December 4, 2023

Submitted via https://www.regulations.gov/commenton/ACF-2023-0009-0001
CC: UCPolicy-RegulatoryAffairs@acf.hhs.gov

Toby Biswas
Director of Policy, Unaccompanied Children Program
Office of Refugee Resettlement
Administration for Children and Families
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201
Re: Unaccompanied Children Program Foundational Rule, Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS); 88 Fed. Reg. 68908; RIN 0970-AC93; ACF-2023-0009

Dear Mr. Biswas,

Immigrant Defenders Law Center ("ImmDef") submits these comments in response to the Office of Refugee Resettlement's ("ORR") Notice of Proposed Rulemaking ("NPRM") on the Unaccompanied Children Program Foundational Rule ("proposed rule").

ImmDef is a non-profit 501(c)(3) law firm and a Legal Service Provider ("LSP") at nearly twenty ORR facilities in the greater Los Angeles area, including shelters, transitional foster care, and long-term foster care facilities. We are also the LSP for the lone Unaccompanied Refugee Minor ("URM") program in Southern California. Additionally, we were also the LSP at both Pomona and Long Beach Emergency Intake Sites ("EIS") when those facilities were operational in 2021 and have represented multiple children placed at Out of Network ("OON") facilities in the region. We also represent hundreds of children released from ORR custody to sponsors in our service area every year.

We have a wealth of relevant experience representing both children in the care of ORR and those who have been released to sponsors in the community having provided legal services to over 20,000 unaccompanied children since our founding in 2015. We also have extensive experience working alongside relevant stakeholders such as Federal Field Specialists ("FFS") and other ORR officials, ORR subcontracted care-provider staff, Child Advocates, community organizations, Immigration and Customs Enforcement Juvenile Coordinators ("FOJC"), the Office of the Principal Legal Advisor ("OPLA"), and the Executive Office for Immigration Review ("EOIR").

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Importantly, ImmDef has signed on to multiple coalitional comments put forth by immigrant rights organizations and other advocacy groups. Those comments are comprehensive and nuanced. In the instant individual comment, ImmDef seeks to highlight client stories illustrative of the potential impact of the NPRM and give some additional feedback that was not provided in the coalitional comments documents to which we signed. Thus, our comments' narrow focus below does not constitute an endorsement of other segments of the NPRM. In the following comment, we express appreciation for aspects of the proposed rule, encourage ORR to improve upon certain sections of the proposed rule, and oppose or request significant revision of certain sections of the proposed rule.

A. 410.1001 Definitions—Transfer

ImmDef has joined coalitional comments that have made recommendations to better protect the rights of children with respect to their transfer and placement and reiterates those comments here, including commending ORR's decision to limit the ability of ORR subcontracted facilities to deny placements. ImmDef writes separately to commend ORR's proposal to affirm that a long-term foster care[1] placement shall be considered a lateral transfer from a shelter level of care.

ImmDef commends the part of the proposed rule's definition of "transfer" that explains that a transfer "from a shelter to a community-based care facility, or vice versa, would be neither a step up nor a step down, because both placement types are not considered restrictive." In ImmDef's experience, several of the children we have served at OON Residential Treatment Facilities ("RTC") have been denied transfer to long-term foster care settings because there has historically been a policy requiring children be "stepped down" to a shelter level of care before they can enter long-term foster care in a community setting.

The regulation could be strengthened to clarify that no such chain of step-downs is required. Rather, if it is determined that a child can safely participate in a lower level of care, that could equally be in a shelter or in a community care facility. In ImmDef's experience, many of the behaviors that lead to a child's step up are triggered by detention fatigue and feelings of helplessness, isolation, and frustration over the lack of progress in the child's immigration case due to interruptions in their representation caused by multiple transfers. Children are therefore caught in a vicious cycle—their behaviors are caused by detention fatigue and the pressures of a stepped-up facility, but ORR will not step them down to a facility that would better support their wellbeing because of these same behaviors.

Considering the foregoing, ImmDef recommends the following adjustment to proposed 410.1001:

"Transfer *means the movement of an unaccompanied child from one ORR care provider facility to another ORR care provider facility, such that the receiving care provider facility takes over the physical custody of the child…. But a transfer from a shelter to a community-based care facility, or vice versa, would neither be a step up nor a step down, because both placement types are not considered restrictive.* ***[ADD] Thus, if the least restrictive placement for an unaccompanied child has been determined to be a shelter level of care, a community-based***

[1] "Long term foster care" is the current term under ORR policy. ORR proposes to change the term to "long-term home care" in the NPRM. ImmDef has no objection to such change.

care facility shall also be considered an appropriate placement, without the need for a child in a restrictive placement to be first "stepped down" to a shelter level of care."

B. 410.1003 General principles that apply to the care and placement of unaccompanied children

ImmDef joined multiple coalitional comments recommending changes to the general principles guiding ORR's care and placement of unaccompanied children to better protect such children's rights and to ensure they are welcomed with dignity and reiterates those comments here. ImmDef writes separately to urge ORR to include language that would ensure both ORR and ORR-subcontracted facilities appropriately understand their role as one of caretaking, rather than one of law enforcement or punishment.

