YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS

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Submitted via email

Administration for Children and Families
Office of Planning, Research, and Evaluation (OPRE)
330 C Street SW, Washington, DC 20201
infocollection@acf.hhs.gov
Attn: ACF Reports Clearance Officer

December 22, 2022

RE: Comments re: ORR Proposed Information Collection Activity; Placement and Transfer of Unaccompanied Children Into Office of Refugee Resettlement Care Provider Facilities (OMB #0970–0554)

Dear ACF/OPRE Certifying Officer,

The Young Center for Immigrant Children's Rights (Young Center) writes to comment on the above-referenced proposed information collection activity, titled "Placement and Transfer of Unaccompanied Alien Children Into ORR Care Provider Facilities," published on October 25, 2022, by the Office of Refugee Resettlement (ORR), Administration for Children and Families, U.S. Department of Health and Human Services.[1]

The Young Center serves as the federally-appointed independent Child Advocate, akin to 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).[2] The Young Center is the only organization authorized by ORR to serve in that capacity. 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, including many unaccompanied children whom ORR has placed or transferred to more restrictive settings.

ORR proposes changes to one existing form, the Notice of Placement in a Restrictive Setting (Form P–4/4s/4d/4p) (hereafter "Proposed Notice of Placement"), and one new form, the Notice of Administrative Review (P–18) (hereafter "Proposed Notice of Administrative Review"). Both forms relate to the placement and transfer of children in restrictive settings. While we recognize that ORR is proposing these form changes in order to comply with its obligations under the

[1] *See* 87 Fed. Reg. 64487 (Oct. 25, 2022).
[2] William Wilberforce Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232(c)(6)(A) (hereafter TVPRA).

preliminary injunction in *Lucas R v. Becerra*,[3] we are concerned that deficiencies in the proposed forms threaten the safety and wellbeing of children in ORR's custody.

First, the proposed forms provide inadequate instructions to ORR staff that invite placement and transfer decisions based on incomplete, inaccurate, or prejudicial information. In this way, the forms fail to conform with the standard set forth in *Lucas R*. requiring ORR staff to base step-up decisions on "clear and convincing evidence". Second, the proposed forms undermine children's due process with misleading language about access to legal representation and insufficient information regarding how to exercise their right to appeal restrictive placement decisions. It is critical that ORR timely and adequately inform children of the reasons underlying placement decisions and the process by which children can challenge those decisions; without meaningful notice, children cannot exercise their rights. Finally, the proposed forms use vague and confusing language in their instructions to ORR staff.

We recommend significant changes to the language and scope of information collected in these forms to comply with federal law. We further include recommendations for the implementation of these forms to advance the best interests of children and their right to due process.

I. The Proposed Notice of Placement invites ORR staff to place children in restrictive settings, without consideration of their needs or best interests, which is contrary to ORR's obligations under the TVPRA and *Lucas R.*

Pursuant to 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."[4] In accordance with federal law, ORR policy requires that "care providers…make every effort to place and keep children and youth in a least restrictive setting."[5] The Proposed Notice of Placement fails to conform with this mandate.

Through their advocacy on behalf of unaccompanied children, Young Center Child Advocates have witnessed the harm that children experience when placed in restrictive settings and the sustained consequences to 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.[6] On the other hand, research has shown that children's placement in less

[3] *Lucas R. v. Becerra*, No. 2:18-cv-05741-DMG-PLA, 2022 WL 3908829 (C.D. Cal. Aug 30, 2022).
[4] TVPRA; 87 Fed. Reg. 64487 (Oct. 25, 2022).
[5] 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].

[6] 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*

restrictive family-based settings plays a significant role in children's trauma recovery and reduces their vulnerability to trafficking.[7]

Given the harm to children from placement in restrictive settings, it is critically important for ORR, when making placement decisions, to consider each child's full spectrum of needs through a trauma-informed lens to ensure that children are placed in the least restrictive setting in their best interests. A trauma-informed care approach to placement decisions must incorporate the shared understanding that trauma is a key contributor to behavioral health crises.[8] Traumatized children placed in restrictive settings without adequate supports experience behavioral health crises that risk re-traumatization and further exacerbates behavioral needs.[9] Step-ups to residential treatment facilities, staff-secure, and secure facilities should be the absolute last resort, after trauma-informed consideration of the child's needs and the least restrictive setting to meet those needs. For the same reasons, 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.

