



Laurie Ball Cooper
Legal Director
Laurie.BallCooper@ayuda.com
202-349-0656

April 16, 2021

Via email, to infocollection@acf.hhs.gov

Administrative Headquarters
1413 K Street NW
STE 500
Washington, DC 20005
(202) 387-4848

Mary B. Jones, ACF/OPRE Certifying Officer
Administration for Children and Families
Office of Planning, Research, and Evaluation (OPRE)
330 C Street SW, Washington, DC 20201

Washington Office
6925B Willow Street NW
Washington, DC 20012
(202) 387-4848

RE: Request for Public Comment, FR Doc. 2021-03261, Proposed Information Collection Activity; Legal Services for Unaccompanied Alien Children (New Collection)

Virginia Office
2701 Prosperity Avenue
STE 300
Fairfax, VA 22031
(703) 444-7009

Ayuda respectfully submits this comment for the above-referenced “Notice for Proposed Information Collection Activity” (Notice) from the Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services (ORR). The Federal Register published the Notice on February 18, 2021.¹ ORR requests comment on several forms about legal services for Unaccompanied Children² (UCs, “[immigrant] child(ren)” or “[immigrant] kid(s)”).³ ORR seeks input on proposed information collection utility, quality, and clarity, including ways to minimize respondent burden.⁴

Ayuda is a 501(c)(3) organization that provides holistic legal, social, and language access services to low-income immigrant community members in Virginia, Maryland, and the District of Columbia. For over forty-five years, we have served tens of thousands of immigrants through our programs.

Maryland Office
8757 Georgia Ave
STE 800
Silver Spring, MD 20910
(240) 594-0600

Each year, Ayuda provides legal consultations to thousands of noncitizens, including UCs. In 2019, children and youth ages 0–17 constituted 15% of Ayuda’s total clients. The DC metro area—our community—has experienced a drastic uptick in UCs population in recent years. Ayuda represents immigrant children in ORR custody, including consultations and representation for detained children, and “Know Your Rights” presentations. We also represent kids released from ORR custody to sponsors in the DC region, in matters before USCIS and EOIR.

www.ayuda.com

¹ Proposed Information Collection Activity; Legal Services for Unaccompanied Alien Children (New Collection), 86 Fed. Reg. 10082 (proposed Feb. 18, 2021).

² Ayuda uses the term “Unaccompanied Children” (short terms provided above) for kids who meet ORR’s definition of “Unaccompanied Alien Children.” 6 U.S.C. § 279; 8 U.S.C. § 1232. This term aligns with the Biden Administration’s directive for agencies to use “more inclusive language” when referring to immigrants. See Stef W. Kight, *Scoop: Biden to Use “More Inclusive” Immigration Terms*, AXIOS (Feb. 16, 2021), [Scoop: Biden to use “more inclusive” immigration terms - Axios](https://www.axios.com/2021/02/16/biden-immigration-terms) (encouraging replacement of words such as “alien”).

³ 86 Fed. Reg. 10082.

⁴ 86 Fed. Reg. 10084.

Overview

Ayuda acknowledges that ORR has statutorily delegated authority to coordinate and place UCs in its custody.⁵ However, ORR is not without limits on its authority.⁶ ORR *must* “ensur[e] that the interests of the child are considered in decisions and actions relating to the care and custody of [UCs.]”⁷ The proposed bond hearing forms⁸ in the Notice do not achieve ORR’s mandate of placing UCs “in the best interests of the child.”⁹ The proposed bond hearing forms also do not promote judicial and agency efficiency. The spring 2021 “influx” of UCs at the southern U.S. border exacerbates both of these concerns. Second, ORR has a statutory mandate to provide UCs with access to legal services, including representation in legal proceedings and legal orientation programs.¹⁰ The proposed legal representation forms¹¹ in the Notice hinder a child’s access to counsel, and the child’s ability to assert meritorious legal claims in immigration proceedings.

I. The proposed bond hearing forms do not achieve ORR’s mandate of placing UCs “in the best interests of the child,” or promote judicial or agency efficiency—concerns exacerbated by the UCs “influx” in spring 2021.

