CAPITAL AREA IMMIGRANTS' RIGHTS COALITION

Fighting for equal justice for all immigrants at risk of detention and deportation

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Submitted via www.regulations.gov

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

RE: DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

Dear Ms. Seguin:

The Capital Area Immigrants' Rights (CAIR) Coalition appreciates the opportunity to comment on the Notice of Proposed Rulemaking ("NPRM" or "proposed rule") "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children" published in the Federal Register on September 7, 2018 (83 Fed. Reg. 45,486). CAIR Coalition strongly opposes the proposed rule because it does not implement the Flores Settlement Agreement ("FSA" or "the Agreement"),[1] it is inconsistent with statutory requirements set by Congress, and it fails to protect the vulnerable children we serve.

CAIR Coalition's Expertise in Serving Detained Immigrant Children

Established in 1999, CAIR Coalition strives to ensure equal justice for all immigrant adults and children at risk of detention and deportation in the D.C. metropolitan area and beyond through direct legal representation, know your rights presentations, impact and advocacy litigation, and the enlistment and training of attorneys to defend immigrants. In particular, CAIR Coalition's Detained Children's Program provides legal services to unaccompanied immigrant children

[1] Settlement Agreement, *Flores, et al. v. Reno, et al.*, Case No. CV 85-4544 (C.D. Cal., Jan. 1, 1997), *available at* https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf.

detained by the Department of Health and Human Services' ("HHS") Office of Refugee Resettlement (ORR) at facilities in Maryland and Virginia.[2]

CAIR Coalition has served many thousands of detained immigrant children during our history. The vast majority of these children survive unspeakable violence, discrimination, and persecution, either in their home country or during their journey to the United States. Consequently, detained children often suffer high levels of trauma and require special care, attention, and support.

CAIR Coalition also serves one of the two maximum security or "secure" facilities for immigrant children in the nation.[3] Prior to this year, the Government operated three secure facilities in the country, and CAIR Coalition provided services to children in two of the three.[4] As such, CAIR Coalition has an especially direct interest in the proposed rule, which would prolong the detention of children we serve and risk maintaining greater numbers of children in highly restrictive settings.

I. EXECUTIVE SUMMARY

CAIR Coalition opposes the proposed rule for numerous reasons, set forth in our attached comments. For the purposes of our comments, we have focused on the provisions of the proposed rule speaking to, or impacting, secure detention. As experts in the provision of services to children held in jail-like secure facilities, we believe we have a unique perspective to add to the many valid objections being raised by the immigration advocacy community to the NPRM.

An overarching concern is that the Department of Homeland Security ("DHS") and HHS (hereinafter "the Departments") seek termination of the 1997 FSA without implementing its terms. The FSA is founded upon the well-grounded principle of child development that, because children are at particularly vulnerable periods in their intellectual and emotional growth, the adverse effects of any detention of them must be minimized and the period of that detention shortened to the maximum extent possible. The NPRM, in sharp contrast, increases the use, length, and security level of children's detention.

Additionally, the Departments seek to alter the terms negotiated in the Agreement with the proposed rule while claiming to implement the FSA. By their own admission, the Departments

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[2] The facilities include ORR long-term foster care, transitional foster care, and large shelter programs, as well as secure detention facilities. Given the breadth of the services we provide, we serve detained children of all ages—newborns to seventeen year olds.

[3] References to secure facilities or placements do not endorse, adopt, or validate the proposed rule's definition at 45 C.F.R. § 410.101 and § 410.203, but refer to the current categorization of maximum security detention centers for immigrant children.

[4] Until recently, CAIR Coalition served two of the three secure facilities nationwide. *See* Justin Jouvenal, "Commission won't renew contract to house migrant children in Northern Virginia," *Washington Post* (June 20, 2018), *available at* https://www.washingtonpost.com/local/public-safety/commission-wont-renew-contract-to-house-migrant-children-in-northern-virginia/2018/06/20/f6f0939c-74a2-11e8-b4b7-308400242c2e_story.html?utm_term=.4f9b138a20d1 (announcing closure of secure ORR facility in Virginia).

have modified, added, or removed FSA terms such that the proposed rule, on its face, effectively both destroys the FSA protections for children as written and does not implement the principles enshrined in the FSA.

Finally, the proposed rule violates federal and constitutional law that protects the rights of immigrant children. Congress passed two laws after the FSA that spoke to the detention of children: the Homeland Security Act of 2002 (HSA) and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). The HSA created the Departments, while the TVPRA required the placement of children "in the least restrictive setting that is in the best interest of the child" and favors their prompt release to a suitable family member.[5] The proposed rule is designed to place higher numbers of children in the most restrictive setting for extended periods of time, against the plain letter of the TVPRA.[6] The NPRM also infringes on immigrant children's constitutional rights by keeping them detained for longer periods of time without access to a fair and open process where they may challenge their prolonged confinement.[7]

II. THE PROPOSED RULE ROLLS BACK DECADES OF PROTECTIONS UNDER THE FSA

A. The Proposed Rule Violates the Foundational Policies of the FSA

In response to decades of inaction, the U.S. Government agreed in the FSA to a detailed statement of protections directed by a Federal District Court to minimize the adverse effects of any detention on children and shorten the period of that detention. The Agreement requires the Government to implement a number of essential legal protections for immigrant children and families in the custody of the U.S. Government. These protections include requirements that ensure suitable conditions for the facility and proper care and protection for the children,[8] a

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[5] Section 235(c)(2) of the TVPRA, 8 U.S.C. §1232(c)(2).

[6] The Preamble of the proposed rule postures compliance with the HSA and the TVPRA and uses the federal statutes to justify changes to the FSA. *See, e.g.*, 83 Fed. Reg. 45,486 (Sept. 7, 2018) ("The rule would adopt in regulations provisions that parallel the relevant and substantive terms of the FSA, consistent with the HSA and TVPRA, with some modifications discussed further below to reflect intervening statutory and operational changes while still providing similar substantive protections and standards."). Unfortunately, this professed compliance with federal law is inconsistent with DHS and HHS's overt characterization of the TVPRA as ridden with "loopholes." *See* "Kirstjen Nielsen Addresses Families Separation at Border: Full Transcript," *New York Times*, June 18, 2018, *available at* https://www.nytimes.com/2018/06/18/us/politics/dhs-kirstjen-nielsen-families-separated-border-transcript.html; "Unaccompanied Alien Children State and Community Placement Monthly Report Update," Administration for Children and Families, Department of Health and Human Services, April 2, 2018, https://www.acf.hhs.gov/media/press/2018/unaccompanied-alien-children-state-and-community-placement-monthly-report-update. Nevertheless, our comments highlight several instances where the rule fails to comply with the HSA and TVPRA.

[7] *See* Philip E. Wolgin, "The High Cost of the Proposed *Flores* Regulation," Center for American Progress (Oct. 19, 2018), *available at* https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation/. ("[T]he average length of stay in ORR care has also risen. As of September, the average length of stay was 59 days, compared with 48 days in FY 2017.").

[8] FSA ¶11.

humane pathway for release,[9] the right of a detained immigrant child to a bond hearing,[10] and numerous other legal protections for children. While detained, children are to remain in the "least restrictive setting" to minimize the impact of their detention on their well-being and mental health.[11]

The NPRM, on the other hand, will expand children's detention, thwart prompt release, and broaden the Government's discretion to detain and re-detain juveniles at the expense of court oversight. Numerous changes and additions to the FSA reduce the rights of immigrant children; few, if any, provide increased protections. By broadening the definition of "emergency," by abandoning the mandate to transfer children to a licensed program as expeditiously as possible, by broadening the basis for the Government to re-detain children, the Government has increased the likelihood that children will end up in unlicensed[12] or secure detention – the very opposite of the mandate of the FSA. In an increased number of cases, the NPRM would also condemn detained children to indefinite detention, well beyond the reduced detention periods envisioned by the Agreement.

The proposed rule also aims to accomplish what the Attorney General, as directed by the President in his June 20, 2018, Executive Order, failed to negotiate in federal court—i.e., to modify the FSA so as to permit DHS "to detain [noncitizen] families together through the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings."[13] DHS views the FSA not as a way strengthen protections for vulnerable children but as "legal loopholes" or barriers in these agencies' larger plan to detain *en masse.*[14] Unsurprisingly, the NPRM is effectively designed to harm immigrant children and unlawfully deter their cries for safety.[15]

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[9] *Id.*, ¶14 (agreeing to General Policy Favoring Release).

[10] A key protection under the FSA sets a general policy that favors the prompt release of children. *See id.*, ¶24A.

[11] *Id.,* ¶21 and Ex. 2 b) of the FSA.

[12] The expansive definition of emergency or influx in the proposed rule would formalize HHS's de facto practice of depriving large numbers of children from protections secured under the FSA. *See* Cairlin Dickerson, "Migrant Children Moved Under Cover of Darkness to a Texas Tent City," *N.Y. Times,* Sept. 30, 2018, *available at* https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html.

[13] Executive Order of President Donald J. Trump, Affording Congress an Opportunity to Address Family Separation, Section 3(e), June 20, 2018.

[14] *Supra* n.7; *see also,* Victoria Kim, "Trump seeks changes in landmark agreement limiting how long migrant children can be detained," *L.A. Times*, Sept. 6, 2018, *available at* http://www.latimes.com/local/lanow/la-me-ln-flores-agreement-trump-immigration-20180906-story.html.

[15] Julie M. Linton, Marsha Griffin & Alan J. Shapiro, "Detention of Immigrant Children," *American Academy of Pediatrics* (Mar. 2017) ("Young detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school. Qualitative reports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems. Additionally, expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children."). *See also R.I.L.R. v. Johnson*, 80 F.Supp.3d 164 (D.D.C. 2015) (granting plaintiffs' preliminary injunction on the basis of DHS's policy to primarily consider deterrence of future migrant in its decisions whether to release Central American mothers and children from custody).

B. The Proposed Rule Is Arbitrary and Capricious Because It Does Not Implement the FSA as the Termination Clause Requires, and Therefore Cannot Terminate the FSA.

To comply with the FSA termination clause, a rule must "implement" the FSA terms. The parties to the FSA, which included the former Immigration and Nationality Services (INS) and a certified class of detained children, agreed to abide by the standards set in the Agreement until a final rule was published.[16] Specifically, the Agreement provides for termination "45 days following defendants' publication of final regulations implementing [the FSA]."[17]

In the proposed rule, the Departments have made numerous changes to the FSA without first obtaining Federal Court approval. The proposed rule "modifies," "changes," "updates," "clarifies," "adapts" to current "operational realities," proposes "alternatives" to the FSA, "eliminates barriers" the FSA imposes, eliminates terms deemed "now unnecessary," and creates new policy on "challenges that did not exist when the FSA was executed." The NPRM "account[s]" for new statutes, "changed circumstances," and "operational shifts" by claiming that these modifications make the rule "workable in light of subsequent changes." But what proposed rule does not do is fulfill the FSA's implementing requirement. Instead, the Departments have proposed a rule that deviates significantly from the FSA.

None of these changes truly implements the FSA, and as a result, the proposed rule is arbitrary and capricious and cannot trigger the termination clause of the Agreement.[18] The following are examples of <u>one addition</u> and <u>one modification</u> set forth in the proposed rule that violate the language and undermine the purpose of the FSA, and are therefore without effect in a regulatory scheme intended to supersede a settlement agreement.[19]

- DHS makes an <u>addition</u> to the FSA in Section 236.3(n) for DHS to re-detain previously released minors if they become an escape risk, danger to the community, or are issued a final order of removal after being released. Under this proposed rule, DHS can also reassume custody if there is no longer a parent or guardian available, and transfer the child to HHS. This regulation goes beyond the negotiated terms of the FSA by enabling DHS to re-apprehend, arrest, and re-detain countless youth after their release from ORR

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[16] FSA ¶40. After four years without the Departments implementing a rule, the parties negotiated an amendment to the FSA, with new court approval. The new Termination Clause replaces the former Termination Clause at ¶40. *See* Stipulation Extending Settlement Agreement, *Flores v. Reno*, Case No. CV 85-4544 (C.D. Cal., Dec. 7, 2001).
[17] *See id.*
[18] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983)("*State Farm*") (agency action will be set aside if rationale found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see also id.* at 43 ("an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decisions that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").
[19] *O'Neil v. Bunge Corp.*, 365 F.3d 820, 822 (9th Cir. 2004) ("O'Neil") ("The construction and enforcement of settlement agreements are governed by principles of local law which apply to interpretation of contracts generally.").

custody. This addition does not implement the terms of the FSA. The FSA did not contemplate the re-detention of children, which effectively separates children from their family and counsel and contravenes ORR's authority to release children pursuant to best-interest determinations. This rule also makes it much more likely that children will be detained in secure settings in violation of the FSA. This proposed addition is therefore invalid.[20]

- HHS explicitly modifies the FSA in proposed 45 CFR 410.810. The plain language of the FSA provides all immigrant children with the right to a bond redetermination hearing "before the Immigration Judge."[21] The HHS proposed rule substitutes the Immigration Judge with "an independent hearing officer employed by HHS." This modification clearly fails to implement the FSA and undercuts the purpose of providing neutral adjudicators to detained immigrant children seeking to challenge their prolonged confinement. Additionally, the characterization that HHS, which detains the child, can also "independently" adjudicate the child's request for custody redetermination flies in the face of logic, federal court precedent, and basic rules of fairness.[22]

Unfortunately, the NPRM is not the first instance in which the Departments have sought to evade their obligations under the FSA. Throughout the past twenty years, the Government has frequently failed to uphold its basic duties toward detained children.[23] Independent of the FSA, the proposed rule also conflicts with existing federal statutes.[24]

III. THIS PROPOSED RULE USURPS THE AUTHORITY OF LEGISLATORS WHO PRESERVED GOVERNMENTAL OBLIGATIONS UNDER THE FSA IN SUBSEQUENT FEDERAL STATUTES

[20] *See O'Neil.* CAIR Coalition's attached comments further examine the problematic character of this proposed rule. Even prior to the notice-and-comment period, DHS has engaged in re-apprehension of immigrant children duly released from ORR detention based on uncorroborated evidence of flight risk or danger. This practice has resulted in dozens of false accusations, racial profiling, and re-traumatization of immigrant children.

[21] FSA ¶24A: "A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing."

[22] *See Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

[23] The certified class of detained children has submitted five Motions to Enforce to date, due to DHS and HHS's failures to abide by their contractual duties. Additionally, due to the Departments' non-compliance with the FSA, the court installed a Juvenile Coordinator to monitor Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). (Government currently appealing) *Flores v. Sessions*, No. 17-56297 (9th Cir.) (docketed Aug. 28, 2017) (court ordered appointment of Juvenile Coordinator July 27, 2018). FSA ¶24A authorizes this Coordinator to monitor the Departments' compliance with FSA standards. The court deemed a Coordinator necessary due to breach of the FSA, to include detention facilities' unsanitary conditions, lack of food and water. Order Re Plaintiffs' Motion to Enforce and Appoint a Special Monitor, C.D. Cal, June 27, 2017, CV 85-4544 DMG (AGRx); see also 83 Fed. Reg. 45,495.

[24] *State Farm*, 463 U.S. at 41 (1983).

The Departments claim that they must deviate from the FSA to promulgate a rule compliant with existing federal statutes. Congress passed two laws–the HSA and the TVPRA–after the FSA that spoke to the detention of children. The Departments assert that their modifications of the FSA are designed to ensure compliance with the HSA and the TVPRA.[25] The Departments' assertions are legally invalid. For two decades, Congress was on notice about the U.S. Government's contractual obligations to immigrant children under the FSA. However, Congress did not alter the Government's responsibilities. In fact, the HSA recognized in a savings clause the Departments' pre-existing agreements such as the FSA and explicitly provided for those to "remain in effect."[26] The TVPRA also incorporated the savings clause of the HSA.[27]

Accordingly, complying with the HSA and TVPRA cannot legally justify deviation from the FSA. Yet the Departments have deviated significantly. Below are two notable examples.

- Like the FSA, the TVPRA envisioned a narrow, exceptional use for secure detention.[28] In contrast, HHS proposes in Section 410.205 that "unavailable" alternatives and "appropriate" circumstances permit the placement of children in a secure setting. These vague terms enable HHS to exercise broad discretion in placing children in the most restrictive setting—discretion that the TVPRA explicitly proscribes. In every case, Congress required that HHS "*shall*" place unaccompanied immigrant children in "the least restrictive setting that is in the best interest of the child."[29] Rather than uphold this mandate, the proposed rule impermissibly assigns HHS authority it does not have. CAIR Coalition can scarcely understate the impact of this rule, given the psychological harm children suffer in secure detention.[30] By improperly placing larger numbers of children in secure settings, HHS will not only violate federal law but also undermine the principles of child welfare it is required to uphold.[31]

- The NPRM erroneously claim that the HSA and TVPRA permit overhaul of FSA protections. As stated prior, the FSA explicitly provides that immigrant children are

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[25] "[C]ompliance with the HSA, TVPRA, other immigration laws, and the FSA [is] problematic without some modification of the literal text of the FSA." 83 Fed. Reg. 45,487 (Sept. 7, 2018).
[26] 6 U.S.C. § 552(a)(1-2); *see also* 862 F.3d at 870.
[27] 8 U.S.C. § 1232(b)(1).
[28] 8 U.S.C. 1232(c)(2)(A) (solely permitting placement of children in secure facility if "the child poses a danger to self or others or has been charged with having committed a criminal offense").
[29] *Id.* (emphasis added).
[30] Researchers have shown that detained children are ten times more likely to develop psychiatric disorders. *See* Steel, Zachary, Shakeh Momartin, Catherine Bateman, Atena Hafshejani, Derrick M. Silove, Naleya Everson, Konya Roy, Michael Dudley, Louise Newman, Bijou Blick, and Sarah Mares, "Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia," *Australian and New Zealand Journal of Public Health* 28, no. 6 (September 25, 2004): 527-36, *available at* https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-842X.2004.tb00042.x.
[31] 6 U.S.C. § 279(b)(1)(B)(" [T]he Director of the Office of Refugee Resettlement *shall* be responsible for . . . *ensuring that the interests of the child are considered* in decisions and actions relating to the care and custody of an unaccompanied alien child") (emphasis added).

entitled to challenge their detention during bond redetermination proceedings before an Immigration Judge. With the proposed rule 410.810(a), HHS claims that Congress' silence on the procedural mechanism of children's bond hearings permits HHS to proceed with this change. This statutory interpretation conveniently ignores the FSA as the legal backdrop of the HSA and the TVPRA. As the Ninth Circuit already stated, Congress' silence must be examined within the canons of statutory construction.[32] Congress did not speak to the procedural protections for bond because it recognized the full force of the FSA, including Paragraph 24A. Both Congress and the FSA recognized that the same agency that detains a child should not oversee the child's bond proceedings. Congress did not give HHS exclusive authority over the fate of unaccompanied children.[33] In creating HHS, Congress recognized that the Immigration Court was vested with separate powers in reviewing unaccompanied children's special needs.[34]

The proposed rule cannot supersede Congress' statutory authority. By exceeding the scope of their statutory mandate, the Departments put forth unlawful regulations that will strip vital protections from detained immigrant children. As the following section demonstrates, the Departments also fail to follow key elements of the U.S. Constitution.

