November 6, 2018

Debbie Seguin, Assistant Director, Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th St. SW
Washington, D.C. 20536
Via Federal eRulemaking Portal: https://www.regulations.gov

RE: DHS Docket No. ICEB-2018-0002; Comments on proposed rulemaking re: Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children

Dear Ms. Seguin:

Kids in Need of Defense (KIND) appreciates the opportunity to comment on regulations proposed by the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) relating to the apprehension, processing, care, custody, and release of immigrant children (the "Proposed Regulations"), as announced in a notice of proposed rulemaking published September 7, 2018 in Volume 83 of the Federal Register (cited herein as "FR"), No. 174, at 45486-534 (the "NPRM").

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. Since January 2009, KIND has received referrals for over 16,800 children from 70 countries, and has collaborated with more than 570 pro bono partners to serve such children. KIND has field offices in ten cities: Atlanta, Baltimore, Boston, Houston, Los Angeles, Newark, New York, San Francisco, Seattle, and Washington, DC.

Nearly all of the children and minors who receive legal services through KIND are, at some point during the pendency of their immigration matters, detained in the custody of DHS or HHS' Office of Refugee Resettlement (ORR). Many of these children have fled their countries of origin because of violence, abandonment, and other unsafe situations, and they accordingly face enormous challenges upon arriving to the U.S., including healing from a history of trauma, overcoming language and educational barriers, and navigating the immigration system. The manner in which DHS and HHS treat, process, detain, and release minors can have a profound impact on whether a child is able to access needed social services, secure legal representation, and obtain humanitarian protection. As a legal services provider, KIND has a strong interest in ensuring that the *Flores* Settlement Agreement (FSA), which sets forth national standards for the government's treatment, detention and release of unaccompanied children and other minors, is fully and faithfully implemented.

We are concerned that the Proposed Regulations not only fail to implement the FSA, but actually undermine its purposes and that of other critical federal laws and policies pertaining to children in the immigration system. Accordingly, KIND urges DHS and HHS to withdraw the Proposed Regulations.

I. Executive Summary

The stated purpose of the Proposed Regulations is to "implement the relevant and substantive terms of the Flores Settlement Agreement"[1] and thereby trigger the provision that provides for termination of the FSA.[2] (FR 45487-488) However, the Proposed Regulations contravene the substance and purpose of the FSA, and therefore provide no basis to terminate the FSA. Moreover, the Proposed Regulations contain numerous provisions that contravene the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),[3] the Homeland Security Act of 2002 (HSA)[4] and/or the principle of the best interests of the child, and must therefore be withdrawn or rewritten.

Among the high-priority concerns that KIND has identified are the following:

A. **UAC redeterminations.** The Proposed Regulations would institute repeated reexamination of whether a child meets the definition of "unaccompanied alien child" (UAC), injecting instability and duplication of labor into case processing, and stripping vulnerable children of basic protections mandated by Congress.
B. **Age determinations.** Requiring consideration of multiple forms of evidence would better promote accurate age determinations.
C. **Initial custody and transport.** The Proposed Regulations weaken FSA requirements governing initial custody and transport of minors on grounds of "operational feasibility."
D. **Loopholes for custody standards.** Sweeping definitions of "influx" and "emergency" would risk perpetual relaxation of the standards under which children in custody are held and transported.
E. **Secure custody.** Expanding the use of secure custody would be contrary to the FSA's requirement of the least restrictive setting when detention of a minor is necessary.
F. **Impeding release from ORR custody.** Expansive information-sharing for immigration enforcement purposes will be at the expense of child welfare and the FSA policy of prompt release of minors from custody.
G. **Impeding release from DHS custody.** The Proposed Regulations place new restrictions on the release of children from DHS custody, contrary to the FSA's "general policy favoring release."

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[1] The Northern District of California approved the FSA in January 1997, in settlement of *Flores v. Meese*, No. 85-4544 (C.D. Cal. 1985), a class action commenced in 1985 to challenge federal practices for detaining and releasing immigrant minors.
[2] Paragraph 40 of the FSA, as amended by a 2001 stipulation, provides that the FSA "shall terminate 45 days following defendants' publication of final regulations implementing this Agreement." *Flores v. Reno*, No. CV-85-4544-RJK(Px) (C.D. Calif. Dec. 7, 2001).
[3] Public Law 110-457, title II, subtitle D, 122 Stat. 5044.
[4] Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (2002).

H. **Detaining children in unlicensed facilities.** The Proposed Regulations would replace the FSA requirement to hold children in state-licensed facilities with a scheme for deeming facilities in which minors and their families are held together to be licensed if a DHS contractor finds them to be compliant with detention standards of Immigration and Customs Enforcement (ICE).
I. **Post-release services.** Mechanisms responsive to children's legal and social services needs should be developed outside of this rulemaking.
J. **Retaking custody of released minors.** Re-taking custody of previously released minors could have far-reaching negative impacts and raise due process concerns.
K. **Bond redetermination.** Instead of bond redetermination hearings before immigration judges, the Proposed Regulations provide for determinations by "independent hearing officers" within HHS.
L. **Oversight and compliance monitoring.** The Proposed Regulations offer no substitute for the vital third-party oversight currently provided through judicial enforcement of the FSA.
M. **Deterrence as an objective.** The proposed increased use of detention of children and families rests on incorrect assumptions about deterring future migration.
N. **Unquantified costs.** The NPRM contains no estimate of the extent of the concededly higher costs imposed by the Proposed Regulations.

KIND respectfully requests that your Departments withdraw the NPRM in view of the considerations detailed below.

II. The Proposed Regulations Materially Depart from the Terms of the FSA

The Proposed Regulations purport to "implement the relevant and substantive terms" of the FSA, with such "limited changes as are necessary" to also implement the HSA and the TVPRA. (FR 45487) The agencies expressly state that the purpose of the rulemaking "is to terminate the FSA" (FR 45495), invoking the FSA provision which, as amended in 2001, states that the FSA shall terminate 45 days after the publication of final regulations "implementing the agreement." (FR 45490) However, the FSA also specifies that any such final regulations "shall not be inconsistent with the terms of this Agreement." (FSA ¶ 9)

The Proposed Regulations fall short of this requirement. Indeed, by their own explicit admission, the agencies have used the rulemaking to "propose some modifications to the literal text of the FSA" in several material respects. (FR 45495) The NPRM is replete with acknowledgments that the regulations being proposed are not faithful to the FSA: the Proposed Regulations "largely" replicate the FSA's language (FR 45495) and "parallel" the FSA's terms, "providing similar substantive protections and standards" (FR 45486, 45488); the regulations would "reflect the Departments' *current operations* with respect to minors and UACs" (FR 45489, emphasis added).

The NPRM justifies its modifications as necessary to address changes to the "legal and operational environment" since the FSA was promulgated. *Id.* But rulemaking is simply not the

proper vehicle for the agencies to seek to unilaterally change a court-approved settlement agreement, or to otherwise implement the Administration's current policy preferences on the custody of minors. As a consent decree, the FSA functions like any other final judgment, and it *binds* the United States to its terms.[5] The federal government therefore does not have discretion to unilaterally depart from the FSA's terms under the guise of adopting implementing regulations.

Instead, the proper course for DHS and HHS to pursue, if they believe certain terms of the FSA are no longer appropriate or practicable, is to file a motion under Federal Rule of Civil Procedure 60(b)(5) for relief from judgment in the district court that has retained jurisdiction over the implementation and enforcement of the FSA.[6] The standard for relief under Rule 60(b)(5) is demanding: the movant must show that "a significant change in circumstances warrants revision of the decree," and that "the proposed modification is suitably tailored to the changed circumstance."[7] And although changes to the background law may sometimes provide a basis for relief under Rule 60(b)(5), the movant must demonstrate that changes to the law have made "one or more of the obligations placed upon the parties … impermissible," or that the law has changed so as "to make legal what the decree was designed to prevent."[8]

Efforts by federal agencies to modify their obligations under the FSA by filing Rule 60(b)(5) motions have repeatedly been rebuffed by the federal courts. For example, in 2016, the Ninth Circuit affirmed the rejection of the federal government's attempt to modify the FSA so that it would no longer apply to minors who were accompanied by adults at the border.[9] In 2017, the Ninth Circuit rejected the federal government's request to modify the FSA's requirement that minors in immigration authorities' custody be afforded bond redetermination hearings in front of an immigration judge.[10] Most recently, in June 2018, the federal government filed a request to modify the settlement to permit detention of accompanied minors and exempt ICE family residential facilities from the FSA's state licensure requirement. The district court rejected the government's request as "wholly without merit."[11]

Inexplicably, the NPRM is written as though these adverse decisions never happened. Indeed, the Proposed Regulations revive many of the federal government's previous attempts to modify the FSA even though its arguments were conclusively rejected in court. For example, the Proposed Regulations would eliminate the bond hearing requirement, substituting a new process that would involve hearing officers within HHS instead of hearings before an immigration judge. (FR 45509) In defending that proposal, HHS relies on the same statutory arguments concerning

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[5] *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 391 (1992) (recognizing that a consent decree is binding as "a final judgment").
[6] *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 448 (2009) (discussing the role of Rule 60(b)(5) as the proper mechanism for the government to seek to modify a consent decree).
[7] *Rufo*, 502 U.S. at 383.
[8] *Id.*
[9] *See Flores v. Lynch*, 828 F.3d 898, 909-10 (9th Cir. 2016).
[10] *See Flores v. Sessions*, 862 F.3d 863, 874 (9th Cir. 2017).
[11] *See* D.I. 455, *Flores v. Sessions*, No. 85-cv-4544 (July 9, 2018).

the impact of the HSA and the TVPRA that the Ninth Circuit expressly rejected. The Proposed Regulations merely note disagreement with the Ninth Circuit's decision, but offer no basis to depart from the final decision of a federal court interpreting and enforcing the FSA. (FR 45495)

As discussed in more detail in the sections below, multiple provisions in the Proposed Regulations depart from the binding terms of the FSA. These departures are impermissible, and any inconsistencies between the FSA and the rule must be reconciled in a final regulation. If the federal government insists on trying to change material provisions of the FSA, then it must obtain relief under Rule 60(b)(5). It cannot use this rulemaking to skirt the requirements that Rule 60(b)(5) imposes. Absent changes to bring the Proposed Regulations in the line with the FSA, the regulation would be invalid under the Administrative Procedure Act, "as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[12] Moreover, the finalization of regulations like those proposed would not actually terminate the FSA because they do not "implement" the FSA under any reasonable understanding of that term.[13]

III. Comparison of Current and Proposed Regulations

A. Basic Protections for UAC are Congressionally Mandated and Must Not Be Negated Through Repeated Redeterminations Under the UAC Definition.