A. ORR has a mandate to care for, place, and release UCs—timely, safely, *and* legally.

ORR relies on power vested through the Homeland Security Act of 2002 (HSA) and the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) to interact with UCs.¹² The HSA delineated ORR’s UCs care functions as *distinct* from the Department of Homeland Security (DHS) enforcing immigration law.¹³ This distinction reflects clear congressional intent for ORR to focus on child wellbeing, *not* to carry out the duties of a law enforcement agency.¹⁴

ORR recognizes part of its congressional mandate as “prompt place[ment]” of a UC “in the least restrictive setting that is in the best interests of the child.”¹⁵ The agency states it considers “child welfare best practices” and “legal requirements” to make custody determinations and

⁵ 6 U.S.C. § 279(b)(1); 8 U.S.C. § 1232.

⁶ 6 U.S.C. § 279; 8 U.S.C. § 1232.

⁷ 6 U.S.C. § 279(b)(1)(B); *see* 8 U.S.C. § 1232(c)(2)(A) (articulating standard as “best interest of the child”); *see also* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] arts. 3 (noting that “in all actions concerning children . . . the best interests of the child shall be a primary consideration”). The US is a signatory.

⁸ This Comment opines on these bond hearing forms: **Form LRG-7/7s**, *Request for a Flores Bond Hearing*; **Form LRG-8A**, *Motion to Request a Bond Hearing*; **Form LRG-8B**, *Motion to Request a Bond Hearing – Non-Secure Custody*. *See* 86 Fed. Reg. 10083 (proposed forms themselves on file with ORR).

⁹ *About the Program*, OFF. REFUGEE RESETTLEMENT (last updated Mar. 17, 2021), [About the Program | The Administration for Children and Families \(hhs.gov\)](#).

¹⁰ *See* 8 U.S.C. §§ 1232(c)(4) (legal orientation programs); 1232(c)(5) (access to counsel).

¹¹ This Comment opines on these legal representation forms: **Form LRG-5/5s**, *Legal Service Provider List for UAC in ORR Care*; **Form L-2**, *Specific Consent Request Case Summary* (proposed forms themselves on file with ORR).

¹² FACT SHEET: UNACCOMPANIED CHILDREN (UC) PROGRAM, OFF. REFUGEE RESETTLEMENT (Apr. 2, 2021) [hereinafter April 2021 UC Fact Sheet]; *see generally* KIND BLUEPRINT: CONCRETE STEPS TO PROTECT UNACCOMPANIED CHILDREN ON THE MOVE, KIDS IN NEED OF DEF. (Nov. 2, 2020), [KIND Blueprint: Concrete Steps to Protect Unaccompanied Children on the Move - KIND \(supportkind.org\)](#) [hereinafter KIND Report], at 16.

¹³ KIND Report, at 16.

¹⁴ KIND Report, at 16.

¹⁵ April 2021 UC Fact Sheet (citing 8 U.S.C. § 1232(c)(2)); *infra* p. 4.

placement decisions.¹⁶ ORR uses a three tier placement system to process kids “timely and safely” through its custody.¹⁷ UCs can be placed in a nonsecure, “staff secure,” or “secure” facility.¹⁸ ORR places children in a secure setting when they present “problem behavior” and pose an escape risk.¹⁹ A secure setting has procedures and facilities similar to U.S. correctional facilities.²⁰

ORR claims to use bond hearings to facilitate releasing UCs in an efficient, safe, and timely way.²¹ An immigrant child in ORR custody has a right to seek a bond hearing with an Immigration Judge (IJ).²² At this hearing—commonly called a *Flores* hearing—the UC moves the court for release from ORR custody, or to have her placement reconsidered.²³ The requestor has the burden to prove a child is not a danger to himself or the community.²⁴ Even with a favorable ruling by the IJ, the UC will stay in ORR custody *until* ORR finds an appropriate sponsor.²⁵

Given concerns about liberty and vulnerability, U.S. law affords UCs additional due process and legal protections while in ORR custody.²⁶ In custody placements, the TVPRA requires ORR to consider several factors.²⁷ In a *Flores* hearing, a child maintains meaningful rights including: (1) right to be represented by counsel; (2) right to have detention assessed by IJ; (3) right to present, examine, and rebut evidence; and (4) right to build record on custody.²⁸ In December 2020, the Ninth Circuit affirmed that the Flores Agreement provides UCs with substantive and procedural rights and benefits.²⁹ The Circuit Court stressed the need for kids to have a “meaningful forum” for challenging ORR decisions about their detention.³⁰

In addition to U.S. law, ORR cannot act contrary to the “best interest of the child” principle from the UN Convention on the Rights of the Child (CRC).³¹ The “best interest of the child”

¹⁶ ORR GUIDE: CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED, OFF. REFUGEE RESETTLEMENT (last reviewed Feb. 17, 2021) [hereinafter ORR UC Policy Guide], at Section 1.1–1.2.

