

NATIONAL IMMIGRANT JUSTICE CENTER

November 6, 2018

Submitted via email to ICE.Regulations@ice.dhs.gov

Debbie Seguin
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U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

Re: DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

Dear Ms. Seguin:

We are writing on behalf of the National Immigrant Justice Center in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (NPRM or proposed rule) to express our strong opposition to the proposed rule to promulgate and amend regulations relating to the apprehension, processing, care, custody, and release of immigrant juveniles published in the Federal Register on September 7, 2018.

The National Immigrant Justice Center (NIJC) is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC has been unique in blending individual client advocacy with broad-based systemic change. NIJC is the largest legal service provider for unaccompanied immigrant children in Illinois, Indiana, and Wisconsin, including children held in or released from the custody of the Office of Refugee Resettlement (ORR). More broadly, NIJC provides legal services to more than 10,000 individuals each year, including children and their family members currently or formerly incarcerated by DHS, as well as numerous caregivers of citizen and noncitizen children.

The government's legal obligations regarding the apprehension, processing, care, custody, and release of noncitizen children and their family members and caregivers are central to ensuring not only the personal safety and wellbeing of children and their families, but also the fulfillment of the Constitution's mandate

of due process under law. As an immigration legal service provider, NIJC has a strong interest in the proposed regulations and is deeply concerned they fail to provide even minimal personal welfare and due process safeguards for immigrant children and those who care for them.

In this document, we will address the following 11 concerns: (1) unjustified failure to estimate costs; (2) fallacy of the deterrence justification; (3) heightened risks to children's safety from reducing already-minimal oversight and accountability; (4) sabotage of core Flores principle of state child welfare licensing; (5) groundless restrictions on children's release from custody; (6) improper expansion of exceptions that swallow the proposed rule; (7) systematization of the arbitrary application of statutory protections for unaccompanied children; (8) HHS's unacceptable expansion of its discretion to keep children detained; (9) harmful broadening of criteria and discretion to place children in secure custody; (10) HHS's unjustified raising of already-high barriers for sponsors of unaccompanied children; and (11) HHS's unjust proposal to become jailer and judge of unaccompanied children.

For these reasons, as detailed in the comments that follow, DHS and the Department of Health and Human Services (HHS) should immediately withdraw their current proposal and dedicate their efforts to advancing policies that safeguard the health, safety, and best interests of children and their families, starting with robust, good-faith compliance with the Flores Settlement Agreement.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Heidi Altman at haltman@heartlandalliance.org or (312) 718-5021 for further information.

/s/

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DETAILED COMMENTS in opposition to DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

1. The agencies' disingenuous failure to estimate costs sets the tone for the entire NPRM

In the NPRM, the Departments of Homeland Security (DHS) and Health and Human Services (HHS) fail to estimate any of their anticipated costs, in spite of several assertions indicating that the agencies are

capable of estimating costs of their proposal. For example, they include the unsubstantiated claim that “[t]his rule does not exceed the \$100 million expenditure threshold,”¹ which would trigger additional review under Executive Order 12866.

Using publicly-available data from DHS, the Center for American Progress was able to calculate that the costs to DHS alone from the proposed rule will--over a decade--stretch to just over \$2 billion at the low end, and as high as \$12.9 billion at the high end. On an annualized basis, these costs would come out to \$201 million per year, at the low end, and nearly \$1.3 billion per year at the high end.²

The government’s arguments regarding deterrence also serve to obfuscate the exorbitant financial cost associated with the rule while failing to engage with the efficacy of less expensive alternatives to detention (ATDs). In the fiscal year 2019 Congressional Budget Justification, ICE estimated the daily cost of one family detention bed at \$318.79, which contrasts to the average daily cost of alternative to detention programming, which costs as little as \$4 or \$5 per day.³ The government states in the NPRM that indefinite family incarceration is necessary to ensure families attend all immigration proceedings in their cases. This premise has been proven false and inaccurate. Alternatives to detention (ATDs) are extremely effective at ensuring compliance with immigration check-ins, hearings, and, if ordered, removal. DHS’s own Congressional Budget Justification released in May 2017 notes that, “[h]istorically, ICE has seen strong alien cooperation with ATD requirements during the adjudication of immigration proceedings.”⁴

Although participants may be enrolled on ATD for a longer period of time due to court delays when they are not detained, using its own calculations in 2014, the Government Accountability Office found that an individual would have had to be on ATD for 1,229 days before time on ATD and time in detention cost the same amount.⁵ Immigration detention is driven by profit and politics, not public safety.⁶ It continues to be used widely despite the availability of effective and cost-efficient alternatives. A spectrum of alternatives to detention has long existed as the option the government should use in place of mass detention.⁷ Notably,

¹ 83 Fed. Reg. 45502.

² Philip E. Wolgin, “The High Costs of the Proposed *Flores* Regulation” (Washington, DC: Center for American Progress, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation/>.

³ See U.S. Immigration and Customs Enforcement, Congressional Budget Justification for FY 2019, *see also* American Immigration Lawyers Association *et al.*, *The Real Alternatives to Detention* (June 2017), <https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%202006.17.pdf>.

⁴ U.S. Immigration and Customs Enforcement Congressional Justification for FY 2018 at page 179, https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf.

⁵ American Immigration Lawyers Association, *et al.*, *The Real Alternatives to Detention* (June 2017), <https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%202006.17.pdf>.

⁶ See, e.g., Detention Watch Network and National Immigrant Justice Center, *ICE Lies: Public Deception, Private Profit* (Feb. 2018), <https://www.immigrantjustice.org/research-items/report-ice-lies-public-deception-private-profit>.

⁷ In 2009, a bipartisan Independent Task Force on U.S. Immigration Policy sponsored by the Council on Foreign Relations called for an expansion of the use of alternatives to immigration detention as one of its recommendations to ensure that all immigrants have the “right to fair consideration under the law and humane treatment.” Council on Foreign Relations, Independent Task Force Report No. 63: U.S. Immigration Policy (2009),

alternatives to incarceration in the context of the criminal justice system have been broadly endorsed by organizations across the political spectrum, including the American Jail Association, American Probation and Parole Association, American Bar Association, Association of Prosecuting Attorneys, Heritage Foundation, International Association of Chiefs of Police, National Conference of Chief Justices, National Sheriffs' Association, Pretrial Justice Institute, and the Texas Public Policy Foundation.⁸

Finally, despite HHS's unaccountable failure to estimate the costs of its proposals, available information indicates that the overall cost of detaining more unaccompanied children for longer in both permanent and temporary shelters may be more than \$1.3 billion per year:

May 2017				
	Children	Cost per day per child	Totals	
Permanent shelters	2,400 ⁹	\$250	\$600,000	May 2017 daily cost
			\$219,000,000	May 2017 annual cost

September 2018				
	Children	Cost per day per child	Totals	
Permanent shelters	11,200 ¹⁰	\$250	\$2,800,000	September 2018 daily cost of permanent shelters
Temporary facilities	1,600 ¹¹	\$1,000	\$1,600,000	September 2018 daily cost of temporary facilities
			\$4,400,000	September 2018 total daily cost

https://www.cfr.org/sites/default/files/pdf/2009/08/Immigration_TFR63.pdf.

⁸ See Julie Myers Wood and Steve Martin, *The Washington Times*, "Smart Alternatives to Immigrant Detention", Mar. 28, 2013, <http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/>; American Civil Liberties Union, "Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock Up", <https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigrationdetention-atd>.

⁹ Caitlin Dickerson, *The New York Times*, "Detention of Migrant Children Has Skyrocketed to Highest Levels Ever," Sept. 12, 2018, <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html> ("Population levels at federally contracted shelters for migrant children have quietly shot up more than fivefold since last summer, according to data obtained by The New York Times, reaching a total of 12,800 this month. There were 2,400 such children in custody in May 2017.").

¹⁰ *Id.*; see also Caitlin Dickerson, *The New York Times*, "The Government Is Moving Migrant Children to a Texas Tent City. Here's What's Behind It.," Oct. 1, 2018, <https://www.nytimes.com/2018/10/01/us/migrant-children-tent-city-camp-texas.html> (1,600 of the children detained are in temporary facilities).

¹¹ Caitlin Dickerson, *supra* n.10.

			\$1,606,000,000	September 2018 total annual cost
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Difference	
May 2017 – September 2018	
\$3,800,000	Additional cost per day
\$1,387,000,000	Additional cost per year

Detaining an immigrant child in a temporary facility such as a tent city is particularly costly, with the daily cost per child reportedly rising to approximately \$1,000.¹² This is four times the cost of detaining of a child in a permanent HHS facility.¹³ With children now spending an average of 74 days in federal custody,¹⁴ the cost per child will come to a total of approximately \$74,000. And with more than 1,600 children currently detained in makeshift shelters,¹⁵ the government is likely spending an additional \$1.6 million each day to hold children in federal custody. These costs add up: At this rate, over the next year the total bill for detaining children in tent cities—which were not required in the absence of delays caused by the administration’s current policies—will be more than half a billion dollars.¹⁶

2. The NPRM relies on a fallacious and unsubstantiated deterrence justification

In July 2015, a court ruling affirmed that the *Flores* settlement protections, including the limitation on holding children in secure, unlicensed facilities for more than 20 days, applied to accompanied as well as unaccompanied children.¹⁷ In the proposed rule, DHS asserts that this ruling led to an increase in families arriving at the southern border. In particular, DHS claims that “although it is difficult to definitively prove the causal link, DHS’s assessment is that the link is real, as those limitations”—*i.e.*, the limitation on the length of time for which DHS can hold children in detention—“correlated with a sharp increase in family migration.”¹⁸ Notably, DHS fails to provide any of the data or methods used to make its assessment.

¹² Dan Diamond, *POLITICO*, “HHS Reviews Refugee Operations as Trump Calls for Border Crackdown,” Oct. 23, 2018, <https://www.politico.com/story/2018/10/23/trump-caravan-border-hhs-873152> (“HHS is spending about \$1,000 per child per day at the tent city in Tornillo, Texas, and at other temporary facilities, according to three individuals briefed on the latest data.”).

¹³ Julia Ainsley, *NBC News*, “Trump Admin’s ‘Tent Cities’ Cost More than Keeping Migrant Kids with Parents,” June 20, 2018, <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-s-tent-cities-cost-more-keeping-migrant-kids-n884871> (“It costs \$256 per person per night to hold children in permanent HHS facilities like Casa Padre in Brownsville, Texas.”).

¹⁴ Jonathan Blitzer, *The New Yorker*, “To Free Detained Children, Immigrant Families Are Forced to Risk Everything,” Oct. 16, 2018, <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything>.

¹⁵ Caitlin Dickerson, *supra* n.10.

¹⁶ \$1.6 million per day multiplied by 365 days equals \$584 million total.

¹⁷ *Flores, v. Lynch*, No. 85-04544, C.D. Cal., Aug. 21, 2015, <https://www.aila.org/File/Related/14111359p.pdf>.

¹⁸ Notice of Proposed Rulemaking, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” Federal Register, Vol. 83, No. 174, September 7, 2018, pgs. 45493-45494,

Others who have analyzed the relevant data, including data DHS has presented in the past when claiming that the 2015 court ruling increased immigration, have found that the data not only fails to prove DHS's claims of correlation, but also that, as here in the NPRM, DHS unreasonably and erroneously presents its correlation theory as causation.¹⁹ Moreover, in NIJC's experience, families who fled to the United States after July 2015 were unaware of nuanced changes in U.S. law and, instead were prompted to flee because threats of harm to them in their home countries escalated during that time. For example:

Diana²⁰ fled Honduras with her young daughter to seek protection in to United States in November of 2015; days after she received a written death threat from gang members vowing to kill her and her daughter. Diana and her daughter were granted asylum in February 2017.

Isabel fled El Salvador with her young son in June 2016; about a month after she and her son were attacked on the street by MS-13 gang members who restrained her son while they beat her and threatened to kill the family. They were granted asylum in January 2018.

The factors triggering the flight of these families had nothing to do with changes in U.S. law and everything to do with immediate threats to their lives in their home communities. Studies and data have shown that detention and other punitive measures will not deter families from coming to the United States to seek protection. Genuine refugees, like the many families fleeing the Northern Triangle region of Central America, will continue to flee violence to save their lives and those of their children.²¹ There is substantial evidence to demonstrate that not only poverty but also violence, corruption, and impunity drive forced migration from the Northern Triangle countries of Guatemala, Honduras, and El Salvador, to the United States and the rest of the region. In recent years, numerous studies have evidenced that violence is a main push factor of forced migration from this region and a major reason that individuals seek international protection.²²

<https://www.regulations.gov/document?D=ICEB-2018-0002-0001>.

¹⁹ See, e.g., Tom K. Wong, Center for American Progress, "Did a 2015 Flores Court Ruling Increase the Number of Families Arriving at the Southwest Border?" October 16, 2018,

<https://www.americanprogress.org/issues/immigration/news/2018/10/16/459358/2015-flores-court-ruling-increase-number-families-arriving-southwest-border/>; Adam Cox and Ryan Goodman, Just Security, "Detention of Migrant Families as 'Deterrence': Ethical Flaws and Empirical Doubts," June 22, 2018,

<https://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts/>.

²⁰ All client names change to protect client confidentiality.

²¹ See, e.g., Medecins sans Frontieres, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* (June 2017), https://www.msf.org/sites/msf.org/files/msf_forced-to-flee-central-americas-northern-triangle_e.pdf.

²² See, e.g., United Nations High Commissioner for Refugees, *Children on the Run* (May 13, 2014), <http://www.unhcr.org/56fc266f4.html>; United Nations High Commissioner for Refugees, *Women on the Run* (Oct. 26, 2015), <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>; Jonathan T. Hiskey, Abby Cordova, Diana Orces, Mary Fran Malone, American Immigration Council, *Understanding the Central American Refugee Crisis: Why They are Fleeing and How U.S. Policies are Used to Deter Them* (Feb. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/understanding_the_central_american_refugee_crisis.pdf; Center for Gender and Refugee Studies, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (Feb. 2015), https://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_English_1.pdf; Michael Clemens,

Unlimited detention, especially when used for the purpose of deterrence, also violates the prohibition against torture and ill-treatment under U.S. and international law. The UN Special Rapporteur on torture has unequivocally stated that ill-treatment can amount to torture if it is intentionally imposed “for the purpose of deterring, intimidating, or punishing migrants or their families, or coercing them into withdrawing their requests for asylum.”²³

3. The NPRM, combined with DHS’s abominable lack of oversight of its detention facilities, puts children’s health and safety at grave risk

a. Detention, especially indefinite detention, severely harms children and their families

Under these proposed changes, inadequate conditions of confinement in DHS custody are inevitable, heightening the risk of foreseeable health harms to the detained population. Clinical studies have demonstrated that the mitigating factor of parental presence does not negate the damaging impact of detention on the physical and mental health of children.²⁴ In a retrospective analysis, detained children were reported to have a tenfold increase in developing psychiatric disorders.²⁵ Studies of health difficulties of detained children found that most detained children reported symptoms of depression, sleep problems, loss of appetite, and somatic complaints such as headaches and abdominal pains. Specific concerns include inadequate nutritional provisions, restricted meal times, and child weight loss.²⁶ DHS’ own medical experts recorded a case in which a 16-month-old baby lost a third of his body weight over 10 days because of untreated diarrheal disease, yet was never given IV fluids.²⁷ Moreover, indefinite detention has severe medical and mental health consequences.²⁸ For example, one young NIJC client from El Salvador who was

Center for Global Development, *Violence, Development, and Migration Waves: Evidence from Central American Child Migrant Apprehensions* (July 27, 2017), <https://www.cgdev.org/publication/violence-development-and-migration-waves-evidence-central-american-childmigrant>.

²³ Rapport of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, *Migration-related Torture and Ill treatment*, A/HRC/37/50 (February 2018).

