

Themed Comment #5: Legal Services/Rights/Child Advocates

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

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

Re: Unaccompanied Children Program Foundational Rule (88 Fed. Reg. 68908)

Dear Mr. Biswas:

We write on behalf of the undersigned organizations in response to the Office of Refugee Resettlement's (ORR) Notice of Proposed Rulemaking (proposed rule) to address the sections of the proposed rule that relate to legal services and Child Advocates for unaccompanied children.

1. Introduction

Our organizations strongly support the inclusion of language in the NRPM and the Proposed Rule recognizing the importance of legal services and Child Advocates for unaccompanied children. These critical and distinct safeguards, which are provided for through the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), play a vital role in protecting the rights, safety, and wellbeing of children and help ensure their ability to access any legal protections for which they are eligible to prevent their return to trafficking, exploitation, and other harm.

In the following comment, we express appreciation for aspects of the proposed rule, encourage ORR to improve upon certain sections of the proposed rule, and oppose or request significant revision of certain sections of the proposed rule.

Interest of orgs signing on:

The *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.

The *National Immigrant Justice Center* (NIJC), headquartered in Chicago, offers a wide range of *pro bono* and in-house legal services to 12,000 low-income people, including hundreds of unaccompanied children in ORR's custody in Illinois and Indiana. Since its founding more than three decades ago, NIJC

blends individual client advocacy with broad-based systemic change. Attorneys and trained staff provide know-your-rights presentations and direct representation on asylum claims, trafficking and crime survivor relief, and Special Immigrant Juvenile Status among other humanitarian relief for children. NIJC also advocates for immigrants and asylum seekers through policy reform, impact litigation, and public education.

The *Young Center* serves as the federally-appointed independent Child Advocate, akin to a best interests guardian *ad litem*, for trafficking victims and other vulnerable unaccompanied children in government custody, as authorized by the Trafficking Victims Protection Reauthorization Act (TVPRA). 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.

2. Required Notice of Legal Rights [Proposed Rule Subpart B, § 410.1109]
a. Proposed Rule § 410.1109

(a) ORR shall promptly provide each unaccompanied child in its custody, in a language and manner the unaccompanied child understands, with:

Comment: This section needs to provide additional details about communicating with children so that they understand their rights. ORR should provide effective communication access to unaccompanied children with disabilities and take steps to ensure that children with disabilities are not placed in inappropriately restrictive settings ORR should take the following steps to ensure adequate communication access to unaccompanied children with disabilities:

- Children with disabilities should not by default be placed in the most restrictive placements settings simply by virtue of needing specialized care. Instead, ORR should ensure that children with disabilities are given adequate assessments by trained professionals in order to prevent them from being placed in inappropriately restrictive settings.
- ORR should identify community members who can facilitate communication with children with disabilities (such as sign language interpreters, advocates for persons with disabilities, inclusive education or special education teachers, or other caregivers of children with disabilities, or speech therapists).
- For children with visual disabilities, describe the surroundings and introduce people present. Ask permission if offering to guide or touch the child or his or her assistive devices, such as wheelchairs or white canes.
- For children with hearing disabilities, ORR should provide sign language interpreters and use visual aids.
- If the child has difficulty communicating or understanding messages (such as children with disabilities), ORR should ensure the use of clear verbal communication and simple language, ask children to repeat information back and repeat as many times as necessary, in different ways and check for their understanding.

- For children for whom there are concerns regarding capacity to make decisions regarding their case, ORR should ensure that children are quickly referred for a child advocate.

In addition, ORR should ensure that communication with unaccompanied children regarding ORR programs is conveyed to children in the language in which they feel most comfortable communicating, including via sign language interpretation. The burden of acquiring language services should not fall on the children who do not use English as their primary language. ORR should assess a child’s language needs in a culturally competent and child sensitive manner by taking the following steps:

- An affirmative offer of interpretation at the earliest point of contact;
- Sensitivity to group dynamics, language justice, and the historical marginalization of minority – and indigenous-language speakers;
- Children should be asked on more than one occasion and in more than one setting if they speak any other language other than the one being used and whether they feel more comfortable speaking in another language, including the language they speak at home.
- Language access plans of other federal agencies that have wide contact with speakers of languages other than English and NGO resources could provide a valuable starting point.

Some of these include:

- a. Using an “I Speak...Language Identification Guide” language poster or guide developed by the DHS Office of Civil Rights and Civil Liberties (<http://www.dhs.gov/xlibrary/assets/crcl/crcl-i-speak-booklet.pdf>)
- b. For indigenous languages without a written form, ICE’s Juvenile and Family Residential Management Unit (JFRMU) created an intake tool to determine indigenous languages. In it, a PowerPoint presentation that asks listeners to raise their hand when their primary language is spoken. The presentation cycles through 12 indigenous languages that are spoken aloud. When an indigenous speaker is identified, intake staff seek language assistance services. The individual’s primary language is subsequently listed on their identification card to aid communication while they are at the Family Residential Center (FRC).⁸

(1) A State-by-State list of free legal service providers compiled and annually updated by ORR and that is provided to unaccompanied children as part of a Legal Resource Guide for unaccompanied children;

Comment: Unaccompanied children should not only be provided a list of free legal services as contemplated by the proposed Rule, but they should also be informed that they shall have the privilege of being represented by an attorney under 8 U.S.C. §1362 and that it is likely in their best interest to find counsel to represent them, either by locating a free attorney or by retaining a private attorney. They should also be informed of the steps they should take to find or retain an attorney. Unaccompanied children should further be informed that they have a right to meet with their attorney in a confidential setting and that if they are in custody, confidential space will be provided by the facility. In addition, unaccompanied children should also be informed that they may have an attorney represent them in risk determination and step-up proceedings.

We commend ORR’s effort to provide children with contact information of LSPs that represent unaccompanied children in immigration matters. However, our experience in the field has shown that providing children with lists of LSPs is not by itself sufficient to ensure that they connect with appropriate counsel. The limitations of lists are two-fold. First, lists become outdated as soon as they are published, and keeping an updated list is a difficult, time-consuming task requiring someone’s full attention. Second, many young people are hesitant to communicate via telephone or email, if they even have access to those forms of communication. Even when a young person *does* connect via telephone or email with an appropriate LSP, they may be told that the provider does not have capacity to represent them. This is likely to discourage youth from seeking other counsel, and they may incorrectly assume that the only organizations that can represent them are those who appear on the list.

To address these concerns, we recommend that in addition to providing lists, ORR continue to fund, through its legal services contract or other means, such as International Rescue Committee’s (IRC) ImportaMí Program and other efforts to connect children with lawyers via untraditional means. ImportaMí provides easily accessible and pertinent information to unaccompanied children and their sponsors. Its mission is to give unaccompanied children access to cost-effective or free legal services and local resources, all with the aim of enhancing children’s understanding of their rights in the United States. Primarily a referral service, ImportaMí was launched in 2022 as the IRC’s first Signpost instance to provide unaccompanied children and their families with relevant content to assist them in making informed decisions for themselves and their families.

Children can contact ImportaMí through WhatsApp, Facebook, and Facebook Messenger, three modes of communication that populations of unaccompanied children engage with more regularly than telephone or email. ImportaMí’s team, communicates directly with children in their language and finds them local counsel in their area. In our experience, unaccompanied children have had greater success in finding counsel with ImportaMí’s assistance than they have using ORR’s lists of providers.

(2) The following explanation of the right of potential review: “ORR usually houses persons under the age of 18 in the least restrictive setting that is in an unaccompanied child's best interest, and generally not in restrictive placements (which means secure facilities, heightened supervision facilities, or residential treatment centers). If you believe that you have not been properly placed or that you have been treated improperly, you may call a lawyer to seek assistance. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form.”; and

Comment: In addition to advising children that ORR must house persons under the age of 18 in the least restrictive setting....” ORR should also ensure that children are advised of their ability to contest a finding that they should be held in a restrictive setting and that they will be in the best position to challenge such finding if they are represented by counsel. ORR should also inform children of the right to contest the risk determination findings.