ImmDef applauds ORR's inclusion of guiding principles that require that children be treated with "dignity, respect and special concern for their vulnerability." In ImmDef's experience, many ORR subcontracted facilities strive to do so. However, we have also interacted with care providers who approach their work from a more law-enforcement oriented, punitive perspective. Many children in those facilities report feeling overly policed (including removing their ability to participate in religious services, being isolated from peers, having phone calls or free time limited, and receiving threats of delay in reunification or threats of deportation if the children do not comply with the facility staff's behavioral demands). ImmDef commends ORR for its recognition in the preamble that it is not a law-enforcement agency. ImmDef recommends making a stronger statement about ORR's purpose and goals in "general principles" laid out at 410.1003 *et seq.* For example 410.1003 could be amended to read:

"410.1003 (a) ***[ADD] ORR's role with respect to the children in its care is one of caretaking.*** *Within all placements, unaccompanied children shall be treated with dignity, respect and special concern for their vulnerability,* ***[ADD] by ORR staff, the staff of ORR subcontracted facilities, and any other stakeholder or interested person who interacts with the child while the child remains in the custody of ORR, or during the child's transport to or from an ORR care provider."***

C. 410.1103 Considerations generally applicable to the placement of an unaccompanied child

ImmDef has joined other coalitional comments related to the factors that ORR should consider when determining the least restrictive placement for an unaccompanied child, in the child's best interests. ImmDef writes separately to encourage ORR to add access to counsel, and the impact of the placement on the child's legal case or potential legal relief, when making placement decisions.

In ImmDef's experience, many children in ORR custody have faced significant trauma and have had their trust violated by multiple adults and authority figures. Thus, building the necessary rapport to be able to adequately represent them takes time, patience and compassion. This is particularly true for children who have been transferred one or more times and have likely had to tell their traumatic personal stories repeatedly. As such, when considering the transfer of a child, ORR should not only notify the child's attorney or accredited representative in advance *in all* cases but should also take the potential interruption of the attorney/client relationship into account when considering whether and to where to transfer a child. This is of even greater

concern when ORR is considering transferring a child to an OON placement. Because OONs are not ORR subcontracted facilities, they typically do not have a designated LSP and are often in remote locations. Children placed in OON facilities often do not have meaningful or in person access to counsel at all.

Further, while immigration law is federal, certain aspects, such as eligibility for Special Immigrant Juvenile status or asylum, vary widely by state or by Federal Circuit respectively. Advance notice of a transfer is key because it would allow the attorney or accredited representative to advocate against such transfer if it would negatively impact the child's legal case (such as by interrupting the attorney-client relationship, causing them to miss an upcoming asylum interview, negatively impacting their eligibility for relief), or at a minimum take the necessary steps to mitigate undue prejudice to the child's legal case that might result from transfer.

ORR lists placement factors (1)-(17) at 410.1103(b). ImmDef strongly recommends adding additional factors related to a child's access to counsel and impacts on their eligibility for legal relief. As such, ImmDef recommends the following amendment to proposed 410.1103(b):

"410.1103(b) ORR considers the following factors that may be relevant to the unaccompanied child's placement including (1)…:

[ADD] (18) Access to counsel, including whether the child has an existing attorney client relationship that would be interrupted by a placement or change in placement;

(19) Availability of legal relief."

D. 410.1105 Criteria for placing children in restrictive placements

ImmDef has signed onto extensive coalitional comments raising alarms related to the NPRM's proposed regulations related to the placement of children in restrictive placements. ImmDef reiterates here its position that ORR should cease to operate secure facilities, which are infamous for abusive practices. We further reiterate comments that would place additional procedural protections on step up, limit the categories of children ORR would determine to be amenable to restrictive placements, and focus on trauma-informed, supportive services that could allow children at risk of step-up to be successful in less restrictive placements.

ImmDef writes here to comment specifically on 410.1005(b)(2) which would allow a child who has been "unacceptably disruptive" in a "shelter" to be stepped up. ImmDef notes that "unacceptably disruptive" is a highly vague and subjective term, and one that could be used by ORR staff or the staff of ORR subcontracted facilities to improperly justify the step-up of children who are struggling in care. "Disruptive" behavior is often a child's way of communicating that they feel disrespected, unheard, or that their needs are not being met. Furthermore, it is well documented that Black children and children from other marginalized

groups are more likely to be considered "disruptive" due to systemic racism built into our educational and immigration systems.[2]

This bias can be compounded by a lack of cultural humility and competency on the part of ORR subcontracted staff. ImmDef notes that in recent years, the geographical, racial, cultural, religious, and linguistic diversity of children in ORR's care has increased dramatically. Whereas many ORR subcontracted providers may have developed competencies responding to the needs of Spanish-speaking children from Central America and Mexico, ImmDef has witnessed care providers struggle to meet the needs of children from other backgrounds, resulting in many children, particularly Black and African children, and children from Afghanistan and South Asia being deemed "disruptive" on a disproportionate basis compared to their peers. Therefore, including a vague and subjective criterion like "disruptiveness," which is susceptible to bias, is inappropriate and carries the risk of disproportionate impacts on minoritized immigrant children. This criterion should be removed as a basis for step-up.[3]

E. 410.1107 Considerations when determining whether an unaccompanied child is a runaway risk for purposes of placement decisions

ImmDef reiterates our coalitional comments' recommendations that a child's negative prior immigration history (such as prior removal orders or failures to appear) should not be considered in assessing runaway risk. As ORR has acknowledged in the pre-amble, it is not a law enforcement agency, and should not be concerned with "flight risk" from removal proceedings, but rather only "runaway risk" (meaning a child's unauthorized departure from an ORR facility).

