

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 410

RIN 0970–AC93

Unaccompanied Children Program Foundational Rule

AGENCY: Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This NPRM proposes to adopt and replace regulations relating to the key aspects of the placement, care, and services provided to unaccompanied children referred to the Office of Refugee Resettlement (ORR), pursuant to ORR's responsibilities for coordinating and implementing the care and placement of unaccompanied children who are in Federal custody by reason of their immigration status under the Homeland Security Act of 2002 (HSA) and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). ORR intends to promulgate a final rule that would establish a foundation for the Unaccompanied Children Program (UC Program) that is consistent with its statutory duties, for the benefit of unaccompanied children and to enhance public transparency as to the policies governing the operation of the UC Program. ORR also proposes this rule for the purpose of implementing the 1997 *Flores* Settlement Agreement (FSA), which remains in effect as a court-ordered consent decree to which the UC Program is subject. As modified in 2001, the FSA provides that it will terminate forty-five days after publication of final regulations implementing the agreement. ORR anticipates that any termination of the settlement based on the adoption of this proposal as a final rule would only be effective for those provisions that affect ORR and would not terminate provisions of the FSA for other Federal Government agencies.

DATES: Consideration will be given to comments on this NPRM on or before December 4, 2023.

ADDRESSES: You may send comments, identified by Regulatory Information Number (RIN), by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* UCPolicy-RegulatoryAffairs@acf.hhs.gov. Include the RIN in the subject line of the message.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to www.regulations.gov, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Toby Biswas, Director of Policy, Unaccompanied Children Program, Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services, Washington, DC, (202) 205–4440 or UCPolicy-RegulatoryAffairs@acf.hhs.gov.

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I. Public Participation

We encourage all interested parties to participate in this rulemaking by submitting written comments, views, and data on all aspects of this proposed rule. ORR also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. All comments received will be posted, without change, to <https://www.regulations.gov> as part of the public record and will include any personal or commercial information you provide.

A. Submitting Comments

Comments that will provide the most assistance to ORR will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. If you submit comments, please indicate the specific section of this document to which each comment applies and provide a reason for each suggestion or recommendation. You may submit your comments and materials online or by email, but please use only one of these means. If you submit a comment online via <https://www.regulations.gov>, it will be considered received when it is received at the Docket Management Facility.

Instructions: To submit your comments online, go to <https://www.regulations.gov> and insert "0970–AC93" in the "Search" box. Click on the "Comment Now!" box and input your comment in the text box provided. Click the "Continue" box, and if you are satisfied with your comment, follow the prompts to submit it.

All comments received by the accepted methods and due date specified above may be posted without change to content to <https://www.regulations.gov>, which may include personal information provided about the commenter, and such posting may occur after the closing of the comment period. However, the Department may redact certain content from comments before posting, including threatening language, hate speech, profanity, graphic images, or individually identifiable information about a third-party individual other than the commenter.

For additional information, please read the "Privacy and Security Notice" that is available via the link in the footer of <https://www.regulations.gov>.

ORR will consider all comments and materials received during the comment period and may change this rule based on your comments.

B. Viewing Comments and Documents

Docket: To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov> and insert "0970–AC93" in the "Search" box. Click on the "Open Docket Folder," and you can click on "View Comment" or "View All" under the "Comments" section of the page. Individuals without internet access can make alternate arrangements for viewing comments and documents related to this rulemaking by contacting ORR through the **FOR**

FURTHER INFORMATION CONTACT section above. You may sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

C. Privacy Act

As stated in the Submitting Comments section above, please be aware that anyone can search the electronic form of comments received into any dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

II. Table of Abbreviations

ACF—Administration for Children and Families
 DHS—U.S. Department of Homeland Security
 DOJ—U.S. Department of Justice
 EOIR—Executive Office for Immigration Review
 FSA—*Flores* Settlement Agreement
 HHS—U.S. Department of Health and Human Services
 HSA—Homeland Security Act of 2002
 INS—Immigration and Naturalization Service
 OMB—Office of Management and Budget
 ORR—Office of Refugee Resettlement, U.S. Department of Health and Human Services
 TVPRA—William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
 UC Program—Unaccompanied Children Program

III. Executive Summary

A. Purpose of the Proposed Rule

In this notice of proposed rulemaking (NPRM), the Office of Refugee Resettlement (ORR) proposes to replace and supersede regulations at 45 CFR part 410, and to codify policies and requirements concerning the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to ORR. This NPRM is based on statutory authorities and requirements provided under the Homeland Security Act of 2002 (HSA)¹ and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),² and would implement those terms of the 1997 *Flores* Settlement Agreement (FSA) that create responsibilities for HHS and ORR. These proposed regulations are published under the authority granted to the Secretary of Health and Human Services (HHS) by the TVPRA³ and to

the Director of ORR by the HSA.⁴ The proposed regulations would implement requirements that are consistent with the substantive protections provided by, and the underlying purpose of, the FSA with regard to unaccompanied children who are placed in ORR care. The proposed requirements would apply to all care provider facilities, including both standard programs and non-standard programs, as defined below, unless otherwise specified. ORR believes that this proposed rule is warranted at this time in order to codify a uniform set of standards and procedures that will help to ensure the safety and well-being of unaccompanied children in ORR care, implement the substantive terms of the FSA, and enhance public transparency as to the policies governing the operation of the Unaccompanied Children Program (UC Program).

B. Summary of the Major Provisions

This proposed rule would codify ORR policies and requirements for the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to ORR, as discussed in section V. of this proposed rule. In subpart A, ORR proposes to define terms that are relevant to the criteria and requirements in this proposed rule and to codify the general principles that apply to the care and placement of unaccompanied children in ORR care. In subpart B, ORR proposes the criteria and requirements that apply with respect to placement of unaccompanied children at ORR care provider facilities, including specific criteria for placement at particular types of ORR care provider facilities. ORR proposes, in subpart C, policies and procedures regarding the release of an unaccompanied child from ORR care to a vetted and approved sponsor. In subpart D, ORR proposes the standards and services that it must meet and provide to unaccompanied children in ORR care provider facilities. ORR proposes requirements for the safe transportation of each unaccompanied child while in ORR's care in subpart E of this proposed rule. ORR proposes, in subpart F, guidelines for care provider facilities to report information such that ORR may compile and maintain statistical information and other data on unaccompanied children. In subpart G, ORR proposes to codify requirements and policies regarding the transfer of unaccompanied children in ORR care. Subpart H discusses proposed guidelines for determining the age of an individual in ORR care. ORR proposes,

in subpart I, to codify guidelines for emergency or influx facilities, which are ORR facilities that are opened during a time of emergency or influx. In subpart J, ORR proposes guidelines and requirements regarding the availability of administrative review of ORR decisions. Finally, in subpart K, ORR proposes to establish an independent ombud's office that would promote important protections for all children in ORR care.

C. Summary of Costs and Benefits

This rule proposes to codify current ORR requirements for compliance with the FSA, court orders, and statutes, as well as certain requirements under existing ORR policy and cooperative agreements. As discussed in section VII.A of this proposed rule, ORR expects this proposed rule to impose limited additional costs, including those costs incurred by the Federal Government to increase the provision of legal services to unaccompanied children in limited circumstances, supplement costs incurred by grant recipients in order to comply with the proposed requirements (see below), establish a risk determination hearing process, and also to establish the Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds) and other administrative staffing needs. In proposed subpart D at § 410.1309, ORR is proposing, to the greatest extent practicable, subject to available resources as determined by ORR, and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied children who are or have been in ORR care would have access to legal advice and representation in immigration legal proceedings or matters funded by ORR. In proposed subpart J, ORR proposes the establishment of a risk determination hearing process. In proposed subpart K, ORR discusses its proposal to establish an Office of the Ombuds for the UC Program. In addition to the Ombuds position itself, ORR anticipates the need for support staff in the office. ORR estimates the annual cost of establishing and maintaining this office would be \$1,718,529 which includes the cost of 10 full-time personnel, as discussed in further detail in VII.A.2 of this proposed rule.

ORR also notes that all care provider facilities and service providers discussed in this proposed rule are recipients of Federal awards (e.g., cooperative agreements or contracts), and the costs of maintaining compliance with these proposed requirements are allowable costs under the Basic Considerations for cost provisions at 45

¹ Public Law 107–296, sec. 462, 116 Stat. 2135, 2202.

² Public Law 110–457, title II, subtitle D, 122 Stat. 5044.

³ 8 U.S.C. 1232.

⁴ 6 U.S.C. 279.

CFR 75.403 through 75.405,⁵ in that the costs are reasonable, necessary, ordinary, treated consistently, and are allocable to the award. If there are additional costs associated with the policies discussed in this proposed rule that were not budgeted, and cannot be absorbed within existing budgets, the recipient would be able to submit a request for supplemental funds to cover the costs.

IV. Background and Purpose

A. The UC Program

The purpose of this proposed rule is to codify policies, standards, and protections for the UC Program, consistent with the HSA and TVPRA, as well as with the substantive requirements of the FSA as they pertain to ORR. On March 1, 2003, section 462 of the HSA transferred responsibilities for the care and placement of unaccompanied children from the Commissioner of the Immigration and Naturalization Service to the Director of ORR. The HSA defines unaccompanied children and establishes ORR responsibilities with respect to unaccompanied children. The HSA defines “unaccompanied alien child,” a term ORR uses synonymously with “unaccompanied child,” as “a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.”⁶ The TVPRA, meanwhile, added requirements for other executive branch departments and agencies to expeditiously transfer unaccompanied children in their custody to ORR’s care and custody once identified, and requires ORR to ensure unaccompanied children are protected from human trafficking and other crimes. Both statutes are described in further detail in the paragraphs below. Pursuant to these statutory requirements, the UC Program provides a safe and appropriate environment to children and youth who come to the United States without immigration status and who have no parent or legal guardian in the United States or one available in the United States to provide for their care and physical custody. In most cases, unaccompanied children enter ORR custody via transfer from DHS. When DHS immigration officials with an unaccompanied child in custody

transfer that child to ORR, ORR promptly places the unaccompanied child in the least restrictive setting that is in the best interests of the child, taking into consideration danger to self, danger to the community, and risk of flight. ORR considers the unique nature of each child’s situation, the best interest of the child, and child welfare principles when making placement, clinical, case management, and release decisions. To carry out its statutory responsibilities for the care and custody of unaccompanied children as established in the TVPRA and the HSA, and consistent with its responsibilities under the FSA, ORR currently funds residential care providers that provide temporary housing and other services to unaccompanied children in ORR custody. These care providers have been primarily state-licensed and must also meet ORR requirements to ensure a high-quality level of care. These multiple providers create a continuum of care for children, including placements in individual and group homes, shelter, heightened supervision, and secure facilities, and residential treatment centers. While under ORR care, unaccompanied children are provided with classroom education, healthcare, socialization/recreation, mental health services, access to religious and legal services, and case management. Unaccompanied children generally remain in ORR custody until they are released to a parent or other sponsor in the United States, are repatriated to their home country, obtain legal status, or otherwise no longer meet the statutory definition of unaccompanied children (*e.g.*, turn 18). In accordance with current ORR policy, all children who turn 18 years old while in ORR’s care and custody are transferred to DHS for a custody determination. Once transferred to DHS, that agency considers placement in the least restrictive setting available after taking into account the individual’s danger to self, danger to the community, and risk of flight and in accordance with all applicable legal authority.

B. History and Statutory Structure

1. HSA and TVPRA

The HSA abolished the former Immigration and Naturalization Service (INS) and created DHS. The HSA transferred many of the immigration functions from the INS to DHS, but it transferred functions under the immigration laws with respect to the care and custody of unaccompanied children to ORR.⁷ The HSA makes the

ORR Director responsible for a number of functions with respect to unaccompanied children, including coordinating and implementing their care and placement, ensuring that unaccompanied children’s interests are considered in actions and decisions relating to their care, making and implementing placement determinations, implementing policies with respect to the care and placement of children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.⁸ The HSA also states that ORR shall not release unaccompanied children from custody upon their own recognizance, and requires ORR to consult with appropriate juvenile justice professionals and certain Federal agencies in relation to placement determinations to ensure that unaccompanied children are likely to appear at all hearings and proceedings in which they are involved; are protected from smugglers, traffickers, and others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitative activity; and are placed in a setting in which they are not likely to pose a danger to themselves or others.⁹ ORR notes that under its current policies, such consultation is subject to privacy protections for unaccompanied children. For example, ORR restricts sharing certain case-specific information with the Executive Office for Immigration Review (EOIR) and DHS that may dissuade a child from seeking legal relief, or that may bias the court’s length of continuances. Subject to such protections, ORR provides notification of the placement decisions to U.S. Immigration and Customs Enforcement (ICE) and, if referred by U.S. Customs and Border Protection (CBP), to CBP. ORR provides the following notification information: identifying information of the unaccompanied child, ORR care provider name and address, and ORR care provider point of contact (name and telephone number).¹⁰

In 2008, Congress passed the TVPRA, which further elaborated duties with respect to the care and custody of unaccompanied children. The TVPRA provides that, consistent with the HSA, the care and custody of all

⁵ See 6 U.S.C. 279(b)(1).

⁶ 6 U.S.C. 279(g)(2).

¹⁰ Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (Mar. 11, 2021).

⁵ See also 45 CFR 75.101.

⁶ 6 U.S.C. 279(g)(2).

⁷ 6 U.S.C. 279(a).

unaccompanied children, including responsibility for their detention, where appropriate, is the responsibility of the Secretary of HHS, except as otherwise specified. The TVPRA states that each department or agency of the Federal Government must notify HHS within 48 hours upon the apprehension or discovery of an unaccompanied child or any claim or suspicion that a non-citizen individual in the custody of such department is under the age of 18.¹¹ The TVPRA states further that, except in exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied child in its custody shall transfer the custody of such child to HHS not later than 72 hours after determining such child is an unaccompanied child. Furthermore, the TVPRA requires the Secretary of HHS to establish policies and programs to ensure that unaccompanied children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.¹² The TVPRA describes requirements with respect to safe and secure placements for unaccompanied children, safety and suitability assessments of proposed sponsors for unaccompanied children, legal orientation presentations, access to counsel, and child advocates, among other requirements. HHS delegated its authority under the TVPRA to the Assistant Secretary for Children and Families, which then re-delegated the authority to the Director of ORR.¹³

2. The *Flores* Settlement Agreement Terms and Implementation

On July 11, 1985, four non-citizen children in Immigration and Naturalization Service (INS)¹⁴ custody filed a class action lawsuit in the U.S. District Court for the Central District of California on behalf of a class of minors detained in the custody of the INS (*Flores* litigation).¹⁵ At that time, the INS was responsible for the custody of minors entering the United States unaccompanied by a parent or legal guardian. The *Flores* litigation challenged “(a) the [INS] policy to condition juveniles’ release on bail on

their parents’ or legal guardians’ surrendering to INS agents for interrogation and deportation; (b) the procedures employed by the INS in imposing a condition on juveniles’ bail that their parents’ or legal guardians’ [sic] surrender to INS agents for interrogation and deportation; and (c) the conditions maintained by the INS in facilities where juveniles are incarcerated.”¹⁶ The plaintiffs claimed that the INS’s release and bond practices and policies violated, among other things, the Immigration and Nationality Act (INA), the Administrative Procedure Act (APA), and the Due Process Clause and Equal Protection Guarantee under the Fifth Amendment.¹⁷ After over ten years of litigation, the U.S. Government and *Flores* plaintiffs entered into the “*Flores* Settlement Agreement” (FSA), which was approved by the district court as a consent decree on January 28, 1997.¹⁸

The FSA applies to both unaccompanied children, as defined in the HSA, and to children accompanied by their parents or legal guardians,¹⁹ but ORR notes that this proposed rule is intended specifically to codify requirements regarding the care of unaccompanied children who have been transferred to the care and custody of ORR. As relevant to ORR, the FSA imposes several substantive requirements for government custody of unaccompanied children, requiring first and foremost that minors be placed in the “least restrictive setting appropriate to the minor’s age and special needs,”²⁰ and establishing a general policy favoring release of unaccompanied children where it is determined that detention of the unaccompanied child is not required either to secure the child’s timely appearance for immigration proceedings or to ensure the unaccompanied child’s safety or that of others.²¹ When release is appropriate, the FSA establishes the following order of priority with respect to potential sponsors: a parent, legal guardian, adult relative, or another adult designated by the parent or legal guardian as capable and willing to care for the minor’s well-being. If no sponsor is available, an unaccompanied child will be placed at a care provider facility licensed by an appropriate state agency. Under the

original terms of the FSA, unaccompanied children who were not released remained in INS custody; currently, under the FSA, unaccompanied children who are not released remain in ORR legal custody and may be transferred or released only under the authority of ORR. The FSA also mandates that any non-citizen child who remains in government custody for removal proceedings is entitled to a bond hearing before an immigration judge, “unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing.”²² The FSA contains many other provisions relating to the care of unaccompanied children, including Exhibit 1, which describes the minimum standards required at licensed care provider facilities caring for unaccompanied children.

The FSA states that within 120 days of the final district court approval of the agreement, the Government shall initiate action to publish the relevant and substantive terms of this Agreement in regulation.²³ In 1998, the INS published a proposed rule having a basis in the substantive terms of the FSA, entitled “Processing, Detention, and Release of Juveniles.”²⁴ Over the subsequent years, that proposed rule was not finalized. The FSA originally included a termination date, but in 2001, the parties agreed to extend the agreement and added a stipulation that terminates the FSA “45 days following defendants’ publication of final regulations implementing [he] Agreement.”²⁵ In January 2002, the INS reopened the comment period on the 1998 proposed rule,²⁶ but the rulemaking was ultimately terminated. Thus, as a result of the 2001 Stipulation, the FSA has not terminated. The U.S. District Court for the Central District of California has continued to rule on various motions filed in the case and oversee enforcement of the FSA.

3. The 2019 Final Rule

On September 7, 2018, DHS and HHS issued a joint proposed rule, entitled “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children” (2018 Proposed Rule).²⁷ The purpose of the proposed rule was to implement the substantive terms of the FSA, and thus enable the district court to terminate the

¹¹ 8 U.S.C. 1232(b)(2).

¹² 8 U.S.C. 1232(c)(1).

¹³ See Delegation of Authority, 74 FR 14564 (Mar. 31, 2009); see also Delegation of Authority, 74 FR 19232 (Apr. 28, 2009).

¹⁴ As discussed further, below, INS was abolished when the Department of Homeland Security was established in 2002. 6 U.S.C. 291.

¹⁵ See Complaint for Injunctive and Declaratory Relief, and Relief in the Nature of Mandamus at 2, *Flores v. Meese*, No. 85–4544 (C.D. Cal. filed July 11, 1985).

¹⁶ *Id.* *Flores* Compl. at paragraph 1.

¹⁷ See *id.* at ¶¶ 66–69.

¹⁸ See Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85–4544–RJK(Px) (C.D. Cal. Jan. 17, 1997, as amended Dec. 7, 2001).

¹⁹ See *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (holding that the FSA applies to accompanied minors as well as unaccompanied minors).

²⁰ *Id.* at ¶ 11.

²¹ *Id.* at ¶¶ 12A, 14.

²² *Id.* at ¶ 24A.

²³ *Id.* at ¶ 9.

²⁴ See 63 FR 39759 (July 24, 1998).

²⁵ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85–4544–RJK(Px) (C.D. Cal. Jan. 17, 1997, as amended Dec. 7, 2001), at ¶ 40.

²⁶ 67 FR 1670 (Jan. 14, 2002).

²⁷ 83 FR 45486 (Sep. 7, 2018).

agreement. The rule proposed to adopt provisions that were intended to parallel the relevant substantive terms of the FSA, with some modifications to reflect statutory and operational changes put in place since the FSA was entered into in 1997, along with certain other changes.²⁸ A final rule was promulgated on August 23, 2019 (2019 Final Rule), which comprised two sets of regulations: one issued by DHS and the other by HHS. The HHS regulations addressed only the care and custody of unaccompanied children.²⁹ The DHS regulations addressed other provisions of the FSA that pertained to DHS, including the requirement that after DHS apprehends unaccompanied children it should transfer them to the custody of HHS.³⁰

After DHS and HHS issued the 2018 Proposed Rule and before the 2019 Final Rule was published, plaintiffs in the *Flores* litigation filed a Motion to Enforce the FSA. The court deferred ruling on the Motion, ordering DHS and HHS to file a notice upon issuance of final regulations, which DHS and HHS did in August 2019. Later that month DHS and HHS also filed a Notice of Termination and Motion in the Alternative to Terminate the FSA, while Plaintiffs filed a supplemental brief addressing their Motion to Enforce. Plaintiffs' Motion to Enforce presented two separate but related issues: (1) whether the 2019 Final Rule would effectively terminate the FSA, and (2) if not, to what extent the Court should enjoin the government from implementing the 2019 Final Rule. On September 27, 2019, approximately one month after the 2019 Final Rule was published, the District Court for the Central District of California entered an Order granting Plaintiffs' Motion to Enforce insofar as it sought an order declaring that the Government failed to terminate the FSA, denied the Government's Motion to Terminate the FSA, and issued a permanent injunction consistent with its order.³¹

On December 29, 2020, in *Flores v. Rosen*, the U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the District Court Order.³² Regarding the HHS regulations applicable to the care and custody of unaccompanied children in the 2018 Proposed Rule, the Court of Appeals

held that the regulations were "largely consistent" with the FSA, with two exceptions.³³ First, it held that the HHS regulation allowing placement of a minor in a secure facility upon an agency determination that the minor is otherwise a danger to self or others broadened the circumstances in which a minor may be placed in a secure facility, and therefore was inconsistent with the FSA. Second, it held that provisions providing a hearing to unaccompanied children held in secure or staff-secure placement only if requested was inconsistent with the FSA's opt-out process for obtaining a bond hearing. Although the Ninth Circuit held that the majority of the HHS regulations could take effect, it also held that the District Court did not abuse its discretion in declining to terminate the portions of the FSA covered by those regulations, noting that the Government moved to "terminate the Agreement in full, not to modify or terminate it in part."³⁴ Consistent with its findings, the Ninth Circuit held that the FSA "therefore remains in effect, notwithstanding the overlapping HHS regulations" and that the Government if it wished could move to terminate those portions of the FSA covered by the valid portions of the HHS regulations.³⁵

Separately, a group of states brought litigation in the District Court for the Central District of California seeking to enjoin the government from implementing the 2019 Final Rule (*California v. Mayorkas*), based on other grounds including the Administrative

³³ The underlying District Court case also found a third problematic aspect of the HHS regulations, that the HHS regulations were inconsistent with the FSA because they used descriptive, not mandatory, language in implementing certain provisions (*e.g.*, while the FSA requires that minors not released "shall be placed temporarily in a licensed program" whose homes and facilities "shall be non-secure as required under state law," FSA ¶¶ 6, 19, the regulations stated that "ORR places [unaccompanied minors] into a licensed program" and that "ORR places each [minor] in the least restrictive setting that is in the best interest of the child and appropriate to the [minor's] age and special needs," 84 FR 44,392, 44,531.). But on appeal, the Ninth Circuit ruled that where the 2019 Final Rule did not use mandatory language, nevertheless "HHS and ORR are bound by and must comply with the descriptive language in the HHS regulations as equivalent to the mandatory requirements in the Agreement. So interpreted, the descriptive language in the regulations is consistent with the Agreement." *Flores v. Rosen*, 984 F.3d 720, 731 (9th Cir. 2020).

³⁴ 984 F.3d 720, 737 (9th Cir. 2020).

³⁵ *Id.* With respect to the DHS portions of the 2019 Final Rule, the Ninth Circuit held that some of the DHS regulations regarding initial apprehension and detention were consistent with the FSA and could take effect, but that the remaining DHS regulations were inconsistent with the FSA and the district court properly enjoined them and the inconsistent HHS regulations from taking effect. *See id.* at 744.

Procedure Act.³⁶ The court stayed the case, given the related litigation brought by *Flores* plaintiffs, which culminated in the Ninth Circuit decision in *Flores v. Rosen*. After that decision, the plaintiffs in *California v. Mayorkas* filed supplemental briefing requesting a narrowed preliminary injunction, alleging that several portions of the HHS provisions of the 2019 Final Rule violated the Administrative Procedure Act. Subsequently, the parties entered into settlement discussions. As of December 10, 2021, the parties informed the court that HHS did not plan to seek termination of the FSA under the terms of the stipulation or to ask the court to lift its injunction of the HHS regulations. Instead, HHS would consider a future rulemaking that would more broadly address issues related to the custody of unaccompanied children by HHS and that would replace the rule being challenged in *California v. Mayorkas*. Based on this agreement, the court ordered that the *California v. Mayorkas* litigation should be placed into abeyance with regard to the Plaintiffs' claims against HHS while HHS engaged in new rulemaking to replace and supersede the HHS regulations in the 2019 Final Rule.³⁷ Further, among other things, HHS agreed that while it underwent new rulemaking, it would not seek to lift the injunction of the 2019 Final Rule, nor seek to terminate the FSA as to HHS under the 2019 Final Rule, and that it would make best efforts to submit a notice of proposed rulemaking to the OMB by April 15, 2023, providing quarterly updates to the Court should it not meet that deadline.³⁸ In accord with the relevant order ORR made best efforts to submit the NPRM to OMB, and ultimately sent the document to OMB on April 28, 2023.³⁹ This NPRM initiates that broader rulemaking effort, and reflects the stipulated agreement in *California v. Mayorkas*, and applies, as relevant, the findings of the Ninth Circuit regarding the 2019 Final Rule in *Flores v. Rosen*. Note, because the permanent injunction of the 2019 Final Rule was never lifted, and the FSA continued to remain in effect, ORR does not anticipate that any third parties would have developed reliance interests

³⁶ *California v. Mayorkas*, No. 2:19-v-07390 (C.D. Cal. filed Aug. 26, 2019).

³⁷ *See* Stipulation re Request to Hold Plaintiffs' Claims as to HHS Under Abeyance, *California v. Mayorkas*, No. 2:19-v-07390 (C.D. Cal. Apr. 12, 2022), ECF No. 159. *See also* Order Approving Stipulation, ECF No. 160.

³⁸ *See id.*

³⁹ Pending E.O. 12866 Regulatory Review, <https://www.reginfo.gov/public/do/eoDetails?rrid=312162>.

²⁸ *Id.*

²⁹ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 FR 44392, 44530–44535 (Aug. 23, 2019).

³⁰ *Id.* at 44526.

³¹ *Flores v. Barr*, 407 F. Supp. 3d 909 (C.D. Cal. 2019).

³² *Flores v. Rosen*, 984 F. 3d 720 (9th Cir. 2020).

on the HHS regulations in the 2019 Final Rule.

4. Lucas R. Litigation

Another ongoing litigation involving ORR, filed in 2018, also has ramifications for this NPRM. *Lucas R. v. Becerra*,⁴⁰ a class action lawsuit, was filed in the U.S. District Court for the Central District of California, alleging ORR had violated the FSA, the TVPRA, the U.S. Constitution, and section 504 of the Rehabilitation Act of 1973 (section 504). Based on the plaintiffs' allegations, the court certified five plaintiff classes comprising of all children in ORR custody:

(1) who are or will be placed in a secure facility, medium-secure facility, or residential treatment center (RTC), or whom ORR has continued to detain in any such facility for more than 30 days, without being afforded notice and an opportunity to be heard before a neutral and detached decisionmaker regarding the grounds for such placement (*i.e.*, the "step-up class");

(2) whom ORR is refusing or will refuse to release to parents or other available custodians within 30 days of the proposed custodian's submission of a complete family reunification packet on the ground that the proposed custodian is or may be unfit (*i.e.*, the "unfit custodian class");

(3) who are or will be prescribed or administered one or more psychotropic medications without procedural safeguards (*i.e.*, the "drug administration class");

(4) who are natives of non-contiguous countries and to whom ORR is impeding or will impede legal assistance in legal matters or proceedings involving their custody, placement, release, and/or administration of psychotropic drugs (*i.e.*, the "legal representation class"); and

(5) who have or will have a behavioral, mental health, intellectual, and/or developmental disability as defined in 29 U.S.C. [section] 705, and who are or will be placed in a secure facility, medium-secure facility, or [RTC] because of such disabilities (*i.e.*, the "disability class").⁴¹

On August 30, 2022, the U.S. District Court for the Central District of California granted preliminary injunctive relief concerning the allegations of the unfit custodian, step-up, and legal representation classes. As

of October 31, 2022, ORR implemented new policies and procedures on issues identified in the Court's preliminary injunction order. As of September 2023, ORR remains in active litigation in the *Lucas R.* class action. Depending on developments in the case, ORR may incorporate additional provisions in the final rule as discussed in this preamble.

C. Statutory and Regulatory Authority

As discussed above, under the HSA and TVPRA, the ORR Director is responsible for the care and placement of unaccompanied children. Under the HSA, ORR is responsible for "coordinating and implementing the care and placement of [unaccompanied children] who are in Federal custody by reason of their immigration status," "identifying a sufficient number of qualified individuals, entities, and facilities to house [unaccompanied children]," "overseeing the infrastructure and personnel of facilities in which [unaccompanied children reside]," and "conducting investigations and inspections of facilities and other entities in which [unaccompanied children] reside, including regular follow-up visits to such facilities, placements, and other entities, to assess the continued suitability of such placements."⁴² Under the TVPRA, Federal agencies are required to notify HHS within 48 hours of apprehending or discovering a UC or receiving a claim or having suspicion that a non-citizen in their custody is an unaccompanied child under 18 years of age.⁴³ The TVPRA further requires that, absent exceptional circumstances, any Federal agency must transfer an unaccompanied child to the care and custody of HHS within 72 hours of determining that a non-citizen child in its custody is an unaccompanied child. With respect to the care and placement of unaccompanied children, the TVPRA requires that HHS establish policies and programs to ensure that unaccompanied children are protected from traffickers and other persons seeking to victimize or exploit children. Among other things, it also requires HHS to place unaccompanied children in the least restrictive setting that is in the best interest of the child, and states that in making such placements it may consider danger to self, danger to the community, and risk of flight. As previously discussed, the Secretary of HHS delegated the authority under the TVPRA to the Assistant Secretary for Children and Families,⁴⁴ who in turn

delegated the authority to the Director of ORR.⁴⁵ It is under this delegation of authority that ORR now proposes to issue regulations describing how ORR meets its statutory responsibilities under the HSA and TVPRA and to implement the relevant and substantive terms of the FSA for the care and custody of unaccompanied children.

In addition to requirements and standards related to the direct care of unaccompanied children, ORR proposes to establish a new UC Office of the Ombuds, to create a mechanism that allows unaccompanied children and stakeholders to raise concerns with ORR policies and practices to an independent body. The Ombuds will be tasked with fielding concerns from any party relating to the implementation of ORR regulations, policies, and procedures; reviewing individual cases, conducting site visits and publishing reports including reports on systemic issues in ORR custody, particularly where there are concerns about access to services or release from ORR care; and following up on grievances made by children, sponsors, or other stakeholders. HHS has authority to establish this office under its authority to "establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity."⁴⁶

D. Basis and Purpose of Regulatory Action

The purpose of this NPRM is to propose a regulatory framework that would: (1) codify policies and practices related to the care and custody of unaccompanied children, consistent with ORR's statutory authorities; and (2) implement relevant provisions described by the FSA. The FSA describes "minimum" standards for care of unaccompanied children at licensed care provider facilities, but Congress subsequently enacted legislation establishing requirements for the UC Program. This NPRM proposes both to implement the protections set forth in the FSA and to broaden them consistent with the current legal and operational environment, which has significantly

⁴⁵ 74 FR 1232 (2009).

⁴⁶ 8 U.S.C. 1232(c)(1); *see also* 6 U.S.C. 279(b)(1)(L) (describing ORR's responsibility to conduct investigations and inspections of facilities and other entities in which unaccompanied children reside, including regular follow-up visits to such facilities, placements, and other entities, to assess the continued suitability of such placements).

⁴⁰ *Lucas R. v. Becerra*, Case No. 2:18-cv-5741 (C.D. Cal. filed Jun. 29, 2018).