¹⁷ See ORR UC Policy Guide, at Introduction, Section 1.2.4.

¹⁸ See ORR UC Policy Guide, at Section 1.2.4 (listing over fifteen factors ORR uses to make placement decisions).

¹⁹ ORR UC Policy Guide, at Section 1.2.4.

²⁰ ORR UC Policy Guide, at Section 1.2.4.

²¹ ORR UC Policy Guide, at Section 2.9.

²² ORR UC Policy Guide, at Section 2.9; Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1998) [hereinafter *Flores* Settlement Agreement]; see also PRACTICE ALERT ON FLORES V. SESSIONS, IMMIGR. L. RESOURCE CTR. (July 2017), [Flores v. Sessions Practice Alert | July 2017 \(ilrc.org\)](#) [hereinafter IRLC Practice Alert 2017]. This is a right afforded unless affirmatively waived. See *Flores v. Rosen*, 984 F.3d 720, 734 (9th Cir. 2020) (holding that UCs in secure/staff-secure facilities have hearings *automatically* unless they refuse).

²³ ORR Policy Guide, at Section 2.9; *Flores* Settlement Agreement. In practice, the UC moves the court by completing a “Request for a Flores Bond Hearing Form” while in ORR custody. The UC, her legal representative, or parent/guardian may file a “Motion to Request a Bond Hearing.” ORR Policy Guide, at Section 2.9.

²⁴ See ORR Policy Guide, at Section 2.9.

²⁵ See ORR Policy Guide, at Section 2.9 (emphasizing that IJs do not rule on ORR custody placement or conditions).

²⁶ *Flores v. Rosen*, 984 F.3d at 734. The TVPRA “partially codified” the Flores Settlement’s heightened legal procedures for UC. See generally KIND Report, at 5.

²⁷ See Adrián E. Alvarez, *Enabling the Best Interest Factors*, 2 ARIZ. STATE L. J. ONLINE 90, 92–93 (2020), [Alvarez-Final.pdf \(arizonastatelawjournal.org\)](#) (articulating these factors).

²⁸ See *Flores v. Rosen*, 984 F.3d at 734 (citing to Flores Settlement Agreement).

²⁹ *Flores v. Rosen*, 984 F.3d at 729.

³⁰ *Flores v. Rosen*, 984 F.3d at 733–34; see also IRLC Practice Alert 2017, at 1 (envisioning what an internal ORR process might look like, and how it would be legally deficient in protecting UC rights).

³¹ CRC art. 3; see also FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN (May 2016), SUBCOMM. ON BEST INTERESTS OF THE INTERAGENCY WORKING GRP. ON UNACCOMPANIED & SEPARATED

considers a child's safety, health and wellbeing, family integrity, liberty, identity, and expressed interests.³² The Convention targets four areas directly related to UCs: (1) Article 37: freedom from arbitrary arrest and detention; (2) Article 22: protections for children seeking asylum, (3) Article 37: appropriate treatment for children in detention; (4) Article 9, maintaining family unity.³³ The CRC also guarantees that a child has a procedural right to assess positive and negative consequences of an action involving the child.³⁴

B. ORR's approach to placing UCs in custody facilities—the condition precedent for a child to seek a bond hearing—is not in the best interests of the child.

ORR maintains it ensures “the interests of the child are considered in decisions related to the care and custody of UCs.”³⁵ However, ORR's current facility placement approach raises serious questions on how ORR considers UCs health and wellbeing, liberty, and family integrity, along with due process concerns.

1. Best interests of the child—health and wellbeing, liberty, and family integrity.

There is scientific consensus that even short stays in ORR custody have long-term, negative impacts on immigrant child health.³⁶ The American Academy of Pediatrics (AAP)—a leading voice on kids' health—holds that “there is no evidence that any time in detention is safe for the child.”³⁷ AAP also calls for “limited exposure of any child” to current ORR facilities.³⁸ Even brief detention periods lead to lasting psychological harm for children.³⁹ A recent study in the scientific journal *Social Science & Medicine* found “high rates of emotional distress” for UCs, including 32% of the children in the study showing signs of emotional problems.⁴⁰

CHILD., Best Interests Framework (georgetown.edu) [hereinafter Best Interests Framework], at 4. While the US has not ratified the CRC, as a signatory it is “obliged to refrain from acts that would defeat the agreement's object and purpose.” Alvarez, *Enabling the Best Interest Factors*, at 97. U.S. state courts and other child welfare agencies also apply the “best interests of the child” standard. Alvarez, *Enabling the Best Interest Factors*, at 90.