In ImmDef's experience serving thousands of children housed in licensed, non-secure facilities, we have not seen any correlation between prior receipt of a removal order or a failure to appear and the risk that the child will run away from a facility. In many cases, a child is not even aware that they *have* a prior removal order. Once ImmDef determines the existence of such an order and explains the significance of it to children, children are typically highly motivated to cooperate with their attorney to resolve the matter. If anything, the existence of a prior removal order makes it more likely that a child will *stay* in an ORR subcontracted facility to work with their LSP or attorney or representative of record to resolve it.

Thus, ImmDef strongly reiterates the call of immigrant rights organizations to strike the existence of a prior removal order, breach of bond, or failure to appear from the list of factors when considering whether a child is a "runaway risk."

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[2] *See e.g.* Sabol, Terri *et al., A window into racial and socioeconomic status disparities in preschool disciplinary action using developmental methodology* (Sept. 23, 2021) *available at* *https://nyaspubs.onlinelibrary.wiley.com/doi/10.1111/nyas.14687*; *See also* Human Rights First, NGO Shadow Report on Anti-Black U.S. Immigration Practices (July 22, 2022) *available at* *https://humanrightsfirst.org/library/ngo-shadow-report-on-anti-black-us-immigration-practices-submitted-to-the-committee-on-the-elimination-of-racial-discrimination/*

[3] ImmDef also briefly notes that were ORR to retain this criterion, 410.1005(b)(2) should be amended because it refers to disruptiveness in "shelter." ImmDef presumes that ORR is referring to children placed in "standard facilities" per the proposed term, or "licensed, non-secure facility" per the FSA.

F. 410.1108 Placement and services for children of unaccompanied children

ImmDef has signed on to coalitional comments regarding the treatment of pregnant and parenting children and reiterates the recommendations therein, including comments commending ORR for enshrining pregnant unaccompanied children's right to abortion, and those comments making recommendations to strengthen such rights, and to prevent unwarranted separations of unaccompanied parenting youth from their children. ImmDef writes separately here to reiterate and highlight two additional points.

First, at 410.1108(a), ORR outlines that parenting unaccompanied youth, and their children should typically be placed in the same facility, absent "unusual or emergency situations." ImmDef writes separately to suggest that ORR specifically include that unaccompanied parenting youth have the right to demand, (without pressure or coercion) the immediate release of their U.S. citizen children from care. While ImmDef appreciates ORR's commitment to *care for* and *house* the U.S. citizen children of unaccompanied parenting youth, they have no authority to *detain* U.S. citizen children. Therefore, unaccompanied parenting youth can and do have the right to demand their immediate release from ORR custody. In many cases, the unaccompanied parenting youth will wish for their child to remain in their care, but there could be times when the unaccompanied parenting youth wishes for the U.S. citizen child to be immediately released from care, such as when there is another close relative who is anticipated to assume primary care of the child upon release. Therefore, ImmDef recommends that proposed 410.1108(a)(2) be amended as follows:

"410.1108(a) Placement. If an unaccompanied child and their children are referred together to ORR, ORR shall place the unaccompanied children and their children together in the same facility, except in unusual or emergency situations. Unusual or emergency situations include but are not limited to… (2) The unaccompanied child requests alternate placement for the unaccompanied child ***[ADD] or the child is a U.S. citizen, and the unaccompanied child demands the immediate release of the U.S. citizen child from ORR care. No ORR or ORR subcontracted staff shall ever pressure or encourage the unaccompanied child to make such a demand;*** *or…"*

Second, ImmDef is concerned about the language at (b)(2) of this subpart, which would require that the "[utilization of those benefits and services [for U.S. citizen children] shall be exhausted to the greatest extent practicable before ORR-funded services are utilized." ImmDef is concerned that delays inherent in public benefits applications, or lack of eligibility for certain services, could impede U.S. citizen children in ORR custody's timely access to necessary medical or psychiatric care. ImmDef strongly suggests amending the proposed regulation as follows:

"410.1108(b)(2)… "Utilization of those benefits and services shall be exhausted to the greatest extent practicable before ORR-funded services are utilized ***[ADD], unless doing so would cause delay or material change in the quality of necessary medical or psychiatric treatment of the U.S. itizen child****."*

G. 410.1201 Sponsors to whom ORR releases an unaccompanied child

ImmDef has joined coalitional comments related to the release of children to designated sponsors, including comments commending ORR for affirming that ORR will not disqualify

sponsors due to immigration status, nor will it share immigration status information of sponsors with immigration or law enforcement authorities.

