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Mr. Toby Biswas

Director of Policy, Unaccompanied Children Program

Office of Refugee Resettlement

Administration for Children and Families

Department of Health and Human Services

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 undersigned organizations respectfully submit these comments in response to the Notice of Proposed Rulemaking (NPRM) entitled *Unaccompanied Children Program Foundational Rule* (“proposed rule”) by the Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), initially published on October 4, 2023. Drawing on our collective experience and expertise as care providers for unaccompanied children in Federal Government custody, we appreciate the opportunity to submit comments regarding the NPRM.

As a collective, we represent 15 organizations involved in the placement, care, and services provided to unaccompanied children in Federal custody. For years our various organizations have provided unaccompanied children with quality care and services that are in the best interest of the child. Given this experience, we felt it of great value to contribute comments on the NPRM from the perspective of care providers who understand how children will be directly impacted by the proposed policies and regulations. Important to note, our comment provides input on specific sections of the proposed rule but does not represent an exhaustive review nor an endorsement of other segments of the proposed rule, though many have joined or written separate individualized comments on various sections.

We welcome that the proposed rule is issued by ORR - an office with expertise in the care of immigrant children - and reiterate that unaccompanied children are, first and foremost, children and are entitled to protection and fulfillment of their rights. Unaccompanied children are forced

to flee for a variety of reasons, but all have experienced a dangerous journey traveling thousands of miles filled with horrors that no child should ever have to encounter. We commend ORR for its continued work to prioritize the care and wellbeing of unaccompanied children in the United States. The undersigned organizations provide the following comments on the proposed rule regarding the UC Program:

### **Subpart A – Care and Placement of Unaccompanied Children**

As leading care providers for unaccompanied children through ORR, we welcome the opportunity to share our comments on the proposed rule, the definitions used throughout the document and the principles that will apply to ORR placement, care, and service decisions. We present the following concerns and proposed recommendations as it relates to Subpart A:

#### **§ 410.1000**

We recognize that it is essential to codify practices based on the statutory authorities and requirements of the Homeland Security Act (HSA) and the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 and to implement the terms of the Flores Settlement Agreement (FSA).

Providing a uniform set of standards and procedures will create conformity and clarity to essentially provide for the well-being of unaccompanied children in ORR care, which is a mutual overarching objective for all of us. We wholeheartedly believe that the FSA goes hand in hand with this objective, so implementing the terms of this landmark case are fundamentally important to this proposed rule. This rule will set out a transparent path for the program and the agency as a whole and how stakeholders have a role to play in ensuring there are policies in place to guide those working directly with unaccompanied children.

#### **§ 410.1001**

With respect to the definitions, we generally have no objection to what is outlined in the proposed rule. Given the length of time the UC Program has been under ORR, updating terms to align with the HSA, TVPRA, and FSA is sensible.

The proposed new term, “care provider facility,” making it broader than the current term, “standard program,” will help clarify the meaning of influx or emergency facilities. Enhancing the “care provider facility” definition to encompass any facility in which an unaccompanied child may be placed while in the custody of ORR, including any facility exclusively serving children in need of particular services and treatment is a move in the right direction.

We are also in general consensus on the change in definition from “disability” to the proposed “special needs unaccompanied child.”

Again, as it pertains to changing the general dynamics of the “influx” definition and the threshold we generally concur with ORR’s recommendation based on more realistic and current state of affairs as it pertains to the change from 1997 standards to 2023 standards and the real-time changes to the program.

The definition of “post release services” to help families seek and obtain educational resources is better suited to the program. Monitoring children’s progress in school will require resources and funding, and additional clarification from ORR on the responsibility of the residential care provider once the child leaves the facility is welcome.

As described, we have no concern with the changes to most of the definition changes in Subpart A.

### **§ 410.1003**

We set out to always treat the children who are placed in our facilities with the utmost respect and dignity. Identifying principles that set out clearly defined agency and facility provider initiatives will help make sure we are all aligned in this objective. Section 410.1003 reiterates guiding principles of the FSA for the UC Program, and we welcome what is outlined to tailor the care of unaccompanied children to individualized needs and ensure the protection of unaccompanied children from those looking to exploit or victimize them. This section of the proposed rule is critical as we continue to see instances of abuse and exploitation of unaccompanied children in the United States by human traffickers and employers. The Federal Government should continue to allocate resources to address this ever-present problem. It is also important to facilitate holistic communication in implementing a plan for monitoring and follow-up for children once they are released from a residential facility.