A. The Proposed Notice of Placement invites ORR staff to base their placement decisions solely on Significant Incident Reports, which often contain incomplete and prejudicial information

Section D of the Proposed Notice of Placement, titled "Summary of Supporting Evidence for Restrictive Placement," includes new language requiring the ORR Case Manager, Case

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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.

[7] National Child Traumatic Stress Network Child Welfare Committee and Chapin Hall Center for Children at the University of Chicago, *Recommendations for Trauma-Informed Care Under the Family First Prevention Services Act*, P. 11 (2020) (Discussing the disparity in placement type between residential settings and family foster homes for as "playing a role in vulnerability" to trafficking and recommending against "disrupted placements."), https://www.nctsn.org/sites/default/files/resources/special-resource/recommendations_for_trauma_informed_care_under_the_family_first_prevention_services_act.pdf.

[8] SAMHSA at 30. ("All staff in the crisis response system realize that trauma is a major contributor to behavioral health crises. They also know that past trauma and community trauma impact how crisis services are perceived…The program, organization, and system respond to these realities by applying a trauma-informed approach into all aspects of services.").

[9] Burrell at 4 ("in addition to the trauma inherently experienced as a result of incarceration, youth may suffer re-traumatization in the custodial setting."); *See also* Stephanie Bryson, et al., *What are effective strategies for implementing trauma-informed care in youth inpatient psychiatric and residential treatment settings? A realist systematic review.,* INTL J. MENT HEALTH SYST, 11:36, p.1 (2017).

Coordinator, and Federal Field Specialist (FFS) each to "[p]rovide a detailed summary of specific incidents related to the reason(s) for the restrictive placement." The proposed form does not elicit any other evidence or information from ORR staff to support the reasons for their determination that the child meets the criteria for placement or transfer to a more restrictive placement. Thus, rather than ensuring that placement and transfer decisions are based on a holistic review of a child's needs and consideration of a child's best interests, the Proposed Notice of Placement invites ORR staff to rely solely on "specific incidents," captured in Significant Incident Reports (SIRs), to justify restrictive placements. Directing ORR staff to rely on SIRs to justify placements in restrictive settings is not only contrary to ORR's obligations under the TVPRA and *Lucas R.* but also harmful to children, leading to inappropriate step-ups and prolonged custody of children.

ORR providers use SIRs to document a wide range of children's statements, behaviors, and actions, including but not limited to conflicts with staff and other children; acts of self-harm; resistance to facility rules governing movement and recreation time; and property damage. As explained in a report recently published by the Young Center and the National Immigrant Justice Center, SIRs often contain incomplete, inaccurate, or unreliable information and fail to reflect children's holistic needs.[10] They are one-sided, typically written by one provider staff from the provider perspective, and do not include the child's perspective. They often lack critical context regarding a child's history, health conditions, and other circumstances and events leading up to incidents, which may explain a child's behavior or reaction. SIRs also rarely include detailed information regarding what individualized interventions – including de-escalation and crisis prevention efforts – the provider used, if any, to prevent an incident from occurring or escalating.

In our experience, children are more likely to be stepped up to more restrictive settings or kept in restrictive settings following SIRs regarding a child's behavior. Staff often rely heavily, or even solely, on SIRs in justifying placement and transfer decisions, simply providing a list of SIRs in the Notice of Placement with a short description of the alleged incident based on the SIR. In some instances, staff have based step-up decisions on the number of SIRs a child has incurred, regardless of whether the SIRs were for minor infractions, developmentally appropriate behavior, or a child's disclosures of incidents that occurred prior to being in ORR custody, such as abuse, neglect, or violence suffered by the child in their country of origin or during their migration journey. Thus, rather than engage in a holistic assessment of a child's needs and best interests, using a trauma-informed lens, ORR staff frequently base placement and transfer decisions on incomplete, inaccurate, and decontextualized information in SIRs. The language in the proposed form further encourages and institutionalizes this harmful practice.
By inviting care providers to make placement determinations based on SIRs, the proposed changes encourage providers to use SIRs and step-ups as a reactive and punitive tool rather than focusing on meeting a child's needs and ensuring their safety, wellbeing, and best interests in the least restrictive setting. The Proposed Notice of Placement fails to comport with not only ORR's

