

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
Washington, DC

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;

The Capital Area Immigrants' Rights Coalition (CAIR Coalition), the Immigrant Legal Resource Center (ILRC), the National Immigrant Justice Center (NIJC), the University of California Davis School of Law, Immigration Clinic, and the Young Center for Immigrant Children's Rights ("Young Center") submit this comment among the undersigned 81 organizations, law offices, law professors, and medical practitioners in response to the Office of Refugee Resettlement's (ORR) Notice of Proposed Rulemaking ("proposed rule" or NPRM) to address the sections of the proposed rule that relate to the treatment of children likely to be placed in restrictive custody, particularly in secure, staff secure or the newly proposed "heightened supervision" placements, alongside any other placement that is restrictive but not therapeutic in nature.¹

Interest and Expertise of Undersigned Organizations

CAIR Coalition is a nonprofit immigration legal services organization, with offices based in Washington, DC and Baltimore, Maryland. For nearly 25 years, CAIR Coalition has offered high-quality *pro bono* legal services and information to noncitizen children and adults, with a particular focus on helping people in the custody of ORR and the U.S. Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) in the Washington, D.C. capital area and beyond. CAIR Coalition provides know-your-rights presentations, direct representation

¹ Many of our organizations have also joined a separate comment addressing provisions of the NPRM that intersect with the placement of children with disabilities within ORR's network.

both before the Asylum Office and immigration courts, impact and appellate litigation, legislative advocacy, and training and mentoring for *pro bono* attorneys.

The *ILRC* is a national non-profit organization that works to advance immigrant rights through advocacy, educational materials, and legal trainings. Since 1979, the *ILRC*'s mission has been to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. *ILRC* serves the individuals and community of organizations that are most impacted by this proposed rule. The *ILRC* supports immigration legal service providers nationwide, serving hundreds of organizations and practitioners that work with immigrant children and adults.

The *National Immigrant Justice Center* (*NIJC*), headquartered in Chicago, offers a wide range of *pro bono* and in-house legal services to 12,000 low-income people, including hundreds of unaccompanied children in *ORR*'s custody in Illinois and Indiana. Since its founding more than three decades ago, *NIJC* blends individual client advocacy with broad-based systemic change. Attorneys and trained staff provide know-your-rights presentations and direct representation on asylum claims, trafficking and crime survivor relief, and Special Immigrant Juvenile Status among other humanitarian relief for children. *NIJC* also advocates for immigrants and asylum seekers through policy reform, impact litigation, and public education.

The *University of California Davis School of Law, Immigration Clinic* is a nonprofit, public interest clinic dedicated to serving detained immigrants and educating law students. The Clinic is counsel to the plaintiff class in *Lucas R. v. Azar*, No. 18-CV-05741-DMG, (C.D. Cal.) ("*Lucas R.*") and has national expertise in federal litigation, criminal defense, and immigration law. The Clinic is the second oldest immigration law clinic in the United States and has decades of experience defending asylum seekers, immigrant children, and vindicating the rights of immigrants in federal court.

The *Young Center* serves as the federally-appointed independent Child Advocate, akin to a best interests guardian *ad litem*, for trafficking victims and other vulnerable unaccompanied children in government custody, as authorized by the Trafficking Victims Protection Reauthorization Act (*TVPRA*). The role of the Child Advocate is to advocate for the best interests of the child. A child's best interests are determined by considering the child's safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity. Since 2004, *ORR* has appointed *Young Center* Child Advocates for thousands of unaccompanied children in *ORR* custody.

Many of the undersigned organizations ("we") have extensive experience providing legal, child advocate, social, mental health or other services to and advocacy on behalf of unaccompanied

children² in restrictive placements. We have borne witness to the harms these children suffer, as their placement, treatment, and criminalization compound many of their experiences fleeing traumatic violence or even torture. Rather than receive the care they need, we have seen these children experience indefinite detention and abusive treatment in these facilities, which have frequently attracted lawsuits, outrage, and condemnation from families, immigrant communities, and local governments alike. **Many of our organizations have called on ORR to discontinue the use of secure facilities, which has consistently dehumanized children and subjected them to physical and psychological torment. We reiterate this call here and under section (1)(d)(i) of our comments below.**

Finally, our comment's narrow focus does not constitute an endorsement of other segments of the NPRM, though we have joined or led separate comments providing stakeholder input on those sections.

Our organizations appreciate ORR's consideration of our comments. We further encourage ORR to consider the discrete changes proposed in this comment to improve and strengthen fair treatment and care for unaccompanied children considered for restrictive placements.

For any questions, please reach out to scott@caircoalition.org for CAIR Coalition; rprandini@ilrc.org for ILRC; aerfani@heartlandalliance.org for NIJC; jpmulligan@ucdavis.edu for the University of California Davis School of Law, Immigration Clinic; and jliu@theyoungcenter.org for the Young Center.

Sincerely,

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Advocates for Basic Legal Equality, Inc (ABLE)
Alianza Americas
American Immigration Council
Americans for Immigrant Justice
Angry Tias and Abuelas of the RGV
Bazelon Center for Mental Health Law
Capital Area Immigrants' Rights Coalition (CAIR Coalition)
Catholic Charities Baltimore, Esperanza Center
Central American Resource Center - CARECEN- of California
Center for Gender & Refugee Studies
Center for Law and Social Policy

² Throughout this comment we refer to unaccompanied children or children in alignment with the NPRM's definition at proposed 45 C.F.R. § 410.1001. 88 Fed. Reg. 68914.

Church World Service
Community Legal Services in East Palo Alto
Diocesan Migrant and Refugee Services Inc/Estrella del Paso
Empowering Pacific Islander Communities
Florence Immigrant and Refugee Rights Project
Florida Legal Services, Inc.
Freedom Network USA
Galveston-Houston Immigration Representation Project
Grassroots Leadership
HIAS Pennsylvania
Hope Border Institute
Houston Immigration Legal Services Collaborative
Human Rights Initiative of North Texas
Immigration Center for Women and Children
Immigration Counseling Service
Immigrant Defenders Law Center (ImmDef)
Immigrant Justice Task Force, Wellington United Church of Christ
Immigrant Legal Resource Center
The Immigration Project
Immigrants' Rights Clinic, Morningside Heights Legal Services, Inc., Columbia Law School
International Rescue Committee
JFCS Pittsburgh
Just Neighbors
Justice Action Center
Justice in Motion
Juvenile Law Center
La Raza Centro Legal
Law Office of Daniela Hernandez Chong Cuy
Law Office of Helen Lawrence
Law Office of Miguel Mexicano
Lawyers for Good Government
Legal Services for Children
Los Angeles Center for Law and Justice
LSN Legal LLC
Martinez & Nguyen Law, LLP
Massachusetts Immigrant and Refugee Advocacy Coalition
Michigan Immigrant Rights Center
Migration Matters
National Disability Rights Network (NDRN)
National Immigrant Justice Center

National Immigration Law Center (NILC)
National Immigration Project
OneAmerica
Physicians for Human Rights - Student Advisory Board
Project Lifeline
Rocky Mountain Immigrant Advocacy Network
Save the Children
South Asian Public Health Association
Witness at the Border
Safe Passage Project
United We Dream
University of California Davis School of Law, Immigration Clinic
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1) Organizational Comments on Specific Sections of the NPRM

Below, we provide comments on specific portions of the proposed rule, specifically proposed 45 C.F.R. §§ 410.1001, 410.1101, 410.1103, 410.1105, 410.1302, 410.1303, 410.1304, 410.1601, 410.1901-02, and 410.1903.

a) Basic requirements of care should not deviate by placement levels (proposed §§ 410.1001 and 410.1302).

Under proposed § 410.1001, ORR states in the NPRM that secure facilities “*do[] not need to meet the requirements of § 410.1302 and [are] not defined as a standard program or shelter.*”³ Requirements under § 410.1302 include state licensing;⁴ adequate food, drinking water, hygiene items and access to toilets and sinks, adequate temperature control; individualized needs assessments, including on language access and other special needs children may face; appropriate educational services, tailored to children’s development and disabilities, where applicable; individual and group counseling sessions, which are often the only outlet children

³ 88 Fed. Reg. 68981.

⁴ Many of our organizations have commented separately on the importance of state licensing ahead of the final rule.

have to process traumatic histories and symptoms; recreation and leisure activities; admission and orientation, including trafficking screenings; access to religious services; visitation; information about access to legal services and rights under labor rights; among other services.

ORR provides no justification for failing to apply the standards delineated in § 410.1302 to secure facilities. As we explain in section (1)(d)(i), no child should be placed in a secure facility because children in those settings already experience disparate treatment that inflicts lasting harm on their health and wellbeing. With this proposed language, ORR would codify the disparity rather than remedy it by exempting secure facilities from “minimum standards of care and services” required of lower security shelters.⁵

In our experience, children in secure settings are more likely to experience violations of their rights, including access to religious services, language access if they speak a language other than Spanish, accommodations for their physical, developmental, or mental health disabilities, recreation, and trauma-informed services that help them heal.⁶ This all but ensures that ORR will view children placed in secure settings as a less deserving category of children.⁷

At bottom, we expect ORR to treat all children as children first, regardless of the determinations made with regard to their placement. That is why we recommend erasing the aforementioned sentence in § 410.1001 and ensuring that all facilities, within and outside ORR's network, meet the basic standards of care delineated in § 410.1302.

b) Incomplete documentation about a child should never permit ORR to leave children in DHS custody beyond 72 hours, given the clear dangers to children’s health and safety (proposed § 410.1101).

Under proposed § 410.1101(d)(6)(i-ii), ORR authorizes delay in identifying a timely placement for and accepting transfer of a UC if the referring federal agency indicates the child “has been charged with or has been convicted of a crime, or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent, and additional information is essential in order to determine an appropriate ORR placement.” The NPRM specifically cites the TVPRA’s

⁵ 88 Fed. Reg. 68936.

⁶ See e.g., *Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n*, 985 F.3d 327 (4th Cir. 2021); *Lucas R. v. Becerra*, Dkt. 391 CV 18-5741-DMG (Preliminary Injunction Order).

⁷ NIJC & the Young Center for Immigrant Children, *Punishing Trauma: Incident Reporting and Immigrant Children in Government Custody* (Sept. 2022), available at <https://www.theyoungcenter.org/overhaulreports> (hereinafter “*Punishing Trauma*”)

“exceptional circumstances” provision in 8 U.S.C. § 1232(b)(3) to justify exceeding the 72-hour threshold for transfers of unaccompanied children out of CBP or ICE custody.⁸

However, this marks a weakening of protections from existing ORR policy, where ORR strictly adheres to this 72-hour timeline as a rule. The ORR Policy Guide permits no exception to the prompt transfer of children required by the TVPRA, noting: “If exceptional circumstances prevent the referring Federal agency from providing complete documentation, the care provider may not deny or delay admitting the child or youth.”⁹

The implications of permitting ORR to leave unaccompanied children in the custody of federal agencies unable to care for unaccompanied children are grave. The two primary federal agencies that refer unaccompanied children to ORR are Customs and Border Protection (CBP) and ICE. Both agencies have horrific records with respect to the care of children in their custody. Prolonged CBP detention has led to “clearly preventable” death of multiple children in its custody.¹⁰ When children exceed 72 hours in CBP custody, they have been exposed to unsanitary, filthy conditions that also endanger their health.¹¹

ICE custody is no safer for children. In 2021, county judges for the government of Cowlitz County, Washington, decided to terminate their controversial contract with ICE to detain children in the local juvenile jail. For months, local advocates had called for the Cowlitz County Youth Services Center to end its contract with ICE over concerns for youth and due to violations of international human rights standards.¹² Another juvenile jail in Oregon ended its contract to

⁸ 88 Fed. Reg. 68918.

⁹ ORR Policy Manual 1.3.4 (last updated 1/27/15).

¹⁰ Notice of Filing Juvenile Care Monitor Report by Dr. Paul H. Wise 2:85-cv-04544-DMG-AGR, ECR No. 1352, at 6, https://youthlaw.org/sites/default/files/2023-07/2023.07.18_Flores%20Juvenile%20Care%20Monitor%20Report.pdf; *see also id.*, at 38 (“Based on the currently available information, the death of [Anadith] was a preventable tragedy that resulted from a series of failures in the CBP medical and custodial systems for children... These failures occurred at multiple levels and should not be viewed as rare anomalies but rather as systemic weaknesses that if not remedied, are likely to result in future harm to children in CBP custody.”); *Indigenous Children are Dying at the U.S./Mexico Border* https://www.aisc.ucla.edu/news/mayanleague_indigenous.aspx (May 17, 2019), (International Mayan League denouncing the death of multiple Indigenous children in CBP custody).

¹¹ Daniella Silva, *Almost 300 migrant children removed from Texas facility described as 'appalling'*, NBC News (June 14, 2019), <https://www.nbcnews.com/news/latino/nearly-300-migrant-children-removed-texas-facility-described-appaling-n1021151>.

¹² Katie Fairbanks, *Cowlitz County Superior Court Judges end contract with ICE to house youth*, The Columbian (Feb. 9, 2021),

detain youth for ICE in 2020, also in response to community pressure.¹³ Medical experts and human rights advocates have roundly condemned ICE detention of children, noting that their facilities “do not meet the basic standards for the care of children in residential settings.”¹⁴ These conditions in both ICE and CBP custody make clear that it is imperative not to extend children’s stay in those facilities beyond 72 hours.

We thus urge ORR not to suspend or modify the 72-hour rule for referrals and omit proposed § 410.1101(d)(6) in its entirety, even where further information is needed to determine the child’s appropriate placement. Its current policy manual (in effect since 2015) demonstrates that no such deferral is necessary, even when documentation is incomplete. This particular exception is also absent from the *Flores* Settlement Agreement’s (FSA) list of exceptions, including paragraph 12A. that ORR cites as support for the list in § 410.1101(d). 88 Fed. Reg. 68918.

