redeterminations requested or required by ORR that are based on information other than what is provided by a care provider facility; and information about the labor exploitation of a released child—whether suspected, alleged, or confirmed—that ORR learns from media reports, local legal case information, or a Homeland Security investigation. When ORR does learn of such information, it should be

³¹ See *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1074 (9th Cir. 2010) (explaining that “[b]ecause the regulations implementing the ADA require a public entity to accommodate individuals it has identified as disabled . . . some form of tracking system is necessary in order to enable [defendants] to comply with the Act” (quoting *Armstrong v. Davis*, 275 F.3d 849, 876 (9th Cir. 2001))).

required to record that information in a manner allowing it to be aggregated, analyzed, disaggregated, and reported out, as appropriate.

Recommendation (new section) § 410.1502:

410.1502 – Additional Case File Data

- (a) ORR shall maintain additional information and data regarding unaccompanied children that it obtains from sources other than care providers, grantees, contractors, and other individuals whose contact with the child occurs under ORR’s purview.

- (b) When ORR learns of information that implicates the well-being of a child, or the safety and stability of a child’s placement, ORR shall record this information in the case file. ORR shall make all reasonable attempts to codify such information in a manner that allows the information to be aggregated, analyzed, disaggregated, and reported out, as appropriate.

- (c) Additional case file data that ORR maintains shall include, but is not limited to the following. ORR shall maintain this data even if facts are in question, in doubt, or cannot be substantiated independently:
 - 1. In circumstances of age determination or redetermination (proposed 410.1001 and proposed 410.1700 *et seq*), whether the age determination was dental radiograph, bone radiograph, or another and specific medical age determination, as well as the region and state where the child is located, and federal staff overseeing the case;

 - 2. In circumstances of a known or suspected separation from a parent or legal guardian of an unaccompanied child, whether ORR came to know of the separation via notice from a referring agency, ORR’s monitoring, or the proactive disclosure of the separated child to an individual who is not affiliated with ORR, as well as all available information relating to the biographical information of the separated parent or legal guardian, the specific facts of the separation, documentation of notification to the child of the child’s rights, and documentation of the appointment of a Child Advocate;

 - 3. In circumstances of child labor exploitation of a released child – whether suspected, affirmatively alleged, or confirmed – the source of the information, specific facts of the child’s case, documentation of outreach and emergency procedures followed, whether the child reported or attempted to report unsafe or unhealthy work environments to ORR or trusted adults, and documentation of ORR’s responsive

actions;

4. In circumstances of physical abuse, sexual abuse, or serious sexual misconduct involving an unaccompanied child or children in which an unknown number of additional victims are suspected or in which a known number of as-yet unidentified victims are suspected – whether suspected, alleged or confirmed events – the source of the reports that additional children may be involved, the timeframe and timing of the whereabouts of the alleged or confirmed perpetrator, the number of potential additional victims, the number of children known specifically to be at risk based on the timing of their known whereabouts, as well as notes in the case files of individual children specifically at risk and ORR responsive actions taken on behalf of those children.

v. Requirement for publication of ORR Data

Comment: We are concerned that the proposed rule takes a substantial step away from necessary transparency into ORR’s network and operations. Without the external oversight established by the *Flores* settlement agreement, including site visits and monitoring, it will be difficult to ensure the care and well-being of unaccompanied children. Although the proposed Office of the Ombuds would play an important role in the oversight of ORR’s programs, it is critical that ORR also publish aggregated data for public consumption, so that non-governmental stakeholders and others can monitor key trends.

ORR currently publishes a significant quantity of aggregated information on its website. The proposed rule fails to include guarantees that this publication will continue and that currently available data will remain accessible. The proposed rule also does not address the breadth, specificity, frequency of publication, quality, or purpose of information that ORR must make publicly available in the future. Each of these characteristics of data reporting is critical.

We propose to concretize ORR’s data publication for Stakeholders and the general public in the Foundational Rule, to guarantee the continued public availability of critical information about unaccompanied children and their care. This recommendation complements our recommendations regarding reports that the Ombuds Office should make to Congress and the public, as described in Section 3 of this comment.

ORR’s public data reporting should be reliable, frequent, and regular. It should also include a data dictionary that makes clear how each reported figure is calculated. An example data dictionary can be found for CBP published statistical data.³²

³² U.S. Customs and Border Protection, *Southwest Land Border Encounters*, last accessed on November 20, 2023, available at <https://www.cbp.gov/sites/default/files/assets/documents/2022-Dec/southwest-land-border-encounters-data-dictionary.pdf>

Recommendation: (new section) § 410.1503:

410.1503– Public Reporting of Aggregated ORR Data.

- (a) General. To facilitate public monitoring, and to support the data collection and monitoring duties of the Ombuds, ORR shall collect, publish, and retain, on a publicly available website, demographic information that is pertinent to serving the population of unaccompanied children. Publication shall occur on a frequent and regular basis.
- (b) Further information available to Ombuds. For the purpose of enhanced transparency, ORR shall make disaggregated information available to the Ombuds.
- (c) Information. ORR’s published aggregate data shall include, but is not limited to, information regarding:
 - 1. The national demographic makeup of unaccompanied children, including the number of children in care both overall and broken out by age cohort, nationality, whether of indigenous origin, preferred language, gender, whether pregnant or parenting, current length of time in placements, type of placements, whether a child’s placement is in-network or out-of-network, and the goal for reunification by sponsor or placement type. Additional demographic data to be published shall include the number and percentage of unaccompanied noncitizen children designated for and receiving mandatory home studies, discretionary home studies, and post-release services;
 - 2. ORR facilities, including the total number of funded beds, available beds, unavailable beds, pending beds, and utilization rate; disaggregation of the above for each state where ORR has a grantee or contractor care provider; and disaggregation of the above by facility type;
 - 3. Reunifications, including discharge rate, the localities of children’s release, and number of completed reunifications disaggregated by sponsor category. Relevant reunification data further includes median time between ORR’s assumption of custody and the time when a sponsor assumes physical custody of the child, disaggregated by (1) sponsor category, and, separately, (2) children with Home Studies

mandated by the Trafficking Victims Protection Reauthorization Act of 2008 or who are granted discretionary Home Studies, and all other children;