[10] Young Center for Immigrant Children's Rights and National Immigrant Justice Center, *Punishing Trauma: Incident Reporting and Government Children in Federal Custody*, 25, (September 2022) https://static1.squarespace.com/static/597ab5f3bebafb0a625aaf45/t/632b4a5e7128a06d3855eb73/1663781479727/2022+09+21+FINAL+SIR+REPORT-HYPERLINKED.pdf.

obligation under the TVPRA to place children in the least restrictive setting in their best interests, but also ORR's own policy, which requires ORR staff to consider a number of factors in making placement determinations, including "any special needs or issues requiring specialized services, length of stay in ORR custody, family sponsorship options, legal representation needs, and the child's past history of abuse."[11] Moreover, despite ORR's assertion that the revisions to the Notice of Placement are necessary to comply with *Lucas R.*, the proposed notice fails to comport with the *Lucas R.* court's decision holding that ORR is required to "employ a 'clear and convincing' evidentiary standard in deciding whether a minor should be stepped up."[12] In articulating this standard, the *Lucas R.* court explained: "ORR and care provider professionals will still make decisions guided by child welfare principles and the many factors articulated in the Policy Guide and MAP, but step-up decisions must be based on clear and convincing evidence."[13] Requiring ORR providers to rely on SIRs in their placement decisions fails to align with ORR's obligation to make decisions guided by child welfare principles and after consideration of the many factors discussed above.

We recommend that ORR rescind this proposed change and instead make changes to its Notice of Placement to reflect ORR's obligation to engage in a holistic assessment that prioritizes children's needs and their best interests, rather than rely on SIRs, in placement decisions. Prior to considering a child's step-up to a more restrictive setting, ORR staff should conduct a thorough holistic assessment of the child's history, developmental, and behavioral and health needs, as well as consider the staff's exhausted interventions and whether the child may be able to remain in a less restrictive setting with additional interventions and supports. The form should also be revised to require ORR staff and Federal Field Specialists to conduct independent reviews which will help to reduce bias and increase accountability in decision-making. We are aware of at least one case in which a child received a Notice of Placement in which the Case Coordinator and FFS provided short statements agreeing with the Case Manager's summarized reasoning, without engaging in their own independent analysis. Merely concurring with the recommendations of other staff without independent consideration of the evidence falls short of the standards set forth in the TVPRA and *Lucas R*.

B. The Proposed Notice of Placement's reliance on SIRs is also contrary to ORR's mandate under Section 504 of the Rehabilitation Act to place children with disabilities in the most integrated setting

The Proposed Notice of Placement's failure to ensure a holistic assessment of a child's needs and best interests, including a consideration by ORR staff of whether the child may be able to remain in a less restrictive setting with additional supports and interventions, is particularly harmful for

[11] ORR Guide: Unaccompanied Children § 1.2.1.

[12] *Lucas R. v. Becerra,* No. 2:18-cv-05741-DMG-PLA, 2022 WL 2177454, at *6 (C.D. Cal. Mar. 11, 2022), See also, *Lucas R. v. Becerra*, No. 2:18-cv-05741-DMG-PLA, 2022 WL 3908829, at *3 (C.D. Cal. Aug. 30, 2022) ("ORR shall have the burden of proving by clear and convincing evidence that sufficient grounds exist for stepping up or continuing to hold a minor in a restrictive placement.").

[13] *Lucas R. v. Becerra,* No. 2:18-cv-05741-DMG-PLA, 2022 WL 2177454, at *6 (C.D. Cal. Mar. 11, 2022).

children with disabilities and mental health concerns. Under Section 504 of the Rehabilitation Act, ORR is required to afford children with disabilities placement and services "in the most integrated setting appropriate" to meet their needs.[14] In our experience, children with developmental disabilities may not demonstrate the same responsiveness to treatment interventions that are not tailored to their strengths and capacities. For some of the children served by Young Center child advocates, transfer to a Residential Treatment Center has been retraumatizing, causing regression in their recovery and unnecessarily prolonging their time in ORR custody. ORR should prioritize the health, safety and wellbeing of children with particular psychological or developmental needs. This includes exhausting all available treatment options, including community-based resources, and preventing unnecessary transfers to Residential Treatment Centers that could create instability and cause harm to children.