IV. THE PROPOSED RULE INFRINGES ON IMMIGRANT CHILDREN'S CONSTITUTIONAL RIGHTS

It is a settled constitutional matter that the Due Process Clause of the Fifth Amendment protects all persons, including noncitizens.[35] Federal courts have recently enjoined the Departments for infringing on immigrant children's constitutional rights.[36] Nevertheless, the proposed rule greatly expands the Department's ability to detain immigrant children in secure settings in violation of their rights under the Fifth Amendment. CAIR Coalition is particularly alarmed by the proposed rule's focus on (1) keeping children detained without adequate procedural means to challenge

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[32] 862 F.3d at 875 ("[A] basic canon of statutory construction requires that we presume Congress does not silently abrogate existing law. . . . We are confident that Congress's failure to address bond hearings in the HSA and TVPRA did not occur because Congress lacked the words to do so."). This should not come as a surprise to HHS, as it already conceded this statutory interpretation in 2017. *See* 862 F.3d at 871 n.7 ("The government recognizes that the HSA savings clause, 6 U.S.C. § 552(a), and its incorporation in the TVPRA, 8 U.S.C. § 1232(b)(1), "maintained the Agreement in effect as a consent decree.").

[33] 862 F.3d at 871 ("Congress did not intend to entirely remove unaccompanied minors from the auspices of authorities outside ORR.").

[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] *Zadvydas v. Davis*, 533 U.S. 678 (2001) ("Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent.").

[36] *See Saravia v. Sessions*, No. 18-15114 (9th Cir. 2018) (affirming immigrant children's Due Process rights to prompt hearings upon re-detention by DHS), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2018/10/01/18-15114.pdf.

their detention, and (2) increasing DHS's means to re-detain children without proper justification.

First, the NPRM effectively abrogates bond hearings for unaccompanied children—a tool that the Ninth Circuit already recognized as imperfect though invaluable to the bare minimum protections afforded for detained youth.[37] By leaving those hearings to the hands of HHS, the Government leaves children with no procedural protection to hold the agency accountable. The NPRM substitutes a neutral judicial review and opportunity to be heard for ORR's infamous "bureaucratic limbo" and "opaque decision making."[38] This proposed rule will thus prolong the detention of children in a secure context without procedural due process. Importantly, the Ninth Circuit reinstated Flores bond hearings because of overwhelming evidence that ORR routinely keeps children in secure detention for months or years on end.[39] Other federal courts have recognized that this indefinite detention of children without access to a judicial hearing that independently reviews their custody violates procedural due process.[40]

Second, the NPRM permits the re-detention of children whom ORR released from detention, without adequate procedural protections to challenge DHS's actions. Section 236.3(n) permits the apprehension of released children so long as there is a "material change in circumstances" that indicates that the child is now a danger to the community or an escape risk. Notably, the regulations are silent on the party that bears the burden of proof that there is a material change in circumstances.[41] The constitutional implications of this rule are severe. As the Ninth Circuit recently held, immigrant children are entitled to prompt hearings where the Government bears the burden of demonstrating why there was a material change in circumstances justifying their re-arrest. Prior to scrutiny by federal courts, the Government re-arrested dozens of immigrant children and catapulted them into secure detention, far from their families and counsel.[42] When the burden properly was placed on the Government to corroborate its claims, many children were freed from detention and reunited with their families.

Abiding by constitutional protections is not only required but vital to the principles of child welfare. Because this proposed rule deprives children of a meaningful forum to contest their prolonged detention, many will turn to self-deportation despite viable claims of relief. CAIR

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[37] 862 F.3d at 868.
[38] *Id.*
[39] 862 F.3d at 872-74.
[40] *See Beltran v. Cardall*, 222 F. Supp. 3d. 476 (E.D.Va. 2016); *Santos v. Smith*, 260 F. Supp. 3d. 598 (W.D.Va. 2017).
[41] This section refers to 236.3(m), which permits children who are not unaccompanied to seek bond hearings under 8 C.F.R. § 1003.19. Importantly, the bond hearings referenced here place the burden of proof on the Respondent, here an immigrant child who is abruptly detained by DHS and taken to a detention center that is far from family and counsel. As the Ninth Circuit examined in *Saravia, supra*, this mechanism falls short of protecting immigrant children's rights under the Due Process Clause.
[42] *See* Stephen Kang, "Court Rules ICE Can't Detain Immigrant Teens Without Due Process," ACLU.org (Dec. 5, 2017), *available at* https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/court-rules-ice-cant-detain-immigrant-teens.

routinely observes children in secure detention abandon their viable claims of relief because they can no longer tolerate indefinite detention for months or years on end. As the Ninth Circuit observed, the absence of procedural protections to contest detention causes children to lose hope: they face "an impossible choice between what is, in effect, indefinite detention in prison, and agreeing to their own removal and possible persecution."[43] That is why CAIR Coalition urges the Departments to protect – not undermine – immigrant children's constitutional rights in the NPRM.

V. CONCLUSION

For the reasons detailed in the comments that follow, DHS and HHS should immediately withdraw their current proposal and dedicate their efforts to advancing policies that safeguard the health, safety, and best interests of immigrant children. Only a robust, good-faith implementation of the FSA, in conformance with existing statutory and constitutional protections, will properly replace the existing Agreement.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact me to provide further information.

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Encl. CAIR Coalition's annotated comments to the NPRM.

[43] 862 F.3d at 874 n.11.

CAIR COALITION'S ANNOTATED COMMENTS TO THE NPRM

LAID OUT BELOW IN THE PROPOSED REGULATIONS ARE SPECIFIC COMMENTS OF CAIR COALITION. OUR COMMENTS ARE SET-OUT IN RED TEXT BENEATH THE PROPOSED SECTION TO WHICH THE COMMENTS APPLY.

List of Subjects

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 236

Apprehension and Detention of Inadmissible and Deportable Aliens, Removal of Aliens Ordered Removed, Administrative Practice and Procedure, Aliens, Immigration.

45 CFR Part 410

Administrative practice and procedure, Child welfare, Immigration, Unaccompanied alien children, Reporting and recordkeeping requirements.

Department of Homeland Security

8 CFR Chapter I

For the reasons set forth in the preamble, parts 212 and 236 of chapter I are proposed to be amended as follows:

PART 212 – DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

1. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1181, 1182, 1203, 1225, 1257; 8 CFR part 2.

2. In § 212.5, revise paragraphs (b) introductory text and (b)(3) to read as follows:

§ 212.5 Parole of aliens into the United States.

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(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding:

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(3) Aliens who are defined as minors in § 236.3(b) of this chapter and are in DHS custody. The Executive Assistant Director, Enforcement and Removal

Operations; directors of field operations; field office directors, deputy field office directors; or chief patrol agents shall follow the guidelines set forth in § 236.3(j) of this chapter and paragraphs (b)(3)(i) through (ii) of this section in determining under what conditions a minor should be paroled from detention:

(i) Minors may be released to a parent or legal guardian not in detention.

(ii) Minors may be released with an accompanying parent or legal guardian who is in detention.

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PART 236 – APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

3. The authority citation for part 236 is revised to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 6 U.S.C. 112(a)(2), 112(a)(3), 112(b)(1), 112(e), 202, 251, 279, 291; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1232, 1357, 1362; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

4. Section 236.3 is revised to read as follows:

§ 236.3 Processing, detention, and release of alien minors.

(a) *Generally*. (1) DHS treats all minors and UACs in its custody with dignity, respect and special concern for their particular vulnerability.

(2) The provisions of this section apply to all minors in the legal custody of DHS, including minors who are subject to the mandatory detention provisions of the INA and applicable regulations, to the extent authorized by law.

(b) *Definitions*. For the purposes of this section:

(1) *Minor* means any alien who has not attained eighteen (18) years of age and has not been:

(i) Emancipated in an appropriate state judicial proceeding; or

(ii) Incarcerated due to a conviction for a criminal offense in which he or she was tried as an adult.

(2) *Special Needs Minor* means a minor whose mental and/or physical condition requires special services and treatment as identified during an individualized needs assessment as referenced in paragraph (i)(4)(iii) of this section. A minor may have special needs due to drug or alcohol abuse, serious emotional disturbance, mental illness or retardation, or a physical condition or chronic illness that requires special services or treatment. A minor who has suffered serious neglect or abuse may be considered a minor with special needs if the minor requires special services or treatment as a result of the neglect or abuse.

(3) *Unaccompanied Alien Child* (UAC) has the meaning provided in 6 U.S.C. 279(g)(2), that is, a child who has no lawful immigration status in the United States and who has not attained 18 years of age; and with respect to whom: there is no parent or legal guardian present in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody. An individual may meet the definition of UAC without meeting the definition of minor.

(4) *Custody* means within the physical and legal control of an institution or person.

(5) *Emergency* means an act or event (including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or public health concerns at

one or more facilities) that prevents timely transport or placement of minors, or impacts other conditions provided by this section.

The definition of "emergency" as used in the proposed regulations is too broadly defined and will allow DHS to increase its holding of immigrant children in a secure setting.[1] CAIR Coalition opposes this broadened definition because, as later discussed with Section Under the FSA, the term "emergency" is defined as "any act or event that prevents the placement of minors pursuant to Paragraph 19 within the time frame provided. Such emergencies include natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies (e.g., a chicken pox epidemic among a group of minors)."[2] In revising this FSA definition for the proposed regulations, DHS broadened the definition to an illogical and arbitrary degree.

First, the proposed definition of an emergency includes "an act or event" "at one or more facilities."[3] This would allow the government to designate an emergency situation and operate system-wide under 8 CFR section 236.3(e) under lesser standards with respect to children if there is an incident (e.g., a fire) at one detention facility.[4] To allow one facility's incident to alter the proposed regulatory protections for children nationally runs counter to the purposes outlined in the preamble and is not consistent with the FSA.[5]

From our experience, it is not unusual for one facility to be in an emergency situation while other facilities are capable of meeting the required child-protective rules. For example, in

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[1] *See infra* our comments on § 410.205 (highlighting that proposed rule creates loophole to place children in secure detention based on availability and appropriate circumstances, in violation of the TVPRA).
[2] FSA Section 12 B.
[3] Proposed 8 CFR § 236.3 (b)(5).
[4]The authority to transfer non-UACs from one facility to another that would be found in proposed 8 CFR §236.3(e) would not limit the scope of the U.S. government's transfer authority in times of emergency. The transfer authority in an emergency in not limited to detainees in or slated for a facility affected by an emergency. Thus the authority, once triggered, could be used to the disadvantage of hapless detainees in parts of the immigration system unaffected by the "emergency."
[5] *See* Preamble, 43-44.

2017, a facility located in the Capital Region was the site of a scabies outbreak. The children were quarantined, and no transfers or visits were allowed until the outbreak passed. During the same time, the other children's detention facilities in the Capital Region continued to provide routine services. There was no need to apply the emergency protocol and curtail protections for children nationally at unaffected sites.

Second, as envisioned in the proposed rule, DHS is given carte blanche to declare an emergency and free themselves of many stated obligations to children. In the FSA, an emergency only occurs when an incident prevents the government from fulfilling its obligations to timely place children in appropriate detention facilities.[6] The proposed regulations expand this to include incidents that impact "timely transport or placement of minors, or impacts other conditions provided by this section."[7] This catch-all provision is too broad and would allow the government to declare an emergency at almost any time, so long as some incident impedes the government from delivering any service or meeting any obligation in the proposed regulations. This is particularly troublesome because the Departments' increased detention of children inherently increases the risk of medical emergencies among detained children.[8] DHS offers no persuasive reason for providing such a broad definition of emergency and the expansion of its powers. The treatment of "emergency" is the regulations is thus arbitrary and capricious.

Third, DHS's expanded definition would result in the placement of larger number of children in secure detention, well beyond what the FSA provides. The FSA requires DHS

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[6] FSA ¶ 12(B).
[7] Proposed 8 CFR § 236(b)(5).
[8] *See* Liza Gross, "Migrant Children At Risk Of Disease Outbreaks, Doctors Say*,"* Huffington Post (June 27, 2018), https://www.huffingtonpost.com/entry/migrant-children-at-risk-of-disease-outbreaks-doctors-say_us_5b339face4b0b5e692f35764. ("The cramped conditions at detention facilities, combined with the stress of separation from their parents, could further weaken the children's immune systems, making them more susceptible to illness and infection, Uwemedimo and other doctors said.").

during an emergency or influx to transfer a minor who is not a UAC to a licensed program (which by definition are not secure), using reasonable efforts to expeditiously effectuate the transfer.[9] Thanks to this broader definition of "emergency," Proposed Section 236.3(e) will undermine the FSA's protection of vulnerable immigrant children,[10] allowing the government instead to hold immigrant children outside of licensed program (e.g., in secure detention) while making "reasonable efforts" to place the child elsewhere.

(6) *Escape-risk* means that there is a serious risk that the minor will attempt to escape from custody. Factors to consider when determining whether a minor is an escape-risk include, but are not limited to, whether:

(i) The minor is currently subject to a final order of removal;

(ii) The minor's immigration history includes: a prior breach of bond, a failure to appear before DHS or the immigration courts, evidence that the minor is indebted to organized smugglers for his transport, or a voluntary departure or previous removal from the United States pursuant to a final order of removal; or

(iii) The minor has previously absconded or attempted to abscond from state or federal custody.

CAIR Coalition incorporates our comments for this definition of "escape risk" that we provided for the HHS definition of "escape risk" found at Section 410.101.

(7) *Family unit* means a group of two or more aliens consisting of a minor or minors accompanied by his/her/their adult parent(s) or legal guardian(s). In

Section 12 A. 1. of the Flores Settlement Agreement (herein, "FSA")..

[10] American Psychiatric Association, *APA Statement Opposing Separation of Children from Parents at the Border* (May 30, 2018), https://www.psychiatry.org/newsroom/news-releases/apa-statement-opposing-separation-of-children-from-parents-at-the-border.

determining the existence of a parental relationship or a legal guardianship for purposes of this definition, DHS will consider all available reliable evidence. If DHS determines that there is insufficient reliable evidence available that confirms the relationship, the minor will be treated as a UAC.

(8) *Family Residential Center* means a facility used by ICE for the detention of Family Units.

(9) *Licensed Facility* means an ICE detention facility that is licensed by the state, county, or municipality in which it is located, if such a licensing scheme exists.

Licensed facilities shall comply with all applicable state child welfare laws and regulations and all state and local building, fire, health, and safety codes. If a licensing scheme for the detention of minors accompanied by a parent or legal guardian is not available in the state, county, or municipality in which an ICE detention facility is located, DHS shall employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE.

(10) *Influx* means a situation in which there are, at any given time, more than 130 minors or UACs eligible for placement in a licensed facility under this section or corresponding provisions of ORR regulations, including those who have been so placed or are awaiting such placement.

CAIR Coalition incorporates our comments for this definition of "influx" that we provided for the HHS definition of "influx" found at Section 410.101.

(11) *Non-Secure Facility* means a facility that meets the definition of non-secure in the state in which the facility is located. If no such definition of non-secure exists under state law, a DHS facility shall be deemed non-secure if egress from a portion of the facility's building is not prohibited through internal locks within the building or exterior locks and egress from the facility's premises is not prohibited through secure fencing around the perimeter of the building.

(12) *Office of Refugee Resettlement (ORR)* means the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement.

(c) *Age Determination*. (1) For purposes of exercising the authorities described in this part, DHS shall determine the age of an alien in accordance with 8 U.S.C.

1232(b)(4). Age determination decisions shall be based upon the totality of the evidence and circumstances.

(2) If a reasonable person would conclude that an individual is an adult, despite his or her claim to be under the age of 18, DHS may treat such person as an adult for all purposes, including confinement and release on bond, recognizance, or other conditions of release. In making this determination, an immigration officer may require such an individual to submit to a medical or dental examination conducted by a medical professional or other appropriate procedures to verify his or her age.

(3) If an individual previously considered to have been an adult is subsequently determined to be a under the age of 18, DHS will then treat such individual as a minor or UAC as prescribed by this section.

(d) *Determining whether an alien is a UAC*. (1) Immigration officers will make a determination as to whether an alien under the age of 18 is a UAC at the time of encounter or apprehension and prior to the detention or release of such alien.

(2) When an alien previously determined to have been a UAC has reached the age of 18, when a parent or legal guardian in the United States is available to provide care and physical custody for such an alien, or when such alien has obtained lawful immigration status, the alien is no longer a UAC. An alien who is no longer a UAC is not eligible to receive legal protections limited to UACs under the relevant sections of the Act. Nothing in this paragraph affects

USCIS' independent determination of its initial jurisdiction over asylum applications filed by UACs pursuant to section 208(b)(3)(C) of the Act.

(3) *Age-out procedures*. When an alien previously determined to have been a UAC is no longer a UAC because he or she turns eighteen years old, relevant ORR and ICE procedures shall apply.

(e) Transfer of minors who are not UACs from one facility to another. (1) In the case of an influx or emergency, as defined in paragraph (b) of this section, DHS will transfer a minor who is not a UAC, and who does not meet the criteria for secure detention pursuant to paragraph (i)(1)of this section, to a licensed facility as defined in paragraph (b)(9) of this section, which is non-secure, as expeditiously as possible. Otherwise, to the extent consistent with law or court order, DHS will transfer such minor within three (3) days, if the minor was apprehended in a district in which a licensed program is located, or within five (5) days in all other cases.

(2) In the case of an emergency or influx, DHS will abide by written guidance detailing all reasonable efforts that it will take to transfer all minors who are not UACs as expeditiously as possible.