ORR’s caveat that “the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR” is insufficient to quell our concerns that this provision opens up a significant loophole to leave some children in DHS’ unsafe conditions. 88 Fed. Reg. 68918. Conditions in CBP and ICE custody are anathema to children’s wellbeing and safety. Keeping them in those conditions in order to obtain additional documentation does not comport with children’s best interest. Given ORR’s mandate, we strongly recommend deleting § 410.1101(d)(6).

c) Comments on proposed § 410.1103, Considerations generally applicable to the placement of an unaccompanied child

- i) Congress tasked ORR with the care and custody of unaccompanied children, not acting as ICE’s proxy (proposed § 410.1103(a)).

Under proposed § 410.1103(a), ORR states in the NPRM that “ORR shall place each unaccompanied child in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child’s age and individualized needs, *provided that such*

<https://www.columbian.com/news/2021/feb/09/cowlitz-county-superior-court-judges-end-contract-with-ice-to-house-youth/>.

¹³ Conrad Wilson, *NORCOR, last jail in Oregon to hold immigration detainees, to end ICE contract*, OPB (Aug. 21, 2020), <https://www.opb.org/article/2020/08/21/northern-oregon-regional-correctional-facility-norcor-ice/>.

¹⁴ See Julie M. Linton, Marsha Griffin & Alan J. Shapiro, *Detention of Immigrant Children*, *Pediatrics* (2017) 139 (5): e20170483. <https://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.short>. See also, Ashoka Mukpo, *The ‘ICE Kids’*, *The Nation* (May 13, 2021), <https://www.thenation.com/article/society/ice-juvenile-jail-detention/>; Center for Human Rights, University of Washington, *Immigrant Family Separation in Northwest Juvenile Jails* (Apr. 22, 2020), <https://jsis.washington.edu/humanrights/2020/04/22/cowlitz-norcor-immigrant-family-separation/>.

setting is consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and in protecting the unaccompanied child's well-being and that of others" (italics added). The italicized language should be removed because it is inconsistent with ORR's child welfare mandate.

As ORR itself recognizes, it is "not a law enforcement agency, unlike the former [Immigration and Nationality Service (INS)]." 88 Fed. Reg. 68923, 68975. Years after the federal government entered into the FSA with oversight over the then-INS' treatment of immigrant children, the INS (and its responsibilities under the FSA) was split among separate agencies.¹⁵ The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, codified in pertinent part at 6 U.S.C. § 279 ("HSA"), transferred responsibility for "the care of unaccompanied alien children" to "the Director of the Office of Refugee Resettlement of the Department of Health and Human Services"¹⁶ The TVPRA later specified that "the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services." 8 U.S.C. § 1232(b)(1). The TVPRA specifically charges HHS with responsibility for a child's placement, both within ORR and with vetted sponsors.¹⁷ The division of responsibilities is clear, and ORR does not operate as an immigration enforcement agency.

Proposed § 410.1103(a) blurs this division, by assessing "risk of flight"¹⁸ under "the immigration law context" — defining it as "risk of not appearing for their immigration proceedings."¹⁹ Consideration of "risk of flight" as it relates to immigration proceedings (as opposed to flight from a custodial setting), lies squarely with the Department of Homeland Security.²⁰ For this reason, it is inappropriate (and illogical) for ORR to consider compliance with immigration enforcement obligations in making placement decisions. While the TVPRA *permits* HHS to consider a young person's "danger to self, danger to the community, and risk of

¹⁵ "In 2002, Congress enacted the Homeland Security Act . . . abolishing the INS and transferring most of its immigration functions to the newly-formed Department of Homeland Security ("DHS"), in which Immigration and Customs Enforcement ("ICE") is housed. 6 U.S.C. §§ 111, 251, 291." *Flores v. Lynch*, 828 F.3d 898, 904 (9th Cir. 2016).

¹⁶ 6 U.S.C. § 279(a).

¹⁷ 8 U.S.C. § 1232(c)(2)(A); (3)(A).

¹⁸ 8 U.S.C. § 1232(c)(2)(A).

¹⁹ 88 Fed. Reg. 68915.

²⁰ We further note that, while paragraph 22 of the *Flores* Settlement Agreement precedes the HSA, it also defines "escape-risk" in relation to escape from custody, not ensuring appearance in immigration proceedings.

flight” when making placement decisions (8 U.S.C. § 1232(C)(2)(A)), “risk of flight” in this context should be understood to refer to flight from custodial ORR facilities or placements.

Because ORR does not have law enforcement authority and compliance with immigration court obligations is not an appropriate consideration for ORR placement decisions, placement decisions should be guided by a determination that the placement is in the least restrictive setting in the best interest of the child. Accordingly, the proposed regulation should be amended as follows: “ORR shall place each unaccompanied child in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child's age and individualized needs, provided that such setting is consistent with ~~the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and~~ in protecting the unaccompanied child's well-being and that of others.”

- ii) ORR should reconsider placement decision factors under proposed § 410.1103(b) that entrench the harmful practice of the criminalization and vilification of children.

Under proposed § 410.1103(b), ORR lists an array of factors to consider when evaluating a child’s placement. We comment on two of those factors here, both of which risk criminalizing children and straying from ORR’s role under the TVPRA.

First, we oppose the inclusion of “criminal history” (§ 410.1103(b)(10)) as a factor, because it is overbroad and permits the consideration of unsupported allegations, unsubstantiated statements, and criminal charges that have not resulted in convictions. ORR should not consider criminal charges that have not resulted in convictions in making placement decisions. In particular, criminal charges that have been dismissed or withdrawn should be deemed to lack probable cause, as there was a determination by a criminal court that the charges would not be prosecuted and were likely unfounded. In our experience, very few children are charged in adult, criminal court proceedings, and when they are, it is not necessarily for actions that suggest a risk to others while the child is in ORR custody.

ORR should also not consider juvenile delinquency adjudications. For numerous public policy reasons based on neuroscience research confirming an individual’s ongoing brain development through their mid to late 20s, criminal laws do not treat children the same as adults, and juvenile delinquency adjudications are not considered criminal convictions.²¹ The Supreme Court has recognized these differences. In *Roper v. Simmons*, 543 U.S. 551, 553, 570 (2005), in holding that capital punishment of a juvenile violated the Eighth Amendment, the Court noted “[t]he

²¹ Nat’l Conference of State Legislatures, “Adolescent Brain Development and Youth Justice,” updated Apr. 7, 2023, <https://www.ncsl.org/civil-and-criminal-justice/adolescent-brain-development-and-youth-justice>.

reality that juveniles still struggle to define their identity” and stated: “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.”²² Similarly, under immigration law, juvenile delinquency findings are not considered criminal convictions.²³

Due to growing recognition that the punitive and collateral consequences of the juvenile justice system are disproportionate and antithetical to rehabilitative and restorative justice, policymakers have made significant strides towards moving our juvenile justice system towards developmental and rehabilitative approaches.²⁴ These approaches have included a push to restore the confidentiality of juvenile records and to prohibit reliance on juvenile records by employers and other agencies for purposes that are not juvenile justice-related. While terminology, structures and processes differ across the United States, the nation’s juvenile delinquency systems continue to recognize the principle that significant developmental differences between young people and adults require legal structures, processes, and outcomes distinct and different from adult criminal justice processes. As a child welfare agency with the mandate to care for children, ORR should ensure that juvenile records remain confidential and are not used against children, particularly to place children in restrictive, punitive settings.

ORR’s reliance on “criminal history” information is also problematic because ORR and facility staff are not, and should not be, trained to decode complicated criminal records. They may also be unable to discern whether a charge was dismissed or changed to a less serious charge. For example, when children are accused of criminal acts, it is not uncommon for district attorneys to overcharge cases and later “break them down” or change them to something less serious. The original charges will still appear on the child’s record, even if the final verdict is “not guilty.” If ORR and facility staff are unable to decipher all of the annotations and notes in a child’s criminal record, it may lead to the child being placed in an overly restrictive placement or in settings that are not in the best interests of the child, or being denied release to a parent, family member, or other sponsor who is better able to care for the child within the community. ORR and provider staff are also not required to request, review, and fully understand the incident report or other documents underlying criminal or delinquency charges. In fact, ORR staff frequently confuse charges with convictions, or delinquency proceedings with criminal proceedings. Those reports will often explain that the underlying incident is not as serious as the criminal charge would otherwise lead them to believe.

²² *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

²³ See, e.g., *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

²⁴ Nat’l Conference of State Legislatures, “Adolescent Brain Development and Youth Justice,” updated Apr. 7, 2023, <https://www.ncsl.org/civil-and-criminal-justice/adolescent-brain-development-and-youth-justice>.

At most, ORR should only consider confirmed or verified criminal convictions for children charged as adults and only when it is necessary to appropriately care for the child or others. Accordingly, we recommend amending the proposed language to read “adult criminal history convictions.”

Second, we also oppose the inclusion of “behavior” (§ 410.1103(b)(12)) as a factor, because “behavior” is vague and overbroad. In our experience, ORR and its providers often rely heavily on “Significant Incident Reports” (SIR) as evidence of “bad behavior” in determining a child’s level of placement. However, the information in SIRs, particularly those that relate to alleged behavioral problems, is often gathered and documented by ORR and its providers without the broader context of the many challenging circumstances each unaccompanied child confronts and the significant trauma many have endured and which are important context for the events constituting an alleged “SIR”. As a result, this information often creates unjustified impediments to a child’s efforts to achieve permanency and safety.

The majority of children in ORR custody are teenagers — not yet adults physically, emotionally or intellectually. Under the very best of circumstances children at this age and stage of development are primed to crave autonomy and independence and push back against authority. They are also more likely than adults to be impacted by emotionally stressful circumstances.²⁵ The uncertainty of their situation in ORR custody, including how long they will be in custody, and seeing other children coming and going while they remain in custody, weighs upon them heavily. This combination of stressors compounds the trauma children have experienced before their arrival and, unsurprisingly, impacts their presentation and behaviors in a manner which may subsequently be reported in SIRs.²⁶

At the same time, SIRs document specific moments of a child’s behavior while in ORR custody, but fail to set forth a full portrait of the child or provide the broader context surrounding a child’s behavior during a single incident. Moreover, the forms are completed and become part of the child’s record without any prior notice or participation by the child, the child’s attorney (if they have one), the independent Child Advocate (if they have one), and the local ORR-funded legal services provider. SIRs may prompt a child to be stepped up to an even more restrictive environment, which is often inappropriate to address a child’s trauma and related manifestations of that trauma. Additionally, they often unduly complicate and delay a child’s transfer to a long-term foster care placement.

²⁵ Frances E. Jensen & Amy Ellis Nutt, *The Teenage Brain: A Neuroscientist’s Survival Guide To Raising Adolescents And Young Adults* 22 (2015).

²⁶ See Michael D. De Bellis & Abigail Zisk, *The Biological Effects of Childhood Trauma*, 23 Child Adolescent Psychiatric Clinics Of North Am. 185, 199-200 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3968319/pdf/nihms-555973.pdf> (discussing how childhood trauma can inhibit executive function, memory, and problem solving).

The inclusion of “behavior” as a separate factor is also duplicative. In our experience, behavioral issues exhibited by children are often manifestations of stress, detention fatigue, and trauma, and typically indicate a child’s need for additional support and services. To the extent that ORR would want to consider a child’s need for behavioral supports, this is already captured under 410.1103(b)(9), which includes “[a]ny specialized services or treatment required or requested by the unaccompanied child” as a factor for consideration in placement.

Since it is already captured under other factors, “behavior” should be deleted as a factor as part of an effort to move the ORR system of care away from a punishment and behavioral management mindset towards a comprehensive system of trauma-informed care that recognizes that a child’s behavior is often connected to other needs, such as mental health needs, or may be appropriate in light of the child’s stage of development and the circumstances the child is facing. In the alternative, if ORR insists on including “behavior” as a factor for consideration in placement, we recommend that the language at least be amended to “the child’s need for behavioral supports and services.”

- iii) ORR should reduce the timeframe for review of restrictive placements under 410.1103(d).

Under proposed § 410.1103(d), ORR states in the NPRM that “ORR shall review, at least every 30 days, the placement of an unaccompanied child in a restrictive placement to determine whether a new level of care is appropriate.” This not only overlooks the opportunity to expect more prompt reviews as a norm, but also ignores statutory support and evidence that children require faster reviews while in restrictive settings. We recommend that ORR shorten the length of time to “at least every 14 days” to ensure compliance with its legal obligation under the TVPRA to place children in the least restrictive setting in their best interest.

The TVPRA requires that ORR review the placement of children in secure facilities — the most restrictive level of placements — on a monthly basis “at a minimum.” Congress is silent as to the specific timeline for reviews in other restrictive placements. Proposed § 410.1103(d) appears to extend the baseline review period for secure placements to all children in restrictive care. This extension is not warranted. Under the TVPRA, ORR is required to place unaccompanied children in its custody “in the least restrictive setting that is in the best interest of the child.”²⁷ In accordance with the TVPRA, ORR policy requires that “care providers. . . make every effort to place and keep children and youth in a least restrictive setting.”²⁸ By applying the TVPRA’s 30-

²⁷ 8 U.S.C. § 1232(c)(2)(A).

²⁸ Off. of Refugee Resettlement, Admin. for Children & Families, U.S. Dep’t of Health & Human Serv., ORR Guide: Children Entering the United States Unaccompanied § 1.4.1 (2015), [hereinafter ORR Guide: Unaccompanied Children].

day minimum standard from secure settings to all restrictive settings, the proposed language sets an unacceptably low expectation for ORR’s mandate.