In order to ensure ORR staff are complying with their mandate to place children in the least restrictive and most integrated setting in their best interest, the Notice of Placement form should include an assessment of whether a child would be able to remain or be placed in a less restrictive setting with additional services and supports; a summary of the services, interventions, and supports that a child has received in their current placement before transfer; any barriers to meeting the child's needs in a less restrictive placement; and how the recommended restrictive environment would better address the child's needs. The form should be revised to elicit information on all available treatment options that ORR provider staff have pursued prior to recommending step-up or continued placement in a restrictive setting.

C. The Proposed Notice of Placement permits children who have been approved for transfer to a less restrictive setting or release to be kept in unnecessarily restrictive placements in violation of their rights under federal law

Section C of the Proposed Notice of Placement, titled "Reasons for Restrictive Placement," requires ORR provider staff to select from a number of prepopulated criteria the staff believe the child meets to warrant placement or transfer to a more restrictive placement. For example, for secure placements, the form provides five options reflecting criteria set forth under ORR policy as warranting placement in a secure facility. In addition to including the ORR policy-based criteria that a child must meet to be placed in a specific restrictive setting, the form also includes, for each type of restrictive placement, the option that a child is "pending transfer to a less restrictive placement". The form does not provide any space or include any additional questions for the staff to provide more information about the pending transfer, when it is expected to be completed, or the reasons for the transfer. Thus, the form effectively allows providers to keep children in restrictive placements, even though they do not meet the criteria for those placements if they are awaiting transfer to a less restrictive placement.

[14] 45 C.F.R. § 84.4.

In our experience, children often remain 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 staff are unable to find a less restrictive facility that is willing accept the child's referral for placement. Often, less restrictive providers will deny children's placement based on the child's past SIRs. Providers may also discriminate against 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 violates not only the TVPRA's mandate to keep children in the least restrictive setting, but 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.[15] By allowing providers to justify placement of a child in a restrictive setting on the basis that they are "pending transfer," the Proposed Notice of Placement Form further institutionalizes and perpetuates this illegal and discriminatory practice of keeping children in unnecessarily restrictive settings.

As with the language in Section D, the proposed changes providing for "pending transfer to a less restrictive placement" as a criteria that warrants continued restrictive placement are contrary to the TVPRA's mandate to place children in the least restrictive setting in the child's best interest; ORR policy requiring that children only be stepped up and placed in restrictive setting when they meet the criteria for placement; and *Lucas R.*'s requirement that ORR base their restrictive placement decisions on "clear and convincing evidence."[16] This language should be removed as an option that can be selected for each type of restrictive setting. Moreover, ORR should ensure that children are promptly stepped down when ORR has found that they no longer meet the criteria for placement in a more restrictive setting.

II. The Proposed Notice of Placement and Proposed Notice of Administrative Review fail to ensure adequate notice and a full and fair opportunity to appeal placement decisions

Every child should be afforded a full and fair opportunity to challenge ORR's restrictive placement decisions. Children should receive timely and adequate notice of the placement decision, ORR's reasons for the placement decision, and their right to appeal. Children and their advocates should promptly receive all information necessary to effectively prepare their appeal, including all the evidence relied upon by ORR in making their decision and the child's entire case file. Here, the proposed notices fall far short of ensuring children's due process rights.

A. The proposed notices misstate the role of child advocates in the placement review process

[15] *Id.*
[16] *Lucas R. v. Becerra*, No. 2:18-cv-05741-DMG-PLA, 2022 WL 3908829 (C.D. Cal. Aug 30, 2022); ORR Guide: Unaccompanied Children § 1.2.4.

Both notices conflate the roles that attorneys and child advocates play in the appeal process, incorrectly suggesting that child advocates can serve as the child's legal representative. For instance, Section E of the Proposed Notice of Placement, titled "Your Rights to Challenge Your Placement," states (p. 3): "You have the right to consult an attorney and/or a child advocate to assist you. This Notice of Placement will be provided to your attorney and/or child advocate automatically." The Proposed Notice of Administrative Review also repeatedly conflates the role of attorneys and child advocates in the appeal process. The notice instructs (p. 1): "If you have not done so already, you should talk to an attorney (legal representative) and/or Child Advocate." Further down the same page, the form states: "You and/or your representative (attorney or child advocate) will be provided a copy of your entire case file"; "You and/or your representative (attorney or child advocate) will have an opportunity to provide a written statement supporting your position."; "You and/or your representative (attorney or child advocate) can request an optional hearing, where you or your representative can make verbal statements, call witnesses, and ask questions." At the end of the proposed form, under a section titled "Next Steps" (p.2), the notice states: "For those requesting a Hearing, please provide . . . [t]he name, email address, and telephone number for the attorney or child advocate that will represent you."