⁴¹ Order re Defendants' Motion to Dismiss [101] and Plaintiff's Motion for Class Certification [97], *Lucas R. v. Becerra*, No. 2:18-cv-05741 (C.D. Cal. Nov. 2, 2018), ECF No. 126.

⁴² *Id.*

⁴³ 8 U.S.C. 1232(b)(2).

⁴⁴ 74 FR 14564 (2009)

changed since the FSA was signed over 25 years ago.

E. Severability

To the extent that any portion of the requirements arising from the final rule is declared invalid by a court, ORR intends for all other parts of the final rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect. While our expectation is that all parts of the final rule that are operable in such an environment would remain in effect, ORR will assess at that time whether further rulemaking is necessary to amend any provisions subsequent to any holding that ORR exceeded its discretion or the provisions are inconsistent with the FSA or are vacated or enjoined on any other basis.

V. Discussion of Elements of the Proposed Rule

Subpart A—Care and Placement of Unaccompanied Children

In this NPRM, ORR proposes to codify requirements and policies regarding the placement, care, and services provided to unaccompanied children in ORR custody. The following provisions identify the scope of this part, the definitions used throughout this part, and principles that apply to ORR placement, care, and services decisions.

Section 410.1000 Scope of This Part

ORR proposes, in § 410.1000(a), that the scope of this part pertain to the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to ORR. As described in section IV. of this proposed rule, ORR's care, custody, and placement of unaccompanied children is governed by the HSA and TVPRA, and ORR provides its services to unaccompanied children in accordance with the terms of the FSA. ORR also clarifies that proposed part 410 would not govern or describe the entire program. For example, part 411 (describing requirements related to the prevention of sexual abuse of unaccompanied children in ORR care) would remain in effect under this proposed rule. ORR notes that its current policies and practices are described in the online ORR Policy Guide,⁴⁷ Field Guidance,⁴⁸ manuals describing compliance with ORR policies and procedures, and other

communications from ORR to care provider facilities. ORR will continue to utilize these vehicles for its subregulatory guidance and will revise them in connection with publication of the final rule as needed to ensure compliance with the final rule. The proposed provisions of this part would, in many cases, codify existing ORR policies and practices. Further, upon publication of a final rule, ORR would continue to publish subregulatory guidance as needed to clarify the application of these regulations.

ORR also proposes, in § 410.1000(b), that the provisions of this part are separate and severable from one another and that if any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect. Additionally, ORR proposes in § 410.1000(c) that ORR does not fund or operate facilities other than standard programs, restrictive placements (which includes secure facilities, including residential treatment centers, and heightened supervision facilities), or emergency or influx facilities, absent a specific waiver as described under proposed § 410.1801(d) or such additional waivers as are permitted by law.

Section 410.1001 Definitions

ORR proposes, in § 410.1001, to codify the definitions of terms that apply to this part. Some definitions are the same as those found in statute, or other authorities (e.g., the definition of “unaccompanied child” is the same as the definition of “unaccompanied alien child” as found in the HSA, 6 U.S.C. 279(g)(2)). Notably, for purposes of this proposed rule, ORR would update certain terms and definitions provided in the FSA (e.g., the definition of “influx”). Below is an explanation for certain definitions, to further explain ORR's rationale when the proposed rule applies the relevant terms.

The proposed definition of “care provider facility” is intended to generally describe any placement type for unaccompanied children, except out of network (OON) placements, and as a result is broader than the term “standard program,” provided below, which for example does not include emergency or influx facilities. ORR also notes that this proposed definition does not reference “facilities for children with special needs,” a term used in the definition of “licensed program” in the FSA and 45 CFR 411.5. ORR is considering not using the term “facilities for children with special needs” within the part for the reasons set forth below in this section at the proposed definition of “standard

program.” Moreover, ORR understands this proposed definition for “care provider facility” to encompass any facility in which an unaccompanied child may be placed while in the custody of ORR, including any facility exclusively serving children in need of particular services and treatment.

The proposed definition of “disability” is distinct from its proposed definition for a “special needs unaccompanied child,” discussed later in this section and which is derived specifically from the FSA. Although some unaccompanied children may have a disability and also have special needs, the terms are not synonymous. For example, an unaccompanied child exiting ORR custody may be considered to have a disability within the definition set forth in section 504 of the Rehabilitation Act of 1973 even if the child does not require services or treatments for a mental and/or physical impairment.

The proposed definition of “emergency” differs from the definition finalized at 45 CFR 411.5, which defines the term as “a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action.” “Emergency,” for purposes of this proposed rule, would reflect the term's usage in the context of the requirements in this proposed rule.

With respect to the proposed definition of “EOIR accredited representative,” ORR notes that DOJ refers to these individuals simply as “accredited representatives,” see 8 CFR 1292.1(a)(4), but for purposes of this proposed rule, ORR adopts the term “EOIR accredited representative.”

The proposed definition of “heightened supervision facility” incorporates language consistent with the definition of “medium secure facility” provided in the FSA at paragraph 8. This term is meant to replace the term “staff secure facility” as used under existing ORR policies. ORR has decided to change its terminology because it has become clear that the prior term was not well understood and did not effectively convey information about the nature of such facilities.

The proposed definition of “influx” would change the threshold for declaring an influx, for ORR's purposes, from the FSA standard, which ORR believes is out of date considering current migration patterns and its organizational capacity. The FSA defines influx as “those circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program.” ORR's proposed definition, however,

⁴⁷ ORR Unaccompanied Children Program Policy Guide, <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide>.

⁴⁸ Unaccompanied Children's Program Field Guidance, <https://www.acf.hhs.gov/orr/policy-guidance/uc-program-field-guidance>.

would not impact the rights, and responsibilities of other parties of the FSA. ORR believes that the proposed definition more appropriately reflects significantly changed circumstances since the inception of the FSA and provides a more realistic, fair, and workable threshold for implementing safeguards necessary in cases where a high percentage of ORR's bed capacity is in use. The 1997 standard of 130 minors awaiting placement does not reflect the realities of unaccompanied children referrals in the past decade, in which the number of unaccompanied children referrals each day typically exceeds, and sometimes greatly exceeds, 130. To leave this standard as the definition of influx would mean, in effect, that the program was always in influx status. Accordingly, ORR has developed a more realistic and workable threshold for implementing safeguards necessary in cases where a high percentage of ORR bed capacity is in use.

With respect to the proposed definition of "post-release services," ORR notes that assistance linking families to educational resources may include but is not limited to, in appropriate circumstances, assisting with school enrollment; requesting an English language proficiency assessment; seeking an evaluation to determine whether the child is eligible for a free appropriate public education (which can include special education and related services) or reasonable modifications and auxiliary aids and services under the Individuals with Disabilities Education Act or section 504 of the Rehabilitation Act of 1973; and monitoring the unaccompanied child's attendance at and progress in school. ORR notes that while the TVPRA requires that follow-up services must be provided during the pendency of removal proceedings in cases in which a home study occurred, the nature and extent of those services would be subject to available resources.

With respect to the proposed definition of "runaway risk," ORR notes that the FSA and ORR policy currently uses the term "escape risk." See FSA paragraph 22 (defining "escape risk" as "a serious risk that the minor will attempt to escape from custody," and providing a non-exhaustive list of factors ORR may consider when determining whether an unaccompanied child is an escape risk—*e.g.*, whether the unaccompanied child is currently under a final order of removal, the unaccompanied child's immigration history, and whether the unaccompanied child has previously absconded or attempted to abscond from

government custody). ORR proposes to update this term to "runaway risk," which is a term used by state child welfare agencies and Federal agencies to describe children at risk from running away from home or their care setting. Rather than basing its determination of runaway risk solely on the factors described in the FSA, ORR proposes under this rule that such determinations must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away. This proposed definition of runaway risk is meant to be consistent with how the term is used in the FSA to describe escape from ORR care, *i.e.*, from a care provider facility. ORR notes here and throughout this proposed rule that the TVPRA uses the term "risk of flight," stating HHS "may" consider "risk of flight," among other factors, when making placement determinations.⁴⁹ ORR understands that in the immigration law context, "risk of flight" refers to an individual's risk of not appearing for their immigration proceedings.⁵⁰ ORR proposes, with respect to its responsibilities toward unaccompanied children in its custody, to interpret "risk of flight" as including "runaway risk," thereby adding runaway risk to the list of factors it would consider in making placement determinations. Runaway risk often overlaps with concern that an unaccompanied child may not appear for the child's immigration proceedings. ORR also notes that runaway risk may also relate to potential danger to self or the community, given the inherent risks to unaccompanied children who run away from custody.

With respect to the proposed definition of "secure facility," ORR notes that the FSA uses but does not provide a definition for this term. Nevertheless, the proposed definition is consistent with the provisions of the FSA applying to secure facilities. Also, this proposed definition differs from the definition in the 2019 Final Rule, which could have been read to indicate that any contract or cooperative agreement for a facility with separate accommodations for minors is a secure facility. Such a definition risks erroneously confusing other types of ORR placements that are not secure with secure placements and therefore

⁴⁹ 8 U.S.C. 1232(c)(2)(A).

⁵⁰ See *e.g.*, hearings conducted by the Department of Justice's Executive Office for Immigration Review to decide custody redeterminations under section 236(a) of the Immigration and Nationality Act, 8 U.S.C. 1226(a), "where an alien must establish that the alien does not present a danger to others, a threat to the national security, or a flight risk." *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006).

ORR is proposing an updated definition in this proposed rule.

With respect to the proposed definition of "special needs unaccompanied child," ORR notes that this definition has been included to incorporate the term "special needs minor" as described within the FSA at paragraph 7, except ORR proposes to update the definition by using the phrase "intellectual or developmental disability" instead of "mental illness or retardation" as used in the FSA. ORR understands that this update reflects current terminology which has superseded the terminology used in the FSA ("retardation"). Although an unaccompanied child with a disability, as defined in this section, could also be a "special needs unaccompanied child" as incorporated here, the definition of disability is broader and thus the terms are not synonymous. To further this clarification, ORR proposes a separate definition for disability earlier in this section that incorporates the meaning of the term across applicable governing statutory authorities. ORR is also considering not defining and not using the term "special needs unaccompanied child" within the part for the reasons set forth below at proposed §§ 410.1103 and 410.1106.

The proposed definition of "standard program" reflects and updates the term "licensed program" at paragraph 6 of the FSA. The FSA does not discuss situations where states discontinue licensing, or exempt from licensing, child care facilities that contract with the Federal Government to care for unaccompanied children, as has happened recently in some states.⁵¹ ORR has included this proposed definition of "standard program" that is broader in scope to account for circumstances wherein licensure is unavailable in the state to programs that provide residential, group, or home care services for dependent children when those programs are serving unaccompanied children. ORR notes that most states where ORR has care provider facilities have not taken such actions, and that wherever possible standard programs would continue to be licensed consistent with current practice under the FSA. However, ORR

⁵¹ See, *e.g.*, Proclamation by the Governor of the State of Texas, May 31, 2021, available at: https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf (directing the Texas Health and Human Service Commission (HHSC) to amend its regulations to "discontinue state licensing of any child-care facility in this state that shelters or detains [UC] under a contract with the Federal government."); see also Fl. Executive Order No. 21–223 (Sep. 28, 2021), available at: https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-223.pdf.

is considering substituting the term “licensed program” with the proposed updated term “standard program” in order to establish that the requirement that facilities in those states must still meet minimum standards, consistent with requirements for licensed facilities expressed in the FSA at Exhibit 1, in any circumstance in which a state refuses to license a facility because the facility is housing unaccompanied children.⁵² ORR solicits comments on using the proposed definition of “standard program” in lieu of the term “licensed program.”

ORR understands this proposed definition for “standard program” to encompass any program operating non-secure facilities that provide services to unaccompanied children in need of particular services and treatment or children with particular mental or physical conditions. Given this, ORR believes the continued use of language such as “facilities for children with special needs” and “facilities for special needs minors,” as used in the FSA definition of “licensed program,” is unnecessary for this regulation, and potentially problematic for reasons discussed elsewhere within this section and at proposed §§ 410.1103 and 410.1106. For now, ORR has included this language in the proposed rule to ensure consistency with the FSA, but it is considering not using the term “special needs unaccompanied child” or specifying that facilities for special needs unaccompanied children operated by a standard program are covered by the requirements that apply to standard programs in the part. Therefore, ORR also solicits comments in this section on its proposal to not include in the definition of “standard program” the FSA terminology used in the term “licensed program” referencing facilities for special needs unaccompanied children or a facility for special needs unaccompanied children.

The proposed definition of “trauma bond” is consistent with how the Office to Monitor and Combat Trafficking in Persons, Department of State defined the term in its factsheet, *Trauma Bonding in Human Trafficking*.⁵³

⁵² Separate from this notice of proposed rulemaking and in the spirit of current FSA requirements, ACF is currently developing a notice of proposed rulemaking that would describe the creation of a Federal licensing scheme for ORR care providers located in states where licensure is unavailable to programs serving unaccompanied children.

⁵³ Office to Monitor and Combat Trafficking in Persons. (2020, June). *Trauma Bonding in Human Trafficking*. U.S. Department of State. https://www.state.gov/wp-content/uploads/2020/10/TIP_Factsheet-Trauma-Bonding-in-Human-Trafficking-508.pdf.

With respect to the proposed definition of “trauma-informed,” ORR believes that a trauma-informed approach to the care and placement of unaccompanied children is essential to ensuring that the interests of children are considered in decisions and actions relating to their care and custody.⁵⁴ ORR understands trauma-informed system, standard, process, or practices consistently with the 6 Guidelines To A Trauma-Informed Approach developed by the Centers for Disease Control and Prevention (CDC) in collaboration with the Substance Abuse and Mental Health Services Administration (SAMHSA).

Section 410.1002 ORR Care and Placement of Unaccompanied Children

ORR proposes, at § 410.1002, a description of ORR’s authority to coordinate and implement the care and placement of unaccompanied children who are in ORR custody by reason of their immigration status. ORR notes that this substantive requirement is aligned with the requirement established in the 2019 Final Rule at 45 CFR 410.102(a), concerning the scope of authority of ORR regarding the care and placement of unaccompanied children. That section of the 2019 Final Rule was not found to be inconsistent with the FSA by the 9th Circuit in *Flores v. Rosen*, but as discussed in section IV.B.3 of this proposed rule, the 2019 Final Rule in its entirety is currently enjoined and will be superseded by the standards proposed in this proposed rule, once finalized.

Section 410.1003 General Principles That Apply to the Care and Placement of Unaccompanied Children

ORR proposes, at § 410.1003, to describe principles that would apply to the care and placement for unaccompanied children in its custody. These principles are based on ORR’s statutory duties to provide care and custody for unaccompanied children in a manner that is consistent with their best interests.⁵⁵

⁵⁴ See 6 U.S.C. 279(b)(1)(B); 8 U.S.C. 1232(c)(2)(A).

⁵⁵ See, e.g., 6 U.S.C. 279(b)(1) (making ORR responsible for, among other things, “coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status,” “ensuring that the interest of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child,” and “overseeing the infrastructure and personnel of facilities in which unaccompanied alien children reside.”); see also 8 U.S.C. 1232(c)(1) (requiring HHS to “establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative

At § 410.1003(a), ORR proposes that for all placements, unaccompanied children shall be treated with dignity, respect, and special concern for their particular vulnerability as unaccompanied children. In addition to ORR’s statutory authorities, this proposal is consistent with the substantive criteria set forth at paragraph 11 of the FSA, and current ORR policies.

At § 410.1003(b), ORR proposes that ORR shall hold unaccompanied children in facilities that are safe and sanitary and that are consistent with ORR’s concern for the particular vulnerability of unaccompanied children. This is consistent with the substantive requirement from paragraph 12A of the FSA that “[f]ollowing arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS’s concern for the particular vulnerability of minors.” ORR notes that although this provision applies to the arrest and detention of unaccompanied children prior to their placement in an ORR care provider facility, and not to unaccompanied children after they are placed in ORR’s care, ORR is proposing to adopt this standard for its facilities and custody of unaccompanied children as well. ORR also notes that it is proposing the phrasing “the particular vulnerability of unaccompanied children” as opposed to “the particular vulnerability of minors,” as it believes that the specific vulnerability of the population of unaccompanied children should be considered when providing them with safe and sanitary conditions.

At proposed § 410.1003(c), ORR would be required to plan and provide care and services based on the individual needs of and focusing on the strengths of the unaccompanied child. As a complementary provision, ORR proposes, at § 410.1003(d), to encourage unaccompanied children, as developmentally appropriate and in their best interests, to be active participants in ORR’s decision-making process relating to their care and placement. ORR believes that these collaborative approaches to care provision allow for the recognition of each child’s specific needs and strengths while providing opportunities for unaccompanied children to become more empowered, resilient, and self-efficacious.

activity, including policies and programs reflecting best practices in witness security programs.”); 1232(c)(2)(A) (“... an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child . . .”).

ORR proposes, at § 410.1003(e), to codify a requirement that care of unaccompanied children be tailored to the individualized needs of each unaccompanied child in ORR custody, ensuring the interests of the child are considered, and that unaccompanied children are protected from traffickers and other persons seeking to victimize or otherwise engage them in criminal, harmful, or exploitative activity, both while in ORR custody and upon release from the UC Program. ORR recognizes the utmost importance of protecting unaccompanied children from traffickers and other persons seeking to victimize or otherwise engage in harmful activities, including unscrupulous employers. ORR believes the provisions proposed at § 410.1003(e) reinforce ORR's commitment to ensuring the best interests of unaccompanied children are considered and actions are taken to safeguard them from harm. ORR also believes that codifying the requirement to consider each unaccompanied child's individualized needs reinforces that unaccompanied children will be assessed by ORR to determine whether they may require particular services and treatment while in the UC Program, such as to address the ramifications of a history of severe neglect or abuse, as provided for in paragraph 7 of the FSA.

Consistent with the substantive criteria set forth in the TVPRA, 8 U.S.C. 1232(c)(2)(A), ORR proposes at § 410.1003(f) to require that unaccompanied children be promptly placed in the least restrictive setting that is in the best interest of the child, with placement considerations including danger to self; danger to the community; and runaway risk, as defined in § 410.1001. In addition to ORR's statutory authorities, this proposal is consistent with the substantive criteria set forth at paragraph 11 of the FSA, and current ORR policies.

At proposed § 410.1003(g), ORR would require consultation with parents, legal guardians, child advocates, and attorneys of record or EOIR accredited representatives as needed when requesting information or consent from all unaccompanied children.

Section 410.1004 ORR Custody of Unaccompanied Children

Proposed § 410.1004 describes the scope of ORR's custody of unaccompanied children. Consistent with its statutory authorities and the FSA, this proposed provision specifies that all unaccompanied children placed by ORR in care provider facilities remain in the legal custody of ORR and

may be transferred or released only with ORR approval.⁵⁶ The provision would also provide that in the event of an emergency, a care provider facility may transfer temporary physical custody of an unaccompanied child prior to securing approval from ORR but shall notify ORR of the transfer as soon as is practicable thereafter, and in all cases within 8 hours.⁵⁷

Subpart B—Determining the Placement of an Unaccompanied Child at a Care Provider Facility

In subpart B of this proposed rule, ORR proposes to codify the criteria and requirements that apply to placement of unaccompanied children at particular types of care provider facilities. The HSA makes ORR responsible for, among other things, “coordinating and implementing the care and placement of unaccompanied alien children who are in federal custody by reason of their immigration status,” “making placement determinations for all unaccompanied alien children who are in federal custody by reason of their immigration status,” “implementing the placement determinations,” and “implementing policies with respect to the care and placement of unaccompanied alien children.”⁵⁸ In addition, subpart B would clarify and strengthen placement criteria to better ensure appropriate placement based on each unaccompanied child's individual background, characteristics, and needs. ORR believes that these proposed provisions can help to protect the interests of unaccompanied children in ORR care by supporting safe and appropriate placement in the least restrictive setting appropriate to the child's age and individualized needs, consistent with existing legal requirements and child welfare best practices.

Section 410.1100 Purpose of This Subpart

Proposed § 410.1100 describes the purposes of subpart B, which are to set forth the process by which ORR receives referrals from other Federal agencies and the factors ORR considers when placing an unaccompanied child in a particular care provider facility. In addition, proposed § 410.1100 would clarify that, as used in this subpart,

⁵⁶ See 8 U.S.C. 1232(b)(1) (“Consistent with section 279 of title 6, and except as otherwise provided under subsection (a), the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.”).

⁵⁷ See FSA at ¶ 19.

⁵⁸ 6 U.S.C. 279(b)(1). See also 8 U.S.C. 1232(c)(2)(A).

“placement determinations” or “placements” refers to placements in ORR-approved care provider facilities during the time an unaccompanied child is in ORR care, and not to the location of an unaccompanied child once the child is released in accordance with provisions proposed in subpart C.

Section 410.1101 Process for the Placement of an Unaccompanied Child After Referral From Another Federal Agency

ORR proposes, at new § 410.1101, to codify its existing process for accepting referrals of unaccompanied children from another Federal agency and for placement of an unaccompanied child in a care provider facility upon such referral. Consistent with the TVPRA at 8 U.S.C. 1232(b)(3), which requires any department or agency of the Federal Government that has an unaccompanied child in its custody to transfer the custody of such child to HHS not later than 72 hours after determining that the child is an unaccompanied child, unless there are exceptional circumstances,⁵⁹ and with existing policy, under proposed § 410.1101(a), ORR accepts referrals from any department or agency of the Federal Government of unaccompanied children in the referring department or agency's custody. Further, consistent with existing policy and in cooperation with referring agencies, ORR accepts such referrals at any time of day, every day of the year. ORR may seek clarification about the information provided by the referring agency (including about how the referred individual meets the statutory definition of unaccompanied child). In such instances, ORR shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory time frames for transferring unaccompanied children to ORR.

At § 410.1101(b) and (c), ORR proposes timeframes for identifying, and notifying a referring Federal agency of ORR's identification of, an appropriate placement for an unaccompanied child, and for accepting transfer of custody of

⁵⁹ The TVPRA also contains specific provisions for DHS to screen children who are from contiguous countries to determine whether such children meet statutory criteria to be returned to the child's country of nationality or of last habitual residence. Such screening should occur within 48 hours of apprehension. If the child does not meet the criteria to be returned or no determination can be made within 48 hours of apprehension, the TVPRA states that the child shall “immediately be transferred to the Secretary of HHS and treated in accordance with subsection (b).” 8 U.S.C. 1232(a)(4). We read this language in concert with the language in 8 U.S.C. 1232(b)(3) and, thus, include the one 72-hour standard in this proposed rule.

an unaccompanied child after a referring Federal agency determines that a child is an unaccompanied child who should be referred to ORR. At § 410.1101(b), ORR proposes to codify its current policy that upon notification from any department or agency of the Federal Government that a child is an unaccompanied child and therefore must be transferred to ORR custody, ORR must identify an appropriate placement for the unaccompanied child and notify the referring Federal agency within 24 hours of receiving the referring agency's notification whenever possible, and no later than 48 hours of receiving the referring agency's notification, barring exceptional circumstances (see paragraph below). ORR believes that setting a maximum time frame of 48 hours for ORR to identify a placement and notify a referring Federal agency of ORR's identification of a placement would help to expedite transfer of unaccompanied children from the referring Federal agency to ORR care, but also that certain exceptions to this time frame may be necessary in certain circumstances, as discussed in the following paragraph. Proposed § 410.1101(c) would require ORR to work with the referring Federal department or agency to accept transfer of custody of the unaccompanied child, consistent with the statutory requirements at 8 U.S.C. 1232(b)(3) (the referring Federal agency must transfer custody of an unaccompanied child to HHS not later than 72 hours after determining that the child is an unaccompanied child, except in the case of exceptional circumstances).

As noted above, the TVPRA provides that referring Federal agencies must transfer custody of unaccompanied children to HHS within 72 hours unless there are exceptional circumstances. In order to help facilitate this requirement in coordination with referring agencies, proposed § 410.1101(b) and (c) describe internal timeframes for ORR to identify and notify referring Federal agencies of placements and to accept transfer of custody from referring agencies. But ORR notes that it may in certain "exceptional circumstances" be unable to timely identify placements for and help facilitate other agencies' timely transfers of unaccompanied children to its custody. For purposes of proposed § 410.1101(b) and (c), proposed § 410.1101(d) describes circumstances which would prevent ORR from timely identifying a placement for an unaccompanied child or accepting transfer of custody. At proposed § 410.1101(d), ORR describes these

exceptional circumstances consistent with those described in paragraph 12.A of the FSA, some of which were also incorporated into the 2019 Final Rule at § 410.202. The proposed "exceptional circumstances," for ORR's purposes, would include the following: (1) any court decree or court-approved settlement that requires otherwise; (2) an influx, as defined in proposed § 410.1001; (3) an emergency, including a natural disaster, such as an earthquake or hurricane, and other events, such as facility fires or civil disturbances; (4) a medical emergency, such as a viral epidemic or pandemic among a group of unaccompanied children; (5) the apprehension of an unaccompanied child in a remote location, and (6) the apprehension of an unaccompanied child whom the referring agency indicates (i) poses a danger to self or others or (ii) has been charged with or has been convicted of a crime, or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent, and additional information is essential in order to determine an appropriate ORR placement. Notably, the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR. In addition, "exceptional circumstances," for ORR's purposes, would include an act or event that could not be reasonably foreseen that prevents the placement of or accepting transfer of custody of an unaccompanied child within the proposed timeframes. Given the mandate under the TVPRA, 8 U.S.C. 1232(c)(2), that ORR place an unaccompanied child in the least restrictive setting that is in the best interests of the unaccompanied child, subject to consideration of danger to self, danger to the community/others, and risk of flight, additional time may be needed in some circumstances to determine the most appropriate and safe placement that comports with the best interests of the unaccompanied child. Thus, ORR believes that this general exception for acts or events that could not be reasonably foreseen is appropriate to afford additional time to assess these considerations, though ORR is mindful of avoiding prolonged placements in DHS facilities that are not designed for the long-term care of children. As discussed previously, these proposed exceptional circumstances would, as appropriate, modify the timeframes applicable to ORR under proposed § 410.1101(b) and (c).

ORR notes that the FSA also includes an exception to these timeframe requirements for unaccompanied children who do not speak English and

for whom an interpreter is unavailable. However, ORR does not propose to include this as an exceptional circumstance for purposes of § 410.1101(b) and (c). Because ORR is able to serve unaccompanied children regardless of their primary language through the use of telephonic interpreters, ORR does not view this as an insurmountable impediment to the prompt placement of unaccompanied children. In addition, the FSA includes an exception in which a reasonable person would conclude that an individual is an adult despite the individual's claim to be an unaccompanied child. However, ORR does not propose to include this as an exceptional circumstance for purposes of proposed § 410.1101(b) and (c) because ORR does not believe that such a situation poses the type of urgency inherent in exceptional circumstances as described above. For further information on ORR's proposed policies regarding age determinations, ORR refers readers to its discussion of proposed subpart H.

As discussed previously, the TVPRA contemplates the referral and transfer of unaccompanied children to ORR from other Federal agencies or departments, requiring that, absent exceptional circumstances, such transfer must occur no later than 72 hours after determining that a child is an unaccompanied child.⁶⁰ ORR seeks to accept transfer of unaccompanied children as quickly as possible after a placement has been identified within this time frame. In identifying placements for unaccompanied children, ORR balances the need for expeditious identification of placement with the need to ensure safe and appropriate placement in the best interests of the unaccompanied child, which necessitates a comprehensive review of information regarding an unaccompanied child's background and needs before placement. Under existing policy, to determine the appropriate placement for an unaccompanied child, ORR requests and assesses extensive background information on the unaccompanied child from the referring agency, including the following: (1) how the referring agency made the determination that the child is an unaccompanied child; (2) health related information; (3) whether the unaccompanied child has any medication or prescription information, including how many days' supply of the medication will be provided with the unaccompanied child when transferred into ORR custody; (4) biographical and biometric information,

⁶⁰ See 8 U.S.C. 1232(b)(2) and (3).

such as name, gender, alien number, date of birth, country of birth and nationality, date(s) of entry and apprehension, place of entry and apprehension, manner of entry, and the unaccompanied child's current location; (5) any information concerning whether the unaccompanied child is a victim of trafficking or other crimes; (6) whether the unaccompanied child was apprehended with a sibling or other relative; (7) identifying information and contact information for a parent, legal guardian, or other related adult providing care for the unaccompanied child prior to apprehension, if known, and information regarding whether the unaccompanied child was separated from a parent, legal guardian, or adult relative after apprehension, and the reason for separation; (8) if the unaccompanied child was apprehended in transit to a final destination, what the final destination was and who the unaccompanied child planned to meet or live with at that destination, if known; (9) whether the unaccompanied child is a runaway risk, and if so, the runaway risk indicators; (10) any information on a history of violence, juvenile or criminal background, or gang involvement known or suspected, risk of danger to self or others, state court proceedings, and probation; (11) if the unaccompanied child is being returned to ORR custody after arrest on alleged gang affiliation or involvement, ORR requests all documentation confirming whether the unaccompanied child is a *Saravia* class member and information on the *Saravia* hearing, including the date and time;⁶¹ and (12) any particular needs or other information that would affect the care and placement of the unaccompanied child, including, as applicable, information about services, supports, or program modifications provided to the child on the basis of disability.

⁶¹ A *Saravia* class member is defined as a noncitizen minor who (1) came to the United States as an unaccompanied child, as defined at 6 U.S.C. 279(g)(2); (2) was previously detained in the custody of the Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR) but then released to a sponsor by ORR; and (3) has been or will be rearrested by the Department of Homeland Security (DHS) on the basis of a removability warrant based in whole or in part on allegations of gang affiliation. In *Saravia* bond hearings DHS bears the burden to demonstrate changed circumstances since the minor's release by ORR which demonstrate the minor is a danger to the community. DHS must demonstrate that circumstances have changed since the child's release from ORR custody such that the child poses a danger to the community or is a flight-risk. See Order Certifying the Settlement Class and Granting Final Approval of Class Action Settlement, *Saravia v. Barr*, Case No.: 3:17-cv-03615 (N.D. Cal. Jan. 19, 2021), ECF No. 249.

Furthermore, the TVPRA places the responsibility for the transfer of custody on referring Federal agencies.⁶² ORR custody begins when it assumes physical custody from the referring agency. Proposed § 410.1101(e) would codify this practice, which is currently reflected at section 1.1 of the Policy Guide.

Section 410.1102 Care Provider Facility Types

Proposed § 410.1102 describes the types of care provider facilities in which unaccompanied children may be placed. The basis for this section is ORR's statutory authority to make placement determinations for unaccompanied children in its care, as well as other responsibilities such as implementing policies with respect to their care and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.⁶³ Specifically, this section proposes that ORR may place an unaccompanied child in a care provider facility as defined at proposed § 410.1001, including but not limited to shelters, group homes, individual family homes, heightened supervision facilities, or secure facilities, including RTCs. ORR proposes that it may also place unaccompanied children in out-of-network (OON) placements under certain, limited circumstances, such as an OON RTC (which would need to meet the standards that apply to RTCs that are ORR care provider facilities) or a temporary stay at hospital (for example, for surgery). ORR would make such placements taking into account the considerations and criteria set forth in proposed §§ 410.1103 through 410.1109 and 410.1901, as further discussed below. In addition, ORR proposes that in times of influx or emergency, as further discussed in proposed subpart I (Emergency and Influx Operations), ORR may place unaccompanied children in facilities that may not meet the standards of a standard program, but rather meet the standards in subpart I. ORR believes that this proposed provision is consistent with the FSA requirement that unaccompanied children be placed in licensed programs until such time as release can be effected or until immigration proceedings are concluded, except that in the event of an emergency or influx of children into the United States, ORR must place unaccompanied children into licensed programs as expeditiously as possible.⁶⁴

⁶² 8 U.S.C. 1232(b)(3).

⁶³ See generally 6 U.S.C. 279(b)(1).

⁶⁴ See FSA at paragraph 19 and Exhibit 3.