ORR already applies a 30-day minimum standard in most restrictive settings when evaluating children for a “step-down” to a lesser restrictive setting. This application has shown that reviews scarcely occur prior to the full thirty-day period, which providers and children have understood to set a “clock” or trial period in which children must be on their best behavior and incur no SIRs to merit a less restrictive placement — a process that often leads children to despair.²⁹ Codifying a minimum 30-day review will entrench the practice that leaves children languishing in restrictive settings far longer than needed, resulting in detention fatigue and trauma-related behaviors that frequently restart the 30-day clock for children.³⁰

Additionally, there is extensive data and support for more prompt reviews of restrictive placements. Restrictive placements can be extremely harmful for children and can have sustained consequences for their long-term development, safety, and wellbeing. Children in restrictive institutional settings are at heightened risk of developing psychological, emotional and behavioral health problems, including higher rates of delinquency, attachment problems, self-harm and suicidality.³¹ Thirty days is an exceedingly long period of time for a child in these conditions and often invites them to view their placement as de facto punitive. Nevertheless, ORR rarely revisits restrictive placements before the full 30-day period — even when the reason for the child’s placement in a restrictive setting ceases to exist far before the 30-day review date, resulting in children being kept in unnecessarily restrictive settings for days and weeks longer than necessary. Such periods of custody in unnecessarily restrictive settings is not in their best interests. For this reason, children who are stepped up to restrictive facilities should be stepped down promptly when it is determined that the child should no longer be placed in the more restrictive setting. ORR can and should review cases more promptly than every 30 days.

To depart from this longstanding practice that harms children and adopt a timeframe that advances the best interests of children, we recommend that the review period be shortened to

²⁹ *Punishing Trauma*, at p.7.

³⁰ *Punishing Trauma*, at 3, 12, 18.

³¹ Sue Burrell, *Trauma and the Environment of Care in Juvenile Institutions*, National Center for Child Traumatic Stress, 1, 4 (2013), <https://www.nctsn.org/resources/trauma-and-environment-care-juvenile-institutions>; Substance Abuse and Mental Health Services Administration (SAMHSA), National Guidelines for Child and Youth Behavioral Health Crisis Care, Pub. No. PEP22-01-02-001 (2022); Lauren H. K. Stanley and Shamra Boel-Studt, The Influence of Youth Gender and Complex Trauma on the Relation Between Treatment Conditions and Outcomes in Therapeutic Residential Care, *J Child Adolesc. Trauma*, 93, 94 (Mar. 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7900294/>; Mary Dozier, et al, Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association, *Am. Journal of Orthopsychiatry*, Vol. 84, No. 3, 219, 221 (2014), <https://www.apa.org/pubs/journals/features/ort-0000005.pdf>.

every 14 days and that the language be amended to read: “ORR shall review, at least every ~~30~~ 14 days, the placement of an unaccompanied child in a restrictive placement to determine whether a new level of care is appropriate.”

- iv) Procedural limits on placement denials are welcome and long overdue (proposed § 410.1103(f-g)).

Proposed § 410.1103(f) prohibits providers from denying placement to children unless the provider can satisfy one of four permissible reasons for denial. Three of the stated reasons align with ORR Policy Guide § 1.3.3. We support the codification of Policy 1.3.3 and ORR’s restrictions on the reasons providers may deny placements to children. The issue of providers improperly denying placements to children — effectively “cherry-picking” children — has been a longstanding problem.

In our experience, children have often remained in unnecessarily restrictive placements even after ORR and provider staff have determined that they should be stepped down to a less restrictive placement, because ORR is unable to find a less restrictive facility that is willing to accept the child’s referral for placement. Often, less restrictive providers have denied placement for reasons that do not comply with ORR Policy Guide 1.3.3. For instance, providers have frequently denied placement to children based on the child’s behavioral issues, relying on the child’s past SIRs.³² Providers have also denied placement to children based on their disabilities, including mental or behavioral health conditions, asserting that they are unable “meet the child’s needs.” As a result, children are kept in unnecessarily restrictive settings for weeks after they have been approved for a step down. Permitting care providers in ORR’s network to deny children placement solely based on their SIRs or disabilities not only violates ORR Policy, but it directly contravenes the TVPRA’s mandate to keep children in the least restrictive setting and also violates the integration mandate of Section 504 of the Rehabilitation Act, which requires ORR to place children “in the most integrated setting appropriate” to their needs.³³ Accordingly, we support ORR’s efforts to bar providers from denying placement to children on improper and discriminatory bases.

Proposed § 410.1103(g) requires a provider to “submit a written request to ORR for authorization to deny placement of unaccompanied children, providing the individualized reasons for the denial” and to obtain approval by ORR before they the provider can deny placement. We support these provisions and believe that these procedures will provide greater transparency and accountability to ensure that providers are not continuing to deny placements to children on improper bases. In addition to these procedures, we further recommend that the

³²*Punishing Trauma*, at 8-9.

³³ 29 U.S.C. § 794; 45 C.F.R. § 84.4(b)(2).

regulations set strict timeframes by which providers must respond to placement requests. In our experience, providers often do not respond to placement requests at all or delay in responding for months without any justification. These delays and failures to respond are tantamount to improper denials, and ORR should not permit providers to avoid their obligations by delaying or failing to respond to placement requests. ORR should set a strict timeframe of 72 hours within which providers must respond to a placement request. ORR should also set a strict timeframe within which ORR staff must respond to any written request by a provider for authorization to deny placement. If ORR denies the provider's request, the provider should be required to arrange promptly for the child's transfer to its facility.

Accordingly, we recommend that § 410.1103(g) be amended to state: *“Care provider facilities must respond to placement requests within 72 hours. Care provider facilities must submit a written request to ORR for authorization to deny placement of unaccompanied children, providing the individualized reasons for the denial. Any such request must be approved by ORR before the care provider facility may deny a placement. ORR may follow up with a care provider facility about a placement denial to find a solution to the reason for the denial. ORR will respond to a care provider facility's written request for authorization to deny placement to an unaccompanied child within 72 hours. If ORR denies the care provider facility's request, the care provider facility shall promptly arrange for the child's transfer to its facility.”*

We further recommend that the final regulation include provisions requiring ORR monitoring of placement requests, in order to ensure provider compliance and ORR oversight. In May 2023, the HHS Office of the Inspector General issued a report of an audit the Inspector General's office conducted of ORR's compliance with its placement and transfer policies. The report found that “ORR staff and care provider facility staff did not document information critical to the transfer of unaccompanied children” and “did not have a process in place to track denied transfers.”³⁴ The report concluded that “without adequate documentation in the children's records and UC Portal, ORR is unable to determine why facilities are denying transfers when bed space is available or have assurance that children are placed in the least restrictive setting most appropriate for individual needs.”³⁵ Given these concerning findings and the longstanding issue of improper placement denials by providers, the regulations should provide for monitoring and oversight of provider compliance with respect to placement requests. Specifically, ORR should track providers' written requests for authorization to deny placements and its responses to those requests and order corrective actions, such as re-training, for providers who have had their requests denied on multiple occasions. For accountability and oversight, ORR should publish

³⁴ HHS Off. Inspector General, “The Office of Refugee Resettlement Needs To Improve Its Oversight Related to the Placement and Transfer of Unaccompanied Children,” May 2023, p. 12.

³⁵ *Id.*

aggregate data regarding provider compliance and provide data regarding corrective actions to the Ombudsperson for review.

d) ORR should end the use of secure placements and eliminate duplicative and criminalizing language in proposed § 410.1105.

ORR proposes a set of criteria for placement of children in secure and heightened secure settings, which we address below.³⁶

- i) There is no requirement, or justification, for ORR to continue to use secure facilities in caring for unaccompanied children (proposed § 410.1105(a)(1)).

Neither the TVPRA nor the FSA require the placement of children in jail-like³⁷ conditions, including secure facilities. Rather, the FSA clearly uses a permissive “may” in paragraph 21, while Congress set guardrails to restrict the use of secure facilities.³⁸ **ORR is under no statutory or judicial obligation to create a regulatory scheme that continues to send some children to juvenile detention centers while most are kept in non-punitive settings. As such, we urge ORR to remove the use of secure facilities from its provider network and eliminate reference to such facilities in the final rule.** While some limited use of residential treatment and heightened restrictive settings may be required in rare instances, placements in juvenile jails (i.e., secure facilities) are anathema to ORR’s child welfare mandate.³⁹

Our recommendation is grounded in years of witnessing secure facilities abuse children and violate their rights as well as an evidence-based understanding of children’s developmental needs and welfare. Within ORR’s network, secure placements have consistently facilitated and invited abusive, punitive, and traumatizing treatment of children, including:

³⁶ Our comments do not address the criteria regarding placement in Residential Treatment Centers (RTC) because a separate comment addresses the sections of the NPRM related to therapeutic placements and the treatment of children with disabilities — including § 410.1105(c).

³⁷ ORR Juvenile Coordinator Report at 7, 22, *Flores v. Garland*, No. 85-cv-04544-DMG-AGR, ECF No. 1259-3 (C.D.Cal. Jul. 1, 2022).

³⁸ The TVPRA specifies where children shall *not* be placed in a secure facility, but neither defines a secure facility nor requires its use in every case where dangerousness or a criminal charge arise. 8 U.S.C. § 1232(C)(2)(A) (“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.”).

³⁹ Calling secure facilities “juvenile jails” is a simplified form of referencing juvenile detention centers, consistent with the NPRM’s definition at § 410.1001 and the FSA at paragraph 21.

- Months or years of prolonged detention with no end in sight: Children in secure custody experience such “profound helplessness and despair” that many opt to abandon their legitimate asylum claims because they simply cannot stay detained any longer;⁴⁰
- Indefinite restriction, with no tangible horizon for “step-down” to a more child-friendly environment: Children in secure custody frequently face elusive goalposts and unrealistic benchmarks such as 30 days of “good behavior,” only to remain in the same juvenile jails with no end in sight.⁴¹ Unsubstantiated allegations of dangerousness or flight risk are commonplace, as children’s sole remedy is to challenge their wrongful placement *after* they are transferred into secure custody.⁴²
- Prolonged delays in family reunification: On average, children in secure custody spend nearly four times longer in ORR detention than their peers at lower-level shelter placements.⁴³ Though other children are frequently directly released from lower level shelters to their families, children in secure facilities face heightened requirements separating them from their families for months or years due to their placement.⁴⁴
- Mislabeling and racial profiling of children: As a former secure facility program director testified, children are routinely mislabeled as “gang-involved” with scant evidence, leading to prolonged and restrictive placement in ORR custody.⁴⁵ ORR’s secure juvenile jails have also facilitated the separation of children from their families and communities due to improper labeling by federal or local law enforcement authorities.⁴⁶
- Criminalization of developmentally appropriate behavior: Medium or staff secure facilities have increasingly turned to local law enforcement to manage children’s

⁴⁰ *Flores v. Sessions*, 862 F.3d 863, 873 at n.11 (9th Cir. 2017) (describing children held in Yolo).

⁴¹ *Id.* at 873; *see also* Statement of Uncontroverted Facts and Conclusions of Law in Supp. Pls.’ Mot. Partial Summ. J. ¶ 152, *Lucas R. v. Becerra*, ECF No. 269-2 (C.D. Cal. October 2, 2020).

⁴² *Lucas R. v. Becerra*, 2022 WL 2177454, at *22 (C.D. Cal. Mar. 11, 2022) (describing placement review panel).

⁴³ *Lucas R. v. Becerra*, 2022 WL 2177454, at *7 (C.D. Cal. Mar. 11, 2022) (children in secure custody spend on average 185.9 days in ORR detention while children in shelter placements spend on average 52.6 days according to data from November 2017 to March 2020).

⁴⁴ *Santos v. Smith*, 260 F.Supp.3d 598 (W.D. Va. 2017).

⁴⁵ Kelsey R. Wong, *Written Statement*, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, United States Senate (April 26, 2018), *available at*

<https://www.hsgac.senate.gov/subcommittees/investigations/library/files/wong-testimony/> (testimony from former SVJC program director).

⁴⁶ In 2017, allegations surfaced that Immigration and Customs Enforcement (ICE) racially profiled Central American children and wrongfully labeled them as gang members before placing them in ORR’s secure juvenile jails for months on end. A class action suit debunked most of these allegations. *See Saravia v. Sessions*, 280 F.Supp.3d 1168 (N.D.Ca. 2017).

behavior, criminalizing boundary-testing behavior that is developmentally appropriate.⁴⁷ This has resulted in disturbing uses of force against children, prolonged stays in ORR custody, and placements in secure juvenile jails.⁴⁸

- Disparate harm to children with mental health disabilities: Children with disabilities are often trapped in secure settings based on behavioral history that frequently stems from their disability. However, secure settings exacerbate children’s symptoms rather than provide them with trauma-informed care,⁴⁹ trapping them in a vicious circle where they are continuously punished with more restriction as a result of their disability. This contravenes best practices for the care of children with disabilities, as well as children’s rights under Section 504 of the Rehabilitation Act.⁵⁰
- Physical and verbal abuse from adults tasked with their care: Shackling and “knocking down” youth is commonplace in secure sites, as well as reported uses of pepper spray.⁵¹ In addition to physical abuse, children have also reported being called racial slurs.⁵²

⁴⁷ Aura Bogado and Laura C. Morel, “‘I’m going to tase this kid’: Government shelters are turning refugee children over to police,” *Reveal*, June 8, 2021, available at <https://revealnews.org/article/im-going-to-tase-this-kid-government-shelters-are-turning-refugee-children-over-to-police/> (tasing and detaining child who did not want to go to classes).

⁴⁸ Dep’t of Justice, *United States’ Investigation of Maine’s Behavioral Health System for Children*

Under Title II of the Americans with Disabilities Act (June 22, 2022), at 13, available at <https://www.justice.gov/opa/press-release/file/1514326/download> (“Law enforcement responses to mental health crises are not only ineffective, they increase the likelihood that children whose needs could be met with behavioral health services will instead enter the juvenile justice system. In the worst situations, children end up incarcerated at [juvenile detention facility].”).

