submitted via www.regulations.gov

November 6, 2018

Ms. Debbie Seguin
Assistant Director, Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th St. SW
Washington, DC 20536

RE: DHS/HHS Notice of Proposed Rulemaking for Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, DHS Docket No. ICEB-2018-002

Dear Ms. Seguin:

The Young Center for Immigrant Children's Rights (Young Center) appreciates the opportunity to comment on the Notice of Proposed Rulemaking for the Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children published Friday, September 7, 2018 (the "Notice") by the Department of Health and Human Services (HHS) and the Department of Homeland Security (DHS).[1]

The 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 (TVPRA).[2] The Young Center is the only organization authorized by 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, development needs and identity. Since 2004, ORR has appointed Young Center Child Advocates for thousands of unaccompanied children in ORR custody.

We have a particular interest and expertise in the regulations proposed in the Notice. We have worked with ORR to develop policies for the role of the Child Advocate that are consistent with the Flores Settlement Agreement (hereinafter "Agreement"), and have submitted independent best interests recommendations for individual children to officials within HHS, DHS, and DOJ to ensure that children receive the protections set forth in the Agreement, including their placement in the least restrictive setting; their access to health services,

[1] *See* Federal Regulation No. 174, Vol. 83 at 45486-45534.
[2] William Wilberforce Trafficking Victims Protection Act of 2008, 8 U.S.C.A. § 1232(c)(6)(A) (Westlaw through Pub. L. No. 115-171).

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educational services, counseling and other support while in custody; and their release to parents, family or other sponsors. We have been appointed to children transferred to "family residential centers," children transferred to and from DHS custody, children who face prolonged stays in federal custody, children placed in "secure" facilities and children who turn 18 while in federal custody—populations that will be directly affected by the rules proposed in the Notice. We also engage in policy initiatives to develop and promote standards for protecting the best interests of children while they are subject to decision-making by officials within DHS and HHS. The Young Center's policy director served on DHS Secretary Johnson's Advisory Committee on Family Residential Centers.

As a result, we are uniquely positioned to comment on the extent to which the Notice's proposed rules comply with the Agreement as we have seen it applied over the last 15 years. We are also uniquely positioned to comment on those areas in which the proposed rules are inconsistent with well-established principles of child welfare. These principles include: that children are not miniature adults but are developing human beings with different needs and capacities than adults; that the family is the best and safest environment in which a child can grow and develop; that children's liberty is necessary for their appropriate growth and development. For immigrant children who have journeyed on their own, or who have been separated from family members, the importance of family reunification, of limiting restrictions on liberty, and on providing community-based services to recover from trauma are particularly important for their growth and development, and their ability to participate meaningfully in their immigration cases.

We therefore offer the following comments to safeguard DHS's and HHS's ability to comply with their legal responsibilities to protect the health, safety, and best interests of immigrant children and their families.

I. The Flores Settlement Agreement and subsequent legislation were created to ensure the safety and well-being, proper care, and timely release of children in immigration detention.

In 1985, children's advocates filed a class action lawsuit, *Reno v. Flores*, to challenge the care and custody of unaccompanied immigrant youth by the then-Immigration and Naturalization Services (INS). In 1997, the parties settled certain issues related to the detention conditions and release of unaccompanied children, set out in the Agreement[3]. The Agreement prioritized family reunification for children[4] and addressed how children should be treated in detention.[5] Decades after the original lawsuit, to buttress protections in the Agreement, Congress twice passed legislation to increase protections for immigrant children: the Homeland Security Act of 2002 (HSA)[6], and the TVPRA of 2008. The focus on children's prompt reunification with family remained a priority. The HSA shifted the care and custody of unaccompanied minors in federal

[3] *Flores v. Reno*, Case No. CV 85-4544-RJK (Px) (CD Cal. Nov. 30, 1987).
[4] *Id.* at Paragraph 14.
[5] *Id.* at Paragraph 12A.
[6] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

detention from the INS to the Office of Refugee Resettlement (ORR) within HHS.[7] The TVPRA went a step further, and placed the care, custody, and *detention* of unaccompanied children under ORR. Importantly, the TVPRA required ORR to place children in the "least restrictive setting that is in the best interests of the child," and required ORR to consider the child's "danger to self, danger to the community, and risk of flight."[8] Together, the Agreement, HSA, and TVPRA weave a network of protections intended to safeguard the best interests—the safety and well-being—of vulnerable immigrant children in government custody.

A. The Agreement was implemented in response to policies and practices that put children in harm's way and prevented their release from government custody.

In the late 1980s and early 1990s, unaccompanied children began migrating from Central America to the United States. These children were fleeing armed conflict, abuse and extreme poverty; some hoping to reunite with relatives in the United States.[9] Because of a severe backlog in the asylum process, it frequently took months or even years for a case to be processed and immigrants—including children—were detained by the government until their cases were completed.[10] During this time, unaccompanied children as young as four years old were held in secure, prison-like settings, shackled, isolated, and forced to wear prison uniforms, even subjected to solitary confinement.[11] Children were also strip searched and forced to share bathrooms and sleeping quarters with unrelated adults of both sexes.[12] Starting in the 1980s, INS was responsible for both enforcing immigration laws and caring for these unaccompanied children—a clear conflict of interest that left children subject to prolonged or indefinite detention in inhumane conditions while INS determined whether they were removable from the U.S.[13] The INS essentially treated children as adults in miniature and "applied the same model of punitive detention to children as it did to adults."[14] However, unlike adults, these children were not eligible for release on bond, meaning many of them remained in detention "bewildered and frightened, denied meaningful access to attorneys and their relatives" until they were ultimately