Consistent with proposed § 410.1102, ORR would place unaccompanied children in group homes or individual family homes, including long-term and transitional home care settings, as appropriate, based on the unaccompanied child's age and individualized needs and circumstances. Proposed definitions of "ORR long-term home care" and "ORR transitional home care" are included in § 410.1001, which would replace the terms "long-term foster care" and "transitional foster care" as those terms are used in the definition of "traditional foster care" provided at 45 CFR 411.5. Where possible, ORR believes that based on an unaccompanied child's age, individualized needs, and circumstances, as well as a care provider facility's capacity, it should favor placing unaccompanied children in transitional and long-term home care settings while they are awaiting release to sponsors. Having said that, ORR notes that efforts to place more unaccompanied children out of congregate care shelters that house more than 25 children together is a long-term aspiration, given the large number of children in its custody and the number of additional programs that would be required to care for them in home care settings or small-scale shelters of 25 children or less. Given this reality, care provider facilities structured and licensed to accommodate more than 25 children continue to serve a vital role in meeting this need.

Finally, for the final rule, ORR is also considering replacing its current long-term and transitional home care placement approach with a community-based care model that would expand upon the current types of care provider facilities that may care for unaccompanied children in community-based settings. This is in line with a vision of moving towards a framework of community-based care as described in the following paragraphs. ORR believes such a framework would be consistent with the language of this proposed rule and that ORR would be able to implement it in a manner consistent with this proposed rule.

If ORR were to finalize the community-based care model in the final rule, references to ORR long-term home care and ORR transitional home care as used in this proposed rule would be replaced with the term community-based care, and ORR would define "community-based care" in § 410.1001 as an ORR-funded and administered family or group home placement in a community-based setting, whether for a short-term or a long-term placement. The proposed definition of

“community-based care” encompasses the term “traditional foster care” that is codified at existing § 411.5.

“Community-based care” would be a continuum of care that would include basic and therapeutic foster family settings as well as supervised independent living group home settings for unaccompanied children, which are funded and administered by ORR. It aims to more effectively place and support unaccompanied children who are best served in family settings, such as tender age unaccompanied children, pregnant/parenting unaccompanied children, unaccompanied children with extended stays, and unaccompanied children who are moving towards independent living or close to aging out of ORR care. Thus, a community-based care model would include placements in care provider facilities capable of accommodating unaccompanied children with both long-term (*e.g.*, where there is no reasonable prospect of release to a sponsor) and short-term (*e.g.*, rapid release expected) care needs. For purposes of UC Program management, the term community-based care would encompass and replace the term “traditional foster care” provided at existing § 411.5 as well as the terms “ORR long-term home care” and “ORR transitional home care” as used in this proposed rule. Components of the ORR community-based care model would include caregivers (either the foster parent or the designated official for a child care institution, inclusive of care provider facility staff) providing care in a manner consistent with their state licensing requirements, such as exercising the Reasonable and Prudent Parent Standard, as defined at 42 U.S.C. 675(10)(A), to make daily decisions on age-appropriate activities for the child. The Reasonable and Prudent Parent Standard is the standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child, while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining whether to allow a child in foster care to participate in extracurricular, enrichment, cultural, and social activities. Under an ORR community-based care model, when unaccompanied children are in community-based settings on an extended basis, they would be eligible to attend local schools under applicable school policies to the same extent that unaccompanied children in long-term home care placements can, to facilitate integration into the local community and the

development of relationships with peers and adults. Under a community-based care model, caregivers would support: (1) unaccompanied children’s integration into their local communities, development of healthy and nurturing relationships with adults and peers, and engagement and connection to local services, activities, and opportunities; (2) the development of unaccompanied children’s independent living skills when they are of the age that supports transition to adulthood (*e.g.*, 16 years or older); and (3) proactive permanency planning for unaccompanied children who do not have a viable sponsor, including identification of trusted adults and alternative care options that promote permanency for the unaccompanied children. Additionally, under a community-based care model, in consultation as appropriate with the child’s attorney or other relevant stakeholder such as a legal service provider or child advocate, ORR will consider a child’s eligibility for or access to legal relief (including, for example, a special immigrant juvenile predicate order) in a specific jurisdiction as part of the placement decision. ORR welcomes public comment on this vision of community-based care, its inclusion as a care provider facility type in the final rule in place of ORR’s current long-term and transitional home care placement approach, and any other concerns relevant to this change based on existing language in the proposed rule.

Section 410.1103 Considerations Generally Applicable to the Placement of an Unaccompanied Child

Proposed § 410.1103 sets forth considerations generally applicable to the placement of unaccompanied children consistent with the TVPRA, 8 U.S.C. 1232(c)(2)(A) and the FSA. The TVPRA mandates that ORR place each unaccompanied child in the least restrictive setting that is in the best interest of the unaccompanied child, with due consideration by HHS of danger to self, danger to community, and risk of flight. Similarly, paragraph 11 of the FSA requires that each unaccompanied child be placed in the least restrictive setting appropriate to the child’s age and “special needs,” provided that such setting is consistent with the interest in ensuring the unaccompanied child’s timely appearance before DHS and the immigration courts and protecting the unaccompanied child’s well-being and that of others. Consistent with the statutory mandate and the FSA provision, as well as existing policy, under proposed § 410.1103(a), ORR

would place each unaccompanied child in the least restrictive setting that is in the best interest of the unaccompanied child and appropriate to the unaccompanied child’s age and individualized needs, provided that such setting is consistent with the interest in ensuring the unaccompanied child’s timely appearance before DHS and the immigration courts and protecting the unaccompanied child’s well-being and that of others.

ORR considers the following factors when evaluating an unaccompanied child’s best interest: the unaccompanied child’s expressed interests, in accordance with the unaccompanied child’s age and maturity; the unaccompanied child’s mental and physical health; the wishes of the unaccompanied child’s parents or legal guardians; the intimacy of relationship(s) between the unaccompanied child and the child’s family, including the interactions and interrelationship of the unaccompanied child with the child’s parents, siblings, and any other person who may significantly affect the unaccompanied child’s well-being; the unaccompanied child’s adjustment to the community; the unaccompanied child’s cultural background and primary language; length or lack of time the unaccompanied child has lived in a stable environment; individualized needs, including any needs related to the unaccompanied child’s disability; and the unaccompanied child’s development and identity. ORR also notes that its care provider facilities are usually congregate care settings. As a result, consistent with prioritizing the safety and well-being of all unaccompanied children, when making a placement determination, ORR evaluates the best interests of both the individual unaccompanied child being placed and the best interests of the other unaccompanied children at the care provider facility where the individual unaccompanied child may be placed. ORR notes that the factors and considerations in proposed § 410.1103(b) and proposed § 410.1105 also are evaluated in determining the best interest of the child for purposes of placement.

ORR also proposes to use the term “individualized needs,” in proposed § 410.1103(a), rather than “special needs” (as used in the FSA and regulations established in the 2019 Final Rule at 45 CFR 410.201(a)), because it believes the term “special needs” has created confusion. The term “special needs” may imply that, in determining placement, ORR considers only a limited range of needs that fall within

a special category. Instead, in assessing the appropriate placement of an unaccompanied child, ORR takes into account any need it becomes aware of that is specific to the individual being assessed, regardless of the nature of that need. In addition, the term “special needs” may imply that, in determining placement, ORR considers only those needs related to an unaccompanied child’s disability, which as explained, is not the case. To avoid the suggestion that, in determining placement of an unaccompanied child, ORR only takes into account a limited range of needs that fall within a special category, we are using the broader term “individualized needs” for purposes of proposed § 410.1103(a).

ORR further notes that as used in the FSA, including the considerations required at paragraph 11, “special needs” is not synonymous with disability or disability-related needs. The term “special needs” has no clear legal meaning; of note, it is not used in section 504 or the HHS implementing regulations at 45 CFR part 85. Aside from its particular usage in the FSA, the term “special needs” is often understood to be a placeholder or euphemism for “disability.” As with the term “handicapped,” ORR is concerned about perpetuating language that has become stigmatized over time. For these reasons, as discussed above at § 410.1001, ORR invites comments concerning the continued use of the terms “special needs minor” or “special needs unaccompanied child” but has included these terms in the proposed rule in order to ensure consistency with the FSA.

Under proposed § 410.1103(b), consistent with existing policy and with certain requirements under the TVPRA,⁶⁵ ORR proposes that it would consider additional factors that may be relevant to the unaccompanied child’s placement, to the extent such information is available, including but not limited to the following: danger to self and the community/others, runaway risk, trafficking in persons or other safety concerns, age, gender, LGBTQI+ status, disability, any specialized services or treatment required or requested by the unaccompanied child, criminal background, location of potential sponsor and safe and timely release options, behavior, siblings in ORR custody, language access, whether the unaccompanied child is pregnant or parenting, location of the unaccompanied child’s apprehension, and length of stay in ORR custody. ORR believes that this information, to the

extent available, is necessary for a comprehensive review of an unaccompanied child’s background and needs, and for appropriate and safe placement of an unaccompanied child.

In addition, with respect to the consideration of whether any specialized services or treatments are required, ORR is aware of the importance of ascertaining an unaccompanied child’s health status, including the need for proximity to medical specialists, the child’s reproductive health status (such as information relating to pregnancy or post-partum status; use of birth control; and any recent procedures, medications, or current needs related to pregnancy), and whether the child is a victim of a sex crime (*e.g.*, sexual assault, sex trafficking), and other healthcare needs, upon entering ORR care in order to ensure the most appropriate placement, and relies on information provided from referring Federal agencies to make appropriate placements. For further discussion of proposed policies related to access to medical care, ORR refers readers to proposed § 410.1307(b). When it receives a referral of an unaccompanied child from another Federal agency, ORR documents and reviews the unaccompanied child’s biographical and apprehension information, as submitted by the referring Federal agency in ORR’s case management system, including any information about an unaccompanied child’s health status, including their reproductive health status and need for medical specialists.

Under proposed § 410.1103(c), ORR would be able to utilize information provided by the referring Federal agency, child assessment tools, interviews, and pertinent documentation to determine the placement of all unaccompanied children. In addition, ORR proposes that it may obtain any relevant records from local, State, and Federal agencies regarding an unaccompanied child to inform placement decisions. Such information is vital in carrying out ORR’s general duty to coordinate the care and placement of unaccompanied children, including determining whether a restrictive placement may be necessary.⁶⁶ ORR is proposing to add these provisions to the regulations to clarify the broad range of information it may utilize in making placement determinations.

The TVPRA requires that the placement of an unaccompanied child in a secure facility be reviewed on a

monthly basis to determine if such placement remains warranted.⁶⁷ ORR notes that it exceeds the statutory requirement here because under its current policies all restrictive placements, not only secure placements, must be reviewed at least every thirty days. Proposed § 410.1103(d) would codify the practice of reviewing restrictive placements at least every thirty days to determine if such placements remain warranted.

Additionally, in proposed § 410.1103(e), ORR proposes to codify its existing policy that ORR make reasonable efforts to provide placements in those geographical areas where DHS encounters the majority of unaccompanied children. ORR believes this provision is justified in order to facilitate the orderly and expeditious transfer of children from DHS border facilities to ORR care provider facilities, which is in the child’s best interest. This requirement reflects the requirement at paragraph 6 of the FSA. ORR notes that in making any placement decision, it also would take into account the considerations set forth in proposed § 410.1103(a) and (b).

Finally, ORR proposes at § 410.1103(f) to codify a requirement that care provider facilities accept all unaccompanied children placed by ORR at their facilities, except in limited circumstances. Such a requirement is consistent with ORR’s authority to make and implement placement determinations, and to oversee its care provider facilities, as established at 6 U.S.C. 279(b)(1). Consistent with existing policy, under proposed § 410.1103(f), a care provider facility may only deny ORR’s request for placement based on the following reasons: (1) lack of available bed space; (2) the placement of the unaccompanied child would conflict with the care provider facility’s state or local licensing rules; (3) the initial placement involves an unaccompanied child with a significant physical or mental illness for which the referring Federal agency does not provide a medical clearance; or (4) in the case of the placement of an unaccompanied child with a disability, the care provider facility concludes it is unable to meet the child’s disability-related needs without fundamentally altering its program, even by providing reasonable modifications and even with additional support from ORR. ORR proposes that if a care provider facility wishes to deny a placement, it must make a written request to ORR providing the individualized reasons for

⁶⁵ See 8 U.S.C. 1232(c).

⁶⁶ See generally 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(c)(2).

⁶⁷ See 8 U.S.C. 1232(c)(2)(A); see also 2019 Final Rule at § 410.203(c).

the denial. ORR proposes that any such request must be approved by ORR before the care provider facility may deny a placement. In addition, under proposed § 410.1103(f), ORR would be able to follow up with a care provider facility about a placement denial to find a solution to the reason for the denial.

ORR is not proposing to codify in subpart B the provisions finalized in the 2019 Final Rule at § 410.201(b) or (e), which were based on requirements set forth in paragraph 12A of the FSA. The 2019 Final Rule at § 410.201(b) provided that ORR separates unaccompanied children from delinquent offenders. However, ORR notes that paragraph 12A of the FSA concerns detention of unaccompanied children following arrest by the former INS, and currently DHS, before transfer of custody to ORR. ORR is not involved in the apprehension or encounter of unaccompanied children or their immediate detention following apprehension or encounter and thus ORR proposes to omit this provision from this regulation. Having said that, ORR proposes that it will apply the facility standards described as paragraph 12A of the FSA to its care provider facilities, consistent with standards set forth in proposed subpart D (Minimum Standards and Required Services) and proposed subpart I (Emergency and Influx Operations).

The 2019 Final Rule at § 410.201(c) provides that if there is no appropriate licensed program immediately available for placement, and no one to whom ORR may release an unaccompanied child, the unaccompanied child may be placed in an ORR-contracted facility, having separate accommodations for children, or a state or county juvenile detention facility, shall be separated from delinquent offenders, and that every effort must be taken to ensure the safety and well-being of the unaccompanied child detained in these facilities. ORR proposes omitting this provision from these regulations. This provision was also based on paragraph 12A of the FSA, which concerns detention of the unaccompanied child following arrest by the former INS, and currently following encounter by DHS, before transfer of custody to placement in an ORR care provider facility. Instead, consistent with existing policies, under proposed § 410.1101(b) ORR would identify an appropriate placement for the unaccompanied child at a care provider facility within 24 hours of receiving the referring agency's notification, whenever possible, and no later than 48 hours of receiving such notification, barring exceptional circumstances. Also, as further

discussed in the next section (addressing proposed § 410.1104), in the event of an emergency or influx of unaccompanied children into the United States, ORR would place unaccompanied children as expeditiously as possible in accordance with proposed subpart I (Emergency and Influx Operations).

Section 410.1104 Placement of an Unaccompanied Child in a Standard Program That Is Not Restrictive

At proposed § 410.1104, ORR proposes to codify substantive criteria for placement of an unaccompanied child in a standard program that is not a restrictive placement. The TVPRA requires ORR to promptly place unaccompanied children "in the least restrictive setting that is in the best interest of the child," and states that in making such placements ORR "may consider danger to self, danger to the community, and risk of flight."⁶⁸ ORR also notes that under paragraph 19 of the FSA, with certain exceptions, an unaccompanied child must be placed temporarily in a licensed program until release can be effectuated or until immigration proceedings are concluded. Consistent with the TVPRA and existing policy, under proposed § 410.1104, ORR would place all unaccompanied children in a standard program that is not a restrictive placement (in other words, that is not a heightened supervision facility) after the unaccompanied child is transferred to ORR legal custody, except in the following circumstances: (a) the unaccompanied child meets the criteria for placement in a restrictive placement set forth at proposed § 410.1105; or (b) in the event of an emergency or influx of unaccompanied children into the United States, in which case ORR shall place the unaccompanied child as expeditiously as possible in accordance with proposed subpart I (Emergency and Influx Operations). ORR understands these exceptions to be consistent with placement considerations described in the TVPRA at 8 U.S.C. 1232(c)(2)(A) (noting, for example, that in making placements HHS "may consider danger to self, danger to the community, and risk of flight"), and exceptions provided for in section paragraph 19 of the FSA.

ORR does not propose to codify certain other exceptions described in the FSA and included in the 2019 Final Rule at § 410.202(b) and (d). The 2019 Final Rule at § 410.202(b) provided that unaccompanied children do not have to be placed in a standard program as otherwise required by any court decree

or court-approved settlement. ORR does not believe it is necessary to include this exception, as any court decree or settlement that would require ORR to implement placement criteria that differ from those at proposed § 410.1104 would take effect pursuant to its own terms even without specifying these potential circumstances in the regulation. Section 410.202(d) provided that an unaccompanied child does not have to be placed in a standard program if a reasonable person would conclude that the unaccompanied child is an adult despite the individual's claims to be a child. ORR also does not believe it is necessary to include this exception in proposed § 410.1104 because a person determined by ORR to be an adult (has attained 18 years of age) would be excluded from the definition of unaccompanied child and thus would not be placed in any ORR care provider facility (see proposed subpart H for discussion of age determinations).

Section 410.1105 Criteria for Placing an Unaccompanied Child in a Restrictive Placement

Proposed § 410.1105 addresses the criteria for placing unaccompanied children in restrictive placements. As defined in proposed § 410.1001, restrictive placements would include secure facilities, heightened supervision facilities, and RTCs. The proposed criteria for placement in each of these facilities are further discussed below.

Proposed § 410.1105(a) addresses placement at secure facilities that are not RTCs. At proposed § 410.1105(a)(1), ORR proposes that, consistent with existing policies, it may place an unaccompanied child in a secure facility (that is not also an RTC) either upon referral from another agency or department of the Federal Government (*i.e.*, as an initial placement), or through a transfer to another care provider facility after the initial placement.

Under proposed § 410.1105(a)(2), ORR would not place an unaccompanied child in a secure facility (that is not also an RTC) if less restrictive alternative placements are available. Such placements must also be appropriate under the circumstances, and in the best interests of the unaccompanied child. In determining whether there is a less restrictive placement available to meet the individualized needs of an unaccompanied child with a disability, consistent with section 504 of the Rehabilitation Act, 29 U.S.C. 794(a), ORR must consider whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and

⁶⁸ 8 U.S.C. 1232(c)(2)(A).

services that would allow the unaccompanied child with a disability to be placed in that less restrictive facility. However, ORR is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. The proposed regulation text is consistent with 8 U.S.C. 1232(c)(2)(A). Also, ORR notes that this proposed requirement is consistent with paragraph 23 of the FSA, which provides that ORR may not place an unaccompanied child in a secure facility if there are less restrictive alternatives that are available and appropriate in the circumstances. Under the FSA, less restrictive alternatives include transfer to (a) a medium security facility, which is equivalent to “heightened supervision facility” as defined at proposed § 410.1001, or (b) another licensed program, a term which for purposes of this proposed rule is superseded by “standard program” as defined at proposed § 410.1001. Consistent with the FSA, ORR further proposes in § 410.1105(a)(2) that it may place an unaccompanied child in a heightened supervision facility or other non-secure care provider facility as an alternative, provided that the unaccompanied child does not pose a danger to self or others. ORR believes that such alternative placements may not be appropriate for unaccompanied children who pose a danger to self or others, as less restrictive placements may not have the level of staff supervision and requisite security procedures to address the needs of such unaccompanied children.

ORR proposes to place unaccompanied children in secure facilities (that are not RTCs) in limited, enumerated circumstances set forth at proposed § 410.1105(a)(3). Specifically, ORR proposes that it may place an unaccompanied child in a secure facility (that is not an RTC) only if the unaccompanied child meets one of three criteria. First, ORR proposes at § 410.1105(a)(3)(i) that it may place the unaccompanied child in a secure facility (that is not an RTC) if the unaccompanied child has been charged with or has been convicted of a crime, or is the subject of delinquency proceedings, a delinquency charge, or has been adjudicated delinquent, and where ORR deems that those circumstances demonstrate that the unaccompanied child poses a danger to self or others, not including: (1) an isolated offense that was not within a pattern or practice of criminal activity and did not involve violence against a person or the use or carrying of a

weapon; or (2) a petty offense, which is not considered grounds for stricter means of detention in any case. These proposed provisions were also included in the 2019 Final Rule at § 410.203(a)(1), except that proposed § 410.1105(a)(3) omits language from the FSA and previous § 410.203(a)(1) that allows an unaccompanied child to be placed in a secure facility if the unaccompanied child is “chargeable with a delinquent act” (which under the FSA means that ORR has probable cause to believe that the unaccompanied child has committed a specified offense). ORR believes it is appropriate to omit such language because being “chargeable” with an offense is not a permissible reason for placement in a secure facility identified by the TVPRA.⁶⁹ Further, because it is not a law enforcement agency, unlike the former INS, ORR is not in a position to make determinations such as whether an unaccompanied child is “chargeable.” Even without this language, ORR believes this proposed provision is consistent with the substantive criteria of the FSA. Furthermore, consistent with 8 U.S.C. 1232(c)(2)(A) (which does not list runaway risk as a permissible reason for placement in a secure facility), ORR does not propose runaway risk as a factor in determining placement in a secure facility, even though that is a permissible ground under the FSA for placement in a secure facility.

Second, ORR proposes in § 410.1105(a)(3)(ii) that it may place an unaccompanied child in a secure facility (that is not an RTC) if the unaccompanied child, while in DHS or ORR custody, or while in the presence of an immigration officer, ORR official, or ORR contracted staff, has committed, or has made credible threats to commit, a violent or malicious act (whether directed at the unaccompanied child or others). The 2019 Final Rule at § 410.203(a)(2) and paragraph 21B of the FSA contain a similar provision, except that in contrast to § 410.203(a)(2) and the FSA, this proposed provision would include acts committed in the presence of an “ORR official or ORR contracted staff.” ORR believes that the addition of this language is appropriate given that ORR officials and contracted staff would more often be in a position to observe an unaccompanied child’s behavior and actions and to assess whether an unaccompanied child has committed, or made credible threats to commit, the

acts referenced in this provision. Again, ORR does not believe this proposed change constitutes a substantive deviation from the requirements of the FSA.

Third, ORR proposes at § 410.1105(a)(3)(iii) that it may place an unaccompanied child in a secure facility (that is not an RTC) if the unaccompanied child has engaged, while in a restrictive placement, in conduct that has proven to be unacceptably disruptive of the normal functioning of the care provider facility, and removal is necessary to ensure the welfare of the unaccompanied child or others, as determined by the staff of the care provider facility (e.g., substance or alcohol use, stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR determines the unaccompanied child poses a danger to self or others based on such conduct. The 2019 Final Rule contained a similar provision at § 410.203(a)(3), which was based on paragraph 21C of the FSA. But in contrast to § 410.203(a)(3) of the 2019 Final Rule and the FSA, the proposed provision requires that the conduct at issue be engaged in while in a “restrictive placement,” rather than a “licensed program.” ORR believes that such disruptive behavior should initially result in potential transfer to a heightened supervision facility before placement in a secure facility (that is not an RTC)—in other words, that disruptive behavior in a standard program that is not a restrictive placement should not result in immediate transfer, or “step up,” to such a secure facility. As discussed above, the 2019 Final Rule was intended to implement the provisions of the FSA that relate to HHS; however, ORR is proposing this change in order to ensure that unaccompanied children in such circumstances are stepped up to a more structured program rather than being immediately placed in a secure facility. ORR believes this update is consistent with its authorities under the HSA and TVPRA,⁷⁰ and does not believe it constitutes a substantive deviation from the requirements of the FSA, which provides that unaccompanied children “may” be transferred to secure facilities based on unacceptably disruptive conduct where transfer is necessary to ensure the welfare of the unaccompanied child or others but does not require such transfer.⁷¹

⁶⁹ See 8 U.S.C. 1232(c)(2)(A) (“A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.”).

⁷⁰ See, e.g., 8 U.S.C. 1232(c)(2)(A) (requiring that unaccompanied children “shall be promptly placed in the least restrictive setting that is in the best interest of the child.”).

⁷¹ FSA at paragraph 21C.

At proposed § 410.1105(b), ORR outlines the policies and criteria that it would apply in placing unaccompanied children in heightened supervision facilities. The term “heightened supervision facility,” as defined at proposed § 410.1001, would be used in place of the term “medium secure” facility provided in the FSA, and in place of the term “staff secure facility” currently used by ORR in its regulations and sub-regulatory guidance. ORR believes that the term “heightened supervision facility,” as defined in this proposed rule, better reflects the nature and purpose of such facilities, which is to provide care to unaccompanied children who require close supervision but do not need placement at a secure facility, including an RTC. As reflected in the proposed definition, heightened supervision facilities maintain stricter security measures than a shelter such as intensive staff supervision in order to provide supports, manage problem behavior and prevent an unaccompanied child from running away. ORR proposes at § 410.1105(b)(1) that it may place unaccompanied children in this type of facility either at initial placement (upon referral from another agency or department of the Federal Government) or through a transfer from the initial placement. Furthermore, at proposed § 410.1105(b)(2), ORR proposes to codify factors it would consider in determining whether to place unaccompanied children in a heightened supervision facility. Specifically, ORR would consider if the unaccompanied child (1) has been unacceptably disruptive to the normal functioning of a shelter such that transfer is necessary to ensure the welfare of the unaccompanied child or others; (2) is a runaway risk, based on the criteria at proposed § 410.1107; (3) has displayed a pattern of severity of behavior, either prior to entering ORR custody or while in ORR care, that requires an increase in supervision by trained staff; (4) has a non-violent criminal or delinquent history not warranting placement in a secure facility, such as isolated or petty offenses as described previously; or (5) is assessed as ready for step-down from a secure facility, including an RTC. ORR believes that each of these proposed criteria identifies pertinent background and behavioral concerns that may warrant heightened supervision, rather than placement in a secure facility, including an RTC, consistent with the purpose of heightened supervision facilities.

Proposed § 410.1105(c) sets forth the criteria ORR would consider for placing an unaccompanied child in an RTC, as defined at proposed § 410.1001. ORR would place an unaccompanied child at an RTC only if it is the least restrictive setting that is in the best interest of the unaccompanied child and appropriate to the unaccompanied child’s age and individualized needs, consistent with the TVPRA at 8 U.S.C. 1232(c)(2)(A) (“an unaccompanied alien child shall be promptly placed in the least restrictive setting that is in the best interest of the child.”). Similar to other secure facilities and heightened supervision facilities, ORR proposes that an unaccompanied child may be placed at an RTC both as an initial placement upon referral from another agency or department of the Federal Government, and upon transfer from another care provider facility. In addition, ORR proposes at § 410.1105(c)(1) that unaccompanied children who have serious mental or behavioral health issues may be placed in an RTC only if the unaccompanied child is evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child’s case file or referral documentation by a licensed psychologist or psychiatrist that an RTC is appropriate. This requirement is consistent with the factors the Secretary of HHS may consider under the TVPRA at 8 U.S.C. 1232(c)(2)(A) in making placement determinations for unaccompanied children and was also included in the 2019 Final Rule at § 410.203(a)(4).⁷² ORR also notes that when it determines whether placement in an RTC, or any care provider facility is appropriate, it considers the best interests not only of the unaccompanied child being placed, but also the best interests of other unaccompanied children who are housed at the proposed receiving care provider facility, including their safety and well-being. ORR believes it is authorized to consider these factors under the TVPRA.⁷³ ORR also considers the safety of care provider facility staff when making placement determinations for

⁷² See also Order Re Plaintiffs’ Motion to Enforce Class Action Settlement at *11, *Flores vs. Sessions*, No. 2:85-cv-04544, (C.D. Cal. Jul. 30, 2018), ECF No. 470 (ordering ORR to transfer all unaccompanied children placed at a particular RTC out of that facility unless a licensed psychologist or psychiatrist determined that a particular child posed a risk of harm to self or others).

⁷³ 8 U.S.C. 1232(c)(2)(A) (“In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight.”).

unaccompanied children, consistent with its duty to oversee the infrastructure and personnel of facilities in which unaccompanied children reside.⁷⁴ For an unaccompanied child with one or more disabilities, consistent with section 504 of the Rehabilitation Act, 29 U.S.C. 794(a), the determination whether to place the unaccompanied child in an RTC would need to consider whether reasonable modifications to policies, practices, and procedures in the unaccompanied child’s current placement or any provision of auxiliary aids or services, could sufficiently reduce the danger to the child or others. However, ORR is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. Finally, consistent with its existing policies, ORR proposes at § 410.1105(c)(1) that it would use the criteria for placement in a secure facility described at proposed § 410.1105(a) to assess whether the unaccompanied child is a danger to self or others. ORR believes that it is appropriate to apply these criteria in making this assessment in the context of RTC placement, because all secure facilities (including RTCs) are intended for unaccompanied children who pose a danger to self and others (although RTCs are intended for unaccompanied children who also have a serious mental health or behavioral health issue that warrants placement in an RTC).

Consistent with existing policies, under proposed § 410.1105(c)(2), ORR would be able to place an unaccompanied child at an out-of-network (OON) RTC when a licensed clinical psychologist or psychiatrist consulted by ORR or a care provider facility has determined that the unaccompanied child requires a level of care only found in an OON RTC (either because the unaccompanied child has identified needs that cannot be met within the ORR network of RTCs or no placements are available within ORR’s network of RTCs), or that an OON RTC would best meet the unaccompanied child’s identified needs. Also consistent with existing policies, in these circumstances, even though an unaccompanied child would be physically located at the OON RTC, the unaccompanied child would remain in ORR legal custody. ORR would monitor the unaccompanied child’s progress and ensure the unaccompanied child is receiving required services. OON RTCs are vetted prior to placement via state licensing authorities to ensure that the program is in good standing and is

⁷⁴ See 6 U.S.C. 279(b)(1)(G).

complying with all applicable state welfare laws and regulations and state and local building, fire, health, and safety codes. ORR also may confer with other Federal agencies and non-governmental stakeholders (e.g., the protection and advocacy (P&A) systems) when vetting OON RTCs to determine, in its discretion, the appropriateness of such OON RTCs for placement of unaccompanied children. ORR appreciates that P&As may have valuable information relating to the vetting process because they may have prior experience with certain facilities with respect to their past care and treatment of individuals with disabilities (e.g., findings of abuse and neglect, compliance issues).

Under proposed § 410.1105(c)(3), the criteria for placement in or transfer to an RTC would also apply to transfers to or placements in OON RTCs (that is, the clinical criteria considered in placing an unaccompanied child at an RTC level of care would not change regardless of whether the RTC is in ORR's network or OON). Proposed § 410.1105(c)(3) would also permit care provider facilities to request that ORR transfer certain unaccompanied children to RTCs. Proposed § 410.1601(d), discussed later in this preamble, further addresses when a care provider facility may make such a request.

Section 410.1106 Unaccompanied Children Who Need Particular Services and Treatment

Proposed § 410.1106 would codify the requirements for ORR when placing unaccompanied children assessed to have a need for particular services, equipment, and treatment by staff. This section satisfies and updates paragraph 7 of the FSA, which requires ORR to assess unaccompanied children to determine if they have "special needs," and, if so, to place such unaccompanied children, whenever possible, in licensed programs in which ORR places unaccompanied children without "special needs," but which provide services and treatment for such "special needs." As indicated by the definition for "special needs unaccompanied child" from the FSA and included above at proposed § 410.1001, an unaccompanied child is considered to have "special needs" if ORR determines that the unaccompanied child has a mental and/or physical condition that requires particular services and treatment by staff. ORR may determine that an unaccompanied child needs particular services and treatment by staff for a variety of reasons including, but not limited to, those delineated within the definition of "special needs

unaccompanied child" and specified in paragraph 7 of the FSA. For this reason, ORR is proposing this section without limiting its scope to "special needs unaccompanied child." ORR notes that an unaccompanied child may need particular services and treatment due to a disability, as defined at proposed § 410.1001, but not all unaccompanied children with disabilities necessarily require particular services and treatment by staff. Likewise, an unaccompanied child does not need to have been identified as having a disability to be determined to require particular services and treatment to meet their individualized needs.