Contrary to the language in the proposed forms, child advocates and attorneys serve distinct roles in the appeal process. By conflating their roles, the proposed forms misstate the child advocate's role. Pursuant to the TVPRA, child advocates are appointed by ORR to advocate for children's best interests.[17] A child's best interests are determined by considering the child's safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity.[18] Although the child's expressed wishes are a primary consideration in a best interests determination, it is not the only consideration.

The TVPRA explicitly requires that child advocates be "independent." In order to be able to effectively advocate for the best interests of children their role, child advocates must be able to make their determinations independently, free from influence by ORR or any third parties. The American Bar Association explains:

> To avoid any real or perceived conflicts of interest, the Child Advocate must not be an employee of the Custodial Agency or of any third party with whom the Custodial Agency contracts to care for Unaccompanied Children, nor should the Child Advocate also be the Child's Attorney. **The Child Advocate is not a substitute for an Attorney for the Child, nor vice versa, because the purpose of appointing a Child Advocate is to ensure that the Best Interests of the Child are identified and communicated, while**

[17] TVPRA, 8 U.S.C. § 1232(c)(6)(A).
[18] Subcomm. on Best Interests, Interagency Working Grp. on Unaccompanied and Separated Children, Framework for Considering the Best Interests of Unaccompanied Children 5, (2016), [hereinafter Best Interests Framework].

> **the role of an Attorney is to serve the expressed wishes and legal interests of the Child**. [emphasis added][19]

Given this clearly distinct and critical role, it would be improper for a child advocate to serve as legal representative for a child in the Placement Review Panel process. Instead, child advocates can and should participate in the panel review process by providing Best Interests Determinations (BIDs), either in writing, through testimony, or both. They may also assist children, upon request, with answering questions a child may have about the restrictive placement decision and/or the panel review process. Separation of the child advocate's role from that of the child's attorney is particularly important in the panel review process, where the child advocate's best interests determination may be key evidence for consideration by the review panel in determining whether ORR's placement decision was warranted. The child advocate's independent assessment of the child's best interests is critical to ensuring that the panel can rely on the BID as credible, probative evidence of a child's best interests.

The proposed notices should be corrected to remove any language that suggests that child advocates can serve as representatives for children in appeals. The proposed notices should explain clearly in child-appropriate language the distinct roles of attorneys and child advocates, explaining that the child advocate's role is to advocate for the child's best interests and making clear that the child advocate does not serve as the child's attorney or legal representative and their assistance to children in the appeal process does not amount to creating an attorney-client relationship.

Clear, unambiguous language in notices is vitally important for children in ORR custody, so that they are not confused about their right to appeal placement decisions and the resources that are available to them to navigate the process. Step-ups and prolonged placement in restrictive settings are often very stressful, frustrating, and distressing for children, especially when they believe they have been inappropriately placed in a restrictive setting. A complex, confusing, and opaque appeal process only exacerbates children's stress and frustration. ORR must provide meaningful notice that ensures that children have the information they need to exercise their right to appeal and to be able to understand and access the resources that may be available to them, such as attorneys and child advocates, in order to be able to navigate the process.

In addition to clarifying the role of child advocates in the appeals process, the proposed notices should also explain that children need to be appointed a child advocate by ORR in order to access child advocate services. As currently worded, the proposed notices suggest that all children can consult with or obtain the services of child advocates. However, while children in restrictive placements are particularly vulnerable and would benefit from the support of a Child Advocate, ORR currently does not fund sufficient child advocate services to meet the needs of

[19] Comm'n on Immigration, Am. Bar Ass'n, Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States § VII.G.3 (2018), [hereinafter ABA Standards].

all vulnerable children in its care. The proposed forms should be revised to clarify that children can seek assistance from their child advocate "if one has been appointed" and should also explain how a child may seek a referral for child advocate services through their attorney or ORR provider staff. The form should also be revised to direct [any ORR/ORR-funded staff reviewing the form] to submit a referral for the appointment of a child advocate for any child who becomes eligible for a placement review hearing.