### **Subpart C - Releasing an Unaccompanied Child From ORR Custody**

### **§ 410.1204**

Under Section 410.1204(d), ORR proposes that the home study would provide its report to the potential sponsor if the release request is denied, as well as any subsequent addendums. While we recognize that, in most cases, explaining the purpose of a home study is necessary and important, we also find it important to note that if there are concerns about a sponsor’s intention then this may provide opportunities to fabricate information to receive a favorable home study recommendation. Additionally, many children are referred for home studies for past abuse, neglect, or trauma, and depending on their age the child may not consent to have this information shared with a sponsor. This is a common difficulty when conducting home studies, but children’s wishes should always be respected when it comes to sharing confidential information, particularly with non-parent sponsors.

ORR previously proposed sharing home study reports with sponsors who were denied. We find this proposed practice to be highly problematic because, as previously mentioned, the report contains confidential information related to the child's history: sharing that with a denied sponsor without the child's consent is in violation of ORR's own policies. Sponsors can receive an explanation as to why they were denied, but it should protect the child's right to confidentiality, and in cases where it is determined that the sponsor's intentions may be malicious, not shared at all.

### § 410.1205 & 410.1206

Section 410.1206 contains procedures for parents and legal guardians of unaccompanied children to appeal a release denial. We are concerned that this section lacks detail surrounding what information is protected and how such hearings would take place/who has jurisdiction over them. We are greatly concerned over areas in Section 410.1205 that reference both potential sponsors and unaccompanied children to have assistance of counsel **at no cost to the Federal Government**. Expecting an unaccompanied child to retain needed counsel at no cost to the government seems infeasible and problematic.

### § 410.1210

We commend ORR's efforts to improve and expand access to Post Release Services (PRS) for unaccompanied children and applaud ORR's goal to provide universal PRS by Fiscal Year (FY) 2025. We emphasize the importance of PRS in ensuring a child's successful integration into their communities as well as their access to essential services. Despite valiant efforts to expand PRS, we recognize existing challenges surrounding funding levels and provider capacity. In FY 2022, less than 50 percent of unaccompanied children received PRS.<sup>1</sup> Considering such challenges and a preexisting waitlist of eligible children to receive PRS, we encourage ORR to set a plan for achieving universal PRS by 2025 and that this plan be made accessible to the public.

Considering challenges surrounding funding and its changing nature, we encourage ORR to provide clarity and more specifics in areas where appropriations would impact the ability to carry out the proposed rule. Section 410.1210(c) further lists situations where ORR may, within its discretion, refer unaccompanied children for PRS, expanding upon established situations. Although we welcome such additions, considering future scenarios around funding and capacity, we recommend ORR provide specifics regarding eligibility should there not be adequate appropriations to achieve universal PRS by 2025. In its proposal to provide "additional consideration" to "unaccompanied children with certain needs," ORR lists needs to include and notes that the list is not limited to those written. Within an unpredictable funding environment, a clearer definition as to what "additional consideration" implies and specifics regarding eligibility

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<sup>1</sup> Office of Refugee Resettlement. "Fact Sheets and Data." October 13, 2023.  
<https://www.acf.hhs.gov/orr/about/ucs/facts-and-data#Home%20Studies%20and%20Post-Release%20Services>.

would be important for providers to reference. This also applies to Section 410.1210(g), where ORR proposes to codify timeframes in which PRS providers are required to start PRS for unaccompanied children once they are released from ORR care. Such timeframes are nearly fully dependent on appropriations and available providers, so if funding cannot be guaranteed, we recommend providing better detail as to how such impacts on a timeframe would be mitigated.

Also under proposed Section 410.1210(c), we recommend ORR provide clarity regarding its referrals of unaccompanied children for PRS after becoming aware of the situations listed via post-release notifications of concern or calls to its national call center. Under the proposed rule, ORR would require the PRS provider to follow up with the child and assess whether PRS would be appropriate. However, a notification of concern would only come from an active PRS case or the call center. If PRS providers are submitting a notification of concern, then that indicates they are currently providing PRS and feel it is appropriate. PRS providers receive the cases and provide services. ORR would need to make that determination if a provider is not involved.

We note and welcome under proposed Section 410.1210(d) the importance of PRS assessments that are developmentally appropriate for the child. We also recommend ORR work collaboratively to develop an assessment that all PRS providers use. As care providers for unaccompanied children, we are aware of complications that can arise due to variation within assessments. All care providers must use the Unaccompanied Children Assessment, yet variation is permitted with PRS providers, which in some cases has led providers to experience issues with data collection and variations in how they assess need or lack thereof, thus risking discrepancies and protection gaps.