To avoid confusion, ORR refers in this section to unaccompanied children with individualized needs rather than using the outdated "special needs" terminology found in the FSA at paragraph 7. As noted above regarding proposed § 410.1103, the term "special needs" has created confusion and may imply that in determining placement, ORR considers only a limited range of needs that fall within a special category. Instead, in assessing the appropriate placement of an unaccompanied child, ORR considers any need it becomes aware of that is specific to each unaccompanied child being assessed, regardless of the nature of that need. The examples provided in this section of individualized needs that may require particular services, equipment, and treatment by staff are illustrative, and not exhaustive. Furthermore, as also discussed above at proposed §§ 410.1001 and 410.1103, ORR is concerned about using the term "special needs" given its association as a placeholder or euphemism for disability whereas this section does not apply only to unaccompanied children with disabilities who require particular services and treatment.

ORR also notes that this section incorporates the preference for inclusive placements that serve unaccompanied children with a diversity of needs, including the need for particular services or treatments, whenever possible, as provided in paragraph 7 of the FSA, and particular equipment. This section is distinct from, but in alignment with, HHS' implementing regulation for section 504 of the Rehabilitation Act of 1973 at 45 CFR 85.21(d) that prohibits discrimination on the basis of disability by requiring that the agency administer programs and activities in the most integrated setting appropriate to the needs of individuals with disabilities. The most integrated setting appropriate to the needs of an individual with a disability is a setting that enables individuals with

disabilities to interact with individuals without disabilities to the fullest extent possible.⁷⁵

Section 410.1107 Considerations When Determining Whether an Unaccompanied Child Is a Runaway Risk for Purposes of Placement Decisions

Proposed § 410.1107 would codify factors that ORR considers in determining whether an unaccompanied child is a runaway risk for purposes of placement decisions. As described in § 410.1001, the FSA and ORR policy currently use the term "escape risk," and ORR proposes in this proposed rule to update the terminology to "runaway risk" and also proposes to update the definition provided in the FSA. ORR notes that the TVPRA provides that HHS "may" consider "risk of flight," among other factors, when making placement determinations.⁷⁶ As proposed, ORR would interpret "risk of flight," which is used in immigration law regarding an individual's risk of not appearing for their immigration proceedings, as including runaway risk. In its discretion, ORR considers these runaway risk factors when evaluating whether to transfer an unaccompanied child to another care provider facility, in accordance with proposed § 410.1601. For example, an unaccompanied child may be transferred from a non-secure level of care to a heightened supervision facility where there is higher staff ratio and a secure perimeter (stepped up) if ORR determines the unaccompanied child is a runaway risk in accordance with proposed § 410.1107.

Proposed § 410.1107(a) through (c) would codify the risk factors to consider when evaluating whether an unaccompanied child is a runaway risk for purposes of placement. These factors are consistent with paragraph 22 of the FSA, which are also included in the 2019 Final Rule at § 410.204. Specifically, ORR proposes it would consider the following factors: (a) whether the unaccompanied child is currently under a final order of removal (i.e., the unaccompanied child has a legal duty to report for deportation); (b) whether the unaccompanied child's immigration history includes: (1) a prior

⁷⁵ 53 FR 25591, 25600 (July 8, 1988).

⁷⁶ 8 U.S.C. 1232(c)(2)(A). Note that 8 U.S.C. 1232(c)(2)(A) does not list risk of flight as a ground for placing an unaccompanied child in a secure facility. Therefore, even though paragraph 21.D of the FSA states that being an escape risk (or runaway risk as proposed in this rule) is a ground upon which ORR may place an unaccompanied child in a secure facility, ORR does not propose in this rule that runaway risk is a basis for placement in a secure facility.

breach of bond, (2) a failure to appear before DHS or the immigration court, (3) evidence that the unaccompanied child is indebted to organized smugglers for their transport, or (4) a previous removal from the U.S. pursuant to a final order of removal; and (c) whether the unaccompanied child has previously absconded or attempted to abscond from state or Federal custody. ORR notes that under paragraph 22(B) of the FSA, a voluntary departure from the U.S. by the unaccompanied child is also a risk factor. Based on ORR's experience in placing an unaccompanied child, ORR proposes not to codify whether the child's immigration history includes a voluntary departure because this factor has not been relevant in determining whether the child is a runaway risk.

ORR notes that paragraph 22 of the FSA provides a non-exhaustive list of factors to consider when evaluating runaway risk.^{77 78} Consistent with this language, as well as with ORR's authority generally to consider runaway risk in making placement determinations, ORR proposes additional factors at § 410.1107(d) and (e) for ORR to consider when determining whether an unaccompanied child is a runaway risk for purposes of placement decisions. Proposed § 410.1107(d) would require ORR to consider whether the unaccompanied child has displayed behaviors indicative of flight or has expressed intent to run away. Under proposed § 410.1107(e), ORR would consider evidence that the unaccompanied child is indebted to, experiencing a strong trauma bond to, or is threatened by a trafficker in persons or drugs, in determining whether the unaccompanied child is a runaway risk. ORR developed this proposal through its practical experience of making runaway risk placement decisions and believes it is appropriate to add as an additional factor to consider. ORR seeks public comment on these proposed factors and welcomes feedback on other factors ORR should or should not consider when determining if an unaccompanied child is a runaway risk for purposes of placement decisions.

Section 410.1108 Placement and Services for Children of Unaccompanied Children

At proposed § 410.1108, ORR proposes the requirements for the placement of children of

unaccompanied children and services they would receive while in ORR care. ORR believes that when unaccompanied children are parents of children, it is in the best interests of the children to be placed in the same facility as their unaccompanied children parents. Accordingly, ORR proposes at § 410.1108(a) to codify its existing policy that it will place unaccompanied children and their children together at the same care provider facilities, except in unusual or emergency situations. ORR considered limiting this proposal to the biological children of unaccompanied children; however, at the time of intake and placement, it may not be known whether the children are the biological children of the unaccompanied children. Accordingly, ORR proposes to not limit this proposal to the biological children of unaccompanied children and instead proposes broader language to allow for flexibility in placing unaccompanied children and their children to account for other situations (for example, the unaccompanied child may not be the biological parent of a child but is the child's caretaker).

Consistent with existing policy, and with its responsibility to consider the best interests of children in making placement decisions, ORR proposes that unusual or emergency situations would include, but not be limited to: hospitalization or need for a specialized care or treatment setting that cannot provide appropriate care for the child of the unaccompanied child; a request by the unaccompanied child for alternate placement of the child of the unaccompanied child; and when the unaccompanied child is the subject of substantiated allegations of abuse or neglect against the child of the unaccompanied child (or temporarily in urgent cases where there is sufficient evidence of child abuse or neglect warranting temporary separation for the child's protection). ORR proposes to codify these requirements into regulation at § 410.1108(a)(1) through (3).

ORR is aware that children of unaccompanied children may not be unaccompanied children within the definition provided in the HSA at 6 U.S.C. 279(g)(2). For example, a child born in the United States will likely be a U.S. citizen at birth under section 1401(a) of the Immigration and Nationality Act, 8 U.S.C. 1401(a), and the U.S. Constitution, as amended, XIV section 2. Additionally, a noncitizen child who is in the custody of a parent who is an unaccompanied child who is available to provide care and physical custody, is not an unaccompanied child.

ORR understands that it has custody of the unaccompanied child, consistent with its statutory authorities, and that the unaccompanied child has custody of their child. Under the proposed rule, ORR would not seek to place the parent and child in different facilities or shelters except in the limited circumstances noted above. ORR understands this to be consistent with its responsibility to consider the interests of unaccompanied children.⁷⁹ If the child who is in the custody of their unaccompanied child parent has another parent who is a citizen present in the U.S., ORR would consider whether it is in the best interests of the child to place the child with the unaccompanied child parent or the parent who is a U.S. citizen. ORR requests comments regarding this interpretation of its authorities under the TVPRA and the HSA, because neither statute expressly contemplates scenarios where an unaccompanied child is a parent.

Proposed § 410.1108(b) describes requirements for providing services to children of unaccompanied children while in ORR care. Under proposed § 410.1108(b)(1), children of unaccompanied children would receive the same care and services as ORR provides to the unaccompanied children, as appropriate, regardless of the children's immigration or citizenship status. Additionally, U.S. citizen children of unaccompanied children would be eligible for mainstream public benefits and services to the same extent as other U.S. citizens (for example, Medicaid). Application(s) for public benefits and services shall be submitted on behalf of the U.S. citizen children of unaccompanied children by the care provider facilities. This may include, but is not limited to, helping file for birth certificates or other legal documentation as necessary. Further, under proposed § 410.1108(b)(2), utilization of those public benefits and services should be exhausted to the greatest extent practicable for U.S. citizen children of unaccompanied children before ORR-funded services are utilized for these children.

Section 410.1109 Required Notice of Legal Rights

In proposed § 410.1109(a), ORR would be required to promptly provide each unaccompanied child in its custody with the information described in § 410.1109(a)(1) through (3) in a

⁷⁷ See FSA at paragraph 22 ("Factors to consider when determining whether a minor is an escape-risk or not include, but are not limited to . . .").

⁷⁸ Existing § 410.204 also does not limit ORR to considering just the factors listed in the regulation and states "ORR considers, among other factors . . ."

⁷⁹ See, e.g., 6 U.S.C. 279(b)(1)(B) (making ORR responsible for "ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child").

language and manner the unaccompanied child understands. First, ORR would require, under proposed § 410.1109(a)(1), that unaccompanied children in ORR custody be promptly provided with a state-by-state list of free legal service providers compiled and annually updated by ORR and that is provided to unaccompanied children as part of a Legal Resource Guide for unaccompanied children. This proposed requirement is consistent with TVPRA at 8 U.S.C. 1232(c)(5) (requiring that HHS “ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking,” and that to the greatest extent practicable HHS “make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.”). In addition, the proposed requirement is consistent with the HSA at 6 U.S.C. 279(b)(1)(I) (requiring ORR to compile, update, and publish “at least annually a state-by-state list of professionals or other entities qualified to provide guardian and attorney representation services for unaccompanied alien children”). ORR notes that the list of free legal service providers may also be compiled and updated by an ORR contractor or grantee.

Second, under proposed § 410.1109(a)(2), ORR would also be required to provide the following explanation of the right of potential review: “ORR usually houses persons under the age of 18 in the least restrictive setting that is in an unaccompanied child’s best interest, and generally not in restrictive placements (which means secure facilities, heightened supervision facilities, or residential treatment centers). If you believe that you have not been properly placed or that you have been treated improperly, you may call a lawyer to seek assistance. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form.” This requirement updates language described in the requirement to deliver a similar notice under Exhibit 6 of the FSA,⁸⁰ to reflect

⁸⁰ Exhibit 6 of the FSA provides the following notice language: “The INS usually houses persons

current placement requirements detailed in this proposed rule. The FSA language, for example, refers to the former INS, instead of ORR, and to “detention facilities” rather than restrictive settings or placements.

ORR also proposes at § 410.1109(a)(3) that a presentation regarding their legal rights would be provided to each unaccompanied child as provided under proposed § 410.1309(a)(2). We refer readers to proposed § 410.1309(a) for additional information regarding this presentation. ORR would take appropriate steps to ensure that the information it presents to unaccompanied children is communicated effectively to individuals with disabilities, including through the provision of auxiliary aids and services as required by section 504 of the Rehabilitation Act of 1973 and HHS’ implementing regulations at 45 CFR 85.51. ORR would also take reasonable steps to ensure that individuals with limited English proficiency have a meaningful opportunity to access information and participate in ORR programs, including through the provision of interpreters or translated documents. We request comments on steps ORR should take to ensure that it provides effective communication access to unaccompanied children who are individuals with disabilities. We also request comment on steps ORR should take to ensure meaningful access to unaccompanied children who are limited English proficient regarding information about and participation in ORR programs.

Finally, under proposed § 410.1109(b), consistent with ORR’s existing policy, ORR shall not engage in retaliatory actions against legal service providers or any other practitioner because of advocacy or appearance in an action adverse to ORR. ORR proposes this text, notwithstanding the general presumption that government agencies and officials act with integrity and regularity,⁸¹ to further express ORR’s intent to promote and protect unaccompanied children’s ability to access legal counsel. For discussion regarding the availability of administrative review of ORR placement decisions, ORR refers readers to

under the age of 18 in an open setting, such as a foster or group home, and not in detention facilities. If you believe that you have not been properly placed or that you have been treated improperly, you may ask a federal judge to review your case. You may call a lawyer to help you do this. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form.”

⁸¹ See, e.g., *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

proposed subpart J of this proposed rule.

Subpart C—Releasing an Unaccompanied Child From ORR Custody

Section 410.1200 Purpose of This Subpart

This proposed subpart regards ORR’s policies and procedures regarding release, without unnecessary delay, of an unaccompanied child from ORR custody to a vetted and approved sponsor. Release is defined in subpart A as the ORR-approved transfer of an unaccompanied child from ORR care and custody to a vetted and approved sponsor in the United States. Accordingly, release does not include discharge for other reasons, including but not limited to those such as the child turning 18, attaining legal immigration status, or being removed to their home country.

As discussed in this proposed subpart, once an unaccompanied child is released by ORR to a sponsor, that unaccompanied child is no longer in ORR’s custody. The TVPRA distinguishes minors in HHS custody from those released to “proposed custodians” determined by ORR to be “capable of providing for the child’s physical and mental well-being.”⁸² In addition, under the FSA, once an unaccompanied child is released to a sponsor, the sponsor assumes custody.⁸³ This subpart includes the proposed process for determining that sponsors are able to care for the child’s physical and mental well-being.

Subpart C also proposes notice and appeal processes and procedures that certain potential sponsors will be afforded. This NPRM proposes that parents or legal guardians of an unaccompanied child who are denied sponsorship of that unaccompanied child be afforded the ability to appeal such denials. Because issues relating to procedures for non-parent relatives are currently in litigation in the *Lucas R.* case, they are not part of this rulemaking.

Section 410.1201 Sponsors to Whom ORR Releases an Unaccompanied Child

Proposed § 410.1201 describes sponsors to whom ORR may release an unaccompanied child and criteria that

⁸² 8 U.S.C. 1232(c)(3)(A).

⁸³ See, e.g., FSA at paragraph 15 (requiring sponsors to sign an Affidavit of Support and an agreement to, among other things, provide for the unaccompanied child’s physical, mental, and financial well-being); see also paragraph 19 (noting that in any case where an unaccompanied child is not released to a sponsor, the unaccompanied child “shall remain in INS legal custody.”).

ORR employs when assessing a potential sponsor. As discussed, the HSA makes ORR responsible for making and implementing placement determinations for unaccompanied children.⁸⁴ In addition to these statutory requirements, the FSA establishes a general policy favoring release of unaccompanied children to sponsors, and further describes a preferred order of release, which ORR follows as a matter of policy.⁸⁵

Consistent with its statutory authority and the FSA, proposed § 410.1201(a) lists potential sponsors in order of release preference. ORR notes that this order of preference reflects its strong belief that, generally, placement with a vetted and approved family member or other vetted and approved sponsor, as opposed to in an ORR care provider facility, whenever feasible, is in the best interests of unaccompanied children. Proposed § 410.1201(a) would therefore codify the following order of preference for release of unaccompanied children: (1) to a parent; (2) to a legal guardian; (3) to an adult relative; (4) to an adult individual or entity, designated by the parent or legal guardian as capable and willing to care for the unaccompanied child's well-being through a declaration signed by the parent or legal guardian under penalty of perjury before an immigration or consular officer, or through such other document(s) that establish(es) to the satisfaction of ORR, in its discretion, the affiant's maternity, paternity, or guardianship; (5) to a standard program willing to accept legal custody of the unaccompanied child; or (6) to an adult individual or entity seeking custody, in the discretion of ORR, when it appears that there is no other likely alternative to long term custody and release to family members does not appear to be a reasonable possibility. Possible scenarios in which ORR envisions (6) may be applicable include, for example, foster parents or other adults who have built or are building a relationship with an unaccompanied child while in ORR care, such as a teacher or coach, and in which it is possible to ensure that a healthy and viable relationship exists between the unaccompanied child and proposed sponsor. Proposed § 410.1202, discussed below, describes ORR's proposed sponsor suitability assessment process, which includes an assessment of the potential sponsor's previous and existing relationship with the unaccompanied child.

Under proposed § 410.1201(b), consistent with existing policy, ORR would not disqualify potential sponsors based solely on their immigration status. In addition, ORR proposes that it shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes. ORR will not share any immigration status information relating to potential sponsors with any law enforcement or immigration related entity at any time. To the extent ORR does collect information on the immigration status of a potential sponsor, it would be only for the purposes of evaluating the potential sponsor's ability to provide care for the child (*e.g.*, whether there is a plan in place to care for the child if the potential sponsor is undocumented and detained).

Proposed § 410.1201(c) provides that, in making determinations regarding the release of unaccompanied children to potential sponsors, ORR shall not release unaccompanied children on their own recognizance.

Section 410.1202 Sponsor Suitability

Before releasing an unaccompanied child to a sponsor, ORR has a responsibility to ensure that the sponsor has been determined to be able to care for the child's physical and mental wellbeing and has not engaged in activity that would indicate a potential risk to the child.⁸⁶ Further, under the FSA, ORR may require a positive result in a suitability assessment of an individual or program prior to releasing an unaccompanied child to that entity, which may include an investigation of the living conditions in which the unaccompanied child would be placed and the standard of care the child would receive, verification of the identity and employment of the individuals offering support, interviews of members of the household, and a home visit. The FSA also provides that any such assessment should also take into consideration the wishes and concerns of the minor. ORR believes that this assessment of suitability may also include review of past criminal history, if any, and fingerprinting, as discussed subsequently in this section.

Consistent with statutory authorities and the FSA, and with existing policy, proposed § 410.1202(a) would require potential sponsors to complete an application package to be considered as a sponsor for an unaccompanied child. Application packages, in the potential sponsor's native or preferred language,

would be able to be obtained from either the care provider facility or from ORR directly to ensure sponsors have access to the application.

Also consistent with existing policy, proposed § 410.1202(b) establishes that suitability assessments will be conducted for all sponsors prior to release of a child to a potential sponsor and describes the minimum requirements for a suitability assessment. Consistent with ORR's responsibilities under 8 U.S.C. 1232(c)(3)(A), and with its current policies, suitability assessments would, at minimum, consist of review of the proposed sponsor's application package described in § 410.1202(a), including verification of the proposed sponsor's identity and the proposed sponsor's relationship to the child. ORR may consult with the issuing agency (*e.g.*, consulate or embassy) of the sponsor's identity documentation to verify the validity of the sponsor identity document presented and may also conduct a background check on the proposed sponsor.

Proposed § 410.1202(c) through (i) describe additional requirements or discretionary provisions related to completion of a suitability assessment. These proposed requirements are in addition to those described at 8 U.S.C. 1232(c)(3)(A) (describing "minimum" requirements for suitability assessments), and ORR proposes them consistent with its authority to implement policies with respect to the care and placement of unaccompanied children as described at 6 U.S.C. 279(b)(1)(E). Proposed § 410.1202(c) would provide ORR the discretion to evaluate the overall living conditions into which the unaccompanied child would be placed upon release to the potential sponsor. Proposed paragraph (c) therefore provides that ORR may interview members of the potential sponsor's household, conduct a home visit or home study pursuant to proposed § 410.1204, and conduct background and criminal records checks, which may include biometric checks such as fingerprint-based criminal record checks on a potential sponsor and on adult household members, consistent with the TVPRA requirement to make an independent finding that the proposed sponsor has not engaged in any activity that would indicate a potential risk to the child. Proposed § 410.1202(c) also permits ORR to verify the employment, income, or other information provided by the individuals offering support. The TVPRA at 8 U.S.C. 1232(c)(3) does not require a verification of the sponsor's employment. However, ORR is

⁸⁴ See 6 U.S.C. 279(b)(1). See also 8 U.S.C. 1232(c)(2)(A).

⁸⁵ See FSA at paragraph 14.

⁸⁶ See 8 U.S.C. 1232(c)(3)(A). See also FSA paragraph 17.

proposing to include this as a permissible consideration as part of the suitability assessment to ensure sponsors can show they have resources to provide for the child's physical and mental well-being. Although ORR believes this information may be relevant, it will not automatically deny an otherwise qualified sponsor solely on the basis of low income or employment status (either formal or informal). Finally, proposed § 410.1202(c) establishes that any suitability assessment also take into consideration the wishes and concerns of the unaccompanied child, consistent with FSA paragraph 17.

As part of a suitability assessment and determining whether a proposed sponsor can care for not just an unaccompanied child's physical well-being but also an unaccompanied child's mental well-being, ORR proposes to include additional assessment components to evaluate the environment into which the unaccompanied child may be placed. Under proposed § 410.1202(d), ORR would assess the nature and extent of the sponsor's previous and current relationship with the unaccompanied child and, if applicable, the child's family. ORR proposes that it would be able to deny release of an unaccompanied child to unrelated sponsors who have no pre-existing relationship with the child or the child's family prior to the child's entry into ORR custody. ORR intends that this proposed language be read consistently with proposed § 410.1201(a)(4), such that ORR may release an unaccompanied child to an individual with no pre-existing relationship with the child if the individual is designated by the child's parent or legal guardian, but ORR would not be required to do so. Additionally, under proposed § 410.1202(e), ORR would consider the sponsor's motivation for sponsorship; the opportunity for the potential sponsor and unaccompanied child to have the opportunity to build a healthy relationship while the child is in ORR care; the unaccompanied child's preferences and perspective regarding release to the sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the sponsor, as applicable.

Proposed § 410.1202(f) specifies an unaccompanied child's risks or specific, individual concerns that should be evaluated in conjunction with ORR's evaluation of the child's current functioning and strengths. ORR proposes that these shall include risks or concerns such as: (1) whether the unaccompanied child is a victim of sex

or labor trafficking or other crime, or is considered to be at risk for such trafficking due, for example, to observed or expressed current needs, *e.g.*, expressed need to work or earn money because of indebtedness or financial hardship; (2) the child's history of involvement with the criminal justice system or juvenile justice system (including evaluation of the nature of the involvement, for example, whether the child was adjudicated and represented by counsel, and the type of offense), or gang involvement; (3) the child's history of behavioral issues; (4) the child's history of violence; (5) any individualized needs, including those related to disabilities or other medical or behavioral/mental health issues; (6) the child's history of substance use; and/or (7) the child is either a parent or is pregnant.

In proposed § 410.1202(g), ORR establishes a non-exhaustive list of factors that it would consider when evaluating a potential sponsor's ability to ensure the physical or mental well-being of a child. ORR proposes it would consider the potential sponsor's strengths and resources in conjunction with any risks or concerns including: (1) the potential sponsor's criminal background; (2) the potential sponsor's current illegal drug use or history of abuse or neglect; (3) the physical environment of the home; and/or (4) other child welfare concerns. ORR notes that the term "other child welfare concerns" is intentionally broad to allow for discretion and notes that the term may include the wellbeing of any other unaccompanied children currently or previously under the potential sponsor's care. Pursuant to section 504 of the Rehabilitation Act and HHS' implementing regulations at 45 CFR part 85, ORR notes that it shall not discriminate against a qualified individual with a disability when evaluating their ability to serve as a sponsor. In addition, ORR notes that it does not consider these listed risks or concerns as necessarily disqualifying to potential sponsorship; however, in keeping with its responsibility to ensure the best interest of the child, ORR must assess the extent to which any of these risks or concerns could be detrimental to or seriously impede a potential sponsor's ability to care for the unaccompanied child and the possibility of safe release given thorough consideration of the sponsor's specific situation and adaptation of a release plan to ensure the unaccompanied child's well-being pursuant to proposed § 410.1202(i).

Under proposed § 410.1202(h), ORR would assess the potential sponsor's

understanding of the unaccompanied child's needs, plan to provide the child with adequate care, supervision, and housing, understanding and awareness of responsibilities related to compliance with the UC's immigration court proceedings, school attendance, and U.S. child labor laws and awareness of and ability to access community resources.

Finally, under proposed § 410.1202(i), ORR would develop a release plan that could enable a safe release to the potential sponsor through the provision of post-release services, if needed.

Section 410.1203 Release Approval Process

Section 410.1203 proposes ORR's process for approving an unaccompanied child's release. Proposed § 410.1203(a) reflects the FSA requirement that ORR makes and records timely and continuous efforts towards safe and timely release of unaccompanied children. These efforts include intakes and admissions assessments and the provision of ongoing case management services to identify potential sponsors.

Under proposed § 410.1203(b), if a potential sponsor is identified, ORR would provide an explanation to both the unaccompanied child and the potential sponsor of the requirements and procedures for release.

Proposed § 410.1203(c) details the information that a potential sponsor must provide to ORR in the required sponsor application package for release of the unaccompanied child. Proposed information requirements include supporting information and documentation regarding: the sponsor's identity; the sponsor's relationship to the child; background information on the potential sponsor and the potential sponsor's household members; the sponsor's ability to provide care for the child; and the sponsor's commitment to fulfill the sponsor's obligations in the Sponsor Care Agreement. The Sponsor Care Agreement, which shall be made available in a potential sponsor's native or preferred language pursuant to proposed § 410.1306(f), requires a potential sponsor to commit to: (1) provide for the unaccompanied child's physical and mental well-being; (2) ensure the unaccompanied child's compliance with DHS and immigration courts' requirements; (3) adhere to existing Federal and applicable state child labor and truancy laws; (4) notify DHS, EOIR at the Department of Justice, and other relevant parties of changes of address; (5) provide notice of initiation of any dependency proceedings or any risk to the unaccompanied child as

described in the Sponsor Care Agreement; and (6) in the case of sponsors other than parents or legal guardians, notify ORR of a child moving to another location with another individual or change of address. This provision also proposes that in the event of an emergency (for example, a serious illness or destruction of the sponsor's home), a sponsor may transfer temporary physical custody of the unaccompanied child, but the sponsor must notify ORR as soon as possible and no later than 72 hours after the transfer. ORR notes that this departs from the 2019 Final Rule and the FSA to the extent that ORR is not proposing to require the sponsor to seek ORR's permission to transfer custody of the unaccompanied child. This departure reflects that ORR does not retain legal custody of an unaccompanied child after the child is released to a sponsor; however, ORR retains an interest in knowing this information for the provision of post-release services, tracking concerns related to potential trafficking, and for potential future sponsor assessments should the child's sponsor step forward to sponsor a different child.⁸⁷

Under proposed § 410.1203(d), ORR would conduct a sponsor suitability assessment consistent with the requirements of proposed § 410.1202.

Under proposed § 410.1203(e), consistent with existing policies, ORR would not release an unaccompanied child to any person or agency it has reason to believe may harm or neglect the unaccompanied child, or that it has reason to believe will fail to present the unaccompanied child before DHS or the immigration courts when requested to do so. For example, ORR would deny release to a potential sponsor if the potential sponsor is not willing or able to provide for the unaccompanied child's physical or mental well-being; the physical environment of the home presents risks to the unaccompanied child's safety and well-being; or the release of the unaccompanied child to that potential sponsor would present a risk to him or herself or others.

Furthermore, in proposed § 410.1203(f), ORR shall educate the potential sponsor about the needs of the unaccompanied child as part of the release process and would also work with the sponsor to develop an appropriate plan to care for the unaccompanied child if the child is released to the sponsor. Such plans would cover a broad range of topics including providing the unaccompanied child with adequate care, supervision,

access to community resources, housing, and education.⁸⁸

Section 410.1204 Home Studies

The TVPRA requires a home study be performed for the release of an unaccompanied child in certain circumstances.⁸⁹ In this section of the proposed rule, therefore, ORR proposes both required and discretionary home studies depending upon specific circumstances, including for those circumstances in which the safety and well-being of the child is in question.

In proposed § 410.1204(a), ORR establishes that, as part of the sponsor suitability assessment, it may require a home study which includes an investigation of the living conditions in which the unaccompanied child would be placed, the standard of care the child would receive, and interviews with the potential sponsor and others in the sponsor's households. If ORR requires a home study, such home study shall take place prior to the child's physical release.

In § 410.1204(b), ORR proposes three circumstances in which a home study shall be required. The first is under the conditions identified in the TVPRA at 8 U.S.C. 1232(c)(3)(B): "a home study shall be conducted for a child who is a victim of a severe form of trafficking in persons, a special needs child with a disability (as defined in section 12102 of title 42), a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child

⁸⁸ Regarding education, ORR understands that under the laws of every state, children up to a certain age must attend school and have a right to attend public school. Public schools may not refuse to enroll children, including unaccompanied children, because of their (or their parents or sponsors') immigration status or race, color, or national origin. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (finding that under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, a State may not deny access to a basic public education to any child residing in the State, whether present in the United States legally or otherwise). Additionally, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and the Equal Educational Opportunity Act of 1974, 20 U.S.C. 1701 *et seq.*, prohibit public schools from discriminating on the basis of race, color, or national origin. ORR also understands that school districts may not insist on documentation requirements that effectively prevent enrollment of an unaccompanied child. See 42 U.S.C. 2000d; see also U.S. Dep't of Justice, Civil Rights Division & U.S. Dep't of Education, Office for Civil Rights, *Information on the Rights of All Children to Enroll in School: Questions and Answers for States, School Districts and Parents*, Answers 3, 5, 7, and 8 (rev. May 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201405.pdf>.

⁸⁹ See 8 U.S.C. 1232(c)(3)(B).

based on all available objective evidence."

Consistent with existing policy, ORR also proposes other circumstances in which it would require a home study. The second circumstance in which a home study is proposed to be required is before releasing any child to a non-relative sponsor who is seeking to sponsor multiple children, or who has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children. The third circumstance in which a home study is proposed to be required is before releasing any child who is 12 years old or younger to a non-relative sponsor. ORR believes that these latter two categories are consistent with the statutory requirement that HHS determine that a proposed sponsor "is capable of providing for the child's physical and mental well-being,"⁹⁰ to "establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity."⁹¹

Under proposed § 410.1204(c), ORR would have the discretion to initiate home studies if it determines that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child.

Under proposed § 410.1204(d), the care provider would inform a potential sponsor whenever it plans to conduct a home study, explain the scope and purpose of the study to the potential sponsor, and answer questions the potential sponsor has about the process. In addition, under this proposed paragraph, the home study would provide its report to the potential sponsor if the release request is denied, as well as any subsequent addendums if created.

Finally, proposed § 410.1204(e) establishes that an unaccompanied child for whom a home study is conducted shall receive post-release services as described at § 410.1210. This requirement would be consistent with 8 U.S.C. 1232(c)(3)(B), which states that "The Secretary of Health and Human Services 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

⁹⁰ 8 U.S.C. 1232(c)(3)(A).

⁹¹ 8 U.S.C. 1232(c)(1).

⁸⁷ See, e.g., 6 U.S.C. 279(b)(2).

services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.”

Section 410.1205 Release Decisions; Denial of Release to a Sponsor

Proposed § 410.1205 would provide guidance for situations in which ORR denies the release of an unaccompanied child to a potential sponsor. Under proposed § 410.1205(a), a sponsorship would be denied if, as part of the sponsor assessment process described at proposed § 410.1202 or the release process described at proposed § 410.1203, ORR determines that the proposed sponsor is not capable of providing for the physical and mental well-being of the unaccompanied child or that the placement would result in danger to the unaccompanied child or the community.

Under proposed § 410.1205(b), if ORR denies release of an unaccompanied child to a potential sponsor who is a parent or legal guardian, ORR must notify the parent or legal guardian of the denial in writing. Such Notification of Denial letter would include: (1) an explanation of the reason(s) for the denial; (2) evidence and information supporting ORR's denial decision, including the evidentiary basis for the denial; (3) instructions for requesting an appeal of the denial; (4) notice that the potential sponsor may submit additional evidence, in writing before a hearing occurs, or orally during a hearing; (5) notice that the potential sponsor may present witnesses and cross-examine ORR's witnesses, if such witnesses are willing to voluntarily testify; and (6) notice that the potential sponsor may be represented by counsel in proceedings related to the release denial at no cost to the Federal Government. Relatedly, in § 410.1205(c), ORR proposes that if a potential sponsor who is the unaccompanied child's parent or legal guardian is denied, ORR shall inform the unaccompanied child, the child advocate, and the unaccompanied child's attorney of record or EOIR accredited representative (or if the unaccompanied child has no attorney of record or EOIR accredited representative, the local legal service provider) of that denial.