ImmDef writes separately to highlight that the proposed regulation creates confusion at 410.1201(a)(5), which specifies that children may be released to a "standard program willing to accept legal custody." Given that "standard program" has no legal meaning, other than the one proposed in ORR's own definition of a type of *ORR subcontracted* facility, it is not clear what type of program this regulation is referring to. ImmDef assumes that ORR meant to specify that a child could be released to a non-ORR subcontracted, state licensed facility in certain situations. To eliminate confusion, ImmDef proposes amending the proposed regulation as follows:

> *"410.1201(a)(5) A ~~standard program~~ state-licensed, community-based program willing to accept legal custody; or…"*

H. 410.1203 Release approval process

ImmDef reiterates and commends the coalitional comments aimed at improving due process protections for both children and potential sponsors in the release approval process, along with recommendations to ensure that children are released to suitable sponsors without undue delay, including by increasing access to post-release services in keeping with ORR's acknowledgement that release to a community sponsor, rather than prolonged detention, is typically in a child's best interests.

ImmDef writes separately regarding proposed 410.1203(c)(5)-(6). These proposed regulations would require sponsors to notify ORR of the initiation of any dependency proceedings, and to require sponsors to notify ORR of any change of address of the child, respectively. As the preamble to the NPRM acknowledges, once a child is released from care, they are under the custody of their custodian rather than ORR. ORR has no authority to mandate ongoing updates by sponsors, particularly where ORR has not even placed a time limit after which sponsors would no longer be required to make such notifications. Further, in the case of change of address notifications, it is duplicative, given that children and their sponsors have an independent responsibility to notify EOIR and the Department of Homeland Security ("DHS") of any change of address. ORR should strike (c)(5)-(6) from 410.1203, or at a minimum require them only within a specified, reasonable time limit, such as 30 days, or only require them of children receiving post-release services ("PRS") mandated by the Trafficking Victims Protection Reauthorization Act ("TVPRA").

I. 410.1209 Requesting specific consent from ORR regarding custody proceedings

ImmDef underscores and reiterates the coalitional comments submitted in collaboration with immigrant rights organizations and writes separately to highlight that the proposed regulations could have unintended consequences before U.S. Citizenship and Immigration Services ("USCIS") for children in ORR custody who are petitioning for Special Immigrant Juvenile Status ("SIJS"), and should be amended to prevent such consequences. The proposed regulation should be amended as follows to avoid such consequences:

"410.1209(b) ***[ADD] An unaccompanied child in ORR custody need not request ORR's specific consent before a juvenile court exercises jurisdiction to enter findings or orders that do not alter the child's custody status or placement with ORR.*** *~~If an unaccompanied child seeks to invoke the jurisdiction of a juvenile court for a dependency order to petition for SIJ classification or to~~*

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

Furthermore, the proposed regulation at 410.1209(f) proposed a 60 business-day timeline by which ORR must respond to requests for specific consent. In ImmDef's experience, requests for specific consent are only necessary in emergent situations. For example, in one instance ORR was seeking to reunify a child with a serious heart condition with a Category 2 sponsor. The child would need heart surgery soon after release, and needed his sponsor to have legal guardianship of him in order for the sponsor to consent to the medical treatment on the child's behalf. ImmDef filed a guardianship petition in the relevant California court while the child was still detained in order for the guardianship to be in place in time to consent to surgery. We were unsure of the timing of release, and it was not clear whether the child would be released or still in care at the time of the hearing on the guardianship. As such, we timely submitted a request for specific consent, but it took months to receive a response.

Because specific consent is typically only needed in emergent situations, ImmDef recommends that 410.1209(f) be amended as follows:

"410.1209(f)- ORR shall make determinations on specific consent requests within ~~60 business~~ ***30 calendar*** *days of receipt of a request. ~~When possible,~~ ORR shall expedite urgent requests."*

J. 410.1210 Post-release services

ImmDef commends ORR's commitment to increase access to PRS and to incorporate PRS as a tool to ensure children are safely and swiftly released to an approved sponsor. ImmDef joined extensive coalitional comments related to PRS and writes separately here to underscore the recommendation that in most cases, PRS should be *voluntary.* In the domestic child welfare context, due process does not permit government intrusion on a family's child rearing methods absent a judicial finding that the child has been abused, abandoned, or neglected by his or her caretaker. Likewise, ORR cannot and should not require a family to participate in PRS absent such a finding. Instead, children and sponsors should have the option to "opt in" to PRS and to discontinue them at any time if they find them unhelpful, overly burdensome, or for any other reason.