[7] The HSA also charged ORR with making and implementing placement decisions and overseeing the facilities where children were placed and required that the ORR ensure the interests (rather than "best interests", as later clarified by the TVPRA) of the child were considered in decisions and actions related to the care and custody of the child.
[8] 8 C.F.R. 1232(c)(2)(A).
[9] *See* Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 589 (1998).
[10] *See, e.g.*, Press Release, U.S. Dep't of Justice, Asylum Reform: Five Years Later (Feb. 1, 2000), available at http://www.uscis.gov/files/pressrelease/Asylum.pdf; *All Things Considered: The History of the Flores Settlement And Its Effects on Immigration* (NPR radio broadcast Jun. 22, 2018), *available at*: https://www.npr.org/2018/06/22/622678753/the-history-of-the-flores-settlement-and-its-effects-on-immigration.
[11] Dianne Feinstein, *Protecting defenseless children is not an immigration 'loophole.'* THE WASHINGTON POST, Apr. 13, 2018, https://www.washingtonpost.com/opinions/protecting-defenseless-children-is-not-an-immigration-loophole/2018/04/13/11bf9012-3e64-11e8-a7d1-e4efec6389f0_story.html?utm_term=.6a1c409095fe.
[12] Navarro, *supra* note 9, at 596.
[13] M. Aryah Somers, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 334-35 (2010).
[14] Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 250 (2010).

deported.[15] This poor treatment of children continued for years until the Agreement established the first national guidelines for the "detention, release, and treatment" of children in the U.S. immigration detention system.[16]

B. The Agreement established special protections for children and reflected widely-accepted principles of child protection.

The Agreement created a general policy against the detention of children, requiring that children be released as "expeditiously" as possible.[17] While the child is detained, the Agreement required the government to "make and record the prompt and continuous efforts on its part toward family reunification and [ ] release" of the child.[18] Additionally, under the Agreement, the child's release must be to the "least restrictive setting" possible—with priority given, first, to release to a parent or other family member and then to a "licensed program" or, "when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility," then to another suitable adult or entity seeking custody of the child.[19] Thus, the two main child-protective standards established by the Agreement were the prioritization of release of children pending their immigration proceedings and a general prohibition against housing children in a federal immigration facility (*i.e.*, a facility such as an FRC – which, we note, is similar to a prison setting), but, rather, should be in a setting that is licensed by a state child welfare agency for the longer-term housing and care of children (such as a group home, foster home or juvenile delinquent facility).[20]

The Agreement also required the government to treat all immigrant children in custody "with dignity, respect and special concern for their particular vulnerability as minors."[21] INS's recognition of the need to treat children differently than adults in the Agreement represented a fundamental shift from the agency's past practice and an important first step toward safeguarding the best interests of immigrant children in government custody. By 1997, when the Agreement was finalized there was international consensus surrounding the paramount importance of considering the best interests of children in all decisions.[22] This recognition was paralleled in U.S. courts which had long recognized that "children are different from adults and need to be treated as such."[23] However, even though the Agreement created important protections for

[15] HUMAN RIGHTS WATCH CHILDREN'S RIGHTS PROJECT, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE 1 (1997).
[16] Agreement, ¶ 6.
[17] Agreement, ¶ 12A.
[18] Agreement, ¶ 18.
[19] Agreement, ¶ 14.
[20] The Agreement also mandated minimum standards for the detention of immigrant children including (1) food and drinking water; (2) medical assistance in the event of emergencies; (3) toilets and sinks; (4) adequate temperature control and ventilation; (5) adequate supervision to protect children from others; and (6) separation of children form unrelated adults. Agreement ¶ 12.
[21] Agreement, ¶ 11.
[22] *See., e.g.,* United Nations, G.A. Res. 44/25, Convention on the Rights of the Child, art. 3 (Nov. 20, 1989) ("[i]n all actions concerning children, . . . the best interests of the child shall be a primary consideration.")
[23] Patricia Escher, et. al., *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases,* National Council of Juvenile and Family Court Judges 78 (2010).

immigrant children in government custody, INS did not consistently comply with the Agreement.[24]

C. Congress twice extended the Agreement's child protection principles.

Under the HSA, Congress transferred "functions under the immigration laws of the United States with respect to the care of unaccompanied alien children" that were previously vested in INS to HHS. The stated purpose of the HSA is "[t]o establish the Department of Homeland Security, and for other purposes."[25] Notwithstanding this primary purpose, the care of unaccompanied minor children was transferred to the HHS because "[i]t would not be appropriate to transfer this responsibility to a Department of Homeland Security.[26] This was in recognition of the fact that:

> Unaccompanied minors deserve special treatment under our immigration laws and policies. Many of these children have been abandoned, are fleeing persecution, or are escaping abusive situations at home. These children are either sent here by adults or forced by their circumstances, and the decision to come to our country is seldom their own.[27]

It was arguably also a response to criticism of the INS and its failure to consistently comply with the Agreement in its treatment of immigrant children.[28] The original bill as introduced into the House had transferred to DHS the task of "administering the immigration and naturalization laws of the United States"[29] without any carve outs for unaccompanied children. The decision to reverse the original text and transfer the function of care for unaccompanied children to HHS, followed extensive testimony in Congressional committees supporting the view that given unaccompanied children's unique vulnerabilities, they would be ill-suited to DHS administration and would be more appropriately cared for by HHS.[30]

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[24] *See* U.S. DEP'T OF JUSTICE, UNACCOMPANIED JUVENILES IN INS CUSTODY 6 (2001), *available at* http://www.justice.gov/oig/reports/INS/e0109/chapter1.htm ([a]lthough the INS has made significant progress since signing the Flores agreement, our review found deficiencies with the implementation of the policies and procedures developed . . . . This report alerts senior INS managers to the existence of problems that could lead to potentially serious consequences affecting the wellbeing of the juveniles); *and* AMNESTY INT'L USA, UNITED STATES OF AMERICA: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION (2003) (finding that immigrant children in government custody were routinely deprived of their rights).