(3) A presentation regarding their legal rights, as provided under § 410.1309(a)(2). **The presentation should include the following information:**

(a) Children should be informed that they shall have the privilege of being represented by an attorney and that they have the right to meet with their attorney in a confidential setting.

(b) Children have the ability to contest a finding that they should be held in a restrictive setting and that they will be in the best position to challenge such finding if they are represented by counsel.

(b) ORR shall not engage in retaliatory actions against legal service providers or any other representative because of advocacy or appearance in an action adverse to ORR.

Comment: We applaud the language directing ORR not to engage in retaliatory actions against legal service providers (LSPs) because of advocacy or appearance in an action adverse to ORR. As stated in the Rule, we agree that this language is consistent with ORR’s intent to promote and protect unaccompanied children’s ability to access legal counsel. Immigration proceedings are adversarial in nature and litigants should not be punished or retaliated against by ORR for taking positions that advance the legal rights of the children they represent but may be adverse to ORR’s positions. ORR should extend the same presumption of integrity and regularity to attorneys for unaccompanied children that is extended to government agencies and officials and operate from the position that attorneys for unaccompanied children also act with integrity and regularity.

3. Requesting Specific Consent From ORR Regarding Custody Proceedings [Proposed Rule § 410.1209

a. Proposed Rule § 410.1209

Comment: Proposed section 410.1209 elaborates on the requirement of “specific consent” found in the statutory definition of “special immigrant juvenile” (SIJ), 8 U.S.C. § 1101(a)(27)(J). This proposed provision seeks to clarify that a child in ORR custody who seeks to have a juvenile court change their ORR custody or placement status must first request specific consent from HHS. The Proposed Rule helpfully clarifies that specific consent from HHS is not needed where a child seeks a dependency order from the juvenile court but does not seek to change the ORR custody or placement. However, we recommend modifications to the proposed rule, tracked below, to correct for unintended implications in the language as proposed, to reduce potential for confusion about the role of state juvenile courts with respect to SIJ classification, and to ensure timely consideration of specific consent requests, including for children aging out of ORR care.

§ 410.1209 Requesting specific consent from ORR regarding custody proceedings.

(a) An unaccompanied child in ORR custody is required to request specific consent from ORR if the child seeks ~~to have to invoke the jurisdiction of~~ a juvenile court ~~to~~ alter the child’s custody status or ~~order the child’s~~ release from ORR custody.

(b) An unaccompanied child in ORR custody need not request ORR’s specific consent before a juvenile court exercises jurisdiction to enter findings or orders that do not alter the child’s custody status or placement with ORR. ~~If an unaccompanied child seeks to invoke the jurisdiction of a juvenile~~

~~court for a dependency order to petition for SIJ classification or to otherwise permit a juvenile court to establish jurisdiction regarding a child's placement and does not seek the juvenile court's jurisdiction to determine or alter the child's custody status or release, the unaccompanied child does not need to request specific consent from ORR.~~

(c) A child who has been released by ORR to a sponsor is no longer in the actual or constructive custody of ORR, and therefore, ORR's specific consent is not required before a juvenile court exercises jurisdiction over the child's custody or placement.

~~(e) (d)~~ Prior to **requesting that** a juvenile court ~~determining or altering the~~ **an** unaccompanied child's custody status or release from ORR, attorneys or others acting on behalf of an unaccompanied child must complete a request for specific consent.

~~(e) (e)~~ ORR shall acknowledge receipt of the request within two business days.

~~(e) (f)~~ Consistent with its duty to promptly place unaccompanied children in the least restrictive setting that is in the best interest of the child, ORR shall consider whether ORR custody ~~is required to~~:

(1) ~~is required to e~~Ensure a child's safety; or

(2) ~~is required to e~~Ensure the safety of the community.

~~(f) (g)~~ ORR shall make **a** determinations on **any** specific consent requests within ~~60~~ **30** business days of receipt of a request. **In cases in which a child is expected to age out of ORR care in 14 days or less, ORR shall make a determination within 72 hours of such request. ORR shall make its best efforts to expedite all other urgent requests.** ~~When possible, ORR shall expedite urgent requests.~~

~~(e) (h)~~ ORR shall inform the unaccompanied child, or the unaccompanied child's attorney or other authorized representative of the decision on the specific consent request in writing, along with the evidence utilized to make the decision.

~~(h) (i)~~ The unaccompanied child, the unaccompanied child's attorney ~~of record~~, or other authorized representative may request reconsideration of ORR's denial with the Assistant Secretary for ACF within 30 business days of receipt of the ORR notification of denial of the request. The unaccompanied child, the unaccompanied child's attorney, or authorized representative may submit additional (including new) evidence to be considered with the reconsideration request.

~~(i) (j)~~ The Assistant Secretary for ACF or designee **shall** considers the request for reconsideration and any additional evidence, and sends a final administrative decision to the unaccompanied child, or the unaccompanied child's attorney or other authorized representative, within 15 business days of receipt of the request.

4. Legal Services [Proposed Rule Subpart D, §410.1309]

a. Proposed Rule § 410.1309

(a) *Unaccompanied children's access to immigration legal services* —(1) *Purpose.* This paragraph (a) describes ORR's responsibilities in relation to legal services for unaccompanied children, consistent with 8 U.S.C. 1232(c)(5).

(2) *Orientation.* An unaccompanied child in ORR's legal custody shall receive:

(i) An in-person, ~~telephonic, or video~~ presentation concerning the rights and responsibilities of undocumented children in the immigration system, presented in the language of the unaccompanied child and in an age-appropriate manner. **Telephonic and video presentations should be permitted only in rare circumstances when necessary to protect the health and/or wellness of children in ORR's care and custody.**

(A) Such presentation shall be provided by an independent legal service provider that has appropriate qualifications and experience, as determined by ORR, to provide such presentation and shall include information notifying the unaccompanied child of their legal rights and responsibilities, including protections under child labor laws, and of services to which they are entitled, including educational services. The presentation must be delivered in the language of the unaccompanied child and in an age-appropriate manner.

(B) Such presentation must occur within 10 business days of child's admission to ORR or within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care or ORR transitional home care), whichever is later, and every 6 months for unrepresented children who remain in ORR custody, as practicable. If the unaccompanied child is released before 10 business days, a legal service provider shall follow up as soon as practicable to complete the presentation, in person or remotely.

(ii) Information regarding the availability of free legal assistance and that they may be represented by counsel at no expense to the government.

(iii) Notification regarding the child's ability to petition for SIJ classification, to request that a juvenile court determine dependency or placement in accordance with § 410.1209 **if permitted by state law and local court practice**, and notification of the ability to apply for asylum or other forms of relief from removal.

(iv) Information regarding the unaccompanied child's right to a removal hearing before an immigration judge, the **possible** ability to apply for asylum with USCIS in the first instance, and the ability to request voluntary departure in lieu of removal.

(v) A confidential legal consultation with a qualified attorney (or ~~paralegal non-attorney staff~~ working under the direction of an attorney; or ~~EOIR DOJ~~ accredited representative) to determine possible forms of relief from removal in relation to the unaccompanied child's immigration case, as well as other case disposition options such as, but not limited to, voluntary departure. Such consultation shall occur within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care or ORR transitional home care) or **within 10 business days** upon request from ORR. ORR ~~shall~~ may request an additional legal consultation on behalf of a child, if the child has been identified as:

(A) A potential victim of a severe form of trafficking;

(B) Having been abused, abandoned, or neglected; or

(C) Having been the victim of a crime or domestic violence; or

(D) Persecuted or in fear of persecution due to race, religion, nationality, membership in a particular social group, or for a political opinion.