³² See Best Interests Framework, at 5.

³³ Julie M. Linton et. al., *Policy Statement: Detention of Immigrant Children*, 139 PEDIATRICS 4 (Apr. 2017), Detention of Immigrant Children | American Academy of Pediatrics (aappublications.org) [hereinafter AAP Policy Statement] (citing the CRC).

³⁴ Alvarez, *Enabling the Best Interest Factors*, at 97–98.

³⁵ April 2021 UC Fact Sheet.

³⁶ See generally AAP Policy Statement; Altaf Saadi et al., *Understanding US Immigration Detention: Reaffirming Rights & Addressing Social-Structural Determinants of Health*, 22 HEALTH & HUMAN RIGHTS J. 187 (June 2020), Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health – Health and Human Rights Journal (hhrjournal.org); Rhitu Chatterjee, *What are Long-Term Mental Health Impacts for Kids in Migrant Detention Centers?*, NPR (Aug. 23, 2019), What Are Long-Term Mental Health Impacts For Kids In Migrant Detention Centers? : Shots - Health News : NPR (citing *Social Science & Medicine*) [hereinafter Chatterjee 2019 NPR Article].

³⁷ AAP Policy Statement, at 6.

³⁸ AAP Policy Statement, at 1.

³⁹ See Rachel Pearson, *Opinion: No Amount of Detention is Safe for a Child. Here are some Better Solutions for Migrant Kids.*, WASH. POST (Mar. 4, 2021), Opinion | No amount of detention is safe for a child. Here are better solutions for migrant kids. - The Washington Post (telling pediatrician's experience working with immigrant kids).

⁴⁰ Chatterjee 2019 NPR Article.

Secure and staff-secure facilities particularly implicate a key child best interest—liberty. UC held in staff-secure or secure settings face a “substantial loss of liberty.”⁴¹ Kids may be placed in these heightened detention facilities without knowing the information ORR used to make the determination.⁴² ORR’s decision can be based on arbitrary and unfounded allegations by staff, or self-disclosures prone to error.⁴³ A child determined to be a threat to herself or others could be detained indefinitely.⁴⁴ Children in secure or staff-secure facilities often spend additional weeks or months in ORR custody than those in less restrictive settings.⁴⁵ In September 2019, discharged UCs ever placed in more restrictive settings were detained for ~198 days, compared to ~52 days for kids in a nonsecure facility.⁴⁶ Transfers between different supervision levels also increase the total detention time, and likelihood of placement in a more restrictive setting.⁴⁷

UCs in ORR custody cannot reunite with family—a key concern under the CRC and ORR’s own authorizing statutes—while in detention. Ayuda has seen our child clients thrive upon reunification with family members—enrolling and succeeding in school, receiving case management and/or mental health services, and pursuing immigration relief to which they are entitled, among other things.

2. Best interests of the child—due process concerns.

The Flores Settlement and CRC require ORR to establish mechanisms for ensuring UCs due process rights.⁴⁸ The right to due process includes a right to fair procedures, including an opportunity to be heard. Due process protections are particularly important for immigrant children. UCs may find themselves in ORR Custody with little control over their circumstances.⁴⁹ They face obstacles that adults in immigrant detention face—such as gathering evidence—but with less knowledge of the legal system. Examples of current UC due process concerns include: (1) kids being woken in the middle of the night and taken to more secure facilities, without prior notice;⁵⁰ (2) difficulties in a detained child obtaining comprehensive immigration representation;⁵¹ (3) UCs video appearing in Immigration Court, where they are less likely to succeed than in person.⁵²

⁴¹ See Neha Desai et al., CHILD WELFARE & UNACCOMPANIED CHILDREN IN FEDERAL IMMIGRATION CUSTODY: A DATA & RESEARCH BASED GUIDE FOR FEDERAL POLICY MAKERS, NAT’L CTR. YOUTH L. (Dec. 2019), [Briefing-Child-Welfare-Unaccompanied-Children-in-Federal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf](#) (youthlaw.org) [hereinafter NCYL Report], at 8, 17.

⁴² NCYL Report, at 16.

⁴³ NCYL Report, at 16.