²⁴ Dudley, Michael, Zachary Steel, Sarah Mares, and Louise Newman. *Children and Young People in Immigration Detention*. *Current Opinion Psychiatry* 25, no. 4 (July 2012): 285-92. doi:10.1097/YCO.0b013e3283548676; Ehntholt, K., Trickey, D., Harris Hendriks, J., Chambers, H., Scott, M., Yule, W., & Tibbles, P. (2018). Mental health of unaccompanied asylum-seeking adolescents previously held in British detention centres. *Clinical Child Psychology and Psychiatry*, 23(2), 238–257; Kronick, R., Rousseau, C., & Cleveland, J. (2015). Asylum-seeking children’s experiences of detention in Canada: A qualitative study. *American Journal of Orthopsychiatry*, 85(3), 287.

²⁵ Steel, Zachary, Shakeh Momartin, Catherine Bateman, Atena Hafshejani, Derrick M. Silove, Naleya Everson, Konya Roy, Michael Dudley, Louise Newman, Bijou Blick, and Sarah Mares. *Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia*. *Australian and New Zealand Journal of Public Health* 28, no. 6 (September 25, 2004): 527-36. doi:10.1111/j.1467-842x.2004.tb00042.x.

²⁶ Lorek, Ann, Kimberly Ehntholt, Anne Nesbitt, Emmanuel Wey, Chipo Githinji, Eve Rossor, and Rush Wickramasinghe. *The Mental and Physical Health Difficulties of Children Held within a British Immigration Detention Center: A Pilot Study*. *Child Abuse & Neglect* 33, no. 9 (September 2009): 573-85. doi:10.1016/j.chiabu.2008.10.005.

²⁷ Dr. Scott Allen and Dr. Pamela McPherson, *Letter to the Senate Whistleblowing Caucus*, July 17, 2018, <https://www.whistleblower.org/sites/default/files/Original%20Docs%20Letter.pdf>.

²⁸ Physicians for Human Rights, *Punishment before Justice: Indefinite Detention in the US* (June 1, 2011), <https://phr.org/resources/punishment-before-justice-indefinite-detention-in-the-us/>.

detained with his mother reported experiencing frightening heart palpitations. His mother reported to government officials that her son, who was 12 years old, would say “mommy, my heart is like that” and she would see his shirt moving as his heart raced. After mother and son paid a bond and were released from family detention, the medical issue subsided. The family went on to win asylum in April 2016.

b. DHS has a poor track record of accountability and transparency with respect to immigration detention facilities

The proposed regulation would allow DHS to “employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE [Immigration and Customs Enforcement].”²⁹ DHS claims that this would provide “materially identical assurances about the conditions” of family detention centers while allowing for longer periods of detention.³⁰

Self-inspections by DHS and its contractors are much weaker than the protections that *Flores* provides. DHS’s record of oversight, transparency, and accountability with regard to immigration detention facilities is abysmal—and it puts lives at risk.³¹

i. ICE hides family detention center inspections from public view

DHS asserts in its proposed regulation that “ICE currently meets the proposed licensing requirements” because it currently requires family detention facilities to comply with ICE’s detention standards and hires inspectors to monitor compliance, and therefore “DHS would not incur additional costs in fulfilling the requirements of the proposed alternative licensing scheme.”³²

Since May 2015, DHS has contracted with a company called Danya International to inspect family detention centers (which ICE calls family residential centers, or FRCs) for compliance with ICE’s internal standards. According to court documents, Danya has conducted unannounced monthly inspections of all three family residential centers since August 2015.³³ Only three reports from those inspections—one from each facility, as selected by ICE—are publicly available.³⁴ With respect to the others, the only information available to the public is an assertion by an ICE official in a court declaration that “Danya has generally found the FRCs to be compliant with a majority” of standards, and “[w]here Danya observed individual issues of non-compliance, the facilities took corrective action as appropriate and achieved compliance

²⁹ Department of Homeland Security and Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” *Federal Register*, Vol. 83, No. 174, Sept. 7, 2018, p. 45525. <https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf> (Downloaded Oct. 15, 2018)

³⁰ *Id.*, p. 45488.

³¹ See, e.g., Human Rights Watch et al, *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention* (June 20, 2018), <https://immigrantjustice.org/research-items/report-code-red-fatal-consequences-dangerously-substandard-medical-care-immigration>.

³² *Id.*, p. 45518.

³³ Declaration of Jon Gurule, ¶6, *Flores v. Holder*, No. CV 85-4544-DMG (C.D. Cal June 3, 2016) <https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0030.pdf> (Downloaded Oct. 11, 2018)

³⁴ *Id.*, exhibits 1, 2 and 3.

although this is a continuous process.”³⁵ These vague descriptions provide almost no information about what individual standards were violated, or how severe and prolonged those violations were.

ICE denied requests by DHS’s own Advisory Committee on Family Residential Centers for access to the other Danya International inspection reports.³⁶ The three reviews that are available consist mainly of checklists of standards with limited further explanation of the findings, and no apparent input from detainees.

DHS’s Office of Civil Rights and Civil Liberties has conducted more in-depth inspections and investigations of family detention centers, but those documents and reports are likewise unavailable to the public. Two medical doctors who served as subject matter experts for the Office of Civil Rights and Civil Liberties on family detention centers, Dr. Pamela McPherson and Dr. Scott Allen, recently reported to Congress that their investigations “frequently revealed serious compliance issues resulting in harm to children.”³⁷ Drs. McPherson and Allen stated that family detention centers “still have significant deficiencies that violate federal detention standards,” including repeated violations of the standards for medical staffing, clinic space, timely access to medical care, and language access, and gave detailed examples of cases when children have been harmed by inadequate medical care.

- ii. ICE is incapable of maintaining an even minimally adequate inspections regime for its detention facilities for adults

More information is publicly available regarding DHS’s record on inspections of adult ICE detention centers—but that record provides further evidence that the agency’s self-inspections, even when working with an outside auditor, are a poor substitute for state child welfare agencies or court supervision.

A DHS Office of Inspector General (OIG) investigation published in June found that because of the flaws in inspections of ICE detention facilities, deficiencies “remain uncorrected for years.”³⁸ The most frequent inspections of ICE facilities are conducted by a private contractor called the Nakamoto Group. The OIG found that Nakamoto’s inspections were severely lacking. According to OIG, “typically, three to five inspectors have only 3 days to complete the inspection, interview 85 to 100 detainees, brief facility staff, and begin writing their inspection report for ICE.” An ICE employee told the OIG that this was not “enough time to see if the [facility] is actually implementing” required policies. Other ICE personnel described Nakamoto inspections as “very, very, very difficult to fail” and “useless.”

For the inspections that DHS OIG observed, Nakamoto reported having conducted 85 to 100 detainee

³⁵ *Id.* ¶6.

³⁶ *Report of the DHS Advisory Committee on Family Residential Centers*, Oct. 7, 2016, p. 93 <https://www.humanrightsfirst.org/sites/default/files/dhs-advisory-committee-on-family-residential-centers.pdf>.

³⁷ Letter from Dr. Scott Allen and Dr. Pamela McPherson of the Department of Homeland Security Office of Civil Rights and Civil Liberties, to Sens. Charles E. Grassley and Ron Wyden, Senate Whistleblowing Caucus, July 17, 2018 <https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf>.

³⁸ Department of Homeland Security Office of Inspector General, *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements: DHS OIG Highlights* (OIG-18-67), June 26, 2018 <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

interviews. But contrary to what Nakamoto’s contract required, the conversations with detainees that OIG saw were not conducted in private, were conducted only in English, and OIG wrote that it “would not characterize them as interviews.” (Although the OIG found that inspections conducted by the Office of Detention Oversight were more thorough, these occurred only once every three years on average, and ICE failed to adequately follow up to ensure that problems were corrected.)

Given these endemic inspections failures, ICE’s refusal to make the vast majority of its inspections of its facilities detaining children public provokes little wonder. If ICE’s third-party vendor for auditing the adult detention facilities’ compliance with ICE’s internal detention standards cannot adequately survey adult detainees, ICE cannot credibly guarantee that a similar scheme for children will produce better—or even minimally adequate—results. Instead, the problems plaguing the inspections scheme for adults will only be exacerbated when applied to children.

iii. DHS lies to the public, including about its treatment of children

In addition to the systemic flaws in detention monitoring described above, DHS has shown a disturbing pattern of deceiving Congress and the public,³⁹ not least current DHS leadership about the agency’s treatment of children. Over the last few months, Secretary of Homeland Security Kirstjen Nielsen has claimed that DHS does not detain children;⁴⁰ that DHS did not have a policy of family separation;⁴¹ that deterrence was not one of the purposes of family separation;⁴² and that parents deported without their children had been given the opportunity to reunite and declined to take it.⁴³ All of those statements are false, and provide further evidence that DHS cannot be trusted to monitor itself with regard to treatment of children in detention.⁴⁴

4. The NPRM violates the Flores Settlement Agreement on its face and vitiates its fundamental purpose by permitting DHS to “self-license” detention centers for children and families

³⁹ See, e.g., Detention Watch Network and National Immigrant Justice Center, *ICE Lies: Public Deception, Private Profit* (Feb. 2018), <https://www.immigrantjustice.org/research-items/report-ice-lies-public-deception-private-profit>.

⁴⁰ Testimony of Kirstjen Nielsen, Secretary of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on “Threats to the Homeland,” Oct. 10, 2018 [Quote at 1:29:43]. <https://www.c-span.org/video/?452548-1/secretary-nielsen-fbi-director-wray-testify-homeland-security-threats&live&start=5375>.

⁴¹ Kirstjen Nielsen, Twitter Post, June 17, 2018, 2:52 p.m. <https://twitter.com/secnielsen/status/1008467414235992069?lang=en>.

⁴² Testimony of Kirstjen Nielsen, Secretary of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on “Authorities and Resources Needed to Protect and Secure the United States,” May 15, 2018. [Quote at 56:58]. <https://www.c-span.org/video/?445411-1/homeland-security-secretary-kirstjen-nielsen-testifies-senate-panel&start=3406>.

⁴³ Samuel Chamberlain, “DHS Secretary Nielsen says White House is ‘on track’ to reunite separated families by deadline,” *Fox News*, July 24, 2018. <https://www.foxnews.com/politics/dhs-secretary-nielsen-says-white-house-is-on-track-to-reunite-separated-families-by-deadline>.

⁴⁴ Letter from Danielle Brian and Lisa Rosenberg to Sens. Ron Johnson and Claire McCaskill, Oct. 2, 2018. <https://www.pogo.org/letter/2018/10/letter-to-senators-regarding-kirstjen-nielsens-inaccurate-testimony/> (Hereinafter Brian and Rosenberg Letter); Department of Homeland Security Office of Inspector General, “Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, OIG-18-84, Sept. 27, 2018. <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

- a. *The FSA requires the government to hold children in state-licensed facilities **notwithstanding** implementation of the settlement by regulation*

FSA Paragraph 40 requires that DHS hold the “general population” of minors in its custody in “facilities that are state-licensed for the care of dependent minors” notwithstanding publication of final regulations implementing the FSA. As a result of this strict stipulation requirement, DHS is barred from housing children not subject to an exception to the licensed facility requirement in any facility that is not state-licensed, leaving no room for an alternative licensing scheme like the one proposed by DHS.

- b. *The stated purpose and effect of the proposed regulations—indefinite detention of children—is the opposite of the FSA’s stated purpose and requirement of expeditious release of children from detention*

The core principle and requirement of the FSA is that migrant children taken into detention should be released from detention as “expeditiously” as possible, which is reflected in its two basic premises. First, pending a child’s further immigration proceedings, the child should be released almost immediately to family members or other acceptable sponsors rather than held in detention. Second, if a child will remain in detention longer term (as contemplated by the FSA, because there are no family members or acceptable sponsors to whom the child can be released), then the child should not be in a federal immigration facility (*i.e.*, a facility such as an FRC--which, is similar to a prison setting), but, rather, should be in a setting that is licensed by a state child welfare agency for the longer-term housing and care of children.

By contrast, the Proposed Regulations provide for *indefinite* detention of Accompanied Children in federal immigration facilities pending resolution of the long process of their and their parents’ immigration proceedings.⁴⁵ The Government now seeks, through the Proposed Regulations that it contends materially *implement* the FSA, to accomplish the *material modification* of the FSA that the Government already sought from the court and the court rejected.⁴⁶

- c. *The proposed federal licensing scheme amounts to DHS granting itself the right to self-license its detention centers for prolonged incarceration of children*

⁴⁵ 83 Fed. Reg. 45493. We note that, under the FSA, the Government’s policy with respect to *Unaccompanied Children* (*i.e.*, children who cross the border *without* a parent or legal guardian) has been to place them in a licensed program pending resolution of their immigration claims--at which time they would then, depending on the resolution, either be removed from the country or returned to a licensed program until they reached the age of majority and could be released. The Proposed Regulations would not change this policy relating to Unaccompanied Children. The change that the Proposed Regulations would effect is that *Accompanied Children* (*i.e.*, children who cross the border with a parent or legal guardian) would be detained indefinitely in federal immigration facilities (FRCs) pending resolution of their and their parents’ immigration claims--rather than, as was the case before 2014, being released with their parents (subject to ankle monitoring, bond, or other compliance programs), or, as was the case under the family separation policy in April-June 2018, forcibly separated from their parents to be housed alone in a licensed program.

⁴⁶ *Flores v. Sessions*, Case No. CV 85-4544-DMG, C.D. Cal., July 9, 2018 (“[the government] now seek[s] to hold minors in indefinite detention in unlicensed facilities, which would constitute a fundamental and material breach of the parties’ Agreement”).

The Proposed Regulations accomplish the Government’s preferred policy of indefinite detention of children by providing that the federal Government can self-license its own federal detention facilities.⁴⁷ Although the concept of licensing inherently requires review or oversight by *another entity* than the one being regulated, the language of the proposed rule would not require that the outside entity providing oversight actually certify that the a facility is in compliance with applicable ICE-established residential standards. On the face of the proposed rule, DHS would need to only appoint a watchdog; the watchdog would need not have any actual authority. And as discussed above, DHS’s track record with self-appointed watchdogs is abysmal.

Any entity hired pursuant to DHS Proposed Regulation 236.3(b)(9) is unlikely to be able to enforce applicable rules and guidelines in a fair manner, a reality already borne out by the endemic failures of the inspections regime governing ICE adult detention facilities. Ample evidence demonstrates that the Government is incapable of effectively or meaningfully inspecting its immigration detention facilities, a systemic failure is borne out by, among other examples, the “untimely and inadequate detainee medical care” and “nooses in detainee cells” found in the OIG’s unannounced inspection of an ICE detention facility in Adelanto, California that had passed its most recent inspection only last year.⁴⁸ In another example, the Stewart Detention Center in Georgia passed its inspection just days before the suicide of a mentally-ill detainee kept in solitary confinement in violation of ICE’s own detention standards.⁴⁹ These failures strongly indicate that the removal of the core outside licensing and monitoring protections of Flores in favor of the Government’s proposed self-licensing scheme will jeopardize children’s lives.

In addition, without an impartial, outside entity to review DHS facilities and enforce standards, even if the standards adopted by ICE sufficiently protected children, it would be much harder for children held in facilities that do not satisfy the standards to obtain relief from facility noncompliance.

Even now, current standards for ICE family detention centers fail to address core components of child wellbeing and protection. These standards lack a recognition of the wide range of children’s socio-emotional, health, mental health and physical developmental needs at varying ages.⁵⁰ The conditions in

⁴⁷ 83 Fed. Reg. 45525. The Government explains that, under the requirements of the FSA, the Government has three options with respect to the custody of migrant children who are accompanied by a parent (or legal guardian): “1) parole all family members into the United States; 2) detain the parent(s) or legal guardian(s) and either release the juvenile to another person or legal guardian or transfer them to HHS to be treated as an UAC [(i.e., detain the children, separately from the parents, in state-licensed facilities for children who are dependent on the state)]; or 3) detain the family unit together by placing them at an appropriate FRC [(family residential center)] during [(i.e., for “the pendency of] their immigration proceedings.” The Government states that it prefers the third option--and needs the Proposed Regulations because the FSA creates “a barrier” to the utilization of this option given that the FSA prohibits prolonged (more than 20 days) detention of children in facilities that are not licensed by a State child welfare agency. PR, § IV.C.1 (pp. 29-31).