(vi) An unaccompanied child in ORR care shall be able to conduct private communications with their attorney of record, EOIR accredited representative, or **any staff from a** legal service provider in a private enclosed area that allows for confidentiality for in-person, virtual, ~~or~~ **and** telephone meetings.

Comment: ORR should require facilities to set aside sufficient space for attorneys to meet confidentially with their clients. We appreciate ORR's acknowledgement that communications and meetings between unaccompanied children and their attorneys must be held in enclosed designated spaces. We also applaud the proposed rule's provision on having private areas for confidential legal consultations. However, to ensure sufficient capacity, the proposed rule should further specify how many confidential rooms should be available at a site, depending on the number of children in custody. This is particularly important for large emergency facilities.

Many facilities do not have designated space for legal screenings and scramble at the last minute to find such space. Legal screenings therefore often take place in a variety of inappropriate spaces including:

- In the offices of facility staff who may need to enter the office during the screening to retrieve items.
- In children's bedrooms, where there is insufficient privacy due to the rooms having no doors.
- In spaces that are not quite confidential. For example, some facilities have plastic partitions to create rooms, but the partitions do not reach the ceiling and are thus not soundproof.
- In spaces where the television is on, or other noise makes it difficult for the child to hear and be heard.
- Rooms set aside for legal visits that are too small, in one instance the size of a telephone booth, making the visits physically difficult and uncomfortable.

To address these issues, ORR should provide clear guidelines to shelters about the number of appropriate confidential spaces for legal screenings and meetings needed based on facility capacity. Facilities with capacity for 100 children should have at least 3 designated, confidential meeting spaces available in order to provide timely screenings and other legal consultations. Facilities with capacity for up to 50 children should have at least 2 designated, confidential meeting spaces.

(3) *Accessibility of information.* In addition to the requirements in paragraphs (a)(1) and (2) of this section for orienting and informing unaccompanied children of their legal rights and access to services while in ORR care, ORR shall also require this information be posted for unaccompanied children in an age-appropriate format and translated into each child's preferred language, in any ORR contracted or grant-funded facility where unaccompanied children are in ORR care.

(4) *Direct immigration legal representation services for unaccompanied children currently or previously under ORR care.* To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR shall fund legal service providers to provide direct

immigration legal representation for certain unaccompanied children, subject to ORR's discretion and available appropriations. Examples of direct immigration legal representation include, but are not limited to:

Comment: ORR must commit to taking concrete steps toward fulfilling its mandate to provide unaccompanied children with legal representation to the greatest extent practicable. We applaud ORR's commitment to achieving universal representation for unaccompanied children. However, as drafted, the proposed rule falls short of ORR's mandate under the TVPRA to ensure to the greatest extent practicable representation for *all* unaccompanied children. The proposed rule should interpret the TVPRA's directive to make use of pro bono counsel as a directive to maximize and leverage resources, and not as a precondition or replacement to ORR funding of legal services for unaccompanied children. ORR should also increase capacity amongst private practitioners and LSPs to represent unaccompanied children by adequately and competitively compensating attorneys for their work. Ensuring counsel for unaccompanied child is particularly important as their cases last for years given existing adjudication backlogs with USCIS and the immigration courts.

The proposed rule incorporates and updates the requirement at ¶A.14, Exhibit 1 of the FSA that children in immigration custody be provided “[l]egal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the government, the right to a deportation or exclusion hearing before an immigration judge, the right to apply for political asylum or to request voluntary departure in lieu of deportation.”¹ This provision predates the TVPRA, which goes further and requires that HHS “shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that *all* unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.” 8 U.S.C. 1232(c)(5), emphasis added.

The proposed rule conditions ORR's compliance with this obligation on the availability of appropriations, ORR's discretion, and the practicability of securing pro bono counsel. *See Proposed § 410.1309(a)(4) (“To the extent that ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR shall fund legal service providers to provide direct immigration legal representation for certain unaccompanied children, subject to ORR's discretion and available appropriations.”* (emphasis added)). This misconstrues the TVPRA's directive on the use of pro bono counsel and thereby waters down the TVPRA's access to counsel provisions. In practice, this would require ORR to rule out the “practicability” of pro bono legal assistance before making ORR-

¹ *See Proposed Rule § 410.1302(c)(12)* (including among the services to be provided or arranged for each unaccompanied child in care “[l]egal services information regarding the availability of free legal assistance, and that they may be represented by counsel at no expense to the government, the right to a removal hearing before an immigration judge; the ability to apply for asylum with U.S. Citizenship and Immigration Services (USCIS) in the first instance, and the ability to request voluntary departure in lieu of removal.” This language reflects and updates in certain respects language from the FSA (Paragraph A.14, Exhibit 1). *See also* NPRM at p. 68949 & n. 121; Proposed Rule § 410.1309 (addressing legal services).

supported counsel available – a dramatic contraction, rather than expansion, of access to counsel for unaccompanied children. Instead, the rule must provide that ORR will make its best efforts to provide legal representation to every unaccompanied child and will seek sufficient discretionary appropriations from Congress to meet this mandate.

In addition to relying on pro bono attorneys, ORR should increase network capacity to represent unaccompanied children by ensuring that attorneys are compensated at reasonable and competitive rates in addition to relying on pro bono attorneys. One of the biggest obstacles to increasing network capacity to represent unaccompanied children is the lack of attorney capacity in the field. However, there are important steps ORR should take to increase attorney capacity to represent these cases.

Representation of unaccompanied children has largely been done by non-profit organizations (hereafter referred to as Legal Services Providers (LSPs), which have the specialized legal knowledge and managerial experience to staff and supervise these cases. Pro bono attorneys mentored by such LSPs can augment representation capacity, provided there is the necessary support and funding for recruitment, training, and ongoing mentorship. However, LSPs are at or near capacity and are thus unable to meet the goal of providing representation, even with the use of pro bono attorneys, for all unaccompanied children.

Over the last few years, smaller firms and solo practitioners have also taken on unaccompanied children's cases through ORR's legal representation contracts and have potential to further increase network capacity. But recruiting solo practitioners and small firms to the representation network is challenging due to the disparity between the hourly rates that are available under the existing ORR contract and the hourly rates available in the private sector. For this reason, in addition to supporting pro bono models, ORR should prioritize compensating attorneys for unaccompanied children at reasonable, competitive rates.

Many removal defense attorneys consider positions with local and federal public defender offices, and, therefore, use compensation rates in those practice areas as points of comparison. Federal public defenders and other public defenders are paid much higher salaries than attorneys at immigration non-profit organizations. Likewise, solo practitioners and small firms often operate much smaller practices with higher overhead and more experienced personnel, requiring minimum rates that are higher than the current ORR rates. In addition, it can be hard to recruit new LSPs to join the network because of staffing shortages. There are often a limited number of qualified practitioners in the field after decades of underfunding/no funding to support nonprofit organizations doing this work. The system, as it currently operates, is unsustainable.

ORR should contract with unaccompanied children attorneys at reasonable, competitive rates. This will increase the number of small firms and solo practitioners who are interested in representing unaccompanied children and ensure that LSPs are adequately funded and can adjust salaries accordingly, leading to longer-term retention of non-profit attorneys. In addition, ORR should invest in continuous training for attorneys and prioritize keeping caseloads at a reasonable level to decrease burnout and retain attorneys in the field longer term.²

² We propose that a "reasonable caseload" is approximately 25 active cases per attorney.

ORR should include up to date CBP and ORR referral data into grantmaking to prevent gaps in the assessed numbers of children in need of legal assistance by state. Provisions of the proposed rule authorizing grants to legal services providers state that “[s]ubject to the availability of funds, grants or contracts shall be calculated based on the historic proportion of the unaccompanied child population in the State within a lookback period determined by the Director, provided annually by the State.” The number of unaccompanied children in need of legal assistance and released in a given locality is intrinsically linked to the number of children arriving to the U.S. and referred to ORR’s care each year. Historic statistics may not reflect current representational needs and will likely fail to account for shifts over time in the proportions of children released from ORR care to states and localities. By permitting the Director to determine the "lookback period," the proposed rule could leave out thousands of unaccompanied children released within any given year(s) who never secured legal representation yet remain in removal proceedings. To ensure that longstanding gaps in representation are not perpetuated, we recommend that ORR be required to factor up to date CBP and ORR referral data into grantmaking to remain ahead of, rather than behind, any changes in systemic needs.