Current requirements. The defined term "unaccompanied alien child" serves as a foundation of a statutory framework supporting a range of protective measures for minors who enter the U.S. immigration system in that vulnerable status. In 2002, the HSA expressly carved out custodial responsibility for UAC from the other duties transferred from the former Immigration and Naturalization Service (INS) to the newly created DHS.[14] In 2008, the TVPRA imposed on DHS (and all other federal agencies) the duty to notify HHS within 48 hours not only when a UAC is discovered, but also of "any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age."[15] Congress thereby charged ICE and CBP with the duty to determine that a child in custody is or *may be* a UAC, but granted them no statutory authority to rescind such a determination.

Once identified as a UAC, a child is entitled to certain minimum protections that enhance child safety and reduce some of the barriers to the child's participation in the immigration system.

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[12] 5 U.S.C. § 706(2)(A).

[13] *See* Cong. Res. Servs., *The "*Flores *Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions* 16 (Sept. 17, 2018) ("[I]f a court accepts the argument that the proposed regulations, once finalized, do not implement the terms of the Flores Settlement, the court would probably hold that the regulations do not satisfy the settlement agreement's termination provision, leaving the agreement in effect.").

[14] HSA at § 462 (b)(1), 6 U.S.C. § 279(b)(1). Congress' protective intent is reflected in remarks in the Congressional Record: "It would not be appropriate to transfer this responsibility to a Department of Homeland Security. . . ORR has decades of experience working with foreign-born children, and ORR administers a specialized resettlement program for unaccompanied refugee children." 148 Cong. Rec. S8180 (2002) (letter from Sen. Lieberman & Sen. Thompson).

[15] TVPRA § 235 (b)(2)(3), 8 USC § 1232(b)(2), (3).

These provisions include: safety assessments by ORR before UACs are released from federal custody;[16] special procedures for processing UAC claims for protection such as exemption from the one-year filing deadline and safe third country bar to asylum;[17] USCIS initial jurisdiction over an asylum application filed by a UAC;[18] availability of child advocates;[19] and voluntary departure at no cost to the UAC.[20]

Proposed Regulations. DHS' Proposed Regulations call for determining whether a child is a UAC "at the time of encounter or apprehension and prior to the detention or release." (Proposed § 236.3(d), FR 45525) Both Departments' Proposed Regulations provide that "[a]n alien who is no longer a UAC is not eligible to receive legal protections limited to UACs." (*Id.;* Proposed § 410.101, FR 45530). The DHS Proposed Regulation states that it would have no effect on USCIS' independent determination of its initial jurisdiction of asylum applications filed by UAC, while the HHS provision is silent on that point. *Id.* The fallacy in this proposed rule is rooted in the misconception that the protections that attach to UAC are "limited to UACs," *id.* The provisions triggered when a child is identified as a UAC are durable, lasting until removal proceedings and/or requests for relief are resolved, as reflected in: (1) the nature of the rights conferred; (2) the statutory language; (3) the legislative history; and (4) experience implementing the provisions.

1) Nature of the rights conferred

By their nature, the protections for UAC are designed to be permanent; if rendered temporary, they would be rendered nugatory. It is impermissible to construe a statute in a way that renders any of its terms ineffective, as would occur if TVPRA's protections were time-limited. For example, the provision exempting UAC from the one-year filing deadline is incompatible with periodic "redeterminations" under the UAC definition, whereby the one-year deadline could be reinstated against a child who reasonably relied on the exemption for UAC– potentially when the one-year timeframe was nearly or already expired. The Proposed Regulations completely fail to address the consequences of changing substantive rules mid-case, or the due process concerns it would present. As another example, duties under the TVPRA provisions on safety and suitability assessments, and on post-release services, would become ambiguous and incomprehensible if a plan to release a child to a parent or legal guardian took the child out of the reach of the UAC protections. [21]

[16] TVPRA § 235(c)(3).
[17] *Id. at* (§ 235(d)(7), INA § 208(a)(2)(E).
[18] 8 U.S.C. § 1158(b)(3)(C), INA § 208 (b)(3)(C).
[19] TVPRA § 235(c)(6).
[20] TVPRA § 235(a)(5).
[21] TVPRA § 235(c)(3)(B).

2) Statutory language

The text and structure of the TVPRA's UAC provisions further reflect that the protections provided to UACs were not intended to be transient, as would be the case if UAC status were subject to limitless redeterminations. The asylum-related UAC provisions, along with a range of other protections for vulnerable children, were enacted under the heading "Permanent protection for certain at-risk children,"[22] signaling Congress' intention that special asylum provisions that attach to UAC were meant to endure throughout the child's pursuit of relief.[23] Moreover, because the statute provides for USCIS jurisdiction over "any asylum application *filed by"* a UAC, it is plainly within contemplation that not every individual who meets the UAC definition at the time of filing will continue to meet the UAC definition throughout the pendency of the application.

The enduring nature of the TVPRA's protections is similarly evident in the Act's provision related to access to counsel. The TVPRA directs HHS to "ensure, to the greatest extent practicable . . . that all unaccompanied 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."[24] It is difficult to conceive that Congress would direct HHS to facilitate access to counsel to protect vulnerable UAC, including following their release from custody (when they may no longer be "unaccompanied" if, for example, they have reunited with a parent), while also permitting the agency to strip UAC of the Act's other procedural protections intended to ensure the child-appropriate treatment of their cases and to prevent their return to harm.[25]

3) Legislative history

The stated purposes of the UAC provisions in the TVPRA include "to protect children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution and other life threatening circumstances" and to fulfill "a special obligation to ensure that these children are treated humanely and fairly."[26] These purposes are not immediately fulfilled when a child turns 18 or reunites with a parent -- events that may occur

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[22] TVPRA § 235(d); *see also Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (recognizing that although statutory "headings are not commanding," they may provide important "cues" about congressional intent).
[23] ACF Fact Sheet, "Subject: U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Children's Program" (updated January 2016), available at: https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf.
[24] 8 U.S.C. 1232(c)(5).
[25] *See, e.g.*, Cong. Record (House), William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Dec. 10, 2008, at H10902, Statement of Rep. Smith (NJ) ("By protecting the victims and not sending them back to their home country where they are often exploited in a vicious cycle of exploitation, we say to the victims we will make every effort to make you safe and secure."); *id.* at 10903, Statement of Rep. Loretta Sanchez (CA) (The TVPRA "provides additional protections for trafficking survivors who are threatened by trafficking perpetrators, and for children who are at risk of being repatriated into the hands of traffickers or abusers.").
[26] 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008).

during the long trajectory of an immigration case.[27] As the USCIS Asylum Division has instructed its officers, "children . . . are prone to be more severely and potentially permanently affected by trauma than adults."[28]

4) Experience implementing the provisions

Agency policies implementing the TVPRA reveal the wisdom of not disturbing the protections that attach to UAC. As explained in 2012 by the CIS Ombudsman, the "TVPRA's procedural and substantive protections were designed to remain available to UACs throughout removal proceedings, housing placement, and the pursuit of any available relief."[29] After three years' experience under the TVPRA, a CIS Ombudsman report identified multiple abuses and inefficiencies inherent in practices then used to make jurisdictional determinations.[30] The report concluded that that "USCIS' policy of re-determining UAC status creates delay and confusion. Instead of facilitating expedited, non-adversarial interviews for young asylum-seekers, it essentially disregards UAC status determinations rendered by other federal agencies."[31] The Ombudsman recommended eliminating UAC redeterminations to promote fairness and "a predictable and uniform process."[32] USCIS adopted these recommendations in 2013,[33] providing that USCIS would take initial jurisdiction based on a previous UAC determination, even where the applicant had turned 18 or reunited with a parent or legal guardian.[34] Thus, under this established policy, a change in circumstances taking a child outside the four corners of the UAC definition would not cause forfeiture of the TVPRA's initial jurisdiction provisions.[35]

The NPRM offers no principled reason why DHS should treat any other provisions that attach to UAC differently, and the adoption of such a disparity would be arbitrary and capricious. In addition to breaking from current practice and creating confusion about the status of a UAC's legal rights, the Proposed Regulation's redetermination provision would have other negative

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[27] *See, e.g.* Statement of Sen. Feinstein at S10887 (noting that the law "requires, whenever possible, family reunification or other appropriate placement in the best interest of" UAC).
[28] USCIS Asylum Division, Guidelines for Children's Asylum Claims at 37 (Mar. 21, 2009), available at: https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson29_Guide_Children%27s_Asylum_Claims.pdf
[29] Office of the Citizenship and Immigration Services Ombudsman, "Ensuring a Fair and Effective Asylum Process for Unaccompanied Children" (Sept. 20, 2012), available at: https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac.pdf .
[30] For example, the report found that "USCIS devotes significant time and effort to adjudicating UAC filings only to dismiss almost half of that work," and that "in some instances, ICE uses the [UAC asylum information] sheet as a tool to compel children to complete pleadings or wait until certain hearing dates . . . thereby withholding access to the UAC asylum process."
[31] Ombudsman 2012 Report (*supra)* at 1.
[32] *Id.* at 6.
[33] Ted Kim, Acting Chief, USCIS Asylum Division, "Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed By Unaccompanied Alien Children (May 28, 2013).
[34] *Id.* at 2.
[35] The Board of Immigration Appeals recently held, in a decision not binding on USCIS, that the initial jurisdiction provision would not apply after a UAC turned 18, such that an immigration judge would be free to assume jurisdiction over the asylum claim. *Matter of M-A-C-O-*, 27 I&N Dec. 477, 480 (BIA 2018).

consequences. In practice, serial redeterminations would likely entail repetitive questioning of children during a time when they are detained and vulnerable.

Under the Proposed Regulations, children could be reclassified one or more times, potentially leading to changes in custody. The variability would cause uncertainty and unpredictability regarding case timelines and legal decision-making. Notwithstanding DHS' assertion that its Proposed Regulation would have no effect on initial asylum jurisdiction, the prospect of impending redetermination could incentivize hasty or premature filings that in turn reduce the quality of the presentation, further burdening adjudicators. A child applying for asylum after a redetermination would be forced to proceed in an adversarial setting, impeding the child's participation in the process and compounding the trauma of survivors of violence and abuse in particular. Importantly, children who are reunified with a family member are still required to make their own cases based on experiences they endured. Reunification with a family member or the child's turning 18 does not eliminate the child's vulnerability in the immigration system or lead to automatic joinder of the child's case with that of an adult.