⁴⁸ See DHS OIG, Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California, OIG 18-86, Sept. 27, 2018, <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf>.

⁴⁹ Spencer Woodman and Jose Olivares, *The Intercept*, “Immigrant Detainee Called ICE Help Line Before Killing Himself in Isolation Cell,” Oct. 8, 2018, <https://theintercept.com/2018/10/08/ice-detention-suicide-solitary-confinement/>.

⁵⁰ U.S. Department of Homeland Security, *Family Residential Standards*, U.S. Immigration and Customs Enforcement, 2018, <https://www.ice.gov/detention-standards/family-residential>.

family detention centers are clearly not conducive to provide these vulnerable families with the support they need, and evidence suggests that children’s mental health and development deteriorates the longer they are in detention.⁵¹ Experts report regressions in child development, suicide attempts, and high levels of anxiety and depression among detained children.⁵² Furthermore, various assessments—including a 2016 assessment made by a DHS-appointed advisory committee—have established that appropriate standards are simply impossible within the context of family detention.⁵³

The NPRM notes that family detention centers are not aligned with existing state licensing systems. In fact, the myriad licensing challenges that have faced detention facilities demonstrate the importance of this requirement of the Flores settlement agreement and the crucial role that licensing and monitoring can play in guarding against and identifying inappropriate conditions for children. For example, the T. Don Hutto Center in Texas closed after three years of operation due to multiple lawsuits related to the center’s poor conditions.⁵⁴ In January 2016, the Pennsylvania Department of Human Services revoked the child care license of the Berks County Residential Center because the Department of Homeland Security was found to be using its license inappropriately.⁵⁵ Demonstrating the agency’s disregard for child care licensure standards and regulations, the facility continued to operate for a year with a suspended license. In late 2015, the Texas Department of Family Protective Services introduced a regulation called the “FRC rule” that would allow the Dilley detention center to detain children while exempt from statewide health and safety standards. In June 2016, a judge ruled that such an exemption could put children at risk of abuse, particularly due to shared sleeping spaces with non-related adults. In December 2016, that decision was upheld by a federal judge.⁵⁶ The numerous reports of sexual abuse at DHS facilities and lack of adequate medical services point to the urgent need for appropriate oversight of facilities housing families and children.⁵⁷

⁵¹ Australian Human Rights Commission, *The Forgotten Children: National Inquiry on Immigrant Children in Detention*, 2014, <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-nationalinquiry-children>.

⁵² Claire Hutkins Seda, *Dr. Luis Zayas Provides Testimony on Family Detention*, Migrant Clinicians Network, July 29, 2015, <http://www.migrantclinician.org/blog/2015/jul/dr.-luis-zayas-provides-testimony-family-detention.html>.

⁵³ Immigration and Customs Enforcement, *Report of the DHS Advisory Committee on Family Residential Centers, 2016*, <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

⁵⁴ American Civil Liberties Union, *ACLU Challenges Illegal Detention of Immigrant Children Held in Prison-Like Conditions*, 2007, <https://www.aclu.org/news/aclu-challenges-illegal-detention-immigrant-children-held-prisonconditions?redirect=cpreirect/28865>.

⁵⁵ Michael Matza, *PA Fights to Shut Down Immigrant Family Detention Center in Berks*, *The Inquirer*, 2017, <http://www.philly.com/philly/news/pennsylvania/Pa-renews-effort-to-revoke-the-license-of-immigrant-familydetention-center---.html>; Renée Feltz, *Pennsylvania Doubles Down on Revoking Child-Care License for Controversial Family Detention Center*, *Rewire*, 2017, <https://rewire.news/article/2017/05/05/pennsylvania-doubles-revoking-child-care-licensecontroversial-family-detention-center/>.

⁵⁶ Alexa Garcia-Ditta, *Judge Halts Child Care License for Dilley Detention Center*, *Texas Observer*, 2016, <https://www.texasobserver.org/immigrant-family-detention-license-hold/>; *Grassroots Leadership v. Texas Department of Family and Protective Services*, Final Judgement, D-1-GN-15-004336, District Court of Travis County 2016, https://grassrootsleadership.org/sites/default/files/uploads/gli_v._dfps_final_judgment.pdf; Representative Lucille Roybal-Allard, Representative Pramila Jayapal, *In ICE Detention Pregnant Women Face Stress, Trauma, and Inadequate Care*, *The Hill*, 2018, <https://thehill.com/blogs/congress-blog/homeland-security/384602-in-ice-detention-pregnant-women-face-stress-trauma-and>.

⁵⁷ Emily Kassie, *Sexual Assault inside ICE Detention: 2 Survivors Tell Their Stories*, *The New York Times*, 2018, <https://www.nytimes.com/2018/07/17/us/sexual-assault-ice-detention-survivor-stories.html>.

5. DHS's proposal to restrict the release of children in its custody constitutes deliberate cruelty contrary to decades of previous practice and policy

- a. *DHS erroneously claims that the HSA and TVPRA prohibit the release of children in DHS custody to caregivers other than parents and legal guardians*

DHS proposes to amend its existing regulations to limit DHS's authority to release a minor from its custody only to a parent or legal guardian. *See* Proposed Regulation 236.3(j). For many children, this would mean that they have no sponsor available in the United States and lead to their long detention, placement in long-term foster care, or detention fatigue—potentially forcing the child to accept voluntary departure and risk re-exposure to the danger he or she fled from in the first place, rather than pursue relief in the United States for which they may qualify. Moreover, combined with the proposed policy of continuous redeterminations of a child's designation as an unaccompanied child,⁵⁸ many more children would be subject to prolonged detention by DHS, without possibility of release to an appropriate caregiver in accordance with their best interests.

DHS characterizes these proposed changes as an alignment with the existing statutes and regulations and states numerous times that DHS does not have the authority to release a minor to anyone other than a parent or legal guardian.⁵⁹ Although DHS cites the TVPRA and the HSA as limiting its authority to release a minor to anyone other than a parent or legal guardian, it fails to provide a single citation to the provisions in either statute that purportedly limit DHS's authority in this manner.⁶⁰

Moreover, the NPRM does not provide any explanation as to why DHS believes that it currently lacks the authority to comply with the text of the FSA and DHS Regulation 236.3(b) in circumstances when these authorities call for DHS to release a minor to a person or entity other than a parent or legal guardian. Rather, DHS states only that they currently lack this authority today due to the TVPRA and HSA—again without providing any citations to text within the TVPRA or the HSA to support its statement. Furthermore, the NPRM states only that the TVPRA and HSA were enacted after DHS Regulation 236.3(b) was originally promulgated.⁶¹ If Congress had intended to modify the agency's obligation that are codified in FSA paragraph 14 when enacting the HSA and/or the TVPRA, Congress would have been direct and explicit.⁶²

- b. *DHS would limit parole for accompanied children (and adults) in expedited removal, even as it seeks to place even greater numbers of children in expedited removal, codifying a default of detention for asylum-seeking families*

⁵⁸ *See* 83 FR 45497 (Proposed 8 CFR § 236.3(d)).

⁵⁹ 83 Fed. Reg. 45495, 45500, 45503, 45504, 45516, 45517, 45524 and 45528.

⁶⁰ 83 Fed. Reg. 45495, 45500, 45503 and 45516.

⁶¹ *Id.* at 45502.

⁶² *See, e.g., Hui v. Castaneda*, 559 U.S. 799, 810 (2010) (“[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest”). As the Ninth Circuit noted, courts avoid overruling the terms of a binding agreement incorporated into a judicial decree, such as the FSA, merely because Congress failed to speak affirmatively to preserve such terms in a later legislation. *See Flores v. Sessions*, 862 F.3d at 875.

The proposed regulations impose heightened parole standards for detained individuals – both accompanied children and adults – in expedited removal proceedings. The current parole regulations allow detained individuals in expedited removal proceedings to seek parole for “urgent humanitarian reasons” or “significant public benefit” under 8 CFR § 212.5(b). In 2017, a federal district court judge ruling on the FSA found that under that provision DHS had discretion to release detained children on a case-by-case basis, including those in the expedited removal process.⁶³ The proposed regulations, however, limit children (and adults) in expedited removal proceedings who have not yet passed a credible or reasonable fear interview to parole under the much narrower circumstances of a medical emergency or for law enforcement purposes. *See* 8 CFR § 235.3(b)(2)(iii), (4)(ii). Given the already limited use of parole in general, the proposed regulation would further reduce the release of children from detention who pose no flight or security risk. Under this regulation, children with urgent humanitarian needs, including pregnant young women as well as children with physical disabilities, cognitive impairments or chronic medical conditions, would likely no longer qualify for parole under the exacting medical emergency standard.

Moreover, while unaccompanied children (except for certain children from Mexico and Canada) are not subject to expedited removal but instead must be placed in removal proceedings before EOIR,⁶⁴ many current unaccompanied children could be stripped of that status under DHS Proposed Regulation 236.3(d).⁶⁵ If adopted, this could enable DHS to terminate some children’s UAC status and place them in expedited removal proceedings, with no possibility of parole—severely restricting their meaningful access to counsel and completely upending the current legal protections provided to unaccompanied children.

6. DHS and HHS propose exceptions that would swallow all of the proposed protections for children in their care

a. The agencies seek unchecked power to claim “emergency” and suspend child protections

The proposed regulations provide for broad exemptions to existing child protections by expansively defining the terms “emergency” and “influx.”⁶⁶ These broad definitions provide massive leeway to DHS and HHS to selectively ignore the important children’s rights provisions of the regulation, essentially leaving immigration operations impacting migrant children unregulated.

The term emergency, under the proposed regulations, “means an act or event...that prevents timely transport or placement of minors or impacts other conditions,” with the last catchall portion of the phrase “impacts other conditions” implicating the basic needs of children, including the very provision of snacks and meals or prolonged detention of children in border jails.⁶⁷ The regulations propose natural disaster, facility fire, civil disturbance, medical or public health concerns in the list of examples of such events but indicate that other kinds of events might also qualify, leaving significant room for interpretation.

⁶³ *Flores v. Sessions*, No. 2:85-cv-04544 (C.D. Cal. June 27, 2017).

⁶⁴ *See* 8 U.S.C. § 1232(a)(5)(D).

⁶⁵ 83 Fed. Reg. 45497.

⁶⁶ 83 Fed. Reg. 45496.

⁶⁷ 83 Fed. Reg. 45525.

DHS and HHS also propose to adopt an antiquated definition of influx, a situation, according to the proposed regulations, in which there are, “at any given time, more than 130 minors or UACs eligible for placement in a licensed facility.”⁶⁸ This original numerical cut off of 130 minors was set by the parties in the late 1990s when the then INS apprehended 1.4 million people a year.⁶⁹ Divided equally each of the almost 7,000 border agents apprehended an average of 17 people a month. In fiscal year 2017, by comparison, Border Patrol arrested a much smaller number of 310,531 people at the U.S. border, and each of the almost 20,000 agents made an average of only 1.3 arrests a month. DHS and HHS disingenuously argue that they exist within a “constant state of influx” even while overall border crossings are 20 percent of what they were at the moment that term was defined in the FSA while staffing has increased by almost three times. The border is not in crisis – except in terms of our government’s failure to secure protection of vulnerable people’s rights – and DHS suffers from no shortage of resources to respond to historically low migratory flows.⁷⁰

Border arrests and staffing 1997, 2017

Year	1997	2017
Total border arrests ⁷¹	1,412,953	310,531
Number of border agents ⁷²	6,895	19,437

Instead DHS and HHS appear to be using these proposed regulations as a means of quietly erasing the FSA’s time limitations on transferring children out of DHS custody, admitting that the impact of the definitions of emergency and influx is to make ignoring limitations on transfer the “default.”⁷³ This would continue to expose children to dangerous conditions in DHS custody documented repeatedly by government inspectors and outside researchers including inadequate and inappropriate food, severely cold temperatures, bullying and abuse and lack of medical care.⁷⁴

It is unacceptable that an emergency situation should legitimize violations of minimum standards and remove the mandatory requirement that deviations from minimum standards must be recorded. DHS offers

⁶⁸ *Id.*

⁶⁹ In fiscal year 1997, INS apprehended 1,412,953 at the US border. United States Border Patrol, Nationwide Illegal Alien Apprehensions Fiscal Years 1925-2017, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Apps%20FY1925-FY2017.pdf>.

⁷⁰ See, e.g., Julia Toepfer and Tara Tidwell Cullen, *National Immigrant Justice Center*, “ICE Lies, Manipulates, and Takes Money from Other Agencies to Lock Up and Deport More Immigrants,” Sept. 13, 2018, <https://immigrantjustice.org/staff/blog/ice-lies-manipulates-and-takes-money-other-agencies-lock-and-deport-more-immigrants>.

⁷¹ United States Border Patrol, Nationwide Illegal Alien Apprehensions Fiscal Years 1925-2017, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Apps%20FY1925-FY2017.pdf>.

⁷² United States Border Patrol, Border Patrol Agent Staffing by Fiscal Year, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Staffing%20FY1992-FY2017.pdf>.

⁷³ See 83 Fed. Reg. 45498.

⁷⁴ See Human Rights Watch, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells*, February 28, 2018, <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>.

as an example delaying access to meal during transfer from a facility in the path of a natural disaster;⁷⁵ the hypothetical example should instead ensure that non-perishable, nutritious food and bottled water in packs will be kept on site at all times in case of an emergency evacuation in order to ensure that nutritional needs of children are met. Critical medical care for acute and infectious conditions that require immediate attention might be ignored or delayed during “emergency” conditions which can nearly always be met.

This expansion of the weakening of protections triggered by an emergency or influx is especially worrying given the agencies' current record of failure to adhere to basic standards of child protection.⁷⁶ Recent cases have demonstrated the current deficiencies in emergency care for detained children, including the death of a 19-month-old toddler due a respiratory infection that went untreated⁷⁷ and the near death of a 5-year-old due to an untreated ruptured appendix,⁷⁸ both shortly after being released from Dilley family detention center. Constant exemption not just of the requirements to transfer children to child care facilities but to provide for their basic care while in border jails makes a mockery of the FSA's scheme.

- i. HHS proposes functionally unlimited flexibility to delay placement of unaccompanied children in licensed programs

Proposed section 410.201 allows ORR to unnecessarily delay the placement of children in licensed programs and circumvent FSA protections as a matter of course. Worse, the proposed regulations leave undefined the potential duration of these placements by partially incorporating and weakening FSA language related to influxes and emergencies. Specifically, the proposed regulation modifies language stating that the government “*shall* place all minors [in licensed programs] *as expeditiously as possible*” to state only that ORR “makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible.” (Emphasis added).

The FSA's influx and emergency provisions were intended to account for unexpected and significant increases in children in custody, and not to serve as a baseline standard for the agency's ongoing and routine care and placement of unaccompanied children. Flexibility of this kind is inappropriate as a “consideration generally applicable to the placement of children,” as such a reading would render hollow the protections and provisions of *Flores*, the TVPRA, and HSA.

This reading would also allow for prolonged stays in custody by largely referencing the *initial* placement of children into licensed programs, without accounting for the potential transfers of children to emergency facilities following such placements, as has recently occurred in ORR's emergency influx facilities, such

⁷⁵ 83 Fed. Reg. 45496, 45526.

⁷⁶ See Human Rights Watch, In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells, February 28, 2018, <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>.