We appreciate ORR's request noted in the Preamble regarding Section 410.1210 for comment on whether it should codify Safety and Well Being Follow Up calls (SWB calls) and whether ORR should integrate SWB calls into PRS. As a collective group that includes organizations providing PRS to unaccompanied children, we see value in ORR integrating SWB calls into PRS, as PRS providers are charged to work with children post-release. Often shelters and other care providers are located at a distance from where children are released, whereas PRS providers research and find resources, develop relationships and partnerships, and engage with community stakeholders where children are released. Integrating SWB calls into the scope of PRS has the potential to enhance their effectiveness. However, we do note that at the current funding level of PRS and limited provider capacity, adding SWB calls to the services PRS providers facilitate could place additional strain on providers and lengthen the waitlist. We recommend that to integrate SWB calls into PRS, ORR fund additional PRS providers to conduct calls.

In the proposed rule, ORR also seeks feedback on expanding PRS and incorporating three "levels" of PRS. We believe that these three levels of PRS will overall be beneficial to unaccompanied children and strengthen delivery and management of these services for PRS providers. However, language around each level of service having "different levels of

engagement” is vague and presumes amount of contact rather than variation in services. Current policy generally distinguishes service levels by type of contact and frequency of such contact. We recommend ORR better specify what each level of PRS should provide. We also find the explanation of “intensive home engagements” to be vague and request ORR clarify what their desired outcome for Level 3 PRS is.

In addition, our previously expressed concern regarding variation in PRS assessments should be considered in discussing levels of PRS. By having different assessments, each provider will have varying definitions of cases that merit Level 1, 2, or 3 PRS. For example, one provider could determine that, for them, a case should receive Level 3 PRS, but another provider’s assessment could deem a case at Level 2. This reiterates the need for a uniform assessment that in turn achieves consistent determinations of PRS levels.

Under proposed Section 410.1210(e)(3), ORR would require PRS providers to document all ongoing check-ins and home visits as well as the progress and outcomes of those home visits. Under proposed Section 410.1210(f)(2), ORR would require PRS providers to document any community resource referrals and their outcomes. These proposals give us pause as increased data gathering on children post-release without the infrastructure to support this and without objectives on the use and utility of such data is problematic for privacy reasons. We request ORR provide more detail as to why this data is desired by the Office and clarity around how they plan to use it.

#### **Subpart D - Minimum Standards and Required Services**

As care providers, we hold in the highest regard the principles of treating unaccompanied children in Federal Government custody with dignity and respect. We commend ORR’s commitment to do the same and setting standards and services that uphold said principles. We note that information outlined in Subpart D originates from the FSA and ORR is required to include such information. However, we find that parts of Subpart D of the proposed rule fall short in addressing the full scope of current needs of unaccompanied children. The standards, originating over 20 years ago, do not align with the present demographics and short stays in ORR shelter care. For example:

410.1302 (c) (10) - Compliance with phone call requirements as specified in this section is achievable, however, it was already superseded by policy changes regarding phone calls.

410.1302 (c) (13) - In general, it would be more beneficial to specify the purposes of the Legal Services Provider and scope of work and authority. In this section, it would be beneficial to focus this provided information on more practical areas such as the process for employment approval, permissible and prohibited work, awareness of human trafficking, how to remain safe if engaging in employment without the necessary work authorization documentation.

We recommend where possible a shift in focus, de-prioritizing traditional subject learning for programs with brief lengths of stay. Instead, we propose an emphasis on acculturation, language acquisition, and life skills tailored to age-appropriate groups. Additionally, we recommend a stronger focus on psychosocial education and self-regulation techniques to better prepare children for their transition out of ORR care. The current emphasis on subject matter education, in our view, is disproportionate to the needs of unaccompanied children in ORR care.

### **Subpart H - Age Determinations**

We recognize ORR's obligation to make prompt age determinations for individuals in its care. This underscores the importance of having clear procedures and protections in place that prevent wrongful age determinations and uphold a fair, consistent, and reliable process, particularly for children.

In this regard, we request ORR provide additional information to clarify its age determination procedures. This includes questions surrounding what happens for a child while the age determination process is ongoing; what occurs in the event that the totality of evidence is inconclusive; what happens for children who claim to be adults or present paperwork as adults but are suspected to be minors; detail surrounding the use of social media, internet, and pictures in the process of age determination; and details surrounding protective plans in place in the event potential adults are placed with children for a period of time.