Recommendation. Conditioning UAC protections on a child's remaining under 18 and without an available parent or legal guardian is anathema to the TVPRA and is not relevant to the Proposed Regulation's purported objective of codifying the FSA. Accordingly, Proposed § 236.3(d) and the final sentence of Proposed § 410.101 should be eliminated. A more productive set of regulations would codify the current initial jurisdiction policy, as set forth in USCIS' 2013 guidance.

B. The Mandate to Determine Age Through Multiple Forms of Evidence is Ambiguous Under the Proposed Regulations.

Current requirements. With respect to determining the age of a minor, the FSA provides that an individual may be required to "submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age." (FSA ¶ 13) The TVPRA calls for HHS age determination procedures that "[a]t a minimum . . . shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien."[36] Pursuant to 2017 ICE guidance, "In cases where the age of a subject is in question, the TVPRA requires that age-determination procedures include reviewing multiple forms of evidence. Under these procedures, each case must be evaluated carefully based on the totality of all available evidence, including the statement of the individual in question."[37]

Proposed Regulations. ORR's Proposed Regulations state that "Procedures for determining the age of an individual must take into account multiple forms of evidence." (Proposed § 410.700) Yet the NPRM states that in applying its proposed procedures, "ORR *may* take into account

[36] 8 U.S.C. § 1232(b)(4).
[37] U.S. Immigration & Customs Enforcement, *Juvenile and Family Residential Management Unit Field Office Juvenile Coordinator Handbook: Enforcement and Removal Operations* 21 (2017).

multiple forms of evidence" (FR 45508, discussing Proposed § 410.701), suggesting that ORR may not view its Proposed Regulation as a mandate to consider multiple forms of evidence in each age determination. ORR should make clear that it will comply with this requirement as set forth in the TVPRA and the Government's own policy guidance.

C. The Proposed Regulations Erode FSA Protections for Minors During Initial Government Custody and Transport.

Current requirements. The FSA sets forth numerous protections for minors following their initial apprehension by DHS. Paragraph 12 of the FSA specifies that facilities must provide "adequate supervision to protect minors from others, and contact with family members who were arrested with the minor." (FSA ¶12) It also provides that the Government "will segregate unaccompanied minors from unrelated adults. Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours." *Id.*

Paragraph 25 of the FSA provides that UACs "should not be transported by [the Government] in vehicles with detained adults except when being transported from the place of arrest or apprehension to [a Government] office, or where separate transportation would be otherwise impractical." (FSA ¶ 25)

Proposed Regulations. DHS' Proposed Regulation incorporates Paragraph 12 of the FSA in part, but then makes several important modifications. The Proposed Regulation states that "DHS will provide adequate supervision and will provide contact with family members arrested with the minor or UAC *in consideration of the safety and well-being of the minor or UAC, and operational feasibility*." (Proposed § 236.3(g)(2), emphasis added.)

In contrast to the FSA, the Proposed Regulations uncouple adequate supervision from the aim "to protect minors from others." The Proposed Regulation similarly weakens the FSA requirement related to minors' contact with family members with whom they were arrested by adding vague qualifying considerations based on the UAC or minor's safety and well-being and "operational feasibility." (Proposed § 236.3(g)(2)) The safety and well-being of all minors and UACs in the Government's care and custody is paramount, but the Proposed Regulation offers no parameters for applying this exception in practice. More troubling, DHS could dispense with contact with family members to accommodate "operational concerns," or when it would place "an undue burden on agency operations." (FR 45500) No language circumscribes DHS' discretion to invoke this exception and thereby deprive children and youth of critical support from parents, siblings, and other family members at a time in which they are especially vulnerable and experiencing heightened fear and anxiety. Contact with family members can help to insulate minors from additional trauma and provide needed comfort that is particularly important for survivors of violence, abuse, neglect, and other harm.

The Proposed Regulation further provides that UACs "generally" will be held separately from unrelated adults, and where "not immediately possible . . . may be housed with an unrelated adult

for no more than 24 hours *except in the case of an emergency or other exigent circumstances."* (Proposed § 236.3(g)(2), emphasis added.)[38] The NPRM states that it may be necessary to hold UACs with unrelated adults for more than 24 hours "during a weather-related disaster such as hurricanes in south Texas, or if an outbreak of communicable disease . . . requires the temporary commingling of the detainee population. Appropriate consideration is given to age, mental condition, physical condition, and other factors when placing UACs in to space with unrelated adults." (FR 45500)

The FSA provides no exceptions to the requirement that the Government not hold minors with unrelated adults for more than 24 hours, and the Government cannot unilaterally alter the FSA's terms to provide such an exception. The expansive definition of "emergency" elsewhere in the regulations, combined with "other exigent circumstances," which the Proposed Regulations do not define, could in practice allow DHS to hold unrelated adults and minors together as a matter of course—contrary to the best interests of UACs and other minors, and contrary to the FSA. The Proposed Regulation offers no reasoned explanation for the modifications to the FSA's language. By expanding DHS' ability to hold UACs together with unrelated adults—a situation the FSA explicitly sought to limit--the Proposed Regulation would increase the risks facing children and youth who are vulnerable as a result of their age, developmental stage, and prior trauma. Importantly, while separation from unrelated adults is important for safety concerns, consistent with CBP's own Transport, Escort, Detention and Search (TEDS) standards, children should be held with their parents.[39]

Proposed § 236.3(f)(4)(i) also enables DHS to transport UACs with unrelated adults not simply when separate transportation is impractical, but whenever it is "unavailable." (Proposed 236.3(f)(4)(i)) This addition provides DHS greater leeway to circumvent FSA protections, despite the agency's ability to plan for and prioritize sufficient and appropriate transportation and vehicles for those it apprehends. This provision also would allow DHS to transport UACs with unrelated adults to a "DHS facility," rather than an "office," as provided for by the FSA. In practice, this could lead to UACs being transported with unrelated adults with greater frequency and for longer distances, as facilities may encompass a broader range of locations than border patrol stations and ports of entry near the site of apprehension.

Recommendations. Unless loopholes not authorized by the FSA are eliminated, the Proposed Regulations on apprehension and transport could expose minors to increased risks to their safety, and would depart from the agency's responsibility under the FSA to treat all minors "with dignity, respect and special concern *for their particular vulnerability as minors*." (FSA ¶ 11, emphasis added.)

[38] This section also includes references to existing DHS regulations, which discuss prevention of sexual abuse. Emphasis on prevention of such harm may be beneficial to UACs and other minors, and the agency should focus on it, along with other serious risk or harms facing children and youth in its custody.
[39] U.S. Customs & Border Prot., *National Standards on Transport, Escort, Detention, and Search* (Oct. 2015), https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf.

D. The Proposed Regulations on "Influx" or "Emergency" Elevate "Operational Feasibility" Over the Best Interests of the Child by Relaxing Mandates to Meet Placement, Custody, and Transport Standards.

Current requirements. Under the FSA, the government must, within 3 to 5 days, temporarily place minors (other than UAC) in licensed programs until they can be released from custody. (FSA ¶ 19) In circumstances defined as "influx" or "emergency," the FSA relaxes those time limits and mandates temporary placement "as expeditiously as possible." (FSA ¶ 12A(3)) The FSA defines an "emergency" as "any act or event that prevents the placement of minors [in a licensed program] within the time frame provided. Such emergencies include natural disasters . . . , facility fires, civil disturbances, and medical emergencies." An "influx" is defined by "more than 130 minors eligible for placement in a licensed program . . . including those who have been so placed or are awaiting such placement." (FSA ¶ 12B)

With respect to UAC, the TVPRA directs that, "[e]xcept in the case of exceptional circumstances," all federal agencies and departments must transfer any child in their custody who is determined to be an unaccompanied alien child or for whom a determination cannot yet be made to HHS within 72 hours.[40] HHS must then "promptly" place unaccompanied children "in the least restrictive setting that is in the best interest of the child."[41]

Paragraph 6 of the FSA also requires "reasonable efforts to provide licensed placements in those geographical areas where the majority of minors are apprehended, such as Southern California, southeast Texas, southern Florida and the northeast corridor." (FSA ¶ 6)

Proposed Regulations. Despite significant changes in arrival numbers since the FSA's effective date, under the Proposed Regulations, both agencies adopt the FSA's fixed numerical definition of "influx." (Proposed §§ 236.3(b)(10), 410.101, 410.202(a)(3), 410.202). An influx of 130 would have represented a sizeable number of children in custody more than twenty years ago, but is no longer significant, as the number of unaccompanied minors arriving annually has increased significantly since 1997, and the Government's operations have likewise expanded and matured -- as noted repeatedly in the NPRM.[42] In the years since, ORR has been able to calibrate its available bed space and operations as needed to account for varying flows of unaccompanied alien children.[43] Yet as the NPRM acknowledges,[44] retaining the outmoded trigger for the "influx" provisions would enable DHS and HHS to operate virtually continuously under relaxed standards. In effect, as "expeditiously as possible" would be the default for

[40] 8 U.S.C. § 1232(b)(3).
[41] 8 U.S.C. § 1232(c)(2).
[42] For example, the Proposed Regulations dispense with FSA provisions addressing the need to transfer children from remote areas or where an interpreter is needed for an "unusual" language on the basis that "DHS has matured its operations such that these factors no longer materially delay transfer." (FR 45498); *id.* at 45,505.
[43] *See* U.S. Customs & Border Prot., *Southwest Border Sectors: Family Unit and Unaccompanied Alien Children (0-17) Apprehensions*, https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20FY16.pdf (reporting 68,541 UAC apprehensions in FY14; 39,970 in FY15; and 59,692 in FY16); U.S. Customs & Border Prot., *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018*, https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions (reporting the apprehension of 38,474 UACs in FYTD2017 and 45,704 in FYTD2018).
[44] The NPRM notes that DHS "for years has been operating at the current FSA definition of 'influx,'' FR 45496.

placement of all minors who are not UAC (FR 45498), and "influx" can also be invoked to relax standards for transfers and services, even where the population's needs are well within the agencies' capacity to address.