(i) For unrepresented unaccompanied children who become enrolled in ORR Unaccompanied Refugee Minor (URM) programs, provided they have not yet obtained immigration relief ~~or reached 18 years of age at the time of retention of an attorney;~~

Comment: ORR should not limit representation of children in URM custody to those children who have not yet turned 18. ORR should allow representation to be initiated after an unaccompanied child in URM custody turns 18. There are many reasons why a child might not obtain counsel until they are 18. For example, children may be released from ORR custody to URM on their 18th birthday or shortly before, making it impossible for them to find counsel before they turn 18. In addition, there may not be capacity for LSPs to serve a child close to her 18th birthday or the child will be on a waitlist and turn 18. Moreover, indigenous language speakers have greater challenges in communicating with LSPs, leading to delays in accessing counsel. Finally, children who have experienced trauma may take longer to seek counsel, or they may be in situations of abuse or exploitation and not independent until they turn 18. As these examples illustrate, many vulnerable youth are being left out of services based on this restriction.

Many unaccompanied immigrant youth between 18 and 21 years of age face circumstances identical to those faced by their younger counterparts. Language in California’s AB 900 is instructive:

Given the recent influx of unaccompanied immigrant children arriving to the United States, many of whom have been released to family members and other adults in California and have experienced parental abuse, neglect, or abandonment, it is necessary to provide an avenue for these unaccompanied children to petition the probate courts to have a guardian of the person appointed beyond reaching 18 years of age. This is particularly necessary in light of the vulnerability of this class of unaccompanied youth, and their need for a custodial relationship with a responsible adult as they adjust to a new cultural context, language, and education system, and recover from the trauma of abuse, neglect, or abandonment. These custodial arrangements promote permanency, and the long-term well-being of immigrant children present in the United States who have experienced abuse, neglect, or abandonment. See [AB 900 Assembly Bill – CHAPTERED \(ca.gov\)](#)

AB 900 also has language defining 18 to 20 year olds as minors in California: “For purposes of this division, the terms ‘child,’ ‘minor,’ and ‘ward’ include an unmarried individual who is younger than 21 years of age and who, pursuant to this section, consents to the appointment of a guardian or extension of a guardianship after he or she attains 18 years of age.”³

The United States has historically been inconsistent when it comes to deciding what young adults are allowed and not allowed to do. While many states recognize the age of minority until the age of 18, in Alabama and Nebraska the age of majority is 19 years old and in Mississippi it is 21 years old. The minimum legal age to drink alcohol and use tobacco products in the United States is 21. At the very least, ORR should treat obtaining an attorney as important as preventing young people from drinking and smoking and allow unaccompanied children in URM custody to obtain lawyers until the age of 21.

Allowing unaccompanied children to obtain attorneys after the age of 18 is also consistent with a growing body of neuroscientific research which strongly suggests that teenagers and young adults do not have fully developed brains. The prefrontal cortex, the part of the brain we utilize for impulse control, emotional reactions, executive functioning, and decision making, is the last part of the brain to develop, and continues to develop well into a person’s twenties.

In addition, the Federal Sentencing commission has defined youthful offenders as those who are 25 years old or younger at the time of sentencing. This is based on “recent case law and neuroscience research in which there is growing recognition that people may not gain full reasoning skills and abilities until they reach age 25 on average.”⁴

In light of the research on brain development and other areas of the law that recognize minority continuing past the age of 18, ORR should allow unaccompanied children in URM custody to obtain a lawyer until the age of 25, or at the very least until the age of 21.

(ii) For unaccompanied children in ORR care who are in proceedings before the Executive Office for Immigration Review (EOIR), including unaccompanied children seeking voluntary departure **who may not yet be in proceedings before EOIR**, and for whom other available assistance does not satisfy the legal needs of the individual child;

(iii) For unaccompanied children released to a sponsor residing in the defined service area of the same legal service provider who provided the child legal services in ORR care, to promote continuity of legal services; and

(iv) For other unaccompanied children, to the extent ORR determines that appropriations are available.

(b) *Legal services for the protection of unaccompanied children's interests in certain matters not involving direct immigration representation* —(1) *Purpose*. This paragraph (b) provides for the use of additional funding for legal services, to the extent that ORR determines it to be available, to help ensure

³ [AB 900 Assembly Bill – CHAPTERED \(ca.gov\)](#).

⁴ Youthful offenders in the Federal System, United States Sentencing Commission, May 2017 at 5, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf.

that the interests of unaccompanied children are considered in certain matters relating to their care and custody, to the greatest extent practicable.

Comment: The proposed rule creates distinct funding categories—one for direct immigration legal representation and the other for “matters not involving direct immigration representation.” However, creating separate categories of representation could de-prioritize funding for matters listed in proposed rule at § 410.1309(b) and create confusion and inefficiencies for the delivery of legal services, especially because in many cases, the matters listed are inextricably linked to the child’s legal immigration case. For example, prolonged custody or out of network placements can have a direct impact on a child’s immigration legal case. The exacerbation of trauma symptoms, detention fatigue, and/or the conditions of restrictive and out-of-network placements can impact a child’s ability to meaningfully participate in their own immigration case. But it is included in the proposed rule within the category for “certain matters not involving direct immigration representation.” Under the proposed rule “helping an unaccompanied child to obtain an employment authorization document”—a permit provided through USCIS—also falls within this category. Yet applications for an EAD are often predicated on, and in some cases may be filed simultaneously with, the child’s application for legal relief. EADs are often used not only as a vital form of identification but to aid older youth in avoiding exploitative situations and accessing safe, lawful employment. The potential de-prioritization of funding for such services would create unnecessary inefficiencies, exacerbate the vulnerability of unaccompanied children, and work at cross-purposes with ORR’s efforts to prevent child labor exploitation and the TVPRA’s directive that ORR provide “counsel to represent [children] in legal proceedings or matters and *protect them from mistreatment, exploitation, and trafficking.*”(emphasis added). Funding for representation in those matters should therefore not be categorized separately, which might contribute to their de-prioritization.

To help prevent or reduce the likelihood of the zeroing-out of funding for legal representation, while also ensuring sufficient funding for capacity to address influxes, ORR should advocate for sufficient appropriations to ensure adequate funding for legal representation of unaccompanied children. Another suggestion is for ORR to partner with the private sector to sponsor the salaries of LSP attorneys to meet this expanded mandate. ORR could also partner with law firms to lend attorneys to an LSP for at least one year or more at a time, allowing attorneys to gain litigation experience and client communication skills while also providing a much-needed resource to the LSPs.

(2) *Funding.* To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR may fund access to counsel for unaccompanied children, including for purposes of legal representation, in the following enumerated non-immigration related matters, ~~subject to ORR's discretion and~~ in no particular order of priority:

Comment: We commend proposed rule § 410.1309(b)’s addition of funded legal representation in ORR appellate matters including the Placement Review Panel related to placement in restrictive facilities, risk determination hearings, and the denial of a release to the child’s parent or legal guardian. We also applaud the language to provide funding to represent children in matters including state juvenile court proceedings.