We recommend that consulate-verified birth certificates where possible be standard practice for age determination to prevent errors that could potentially result in a child being sent to an adult facility, as we have seen cases of children coming back to ORR for this reason.

### **Subpart I - Emergency and Influx Operations**

We express concerns regarding the absence of explicit delineation between EIS and ICF in relation to standard programs and/or their distinction from each other.

Our recommendation is to remove EIS and establish it as a distinct Subpart, particularly emphasizing its exclusive use during emergency declarations. We propose defined time frames for emergency declarations, considering the changes in capacity facilitated by the IDIQ vehicle which provides access to multiple ICFs. Our recommendation is to remove EIS and establish it as a distinct and separate Subpart, particularly emphasizing its exclusive use during emergency declarations rather than as an emergency response to sudden influx. Additionally, we suggest a proactive approach by ORR to address potential influx situations, ensuring readiness for accommodating children and minimizing the risk of maltreatment at the border.

## **Subpart K - UC Office of the Ombuds**

The undersigned organizations welcome the creation of an independent UC Office of the Ombuds to promote the protections for all children in ORR care and ensure that the best interests of the child are centered in all decisions and actions relating to the care and custody of unaccompanied children. We also support that the Office of the Ombuds would operate as an independent and impartial entity, however, unlike the Flores monitor, the Office of the Ombuds would not have the authority that equates to a monitor appointed by court ordered consent decree. It is evident that the framework for the Office of the Ombuds has been established utilizing the Administrative Conference Recommendations (ACUS) as a best practice standard as well as standards from other best practice organizations, thus providing a solid foundation for the framework. Considering such factors, we present the following concerns and proposed recommendations as it relates to Subpart K:

### **§ 410.2000**

The biggest difference between the Office of the Ombuds and the Flores monitor is that the Ombuds does not have the authority that equates to a monitor appointed by court ordered consent decree. Instead, the ombuds is established as an independent mechanism to identify and report concerns, investigate claims, collaborate with ORR to resolve issues and publish reports.

We are concerned that there is no defined mechanism by which the Office of the Ombuds will be evaluated for effectiveness, best practice standards, etc. We recommend the establishment of an annual review process for the Office utilizing ACUS or other best practice standards. ACUS recommends periodic evaluation of Office of the Ombuds management and program effectiveness and provides structure for both internal and external evaluation processes.<sup>2</sup>

Under Section 410.2003, we are concerned that the proposed minimum personnel requirements for the Ombuds are brief and do not include some critical industry standard experience.

We suggest minimum requirements for the Ombuds to include: knowledge and experience in conducting investigations; Qualified to analyze regulatory guidelines, policy and procedures, legal frameworks and statutes; Experience in the establishment and assessment of Quality Assurance / Improvement practices; Certification as an ombudsman through the International Ombudsman Association (IOA).<sup>3</sup>

Additionally, under Section 410.2003 we are concerned to see that the Ombuds has discretion to engage additional staff as it deems necessary, but that there is no guidance on what kind of staff this may be. We encourage that in staffing the Office of the Ombuds, staff with lived experience

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<sup>2</sup> Admin. Conf. of the U.S., Recommendation 2016-5, The Use of Ombuds in Federal Agencies, 81 Fed. Reg. 94,316 (Dec. 23, 2016).

<sup>3</sup> United States Ombudsman Association, Governmental Ombudsman Standards, Approved October 14,2003.



as an unaccompanied child or who have regular consultation with those who have lived experience are considered, and that this informs the operational structure of the Office. Individuals with lived experience offer a deeper understanding of the needs, challenges and system realities of young people being served.<sup>4</sup> The involvement of individuals with lived experience promotes increased transparency and embeds the recommendations of youth and families that have long been underrepresented within Federal programs. Hearing and learning from those that have been most impacted by the system elevates their expressed needs as benchmarks for continuous improvement.

Section 410.2004 describes limits of confidentiality and the current text states that confidentiality must be preserved “except in instances of imminent harm or judicial action and is prohibited from using or sharing information for any immigration enforcement related purpose.” This does not explicitly indicate whether the Ombuds and associated staff are considered mandated reporters. We suggest establishing the expectation that the Ombuds and associated staff are considered mandated reporters and thus are required to adhere to mandated reporting laws in the State in which they are acting in their professional capacity.