Section 236.3(e) of Title 8 of the proposed rule has broadened the authority of DHS from that given to it by the FSA. This proposed regulation allows the government to hold children in a secure detention facility during an "emergency" or an "influx." In contrast with the FSA, this section provides the government with greater flexibility to not place children in licensed facilities (which are by definition non-secure[11]). This has the effect of increasing the

[11] Proposed 8 CFR § 236(b)(9).

number of juveniles in secure detention. This is counter to the requirements of the FSA and the policies set forth in the preamble.[12] Further, this proposed regulation in its imprecision fails to impose clear and nonarbitrary obligations on the government during an "emergency" or an "influx."

Finally, this rule would legitimize the violation of minimum standards of child welfare provided by the FSA during states of emergency. Pursuant to the FSA, during emergencies and influxes, the government must "place all minors pursuant to paragraph 19 as expeditiously as possible" and must "have a written plan that describes the steps the government will take to place all minors as expeditiously as possible into licensed programs during emergencies and influxes."[13] This mandatory language of the FSA is very clear that the government must place children in non-secure facilities as quickly as possible. There is no exception to this in the FSA. Contrary to the FSA, Proposed Section 8 CFR 236(e)(2) abandons the mandatory language of the FSA to place all children expeditiously and instead require that the government makes "reasonable efforts" to place each children in a licensed program as expeditiously as possible using the following procedures." The "all reasonable efforts" language of the proposed regulations loosens the FSA's pressure on DHS not to place children in non-licensed programs – including secure facilities.

(f) *Transfer of UACs from DHS to HHS.* (1) All UACs apprehended by DHS, except those who are subject to the terms of 8 U.S.C. 1232(a)(2), will be transferred to ORR for care, custody, and placement in accordance with 6 U.S.C. 279 and 8 U.S.C. 1232.

[12] FSA ¶ 11; TVPRA 8 U.S.C. § 1232 (c)(2) (". . . an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight.").
[13] FSA ¶ 12.

(2) DHS will notify ORR within 48 hours upon the apprehension or discovery of a UAC or any claim or suspicion that an unaccompanied alien detained in DHS custody is under 18 years of age.

(3) Unless exceptional circumstances are present, DHS will transfer custody of a UAC as soon as practicable after receiving notification of an ORR placement, but no later than 72 hours after determining that the minor is a UAC per paragraph (d) of this section. In the case of exceptional circumstances, DHS will abide by written guidance detailing the efforts that it will take to transfer all UACs as required by law.

(4) *Conditions of transfer*. (i) A UAC will not be transported with an unrelated detained adult(s) unless the UAC is being transported from the place of apprehension to a DHS facility or if separate transportation is otherwise impractical or unavailable.

(ii) When separate transportation is impractical or unavailable, necessary precautions will be taken to ensure the UAC's safety, security, and well-being. If a UAC is transported with any unrelated detained adult(s), DHS will separate the UAC from the unrelated adult(s) to the extent operationally feasible and take necessary precautions for protection of the UAC's safety, security, and well-being.

(g) *DHS procedures in the apprehension and processing of minors or UACs*.

(1) Processing. (i) *Notice of rights and request for disposition*. Every minor or UAC who enters DHS custody, including minors and UACs who request voluntary departure or request to withdraw their application for admission, will be issued a Form I-770, Notice of Rights and Request for Disposition, which will include a statement that the minor or UAC may make a telephone call to a parent, close relative, or friend. If the minor or UAC is believed to be less than 14 years of age, or is unable to comprehend the information contained in the Form I-770, the notice shall be read and explained to the minor or UAC in a language and manner that he or she understands. In the event that a minor or UAC is no longer amenable to voluntary departure or to a withdrawal of an application for admission, the minor or UAC will be issued a new Form I-770 or the Form I-770 will be updated, as needed.

(ii) *Notice of Right to Judicial Review*. Every minor who is not a UAC who is transferred to or remains in a DHS detention facility will be provided with a Notice of Right to Judicial Review, which informs the minor of his or her right to seek judicial review in United States District Court with jurisdiction and venue over the matter if the minor believes that his or her detention does not comply with the terms of paragraph (i) of this section.

(iii) *Current List of Counsel*. Every minor who is not a UAC who is transferred to or remains in a DHS detention facility will be provided the free legal service provider list, prepared pursuant to section 239(b)(2) of the Act.

(2) *DHS custodial care immediately following apprehension*. (i) Following the apprehension of a minor or UAC, DHS will process the minor or UAC as expeditiously as possible. Consistent with 6 CFR 115.114, minors and UACs shall be held in the least restrictive setting appropriate to the minor or UAC's age and special needs, provided that such setting is consistent with the need to protect the minor or UAC's well-being and that of others, as well as with any other laws, regulations, or legal requirements. DHS will hold minors and UACs in facilities that are safe and sanitary and that are consistent with DHS's concern for their particular vulnerability. Facilities will provide access to toilets and sinks, drinking water and food as appropriate, access to emergency medical assistance as needed, and adequate temperature and ventilation. DHS will provide adequate supervision and will provide contact with family members arrested with the minor or UAC in consideration of the safety and well-being of the minor or UAC, and operational feasibility. UACs generally will be held separately from unrelated adult detainees in accordance with 6 CFR 115.14(b) and 6 CFR 115.114(b). In the event that such separation is not immediately

possible, UACs in facilities covered by 6 CFR 115.114 may be housed with an unrelated adult for no more than 24 hours except in the case of an emergency or other exigent circumstances.

(ii) Consistent with the statutory requirements, DHS will transfer UACs to HHS in accordance with the procedures described in paragraph (f) of this section.

(h) *Detention of family units*. DHS's policy is to maintain family unity, including by detaining families together where appropriate and consistent with law and available resources. If DHS determines that detention of a family unit is required by law, or is otherwise appropriate, the family unit may be transferred to a Family Residential Center which is a licensed facility and non-secure.

(i) *Detention of minors who are not UACs in DHS custody*. In any case in which DHS does not release a minor who is not a UAC, said minor shall remain in DHS detention. Consistent with 6 CFR 115.14, minors shall be detained in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with the need to ensure the minor's timely appearance before DHS and the immigration courts and to protect the minor's well-being and that of others, as well as with any other laws, regulations, or legal requirements. The minor shall be placed temporarily in a licensed facility, which will be non-secure, until such time as release can be effected or until the minor's immigration proceedings are concluded, whichever occurs earlier. If immigration proceedings are concluded and result in a final order of removal, DHS will detain the minor for the purpose of

removal. If immigration proceedings result in a grant of relief or protection from removal where both parties have waived appeal or the appeal period defined in 8 CFR 1003.38(b) has expired, DHS will release the minor.

(1) A minor who is not a UAC referenced under this paragraph may be held in or transferred to a suitable state or county juvenile detention facility, or a secure DHS detention facility, or DHS contracted facility having separate accommodations for minors, whenever the Field Office Director and the ICE supervisory or management personnel have probable cause to believe that the minor:

(i) Has been charged with, is chargeable with, or has been convicted of a crime or crimes, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act or acts, that fit within a pattern or practice of criminal activity;

(ii) Has been charged with, is chargeable with, or has been convicted of a crime or crimes, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act or acts, that involve violence against a person or the use or carrying of a weapon;

(iii) Has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in federal or state government custody or while in the presence of an immigration officer;

(iv) Has engaged, while in the licensed facility, in conduct that has proven to be unacceptably disruptive of the normal functioning of

the licensed facility in which the minor has been placed and transfer to another facility is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed facility;

(v) Is determined to be an escape-risk pursuant to paragraph (b)(6) of this section; or

(vi) Must be held in a secure facility for his or her own safety.

(2) DHS will not place a minor who is not a UAC in a secure facility pursuant to paragraph (i)(1) if there are less restrictive alternatives that are available and appropriate in the circumstances, such as transfer to a facility which would provide intensive staff supervision and counseling services or another licensed facility. All determinations to place a minor in a secure facility will be reviewed and approved by the Juvenile Coordinator referenced in paragraph (o) of this section. Secure facilities shall permit attorney-client visits in accordance with applicable facility rules and regulations.

CAIR Coalition incorporates our comments to proposed section 45 CFR 410.203 with respect to the placement of children in secure detention as the comments apply to this section and the placement of children in secure detention by DHS.

(3) *Non-secure facility*. Unless a secure facility is otherwise authorized pursuant to this section, ICE facilities used for the detention of minors who are not UACs shall be non-secure facilities.

(4) *Standards*. Non-secure, licensed ICE facilities to which minors who are not UACs are transferred pursuant to the procedures in paragraph (e) of this section shall abide by applicable standards established by ICE. At a minimum, such standards

shall include provisions or arrangements for the following services for each minor who is not a UAC in its care:

(i) Proper physical care and maintenance, including suitable living, accommodations, food, appropriate clothing, and personal grooming items;

(ii) Appropriate routine medical and dental care, family planning services, and emergency health care services, including a complete medical examination (including screening for infectious disease) within 48 hours of admission, excluding weekends and holidays, unless the minor was recently examined at another facility; appropriate immunizations in accordance with the U.S. Public Health Service (PHS), Centers for Disease Control and Prevention; administration of prescribed medication and special diets; appropriate mental health interventions when necessary;

(iii) An individualized needs assessment which includes:

(A) Various initial intake forms;

(B) Essential data relating to the identification and history of the minor and family;

(C) Identification of the minor's special needs including any specific problem(s) which appear to require immediate intervention;

(D) An educational assessment and plan;

(E) An assessment of family relationships and interaction with adults, peers and authority figures;

(F) A statement of religious preference and practice;

(G) An assessment of the minor's personal goals, strengths and weaknesses; and

(H) Identifying information regarding immediate family members, other relatives, godparents, or friends who may be residing in the United States and may be able to assist in family reunification;

(iv) Educational services appropriate to the minor's level of development and communication skills in a structured classroom setting, Monday through Friday, which concentrates primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). The educational program should include subjects similar to those found in U.S. programs and include science, social studies, math, reading, writing, and physical education. The program design should be appropriate for the minor's estimated length of stay and can include the necessary skills appropriate for transition into a U.S. school district. The program should also include acculturation and adaptation services which include information regarding the development of social and inter-personal skills that contribute to those abilities as age appropriate;

(v) Appropriate reading materials in languages other than English for use during the minor's leisure time;

(vi) Activities according to a recreation and leisure time plan which shall include daily outdoor activity, weather permitting, at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (this should not include time spent watching television). Activities should be increased to a total of three hours on days when school is not in session;

(vii) At least one individual counseling session or mental health wellness interaction (if the minor does not want to participate in a counseling session) per week conducted by trained social work staff with the specific objectives of reviewing the minor's progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each minor;

(viii) Group counseling sessions at least twice a week. This is usually an informal process and takes place with all t*f*he minors present and can be held in conjunction with other structured activities. It is a time when new minors present in the facility are given the opportunity to get acquainted with the staff, other children, and the rules of the program. It is an open forum where everyone gets a chance to speak. Daily program management is discussed and decisions are made about recreational activities, etc. It is a time for staff and minors to discuss whatever is on their minds and to resolve problems;

(ix) Upon admission, a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations and the availability of legal assistance;

(x) Whenever possible, access to religious services of the minor's choice;

(xi) Visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation. The staff shall respect the minor's privacy while reasonably preventing the unauthorized release of the minor and preventing the transfer of contraband;

(xii) A reasonable right to privacy, which shall include the right to:

(A) Wear his or her own clothes, when available;

(B) Retain a private space in the residential facility for the storage of personal belongings;

(C) Talk privately on the phone, as permitted by applicable facility rules and regulations;

(D) Visit privately with guests, as permitted by applicable facility rules and regulations; and

(E) Receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

(xiii) When necessary, communication with adult relatives living in the United States and in foreign countries regarding legal issues related to the release and/or removal of the minor;

(xiv) Legal 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 apply for asylum or to request voluntary departure; and

(xv) Attorney-client visits in accordance with applicable facility rules and regulations.

(5) In the event of an emergency, a licensed, non-secure facility described in paragraph (i) of this section may transfer temporary physical custody of a minor prior to securing permission from DHS, but shall notify DHS of the transfer as soon as is practicable thereafter, but in all cases within 8 hours.

(j) *Release of minors from DHS custody*. DHS will make and record prompt and continuous efforts on its part toward the release of the minor. If DHS determines that detention of a minor who is not a UAC is not required to secure the minor's timely appearance before DHS or the immigration court, or to ensure the minor's safety or the safety of others, the minor may be released, as provided under existing statutes and regulations, pursuant to the procedures set forth in this paragraph. .

(1) DHS will release a minor from custody to a parent or legal guardian who is available to provide care and physical custody.

(2) Prior to releasing to a parent or legal guardian, DHS will use all available reliable evidence to determine whether the relationship is bona fide. If no reliable evidence is available that confirms the relationship, the minor will be treated as a UAC and transferred into the custody of HHS as outlined in paragraph (f) of this section.

(3) For minors in DHS custody, DHS shall assist without undue delay in making transportation arrangements to the DHS office nearest the location of the person to whom a minor is to be released. DHS may, in its discretion, provide transportation to minors.

(4) Nothing herein shall require DHS to release a minor to any person or agency whom DHS has reason to believe may harm or neglect the minor or fail to present him or her before DHS or the immigration courts when requested to do so.

(k) *Procedures upon transfer*. -- (1) *Possessions*. Whenever a minor or UAC is transferred from one ICE placement to another, or from an ICE placement to an ORR placement, he or she will be transferred with all possessions and legal papers; provided, however, that if the minor or UAC's possessions exceed the amount normally permitted by the carrier in use, the possessions shall be shipped to the minor or UAC in a timely manner.

(2) *Notice to counsel*. A minor or UAC who is represented will not be transferred from one ICE placement to another, or from an ICE placement to an ORR placement, until notice is provided to his or her counsel, except in unusual and compelling circumstances, such as where the safety of the minor or UAC or others is threatened or the minor or UAC has been determined to be an escape-risk, or where counsel has waived such notice. In unusual and compelling circumstances, notice will be sent to counsel within 24 hours following the transfer.

(l) *Notice to parent of refusal of release or application for relief*. (1) A parent shall be notified of any of the following requests if the parent is present in the United States

and can reasonably be contacted, unless such notification is otherwise prohibited by law or DHS determines that notification of the parent would pose a risk to the minor's safety or well-being:

(i) A minor or UAC in DHS custody refuses to be released to his or her parent; or

(ii) A minor or a UAC seeks release from DHS custody or seeks voluntary departure or a withdrawal of an application for admission, parole, or any form of relief from removal before DHS, and that the grant of such request or relief may effectively terminate some interest inherent in the parent-child relationship and/or the minor or UAC's rights and interests are adverse with those of the parent.

(2) Upon notification, the parent will be afforded an opportunity to present his or her views and assert his or her interest to DHS before a determination is made as to the merits of the request for relief.

(m) *Bond hearings.* Bond determinations made by DHS for minors who are in removal proceedings pursuant to section 240 of the Act and who are also in DHS custody may be reviewed by an immigration judge pursuant to 8 CFR part 1236 to the extent permitted by 8 CFR 1003.19. Minors in DHS custody who are not in section 240 proceedings are ineligible to seek review by an immigration judge of their DHS custody determinations.

(n) *Retaking custody of a previously released minor.* (1) In addition to the ability to make a UAC determination upon each encounter as set forth in paragraph (c) of this

section, DHS may take a minor back into custody if there is a material change in circumstances indicating the minor is an escape-risk, a danger to the community, or has a final order of removal. If the minor is accompanied, DHS shall place the minor in accordance with paragraphs (e) and (i) of this section. If the minor is a UAC, DHS shall transfer the minor into HHS custody in accordance with paragraph (e) of this section.

(2) DHS may take a minor back into custody if there is no longer a parent or legal guardian available to care for the minor. In these cases, DHS will treat the minor as a UAC and transfer custody to HHS as outlined in paragraph (e) of this section.

(3) Minors who are not UACs and who are taken back into DHS custody may request a custody redetermination hearing in accordance with paragraph (m) of this section and to the extent permitted by 8 CFR 1003.19.

Section 236.3(n) of the Proposed Regulations for the first time defines when the government may retake custody of a child previously placed with a sponsor.[14] Section 236.3(n) would provide authority to some unspecified part of the Government to retake custody of any reunified child deemed "an escape risk,[15] a danger to the community, or has a final order of removal."

This is a sharp reversal from the principles of the FSA and will likely substantially increase the number of children placed into secure detention. This addition to the FSA's plain text enables DHS to re-arrest detained children based on vague and discriminatory presumptions of dangerousness.[16] Significantly, this rule fails to clarify which party makes the determination

[14] The current regulations have no provisions for reassuming custody of previously released minors if they become an escape risk, become a danger to the community, or are issued a final order of removal after being released. Discussion of Elements of the Proposed Rule, Proposed 8 CFR § 236.3(n), Retaking Custody of a Previously Released Minor.

[15] CAIR Coalition incorporates our comments for this definition of "escape risk" that we provided for the HHS definition of "escape risk" found at § 410.101.

[16] This is particularly alarming given rhetoric from members of this administration that overtly vilifies immigrant children, labelling them "wolves in sheep clothing." *See* "Remarks by Attorney General Jeff Sessions to Federal

that there is a "material change in circumstances" and how such a determination will be made.[17] When the Government receives authority to remove a child from her family and place her in a government detention facility, the rule should be very clear as to how and by whom the decision would be made. Otherwise, no child placed with a sponsor will be free of the fear of re-apprehension.

Second, the section must specify that government has the burden of proof on all points. Codification of an elevated evidentiary standard is particularly important, as made apparent by the litigation in *Saravia v. Sessions.*[18] After a full hearing, judges ordered the great majority of class members[19] because the government could not show a "change in circumstances"[20] when the matter was considered before neutral decision-makers.

Third, this section makes no provision for DHS to provide timely notice, or to share its evidence, of a "material change in circumstances" with the child who is being re-detained, the child's parents, or the child's counsel. Without such notice and opportunity to respond, a child would lack an effective procedure to challenge her re-detention.[21]

Law Enforcement in Boston," Delivered September 21, 2017, https://www.justice.gov/opa/speech/attorney-general-sessions-gives-remarks-federal-law-enforcement-boston-about (last accessed November 5, 2018).