The Proposed Regulations would also significantly and detrimentally change the FSA's application of the term "emergency." (Proposed § 236.3(b)(5); Proposed §410.101). Whereas the FSA defines an emergency as acts or events preventing placement of minors within specified time periods, the Proposed Regulations broaden the definition to also include an act or event "that prevents timely transport . . . of minors or impacts other conditions provided by" Proposed § 236.3. (FR 45496) This language expands opportunities for the Government to delay compliance or excuse temporary noncompliance with FSA-mandated standards, justified on the grounds of "operational feasibility" and the need for flexibility "to cover a wide range of possible emergencies." *Id.* For example, if "emergency or other exigent circumstances" are invoked, a UAC may be housed with an unrelated adult in excess of 24 hours. (Proposed § 236.3(g)(2)(i))

HHS's Proposed Regulations further dilute the FSA's provisions by replacing a binding directive on placement with a weaker statement. *Compare* Proposed 45 CFR 410.202 (stating only that "*ORR places* the UAC as expeditiously as possible") *with* the FSA's directive "shall place" language. This could potentially provide HHS, like DHS, with broad latitude to delay indefinitely the placement of minors in licensed programs and the least restrictive settings appropriate to their needs, contrary to the FSA and TVPRA.

The Proposed Regulations would also provide HHS with the flexibility to narrow the geographic breadth of its licensed programs. The Proposed Regulations contain a bare assertion that "ORR makes reasonable efforts to provide placements in those geographical areas where DHS apprehends the majority of UAC," (Proposed § 410.201(c)), without mention of the geographic areas specified in the FSA. The selection of appropriate locations for licensed programs helps to minimize difficult transitions for children following apprehension, facilitates access to needed services, and connects children to community-based programs with expertise working with immigrant youth, which can in turn connect children to social, medical, and legal service providers that offer culturally and linguistically appropriate support. These considerations contribute not only to the well-being of children while in ORR custody but also to their safety, successful community integration, and compliance with immigration proceedings following release. Locating facilities in areas with high numbers of sponsors can facilitate reunifications and the release of UAC from federal custody without unnecessary delay, consistent with the FSA.

Recommendations. DHS has requested comments as to whether the definition of influx should be modified. The emergency and influx provisions of the FSA recognize that certain circumstances beyond the Government's control might necessitate limited exceptions to the FSA's placement deadlines. The Proposed Regulations, however, would turn conditions that were intended to serve as narrow exceptions into a baseline, and permit DHS and HHS to circumvent compliance with FSA and TVPRA provisions as a matter of course. As a consequence, minors may be held indefinitely in temporary Customs and Border Protection facilities that are intended only for short-term use and that are notorious for frigid temperature,

deficient medical care, and other poor conditions.[45] While UAC would continue to be transferred to ORR under the Proposed Regulations, ORR's broadened proposed emergency and influx provisions could similarly be used to justify delaying the placement of unaccompanied children in licensed programs, instead utilizing, for example, the tent city of Tornillo, which has capacity to house more than three thousand unaccompanied children, despite relatively steady arrival numbers of unaccompanied children at the border.[46]

More than 13,300 unaccompanied children are currently in ORR custody, a dramatic increase over prior years owing not to increased arrival numbers but to ORR's recent policy changes, including new information sharing with DHS, and additional fingerprinting requirements for sponsors and members of their households.[47] Allowing ORR to use "influx" facilities to manage delays in release resulting from its own policies would nullify the critical protections of the FSA and TVPRA, and is thus inconsistent with both the intent and structure of these provisions.

The NPRM also sanctions inappropriate shortcuts that threaten to undermine child welfare in order to compensate for insufficient planning and resource allocation. For example, in addressing potential emergency situations, the NPRM considers the example of flexibility to delay minors' snacks or meals until after completing transport out of the path of a hurricane (FR 45498), but never considers how provisions could be made to serve the children *during* transport. Rather than devising means to delay the provision of basic services such as meals, the agencies should prioritize emergency preparedness planning to ensure their readiness to respond to disasters or other true emergencies.

To provide for these needs, ORR must have a contingency fund to support emergency facilities in unexpected influxes, and to ensure they are fully compliant with all legal standards for services within 60 days of opening. As the FSA and TVPRA make clear, children's best interests, safety, and basic needs cannot be sidelined for mere operational convenience.

E. The Proposed Regulations Expand HHS's Ability to Place UACs in Secure Custody Contrary to the "Least Restrictive Setting" Requirement in the FSA and the TVPRA.

Current requirements. In recognition of their "particular vulnerability," the FSA requires that UACs and minors be placed "in the least restrictive setting appropriate to the[ir] age and special needs" that protects the child's well-being and the well-being of others and ensures the child will appear in immigration court. (FSA ¶ 11) Likewise, the TVPRA requires UACs in custody to be "promptly placed in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A). Accordingly, the FSA circumscribes the conditions in which UACs can be placed in secure facilities--the most restrictive in HHS's continuum of care.

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[45] *See, e.g.*, Scott Neuman, *Migrants Allege They Were Subjected to Dirty Detention Facilities, Bad Food and Water*, NPR (July 12, 2018), https://www.npr.org/2018/07/18/629998961/lawsuit-charges-migrants-subjected-to-dirty-detention-facilities-bad-food-and-wa.

[46] *See, e.g.*, Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. Times (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html.

[47] *See id.*

The FSA provides that a minor may be held in secure custody only if: (a) there is probable cause to believe the minor committed a criminal or delinquent act, other than isolated or petty offenses; or, if a minor (b) committed or credibly threatened to commit a violent or malicious act, (c) engaged in conduct "unacceptably disruptive of the normal functioning of a licensed program"; (d) is an escape-risk; or (e) must be held in a secure facility to ensure the minor's own safety. (FSA ¶ 21) Even where a child meets one of these criteria, however, they cannot be placed in a secure facility "if there are less restrictive alternatives that are available and appropriate in the circumstances." (*Id*. at ¶ 23) Pursuant to the TVPRA, placements in secure facilities "shall be reviewed, at a minimum, on a monthly basis." 8 U.S.C. § 1232(c)(2).

Proposed Regulations. HHS's Proposed Regulations add an additional, broad criterion for placing UACs in secure custody, based on "danger to self or others." (Proposed § 410.403 (a)(4), (5)) The Proposed Regulations provide that ORR Federal Field Specialists will review all placements of UAC in secure facilities, but they omit the requirement for monthly reviews of those placement decisions. (Proposed § 410.203(b)) They also fail to specify how other placements, including in HHS's staff-secure and residential treatment centers, will be reviewed to ensure compliance with the FSA and TVPRA. This omission is particularly significant in light of recent court orders addressing HHS's breaches of the FSA with respect to the placement of UACs in more restrictive forms of custody without complying with requisite standards, and notice and review requirements.[48]

Recommendation. HHS's Proposed Regulations must be amended to incorporate all of the safeguards relating to restrictive placements set forth in the FSA and TVPRA.

F. The Proposed Regulations Lack a Commitment to Continuous Release Efforts, Instead Utilizing the Family Reunification Process for Immigration Enforcement Purposes.

Current requirements. The FSA favors the release of UACs from federal custody and requires the Government to "release a minor from its custody without unnecessary delay" where detention is not required to secure the minor's appearance in court or to ensure the safety of the minor or others. (FSA ¶ 14). The FSA lists in order of preference the relations to whom a UAC may be released, and sets forth other procedures for assessing and managing potential placements. (FSA ¶¶ 14-17) In addition, the FSA states the Government "*shall make* and record the prompt and continuous efforts on its part toward family reunification and the release of the minor . . . . Such efforts at family reunification shall continue so long as the minor is in INS custody." (FSA ¶ 18, emphasis added).

The TVPRA, for its part, directs HHS to promptly place a UAC "in the least restrictive setting that is in the best interest of the child."[49] Prior to placing a UAC with an individual, ORR is to

[48] *Flores v. Sessions*, No. 2:85-cv-04544, at 19-20 (C.D. Cal. June 27, 2017).
[49] 8 U.S.C. § 1232(c)(2).

conduct safety and suitability assessments to "make[] a determination that the proposed custodian is capable of providing for the child's physical and mental well-being."[50]

ORR maintains policies and procedures for conducting suitability assessments to enable the release of UACs to qualified parents, guardians, relatives or other adults, who are referred to as "sponsors."[51] These policies have typically included: (i) identification of potential sponsors; (ii) a potential sponsor's submission of a Family Reunification Application, supporting documentation, and an Authorization for Release of Information; (iii) the evaluation of a potential sponsor's suitability, including verification of identity and relationship to the child; (iv) fingerprinting and background checks, where applicable; and (v) in some cases, home studies.[52]

In May 2018, ORR sought modifications to its sponsorship forms as part of the agency's efforts to implement a new Memorandum of Agreement (MOA) with DHS.[53] The MOA allows for continuous information-sharing between the agencies, including ORR's transmission of biographical and biometric information about potential sponsors to DHS, which will conduct criminal and immigration history background checks on all potential sponsors and other adults in the potential sponsor's household to inform ORR's sponsor suitability determinations.[54] In May 2018, DHS published a notice requesting comments on similar changes to its records and procedures, stating among its purposes to "screen individuals to verify or ascertain citizenship or immigration status, immigration history, and criminal history to inform determinations regarding sponsorship of unaccompanied alien children who are in the care and custody of HHS and to identify and arrest those who may be subject to removal."[55]

Proposed Regulations. In its Proposed Regulations, ORR offers an observation or recitation that "ORR makes and records the prompt and continuous efforts on its part toward family reunification," without actually holding itself to an obligation to *make* those efforts as set forth in

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[50] *Id.* ("Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.")

[51] Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 2 Safe and Timely Release from ORR Care* (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2.

[52] *Id.*

[53] Sponsorship Review Procedures for Approval for Unaccompanied Alien Children, 83 Fed. Reg. 22,490 (proposed May 15, 2018), https://www.federalregister.gov/documents/2018/05/15/2018-10452/agency-recordkeepingreporting-requirements-under-emergency-review-by-the-office-of-management-and. This request received approval by OMB through emergency processing review. ORR made a similar request for emergency processing approval on August 24, 2018, Sponsorship Review Procedures for Approval for Unaccompanied Alien Children, 83 Fed. Reg. 42,895 (proposed Aug. 24, 2018), and a request for public comments on October 16, 2018, Sponsorship Review Procedures for Approval for Unaccompanied Alien Children, 83 Fed. Reg. 52,221 (proposed Oct. 16, 2018).

[54] *See* Memorandum of Agreement Among ORR (HHS) and ICE, CBP (DHS) Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (signed Apr. 13, 2018), at 4-5, available at https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf.

[55] Department of Homeland Security (DHS)/U.S. Immigration and Customs Enforcement (ICE)-007 Alien Criminal Response Information Management (ACRIMe), 83 Fed. Reg. 20,844 (proposed May 8, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-05-08/pdf/2018-09902.pdf.

the FSA. (Proposed § 410.201(f)) This recasting of a mandate as a mere statement, and omitting continued efforts toward release, are 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.