⁴⁴ See ORR UC Policy Guide, at Section 2.7.4.

⁴⁵ Alvarez, *Enabling the Best Interest Factors*, at 106.

⁴⁶ NCYL Report, at 16.

⁴⁷ NCYL Report, at 7.

⁴⁸ Flores Settlement Agreement; see CRC art. 3 (stating child needs opportunity to assess positive and negative equities of a decision involving her).

⁴⁹ See Anna Laquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 117 WASH. U. GLOBAL STUD. L. REVIEW 589, 590 (2018), https://openscholarship.wustl.edu/law_globalstudies/vol17/iss3/.

⁵⁰ NCYL Report, at 6, 17.

⁵¹ *Supra* Part II.

⁵² See generally IMMIGRATION HEARINGS BY VIDEO: A THREAT TO CHILDREN’S RIGHT TO FAIR PROCEEDINGS, YOUNG CTR. FOR CHILD. RIGHTS (Jan. 2020), <https://static1.squarespace.com/static/597ab5f3beba0a625aaf45/t/5e4d5c0cc48abe2cc9bd102a/1582128140439/Young+Center+VTC+Report+Updated+January+2020.pdf>.

Bond hearings are a fundamental procedural safeguard for kids in ORR custody to enforce their due process rights, reunite with family in the United States.⁵³ The Immigrant Legal Resource Center explains, in the context of children in secure settings:

“[T]he bond hearing may provide [UC] the opportunity to contest the basis for their level of confinement—their alleged risk to themselves or others or commission of a criminal offense. This is *incredibly important* as children in secure facilities often languish . . . without an opportunity to review the government’s evidence against them or rebut it in a meaningful way.”⁵⁴ [emphasis added]

C. The spring 2021 “influx” of UCs heightens “best interest” facility placement and due process concerns.

The current “influx” of UCs exacerbates the above-stated concerns on how ORR considers the best interests of immigrant children in its custody. The number of children in ORR has tripled in four months—from 1, 929 on October 31, 2020, to 6,581, on February 28, 2021.⁵⁵ As of February 28, 2021, more than 27% of UCs in ORR care are under the age of 14.⁵⁶ Without enough ORR beds, some immigrant kids are stranded in CBP and temporary overflow facilities.⁵⁷ Effectively, ORR has a caseload larger than many state child welfare agencies handle.⁵⁸

Kids in ORR “emergency” or “influx” facilities have limited access to essential legal services, placing them at greater risk for being lost in the system.⁵⁹ ORR’s own Policy Guide shows how the Agency impermissibly relaxes legal services requirements in these facilities.⁶⁰ For example, Section 7.2.1 has a child *not* having an attorney of record as a positive factor for placing them in an unlicensed influx care facility.⁶¹ Section 7.6 allows ‘normal’ ORR facilities to get waivers to operate with influx facility requirements, thus lowering the services available to UCs.⁶² These sections exemplify how ORR is dodging mandate to consider “the best interests of the child” (from authorizing statutes, the Flores Settlement, and the CRC) under the umbrella of “emergency.” While some flexibility may be needed to handle an “influx,” it does not erase the due process and facility placement concerns present *even before* the current rise in UCs. In fact, strained agency resources will only intensify issues of child wellbeing and liberty.

⁵³ See generally IRLC Practice Alert 2017; *infra* Part I.D.

⁵⁴ IRLC Practice Alert 2017, at 2.

⁵⁵ *Latest UC Data – FY2021*, OFF. REFUGEE RESETTLEMENT (last updated Mar. 30, 2021), [Latest UC Data – FY2021 | HHS.gov](#) [hereinafter March 2021 UC Data].

⁵⁶ March 2021 UC Data.

⁵⁷ See generally Julia Ainsley & Alicia Victoria Lozano, *U.S. to Open Overflow Facility for Unaccompanied Migrant Children*, NBC NEWS (Mar. 20, 2021), [U.S. to open overflow facility for unaccompanied migrant children \(nbcnews.com\)](#); Camilo Montoya-Galvez, *Refugee Agency to Fast-Track Release of Some Migrant Children with Parents in the U.S.*, CBS NEWS (Mar. 23, 2021), [Refugee agency to fast-track release of some migrant children with parents in the U.S. - CBS News](#).

⁵⁸ Laquer Estin, *Child Migrants and Child Welfare*, at 600.