- (i) ORR appellate procedures, including Placement Review Panel (PRP), under § 410.1902, and risk determination hearings, under § 410.1903;
- (ii) For unaccompanied children upon their placement in ORR long-term home care or in a residential treatment center outside a licensed ORR facility, and for whom other legal assistance does not satisfy the legal needs of the individual child;
- (iii) For unaccompanied children with no identified sponsor who are unable to be placed in ORR long-term home care or ORR transitional home care;
- (iv) For purposes of judicial bypass or similar legal processes as necessary to enable an unaccompanied child to access certain lawful medical procedures that require the consent of the parent or legal guardian under State law, and when the unaccompanied child is unable or unwilling to obtain such consent;
- (v) For the purpose of representing an unaccompanied child in state juvenile court proceedings, ~~when the unaccompanied child already possesses SIJ classification;~~ and
- (vi) For the purpose of helping an unaccompanied child to obtain an employment authorization document **should a child be eligible for one.**

(c) *Standards for legal services for unaccompanied children.* (1) In-person meetings are preferred during the course of providing legal counsel to any unaccompanied child under paragraph (a) or (b) of this section, though telephonic or teleconference meetings between the unaccompanied child's attorney or ~~EOIR~~-accredited representative and the unaccompanied child may substitute as appropriate. Either the unaccompanied child's attorney, ~~EOIR~~-accredited representative, or a care provider staff member or care provider shall always accompany the unaccompanied child to any in-person courtroom hearing or proceeding, in connection with any legal representation of an unaccompanied child pursuant to this section. **At the request of a child and/or their legal representative, the care provider staff member or care provider should not be present during an actual courtroom hearing or proceeding, in-person or virtual.**

(2) Information and notice shared with an unaccompanied child's attorney or ~~EOIR~~-accredited representative. Upon receipt by ORR of proof of representation and authorization for release of records signed by the unaccompanied child or other authorized representative, ORR shall share, upon request **and promptly**, the unaccompanied child's complete case file apart from any legally required redactions to assist in the legal representation of the unaccompanied child.

Comment: ORR should ensure that all information in its possession is shared with the unaccompanied child's representative. ORR should disclose all information in its possession to the attorney for the unaccompanied child, including but not limited to:

- All interactions with law enforcement, including events where the child is the alleged victim, alleged perpetrator, or a witness.
- All allegations or accusations of sexual abuse or harassment.
- Any information that will or can be shared with enforcement agencies including local, state, and federal law enforcement, as well as DHS

All interactions with law enforcement or allegations of abuse and harassment should be shared with counsel for the child because they will likely be relevant to the child's immigration relief, potentially making a child eligible or ineligible for relief or impacting their ability to be released from custody or placed in a less restrictive setting. To the extent privacy concerns are an issue, documents could be turned over under protective order. In addition, there could be certain circumstances where particularly sensitive evidence, such as in a sexual abuse case, be maintained in the custody of ORR or the care provider where the attorney could arrange to view the evidence and take notes, but not take physical possession of the evidence. Documents and other information regarding contact with law enforcement or allegations of abuse and harassment should be turned over without delay, and not more than 30 days after the incident, or in the case of investigations or reports, 30 days after the creation of the document.

Additionally, section 410.1309(c)(2) provides for ORR's sharing of a child's complete case file (except legally required redactions), on request and receipt of proof of representation and a signed authorization for release of records. This section should be harmonized with current ORR policy permitting care providers to share certain information directly with the child's attorneys if the child permits and it relates to the child's legal case.

(d) *Grants or contracts for unaccompanied children's immigration legal services.* (1) This paragraph (d) prescribes requirements concerning grants or contracts to legal service providers to ensure that all unaccompanied children who are or have been in ORR care have access to counsel to represent them in immigration legal proceedings or matters and to protect them from mistreatment, exploitation and trafficking, to the greatest extent practicable, in accordance with the TVPRA [at 8 U.S.C. 1232(c)(5)] and 292 of the Immigration and Nationality Act [at 8 U.S.C. 1362].

(2) ORR may make grants, in its discretion and subject to available resources—including formula grants distributed geographically in proportion to the population of released unaccompanied children—or contracts under this section to qualified agencies or organizations, as determined by ORR and in accordance with the eligibility requirements outlined in the authorizing statute, for the purpose of providing immigration legal representation, assistance and related services to unaccompanied children who are in ORR care, or who have been released from ORR care and living in a State or region.

(3) Subject to the availability of funds, grants or contracts shall be calculated based on the historic proportion of the unaccompanied child population in the State within a lookback period determined by the Director, provided annually by the State.

(e) *Non-retaliation against legal service providers.* ORR shall presume that legal service providers are acting in good faith with respect to their advocacy on behalf of unaccompanied children and ORR shall not retaliate against a legal service provider for actions taken within the scope of the legal service providers' responsibilities. For example, ORR shall not engage in retaliatory actions against legal service providers or any other representative for reporting harm or misconduct on behalf of an unaccompanied child.

4. Transportation of an unaccompanied child in ORR's care [Subpart E, § 410.1401]

a. Proposed Rule § 410.1401

(a) ORR care provider facilities shall transport an unaccompanied child in a manner that is appropriate to the child's age and physical and mental needs, including proper use of car seats for young children, and consistent with § 410.1304.

Comment: Provisions in the Proposed Rule related to transportation of unaccompanied children (§ 410.1401; § 410.1304) pose concerning implications for children and their ability to fairly access legal protection. Although the Proposed Rule requires transport of children by ORR to be consistent with the child's needs and with behavior management strategies generally prohibiting use of restraints, it permits broad discretion to ORR's secure programs to restrain children "for their own immediate safety or that of others" when traveling to immigration court or an asylum interview, or during these proceedings if the facility determines the child "exhibits imminent runaway behavior, makes violent threats, demonstrates violent behavior, or if the secure facility has made an individualized determination that the child poses a serious risk of violence or running away if the child is unrestrained in court or the interview." Notice at 68992. These provisions notably lack specificity about the child welfare qualifications of staff making these consequential decisions, and about the showing required for them. Accordingly, they raise a risk of harmful and unnecessary use of restraints where more trauma-sensitive approaches are not only available but imperative.

Many unaccompanied children arrive to the U.S. seeking protection from severe violence and other harm in their country of origin. Obtaining legal relief requires children to navigate complex processes, appear in court or other formal settings, and be questioned by unfamiliar adjudicators about painful experiences central to their legal claims. Children understandably experience significant fear or worry as they approach court hearings or asylum interviews, which will have profound consequences for a child's future and safety. Some children remain in ORR custody during this time, at a distance from family or friends who may be able to provide comfort or support; unpredictable scheduling may further exacerbate anxiety.

It is essential that ORR appropriately address behaviors that could be indicative of trauma, mental health needs, or disability through trauma-informed care and services rather than unnecessary or habitual use of restraints.⁵ This includes instances in which a child may exhibit or threaten violent or runaway behavior around the time of immigration proceedings. Inappropriate use of restraints at this vulnerable stage not only poses serious risk of harm and re-traumatization for children, but can also negatively impact the child's legal case by interfering with their ability to participate in proceedings and potentially biasing adjudicators against them. Holistically and proactively addressing children's needs throughout their time in care may reduce distress and behaviors that appear unsafe or otherwise prompt concerns for ORR staff.⁶ When situations do arise, care providers should consult with ORR, mental health professionals, child advocates, and attorneys or legal services providers working with the child to develop responses informed by the context in which behavior may be arising and consistent with the child's best interests. Use of restraints should not be permitted absent a particularized showing as to why the transport or proceeding cannot be accomplished without the use of a restraint, with due consideration to the attendant risks to due process and to the child's well-being. Decisions should be made by individuals with appropriate child welfare expertise and training and require, for example, a determination by a licensed

⁵ See Young Center for Immigrant Children's Rights & National Immigrant Justice Center, Punishing Trauma: Incident Reporting and Immigrant Children in Government Custody (Sept. 2022) at 22.

⁶ *Id.*

psychologist or psychiatrist that the child poses risk of danger to self or others *unless* restrained for a court hearing, asylum interview, or transportation. Such determinations should include confirmation that alternatives have been actively considered.