⁴⁹ *Doe 4 v. Shenandoah Valley Juvenile Ctr. Comm’n.*, 985 F.3d 327, 347 (4th Cir. 2021).

⁵⁰ The Department of Justice has investigated parallel concerns in the domestic sphere under the Americans with Disability Act. *See* Dep’t of Justice, *Investigation of the State of Alaska’s Behavioral Health System for Children* (Dec. 15, 2022), at 16, available at <https://www.justice.gov/opa/press-release/file/1558151/download> (“Prolonged institutional stays often cause children to regress in their behaviors because they become frustrated about being unable to leave, delaying their discharge even further.”); Dep’t of Justice, *Investigation of Nevada’s Use of Institutions to Serve Children with Behavioral Health Disabilities* (Oct. 4, 2022), at 14, available at <https://www.justice.gov/opa/press-release/file/1540616/download> (“Institutional and restrictive placements can exacerbate the children’s behavioral health disabilities, place them at increased risk of further institutional placements in residential treatment facilities and psychiatric hospitals, and separate them from their homes, families, and communities for long periods of their childhoods.”).

⁵¹ Xavier Becerra et al., *The California Department of Justice’s Review of Immigration Detention in California* (Feb. 2019), p.52-53, available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf> (describing take-downs of youth and use of force, including pepper spray in Yolo).

⁵² Michael Biesecker, *Young immigrants detained in Virginia center allege abuse*, AP News (June 21, 2018), available at <https://apnews.com/article/5afc79382c2147b9b2540ea4fd74be0c> (“Immigrant children as young as 14 housed at [SVJC] say they were beaten while handcuffed and locked up for long periods in solitary confinement, left nude and shivering in concrete cells.”); CBS News, *Report: Young Immigrants Detained in Virginia Center Allege*

- The violation of children’s rights to privacy: Children frequently confide deeply traumatic events to adults in ORR custody. In the recent past, children in secure settings have seen their trust and privacy violated as their confidences were shared with U.S. Immigration and Customs Enforcement (ICE), who in turn weaponized the information during their bond and asylum adjudication.⁵³ Although ORR has installed some safeguards,⁵⁴ children in secure settings are still vulnerable to privacy violations due to alleged behavioral histories and incident reports.⁵⁵
- Lasting impact on children’s self-worth and psychological well-being: The American Academy of Pediatrics has warned that even a short stay in detention can cause lasting harm to a child.⁵⁶ In secure settings, children’s psychological health frequently deteriorates to the point of self-harm and suicidal ideation — which in turn keeps them trapped in restrictive settings leading children to spiral further.

Against this backdrop, ORR has substantial justification *not* to continue placing any child in secure placements, and to instead ensure that concerns of dangerousness or flight risk are mitigated with heightened supervision in less restrictive facilities. The domestic child welfare sphere has already moved away from institutionalizing and jailing children with higher needs,⁵⁷ and community-based and wraparound foster care models have proven to decrease the need for residential treatment centers and juvenile jails.⁵⁸ These solutions are also more resource-efficient,

Abuse (June 21, 2018), available at <https://www.cbsnews.com/detroit/news/young-immigrants-detained-in-virginia-center-allege-abuse/> (lawsuit alleging racial epithets).

⁵³ Hannah Dreier, *To stay or to go? Amid coronavirus outbreaks, migrants face the starkest of choices: Risking their lives in U.S. detention or returning home to the dangers they fled*, Wash. Post, Dec. 26, 2020, available at <https://www.washingtonpost.com/nation/2020/12/26/immigration-detention-covid-deportation/?arc404=true>.

⁵⁴ ORR Unaccompanied Children Program Policy Guide, section 5.10.2 (last updated May 31, 2022) (limiting sharing of mental health information and behavioral reports).

⁵⁵ See generally, *Punishing Trauma*.

⁵⁶ American Academy of Pediatrics, *Detention of Immigrant Children* (May 2017), Vol. 139 / Issue 5, p. 6; available at <https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf> (“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.”).

⁵⁷ See Family First Prevention Services Act (2018), signed into law as part of the Bipartisan Budget Act of 2018, Public Law (P.L.) 115-123 on February 9, 2018.

⁵⁸ See, e.g., Dep’t of Justice, *United States’ Investigation of Maine’s Behavioral Health System for Children Under Title II of the Americans with Disabilities Act*, at 5 (“Maine previously operated a statewide wraparound program that prevented children from being institutionalized, saving money and resources that would have been spent on institutional care. Wraparound programs are a best practice that go beyond coordinating services to identifying and building a wider net of resources for youth, including family and community supports. Children who participated in

avoiding the cost-intensive practice of jailing or institutionalizing children indefinitely and continuously defending a liability-ridden system of care. While we appreciate some of the limits the NPRM places on the use of secure facilities,⁵⁹ they are no place for children — even as a last resort and with safeguards.⁶⁰

- ii) In addition to eliminating secure facilities from the NPRM, ORR should consider implementing substantial safeguards under § 410.1105(a)(3).

The elimination of secure custody from the NPRM would largely make § 410.1105(a) obsolete. However, we offer comments as to the remaining secure criteria under § 410.1105(a)(3) in anticipation of their application to any restrictive facility. There are five specific ways that the NPRM could curb the unjust placement of children in restrictive settings under this section.

First, ORR should delete “, or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent,” from § 410.1105(a)(3)(i). The TVPRA and years of Supreme Court precedent provide ORR ample justification not to consider delinquency records (whether in the form of charges or adjudications) in the placement of children in restrictive settings. Congress omitted any reference to juvenile delinquency adjudications in the TVPRA, instead requiring that ORR refrain from placing children in secure settings absent dangerousness or a *criminal* charge. This omission is significant, as Congress has long distinguished between criminal and delinquency proceedings.⁶¹ Over a decade after the FSA, Congress thus did not view delinquency charges or adjudications as pertinent to restrictive placements.

The Supreme Court has recognized that children lack maturity and responsibility and as a result engage in impulsive actions and decisions, and are more susceptible to negative influences. As such, children’s criminal or delinquent history should have little if any bearing on placement

Maine’s statewide wraparound program greatly improved their day-to-day functioning with a 43% reduction in the use of psychiatric hospitals and a 29% reduction in the use of residential treatment facilities.”).

⁵⁹ In particular, we appreciate the elimination of “chargeable” as a ground for placement in secure settings under § 410.1105(a)(3)(i) and the departure from the 2019 Final Rule § 410.1105(a)(3)(iii) in 88 Fed. Reg. 68923.

⁶⁰ Importantly, § 410.1105(a)(2) falls woefully short of even characterizing secure placement as a last resort. That a child may be placed into a juvenile jail simply because a less restrictive other option is practically unavailable raises serious concerns and undermines the positive changes proposed under § 410.1103(f-g). Our organizations have represented children who have found themselves in secure placements for weeks or months simply because staff secure facilities refused to accept them. In each case, ORR admitted that the child should be in staff secure, but claimed that no space was available due to the refusal of those medium-level facilities. Children intimately felt the punishment and injustice of their placement. While § 410.1103(f-g) attempts to cure some of these concerns, § 410.1105(a)(2) codifies this unacceptable scenario.

⁶¹ *Devison*, 22 I&N Dec. 1362.

decisions.⁶² Given this reality, youthful violations of the law may not be indicative of character.⁶³ In fact, “[f]or most teens, [risky or antisocial] behaviors are fleeting.”⁶⁴ Accordingly, not only is it inappropriate to draw conclusions about a child’s character based on youthful violations of the law, doing so further entrenches them in punishing settings that can lead to additional impulsive actions. This Supreme Court precedent puts ORR on firm footing not to consider juvenile adjudications — and requires ORR not to draw conclusions about youth’s character even in the context of criminal convictions.

Second, ORR should amend § 410.1105(a)(3)(i) as follows: “and where ORR ~~deems~~ determines by clear and convincing evidence that those circumstances demonstrate that the unaccompanied child poses a danger to self or others.” We appreciate that this clause begins with “and” and not “or,” requiring ORR not to infer that a charge or conviction alone suffices to place a child in the most restrictive setting. However, any determination of dangerousness should not be done lightly. The qualification of ORR’s assessment requires ORR to make a measured, supported assessment to ensure that no child is harmed by an improper transfer. Clarifying ORR’s determination would also better align with the NPRM’s laudable goal to codify the use of placement review panels under proposed § 410.1901(a).

Third, ORR should delete § 410.1105(a)(3)(ii), as its consideration is already captured under the dangerousness assessment under (a)(3)(i) while the evaluation of maliciousness is far beyond ORR’s expertise. Far beyond the clear dangerousness criteria in the TVPRA, (a)(3)(ii) invites ORR staff to judge whether a child’s behavior is “malicious” — an import from the criminal legal system that is as weighty as it is murky. The definition of malice has changed dramatically over hundreds of years of jurisprudence and legal interpretation.⁶⁵ Much as we urged ORR not to act as ICE’s proxy under section (1)(c)(i) *supra*, we call on ORR not to adopt a role best suited for a law enforcement agency here also.

Fourth, ORR should also delete § 410.1105(a)(3)(iii), which is similarly redundant of the dangerousness assessment ORR performs in each case. In this prong, ORR staff determine whether a child is “unacceptably disruptive” *and* whether that child is a danger to themselves or others. Simpler rules promote greater compliance, clarity, and accountability. Despite the high threshold set by the FSA’s paragraph 21, the parallel prong § 410.1105(a)(3)(iii) seeks to codify has led to countless children improperly placed in restrictive settings. Regardless of a child’s

⁶² See *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

⁶³ *Id.* at 570.

⁶⁴ *Id.*

⁶⁵ See e.g., Bergelson, Vera, *The Depths of Malice* (August 18, 2020), <https://ssrn.com/abstract=3680118>.

history, ORR frequently overreports threats or actions by young people as more serious than they are which can trap children in restrictive settings, compounding harm. Too often, kids placed in secure settings have unaddressed disabilities or unmet trauma needs⁶⁶ and would be better served receiving community-based behavioral health services. ORR should not pass up the opportunity to protect children from these improper and potentially unlawful step-ups into secure custody.

Finally, placement criteria should not include the assessment that a child is a danger to themselves. Restrictive settings may only be appropriate in very limited situations where a child poses a “direct threat,” which by regulation, means a “significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.”⁶⁷ The direct threat standard under the ADA and Section 504 of the Rehabilitation Act does not consider a *threat to self* as an adequate reason to deny reasonable modifications for a child to receive care in a more integrated setting. Reasonable modifications for these children should include delivery of crisis intervention and stabilization services in a non-secure setting.

- e) **ORR proposes key changes in § 410.1304 that can be improved to advance a more supportive approach to behavioral health, track and monitor every use of law enforcement, and avert continued harm to children in secure custody.**
 - i) ORR should amend § 410.1304(a) to advance a more supportive, inclusive, and positive approach to behavioral care.

With a few discrete changes, ORR could improve this section of the NPRM to approach behavioral support through a more positive and inclusive lens. Specifically, we recommend that the language in § 410.1304(a) be amended to read:

Care provider facilities must develop **strengths-based** behavioral **support management** strategies that include, evidence-based, trauma-informed, and linguistically responsive program rules and behavioral **support management** policies that take into consideration the range of **ages, and** maturity, **disabilities and intersecting identities** in the program and that are culturally sensitive to the needs of each unaccompanied child.

The behavioral support strategies must prioritize children’s safety and well-being by adopting positive behavioral support interventions, which include restorative practices.

⁶⁶ See, e.g., *Doe 4*, 985 F.3d at 330-334.

⁶⁷ 28 CFR 35.139, 35.104. See also *Hargrave v. Vermont*, 340 F.3d, 27 (2d Cir. 2003) (“whereas the ‘direct threat’ defense requires the person to pose a risk of harm to others...”).

The behavior **support management** strategies must not use any practices that involve negative reinforcement or involve consequences or measures that are not constructive and are not logically related to the behavior being regulated.

ORR would be on firm footing to make the changes proposed for the following reasons:

- **“Behavioral support,” rather than “Behavioral Management”**

We support ORR’s commitment to providing children with evidence-based, trauma-informed, and linguistically responsive care. We recommend revising the proposed regulation language to require care provider facilities to utilize strategies to support, rather than “manage” children’s behavior. ORR is not a correctional agency; its role is not to ‘manage’ or control children’s behavior. ORR’s mandate to care for children in its custody includes providing behavioral support, with the goal of promoting children’s lifelong health, safety, and developmental wellbeing. Therefore, behavioral support better aligns with this mandate, centering children’s health, safety, and wellbeing as ORR’s primary focus.

- **A Strengths-Based Approach**

We commend ORR for including language in 410.1304(a)(1) that unequivocally prohibits abusive and punitive practices. We recommend, however, that ORR also require care providers to utilize a positive, strengths-based approach that recognizes that all children have strengths and capacities to develop whatever qualities are nurtured and affirmed in them. Research shows that strength-based interventions lead to more positive mental health outcomes than traditional corrective behavior management strategies for all children.⁶⁸ A strength-based approach supports children in developing positive behaviors by focusing on affirming their best qualities, rather than their negative characteristics. Effective strengths-based behavioral support considers and capitalizes on children’s perspectives, interests and support systems.⁶⁹ Accordingly, we recommend that ORR revise the term ‘behavior management’ to ‘strengths-based behavioral support.’ This revision will align the regulations with behavioral science and child development best practices.

⁶⁸ Heather Forkey et al., American Academy of Pediatrics Council on Foster Care, Adoption and Kinship Care, “Trauma-Informed Care,” *Pediatrics* 148, no. 2 (2021): 7, <https://publications.aap.org/pediatrics/article/148/2/e2021052579/179781/Trauma-Informed-Care-in-Child-Health-Systems> (“Robust implementation of [trauma-informed care] is strength-based, building on family protective factors rather than emphasizing deficits.”).