⁵⁹ See THE ORR & DHS INFORMATION-SHARING AGREEMENT & ITS CONSEQUENCES, MIGRATION & REFUGEES SERV. ET AL. (last revised Apr. 2019) (explaining limitations—note information-sharing agreement rescinded March 2021).

⁶⁰ See generally ORR Policy Guide, at Section 7.

⁶¹ ORR Policy Guide, at Section 7.2.1.

⁶² ORR Policy Guide, at Section 7.6.

With ORR’s overloaded system, tracking an immigrant child can be a “complete maze,”⁶³ even for zealous or experienced family members or legal advocates. Despite these children’s experiences, the federal government has shown “little urgency to hasten [family] reunifications”⁶⁴—a best interest factor, and the guiding purpose of ORR’s UCs program.

D. The proposed bond hearing forms should ensure that ORR considers the best interests of the child—by capturing the child’s own expressed views, and building in safeguards for understanding content—and promote judicial and agency efficiency.

Ayuda offers suggestions for the following proposed bond hearing forms: (1) **Form LRG-7/7s**, *Request for Flores Bond Hearing*; (2) **Form LRG-8A**, *Motion to Request a Bond Hearing*, and **Form LRG-8B**, *Motion to Request a Bond Hearing – Non-Secure Custody*.

1. Form LRG-7/7s, *Request for Flores Bond Hearing*.

ORR should focus on how **Form LRG-7/7s** can accurately capture the child’s view on whether to request, or withdraw a request, for a *Flores* bond hearing. To not contravene the *Flores* Settlement or CRC, ORR must ensure the form actually expresses the view of the child, appropriate to his age, experience, and development. The form should reflect that the child understands the positive and negative equities in making the *Flores* bond hearing decision. Ayuda proposes these recommendations for Form LRG-7/7s:

- **Provide simplified versions of Form LRG-7/7s—according to the UC’s age—with age-appropriate instructions.** The version breakdown could follow ORR’s internal data organization for age: 0–5; 6–12; 13–14; 15–16; 17+. The versions could also follow recognized child development stages, such as this list adapted from the American Academy of Pediatrics: toddler (1–3); preschool (3–5); early grade school (5–9); late grade school (10–12); early teen (13–14); late teen (15–17).⁶⁵

For example, the *Flores* bond hearing form designed for younger UCs could replace the top paragraph description section with an infographic. The infographic would use pictures and development-appropriate words to explain what an IJ does, what happens in a *Flores* bond hearing, and how the UCs might interact with an IJ during the *Flores* bond hearing.

- **Include spaces for “check marks” next to technical terms, to verify that a UC actually understands what the term means.** Here is an example of “check box” placement:

Instruction: Place a check mark in the box next to the word(s) in red if you understand what the word(s) mean. If you do not understand the meaning, leave the box blank.

⁶³ Sarah Stillman, *The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights*, NEW YORKER (Oct. 11, 2018), *The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights* | The New Yorker [hereinafter Stillman 2018 New Yorker Article].

⁶⁴ See Stillman 2018 New Yorker Article.

⁶⁵ See *Ages & Stages*, HEALTHYCHILDREN.ORG (AM. ACADEMY PEDIATRICS), [Ages & Stages - HealthyChildren.org](https://www.healthychildren.org/ages-stages/) (last visited Apr. 14, 2021) (walking through child development stages).

*You have the opportunity as an unaccompanied alien child in the custody of the Office of Refugee Resettlement (ORR) to request a **Flores bond hearing** [] before an **immigration judge** []. In a Flores bond hearing, an immigration judge reviews your case to determine whether you **pose a danger to the community** [].*

Any reviewee of the Flores bond hearing form would have a better understanding of what terms may need to be further explained to the child, either by ORR staff or the IJ.

- **After the second “select one” choice set, and before “signature,” leave a set of lines for the child to express, in their own words, the request for the Flores bond hearing before the IJ.** Here is an example of this narrative space:

(Optional): In your own words, write why you want the immigration judge to hear your request for a Flores bond hearing, or why you want to withdraw that request.

2. **Form LRG-8A**, *Motion to Request a Bond Hearing*, and **Form LRG-8B**, *Motion to Request a Bond Hearing – Non-Secure Facility*.