⁷⁷ Jamiel Lynch, Dave Alsup and Madison Park, *CNN*, “Law firm alleges neglectful medical care after child dies weeks after ICE custody,” Aug. 28, 2018, <https://www.cnn.com/2018/08/28/us/texas-ice-child-death/index.html>.

⁷⁸ Debbie Nathan, *The Intercept*, “A 5-year-old Girl in Immigrant Detention Nearly Died of an Untreated Ruptured Appendix,” Sept. 2, 2018, <https://theintercept.com/2018/09/02/border-patrol-immigrant-detention-medical-neglect-texas/>.

as Tornillo.⁷⁹

Moreover, by weakening language in the FSA’s provisions related to influx, sections 410.202 and 410.209 (cross-referenced) impermissibly afford the agency latitude to delay placements in licensed programs. Proposed section 410.202 allows an exception to the prompt placement of unaccompanied children in licensed programs “[i]n the event of an emergency or influx of UAC into the United States, in which case *ORR places* the UAC as expeditiously as possible in accordance with §410.209 of this part. . . .”⁸⁰ (Emphasis added).

By contrast, the FSA states that “in the event of an emergency or influx . . . the [government] *shall* place all minors pursuant to Paragraph 19 as expeditiously as possible.”⁸¹ (Emphasis added). By merely reciting agency practice, rather than including the FSA’s more directive language on expeditiously placing children, the proposed regulations permit the government undue flexibility to hold children for longer periods in unlicensed facilities.

- b. *DHS proposes ultra vires qualifications to its obligations under the FSA to protect children from unrelated adults and facilitate communication between children and their families*
 - i. DHS seeks to weaken its duty to keep children safe while holding them with or near unrelated adults

First, while FSA Paragraph 12 requires DHS to provide “adequate supervision to protect minors from others,” the DHS Proposed Regulation 236.3(g)(2) would only require DHS to provide “adequate supervision,” with no mention of protection from others. Moreover, DHS fails to acknowledge this change in the NPRM, a troubling omission given that this change could indicate DHS’s intention to reduce its attention to the potential harms that other people might pose to children, an intention directly contrary to the purpose of the TVPRA, in addition to the FSA.

In addition, the provision in DHS Proposed Regulation 236.3(g)(2)(i) regarding separating children from adults includes the word “generally” where no such qualification exists in FSA Paragraph 12.⁸² This change would lessen the burden on DHS with respect to the segregation of children and adults from total compliance to less-than-total compliance, violating the terms of FSA Paragraph 12 and reducing the protections afforded to unaccompanied children in DHS custody. Furthermore, if the word “generally” is also meant to qualify DHS’s compliance with the two cited provisions of 6 CFR Sec. 115, then the proposed regulations could have the effect of lessening the burden on DHS to protect unaccompanied children from

⁷⁹ See, e.g., Caitlin Dickerson, *The New York Times*, “Migrant Children Moved Under Cover of Darkness to a Texas Tent City,” Sept. 30, 2018, https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html?emc=edit_nn_20181001&nl=morning-briefing&nid=7881910220181001&te=1.

⁸⁰ 83 Fed. Reg. at 45530 (Section 410.202).

⁸¹ FSA para. 12, referencing para. 19.

⁸² 83 Fed. Reg. 45526. “UACs generally will be held separately from unrelated adult detainees in accordance with 6 CFR 115.14(b) and 6 CFR 115.114(b). In the event that such separation is not immediately possible, UACs in facilities covered by 6 CFR 115.114 may be housed with an unrelated adult for no more than 24 hours except in the case of an emergency or other exigent circumstances.”

sexual assault and abuse.

DHS Proposed Regulation 236.3(g)(2)(i) proceeds to state that, in the event that separation between unaccompanied children and adults “is not immediately possible, unaccompanied children in facilities covered by 6 CFR 115.114 may be housed with an unrelated adult for no more than 24 hours except in the case of an emergency or exigent circumstances.” The proposed exceptions are not present in the FSA.

DHS Proposed Regulation 236.3(b)(5) defines the term “emergency” as “an act or event ... that prevents timely transport or placement of minors, or impacts other conditions provided by this section.” The definition of “emergency” as laid out in FSA Paragraph 12 only includes acts or events that prevent the placement of minors in licensed programs within the required timeframes. By including “other conditions” in the definition of “emergency,” the proposed rule would significantly expand the possible triggers for housing unaccompanied children with unrelated adults for extended periods of time. DHS could use *any* disruption—whether related to the housing of unaccompanied children or not—as a way to house unaccompanied children with adults for extended periods of time. DHS’s generalized assertion that its expansion of the scope of the term “emergency” is justified because emergencies may impact its operations in different ways⁸³ falls woefully short of justifying the drastic expansion of the scope of an exception to a rule meant to prevent unaccompanied children from being exposed to unrelated adults and meant to prevent harm and abuse.

No analysis is provided for the addition of the exigent circumstances exception, and the phrase is not defined. This is even more problematic than expanding the definition of “emergency,” since it creates an undefined exception to a crucial rule. Implementing the proposed regulations as drafted would create a significant risk of DHS failing to adequately separate unaccompanied children from unrelated adults based on an arbitrary understanding of what constitutes an “exigent circumstances.”

The proposed regulations risk expanding the instances when DHS may transfer unaccompanied children with unrelated adults outside of the scope of the Flores settlement by using arbitrary, permissive, and vague terminology. The Flores settlement states that unaccompanied children should not be transported with unrelated adults except when “a) being transported from the place of arrest or apprehension to an INS office, or b) where separate transportation would be otherwise impractical.”⁸⁴ When separate transportation would otherwise be impractical, unaccompanied children “*shall* be separated from adults.”⁸⁵

The proposed regulations expand the circumstances in which a child can be transported with adults from when otherwise impractical to when separate transportation is otherwise impractical or *unavailable*.⁸⁶ In the commentary section of the proposed regulations, the government argues that the addition of “or unavailable” is “a clarification of the current standard, and not a substantive change.”⁸⁷ This assertion is simply not true. Given the surplusage canon of construction, every word should be considered and none

⁸³ 83 Fed. Reg. 45496.

⁸⁴ *Flores* Settlement, Para. 25.

⁸⁵ *Id.*

⁸⁶ DHS and ORR Proposed Regulations at 161.

⁸⁷ *Id.* at 54, FN 17.

should be ignored. Therefore, the addition of “unavailable” to the regulations is vague in that there is no definition as to what “unavailable” means in the regulations, rendering the exemption subject to abuse by government officials.⁸⁸

In addition, the proposed regulations further undermine the Flores settlement in that the regulations expand exponentially the instances when an unaccompanied child will be transported together with an unrelated adult. Under the proposed regulations, the government asserts that DHS “will separate the UAC from the unrelated adult(s) to the extent operationally feasible . . .”⁸⁹ This is much more permissive than the Flores settlement which states that if an unaccompanied child is transported with adults they “*shall* be separated from adults.”⁹⁰

Transporting vulnerable children with adults is contrary to their best interests and may lead to violations of their right to bodily integrity. Immigrant children already face “a pattern of intimidation, harassment, physical abuse, refusal of medical services, and improper deportation” at the hands of Border Patrol officials, and transportation with unrelated adults may further exacerbate immigrant children’s vulnerability to violence and abuse.⁹¹ The government was a party to the Flores settlement and agreed to the terms of the Flores settlement which do not allow such transport.

- ii. DHS wants to tie a child’s contact with family members also held in DHS custody to the agency’s convenience, not the child’s best interest

The Flores settlement requires that minors be provided “contact with family members who were arrested with the minor.”⁹² This is a material benefit granted by the FSA that must be preserved. The importance of maintaining family connections is clear from the research on child brain development, which has shown that parents and other caregivers play a critical role in buffering children from trauma and adverse experiences.⁹³ In child welfare, it is well-established best practice that when children need to be removed from their homes due to immediate safety concerns, every effort is made to keep siblings together and to place the children in the homes of family members with whom they have a relationship, in the communities where they are being raised.⁹⁴ Once children have been removed from their homes, moreover, child welfare

⁸⁸ The term unavailable should not be included in the regulations as it undermines the *Flores* settlement, a settlement in which the government is a party and could have pushed for a more permissive standard such as impractical or unavailable.

⁸⁹ DHS and ORR Proposed Regulations at 161.

⁹⁰ *Flores* Settlement, Para. 25.

⁹¹ American Civil Liberties Union, *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection 2* (May 2018), <https://www.aclusandiego.org/civil-rights-civil-liberties/>. Moreover, DHS continues to demonstrate that it cannot be trusted to ensure the basic safety and wellbeing of the children in its care, not least during their transportation. See, e.g., Vanessa Swales, *Reveal*, “ICE gave \$185 million deal to defense contractor under investigation for housing kids in office,” Oct. 15, 2018, <https://www.revealnews.org/article/ice-gave-185-million-deal-to-defense-contractor-under-investigation-for-housing-kids-in-office/>.

⁹² *Flores* Settlement, Para. 12(A).

⁹³ National Scientific Council on the Developing Child, *Supportive Relationships and Active Skill-Building Strengthen the Foundations of Resilience: Working Paper 13* (2015), <https://developingchild.harvard.edu/resources/supportive-relationships-and-active-skill-building-strengthen-the-foundations-of-resilience/>.

⁹⁴ Child Welfare Information Gateway, Children’s Bureau, Administration for Youth, Children and Families,

prioritizes safe visitation as frequently as possible in normalized settings between children and their parents.

But instead of strengthening the protections against family separation, DHS Proposed Regulation 236.3(g)(2) adds two qualifiers to the existing language from FSA Paragraph 12. Specifically, DHS Proposed Regulation 236.3(g)(2) allows DHS to limit contact with family members (i) “in consideration of the safety and well-being” of the minor or (ii) on account of “operational feasibility.”⁹⁵ Each of these provisos introduces discretion by DHS that could be used to deny children contact with their family members.

In explaining the proposed rule, DHS clarifies that “DHS’s use of the term ‘operationally feasible’ in this paragraph does not mean ‘possible,’ but is intended to indicate that there may be limited short-term circumstances in which, while a child remains together with family members in the same CBP facility, providing such contact would place an undue burden on agency operations.”⁹⁶ Although the NPRM cites medical emergencies and law enforcement concerns as two examples of when the well-being of a child or operational feasibility might justify limiting contact between a minor and his or her family, these examples do not adequately explain what is intended by the addition of the exception for operational feasibility.⁹⁷ The “operational feasibility” caveat gives DHS a vast swath of discretion, as DHS itself has a great deal of control over its own operations and what is (and is not) feasible.

Mother Ivette and four-year-old son Erick were forcibly separated in March 2018 and have been detained 1,400 miles apart for more than seven months. From the beginning of her detention, Ivette’s requests to speak with her son were routinely ignored, as were requests from ORR shelter workers who were attempting to facilitate calls for Erick. DHS made clear that it would not commit to ensuring communication because the logistics to do so were challenging. After months of advocacy by Ivette’s attorneys, Ivette now has – at most – one 10 minute weekly call. Initially, due to their separation and months of non-existent communication, Erick refused to speak with Ivette on the phone, yelling “No mommy no.” ORR shelter workers have recommended that communication be made via video calls because of Erick’s young age and developmental stage, but DHS asserts that such communication is not possible.

7. DHS and HHS propose to apply or strip statutory procedural protections for unaccompanied children arbitrarily, as a matter of systemic agency practice and policy

- a. Re-determinations of a child’s unaccompanied status under 8 CFR 236.3(d) and 45 CFR 410.101 would exacerbate the vulnerability of children and run directly contrary to the mandates and purpose of the TVPRA*

For more than 15 years, federal law has uniquely defined and afforded protections to children who arrive in the United States without parents or guardians in recognition of their particular and enduring

“Sibling Issues in Foster Care and Adoption,” Jan. 2013, <https://www.childwelfare.gov/pubPDFs/siblingissues.pdf>.

⁹⁵ § 236.3 (g)(2)

⁹⁶ 83 Fed. Reg. 45500 (Sept. 7, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf>.

⁹⁷ *See id.*

vulnerability.⁹⁸ Status as an unaccompanied child is not merely a technical definition. It brings with it critical substantive and procedural protections tailored to ensure the efficiency of our immigration system as well as the safety and well-being of children and their ability to meaningfully participate in immigration proceedings that determine their futures. The proposed regulations, however, would allow DHS and HHS⁹⁹ to strip these protections from children, making them even more vulnerable and thwarting Congressional intent as demonstrated by the HSA and the TVPRA.

Procedural protections in the TVPRA afford unaccompanied children the opportunity to tell their stories and access any legal relief for which they may qualify, such as asylum or T nonimmigrant status. To this end, the TVPRA exempts unaccompanied children from the one-year filing deadline that otherwise applies to asylum claims.¹⁰⁰ This exemption reflects sensitivity to the particular needs and vulnerabilities of children fleeing persecution, who require time to heal and establish trust so they can reveal what they have experienced to caregivers and legal service providers and assist in preparing their legal cases. The exemption also addresses the unique challenges facing unaccompanied children who typically are detained in one or more ORR facilities, sometimes for extended periods, before release to a caregiver. Flexibility for children to submit their asylum claims once they are settled and have an opportunity to prepare their cases with counsel accords with basic notions of fairness.

In immigration removal proceedings, individuals seeking asylum present their asylum claims before an immigration judge and across from a trained government attorney arguing for their deportation. These circumstances, which are intimidating for an adult, are unfathomably difficult for children. The TVPRA recognizes the inappropriateness of this setting for children arriving without a parent or legal guardian, who frequently do not have legal counsel to represent them, and provides for more child-appropriate procedures to ensure unaccompanied children are not returned to harm. Rather than appearing in immigration court to assert their asylum claims, unaccompanied children may have their asylum cases first heard in a private, non-adversarial setting before an asylum officer trained in trauma-informed interviewing techniques.¹⁰¹

TVPRA protections are essential to ensuring fair treatment and due process for unaccompanied children in our immigration system. Yet under DHS and HHS' proposal, a government official could determine that an unaccompanied child no longer meets the definition of an unaccompanied child and potentially strip

⁹⁸ Homeland Security Act of 2002, Sec. 462; 6 U.S.C. § 279.

⁹⁹ While HHS maintains policies related to determining the age of “individuals without lawful immigration status,” it does not include procedures for re-determining the status of children in ORR custody more generally or on an ongoing basis. *See, e.g.*, ORR, Children Entering the United States Unaccompanied: Section 1. HHS has offered no reason for implementing such policies now, which would depart from its current practice. Instead, HHS states only that “[t]he statutes . . . do not set forth a process for determining whether an individual meets the definition of a UAC.” 83 Fed. Reg. 45505. The TVPRA was enacted in 2008. The agency offers no justification for why it only now seeks to re-determine UAC status on an ongoing basis. Decisions with such import and consequence for unaccompanied children and for the efficiency of the immigration system should not be undertaken without an articulation of legitimate need and a reason for departing from longstanding practice.

¹⁰⁰ INA § 208(a)(2)(E).

¹⁰¹ INA § 208(b)(3)(C); 8 U.S.C. § 1158(b)(3)(C).

access to protections if a child has turned 18,¹⁰² or if a parent or legal guardian is available to provide care and custody for the child. This could occur *even though* the child’s vulnerability endures after having turned 18 or having been reunified with a parent or legal guardian—an enduring vulnerability that Congress recognized by amending the TVPRA to extend certain protections to unaccompanied children when they turn 18.¹⁰³

Importantly, neither reunification with a parent or sponsor nor turning 18 changes the fact that children will be required to defend their own immigration cases. Reunification with a sponsor or family member does not mean that a child’s case automatically attaches to that of an adult or that the child’s vulnerability in the system is eliminated. Procedural fairness, children’s best interests, and administrative efficiency demand that once determined, a child’s status as an unaccompanied child should remain for the duration of the child’s immigration case.