⁶⁹ Eunice Yuen et al., *Accentuate the Positive: Strengths-Based Therapy for Adolescents*, *Adolesc. Psychiatry* (Hilversum). 2020 Dec 21; 10(3): 166–171 (“The strengths-based approach is predicated on the assumption that each individual has a unique set of goals and possesses internal strengths and external resources that can help them achieve these goals. It also aims to activate a (child’s) hopefulness through a strengthened relationship with him/herself, family, therapeutic supports, community, and culture.”)

- **Consideration of A Child’s Disability and Intersecting Identities**

While we agree that all ORR strategies and policies should consider “the range of children’s ages and maturity in the program and be culturally sensitive to the needs of each unaccompanied child,”⁷⁰ this language is insufficient to incorporate ORR’s legal responsibility to prevent other forms of discrimination. We recommend revising the language to require behavioral support strategies that account for children’s disabilities and intersecting identities. In our experience, children in ORR custody are often subjected to discriminatory behavioral interventions for behavior related to their disability. Some children will experience behavioral challenges due to known or unidentified disabilities; their behavior may not conform to program rules because they are not receiving supports that adequately respond to their developmental and/or mental health needs.⁷¹ Children with Attention Deficit Disorder, Anxiety or Major Depressive Disorder may struggle to conform to restrictive program rules and schedules. A child with a cognitive developmental disability may struggle to process instructions or remember rules.

In the case of one child with Post-Traumatic Stress Disorder who was placed in a facility where few others shared his language, feelings of isolation, boredom and frustration manifested as impulsivity and angry outbursts. He was less receptive to talk therapy and preferred to paint or be in nature. Without strengths-based positive behavioral support that considered his interests and perspective, his mental health continued to deteriorate. Within 6 months, he had received dozens of SIRs. Based on the high number of SIRs, he was stepped up to a secure facility, where his health worsened to the point of severe psychologically induced seizures. Even well-meaning care providers risk retraumatizing or causing unintended harm to children by using maladaptive behavioral interventions and step-ups to more restrictive settings to avoid addressing a child’s behavioral challenges and needs.

Children with marginalized identities may also experience heightened isolation and peer discrimination which impacts their behavior. Immigrant youth are particularly susceptible to the insidious impact of interpersonal discrimination, such as bullying and taunting based on ethnicity, gender expression, low English or Spanish proficiency, or religion.⁷² Peer

⁷⁰ In accordance with the Age Discrimination Act of 1975 (42 U.S.C. § 6101 et seq.) (prohibiting discrimination based on age) and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.) (prohibiting discrimination based on race, color, or national origin);

⁷¹ Dear Colleague Letter: *Restraint and Seclusion of Students with Disabilities*, Catherine E. Llahmon, Assist. Secretary for Civil Rights, Department of Education, Dec. 28, 2016, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf>

⁷² Torres, Stephanie A. et. al., “Systems of Oppression: The Impact of Discrimination on Latinx Immigrant Adolescents’ Well-Being and Development.” *Journal of Research on Adolescence*, 32, 2: 501-517, 505, 2022. Retrieved from Loyola eCommons, Psychology: Faculty Publications and Other Works, <http://dx.doi.org/10.1111/jora.12751>

discrimination has been found to contribute to risky behaviors and impact youth emotional well-being over time.⁷³ Researchers in child psychology and behavioral science have found that Black and Latinx youth experience disproportionately higher rates of identity-based bullying and interpersonal trauma than other ethnic groups. Such identity-based bullying, which can involve physical acts of violence, induces similar emotional and physiological reactions to other traumatic events.⁷⁴ Behavioral interventions that focus on avoidance or isolation can exacerbate the mental health consequences of identity-based discrimination while a strengths-based reinforcement of coping strategies can buffer the effects.⁷⁵

For these reasons, it is important that ORR explicitly requires consideration of a child's disabilities and intersecting identities in its proposed regulation regarding behavioral support strategies.

Positive behavioral supports and interventions.

In alignment with growing research on effective behavioral support and interventions for children, we also recommend that care providers' behavior support strategies include positive behavioral support interventions, which may include restorative practices. Growing research supports the use of multi-tiered, restorative, and self-management approaches to behavioral support for children and adolescents.⁷⁶ These approaches include:

- Positive Behavioral Interventions and Supports (PBIS): Developing a strengths-based multi-tiered integrated system of positive behavioral support and interventions is consistent with child welfare best practices.⁷⁷ In the school context, the Department of Education recommends that implementing evidence-based, multi-tiered behavioral frameworks can help improve overall climate, safety, and achievement for all children,

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Lauren Alvis, et. al., Identity-based bullying and mental health among Black and Latino youth: The moderating role of emotional suppression, p. 9, May 24, 2022, https://mmhpi.org/wp-content/uploads/2023/04/2023_Identity-Based-Bullying.pdf.

⁷⁶ Rosa Town, et al., Self-management, self-care, and self-help in adolescents with emotional problems: a scoping review, July 2, 2022, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9840811/pdf/787_2022_Article_2134.pdf; Tyler E. Smith, et al., Self-management interventions for reducing challenging behaviors among school-age students: A systematic review, 2022, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8902300/pdf/CL2-18-e1223.pdf>; Annie E. Casey Foundation, Helping Kids in Foster Care Learn to Manage Their Emotions and Behavior, Feb. 10, 2018, <https://www.aecf.org/blog/helping-kids-in-foster-care-learn-to-manage-their-emotions-and-behavior>.

⁷⁷ Jannik Nitz, et. al., *Multi-tiered systems of support with focus on behavioral modification in elementary schools: A systematic review*, June 22, 2023, doi: [10.1016/j.heliyon.2023.e17506](https://doi.org/10.1016/j.heliyon.2023.e17506).

including children with disabilities.⁷⁸ The DOE advises that "behavioral supports are most effectively organized within a multi-tiered behavioral framework that provides instruction and clear behavioral expectations for all children, targeted intervention for small groups not experiencing success, and individualized supports and services for those needing the most intensive support."⁷⁹ A PBIS model provides an effective multi-tiered framework for integrating trauma awareness in system-wide social, emotional and behavioral support, rather than focusing on trauma as a separate and perhaps competing initiative.⁸⁰

- **Restorative Practices:** Unlike the traditional punitive systems, a restorative practice provides youth opportunities to be heard, listen to those they have harmed, while encouraging youth to acknowledge the harm they have caused and make amends.⁸¹ The Department of Education and Department of Justice recommend embedding Restorative Practices into positive behavioral support frameworks to "address the needs of students, promote positive behavior, build on student assets, and develop social emotional skills and well-being."⁸² There is extensive evidence on the success of restorative justice practices in the decades since their adoption as a non-punitive alternative to discipline in schools and juvenile justice programs.⁸³ Child psychologists, educators and child rights advocates also support a shift towards restorative models of behavior support and conflict resolution.⁸⁴ To be effective, ORR care providers should take appropriate measures to

⁷⁸ Guiding Principles for Creating Safe, Inclusive, Supportive, and Fair School Climates, Dept. of Education, March 2023, <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>.

⁷⁹ United States Department of Education Office of Special Education and Rehabilitative Services, *Dear Colleague Letter on the Inclusion of Behavioral Supports in Individualized Education Programs*, Aug. 1, 2016, <https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf>.

⁸⁰ Eber, L., Barrett, S., Scheel, N., Flammini, A., & Pohlman, K. (Nov. 2020). Integrating a Trauma-Informed Approach within a PBIS Framework. Eugene, OR: Center on PBIS, University of Oregon, <https://www.pbis.org/resource/integrating-a-trauma-informed-approach-within-a-pbis-framework>.

⁸¹ Office of Juvenile Justice and Delinquency Prevention, Restorative Justice for Juveniles, *Literature Review: A product of the Model Programs Guide*, Aug. 2021, <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/restorative-justice-for-juveniles>; Braithwaite, J. 2002. Setting standards for restorative justice. *British Journal of Criminology* 42(3):563–577; González, T. 2012. Keeping kids in schools: Restorative justice, punitive discipline, and the school-to-prison pipeline. *Journal of Law & Education* 41(2):281–335

⁸² Overall, findings indicate that youths who participate in restorative justice programs are less likely to reoffend, compared with youths who are processed traditionally in the juvenile justice system (Stuart, 1996; Bouffard et al., 2017). <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/restorative-justice-for-juveniles#5> <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>

⁸³ Office of Juvenile Justice and Delinquency Prevention, Restorative Justice for Juveniles Literature Review: A product of the Model Programs Guide, <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/restorative-justice-for-juveniles#5>.

⁸⁴ Ernesto Lodi et al., *Use of Restorative Justice and Restorative Practices at School: A Systematic Literature Review*, Int J Environ Res Public Health. 2022 Jan; 19(1): 96, Dec 23, 2021. doi: 10.3390/ijerph19010096; Sonja

guide children in repairing harm and afford children with opportunities for restoration instead of punishment.

- ii) We applaud § 410.1304(b) and recommend systematic review and support in cases involving law enforcement.

We commend ORR for requiring staff to exhaust all other avenues for resolving crises before contacting the police. We also support ORR’s statements in the preamble that “calls to law enforcement are not considered a behavior management strategy,” and encourage ORR staff to apply other trauma-informed, evidence-based, age appropriate and strengths-based means to de-escalate concerning behavior.⁸⁵

We also support ORR evaluations of staff and facilities as a monitoring and oversight mechanism to ensure that facilities and their staff are complying with their obligations and are adequately qualified and trained in behavior supports and effective de-escalation strategies. Given the potential harm to children posed by unnecessary interactions with police, we recommend that every instance of police intervention be reviewed and evaluated, amending § 410.1304(b) as follows: “A call by a facility to law enforcement ~~may~~ **shall** trigger an evaluation of staff involved regarding their qualifications and training in trauma-informed, de-escalation techniques.” In our experience, staff decisions to call law enforcement are too frequently informed by unconscious bias.

The risk to the safety and wellbeing of children caused by unnecessary encounters with police cannot be overstated, particularly for Black, Latinx⁸⁶ and Indigenous youth who are less likely to be perceived as “childlike”⁸⁷ and more likely to be profiled as “dangerous”, restrained, injured, killed or arrested, charged and sentenced as adults than white children.⁸⁸ Addressing what

Gadd and Bettie Ray Butler, *Promoting Equity and Inclusion using Restorative Practices for Students with and At Risk for Disabilities*, National Technical Assistance Center on Transition, 2019, <https://files.eric.ed.gov/fulltext/ED601052.pdf>.

⁸⁵ 88 Fed. Reg. 68942.

⁸⁶ Venta, A., Cadenas, G., Mercado, A., Garcini, L. M., & Domenech Rodríguez, M. M. (2022). Trauma exposure and trauma symptoms as predictors of police perceptions in Latinx youths. *Psychology of Violence, 12*(4), 252–259. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10353768/pdf/nihms-1863512.pdf>.

⁸⁷ By Keaton Carr, Malia Metelues, Kirsten Spears, And Margaret C. Stevenson, “*Stop acting like a child*”: *police denial of Black childhood*, Oxford University Press's Academic Insights for the Thinking World, July 20, 2021, <https://blog.oup.com/2021/07/stop-acting-like-a-child-police-denial-of-black-childhood/>.

⁸⁸ Monique Jindal, MD, MPH, *Policing and Overuse of the Juvenile Justice System*, April 1, 2023, <https://publications.aap.org/pediatrics/article/151/Supplement%201/e2022057267G/191010/Policing-and-Overuse-of-the-Juvenile-Justice?autologincheck=redirected>; Schober, M., Harburger, D.S., Sulzbach, D., Zabel, M. (2022). *A Safe Place to Be: Crisis Stabilization Services and Other Supports for Children and Youth*. Technical Assistance

experts call "adultification bias" towards Black, Indigenous and Latinx youth is critical because adults' beliefs inform how they treat these youth as well as what these youth may come to believe about themselves.⁸⁹

In one case, ORR staff called police because they allegedly observed the child exhibit an 'aggressive' walk towards another youth. The child's preferred language was not Spanish but because his only means of communicating was through scheduled telephonic interpretation services, he relied on a limited understanding of Spanish to communicate urgent needs to ORR staff. He had no access to interpretation services before, during, and following his arrest. When the police arrived on the scene and attempted to restrain the child, he was confused and resisted the police officer's attempts to restrain them. As a result, the youth was arrested and charged with assault on a police officer. Since he was in a state that treated 17-year-olds as adults, he was charged and detained as an adult.

Calls to enforcement can and should be rare, and an extensive investigation and corrective actions may not be necessary in each case. However, systematic review of every case affirms ORR's commitment to minimizing children's interactions with police and provides the accountability and oversight necessary to fulfill that commitment.

Finally, we recommend adding the following language to Section 410.1304(b) requiring that a child's contact with law enforcement trigger referral for community-based therapeutic services: **"Contact between an unaccompanied child and law enforcement leading to restraint, arrest or transfer of custody shall trigger after-care services for the unaccompanied child."** Ensuring that children have proper support after what are often traumatic encounters is in keeping with ORR's charge to ensure children's safety and wellbeing.

- iii) There is no justification for the permitted use of mechanical restraints and seclusion in secure facilities (proposed § 410.1304(d-f)).

We support language in the NPRM at § 410.1304(a)(3) that prohibits the use of prone physical restraints, chemical restraints, or peer restraints for any reason in all care provider facilities, including secure facilities. We also support language prohibiting "standard programs and RTCs"

Collaborative Paper No. 4. Alexandria, VA: National Association of State Mental Health Program Directors, https://innovations.socialwork.uconn.edu/wp-content/uploads/sites/3657/2023/03/Safe-Place-to-Be_Childrens-Crisis-and-Supports_NASMHPD-4.pdf.