Additional safeguards from ORR Policy Guide Sections [3.3.17](#) and [3.3.18](#) should be incorporated in the Proposed Rule to ensure due process and protect children’s rights, among them notifying ORR, the child, and the legal services provider when restraints are being considered for court appearances or asylum interviews; coordinating with children and their legal representatives if assistance is requested to reschedule hearings or interviews or for other accommodations; and documenting any use of restraints.

Facilitating prompt reunification and other safety considerations

Importantly, the Proposed Rule codifies ORR’s ability to help pay for a child’s or sponsor’s travel to facilitate timely release.⁷ This provision, rooted in the *Flores* Settlement, can prevent prolonged and unnecessary detention of children and delays in reunification with family and also reduce economic hardship for sponsors caring for unaccompanied children. Building upon this, we urge ORR to add language requiring ORR to promptly make arrangements for transporting the child to the ORR care provider or ORR facility nearest to the location of the child’s sponsor. This provision is necessary in order to implement language in Paragraph 26 of the *Flores* Settlement, which remains an essential component of facilitating prompt release and reunification.⁸ Additionally, we recommend that the regulations permit sponsor reunification at an alternative location identified by the sponsor if necessary to prevent delays in reunification. Such location shall not, however, include a DHS field office or location, unless determined by the child and their legal representative to be consistent with the child’s best interests.

We further urge the inclusion of language generally restricting ORR from transporting unaccompanied children in vehicles with detained adults, with limited exceptions.⁵ Although this *Flores* provision primarily referred to initial apprehension, and ORR does not detain adults, there may be cases in which providers with which ORR contracts may transport various populations. These safeguards are important to protect children who may travel to immigration proceedings, medical or other appointments, or to other locations to reunify with a sponsor. It is imperative, however, that any language added recognize limited and unique circumstances in which detained adults and children may be transported together to uphold the child’s best interests, such as cases in which transport is approved to reunify a separated child with parents or legal guardians being released from CBP or ICE custody, or to facilitate joint release of a

⁷ Proposed § 410.1401(b) (“In its discretion, ORR may request the care provider facility to transport an unaccompanied child. In these circumstances, ORR may, in its discretion, reimburse the care provider facility or directly pay for the child and/ or sponsor’s transportation, as appropriate, to facilitate timely release.”).

⁸ Applicable to the INS prior to the transfer of responsibilities for care and placement of unaccompanied to ORR pursuant to the Homeland Security Act of 2002, Paragraph 26 of the *Flores* Settlement Agreement provides: “The INS shall assist without undue delay in making transportation arrangements to the INS office nearest the location of the person or facility to whom a minor is to be released pursuant to Paragraph 14. The INS may, in its discretion, provide transportation to minors.”

child and an accompanying family member from CBP custody together where ORR has vetted and approved the family member as a sponsor.

We also support the inclusion of additional safeguards to protect children during transport. These include potentially equipping vehicles transporting unaccompanied children with GPS capability to enable facilities to track the vehicle and directing that more than one staff person accompany the child during transport, in addition to the requirement of one transport staff of the same gender. We further recommend that a child's attorney of record be notified of the transport schedule and that ORR ensure the ability of the child to communicate with their attorney or legal representative. This safeguard is critical to protect the child's wellbeing, including in the event of significant transportation delays, as have occurred during repatriation.

6. Best Interest of the Child [Proposed Rule Subpart A, § 410.1001]

a. Proposed rule: § 410.1001 Best Interest of the child

Comment: The definition of the “best interest” standard in § 410.1001 includes many positive components, and it should be strengthened and clarified to be consistent with the “best interests of the child” standard established in the Convention on the Rights of the Child⁹ and the Subcommittee on Best Interests of the Interagency Working Group on Unaccompanied and Separated Children’s Framework for Considering the Best Interests of Unaccompanied Children (hereinafter “Best Interests Framework”)¹⁰, a document created with input from ORR officials. To effectuate meaningful consideration of children’s best interests—specifically, their expressed wishes, their safety, and their rights to family integrity, liberty, development, and identity—we urge the agency to modify its proposed rule as follows. A detailed analysis of the changes proposed below can be found in our public comment on [Reunification and Release](#).

Recommendation § 410.1001: *Best interest* is a standard ORR applies in determining the types of decisions and actions it makes in relation to the care **[ADD]: and release** of an unaccompanied child. When evaluating what is in a child’s best interests, ORR considers, as appropriate, the following non exhaustive list of factors: the unaccompanied child’s expressed interests, in accordance with the unaccompanied child’s age and maturity; the unaccompanied child’s **[ADD] safety**, mental, and physical health **[ADD]** and the impact of federal custody on those factors; the wishes of the unaccompanied child’s parents or legal guardians; family integrity and the ~~intimacy of~~ **[ADD] existence of** relationship(s) between the unaccompanied child and the child’s family, including the interactions and interrelationship of the unaccompanied child with the

⁹ Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3; Comm. on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), ¶ 76, U.N. Doc. CRC/C/GC/14 (May 29, 2013).

¹⁰ Subcomm. on Best Interests, Interagency Working Grp. on Unaccompanied and Separated Children, Framework for Considering the Best Interests of Unaccompanied Children 5 (2016) (confirming that “the most widely accepted elements of best interests include: safety and well-being; the child’s expressed interests, in accordance with the child’s age and maturity; health; family integrity; liberty; development (including education); and identity) (internal citations omitted).

child’s parents, siblings, and any other person who may significantly affect the unaccompanied child’s well-being; ~~adjustment to the community~~; the unaccompanied child’s cultural background and primary language; ~~length or lack of time the unaccompanied child has lived in a stable environment~~; individualized needs, including any needs related to the unaccompanied child’s disability; ~~and the unaccompanied child’s development and identity~~ **[ADD] and the child’s identity including but not limited to the child’s race, religion, ethnicity, sexual orientation, and gender identity; and any best interests determination(s) submitted by the independent Child Advocate.**

7. Child Advocates [Proposed Rule §410.1308, Subpart D - Minimum Standards and Required Services]

a. Proposed Rule § 410.1308 (b)

(a) *Child advocates.* This section sets forth the provisions relating to the appointment and responsibilities of independent Child Advocates for child trafficking victims and other especially vulnerable unaccompanied children.

Comment: As set forth in the Trafficking Victims Protection Reauthorization Act of 2008, at 8 U.S.C. 1232(c)(6), the role of the Child Advocate is to identify and advocate for the best interests of particularly vulnerable unaccompanied children. Their independence from other service providers and stakeholders is so critical that it was included in the statute authorizing their appointment; for that reason, we have recommended changes to the proposed language to ensure this independence. Additionally, building on best practices in child-centered advocacy, we have recommended changes that ensure best interests determinations (BIDs) are informed by trusted adults in children’s lives. Finally, consistent with both the 2016 *Subcommittee on Best Interests of the Interagency Working Group on Unaccompanied and Separated Children’s Framework for Considering the Best Interests of Unaccompanied Children* (hereinafter “*Interagency Best Interests Framework*”) and the 2018 *American Bar Association Commission on Immigration’s Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States* (hereinafter “*ABA Standards*”), “each government actor shall consider a child’s best interests as part of each decision along the continuum of a child’s care—from apprehension, to custody, to release, and to a decision on the Child’s legal claim, including the possibility of repatriation.” (ABA Standards, VI, p. 22; Interagency Best Interests Framework p. 6).

Recommendation § 410.1308 (b): Role of the Child advocate. Child advocates are ~~third~~ **independent** parties who make ~~independent recommendations~~ **determinations** regarding the best interests of an unaccompanied child (BIDs). Their ~~recommendations~~ **BIDs** are based on information obtained from the unaccompanied child and other sources (including, but not limited to, the unaccompanied child’s parents, ~~the family~~ **and community members**, potential sponsors/sponsors, government agencies, legal service providers, protection and advocacy system representatives ~~in appropriate cases~~, representatives of the

unaccompanied child's care provider, health professionals, and others). Child advocates ~~formally~~ submit their ~~recommendations~~ BIDs to ORR, ~~and/or~~ the immigration court, **asylum officers and other DHS officials, state court judges, attorneys or prospective attorneys, and/or other decision-makers** where appropriate, in the form of best interest determinations (BIDs).

b. Proposed Rule § 410.1308 (c)

Comment: Consistent with nearly 20 years of work by Child Advocates and as set forth in both the ABA Standards and the Interagency Best Interests Framework, we have recommended changes that reflect the Child Advocates' obligation to submit BIDs to any official or agency that has the power to make decisions about a child.