ORR proposes in § 410.1205(d) that if the sole reason for denial of release is a concern that the unaccompanied child is a danger to themselves or the community, ORR must send the unaccompanied child a copy of the Notification of Denial letter, in a language that the child understands, described at § 410.1205(b). If the potential sponsor who has been denied

is the unaccompanied child's parent or legal guardian and is not already seeking appeal of the decision, the unaccompanied child may appeal the denial.

Proposed § 410.1205(e) recognizes that unaccompanied children may have the assistance of counsel, at no cost to the Federal Government, with respect to release or the denial of release to a proposed sponsor.

ORR notes that as part of the *Lucas R.* litigation, it is currently subject to a preliminary injunction that includes certain requirements regarding notification and appeal rights for individuals who have applied to sponsor unaccompanied children, including potential sponsors who are not an unaccompanied child's parent or legal guardian. ORR is complying with the requirements of applicable court orders and has issued sub-regulatory policy guidance to do so. Once the *Lucas R.* litigation is resolved, ORR will evaluate whether further rulemaking is warranted.

Section 410.1206 Appeals of Release Denials

Proposed § 410.1206 would establish procedures for parents and legal guardians of unaccompanied children to appeal a release denial. ORR is responsible for making and implementing placement determinations for unaccompanied children and must do so in a manner that protects the best interest of the unaccompanied children, including ensuring they are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.⁹² ORR also recognizes the strong interest of parents and legal guardians in custody of their children. Consistent with its statutory responsibilities and existing policy, ORR proposes to create an administrative appeal process for parents and legal guardians who are denied sponsorship of an unaccompanied child. Subject to the availability of resources, as determined by ORR, ORR may consider providing language services to parents and legal guardians during the appeals process, if the parent or guardian is unable to obtain such services on their own.

Section 410.1206(a) proposes that parents and legal guardians of unaccompanied children who are denied sponsorship by ORR may seek an appeal of ORR's decision by submitting a written request to the

Assistant Secretary of ACF or the Assistant Secretary's neutral and detached designee.

Proposed § 410.1206(b) would provide that parents and legal guardians of unaccompanied children who are denied sponsorship by ORR may seek an appeal either with or without a hearing and pursuant to processes described by ORR in agency guidance. ORR proposes that the Assistant Secretary or their neutral and detached designee will acknowledge the request for appeal within a reasonable time.

Additionally, proposed § 410.1206(c) establishes a procedure for the unaccompanied child to also appeal a release denial if the sole reason for denial is a concern that the unaccompanied child poses a danger to self or others. In such a case, ORR proposes that the unaccompanied child may seek an appeal of the denial as described in § 410.1206(a). If the unaccompanied child expresses a desire to appeal, the unaccompanied child may consult with their attorney of record or a legal service provider for assistance with the appeal. The unaccompanied child may seek such appeal at any time after denial of release while still in ORR custody.

Section 410.1207 Ninety (90)-Day Review of Pending Release Applications

In the interest of the timely and efficient placement of unaccompanied children with sponsors, proposed § 410.1207 describes a process to review release applications that have been pending for 90 days. Consistent with existing policy, proposed § 410.1207(a) would require ORR Federal staff, who supervise case management services performed by ORR grantees and contractors, to review all pending sponsor applications or Family Reunification Packets (FRP) for unaccompanied children who have been in ORR custody for 90 days after submission of the sponsor application or FRP in order to identify and resolve the reasons that a release application remains pending in a timely manner, as well as to determine possible steps to accelerate the children's safe release.

Proposed § 410.1207(b) would establish that, upon completion of the review, UC Program case managers or other designated agency or care provider staff must update the potential sponsor and unaccompanied child on the status of the case and explain the reasons that the release process is incomplete. ORR proposes that UC Program case managers or other designated agency or care provider staff would work with the potential sponsor, relevant stakeholders, and ORR to address the portions of the

⁹² See generally 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(c).

sponsorship application or FRP that remain unresolved.

Further, to ensure that timeliness of placement remains a priority, for cases that are not resolved after the initial 90-Day Review, ORR proposes that ORR Federal staff supervising the case management process would conduct additional reviews at least every 90 days until the pending sponsor application or FRP is resolved as described in § 410.1207(c).

Section 410.1208 ORR's Discretion To Release an Unaccompanied Child to the Unaccompanied Refugee Minors Program

Proposed § 410.1208 describes specific eligibility criteria for release of an unaccompanied child to the Unaccompanied Refugee Minors (URM) Program. The TVPRA permits ORR to place unaccompanied children in a URM Program, pursuant to section 412(d) of the Immigration and Nationality Act, if a suitable family member is not available to provide care.⁹³ Proposed § 410.1208(a) states that an unaccompanied child may be eligible for services through the ORR Unaccompanied Refugee Minors (URM) Program, including unaccompanied children in the following categories: (1) Cuban and Haitian entrant as defined in section 501 of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note and as provided for at 45 CFR 400.43; (2) an individual determined to be a victim of a severe form of trafficking as defined in 22 U.S.C. 7105(b)(1)(C); (3) an individual DHS has classified as a Special Immigrant Juvenile (SIJ) under section 101(a)(27)(f) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(27)(f), and who was either in the custody of HHS at the time a dependency order was granted for such child or who was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, at the time such dependency order was granted; (4) an individual with U nonimmigrant status under 8 U.S.C. 1101(a)(15)(U), as authorized by TVPRA, pursuant to section 1263 of the Violence Against Women Reauthorization Act of 2013, which amends section 235(d)(4) of the TVPRA to add individuals with U nonimmigrant status who were in ORR custody as unaccompanied children eligible for the URM Program; or (5) other populations of children as authorized by Congress.

With respect to unaccompanied children described in proposed paragraph (a) of this section, under

proposed § 410.1208(b), ORR would evaluate each case to determine whether it is in an unaccompanied child's best interests to be referred to the URM Program.

At proposed § 410.1208(c), ORR notes that when it discharges an unaccompanied child pursuant to this section to receive services through the URM Program, relevant requirements of the ORR Refugee Resettlement Program regulations would apply, including the requirement that the receiving entity establish legal responsibility of the unaccompanied child, including legal custody or guardianship, under state law.⁹⁴ Under proposed § 410.1208(c), until such legal custody or guardianship is established, the ORR Director would retain legal custody of the child.

Section 410.1209 Requesting Specific Consent From ORR Regarding Custody Proceedings

Proposed § 410.1209 addresses the specific consent process and is informed by the TVPRA. Specific consent is a process through which an unaccompanied child in ORR custody obtains consent from HHS to have a state juvenile court make decisions concerning the unaccompanied child's placement or custody. As relevant to this proposed section, ORR notes that the TVPRA modified section 101(a)(27)(f) of the Immigration and Nationality Act, concerning SIJ classification.⁹⁵ To obtain SIJ classification under the TVPRA modifications, a child must be declared dependent or legally committed to or placed under the custody of an individual or entity by a state juvenile court. However, an unaccompanied child in ORR custody who seeks to invoke the jurisdiction of a state juvenile court to determine or alter their custody status or placement must first receive "specific consent" from HHS to such jurisdiction. For example, if an unaccompanied child wishes to have a state juvenile court of competent jurisdiction, not HHS, decide to move them out of HHS custody and into a state-funded foster care home, the unaccompanied child must first receive

⁹⁴ See 45 CFR 400.115.

⁹⁵ See 8 U.S.C. 1101(a)(27)(f) (providing that "no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction . . ."). See also 8 U.S.C. 1232(d)(2) ("All applications for special immigrant status under section 101(a)(27)(f) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(f)) shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed.").

"specific consent" from HHS to go before the state juvenile court. If the unaccompanied child wishes to go to state juvenile court to be declared dependent in order to petition for SIJ classification (*i.e.*, receive an "SIJ-predicate order"), the unaccompanied child does not need HHS' consent. Although the TVPRA transferred authority to grant specific consent from DHS to ORR, DHS retains sole authority over the ultimate determination on SIJ classification.⁹⁶

Proposed § 410.1209(a) states that an unaccompanied child in ORR custody is required to request specific consent from ORR if the unaccompanied child seeks to invoke the jurisdiction of a state juvenile court to determine or alter the child's custody status or release from ORR custody.

Under proposed § 410.1209(b), if an unaccompanied child seeks to invoke the jurisdiction of a state juvenile court for a dependency order so that they can petition for SIJ classification or to otherwise permit a state juvenile court to establish jurisdiction regarding placement, but does not seek the state juvenile court's jurisdiction to determine or alter the child's custody status or release, the unaccompanied child would not need to request specific consent from ORR.

Proposed § 410.1209(c) through (g) explain the process to make a specific consent request to ORR. Under proposed § 410.1209(c), prior to a state juvenile court determining or altering the unaccompanied child's custody status or release from ORR, attorneys or others acting on behalf of an unaccompanied child would be required to complete a request for specific consent. ORR proposes in § 410.1209(d) that it would acknowledge receipt of the request within two business days.

ORR proposes in § 410.1209(e) that it will consider whether ORR custody is required to: (1) ensure a child's safety; or (2) ensure the safety of the community. As ORR does not consider runaway risk for purposes of release, it does not intend to do so here for purposes of adjudicating specific consent requests. ORR notes that such requirements would be consistent with 8 U.S.C. 1232(c)(2)(A) (stating that when making placement determinations, HHS

⁹⁶ Although the TVPRA refers to special immigrant "status," *see, e.g.*, 8 U.S.C. 1232(d), in this proposed rule ORR uses the term special immigrant "classification," consistent with current United States Citizenship and Immigration Services (USCIS) policy. *See generally* U.S. Citizenship and Immigration Services Policy Manual, Vol. 6, Part J, Ch. 1, available at: <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1>.

⁹³ 8 U.S.C. 1232(c)(2)(A).

“may consider danger to self, danger to the community, and risk of flight.”).

Under proposed § 410.1209(f), ORR shall make determinations on specific consent requests within 60 business days of receipt. ORR proposes that it shall attempt to expedite urgent requests when possible.

In § 410.1209(g), ORR proposes that it shall inform the unaccompanied child, the unaccompanied child’s attorney, or other authorized representative of the unaccompanied child of the decision on the specific consent request in writing, along with the evidence used to make the decision. Finally, proposed § 410.1209(h) and (i) detail procedures related to a request for reconsideration in the event ORR denies specific consent. Under proposed § 410.1209(h), the unaccompanied child, the child’s attorney of record, or EOIR accredited representative of the child would be able to request reconsideration of ORR’s denial with the Assistant Secretary for ACF within 30 business days of receipt of the ORR notification of denial of the request. The unaccompanied child, the child’s attorney, or the child’s authorized representative may submit additional (including new) evidence to be considered with the reconsideration request.

Under proposed § 410.1209(i), the Assistant Secretary for ACF or designee would consider the request for reconsideration and any additional evidence, and send a final administrative decision to the unaccompanied child, the child’s attorney, or the child’s other authorized representative, within 15 business days of receipt of the request.

Section 410.1210 Post-Release Services

Proposed § 410.1210 sets forth the requirements for post-release services (PRS). The TVPRA authorizes, and in some cases requires, HHS to provide PRS during the pendency of removal proceedings for certain unaccompanied children.⁹⁷ ORR provides PRS by funding providers to facilitate access to relevant services. Generally, ORR believes that providing necessary services after an unaccompanied child’s release from ORR care is essential to promote the child’s safety and well-being.

⁹⁷ See 8 U.S.C. 1232(c)(3)(B) (“The Secretary of Health and Human Services 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.”).

Under proposed § 410.1210(a)(1), consistent with existing policy, care provider facilities would work with sponsors and unaccompanied children to prepare them for the unaccompanied children’s safe and timely release, to assess the sponsors’ ability to access community resources, and to provide guidance regarding safety planning and accessing services.

Proposed § 410.1210(a)(2) and (3) describe circumstances when ORR would be required to provide PRS to unaccompanied children. Consistent with 8 U.S.C. 1232(c)(3)(B), under proposed § 410.1210(a)(2), ORR would conduct follow-up services, or PRS, during the pendency of removal proceedings for unaccompanied children for whom a home study was conducted. ORR proposes to apply this requirement to any case where a home study is conducted, including home studies that are explicitly required by the TVPRA and those that ORR performs under other circumstances as described at proposed § 410.1204. Under proposed § 410.1210(a)(3), ORR proposes it would have the discretion, to the extent ORR determines that appropriations are available, to provide PRS to unaccompanied children with mental health or other needs who would benefit from the ongoing assistance of a community-based service provider, even if their case did not involve a home study pursuant to proposed § 410.1204. ORR notes that proposed § 410.1210(c) further lists certain situations where ORR may, within its discretion, refer unaccompanied children for PRS. These proposals expand upon the situations whereby ORR may provide PRS. ORR’s current practice, described in the ORR Guide at section 6.2, requires ORR to provide PRS for an unaccompanied child whose sponsor required a home study⁹⁸ or for whom ORR determines the release is safe and appropriate but the unaccompanied child and sponsor would benefit from ongoing assistance from a community-based service provider. ORR also proposes that PRS furnished to these unaccompanied children may include home visits by the PRS provider. ORR seeks public comment on proposed § 410.1210(a)(2) and (3), particularly with respect to the

⁹⁸ ORR Guide section 2.4.2 requires a home study before releasing an unaccompanied child to a non-relative sponsor who is seeking to sponsor: (1) multiple unaccompanied children; (2) additional unaccompanied children and the non-relative sponsor has previously sponsored or sought to sponsor an unaccompanied child; or (3) unaccompanied children who are 12 years and under.

possible expansion of PRS to additional unaccompanied children.

ORR is aware of concerns that, in some cases, release of UC to sponsors may be unduly delayed by a lack of available PRS providers and services near the sponsor. Accordingly, ORR proposes in § 410.1210(a)(4) that ORR would not delay the release of an unaccompanied child if PRS are not immediately available (e.g., due to a referral delay or waitlist for PRS). ORR notes that § 410.1210(g) specifies the timeframes in which PRS providers are required to start PRS for unaccompanied children once they are released from ORR care.

Proposed § 410.1210(b) lists the types of services that would be available as part of PRS, as described in section 6.2.2 of the ORR Guide. PRS providers would be required to ensure PRS are furnished in a manner that is sensitive to the individual needs of the unaccompanied child and in a way the child effectively understands regardless of spoken language, reading comprehension, or disability to ensure meaningful access for all eligible children, including those with limited English proficiency. The comprehensiveness of PRS shall depend on the extent appropriations are available. Specifically, ORR proposes to codify the availability of PRS to support unaccompanied children and sponsors in accessing services in the following areas: placement and stability; immigration proceedings; guardianship; legal services; education; medical services; individual mental health services; family stabilization and counseling; substance use; gang prevention; education about employment laws and workers’ rights; and other specialized services based on need and at the request of unaccompanied children. In addition, ORR believes that PRS should specifically include service areas such as: assisting in school enrollment, including connecting unaccompanied children and sponsors to educational programs for students with disabilities where appropriate; ensuring access to family reunification and medical support services, including support and counseling for the family and mental health counseling; supporting sponsors in obtaining necessary medical records and necessary personal documentation; and ensuring that sponsors of unaccompanied children with medical needs receive support in accessing appropriate medical care. ORR notes that these services areas are currently covered in section 6.2.2 of the ORR Guide, which ORR is proposing to codify in § 410.1210(b). In conducting PRS, ORR and any entities through

which ORR provides PRS shall make reasonable modifications in their policies, practices, and procedures if needed to enable released unaccompanied children with disabilities to live in the most integrated setting appropriate to their needs, such as with a sponsor. ORR is not required, however, to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. Additionally, ORR is aware of the importance of health literacy for unaccompanied children to increase awareness of health issues and to ensure continuity of care after their release, and so proposes at § 410.1210(b)(7) that PRS providers would be required to provide unaccompanied children and sponsors with information and services relevant to health-related considerations for the unaccompanied child. ORR seeks public comment on this paragraph, specifically on how to protect the comprehensiveness of PRS against significant reductions in funding allocated to PRS while still balancing the need to maintain funding for capacity during emergencies and influxes. ORR also seeks public comment on what other services should be within the scope of PRS.

Under proposed § 410.1210(c), ORR proposes to require that unaccompanied children with certain needs receive additional consideration of those case-specific needs, and may be referred for PRS to address those needs. Consistent with 8 U.S.C. 1232(c)(3)(B), ORR proposes that unaccompanied children who would receive additional consideration include those that are especially vulnerable unaccompanied children and would include, but are not limited to: unaccompanied children in need of particular services or treatment; unaccompanied children with disabilities; unaccompanied children with LGBTQI+ status; unaccompanied children who are adjudicated delinquent or have been involved in, or are at high risk of involvement with, the juvenile justice system; unaccompanied children who entered ORR care after being separated from a parent or legal guardian by DHS; unaccompanied children who are victims of human trafficking or other crimes; unaccompanied children who are victims of worker exploitation; unaccompanied children who are at risk for labor trafficking; unaccompanied children enrolled in school who are chronically absent or retained at the end of their school year; and certain parolees. ORR typically considers certain parolees who are also

unaccompanied children to include Unaccompanied Afghan Minors, Unaccompanied Ukrainian children, and other children who are in the UC program (such as those eligible for humanitarian parole). ORR notes that under this proposed section it may refer unaccompanied children for PRS, based on these concerns, even after they have been released. Such referrals may be made pursuant to ORR becoming aware of the situations listed above—*e.g.*, through post-release notifications of concern or calls to its national call center. In that event, ORR would require the relevant PRS provider to follow up with the child and assess whether PRS would be appropriate.

Under proposed § 410.1210(d), the PRS provider assigned to a particular unaccompanied child's case would assess the released unaccompanied child and sponsor for services needed and document the assessment. The assessment would be developmentally appropriate for the unaccompanied child, meaning the PRS provider would be required to tailor it to the released unaccompanied child's level of cognitive, physical, and emotional ability. Further, the assessment is proposed to be trauma-informed, as defined in proposed § 410.1001, and consistent with the *6 Guidelines To A Trauma-Informed Approach* developed by the CDC in collaboration with the SAMHSA.⁹⁹ During the assessment, PRS providers should also identify any traumatic events and symptoms by using validated screening measures developed for use when screening and assessing trauma in children.

ORR notes that under existing policy, it provides Safety and Well Being Follow Up Calls (SWB calls) for all unaccompanied children who are released to sponsors. The purpose of SWB calls is to determine whether the child is still residing with the sponsor, is enrolled in or attending school, is aware of upcoming court dates, and is safe. ORR understands that these calls are authorized under 8 U.S.C. 1232(c)(3)(B) as a form of follow-up services. Although ORR plans to continue conducting SWB calls under this proposed rule, nevertheless ORR does not propose to codify them, to preserve its flexibility in making continuous improvements to the reach and nature of the SWB calls themselves,

⁹⁹ CDC; SAMHSA. (2020, Sept. 17). *6 Guidelines To A Trauma-Informed Approach*. https://www.cdc.gov/orr/infographics/6_principles_trauma_info.htm. The six guidelines include: safety; trustworthiness and transparency; peer support; collaboration and mutuality; empowerment and choice; and cultural, historical, and gender issues.

as well as in integrating SWB calls into the suite of available PRS. ORR seeks public comment on whether it should consider codifying SWB calls in this proposed rule or in future rulemaking and whether ORR should integrate SWB call into PRS, including what factors ORR should consider in integrating SWB calls into PRS.

In the final version of this rule, ORR is considering codifying a requirement that the PRS provider's assessment must include a recommendation regarding the "level" of PRS to be provided in direct response to the unaccompanied child's and the sponsor's needs, based on regular and repeated assessments. As described in proposed § 410.1210(b), PRS include services in a range of service areas. But ORR notes that unaccompanied children and sponsors receiving PRS do not necessarily require follow-up services in every service area; rather, unaccompanied children and sponsors who are referred for PRS have individual needs reflecting their own circumstances. Similarly, ORR believes that the appropriate level of involvement by the PRS provider in coordinating the delivery of those services should accord with the unaccompanied child's and/or sponsor's individual needs. Consistent with this approach, ORR currently provides two "levels" of PRS—Level One and Level Two. Level One services currently include assessments of the needs of unaccompanied children and their sponsors in accessing community services, including enrolling in school. Further, unaccompanied children and their sponsors receive Level One services if they do not require intensive case management as provided with Level Two PRS. Unaccompanied children and their sponsors receive Level Two services if they received Level One Services, and the PRS providers assessed them to need more intensive case management, or the unaccompanied children require a higher level of services as assessed during the unaccompanied children's release from ORR care (*e.g.*, during the sponsor suitability assessment). Level Two services provide a higher level of engagement between the PRS provider and the unaccompanied child and sponsor and include regularly-scheduled home visits (at least once a month), ongoing needs assessments of the unaccompanied child, comprehensive case management, and access to therapeutic support services. ORR is considering updating the levels of PRS available to unaccompanied children and sponsors, from a framework that contains two levels of

PRS to a framework that contains three levels, and further, ORR is considering codifying this PRS level framework. To that end, ORR seeks input from the public on one potential way to update its policies to incorporate additional levels, as described below.

ORR is considering requiring the PRS provider's assessment to include the level of PRS recommended to be provided be in direct response to the unaccompanied child's and the sponsor's needs, based on regular and repeated assessments. Under a revised framework for PRS levels, ORR is considering an option in which Level One PRS would include safety and well-being virtual check-ins;¹⁰⁰ Level Two PRS would cover case management services; and Level Three PRS would include intensive home engagements. Additionally, ORR is considering requiring that a released unaccompanied child may receive one or more levels of PRS depending on the needs and circumstances of the unaccompanied child and sponsor. ORR is considering codifying a requirement that PRS providers would be required to furnish specific levels of PRS to unaccompanied children required to receive PRS under the TVPRA to ensure the safety and well-being of these unaccompanied children post-release and their successful transition into the community. ORR is also considering time limits on the availability of PRS at each level that the PRS provider would furnish to the unaccompanied child and sponsor, which at a minimum would be furnished for six (6) months after release. For example, an unaccompanied child and sponsor referred to Level Three PRS would receive this level of service for at least six months after release, and ORR would subsequently assess every 30 days thereafter whether services are still needed. Further, ORR is considering requiring PRS providers to furnish levels of PRS to unaccompanied children required to receive PRS under the TVPRA and their sponsors for timeframes that may continue beyond the timeframes to be established for the levels. ORR notes that the timeframes for providing PRS would not extend past the circumstances in which PRS would be terminated as specified in proposed § 410.1210(h).

Under proposed § 410.1210(e)(1), the PRS provider would, in consultation with the unaccompanied child and sponsor, decide the appropriate

methods, timeframes, and schedule for ongoing contact with the released unaccompanied child and sponsor based on the level of need and support needed. PRS providers would be required in proposed § 410.1210(e)(2) to make, at a minimum, monthly contact with their assigned released unaccompanied children and their sponsors, either in person or virtually for six months after release. ORR is considering limiting the minimum monthly contact to unaccompanied children and sponsors receiving Level Two and/or Level Three PRS. ORR seeks public comment on this proposal including consideration for applicable factors that should be included in determining how often PRS providers would be required to contact their assigned unaccompanied children and sponsors after release. Under proposed § 410.1210(e)(3), PRS providers would be required to document all ongoing check-ins and in-home visits as well as the progress and outcomes of those home visits.

Under proposed § 410.1210(f)(1), PRS providers would work with released unaccompanied children and their sponsors to ensure they can access community resources. ORR has opted not to enumerate ways that PRS providers could comply with this proposed requirement, because the nature of such assistance would vary by case. But as examples, ORR anticipates that PRS providers could assist unaccompanied children and sponsors with issues such as making appointments; communicating effectively with their service provider; requesting interpretation services, if needed; understanding a service's costs, if applicable; enrollment in school; for younger children, enrollment in child care where needed; for three- and four-year old children, enrollment in preschool where accessible; and other issues relevant to accessing relevant services. ORR also anticipates that PRS providers would assist the released unaccompanied children and sponsors in accessing the following community-based resources: legal services; education and English classes; youth- and community-based programming; medical care and behavioral healthcare; services related to the unaccompanied children's cultural and other traditions; and supporting the unaccompanied children's independence and integration.

Under proposed § 410.1210(f)(2), PRS providers would be required to document any community resource referrals and their outcomes.

ORR proposes to codify at § 410.1210(g) timeframes for when PRS

providers would be required to start PRS. ORR notes that although the TVPRA mandates PRS in certain cases, it does not address the timing of providing PRS. ORR proposes to codify in § 410.1210(g)(1) its existing policy from section 6.2.3 of the ORR Guide that specifies a timeframe for the delivery of PRS to released unaccompanied children who are required to receive PRS pursuant to the TVPRA at 8 U.S.C. 1232(c)(3)(B). As proposed, PRS providers would be required, to the greatest extent practicable, to start services within two (2) days of the unaccompanied children's release from ORR care. PRS shall start no later than 30 days after release if PRS providers are unable to start services within two (2) days of release. Further, at § 410.1210(g)(2), ORR proposes to codify its policy from section 6.2.3 of the ORR Guide that for released unaccompanied children who are referred to PRS but who are not mandated to receive PRS following a home study, PRS providers would be required, to the greatest extent practicable, to start services within two (2) days of accepting a referral.

Proposed § 410.1210(h) describes the circumstances required for termination of PRS, which are based on ORR's existing policy at section 6.2.3 of the ORR Guide. At § 410.1210(h)(1), ORR would require that PRS for an unaccompanied child required to receive PRS pursuant to the TVPRA at 8 U.S.C. 1232(c)(3)(B) would continue until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure, immigration status, or the child receives an order of removal. In the event the unaccompanied child is granted voluntary departure or receives an order of removal, PRS would be discontinued until the child is repatriated, and PRS would end once the unaccompanied child's case is closed. Under proposed § 410.1210(h)(2), ORR would require that PRS for an unaccompanied child receiving PRS, but who is not required to receive PRS following a home study, would continue for not less than six months or until the unaccompanied child turns 18, whichever occurs first; or until the PRS provider assesses the unaccompanied child and determines PRS are no longer needed, but in that case for not less than six months.

Finally, proposed (i) describes records and reporting requirements for PRS providers. Keeping accurate and confidential records is important to ensure the security of any information the PRS provider documents about the unaccompanied child and sponsor. Accordingly, under proposed § 410.1210(i)(1)(i), ORR would require

¹⁰⁰ ORR notes that care provider facilities currently conduct safety and well-being follow-up calls 30 days after the unaccompanied child's release date.

PRS providers to maintain comprehensive, accurate, and current case files that are kept confidential and secure, and that are accessible to ORR upon request. PRS providers would be required to keep all case file information together in the PRS provider's physical and electronic files. Section 410.1210(i)(1)(ii) would also require PRS providers to upload all documentation related to services provided to unaccompanied children and sponsors to ORR's case management system, as available, within seven (7) days of completion of the services.

To prevent unauthorized access to electronic and paper records, proposed § 410.1210(i)(2)(i) would require PRS providers establish and maintain written policies and procedures for organizing and maintaining the content of active and closed case files. Under proposed § 410.1210(i)(2)(ii), prior to providing PRS, PRS providers would be required to have established administrative and physical controls to prevent unauthorized access to the records that include keeping sensitive health information in a locked space when not in use. ORR believes that any information collected from the unaccompanied child or sponsor should not be shared for any other purposes except for coordinating services for them. ORR therefore proposes to codify a requirement at § 410.1210(i)(2)(iii) that PRS providers may not release records to any third party without the prior approval of ORR. If a PRS provider is no longer providing PRS for ORR, ORR proposes further that the PRS provider would be required to provide all active and closed case file records in their original format to ORR according to ORR's instructions.

Proposed § 410.1210(i)(3) sets forth requirements to protect the privacy of all unaccompanied children receiving PRS. Under proposed § 410.1210(i)(3)(i), PRS providers would be required to have a written policy and procedure that protects the sensitive information of released unaccompanied children from access by unauthorized users, such as encrypting electronic communication (including, but not limited to, email and text messaging) containing sensitive healthcare or identifying information of released unaccompanied children. PRS providers would be required under proposed § 410.1210(i)(3)(ii) to explain to released unaccompanied children and their sponsors how, when, and under what circumstances sensitive information may be shared during the course of their PRS. PRS providers would also be required to have appropriate controls on information sharing within the PRS provider

network. ORR believes these controls are necessary to ensure that sensitive information is not exploited by unauthorized users to the detriment of the released unaccompanied children.

ORR proposes that if a PRS provider is concerned about the unaccompanied child's safety and well-being, it must notify ORR and other appropriate agencies of such concerns. Proposed § 410.1210(i)(4)(i) covers the procedures and requirements regarding such notifications of concern (NOC). A PRS provider concerned about an unaccompanied child's safety and well-being would be required to document and report a NOC to ORR and, as applicable, to other investigative agencies (e.g., law enforcement or child protective services). Consistent with section 6.1 of the ORR Guide, ORR anticipates that situations when PRS providers would submit a NOC would include: an emergency; a current case of human trafficking; abuse, abandonment, neglect, and maltreatment; possible exploitative employment situation; kidnapping, disappearances, or a runaway; alleged criminal activity; child protection services involvement; potential fraud, such as document fraud or fees charged for services that are to be provided free of charge; unaccompanied child behavioral incident that raises safety concern; media attention; sponsor declined services; contact or involvement with organized crime; PRS provider unable to contact the unaccompanied child within 30 days of release; and when PRS provider is providing services to an unaccompanied child, loses contact with that child, and there are safety concerns.

Additionally, under proposed § 410.1210(i)(4)(ii), a PRS provider would be required to submit a NOC to ORR within 24 hours of first knowledge or suspicion of events raising concerns about the unaccompanied child's safety and well-being, and to document the NOC.

Proposed § 410.1210(i)(5) would codify requirements for PRS providers regarding case closures. ORR proposes that a case file be formally closed when the PRS are terminated by ORR, and that ORR would supply instructions, including relevant forms, that the PRS provider would be required to follow when closing out a case. For example, similar to current practice, ORR anticipates that it may require PRS providers to complete a case closure form and upload it to ORR's online case management system within 72 hours of a case's closure.

Subpart D—Minimum Standards and Required Services

Section 410.1300 Purpose of This Subpart

In order to ensure that all unaccompanied children receive the same minimum services and at least a specified level of quality of those services, ORR is proposing a set of minimum standards and required services. ORR proposes to establish these standards and requirements consistent with its authorities at 6 U.S.C. 279(b)(1) (making ORR responsible for, among other things, ensuring that the interest of unaccompanied children are considered in decisions and actions relating to their care and custody, implementing policies with respect to the care and placement of unaccompanied children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside), and 8 U.S.C. 1232(c) (requiring HHS to establish policies and programs to ensure that unaccompanied children are protected from certain risks, and requiring placement of unaccompanied children in the least restrictive setting that is in their best interest). As described at proposed § 410.1300, the purpose of this subpart would be to establish the standards and services that care provider facilities must meet and provide in keeping with the principles of treating unaccompanied children in ORR care with dignity, respect and special concern for their particular vulnerability. ORR welcomes public comment on this proposal.

Section 410.1301 Applicability of This Subpart

ORR believes that care provider facilities serving unaccompanied children should be required to meet standards and requirements tailored to their particular placement setting so that children receive at least the same standard of care within a given placement setting. In proposed § 410.1301, ORR proposes to apply these care provider facility standards to all standard programs and to non-standard programs where specified.

Section 410.1302 Minimum Standards Applicable to Standard Programs

In proposed § 410.1302, ORR proposes minimum standards of care and services applied to standard programs; these standards closely reflect the minimum standards of care listed in Exhibit 1 of the FSA, which ORR believes are consistent with the concern for unaccompanied children's interests expressed in the HSA and TVPRA.

Under proposed § 410.1302(a), ORR would require standard programs be licensed by an appropriate state or Federal agency, or meet other requirements specified by ORR if licensure is unavailable in a state to programs providing services to unaccompanied children, to provide residential, group, or foster care services for dependent children. ORR is including this requirement to ensure unaccompanied children are cared for in facilities that are safe and sanitary, and that the facilities have needed oversight. Additionally, because there are other state and local laws and other ORR requirements that are critical to ensuring the safe and sanitary conditions at care provider facilities, ORR would further require, in proposed § 410.1302(b), that standard programs comply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes, or other requirements specified by ORR if licensure is unavailable in their state to standard programs providing services to unaccompanied children. In many instances, ORR requirements exceed requirements of state law, and a provider can comply with both without acting inconsistent with either. If there is a potential conflict between ORR's regulations and state law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. It is important to note, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.