Like HHS's recent rulemaking proposals, the Proposed Regulations seek to broaden ORR's suitability assessments to include fingerprint-based background and criminal records checks on all prospective sponsors and adult residents of prospective sponsor households. (FR 45531; Proposed § 410.302(c)) In describing the changes, the NPRM states that "[f]or many years the suitability assessment has involved prospective sponsors and household members to be fingerprinted and for background checks to be run on their biometric and biographical data to ensure that release of a UAC to prospective sponsors would be safe." (FR 45507) This description, however, does not accurately describe ORR's fingerprinting policies prior to signing the MOA with DHS in April 2018, or mention regulatory review that ORR has recently sought and continues to pursue to align its sponsorship forms with new information-sharing policies and fingerprinting requirements. The omission of this critical context is significant.

In order to support the Proposed Regulations, the NPRM refers to state child welfare provisions requiring background checks for prospective foster care and adoptive parents. *Id.*[56] While ORR has historically released most UACs to their respective parents or immediate relatives,[57] criminal background checks may prove useful in protecting the safety and welfare of UAC. However, the Proposed Regulations, when taken together with ORR's recent policy actions such as the MOA, would not merely evaluate the safety and fitness of potential sponsors and other adults in such potential sponsors' homes, but would also facilitate enforcement against such sponsors through information sharing with DHS, which has stated its intent to use the information it receives to identify and arrest individuals subject to removal. The use of sponsor information for immigration enforcement purposes is at odds with ORR's role with respect to UACs pursuant to the HSA and TVPRA, and also frustrates compliance with the FSA by delaying or impeding the release of UACs to individuals who may be the best and safest caregivers for them.

Contrary to the goal of prompt placement with the most appropriate caregiver, implementation of the MOA through measures set forth in the Proposed Regulations will directly undermine ORR's family reunification efforts. Fearing immigration enforcement against them, potential sponsors may forgo fingerprinting or sponsoring UACs, leading to prolonged stays in ORR custody for these children. This "chilling effect" hinders ORR's ability to place UACs in the "least restrictive setting" and to release minors from custody "without unnecessary delay."[58]

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[56] *See* Children's Bureau, *Background Checks for Prospective Foster, Adoptive, and Kinship Caregivers* (2015), https://www.childwelfare.gov/pubPDFs/background.pdf#page=2&view=Who.
[57] *See* U.S. Gov't Accountability Office, *Unaccompanied Children: HHS Can Take Further Actions to Monitor their Care*, 30 (Feb. 2016), https://www.gao.gov/products/GAO-16-180.
[58] *See* Kids In Need of Defense, *Targeting Families: How ICE Enforcement Against Parents and Family Members Endangers Children*, (Dec. 20, 2017), https://supportkind.org/resources/targeting-families/.

Immigration and Customs Enforcement senior official Matthew Albence recently testified before Congress that, in implementing the MOA, ICE had arrested 41 people who came forward, with another ICE official confirming that "70% of those arrests were for straightforward immigration violations -- meaning they were arrested because ICE discovered they were here illegally."[59] This activity follows on earlier efforts to target sponsors, as evidenced by the statement of then-ICE Acting Director Tom Homan, who in September 2017 said: "You cannot hide in the shadows . . . We're going to put the parents in proceedings, immigration proceedings, at a minimum. . . . Is that cruel? I don't think so."[60]

The Proposed Regulations, if implemented in concert with the MOA, would prioritize immigration enforcement at the expense of child welfare and safety. Indeed, the proposed policy has already created a chilling effect and led to delays in the release of children from ORR custody.[61] KIND has heard of potential sponsors who have declined to come forward out of fear of putting their family members at risk of deportation.

Recommendations. The Proposed Regulations, when read jointly with the recent MOA and ORR's recent regulatory proposals, would promote information-sharing for immigration enforcement purposes and run contrary to child welfare, safety, and the best interests of children as well as the FSA and TVPRA. The recent arrests of dozens of undocumented individuals for immigration violations as a result of the MOA further reinforces the position that the Proposed Regulations will be used to target undocumented parents, guardians, and other adults rather than to prioritize child welfare and safety. These measures, far from implementing the FSA, directly undermine the release of children from custody to safe caregivers. The Proposed Regulations should be modified to ensure that the sponsorship process will not be transformed into an immigration enforcement mechanism.

G. The Proposed Regulations Severely Restrict Options for Releasing Minors From DHS Custody, Contravening the FSA.

Current requirements. Current DHS regulations, consistent with the FSA, provide that a juvenile may be released from custody to a parent, legal guardian, or other adult relative.[62] Also, minors who are subject to expedited removal processes currently have the possibility of parole based on "urgent humanitarian reasons" or "significant public benefit," absent a security risk or risk of absconding.[63]

Proposed Regulations. While current regulations on parole would continue to apply to minors placed in § 240 removal proceedings, minors in expedited removal proceedings could be paroled

[59] Tal Kopan, *ICE Arrested Undocumented Immigrants Who came Forward to take in Undocumented Children*, CNN (Sept. 20, 2018), https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html.
[60] *Id.*
[61] Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. Times (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html.
[62] 8 C.F.R. § 236.3(b)(1); FSA ¶ 14.
[63] 8 C.F.R. § 212.5(b)(3).

only on the basis of medical emergency or law enforcement need – the same standards applicable to adults. (Proposed § 212.5(b)(3), FR 45524).

Although the NPRM alludes repeatedly to "intervening statutory and operational changes," (FR 45486) it does not explain how the HSA, TVPRA, or "operational changes" justify amendments that would result in more minors spending more time in detention. Indeed, the Government's asserted need to align its parole standards by subjecting minors to a higher, narrower standard runs directly counter to the FSA's presumption of release (FSA ¶ 14) and its requirement that minors be placed in the least restrictive setting appropriate and necessary (FSA ¶ 11). In practice, the Proposed Regulations could prevent the release of minors who may be unable to demonstrate a medical "emergency" but who nevertheless experience unique vulnerabilities in government custody, such as minors with special needs and pregnant minors, among others.

The Government's previous attempt to limit the release of minors subject to expedited removal was rejected by the *Flores* court, and as discussed above, the Government cannot escape compliance with the court's order or the FSA by way of its Proposed Regulations.[64] The *Flores* court found that "the expedited removal statute does not excuse [the Government] from the commitment [it] made in the *Flores* Agreement to make and record efforts to release minors in ICE custody, even if the minor or her parent is in expedited removal (i.e., awaiting a credible fear determination)."[65] It clarified that "[w]hile the expedited removal statute generally requires detention, 8 C.F.R. section 212.5 gives [the Government] the discretion to release certain detainees on a case by case basis, including class members (juveniles), who are in various stages of the expedited-removal process."[66] Individualized release decisions accord not only with the FSA, but also with international human rights standards reflecting a strong presumption against the detention of asylum-seekers and children.[67]

DHS describes family detention as a "viable option not only for the numerous benefits that family unity provides for both the family and the administration of the INA, but also due to the significant and ongoing influx of adults who have made the choice to enter the United States illegally with juveniles or to make the dangerous overland journey to the border with juveniles." (FR 45493) Attempts to justify the use of family detention based on its claimed benefits, or as a form of punishment or deterrence, are unsound.

Detention is rarely in the best interest of a child—an understanding shared by medical and child welfare professionals, and ICE's own Advisory Committee on Family Residential Centers.[68]

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[64] *See Flores v. Sessions*, No. 2:85-cv-04544, at 26 (C.D. Cal. June 27, 2017).
[65] *Id.*
[66] *Id.* at 23.
[67] *See, e.g.*, International Covenant on Civil and Political Rights, Arts. 17(1), 23(2) (right to be free from arbitrary detention); U.N. High Commissioner for Refugees, Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), http://www.unhcr.org/505b10ee9.html.
[68] *See, e.g.*, Julie M. Linton, Marsha Griffin, Alan Shapiro, American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*(Apr. 2017),

Even short-term detention, including with parents, can have long-term consequences for children, and child trauma survivors in particular.[69] Detention also presents barriers to accessing legal representation, accessing documentation needed to support claims for humanitarian protection,[70] and communicating with witnesses in the country of origin to obtain critical evidentiary support. Additionally, children may have their own legal defenses against removal, even when detained with a parent.

Extensive alternatives to family detention are available. The now-terminated Family Case Management Program ("FCMP") was 99 percent effective in ensuring that asylum-seeking parents and their children appeared for their immigration court proceedings by helping them find legal representation, guiding them through the court system, and connecting them with other community resources.[71] The program demonstrated that alternatives to detention can be effective in supporting an asylum-seeker while accomplishing the government's interests of ensuring timely court appearances, without resorting to detention. Rather than seeking greater capacity to detain the most vulnerable in our immigration system, DHS should increase its use of available cost-saving alternatives to family detention, including release on recognizance, parole, bond, and community-based alternatives to detention programs.

Recommendations. The current parole regulations should be retained as to juveniles and to facilitate compliance with the FSA. Rather than further restricting the release of minors from custody, DHS should prioritize release to ensure the best interests of minors and their placement in the least restrictive setting appropriate and necessary.

H. The Proposed Scheme for Federal Licensing and Inspection of Family Detention Centers Circumvents, Rather than Effectuates, the FSA.

Current requirements. The FSA includes an exhibit specifying minimum standards for licensed programs used to detain minors, and requires that the facilities comply with applicable state codes and be "licensed by an appropriate State agency." (FSA ¶ 6, Ex. 1) The Ninth Circuit has held that the FSA applies to all immigrant minors in federal custody, whether accompanied or unaccompanied.[72]

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http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483; American Medical Ass'n, *AMA Adopts New Policies to Improve Health of Immigrants and Refugees*,(June 12, 2017), https://www.ama-assn.org/ama-adopts-new-policies-improve-health-immigrants-and-refugees; American College of Physicians, *The Health Impact of Family Detentions in Immigration Cases*, (July 3, 2018), https://www.acponline.org/acp_policy/policies/family_detention_position_statement_2018.pdf; *Report of the ICE Advisory Committee on Family Residential Centers* (Oct. 7, 2016), https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf.

[69] *See* Linton, *supra*, http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.

[70] Human Rights First, *Ailing Justice: Texas: Soaring Immigration Detention, Shrinking Due Process*, 24-27 (June 2018), https://www.humanrightsfirst.org/sites/default/files/Ailing_Justice_Texas.pdf.

[71] Frank Bajak, *ICE Shutters Detention Alternative for Asylum-Seekers*, U.S. News (June 9, 2017), https://www.usnews.com/news/best-states/texas/articles/2017-06-09/ice-shutters-detention-alternate-for-asylum-seekers.

[72] *Flores v. Lynch*, 828 F. 3d 898, 902-03 (9th Cir. 2016).