[17] DHS already obtained expansive powers over the arrest and detention of noncitizens, which it is now seeking to expand to immigrant children. *See* Executive Order 13767(January 25, 2017) (catch-all provision that allows DHS to apprehend anyone who, "in the judgment of an immigration officer … pose[s] a risk to public safety or national security."); *see also* Regina Graham & Liam Quinn, "Trump's executive orders dramatically expand power of immigration officers as they will have 'broad latitude' in deciding who is detained or deported," *Daily Mail* (Jan. 29, 2017), *available at* https://www.dailymail.co.uk/news/article-4169294/Power-immigration-officers-expanded-Trump.html.

[18] *See Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017), aff. No. 18-15114, D.C. No. 3:17-cv-03615 VC (9th Cir., 2018).

[19] See Request for Judicial Notice, *Saravia v. Sessions*, (9th Cir. Mar. 16, 2018), Pls.' Ex. 79 at 112–13 [Doc. # 409-5].

[20] *Saravia*, No. 18-15114 at 10.

[21] Kate M. Manuel, *Aliens' Right to Counsel in Removal Proceedings: In Brief* (Washington: Congressional Research Service, March 17, 2016). "The Fifth Amendment to the U.S. Constitution has generally been construed to mean that aliens have a right to counsel at their own expense in formal removal proceedings. The Fifth Amendment guarantees that "[n]o person ... shall be deprived of life, liberty, or property" without due process of law. Aliens—including those who have entered or remained in the United States in violation of federal immigration law—have been found to be encompassed by the Fifth Amendment's usage of "person," and removal can be seen as implicating an alien's interest in liberty. Thus, courts have historically viewed access to counsel at one's own expense as required to ensure "fundamental fairness" in formal removal proceedings."

CAIR Coalition has served many children re-detained for months on the basis of extremely thin allegations eventually dismissed by an Immigration Judge.[22] These children suffer separation from their parent or guardian as well as legal counsel, for they are often detained on the other side of the country from where they were living. Their lives are interrupted and thrown into confusion and uncertainty, resulting in significant psychological harm.[23] By failing to provide adequate process for children, DHS will further disrupt immigrant children's ability to recover from detention.

(o) *Monitoring*. (1) CBP and ICE each shall identify a Juvenile Coordinator for the purpose of monitoring compliance with the terms of this section.

(2) The Juvenile Coordinators shall collect and periodically examine relevant statistical information about UACs and minors who remain in CBP or ICE custody for longer than 72 hours. Such statistical information may include but not necessarily be limited to:

(i) Biographical information;

(ii) Dates of custody; and

[22] *See* CBS News, "Inside ICE's controversial crackdown on MS-13" (Nov. 16, 2017), *available at* https://www.cbsnews.com/news/ms-13-gang-ice-crackdown-thomas-homan/ (ICE agent admitting to arbitrarily classifying someone as gang member to keep them detained longer); Sarah Gonzalez, "Undocumented Teens Say They're Falsely Accused Of Being In A Gang," NPR (Aug.17, 2017), *available at* https://www.npr.org/2017/08/17/544081085/teens-in-u-s-illegally-say-theyre-falsely-accused-of-being-in-a-gang (showing that color of clothing seems to be enough to label kids as gang members).

[23] *See* Benedict Carey, "A Troubling Prognosis for Migrant Children in Detention: 'The Earlier They're Out, the Better,'" *New York Times*, (June 18, 2018) ("Institutions — even the best and most humane — by their nature warp the attachments children long for, the visceral and concentrated exchange of love, tough and otherwise, that comforts, supports and shapes a child's heart and mind." It additionally explains that "much depends on how long they were held in detention: a longer stay at a later age requires the longest recovery period, he noted.").

(iii) Placements, transfers, removals, or releases from custody, including the reasons for a particular placement.

Department of Health and Human Services

45 CFR Chapter IV

For the reasons set forth in the preamble, part 410 of Chapter IV of title 45 of the Code of Federal Regulations is proposed to be amended as follows:

10. Add part 410 to read as follows:

PART 410 – CARE AND PLACEMENT OF UNACCOMPANIED ALIEN CHILDREN

Authority: 6 U.S.C. 279, 8 U.S.C. 1103(a)(3), 8 U.S.C. 1232.

Subpart A— Care and Placement of Unaccompanied Alien Children

§ 410.100 Scope of this part.

This part governs those aspects of the care, custody, and placement of unaccompanied alien children (UACs) agreed to in the settlement agreement reached in *Jenny Lisette Flores v. Janet Reno, Attorney General of the United States*, Case No. CV 85-4544-RJK (C.D. Cal. 1996). ORR operates the UAC program as authorized by section 462 of the Homeland Security Act of 2002, Pub. L. 107-296, 6 U.S.C. 279, and section 235 of the

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 8 U.S.C. 1232. This part does not govern or describe the entire program.

§ 410.101 Definitions.

DHS means the Department of Homeland Security.

Director means the Director of the Office of Refugee Resettlement (ORR), Administration for Children and Families, Department of Health and Human Services.

Emergency means an act or event (including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or public health concerns at one or more facilities) that prevents timely transport or placement of UACs, or impacts other conditions provided by this part.

The definition of "emergency" as used in the proposed regulations is too broad and serves to create an unworkable and illogical framework for the regulatory scheme proposed in this rulemaking. This definition is important with respect to secure detention as the term is used in Sections 410.202 and 410.209 of the proposed regulations to create a regulatory exemption that would allow the government to hold more children outside of licensed programs (which are by definition not secure[24]). The more expansive the definition of emergency, the broader the power of the government to operate under the regulatory exemption and place more children in secure facilities. More details on this exemption are provided in the comments to Sections 410.202 and 410.209.

Under the FSA, the term "emergency" is defined as "any act or event that prevents the placement of minors pursuant to Paragraph 19 within the time frame provided. Such

[24] Proposed 45 CFR § 410.101.

emergencies include natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies (e.g., a chicken pox epidemic among a group of minors)."[25]In revising this FSA definition for the proposed regulations, DHS and HHS broadened the definition to an illogical and arbitrary degree.

First, the proposed definition includes the language "at one or more facilities." This would allow the government to designate an emergency situation and operate under lesser standards for children if there is an incident (e.g., a fire) at one detention facility. To allow one facility's incident to alter the proposed regulatory protections for children nationally runs counter to the purposes outlined in the preamble and is not in the spirit of the FSA.[26] From our experience, it is not odd for one facility to be in an emergency situation[27] while other facilities are capable of meeting the required child-protective rules. For example, in 2017, a facility located in the Capital Region was the site of a scabies outbreak. The children were quarantined, and no transfers or visits were allowed until the outbreak passed. During the same time, the other children's detention facilities in the Capital Region continued to provide routine services. There was no need to apply the emergency protocol to curtail some protections at the unaffected sites.

Second, DHS and HHS broadened the impact of an incident that would necessitate definition of an emergency. In the FSA, an emergency only occurs when an incident prevents the government from fulfilling its obligations to timely place children in appropriate detention facilities. The proposed regulations expand this to include incidents that impact "timely transport or placement of minors, or impacts other conditions provided by this section." This catch-all provision is too broad and would allow the government to declare an

[25] FSA ¶ 12(b).
[26] *See* Preamble, 43.
[27] Gross, *Migrant Children At Risk.*

emergency at almost any time, so long as some incident impedes the government from delivering any service or meeting any obligation in the proposed regulations.

There is no reason to provide such a broad definition of emergency and the powers for DHS and HHS. As envisioned in the proposed regulations, DHS and HHS have carte blanche to declare an emergency and free themselves of many stated obligations to children. This definition must be curtailed for this regulatory scheme to not be arbitrary and capricious.

Escape risk means there is a serious risk that an unaccompanied alien child (UAC) will attempt to escape from custody.

The expansive definition of "escape risk" in 263(b)(6), as adopted by 410.204 and 410.101, runs afoul of the TVPRA's mandate. Under Section 235(c)(2) of the TVPRA, unaccompanied immigrant children "shall be promptly placed in the least restrictive setting that is in the best interest of the child," and placement decisions take into consideration whether these children pose an "escape risk." ORR considers "escape risk" in its placement decisions per its internal policy manual, section 1.2.1, and notes that escape risk may be a combined factor for placing children in secure detention.[28] CAIR Coalition has served a number of children who were placed in secure detention solely because they were determined to be "escape risks." It took several months for these children to be transferred to less restrictive setting. Not only does this practice violate the TVPRA, research shows that secure detention has a "profoundly negative impact on young people's mental health and physical well-being."[29]

[28] "Children Entering the United States Unaccompanied," Office of Refugee Resettlement (January 30, 2015), §1.2.5, https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied.

[29] *See* Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (Washington: Justice Policy Institute, 2006), http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf.

By expanding the definition of "escape risk," these proposed regulations therefore risk classifying a larger proportion of immigrant children as "escape risks" and placing them in more restrictive settings, including secure detention. Both the TVPRA and the FSA mandate that children shall be placed in the least restrictive setting and that their detention should be short-term. This expansive definition will elevate the placement security levels of a great number of children, which will also be a greater barrier for their prompt reunification or placement in least restrictive settings.

> *Influx* means a situation in which there are, at any given time, more than 130 minors or UACs eligible for placement in a licensed facility under this part or corresponding provisions of DHS regulations, including those who have been so placed or are awaiting such placement.

The definition of "influx" as used in the proposed regulations is too narrow and creates an unworkable and illogical framework that provides the government with unchecked authority to hold children outside of licensed ("non-secure") programs during an influx. This will allow an increase in secure detention, which is counter to the purpose of the FSA, TVPRA, and this regulation per the preamble.

The term "influx" is defined in the FSA and in this proposed section as any time when there are 130 children[30] eligible and waiting for placement in a licensed facility. While this provision comports with the FSA, it is absurdly out of touch with the current numbers of detained children in the United States.

[30] FSA ¶ 12(B).

On any given day, there are approximately 12,800 children held by DHS or HHS throughout the country.[31] This number has risen exponentially under this Administration.[32] A 130-child threshold would be continuously surpassed, creating an illogical system in which the authority reserved exclusively for true emergency or influx situations becomes routine. Such relaxed standards would apply to the ability of the government to place children in secure detention, among other things.

As with the term "emergency," the term "influx" is used in Sections 410.202 and 410.209 of the proposed regulations to create a regulatory exemption that would allow the government to hold more children outside of licensed programs (which are, by definition, non-secure[33]). The narrower the definition of "influx", the broader the power of the government to operate under the regulatory exemption and place more children in secure facilities. More details on this exemption are provided in the comments to Sections 410.202 and 410.209.

No rational basis exists for defining "influx" so loosely and the proposed definition provides DHS and HHS with carte blanche to operate in a constant state of influx, freeing themselves of many stated obligations to children. This definition must be revised and modernized for this regulatory scheme to not be arbitrary and capricious and a violation of the APA.

Licensed program means any program, agency, or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for

[31] Caitlin Dickerson, "Detention of Migrant Children Has Skyrocketed to Highest Levels Ever," *New York Times* (September 12, 2018), https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html.
[32] *Id*.; Stephanie Nebehay, "U.N. panel urges end to detention of would-be immigrants in U.S.," Reuters (August 14, 2017), https://www.reuters.com/article/us-usa-immigration-un-idUSKCN1AU233.U.N. (human rights panel found that widespread detention of asylum seekers in the United States "has grown exponentially" and in violation of international law).
[33] *See* 83 Fed. Reg. 45,486.

dependent children, including a program operating group homes, foster homes, or facilities for special needs UAC. A licensed program must meet the standards set forth in § 410.402 of this part. All homes and facilities operated by a licensed program, including facilities for special needs minors, are non-secure as required under State law. However, a facility for special needs minors may maintain that level of security permitted under State law which is necessary for the protection of a UAC or others in appropriate circumstances, e.g., cases in which a UAC has drug or alcohol problems or is mentally ill.

"All homes and facilities operated … are non-secure" describes homes and facilities that already exist. This verbiage, however, does not include the mandate that all future licensed programs are also non-secure facilities. The FSA includes such a mandate for all current and future licensed programs: "All homes and facilities operated by licensed programs, including facilities for special needs minors, shall be non-secure as required under state law …"[34] This provision fails to meet the requirements of the FSA on its face with respect to ensuring that all licensed programs are non-secure.[35]

Regarding "special needs minors," this section allows the government to place special needs children in a *de facto* secure setting. While the language of this proposed section is drawn from the FSA, the bare minimum standard of the FSA is not appropriate given what is now known about the trauma that detention inflicts upon children with special needs.[36] Children with special needs frequently deteriorate in secure detention; they turn to self-harm

[34] FSA ¶ 6.
[35] *Id*.
[36] Kia Makarechi, "'These Kids Are Traumatized': For migrant children caught at the border, detention is just the beginning," *Vanity Fair* (June 21, 2018), https://www.vanityfair.com/news/2018/06/what-happens-to-immigrant-kids-once-theyre-released.

and develop symptoms consistent with clinical depression because the conditions of their confinement aggravates their mental disorders.[37]

The proposed definition of "licensed program" contains a caveat for the treatment of special needs minors that could be exploited to put minors into facilities with higher security than is necessary or appropriate. Without more explicit directives as to what level of security is allowed, it is likely that children with special needs will end up in secure detention.[38] In our experience, the current practice of the government often places children with special needs into secure detention based only on their special needs and no other basis (e.g., danger to the community).[39] Unfortunately, children in secure detention rarely receive the medical care that they need; when their mental health deteriorates due to their placement, their detention appears endless.[40] This definition is also concerning because it fails to identify a procedure for how special needs and appropriate circumstances are determined. This is especially concerning when read in conjunction with the definition of "special needs minor," which also fails to clearly establish a process for determining whether a child fits under such definition. Finally, this proposed section clearly conflicts with the intent expressed in the

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[37] *See* Holman and Ziedenberg, *Dangers of Detention*, 8. http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf (reporting survey results that nearly 25% of children experienced suicidal ideation in seven-day period while 34% suffered symptoms consistent with clinical depression). *See also* Tyche Hendricks, "Hundreds of Migrant Teens Are Being Held Indefinitely in Locked Detention," KQED News (April 11, 2016), https://www.kqed.org/news/10923059/hundreds-of-migrant-teens-are-being-held-indefinitely-in-locked-detention (citing Barry Krisberg, a criminologist at U.C. Berkeley saying that while ORR's detention may not be intended as a form of punishment, it is punishing in nature, and this is especially true for children who have already been through traumatic experiences).

[38] Pam Clark, *Desktop Guide to Quality Practice for Working with Youth in Confinement*, chapter 2 (Washington: National Institute of Corrections), https://info.nicic.gov/dtg/node/4. "Confinement is part of a continuum of care for responding to youth engaged in delinquent behavior. The continuum begins with sanctions such as Teen/Youth Court, parent education and training, and other diversionary programs. Investments should always be made in preventive and diversionary programs and services in an effort to avoid the use of more restrictive interventions.".

[39] *Id.* Other youth are confined not so much because the delinquent act they committed is serious or because they pose a threat to public safety, but because the programs and services they really do need are not readily available. As a result, when these "special needs" youth are thought to pose a potential threat to public safety or to be a flight risk, they are too often placed in confinement facilities that are ill equipped to meet their special needs."

[40] *See Doe v. Shenandoah Valley Juvenile Center Comm'n*, Class Action Complaint (W.D. Va. Oct. 4. 2017).

preamble to ensure that UACs are treated "with dignity, respect, and special concern for their particular vulnerability as minors."[41]

ORR means the Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services.

Secure facility means a State or county juvenile detention facility or a secure ORR detention facility, or a facility with an ORR contract or cooperative agreement having separate accommodations for minors. A secure facility does not need to meet the requirements of § 410.402, and is not defined as a "licensed program" or "shelter" under this Part.

Given the trauma that secure detention inflicts upon children, the regulations should take pains to define "secure facility" with as much clarity as possible to ensure that the children forced to live in such a setting are treated with as much care and comfort as possible. Even in the secure setting, the TVPRA, FSA, and this regulation's preamble goals of finding the least restrictive setting possible for each child should apply.

The current definition provides no guidance to the government as to what programs and services it must provide in a secure facility. It also makes no reference to what level of security is appropriate and how the security protocols are reviewed. Without such guidance, HHS will have free rein to define "secure facility" as it sees fit.

There are currently two secure facilities in the country: one of which is currently the subject of class action litigation.[42] Without licensing requirement and specific guidelines on

[41] FSA ¶ 11.

[42] *See Doe*, supra; Gary Schneider, "Virginia governor calls for probe into abuse allegations at facility that holds immigrant teens," *Washington Post* (June 21, 2018), https://www.washingtonpost.com/local/virginia-politics/virginia-governor-calls-for-probe-into-alleged-abuse-at-juvenile-detainee-center/2018/06/21/e9b03e82-7581-11e8-b4b7-308400242c2e_story.html.

the type of care provided, this definition does little to protect immigrant children, technically in civil detention, from languishing in punitive conditions without recourse.

> *Shelter* means a licensed program that meets the standards set forth in § 410.402 of this part.
>
> *Special needs minor* means a UAC whose mental and/or physical condition requires special services and treatment by staff. A UAC may have special needs due to drug or alcohol abuse, serious emotional disturbance, mental illness or retardation, or a physical condition or chronic illness that requires special services or treatment. A UAC who has suffered serious neglect or abuse may be considered a special needs minor if the UAC requires special services or treatment as a result of neglect or abuse.

As discussed in our comments on the flawed definition of "licensed program," it is our experience that the government places children with special needs in a secure facility based on a faulty and insubstantial justification that such children are a danger to themselves or others. In our experience, as experts in providing services to children held in secure detention facilities, often a child with special needs is placed in secure detention not because he or she is a danger, but because an appropriate placement for the child's special needs is not available or simply not looked for and it is easier for the government to jail the child rather than help the child.[43]

Our experience is borne out in this rulemaking, as seen in Section 410.208 of the proposed regulations, which provides the government with a loophole to place children with special

[43] Clark, *Desktop Guide*. "Other youth are confined not so much because the delinquent act they committed is serious or because they pose a threat to public safety, but because the programs and services they really do need are not readily available. As a result, when these "special needs" youth are thought to pose a potential threat to public safety or to be a flight risk, they are too often placed in confinement facilities that are ill equipped to meet their special needs."

needs in secure detention.[44] CAIR coalition has served a number of children suffering from acute mental illness (including hallucinations, cognitive delay, suicidal ideation, and post-traumatic stress); in every case, seeking the child's transfer to a more appropriate placement that would provide for their medical needs took months, if not years. Given that a finding of special needs will likely result in the government placing a child placed in secure detention, this proposed definition is lacking on many fronts.