⁸⁹ Center for the Study of Social Policy and National Council of Juvenile and Family Court Judges, *Shifting the Perceptions and Treatment of Black, Native, and Latinx Youth Involved in Systems of Care*, 2018, <https://files.eric.ed.gov/fulltext/ED617199.pdf>.

from using seclusion as a behavioral intervention and language limiting the use of personal restraints to “emergency safety situations” in those facilities.

However, we recommend deleting the proposed language in § 410.1304 (e), (f) allowing for the use of mechanical restraints and seclusion in secure facilities, as these are not interventions permitted in other levels of placement. While the regulation limits the use of these types of interventions in secure facilities only to emergency safety situations, the same child welfare reasons that support prohibiting their use in other types of facilities apply equally in the secure facility context. In our experience, children in secure facilities have the greatest need for supports and services, and for that reason, subjecting them to more severe restraints is particularly inappropriate.

The proposed language is particularly problematic in light of the long, well-documented history of ORR secure facilities improperly using mechanical restraints and seclusion on children. For instance, one former secure facility was infamous for its traumatic use of these harmful tactics on children, including “bind[ing] a child in handcuffs or shackles; at times, . . . plac[ing] restraints onto misbehaving children, strapping them onto an “emergency restraint chair,” where they are trapped until they “tire themselves out.””⁹⁰ In our experience, secure facilities commonly use hand and feet shackles when transporting children to any appointment, including their court appearance, and rarely agree to removing those even upon the request of an immigration judge. The use of these methods humiliates children and leaves a lasting impact on their emotional health and sense of self-worth. These practices are also ineffective at accomplishing their own goals of corrective behavior, while increasing their vulnerability to self-harm or suicide.⁹¹ Finally, these protocols also make the transportation of children outside of secure juvenile jails a de facto impracticability in many cases, even when children request the ability to travel to a place of worship.

Another former secure facility frequently knocked down children for failing to follow instructions and used mechanical restraints on children:

⁹⁰ *Doe 4*, 985 F.3d at 331.

⁹¹ See *Doe 4*, 5:17-cv-00097-EKD-JCH, ECF No. 34-7, Ex. 7 to the Memorandum Motion for Preliminary Injunction, at ¶ 75 (Dr. Gregory N. Lewis, Psy.D. writing of children held in secure custody: “Punitive approaches such as prolonged isolation, restraints, and physical abuse are harmful and ineffective. For example, 50% of all suicides in juvenile facilities occur while youth are held in isolation. Facilities, including [the secure facility Shenandoah Valley Juvenile Center], continue to harm youth by using force (e.g., aggressively restraining youth) and isolation as means of behavioral control rather than using de-escalation, conflict resolution, and trauma-informed strategies that are more effective and not harmful.”) (citations omitted); *id.*, ECF No. 050-2, Ex. 2 to the Reply to Response to Motion for Preliminary Injunction (Dr. Gregory N. Lewis, Psy.D.: “[M]ore punitive approaches towards youths generally lead to higher recidivism rates and do not deter their delinquent behaviors and that youths who enter the juvenile justice system have high rates of adverse childhood experiences and trauma...”).

“*Los tumban.*” This was the most common answer provided when youth were interviewed about staff discipline they have experienced or observed at the facility. The phrase translates to “they knock them down,” referring to detention staff “take downs”—knocking youth down and handcuffing them if a youth refuses to follow instructions, is perceived as a threat to other youth or an officer, and in some cases, if they attempt to commit suicide. . . . One youth reported that he had been “taken down” multiple times for not following the rules since he arrived at the facility less than two months prior to our visit. The youth reported that he was once taken down for covering his window; the officer hit him with a shield. Similarly, if detention staff instructs the youth to “cover” – throw themselves on the floor – and the youth does not obey, four or five officers may aggregate around the youth to force him to go to his room.⁹²

ORR should not trust secure facilities to continue using these methods that have significantly harmed children even in “emergency safety situations.” The regulations should be revised to preclude all facilities, including secure facilities, from using mechanical restraints and seclusion.

Finally, we recommend amending § 410.1304(d) to ensure that personal restraints are used only when absolutely necessary to ensure the safety of the child or others: “(d) ~~Standard~~ All programs, and **including** RTCs, may use personal restraints only in emergency safety situations. **An emergency safety situation occurs when the child presents an imminent risk of physical harm to self or others.**” We further recommend that ORR clarify: that emergency safety situations should be prevented wherever possible; that alternative interventions to de-escalate emergency safety situations be exhausted, including following a child’s Individualized Service Plan (ISP); that decisions on whether a situation necessitates personal restraints be made by staff with appropriate training and child welfare expertise; that care providers are only permitted to use a restraint for as long as necessary to ensure the safety of the child or others and must immediately end upon the cessation of the safety threat, with a maximum duration of 15 minutes;⁹³ that care providers are required to document and notify ORR of any incident involving the use of a

⁹² Xavier Becerra et al., *The California Department of Justice’s Review of Immigration Detention in California*, (Feb. 2019), 52-53, <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf>.

⁹³See Disability Rights California, *Protect Children’s Safety and Dignity: Recommendations on Restraint and Seclusion in Schools*, p. 6, https://www.disabilityrightsca.org/system/files/file-attachments/Restraint_and_Seclusion_Report.pdf (recommending 15-minute limits on the use seclusion and restraints on children) [“(California) law prohibits the use of “a behavioral restraint for longer than is necessary to contain the behavior that poses a clear and present danger of serious physical harm to the pupil or others.” . Cal. Educ. Code § 49005.8(a)(6). However, the absence of clear timelines can lead to children being restrained and secluded for dangerous, even fatal, lengths of time.“].

restraint or seclusion on a child and to explain their underlying emergency justification; and that the use of a restraint shall trigger review of the incident and evaluation by ORR of the facility and staff involved regarding their policies, the qualifications and training of their staff, and what additional support services could have prevented the use of restraints.

In the preamble, ORR states regarding Proposed § 410.1304(d) “that emergency safety situations should be prevented wherever possible, and that personal restraint should only be used after de-escalation strategies and less restrictive approaches have been attempted and failed.”⁹⁴ We agree. The use of restraints does not align with ORR’s child welfare mandate. In recognition of the harm to children caused by the use of restraints, there is a growing trend to limit the use of physical restraint in schools and other settings.⁹⁵

Care provider staff should be required to document any use of a restraint on a child, and in that documentation, the staff must provide all evidence the staff relied upon in determining that the use of a restraint or seclusion on a child was warranted. As with the involvement with law enforcement, the regulations should also require that every instance in which a restraint is used on a child be reviewed and evaluated for compliance and to determine whether any corrective action is necessary with respect to the facility or specific staff at the facility. We also recommend adding language to the regulations that would require evaluation of staff qualifications and training, just as ORR proposes to do with other last-resort measures such as calling law enforcement.

⁹⁴ 88 Fed. Reg. 68942.

⁹⁵Jodi S. Cohen & Jennifer Smith Richards, *National Ban on School Use of Seclusion and Restraint of Students Introduced in Congress*, ProPublica (Nov. 19, 2020, 3:40 p.m. EST), <https://www.propublica.org/article/national-ban-on-school-use-of-seclusion-and-restraint-of-students-introduced-in-congress> (discussing a proposed federal bill, the “Keeping All Kids Safe Act,” which would prohibit and prevent seclusion, mechanical restraint, chemical restraint, and dangerous restraints that restrict breathing, and to prevent and reduce the use of physical restraint in schools). See also Disability Rights Maryland, *Restraint & Seclusion Legal Requirements*, <https://disabilityrightsmd.org/wp-content/uploads/Restraint-Seclusion-Legal-Requirements-Handout-1.pdf>; 18 NYCRR 441.17 (In New York, staff are prohibited from using “room isolation” as a form of restraint for any child who is in a congregate care placement).

f) Small amendments to proposed § 410.1601 would avert harms from unnecessary transfers, which disparately affect children in restrictive settings.

- i) The NPRM should include a reference to factors that are key to reevaluate children’s placement, especially in restrictive settings (proposed § 410.1601(a)).

We welcome a final rule that specifies the care provider facility’s need to “continuously assess unaccompanied children in their care to review whether the children’s placements are appropriate” under proposed § 410.1601. However, through the *Lucas R.* litigation, it has become clear that this assessment should be expansive, and not simply limited to ORR guidelines. Asking the care providers to only “follow ORR guidance” has proved woefully inadequate in the past; requiring more holistic approaches to a child’s transfer is necessary for their proper care. We thus recommend amending § 410.1601(a) to reflect the need to continuously assess unaccompanied children multiple factors, including:

- Disabilities (both diagnosed and not) which may have affected a child’s behavior, desire to runaway or ability to co-exist with others in a facility, as well as how any transfer could aggravate or minimize any such disabilities. Both the care provider facility and ORR should have a service plan in place for the youth and any discussions surrounding a transfer need to take into account the services and supports laid out in the child’s plan.
- Geography: While it can be difficult for a parent or family member to visit a detained child, any continuous assessment should also consider the location of the youth’s family within the United States and the emotional and psychological toll of being detained across the country from their only family in a place they have recently arrived to.
- Language abilities: Though the majority of unaccompanied minors in ORR custody are Spanish-speaking, any continuous assessment of appropriateness of placement should take into account the main language of the child and whether the facility has the necessary staff to communicate with the child.
- Restrictiveness: One of the experts in *Lucas R.*, Dr. Emily Ryo, analyzed over two years’ worth of ORR data from 2017 to early 2020, and found that among custody periods that included time spent at a restrictive facility, such as a secure or staff-secure facility, the average times to reunification were significantly longer than the average times to reunification for children who were only ever placed at a shelter level.⁹⁶ The same data analysis also revealed that not only do children who spend time in restrictive settings on average spend more time in ORR custody, but children who spend time in restrictive settings also have worse case outcomes in terms of the type of release from ORR

⁹⁶ Expert Report of Dr. Emily Ryo, Docket 272-3 at 145-158 (Appendix 5) at 154, *Lucas R. v. Azar* (Case No. 2:18-CV-05741-DMG-PLA).

custody.⁹⁷ For example, 92.97% of children who were only ever placed in shelter level care were reunified with a sponsor, whereas only 47.76% and 41.74% of children who spent time at a staff- secure or secure level of care, respectively, were reunified with a sponsor.⁹⁸ In contrast, the percentages of ORR discharges based on voluntary departure or removal orders were higher for children who spent time in staff-secure or secure level placements compared to children who were only ever in shelter level care.⁹⁹ In other words, the transfer of any unaccompanied child to a facility that is restrictive has huge consequences beyond simply its “appropriateness”.

- Family Separation and Detention Fatigue: Detention, even for a short period of time, has been found to have profound effects on the mental health and development of children.¹⁰⁰ Prolonged detention, even at the shelter level, can be even more devastating, particularly when compounded with the continued separation of the child from their parent or family member.¹⁰¹

For all of these reasons, § 410.1601(a) should be much more robust in its considerations.

Additionally, in subsection (a)(1), we recommend a cross-reference to the Notice of Placement (NOP) in § 410.1001 Definitions and § 410.1901 Restrictive placement case reviews if the transfer will be to a facility that is more restrictive. As § 410.1901(a) states, any evidence used in a step up transfer must be recorded in a child’s file and a restrictive transfer can only occur if there is clear and convincing evidence. The reasons for this type of transfer should be documented in the NOP.

Finally, in subsection (a)(3) and (a)(3)(iii) we recommend changes and a clarification. In (a)(3), we approve of the provision of advanced notice of a transfer, but we would recommend a 72-hour time frame, since 48 hours can sometimes be on the weekend and can find the child’s attorney not available. This limits the potential positive effects that such advance notice could have for attorneys and individuals supporting the child to appropriately plan. Likewise, we would recommend the inclusion of “parent, family member or guardian, or sponsors who have submitted a completed sponsorship packet” in the list of appropriate parties that should be notified of the transfer. This better aligns ORR procedures with the basic rights from the child

⁹⁷ *Id.* at 155.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Laura C.N. Wood, BMJ Pediatrics Open, Impact of Punitive Immigration Policies, Parent-Child Separation and Child Detention on the Mental Health and Development of Children (2018), <https://bmjpaedsopen.bmj.com/content/bmjpo/2/1/e000338.full.pdf>.

¹⁰¹ *Id.*

welfare setting found across the majority of states.¹⁰² It also is more humane, since every parent has a right to know where their child is and where they are going beforehand.

As for (a)(3)(iii), we are concerned about the ability of “interested parties” to waive this advance notice of a transfer. There is no clear definition provided of who can be and who cannot be an interested party and there is no set process for the waiver of this notice. Basic due process requires that a child’s right to a waiver of notice not be given to someone else simply on ORR’s desire to do so, especially if this waiver of notice leads to the physical transfer to a restrictive facility.¹⁰³ There is also no fail-safe for a child to reject such a waiver of notice given by an adult unrelated to the child. And if a child is the interested party waiving notice, we would recommend specific and explicit paperwork that the child can review before agreeing to the waiver of notice.

ii) Section 410.1601(b) lacks cross-referencing and specificity to comply with *Lucas R.*

This subsection requires several cross-references in order to be deemed complete and to not engender confusion, as in a care facility employee or someone within ORR potentially thinking that restrictive placement rules are contained entirely here. Namely, a cross-reference to § 410.1105 Criteria for placing an unaccompanied child in a restrictive placement; § 410.1901 Restrictive Placement Case Reviews; and subsection § 410.1103(d).

This is particularly important with regards to what this subsection states regarding 30-day review of the appropriateness of restrictive placement. The preliminary injunction in place in *Lucas R.* does include this automatic 30-day review that is included in this subsection (b), however, it also includes another automatic and more intensive 90-day review for secure facilities and additionally language requiring the reviewer for RTC’s to be a licensed psychologist or psychiatrist.¹⁰⁴ It is confusing that the proposed rules are too general in this subsection—at the very least, to cross-reference the other sections wherein the full extent of the preliminary injunction is more fully incorporated would alleviate some concern as to improper application of the legal requirements of *Lucas R.*

¹⁰² See Children’s Advocacy Institute & First Star Institute, *A Child’s Right to Counsel*, 4th ed. (2019).