[25] Homeland Security Act of 2002, Pub. L. No. 107-296.

[26] Congressional Record, September 4, 2002, Senate 15989. The Bill, as introduced, had stipulated that the Border Patrol of the Immigration and Naturalization Service would be transferred to the Department of Homeland Security. P.L. 107-296, 116 STAT. 2135.

[27] Congressional Record, September 4, 2002, Senate 15989.

[28] *See, e.g.*, Young & McKenna, *supra* at n. 13, at 250–51.

[29] H.R.5005, 107th Congress (2001-2002).

[30] *See Homeland Security Act of 2002, Hearing on H.R. 5005 Before the H. Comm on the Judiciary*,107th Cong. 38 (2002)(Statement of Ms. Lofgren) ("The issue of unaccompanied alien children is one that we have a bipartisan bill for in both the Senate and the House to do something, because these children really are not well dealt with in the Department of Justice."); *The Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002, Hearing on H.R. 5005 Before the H. Comm on the Judiciary*,107th Cong. 61 (2002)(Statement of Ms. Lofgren) ("We can go back and forth on what should go in. But one thing I think clearly does not belong in Homeland Security, the issue of foreign adoptions, and also unaccompanied minor children.") *The Role*

The TVPRA reauthorized the Trafficking Victims Protection Act of 2000[31] and made various amendments to the previous Trafficking Victims Protection Acts, including adding greater protections for unaccompanied children in federal custody. Through Section 235 (Enhancing Efforts to Combat the Trafficking of Children), it created special rules for the return of children who were nationals or habitual residents of a contiguous country, with some exceptions. Many of the "provisions of the bill and the intent behind them that are closely aligned with the original provisions of H.R. 3887" are found in House Report 110-430,[32] which explains the congressional intent behind this provision:

> Section 236. Enhancing Efforts to Combat the Trafficking of Children
> Section 236 responds to concerns of service providers that a more effective sorting mechanism is needed to carry out the mandate in Section 107 of the TVPA of 2000 that Federal officials affirmatively seek to identify and assist trafficking victims, especially children.
> […]
> Subsection (b) provides enhanced procedures for preventing child trafficking at the U.S. border and U.S. ports of entry. It codifies and improves procedures for the repatriation of unaccompanied children from contiguous countries. It also provides that the Secretary of State shall develop a system for the safe repatriation of unaccompanied children and shall develop a pilot program for that purpose.
> Subsection (c) requires better care and custody of unaccompanied alien children to be provided by the Department of Health and Human Services (HHS).
> Subsection (d) improves procedures for the placement of unaccompanied children in safe and secure settings. It requires that HHS take steps to assist children in complying with immigration orders, assist children in accessing pro bono representation and, in certain cases involving particularly vulnerable children, to obtain guardians ad litem.[33]

As is evident from the legislative history, the child's welfare and safety are paramount considerations in the U.S. government's interactions with immigrant children. Congress has recognized, through its amendments of the HSA and the clear text of the TVPRA that additional safeguards for the protection of UACs' interests are necessary to protect this vulnerable

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of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002, Hearing on H.R. 5005 Before the H. Comm on the Judiciary, 107th Cong. (Statement of Kathleen Campbell Walker of the American Immigration Lawyers Association) ("AILA also strongly believes that the care and custody of unaccompanied alien children should be transferred to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services… They are unaccompanied minors seeking protection and support.")

[31] By authorizing congressional appropriations for the fiscal years 2008-2011 for anti-trafficking purposes.

[32] 154 Cong. Rec H10903 (Dec. 10, 2008).

[33] House Report No. 101-430, pt. 1 (2007). Subsections (b) to (d) were included in the TVPRA verbatim at §235(a)-(c). The TVPRA also authorizes HHS to appoint "independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children." 8 U.S.C. § 1232(c)(6)(A). A Child Advocate's role is to identify and advocate for the best interests of a child and to ensure the child's best interests are considered in any decision on behalf of or about the child, including those made by immigration courts or asylum officers. Child advocates frequently serve the most vulnerable children in the immigration system, including victims of trafficking and abuse, children with disabilities, children who express a fear of return, children who face prolonged custody, and children who have lost their parents to violence. They provide critical support by advancing and safeguarding the safety and well-being of children in custody who do not have adults with them to advocate on their behalf.

population. Specifically, the TVPRA guarantees special protections "to recognize the special needs and circumstances of unaccompanied alien children."[34] Placing them in "safe and secure settings" in addition to "better care and custody" for them was the clearly expressed congressional intent behind the TVPRA.[35]

D. The Agreement was the catalyst for DHS and HHS consideration of the best interests of children in federal custody.

Since the Agreement was implemented, immigration law, DHS policy and HHS policy expanded to ensure consideration of the child's best interests in key decisions about immigrant children—a change that reflects the Agreement's commitment to treating children differently than adults. For example, the 2008 TVPRA turns the Agreement's requirement to hold each child "in the least restrictive setting appropriate to the minor's age and special needs"[36] into a statutory mandate to place children in the "least restrictive setting in their best interests" and allows HHS to appoint "independent Child Advocates" whose role is to identify and advocate for the best interests of child trafficking victims and other vulnerable, unaccompanied children.[37] Since 2008, HHS has developed policies and procedures for the appointment of best interests Child Advocates and for the consideration of best interests recommendations.[38] HHS follows the best interests recommendations of these independent Child Advocates—provided by the Young Center—in the vast majority of cases.[39] DHS has also instituted consideration of the best interests of children. When CBP instituted its first nationwide standards for the agency's interactions with detained individuals, agency officials were directed to "consider the best interest of the juvenile at all points beginning at the first encounter and continuing through processing."[40] A 2016 report by DHS's Advisory Committee on Family Residential Centers relied heavily on the "best interests of the child" standard in its recommendations, including its primary recommendation—that "the detention . . . of families for purposes of immigration enforcement or management are never in the best interest of children."[41]

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[34] Summary of Legislation to Establish a Department of Homeland Security, P.L. 107-296, 116 STAT. 2135 ("Additionally, an Office of Children's Services will be created within HHS to recognize the special needs and circumstances of unaccompanied alien children. The immigration courts and the board of appeals will remain within the Department of Justice.")