First, the application of the definition of "special needs minor" is arbitrary and capricious. While it tracks the definition in the FSA, it fails to identify how such determinations will be made and who will make them.[45] Making a determination as important as one of special needs for a child ought not be left to government employees who have no background in working with children with special needs. Indeed, they simply lack the expertise to form a required reasonable basis for their decision, such that their decisions could not pass muster even in face of a highly deferential standard of review. The definition also leaves no room for an appeal of a decision that special services or treatment is required.

Second, the definition is too broad to create a workable regulatory system. The examples of special needs included in the definition reach an unduly wide swath of children. For example, the proposed regulations states that a child who has "suffered serious neglect or abuse may be considered a special needs minor." Many of the children who are seeking legal protections from removal to their home country would fit into this category.[46] This definition, coupled with the loophole of Section 410.208, will give the government justification to place

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[44] See our comments to § 410.208 Special needs minors for more details.

[45] *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife,* 273 F.3d 1229, 1236 (9th Cir. 2001) (the agency must articulate a rational connection between the facts found and the choice made).

[46] *See Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017) (concerning detained immigrant child who was abused in home country); *see also* Richard Gonzales, "ACLU Report: Detained Immigrant Children Subjected To Widespread Abuse By Officials," NPR (May 23, 2018), *available at* https://www.npr.org/sections/thetwo-way/2018/05/23/613907893/aclu-report-detained-immigrant-children-subjected-to-widespread-abuse-by-officia (reporting that DHS has abused immigrant children).

almost any child in secure detention. This would violate the TVPRA's clear mandates to narrow the use of secure detention.[47]

Sponsor, also referred to as custodian, means an individual (or entity) to whom ORR releases a UAC out of ORR custody.

[47] *See* Section 235(c)(2) of the TVPRA, 8 U.S.C. § 1232(c)(2).

Staff secure facility means a facility that is operated by a program, agency or organization licensed by an appropriate State agency and that meets the standards for licensed programs set forth in § 410.402 of this part. A staff secure facility is designed for a UAC who requires close supervision but does not need placement in a secure facility. It provides 24-hour awake supervision, custody, care, and treatment. It maintains stricter security measures, such as intensive staff supervision, than a shelter in order to control problem behavior and to prevent escape. A staff secure facility may have a secure perimeter but is not equipped internally with major restraining construction or procedures typically associated with correctional facilities.

Unaccompanied alien child (UAC) means an individual who: has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom: there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody. When an alien previously determined to have been a UAC has reached the age of 18, when a parent or legal guardian in the United States is available to provide care and physical custody for such an alien, or when such alien has obtained lawful immigration status, the alien is no longer a UAC. An alien who is no longer a UAC is not eligible to receive legal protections limited to UACs.

This definition is inconsistent with the plain language and spirit of the TVPRA, which does not provide specific mechanisms for stripping vulnerable children of the UAC determination.[48] A federal court recently confirmed that TVPRA protections for UACs are not

[48] *See, e.g.*, TVPRA Section 235(d), "Permanent Protection for Certain At-Risk Children," and provisions throughout designed to protect vulnerable children; 2012 Ombudsman Asylum Recommendations, *supra* note 50, at 4 ("Subjecting a child seeking asylum to multiple UAC determinations . . . appears at odds with the TVPRA's express purpose, namely, to provide timely, appropriate relief for vulnerable children.").

extinguished once UACs turn 18.[49] This proposed definition is therefore arbitrary and capricious.

§ 410.102 ORR care and placement of unaccompanied alien children.

ORR coordinates and implements the care and placement of UAC who are in ORR custody by reason of their immigration status.

For all UAC in ORR custody, DHS and DOJ handle other matters, including immigration benefits and enforcement matters, as set forth in their respective statutes, regulations and other authorities.

ORR shall hold UACs in facilities that are safe and sanitary and that are consistent with ORR's concern for the particular vulnerability of minors.

Within all placements, UAC shall be treated with dignity, respect, and special concern for their particular vulnerability.

Subpart B— Determining the Placement of an Unaccompanied Alien Child

§ 410.200 Purpose of this subpart.

This subpart sets forth what ORR considers when placing a UAC in a particular ORR facility, in accordance with the Flores settlement agreement.

§ 410.201 Considerations generally applicable to the placement of an unaccompanied alien child.

[49] *See Garcia-Ramirez v. Nielsen*, 1:18-cv-00508 (August 30, 2018).

(a) ORR places each UAC in the least restrictive setting that is in the best interest of the child and appropriate to the UAC's age and special needs, provided that such setting is consistent with its interests to ensure the UAC's timely appearance before DHS and the immigration courts and to protect the UAC's well-being and that of others.

This subsection of the proposed regulations fails to create a comprehensive system that is protective of child immigrants. A child's placement while in the custody of ORR should not depend on anything other than the best interest of the child. The provisions of this section create a set of priorities for placement that will justify an increase in secure detention.

It is a hallmark of federal law and the FSA that a child should be held in the least restrictive setting possible.[50] This policy is consistent with the assessment of experts that detention is inherently harmful to children.[51] Section 410.201(b) sets out the factors by which a child's placement in ORR detention is determined. These factors include the best interest of the child (taking into account the child's age, special needs, etc.), the protection of the child's well-being, the protection of others' well-being, and the timely appearance of the child before DHS and the Immigration Courts. This language is drawn from the FSA.[52]

While the language of this subsection does comport with the FSA's text, it does not comport with the language of the TVPRA. The TVPRA does not include in placement determinations a factor based on the expedience of appearance before Immigration Courts or DHS.[53] Thus, including this as a factor creates a conflict between the proposed regulations and federal law.

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[50] FSA ¶ 11; 8 U.S.C. 1232 (c)(2) (". . . an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight.").

[51] *See* Carey, "A Troubling Prognosis."

[52] FSA ¶ 11.

[53] TVPRA Section 235(c)(2).

Beyond the conflict with the TVPRA, the policy of placing the child's best interest at the forefront of all decision-making is absent in this section. No factor should outweigh or be given equal weight as the best interest and protection of the well-being of the child. This section does not prioritize which of the factors HHS must take into account when choosing a child's detention setting placement. In fact, a plain reading of the text of this section allows HHS to disregard the best interest of the child. The proposed text allows HHS to place a child in the least restrictive setting that is in the best interest of the child "provided that" the least restrictive setting is consistent with other factors (that are no focused on the child's best interest). This creates a regulatory scheme by which HHS can prioritize their own efficiencies for court and DHS adjudications rather than the best interest of the child. This is unacceptable. Finally, the TVPRA has at its core the principle that children should be treated in a manner that separates them from the jurisdiction of DHS. This policy is enshrined in the TVPRA's requirement that DHS turn children over to HHS within 72 hours after their designation as a UAC. [54] This clear divide set forth by Congress becomes muddled when expedience for DHS is incorporated into the HHS factors for placement.

(b) ORR separates UAC from delinquent offenders.

(c) ORR makes reasonable efforts to provide placements in those geographical areas where DHS apprehends the majority of UAC.

(d) Facilities where ORR places UAC will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the UAC is in need of emergency services, adequate temperature control and ventilation, adequate supervision

[54] TVPRA Section 235(b)(3).

to protect UAC from others, and contact with family members who were arrested with the minor.

The provisions of 410.201(d) borrow language from the FSA that is inappropriate for this section of the proposed regulations. Paragraph 12 of the FSA speaks to the minimal conditions required of temporary facilities at which the government holds children following arrest.[55] Paragraph 12 of the FSA is only for temporary detention.[56] It is in that context that the government in the FSA agreed to provide the bare minimum of "access to toilets and sinks, drinking water and food as appropriate, medical assistance if the UAC is in need of emergency services, adequate temperature control and ventilation, adequate supervision."[57]

This bare minimum standard is not appropriate for long-term detention. There is no situation in which a child detained for more than a very short time should not be provided living conditions commensurate with state licensing programs for children's detention facilities as required elsewhere in the proposed regulations.

(e) If there is no appropriate licensed program immediately available for placement of a UAC pursuant to Subpart B, and no one to whom ORR may release the UAC pursuant to Subpart C, the UAC may be placed in an ORR-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility. In addition to the requirement that UAC shall be separated from delinquent offenders, every effort must be taken to ensure that the safety and well-being of the UAC detained in these facilities are satisfactorily provided for by the staff. ORR makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible.

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[55] FSA ¶ 12.
[56] *Jenny Lisette Flores, et al. v. Loretta E. Lynch*, CV 85-04544, (C.D.Cal, August 21, 2015), https://www.aila.org/File/Related/14111359p.pdf.
[57] *Id.*

HHS, in proposing these regulations, fails to take into account the purpose of the FSA and and the TVPRA,which favor limited secure detention for children.[58]

Unless this section of the proposed regulations is amended or removed, the government will be in position to greatly increase the use of secure detention across the country. As experts on the provision of services to children in secure detention, CAIR Coalition knows that this outcome will have the effect of traumatizing children and unlawfully deter children from seeking relief from removal.[59]

Under the TVPRA, DHS must turn over children held by DHS within 72 hours of determining that the child is a UAC. From there, HHS must place the child in "the least restrictive setting that is in the best interest of the child."[60] HHS may not place children in a secure setting absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense."[61]

Section 410.201(e) of the proposed regulations throws the TVPRA procedures and policies out the window. This section sets out a system whereby ORR can place any child immigrant into secure detention with little to no justification. This section accomplishes this by allowing ORR to place in state or county juvenile detention facility any child with no available sponsor for reunification and for whom there is no immediate placement in a licensed shelter-level facility. A state or county juvenile detention facility is simply another term for secure detention.

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[58] *See* FSA general policy favoring least restrictive setting; TVPRA Section 235(c)(2).
[59] *R.I.L.R. v. Johnson*, 80 F.Supp.3d 164 (D.D.C. 2015) (granting plaintiffs' preliminary injunction on the basis of DHS's policy to primarily consider deterrence of future migrant in its decisions whether to release Central American mothers and children from custody).
[60] *See TVPRA* Section 235(b)(3) and Section 235(c)(2).
[61] *Id*.

The government has created a loophole where it can place any child in secure detention without making an individualized finding that the child "poses a danger to self or others or has been charged with having committed a criminal offense" as required by the TVPRA. That the government controls the availability of placement in licensed facilities through its contracting functions makes this loophole even more insidious.

Section 410.201(e) of the proposed regulations clearly is contrary to the TVPRA, but it also is unsupported by the purposes set forth in the preamble. Throughout the preamble, the government states many times that children should be held in the least restrictive setting possible. This policy statement is rendered moot by this provision, which will grant ORR wide latitude to place children in secure detention.

The FSA's purpose and provisions are also stymied by this section. The proposed language of Section 410.201(e) is generally copied from FSA paragraph 12, which sets out the standards for temporary placement of children following arrest.[62] The FSA, which sets minimal standards, does allow for placement of children in the manner found in Section 410.201(e). The FSA, however, allows this only for temporary measures and makes this clear through the heading to the FSA section: "Procedures and Temporary Placement Following Arrest."Where the FSA makes more secure detention an exception for temporary measures following arrest, Section 410.201(e) of the proposed regulations is part of the broader Section 410.201, which purports to set forth placement policies for all UACs. Section 410.201 includes no indication that it is designed for temporary use.

That the placement of children in secure detention pursuant to 410.201(e) is not designed to be a temporary measure as contemplated in the FSA is clear from the government's alteration of its own deadlines for removing children placed in secure detention through this

[62] FSA ¶ 12.

loophole. Under the FSA, the government is required to remove children placed in a state or county juvenile detention facility within (i) three days if a placement is available or (ii) five days in any other situation unless the child is proven to be an adult, is shown to meet the individualized screening criteria for secure detention, or if there is an emergency or influx.[63] In case of an emergency or influx, however, the government must move the child from a secure setting to a licensed non-secure setting "as expeditiously as possible."

The government removed the three-day and five-day timelines and also removed the phrase "as expeditiously as possible." In their place, the government drafted Section 410.201(e) to require that it make "all reasonable efforts to place each UAC in a licensed program as expeditiously as possible." This subtle change removes the duty of the government to remove children held in secure facilities and instead gives it allowance to try its best. This is a significant alteration to its obligations and opens the door to massive expansion of indefinite secure detention.

Despite the TVPRA, the FSA, and the preamble to the proposed regulations all stating the policy that the least restrictive setting possible is required and that secure detention is not favored, Section 410.201(e) of the proposed regulations allows the government to increase secure detention across the country. Such a change, which is contrary to policy and law, is not supported by any factual or policy underpinning set forth by DHS and HHS. The inclusion of Section 410.201(e) alone makes the entire proposed regulations arbitrary and capricious, as it allows the government to use the loophole to ignore all other pieces of its own rule.

> (f) ORR makes and records the prompt and continuous efforts on its part toward family reunification. ORR continues such efforts at family reunification for as long as the minor is in ORR custody.

[63] *Id.*

§ 410.202 Placement of an unaccompanied alien child in a licensed program.

(a) ORR places UAC into a licensed program promptly after a UAC is transferred to ORR legal custody, except in the following circumstances:

(1) UAC meeting the criteria for placement in a secure facility set forth in § 410.203 of this part;

(2) As otherwise required by any court decree or court-approved settlement; or,

(3) In the event of an emergency or influx of UAC into the United States, in which case ORR places the UAC as expeditiously as possible in accordance with § 410.209 of this part; or

Section 410.202(a)(3) provides an avenue for the government to hold children in a secure detention facility during an emergency or an influx. The crux of the problem with this section is that it provides the government with flexibility to not place children in licensed facilities (which are by definition non-secure[64]). This is counter to the requirements of the FSA, federal law, and the policies set forth in the preamble.[65] Further, this an imprecise system that fails to provide clear and nonarbitrary obligations on the government during an emergency or an influx and instead allows DHS and HHS to operate unregulated in these situations.

Pursuant to the FSA, during emergencies and influxes, the government must "place all minors pursuant to paragraph 19 as expeditiously as possible" and must "have a written plan that describes the steps the government will take to place all minors as expeditiously as

[64] *See* 83 Fed. Reg. 45,486.

[65] U.S. Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, https://www.hsgac.senate.gov/imo/media/doc/2018.08.15%20PSI%20Report%20-%20Oversight%20of%20the%20Care%20of%20UACs%20-%20FINAL.pdf 8 ("Due to delays in ORR's internal review processes, some UACs are spending more time than necessary in secure facilities. This is contrary to the statutory mandate that UACs should be placed in the least restrictive setting that is in the best interests of the child.").

possible into licensed programs during emergencies and influxes."[66] This mandatory language of the FSA is very clear that the government must place children in non-secure facilities as quickly as possible. There is no exception to this in the FSA.

Contrary to the FSA, Sections 410.202 and 410.209 abandon the mandatory language of the FSA to place all children expeditiously and instead require that the government "makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible using the following procedures." This creates an exception to ORR's obligation to place a UAC in a licensed program promptly after taking custody of the child if an emergency or influx occurs.

The "all reasonable efforts" language of the proposed regulations has an implicit allowance that there will be times when the government's efforts fail, and children will be placed in non-licensed programs – including secure facilities.

This flexibility on the part of the government to place children in non-licensed programs is contrary to the provisions of the TVPRA, which places the highest priority on placing children in the least restrictive setting possible.[67] There is no flexibility in the TVPRA for when a child is detained in a secure setting, and the proposed regulations cannot create such flexibility.

This provision also runs afoul of the FSA, by replacing the directive language ("shall place in licensed programs as expeditiously as possible") with permissive language ("makes all reasonable efforts"). Doing so guts the purpose of the FSA's emergency and influx provisions. The government cannot use best efforts; it must place children expeditiously.[68]

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[66] FSA para. 12.
[67] *Id.*
[68] *Id.*

Finally, the provisions of the proposed regulations on emergency and influx provisions fail to create a regulatory scheme that is clear and nonarbitrary. The proposed regulations leave open a grey area as to what happens to children when the government is "making best efforts" or fails following best efforts to find licensed program bed space for children. Leaving open such an important question creates an unacceptably vague system.

(4) If a reasonable person would conclude that the UAC is an adult despite his or her claims to be a minor.

§ 410.203 Criteria for placing an unaccompanied alien child in a secure facility.

The Flores settlement agreement ("FSA" or "the Agreement") originally bound the Immigration and Naturalization Service but now governs the treatment of children by both the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS).[69] The FSA contemplates development of regulations that "publish the relevant and substantive terms" of the Agreement.[70] The FSA mandates that "[t]he final regulations shall not be inconsistent with the terms of this Agreement."[71] The NPRM indicates that the rule would adopt "provisions that parallel the substantive terms of the FSA" consistent with subsequent law "with some modifications . . . to reflect intervening statutory and operational changes while still providing similar substantive protections and standards."[72] The NPRM

[69] *Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015). *See* Bob Ortega, Drew Griffin & Nelli Black, "For one teen asylum seeker, confessing fears led to months in detention," CNN (June 29, 2018), https://www.cnn.com/2018/06/29/us/teenage-asylum-seeker-migrant-describes-months-in-detention-invs/index.html.
[70] See FSA ¶ 9. *See also* U.S. Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, "Oversight of the Care of Unaccompanied Alien Children," 50, *available at* https://www.hsgac.senate.gov/imo/media/doc/2018.08.15%20PSI%20Report%20-%20Oversight%20of%20the%20Care%20of%20UACs%20-%20FINAL.pdf.
[71] *Id.*
[72] 83 Fed. Reg. 45,486. *See* TVPRA Section 263.3(b)(12), which defines ORR as including HHS and ACF.

indicates that the rule would also "implement closely related provisions of the HSA and TVPRA."[73] HHS' proposed regulations therefore necessarily interpret the FSA in light of statutory changes that have taken place since the agreement was signed. Additionally, HHS' proposed regulations interpret the FSA in light of several subsequent orders interpreting and enforcing the terms of the FSA including the July 30 district court Order in Flores v. Sessions.[74]

Despite these assurances, NPRM sections 45 CFR 410.203, 204, 205, and 206 are inconsistent with both the terms of the agreement and subsequent laws governing the care and treatment of unaccompanied children in government custody. The departures the NPRM makes from the FSA would significantly expand the potential reasons HHS could place a child in secure detention and would likely increase the number of children placed in secure settings.