K. 410.1302 Minimum standards applicable to standard programs

ImmDef joined multiple coalitional comments decrying ORR's plan to codify the use of unlicensed facilities, and ImmDef reiterates those calls. State licensure creates a key oversight component for ORR-subcontracted facilities and should not be removed as a requirement. To do so is out of keeping with the FSA and child welfare best practices. We write separately to say that if ORR proceeds with its plan, outlined at 410.1302(a) to allow unlicensed facilities to operate in certain states, such facilities should be required to submit to additional ORR oversight, by the (proposed) Ombudsman or another independent party to ensure the safety and wellbeing of the children in those facilities.

i. *410.1302(c)(1)*

ImmDef further writes separately to commend ORR's inclusion of minimum standards of care at 410.1301(c)(1)-(13). ImmDef writes separately to make some recommendations to improve each of these standards' responsiveness to children's needs in light of the patterns we have seen in our many years serving unaccompanied children in ORR custody. ImmDef recommends amending certain standards as follows:

"*410.1301(c) Provide or arrange for the following services for each unaccompanied child in care* ***[ADD] to ensure a welcoming, supportive environment that meets the physical, emotional, cultural, linguistic, and religious needs of the children in care:***

(1) "Proper physical care and maintenance, including suitable living accommodations, food that is of adequate variety, quality, ***[ADD] culturally responsive and religiously appropriate*** *and in sufficient quantity to supply the nutrients needed for proper growth and development, which can be accomplished by following the U.S. Department of Agriculture (USDA) Dietary Guidelines, and appropriate for the child and activity level, drinking water* ***[ADD] and snacks*** *that ~~is~~* ***are*** *always available to each unaccompanied child, appropriate* ***[ADD] culturally and religiously responsive*** *clothing* ***[ADD] sufficient for the child to wear clean clothing every day they are in ORR care***, ***[ADD] culturally and religiously responsive*** *personal grooming and hygiene items,* ***[ADD] free*** *access to toilets and sinks, adequate temperature control and ventilation and adequate supervision to protect unaccompanied children from others…"*

The above changes are recommended in light of ImmDef's experience hearing from thousands of children about their experience in ORR custody. These "basic needs" are issues children raise repeatedly and are central to whether the children feel safe and respected in care, or whether they feel that their dignity and autonomy has been diminished.

For example, as ORR continues to receive children from a growing diversity of nations, ORR should codify a requirement that children have access to foods that remind them of home, and that are appropriate to any religious or other dietary restrictions that the child may have. A common complaint we hear from children in care is that they are served meat that is not allowed under their religious practices, or they are served foods that are culturally unfamiliar and give them stomachaches because their body is not used to consuming certain foods. On the positive side, we have heard from children who were invited into the kitchen to show staff how to prepare Afghan food. Those children expressed a feeling of pride and comfort in the ability to eat and share their customary foods with their peers, and ORR care providers should be encouraged and required to undertake such practices.

Further, ImmDef often hears from children who are hungry between meals, sometimes because the culturally unfamiliar foods served at meals are unappetizing. Having a variety of freely available snacks on hand, as many (but not all) of the facilities we serve do, is an important stopgap to ensure those children are receiving adequate calories every day and are not going hungry. It also improves children's feelings of autonomy.

With regard to clothing, ImmDef often hears from children who run out of clean clothing after a few days in care. Laundry schedules prevent them from timely obtaining clean clothing, and the children are required to wear soiled clothing. Teenaged unaccompanied children have expressed that having to wear dirty (potentially smelly) clothing makes them embarrassed and uncomfortable.

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Furthermore, ImmDef has often heard from children who are offered clean clothing upon arrival, but the clothing is not culturally or religiously responsive. For example, girls from certain cultures may prefer long sleeves and long dresses over pants and short sleeves but may only be offered tight t-shirts and jeans. As one compelling example, ImmDef served one Muslim girl who was wearing a heavy, hooded sweatshirt with the hood up in 95-degree heat. When ImmDef staff inquired why she was wearing such a warm garment on such a sweltering day, she explained that she had requested lightweight long sleeves and a head scarf to cover her hair. She had not been provided with one, so she had no choice but to cover her hair with a thick hood. In another example, ImmDef served some Sikh boys who had not been provided with sufficient turbans to cover their hair every day. The children expressed feeling stress and anxiety over violating their religious mandates through no fault of their own. ORR should codify clothing requirements that would ensure ORR subcontracted facilities are prepared to receive the children in their care with dignity, regardless of the child's cultural or religious backgrounds.

ImmDef also recommends codifying a requirement that ORR provide culturally responsive grooming and personal hygiene products. For example, Black children may require certain hair care products and grooming techniques to protect and appropriately care for their hair. As another example, one Muslim child ImmDef served requested a small container to pour water on himself after toileting as was considered religiously and culturally appropriate to him. The ORR-subcontracted care provider denied him this simple request citing that it was "unsanitary." This unreasonable denial left the child feeling dirty, disrespected, and uncomfortable.

Finally, ImmDef suggested adding the word "free" before access to toilets and sinks to guard against the possibility that a care provider might inappropriately restrict access to bathroom facilities as punishment or for any other reason.

ii. *410.1302(c)(9)*

Proposed 410.1302(c)(9), which reads "[w]henever possible, access to religious services of the child's choice, celebrating culture-specific events and holidays, being culturally aware in daily activities as well as food menus, choice of clothing and hygiene routines, and covering various cultures in children's educational services" is insufficient to allay the above concerns related to cultural and religious responsiveness. In ImmDef's experience, some ORR-subcontracted facilities take the position that meeting children's religious and cultural needs is "impossible" due to lack of easy availability of a certain item, lack of training, lack of sufficient staffing to transport a child to religious services, or due to baseless concerns regarding the "unsanitariness" of certain grooming practices. ImmDef has heard ORR-subcontracted staff express that children requesting that their religious and cultural needs be met are asking for "special treatment." This inappropriate statement demonstrates bias on the part of the ORR-subcontracted staff. The staff clearly felt the items and services they were used to providing Spanish-speaking children "the norm," and that being similarly responsive to the *needs* of other children was somehow "special treatment."