- **Change ORR internal policy so that a child in a secure or staff-secure facility must only “opt-out” of a bond hearing.** In secure or staff-secure settings, the immigrant child is at greater risk for deprivation of liberty and due process, along with long-term impact on health and wellbeing. Kids in these restrictive settings should receive an *automatic* review of their placement every month, rather than needing to “opt-in” for a review.⁶⁶
- **Allow e-signatures and e-filing for bond hearing requests.** Attorneys and ORR providers already have strained time and resources in their representation/care of UCs. Allowing e-signatures and e-filings on bond hearing requests with the Immigration Court increases judicial and agency efficiency, facilitating faster reunification for immigrant kids.

II. The proposed legal representation forms hinder a child’s access to counsel, and the child’s ability to assert meritorious legal claims in immigration proceedings.

A. Evidence demonstrates that UCs are forced to navigate the immigration system without the assistance of counsel; thus, too large a burden is placed on the UCs.

Ayuda believes that “no one should face the immigration system without an attorney, least of all a child.”⁶⁷ However, an estimated 75 to 90% of UCs must move through their legal proceedings without any assistance from a legal representative.⁶⁸ Children at the age of five years old must complete and submit their own Flores bond hearing forms.⁶⁹ Yet, while so many UCs

⁶⁶ NCYL Report, at 18.

⁶⁷ *Children and Youth*, AYUDA, [Children and Youth | Ayuda](#) (last visited Apr. 14, 2021).

⁶⁸ See Carlee Goldberg, *Legal Aid for Unaccompanied Children in the U.S. Illegally*, NAT’L CONF. STATE LEGIS. (Sept. 2020), [Legal Aid for Unaccompanied Children in the U.S. Illegally \(ncsl.org\)](#).

⁶⁹ See Stillman 2018 New Yorker Article.

struggle to navigate the complexity of immigration proceedings, the courts only appoint legal counsel to a very limited number of UCs deemed to be particularly vulnerable.⁷⁰

The American judicial system has yet to properly address a UC's right to counsel; however, members of Congress are working to correct this oversight. In the 1993 *Flores v. Reno* case, the US Supreme Court established child welfare standards for immigration detention centers, covering topics including providing proper food and medical assistance for UCs; however, the Court failed to address the UC's right to counsel.⁷¹ Since the *Flores case*, members of Congress have introduced bills which mandate that all UCs receive legal counsel.⁷² Some of the currently pending bills including the following: Stop Cruelty to Migrant Children Act ([SB 2113/HB 3918](#)); Protecting Families and Improving Immigration Procedures Act ([SB 1733](#)); REUNITE Act ([HB 1012](#)); Central America Reform and Enforcement Act ([SB 1445](#)); Funding Attorneys for Indigent Removal Proceedings Act ([SB 2389/HB 4155](#)); Northern Triangle and Border Stabilization Act ([HB 3524](#)); Immigrant Detainee Legal Rights Act ([HB 1045](#)); and Protecting the Rights of Families and Immigrants Who Legally Entered From Detention Act ([SB 2396](#)).⁷³

Evidence demonstrates that whether a UC has a legal representative strongly influences the outcome of the child's case.⁷⁴ In 2014, 80% of the UCs without legal representation were deported compared to the 12% of the UCs with legal representation.⁷⁵ The complexities of an immigration case make it "virtually impossible to navigate protection systems without lawyers to assess their eligibility for humanitarian protection, assist with case preparation, and advocate for them during adversarial hearings."⁷⁶

B. The language used in the proposed forms is dense and incomprehensible to a child.

Most UCs are forced to argue in court alone when they are unable to even understand the language used in the forms, nevertheless the legal process itself.⁷⁷ The American Bar Association advocates for a fundamental change to the legal system's approach to UCs, calling for recognition that UCs need to be treated differently than adults due to the variances in age and development.⁷⁸ However, the language in the proposed forms is not congruent with this approach.

In the proposed **Form LRG-5/5s**, *Legal Service Provider List for UAC in ORR Care*, the UC must sign a statement that she received documents which explain her rights throughout her legal proceedings. Still, the form fails to say whether an officer explained the contents of the

⁷⁰ See Annie Chen, *An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings*, AM. BAR ASS'N (Jul. 14, 2014), [An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings \(americanbar.org\)](#).

⁷¹ See Chen, *An Urgent Need*.

⁷² See Chen, *An Urgent Need*.

⁷³ See Chen, *An Urgent Need*.

⁷⁴ See Goldberg, *Legal Aid*, at 32.

⁷⁵ See Goldberg, *Legal Aid*, at 32.

⁷⁶ KIND Report, at 2.