[35] House Report 110-430, pt. 57 (2007).

[36] Agreement at ¶ 11.

[37] 8 USC 1232 (c)(2); 8 USC 1232(c)(6).

[38] ORR Guide, Children Entering the United States Unaccompanied, Section 2: Safe and Timely Release from ORR Care, at Section 2.3 (available at: https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied).

[39] General Accounting Office, U*naccompanied Children: HHS Should Improve Monitoring and Information Sharing Policies to Enhance Child Advocate Program Effectiveness*, Report 16-367 (April 2016) (finding that agencies including HHS, immigration courts, children's attorneys and others adopt Child Advocate findings more than 70% of the time.)

[40] U.S. Customs and Border Protection, *National Standards on Transport, Escort, Detention and Search*, at Sec. 1.6 (Oct. 2015).

[41] Report of the ICE Advisory Committee on Family Residential Centers, p. 2 (Oct. 7, 2016), (available at: https://www.ice.gov/acfrc).

The "best interests of the child" principle encompasses several consistently-accepted factors. In 2015, the Interagency Working Group on Unaccompanied and Separated Children's Subcommittee on Best Interests released a "Framework for Considering the Best Interests of Unaccompanied Children," (hereinafter "Framework"). The Framework recognizes these widely-accepted elements of best interests: 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."[42] These elements of any best interests determination are reflected Agreement's focus on safety (¶¶11), release to family(¶14, Appendix 1 ¶A11) and provisions to ensure children's health (Appendix 1, ¶¶A1, A2 A6, A7), development (Appendix 1, ¶¶A3, A4, A5, A8, D), and identity (Appendix 1, ¶¶A10, A12, B, C).

Thus, any regulations implementing the Agreement should ensure consideration of the child's best interests in each decision. The Notice not only fails to ensure consideration of best interests in decisions by DHS and HHS but includes rules that would be contrary to the child's best interests. Notably, the proposed rules would permit the detention of children with parents in family detention settings for indefinite periods in facilities without meaningful licensing standards and prevent the parole of children subjected to expedited removal. Of equal concern, the proposed rules fail to require that every child be placed "in the least restrictive placement in the best interests of the child," as required by the TVPRA and subsequent HHS policies.

II. The proposed regulations do not reflect the child protective principles embodied in the Agreement, TVPRA, and HSA and would harm immigrant children and families by prolonging their detention—in some cases, indefinitely.

The proposed regulations would upend more than 20 years of progress in establishing child welfare-based protections for immigrant children. These protections exist because children are uniquely vulnerable and are at high risk for trauma, trafficking, and violence. Many immigrant children have suffered trafficking, abuse, or other violence and children from Central America in particular have been subjected to unrelenting violence, abuse, and other grave danger and serious harm in their countries of origin.[43] Among other changes, they proposed regulations would allow U.S. Immigration & Customs Enforcement (ICE) to expand the detention of children by removing safeguards that limit the time children may be held with their family in immigration detention centers,[44] imposing a heightened parole standard for children detained with parents and eliminating the mandate on DHS to consider releasing children from their parents together, [45] and vastly expanding the definition of "emergencies" to justify exceptions to the requirement to timely transfer children to HHS custody[46]. The proposed regulations would eliminate the state licensing requirement,[47] which is in place to ensure that children are only held in detention centers that meet longstanding state child welfare requirements. Instead, the proposed regulations would allow DHS to self-license detention facilities and to abandon child

[42] Framework at p. 5 (citations omitted).
[43] United Nations High Comm'r for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 11 (2016).
[44] 83 FR 45493; 83 FR 45518.
[45] 83 FR 45488; 83 FR 45502.
[46] 83 FR 45526.
[47] 83 FR 45525.

safety and welfare standards that currently exist. The Young Center opposes the adoption of any regulations that would eliminate legal protections intended to safeguard the best interests of children in immigration custody and ensure their prompt release.

A. The proposed regulations would prolong the length of time children are detained and lead to fewer children being released from detention.

The detention of children with or without their families is never in their best interests. Detention harms the physical and mental health of children and threatens their development. The Proposed Regulations will allow DHS to hold accompanied children in detention *indefinitely* during their and their parents' immigration proceedings.[48] Expanding the use of detention for children and families is contrary to the spirit and letter of the Agreement, ignores the warnings of medical professionals and child welfare experts, and negatively impacts children's ability to participate in their immigration proceedings.