> (a) Notwithstanding § 410.202 of this part, ORR may place a UAC in a secure facility if the UAC:

The factors proposed in the regulations for determining whether a child belongs in secure detention are overly broad, vague, and fail in all respects other than creating a system to increase secure detention.

This section is in direct conflict with the TVPRA's rules for when the government may place a child in secure detention. Section 235(c)(2) of the TVPRA states:

> A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.[75]

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[73] *Id.* at 879 n.18 (citing Senate report reviewing ORR policy manual).
[74] 2:85-cv-04544-DMG-AGR (ECF No. 470, Jul. 30, 2018) (discussing ORR Residential Treatment Centers, placement in secure facilities, notice of placement in secure facilities, and informed consent for administration of psychotropic drugs). § 1232(c)(2)(A).
[75] TVPRA Section 235(c)(2).

The proposed section contravenes this legal requirement by broadening the criteria under which a child may be placed in a secure facility beyond the two factors contained in the TVPRA. Under this regulatory proposal, the government could place a child in secure detention based on such factors as the child being chargeable for a crime, making a threat, or being disruptive. These factors are, on their face, a clear violation of the TVPRA.

While the language in the provisions is similar to the FSA, the language of the FSA has been overridden by the TVPRA, in addition, the proposed section fails to adhere to the FSA's policies and spirit.

(1) Has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act, and where ORR deems those circumstances demonstrate that the UAC poses a danger to self or others. "Chargeable" means that ORR has probable cause to believe that the UAC has committed a specified offense. This provision does not apply to a UAC whose offense is:

As stated above, placement of a child in secure detention based on chargeability is counter to the TVPRA and fails to meet the spirit of the preamble. Further, a minor's acts are considered "delinquencies" (civil infractions rather than criminal offenses) unless charged as criminal offenses in a court of law.[76] It is not clear what would constitute a "pattern or practice of criminal activity" for a minor under this regulation. Finally, the term "probable cause" is too vague, and ORR should not be, and is not qualified to be, in a position to make such a determination.

[76] *Flores v. Sessions*, Order re Plaintiffs' Motion to Enforce Class Action Settlement (July 30, 2018), 19.

(i) An isolated offense that was not within a pattern or practice of criminal activity and did not involve violence against a person or the use or carrying of a weapon; or

(ii) A petty offense, which is not considered grounds for stricter means of detention in any case;

The proposed language on petty offenses contravenes the FSA in several ways, all of which make the section unacceptable. First, the proposed language omits the FSA's list of examples of isolated and nonviolent offenses and petty offenses that would not rise to the level of justifying secure detention.[77] Per the preamble, the agencies chose not to include the examples "because [they] are non-exhaustive and imprecise" and because offences "could be violent offences in certain circumstances depending upon the actions accompanying them."[78] This, however, is counter to the FSA, which includes a list of offences that are grounds for secure detention.

Second, the FSA does not require a finding that an offense can be classified as one involving violence in order to justify placement in secure detention.[79] Instead, the FSA requires that a finding that the child's action involved violence against a person or the use or carrying of a weapon. This is an important distinction, as the proposed standard could result in a child's placement in secure detention even though the child's actions did not involve violence or a weapon, so long as the offense itself could be academically classified as one of violence.

[77] FSA para. 21(a)
[78] 83 Fed. Reg. 45505.
[79] FSA para 21.

(2) While in DHS or ORR's custody or while in the presence of an immigration officer, has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself/herself or others);

(3) Has engaged, while in a licensed program or staff secure facility, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program or staff secure facility in which he or she has been placed and removal is necessary to ensure the welfare of the UAC or others, as determined by the staff of the licensed program or staff secure facility (e.g., drug or alcohol abuse, stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR determines the UAC poses a danger to self or others based on such conduct;

This proposed language contravenes the TVPRA by broadening the standard by which a child may be placed in secure detention to include when the child has been "unacceptably disruptive of the normal functioning of the licensed program or staff secure facility" as determined by staff and "ORR determines the UAC poses a danger to self or others based on such conduct." This standard is too vague and would provide staff at ORR facilities with carte blanche to place children in secure detention. This regulation provides no clarity as to what would constitute an unacceptable level of disruption, or how or on what basis staff will make the dangerousness determination. The provision also does it indicate which party will be responsible for making the determinations.

Further, the proposed regulations lists "fighting" and "intimidation of others" as examples of behavior that would justify placing a child in secure detention. These are far less serious than other conduct that is listed in the proposed regulations or the FSA to justify secure

detention. Given that it is not unusual for children to misbehave in detention as a normal reaction to separation from family and from freedom, this standard would place almost all children at risk of secure detention.[80]

(4) For purposes of placement in a secure RTC, if a licensed psychologist or psychiatrist determines that the UAC poses a risk of harm to self or others.

(5) Is otherwise a danger to self or others.

This catchall provision is irresponsible and impermissibly vague. It is unclear what "danger to self or others" would include, who would make this determination, or how a child or child's counsel could rebut a such a determination. This provision provides too much discretionary authority to ORR makes every other criterion detailed in Section. 410.203 moot.

It is our experience, working with UACs held in secure detention, that ORR's justifications for labeling a child "dangerous to themselves or to others" are weak at best, and blatantly inaccurate at worst.

This provision is also concerning given that HHS is currently involved in multiple lawsuits alleging mistreatment and/or indefinite detention of children in secure facilities,

[80] See, e.g., Justice Policy Institute, The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities, Nov. 2006, http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf; Coalition for Juvenile Justice, Applying Research to Practice Brief: What Are the Implications of Adolescent Brain Development for Juvenile Justice? (2006), http://www.juvjustice.org/sites/default/files/resource-files/resource_138_0.pdf; Jessica Feierman, Kacey Mordecai, and Robert G. Schwartz, Juvenile Law Center, Ten Strategies to Reduce Juvenile Length of Stay, Apr. 22, 2015, https://jlc.org/resources/ten-strategies-reduce-juvenile-length-stay; Jessica Feierman and Lauren Fine, Juvenile Law Center, Trauma and Resilience: A new look at legal advocacy for youth in the juvenile justice and child welfare systems, Apr. 2014, https://jlc.org/sites/default/files/publication_pdfs/Juvenile%20Law%20Center%20-%20Trauma%20and%20Resilience%20-%20Legal%20Advocacy%20for%20Youth%20in%20Juvenile%20Justice%20and%20Child%20Welfare%20Systems.pdf.

including allegations that HHS "stepped up" children to secure detention without providing notice or justification for the transfer.[81]

(b) ORR Federal Field Specialists review and approve all placements of UAC in secure facilities consistent with legal requirements.

Here, HHS has chosen not to include the TVPRA's requirement that a child's placement in secure detention must be reviewed monthly,[82] an omission that is particularly concerning given that a Senate Committee investigation recently determined that "due to delays in ORR's internal review processes, some UACs are spending more time than necessary in secure facilities."[83]

In addition, the TVPRA requires that a UAC in HHS custody "shall be promptly placed in the least restrictive setting that is in the best interest of the child." This regulation fails to take into consideration the best interest of the child.

Consideration of a child's best interest is especially important in contemplating secure placement because, in CAIR Coalition's experience working with children in secure facilities and in non-secure licensed programs, secure placement meaningfully deters children from pursuing the relief for which they are eligible. It instead encourages them to request

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[81] See Doe v. Shenandoah Valley Juvenile Center Comm'n, Class Action Complaint (W.D. Va. Oct. 4. 2017), http://www.washlaw.org/pdf/svjc_class_action_complaint_signed.PDF; Roque Planas and Hayley Miller, Huffington Post, "Migrant Children Report Physical, Verbal Abuse In At Least 3 Federal Detention Centers," June 21, 2018, https://www.huffingtonpost.com/entry/migrant-children-abuse-detentioncenters_us_5b2bc787e4b0040e2740b1b9; Saravia v. Sessions, Order Granting the Motion for Preliminary Injunction, et. al (Nov. 20, 2017), https://www.aclunc.org/sites/default/files/20171121-Gomez_v_Sessions-Order_Granting_PI_and_Class_Cert.pdf; Flores v. Sessions, Memorandum in Support of Motion to Enforce Class Action Settlement (C.D. Ca. Apr. 16, 2018), https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf; and Flores v. Sessions, In Chambers--Order re Plaintiff's Motion to Enforce Class Action Settlement (C.D. Ca. July 30, 2018), https://www.aila.org/File/Related/14111359ae.pdf.

[82] See TVPRA, 8 U.S.C. § 1232 (c)(2)(A).

[83] Staff of S. Comm. on Homeland Security and Gov. Affairs, 115th Cong., Oversight of the care of unaccompanied alien children 8 (2018).

deportation or voluntary departure because they find it intolerable to remain indefinitely in a secure facility.

Additionally, secure placement regularly leads to prolonged detention due to heightened requirements for release to a sponsor that generally in practice require a "step-down" to a less secure setting prior to release and, at one time, included the requirement that the Secretary of HHS personally approve all step-downs and releases, which caused a significant backlog and slowdown.[84]

Prolonged detention is psychologically damaging to minors and effectively deters from pursuing relief from removal.[85] These proposed regulations significantly expand ORR's ability to place a child in secure detention. The potential that more children could be placed in secure detention because of the NPRM is inappropriate and contrary to the child-protective principles underpinning the FSA. Detained unaccompanied immigrant children in the U.S. exhibit high rates of "posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems."[86] Conditions of custody in secure detention often exacerbate the symptomology of illnesses such as post-traumatic stress disorder (PTSD) and can be re-traumatizing for children.[87] In addition, immigration custody has been shown to contribute to psychological distress, triggering "feelings of isolation, powerlessness and disturbing memories of persecution."[88] These feelings are often exacerbated by the seeming indefiniteness

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[84] *See e.g.* Complaint for Injunctive Relief, Declaratory Relief, and Nominal Damages, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741-DMG-PLA (C.D. Cal. filed June 28, 2018); *see also*, *L.V.M. v. Lloyd*, 318 F.Supp. 3d 601 (S.D. N.Y. 2018); *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017)

[85] *See Flores v. Sessions*, 862 F.3d at 874 n.11 (referring to impact of prolonged detention on youth who frequently give up viable claims to seek deportation or voluntary departure, as a result of detention fatigue).

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

[87] Karen M. Abram, et al, Off. of Juv. Justice and Delinquency Prevention Bulletin, Dept. of Justice, PTSD, Trauma, and Comorbid Psychiatric Disorders in Detained Youth (2013), http://www.ojjdp.gov/pubs/239603.pdf.

[88] Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers 6 (2003), http://www.survivorsoftorture.org/files/pdf/perstoprison2003.pdf.

of custody.[89] Detention can also lead to "depression, aggression and rebellion" in children,[90] as it deprives children of healthy attachments and normal developmental experiences.[91] Research has shown that "[y]oung detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school."[92] Finally, children experiencing fatigue based on the seemingly indefinite nature of their detention are often driven to make the unfair choice between detention and returning to countries where they face danger.[93] CAIR Coalition regularly counsels children facing this difficult and unfair choice.

Transfers to secure and staff secure placements nearly always involve a dramatic change in geographic location, meaning not only a change in facility personnel but also usually a change in counsel or loss of access to counsel. CAIR Coalition has served two different secure facilities located in Virginia (and continues to serve one, as the other has closed) and almost all minors detained in these facilities were transferred from another state and were regularly transferred from thousands of miles away. Counsel is often not able to continue to represent a minor who has moved hundreds or thousands of miles, because in-person meetings are impracticable (and especially important when communicating with minor clients) and appearance in Immigration Court or in front of USCIS would require multi-day trips.

§ 410.204 Considerations when determining whether an unaccompanied alien child is an escape risk.

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[89] Id. at 7.
[90] Amy Bess, Human Rights Update: The Impact of Immigration Detention on Children and Families, NTN'L ASSN. OF SOCIAL WORKERS 2 (2011).
[91] Mary Dozier et al., Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association, 84 AM. J. ORTHOPSYCHIATRY 3, 219-225 (2014), https://www.apa.org/pubs/journals/features/ort-0000005.pdf.
[92] See, e.g., Julie M. Linton, et al., American Academy of Pediatrics, Policy Statement: Detention of Immigrant Children, Apr. 2017, at 6-7, http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf (citations omitted).
[93] See Motion for Preliminary Injunction at 15, n. 12, LVM v. Lloyd, 18-cv-1453 (S.D.N.Y. April 30, 2018) (ECF No. 42).

When determining whether a UAC is an escape risk, ORR considers, among other factors, whether:

It is current practice by the Departments to place immigrant children in secure detention following an escape attempt or unfulfilled threats of an escape from a shelter. This practice will likely continue under the proposed rule.

The TVPRA requires that the HHS Secretary place children "in the least restrictive setting that is in the best interest of the child."[94] The Secretary "may consider danger to self, danger to the community, and risk of flight." Additionally, the statute provides that "A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense."[95] Importantly, the TVPRA excludes escape risk as a factor for placement in a secure facility, specifically because it is falls short of being a safety determination. *See supra* comment to Section 263(b)(6) for further analysis of the consequences of this rule.

It is worth noting that these proposed rules also severely limit detained children's rights to challenge their placement due to escape risk determinations. *See supra* comments to section 410.810.

(a) The UAC is currently under a final order of removal;

(b) The UAC's immigration history includes:

(1) A prior breach of a bond;

(2) A failure to appear before DHS or the immigration court;

[94] 8 U.S.C. § 1232(c)(2)(a).
[95] *Id.*

(3) Evidence that the UAC is indebted to organized smugglers for his or her transport; or

Proposed Section 410.204(b)(3**)** is unrealistic in practice, as the vast majority of children who immigrate to the United States are financially supported by their parents or caregivers. CAIR Coalition serves many immigrant children who rely on parents or family members to fund their travels; in most cases the children are completely unaware, or have little knowledge, regarding any debt to smugglers. There is simply no empirical evidence that supports the idea that a child who is in debt will become a flight risk. Making this assumption would not only keep children detained for long periods of time, adversely impacting their mental health,[96] but it could also discourage children who may actually be afraid of smugglers or criminal organizations from coming forward, out of fear of being detained indefinitely.

This regulation also fails to explain in detail what constitutes the word "evidence" and how much the child's disclosures will be used against him/her in this context. Using this term so broadly could place minors in secure facilities without evaluating all of the facts in their cases. Based on our experience, many immigrant children suffer from mental illness,[97] are frequently illiterate,[98] or are severely traumatized, all of which tremendously impacts their ability to provide information. The child's disclosures should not be considered "evidence," given the prevalence of cognitive barriers, mental health history, and other forms of mental

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[96] *See* Carey, "A Troubling Prognosis."

[97] *See* U.S. Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, "Oversight of the Care of Unaccompanied Alien Children," 49, *available at* https://www.hsgac.senate.gov/imo/media/doc/2018.08.15%20PSI%20Report%20-%20Oversight%20of%20the%20Care%20of%20UACs%20-%20FINAL.pdf (citing reports from HHS staff and legal service providers who "told the Subcommittee that UACs coming into the United States over the past several years are significantly more traumatized and in need of mental health services than children who came to the country previously.").

[98] *See* Center for Gender & Refugee Studies & Kids in Need of Defense, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (2014), *available at* https://supportkind.org/wp-content/uploads/2015/04/macArthur_summary_v4.pdf ("[C]hildren with limited education and, often, limited English skills, stand alone before trained government attorneys and immigration judges.").

distress in detained immigrant children.The escape risk assumption based on a child's debt to a smuggler, in other words, is predetermined without a clear indication of what evidentiary requirements will control. This is alarming given that "escape risk" findings frequently keep children detained longer and in more restrictive settings.

(4) A voluntary departure or a previous removal from the United States pursuant to a final order of removal; and

Proposed Section 410.204 (b)(4**)** does not take into consideration situations in which a child might have missed a court hearing because of a sudden change of address, or simply because the child's parent or guardian decided to stop attending court. This subsection of children would receive a final order of removal *in absentia*, thereby making them "escape risks" under the proposed rule. However, because their natural dependence on adult caretakers, unrepresented children are not even aware that they have a deportation order or a scheduled court date.[99] Failure to attend court hearings that result in removal orders can correspond to factors outside the child's control—e.g., lack of notice of the hearing, negligence, or unilateral decision on the part of the child's parent/guardian.

The failure to consider these factors is particularly concerning since Congress explicitly provided circumstances that may enable children to rescind prior removal orders. According to the Immigration and Nationalities Act (INA), even final removal orders may be rescinded if there are exceptional circumstances that justify the noncitizen's failure to appear at a removal

[99] *See* American Immigration Council, *Children in Immigration Court: Over 95 Percent Represented by an Attorney Appear in Court* (May 16, 2016), available at https://www.americanimmigrationcouncil.org/children-in-immigration-court (Though indigent immigrant children do not have the right to counsel in immigration proceedings, there is a tangible difference between children's appearance rate when they are represented and when they are pro se.)

hearing.[100] This federal statute shows that Congress understood that not all removal orders signal the noncitizen's intentional disregard for the law. Consequently, the proposed rule should not presume that all children who have an order of removal will attempt to escape from a facility or support a system that penalizes all minors with little to no consideration of circumstance.

(c) The UAC has previously absconded or attempted to abscond from state or federal custody.

§ 410.205 Applicability of §410.203 for placement in a secure facility.

ORR does not place a UAC in a secure facility pursuant to § 410.203 of this part if less restrictive alternatives are available and appropriate under the circumstances. ORR may place a UAC in a staff secure facility or another licensed program as an alternative to a secure facility.

The TVPRA requires that a child be placed in "the least restrictive setting that is in the best interest of the child."[101] There is no exception for an assessment that such a placement would not be appropriate and this placement is not contingent on availability. Because this proposed rule inserts availability and appropriateness factors into the placement decision, it cannot comport with federal law and is therefore impermissible.

Further, it is not clear from this regulation what ORR's responsibility is to *make* a less restrictive alternative available. If ORR states that there is no available alternative, there is no provision allowing a UAC or UAC's counsel to inquire into how that determination was made or to challenge it. It is not clear when ORR can make such a determination, when ORR would

[100] *See* INA §§ 240(b)(5) and 240(e)(1) (defining "exceptional circumstances" as "circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.").
[101] *See* Section 235(c)(2) of the TVPRA, 8 U.S.C. 1232(c)(2).

be required to do so, or how that determination would be made. Similarly, it is impermissibly vague and thus arbitrary and capricious to include in the regulation the caveat that the less restrictive alternative need not only be available but "appropriate under the circumstances." It is not clear from this regulation who determines appropriateness nor how an immigrant childor counsel would be able to inquire into how that determination was made or to challenge it. This is particularly important for immigrant children who seek to avail themselves of their rights to challenge their placement. *See supra* comments 410.801-810.