B. The proposed notices fail to accurately explain children's right to legal representation

While the court in *Lucas R.* held that ORR is not required to cover children's attorney's fees in the appeal of placement decisions, we strongly urge ORR to ensure that all children are provided with government-funded legal representation in their placement appeals. Legal representation is critical to ensuring that children have a full and fair opportunity to appeal. However, to the extent that the government does not intend to cover the costs of legal representation of children in their appeals, we recommend that ORR explain this clearly and adequately in their notices to children.

Contrary to the Lucas R. preliminary injunction's explicit requirement that ORR's Notice of Placement "include an explanation of the minor's right to be represented by counsel *at no cost to the federal government* in challenging such restrictive placement,"[20] the Proposed Notice of Placement fails to explain that the federal government is not required to provide government-funded legal representation to children. Instead, the Proposed Notice of Placement merely states: "You have the right to consult an attorney and/or a child advocate to assist you. This Notice of Placement will be provided to your attorney and/or child advocate automatically." This language is misleading, suggesting that the child is guaranteed an attorney (as well as a child advocate). The proposed notice should be amended to comply with the preliminary injunction by clearly explaining that the child is not entitled to government-funded legal representation in their appeal, and that the child may have to proceed with an appeal without legal representation.

As with the Proposed Notice of Placement, the Proposed Notice of Administrative Review also contains confusing language that suggests that a child is entitled to representation by a government-funded attorney or a legal service provider in their appeal. For instance, the Notice states (p. 1): "You may have an attorney represent you and/or assist you with the PRP process." It further states: "If you have not done so already, you should talk to an attorney (legal representative) and/or Child Advocate. If you do not have an attorney or child advocate, your Case Manager will refer you to a legal services provider to assist you." The proposed form should be revised to explain that the child is not entitled to a government-funded attorney to represent them in their appeal. Moreover, to the extent that ORR does not intend to fund legal service providers to assist children with restrictive placement decisions, the proposed form should also clarify that a child is not entitled to representation or legal assistance from their legal service provider in their appeal. As stated above, we believe it is critical that ORR provide

[20] *Lucas R. v. Becerra*, No. 2:18-cv-05741-DMG-PLA, 2022 WL 3908829, at *3 (C.D. Cal. Aug. 30, 2022).

government-funded legal representation for all children in their placement appeals, but if ORR does not intend to provide these critical services, it should clearly notify children of this.

C. The proposed notices should be implemented to ensure that children are able to promptly challenge ORR's placement decisions without unnecessary delay

The *Lucas R.* preliminary injunction requires that children be informed "upon receipt of the NOP" of their right to contest the restrictive placement before a Placement Review Panel (PRP) and the procedures for doing so.[21] Rather than providing comprehensive information regarding procedures related to the PRP process in the Proposed Notice of Placement, ORR proposes dividing up notice to children of this information into two separate, consecutive notices, whereby children are first briefly informed of their right to challenge placement decisions in the Notice of Placement, and only if the child requests a PRP, ORR then provides the child with the Notice of Administrative Review, which contains a much more detailed explanation of the PRP process and the child's options to either have a hearing before the PRP or to submit a written statement for the PRP's consideration.

First, we recommend that ORR provide detailed information regarding the PRP process in the Proposed Notice of Placement, because this information may be helpful and relevant to the child in deciding whether to appeal. The Proposed Notice of Placement should also clearly explain the procedures for requesting a PRP. Many children in ORR custody do not have an attorney or a child advocate; for those children, it is critical that they have the information they need to be able to exercise their right to appeal.

Second, we recommend that ORR ensure that the Proposed Notice of Administrative Review is provided to children immediately upon ORR's receipt of the child's request for a PRP. ORR should ensure that there is no delay in providing this information, so that the child can immediately proceed with the review process. In our experience, children in ORR custody often confront unnecessary delays in contesting restrictive placement decisions. These delays have detrimental consequences for children whose mental health may deteriorate due to conditions in restrictive custody, resulting in more SIRs that will be relied upon to keep them in restrictive settings that only further harm their health and wellbeing. The compounding trauma and harm to children's mental health often results in a vicious cycle of step-ups, SIRs, and prolonged restrictive custody. ORR must implement these proposed forms in a manner that avoids unnecessary, harmful delay.