Proposed Regulations. The NPRM acknowledges that "[s]tates generally do not have licensing schemes for facilities to hold minors who are together with their parents or legal guardians," and proposes to "eliminate that barrier to the continued use of FRCs" to detain minors with their parents. (FR 45488) Without masking that agenda, the NPRM proposes to permit DHS to hold minors with their parents in facilities *not* licensed by any state, through the expedient of "an alternative licensing process that would allow FRCs to be considered 'licensed programs' under FSA paragraph 6." (FR 45495) Thus, belying the professed purpose of implementing the FSA, the Proposed Rule simply dispenses with the FSA's inconvenient state licensing requirement: "As all FRCs would be licensed, *or considered licensed*, under this proposed rule, the proposed rule may result in extending detention of some minors, and their accompanying parent or legal guardian, in FRCs beyond 20 days. (FR 45518, emphasis added). The Proposed Regulation would thus attempt to use the rulemaking process to circumvent the FSA and binding judicial decisions enforcing its terms.

More specifically, the NPRM identifies "three primary options" for use when initiating removal proceedings against members of a family unit. (FR 45492) Two options are consistent with the FSA: "(1) Parole all family members into the United States; (2) detain the parent(s) or legal guardian(s) and either release the juvenile . . . or transfer them to HHS to be treated as an UAC." *Id.* Instead of codifying either or both of those permissible options, your agencies propose to "eliminate the barrier" to option 3, long-term use of FRCs to "detain the family unit together." *Id.* As the NPRM acknowledges, *id.*, a federal court has already rejected a bid by the Government to evade the state licensing requirements under Paragraph 19 of the FSA.[73]

The Proposed Regulations partially incorporate the FSA's minimum standards for licensed programs, but with critical omissions. Among the omissions is a requirement that "[m]inors shall not be subject to corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping." (FSA Ex. 1 ¶ 14C) Further, the Proposed Regulations undermine standards related to facilitating family reunification, among others. (Proposed § 236.3(i), FR 45526-528)

DHS' proposed self-licensing scheme for family residential facilities offers the sole mechanism for monitoring compliance with the agency's weakened standards: in the absence of available state licensing, "DHS shall employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE." (Proposed § 236.3(b)(9); FR 45525) In other words, unspecified entities who will be selected and compensated by DHS shall be the sole arbiters of DHS compliance with regulatory standards for FRCs – a flagrant conflict of interest. Just months ago, in the context of adult detention, ICE's capacity for compliance with detention standards was found lacking by the DHS Office of Inspector General.[74]

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[73] *Flores v. Sessions*, CV 85-4544-DMG (AGRx) (July 9, 2018).

[74] DHS Office of Inspector General, ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements, OIG-18-67 (June 2018).

Recommendations. The proposal to permit ICE to deem unlicensed facilities to be "licensed," and to charge its own contractors with compliance review, would evade the FSA rather than implement it, and must therefore be eliminated from the Proposed Regulations since it is inconsistent with the terms of the FSA.

I. HHS Must Comply with TVPRA Provisions on Post-Release Social and Legal Services and Flexibly Respond to Additional Needs as They Emerge.

Current requirements. The FSA states that the Government may require a positive suitability assessment before releasing a UAC from ORR custody to an individual or program. (FSA ¶ 17) Among other elements, such assessments may include "an investigation of the living conditions in which the minor would be placed and the standard of care he would receive." (FSA ¶ 17). HHS and the TVPRA refer to these as "home studies."[75]

The TVPRA provides that HHS "shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency."[76] The TVPRA also states that HHS "shall ensure to the greatest extent practicable" that UAC "have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking,"[77] and directs HHS to "make every effort to utilize the services of pro bono counsel."[78] For especially vulnerable UACs and child victims of trafficking, the TVPRA authorizes the appointment of independent child advocates, who act to identify and advocate for the best interests of the child.[79]

Proposed Regulations. Proposed § 410.302 discusses the parameters for suitability assessments, but does not outline the delivery of post-release services that may be triggered by a home study. The NPRM states that ORR post-release services will be evaluated case by case, not through a blanket policy of scheduling services for UAC who required a home study. The NPRM invites comments on whether the final rule should set forth ORR's general policies concerning requirements for home studies, denials of releases to prospective sponsors, and post-release services. (FR 45507) KIND believes that although these policies are exceptionally important, they are not best implemented as part of this rulemaking.

Recommendations. Post-release social and legal services play a critical role in addressing the unique needs and vulnerabilities of UACs, many of whom have survived violence, abuse,

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[75] Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 2 Safe and Timely Release from ORR Care*, § 2.4.2 (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.4; 8 U.S.C. § 1232(c)(3)(B).
[76] 8 U.S.C. § 1232(c)(3)(B).
[77] *Id.* at § 1232(c)(5).
[78] *Id.*
[79] *Id.* at § 1232(c)(6).

neglect, or other trauma. Social services not only connect UACs with mental health and medical services that can assist in processing and healing from past harm, but also facilitate safe and successful transitions as UACs adapt to a new language, community, and living situation. High-quality legal services advance the safety and well-being of UACs by screening children for protection needs and eligibility for legal relief while also identifying particular vulnerabilities and areas of concern that may be addressed through referrals for social services.

As a provider of pro bono legal services for UACs, KIND works every day with children who are dependent on legal services to navigate an incredibly complex immigration system. Many UACs are eligible for asylum, Special Immigrant Juvenile Status, or humanitarian visas for victims of trafficking and other severe crimes. These forms of relief frequently require that children share the painful experiences that form the basis of their legal claims in an unfamiliar setting. Complicated legal procedures and proceedings, which are frequently difficult for adults to understand and navigate, are particularly challenging for child survivors of trauma, violence, and abuse. The support of an experienced attorney, working in connection with social service providers, facilitates meaningful access to lifesaving protection and helps to ensure children will not be returned to harm.

HHS's compliance with the TVPRA's post-release services provisions, which were enacted after the FSA entered into force, is paramount and must occur regardless of whether these statutory requirements are codified in final regulations. Too few UACs receive family reunification and other services following release from custody, and ORR should redouble its efforts to ensure access to these vital supports for all in need. Minimum requirements for implementing the TVPRA's post-release provisions are, however, best addressed through ORR's Policy Guide, rather than through formal regulations, in order to allow appropriate flexibility and responsiveness.

New and varied needs develop over time and demand that ORR respond in real-time to ensure the well-being of UACs. Vulnerabilities may arise as a result of changing realities in UACs' countries of origin, circumstances in children's homes and communities, or government policies. HHS must retain the ability to draw upon its child welfare expertise and that of the broader community of nonprofit service providers to address these needs on timely basis through creative and appropriately tailored services. The inclusion of minimum requirements in ORR's Policy Guide will allow the agency to develop flexible policies and requirements best suited to children in its care and custody and those who have been released to sponsors in the community. KIND and other legal and social service providers have deep and longstanding experience serving UACs and should be consulted in the development of any such requirements. Routine stakeholder engagements and ongoing communication are particularly beneficial, as service providers work directly with children and can identify trends, emerging needs, and gaps in available offerings.

The recent family separation crisis underscores the urgency with which new needs and vulnerabilities arise, and the importance of acting quickly to safeguard the best interests of

children. Recently, KIND and other legal and social service providers began serving increasing numbers of very young children as well as children who have been deeply traumatized. The provision of specialized services for these particularly vulnerable populations is critical, and represents a need to which ORR must be able to nimbly and competently respond.
The inclusion in ORR's Policy Guide of minimum requirements, developed in consultation with service providers, will best ensure that policies can be modified to address both predictable and unforeseen needs without the delay or constraints that might follow from formalized regulations in these areas. As such, KIND recommends that post-release services requirements not be included in HHS' final rule.

J. Retaking Custody of Previously Released Minors May Entail Due Process Concerns and Other Negative Impacts.

Current requirements. In addition to children arriving at the border,[80] DHS also may encounter UACs or other minors in the community, including those who have been previously released from ORR custody. The agency also may assume custody of UAC from ORR after a child turns 18.[81]

Proposed Regulations. The Proposed Regulations would enable DHS to take minors back into custody "if there is a material change in circumstances indicating the minor is an escape-risk, a danger to the community, or has a final order of removal." (Proposed § 236.3(n)(1)). DHS would also be permitted to retake custody "if there is no longer a parent or legal guardian available to care for the minor." (Proposed § 236.3(n)(2)) In those cases, DHS will treat the minor as a UAC and transfer the child to HHS. (Proposed § 236.3(n)(2)) The Proposed Regulation specifies that this authority is in addition to the agency's "ability to make a UAC determination upon each encounter," and cross-references DHS' Proposed Regulation on age determination. (Proposed § 236.3(n)(1))

The NPRM notes that current regulations do not address the ability of DHS to re-take custody of minors (FR 45504), and DHS offers no further explanation or justification for why it now seeks such provisions. As drafted, this provision could have far-reaching negative impacts for minors and UACs, and would raise serious due process concerns.

Recent legal challenges to DHS' actions point to concerns that may arise when re-taking custody of UAC previously released by ORR. In *Saravia v. Sessions*, several previously released UACs challenged their re-arrest by ICE and their placement in secure custody by ORR on the basis of

[80] The TVPRA provisions on notification to ORR regarding a UAC or person who appears to be under 18 are set forth at 8 U.S.C. § 1232(b)(2), (3) and are summarized elsewhere in these comments.
[81] *See* 8 U.S.C. 1232(c)(2)(B) (requiring that, for UAC transferred to its custody after turning 18, DHS "shall consider placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight" and noting that such children "shall be eligible to participate in alternative to detention programs. . .").

unsubstantiated allegations of gang affiliation or involvement.[82] Ruling in favor of the UACs, the court stated that, because the government had previously found that each UAC was not a flight risk or danger to self or community, it could only justify re-arrest if it could "present evidence of materially changed circumstances – namely, evidence that the noncitizen *is in fact* dangerous or *has become* a flight risk, or *is now* subject to a final order of removal."[83] (emphasis added). As revealed by later hearings conducted pursuant to *Saravia* ruling, the government in many instances lacked such evidence--and had failed to provide UACs with an opportunity to challenge their re-detention before placing them in secure custody, often across the country and at great distance from family members, their communities, and counsel.

While the Proposed Regulations suggest that non-UAC minors taken back into DHS custody "may request a custody redetermination hearing," it is unclear when and how notice of this right would be provided. Section 236.3(g) of the Proposed Regulation provides notice of a right to judicial review to a non-UAC "who is transferred to or remains in a DHS detention facility," (Proposed § 236.3(g)) yet this provision is not cross-referenced in the section on re-taking custody of a minor.