There is no evidence that any amount of time in detention is safe for children.[49] Studies of detained immigrants have shown that children and parents may suffer negative physical and emotional harm from detention, including anxiety, depression and posttraumatic stress disorder.[50] Detention itself undermines parental authority and parents' capacity to respond to their children's needs, which is exacerbated by the impact of detention on parents' mental health.[51] Parents in detention centers have described regressive behavioral changes in their children, including decreased eating, sleep disturbances, clinginess, withdrawal, self-injurious behavior, and aggression.[52] The American Academy of Pediatrics, an organization comprised of over 60,000 leading pediatricians from the United States, has stated that, "even short periods of detention can cause psychological trauma and long-term mental health risks for children" and warned that detention is "no place for a child, even if they are accompanied by their families."[53]

The country's leading medical associations agree that extensive emotional harm results from detention, including: depression and anxiety, self-harm, suicidal ideation, developmental

[48] 83 FR 45493. We note that, under the Agreement, the Government's policy with respect to *unaccompanied* children (*i.e.*, children who cross the border *without* a parent or legal guardian) has been to place them in a licensed program pending resolution of their immigration claims—at which time they would then, depending on the resolution, either be removed from the country or returned to a licensed program until they reached the age of majority and could be released. The proposed regulations would not change this policy relating to unaccompanied children. The change that the proposed regulations would effect is that *accompanied* children (*i.e.*, children who cross the border with a parent or legal guardian) would be detained indefinitely in federal immigration facilities (FRCs) pending resolution of their and their parents' immigration claims—rather than, as was the case before 2014, being released with their parents (subject to ankle monitoring, bond, or other compliance programs), or, as was the case under the family separation policy in April-June 2018, forcibly separated from their parents to be housed alone in a licensed program.

[49] Julie M. Linton, Marsha Griffin, Alan Shapiro, American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] Devin Miller, *Pediatricians speak out: Detention is not the answer to family separation*, AAP News, July 24, 2018, *available at* http://www.aappublications.org/news/2018/07/24/washington072418.

and behavioral regressions, post-traumatic stress disorder, lack of appetite, weight loss, and frequent infections and gastrointestinal symptoms.[54] Other concerning physical manifestations of trauma in detained children include bed-wetting, insomnia, and regression in speech patterns to the point that a child is no longer able to speak.[55] Despite these and many other warnings from medical experts, DHS proposes to substitute its own Immigration and Customs Enforcement (ICE) family residential standards where its family detention facilities cannot obtain licensing from state, municipal, or other appropriate child welfare entities.[56] This would have the effect of eliminating the Agreement's critical limitation on the detention of children in unlicensed facilities. As a result, and as explicitly intended by DHS in promulgating these proposed rules, DHS would detain children with their families for the entirety of their immigration proceedings—in effect, indefinitely.

In July, fourteen major medical organizations joined together to voice deep concerns about the treatment that immigrant children and their parents face in federal custody.[57] The letter from these organizations note that two physicians within DHS' Office of Civil Rights and Civil Liberties found serious compliance issues in DHS-run facilities resulting in "imminent risk of significant mental health and medical harm."[58] The DHS physicians stated that "detention of innocent children should never occur in a civilized society, especially if there are less restrictive options, because the risk of harm to children simply cannot be justified."[59] Currently, there is no mechanism for health professionals to regularly monitor the conditions in DHS facilities and their appropriateness for children.

Additionally, after almost a year of investigation, the DHS Advisory Committee on Family Residential Centers concluded that detention is generally neither appropriate nor necessary for families— and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children.[60] Immigrant

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[54] American College of Pediatrics, *Joint Letter to the House Judiciary, Energy, and Commerce, Homeland Security, and Appropriations Committees*, July 24, 2018, *available at* https://www.acponline.org/acp_policy/letters/letter_house_oversight_request_on_child_detention_centers_2018.pdf.

[55] Christopher Greely, M.D., et al., *Technical Research Report: Policies, Practices, and Structures Impacting the Health and Care Access of Migrant Children, Prepared for the Texas Medical Center Health Policy Institute*, January 2017, *available at* https://www.researchgate.net/publication/316110708_Policies_Practices_and_Structures_Impacting_the_Health_and_Care_Access_of_Migrant_Children; Julie M. Linton, M.D., et al., *Detention of Immigration Children*, 139 PEDIATRICS 4, April 2017, *available at* http://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf; John Burnett, *The U.S. Has a Long, Troubled History of Detaining Families Together*, NPR, June 29, 2018, *available at* https://www.npr.org/2018/06/29/624789871/president-trumps-new-plan-isnt-to-separate-migrant-families-but-to-lock-them-up.

[56] *See* 83 FR 45525.

[57] Letter from American Pediatric Association *et al.* to The Honorable Charles Grassley, *et al.*, July 24, 2018, https://downloads.aap.org/DOFA/Senate%20Congressional%20Oversight%20Request%20Letter%20Final%2007%2024%2018.pdf.

[58] Letter from Dr. Scott Allen and Dr. Pamela McPherson to the Honorable Charles Grassley and the Honorable Ron Wyden, July 17, 2018, https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf.

[59] *Id.*

[60] *Report of the DHS Advisory Committee on Family Residential Centers*, Sept. 30, 2016, https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf.

children are still children. Protections for children in law or by the courts exist because children are uniquely vulnerable and are at high risk for trauma, trafficking, and violence. Proposals like this rule that seek to override the Agreement in order to allow for the longer-term detention of children with or without their parents or to weaken federal child trafficking laws strip children of protections designed for their safety and well-being and put their health and well-being at risk.

It is also especially difficult for children to meaningfully participate in their immigration proceedings if they are in detention or unable to be reunited with their parents and family outside of detention. Even for adults, successfully seeking relief from removal is harder in detention as detention limits their means to obtain counsel, develop and present evidence, or even apply for certain types of relief.[61] For children, this difficulty is compounded by the fact that parents and close family members frequently possess evidence necessary to prove children's immigration cases.[62] This is because children may have an incomplete knowledge or understanding of the circumstances surrounding their asylum claims due to their youth and their parent's effort to protect them and shield them from danger.[63] If children are detained separate from their parents and family or if their sponsors are detained or deported, it will make it that much more difficult for them to obtain necessary evidence to prove their cases.