¹⁰³ See *Zinermon v. Burch*, 494 U.S. 113, 127-28 (1990) (noting that due process generally requires “some kind of hearing” before a deprivation of protected liberty interests); *Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017) (“[T]he government’s discretion to incarcerate non-citizens is always constrained by the requirements of due process.”).

¹⁰⁴ See Preliminary Injunction, *Lucas R.*, 2:18-cv-05741-DMG-PLA, Dkt. # 391. This is also important to § 410.1601(d).

For further clarification, it should also be noted that, while this section deals specifically with transfers within ORR, the protections provided in § 410.1601(b) regarding this automatic 30-day review of a restrictive placement also apply to Out-of-Network RTC facilities.¹⁰⁵

iii) Group transfers under § 410.1601(c) should include safeguards.

We understand the governmental need to potentially transfer multiple individuals on the same flight or at the same time to adequately use resources. However, we recommend that § 410.1601(c) include language to protect the individual rights of each child within the group. For example, the need to accommodate a group transfer should not cause certain timelines that are legally mandated to be trampled on, or for ORR to seek waiver or to cut corners on its due process requirements to each individual child in the service of fitting more children on the same flight on the same day. Likewise, the reasons listed in this subsection for why a group transfer may become necessary should not be used as subterfuge or as an excuse for violating any rights of a child —e.g., a shelter program’s closure and lack of available bed space should not lead to a group transfer of a dozen children to a nearby heightened supervision facility.

g) Small clarifications would strengthen due process protections under the procedure for restrictive placement reviews (proposed § 410.1901).

We applaud ORR for committing to incorporating the language from the preliminary injunction in *Lucas R.* into § 410.1901(a). Similar to the introductory comments to these proposed rules regarding its effect on the FSA, we would clarify that incorporation of some parts of the preliminary injunction in *Lucas R.* relating to the “step-up” class does not limit the effectiveness of the preliminary injunction in its entirety, nor does it limit the effectiveness of future settlement agreements on other claims in *Lucas R.*

§ 410.1901(b) likewise tracks to the language in the *Lucas R.* preliminary injunction and we find that positive. However, we wish to clarify that the NOP issuance at the 30-day mark should not be pro forma—it should include an actual re-evaluation of the child and not simply a reissuance of the same NOP that was provided upon arrival at the restrictive facility. As written, ORR and its care providers could simply print another copy of the original NOP and provide it again to the child at the 30-day mark — a practice that is unfortunately common in our experience, where boilerplate NOPs or NOPs repeating the same justification over months fail to put children on notice of the reason for their continued placement in restrictive settings. A clear explanation of the reasons for keeping them in restrictive placement and potentially new evidence should be

¹⁰⁵ *Id.* (“ORR shall clarify, within the ORR Policy Guide, that the standards and criteria for transfer or placement in an RTC...apply to transfers or placement to OON RTCs.”)

included; otherwise, we do not feel that the rule would be consistent with the findings in the summary judgment order by Judge Gee.¹⁰⁶

We again applaud the proposed rules for including the *Lucas R.* preliminary injunction language, and even adding to it in § 410.1901(c). With that being said, the final rule should clarify that both the attorney at the prior facility or the legal service provider at the new, more restrictive placement receive the NOP 48 hours within a step-up. Currently, it is unclear whether the receiving or prior legal service provider would receive notice, potentially delaying important information-relay among providers. In § 410.1601(a)(3), there is a provision for advance notice of a transfer, but it does not specifically reference an NOP nor restrictive placement step-ups. We would encourage ORR to combine that subsection with this one here, or specifically cross-reference them, so that both prior counsel of record at the sending facility and potential new counsel at the receiving/restrictive placement facility have notice of ORR's reasons on hand.

With respect to § 410.1901(d), we reiterate our call made in (1)(c)(iii) *supra* to conduct reviews of children's placement in restrictive settings within 14 days, rather than at the 30-day or 45-day marks.

h) Proposed § 410.1902, if final, would violate the terms of *Lucas R.*

We are concerned that ORR attempts to alter or omit significant and important portions of the *Lucas R.* preliminary injunction. If final, § 410.1902 would blatantly disregard the plain language of the preliminary injunction and undermine the brave named plaintiffs from *Lucas R.* and the class members they speak on behalf of. To comply with *Lucas R.*, we urge ORR to make the following changes:

- § 410.1902(c) should state: “ORR shall convene the [Placement Review Panel (PRP)] ~~in a reasonable timeframe without undue delay in all requisite cases~~ **within 7 days of a minor's request for a hearing.**” A reasonable timeframe could mean weeks or months of delay for a child, while centering ORR's triaging of tasks and priorities. 7 days was not a suggestion by Judge Gee; it was what she ordered ORR to do.¹⁰⁷ As such, we strongly recommend that ORR make this correction prior to the final rule.
- § 410.1902(d) should state: “The PRP shall issue a decision ~~within 30 calendar days of the PRP request whenever possible~~ **within 7 days of a hearing and submission of evidence or, if no hearing or review of additional evidence is requested, within 7 days following receipt of a child's written statement.**” Judge Gee further specified that “ORR may institute procedures to request clarification or additional evidence, if warranted, or to

¹⁰⁶ See *Lucas R. v. Becerra*, No. CV 18-5741-DMG, 2022 WL 2177454 (C.D. Cal. Mar. 11, 2022) (“Notice is not an effective safeguard of liberty interests if the child does not understand his or her right.”).

¹⁰⁷ See Preliminary Injunction, *Lucas R. v. Beccera*, 2:18-cv-05741-DMG-PLA, Dkt. # 391.

extend the 7-day deadline as necessary under specified circumstances.” We find no justification for proposing a quadruple timeframe to the one required under *Lucas R.*, both for hearings and written submissions.

- Completely missing from the NPRM are the following subsections from the preliminary injunction, which ORR should incorporate:
 - “ORR shall permit the minor or the minor’s counsel to review the evidence in support of step-up or continued restrictive placement before the PRP review is conducted.”¹⁰⁸
 - “ORR shall deliver a minor’s complete case file, apart from any legally required redactions, to their counsel within a reasonable time to be established by ORR.”¹⁰⁹
 - “Where the minor does not have an attorney, ORR shall encourage the grantee care program to seek assistance for the minor from a contracted legal service provider or child advocate.”¹¹⁰
- Additional Concerns:
 - ORR should ensure that each child that requests a PRP has legal representation and is referred for a child advocate. Children should not have to navigate these complex processes alone. We echo concerns raised in other comments that limiting the provision of legal services “to the greatest extent practicable” under § 410.1309 fails to grant children, who are largely legally incompetent, this vital due process necessity. This practical caveat makes little sense if ORR grants automatic access to a PRP but falls short of providing children guaranteed counsel.
 - While § 410.1901(a), correctly states that ORR shall make placement determinations regarding restrictive settings based on clear and convincing evidence, the clear and convincing standard of proof should be added to § 410.1105(a) and § 410.1105(b) to clarify that clear and convincing evidence is required not just in RTC placement determinations, but in all other restrictive placement determinations as well.
 - The NPRM fails to include language ensuring the unaccompanied children’s right to an interpreter at the PRP or translations of the PRP decision. We recommend adding language to specify that ORR informs children of their right to an interpreter and provides a certified interpreter in the child’s preferred language at

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

the PRP hearing to ensure effective communication, compliance with Title VI of the Civil Rights Act of 1964,¹¹¹ and a fair hearing.

- The NPRM also does not specify the language the PRP decision would be issued in, and whether it would use language more easily understood by children. Sections 410.1901(b)(4) and 410.1306(c)(4) and (5) all provide access to translations or interpretation of documents to make sure the unaccompanied children understand their NOPs. ORR should similarly provide translations and interpreters for the PRP hearing and decision. Therefore, we recommend specifying in the Proposed Rules that the PRP decision issued should be in a language that the unaccompanied child understands and prefers and having a case manager explain the PRP decision to the unaccompanied child, in a language the unaccompanied child understands.
- Finally, ORR should clarify that the PRP proceedings would be separate and apart from the A-File. The potential of the PRP hearings having negative impacts on their immigration possibilities may discourage unaccompanied children from exercising their rights to the hearing. We recommend the final rule clarify that the PRP is conducted exclusively within the scope of ORR’s duty under the HSA as the custodian of unaccompanied children. As such, PRP proceedings must not be relied upon in any deportation or removal hearing or any USCIS adjudication, including but not limited to final decisions and discretionary factors.

Unless ORR makes substantial changes we outline above, this particular subsection will be in direct violation of the preliminary injunction issued in *Lucas R*. Given that they do not incorporate significant portions of the preliminary injunction and alter others, they in no way implement the requirements of the preliminary injunction and cannot go into effect.¹¹²

i) Proposed § 410.1903 fails to protect critical due process rights for children in bond hearings.

Paragraph 24(A) of the FSA requires that “[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.” FSA ¶ 24(A). The Ninth Circuit has interpreted this bond redetermination hearing as affording “critical due process rights”, including: “(a) the ‘right to be represented by counsel’; (b) the

¹¹¹ 42 U.S.C. § 2000d *et seq.*; *Lau v. Nichols*, 414 U.S. 563 (1974).

¹¹² To “‘implement’ means[t]o ‘carry out, accomplish; esp.: to give practical effect to and ensure of actual fulfillment by concrete measure’ [and] . . . ‘[t]o complete, perform, carry into effect (a contract, agreement, etc.); to fulfill (an engagement or promise).’” *United States v. McIntosh*, 833 F.3d 1163, 1176 (9th Cir. 2016) (quoting *Implement*, *Merriam Webster’s Collegiate Dictionary* (11th ed. 2003) & *Implement*, *Oxford English Dictionary*, www.oed.com).

‘right to make an oral statement’; (c) the right to ‘examine and rebut the government’s evidence’; (d) the right to ‘create an evidentiary record’; (e) the right ‘to have the merits of [the minor’s] detention assessed by an independent’ adjudicator; and (f) the right to appeal the adjudicator’s decision.”¹¹³ However, Proposed Rule Section 410.1903 does not adequately protect children’s due process rights. Although the Ninth Circuit upheld the bond hearing provision of the 2019 Final Rule except as to the lack of automatic hearings, ORR should take this opportunity to strengthen the minimal protections in the Final Rule to better safeguard these critical due process rights.

i) The Government Must Bear the Burden of Establishing Whether a Child is a Danger to the Community

The Ninth Circuit has explained that *Flores* bond hearings “compel [ORR] to provide its justifications and specific legal grounds for detaining a minor.”¹¹⁴ The NPRM, however, places “[t]he burden of persuasion . . . on the unaccompanied child to show that they will not be a danger to the community if released, using a preponderance of the evidence standard.”¹¹⁵

This is inconsistent with the FSA’s mandate that minors be placed in the least restrictive placement and be treated with special concern for their particular vulnerabilities. Further, because children who ORR contends are a danger to self or others are generally placed in restrictive settings, due process requires that ORR, not the child, bear the burden of proof by clear and convincing evidence that a child must remain detained.¹¹⁶

We strongly recommend that ORR amend § 410.1903(b) as follows: “In hearings conducted under this section, ORR bears the initial burden of **proof and** production to support its determination **by clear and convincing evidence** that an unaccompanied child would pose a danger if discharged from ORR’s care and custody. ~~The burden of persuasion is then on the unaccompanied child to show~~ **may then rebut** that they will not be a danger to the community if released, using a preponderance of the evidence standard.”

¹¹³ *Flores v. Rosen*, 984 F.3d 720, 734 (9th Cir. 2020) (citing *Flores v. Sessions*, 862 F.3d at 867–68, 879).

¹¹⁴ *Flores v. Sessions*, 862 F.3d at 868.

¹¹⁵ Proposed § 410.1903(b).

¹¹⁶ See, e.g., *Lucas R. v. Becerra*, No. , 2022 WL 2177454, at *20 (C.D. Cal. March 11, 2022).

- ii) The final rule must clearly state that a child has a right to review evidence in advance of a hearing.

As mentioned above, Paragraph 24(A) of the FSA has been interpreted by the Ninth Circuit to include the right to examine and rebut the government's evidence.¹¹⁷ However, the Proposed Rule does not require ORR to provide the child with the right to examine evidence in advance of the bond hearing. Rather, § 410.1903(c) states that “[t]he unaccompanied child may present oral and written evidence to the hearing officer and may appear by video or teleconference,” and that “ORR may also present evidence at the hearing, whether in writing, or by appearing in person or by video or teleconference.” This leaves unaccompanied children in the difficult position of being required to prove a negative, without the opportunity to adequately prepare a rebuttal of the government’s evidence.

In order to make the Proposed Rule consistent with the Ninth Circuit’s interpretation of Paragraph 24(A) of the FSA, we urge that the final rule include under § 410.1903(c): “ORR shall provide the child and their advocate(s) an opportunity to review ORR’s evidence within a reasonable time in advance of a hearing.” Alternatively, the final rule could specify that ORR’s evidence at the bond hearing will be limited to the evidence provided to the child as part of their Notice of Placement.

- iii) *Proposed § 410.1903(f) undermines the FSA’s policy favoring release by failing to establish recurring bond hearings for children detained long-term.*

Paragraph 14 of the FSA clearly states that there is a general policy favoring release. Given this policy, children should have the right to recurring bond hearings if they remain detained long-term. Proposed § 410.1903(f) undermines this policy by allowing an unaccompanied child who was determined to pose a danger to the community if released to seek another hearing *only if* the child can demonstrate “a material change in circumstances.” Such a narrow basis for requesting another hearing permits long-term detention of children in violation of the FSA’s stated policy favoring release.