§ 410.206 Information for unaccompanied alien children concerning the reasons for his or her placement in a secure or staff secure facility.

Within a reasonable period of time, ORR provides each UAC placed or transferred to a secure or staff secure facility with a notice of the reasons for the placement in a language the UAC understands.

When the government places a child in secure or staff secure facilities, providing only the child with notice is not enough. The government must also provide notice to the child's counsel and family.[102] Further, the notice must include more than a recitation of the terms of the regulation and must provide a factual basis for the transfer, so that the child has adequate information from which to challenge to the transfer. We also incorporate our concerns about the lack of timely notice for the child, as explained in our comments *supra* in § 410.801.

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§ 410.207 Custody of an unaccompanied alien child placed pursuant to this subpart.

A UAC who is placed in a licensed program pursuant to this subpart remains in the custody of ORR, and may only be transferred or released under its authority. However, in the event of an emergency, a licensed program may transfer temporarily the physical placement of a UAC prior to securing permission from ORR, but must notify ORR of the transfer as soon as possible, but in all cases within eight hours of the transfer. Upon release to an approved sponsor, a UAC is no longer in the custody of ORR.

§ 410.208 Special needs minors.

ORR assesses each UAC to determine if he or she has special needs, and if so, places the UAC, whenever possible, in a licensed program in which ORR places unaccompanied alien children without special needs, but which provides services and treatment for such special needs.

[102] FSA Exhibit 2.

This provision does not comport with the general policy of the FSA, which requires that the government "place each detained minor in the least restrictive setting appropriate to the minor's age and special needs." This mandate requires that the government make an individualized finding and place each immigrant child in the least restrictive setting possible.

Additionally, this provision is too vague and provides the government with too much latitude to place children with special needs in secure detention. This is particularly alarming because the U.S. Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs recently found that HHS routinely and improperly detains children with special needs in secure detention.[103] Given HHS' preexisting record with respect to those children, the proposed rule's mandate to keep children with special needs out of secure detention (i.e., an unlicensed facility) "whenever possible" is too low a standard. Given the trauma of secure detention and the care that children with special needs require, secure detention is never appropriate.[104] Finally, facilities that are not appropriately equipped to serve children with special needs (such as secure detention centers) may infringe on those children's constitutional rights to receive adequate medical care in detention.[105]

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[103] *See* U.S. Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, "Oversight of the Care of Unaccompanied Alien Children," 8, *available at* https://www.hsgac.senate.gov/imo/media/doc/2018.08.15%20PSI%20Report%20-%20Oversight%20of%20the%20Care%20of%20UACs%20-%20FINAL.pdf. (finding that "HHS does not contract with appropriate facilities to house UACs who must be held in a secure facility and who also have significant mental health or emotional issues. Housing UACs who have significant mental health or emotional issues with the general population in secure facilities exposes those UACs, the facility staff, and other children to an increased risk of harm.").

[104] *See generally* Committee on Governmental Affairs, "Juvenile Detention Centers: Are they Warehousing Children with Mental Illness?" U.S. Senate S. Hrg. 108-696 (July 7, 2004) (examining devastating effect of placing mentally ill youth in juvenile detention centers).

[105] *See Doe v. Shenandoah Valley Juvenile Center Comm'n*, Class Action Complaint (W.D. Va. Oct. 4. 2017), http://www.washlaw.org/pdf/svjc_class_action_complaint_signed.PDF.

§ 410.209 Procedures during an emergency or influx.

In the event of an emergency or influx that prevents the prompt placement of UAC in licensed programs, ORR makes all reasonable efforts to place each UAC in a licensed Program as expeditiously as possible using the following procedures:

(a) ORR maintains an emergency placement list of at least 80 beds at programs licensed by an appropriate state agency that are potentially available to accept emergency placements.

(b) ORR implements its contingency plan on emergencies and influxes.

(c) Within one business day of the emergency or influx, ORR, if necessary, contacts the programs on the emergency placement list to determine available placements. To the extent practicable, ORR will attempt to locate emergency placements in geographic areas where culturally and linguistically appropriate community services are available.

(d) In the event that the number of UAC needing placement exceeds the available appropriate placements on the emergency placement list, ORR works with governmental and nongovernmental organizations to locate additional placements through licensed programs, county social services departments, and foster family agencies.

(e) ORR maintains a list of UAC affected by the emergency or influx including each UAC's:

(1) Name;

(2) Date and country of birth;

(3) Date of placement in ORR's custody; and

(4) Place and date of current placement.

(f) Each year ORR reevaluates the number of regular placements needed for UAC to determine whether the number of regular placements should be adjusted to accommodate an increased or decreased number of UAC eligible for placement in licensed programs.

CAIR Coalition incorporates our comments on the deficiencies of procedures for times of emergency and influx as stated in the comments to Section 410.202, Placement of an unaccompanied alien child in a licensed program.

Subpart C— Releasing an Unaccompanied Alien Child from ORR Custody

§ 410.300 Purpose of this subpart.

This subpart covers the policies and procedures used to release, without unnecessary delay, a UAC from ORR custody to an approved sponsor.

§ 410.301 Sponsors to whom ORR releases an unaccompanied alien child.

(a) ORR releases a UAC to an approved sponsor without unnecessary delay, but may continue to retain custody of a UAC if ORR determines that continued custody is necessary to ensure the UAC's safety or the safety of others, or that continued custody is required to secure the UAC's timely appearance before DHS or the immigration courts.

(b) When ORR releases a UAC without unnecessary delay to an approved sponsor, it releases in the following order of preference:

(1) A parent;

(2) A legal guardian;

(3) An adult relative (brother, sister, aunt, uncle, or grandparent);

(4) An adult individual or entity designated by the parent or legal guardian as capable and willing to care for the UAC's well-being in:

(i) A declaration signed under penalty of perjury before an immigration or consular officer, or

(ii) Such other document that establishes to the satisfaction of ORR, in its discretion, the affiant's parental relationship or guardianship;

(5) A licensed program willing to accept legal custody; or

(6) An adult individual or entity seeking custody, in the discretion of ORR, when it appears that there is no other likely alternative to long term custody, and family reunification does not appear to be a reasonable possibility.

§ 410.302 Sponsor suitability assessment process requirements leading to release of an unaccompanied alien child from Federal custody to a proposed sponsor.

(a) The licensed program providing care for the UAC shall make and record the prompt and continuous efforts on its part towards family reunification and the release of the UAC pursuant to the provisions of this section.

(b) ORR requires a background check, including verification of identity and which may include verification of employment of the individuals offering support, prior to release.

(c) ORR also may require further suitability assessment, which may include interviews of members of the household, investigation of the living conditions in which

the UAC would be placed and the standard of care he or she would receive, a home visit, a fingerprint –based background and criminal records check on the prospective sponsor and on adult residents of the prospective sponsor's household, and follow-up visits after release. Any such assessment also takes into consideration the wishes and concerns of the UAC.

(d) If the conditions identified in TVPRA at 8 U.S.C. 1232(c)(3)(B) are met, and require a home study, no release to a sponsor may occur in the absence of such a home study.

(e) The proposed sponsor must sign an affidavit of support and a custodial release agreement of the conditions of release. The custodial release agreement requires that the sponsor:

(1) Provide for the UAC's physical, mental, and financial well-being;

(2) Ensure the UAC's presence at all future proceedings before DHS and the immigration courts;

(3) Ensure the UAC reports for removal from the United States if so ordered;

(4) Notify ORR, DHS, and the Executive Office for Immigration Review of any change of address within five days following a move;

(5) Notify ORR and DHS at least five days prior to the sponsor's departure from the United States, whether the departure is voluntary or pursuant to a grant of voluntary departure or an order of removal;

(6) Notify ORR and DHS if dependency proceedings involving the UAC are initiated and also notify the dependency court of any immigration proceedings pending against the UAC;

(7) Receive written permission from ORR if the sponsor decides to transfer legal custody of the UAC to someone else. Also, in the event of an emergency (e.g., serious illness or destruction of the home), a sponsor may transfer temporary physical custody of the UAC prior to securing permission from ORR, but the sponsor must notify ORR as soon as possible and no later than 72 hours after the transfer; and

(8) Notify ORR and DHS as soon as possible and no later than 24 hours of learning that the UAC has disappeared, has been threatened, or has been contacted in any way by an individual or individuals believed to represent an immigrant smuggling syndicate or organized crime.

(f) ORR is not required to release a UAC to any person or agency it has reason to believe may harm or neglect the UAC or fail to present him or her before DHS or the immigration courts when requested to do so.

Subpart D— Licensed Programs

§ 410.400 Purpose of this subpart.

This subpart covers the standards that licensed programs must meet in keeping with the principles UACs in custody with dignity, respect and special concern for their particular vulnerability

§ 410.401 Applicability of this subpart.

This subpart applies to all licensed programs, regardless of whether they are providing care in shelters, staff secure facilities, residential treatment centers, or foster care and group home settings.

§ 410.402 Minimum standards applicable to licensed programs.

Licensed programs must:

(a) Be licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children.

(b) Comply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes;

(c) Provide or arrange for the following services for each UAC in care, including:

(1) Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items;

(2) Appropriate routine medical and dental care, family planning services, and emergency health care services, including a complete medical examination (including screening for infectious disease) within 48 hours of admission, excluding weekends and holidays, unless the UAC was recently examined at another facility; appropriate immunizations in accordance with the U.S. Public Health Service (PHS), Center for Disease Control; administration of prescribed medication and special diets; appropriate mental health interventions when necessary;

(3) An individualized needs assessment that must include:

(i) Various initial intake forms;

(ii) Essential data relating to the identification and history of the UAC and family;

(iii) Identification of the UAC's special needs including any specific problems that appear to require immediate intervention;

(iv) An educational assessment and plan;

(v) An assessment of family relationships and interaction with adults, peers and authority figures;

(vi) A statement of religious preference and practice;

(vii) An assessment of the UAC's personal goals, strengths and weaknesses; and

(viii) Identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in family reunification; and

(4) Educational services appropriate to the UAC's level of development and communication skills in a structured classroom setting, Monday through Friday, which concentrate primarily on the development of basic academic competencies and secondarily on English Language Training (ELT), including:

(i) Instruction and educational and other reading materials in such languages as needed;

(ii) Instruction in basic academic areas that include science, social studies, math, reading, writing, and physical education; and

(iii) The provision to a UAC of appropriate reading materials in languages other than English for use during the UAC's leisure time;

(5) Activities according to a recreation and leisure time plan that include daily outdoor activity, weather permitting, at least one hour per day of large muscle activity and one hour per day of structured leisure time activities, which do not include time spent watching television. Activities must be increased to at least three hours on days when school is not in session;

(6) At least one individual counseling session per week conducted by trained social work staff with the specific objectives of reviewing the UAC's progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each UAC;

(7) Group counseling sessions at least twice a week. This is usually an informal process and takes place with all the UACs present. This is a time when new UACs are given the opportunity to get acquainted with the staff, other children, and the rules of the program. It is an open forum where everyone gets a chance to speak. Daily program management is discussed and decisions are made about recreational and other program activities, etc. This is a time for staff and UACs to discuss whatever is on their minds and to resolve problems;

(8) Acculturation and adaptation services that include information regarding the development of social and inter-personal skills that contribute to those abilities necessary to live independently and responsibly;

(9) Upon admission, a comprehensive orientation regarding program intent, services, rules (provided in writing and verbally), expectations and the availability of legal assistance;

(10) Whenever possible, access to religious services of the UAC's choice;

(11) Visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation. The staff must respect the UAC's privacy while reasonably preventing the unauthorized release of the UAC;

(12) A reasonable right to privacy, which must include the right to:

(i) Wear his or her own clothes, when available;

(ii) Retain a private space in the residential facility, group or foster home for the storage of personal belongings;

(iii) Talk privately on the phone, as permitted by the house rules and regulations;

(iv) Visit privately with guests, as permitted by the house rules and regulations; and

(v) Receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband;

(13) Family reunification services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for release of the UAC; and

(14) Legal 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 removal hearing before an immigration judge, the right to apply for asylum or to request voluntary departure in lieu of removal;

(d) Deliver services in a manner that is sensitive to the age, culture, native language and the complex needs of each UAC;

(e) Formulate program rules and discipline standards with consideration for the range of ages and maturity in the program and that are culturally sensitive to the needs of each UAC to ensure the following:

(1) UAC must not be subjected to corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping: and

(2) Any sanctions employed must not:

(i) Adversely affect either a UAC's health, or physical or psychological well-being; or

(ii) Deny UAC regular meals, sufficient sleep, exercise, medical care, correspondence privileges, or legal assistance;

(f) Develop a comprehensive and realistic individual plan for the care of each UAC in accordance with the UAC's needs as determined by the individualized needs assessment. Individual plans must be implemented and closely coordinated through an operative case management system;

(g) Develop, maintain and safeguard individual client case records. Licensed programs must develop a system of accountability that preserves the confidentiality of client information and protects the records from unauthorized use or disclosure; and

(h) Maintain adequate records and make regular reports as required by ORR that permit ORR to monitor and enforce these regulations and other requirements and standards as ORR may determine are in the interests of the UAC.

§ 410.403 Ensuring that licensed programs are providing services as required by these regulations.

ORR monitors compliance with the terms of these regulations.

Subpart E—Transportation of an Unaccompanied Alien Child

§ 410.500 Conducting transportation for an unaccompanied alien child in ORR's custody.

(a) ORR does not transport UAC with adult detainees.

(b) When ORR plans to release a UAC from its custody under the family reunification provisions at sections 410.201 and 410.302 of this part, ORR assists without undue delay in making transportation arrangements. ORR may, in its discretion, provide transportation to UAC.

Subpart F –Provisions for Transfer of an Unaccompanied Alien Child

§ 410.600 Principles applicable to transfer of an unaccompanied alien child.

(a) ORR transfers a UAC from one placement to another with all of his or her possessions and legal papers. ORR takes all necessary precautions for the protection of UACs during transportation with adults.

(b) If the UAC's possessions exceed the amount permitted normally by the carrier in use, the possessions are shipped to the UAC in a timely manner.

(c) ORR does not transfer a UAC who is represented by counsel without advance notice to his or her legal counsel. However, ORR may provide notice to counsel within 24 hours of the transfer in unusual and compelling circumstances such as:

(1) Where the safety of the UAC or others has been threatened;

(2) The UAC has been determined to be an escape risk consistent with § 410.204 of this part; or

(3) Where counsel has waived such notice.

Subpart G— Age Determinations

§ 410.700 Conducting age determinations.

Procedures for determining the age of an individual must take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the individual. ORR may require an individual in ORR's custody to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age. If ORR subsequently determines that such an individual is a UAC, he or she will be treated in accordance with ORR's UAC regulations for all purposes.

§ 410.701 Treatment of an individual who appears to be an adult.

If, the procedures in § 410.700 would result in a reasonable person concluding that an individual is an adult, despite his or her claim to be under the age of 18, ORR must treat such person as an adult for all purposes.

Subpart H— Unaccompanied Alien Children's Objections to ORR Determinations

§ 410.800 Purpose of this subpart.

This subpart concerns UACs' objections to ORR placement.

§ 410.801 Procedures.

(a) For UACs not placed in licensed programs, ORR shall—within a reasonable period of time—provide a notice of the reasons for housing the minor in secure or staff secure facility. Such notice shall be in a language the UAC understands.

First, this section fails to provide adequate notice as required under the TVPRA. The TVPRA requires ORR to review the placement of children in secure detention "at a minimum" every 30 days.[106] Though the TVPRA does not speak to notice to the child of the reasons for his or her placement in secure detention, the proposed time frame evades the accountability schedule the TVPRA requires for ORR to hold children in a secure setting. A "reasonable period of time" is a vague time frame that does not hold the agency to its statutory mandate. This is particularly alarming since the Senate recently found that ORR's internal delays violate the TVPRA's mandate.[107]

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[106] 8 U.S.C. § 1232(c)(2)(A). This duty is "in no way inconsistent" with the FSA's paragraphs 24B-D. *See Flores v. Sessions*, In Chambers--Order re Plaintiff's Motion to Enforce Class Action Settlement (C.D.Cal., July 30, 2018) at 7-8, https://youthlaw.org/wp-content/uploads/1997/05/Flores-MTE-order.pdf.

[107] U.S. Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, https://www.hsgac.senate.gov/imo/media/doc/2018.08.15%20PSI%20Report%20-%20Oversight%20of%20the%20Care%20of%20UACs%20-%20FINAL.pdf 8 ("Due to delays in ORR's internal review processes, some UACs are spending more time than necessary in secure facilities. This is contrary to the statutory mandate that UACs should be placed in the least restrictive setting that is in the best interests of the child.").

ORR formalizes its review by providing children with "Notices of Placement" that include checkboxes and reasoning for why they remain in secure settings. Despite the existence of this form, Flores class members have reported that ORR kept them in secure or staff secure facilities "for weeks (and sometimes months) without receiving a written notice of reasons for the transfer."[108] Consequently, in July 2018 Judge Gee found that "Detaining a Class Member in a restrictive setting for three or four months without informing the minor of the reasons for placement amounts to a failure to provide written notice within a reasonable time."[109] Judge Gee relied on California law to interpret the time frame required under the FSA's contractual framework.

In codifying the FSA, the federal government misses the opportunity to provide a concrete time frame that would avert the prolonged detention of children in a secure setting. Judge Gee's order showed that ORR often failed to provide "reasonable" notice even after three or four months—i.e., three to four times the minimum internal placement review it must conduct.[110] By affording ORR "reasonable time" without any concrete time frame, the regulations permit ORR to keep children detained without prompt notice in a secure setting. The lack of notice in turn does not permit unaccompanied children to avail themselves of their rights to seek bond redetermination hearings under the FSA—a key tool that these proposed regulations seek to uproot (*see supra* comments to section 801). Second, this section fails to provide timely notice in advance of placing children in secure detention**.** Children who arrive in secure detention are frequently lost, upset, and confused as to the reasoning behind their placement.[111] They question every interaction they had with ORR staff to determine why they suddenly landed in such a restrictive setting. Something

[108] *See id.*, 16.
[109] *Id.*, 17.
[110] *Id.*, 16-17.
[111] *See* Ortega, et al., "For one teen asylum seeker."

they shared in confidence with a therapist or case manager may be misinterpreted or exaggerated, prompting their transfer across the country to a juvenile hall.