In order to ensure that each unaccompanied child receives the same minimum services that are necessary to support their safety and wellbeing for daily living while in ORR care, under proposed § 410.1302(c), ORR would establish that the services that standard programs must provide or arrange for each unaccompanied child in care. Under proposed § 410.1302(c)(1), ORR would establish minimum requirements related to the provision of proper physical care and maintenance, including suitable living accommodations, food, drinking water, appropriate clothing, personal grooming and hygiene items, access to toilets and sinks, adequate temperature control and ventilation, and adequate supervision to protect unaccompanied children from others. ORR is additionally proposing to require that food be of adequate variety, quality, and in sufficient quantity to

supply the nutrients needed for proper growth and development according to the USDA Dietary Guidelines for Americans,¹⁰¹ and appropriate for the child and activity level, and that drinking water is always available to each unaccompanied child.

ORR believes that the unique needs and background of each unaccompanied child should be assessed by standard programs to ensure that these needs are being addressed and supported by the standard program. Therefore, under proposed § 410.1302(c)(2), and consistent with ORR's existing policy and practice, ORR would require that each unaccompanied child receive an individualized needs assessment that includes: various initial intake forms; essential data relating to identification and history of the unaccompanied child and their family; identification of any special needs the unaccompanied child may have, including any specific problems that appear to require immediate intervention; an education assessment and plan; whether an indigenous language speaker; an assessment of family relationships and interaction with adults, peers and authority figures; a statement of religious preference and practice; assessment of personal goals, strengths, and weaknesses; and identifying information regarding immediate family members, other relatives, or friends who may be residing in the United States and may be able to assist in the safe and timely release of the unaccompanied child to a sponsor. ORR notes that the use of "special needs" in this paragraph is being included to match Appendix 1 of the FSA; it is ORR's preference, for the reasons articulated in the preamble to §§ 410.1103 and 410.1106, to update the language to "individualized needs," and solicits comments on such substitution.

Access to education services for unaccompanied children in care from qualified professionals is critical to avoid lost instructional time while in care and ensure unaccompanied children are receiving appropriate social, emotional and academic supports and services. Under proposed § 410.1302(c)(3), ORR would require standard programs to provide educational services appropriate to the unaccompanied child's level of development, communication skills, and disability, if applicable. ORR believes that this requirement helps ensure that educational services are tailored to meet the educational and

developmental needs of unaccompanied children, including children with disabilities who may require program modifications (such as specialized instruction), reasonable modifications, or auxiliary aids and services. ORR is also proposing that educational services are required to take place in a structured classroom setting, Monday through Friday, which concentrate primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). The educational services must include instruction and educational and other reading materials in such languages as needed. Basic academic areas must include science, social studies, math, reading, writing and physical education. The services must provide unaccompanied children with appropriate reading materials in languages other than English and spoken by the unaccompanied children in care for use during their leisure time. ORR notes that under 45 CFR 85.51, care provider facilities shall also ensure effective communication with unaccompanied children with disabilities. This means the communication is as effective as communication with children without disabilities in terms of affording an equal opportunity to participate in the UC Program and includes furnishing appropriate auxiliary aids and services such as qualified sign language interpreters, Braille materials, audio recordings, note-takers, and written materials, as appropriate for the unaccompanied child. ORR also notes that it is specifying additional staffing requirements inclusive of the provision of educational and other services proposed under § 410.1305.

ORR strongly believes that time for recreation is essential to supporting the health and wellbeing of unaccompanied children. Under proposed § 410.1302(c)(4), ORR would require standard programs to have a recreation and leisure time plan that includes daily outdoor activity, weather permitting, and at least one hour per day of large muscle activity and one hour per day of structured leisure time activities, which does not include time spent watching television. Activities must be increased to at least three hours on days when school is not in session.

The psychological and emotional wellbeing of unaccompanied children are an important component of their overall health and wellbeing, and therefore, consistent with existing policy and practice, ORR is proposing that these needs must be met by standard programs. Under proposed § 410.1302(c)(5), ORR would require

¹⁰¹ Dietary Guidelines for Americans. Available at <https://www.dietaryguidelines.gov/current-dietary-guidelines>.

standard programs to provide counseling and mental health supports to unaccompanied children that includes at least one individual counseling session per week conducted by certified counseling staff with the specific objectives of reviewing the unaccompanied child's progress, establishing new short and long-term objectives, and addressing both the developmental and crisis-related needs of each unaccompanied child. Group counseling sessions are another way that the psychological and emotional wellbeing of unaccompanied children can be supported while in ORR care. Therefore, ORR is proposing to require under § 410.1302(c)(6) that group counseling sessions are provided at least twice a week. These sessions can be informal and can take place with all unaccompanied children present, providing a time when new unaccompanied children are given the opportunity to get acquainted with the staff, other children, and the rules of the program. Group counseling sessions can provide an open forum where each unaccompanied child has an opportunity to speak and discuss what is on their minds and to resolve problems. Group counseling sessions can be informal and designed so that unaccompanied children do not feel pressured to discuss their private issues in front of other children. Daily program management may be discussed at group counseling sessions, allowing unaccompanied children to be part of the decision-making process regarding recreational and other program activities, for example. In addition, ORR notes that additional mental health and substance use disorder treatment services are provided to unaccompanied children based on their medical needs, including specialized care, as appropriate, and in person and virtual options, depending on what best fits the child's needs.

Under proposed § 410.1302(c)(7), ORR would require that unaccompanied children receive acculturation and adaptation services that include information regarding the development of social and inter-personal skills that contribute to those abilities necessary to live independently and responsibly. ORR believes these services are important to supporting the social development and meeting the cultural needs of unaccompanied children in standard programs.

Establishing an admissions process that includes assessments that unaccompanied children should receive upon admission to a standard program helps ensure the immediate needs of unaccompanied children are met in a

consistent way, that other needs are identified and can be supported while in ORR care, and that all unaccompanied children are provided a standardized orientation and information about their care in ORR custody. ORR is therefore proposing to require in proposed § 410.1302(c)(8)(i) that upon admission standard programs must address unaccompanied children's immediate needs for food, hydration, and personal hygiene needs including the provision of clean clothing and bedding. Under proposed § 410.1302(c)(8)(ii), standard programs must conduct an initial intakes assessment covering biographic, family, migration, health history, substance use, and mental health history of the unaccompanied child. If the unaccompanied child's responses to questions during any examination or assessment indicate the possibility that the unaccompanied child may have been a victim of human trafficking or labor exploitation, the care provider facility must notify the ACF Office of Trafficking in Persons within twenty-four (24) hours. Care providers must also provide unaccompanied children with a comprehensive orientation in formats accessible to all children regarding program intent, services, rules (provided in writing and orally), expectations, the availability of legal assistance, information about U.S. immigration and employment/labor laws, and services from the Office of the Ombuds that are proposed in § 410.2002 in simple, non-technical terms and in a language and manner that the child understands, if possible, under proposed § 410.1302(c)(8)(iii). In conjunction with services supporting visitation and contact with family members required under proposed § 410.1302(c)(10), newly admitted unaccompanied children would receive assistance with contacting family members, following ORR guidance and the standard program's internal safety procedures under proposed § 410.1302(c)(8)(iv). ORR notes that medical needs upon admission are required to be assessed comprehensively under § 410.1307. Finally, ORR notes that standard programs are required under existing § 411.33 to provide orientation information related to sexual abuse and sexual harassment and must follow 45 CFR part 411, subpart E, regarding assessment of an unaccompanied child's risk of sexual victimization and abusiveness.

ORR believes the cultural, religious, and spiritual needs of unaccompanied children should be provided for while

in ORR care. Therefore, under proposed § 410.1302(c)(9) ORR would require that standard programs, whenever possible, provide access to religious services of an unaccompanied child's choice, celebrating culture-specific events and holidays, being culturally aware in daily activities as well as food menus, choice of clothing, and hygiene routines, and covering various cultures in educational services. ORR notes that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.¹⁰²

Under proposed § 410.1302(c)(10), ORR would require standard programs to provide unaccompanied children with visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation, such as offering visitation and contact at regular, scheduled intervals throughout the week. Standard programs should provide unaccompanied children with at least 15 minutes of phone or video contact three times a week with parents and legal guardians, other family members, and caregivers located in the United States and abroad, in a private space that ensures confidentiality and at no cost to the unaccompanied child, parent, legal guardian, family member, or caregiver. ORR emphasizes that this is the minimum amount of phone or video time that standard programs must provide to unaccompanied children and that standard programs may provide additional time over and above this requirement, like daily phone or video calls. Standard programs would also be required to respect the unaccompanied children's privacy during visitation while reasonably preventing unauthorized release of the unaccompanied children. ORR notes that standard programs should also encourage in-person visitation between unaccompanied children and parents, legal guardians, family members, or caregivers (unless there is a documented reason to believe there is a safety concern) and have policies in place to ensure the safety and privacy of unaccompanied children and staff, such as an alternative public place for visits.

To facilitate the safe and timely release of unaccompanied children to sponsors or their family, under proposed § 410.1302(c)(11) ORR would require standard programs to assist with family unification services designed to identify and verify relatives in the

¹⁰² See 45 CFR part 87.

United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for release of the unaccompanied children.

Under proposed § 410.1302(c)(12), ORR would require standard programs to provide unaccompanied children with information on legal services, including the availability of free legal assistance, and that they may be represented by counsel at no expense to the government; the right to a removal hearing before an immigration judge; the ability to apply for asylum with United States Citizenship and Immigration Services (USCIS) in the first instance; and the ability to request voluntary departure in lieu of removal. These services are foundational to ensuring that unaccompanied children are aware of their legal rights and have access to legal resources.

Finally, under proposed § 410.1302(c)(13), ORR would require standard programs to provide information about U.S. child labor laws and education around permissible work opportunities in a manner that is sensitive to the age, culture and native language of each unaccompanied child.

Cultural competency among ORR standard programs is considered an important component of a successful program by ORR and under the FSA. Under proposed § 410.1302(d), standard programs are required to deliver the services included in § 410.1302(c) in a manner that is sensitive to the age, culture, native language, and the complex needs of each unaccompanied child.

Under proposed § 410.1302(e), standard programs would be required to develop a comprehensive and realistic individual service plan for each unaccompanied child in accordance with the child's needs as determined by the individualized needs assessment. Individual plans would be implemented and closely coordinated through an operative case management system. To ensure that service plans are addressing meaningful and appropriate goals in partnership with unaccompanied children, service plans should identify individualized, person-centered goals with measurable outcomes and note steps or tasks to achieve the goals, be developed with input from the children, and be reviewed and updated at regular intervals. Under current practice, this is every 30 days the child is in custody following the child's case review. Unaccompanied children aged 14 and older should be given a copy of the plan, and unaccompanied children under age 14 should be given a copy of the plan when appropriate for that particular child's development.

Individual plans shall be in that child's native language or other mode of auxiliary aid or services and/or by the use of clear, easily understood language, using concise and concrete sentences and/or visual aids and check for understanding where appropriate.

Section 410.1303 Reporting, Monitoring, Quality Control, and Recordkeeping Standards

ORR conducts ongoing and multi-layered monitoring of all components of care provider facilities' activities. These efforts ensure consistent oversight, accountability standards and put in place checkpoints at regular intervals, consistent with ORR's authorities.¹⁰³ Proposed § 410.1303 describes how ORR would ensure that care provider facilities are providing services as required by these regulations. Under proposed § 410.1303(a), ORR would monitor all care provider facilities for compliance with the terms of the regulations in parts 410 and 411. ORR is proposing the types of monitoring activities that it would perform: desk monitoring, routine site visits, site visits in response to ORR or other reports, and monitoring visits. Desk monitoring would include ongoing oversight from ORR headquarters. Examples of desk monitoring include monthly check-ins by ORR Federal staff with the care provider facility, regular record and report reviews, financial/budget statements analysis, ongoing reviews of staff background checks and vetting of employees, subcontractors, and grantees, and communications review. Routine site visits would be day-long visits to facilities to review compliance for policies, procedures, and practices and guidelines. Typically, routine site visits occur on a once or twice monthly basis, both unannounced and announced. Site visits in response to ORR or other requests would be visits for a specific purpose or investigation (*e.g.*, regarding a corrective action plan). Routine monitoring visits would be conducted as part of comprehensive reviews of all care provider facilities. Typically, these may be week-long visits and are usually conducted by ORR not less than every two (2) years.

When care provider facilities are out of compliance with ORR policies and procedures, ORR issues a corrective action. A list of corrective actions may be communicated by ORR to care

provider facilities, for example, as part of a report provided to the care provider facility after a monitoring visit. Under proposed § 410.1303(b), ORR would issue corrective actions to care provider facilities when it finds that a care provider facility is out of compliance with its regulations and sub-regulatory policies, including guidance and terms of its contracts and cooperative agreements. If ORR finds a care provider facility to be out of compliance, under this paragraph it would communicate the concerns in writing to the care provider facility's facility director or appropriate person through a written monitoring or site visit report, with a list of corrective actions and child welfare best practice recommendations, as appropriate. ORR would request a response to the corrective action findings from the care provider facility and specify a time frame for resolution and the disciplinary consequences for not responding within the required timeframes. Examples of disciplinary consequences would include stopping placements at the care provider facility until all corrective actions have been addressed or possible non-renewal of the grant for the program, as appropriate.¹⁰⁴

Proposed § 410.1303(c) describes additional monitoring activities that ORR would conduct at secure facilities. In addition to other monitoring activities, consistent with existing policy and practice, ORR would review individual unaccompanied children's case files to ensure unaccompanied children placed in secure facilities are assessed at least every 30 days for the possibility of a transfer to a less restrictive setting.

Proposed § 410.1303(d) describes monitoring of long-term home care and transitional home care facilities. ORR proposes that long-term and transitional foster care homes be subject to the same types of monitoring as other ORR care, but tailored to the foster care arrangement. For example, under proposed § 410.1303(d), during on site monitoring visits, ORR would be able to schedule a visit with the staff of a particular home care facility to conduct a first-hand assessment of the home environment and the care provider's oversight of the home. In addition to ORR monitoring, ORR proposes that ORR long-term home care and transitional home care facilities that provide services through a sub-contract or sub-grant be responsible for

¹⁰³ See, *e.g.*, 6 U.S.C. 279(b)(1) (describing ORR responsibilities including implementing policies with the respect to the care of unaccompanied children, ensuring the interests of unaccompanied children are considered, and overseeing the infrastructure and personnel of facilities where unaccompanied children reside).

¹⁰⁴ ORR also notes that to the extent that a care provider has acted contrary to the terms and conditions of its funding, they may be subject to consequences described at 45 CFR part 75, subpart D.

conducting annual monitoring or site visits of the sub-recipient, as well as weekly desk monitoring. Finally, ORR proposes to require that care providers provide the findings of such reviews to the designated ORR point of contact.

In proposed § 410.1303(e), ORR proposes that the care provider facilities develop quality assurance assessment procedures that accurately measure and evaluate service delivery in compliance with the requirements of this part, as well as those delineated in 45 CFR part 411.

Under proposed § 410.1303(f), ORR would establish care provider facility reporting requirements. The purpose of such reporting is to help ensure that incidents involving unaccompanied children are documented and responded to in a way that protects the best interests of children in ORR care, including their safety and well-being. Requirements on reporting can increase safety for children in ORR's care, and promote transparency, accuracy, and improvement in the care provided. ORR would require care provider facilities to report any emergency incident, significant incident, or program-level event to ORR, and in accordance with any applicable Federal, State, and local reporting laws. Accurately documenting incidents and program-level events is essential to ensuring the health and well-being of all unaccompanied children in care.

ORR proposes under § 410.1303(f)(1) to require that care provider facilities document incidents and events with sufficient detail to ensure that any relevant entity can facilitate any required follow-up; document incidents in a way that is trauma-informed and grounded in child welfare best practices; and update the report with any findings or documentation that are made after the fact. Additionally, proposed § 410.1303(f)(2) states that care provider facilities must never: fabricate, exaggerate, or minimize incidents; use disparaging or judgmental language about unaccompanied children in incident reports; use incident reporting or the threat of incident reporting as a way to manage the behavior of unaccompanied children or for any other illegitimate reason. By "illegitimate reason," ORR means a reason that is unrelated to the purposes of incident reporting, which as stated above are to help ensure that incidents involving unaccompanied children are documented and responded to in a way that protects the best interest of children in ORR care, including their safety and well-being. Further, illegitimate reasons include those that would be inconsistent with ORR's statutory

responsibilities (e.g., to ensure that the interest of the child are considered in decisions and actions relating to the care and custody of an unaccompanied child, to place unaccompanied children in the least restrictive setting that is in the best interest of the child); or inconsistent with these proposed regulations and sub-regulatory policies, including ORR guidance and the terms of its contracts or cooperative agreements.

ORR is proposing limitations on how certain reports may be used by ORR or care provider facilities. ORR believes that these limitations will protect the best interests of unaccompanied children and put their safety first as well as help ensure that reports do not become a potential hindrance to placement in the least restrictive setting. Under proposed § 410.1303(f)(3), ORR would prohibit care provider facilities from using reports of significant incidents as a method of punishment or threat towards any child in ORR care for any reason. Under proposed § 410.1303(f)(4), ORR is proposing that the existence of a report of a significant incident may not be used by ORR as a basis for an unaccompanied child's step up to a restrictive placement or as the sole basis for a refusal to step a child down to a less restrictive placement. Care provider facilities would likewise be prohibited from using the existence of a report of a significant incident as a basis for refusing an unaccompanied child's placement in their facilities. Reports of significant incidents could be used as examples or citations of concerning behavior; however, the existence of a report itself would not be sufficient for a step up, a refusal to step down, or a care provider facility to refuse a placement.

ORR notes that 45 CFR part 411, subpart G, requires reporting to ORR of any allegation, suspicion, or knowledge of sexual abuse, sexual harassment, inappropriate sexual behavior, and Staff Code of Conduct¹⁰⁵ violations occurring in ORR care, along with any retaliatory actions resulting from reporting such incidents; ORR also notes that part 411 requires compliance with required staff background checks at subpart B.

ORR also notes that in proposed § 410.1307(c) ORR proposes to require that ORR monitor compliance with the requirements to issue required notices and documentation for medical services requiring heightened ORR involvement, as well as the other listed requirements.

¹⁰⁵ ORR Unaccompanied Children Policy Guide 4.3.5. Available at <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-4#4.3.5>.

ORR proposes to initiate a Graduated Corrective Action Plan, with reporting requirements increasing along with oversight measures if programs remain non-compliant. Please see proposed § 410.1307(c) for more discussion.

Safeguarding and maintaining the confidentiality of unaccompanied children's case file records is critical to carrying out ORR's responsibilities under the HSA and the TVPRA. The HSA places responsibility on ORR for implementing policies with respect to the care and placement of unaccompanied children, ensuring that the interests of the child are considered in decisions and actions relating to their care and custody, overseeing the infrastructure and personnel of facilities in which unaccompanied children reside, and maintaining data on unaccompanied children.¹⁰⁶ Additionally, the TVPRA places responsibility for the care and custody of unaccompanied children on HHS and requires HHS to "establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity, including policies and programs reflecting best practices in witness security programs."¹⁰⁷ These program statutes recognize that ORR is responsible for maintaining unaccompanied children's records and data and that unaccompanied children are vulnerable persons, and therefore, the privacy and confidentiality of their records is paramount. Unaccompanied children may have histories of abuse, may be seeking safety from threats of violence, or may have been trafficked or smuggled into the U.S. Accordingly, HHS' longstanding policy is to protect from disclosure information about unaccompanied children that could compromise the children's and sponsors' location, identity, safety, and privacy.

Consistent with its statutory responsibilities, ORR proposes in § 410.1303(g) that all care provider facilities must develop, maintain, and safeguard the individual case file records of unaccompanied children. The provisions in § 410.1303(g) would apply to all care provider facilities responsible for the care and custody of unaccompanied children, whether the program is a standard program or not. ORR notes that under its current policies the records of unaccompanied children generated in the course of post-

¹⁰⁶ See 6 U.S.C. 279(b).

¹⁰⁷ See 8 U.S.C. 1232(c)(1); see also *id.* at 1232(b).

release services (PRS) are not always considered to be included in the individual case files of unaccompanied children. However, under this proposed rule, ORR would consider all unaccompanied children's records, including those produced for PRS, to be included in the individual case file records of unaccompanied children, whether generated while the child is in ORR custody or after release to their sponsor.¹⁰⁸ PRS records are created by, or on behalf of, ORR and assist ORR in coordinating supportive services for the child and their sponsor in the community where the child resides, as authorized under 8 U.S.C. 1232(c)(3)(B), which provides HHS authority 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." ORR facilitates the provision of PRS services through its network of PRS providers under cooperative agreements with ORR.

Under proposed § 410.1303(g)(1), ORR would require care provider facilities and PRS providers to maintain the confidentiality of case file records and protect them from unauthorized use or disclosure. ORR also proposes in § 410.1303(g)(2) that the records in unaccompanied children's case files are the property of ORR, whether in the possession of ORR a care provider facility, or PRS provider, including those entities that receive funding from ORR through cooperative agreements, and care provider facilities and PRS providers may not release unaccompanied children's case file records or information contained in the case files for purposes other than program administration without prior approval from ORR. This provision allows ORR to ensure that disclosure of unaccompanied children's records is compatible with program goals, to ensure the safety and privacy of unaccompanied children, to not discourage unaccompanied children from disclosing information relevant to their care and placement, and to prevent potential sponsors from being deterred from sponsoring unaccompanied children. Further, under § 410.1303(g)(3), ORR would require care provider facilities and PRS providers to provide the case files of unaccompanied children to ORR immediately upon ORR's request.

Under § 410.1303(g)(4), ORR proposes that employees, former employees, or

contractors of a care provider facility or PRS provider must not disclose unaccompanied children's case file records or provide information about unaccompanied children, their sponsors, family or household members to anyone except for purposes of program administration, without first providing advance notice to ORR of the request, allowing ORR to ensure that disclosure of unaccompanied children's information is compatible with program goals and ensures the safety and privacy of unaccompanied children. Safeguarding unaccompanied children's information is consistent with ORR's responsibilities under its program statutes, including 8 U.S.C. 1232(c)(1), which requires the Secretary to establish "policies and programs reflecting best practices in witness security programs," and House Report 116-450 recommendations to restrict sharing certain information with other Federal agencies. A request for UC case file information must be made directly to ORR, allowing ORR to consider whether disclosure meets these requirements, is in the best interest of the unaccompanied child, safeguards the unaccompanied child's and their sponsor's, family and household member's personally identifiable and protected health information, and is compatible with statutory program goals and all applicable Federal laws and regulations.

Finally, for purposes of facilitating efficient program administration, ORR policy is to pre-approve certain limited disclosures by ORR grantees and contractors such as (1) registration for school and for other routine educational purposes; (2) routine medical, dental, or mental health treatment; (3) emergency medical care; (4) to obtain services for unaccompanied children in accordance with ORR policies; and (5) pursuant to all available whistleblower protection laws. This pre-approved disclosure policy allows ORR to protect the privacy and safety of each unaccompanied child while also ensuring that certain routine and emergency services and treatment are provided expeditiously without waiting for approval from ORR.

Proposed § 410.1303(h) would require standard programs to maintain adequate records and make regular reports as required by ORR that permit ORR to monitor and enforce the regulations in parts 410 and 411 and other requirements and standards as ORR may determine are in the best interests of each unaccompanied child. ORR welcomes public comment on these proposals.

Section 410.1304 Behavior Management and Prohibition on Seclusion and Restraint

Proposed § 410.1304 describes the requirements for behavior management and the prohibition on seclusion and restraint. ORR proposes these requirements consistent with its statutory responsibilities to implement policies with respect to the care and placement of unaccompanied children, to place unaccompanied children in the least restrictive setting available that is in their best interest, and to ensure the interest of unaccompanied children are considered in decisions and actions related to their care and custody. ORR understands that its responsibilities apply to each unaccompanied child in its care, including unaccompanied children who are subject to behavioral interventions, as well as to other unaccompanied children placed at the same care provider facility as an unaccompanied child who are subject to behavioral interventions.

Effective behavior management is critical to supporting the health, safety, and wellbeing of unaccompanied children in ORR care and can help prevent emergencies and safety situations. Consistent with ORR's statutory responsibilities, proposed § 410.1304(a) would incorporate FSA paragraph 11 requirements and child welfare best practices by requiring care provider facilities to have behavior management strategies that include techniques for care provider facilities to follow. Under proposed § 410.1304(a), care provider facilities must develop behavior management strategies that include evidence-based, trauma-informed, and linguistically responsive program rules and behavior management policies that take into consideration the range of ages and maturity of unaccompanied children in the program and that are culturally sensitive to the needs of each unaccompanied child. Examples of evidence-based standards and approaches may include setting clear and healthy expectations and limits for their behaviors and the behaviors of others, creating a healthy structured environment with routines and schedules, utilizing positive reinforcement strategies and avoiding negative reinforcement strategies, and fostering a supportive environment that encourages cooperation, problem-solving, healthy de-escalation strategies, and positive behavioral management skills. Further, ORR proposes that the behavior management strategies must not use any practices that involve negative reinforcement or involve

¹⁰⁸ See 8 FR 46682 (July 18, 2016) (stating that "[t]he case file contains information that is pertinent to the care and placement of unaccompanied children, including . . . post-release service records[.]").

consequences or measures that are not constructive or not logically related to the behavior being regulated. This would include, as proposed under § 410.1304(a)(1), prohibiting the use or threatened use of corporal punishment, significant incident reports as punishment, and unfavorable consequences related to family/sponsor unification or legal matters (*e.g.*, immigration, asylum). It would also include prohibiting the use of use forced chores or activities that serves no purpose except to demean or humiliate an unaccompanied child, forced physical movement, such as push-ups and running, or uncomfortable physical positions as a form of punishment or humiliation; search an unaccompanied child's personal belongings solely for the purpose of behavior management, and medical interventions that are not prescribed by a medical provider acting within the usual course of professional practice for a medical diagnosis or that increase risk of harm to the unaccompanied child or others. Under proposed § 410.1304(a)(2), ORR would require that any sanctions employed not adversely affect either an unaccompanied child's health or physical, emotional, or psychological well-being; or deny an unaccompanied child meals, hydration, sufficient sleep, routine personal grooming activities, exercise (including daily outdoor activity), medical care, correspondence or communication privileges, or legal assistance. ORR notes that under proposed § 410.1305 it would require training for care provider facility staff on the behavior management strategies, including the use of de-escalation strategies. Under proposed § 410.1304(a)(3), ORR is prohibiting the use prone physical restraints, chemical restraints, or peer restraints for any reason in any care provider facility setting.

Under proposed § 410.1304(b), involvement of law enforcement would be a last resort and a call by a care provider facility to law enforcement may trigger an evaluation of staff involved regarding their qualifications and training in trauma-informed, de-escalation techniques. ORR notes that calls to law enforcement are not considered a behavior management strategy, and care provider facilities are expected to apply other means to de-escalate concerning behavior. But in some cases, such as emergencies or where the safety of unaccompanied children or staff are at issue, care provider facilities may need to call 9–1–1. ORR also notes that proposed § 410.1302(f) describes requirements for

care provider facilities regarding the sharing of information about unaccompanied children. Additionally, because ORR would like to ensure law enforcement is called in response to an unaccompanied child's behavior only as a last resort in emergencies or where the safety of unaccompanied children or staff are at issue, ORR is requesting comment on the process ORR should require care provider facilities to follow before engaging law enforcement, such as the de-escalation strategies that must first be attempted and the specific sets of behaviors exhibited by unaccompanied children that warrant intervention from law enforcement.

Proposed § 410.1304(c) would prohibit standard programs and RTCs from the use of seclusion as a behavioral intervention. ORR notes that this prohibition on the use of seclusion specifically relates to its potential use as a behavioral intervention, and not to a medical need for isolation or quarantine, as discussed in § 410.1307(a)(10). Standard programs and RTCs would also be prohibited from using restraints, except as described at proposed § 410.1304(d) and (f). In emergency safety situations only, ORR is proposing that standard programs and RTCs are permitted to use personal restraint under § 410.1304(d). ORR believes that emergency safety situations should be prevented wherever possible and that personal restraint should only be used after de-escalation strategies and less restrictive approaches have been attempted and failed. As such, ORR emphasizes its proposed requirements under § 410.1304(a) that behavior management strategies used by care provider facilities be evidence-based, trauma-informed, and linguistically responsive. ORR further emphasizes its requirements under proposed § 410.1305 that staff must be trained in these behavior management strategies, including de-escalation techniques,

In secure facilities, not including RTCs, there may be situations where an unaccompanied child becomes a danger to themselves, other unaccompanied children, care provider facility staff, or property. As a result, secure facilities may need to employ more restrictive forms of behavior management than shelters or other types of care provider facilities in emergency safety situations or during transport to or at immigration court or asylum interviews when there are certain imminent safety concerns. ORR notes that under proposed § 410.1303(f) and ORR's current policy, all care provider facilities, regardless of setting, are required to report any emergency incident, significant

incident, or program-level event to ORR, and in accordance with any applicable Federal, State, and local reporting laws.

Therefore, ORR is proposing under § 410.1304(e)(1) to allow secure facilities except for RTCs to use personal restraints, mechanical restraints, and/or seclusion in emergency safety situations. ORR notes that under proposed § 410.1304(a)(3) that the use of prone physical restraints, chemical restraints, or peer restraints is prohibited for any reason for all care provider facilities, including secure facilities. Proposed § 410.1304(e)(2) would allow secure facilities to restrain an unaccompanied child for their own immediate safety or that of others during transport to an immigration court or an asylum interview. ORR is proposing under proposed § 410.1304(e)(3) that secure facilities may restrain an unaccompanied child while at an immigration court or asylum interview if the child exhibits imminent runaway behavior, makes violent threats, demonstrates violent behavior, or if the secure facility has made an individualized determination that the child poses a serious risk of violence or running away if the child is unrestrained in court or the interview. ORR notes that while secure facilities may have safety or runaway risk concerns for which they deem restraints necessary for certain unaccompanied children, immigration judges retain discretion to provide input as to whether the unaccompanied child remains in restraints while in their courtroom. ORR is proposing to require under § 410.1304(e)(4) that secure facilities must provide all mandated services under this subpart to an unaccompanied child to the greatest extent practicable under the circumstances while ensuring the safety of the unaccompanied child, other unaccompanied children at the secure facility, and others. Finally, under proposed § 410.1304(f) ORR would allow care provider facilities to use soft restraints (*e.g.*, zip ties and leg or ankle weights) only during transport to and from secure facilities, and only when the care provider believes a child poses a serious risk of physical harm to self or others or a serious risk of running away from ORR custody.

Section 410.1305 Staff, Training, and Case Manager Standards

Having standards for staff, training, and case managers is in the best interest of unaccompanied children and is supportive to their health and development while in ORR care. Proposed § 410.1305 would establish certain requirements consistent with

ORR's authority to oversee the infrastructure and personnel of facilities in which unaccompanied children reside.¹⁰⁹ Under proposed § 410.1305(a), ORR would require that standard programs, restrictive placements, and post-release service providers, must provide training to all staff, contractors, and volunteers; and that training ensures that staff, contractors, and volunteers understand their obligations under ORR regulations and policies and are responsive to the challenges faced by staff and unaccompanied children at the facility. ORR anticipates that examples of training topics under this proposed paragraph would include the rights of unaccompanied children, including to educational services, creating bias free environments, supporting children with disabilities, supporting the mental health needs of unaccompanied children, trauma, child development, prevention of sexual abuse, the identification of victims of human trafficking, and racial and cultural sensitivity. Standard programs and restrictive placements would also be required to ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to proposed § 410.1304. All trainings would be required to be tailored to the unique needs, attributes, and gender of the unaccompanied children in care at the individual care provider facility. For example, staff who work with early childhood unaccompanied children should be provided training in early childhood care best practices. Additionally, case managers should be trained on child welfare best practices before providing services to children.¹¹⁰ Care provider facilities must document the completion of all trainings in personnel files. In addition to training, ORR would require all staff to complete background check requirements and vetting for their respective roles prior to service provision and care provider facilities would need to provide documentation to ORR of compliance.