4. Transfers, between ORR care provider facilities or between care provider facilities and out-of-network facilities;
 5. The status of any child who approaches their 18th birthday while in ORR custody, including any transfer to ICE custody, any release on their own recognizance, and the communication of a post-18 plan from ORR to ICE in anticipation of the child's 18th birthday;
 6. Facility non-compliance with basic standards and operating procedures, including the number of facilities alleged and found to be out of compliance with facility standards as defined in the Prison Rape Elimination Act of 2003 (34 U.S.C. 30301 et seq.) and any regulations governing ORR's compliance with PREA.
 7. Children in ORR custody identified as having one or more physical or mental disabilities, including
 - i. Data on children identified as having one or more disabilities, figured as a percentage of ORR annual referrals; the categories of disability identified annually; the number of children in ORR custody identified as having one or more disabilities by placement type; the number of disabilities identified, within the referral from the referring agency to HHS, during the child's initial medical examination, and subsequent to the initial medical examination but while the child is in HHS custody; and the median length of stay for children with disabilities, across all placement types; and
 - ii. A description of services and supports provided to children with disabilities due to his or her disability, highlighting individualized services and supports most often provided.
- (d) Requirement for data dictionary. ORR published data shall include a "data dictionary" that explains how users should read and understand reported statistical information. ORR shall specify for fractional data

(e.g., percentages) and rate data (e.g., discharge rate) how both the numerator and denominator are determined.

(e) Review of data collected. Every three years, ORR will review its data collection practices, including any safety concerns that have arisen or might reasonably arise from the collection of data. When making changes to information collected, policies related to data collection, or its data architecture, ORR will ensure data collected is reliable and consistent over time to the greatest extent possible.

5. Conclusion

The undersigned organizations appreciate ORR's, ACF's, and HHS's efforts in promulgating the instant rule to codify the policies and requirements to ensure safe placement and well-being of unaccompanied children in the care of ORR across standard and non-standard programs. We further encourage you to consider our proposed changes in this comment to improve and strengthen the rule.

Sincerely,

Acacia Center for Justice
Florence Immigrant & Refugee Rights Project
Kids in Need of Defense
Women's Refugee Commission
Young Center for Immigrant Children's Rights
Law Office of Daniela Hernandez Chong Cuy
Michigan Immigrant Rights Center
Grassroots Leadership
Witness at the Border
Save the Children
Angry Tias and Abuelas of the RGV
South Asian Public Health Association
Open Immigration Legal Services
Project Lifeline
Safe Passage Project
Hope Border Institute
HIAS Pennsylvania
LSN Legal LLC
Advocate for Basic Legal Equality, Inc. (ABLE)
Martinez & Nguyen Law, LLP
JFCS Pittsburgh
Justice in Motion
National Immigration Forum
Law Office of Helen Lawrence
Child and Adolescent Psychiatrist

Alianza Americas
South Dakota Voices for Peace
Central American Resource Center - CARECEN - of California
Freedom Network USA
VECINA
La Raza Centro Legal
Houston Immigration Legal Services Collaborative
Florida Legal Services, Inc.
Community Legal Services in East Palo Alto
Lawyers for Good Government
Just Neighbors
National Immigrant Justice Center
International Rescue Committee
Immigration Center for Women and Children
Diocesan Migrant and Refugee Services, Inc./Estrella del Paso
Los Angeles Center for Law and Justice
Immigration Counseling Service
Law Office of Miguel Mexicano, P.C.
University of Maryland Support, Advocacy, Freedom, and Empowerment (SAFE) Center
International Refugee Assistance Project (IRAP)
OneAmerica
United We Dream
Lutheran Social Services of the National Capital Area (LSSNCA)
The Immigration Project
Capital Area Immigrants' Rights (CAIR) Coalition
Physicians for Human Rights - Student Advisory Board
Church World Service
Catholic Charities Baltimore, Esperanza Center
Bazelon Center for Mental Health Law
Human Rights Initiative of North Texas
Legal Services for Children
Sunita Jain Anti-Trafficking Initiative
National Immigration Law Center (NILC)
Immigrant Legal Resource Center
Americans for Immigrant Justice
Rocky Mountain Immigrant Advocacy Network
Galveston-Houston Immigrant Representation Project
Juvenile Law Center
Immigrants' Rights Clinic, Morningside Heights Legal Services, Inc. Columbia Law School
UC Davis Immigration Law Clinic

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Sarah H. Paoletti, Transnational Legal Clinic, University of Pennsylvania Carey Law School

Andrew Schoenholtz, Professor from Practice, Georgetown University Law Center

Anna Welch, University of Maine School of Law
Lindsay M. Harris, Professor of Law, University of San Francisco School of Law
Jennifer Moore, Professor of Law, University of New Mexico School of Law
Estelle McKee, Clinical Professor of Law, Cornell Asylum & Convention Against Torture
Appellate Clinic