ORR has the means to diminish the psychological impact of such transfers by providing children, their child advocate, and their counsel notice of an impending transfer. Additionally, this notice can enable children to gather any relevant evidence, including witness testimony, to seek review of their placement in a more restrictive setting. This advance notice would provide for more meaningful bond redetermination hearings (in consideration of our comments to section 810 *infra*) and diminish the psychological harm to children.

(b) ORR shall promptly provide each UAC not released with:

(i) A list of free legal services providers compiled by ORR and that is provided to UAC as part of a Legal Resource Guide for UAC (unless previously given to the UAC); and

(ii) The following explanation of the right of potential review: ORR usually houses persons under the age of 18 in an open setting, such as a foster or group home, and not in detention facilities. 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.

As stated in our comments to Section 410.810(c), detained unaccompanied children are seldom able to secure counsel and have a statutory right to *pro bono* legal representation under the TVPRA. The list alone, without the allocation of TVPRA funds to ensure that children are

able to work with counsel in challenging their placement, will pay lip service to the child's opportunity to be heard or to contest ORR's decision.

§ 410.810 Hearings

(a) A UAC may request that an independent hearing officer employed by HHS determine, through a written decision, whether the UAC would present a risk of danger to the community or risk of flight if released.

(1) Requests under this section may be made by the UAC, his or her legal representative, or his or her parent or legal guardian.

(2) UACs placed in secure or staff secure facilities will receive a notice of the procedures under this section and may use a form provided to them to make a written request for a hearing under this section.

Proposed Section 410.810(a) provides that a "UAC may request that an independent hearing officer employed by HHS." This process is wholly inadequate and fails to provide true due process to the children who are stuck in prolonged detention. The inevitable consequence of this proposed rule is to prolong the detention of children in a secure context without procedural due process and deter them from seeking relief due to their restrictive placement. First, the proposed section clearly violates the plain language of the FSA and runs afoul of the Government's duties to protect the rights of unaccompanied children to a bond redetermination hearing. The plain language of the FSA provides children with the right to a bond redetermination hearing before the Immigration Judge. Specifically, the FSA provides:

> A minor in deportation proceedings shall be afforded a bond redetermination hearing *before an immigration judge* in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing.[112]

[112] FSA at ¶ 24A (emphasis added).

Not only is this clear in the FSA, it was also clarified by the presiding Judge Gee, who oversees the consent decree,[113] and by the Ninth Circuit on appeal.[114] Rather than formalize its contractual duties, the preamble improperly relies on failed arguments made by the Department of Justice (DOJ) during settled litigation in order to posit that there is no basis for children to have bond hearings before the Immigration Judge.[115]

The preamble falsely purports to implement the substantive protections of paragraph 24A of the FSA while depriving children of a neutral adjudicator—namely, the Immigration Judge—and shifting the adjudication of custody reviews to HHS.[116] Not only is this contrary to the plain letter of the FSA, it is also contradictory in the very terms and structure used to label any overseeing ORR party as independent or neutral.[117]

Second, Section 410.810(a)(2) states that "UACs placed in secure or staff secure facilities will receive notice of the procedures under [Section 410.810] and may use a form provided to them to make a written request for a hearing." This notice provision is insufficient. All unaccompanied children in custody must receive notice of the right to a hearing pursuant to the FSA. Notice must be adequate and informative—not perfunctory. Additionally, if a hearing is requested, the unaccompanied child, his or her sponsor, and legal service provider and Young Center advocate, if appointed, must receive notice of the hearing as well as a description of hearing process, with a meaningful opportunity to provide evidence, cross-examine, and review the government's evidence before a neutral adjudicator.

Third, the section is arbitrary and capricious because ORR improperly labels an HHS adjudicator "independent" where HHS is party to the bond redetermination hearing, and it

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[113] *Flores v. Lynch*, 2017 WL 6049373 (2017).
[114] *See Flores v. Sessions*, 862 F.3d 863.
[115] *See* NPRM at 96 ("It is not clear statutory authority for DOJ to conduct such hearings still exists, and indeed DOJ argued in the Ninth Circuit that it does not.")
[116] *Id.*, 97.
[117] *Id.*

deprives children of sound procedural process afforded by the FSA without justification. Merely labelling this adjudicator as "independent" is a conclusory statement because HHS provides no facts to justify this determination.[118]

Fourth, this section is contrary to federal law. Congress passed two laws after the FSA that spoke to the detention of children: the Homeland Security Act of 2002 (HSA) and the Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). For fifteen years after the 1997 FSA, Congress was on notice of the government's duty to provide hearings under paragraph 24A of the FSA.

Lastly, 45 CFR 410.810(a) violates UACs' procedural due process rights and imperils their ability to seek relief. This regulation replaces a child's opportunity to be heard by a neutral, independent arbiter with an HHS employee reviewing his or her own agency's placement. In contrast, paragraph 24A of the FSA provides "meaningful protections" to children facing prolonged detention—protections that the government has been trying to strip from them for over two decades.[119] Without Flores hearings before an immigration judge, children are left without a forum to challenge ORR's unlawful practices of detaining children indefinitely and in secure settings. The constitutional implications of this regulation are severe. The Ninth Circuit reinstated Flores bond hearings because of overwhelming evidence that ORR routinely keeps children in secure detention for months or years on end.[120] Other federal courts have recognized that this indefinite detention of children without access to a judicial hearing that independently reviews their custody is a violation of procedural due process.[121] Because this proposed rule deprives children of a meaningful forum to contest their prolonged

[118] *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993).
[119] 862 F.3d at 867-68.
[120] 862 F.3d at 872-74.
[121] *See Beltran v. Cardall*, 222 F. Supp. 3d. 476 (E.D. Va. 2016); *Santos v. Smith*, 260 F. Supp. 3d. 598 (W.D.Va. 2017).

detention, many will turn to self-deportation despite viable claims of relief. CAIR routinely observes children in secure detention abandon their viable claims of relief because they can no longer tolerate indefinite detention for months or years on end. As the Ninth Circuit observed, the absence of a neutral forum to contest ORR's placement causes children to lose hope: they face "an impossible choice between what is, in effect, indefinite detention in prison, and agreeing to their own removal and possible persecution."[122]

(a) In hearings conducted under this section, the burden is on the UAC to show that he or she will not be a danger to the community (or risk of flight) if released, using a preponderance of the evidence standard.

This section improperly places the burden on the UAC to "show that he or she will not be a danger to the community (or a flight risk) if released, using a preponderance of the evidence standard." This is incompatible with Ninth Circuit's ruling in *Flores v. Sessions*[123]. The Ninth Circuit held that "[f]or all children in ORR custody, these hearings compel the agency to provide its justifications and specific legal grounds for holding a given minor."[124] The proposed regulations excuse the agency from justifying its determination and deny unaccompanied children and their representatives critical information necessary to support the request for bond.

Additionally, the Due Process Clause requires the burden to be placed on the government to justify prolonged secure detention by clear and convincing evidence. A federal court who examined the case of a child that ORR unlawfully held for two and a half years already

[122] 862 F.3d at 874 n.11.
[123] 862 F.3d 863, 868 (9th Cir. 2017).
[124] *Id*.

reached this conclusion.[125] Here, not only do the regulations improperly place the burden on the child, they lower the level of scrutiny over ORR's own actions of keeping children detained for months or years in secure detention.

(b) In hearings under this section, the UAC may be represented by a person of his or her choosing, at no cost to the government. The UAC may present oral and written evidence to the hearing officer and may appear by video or teleconference. ORR may also choose to present evidence either in writing, or by appearing in person, or by video or teleconference.

This section violates the TVPRA because it improperly requires unaccompanied children to appear *pro se* or retain counsel at their own cost. The plain letter of the TVPRA ensures that children have access to counsel to represent them for all "legal proceedings or matters."[126] As the recent class action amended complaint notes, HHS has a history of "block[ing] lawyers from representing detained children with respect to placement . . . notwithstanding that Congress has allocated funds specifically to provide such lawyers to represent children who are or have been in ORR custody in 'legal matters,' including issues related to release and least-restrictive placement."[127] Therefore, this section does not comport with the TVPRA's mandate.[128] Finally, holding this hearing via video further isolates

[125] *See Santos v. Smith*, 260 F. Supp. 3d 598, 613 (W.D. Va. 2017) ("[T]he government must establish the necessity of detention by clear and convincing evidence. . . This is no less true where the government is claiming detention is necessary due to dangerousness.").
[126] *See* TVPRA Section 235(c)(5).
[127] *See* Complaint for Injunctive Relief, Declaratory Relief, and Nominal Damages, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741-DMG-PLA (C.D. Cal. filed June 28, 2018).
[128] *See also supra* comment for § 410.810(b) and the TVPRA's purpose in protecting unaccompanied children due to their particular vulnerabilities.

detained children and runs afoul of basic principles of child-centered and fair process that would be expected from a child welfare agency.[129]

(c) A hearing officer's decision that a UAC would not be a danger to the community (or risk of flight) if released is binding upon ORR, unless the provisions of paragraph (e) of this section apply.

(d) A hearing officer's decision under this section may be appealed to the Assistant Secretary of the Administration for Children and Families. Any such appeal request shall be in writing, and must be received within 30 days of the hearing officer decision. The Assistant Secretary will reverse a hearing officer decision only if there is a clear error of fact, or if the decision includes an error of law. Appeal to the Assistant Secretary shall not effect a stay of the hearing officer's decision to release the UAC, unless within five business days of such hearing officer decision, the Assistant Secretary issues a decision in writing that release of the UAC would result in a significant danger to the community. Such a stay decision must include a description of behaviors of the UAC while in care and/or documented criminal or juvenile behavior records from the UAC demonstrating that the UAC would present a danger to community if released.

In *Flores v. Sessions*, the Ninth Circuit restored paragraph 24A of the FSA to permit all unaccompanied children to seek bond redetermination hearings. The plain language of this paragraph in the FSA does not require a dangerousness assessment. As the Ninth Circuit notes, this hearing is a remedy to the bureaucratic limbo that many children face in

[129] *See generally* "ABA Concerned About Videoconferencing in Immigration Courts; Urges Allowing Requests for In-Person Hearings," American Bar Association (Mar. 13, 2012), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/governmental_affairs_periodicals/washingtonletter/2012/march/immigrationcourts/ ("[Video Teleconferencing] makes it harder for parties, attorneys, and the immigration judge to communicate and connect emotionally, . . . which compounds difficulties faced by vulnerable individuals such as juveniles and individuals diagnosed with severe mental illnesses.").

ORR custody.[130] Flores bond redetermination hearings provide a meaningful forum for unaccompanied children to hold the government accountable when it improperly keeps them detained with no end in sight.[131] Additionally, it is a remedy for children in secure detention to enable them to challenge their placement.[132] Dangerousness is a pertinent factor only in the context of secure detention, where ORR's decision to place a child in this setting requires a dangerousness or flight risk assessment.[133] In these sections, ORR narrowly reduces the scope of bond hearings to dangerousness assessments exclusively, evading the very history of prolonged, unjustified detention that required the use of Flores bond hearings in the first place.[134]

Similarly, Section 235(c)(2) of the TVPRA provides that the Secretary "may" consider dangerousness or flight risk in evaluating placements; given the traumatic history of many unaccompanied youth and the adverse impact on their mental health, the TVPRA recognizes that these factors should not control the placement decision.[135] Here, the regulations improperly turn this "may" into a "must" at the expense of the letter and spirit of the TVPRA.

This section places a disproportionate emphasis on a child's behavior and criminal or juvenile history, ignoring the TVPRA best-interest mandate.[136] Secure detention frequently

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[130] 862 F.3d at 868 ("For all children in ORR custody, these hearings compel the agency to provide its justifications and specific legal grounds for holding a given minor. The record shows that, in the absence of such hearings, unaccompanied minors, their parents, and their counsel are often given conflicting or confusing information about why a child is being detained. Bond hearings provide the concrete information needed to advocate for a minor's release.").
[131] *See* Rachel Prandini & Alison Kamhi, "Practice Alert on Flores v. Sessions," Immigration Legal Resource Center (July 2017), https://www.ilrc.org/sites/default/files/resources/flores_v._sessions_practice_alert_final.pdf.
[132] 862 F.3d at 868.
[133] 8 U.S.C. § 1232(c)(2)(A).
[134] *See* "Class Action Challenges Indefinite Detention of Immigrant Children by Trump Administration," NYCLU, February 20, 2018, https://www.nyclu.org/en/press-releases/class-action-challenges-indefinite-detention-immigrant-children-trump-administration.
[135] 8 U.S.C. §1232(c)(2)(A).
[136] *Id*.

causes children to misbehave—and ORR penalizes them when they do so by keeping them in secure detention even longer. There is overwhelming evidence that detention adversely affects children's mental health.[137] For children in secure detention, every additional day in detention can have profound impact on their mental health.[138] Because of mounting depression and anxiety, children in secure detention often spiral, causing them to act out in desperation.[139] This regulation ignores this record by prioritizing the child's behavioral history.

Finally, Section CFR 410.810(e) provides an inadequate appellate procedure and perpetuates the same problems outlined in our comments for Section 410.810(a). Under the proposed regulations the hearing officer's determination can only be appealed to the Assistant Secretary. The Assistant Secretary of the Administration for Children and Families (ACF) is not an impartial arbiter and will not provide an adequate check on the hearing officer. The ACF, which is also part of HHS, is not a neutral or independent arbiter. When reviewing appeals from Immigration Judge decisions, the Assistant Secretary would review the decision made by his or her own agency regarding the agency's detention of an unaccompanied child.[140] This procedure will perpetuate the same problems outlined in our analysis of Section (a).*supra*. Additionally, the clear error standard gives too much deference to the hearing officer. For an agency that already fails uphold adequate standards of accountability and transparency,[141]

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[137] Children have a tenfold likelihood to develop psychiatric disorders in detention. *See* Zachary Steel, Shakeh Momartin, Catherine Bateman, Atena Hafshejani, Derrick M. Silove, Naleya Everson, Konya Roy, Michael Dudley, Louise Newman, Bijou Blick & Sarah Mares, "Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia," *Australian and New Zealand Journal of Public Health* 28, no. 6 (September 25, 2004), *available at* https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-842X.2004.tb00042.x.
[138] *See* Holman & Ziedenberg, *Dangers of Detention, 2*.
[139] *Id.*
[140] *See Abdurahman v. Ashcroft*, 330 F.3d 587, 596 (3d. 2003) (finding that neutral and impartial arbiter "must assiduously refrain from being advocates for either party").
[141] 862 F.3d at 879 n.18 (citing Senate report reviewing ORR policy manual).

Section 410.810 will not protect the rights guaranteed under the Flores Settlement Agreement for the TVPRA. Congress *permitted* HHS to consider dangerousness in placement decisions, while it *required* HHS to consider the best interest of the child in every case.[142] In order to adequately hold hearing officers accountable for their failure to take into account the best interest of a child in any given case, the hearing officers' action in question must be reviewed under a "substantial evidence" standard instead.[143] HHS to consider the best interest of the child in every case.

(e) Decisions under this section are final and binding on the Department, and a UAC may only seek another hearing under this section if the UAC can demonstrate a material change in circumstances. Similarly, ORR may request the hearing officer to make a new determination under this section if at least one month has passed since the original decision, and ORR can show that a material change in circumstances means the UAC should no longer be released.

(f) This section cannot be used to determine whether a UAC has a suitable sponsor, and neither the hearing officer nor the Assistant Secretary may order the UAC released.

This section contradicts ORR's mandate under the TVPRA to identify a suitable sponsor and pursue release as a least restrictive measure.[144] Insofar as HHS in this regulation reviews its own placement decision, its statutory mandate to seek the least restrictive setting and identify a "suitable family member [to] provide care" of unaccompanied does not cease.[145] As our prior comments show, 801 hearings cannot

[142] In cases where a child poses is neither dangerous nor poses flight risk, Congress specifically mandates that the ORR place the child with a suitable sponsor. 8 U.S.C. § 1232(c)(2)(A).
[143] *See U.S. v. Eurodif S.A.*, 555 US 305, 316 n.6 (2009); *Dickinson v. Zurko*, 527 U.S. 150, 152-61 (1999) (rejecting "clearly erroneous" standard and reaffirming substantial evidence standard of review for agency findings); *Bonnichsen v. U.S.*, 367 F.3d 864, 879-80 (9th Cir. 2004).
[144] 8 U.S.C. § 1232(c)(2)(A).
[145] *Id*.

substitute the procedural review afforded in Flores bond redetermination hearings. There is simply no basis for these regulations to allocate responsibility to HHS on the one hand, but disregard its statutory mandate to determine suitable sponsors and make release decisions on the other146 As our prior comments show, 801 hearings cannot substitute the procedural review afforded in Flores bond redetermination hearings. However, it is unclear why these regulations allocate responsibility to HHS while disregarding its statutory mandate to determine suitable sponsors and make release decisions.

(g) This section may not be invoked to determine the UAC's placement while in ORR custody. Nor may this section be invoked to determine level of custody for the UAC.

This section is illogical and contravenes the purpose of bond redetermination hearings under the FSA, which review an unaccompanied child's placement and level of custody. As stated above, Flores hearings are the only tool available for children facing prolonged secure detention to challenge their placement and level of custody.[147] Prior sections stripped them of the procedural protections of Flores hearings. This section strips them of the substantive value of such hearings, rendering 801 hearings completely meaningless.

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[147] *Flores v. Sessions*, 862 F.3d 863, 867-68 (9th Cir. 2017) ("The hearing is a forum in which a child has the right to be represented by counsel, and to have the merits of his or her detention assessed by an independent immigration judge. The hearing is also an opportunity for counsel to bring forth the reasons for the minor's detention, examine and rebut the government's evidence, and build a record regarding the child's custody. Without such hearings, these children have no meaningful forum in which to challenge ORR's decisions regarding their detention or even to discover why those decisions have been made. There are no procedures available to them that afford them the right to a hearing with counsel, an opportunity to examine adverse evidence, or a forum in which to refute the government's claims regarding the need for their custody.").

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Secretary,

Department of Homeland Security.

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