Third, we also recommend that the Proposed Notice for Administrative Review be amended to specify that the child's case file and the Evidentiary Record underlying a placement decision be provided to the child, their representative, and their child advocate within 48 hours of ORR's receipt of the child's request for the PRP. Currently, the Proposed Notice of Administrative Review provides no timeframe within which ORR must provide these files to the child and/or their legal representative. It merely states (p. 1): "You and/or your representative (attorney or

[21] *Lucas R. v. Becerra*, 2022 WL 3908829 at *3 (C.D. Cal. Aug. 30, 2022).

child advocate) will be provided a copy of your entire case file. In addition, you and/or your representative will be provided a copy of the written documents that the program and FFS relied upon to decide your current placement." This language is insufficient to comply with *Lucas R.*'s requirement that ORR provide children and their counsel with access to the Evidentiary Record "within a reasonable time" and prior to the PRP.[22] Access to the Evidentiary Record is essential for the child and their legal representative to effectively prepare for a hearing or a written statement (and for a child advocate, if appointed, to prepare a written BID). 48 hours is a reasonable timeframe for ORR to provide the Evidentiary Record to a child and their legal representative, given that the PRP hearing should take place within 7 days of the child's request for a hearing.

Until a child and their legal representative receives the Evidentiary Record, they are left with no other option but to prepare their appeal with partial, incomplete information that makes it difficult to effectively prepare an appeal. In some cases, Evidentiary Records reveal new consequential information that was not included in the Notice of Placement and may require additional preparation or investigation to respond to the new information. Any new information revealed in the Evidentiary Record may delay the appeals process, as the child's attorney may need to request a continuation of the hearing date or delay submission of the written statement so they can have additional time. These unnecessary delays can be avoided if ORR ensures that these documents are provided in a timely manner.

III. Other language in the proposed forms should be revised

A. Section C, Proposed Notice of Placement

Section C of the Proposed Notice of Placement (p. 2), titled "Reasons for Restrictive Placement," instructs staff to "check all reasons for *each* type of placement," while simultaneously checking only those reasons "applicable to the current facility." These instructions are confusing for provider staff. They appear to presume that the child is being kept in a restrictive facility. However, in circumstances where staff recommend step-up to an even more restrictive facility or step-down to a different, less restrictive facility, it is unclear how they would be expected to respond to the queries under Section C. Staff may be confused as to whether they should be providing the reasons for step-up or step-down or the reasons for the child's placement in the current facility. For clarity, we recommend rewording these instructions to read: "*Check all reasons that apply for the current placement recommendation only."*

[22] The preliminary injunction in *Lucas R.* requires that ORR must: "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."; "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."; "permit minors the assistance of counsel for their appeals of step-up…decisions"; and "provide case files to legal representatives, upon request, with legally required redactions if necessary." *Lucas R. v. Becerra*, No. 2:18-cv-05741-DMG-PLA, 2022 WL 3908829 (C.D. Cal. Aug 30, 2022).

B. Acknowledgement and Certification, Proposed Notice of Placement

The Proposed Notice of Placement ends with a section titled "Acknowledgment and Certification" that requires provider staff to obtain a child's signature as "acknowledgment of receipt" of the notice. The form allows provider staff, in the alternative, to indicate that the child has refused to sign by checking a box. We recommend that the Proposed Notice of Placement clearly indicate that no negative inference will be drawn from a child's refusal or inability to sign. There are many reasons why a child may not wish to sign the form. For instance, a child may not wish to sign until they have been afforded time to speak with their family, attorney, or child advocate. Children may also feel uncomfortable signing the form if they have questions or do not fully comprehend what the provider staff have communicated to them. The Proposed Notice of Placement should clearly indicate that no negative inference will be drawn from a child's refusal or inability to sign.

IV. Conclusion

The placement or transfer of children in ORR custody to more restrictive settings generally undermines children's best interests and should be the last resort for any child. Young Center child advocates have witnessed firsthand the harm to children from inappropriate step-ups and prolonged placements in restrictive settings that are unable to meet a child's needs. Given the irreparable harm to children's health caused by placement disruptions and unwarranted restrictions cause, it is critical that ORR consider the full spectrum of children's needs in deciding whether placement in a more restrictive setting advances children's best interests. Given the fundamental rights at stake, it is also essential that children be provided with timely and adequate notice and the information necessary to exercise their right to appeal placement and transfer decisions. ORR should review these forms and make appropriate changes to ensure that they not only comport with ORR's legal mandate to place children in the least restrictive setting in their best interests and its due process obligations, but also align with its child welfare mandate to advance the best interests and wellbeing of children in its care.

Respectfully,

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