Under proposed § 410.1305(b) standard programs and restrictive placements would be required to meet the staff to child ratios established by their respective states or other licensing entities, or ratios established by ORR if state licensure is not available. Under current practice, ORR generally requires

staffing ratios of a minimum of 1 staff to 8 unaccompanied children during the day and 1 staff to 16 unaccompanied children at night while children are sleeping. If, however, state requirements require a stricter staff to child ratio, then under proposed § 410.1305(b), ORR likewise would require the care provider to abide by that smaller ratio.

Standard programs and restrictive placements are required to provide case management services in their facilities. Effective case management systems and policy are important to ensuring care provider facilities are effective in attaining positive outcomes for unaccompanied children. Areas for attention include specifying case manager to unaccompanied child ratios that take the occupancy level of the facility into account, ensuring that case management staff are site-based and provide their services in person, and ensuring that case management staffing levels are appropriate to meet ORR's standards for the length of care of unaccompanied children. ORR is proposing to require under § 410.1305(c) that standard programs and restrictive placements have case managers based at the facility's site. To meet the unique needs of a given facility, ORR could then determine the appropriate ratio of case managers per unaccompanied child through its cooperative agreements and contracts with care provider facilities, as appropriate. This will allow ORR to include changes in the staffing ratio relative to the occupancy of unaccompanied children at the facility and consider the policies related to unaccompanied children's length of stay.

Section 410.1306 Language Access Services

Proposed § 410.1306 describes requirements to provide language accessibility for unaccompanied children. ORR believes that it is important to establish specific, minimum language access requirements, which are critical to ensuring that unaccompanied children understand their rights, the release process, and the services they may receive while in ORR care.

Under proposed § 410.1306(a), standard programs and restrictive placements would be required, to the greatest extent practicable, to consistently offer all unaccompanied children the option of interpretation and translation services in their native or preferred language, depending on their preference, and in a way they understand to the greatest extent practicable. ORR notes that under 45 CFR 85.51, standard programs and

restrictive placements shall also ensure effective communication with unaccompanied children with disabilities. This includes furnishing appropriate auxiliary aids and services such as qualified sign language interpreters, Braille materials, audio recordings, note-takers, and written materials, as appropriate for the unaccompanied child. Under ORR's existing policies, standard programs and restrictive placements are required to make every effort possible to provide interpretation and translation services; however, ORR believes it is important to propose the additional requirement that standard programs and restrictive placements consistently offer each unaccompanied child the option of effective interpretation and translation services to ensure meaningful and timely access to these services. If standard programs and restrictive placements are unable to obtain a qualified interpreter or translator in the unaccompanied children's native or preferred language, depending on their preference, after taking reasonable efforts, standard programs and restrictive placements would then be required to consult with qualified ORR staff (under current policy, the Federal Field Specialist and Project Officer) for guidance on how to provide meaningful access to their programs and activities to children with limited English proficiency. Standard programs and restrictive placements would be permitted to use professional telephonic interpreter services after they take reasonable efforts to obtain in-person, qualified interpreters (as defined). ORR believes that these proposals strike a good balance between the importance of interpretation and translation services and the reality of the vast array of language access needs of unaccompanied children. Standard programs and restrictive placements would also be required to translate all documents and materials shared with unaccompanied children in their native or preferred language, depending on their preference, and in a timely manner.

To ensure efficient and reliable access to necessary interpretation and translation services during placement, under § 410.1306(b) ORR would be required to make placement decisions informed by language access considerations. To the extent it is appropriate and practicable, giving due consideration to unaccompanied child's individualized needs, ORR would place unaccompanied children with similar language needs within the same standard program or restrictive

¹⁰⁹ See 6 U.S.C. 279(b)(1)(G).

¹¹⁰ Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children. Available at: <https://oig.hhs.gov/oei/reports/OEI-07-21-00251.pdf>.

placement. ORR believes that this would further ensure the efficient use of resources while also considering the need for timely and appropriate placement.

Proposed § 410.1306(c) would codify language access requirements during intake, orientation, and while informing unaccompanied children of their rights to confidentiality and limits of confidentiality of information while in ORR care. Under current ORR practice, among other things, standard programs and heightened supervision facilities complete an initial intakes assessment of an unaccompanied child; provide a standardized orientation that is appropriate for the age, culture, language, and accessibility needs of the unaccompanied child; and complete a UC Assessment that covers biographic, family, legal/migration, medical, substance use, and mental health history and is subject to ongoing updates. Under current practice, standard programs and restrictive placements provide unaccompanied children with a Disclosure Notice, which is an ORR document explaining the limits to the confidentiality of information unaccompanied children share while in ORR care and custody, as well as the types of information that standard programs and restrictive placements and ORR must share if disclosed by the unaccompanied children for the safety of the unaccompanied children or for the safety of others.

Under proposed § 410.1306(c)(1), standard programs and restrictive placements would be required both to provide a written notice of the limits of confidentiality they share while in ORR care and custody, and to orally explain the contents of the written notice to the unaccompanied children, in their native preferred language, depending on their preference, and in a way they can effectively understand. Standard programs and restrictive placements would be required to do both prior to the completion of the UC Assessment, and prior to unaccompanied children starting counseling services as proposed at § 410.1302(c)(5) and (6).

Under proposed § 410.1306(c)(2), standard programs and restrictive placements would be required to ensure assessments and initial medical exams are conducted in the unaccompanied children's native or preferred language, depending on their preference, and in a way they effectively understand. Proposed § 410.1306(c)(3) would require that standard programs and heightened supervision facilities provide a standardized and comprehensive orientation to all unaccompanied

children within 48 hours of admission in the unaccompanied children's native or preferred language and in a way they effectively understand regardless of spoken language, reading comprehension level, or disability. Further, under proposed § 410.1306(c)(4), for all step-ups to and step-downs from restrictive placements, standard programs and restrictive placements would be required to specifically explain to the unaccompanied children why they were placed in a restrictive placement or, if stepped down, why their placement was changed, while doing so in the unaccompanied children's native or preferred language, and in a way they effectively understand.

Under proposed § 410.1306(c)(5), if the unaccompanied children are not literate, or if documents provided during intakes and/or orientation are not in a language that they can read and effectively understand, standard programs and restrictive placements would be required to have a qualified interpreter orally translate or sign language translate and explain all the documents in the unaccompanied children's native or preferred language, depending on their preference, and confirm with the unaccompanied children that they fully comprehend all materials. Additionally, at proposed § 410.1306(c)(6) and (7), standard programs and restrictive placements would be required to provide unaccompanied children information regarding grievance and ORR's sexual abuse and harassment policies and procedures in the unaccompanied children's native or preferred language, based on their preference, and in a way they effectively understand. Under § 410.1306(c)(8), standard programs and restrictive placements would be required to notify the unaccompanied children that standard programs and restrictive placements will accommodate the unaccompanied children's language needs while they remain in ORR care.

Under proposed § 410.1306(c)(9), with respect to all requirements described in proposed § 410.1306(c), standard programs and restrictive placements would be required to document in each unaccompanied children's case file that they acknowledged that they effectively understand what was provided to them.

Proposed § 410.1306(d) describes requirements regarding language access and education. In order to provide meaningful education services to unaccompanied children, ORR believes that it is important to ensure that educational services are presented to unaccompanied children in a language

that is accessible to them. Proposed § 410.1306(d)(1) would require standard programs and heightened supervision facilities to provide educational instruction and relevant materials in a format and language accessible to all unaccompanied children, regardless of their native or preferred language, including by providing in-person interpretation, professional telephonic interpretation, and written translations, all by qualified interpreters or translators. Proposed § 410.1306(d)(2) would require standard programs and heightened supervision facilities to provide recreational reading materials in formats and languages accessible to all unaccompanied children, which would facilitate their out-of-class enrichment and engagement. Proposed § 410.1306(d)(3) would require standard programs and heightened supervision facilities to translate all ORR-required documents provided to unaccompanied children for use in educational lessons, in formats and languages accessible to all unaccompanied children.

ORR believes that it is important to ensure that the unaccompanied children's religious and cultural expressions, practices, and identities are accommodated to the extent practicable. Accordingly, under proposed § 410.1306(e), when an unaccompanied child makes a reasonable request for religious and/or cultural information or other religious/cultural items, such as books or clothing, the standard program or heightened supervision facility would be required to provide the applicable items, in the unaccompanied child's native or preferred language, depending on the unaccompanied child's preference. At the same time, with respect to the obligations of care provider facilities, ORR notes that it operates the Unaccompanied Children program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.¹¹¹

ORR proposes in § 410.1306(f) that standard programs and restrictive placements would be required to utilize any necessary professional interpretation or translation services needed to ensure meaningful access by an unaccompanied child's parent(s), guardian(s), and/or potential sponsor(s). Standard programs and restrictive placements would also be required to translate all documents and materials shared with the parent(s), guardian(s), and/or potential sponsors in their native

¹¹¹ See 45 CFR 87.3(a).

or preferred language, depending on their preference. ORR notes that under 45 CFR 85.51, standard programs and restrictive placements shall also ensure effective communication with parent(s), guardian(s), and/or potential sponsor(s) with disabilities.

ORR acknowledges the importance of making appropriate interpretation and translation services available to all unaccompanied children while receiving healthcare services so that they understand the services that are being offered and/or provided. Under proposed § 410.1306(g), while unaccompanied children are receiving healthcare services, standard programs and restrictive placements would be required to ensure that unaccompanied children are able to communicate with physicians, clinicians, and other healthcare staff in their native or preferred language, depending on their preference, and in a way they effectively understand, prioritizing services from an in-person, qualified interpreter before using professional telephonic interpretation services.

Section 410.1306(h) proposes language access requirements for standard programs and restrictive placements while unaccompanied children receive legal services. To facilitate unaccompanied children receiving effective legal services, ORR believes that it is essential that unaccompanied children understand the legal services offered to them and the process for participation in removal proceedings post-release, and accordingly, unaccompanied children should be provided with meaningful access to language services as relates to legal services. ORR is proposing to require that standard programs and restrictive placements make qualified interpretation and translation services available upon request to unaccompanied children, child advocates, and legal service providers while unaccompanied children are being provided with legal services. Additionally, ORR proposes in § 410.1306(i) that interpreters and translators would be required to keep information about the unaccompanied children's cases and/or services confidential from non-ORR grantees, contractors, and Federal staff.

Section 410.1307 Healthcare Services

The provision of healthcare to unaccompanied children is foundational to their health and wellbeing and to supporting their childhood development. Therefore, proposed § 410.1307(a) would codify that ORR shall ensure the provision of appropriate routine medical and dental

care; access to medical services requiring heightened ORR involvement, consistent with § 410.1307(c); family planning services; and emergency health services in standard programs and restrictive placements. This proposed paragraph would codify corresponding requirements from Exhibit 1 of the FSA. Further, under proposed § 410.1307(b), care providers must establish a network of licensed healthcare providers, including specialists, emergency care services, mental health practitioners, and dental providers that will accept ORR's fee-for-service billing system under proposed § 410.1307(b)(1). To assess the unique healthcare needs of each unaccompanied child, consistent with existing policy and practice, ORR is including a requirement that unaccompanied children receive a complete medical examination (including screening for infectious disease) within two business days of admission unless an unaccompanied child was recently examined at another facility and if an unaccompanied child is still in ORR custody 60 to 90 days after admission, an initial dental exam, or sooner if directed by state licensing requirements under proposed § 410.1307(b)(2).

In order to prevent the spread of diseases in care provider facilities and avoid preventable illness among unaccompanied children, ORR is also proposing to require appropriate immunizations as recommended by the Advisory Committee on Immunization Practices' Child and Adolescent Immunization Schedule and approved by HHS' Centers for Disease Control and Prevention under proposed § 410.1307(b)(3). To aid in the early detection of potential health conditions and ensure unaccompanied children's health conditions are appropriately managed, under proposed § 410.1307(b)(4) ORR would require an annual physical examination, including hearing and vision screening, and follow-up care for acute and chronic conditions. ORR notes that it facilitates an array of health services, such as medications, surgeries, or other follow-up care, that have been ordered or prescribed by a healthcare provider. ORR would require the administration of prescribed medication and special diets under proposed § 410.1307(b)(5) and appropriate mental health interventions when necessary under proposed § 410.1307(b)(6). ORR notes that it is proposing to require routine individual and group counseling session at proposed § 410.1302(c)(5) and (6).

There are a number of policies and procedures related to medical care and

medications that ORR is proposing to require in order to promote health and safety at their facilities. Under proposed § 410.1307(b)(7), care provider facilities must have policies and procedures for identifying, reporting, and controlling communicable diseases that are consistent with applicable State, local, and Federal laws and regulations. Under proposed § 410.1307(b)(8), care provider facilities must have policies and procedures that enable unaccompanied children, including those with language and literacy barriers, to convey written and oral requests for emergency and non-emergency healthcare services. Finally, under proposed § 410.1307(b)(9), ORR would require care provider facilities have policies and procedures based on state or local laws and regulations to ensure the safe, discreet, and confidential provision of prescription and nonprescription medications to unaccompanied children, secure storage of medications, and controlled administration and disposal of all drugs. A licensed healthcare provider must write or orally order all nonprescription medications and oral orders must be documented in the unaccompanied child's file.

At times, the use of medical isolation or quarantine for unaccompanied children may be required to prevent the spread of an infectious disease due to a potential exposure. Proposed § 410.1307(b)(10) would allow unaccompanied children to be placed in medical isolation and excluded from contact with general population when medically necessary to prevent the spread of an infectious disease due to a potential exposure, protect other unaccompanied children and care provider facility staff for a medical purpose or as required under state, local, or other licensing rules, as long as the medically required isolation is limited to only the extent necessary to ensure the health and welfare of the unaccompanied child, other unaccompanied children at a care provider facility and care provider facility staff, or the public at large. To ensure that unaccompanied children have access to necessary services during medical isolation, ORR is proposing that care provider facilities must provide all mandated services under this subpart to the greatest extent practicable under the circumstances of the medical isolation. A medically isolated unaccompanied child still must be supervised under state, local, or other licensing ratios, and, if multiple unaccompanied children are in medical isolation, they should be placed in units or housing together (as practicable, given the nature

or type of medical issue giving rise to the requirement for isolation in the first instance).

In § 410.1307(c), ORR proposes requirements ensuring access to medical care for unaccompanied children. At § 410.1307(c)(1), consistent with the requirements of proposed § 410.1103, ORR proposes that to the greatest extent possible, an unaccompanied child whom ORR determines requires medical care or who reasonably requests such medical care will be placed in a care provider facility that has available and appropriate bed space, is able to care for such an unaccompanied child, and is in a location where the relevant medical services are accessible. This proposal aligns with proposed subpart B, Determining the Placement of an Unaccompanied Child at a Care Provider Facility, which would require that ORR place unaccompanied children in the least restrictive setting that is in the best interest of the child and appropriate to the child's age and individualized needs, and that ORR considers "any specialized services or treatment required" when determining placement of all unaccompanied children.

Additionally, ORR proposes that if an initial placement in a care provider facility that meets the requirements in § 410.1307(c)(1) is not immediately available or if a medical need or reasonable request, as described in § 410.1307(c)(1), arises after the Initial Medical Exam, ORR shall transfer the unaccompanied child to a care provider facility that is able to accommodate the medical needs of the unaccompanied child. If the medical need is identified, or the reasonable request is received, after the Initial Medical Exam, the care provider facility shall immediately notify ORR. This proposal aligns with subpart G, Transfers, which would require transfer of an unaccompanied child within the ORR care provider facility network when it is determined that an alternate placement for the unaccompanied child that would best meet the child's individual needs. Care provider facilities would be required to follow the process proposed in subpart G such as submitting a transfer recommendation to ORR for approval within three (3) business days of identifying the need for a transfer.

As described in § 410.1307(c)(2), ORR proposes to codify requirements ensuring that unaccompanied children are provided transportation to access medical services, including across state lines if necessary, and associated ancillary services. This would ensure unaccompanied children can access appointments with medical specialists

(e.g., neonatologists, oncologists, pediatric cardiologists, pediatric surgeons, or others), family planning services, prenatal services and pregnancy care, or care that may be geographically limited including but not limited to an unaccompanied child's need or request for medical services requiring heightened ORR involvement. This proposal is consistent with current policy, as noted in subpart E, Transportation of an Unaccompanied Child, that ORR, or its care provider facilities, provide transportation for purposes of service provision including medical services. If there is a potential conflict between ORR's regulations and state law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. It is important to note, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.

These proposals maintain existing policy that ORR must not prevent unaccompanied children in ORR care from accessing healthcare services, which may include medical services requiring heightened ORR involvement or family planning services, and must make reasonable efforts to facilitate access to those services if requested by the unaccompanied child.¹¹² This includes providing transport across state lines and associated ancillary services if necessary to access appropriate medical services, including access to medical specialists and medical services requiring heightened ORR involvement. Under these proposals, ORR will continue to facilitate access to medical services requiring heightened ORR involvement, including access to abortions, in light of ORR's statutory responsibility to ensure that the interests of the unaccompanied child

¹¹² See, e.g., Administration for Children and Families, FIELD GUIDANCE—Issued Oct. 1, 2021, revised Nov. 10, 2022, RE: Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare, available at <https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf>. See also 45 CFR 411.92(d). See also 45 CFR 411.92(d) (requiring timely and comprehensive information about lawful pregnancy-related medical services and timely access to such services for unaccompanied children who experience sexual abuse while in ORR care). ORR notes that it was a party to a settlement agreement reached in Federal litigation concerning unaccompanied children's access to abortion (*Garza* settlement). See Joint Stipulation of Dismissal Without Prejudice, *J.D. v. Azar*, No. 1:17-cv-02122 (D.D.C. Sep. 29, 2020), ECF No. 168. ORR implemented various policies to effectuate the terms of the *Garza* settlement.

are considered in decisions and actions relating to their care and custody, and to implement policies with respect to their care and placement.¹¹³ ORR would continue to permit such access in a manner consistent with limitations on the use of Federal funds for abortions which are regularly included in HHS' annual appropriations, commonly referred to as the "Hyde Amendment."¹¹⁴ Consistent with current policy, ORR will facilitate such access regardless of whether the Federal Government may pay for the abortion under the Hyde Amendment. ORR further notes that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.¹¹⁵

Lastly, ORR proposes a requirement in § 410.1307(d) that care provider facilities shall notify ORR within 24 hours of an unaccompanied child's need or request for a medical service requiring heightened ORR involvement or the discovery of a pregnancy. This proposal is consistent with ORR's current policy requirements for notifying ORR of significant incidents and medical services requiring heightened ORR involvement.

Section 410.1308 Child Advocates

ORR proposes, at § 410.1308, to codify standards and requirements relating to the appointment of independent child advocates for child trafficking victims and other vulnerable unaccompanied children (see particularly statement at proposed § 410.1308(a). The TVPRA, at 8 U.S.C. 1232(c)(6), authorizes HHS to appoint child advocates for child trafficking victims and other vulnerable unaccompanied children. In 2016, the Government Accountability Office (GAO) carried out an assessment of the ORR child advocate program¹¹⁶ and recommended improving ORR monitoring of contractor referrals to the program, as well as improving information sharing with child

¹¹³ See 6 U.S.C. 279(b)(1)(B), (E).

¹¹⁴ See, e.g., Consolidated Appropriations Act, 2023, Public Law 117-328, Div. H, tit. V, sections 506-507; see also Department of Justice, Office of Legal Counsel, *Application of the Hyde Amendment to the Provision of Transportation for Women Seeking Abortions* (Sept. 27, 2022), https://www.justice.gov/d9/2022-11/2022-09-27-hyde_amendment_application_to_hhs_transportation.pdf.

¹¹⁵ See 45 CFR part 87.

¹¹⁶ See GAO, April 19, 2016, "Unaccompanied Children: HHS Should Improve Monitoring and Information Sharing Policies to Enhance Child Advocate Program Effectiveness," GAO-16-367.

advocates regarding the unaccompanied children assigned to them. ORR notes that the need for child advocates in helping to protect the interests of unaccompanied children has continued to grow over time, especially given the increasing numbers of unaccompanied children who are referred to ORR custody. Proposed § 410.1308 is intended to codify specific child advocates' roles and responsibilities which are currently described primarily in ORR policy documents.

At § 410.1308(b), ORR proposes to define the role of child advocates as third parties who identify and make independent recommendations regarding the best interest of unaccompanied children. The recommendations of child advocates are based on information obtained from the unaccompanied children and other sources (including the unaccompanied child's parents, family, potential sponsors/sponsors, government agencies, legal service providers, protection and advocacy system representatives in appropriate cases, representatives of the unaccompanied child's care provider, health professionals, and others). Child advocates formally submit their recommendations to ORR and/or the immigration court as written best interest determinations (BIDs). ORR considers BIDs when making decisions regarding the care, placement, and release of unaccompanied children, but it is not bound to follow BID recommendations.

With respect to the role of child advocates, ORR considered several ways to strengthen or expand the role, including granting child advocates rights of access to ORR records and information on unaccompanied children (in order to advocate for unaccompanied children more effectively); allowing advocates to be present at all ORR hearings and interviews with their client (excepting meetings between an unaccompanied child and their attorney or EOIR accredited representative); and expanding the child advocates program to operate at more locations, or expanding eligibility for the program to allow unaccompanied children who age past their 18th birthday to continue receiving advocates' services. ORR considered the suggestions it received, and notes that, as required by the TVPRA, it already provides child advocates with access to materials necessary to effectively advocate for the best interest of unaccompanied children. In particular, per current ORR policies, and as reflected in this section, child advocates have access both to their clients and to their clients' records.

Child advocates may access their clients' entire original case files at care provider facilities, or request copies from care providers. Further, they may participate in case staffings, which are meetings organized by an unaccompanied child's care provider with other relevant stakeholders to help discuss and plan for the unaccompanied child's care. In drafting this NPRM, ORR believes that the proposed language at § 410.1308(b) (together with other paragraphs proposed in § 410.1308) represent an appropriate balance in codifying the role of child advocates. ORR invites comment on these issues, and on the proposals of § 410.1308(b).

At paragraph § 410.1308(c), ORR proposes to specify the responsibilities of child advocates, which include: (1) visiting with their unaccompanied children clients, (2) explaining the consequences and potential outcomes of decisions that may affect the unaccompanied child, (3) advocating for the unaccompanied child client's best interest with respect to care, placement, services, release, and, where appropriate, within proceedings to which the child is a party, (4) providing best interest determinations, where appropriate and within a reasonable time to ORR, an immigration court, and/or other interested parties involved in a proceeding or matter in which the child is a party or has an interest, and (5) regularly communicating case updates with the care provider, ORR, and/or other interested parties in the planning and performance of advocacy efforts, including updates related to services provided to unaccompanied children after their release from ORR care.

Consistent with the TVPRA at 8 U.S.C. 1232(c)(6)(A), under proposed § 410.1308(d), ORR may appoint child advocates for unaccompanied children who are victims of trafficking or are especially vulnerable. Under proposed § 410.1308(d)(1), an interested party may refer an unaccompanied child to ORR for a child advocate after notifying ORR that a particular unaccompanied child in or previously in ORR's care is a victim of trafficking or is especially vulnerable. As used in this section, "interested parties" means individuals or organizations involved in the care, service, or proceeding involving an unaccompanied child, including but not limited to, ORR Federal or contracted staff; an immigration court judge; DHS staff; a legal service provider, attorney of record, or EOIR accredited representative; an ORR care provider; a healthcare professional; or a child advocate organization. Under proposed § 410.1308(d)(2), ORR would make an appointment decision within five (5)

business days of referral for a child advocate, except under exceptional circumstances including, but not limited to, natural disasters (such as hurricane, fire, or flood) or operational capacity issues due to influx which may delay a decision regarding an appointment. ORR typically would consider the available resources, including the availability of child advocates in a particular region, when appointing a child advocate for unaccompanied children in ORR care. ORR would appoint child advocates only for unaccompanied children who are currently in or were previously in ORR care. And under proposed § 410.1308(d)(3), child advocate appointments would terminate upon the closure of the unaccompanied child's case by the child advocate, when the unaccompanied child turns 18, or when the unaccompanied child obtains lawful immigrant status. Regarding the appointment of child advocates, ORR considered allowing that any stakeholder should be able to make a confidential referral of an unaccompanied child for child advocate services, and also that any termination of such services should be determined in collaboration with the unaccompanied child and the unaccompanied child's parent or legal guardian (if applicable). In terms of referrals, proposed § 410.1308(d) would allow for referrals for child advocate services from a broad range of possible individuals. In terms of terminating child advocate services, ORR considered making terminations contingent on a collaborative process between the child advocate, the unaccompanied child, and the unaccompanied child's sponsor, but ORR believes that the current proposal at § 410.1308(d)(3) would impose reasonable limits for the termination of child advocate services, and that termination itself otherwise falls within the role and responsibilities of child advocates when advocating for an unaccompanied child's best interests.

Under § 410.1308(e), ORR proposes standards concerning child advocates' access to information about unaccompanied children for whom they are appointed. After a child advocate is appointed for an unaccompanied child, the child advocate would be provided access to materials to effectively advocate for the best interest of the unaccompanied child.¹¹⁷ Consistent with existing policy, child advocates would be provided access to their

¹¹⁷ See 8 U.S.C. 1232(c)(6)(A) (" . . . A child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child . . .").

clients during normal business hours at an ORR care provider facility in a private area, would be provided access to all their client's case file information, and may request copies of the case file directly from the unaccompanied child's care provider without going through ORR's standard case file request process, subject to confidentiality requirements described below. A child advocate would receive timely notice concerning any transfer of an unaccompanied child assigned to them.

Under § 410.1308(f), ORR proposes standards for a child advocate's responsibility with respect to confidentiality of information. Notwithstanding the access to their clients' case file information granted to child advocates under proposed paragraph (e), child advocates would be required to keep the information in the case file, and information about the unaccompanied child's case, confidential. Child advocates would be prohibited from sharing case file information with anyone except with ORR grantees, contractors, and Federal staff. Child advocates would not be permitted to disclose case file information to other parties, including parties with an interest in a child's case. Other parties are able to request an unaccompanied child's case file information according to existing procedures. ORR proposes these protections consistent with its interest in protecting the privacy of unaccompanied children in its care, and for effective control and management of its records. Proposed § 410.1308(f) also establishes that, with regard to an unaccompanied child in ORR care, ORR would allow the child advocate of that unaccompanied child to conduct private communications with the child, in a private area that allows for confidentiality for in-person and virtual or telephone meetings. In drafting proposed § 410.1308(f), ORR considered suggestions that a child advocate should be protected from compelled disclosure of any information concerning an unaccompanied child shared with them in the course of their advocacy work and that unaccompanied children and child advocates must have access to private space to ensure confidentiality of in-person meetings and virtual meetings. ORR notes that proposed § 410.1308(f) is to be read consistently with the TVPRA requirement that child advocates "shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child

advocate."¹¹⁸ Also, ORR is seeking comment on specific ways to ensure confidentiality of unaccompanied child-child advocate meetings, and invites public comment on that issue, in particular on appropriate ways to ensure privacy, as well as on the proposed text of § 410.1308(f) generally.

Under proposed § 410.1308(g), ORR proposes that it would not retaliate against a child advocate for actions taken within the scope of their responsibilities. For example, ORR would not retaliate against a child advocate because of any disagreement with a best interest determination or because of a child advocate's advocacy on behalf of an unaccompanied child. ORR notes that proposed § 410.1308(g) is intended to be read consistently with its statutory obligation to provide access to materials necessary to effectively advocate for the best interest of the child, and consistently with a presumption that the child advocate acts in good faith with respect to their advocacy on behalf of the child.¹¹⁹ At the same time, ORR has the responsibility and authority to effectively manage its unaccompanied children's program which includes, for example, ensuring that the interests of the child are considered in decisions and actions relating to care and custody, implementing policies with respect to the care and placement of unaccompanied children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.¹²⁰

Section 410.1309 Legal Services

ORR proposes, at § 410.1309, standards and requirements relating to the provision of legal services to unaccompanied children following entry into ORR care. The proposals under § 410.1309 also include standards relating to ORR funding for Legal Service Providers for unaccompanied children.

ORR believes that Legal Service Providers who represent unaccompanied children undertake an important function by representing such children while in ORR care and in some instances after release. The proposals under § 410.1309 build on current ORR policies, which articulate standards for legal services for unaccompanied children. ORR strives for 100% legal representation of unaccompanied children and will continue to work towards that goal to the extent possible. ORR invites public comment as to

whether and how there are further ways to broaden representation for unaccompanied children.

ORR notes that under the TVPRA, at 8 U.S.C. 1232(c)(5), the Secretary of HHS must "ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362)," that all unaccompanied children who are or have been in its the custody or in the custody of DHS, with exceptions for children who are habitual residents of certain countries, have counsel "to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking." The Secretary of Health and Human Services "shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge." The INA, 8 U.S.C. 1362, provides, "In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

Thus, under the TVPRA, HHS has an obligation, "to the greatest extent practicable," to ensure that unaccompanied children have counsel in (1) immigration proceedings and (2) to protect them from mistreatment, exploitation, and trafficking. Because 8 U.S.C. 1232(c)(5) states these responsibilities are "consistent with" 8 U.S.C. 1362, ORR reads these provisions together as establishing that, while the statute establishes HHS' obligations in relation to legal services, there is not a right to government-funded counsel under 8 U.S.C. 1232(c)(5). Rather, ORR understands that it has a duty to ensure to the greatest extent practicable that unaccompanied children have counsel at no expense to the government, for both purposes described by the TVPRA. Further, the second sentence of 8 U.S.C. 1232(c)(5) states that the Secretary of HHS shall, to the greatest extent practicable, make every effort to utilize the services of pro bono counsel. ORR understands this requirement as establishing the preferred means by which counsel is provided to unaccompanied children, but also that the Secretary has authority to utilize other types of services—namely services that are not pro bono—in areas where pro bono services are not available. In summary, insofar as it is not practicable for the Secretary of HHS to utilize the services of pro bono counsel for all unaccompanied children specified at 8

¹¹⁸ 8 U.S.C. 1232(c)(6)(A).

¹¹⁹ See 8 U.S.C. 1232(c)(6)(A).

¹²⁰ See 6 U.S.C. 279(b)(1)(B), (E), and (G).

U.S.C. 1232(c)(5), the Secretary has discretion under that section (but not the obligation) also to fund client representation for counsel for the unaccompanied children both (1) in immigration proceedings, and (2) to protect them from mistreatment, exploitation, and trafficking—as such concerns may arise outside the context of immigration proceedings (e.g., other discrete services outside the context of immigration proceedings as described in the paragraphs below).

ORR proposes, at § 410.1309(a)(1), that ORR would ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied children who are or have been in ORR care, and who are not subject to special rules for children from contiguous countries, have access to legal advice and representation in immigration legal proceedings or matters, consistent with current policy and as further described in this section. ORR understands “to the greatest extent practicable” to reflect that the provision of legal services must be subject to available resources, as determined by ORR, and otherwise practicable.