Under the proposed regulation, an unaccompanied child could lose critical procedural protections, if determined by DHS to no longer meet the definition of an unaccompanied alien child, even after these protections have already attached. This includes protections such as the ability to first present an asylum claim before a USCIS asylum officer and being exempted from the one-year filing deadline bar to asylum. Indeed, in explaining the proposed provision, the agency asserts that “immigration officers will make a determination of whether an alien meets the definition of a UAC each time they encounter the alien.”¹⁰⁴ Under this formulation, DHS would have unfettered discretion to eliminate, interfere with, and undermine procedural protections once in place, effectively rendering protections of the TVPRA hollow. This interpretation defies basic tenets of statutory interpretation and would impermissibly grant DHS authority to undermine the direct will of Congress in extending particular protections to unaccompanied children based on their vulnerability to harm. It would also create confusion in the immigration system about how to proceed with children’s cases once they are determined to be non-UAC. A few examples illustrate why the protections provided by the TVPRA can be so critical for children, particularly when seeking asylum.

Elizabeth fled Honduras when she was 15-years-old with her 16-year-old brother Cristian and her two young sisters Maria and Andrea. The men in a neighboring family had sexually assaulted Elizabeth, her younger sister, her mother, and grandmother with sexual violence and had threatened to kill Cristian because he helped make a police report against the family. When Elizabeth and Maria began working with an NIJC attorney to prepare their asylum cases, Elizabeth refused to talk about the sexual assaults she had experienced and 14-year-old Maria alternately refused to discuss the assaults or claimed she had fought off her attacker. Because they were allowed to seek asylum before the Asylum Office as unaccompanied children, Elizabeth and Maria were interviewed in a non-adversarial environment by a female officer and did not have to face cross-examination as to why Elizabeth and Maria could not speak about the assaults

¹⁰² Cf. *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018) (finding that an Immigration Judge can assume jurisdiction over an asylum applicant filed by a UAC after turning 18). As demonstrated by the above and foregoing analysis, this BIA decision is contrary to Congressional intent and was wrongly decided.

¹⁰³ 8 USC § 1232(c)(2)(B). See also *Garcia Ramirez v. ICE*, 1:18-cv-00508-RC (D.C. Dist., filed March 5, 2018); Mark Joseph Stern and Sofie Werthan, *Slate*, “ICE’s Illegal Abuse of Teenagers Proves the Agency Is Beyond Reform,” Aug. 23, 2018, <https://slate.com/news-and-politics/2018/08/ice-undocumented-minors-the-government-agency-is-detaining-teenagers-in-violation-of-federal-law.html>.

¹⁰⁴ 83 Fed. Reg. at 45497 (Proposed 8 CFR § 236.3(d)).

or denied they had occurred. The asylum officer instead was able to rely on information from a counselor and other family members to establish their eligibility for protection and granted the four siblings asylum in 2015.

Jamila fled Somalia when she was 17 years old to escape an extremely abusive stepmother who had attempted to sell her into marriage. Jamila feared if she were forced into the marriage, she would be subjected to female genital mutilation for a second time, which was particularly terrifying for Jamila because of the ongoing pain she suffered from her first circumcision. At Jamila's asylum office interview, the asylum officer noted that her declaration provided sufficient detail of the particularly brutal past persecution she had suffered and therefore, the officer did not need to ask Jamila questions about that past harm. Because the non-adversarial nature of the interview meant that Jamila was not subject to cross-examination, she was able to discuss her need for asylum in a non-threatening environment and did not have to go through the re-traumatizing process of discussing the specific details of her past harm.

The proposed regulations would also impact other, critical protections for children:

- *Undermining the screening and processing procedures that lie at the heart of the TVPRA.* For example, if a child from Central America is apprehended by CBP and determined to meet the definition of an unaccompanied child, the TVPRA requires prompt transfer to ORR custody, where s/he would receive child-appropriate services, including a screening for any protection needs. Yet under the proposed regulations, before being transferred out of DHS custody, the child could be found by DHS to no longer meet the definition. By virtue of the redetermination, the child could be deemed no longer eligible for transfer to ORR, and for associated protections. In addition to administrative inefficiency, the proposed regulation could well lead to situations in which unaccompanied children do not receive screenings for protection needs at all, as CBP may anticipate that these will be conducted by ORR and therefore may fail to conduct them if a child's status is subsequently stripped. Such a result would turn the TVPRA on its head and bring about the very result TVPRA protections intended to avoid.
- *Violating the TVPRA's mandate that unaccompanied children access voluntary departure without having to pay.* For example, DHS could assert that an unaccompanied child in ORR custody no longer meets the UAC definition because she has a parent living in the U.S., even though ORR will not release the child to her parent. DHS could assert this at the time the child requests voluntary departure in immigration court, throwing into question whether the immigration judge should order the child deported instead of granting her voluntary departure. DHS or HHS would be able to thwart Congressional intent to shield unaccompanied children from the harsh consequences of deportation by requiring the government to pay for their repatriation through voluntary departure. As a result, children's access to this and other procedural protections in the TVPRA would be subject to the arbitrary and inconsistent whims of individual DHS and HHS officials.

In addition to undermining the screening procedures set forth in the TVPRA, the proposed regulation would

subject unaccompanied children to repeated and continuous questioning by uniformed officials¹⁰⁵ at a time in which they may already struggle to reveal grave harms they have experienced and to trust unfamiliar adults. The proposal makes no mention of the methods by which officers would make these determinations on subsequent encounters, heightening the possibility that these decisions will be made arbitrarily and yield disparate results, despite profound impacts on children and their ability to access protection.

The proposed regulation also injects instability and uncertainty into a process that is already fraught with challenges and inequities for unaccompanied children in particular. While most children already do not have legal counsel to represent them,¹⁰⁶ the proposed regulation would further tip the scale in favor of the government in proceedings by allowing DHS to effectively change the procedures by which a child's case is processed in the middle of a child's case. This would demand that a child repeatedly share painful and difficult facts that form the basis of their claims in different settings and potentially prepare their cases according to distinct procedures and timelines if protections are lost or changed. For example, under the proposed regulation an unaccompanied child who is exempt from the one-year filing deadline could have this protection stripped from them, with the timeline for their asylum case shifting even after it has begun. This violates basic notions of procedural fairness, due process, and access to justice.

Children arriving to the United States alone face countless challenges, from healing from prior trauma and adjusting to new living arrangements to contending with a new and unfamiliar language, and complex legal proceedings. These difficulties are particularly pronounced for child survivors of trafficking, violence, abuse, and neglect, who deeply fear they will be returned to countries in which their safety and their lives are at risk. The proposed regulation compounds the uncertainty and unpredictability children confront in their efforts to secure protection, and could lead to additional transfers in custody, including to potentially restrictive settings, and repeated legal appearances at times in which these children most need stability and access to support services. The proposed regulation would also demand that children prepare and present their claims in more adversarial settings, at further injury to their ability to meaningfully participate in proceedings and establish their eligibility for legal protection, *despite* their unique vulnerability. With procedural rules changing in the middle of a child's case, adjudications may be prolonged and access to legal relief significantly undermined or delayed.

The proposed rule could also strip children of critical access to legal counsel and social services dedicated for unaccompanied children. If a child is stripped of unaccompanied child status, their eligibility for nonprofit, state, and federal programs for unaccompanied children may be lost, including access to government-funded pro bono counsel or social services. This would increase the vulnerability of children exponentially and deprive them of services intended to alleviate and address the unique challenges they are facing.

These grave consequences violate due process protections and expose children to greater risk of return to danger or harm. The HSA, FSA, and TVPRA cannot be read to permit such a result.

¹⁰⁵ 83 Fed. Reg. at 45497 (Proposed 8 CFR § 236.3(d)).

¹⁰⁶ See, e.g., Laila Hlass, *Slate*, "Defenseless Children: It's unconscionable that many kids detained at the border don't have lawyers at their immigration hearings," Jul. 5, 2018, at <https://slate.com/news-and-politics/2018/07/children-detained-at-border-dont-have-lawyers-must-represent-themselves.html>.

- b. *Proposed 8 CFR 236.3(d) and 45 CFR 410.101 would rob children of access to legal counsel while exponentially increasing administrative costs and inefficiencies*
 - i. Proposal would prevent children from meaningfully accessing legal counsel

Among other responsibilities, the TVPRA provides that HHS:

shall ensure, to the greatest extent practicable . . . that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security . . . have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.¹⁰⁷

Pro bono legal services, like social services, may be provided by nonprofit organizations and governments to children based on their status as unaccompanied children. The TVPRA requires that HHS facilitate access to such services. Yet, under the proposed rule, ORR could re-determine a child's status and potentially render them ineligible to receive these critical services.

Depriving children of access to legal services would have a dramatic impact on the ability of children to meaningfully participate in immigration proceedings that may determine their futures, and on the outcome of children's legal cases. For unaccompanied children's cases in FY2017, nearly 60% were unrepresented.¹⁰⁸ Without an attorney, children are five times more likely to be deported.¹⁰⁹ By stripping children of UAC status and the related protections, ORR would undermine its responsibility for facilitating access to legal counsel and the protection of children from mistreatment and other harm. Such actions would not only fail to advance children's best interests, but run directly opposed to them. The TVPRA cannot be read to permit this result.

Moreover, frequent status redeterminations will serve to disrupt attorney/client relationships that are forged. If a child with UAC status secures pro bono counsel to help her with her asylum case and then after her case is filed, she loses her UAC status and is placed in DHS detention¹¹⁰ far away from her counsel, she could easily lose all meaningful access to her lawyer. It is unlikely that unaccompanied children in these

¹⁰⁷ 8 U.S.C. § 1232(c)(5).

¹⁰⁸ See TRAC Immigration, "Juveniles – Immigration Court Deportation Proceedings" Tracker, <http://trac.syr.edu/phptools/immigration/juvenile/>. Select "Fiscal Year Began" from first drop-down menu and click "2017"; select "Outcome" from the middle pull-down menu, click "All"; select "Represented" from the last drop-down menu. Starting in FY2018, cases in TRAC include all juveniles, unaccompanied children and children who arrive as a family unit. This change was made because it is no longer possible to reliably distinguish these two separate groups in the court's records.

¹⁰⁹ Syracuse University, TRAC Immigration, "Representation for unaccompanied children in immigration court" (Nov. 24, 2014), <http://trac.syr.edu/immigration/reports/371/>.

¹¹⁰ See DHS Proposed Regulation 236.3(n) (proposing to authorize DHS to "take a minor back into custody if there is a material change in circumstances").

circumstances would be able to access counsel for a sufficient amount of time to allow the counsel to communicate with their often traumatized clients and advocate for their legal rights effectively. This would also inhibit the ability of unaccompanied children to collect evidence to support their case and to seek therapy to recover from traumatic experiences as well as assessments by therapists to support their asylum applications. By adding the possibility of the loss of UAC status always hanging over an unaccompanied child's asylum application, DHS Proposed Regulation 236.3(d) and HHS Proposed Regulation 410.101 could impair both the child's and his or her legal counsel's ability to effectively plan and pursue asylum claims.

ii. Proposal would drive up administrative burdens at the expense of children

Under the proposed regulation, the procedures applicable to a child's claims could be changed even after the child's case has begun. In addition to creating new and grave challenges for unaccompanied children, re-determinations of a child's unaccompanied status would lead to new administrative burdens and additional processing delays for DHS and DOJ. The provision would exacerbate the very delays and backlogs targeted by several recent changes undertaken by the agencies.

With the potential for a child to be stripped of protections at any time, the proposed rule incentivizes the rushed filing of claims before an event that could alter a child's status. As a result, adjudicators may be required to consider less comprehensive and well-prepared filings—a reality that threatens to slow the evaluation of cases and delay relief to those in need. The rule also duplicates the labor of federal agencies, as claims first filed with USCIS may be shifted to the caseload of EOIR. These changes in jurisdiction, apart from creating logistical and administrative challenges, increase the potential for inconsistent results in children's cases. The proposed regulation thus poses new burdens and costs for both DHS and DOJ without promising any related benefits—and indeed directly undermines the efficient administration of our immigration laws and the adjudication of benefits.

Congress provided HHS with responsibility for the care and custody of unaccompanied children based on its experience and expertise working with refugee children. It expressly decided to divide the agency's care and custody of this vulnerable population from the aims of immigration enforcement or the adjudication of benefits. The proposed change, however, would work a detriment to children, and moreover, create significant burdens for the immigration system by potentially changing the procedural and substantive protections available to children in proceedings managed by *other* agencies.

HHS's expertise, responsibilities, authority rest in child welfare, not in the commencement or management of immigration proceedings. By allowing the agency to re-determine the status of children in its care on an ongoing basis, however, the agency could strip children of protections that would, for example, determine which agency has initial jurisdiction over their asylum cases and the timeline necessary for filing their asylum claims. Such a result affords the agency inappropriate and undue latitude related to the adjudication of immigration benefits and the outcome of children's cases, contrary to federal law.¹¹¹ This would also create new inefficiencies for an already-burdened immigration system, as the potential for duplicate filings,

¹¹¹ See 6 U.S.C. § 279(a).

confusion as to which procedures apply to a given case, and delays would naturally increase.

8. HHS seeks to replace clear, affirmative protections for unaccompanied children with unaccountable flexibility that would put unaccompanied children at risk

- a. *Proposed section 410.201(e) inappropriately incorporates FSA provisions addressing facilities in which a child may be held following apprehension to provide ORR broad flexibility to detain children in secure facilities indefinitely.*

While much of the proposed text in Section 410.201 tracks the FSA’s provisions related to the placement of unaccompanied children, the proposed rule incorporates provisions related to DHS’ detention of unaccompanied children during initial processing at the border, confusing the standards for short-term detention (for less than 72 hours) with the standards for ORR’s placement of children in ORR-contracted facilities. In doing so, it provides the agency with undue latitude to hold children indefinitely in temporary or secure facilities before transferring them to less restrictive, licensed placements—contravening both the terms and spirit of *Flores* and the TVPRA.

Without explicitly stating so, Section 410.201 of HHS’ proposed regulation pairs FSA provisions addressing temporary placements of children following arrest with an exception for influxes and emergencies¹¹² to give ORR greater flexibility when placing unaccompanied children—potentially delaying their transfer to licensed programs indefinitely. The FSA and TVPRA cannot be so interpreted.

Proposed section 410.201 includes, under the title “considerations generally applicable to the placement of an unaccompanied alien child,” flexibility for ORR to hold children for indefinite periods in contracted facilities or state and county juvenile facilities, which may be secure, before placing them in licensed programs. While the proposed regulation shares some language with the influx provision of the FSA, it does so under a section title suggesting broader application to ORR’s placement determinations more generally. This result is not only inappropriate under *Flores* but contrary to the TVPRA and HSA.¹¹³

Currently, thousands of children are being held in large-scale facilities, including in Tornillo, Texas,¹¹⁴ and Homestead, Florida,¹¹⁵ that are not licensed for the residential care of children and that pose particular consequences for child survivors of trauma and violence, given the facilities’ remote location, size, and limited access to critical support services. These “influx” shelters, intended to be temporary, may in reality hold children for months. In recent weeks, thousands of children have been abruptly transferred from licensed programs to these remote facilities, purportedly to make room for other children as they await

¹¹² FSA para. 12.

¹¹³ See HSA, Section 462; 8 USC § 1232(b), 8 U.S.C. § 1232(c)(2)(A).

¹¹⁴ Dominique Mosbergen, *Huffington Post*, “Trump Administration Quietly Moves 1,600 Migrant Children to Texas Tent City: Report,” Oct. 1, 2018, https://www.huffingtonpost.com/entry/tornillo-tent-city-migrant-children_us_5bb1fcc6e4b0c7575966ff2e.