Moreover, the NPRM provides that “[s]imilarly, 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/or ORR can show that a material change in circumstances.”¹¹⁸ There is no justification for permitting ORR to request reconsideration of a child’s danger to the community every month

¹¹⁷ *Flores v. Rosen*, 984 F.3d at 734.

¹¹⁸ Proposed § 410.1903(f).

while barring the child from requesting reconsideration absent a material change in circumstances, especially in light of the FSA’s policy favoring release.

We thus recommend that the final rule establish a right to recurring bond hearings for children detained long-term. At the very least, the final rule should permit unaccompanied children to request another hearing for the same bases that ORR is permitted to request a new determination: if at least one month has passed since the original decision, and/or a showing of a material change in circumstances. A consistent amendment of § 410.1903(f) would read as: “(f) Decisions under this section are final and binding on the Department, ~~and an unaccompanied child who was determined to pose a danger to the community if released may only seek another hearing under this section if the unaccompanied child can demonstrate a material change in circumstances.~~ Similarly, ORR **or the unaccompanied child** 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/or **ORR the requesting party** can show ~~that~~ a material change in circumstances, such that the prior determination should be overturned ~~means the unaccompanied child should no longer be released due to presenting a danger to the community.~~”

2) Additional comments ahead of the final rule

a) ORR should consider creating processes for children to challenge unjust restrictive placements before they are transferred and suffer harm.

ORR recognizes in the Preamble to the NPRM the importance of providing advance notice of transfers to restrictive placements.¹¹⁹ However, § 410.1901(b) only requires that ORR shall provide an unaccompanied child with a Notice of Placement (NOP) no later than 48 hours after step-up to a restrictive placement, as well as every 30 days the unaccompanied child remains in a restrictive placement. Similar language appears in § 410.1001 defining Notice of Placement (NOP), which states that the care provider facility where the unaccompanied child is placed must provide the NOP to the child within 48 hours *after* an unaccompanied child's arrival at a restrictive placement, as well as at minimum every 30 days the child remains in a restrictive placement. We recommend requiring ORR to provide NOPs in advance of a step-up to a restrictive placement. If ORR cannot ensure the provision of a NOP to every unaccompanied child prior to step-up, we recommend at least adding the Preamble language of “whenever possible, ORR seeks to provide NOPs in advance of a step-up to a restrictive placement” to both § 410.1901(b) and the definition of Notice of Placement (NOP) in § 410.1001.¹²⁰

¹¹⁹ 88 Fed. Reg. 68959 (“whenever possible, ORR seeks to provide NOPs in advance of a step-up to a restrictive placement.”).

¹²⁰ With the proposed rules, ORR is not providing sufficient safeguards to ensure wrongful step ups do not occur. *Lucas R. v. Becerra*, Dkt. 391 CV 18-5741-DMG (Preliminary Injunction Order) at 28 (“...pre-deprivation notice

We urge ORR to consider a germane point to providing advance notice: granting children an opportunity to challenge their transfer before such transfer is made. ORR can facilitate and support design and implementation of an independent hearing process that takes place before any transfer to restrictive custody happens, allowing for the child to challenge the decision to place them in a restrictive setting.

Pre-transfer hearings should incorporate basic elements of due process that are applied in the domestic child welfare context. They must occur before the child is transferred to the restrictive placement (unless the Director has a reasonable belief, based on clearly articulable facts, that the child is a present, imminent danger to others). Such hearings must: (i) require that the child have access to an administrative review hearing if placed in a restrictive placement, with notification requirements to the child and their counsel (required) and child advocate; (ii) require that a neutral fact finder oversee the hearing; (iii) set minimum standards for notification, case records, timing, and procedural matters of administrative hearings related to restrictive placements; (iv) clarify that the burdens of production and proof are on the Director of ORR to provide evidence demonstrating that the child is a danger to themselves or others and the restrictive placement is in the best interests of the child. ORR must state clearly that administrative needs, such as the short supply of placements or budgetary constraints are not acceptable reasons to transfer a child to a secure setting.

The PRP process has provided a necessary opportunity for children to challenge their placement in a restrictive setting. ORR can improve upon this practice, allowing for the child to challenge the decision to place them in a restrictive setting before the transfer happens. Too often, the PRP process occurs 30-60 days after the child's transfer, aggravating the damage caused by that improper placement has already accrued to the child. This proposal protects children's rights to be heard ahead of suffering these lasting harms.

b) Request for comment recommending de-escalation techniques.

In the preamble, ORR invites comments on “the process ORR should require care provider facilities to follow before engaging law enforcement, such as the de-escalation strategies that must first be attempted and the specific sets of behaviors exhibited by unaccompanied children that warrant intervention from law enforcement.”¹²¹ We appreciate the opportunity to inform ORR's efforts to limit to the greatest extent possible children's arrests and other involvement with law enforcement while in ORR custody.

and hearing are not constitutionally required for all Class Members, *so long as* Class Members have other pre-deprivation protections and adequate access to bolstered post-deprivation remedies.”(emphasis added).

¹²¹ 88 Fed. Reg. 68942.

First, we recommend that ORR approach “de-escalation” as a long-term, holistic effort that begins the moment a child first enters ORR custody, not at the point at which a child is in the midst of a crisis that warrants intervention. From this perspective, the most critical “strategy” for ORR to implement towards de-escalation is to integrate a comprehensive trauma-informed care system. Experts define trauma-informed care as “aim[ing] to transform entire systems of care by embedding an understanding of traumatic stress response ‘in all aspects of service delivery and plac[ing] priority on the individual’s safety, choice, and control.’”¹²² Importantly, it incorporates extensive preventative care rather than reactive responses.¹²³

A comprehensive trauma-informed system requires staff to undergo a deeper assessment of the “common set of assumptions about the factors underlying children’s (behavior), an understanding that the manner in which limits are set and expectations pursued by adults may precipitate such behavior, and an emphasis on crisis prevention rather than crisis management.”¹²⁴ This holistic approach has been proven to be effective, significantly reducing the need for using physical restraints or seclusion, and minimizing the re-traumatization of children through crisis prevention.¹²⁵ Such holistic culture change requires immediate and incremental efforts to rebuild healthy support systems, including but not limited to:

- Identifying early signs of detention fatigue. Children in custody frequently suffer “detention fatigue,” particularly during long stays in ORR custody caused by delays in family reunification, foster care placement denials and transfers to restrictive settings. Children in these circumstances may experience psychological distress, stemming from a sense of helplessness, limited agency, and lack of trauma-informed care.

¹²² S.A. Bryson et al., “What are effective strategies for implementing trauma-informed care in youth inpatient psychiatric and residential treatment settings? A realist systematic review,” *International Journal of Mental Health Systems*, 11, no. 36 (2017): 3, <https://doi.org/10.1186/s13033-017-0137-3>.

¹²³ Ibid., 2 (“[N]urturing relationships can provide a ‘buffer’ against the effect of childhood trauma through the co-regulation of stress. [Trauma-informed care] aims to create a treatment culture of nonviolence, learning, and collaboration by rebuilding the child’s sense of control and empowerment. TIC seeks to avoid traumatizing practices such as seclusion and restraint”).

¹²⁴ Ross W. Greene et al., “Innovations: child and adolescent psychiatry: use of collaborative problem solving to reduce seclusion and restraint in child and adolescent inpatient units,” *Psychiatric Serv.* 57, no. 5 (2006): 57: 611, <https://ps.psychiatryonline.org/doi/full/10.1176/ps.2006.57.5.610>.

¹²⁵ See, e.g., Bryson, “What are effective strategies,” 14 (seclusion and restraint episodes declined from 281 in the 9 months before training on collaborative problem solving to one incident 15 months post-training; staff and patient injuries also significantly declined); K. Murphy et al., “Trauma-informed child welfare systems and children’s well-being: a longitudinal evaluation of KVC’s bridging the way home initiative,” *Child Youth Serv. Rev.* 75 (2017); 23–34, <https://www.sciencedirect.com/science/article/pii/S0190740917301342?via%3Dihub> (systemwide reform effort to provide trauma-informed care resulted in greater improvements in child functioning, emotional regulation, and behavioral regulation and increased placement stability).

- Building trusting relationships with youth through care provider training, consistency and retention. De-escalation relies on clear and consistent communication, active-listening and trust-building.¹²⁶ Effectively trained care providers avoid the use of physical restraints to de-escalate crises because it erodes trust and is counterproductive long-term.¹²⁷ Studies have shown that trauma-informed care models that focus specifically on improving children-staff relationships in residential care settings in the child welfare context can be effective in decreasing the number of behavioral incidents, including incidents of aggression, destruction of property, and children running away.¹²⁸
- Addressing secondary traumatic stress for child welfare providers. Responding to staff mental health needs, including the effects of vicarious trauma, is essential and most effectively processed through regular debriefing practices as well as self-care practices.¹²⁹
- Engaging youth perspectives. The most important members of the ORR care community are the children it serves. A key component of positive behavioral support practice is valuing young people’s agency, listening to their voices and assisting them in forming healthy relationships with themselves and others.¹³⁰ It is important that care providers create opportunities to affirm and actively engage youth voices, including through youth councils and youth-led town halls, restorative justice circles, and review processes for youth to provide feedback to care provider staff.
- Collaborating with key stakeholders. Convene a working group of experts in childhood development, restorative practices, trauma recovery and culturally-sensitive behavioral support to offer technical assistance to care providers. The working group may include child psychologists, child advocates, disability rights and juvenile justice advocates to

¹²⁶ Ane Slaatto et al., Conflict prevention, de-escalation and restraint in children/youth inpatient and residential facilities: A systematic mapping review, *Children and Youth Services Review*, May 2021, 127(1):106069, DOI: [10.1016/j.childyouth.2021.106069](https://doi.org/10.1016/j.childyouth.2021.106069).

¹²⁷ Ibid., 6 (“(S)tudies of experiences of restraint found negative outcomes and experiences. For example, approximately one-third of the sample of youth (studied) reported a lack of confidence and trust in both parents and staff. Another study found that young people react with intensely negative emotions to physical restraint...Untrained workers supported the use of physical restraint more than did trained workers.”).

¹²⁸ Charles V. Izzo et al., “Intervening at the Setting Level to Prevent Behavioral Incidents in Residential Child Care: Efficacy of the CARE Program Model,” *Prev. Sci.* 17 (2016): 554–564, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4887550/pdf/11121_2016_Article_649.pdf (evidence-based, trauma-informed intervention model focusing on improving children-staff interactions and organizational functioning resulted in significant declines in behavioral incidents of aggression toward staff, destruction of property, and runaways among children in residential care); Martha J. Holden and Deborah E. Sellers, “An Evidence-Based Program Model for Facilitating therapeutic responses to Pain-Based Behavior in Residential Care,” *Int’l J. of Child, Youth and Family Studies* 10, nos. 2-3 (2019): 70-71, <https://journals.uvic.ca/index.php/ijcyfs/article/view/18853>.

¹²⁹ Katelyn Donisch, Chris Bray, and Abigail Gewirtz, 2016 Child Welfare, Juvenile Justice, Mental Health, and Education Providers’ Conceptualizations of Trauma-Informed Practice, pg. 131.

¹³⁰ Sue Perkins, Amplifying Youth Voice in a Restorative School Community, Nov. 14, 2018, <https://community-matters.org/2018/11/14/amplifying-youth-voice-in-a-restorative-school-community/>.

help ORR and care providers to objectively examine and re-mediate exclusionary and punitive policies through a more inclusive, healing-centered lens.

In addition, we recommend that ORR ensure facilities implement behavioral support systems that are fair, consistent, and equitably enforced, with consideration for the individualized needs of children and unconscious bias. ORR states in the NPRM that any limits and expectations for children's behavior and their care community must be "clear and healthy."¹³¹ We support this position. However, we also believe that any expectations and limits placed on children and the enforcement of those expectations be implemented in a manner that is fair and consistent, and also accounts for the risk of unconscious bias. In the past, advocates have observed that some care providers have inconsistently enforced rules or imposed unconstructive restrictions. For instance, many children are punished for 'unauthorized movement' within facilities for simply walking to another room or going outside to get some fresh air, even when children are experiencing heightened states of claustrophobia or mental distress. Also, children with learning disabilities may experience more barriers to understanding program rules and be more sensitive to the frustration caused by linguistic and cultural barriers.¹³² Arbitrary rules that are not informed by best practices, trauma-awareness, or cultural sensitivity risk retraumatizing children and open the door for mistreatment.¹³³

Reinforcement measures that may appear to be "positive" and "strengths-based" can also be harmful if inequitably applied. For instance, many facilities use "points rewards systems" to manage behavior. However, many experts challenge the use of such systems,¹³⁴ because they fail to account for children's individual needs, strengths and intrinsic motivation. Instead, rewards systems create unhealthy dependency on external validation while provoking shame and a sense of punishment for children whose behavior does not conform to expectations, regardless of the reason. Rewards systems may be particularly inappropriate in the ORR context, given the need for culturally competent, linguistically responsive, trauma-informed, individualized care. Some children have reported discriminatory treatment by staff who selectively enforce rules or bestow

¹³¹ 88 Fed. Reg. 68941.

¹³² Alejandro Rice and Celeste Roseberry-McKibbin, *Turning Frustration into Success for English Language Learners*, April 1, 1999, <https://www.ascd.org/el/articles/turning-frustration-into-success-for-english-language-learners>.

¹³³ Luana Rodriguez, *A Curriculum on Culturally Competent Practices to Prevent Retraumatization in Diverse Survivors*, Walden Univ., 2016, <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=4305&context=dissertations>.

¹³⁴ Connie Persike, *The Dark Side of Rewards, Part 1: Why Incentives Do More Harm Than Good in the Classroom*, May 6, 2023, <https://endseclusion.org/2023/05/06/the-dark-side-of-rewards-why-incentives-do-more-harm-than-good-in-the-classroom/>.

rewards based on favoritism. We strongly recommend requiring any policies and strategies to be safe and equitably enforced.