B. <u>The indefinite detention of families will be extremely expensive, jeopardizing the agencies' ability to provide other services necessary to protect the best interest of children.</u>

Given the administration's stated goal of detaining children and their families during the adjudication of their cases, the proposed regulations are likely to result in the detention of children and their parents for many months or even years, in contravention of the Agreement and district court's orders, as their cases proceed through the immigration courts and on appeal. This is going to have a deleterious effect on children and families and will also be extremely expensive. According to ICE, the agency spends $320 per person, per day to detain an individual in a family detention center.[64] At this rate, detaining a family of three in a family detention costs the government approximately $28,800 per month or $345,600 over the course of a year. Under the new proposed rule, more families will be detained by the government and for longer periods of time. This will be extremely expensive to DHS and to taxpayers[65] but has not been accounted for by DHS in the rule. Rather than expanding detention DHS should increase funding for legal

[61] *See Abdi v. Duke*, 280 F. Supp. 3d 373 (W.D.N.Y. 2017), *order clarified sub nom. Abdi v. Nielsen*, 287 F. Supp. 3d 327 (W.D.N.Y. 2018).
[62] *See, e.g., Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1314 (9th Cir. 2012); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006).
[63] *See, e.g.*, USCIS, CHILDREN'S CLAIMS: TRAINING MODULE (Nov. 30, 2015).
[64] Department of Homeland Security U.S. Immigration and Customs Enforcement, *Budget Overview: FY 2018 Congressional Justification, available at* https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf.
[65] *See* Philip E. Wolgin, "*The High Costs of the Proposed Flores Regulation*" Center for American Progress (2018), *available at* https://www.americanprogress.org/issues/immigration/reports/2018/10/19 /459412/high-costs-proposed-flores-regulation/.

representation for children and families facing deportation[66] and employ effective and cost-effective case management and appearance support programs.[67]

III. The proposed regulations undermine critical protections for unaccompanied children created by the Agreement and subsequent legislation, and contradict well-established policies and procedures promulgated by HHS and DHS under the Agreement.

In our role as Child Advocate, we have worked with ORR for the prompt release of children from custody to parents or other adult family members, and for procedures that respect children's integrity, liberty and identity. We routinely submit recommendations to DHS and HHS urging the agencies to take specific steps to ensure children's placement in the least restrictive setting in their best interests, their release to parents and family, and protect them from harm. We do not believe the following proposed regulations are consistent with more than a decade of practice or policies implemented under the Agreement.

A. Changing children's designation as "unaccompanied" increases instability in a manner inconsistent with child welfare standards and undermines children's ability to have fair proceedings before government officials

The TVPRA provides children designated as "unaccompanied" with an array of substantive and procedural protections designed to ensure fair, efficient legal proceedings and the safety and well-being of children. These include: exemption from the one-year filing deadline for asylum claims,[68] which reflects sensitivity to the particular needs and vulnerabilities of children fleeing persecution, who may require time to heal and establish trust before telling their stories; the ability to present asylum claims in a private setting before an asylum officer trained in trauma-informed interviewing techniques,[69] which provides a more child-appropriate setting for children to tell their stories than an immigration court; and the appointment of independent child advocates,[70] who identify and advocate for the best interests of the child and who ensure the child's best interests are considered in every decision about the child. By allowing immigration officials to determine that an unaccompanied child no longer meets the "UAC" definition when a child is released from custody to a parent or legal guardian or upon turning 18, even though the

[66] Families and children with legal counsel appear overwhelmingly at their immigration court proceedings – up to 97% of the time. This figure represents reflects the percentage of individuals on the immigration court's adults with children docket with legal representation whose court proceedings began in fiscal year 2014 as of August 2018. *See* TRAC, "Priority Immigration Court Cases: Women with Children," *available at* http://trac.syr.edu/phptools/immigration/mwc/.

[67] The Family Case Management Plan, which was in effect between 2016 and 2017 provided families with much-needed social and medical support services and also led to 99.3% attendance by families at ICE check-ins and 100% court attendance. Associated Press, *ICE Shutters Detention Alternative for Asylum-seekers*. VOA News, June 9, 2017, *available at* https://www.voanews.com/a/ice-shutters-detention-alternative-asylum-seekers/3893854.html. *See* Eleanor Acer, *Studies: Mass Detention of Migrant Families is Unnecessary, Inefficient*. Just Security, July 5, 2018, *available at* https://www.justsecurity.org/58897/studies-show-mass-detention-family-migrants-unnecessary-inefficient/.

[68] INA § 208(a)(2)(2).

[69] INA § 208 (b)(3)(C); 8 U.S.C. §1158(b)(3)(C).

[70] 8 U.S.C. § 1232(c)(6).

child remains vulnerable, the proposed regulations violate the clear intent of the Agreement and TVPRA. Procedural fairness, the child's best interests, and administrative efficiency all demand that once determined, a child's status as an unaccompanied alien child should remain for the duration of the child's immigration proceedings.

B. The proposed regulations place inappropriate weight on medical tests to determine whether children are younger than or older than 18.

The proposed regulations purport to rely on the Agreement and TVPRA for procedures to evaluate whether youth are children are over the age of 18;[71] yet they contradict both the language and the clear intent of the Agreement, the TVPRA, and well-established agency practices promulgated pursuant to Flores and the TVPRA. Specifically, the proposed regulations: (1) fail to start with a presumption that the individual is a child; (2) fail to indicate that medical tests cannot serve as the sole basis for age determinations; (3) fail to limit medical testing to bone and dental radiographs; (4) fail to require or even identify other forms of evidence that must be considered when available; and (5) fail to take into account evidence demonstrating the unreliability of medical tests to accurately determine whether an individual is younger or older than 18.

i. The proposed regulations do not match the standard set in either the Agreement or the TVPRA for considering medical tests and are inconsistent with agency practice.