¹¹⁵ Douglas Banks and Brenda Medina, *The Miami Herald*, “Up to 1,000 children held by immigration authorities now living in Homestead compound,” June 19, 2018, <https://www.miamiherald.com/news/local/community/miami-dade/article213411029.html>.

release to sponsors.¹¹⁶ Hurried transitions with little warning further destabilize children whose trust has in many cases already been deeply eroded by prior abuse, violence, and threats to their lives. Large-scale facilities, which lack schooling and have limited mental health and legal services, compound the emotional and psychological trauma facing unaccompanied children and increase the risk their needs will be inadequately addressed. Yet, currently, children are being held in Tornillo for an average of 20 days.¹¹⁷ Regulations expanding the ability of ORR to use such facilities more broadly are not only contrary to the best interests of children but to the very aims of *Flores*.

The potential for ORR to increase its use of secure state and local facilities is similarly inappropriate. The TVPRA, like *Flores*, provides criteria for when children may be placed in secure facilities. Specifically, the TVPRA states that “[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.” Yet Section 410.201 would suggest that secure placements could happen more routinely and outside of these circumstances.¹¹⁸

Recent media reports and lawsuits, including motions to enforce the FSA, have highlighted the pronounced impact of secure detention on unaccompanied children and the mistreatment to which they are frequently exposed in custody.¹¹⁹ In 2017, unaccompanied youth challenged “unconstitutional conditions that shock the conscience, including violence by staff, abusive and excessive use of seclusion and restraints, and the denial of necessary mental health care” at Shenandoah Valley Juvenile Center—a secure facility under contract with ORR.¹²⁰ In another lawsuit in 2017, a federal court ordered the government to provide prompt hearings before an immigration judge to unaccompanied children who had previously been released from ORR custody, subsequently arrested by DHS on unsubstantiated allegations of gang affiliation, and then detained indefinitely by ORR in high-security facilities without receiving notice of the reasons for their detention or an opportunity to challenge such placements.¹²¹

¹¹⁶ Caitlin Dickerson, *The New York Times*, “Migrant Children Moved Under Cover of Darkness to a Texas Tent City,” Sept. 30, 2018, https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html?emc=edit_nn_20181001&nl=morning-briefing&nid=7881910220181001&te=1.

¹¹⁷ Angelina Chapin, Huffington Post, “Migrant Children Describe Tent City As ‘Punishment,’ Experts Say,” Oct. 2, 2018, https://www.huffingtonpost.com/entry/migrant-children-say-being-in-texas-tent-city-is-punishment_us_5bb2a902e4b00fe9f4f9ab0f.

¹¹⁸ 8 U.S.C. § 1232(c)(2)(A).

¹¹⁹ Roque Planas and Hayley Miller, *Huffington Post*, “Migrant Children Report Physical, Verbal Abuse In At Least 3 Federal Detention Centers,” June 21, 2018, https://www.huffingtonpost.com/entry/migrant-children-abuse-detention-centers_us_5b2bc787e4b0040e2740b1b9.

¹²⁰ *Doe v. Shenandoah Valley Juvenile Center Comm’n*, Class Action Complaint (W.D. Va. Oct. 4, 2017), http://www.washlaw.org/pdf/svjc_class_action_complaint_signed.PDF. See Bob Ortega, *CNN*, “Virginia report clears child detention center of abuse, but youths’ lawyer says investigation was insufficient,” Aug. 14, 2018, <https://www.cnn.com/2018/08/14/us/virginia-clears-shenandoah-detention-center-abuse-allegations-invs/index.html> (discussing the findings of a state investigation finding allegations related to Shenandoah did not amount to child abuse or neglect—an investigation counsel challenge as “shockingly inadequate.”).

¹²¹ *Saravia v. Sessions*, Order Granting the Motion for Preliminary Injunction, et. al (Nov. 20, 2017), https://www.aclunc.org/sites/default/files/20171121-Gomez_v_Sessions-Order_Granteeing_PI_and_Class_Cert.pdf; *affirmed Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018).

In July 2018, in response to a motion by class counsel to enforce the FSA,¹²² Judge Dolly Gee held that the government had breached the FSA on multiple grounds by implementing policies that unnecessarily delay the release of unaccompanied children, using “step ups” to secure custody without providing justification, proper notice to the child, or an opportunity for children to contest these placements, and giving psychotropic medications without required legal authorization.¹²³

Mistreatment and prolonged detention have a devastating impact on children. DHS’ own Advisory Committee has previously reported on the inappropriateness of continued detention for survivors of trauma in particular, stating that “[n]umerous studies have documented how detention exacerbates existing mental trauma and is likely to have additional deleterious physical and mental health effects on immigrants – particularly traumatized persons like asylum seekers.”¹²⁴ Many children suffer worsening depression¹²⁵ and engage in self-harm. The indefinite detention of children in secure conditions is precisely the situation the FSA sought to address and remedy, and the FSA, TVPRA, and HSA cannot be read together to enable this result. “The overarching purpose of the HSA and TVPRA was quite clearly to give unaccompanied minors more protection, not less.”¹²⁶

b. *Proposed section 410.201(f) omits critical language in the FSA requiring the government to document and make continuous efforts toward the release of children from custody.*

Among the considerations to be applied generally to ORR’s placement of unaccompanied children, the proposed regulation states that “ORR makes and records the prompt and continuous efforts on its part toward family reunification. ORR continues such efforts at family reunification for as long as the minor is in ORR custody.” This provision reflects in part language from paragraph 18 of the FSA, but with a critical omission.

FSA paragraph 18 reads “Upon taking into custody, the INS, or the licensed program in which the minor is placed, shall make and record the prompt and continuous efforts on its part toward family reunification ***and the release of the minor pursuant to Paragraph 14 above. Such efforts at family reunification shall continue so long as the minor is in INS custody.***” (emphasis added).

The omission of language directing ORR’s continued efforts toward the release of children from custody is significant. The FSA, by its own terms, “sets out a nationwide policy for the detention, *release*, and

¹²² *Flores v. Sessions*, Memorandum in Support of Motion to Enforce Class Action Settlement (C.D. Ca. Apr. 16, 2018), https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf.

¹²³ *Flores v. Sessions*, In Chambers--Order re Plaintiff’s Motion to Enforce Class Action Settlement (C.D. Ca. July 30, 2018), <https://www.aila.org/File/Related/14111359ae.pdf>.

¹²⁴ Report of the DHS Advisory Committee on Family Residential Centers, Sept. 30, 2016, <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf> (addressing family detention centers).

¹²⁵ See, e.g., Samantha Michaels, *Mother Jones*, “The Feds Are Locking Up Immigrant Kids—Who Have Committed No Crimes—In Juvie,” July 10, 2018, <https://www.motherjones.com/crime-justice/2018/07/immigrant-kids-are-being-sent-to-violent-juvenile-halls-without-a-trial/> (discussing a child who, “now diagnosed with ‘major depressive disorder,’ waits in the psychiatric facility in Texas. Among his ‘major stressors,’ the facility notes, is the fact that he is ‘being kept from family and in ORR custody.’”).

¹²⁶ *Flores v. Sessions*, No. 17-55208 (9th Cir. July 5, 2017), at 32.

treatment of minors. . . .”¹²⁷ Indeed, the provision from which the proposed regulation draws is part of a larger section of the settlement titled “General Policy Favoring Release,” which sets forth the process by which the government is to release minors from custody “without unnecessary delay” whenever “detention of the minor is not required either to secure his or timely appearance before the INS or the immigration court, or to ensure the minor’s safety or that of others.”¹²⁸ The removal of reference to continued efforts toward release is particularly troubling when read in tandem with other provisions in the proposed regulations expanding the government’s ability to detain children in family detention and unlicensed programs for potentially indefinite periods.

Importantly, ORR’s overarching purpose with respect to unaccompanied children is to provide care and custody for them only until they can be released to safe sponsors in the community.¹²⁹ As such, ORR custody serves a distinct role from ICE custody more generally, as ORR’s primary purpose is not to detain children throughout their removal proceedings but to enable reunification and release of children in a manner that minimizes children’s time in federal custody.¹³⁰ This accords with basic child welfare principles, domestically and internationally, advising that the detention of children should be used only as a last resort and for the shortest duration appropriate.¹³¹ The proposed regulation’s omission of references to release overlooks this critical responsibility.

The proposed regulation similarly fails to ensure ORR’s prompt and continuous efforts toward the reunification and release of children by weakening the FSA’s language to merely reference agency practice, rather than a requirement. While the FSA states that the government “shall” make prompt and continuous efforts to these ends, the proposed regulation states only that “ORR makes and records” such efforts.

- c. *Proposed section 410.202 of HHS’ proposed regulation fails to ensure compliance with FSA and TVPRA requirements on placements of children in the least restrictive setting appropriate to their needs.*

Section 410.202 states that ORR “places UAC into a licensed program promptly after a UAC is transferred to ORR legal custody,” with four enumerated exceptions. Rather than focusing on how placement decisions

¹²⁷ FSA para. 9 (emphasis added).

¹²⁸ FSA para. 14.

¹²⁹ See ORR, Unaccompanied alien children: Frequently Asked Questions, <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-frequently-asked-questions> (“HHS is legally required to provide care for all children until they are released to a suitable sponsor, almost always a parent or close relative, while they await immigration proceedings.”); see generally FSA, para. 14.

¹³⁰ This primary purpose is significantly compromised not only by this NPRM, but also by current policies implemented by ORR hand-in-hand with ICE, which include sharing information about potential sponsors for unaccompanied children. As a result of these chilling policies, unaccompanied children are now languishing in ORR custody for an average of 74 days prior to release, in contravention of the letter and spirit of the FSA, HSA, and TVPRA. Jonathan Blitzer, *The New Yorker*, “To Free Detained Children, Immigrant Families Are Forced to Risk Everything,” Oct. 16, 2018, <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything>.

¹³¹ See Art. 37, United Nations General Assembly, Convention on the Rights of the Child, <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> (“The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”).

are made or the process by which they are implemented this section instead emphasizes those circumstances in which an unaccompanied child is *not* placed in a licensed program. As formulated, the proposed regulations provide ORR with broad latitude in making placement decisions that may run contrary to both the well-being and best interests of children, and the TVPRA, HSA, and FSA.

The FSA, incorporated in relevant part in the TVPRA, requires that unaccompanied children be placed in the “least restrictive setting appropriate to the minor’s age and special needs, provided that such setting is consistent with its interests to ensure the minor’s timely appearance . . . before the immigration courts and to protect the minor’s well-being and that of others.”¹³² This requirement reflects the widely accepted understanding among child welfare and medical professionals that confinement poses significant developmental, emotional, physical, and psychological consequences for children and youth.

Where the FSA states that a “minor *shall* be placed temporarily in a licensed program until such time as release can be effected....,”¹³³ the proposed regulation states only that “ORR places UAC in a licensed program promptly after a UAC is transferred to legal custody,”¹³⁴ replacing a directive with a mere reference to agency practice. The distinction is significant, as “shall” is normally construed to be a nondiscretionary directive.¹³⁵

9. HHS and DHS propose rules that would put even more children in secure detention, contrary to child welfare best practices and due process of law

a. HHS proposes expansions to criteria for placing unaccompanied children in secure custody in violation of the FSA

i. Unjustified expansion of non-violent offense criteria triggering secure placement

Proposed section 410.203 governs HHS’s placement of unaccompanied children in secure custody but makes several significant departures from the FSA that significantly alter the criteria for secure placement. First, the NPRM omits FSA Paragraph 21(A)’s examples of isolated and non-violent offenses and petty offenses that would not be sufficient reason to transfer a child to secure custody.¹³⁶ HHS chose not to include the examples “because [they] are non-exhaustive and imprecise” and because the examples listed in the paragraph “could be violent offences in certain circumstances depending upon the actions accompanying them”¹³⁷ and because “state law may classify these offenses as violent.”¹³⁸ However, the examples in FSA Paragraph 21(A)(ii) specifically enumerate a non-exhaustive list of “petty offenses which are not grounds for stricter means of detention in any case” including joyriding, shoplifting, disturbing the peace.¹³⁹ Given

¹³² FSA para. 11.

¹³³ FSA para. 19 (emphasis added).

¹³⁴ Section 410.202.

¹³⁵ See, e.g., *Mission Critical Sols. v. United States*, 91 Fed. Cl. 386, 403 (Fed. Cir. 2010) (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)) (“The word ‘shall’ is ordinarily ‘[t]he language of command.’”).

¹³⁶ 83 Fed. Reg. 45530.

¹³⁷ 83 Fed. Reg. 45505.

¹³⁸ 83 Fed. Reg. 45506.

¹³⁹ FSA ¶ 21(A)(ii).

this explicit list of offenses that the FSA clearly states are *not* grounds for placement in secure detention, HHS’s decision to omit the listed offenses on grounds that they could be in some circumstances reason for placement in secure detention is extremely troubling and inconsistent with the plain text of the FSA.

Moreover, HHS’ justification that the enumerated examples of isolated offenses in Paragraph 21(A)(i) that “did not involve violence against a person or the use or carrying of a weapon” could be classified as violent under state law or be violent in certain circumstances is similarly dubious. The text of the FSA does not contemplate a determination of whether an offense is “classified” as violent by state law; rather it poses the clear question of whether the offense *involved* violence against a person or the use of or carrying of a weapon. HHS offers no justification for the proposed change in the interpretation of these criteria, which could lead to more children being placed in secure custody. Moreover, looking to state law to determine whether an offense is classified as “violent” would create uncertainty and inconsistency in the type of offenses sufficient for placement of a child in secure custody.

ii. Addition of vague, broad “dangerousness” criteria

Section 410.203(3) also expands grounds under FSA Paragraph 21(C) by which a child could be “stepped-up” or transferred into secure custody from a less restrictive setting. As noted above, the FSA provides for transfer to a secure facility where a child has engaged in “unacceptabl[y] disruptive” conduct “disruptive of the normal functioning of the licensed program” and whose removal “is necessary to ensure the welfare of the minor or others.” Section 410.203 expands “disruptive conduct” to include conduct engaged in at staff-secure facilities and adds “sexually predatory behavior” to the list of example behaviors in the provision.¹⁴⁰ It also includes a requirement that ORR determine that the child “poses a danger to self or others based on such conduct.”¹⁴¹ The NPRM does not explain how or on what basis ORR will make this dangerousness determination, nor does it indicate who will be responsible for making the determination.

iii. Proposed catchall provision swallows up other enumerated criteria to give HHS unfettered discretion to jail children

Section 410.203(5) provides for placement of a child in secure detention if the child “is otherwise a danger to self or others.”¹⁴² This language is notably and confusingly different from the text of the TVPRA, which requires a “determination that the child poses a danger to self or others.”¹⁴³ HHS does not indicate what criteria or test would be used for this determination or who would be responsible for making the determination, but does state that the Federal Field Specialist is responsible for “reviewing and approving all placements of [children] in secure facilities.”¹⁴⁴ Section 410.203(5) creates a discretionary catchall provision for placing a child in secure detention that is so vague and so broad that it would swallow up every other criteria detailed in Section. 410.203. This provision is especially concerning given that HHS is currently involved in multiple lawsuits alleging mistreatment and/or indefinite detention of children in

¹⁴⁰ 83 Fed. Reg. 45530.

¹⁴¹ *Id.*

¹⁴² 83 Fed. Reg. 45530.

¹⁴³ 8 U.S.C. § 1232(c)(2)(A).

¹⁴⁴ *Id.*

secure facilities, including allegations that HHS “stepped up” children to secure detention without providing notice or justification for the transfer.¹⁴⁵

b. DHS’s deliberate omission of medium security facilities for children violates the FSA

Under Paragraph 23 of the FSA, DHS may not place a minor in a secure facility “if there are less restrictive alternatives that are available and appropriate in the circumstances.” Such alternatives include “transfer to (a) a medium security facility which would provide intensive staff supervision and counseling services or (b) another licensed program.” Medium security facilities, by complying with (a) state licensing rules and (b) the requirements for licensed programs set out in Exhibit 1 to the FSA (discussed below in Section 6(d) of this memorandum), serve as a step between normal licensed programs and secure facilities and are critical to fulfilling the principle set out in FSA Paragraph 11, which requires that minors be placed in the “least restrictive setting” appropriate to their circumstances.