Recommendation: (c) *Responsibilities of the child advocate.* The child advocate's responsibilities include, but are not limited to:

- (1) Visiting with ~~their~~ unaccompanied child **ren to whom they are appointed** ~~clients~~;
- (2) Explaining the consequences and potential outcomes of decisions that may affect ~~their~~ **the** unaccompanied child;
- (3) Advocating for ~~their~~ **the** unaccompanied child's ~~client's~~ best interests with respect to care, placement, services, **reunification or** release, and within proceedings to which the child is a party **including but not limited to the child's application for relief from removal or a potential order of removal**;
- (4) Providing best interests determinations (**BIDs**), where **necessary to advance the child's rights and best interests** ~~appropriate~~ and within a reasonable time to ORR, an immigration court, **asylum officer, state court judge**, and/or other stakeholders involved in a proceeding or matter in which the unaccompanied child is a party or has an interest; and,
- (5) Regularly communicating ~~ease~~ **updates** with the care provider facility, ORR, and/or other stakeholders in the planning and performance of advocacy efforts, ~~including updates related to services provided to an unaccompanied child after their release from ORR care.~~ [If the agency will not strike this language, we propose in the alternative: "including updates related to **advocacy** on behalf of an unaccompanied child after their release from ORR care **upon request by the agency.**"]

c. Proposed Rule § 410.1308 (d)

Comment: Because ORR holds the authority to appoint Child Advocates, the agency automatically receives notification of referrals when the Child Advocate contractor has capacity to accept a referral and requests appointment. As drafted, the proposed regulation would require the creation of an unnecessarily duplicative and time-consuming system for an interested stakeholder to notify ORR before submitting the referral to the Child Advocate contractor. In addition to the cost and time required to add another step to this process, the additional step could delay the appointment of Child Advocates in time-sensitive cases, resulting in unnecessary harm to the child—for example, delayed release from custody and reunification with family, or transfer to adult jail for a child turning 18, or an opportunity to safely repatriate when a child wishes to return to home country. Adding unnecessary steps to the appointment process risks delaying the ability of all decision makers, within and outside of ORR, to consider BIDs focused on children's best interests.

We recommend maintaining the current system in which the child advocate contractor submits referrals to ORR, recommending appointment or declining to recommend appointment. In that way, ORR will continue to be notified of all referrals without creating a second and redundant notification system. Additionally, consistent with longstanding practice, anyone concerned for the best interests of a child may submit a referral for appointment, including but not limited to other children in custody, children's family members or proposed sponsors, consular officials and/or community-based organizations.

Recommendation: (d) *Appointment of child advocates.* "ORR may appoint child advocates for unaccompanied children who are victims of trafficking or especially vulnerable.

(1) An interested party may refer an unaccompanied child to ORR for a child advocate after notifying ORR that for a particular unaccompanied child who is currently in or was previously in, ORR's care and custody, is a victim of trafficking or is especially vulnerable. As used in this paragraph (d)(1), *interested parties* means individuals or organizations involved in the care, service, or proceeding involving an unaccompanied child, including but not limited to, ORR Federal or contracted staff; an immigration judge; DHS Staff; a legal service provider, attorney of record, or EOIR accredited representative; an ORR care provider; healthcare professional; ~~or~~ a child advocate organization; **a child's family member or proposed sponsor(s) or another unaccompanied child; consular officials; or community-based organizations serving the child or child's family..**"

d. Proposed Rule § 410.1308 (d)(2)

Comment: There is no need to constrain the appointment of Child Advocates to children who have been in ORR custody. The statute says child trafficking victims (survivors) and other vulnerable unaccompanied children, and does not add this limitation. Permitting the appointment of Child Advocates to children who were not transferred to ORR custody, and/or to children who were only briefly in ORR custody along the border before their release and immediate reunification with accompanying adult family members (commonly referred to as Category Two sponsors), may assist in limiting the number of children unnecessarily transferred to ORR custody when it is not in the child's best interests and when that transfer could result in significant expense to the government.

Recommendation: (2) ORR shall make an appointment decision within five (5) business days of a referral for a child advocate, except under exceptional circumstances which **require faster appointment or which** may delay a decision regarding an appointment. ORR will appoint child advocates for unaccompanied children who are currently in or were previously in ORR care and custody **and in some limited cases, unaccompanied children who were not in ORR care or custody.** ~~ORR does not appoint child advocates for unaccompanied children who are not in or were not previously in ORR care and custody.~~

e. Proposed Rule § 410.1308 (d)(3)

Comment: In accordance with long-standing practice, Child Advocates continue accompaniment and advocacy for certain youth after they turn 18, either because there is a dispute about the age of the young person or because the government's actions or inactions have put the 18-year-old in a particularly

dangerous situation, such as adult detention or homelessness. Despite continuing with these cases, the Child Advocate program maintains an obligation to take on new cases consistent with its contract.

Recommendation: Recommendation: (3) Child advocate appointments terminate upon the closure of the unaccompanied child's case by the child advocate **contractor, when the unaccompanied child turns 18; or when the unaccompanied child obtains lawful immigration status and is safely in the care of an adult or other safe entity.**

f. Proposed Rule § 410.1308 (e)

Comment: Consistent with the statute authorizing the appointment of Child Advocates and with practices carefully negotiated with ORR over the last two decades, Child Advocates must have prompt access to all information in a child's case. Timeliness is particularly critical; this includes advance notice—with time to advocate—before a child is transferred over their objection or transferred (“stepped up”) to a more restrictive facility, including to residential treatment centers (RTCs).

Recommendation: (e) *Child advocate's access to information.* 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.

g. Proposed Rule § 410.1308 (f)

Comment: The role of the independent Child Advocate is to advocate for the best interests of the child through best interests determinations (BIDs) submitted to decision-makers in the child's case. Decisionmakers include but are not limited to ORR grantees, contractors, and federal staff. For example, Child Advocates routinely provide BIDs that include information from children's files to state courts for children seeking dependency or custody orders as part of the process of seeking Special Immigrant Juvenile Status. Child Advocates also provide BIDs that include information from children's files to federal courts reviewing Hague Convention or habeas claims. Sharing information from the child's file is particularly important for conducting in-country safety assessments, which are provided by Child Advocates at no expense to the government as part of fact-gathering necessary to determine a child's best interests. Child Advocates also provide BIDs with information from children's files to attorneys considering representation of children or children's family members, when that representation has been determined to be in a child's best interests.

As drafted the rule would eviscerate the Child Advocate's ability to advocate for the child, in violation of guidance set forth by both the ABA Standards, which requires the Child Advocate to “keep communications with the Child confidential except where the Child Advocate determines that the sharing of information is required to ensure the Child's safety or to otherwise serve the Child's Best Interests” (at

Section VI, 6, emphasis added). In all of the situations noted above, the Child Advocate only discloses information with the child's consent; or if the child lacks capacity to consent, after a determination that disclosure is in the child's best interests; or when it is necessary to protect the child's safety.

Moreover, as written, the regulation incorrectly assumes that the federal government owns and controls all information about the child. 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. In permitting children to request copies of their ORR files after their release, the government has implicitly acknowledged that children have a right to the information in their case files, to use as they need. This right does not hinge on whether the child is detained or released. Rather, the information can and should be used to advance the child's rights and best interests with the child's consent, or when a Child Advocate has conducted a BID and determined that disclosure of information is in a child's best interests. State laws governing children in dependency or custody proceedings similarly permit children and their families to access information in their case files and use it for their own purposes without regard to whether the child is in state custody. (*See, e.g.*, 55 PA Code Sec. 3130.44.)