The Agreement recognizes that there will be circumstances in which the age of a child is not known with certainty but permits the individual to be treated as an adult only when a reasonable person would hear the child's claim to childhood but still conclude that she or he was an adult. In other words, the language of the Agreement starts with the child's claim and provides a mechanism to override the child's claim only when it would be reasonable to do so. The TVPRA, at Section 235(b)(4), requires that "procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien." By identifying only medical or dental examinations as evidence of age, the proposed regulations would permit exclusive reliance on imprecise medical tests in direct violation of the statute.

In implementing the Agreement, both HHS and DHS have acknowledged the inherent lack of precision of medical tests to determine age and have adopted high standards for relying on these tests. Section 1.6.2 of ORR's policies regarding children entering the U.S. unaccompanied states:

> As no current medical assessment method can determine an exact age, best practice relies on the estimated probability that an individual is 18 or older . . . If an individual's estimated probability of being 18 or older is 75 percent or greater according to a medical age assessment, and this evidence has been considered in

[71] 83 FR 45497; 83 FR 45508.

conjunction with the totality of the evidence, ORR may refer the individual to DHS.[72]

Under this guidance, even a 75% or greater probability that the person is 18 is just one factor in a totality of the circumstances approach.

Similarly, DHS guidance from 2004 explicitly precludes determinations that rely solely on medical tests, limits medical tests to bone and dental x-rays, and lists specific information that must be considered, if available, in any age determination.[73] The proposed regulations do not sufficiently acknowledge the inaccuracies of the tests, do not explicitly preclude age determinations based solely or primarily on these imprecise tests, and do not limit tests to bone and dental scans as the agencies have in their implementation of Flores for the past two decades. They also fail to require that the examining clinician provide a statement of the "percentage of probability" that the individual is either a juvenile or adult,[74] and fail to advise DHS officials to consider what is known about the degree of reliability of medical tests.[75]

ii. Advances in forensic testing have rendered the medical examinations proposed by rule unreliable.

The consequences of an erroneous age determination are great. A mistaken age determination means that a child will be sent to an adult detention facility with almost no recourse for the mistake, losing access to the range of services required by the Agreement.[76] Given these severe consequences, age assessment based on medical tests is far too imprecise. According to most experts, radiographs of teeth and bones both have margins of error of ±2 years, which is hardly useful for determining whether an individual is 17 or 18 years old.

Radiographs of bones to assess age are not sufficiently precise to provide valuable insight regarding a person's age because children grow at wildly different rates. According to Tim Cole, a professor of medical statistics at University College of London, bone radiographs can provide the wrong answer as to whether someone is 18 up to one-third of the time.[77] Researchers reviewing bone radiographs of adolescents found that the average chronological age for wrist maturity was 17.6 years with a *margin of error of 1.3 years*.[78] In other words: 61% of people will

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[72] Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1*, U.S. DEP'T OF HEALTH & HUM. SERV. (Jan. 30, 2015, rev. Jul. 5, 2016), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1.

[73] Victor X. Cerda, U.S. Immigr. & Customs Enforcement, *Age Determination Procedures for Custody Decisions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Aug. 20, 2004), https://www.ice.gov/doclib/foia/dro_policy_memos/agedeterminationproceduresforcustodydecisionsaug202004.pdf.

[74] *Id.*

[75] *Id.*

[76] *See* Office of Refugee Resettlement, U.S. Dep't of Health & Hum. Serv., *Services Provided*, https://www.acf.hhs.gov/orr/about/ucs/services-provided (last visited Oct. 8, 2018).

[77] Andy Coghlan, *New Scientist*, "With no paper trail, can science determine age?" May 9, 2012, https://www.newscientist.com/article/mg21428644-300-with-no-paper-trail-can-science-determine-age/.

[78] A. Aynsley-Green et al., *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control*, 102 BRIT. MED. BULL. 17, 39 (2012).

have fully matured bones in their wrist before turning 18, rendering a finding of mature bones almost meaningless in determining whether a person is over 18.

Furthermore, comparisons should be based on images taken from the same population as the subject;[79] but atlases of radiograph images do not exist for children from many countries in Asia, Africa or the Middle East.[80] Even when comparative normative images do exist, at best chronological age correlates to ±2 years of maturity age, and in some entirely normal children, this may be discordant by as much as 4 to 5 years.[81]

Dental examinations to determine age are equally unreliable. After the age of 14, dental age assessment is based entirely on the development and eruption of the third molar (or wisdom tooth).[82] However, wisdom tooth growth varies dramatically. One study found that mature third molars can be seen in individuals as young as 15 years old; whereas some individuals as old as 25 years still did not have mature third molars.[83] Age assessments of adolescents based on wisdom teeth growth has an accuracy of only ±2 to 4 years.[84] Furthermore, the timing of eruption of the third molar depends on ethnicity,[85] gender,[86] socio-economic status, and even birth eight.[87]

Finally, subjecting children to medical tests that involve radiation, even in small amounts, raises significant ethical concerns, particularly where there are no health benefits and a lack of informed consent to the testing. "Even though the radiation dose from an X-ray of the hand is small . . . radiologists, dentists and others cannot simply downplay the effects of 'a little bit of radiation' but rather must consider the As Low As Reasonably Achievable (ALARA) principle."[88] Given the inability of these procedures to determine age with any degree of certainty, the benefits of subjecting children to x-rays, particularly without their informed consent or the informed consent of their parents, are unacceptably small.

