

December 4, 2023

Submitted via <https://www.regulations.gov/commenton/ACF-2023-0009-0001>

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

We write on behalf of the undersigned organizations and individuals in response to the Office of Refugee Resettlement's (ORR) Notice of Proposed Rulemaking on the Unaccompanied Children Program Foundational Rule<sup>1</sup> ("proposed rule") to address the sections of the proposed rule that relate to emergency or influx facilities.

We have extensive experience providing legal, child advocate, social, mental health or other services to and advocacy to unaccompanied children in ORR custody. Collectively, we have deep experience in the areas of enforcing constitutional due process rights, child welfare, the ORR release and reunification process, child development, child migration, language and cultural competency, and service provision for unaccompanied children prior to and following release from ORR custody, among other things. We have seen that children fare best in home-like settings in which they have developmentally appropriate ways to engage in decisions that impact them and form trusting relationships with peers and adults. We know that increased size and restrictiveness in a custodial setting exacerbates the negative impacts of federal custody on children and impedes prompt release to sponsors. We have also seen that federal custody can cause increased trauma and impede healing rather than providing a setting in which young people can recover from their past traumatic experiences.

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<sup>1</sup> Unaccompanied Children Program Foundational Rule, 88 FR 68908 (Oct. 4, 2023) (to be codified at 45 C.F.R. pt. 410).

Importantly, our comments' narrow focus on Emergency or Influx Facilities does not constitute an endorsement of other segments of the proposed rule, though we have joined or led separate comments providing stakeholder input on other sections. 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.

### **Subpart I (§§ 410.1002; 410.1800-02): Emergency and Influx Facilities**

a. We appreciate ORR's updated definition of "influx" and urge ORR to codify protections for children placed in an Emergency or Influx Facility (EIF)

Advocates appreciate ORR's definition of "influx" in proposed §410.1001 as periods when 85 percent of ORR's net standard program bed capacity is occupied for seven consecutive days. We request that ORR define "net standard program bed capacity" so we can adequately evaluate the true meaning of 85 percent capacity. In the past, ORR has based capacity on the number of "available" beds, a number which varies based on several factors. **We urge ORR to publish the percentage of beds in use along with the other data routinely published by ORR on a weekly basis.** Overall, we commend the codification of clear standards for when emergency or influx facilities will be utilized.

We likewise support ORR's stated commitment in proposed § 410.1800 and in the preamble to the proposed regulations (p. 68956) to regularly reevaluating and expanding regular shelter capacity as needed to minimize the need to utilize influx facilities. Together these proposed sections work toward a reduction in use of unlicensed and large congregate care facilities and promote the best interests of the children in ORR's care.

In addition, we appreciate the limitations on transfer to an EIF proposed in § 410.1802, which make clear that EIFs are not intended for particularly young children or children with more complex health, placement, or reunification/release considerations. We suggest that ORR add a requirement that a comprehensive eligibility screening be done *prior to* placement in an EIF, including screening for complex reunification and/or health concerns, disabilities, and whether a child speaks preferred or primary languages other than English or Spanish – especially indigenous languages – even if a child speaks some Spanish or English. If a child is placed in an EIF and Spanish or English is not their primary language, ORR should guarantee language access through in-person interpretation to the extent possible, as soon as the child's dominant language is known, for the full period the child remains in an EIF placement.

We also encourage ORR to include a mechanism in its final regulation by which a child, care provider, sponsor or relative, or service provider can request that a child not be placed in an EIF and/or to challenge ORR's placement decision for a child improperly placed in an EIF. This would create an important guardrail and enable those working closely with UCs to highlight any factors making EIF placement inappropriate for a given child and would allow ORR to more quickly and efficiently correct errors in EIF placement under the eligibility factors outlined in § 410.1802. ORR should appoint a primary contact for addressing EIF placement concerns and for concerns regarding a child's release from an EIF, accessible to sponsors, family-members, child advocates, and service providers. This could be similar to the process outlined in the *Flores* agreement regarding EISs which provided for "Legal service providers [to] notify ORR of concerns regarding a child's release by emailing UCLegalServicesSupport@acf.hhs.gov or contacting the Federal Field Specialist and/or site lead" and which required "ORR [to] provide a response within 5 business days to legal service providers who submit notification to ORR that they represent a named child on reunification/release." We further suggest that if an EIF placement inquiry has not been resolved within five days of notification, a neutral and independent officer should conduct an expedited review of the inquiry and resolve it within five business days.

We note that while the FSA provides for assistance obtaining legal guardianship when necessary for the release of the child, legal guardianship is generally not necessary for approval of release and should not be used as a barrier to release.

**Recommendation: § 410.1802**

**(a) [ADD] Prior to placement in an emergency or influx facility, ORR shall screen an unaccompanied child for the below criteria.** Unaccompanied children who are placed in an emergency or influx facility must meet all of the following criteria to the extent feasible. If ORR becomes aware that a child does not meet any of the following criteria at any time after placement into an emergency or influx facility, ORR will transfer the unaccompanied child to the least restrictive setting appropriate for that child's need as expeditiously as possible.

**[ADD] (c) ORR shall establish an email and/or phone hotline for receiving notification of concerns and inquiries regarding a child's placement at an emergency influx facility or release from such a facility. ORR will provide a response within five business days to the individual who submitted the concern or inquiry. If the concern or inquiry is not fully resolved within five business days, a neutral and independent hearing officer shall be appointed to provide expedited review and resolve the inquiry or concern within an additional five business days.**

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

Sincerely,

Advocates for Basic Legal Equality, Inc. (ABLE)  
Alianza Americas  
Americans for Immigrant Justice  
Capital Area Immigrants' Rights (CAIR) Coalition  
Catholic Charities Baltimore, Esperanza Center  
Central American Resource Center (CARECEN) of California  
Church World Service  
Community Legal Services in East Palo Alto  
Diocesan Migrant and Refugee Services Inc./Estrella del Paso  
Florence Immigrant & Refugee Rights Project  
Florida Legal Services, Inc.  
HIAS Pennsylvania  
Human Rights Initiative of North Texas  
Immigrant Defenders Law Center (ImmDef)  
Immigrant Rights Clinic, Morningside Heights Legal Services, Columbia Law School  
Immigration Counseling Service  
International Rescue Committee  
Just Neighbors  
Justice in Motion  
Juvenile Law Center  
La Raza Centro Legal  
Law Office of Daniela Hernandez Chong Cuy  
Lawyers for Good Government  
Legal Services for Children  
Los Angeles Center for Law and Justice  
LSN Legal, LLC  
Lutheran Social Services of the National Capital Area (LSSNCA)  
Martinez & Nguyen Law, LLP  
Michigan Immigrant Rights Center  
National Immigrant Justice Center

National Immigrant Law Center (NILC)  
OneAmerica  
Physicians for Human Rights - Student Advisory Board  
Save the Children  
The Immigration Project  
UC Davis Immigration Law Clinic  
United We Dream  
VECINA  
Witness at the Border  
Women's Refugee Commission  
Young Center for Immigrant Children's Rights

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Signing in their individual capacities:

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Aradhana Tiwari, Sunita Jain Anti-Trafficking Initiative at Loyola Law School

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