Recommendation: (f) *Child advocate's responsibility with respect to confidentiality of information.* 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.

h. Proposed Rule § 410.1308 (g)

Comment: The role of the independent Child Advocate is to identify and advocate for the best interests of children with any agency or official that is making decisions about the child. Child Advocates frequently advocate with ORR, which makes countless decisions about children in custody, from placement to services to release and reunification. However, pursuant to the TVPRA, ORR is also the agency delegated the power by the Secretary of Health and Human Services to appoint Child Advocates. As a result, Child Advocates often advocate with or challenge the decisions of the very agency that has the power to appoint them. We appreciate the agency's inclusion of language prohibiting retaliation but believe this language needs to be strengthened to be consistent with laws prohibiting retaliation.

Recommendation: (g) *Non-retaliation against child advocates.* ORR shall presume that Child Advocates are acting in good faith with respect to their advocacy on behalf of unaccompanied children, and shall not retaliate against a Child Advocate for actions taken within the scope of their responsibilities. For example, ORR shall not retaliate against Child Advocates because of any disagreement with a best interests determination in regard to an unaccompanied child, or because of a Child Advocate's advocacy on behalf of an unaccompanied child. **Consistent with other areas of federal law, retaliation includes any adverse action impacting the Child Advocate's ability to fulfill their role, including but not limited to terminating or failing to renew the Child Advocate contract; limiting Child Advocate's**

access to children or facilities or information in children’s cases; failing to refer eligible children for the appointment of a Child Advocate; limiting or controlling referrals from other stakeholders; and declining to appoint Child Advocates when appointment is requested by the Child Advocate contractor.

8. Recommendation to Add Regulations Requiring ORR to Promptly Provide Children’s Attorneys and Child Advocates with Family Separation Information

Comment: Under the Settlement Agreement in *Ms. L v. ICE*, which has been preliminarily approved by the court, in cases where the federal government has separated a parent and child who traveled together, the federal government must provide ORR with information regarding the separation at the time of the child’s transfer to ORR custody.¹¹ This information includes information regarding the government’s reason for separation and the location and contact information for the parent or legal guardian.¹² ORR is then required to provide this information, within three business days, to the facility where the child is being held, the child’s attorney of record and/or accredited representative, and to any appointed Child Advocate.¹³ ORR should codify this legal obligation in the regulations to ensure that separated children’s advocates are promptly provided with the information they need to effectively advocate for them and to facilitate prompt reunification of the child with their parent whenever possible.

It is absolutely critical that advocates for separated children in ORR custody have access to all available information regarding the government’s separation of the child from their parent. The chaos and harm to families caused by the government’s systemic failure to document and track this information during the Trump Administration’s Zero Tolerance policies illustrates the potentially profound consequences when this information is not shared with parents, children, and their advocates. As the court in *Ms. L* found:

[T]he practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence. This is a startling reality. The government readily keeps track of personal property of detainees in criminal and immigration proceedings...Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*. Certainly, that cannot satisfy the requirements of due process.¹⁴

¹¹ Proposed Settlement Agreement, *Ms. L v. ICE*, Case No. 18-cv-00428 (S.D. Cal. Oct. 16, 2023), ECF No. 711-1, p. 30; Order Granting Preliminary Approval of Proposed Settlement; Preliminarily Certifying Settlement Classes; Approving Class Notice, *Ms. L v. ICE*, Case No. 18-cv-00428 (S.D. Cal. Oct. 24, 2023), ECF No. 717.

¹² Proposed Settlement Agreement, *Ms. L v. ICE*, Case No. 18-cv-00428 (S.D. Cal. Oct. 16, 2023), ECF No. 711-1, p. 30.

¹³ *Id.*

¹⁴ *Ms. L v. ICE*, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018).

The *Ms. L* court specifically noted the “profoundly negative effect on the parents’ criminal and immigration proceedings, as well as the childrens’ (sic) immigration proceedings” caused by the government’s systemic failures:

In effect, these parents have been left “in a vacuum, without knowledge of the well-being and location of their children, to say nothing of the immigration proceedings in which those minor children find themselves.” This situation may result in a number of different scenarios, all of which are negative – some profoundly so. For example, “[i]f parent and child are asserting or intending to assert an asylum claim, that child may be navigating those legal waters without the benefit of communication with and assistance from her parent; that defendant, too, must make a decision on his criminal case with total uncertainty about this issue.” Furthermore, “a defendant facing certain deportation would be unlikely to know whether he might be deported before, simultaneous to, or after their child, or whether they would have the opportunity to even discuss their deportations[.]” Indeed, some parents have already been deported without their children, who remain in government facilities in the United States.” [internal citations omitted]¹⁵

Without question, it is in children’s best interests for their advocates to have critical information relevant to their placement in ORR custody and likelihood of release, their immigration case, and their safety and well-being. As a child welfare agency, ORR should ensure that its regulations reflect its obligations to mitigate the profound harm and trauma caused by family separations and to facilitate the prompt reunification of children with their families when they have been wrongfully separated.

9. Conclusion

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

Sincerely,

Acacia Center for Justice
Advocates for Basic Legal Equality, Inc (ABLE)
Advocates for Human Rights
Alianza Americas
Americans for Immigrant Justice
Angry Tias and Abuelas of the RGV
Capital Area Immigrants' Rights (CAIR) Coalition
Catholic Charities Baltimore, Esperanza Center
Central American Resource Center - CARECEN- of California
Church World Service
Community Legal Services in East Palo Alto
Dignidad
Diocesan Migrant and Refugee Services Inc/Estrella del Paso
Florida Legal Services, Inc.
Freedom Network USA

¹⁵ *Id.*

Galveston-Houston Immigrant Representation Project
Grassroots Leadership
HIAS Pennsylvania
Hope Border Institute
Houston Immigration Legal Services Collaborative
Human Rights Initiative of North Texas
Empowering Pacific Islander Communities
Florence Immigrant and Refugee Rights Project
Immigrant Children Advocates' Relief Effort (ICARE)
Immigrant Defenders Law Center (ImmDef)
Immigrant Justice Task Force, Wellington United Church of Christ
Immigrant Legal Defense
Immigrants' Rights Clinic, Morningside Heights Legal Services, Inc., Columbia Law School
Immigration Center for Women and Children
Immigration Counseling Service
International Refugee Assistance Project (IRAP)
International Rescue Committee
JFCS Pittsburgh
Justice in Motion
Just Neighbors
Juvenile Law Center
La Raza Centro Legal
Law Office of Daniela Hernandez Chong Cuy
Law Office of Helen Lawrence
Law Office of Miguel Mexicano PC
Lawyers for Good Government
Legal Services for Children
Los Angeles Center for Law and Justice
LSN Legal LLC
Lutheran Social Services of the National Capital Area (LSSNCA)
Martinez & Nguyen Law, LLP
Massachusetts Immigrant and Refugee Advocacy Coalition
Michigan Immigrant Rights Center
Migration Matters
National Disability Rights Network (NDRN)
National Immigrant Justice Center
National Immigration Forum
National Immigration Law Center (NILC)
National Resource Center on Domestic Violence
OneAmerica
Open Immigration Legal Services
Physicians for Human Rights - Student Advisory Board
Public Counsel
Project Lifeline

Rocky Mountain Immigrant Advocacy Network
Safe Passage Project
Save the Children
South Dakota Voices for Peace
Sunita Jain Anti-Trafficking Initiative
The Immigration Project
The National Domestic Violence Hotline
The Right to Immigration Institute
United We Dream
UC Davis Immigration Law Clinic
University of Maryland Support, Advocacy, Freedom, and Empowerment (SAFE) Center
Defense Clinic
VECINA
Witness at the Border
Young Center for Immigrant Children's Rights

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