Despite this, the regulations proposed by DHS do not contain a conceptual analog to a medium security facility. Although DHS Proposed Regulation 236.3(i)(2) refers to facilities “which would provide intensive staff supervision and counseling services”, the proposed rule provides no meaningful clarification of what this type of facility would be like or the requirements that would be applicable to this type of facility. The NPRM states that DHS did not provide for medium security facilities because DHS only operates secure and non-secure facilities,¹⁴⁶ thus making a definition for medium security facilities unnecessary. This explanation implies that DHS chose to remove an FSA requirement because DHS is currently not following the requirement. Non-compliance with a rule is not remedied by eliminating the rule. On the contrary, the elimination violates the FSA’s requirement for any final regulations to substantively and consistently implement the FSA’s terms.¹⁴⁷

c. The NPRM would increase secure detention of children despite ample evidence demonstrating long-lasting harms

Any clarification provided by the proposed regulations is subsequently eliminated by the catchall categories, allowing ORR to place a child in secure custody “where ORR deems those circumstances demonstrate that the UAC poses a danger to self or others” or where a UAC “has made credible threats to commit, a violent or malicious act,” or when the UAC (as determined by ORR) “engages in unacceptably

¹⁴⁵ See *Doe v. Shenandoah Valley Juvenile Center Comm’n*, Class Action Complaint (W.D. Va. Oct. 4. 2017), http://www.washlaw.org/pdf/svjc_class_action_complaint_signed.PDF; Roque Planas and Hayley Miller, *Huffington Post*, “Migrant Children Report Physical, Verbal Abuse In At Least 3 Federal Detention Centers,” June 21, 2018, https://www.huffingtonpost.com/entry/migrant-children-abuse-detention-centers_us_5b2bc787e4b0040e2740b1b9; *Saravia v. Sessions*, Order Granting the Motion for Preliminary Injunction, et. al (Nov. 20, 2017), https://www.aclunc.org/sites/default/files/20171121-Gomez_v_Sessions-Order_Granteeing_PI_and_Class_Cert.pdf, affirmed *Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018); *Flores v. Sessions*, Memorandum in Support of Motion to Enforce Class Action Settlement (C.D. Ca. Apr. 16, 2018), https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf; and *Flores v. Sessions*, In Chambers--Order re Plaintiff’s Motion to Enforce Class Action Settlement (C.D. Ca. July 30, 2018), <https://www.aila.org/File/Related/14111359ae.pdf>.

¹⁴⁶ 83 Fed. Reg. 45497.

¹⁴⁷ FSA ¶ 9.

disruptive behavior that interferes with the normal functioning of a ‘staff secure’ shelter”. These justifications for placing children in highly restrictive settings give unfettered discretion to ORR staff and contractors to place a child in a juvenile jail for any reason, from disrupting the lunch line in the cafeteria to refusing to follow a dress code to actually threatening another child or staff with a weapon. It provides no guidance for who makes these decisions, how they are made, who reviews them, what threats are deemed “credible” and why, or what would be sufficiently disruptive behavior to interfere with shelter functioning.

Equally concerning, the NPRM also lists “fighting” and “intimidation of others” as a justification for placing a child in a more restrictive setting. This necessarily implicates behavior less serious than any of the aforementioned justifications or it would be duplicative. This suggests that normal “school yard” fights, which should be addressed in a developmentally appropriate and productive way, will instead be treated as equally serious as other enumerated behaviors, therefore placing all children, regardless of the degree of alleged misbehavior or developmental typicality, at risk of incarceration in secure settings. This is at odds with the broad field of research and best practices for children exhibiting disruptive behavior and with child development and child welfare more generally.¹⁴⁸

These changes would be especially harmful to NIJC clients like David and Aly.

David is a young old boy who was forcibly separated at the border from his adult brother who is his legal guardian. The separation was extremely difficult for David and since being placed into ORR custody, David has had numerous Significant Incident Reports after he has acted-out at the ORR shelter. David wishes to take voluntary departure to reunite with his brother and had he been “stepped up” as a result of his behavior – which was likely due to his separation from his brother – his reunification with his brother may have been unnecessarily delayed.

Aly fled his home country in West Africa when he was 16 years old because he feared his family would kill him after they learned he was gay. In ORR custody, Aly struggled with mental health issues, expressed thoughts of self-harm and refused to cooperate with shelter policies. Recognizing Aly’s behavior was connected to his prior trauma and poor mental health, shelter staff worked closely with Aly and instead of stepping him up to a secure facility, was able to refer him to a program that would provide him with more individualized care so he could focus on his asylum case.

¹⁴⁸ See, e.g., Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Nov. 2006, http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf; Coalition for Juvenile Justice, *Applying Research to Practice Brief: What Are the Implications of Adolescent Brain Development for Juvenile Justice?* (2006), http://www.juvjustice.org/sites/default/files/resource-files/resource_138_0.pdf; Jessica Feerman, Kacey Mordecai, and Robert G. Schwartz, Juvenile Law Center, *Ten Strategies to Reduce Juvenile Length of Stay*, Apr. 22, 2015, <https://jlc.org/resources/ten-strategies-reduce-juvenile-length-stay>; Jessica Feerman and Lauren Fine, Juvenile Law Center, *Trauma and Resilience: A new look at legal advocacy for youth in the juvenile justice and child welfare systems*, Apr. 2014, https://jlc.org/sites/default/files/publication_pdfs/Juvenile%20Law%20Center%20-%20Trauma%20and%20Resilience%20-%20Legal%20Advocacy%20for%20Youth%20in%20Juvenile%20Justice%20and%20Child%20Welfare%20Systems.pdf.

The potential that more children could be placed in secure detention because of the NPRM is inappropriate and contrary to the child-protective principles underpinning the FSA. Detained unaccompanied immigrant children in the U.S. exhibit high rates of “posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems.”¹⁴⁹ Conditions of custody in secure detention often exacerbate the symptomology of illnesses such as post-traumatic stress disorder (PTSD) and can be re-traumatizing for children.¹⁵⁰ In addition, immigration custody has been shown to contribute to psychological distress, triggering “feelings of isolation, powerlessness and disturbing memories of persecution.”¹⁵¹ These feelings are often exacerbated by the seeming indefiniteness of custody.¹⁵² Detention can also lead to “depression, aggression and rebellion” in children,¹⁵³ as it deprives children of healthy attachments and normal developmental experiences.¹⁵⁴

Additionally, prolonged family separation and detention has been shown to lead to psychological and physiological harm in children.¹⁵⁵ These harms include “frustration and a sense of helplessness” and behavioral issues including self-harm, depression, and suicidal ideation, which increase with each additional week a child spends in custody.¹⁵⁶ The consequences may last much longer. Research has shown that “[y]oung detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school.”¹⁵⁷ Finally, children experiencing fatigue based on the seemingly indefinite nature of their detention are often driven to make the unfair choice between detention and returning to countries where they face danger.¹⁵⁸

Simply put, the use of detention carries significant and negative consequences for young people and society at large. This is one of the primary reasons that cities, states, and counties throughout the country have significantly reduced the inappropriate and unnecessary use of secure detention for young people in public systems, specifically the juvenile justice system.¹⁵⁹

¹⁴⁹ Julie M. Linton, Marsha Griffin, & Alan J. Shapiro, American Academy of Pediatrics, *Detention of Immigrant Children*, 2017, <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>.

¹⁵⁰ Karen M. Abram, et al, Off. of Juv. Justice and Delinquency Prevention Bulletin, Dept. of Justice, *PTSD, Trauma, and Comorbid Psychiatric Disorders in Detained Youth* (2013), <http://www.ojjdp.gov/pubs/239603.pdf>.

¹⁵¹ Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* 6 (2003), <http://www.survivorsoftorture.org/files/pdf/perstoprison2003.pdf>.

¹⁵² *Id.* at 7.

¹⁵³ Amy Bess, *Human Rights Update: The Impact of Immigration Detention on Children and Families*, NTN’L ASSN. OF SOCIAL WORKERS 2 (2011).

¹⁵⁴ Mary Dozier et al., *Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, 84 AM. J. ORTHOPSYCHIATRY 3, 219-225 (2014), <https://www.apa.org/pubs/journals/features/ort-0000005.pdf>.

¹⁵⁵ See Affidavit of Dr. Lisa Fortuna, Director of the Child and Adolescent Psychiatry Division at Boston Medical Center at ¶¶ 11-17, 19-23; *LVM v. Lloyd*, 18-cv-1453 (S.D.N.Y. May 9, 2018) (ECF No. 46).

¹⁵⁶ *Id.* at ¶ 18(c)-(d), and ¶¶ 15-16.

¹⁵⁷ See, e.g., Julie M. Linton, et al., American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, at 6-7, <http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf> (citations omitted).

¹⁵⁸ See Motion for Preliminary Injunction at 15, n. 12, *LVM v. Lloyd*, 18-cv-1453 (S.D.N.Y. April 30, 2018) (ECF No. 42).

¹⁵⁹ See Richard A. Mendel, *Two Decades of JDAI: From Demonstration Project to National Standard* (2009), <https://www.aecf.org/m/resourcedoc/aecf-TwoDecadesofJDAIfromDemotoNatl-2009.pdf>; see also Josh Weber et

10. HHS proposes to increase already prohibitively high barriers for potential sponsors for unaccompanied children

The Flores settlement establishes a “general policy favoring release.” If detention is not required to ensure a minor’s safety or compliance with immigration proceedings, ORR must release an unaccompanied child to an approved sponsor without “unnecessary delay.”¹⁶⁰ This requirement is grounded in the recognition that children need a close and supportive relationship with a caregiver in order to thrive. It is also grounded in the recognition that congregate care facilities, where most unaccompanied children are sent before they are released to a sponsor, are harmful to children’s health and well-being.

The TVPRA charges HHS with ensuring that unaccompanied children are “promptly placed in the least restrictive setting that is in the best interest of the child.”¹⁶¹ Specifically, HHS is tasked with the “care and custody of all unaccompanied alien children, including responsibility for their detention, *where appropriate.*” 8 U.S.C. § 1232(b)(1) (emphasis added). HHS’ responsibilities include ensuring that the proposed sponsor “is capable of providing for the child’s physical and mental well-being.” 8. U.S.C. § 1232(c)(3)(A). Family members are presumptively those individuals best suited to provide for children’s physical and mental well-being, barring any finding that the proposed sponsor has “engaged in any activity that would indicate a potential risk to the child.” *See id.* ORR’s reunification process, like its policies for providing for the care and custody of unaccompanied minors, must be governed by foster care and child welfare practices. *See* 6 U.S.C. §§ 279(b)(1)(A)-(F).

In child welfare, researchers have found that youth who have been placed in group homes, instead of family foster care, have higher rates of delinquency and worse educational outcomes. In addition, youth who have experienced trauma are at higher risk of further abuse when placed in group homes compared to family homes.¹⁶² In recognition of the problems posed by congregate care, state child welfare systems have significantly reduced the number of children placed in these settings over the last ten years.¹⁶³ The federal government has recognized the need to further reduce the number of children in group homes, and the recently-enacted Family First Prevention Services Act of 2018 places new limits on federal funding for the

al., Georgetown University Center for Juvenile Justice Reform, *Transforming Juvenile Justice Systems to Improve Public Safety and Youth Outcomes* (2018), <http://cjjr.georgetown.edu/wp-content/uploads/2018/05/Transforming-Juvenile-Justice-Systems-to-Improve-Public-Safety-and-Youth-Outcomes.pdf>; The Pew Charitable Trusts, *Re-Examining Juvenile Incarceration* (April 2015), https://www.pewtrusts.org/-/media/assets/2015/04/reexamining_juvenile_incarceration.pdf; Tony Fabelo et al., Council of State Governments Justice Center, *Closer to Home: An Analysis of the State and Local Impact of the Texas Juvenile Justice Reforms* (2015), <https://csgjusticecenter.org/wp-content/uploads/2015/01/exec-summary-closer-to-home.pdf>.

¹⁶⁰ Paragraph 14, *Flores v. Reno*, case no. CV 85-4544-RJK(Px), Stipulated Settlement Agreement.

¹⁶¹ The history of ORR’s obligations to care for and promptly release UACs is set forth in detail in the SAC, at ¶¶ 37-42.

¹⁶² For a summary, *see* Casey Family Programs, “What are the outcomes for youth placed in congregate care settings,” updated Jan. 2017, https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_CC-Outcomes-Resource.pdf.

¹⁶³ U.S. Department of Health and Human Services, Administration for Children and Families, U.S. Children’s Bureau, “A National Look at the Use of Congregate Care in Child Welfare,” May 13, 2015, https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare_brief.pdf.

use of congregate care in child welfare, as well as additional expectations for quality of care and family engagement in such facilities.¹⁶⁴ Although there has been little research on unaccompanied children’s experience in congregate care in the custody of ORR, there are serious allegations of abuse and neglect in some of the shelters that house unaccompanied minors.¹⁶⁵

Evaluations of children placed in immigration detention with their families have found them to experience serious trauma.¹⁶⁶ Studies of detained immigrant children have found high rates of posttraumatic stress disorder, depression, and anxiety, and psychologists agree that “even brief detention can cause psychological trauma and induce long-term mental health risks for children.”¹⁶⁷ Dr. Luis Zayas, Dean of the School of Social Work at the University of Texas at Austin and an expert on child and adolescent mental health, interviewed families in immigration detention facilities and found “regressions in children’s behavior; suicidal ideation in teenagers; nightmares and night terrors; and pathological levels of depression, anxiety, hopelessness, and despair.”¹⁶⁸ Troublingly, if unsurprisingly, in setting out proposed regulations codifying the family reunification process in the NPRM, HHS fails to consider the ample and readily available evidence demonstrating the harms of prolonged detention and family separation.

a. Proposed 45 C.F.R. §§ 410.301-302 grant ORR broad authority to deny children family reunification, raising serious due process concerns

While proposed sections 410.301 and 410.302(f) permit ORR to deny reunification on the basis of a belief that the child’s sponsor will not secure the child’s appearance before DHS or the immigration courts, they fail to establish how ORR is to determine whether custody is required to secure the child’s appearance, as well as any process by which a child may be protected from an erroneous determination. The regulations do not provide for any notice to the unaccompanied child of such a determination or the evidence used to make it, do not provide the unaccompanied child any opportunity to contest such a determination or provide his or her own evidence in opposition, nor do they provide for any opportunity to be heard if ORR denies reunification because it determines it must maintain custody in order to secure that child’s appearance before DHS or the immigration courts. This is entirely at odds with ORR’s child welfare mandate. ORR is not an immigration enforcement agency, nor does it have the authority or mandate to conduct immigration

¹⁶⁴ For a summary see Congressional Research Service, “Family First Prevention Service Act (FFPSA),” Feb. 9, 2018,

https://www.everycrsreport.com/files/20180209_IN10858_f4acfb3c556414a49462f8d88f0d559505245e68.pdf.

¹⁶⁵ Aura Bogado et al., *Texas Tribune*, “Separated migrant children are headed toward shelters that have a history of abuse and neglect,” June 20, 2018, <https://www.texastribune.org/2018/06/20/separated-migrant-children-are-headed-toward-shelters-history-abuse-an/>.

¹⁶⁶ Wendy Cervantes, CLASP, “Baby Jails are Not Child Care,” Feb. 2018, <https://www.clasp.org/sites/default/files/publications/2018/02/Baby%20Jails%20are%20not%20Child%20Care.pdf>.

Lutheran Immigration and Refugee Service and the Women’s Refugee Commission, “Locking Up Family Values, Again” (Oct. 2014), <https://innovationlawlab.org/wp-content/uploads/2015/01/Fam-Detention-Again-Full-Report.pdf>.