⁷⁷ See Young, *Alone, and In Court*, L.A. TIMES (Mar. 14, 2014), [Young, alone and in court - Los Angeles Times \(latimes.com\)](#).

⁷⁸ See Chen, *An Urgent Need*.

document to the child. Thus, a child may sign the form admitting to the receipt of the documents without any understanding of their contents or her own legal rights.

Furthermore, **Form LRG-5/5s** states the UC may reach out to any legal service provider on or off a list of providers funded by the ORR. However, Ayuda is concerned that detained UCs do not have sufficient access to methods for communicating with legal service providers. According to standards from sibling agency Immigrations and Custom Enforcement (ICE):

“[A] facility may neither restrict the number of calls a detainee places to his/her legal representatives, nor limit the duration of such calls by rule or automatic cut-off, unless necessary for security purposes or to maintain orderly and fair access to telephones . . . a facility may place reasonable restrictions on the hours, frequency and duration of such direct and/or free calls but may not otherwise limit a detainee’s attempt to obtain legal representation.”⁷⁹

However, research demonstrates that ICE fails to meet these basic standards. Some issues to phone access that UCs face include “exorbitant rates to place phone calls; heavy surveillance of phone calls, including those with legal counsel on the line; and dropped calls and unclear or inconsistent guidance on the availability of free phone calls to authorized legal service providers.”⁸⁰ Detainees have filed lawsuits, asking courts to stop ICE from disallowing them basic access to telephones to contact their legal representatives.⁸¹ Thus, providing the child in ORR custody with a list of legal service providers is not enough to ensure she actually receives help from a legal representative. **Form LRG-5/5s** should provide some guarantees that the child will have proper access to telephones and/or internet to contact a legal representative.

C. The forms lack clarity in their explanation of the relevant legal standards.

The forms, specifically **Form L-2**, *Specific Consent Request Case Summary*, fail to provide an adequate description of applicable legal standards. **Form L-2** specifically asks the federal field specialist (FFS) to determine whether the reunification with a UC’s viable sponsor is in the “best interest of the child.” However, the form fails to explicitly state the relevant definition of the term “best interest of the child.”

In the past, HHS has stated its intention to “ensuring that the interests of the child are considered in decisions related to the care and custody of UC[s].”⁸² However, “best interests” is a term of art used in various types of law, and HHS has failed to properly define this term as it applies in the field of immigration law.⁸³ Thus, the “best interests” standard is presented in the

⁷⁹ OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, 5.6 TELEPHONE ACCESS, IMMIGR. CUSTOMS ENFOR. (last updated Dec. 2016), [PBNDs 2011, Rev. 2016 \(ice.gov\)](#).

⁸⁰ Claudia Valenzuela, *ICE Makes It Almost Impossible for People to Make Phone Calls from Detention Centers, Even in a Pandemic*, IMMIGR. IMPACT (Aug. 27, 2020), [ICE Makes It Almost Impossible for People to Make Phone Calls from Detention Centers, Even in a Pandemic \(immigrationimpact.com\)](#).

⁸¹ See *Detained Immigrants Ask Court to Stop ICE Interference to Phone Access in Immigration Detention Centers*, AM. IMMIGR. COUNCIL (Aug. 27, 2020), [Detained Immigrants Ask Court to Stop ICE Interference to Phone Access in Immigration Detention Centers | American Immigration Council](#).

⁸² April 2021 UC Fact Sheet.

⁸³ Best Interests Framework, at 5.

form without any additional clarification and definition. If ORR's goal is to place immigration law's understanding of the "best interest of the child" standard in line with that of another field of law, such as family law, the agency should expressly state this intention and provide the UCs and their legal representatives with a clear definition on the form itself.⁸⁴

Conclusion

Ayuda strongly recommends that the proposed forms are revised to ensure that the legal rights of UCs are observed and protected. The proposed forms in their current state do not protect the best interests of the child.⁸⁵ Furthermore, the proposed forms fail to adhere to ORR's statutory mandate to provide UCs with access to legal services.⁸⁶ The forms contain dense language that is likely incomprehensible to a UC and do not provide assurances that the UCs will be granted appropriate and necessary access to methods of communication with their legal representation.

Sincerely,



Laurie Ball Cooper*
Legal Director, Ayuda



Robyn Schowengerdt
Law Student Intern



Meagan McCullough
Law Student Intern

⁸⁴ See *supra* Part I.

⁸⁵ *Supra* Part I.

⁸⁶ *Supra* Part II.