ImmDef commends ORR on recognizing, in the NPRM, that each child *should* receive special treatment—that is, each child has "individualized needs" that ORR should strive to meet. Hence, ORR should amend the language at 410.1302(9) to more strongly require that care providers adequately meet the religious and cultural needs of the children in their care. ImmDef suggests it should be amended as follows:

"(9) ~~[w]henever possible,~~ Access to religious services of the child's choice, celebrating culture-specific events and holidays, being culturally aware in daily activities as well as food menus, choice of clothing and hygiene routines, and covering various cultures in children's educational services."

L. 410.1304 Behavior management and prohibition on seclusion and restraint

ImmDef joined multiple coalitional comments recommending changes to the proposed regulations that would replace focus on behavior "management" with strengths-based behavior *support*, and would ensure that children's trauma, developmental stage, and any disability are considered in any disciplinary decision and individualized service plan. ImmDef reiterates those comments.

We write separately regarding 410.1304(a)(2)(ii), which would prohibit any behavior support practices that infringe on children's basic rights. ImmDef commends codification of these limits on behavior support practices. ImmDef has witnessed care providers limit children's access to communication with their families as a form of punishment, and we welcome the prohibition on such practices. However, we have also seen care providers limit or prevent children's access to religious services as punishment for "misbehavior" while in care. In addition to violating these children's rights, it is also counterproductive. Children who are forced to miss religious services report understandable feelings of anxiety, stress, anger, and frustration. It is no wonder that many of these children continue to "act out" in response to these punishments. Thus, care providers should be prohibited from limiting access to religious services as a method of behavior "management."

In light of the foregoing, ImmDef recommends the following change to further protect children from having their rights stripped as part of a behavior support plan:

*"(2)(ii) "Deny unaccompanied children meals, hydration, sufficient sleep, routine personal grooming activities, exercise (including daily outdoor activity) medical care, correspondence or communication privileges, **[ADD] religious services,** or legal assistance."*

M. 410.1305 Staff, training and case manager requirements

ImmDef writes separately on this proposed regulation to commend ORR on its proposal at 410.1405(c) to require that "Standard programs and restrictive placements must have case managers based on site at the facility." ImmDef applauds ORR for codifying an expectation of onsite case management. However, the regulatory language should be strengthened to ensure that all case management takes place onsite and in person. In the preamble (at p. 68943), ORR clarifies that part of the purpose of this proposed rule is to "ensure that case management staff are site based and provide their services in person." ImmDef strongly supports this goal, but the proposed regulatory text falls short of ensuring it, because the proposed regulation could be read to allow virtual or offsite case management, so long as the ORR subcontracted facility has *some* case managers onsite.

In ImmDef's experience working with programs that have contracted virtual case management, we have witnessed multiple issues with its use. Children report not knowing who

their case manager is, or whether anyone is working on their reunification. They do not receive reasonable updates on the reunification process and are left wondering when and whether they will be able to reunite with their families. In one case, a tender-aged minor receiving virtual case management started experiencing severe symptoms of anxiety and could not sleep because he was so worried and had no access to information about his reunification. An onsite childcare worker (not case manager) simply told him to try to calm down because if he had to be hospitalized it would delay his reunification further.

In another instance, a deaf child receiving virtual case management was not allowed to text with or send written messages to his family. He did not use sign language, so his calls to his family consisted only of waiving via video, with no actual communication. Despite ImmDef elevating this to his virtual case manager multiple times, the case manager insisted he was receiving appropriate access to family communication. Because she was not onsite, she did not have personal knowledge of the inadequate quality of the communications. It was only when ImmDef, together with his Child Advocate, intervened with his onsite therapist that he was allowed to communicate with his family via written messages and texts.

Additionally, ImmDef has noticed that virtual case managers often lack awareness of a child's language needs. While, as highlighted in other coalitional comments to which ImmDef has signed, both offsite and onsite case managers often provide incomplete or incorrect information about children's best languages, the issue is more prevalent with offsite case managers because they are not in regular, in person contact with the children they serve. Among other concerns, this results in a delay in legal services to the children. It is not uncommon for ImmDef to arrive for a scheduled know your rights presentation, only to learn that a child needs interpretation in a different language than what we had been told. If an on-demand interpreter is not available (as is often the case with rarer languages) services must be postponed until an appropriate interpreter can be scheduled.