For UACs re-arrested by DHS and transferred to the custody of HHS, the Proposed Regulations suggest that notice of the reasons for and the right to challenge placement in restrictive custody could come *after* UACs have already been placed in such custody, potentially after having been moved across the country from where they were apprehended. For example, Proposed § 410.206 states that, "[w]ithin a reasonable period of time, ORR provides each UAC placed or transferred to secure or staff secure facility with notice of the reasons for the placement in a language the UAC understands." (Proposed § 410.206)

Proposed § 410.810 similarly suggests that notice would be provided after placement has occurred, stating "UACs *placed in* secure or staff secure facilities will receive a notice of the procedures under this section and may use a form provided to them to make a written request for a hearing under this section." (emphasis added). Even if provided, the hearing process set forth by the Proposed Regulations would place UACs at a significant disadvantage in challenging their re-arrest or placement.

Problematically, the Proposed Regulations state that UACs who DHS takes back into custody would be transferred to HHS in accordance with paragraph (e) of the related section. (Proposed § 236.3(n)(1;2)) Yet paragraph (e) refers not to the transfer by DHS of UACs, but rather, to the "[t]ransfer of minors who are not UACs from one facility to another." (Proposed § 236.3(e)). Unlike Proposed § 236.3(f), which references the TVPRA's requirements for transferring UACs,

[82] *See Saravia v. Sessions*, No. 18-15114 (N.D. Cal. Oct. 1, 2018); Saravia v. Sessions*: Due Process for Immigrant Youth*, ACLU (Aug. 11, 2011), https://www.aclunc.org/our-work/legal-docket/saravia-v-sessions-due-process-immigrant-youth.

[83] *Saravia v. Sessions*, Order Granting the Motion for Preliminary Injunction, et. al. (N.D. Cal. Nov. 20, 2017), at 1, https://www.aclunc.org/sites/default/files/20171121-Gomez_v_Sessions-Order_Granting_PI_and_Class_Cert.pdf.

paragraph (e) contains language related to the Proposed Regulations' influx provision and could lead to delays in transferring UACs to HHS and licensed programs.

Recommendations. Minors and UACs who are taken back into custody may have been living with family members and have already begun their legal cases with the assistance of counsel. It is critical that the Government immediately provide all such children with an opportunity to contact family members as well as their attorneys. The Government must also timely provide notice of and information about opportunities to challenge their re-detention and placements.

K. The Proposed Regulations Improperly Reassign Responsibility for Bond Redetermination Hearings to HHS.

Current requirements. The FSA provides that "[a] minor in deportation proceedings shall be afforded a bond redetermination hearing *before an immigration judge* in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing." (FSA ¶ 24A, emphasis added) Minors can appeal adverse bond redetermination decisions to the Board of Immigration Appeals and then to a federal Court of Appeals.

Proposed Regulations. The Proposed Regulations would remove the bond redetermination hearings from the purview of an immigration judge and would instead vest responsibility for the hearings with "an independent hearing officer employed by HHS." (Proposed § 410.810). This change is a clear departure from the FSA. In order to support the change, the NPRM asserts that there "is not clear statutory authority for the DOJ to conduct such hearings" (FR 45509), and that because Congress has vested HHS with control over the custody and release of UACs, it has therefore "deliberately omitted any role for immigration judges." *Id.* This rationale is unavailing.

Placement decisions and judicial review, and bond redetermination hearings are distinct procedures, both relevant to UACs in ORR custody. Immigration judges have the authority to review HHS' initial determination regarding whether a UAC poses a danger to self or others, or an escape risk.[84] (FSA ¶ 24A) These determinations do not, however, compel the release of a UAC from HHS custody or determine the level of placement. Those decisions remain within the authority of HHS, which is required to ensure the safe and secure release of UACs, and their placement in the "least restrictive setting" in their best interests until release can be achieved.[85] UACs may challenge their placements through judicial review by a U.S. District Court with jurisdiction and venue. (FSA ¶ 24B)

In addition to failing to provide adequate justification for its departure from the FSA in reassigning responsibility for bond redetermination hearings, the NPRM also fails to address the obvious procedural concerns that arise when the agency charged with making the placement decision is also responsible for evaluating the initial determinations that informed such decisions.

[84] Although known as "bond redetermination hearings" these proceedings are not identical to those in the criminal context in that they do not in practice involve the issuance or requirement of a bond, but rather involve only findings regarding whether a minor poses a safety or flight risk.
[85] 8 U.S.C. § 1232(c)(2); FSA ¶¶ 11; 14; 17; 18.

The NPRM asserts that the new hearings before an independent hearing officer would provide "essentially the same substantive protections, but through a neutral adjudicator at HHS rather than DOJ." (FR 45509) However, the NPRM fails to specify how HHS plans to structure the hearings or to ensure the hearings are in fact the substantive equivalent of a hearing in front of an immigration judge. To the contrary, the Proposed Regulations would effect significant changes to the burden of proof and appeals processes in ways that markedly disadvantage UAC in hearings.

Under the Proposed Regulations, the bond redetermination hearings would require that the UAC make a showing that he or she would not present a risk of danger to the community or a risk of flight if released. (Proposed § 410.810(b), FR 45533). By placing the burden of proof on the UAC, the Proposed Regulations circumvent the TVPRA, which assigns HHS responsibility for placing UACs in the "least restrictive setting that is in the best interest of the child."[86] The NPRM fails to provide any justification for placing the burden of proof on the UAC and does not attempt to reconcile the requirement with the language of the TVPRA.

Finally, the Proposed Regulations would make it more difficult for UACs to appeal adverse hearing decisions because they provide for judicial review only after the UAC has exhausted HHS's internal administrative process. Under the FSA, a UAC can challenge an adverse bond redetermination hearing decision by appealing directly to the Board of Immigration Appeals and then to a federal circuit court of appeals. The Proposed Regulations require that a UAC lodge an appeal through an internal process, including an appeal to the Assistant Secretary. (Proposed § 410.810(e); FR 45533). By adding additional layers of appeal within HHS, the Proposed Regulations will likely lead to the prolonged detention of UACs.

Recommendations. The Proposed Regulations related to changes in the bond redetermination hearing process curb the rights of UACs and will place them in a significantly more precarious position than the FSA contemplated. Detained UACs face significant hurdles due to language and educational barriers, limited access to counsel, the formal process for requesting a hearing and appealing adverse decisions, and fear stemming from past trauma and new uncertainties. The Proposed Regulations only create additional hurdles for detained UACs by (i) removing the process from an independent immigration judge and putting HHS in the position to be both the decision-maker and reviewer, (ii) requiring UACs to prove they do not pose a danger or flight risk instead of requiring HHS to justify its initial determinations and (iii) creating a complicated and time-consuming appeal process that will result in prolong detention.

L. The Proposed Regulations Would Eliminate Critical Third-Party Oversight and Monitoring Without Viable Mechanisms for Ensuring Compliance with FSA Standards and Protections.

Current requirements. The FSA includes several provisions that permit counsel for the *Flores* class to monitor and seek enforcement of compliance with the Agreement. These provisions

[86] 8 U.S.C. §1232(c)(2)(A).

include directing the Government to provide information to counsel regarding policies and instructions related to the FSA's implementation (FSA ¶ 29); permit counsel to contact the Juvenile Coordinator to investigate cases and request the reasons a minor has not been released (FSA ¶ 28.B); provide updates to counsel regarding compliance with the FSA's terms (FSA ¶ 30); permit counsel to visit with class members (FSA ¶ 32); and permit counsel to request access to any licensed program or medium security or detention facility in which a minor has been placed (FSA ¶ 33).

Proposed Regulations. In addressing provisions in the FSA related to Plaintiffs' class counsel and the supervising court, the NPRM states that "[f]ollowing termination of the FSA, such provisions will no longer be necessary, because compliance with the published regulations will replace compliance with the settlement agreement. As a result, they are not included in this proposed rule." (FR 45495) The NPRM documents several FSA provisions that are excluded from the Government's proposed regulations, noting in several places that "[s]pecial provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule." (FR 45517)

The Proposed Regulations would further limit monitoring and oversight to efforts managed, selected, or performed by the agencies themselves. Proposed Section 236.3(o), titled "Monitoring," directs CBP and ICE to each identify a Juvenile Coordinator to monitor compliance with the relevant sections of the Proposed Regulations. This language in part reflects monitoring provisions in the FSA (FSA ¶ 28A), but omits critical collections of information regarding the placement of minors in more restrictive or secure facilities. Additionally, the Proposed Regulations omit accompanying FSA provisions requiring the Juvenile Coordinator to share reports with Plaintiffs' counsel and permitting Plaintiffs' counsel to engage with the Juvenile Coordinator regarding implementation of the FSA. In so doing, the Proposed Regulations render these monitoring provisions ineffectual. For example, the Proposed Regulations would direct the collection of information about minors who had been held in CBP or ICE custody for longer than 72 hours, but would not require DHS to do anything with this information or to subject it to independent oversight and review, or corrective action.

HHS' Proposed Regulations similarly lack third-party monitoring and oversight comparable to that provided by *Flores* class counsel and the court. With respect to licensed programs, for example, the Proposed Regulations state only that "ORR monitors compliance with the terms of these regulations." (FR 45533) This conclusory assertion fails to ensure that the majority of facilities operated by the agency for UACs will be evaluated for compliance by anyone other than agency staff. Although third-party monitoring and oversight could be adopted by the agency, nothing in the Proposed Regulations would require it.

Recommendations. While the FSA contemplates its potential termination through the publication of regulations implementing its terms, the Agreement cannot be interpreted to relieve the Government of responsibility for complying in practice with the FSA's provisions. The inclusion in the FSA of several provisions related to counsel and oversight by the courts—and the ongoing

litigation history involving repeated motions to enforce the FSA since it has been in force underscore the essential role of third-party monitoring in ensuring the Government faithfully and appropriately implements the FSA's standards and terms. Contrary to the Government's assertions, these provisions are highly relevant and plainly substantive to the FSA's implementation.