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[79] *See* Andreas Schmeling *et al.*, Review Article, *Forensic Age Estimation*, 113 DEUTSCHES ÄRZTEBLATT INT'L 44, 46 (2016).
[80] Aynsley-Green. *supra* n.78 at 24.
[81] *Id.*
[82] Nishant Singh, et al., *Age estimation from physiological changes of teeth: A reliable age marker?*, 6 J. OF FORENSIC DENTAL SCI. 113 (2014).
[83] Aynsley-Green. *supra* n.78 at 34.
[84] *See* Ines Willershausen et al., Review Article, *Possibilities of Dental Age Assessment in Permanent Teeth: A Review*, S1 DENTISTRY 1, 3 (2012) (citations omitted).
[85] *See* Schmeling, *supra* n. 79 at 47; *see also* Willershausen, *supra* n. 81 at 2 (citations omitted).
[86] *See* A.S. Panchbhai, Review, *Dental radiographic indicators, a key to age estimation*, 40 DENTOMAXILLOFACIAL RADIOLOGY 199, 211 (2011), citing Ana C. Solari & Kenneth Abramovitch, *The Accuracy and Precision of Third Molar Development as an Indicator of Chronological Age in Hispanics*, 47 J. FORENSIC SCI. 531 (2002).
[87] *See* B.S. Manjunatha and Nishit K. Soni, Review Article, *Estimation of age from development and eruption of teeth*, 6 J. OF FORENSIC DENTAL SCI. 73 (2014).
[88] Aynsley-Green. *supra* n.78 at 34.

C. Children must be placed in the least restrictive setting in their best interests—in other words, with parents and family.

The proposed regulations include a series of changes to the process of evaluating parents and other sponsors as safe placements for unaccompanied children, which conflict with the Agreement's and TVPRA's mandate for children to be placed in the least restrictive setting in their best interests. When determining whether a sponsor is suitable for a child, HHS should consider best practices in child welfare. First, as in child welfare, the goal should be to place a child in an appropriate family setting as quickly as possible. This requires evaluating sponsors to verify their relationship to the child and to ensure the immediate safety of the child. Evaluations that extend beyond child safety, or which invite immigration enforcement against sponsors, will lead to the prolonged detention of children and their prolonged separation from parents and other family members. According to the administration, 41 sponsors were recently arrested after applying to sponsor a child's release from federal custody; fear of immigration enforcement may be a primary cause of the increased lengths of stay in ORR custody for unaccompanied children.[89] We urge HHS to withdraw the regulations that would expand sponsor suitability assessments, permit the agency to deny reunification on the basis that the sponsor might not secure the child's appearance in immigration proceedings, or fail to set clear timelines for decision-making or opportunities for children and sponsors to be notified of and challenge denials of release.

HHS's prior, existing sponsor suitability assessments—which did not focus on the immigration status of the sponsor—were sufficiently robust to identify potential sponsors who might pose a risk to the safety of an unaccompanied children. Moreover, there is no known correlation between a sponsor's immigration status and the likelihood that the individual poses a threat to the safety of, or lacks the ability to care for, a child. Even if HHS were to determine that it requires information about potential sponsors' immigration status for some purpose related to serving the best interests of the children in its care, there are alternate methods to obtain that information that do not require HHS to expand information collection or sharing, and that would not delay reunification of children with their families.

IV. DHS and HHS did not adhere to rulemaking requirements and should withdraw this proposed rule to determine the costs of implementation.

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the costs and benefits of available alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of

[89] Tal Kopan, *CNN*, "ICE arrested undocumented immigrants who came forward to take in undocumented children," Sept. 20, 2018, https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html; Tal Kopan, *CNN*, "The simple reason more immigrant kids are in custody than ever before," Sept. 14, 2018, https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html; Jonathan Blitzer, *The New Yorker*, "To Free Detained Children, Immigrant Families Are Forced to Risk Everything," Oct. 16, 2018, https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything.

quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, further emphasizes the importance of costs, and requires that for every one new significant regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.

OMB has designated this rule a significant regulatory action, although not "an economically significant" regulatory action, under Executive Order 12866. We disagree with OMB's premature designation of this rule as "not an economically significant" given the agencies' current inability to estimate costs. Furthermore, even a top-level review of the data suggests that the economic impact of this rulemaking is, in fact, significant. Regardless, this rulemaking should have triggered consideration of Executive Order 13771, yet there is no evidence DHS or HHS conducted any analysis under Executive Order 13771.

The relevant agencies admit that "new costs" will be incurred for several reasons, including (1) proposed alternative licensing process that may result in additional or longer detention for certain minors; (2) changes to ICE parole determination practices to align them with applicable statutory and regulatory authority; and (3) the costs of shifting hearings from DOJ to HHS. Nevertheless, DHS and HHS state that they are "unable to estimate the costs of this to the Government or to the individuals being detained because we are not sure how many individuals will be detained at FRCs after this rule is effective or for how much longer individuals may be detained because there are so many other variables to consider."[90] The agencies have sought comment on how these costs might be reasonably estimated.

As an initial matter, agencies must determine a reasonable estimate of costs in order to fulfill general rulemaking requirements under Executive Order 12866 and Executive Order 13563. The agency may not simply bypass any meaningful consideration of new costs (and the requisite treatment of those costs in the rulemaking process) by claiming it too challenging to estimate them. Particularly given the renewed emphasis under Executive Order 13771 to ensure that "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations," DHS and HHS must do more than is evident in the Notice. Without any estimates of the costs, DHS cannot show that (1) the benefits outweigh the costs; or (2) that the incremental cost of the proposed regulations has been appropriately counterbalanced by the elimination of existing costs associated with at least two prior regulations, as required under Executive Order 13771.[91]

[90] 83 FR 45514.
[91] Exec. Order No. 13771, 82 FR 9339.

V. Conclusion

The Flores Agreement—and Congress, through subsequent legislation—established a clear policy of releasing children from government custody to live with parents, family or other sponsors during the pendency of their immigration cases. The proposed rule fails to implement the terms of the Agreement and repeatedly seeks to undermine existing protections for children. These protections are essential for children's safety and well-being. The Young Center urges DHS and HHS to either abandon the proposed rule or to revise it to mirror the conditions agreed upon in the Agreement.

Respectfully submitted,

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