In light of the foregoing, ImmDef recommends the following change to the proposed regulations:

*"410.1305(C): "Standard programs and restrictive placements must ~~have case managers~~ **conduct all case management in person via case managers based on site at the facility.**"*

N. 410.1306 Language access services

ImmDef has joined extensive coalitional comments recommending steps to improve language access and reiterates them here. ImmDef writes separately to highlight that the regulations must be strengthened with regard to the use of interpretation to facilitate family communication, reunification, and legal services.

i. 410.1306(f)

In recent months, as the linguistic diversity of the children in ORR care increases, ImmDef has heard from children who have waited three weeks or more to be able to have an initial phone call with their parents or other family members, because the care provider was unable to obtain interpretation in the relevant language to approve the contact. These children expressed feeling heightened anxiety, sadness and worry that they had not been able to speak

with their family. Additionally, we have seen delays in reunification due to delays in translating birth certificates or identity documents. Such delays are unacceptable, as every day a child is unnecessarily detained can have serious negative consequences to their mental health and well-being. It also has the effect of unacceptably subjecting African and other minoritized migrant children to longer lengths of stay compared to their peers in care. ImmDef has seen that it is often speakers of African languages such as Pular and Malinke, who are subjected to these delays at the facilities where we conduct our work.

In light of the foregoing, ImmDef recommends the following change to the proposed regulations:

"410.1306(f) Parent and sponsor communications. Standard programs and restrictive placements shall utilize any necessary professional interpretation or translation services to ensure meaningful access by unaccompanied child's parent(s), guardian(s) and/or potential sponsor(s). Standard programs and restrictive placements shall translate all documents and materials shared with the parent(s), guardian, and/or potential sponsors in their native or preferred language, depending on their preference. ***[ADD] Standard programs and restrictive placements shall ensure timely interpretation and translation to approve contacts and communications between children, family members and potential sponsors, and shall not delay approval of contacts due to the language of the child or the contact, but shall rather make all efforts to expeditiously obtain any interpretation or translation needed to approve the contact. Standard programs and restrictive placements shall secure timely document translation of any documents required to complete the reunification process, including birth certificates and identity documents of unaccompanied children and/or sponsors. Standard programs and restrictive placements shall immediately notify ORR of the need for assistance obtaining document translation or interpretation services to facilitate family contact or reunification, and ORR shall expeditiously provide such assistance."***

ii. 410.1306(h)-(i)

ImmDef commends ORR's inclusion of interpretation for legal services at 410.1306(h). ImmDef recognizes that ORR has affirmed at 410.1306(i) that interpreters "shall keep all information about the unaccompanied children's cases and/or services confidential from non-ORR grantees, contractors and Federal staff." ImmDef proposes that this regulation be strengthened, to ensure attorney-client privilege and confidentiality, as follows:

(i) Interpreters and translators responsibility with respect to confidentiality of information: *Interpreters and translators shall keep all information about the unaccompanied children's cases and/or services confidential from non-ORR grantees, contractors and Federal staff. Interpreters and translators shall not disclose case file information to other interested parties in the unaccompanied children's cases.* ***[ADD] In the case of interpretation in the receipt of legal services, including consultations, meetings, or other communications between the unaccompanied child and their attorney, accredited representative, or legal service provider, interpreters shall keep all information confidential. The interpretation shall not be made part of the child's ORR case file, nor shall the interpreter or translator disclose any information so interpreted or translated to any third party (including ORR staff or subcontracted staff)."***

O. 410.1309 Legal Services

ImmDef has joined coalitional comments related to improving access legal services and we reiterate those comments . ImmDef writes separately to flag a gap in the proposed regulatory language that would arbitrarily leave children in transitional home care with less access to legal services than their peers in other standard facilities.

At 410.1309(a)(2)(B), ORR proposes that children ("except [children in] ORR long-term home care or ORR transitional home care") should receive a Know Your Rights presentation and consultation within 10 business days of their placement in or transfer to a facility. ImmDef notes that the exception for children in ORR long-term care makes sense, as under current practice, most if not all of those children receive direct, full-scope representation by an LSP upon their placement. Thus, Know Your Rights presentations and consultations may not be necessary, given that they will receive that information through the normal course of their representation relationship with their attorney or accredited representative.

However, children placed in "ORR transitional home care" (currently known as "transitional foster care") typically do not have the same level of access to counsel. Transitional foster care placements are standard, short-term placements that carry no increased access to counsel over shelter settings or other "standard" programs. Thus, it is nonsensical to exempt children in "ORR transitional home care" from the right to receive a Know Your Rights Presentation and legal consultation. As such, ImmDef recommends that the relevant parts of 410.1309(a)(2)(B) be amended as follows:

"*410.1309(a)(2)(B) Such presentation must occur within 10 business days of the child's transfer to a new ORR facility (except ORR long-term home care ~~or ORR transitional home care~~)…"*

(a)(2)(B)(v) A confidential legal consultation with a qualified attorney (or ~~paralegal~~ ***non-attorney legal staff*** *working under the direction of an attorney or ~~EOIR~~ accredited representative)… shall occur within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care ~~or transitional home care~~)."*

P. 410.1401 Transportation of an unaccompanied child in ORR's care

ImmDef has joined other coalitional comments recommending changes that would strengthen the rights of children during their transport. We write separately to highlight the need for facilities to maintain sufficient staffing to transport children for medical, religious, or recreational needs.