¹⁶⁷ Julie Linton et al., American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Mar. 2017, <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483#xref-ref-51-1>.

¹⁶⁸ Claire Hutkins Seda, Migrant Clinicians Network, “Dr. Luis Zayas Provides Testimony on Family Detention,” July 29, 2015, <https://www.migrantclinician.org/blog/2015/jul/dr.-luis-zayas-provides-testimony-family-detention.html>.

enforcement. It is unclear how ORR would make such a determination. Despite this, the proposed provisions seek to authorize HHS to make internal, unreviewable, and unilateral decisions to hold a child in federal custody indefinitely.

Proposed section 410.301(f) also fails to recognize ORR's court-ordered obligation to provide due process if withholding an unaccompanied child from his or her parent. ORR may not unilaterally make a determination, let alone under a standard of "reason to believe," that it will not reunify a child with his or her parent. If denying a parent-sponsor, ORR is required to provide detailed notice to the parent, including notice of the evidence leading to a denial decision, and must offer a hearing before a neutral arbiter at which the parent and/or child may be heard.¹⁶⁹ This proposed regulation runs afoul of due process and of past court rulings on the release of unaccompanied children to parent sponsors.

b. HHS seeks to codify inappropriate interagency policies that have unaccompanied children languishing in custody

This proposed regulation cannot be read in isolation, and must be read together with the DHS Notice of Modified System of Records, Docket Number DHS-2018-0013 and with HHS ACF Sponsorship Review Procedures for Approval, OMB No.: 0970-0278. These two additional regulations establish universal information collection from all sponsors, household members, and alternate caregivers together with universal information sharing with DHS to be used for immigration enforcement purposes. Taken together, these proposed regulations and DHS' and HHS' prior regulations will cause lengthy and unnecessary delays in reunifying children with their families; already, reports indicate a chilling effect of the regulations leading to potential sponsors failing to come forward for fear they will be targeted for deportation.¹⁷⁰

The expanded sponsor suitability assessment procedures are unnecessary not least because HHS is not required by any law to collect information about potential sponsors' immigration status. Neither the TVPRA nor the Flores settlement agreement requires HHS to collect immigration status information on parents or other sponsors, to collect such information on other adult members of the household, or to use any information collected to deport families of unaccompanied children.¹⁷¹

DHS and HHS cite the Flores settlement agreement in support of the proposed expanded suitability assessment procedures, but the FSA does not require the collection of immigration status information for purpose of evaluating sponsor suitability. The paragraph cited by HHS authorizes the agency to conduct a

¹⁶⁹ See, e.g., *Beltran v. Cardall*, 222 F. Supp. 3d 476 (E.D. Va. 2016); *Santos v. Smith*, 260 F. Supp. 3d 598, 614 (W.D. Va. 2017).

¹⁷⁰ Caitlin Dickerson, *The New York Times*, "Detention of Migrant Children Has Skyrocketed to Highest Levels Ever," Sept. 12, 2018, <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>. Already as a result of these prior regulations, unaccompanied children are languishing in ORR custody for an average of 74 days prior to release. Jonathan Blitzer, *The New Yorker*, "To Free Detained Children, Immigrant Families Are Forced to Risk Everything," Oct. 16, 2018, <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything>.

¹⁷¹ See 8 U.S.C. § 1232(c)(3)(A) (Outlining the minimum evaluative methods necessary to determine that a potential sponsor will be "capable of providing for the child's physical and mental well-being," and making no mention of immigration status.).

“positive suitability assessment.”¹⁷² But the FSA does not mention, let alone require, an immigration status check as part of that assessment.¹⁷³ Moreover, HHS does not even consider immigration status in determining suitability of a potential sponsor.¹⁷⁴

11. HHS’s proposed “810 hearings” violate not only the FSA but also basic due process requirements

HHS proposes, through this NPRM, to replace the FSA’s requirement that an immigration judge review a child’s placement in a custody redetermination (“bond”) with hearings run by an HHS administrative officer, in effect making HHS both jailer and judge.¹⁷⁵ Currently, FSA paragraph 24(A) requires that a child in deportation proceedings “shall be afforded a bond redetermination hearing before an immigration judge in every case,” a mandate upheld by the U.S. Court of Appeals for the Ninth Circuit in *Flores v. Sessions*.¹⁷⁶ Despite this, HHS claims that a child’s opportunity to be heard by a neutral, independent arbiter is reasonably replaced by an HHS employee reviewing his own agency’s placement decision.¹⁷⁷

As such, proposed 45 C.F.R. 410.810 fails to ensure that the due process rights of unaccompanied children are protected. Due process requires a UAC to receive detailed and meaningful notice of the charges and evidence against them, and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950). This opportunity must come before a neutral, independent arbiter in order to safeguard “the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process.” *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980). Indeed, “involuntary confinement of an individual for any reason is a deprivation of liberty which the State cannot accomplish without due process of law.” *O’Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Justice Burger, concurring). Federal courts have evaluated similar ORR procedures to those proposed in 45 C.F.R. 410.810 and found them lacking:

¹⁷² Stipulated Settlement Agreement at ¶ 17, *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997) (emphasis added).

¹⁷³ *Id.*

¹⁷⁴ ORR Policy Guide Section 2.5.2, <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.5.2>.

¹⁷⁵ Recent reporting demonstrates how HHS already assumes these inherently conflicting roles at the expense of children. Only this summer, HHS officials “helped” five-year-old Helen withdraw her request for a custody redetermination (bond) hearing:

“[I]n early August, an unknown official handed Helen a legal document, a “Request for a Flores Bond Hearing,” which described a set of legal proceedings and rights that would have been difficult for Helen to comprehend. (“In a Flores bond hearing, an immigration judge reviews your case to determine whether you pose a danger to the community,” the document began.) On Helen’s form, which was filled out with assistance from officials, there is a checked box next to a line that says, “I withdraw my previous request for a Flores bond hearing.” Beneath that line, the five-year-old signed her name in wobbly letters.”

Sarah Stillman, *The New Yorker*, “The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights,” Oct. 11, 2018, <https://www.newyorker.com/news/news-desk/the-five-year-old-who-was-detained-at-the-border-and-convinced-to-sign-away-her-rights>.

¹⁷⁶ *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017).

¹⁷⁷ 83 Fed. Reg. 45509-10, 45533-34.

Virtually all of those procedures, however, consisted of internal evaluation and unilateral investigation. In effect, Respondents contend that due process was satisfied here because ORR made a significant effort to reach the correct decision. But due process does not concern itself only with the degree to which one can trust the government to reach the right result on its own initiative; rather, due process is measured by the affected individual's opportunity to protect his or her own interests. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (“the Due Process Clause grants the aggrieved party the opportunity to present his case”).

Beltran v. Cardall, 222 F. Supp. 3d 476, 486–87 (E.D. Va. 2016).

Moreover, if the government wants to detain a child in a secure setting, “the government must establish the necessity of detention by clear and convincing evidence. . . This is no less true where the government is claiming detention is necessary due to dangerousness.” *Santos v. Smith*, 260 F. Supp. 3d 598, 613 (W.D. Va. 2017) (citing *United States v. Salerno*, 481 U.S. 739, 751 (1987) (pretrial detention); *Addington v. Texas*, 441 U.S. 418 (1979); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (finding due process violation where an individual detained on grounds of dangerousness was denied an adversarial hearing in which the state had to prove his dangerousness by clear and convincing evidence); Va. Code Ann. §§ 37.2–800, *et seq.* (setting forth requirements for involuntary civil commitment of an adult, which includes a judicial hearing in front of a district judge or special justice).

First, the well-laid out requirements of procedural due process require the provision of notice to the UAC of the specific reasons and evidence HHS is depending upon for its dangerousness determination prior to any 810 hearing, with sufficient time to allow the unaccompanied child to gather their own evidence to counter HHS's assertion of dangerousness. Due process mandates that such notice be provided *prior to* a child's transfer to a secure or staff-secure facility (and the associated severe deprivation of his or her liberty), to allow the child to contest the evidence and transfer decision. Nonetheless, there is no requirement in this section or any other that HHS provide detailed notice to the unaccompanied child explaining the evidence upon which it relied to determine that the child must be placed in a secure setting.¹⁷⁸ It would be impossible for a child to present evidence proving that he or she is not dangerous without seeing the evidence upon which the government is relying to make such a determination. Notice of hearing procedures does not satisfy the meaningful notice requirements of due process.

Second, the burden of demonstrating that the unaccompanied child will be a danger to the community or flight risk properly rests on HHS, rather than on the unaccompanied child. As HHS engages in its own

¹⁷⁸ HHS neglects to acknowledge its Constitutional obligation to provide not only adequate, but also prompt notice. Paragraph 24(C) of the FSA dictates that the government “shall provide minors not placed in licensed programs with a notice of the reasons for housing the minor in a detention or medium security facility”, and a district court recently ordered the government to provide “written notice” of reasons for placement in a secure facility, staff secure facility, or RTC “within a reasonable time of ORR’s placement decisions”. *Flores v. Sessions*, 2:85-cv-04544-DMG-AGR, p. 19 (ECF No. 470, Jul. 30, 2018). Despite this, HHS in the NPRM omits the mandatory “shall” language, choosing instead to simply use descriptive language that places no affirmative requirement on ORR. In effect, ORR would determine how soon unaccompanied children could challenge their placement.

internal research and decision-making regarding dangerousness and risk of flight, which they otherwise do not share with the unaccompanied child who is the subject of that determination, it is grossly unfair to require a detained child to provide evidence to the contrary without first seeing the evidence against them.¹⁷⁹ This is in line with the Ninth Circuit’s view that the bond hearings required under paragraph 24A of the FSA “compel the agency to provide its justifications and specific legal grounds for holding a given minor.” *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017). It is also consistent with the Flores Settlement Agreement’s requirement that the government place detained children in the “least restrictive setting appropriate to the minor’s age and special needs,” and its presumption of a general policy favoring release. FSA at ¶¶ 11, 14; § VI. Given the gravity of the consequences of this determination (continued detention, or continued detention in a lockdown facility), the government should bear the burden of demonstrating that a child is a danger to the community or flight risk by clear and convincing evidence. The clear and convincing evidence standard is the governing standard in almost all civil detentions, with the exception of immigration detention. Given that children’s liberty interests are at stake in the context of detained UACs, this higher standard of proof must be applied. *See, e.g., In Re Gault*, 387 U.S. 1 (1967).

Third, the “opportunity to be heard” in the proposed regulations does not meet due process requirements. We strongly disagree with HHS’s assertions that “as the legal custodian of UACs who are in federal custody,” it “clearly has the authority to conduct the hearings envisioned by the FSA,” 83 Fed. Reg. 45486, 45509 (Sept. 7, 2018) (to be codified at 8 CFR pts. 212 and 236, 45 CFR pt. 410), or that HHS could possibly provide “the same type of hearing paragraph 24(A) [of the FSA] calls for.” *Id.* By removing the option for unaccompanied children to come before an immigration judge working as a part of the DOJ, this proposed rule positions HHS/ORR as both judge and jailer. This is problematic for several reasons.

First, the Ninth Circuit has already considered and rejected the same arguments advanced by HHS in the proposed regulations regarding its authority to conduct hearings that would comply with paragraph 24(A) of the FSA. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017). The court went into detail about the benefits provided by the bond hearing guaranteed to children in paragraph 24(A), despite their differences from bond hearings for accompanied minors or adults, including the importance of having their detention assessed by an independent immigration judge. *Flores*, 862 F.3d at 867 (“The hearing is a forum in which a child has the right to be represented by counsel, and to have the merits of his or her detention assessed by an independent immigration judge.”) The court went on to discuss the benefits to unaccompanied children held in both secure and non-secure facilities. For unaccompanied children held in secure facilities, the hearings provide an opportunity for youth to directly contest the basis for their confinement in secure detention, as the TVPRA only allows children to be placed in secure facilities if they pose a safety risk to themselves or others, or have committed a criminal offense, both of which are determinations made by an immigration judge at a bond hearing. For youth in non-secure facilities, the hearings still provide unaccompanied children an opportunity to be represented by counsel and have their detention assessed by an independent immigration judge, outside of the ORR system, among other benefits.

¹⁷⁹ *See Garza v. Hargan*, 874 F.3d 735, 737 (D.C. Cir. 2017) (per curiam), *cert. granted, judgment vacated as moot*, *Azar v. Garza*, 138 S. Ct. 1790 (2018) (finding the “government bulldozed over constitutional lines” when it argued that the unaccompanied child had “*the burden of extracting herself from custody* if she wants to exercise the right to an abortion . . . like some kind of legal Houdini,” noting the logistical impossibilities for a child to find a sponsor or placement from within ORR custody) (emphasis in original).

Not only is proposed regulation 45 C.F.R. 410.810 completely at odds with the FSA and the Ninth Circuit’s decision interpreting that provision, but in practice, the enumerated benefits of having access to a *Flores* bond hearing would be extremely curtailed were HHS to assume the role of arbiter in re-evaluating detention decisions. In fact, there is an inherent tension in the idea that the very same agency that has the power to make placement and release decisions for unaccompanied children, including whether they are a danger to the community or present a flight risk, could neutrally re-evaluate its own decisions.

The proposed regulations raise several additional concerns. The appeal process set forth in 45 C.F.R. 410.810(e) is not only insufficient, but inappropriately tasks a political appointee with deciding the outcome of a child’s appeal. This all but ensures that political considerations will take precedence over any neutral consideration of the merits of the appeal and the best interests of the child.¹⁸⁰ If unaccompanied children will not be provided the ability to challenge the basis for their detention in front of an independent immigration judge, they should at a minimum be advised of their right to appeal a decision of an HHS adjudicator to an independent judge in a federal court, as a binding HHS decision would constitute final agency action. Furthermore, if HHS proposes to make a binding determination that a child cannot be reunified because he or she poses a danger to the community (as opposed to a decision that pending reunification a child must be in a secure setting), a full, in-person hearing before a neutral (non-HHS) arbiter is absolutely required to satisfy due process. In either situation, an internal review by the agency itself is in no way sufficient given the liberty interests at stake, the long-term health and mental health consequences that result from the detention of children, and the relatively small population of children held in secure or staff-secure detention. Finally, best practices in child welfare and fairness require a UAC’s 810 hearing to occur in person rather than through video- or teleconferencing. *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 *Northwestern U. L. Rev.* 4, 933 (2015).

Additionally, the limitation on “810 hearings” in subsection (h) to disallow the use of these hearings for challenges to placement or level of custody decisions is in direct conflict with the Ninth Circuit’s decision in *Flores v. Sessions*, and will strip children of one of the most meaningful protections provided by such a hearing. As the Ninth Circuit pointed out, “[p]roviding unaccompanied minors with the right to a hearing under Paragraph 24A therefore ensures that they are not held in secure detention without cause.” *Flores v. Sessions*, 862 F.3d at 868. The level of ORR detention in which children are held can drastically affect their experiences and length of detention, so this is not to be taken lightly. *See, e.g.*, Complaint for Injunctive Relief, Declaratory Relief, and Nominal Damages, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741-DMG-PLA (C.D. Cal. filed June 28, 2018); *see also, L.V.M. v. Lloyd*, 318 F. Supp. 3d 601 (S.D. N.Y. 2018); *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017).

¹⁸⁰ Examples of harm to children from politically-driven decisions by political appointees at HHS continue to accumulate. A notable example found that such agency decision-making represented the “zenith of impermissible agency action.” *LVM v. Lloyd*, 318 F.Supp.3d 601, 619 (S.D.N.Y. 2018), <https://www.nyclu.org/en/press-releases/court-halts-trump-administration-policy-prolonging-detention-hundreds-immigrant> (noting that the agency’s creation of the release policy without a record indicating need for a change “is at the zenith of impermissible agency actions”).