The need for effective monitoring has not diminished with time. To the contrary, as recently as July 2018, the supervising court found the Government had breached the FSA in several respects, including by:

> (1) detaining certain Class Members in Shiloh Residential Treatment Center ("RTC") in violation of Paragraphs 6, 7, 8, and 19 and Exhibit 1 of the Agreement, (2) failing to timely provide a written notice of reasons for placing a Class Member in a secure facility, staff-secure facility, or RTC in violation of Paragraph 24C of the Agreement, (3) placing certain Class Members in secure facilities in violation of Paragraph 21 of the Agreement, (4) administering psychotropic medication to Class Members at Shiloh RTC in violation of Paragraphs 6 and 9 and Exhibit 1 of the Agreement, and (5) undertaking certain policies that unnecessarily delay the release of Class Members to custodians in violation of Paragraphs 14 and 18 of the Agreement.[87]

In October 2018, the court appointed a Special Master/Independent Monitor to monitor compliance with the court's orders and to make findings of fact and reports and recommendations.[88]

The ability of *Flores* counsel to interview detained children in a confidential manner that enables them to share information about how they are being treated has been critical to identifying mistreatment and non-compliance with standards. The grave breaches highlighted by *Flores* counsel and outlined by the court signal the inappropriateness of eliminating third-party monitoring and oversight of compliance with the FSA, and the insufficiency of DHS' and HHS' existing mechanisms for ensuring the agencies faithful implement the FSA's terms and standards. Ongoing breaches of the FSA have led to real and considerable harms and impacts for UACs and other minors in the Government's custody. Compliance with the requirements set by the FSA cannot be left to mere discretion or happenstance, particularly at a time in which Government policies are leading to increasing numbers of minors in custody and for longer periods of time.

M. The Proposed Regulations Advance Incorrect Assumptions about Deterrence to Support the Expanded Detention of Children and Families.

Proposed Regulations. The NPRM asserts that the Proposed Regulations would allow for the detention of families together for the duration of their immigration proceedings, rather than

[8787] *Flores v. Sessions*, CV 85-4544-DMG, at 2 (C.D. Cal. Oct. 5, 2018), ORDER APPOINTING SPECIAL MASTER/INDEPENDENT MONITOR, https://www.aila.org/File/Related/14111359af.pdf.
[88] *Id.* at 3.

separating children from their parents. The NPRM argues that family detention is important in part "due to the significant and ongoing influx of adults who have made the choice to enter the United States illegally with juveniles or make the dangerous overland journey to the border with juveniles, a practice that puts juveniles at significant risk of harm. The expectation that adults with juveniles will remain in the United States outside of immigration detention may incentivize these risky practices." (FR 45493) Pointing to the Government's detention of families throughout their proceedings in 2014, the NPRM argues that "[a]lthough it is difficult to definitely prove a causal link . . . , DHS' assessment is that this change helped stem the border crisis, as it correlated with a significant drop in family migration."[89] (FR 45493) By embracing expanded family detention for purposes of deterring future migration, the Government overlooks and miscasts the factors, including extreme violence, that are driving migration of children with or without their parents and families to the United States' Southern border.

The majority of the children KIND serves come from El Salvador, Guatemala, and Honduras. These countries are currently among the most dangerous in the world, and children in particular are frequently targeted for violence, sexual abuse, extortion, forced recruitment by gangs and narco-traffickers, and human trafficking.[90] Sexual and gender-based violence against women, children and LGBTI individuals is pervasive, and gangs frequently use such violence as a means of controlling territories or ensuring compliance with the gang's demands.[91]

While the NPRM frames migration as a choice, the reality is that many children and families in the region are forced from their homes, communities, and countries in search of protection that their own governments are either unable or unwilling to provide. High impunity rates for crimes and corruption leave many children and families without a means of securing safety within their countries of origin. In the face of prevailing conditions, the Government's proposed policy is unlikely to effectively deter migration[92] yet will make families increasingly vulnerable. It also may prove unlawful, as the Government's previous attempt to detain mothers and children for the general purpose of deterring others from migrating was enjoined by a federal court.[93]

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[89] The NPRM references a drop in family unit apprehensions at the Southwest Border from 68,445 in FY 2014 to 39,838 in FY 2015. (FR 45493)

[90] *See* UNHCR, *Children on the Run: Unaccompanied Children Leaving Central American and Mexico and the Need for International Protection* (2014), http://www.unhcr.org/56fc266f4.html.

[91] Kids in Need of Defense & Human Rights Center Fray Matías de Córdova, *Childhood Cut Short: Sexual and Gender-based Violence Against Central American Migrant and Refugee Children* (June 2017), https://supportkind.org/wp-content/uploads/2017/06/Childhood-Cut-Short-KIND-SGBV-Report_June2017.pdf.

[92] Muzaffar Chishti and Sarah Pierce, Migration Policy Institute, Policy Beat, *Trump Administration's New Indefinite Family Detention Policy: Deterrence Not Guaranteed* (Sept. 26, 2018) ("While both detention and prosecution have been used by past administrations with some success to deter unauthorized flows of economic migrants, there is scant evidence that these would achieve similar outcomes with respect to today's arrivals of families and children from Central America, often driven by the desire to escape violence."); Tom K. Wong, Center for American Progress, *Do Family Separation and Detention Deter Immigration?* (July 24, 2018), https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/.

[93] RILR v. Johnson, Civil Action No. 15-11, Memorandum Opinion (D.D.C. Feb. 20, 2015), https://www.aclu.org/legal-document/rilr-v-johnson-memorandum-opinion?redirect=immigrants-rights/rilr-v-johnson-memorandum-opinion.

Recommendation. Rather than positing family detention as a deterrent to migration, the Government should re-double its efforts to address the root causes of child and family migration from Central America and provide additional assistance to strengthen protection systems in the region. The Central American Minors Program,[94] for example, enabled certain children to apply protection in the United States while still in their countries of origin. Yet in 2017, the Government shuttered this small and narrowly tailored program, which allowed children to avoid having to undertake dangerous journeys—a concern the NPRM purports to address. The Government can better address the needs and realities of children and families and the root causes of their migration through restoration and expansion of the CAM program, support for asylum and other protection systems in the region, and programming and support to prevent and prosecute violence, and increase access to services for survivors.

N. The Proposed Regulations Fail to Include a Reasonable Estimate of Costs.

Current requirements. When proposing regulations, federal agencies must "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." [95] Such assessments should consider both quantitative and qualitative aspects of the proposed action. In the case of multiple alternatives, "agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."[96]

Proposed Regulations. The NPRM makes numerous references to the potential costs of the Proposed Regulations, including those from the proposed alternative licensing scheme for family detention facilities, changes to parole practices, and the transfer of bond redetermination hearings for UACs from DOJ to HHS. (FR 45514) While noting that the Proposed Regulations could lead to "additional or longer detention for certain minors," the Government asserts that it cannot provide a cost estimate "because we are not sure how many individuals will be detained at [family residential centers] after this rule is effective or for how much longer individuals may be detained because there are so many other variables to consider." *Id.* The NPRM invites comments on how such costs could be reasonably estimated, "given the uncertainties." *Id.*

Recommendations. The Government cannot evade its responsibility to assess the economic and other impacts of its proposal by referring to uncertainties largely of its own making.[97] To the contrary, the Government should look to past and current practice as valuable points of reference that can inform cost projections.

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[94] USCIS, In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM), https://www.uscis.gov/CAM.
[95] Exec. Order No. 12,866, 58 Fed. Reg. 190 (Sept. 30, 1993).
[96] *Id.*
[97] *See Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) (holding that agency had acted arbitrarily and capriciously by disregarding potential costs merely because they were uncertain).

In 2015, the *Flores* court suggested that, in extenuating circumstances, 20 days may be a reasonable time period in which the Government can hold children in secure, unlicensed family detention facilities. Average lengths of stay in a family residential facility decreased after this ruling, falling to 14.2 days for FY 2017.[98] Yet the average length of stay prior to that ruling--47.4 days in FY 2014--provides a valuable point of reference for estimating what costs might look like if the FSA were terminated and the average length of stay reverted back to pre-ruling levels.[99]

In this scenario, if DHS detained the same number of people as in FY 2017 in family residential centers (37,825), and the average length of stay is 47.4 days, the annual costs would total $194 million.[100] Yet if the Administration were to increase its enforcement efforts and detain each person in a family unit, working from the 107,063 people who so arrived in FY 2018, detention costs could near $1.24 billion.[101] The acquisition of bed space through new family residential facilities would increase costs further and could run from between $72 million to $520 million.[102] These figures not only make the Proposed Regulations an "economically significant" rule necessitating a Regulatory Impact Analysis, but also call into question the supposed benefits advanced by the agency.[103]

In addition to failing to estimate the costs of its proposals, the NPRM fails to consider viable alternative options, including a range of proven and cost-effective alternatives to detention (ATDs) that can ably address the aims of the Proposed Regulations. The Family Case Management Program, terminated by the Administration in 2017, proved 99 percent effective in ensuring compliance with immigration court appointments and proceedings. It also facilitated fair and appropriate treatment of asylum-seeking families through case management services. This program cost only $36 per day per family,[104] as compared to roughly $319 per person per day for family detention beds.[105] Other alternatives to detention are available at an average cost of $4.50 per day per participant.[106]

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[98] *See* Philip E. Wolgin, *The High Costs of the Proposed* Flores *Regulation*, Ctr. for American Progress (Oct. 19, 2018), https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation/.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *See, e.g.*, FR 45493 ("It is important that family detention be a viable option not only for the numerous benefits that family unity provides for both the family and the administration of the INA, but also due to the significant and ongoing influx of adults who have made the choice to enter the United States illegally with juveniles or make the dangerous overland journey to the border with juveniles, a practice that puts juveniles at significant risk of harm.")
[104] Frank Bajak, *ICE shutters Detention Alternative for Asylum-Seekers*, ABC (June 9, 2017), available at https://www.usnews.com/news/best-states/texas/articles/2017-06-09/ice-shutters-detention-alternate-for-asylum-seekers.
[105] Dept. of Homeland Sec. U.S. Immigration & Customs Enf't, *Budget Overview: Fiscal Year 2018 Congressional Justification* 131 (2018), https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf.
[106] *Id.* at 180.

The Government should have considered and prioritized these proven, cost-effective, and less restrictive alternatives in developing its Proposed Regulations. It would not be appropriate to finalize regulations until the Government has completed this analysis.

IV. CONCLUSION

For reasons including the foregoing, the Proposed Regulations fall short of their stated purpose of giving effect to the requirements of the FSA and TVPRA. We respectfully call upon your Departments to suspend the effective date of any final rule until your Departments have fully resolved these deficiencies. We believe that the above recommendations will help to improve that process.

Thank you for the opportunity to provide input on the Proposed Regulations. I can be reached at csmith@supportkind.org or (202) 361-1442 if you have any questions or need any further information or explanation.

Sincerely,

/s/

Cory W. Smith
Vice President, Policy, Advocacy & Communications
Kids in Need of Defense (KIND)

Brian T. Burgess
Elaine Herrmann Blais
Emily L. Rapalino
Pro Bono Counsel