We are concerned by the lack of a Charter or Terms of Reference, which are recommended by the International Ombuds Association (IOA). IOA recommends that each Ombuds office establish a Charter or Terms of Reference which articulates the principles of the Ombuds function within the organization, establishes standards of practice and a code of ethics. We recommend that the Office of the Ombuds shall establish standards of practice and a code of ethics that adopts best practice standards as established by the IOA and other leading Ombuds organizations. These standards shall be presented and approved by agency leadership and reviewed annually to ensure ongoing alignment with best practice standards.

Although mentioned in the “key principles” narrative, the components of the credible review process are not addressed by the proposed rule. According to the United States Ombudsman Association’s (USOA) Governmental Ombudsman Standards, “The concept of a credible review process encompasses the authority granted to the Ombudsman and the Ombudsman’s responsibilities towards the complainant, the subject of a complaint, the appointing entity, and the public.”<sup>5</sup> The lack of detail on the credible review process is concerning – if the process used to investigate complaints is flawed, then the recommendations are more likely to be ignored or misinterpreted.

We encourage ORR to examine the standards for a credible review process detailed within the USOA Governmental Ombudsman Standards and adopt minimum expectations for the review

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<sup>4</sup> Children’s Bureau. (2021). 2021/2022 Prevention resource guide. U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth & Families, Office on Child Abuse and Neglect.

<sup>5</sup> United States Ombudsman Association, Governmental Ombudsman Standards, Approved October 14,2003.

process within the final rule. Minimum expectations should include a defined and transparent process for how complaints are to be made, received, and acted upon, including the scope and manner of investigations; The subjects of the Ombuds reports should be consulted and afforded the opportunity to respond to the report prior to its being published; Steps that are to be taken when a complaint is not accepted for investigation; Timeframe expected for Ombuds to complete an investigation; Expectations for Ombuds to provide updates on the status of the investigation to both the complainant and the subject.

Section 410.2002 (a) contains language proposing the scope of activities that *may* fall under the purview of the Ombuds. We recommend ORR establish minimum standards or expectations for the scope and responsibilities of the role.

Additionally, it is being proposed that the Ombuds will report directly to the ACF Assistant Secretary. We are concerned that this reporting structure does not offer enough distance/separation from operations within the Division of UC Services to mitigate potential conflicts of interest and promote impartiality and independence. Best practices supported by the ABA and ACUS recommend that in order for Ombuds offices to be credible and effective, they should be independent in structure, function and appearance. We recommend the Ombuds should report to the HHS Secretary. This reporting structure would mirror the current structure in place for the Office of Inspector General.

We note and are concerned by areas in which the Office of the Ombuds is given significant decision-making authority and discretion with no structure, framework or minimum standards being provided within the proposed rule. For example, in Section 410.2003(d), the Ombuds shall establish procedures for training, certification, and continuing education for staff and other representatives of the Office. We encourage ORR to consult the ACUS framework for training standards that link the Ombuds to professional ombuds organizations and establish minimum standards for training and certification included within the proposed rule.<sup>6</sup> Training and skills development should incorporate participating in relevant professional working groups. Minimum standards should include, but not be limited to Mandatory Reporting Laws and Ombuds standards and practices offered by an ombuds professional association, ombuds training program and/or ombuds working groups.

Lastly, under Section 410.2001, the Office has discretion to determine the best approaches to providing outreach and awareness of the ability to act as a neutral third party. Again, no minimum standards or timeframes for when this will occur are established. We recommend establishing a timeframe by which the Office will make information on how to contact them publicly available. Additionally, there should be a requirement for contact methods to be reviewed annually for effectiveness. At minimum, the Office shall establish a toll-free hotline to

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<sup>6</sup> Admin. Conf. of the U.S., Recommendation 2016-5, The Use of Ombuds in Federal Agencies, 81 Fed. Reg. 94,316 (Dec. 23, 2016).

be published on the agency website, and in flyers provided to ORR personnel and ORR care providers. Additionally, the agency website shall include identity of the Ombuds, contact information along with a description of their role and scope of responsibility.

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The undersigned organizations thank ORR for the opportunity to submit comments regarding this proposed rule and look forward to continuing dialogue about our remarks.

Sincerely,

Bethany Christian Services  
Board of Child Care  
Crittenton Services for Children and Families  
Gulf Coast JFCS  
Heartland Human Care Services  
Hillsides  
Holy Family Institute  
Lutheran Immigration and Refugee Service (LIRS)  
Lutheran Social Services of the National Capital Area (LSSNCA)  
NAFI Connecticut, Inc.  
National Youth Advocate Program  
The Children's Village  
There Is Hope TFC  
Timber Ridge School  
U.S. Committee for Refugees and Immigrants (USCRI)