ImmDef has heard many complaints from children who were unable, often for weeks at a time, to attend their preferred religious services because the ORR-subcontracted facility where they were detained lacked sufficient staffing to transport them. Additionally, we have heard from children who are on a heightened level of supervision that they are not able to participate in outings to the same extent as other children because the facility again lacks sufficient staffing to be able to transport them. The children report feeling sadness, isolation, and justified anger and frustration in response to being excluded from religious services and recreational activities due to insufficient staffing. As such, ImmDef recommends amending proposed 410.1401(c) as follows:

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"410.1401(c) The care provider facility shall comply with all relevant State and local licensing requirements and State and Federal regulations regarding the transportation of children such as meeting or exceeding the minimum staff/child ratio required by the care provider facility's licensing agency ***[ADD](and in all cases maintain sufficient staffing to allow equal access to religious services and other offsite activities to all children, regardless of disability, heightened supervision needs or any other reason),*** *maintaining and inspecting vehicles, etc.*

Q. 410.1601 Transfer of an unaccompanied child within the ORR care provider facility network

ImmDef has joined extensive coalitional comments that would better protect the rights of unaccompanied children subject to transfer and reiterates those comments. We write separately to strongly recommend that ORR consider a child's access to legal relief and continued access to their attorney or accredited representative, if any, in determining whether and where to transfer a child.

As outlined above in our comment to Proposed 410.1103, a child's placement can have a significant impact on their access to legal services and their ability to pursue legal relief. As such, ImmDef recommends amending proposed 410.1601(a)(3) as follows:

"410.1601(a)(3) "Within 48 ***[ADD] business*** *hours prior to the unaccompanied child's physical transfer, the referring care provider facility shall notify all appropriate interested parties of the transfer, including the child's attorney of record or EOIR accredited representative, legal service provider, or child advocate, as applicable. However, such advance notice is not required in unusual and compelling circumstances, in which cases notices shall be provided within 24* ***business*** *hours* ~~*following*~~ ***in advance of*** *transfer."*

R. 410.2000 Establishment of the UC Office of the Ombuds

ImmDef applauds the creation of an Ombudsperson to monitor services and conditions at ORR facilities. However, ImmDef is concerned at the small size of the Office contemplated at page 68966 of the preamble of the NPRM. According to the preamble, the Office of the Ombuds is expected to employ just ten people, the Ombudsperson him- or herself and nine support staff. Given that the Office of the Ombuds will have oversight over hundreds of ORR facilities nationwide, often housing 15,000 to 20,000 unaccompanied children at any given time, the small size of the contemplated staff suggests that their reach and availability to impacted unaccompanied children and sponsors would be extremely limited. ImmDef recommends that ORR increase the size of the Office to ensure that the Ombuds is reasonably accessible to all children in care throughout the United States.

S. New Recommended Regulation - Provision of photo identification to all minors in ORR care

ORR issues a verification of release ("VOR") to unaccompanied children who are released to sponsors. This document, which includes the name, age, photo and address of the unaccompanied child, can be immensely useful to the child following release from ORR care. The VOR is often the only form of identification that the child has upon release and can be used not only for enrollment in school, but also to request essential other forms of identification such

as an employment authorization document ("EAD") based on a pending asylum application or approved SIJ petition. Some unaccompanied children do not receive a VOR, which can result in significant consequences later on. These include children who age-out of ORR care on their 18th birthday. These may face difficulties obtaining a passport or national ID card from their home countries, or a state ID in states, such as California, that provide state ID's without regard to immigration status.

Without any photo identification, children and youth may not be able to apply for an EAD, or even if they can apply, may be turned away from the USCIS Application Support Centers ("ASC") that obtain biographical information for USCIS to assist in approving their applications for EADs.

For example, one ImmDef client who aged out of ORR was never issued a VOR (because she aged out and did not obtain a school ID since she never enrolled (at age eighteen, she was not legally required to do so). And, Ayouth who had been abused, abandoned and/or neglected by her parents, was unable to apply for a passport from her home country, since that country required parental consent for those under the age of 21. Her application to apply for an ID in the state where she was living was denied multiple times due to lack of existing photo identification. She was able to apply for the EAD but was never permitted to attend her ASC appointment for lack of ID. Instead, she waited over a year until she turned 21 to request a passport, after which she was able to finally get her EAD. Having a VOR or a similar document could have eliminated this delay for her. Therefore, we request that a new regulation be added to mandate the issuance of photo identification to all minors who were in ORR care, regardless of whether they age-out or are released from care.

Conclusion

ImmDef thanks ORRs for the opportunity to comment on the Proposed Rule. We are encouraged by the provisions that would improve conditions for children and ensure their safe release without undue delay. The changes we offer to the Proposed Rule, through the instant comment and via additional coalitional comments to which ImmDef joined, would further strengthen these provisions. We urge ORR to adopt our recommendations and improve protections for youth in the Final Rule. Should you have any questions or require any additional information related to our comments, please do not hesitate to reach out to Legal Services Director Marion ("Mickey") Donovan-Kaloust at mickey@immdef.org.

Sincerely,

Marion Donovan-Kaloust, Legal Services Director
Immigrant Defenders Law Center