ORR proposes, at § 410.1309(a)(2), that an unaccompanied child in ORR care receive (1) a presentation concerning the rights and responsibilities of unaccompanied children in the immigration system, including information about protections under child labor laws and educational rights, presented in the language of the unaccompanied child and in an age-appropriate manner; (2) information regarding availability of free legal assistance, and that they may be represented by counsel, at no expense to the government;¹²¹ (3) notification of

¹²¹ This language is intended, consistent with ORR’s statutory authorities, to implement paragraph A.14 of Exhibit 1 of the FSA, which states: “Legal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the government, the right to deportation or exclusion hearing before an immigration judge, the right to apply for political asylum or to request voluntary departure in lieu of deportation.” With respect to information regarding the availability of free legal assistance, ORR understands the proposed language at § 410.1309(a)(2)(ii) to be consistent with paragraph A.14, but updated to avoid potential confusion. As discussed above, 8 U.S.C. 1232(c)(5) does not describe an unaccompanied child’s ability to access legal counsel as a “right;” and ORR cannot, by regulation, confer such a right. Rather, by reference to the Immigration and Nationality Act, the TVPRA describes unaccompanied children’s access to counsel as a “privilege,” and also makes HHS responsible for ensuring such privilege “to the greatest extent practicable.” ORR notes that this clarification does not represent a change in ORR’s existing policies or practices, and as described elsewhere in this section, ORR proposes to expand

the ability to petition for SIJ classification, to request that a state juvenile court determine dependency or placement, and notification of the ability to apply for asylum or other forms of relief from removal; (4) information regarding the unaccompanied child’s right to a removal hearing before an immigration judge, the ability to apply for asylum with USCIS in the first instance, and the ability to request voluntary departure in lieu of removal; and (5) a confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or EOIR accredited representative) to determine possible forms of legal relief in relation to the unaccompanied child’s immigration case. ORR also proposes in § 410.1309(a)(2) that an unaccompanied child in ORR care be able to communicate privately with their attorney of record, EOIR accredited representative, or legal service provider, in a private enclosed area that allows for confidentiality for in-person and virtual or telephone meetings. ORR notes that these proposed services go beyond that which is required under the FSA. For example, although both the FSA and proposed § 410.1309(a)(2) require that unaccompanied children receive information regarding their legal rights and availability of free legal assistance, proposed § 410.1309(a)(2) would provide additional specificity to the type of information that would be provided. Additionally, ORR notes that proposed § 410.1309(a)(2) goes beyond the scope of what is required under the FSA by providing that unaccompanied children receive not just information regarding the availability of legal counsel, but also requiring that unaccompanied children receive a confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or a DOJ accredited representative) to help them understand their individual immigration case. Finally, although the FSA requires that unaccompanied children have “a reasonable right to privacy,” which includes the right to talk privately on the phone and meet privately with guests (as permitted by the facility’s house rules and regulations), FSA Exhibit 1 at paragraph A.12, proposed § 410.1309(a)(2) would go beyond the FSA’s requirement to make explicit that communications and meetings with the unaccompanied child’s attorney of record, EOIR accredited representative, and legal service provider must be held in

the availability of legal services to unaccompanied children beyond current practice.

enclosed designated spaces, without reference to any limitation on such rights by the facility’s house rules and regulations.

With respect to the confidential legal consultation, ORR notes the importance of allowing unaccompanied children and their legal service providers, attorneys of record, or EOIR accredited representatives access to private space, to ensure that any communications or meetings about legal matters can be held confidentially. In addition, in developing the proposal to require a presentation on the rights of unaccompanied children in the immigration system, ORR is considering including a requirement for additional presentations for unaccompanied children who remain in ORR care beyond six months.

ORR proposes, at § 410.1309(a)(3), that ORR would require this information, regarding unaccompanied children’s legal rights and access to services while in ORR care, be posted in an age-appropriate format and translated into each child’s preferred language consistent with proposed § 410.1306, in any ORR contracted or grant-funded facility where unaccompanied children are in ORR care.

ORR proposes, at § 410.1309(a)(4), that to the extent that appropriations are available, and insofar as it is not practicable to secure pro bono counsel for unaccompanied children as specified at 8 U.S.C. 1232(c)(5), ORR would fund legal service providers to provide direct immigration legal representation to certain unaccompanied children subject to ORR’s discretion to the extent it determines appropriations are available. Examples of direct immigration legal representation include, but are not limited to: (1) for unrepresented unaccompanied children who become enrolled in ORR URM Programs, provided they have not yet obtained lawful status or reached 18 years of age at the time of retention of an attorney; (2) for unaccompanied children in ORR care who must appear before EOIR, including children seeking voluntary departure, or who must appear before U.S. Citizenship and Immigration Services (USCIS); (3) for unaccompanied children released to a sponsor residing in the defined service area of the same legal service provider who provided the child legal services in ORR care, to promote continuity of legal services; and (4) for other unaccompanied children, in ORR’s discretion.

Under proposed § 410.1309(b), ORR would fund legal services for the protection of an unaccompanied child’s

interests in certain matters not involving direct immigration representation, consistent with its obligations under the HSA, 6 U.S.C. 279(b)(1)(B), and the TVPRA, 8 U.S.C. 1232(c)(5). In addition to the direct immigration representation outlined in § 410.1309(a)(4), to the extent ORR determines that appropriations are available and use of pro bono counsel is impracticable, ORR proposes that ORR may (but is not required to) make funding for additional access to counsel available for unaccompanied children in the following enumerated situations for proceedings outside of the immigration system when appropriations allow and subject to ORR's discretion in no particular order of prioritization: (1) ORR appellate procedures, including the Placement Review Panel (PRP) related to placement in restrictive facilities under § 410.1902, risk determination hearings under § 410.1903, and the denial of a release to the child's parent or legal guardian under § 410.1206; (2) for unaccompanied children upon their placement in ORR long-term home care or in an RTC outside a licensed ORR facility and for whom other legal assistance does not satisfy the legal needs of the individual child; (3) for unaccompanied children with no identified sponsor who are unable to be placed in ORR long-term home care or ORR transitional home care; (4) for purposes of judicial bypass or similar legal processes as necessary to enable an unaccompanied child to access certain lawful medical procedures that require the consent of the parent or legal guardian under state law and the unaccompanied child is unable or unwilling to obtain such consent; (5) for the purpose of representing an unaccompanied child in state juvenile court proceedings, when the unaccompanied child already possesses SIJ classification; and (6) for the purpose of helping an unaccompanied child to obtain an employment authorization document. ORR invites comment on these proposals under § 410.1309(b), and also with regard to how a mechanism might be incorporated into the rule to help prevent, or reduce the likelihood of, the zeroing-out of funding for legal representation, while also ensuring sufficient funding for capacity to address influxes.

At § 410.1309(c), ORR proposes to establish relevant requirements and expectations for the provision of the legal services described at § 410.1309(a) and (b). ORR proposes at § 410.1309(c)(1) that in the course of funding legal counsel for any

unaccompanied children under proposed § 410.1309(a)(4) or (b)(2), in-person meetings would be preferred, although unaccompanied children and their representatives would be able to meet by telephone or teleconference as an alternative option when needed and when such meetings can be facilitated in such a way as to preserve the unaccompanied child's privacy. Either the unaccompanied child's attorney of record or EOIR accredited representative or an ORR staff member or care provider would always accompany the unaccompanied child to any in-person hearing or proceeding, in connection with any legal representation of an unaccompanied child pursuant to § 410.1309.

When developing proposed § 410.1309(c)(1), ORR considered the alternatives of enacting a requirement that an unaccompanied child's attorney of record or BIA accredited representative always be required to attend court hearings and proceedings in-person with the unaccompanied child, or that the attorney of record or EOIR accredited representative always engage in in-person meetings with the unaccompanied child while representing them, absent a good cause reason not to do so. ORR concluded that the current proposal at § 410.1309(c)(1) reflects a balance between ensuring that unaccompanied children have effective access to legal representation and services, while establishing a preference for in-person meetings, and ensuring that unaccompanied children will not have to walk into physical proceedings alone.

Under proposed § 410.1309(c)(2), ORR would require the sharing of certain information with an unaccompanied child's representative, including certain notices. Under paragraph (c)(2), upon receipt by ORR of (1) proof of representation and (2) authorization for release of records signed by the unaccompanied child or other authorized representative, ORR would, upon request, share the unaccompanied child's complete case file apart from any legally required redactions to assist with legal representation of that child. Section 410.1309(c)(2) reflects current ORR policy guidance describing the process by which an individual will be recognized by ORR as the attorney of record or EOIR accredited representative for an unaccompanied child. Under current practice, ORR recognizes an individual as an unaccompanied child's attorney of record or EOIR accredited representative through the submission of an ORR form, the ORR Notice of Attorney Representation. ORR notes that this form is not identified specifically in

the proposed regulatory text, so as to preserve operational flexibility for ORR to accept different forms of proof as appropriate, as needed. ORR also considered the importance of timely notice by ORR to the unaccompanied child's representative in order to allow for effective legal representation, in connection with law enforcement events, age redetermination processes, and allegations of sexual abuse or harassment.

ORR seeks public comment on these issues, including the scope of reportable events or interactions with law enforcement and scope of notice depending on the unaccompanied child's involvement in the reportable event (*i.e.*, as an alleged victim, alleged perpetrator, or as a witness). With allegations or accusations of sexual abuse or harassment, ORR solicits public comment on privacy concerns and other considerations. ORR also solicits comment on the appropriate timeframes for various types of notification.

As discussed in section IV.B of this NPRM, the Secretary's authority under 8 U.S.C. 1232 has been delegated to the ORR Director. As discussed above, ORR understands that in addition to expanding access to pro bono services and funding legal services in immigration-related proceedings or matters, it may also promote pro bono services and fund legal services for broader purposes that relate to protecting unaccompanied children from mistreatment, exploitation, and trafficking. Consistent with the TVPRA, ORR makes every effort to use pro bono legal services to the greatest extent practicable to secure counsel for unaccompanied children in these contexts. Specifically, ORR-funded legal service providers may help coordinate a referral to pro bono services, and ORR provides each unaccompanied child with lists of pro bono legal service providers by state and pro bono services available through a national organization upon admission into a care provider facility.¹²² That said, in some cases it is impracticable for ORR to secure pro bono legal services for unaccompanied children. For example, it may be impracticable to secure pro bono services if the demand for such services exceeds the supply of pro bono services, as may occur at certain locations or during times of influx. To

¹²² See 6 U.S.C. 279(b)(1)(I). See also Office of Refugee Resettlement Division of Unaccompanied Children Operations, Legal Resource Guide—Legal Service Provider List for [UC] in ORR Care, https://www.acf.hhs.gov/sites/default/files/documents/orr_english_legal_service_providers_guide_with_form_508.pdf.

the extent pro bono legal services are unavailable or impracticable to secure because it has limited resources, ORR must be selective in the kinds of legal services it funds. As a result, ORR proposes through this rule to establish its discretion to fund legal services for specific purposes, based on its judgment and priorities.

In terms of funding legal services, at proposed § 410.1309(d), ORR also proposes to, in its discretion and subject to available resources, make available funds (if appropriated) to relevant agencies or organizations to provide legal services for unaccompanied children who have been released from ORR care and custody. ORR would establish authority to make available grants—including formula grants distributed geographically in proportion to the population of released unaccompanied children—or contracts for immigration legal representation, assistance, and related services to unaccompanied children.

To prevent retaliation against legal service providers, at § 410.1309(e), ORR proposes that it shall presume that legal service providers are acting in good faith with respect to their advocacy on behalf of unaccompanied children, and ORR shall not retaliate against a legal service provider for actions taken within the scope of the legal service providers' responsibilities. For example, ORR shall not engage in retaliatory actions against legal service providers or any other representative for reporting harm or misconduct on behalf of an unaccompanied child. As noted at proposed § 410.1309(e), ORR will not retaliate against legal service providers; however, ORR has the responsibility and authority to effectively manage its unaccompanied children's program which includes, for example, ensuring that the interests of the child are considered in decisions and actions relating to care and custody, implementing policies with respect to the care and placement of unaccompanied children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.

Section 410.1310 Psychotropic Medications

ORR is proposing requirements related to the administration of psychotropic medications to unaccompanied children while in ORR care. ORR notes that the third of the five plaintiff classes certified by the United States District Court for the Central District of California in the *Lucas R. v. Becerra* case, as discussed in section IV.A.4. of this proposed rule, is the

“drug administration class.” The class is comprised of unaccompanied children in ORR custody “who are or will be prescribed or administered one or more psychotropic medications without procedural safeguards[.]”¹²³ ORR will be bound by any potential future court decisions or settlements in the case.¹²⁴ The Court's Preliminary Injunction ordered on August 30, 2022, did not address this claim and, as of April 2023, ORR remains in active litigation regarding this claim.

ORR believes that psychotropic medications should only be administered appropriately and in the best interest of the child and with meaningful oversight. Therefore, ORR is proposing in § 410.1310(a) that, except in the case of a psychiatric emergency, ORR must ensure that, whenever possible, authorized individuals provide informed consent prior to the administration of psychotropic medications to unaccompanied children. In § 410.1310(b), ORR proposes that it would ensure meaningful oversight of the administration of psychotropic medication(s) to unaccompanied children. Examples of such oversight are the review of cases flagged by care providers, and secondary retrospective reviews of the administration of psychotropic medication(s) in certain circumstances, such as based on the child's age, the number of psychotropic medications that have been prescribed, or the dosages of such psychotropic medications.

Section 410.1311 Unaccompanied Children With Disabilities

ORR believes that protection against discrimination and equal access to the UC Program is inherent to ensuring that unaccompanied children with disabilities receive appropriate care while in ORR custody. ORR notes that the *Lucas R.* case, discussed in the Background of this proposed rule, is relevant to this topic area and that ORR will be bound by any potential future court decisions or settlements in the case. The fifth of the five plaintiff classes certified by the United States District Court for the Central District of California in *Lucas R.* is the “disability class” that includes unaccompanied children “who have or will have a behavioral, mental health, intellectual, and/or developmental disability as defined in 29 U.S.C. 705, and who are

or will be placed in a secure facility, medium-secure facility, or [RTC] because of such disabilities [(i.e., the ‘disability class’)].”¹²⁵ The Court's Preliminary Injunction ordered on August 30, 2022, did not settle this claim and, as of April 2023, ORR remains in active litigation regarding this claim. ORR is proposing requirements to ensure the UC Program's compliance with the HHS section 504 implementing regulations at 45 CFR part 85. ORR is therefore proposing at § 410.1311(a) to provide notice of the protections against discrimination assured to unaccompanied children with disabilities by section 504 at 45 CFR part 85 while in the custody of ORR and the available procedures for seeking reasonable modifications or making a complaint about alleged discrimination against children with disabilities in ORR's custody.

ORR understands its obligations under section 504 to administer programs and activities in the most integrated setting appropriate to the needs of qualified unaccompanied children with disabilities.¹²⁶ ORR is proposing at § 410.1311(b) ORR shall administer the UC Program in the most integrated setting appropriate to the needs of children with disabilities, in accordance with 45 CFR 85.21(d), unless ORR can demonstrate that this would fundamentally alter the nature of its UC Program. As noted, the most integrated setting is a setting that enables individuals with disabilities to interact with non-disabled individuals to the fullest extent possible.¹²⁷

ORR is proposing at § 410.1311(c) that it would provide reasonable modifications to the UC Program for each unaccompanied child with one or more disabilities as needed to ensure equal access to the UC Program. ORR would not, however, be required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. Under proposed § 410.1311(d), ORR would require that services, supports, and program modifications being provided to an unaccompanied child with one or more disabilities be documented in the child's case file, where applicable.

Under proposed § 410.1311(e), in addition to the requirements for release of unaccompanied children established elsewhere in this regulation and through

¹²³ Amended Order re Defendants' Mot. to Dismiss and Plaintiffs' Mot. for Class Cert., *Lucas R., et al. v. Xavier Becerra, et al.*, No. 18–CV–5741 (C.D. Cal. Dec. 27, 2018).

¹²⁴ *Lucas R., et al. v. Xavier Becerra, et al.*, 18–CV–5741 (DMG) (C.D. Cal. filed Jun. 29, 2018).

¹²⁵ Amended Order re Defendants' Mot. to Dismiss and Plaintiffs' Mot. for Class Cert., *Lucas R., et al. v. Xavier Becerra, et al.*, No. 18–CV–5741 (C.D. Cal. Dec. 27, 2018).

¹²⁶ 45 CFR 85.21(d).

¹²⁷ 53 FR 25595, 25600 (July 8, 1988).

any subregulatory guidance ORR may issue, ORR is proposing requirements regarding the release of an unaccompanied child with one or more disabilities to a sponsor. Section 410.1311(e)(1) would require that ORR's assessment under § 410.1202 of a potential sponsor's capability to provide for the physical and mental well-being of the unaccompanied child must include explicit consideration of the impact of the child's disability or disabilities. Under § 410.1311(e)(2), in conducting PRS, ORR and any entities through which ORR provides PRS shall make reasonable modifications in their policies, practices, and procedures if needed to enable released unaccompanied children with disabilities to live in the most integrated setting appropriate to their needs, such as with a sponsor. ORR is not required, however, to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. Additionally, ORR would affirmatively support and assist otherwise viable potential sponsors in accessing and coordinating appropriate post-release, community-based services and supports available in the community to support the sponsor's ability to care for the unaccompanied child with one or more disabilities, as provided for under proposed § 410.1210. Under § 410.1311(e)(3), ORR would not delay the release of an unaccompanied child with one or more disabilities solely because post-release services are not in place prior to the child's release.

Subpart E—Transportation of an Unaccompanied Child

Section 410.1400 Purpose of This Subpart

This proposed subpart concerns the safe transportation of each unaccompanied child while in ORR's care. ORR notes that ORR generally does not provide transport for initial placements upon referral from another Federal agency, but rather, it is the responsibility of other Federal agencies to transfer the unaccompanied child to ORR custody within 72 hours of determining the individual is an unaccompanied child.¹²⁸ ORR, or its care provider facilities, does provide transportation while the unaccompanied child is under its care including in the following circumstances: (1) for purposes of service provision, such as for medical services, immigration court hearings, or community services; (2) when

transferring between facilities or to an out of network placement; (3) group transfers due to an emergency or influx; and (4) for release of an unaccompanied child to a sponsor who is not able to pick up the unaccompanied child, as approved by ORR. Proposed subpart E provides certain requirements for such transportation while unaccompanied children are under ORR care.

Section 410.1401 Transportation of an Unaccompanied Child in ORR's Care

ORR proposes transportation requirements for care provider facilities to help ensure that unaccompanied children are safely transported during their time in ORR care. Proposed § 410.1401(a) would require care provider facilities to transport an unaccompanied child in a manner that is appropriate to the child's age and physical and mental needs, including proper use of car seats for young children, and consistent with proposed § 410.1304. For example, individuals transporting unaccompanied children would be able to use de-escalation or other positive behavior management techniques to ensure safety, as explained in the discussion of proposed § 410.1304(a). As discussed in proposed § 410.1304(f), care provider facilities may only use soft restraints (e.g., zip ties and leg or ankle weights) during transport to and from secure facilities, and only when the care provider facility believes the child poses a serious risk of physical harm to self or others or a serious risk of running away from ORR custody. As discussed in proposed § 410.1304(e)(2), secure facilities, except for RTCs, may restrain a child for their own immediate safety or that of others during transport to an immigration court or an asylum interview. ORR believes the proposed requirements at § 410.1401(a) are important to ensuring the safety of unaccompanied children as well as those around them while being transported in ORR care.

Under proposed § 410.1401(b), ORR would codify a requirement in the FSA that it assist without undue delay in making transportation arrangements where it has approved the release of an unaccompanied child to a sponsor, pursuant to proposed §§ 410.1202 and 410.1203. ORR also proposes that it would have the authority to require the care provider facility to transport an unaccompanied child. In these circumstances, ORR may, in its discretion, reimburse the care provider facility or pay directly for the child and/or sponsor's transportation, as appropriate, to facilitate timely release.

To further ensure safe transportation of unaccompanied children, proposed

§ 410.1401(c) proposes to codify existing ORR policy that care provider facilities shall comply with all relevant State and local licensing requirements and state and Federal regulations regarding transportation of children, such as meeting or exceeding the minimum staff/child ratio required by the care provider facility's licensing agency, maintaining and inspecting all vehicles used for transportation, etc. If there is a potential conflict between ORR's regulations and state law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. It is important to note, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties, which ORR proposes at § 410.1401(d). Under proposed § 410.1401(e), ORR proposes to require the care provider facility to conduct all necessary background checks for drivers transporting unaccompanied children, in compliance with proposed § 410.1305(a). Finally, proposed § 410.1401(f) proposes to codify existing ORR policy that if a care provider facility is transporting an unaccompanied child, then at least one transport staff of the same gender as the unaccompanied child being transported must be present in the vehicle to the greatest extent possible under the circumstances.

Subpart F—Data and Reporting Requirements

Proposed 45 CFR part 410, subpart F, provides guidelines for care provider facilities to report information such that ORR may compile and maintain statistical information and other data on unaccompanied children.

Section 410.1500 Purpose of This Subpart

The HSA requires the collection of certain data about the children in ORR's care and custody.¹²⁹ Specifically, ORR is required to maintain statistical and other information on unaccompanied children for whom ORR is responsible, including information available from other government agencies and including information related to a child's biographical information, the date the child entered Federal custody due to immigration status, documentation of placement, transfer, removal, and release from ORR facilities, documentation of and rationale for any detention, and

¹²⁸ See 8 U.S.C. 1232(b)(3).

¹²⁹ 6 U.S.C. 279(b)(1)(J).

information about the disposition of any actions in which the child is the subject.

Section 410.1501 Data on Unaccompanied Children

This proposed section implements the HSA by requiring care provider facilities to maintain and periodically report to ORR data described in proposed § 410.1501(a) through (e): biographical information, such as an unaccompanied child's name, gender, date of birth, country of birth, whether of indigenous origin and country of habitual residence; the date on which the unaccompanied child came into Federal custody by reason of immigration status; information relating to the unaccompanied child's placement, removal, or release from each care provider facility in which the child has resided, including the date and to whom and where placed, transferred, removed, or released in any case in which the unaccompanied child is placed in detention or released, an explanation relating to the detention or release; and the disposition of any actions in which the child is the subject. In addition, for purposes of ensuring that ORR can continue to appropriately support and care for children in its care throughout their time in ORR care provider facilities, as well as to allow additional program review, ORR proposes in § 410.1501(f) and (g) that care provider facilities also document and periodically report to ORR information gathered from assessments, evaluations, or reports of the child and data necessary to evaluate and improve the care and services for unaccompanied children. ORR notes that some of the information described in this section, such as requirements described at paragraphs (f) and (g), or reporting regarding whether an unaccompanied child is of indigenous origin, is not specifically enumerated at 6 U.S.C. 279(b)(1)(f). Nevertheless, ORR proposes including such information in the rule text because it understands maintaining such information to be consistent with other duties under the HSA to coordinate and implement the care and placement of unaccompanied children.

Subpart G—Transfers

In this NPRM, ORR proposes to codify requirements and policies regarding the transfer of an unaccompanied child in ORR care. The following provisions identify general requirements for the transfer of an unaccompanied child, as well as certain circumstances in which transfers are necessary, such as in emergencies.

Section 410.1600 Purpose of This Subpart

ORR proposes at § 410.1600 to codify the purpose of this subpart as providing the guidelines for the transfer of an unaccompanied child.

Section 410.1601 Transfer of an Unaccompanied Child Within the ORR Care Provider Facility Network

ORR proposes, at § 410.1601(a), to codify general requirements for transfers of an unaccompanied child within the ORR care provider network. ORR proposes that care provider facilities would be required to continuously assess an unaccompanied child in their care to ensure the unaccompanied child placements are appropriate. This proposed requirement is consistent with the TVPRA, which provides that an unaccompanied child shall be placed in the least restrictive setting that is in their best interests, subject to considerations of danger to self or the community and runaway risk.¹³⁰ Additionally, care provider facilities would be required to follow ORR policy guidance, including guidance regarding placement considerations, when making transfer recommendations. ORR also proposes requirements for care provider facilities to ensure the health and safety of an unaccompanied child. The proposed requirements align with proposed § 410.1307(b), where ORR proposes procedures related to placements upon the ORR transfer of an unaccompanied child to a facility that is able to accommodate the medical needs or requests of the unaccompanied child.

At proposed § 410.1601(a)(1), care provider facilities would be required to make transfer recommendations to ORR if they identify an alternate placement for a child that best meets a child's needs. Under proposed § 410.1601(a)(2), when ORR transfers an unaccompanied child, the unaccompanied child's current care provider facility would be required to ensure that the unaccompanied child is medically cleared for transfer within three business days, provided the unaccompanied child's health allows and unless otherwise waived by ORR. For an unaccompanied child with acute or chronic medical conditions, or seeking medical services requiring heightened ORR involvement, the appropriate care provider facility staff and ORR would be required to meet to review the transfer recommendation. Should the unaccompanied child not be medically cleared for transfer within three business days, the care provider

facility would be required to notify ORR. ORR would provide the final determination of a child's fitness for travel if the child is not medically cleared for transfer by a care provider facility. Should ORR determine the unaccompanied child is not fit for travel, ORR would be required to notify the unaccompanied child's current care provider facility of the denial and specify a timeframe for the care provider facility to re-evaluate the transfer of the unaccompanied child. ORR welcomes public comment on these proposals.

At proposed § 410.1601(a)(3), ORR describes notifications that would be required when ORR transfers an unaccompanied child to another care provider facility, including required timeframes for such notifications. Specifically, ORR proposes that within 48 hours prior to the unaccompanied child's physical transfer, the referring care provider facility would be required to notify all appropriate interested parties of the transfer, including the child, the child's attorney of record, legal service provider, or Child Advocate, as applicable. ORR notes, in addition, that interested parties may include EOIR. Proposed § 410.1601(a)(3) further provides that advanced notice shall not be required in unusual and compelling circumstances. In such a case, notice to interested parties must be provided within 24 hours following the transfer of an unaccompanied child in such circumstances. ORR is aware of concerns around notifications regarding the transfer of an unaccompanied child and believes that these proposed requirements provide an effective timeline and notice while still allowing for flexibility if there are unusual and compelling circumstances. ORR believes proposed § 410.1601(a)(3) is consistent with, and even goes beyond, the requirements set out in the FSA at paragraph 27, which requires only "advance notice" to counsel when an unaccompanied child is transferred but does not specify how much advance notice is required.

Proposed § 410.1601(a)(4) and (5) would codify requirements from paragraph 27 of the FSA that children be transferred with their possessions and legal papers, and any possessions that exceed the normally permitted amount by carriers be shipped in a timely manner to where the child is placed. ORR would also require that children be transferred with a 30-day supply of medications if applicable. Consistent with existing practice, ORR would require that the accepting care provider is instructed in the proper administration of the unaccompanied child's medications.

¹³⁰ 8 U.S.C. 1232(c)(3)(A).

Proposed § 410.1601(b) would codify current ORR practices regarding the review of restrictive placements. When unaccompanied children are placed in a restrictive setting (secure, heightened supervision, or Residential Treatment Center), the receiving care provider facility and ORR would be required to review their placement at least every 30 days to determine if another level of care is appropriate. Should the care provider facility and ORR determine that continued placement in a restrictive setting is necessary, the care provider facility would be required to document, and as requested, provide the rationale for continued placement to the child's attorney of record, legal service provider, and their Child Advocate.

Proposed § 410.1601(c) describes requirements related to group transfers. Group transfers are described as circumstances where a care provider facility transfers more than one child at a time, due to emergencies or program closures, for example. Under proposed § 410.1601(c), when group transfers are necessary, care provider facilities would be required to follow ORR policy guidance and additionally be required to follow the substantive requirements provided in § 410.1601(a). ORR believes that clarifying these requirements for care provider facilities engaging in group transfers would help to ensure the safety and health of unaccompanied children in emergency and other situations that require the transfer of multiple unaccompanied children. ORR seeks public comment on these proposals.

Proposed § 410.1601(d) describes requirements related to the transfer of an unaccompanied child in a care provider facility's care to an RTC. Under this proposed provision, care provider facilities would be permitted to request the transfer of an unaccompanied child in their care pursuant to the requirements of proposed § 410.1105(c).

ORR proposes, at § 410.1601(e), requirements concerning the temporary transfer of an unaccompanied child during emergency situations. In § 410.1601(e), ORR makes clear that, consistent with the HSA and TVPRA, an unaccompanied child remains in the legal custody of ORR and may only be transferred or released by ORR. As allowed under the FSA, ORR proposes, in emergency situations, to allow care provider facilities to temporarily change the physical placement of an unaccompanied child prior to securing permission from ORR. But in these situations, ORR would require the care provider to notify ORR of the change of placement as soon as possible, but in all cases within eight hours of transfer.

As a general matter and given the standard that placements must be in the best interests of the child, it is ORR's preference to minimize the transfer of an unaccompanied child and limit transfers to situations in which a transfer is necessary in order to promote stability and encourage establishment of relationships, particularly among vulnerable children in ORR care. ORR broadly invites public comment on all of the proposals under subpart G, and solicits input regarding the specifics, language, and scope of additional provisions related to minimizing the transfers of an unaccompanied child and the placement of an unaccompanied child with disabilities.

Subpart H—Age Determinations

In subpart H of this proposed rule, ORR provides guidelines for determining the age of an individual in ORR care. The TVPRA instructs HHS to devise age determination procedures for individuals without lawful immigration status in consultation with DHS.¹³¹ Consistent with the TVPRA, HHS and DHS jointly developed policies and procedures to assist in the process of determining the correct age of individuals in Federal custody. Establishing the age of the individual is critical because, for purposes of the UC Program, HHS only has authority to provide care to unaccompanied children, who are defined in relevant part as individuals who have not attained 18 years of age. ORR also notes that the FSA allows for age determinations in the event there is a question as to veracity of the individual's alleged age.

Section 410.1700 Purpose of This Subpart

ORR acknowledges the challenges in determining the age of individuals who are in Federal care and custody. These challenges include but are not limited to: lack of available documentation; contradictory or fraudulent identity documentation and/or statements; ambiguous physical appearance of the individual; and diminished capacity of the individual. Proposed § 410.1700 sets forth the purpose of this subpart as providing the provisions for determining the age of an individual in ORR custody. ORR notes that under this proposed section, and as a matter of current practice, it would only conduct age determination procedures if there is a reasonable suspicion that an individual is not a minor. ORR believes that the proposed requirements and standards described within this subpart

properly balance the concerns of children who are truly unaccompanied children with the importance of ensuring individuals are appropriately identified as a minor. ORR notes that proposed § 410.1309 regards required notification to legal counsel regarding age determinations.

Section 410.1701 Applicability

Proposed § 410.1701 states that this subpart would apply to individuals in the custody of ORR. This would be consistent with 8 U.S.C. 1232(b)(4), which specifies that DHS' and HHS' age determination procedures "shall" be used by each department "for children in their respective custody." Proposed § 410.1701 also reiterates that under the statutory definition of an unaccompanied child,¹³² an individual must be under 18 years of age.

Section 410.1702 Conducting Age Determinations

Proposed § 410.1702 would codify general requirements for conducting age determinations. The TVPRA requires that age determination procedures, at a minimum, consider multiple forms of evidence, including non-exclusive use of radiographs. Given these minimum requirements, proposed § 410.1702 would allow for the use of medical or dental examinations, including X-rays, conducted by a medical professional, and other appropriate procedures. The terms "medical" and "dental examinations" are taken from the FSA at paragraph 13, and ORR interprets them to include "radiographs" as discussed in the TVPRA. Under proposed § 410.1702, ORR would require that procedures for determining the age of an individual consider the totality of the circumstances and evidence rather than rely on any single piece of evidence to the exclusion of all others.

Section 410.1703 Information Used as Evidence To Conduct Age Determinations

Proposed § 410.1703 describes information that ORR would be able to use as evidence to conduct age determination. Under proposed § 410.1703(a), ORR would establish that it considers multiple forms of evidence, and that it makes age determinations based upon a totality of evidence. Under proposed § 410.1703(b), ORR may consider information or documentation to make an age determination, including but not limited to: (1) birth certificate, including a certified copy, photocopy, or facsimile copy if there is no

¹³¹ See 8 U.S.C. 1232(b)(4).

¹³² See 6 U.S.C. 279(g)(2).

acceptable original birth certificate and proposes that ORR may consult with the consulate or embassy of the individual's country of birth to verify the validity of the birth certificate presented; (2) authentic government-issued documents issued to the bearer; (3) other documentation, such as baptismal certificates, school records, and medical records, which indicate an individual's date of birth; (4) sworn affidavits from parents or other relatives as to the individual's age or birth date; (5) statements provided by the individual regarding the individual's age or birth date; (6) statements from parents or legal guardians; (7) statements from other persons apprehended with the individual; and (8) medical age assessments, which should not be used as a sole determining factor but only in concert with other factors.

Regarding the proposed use of medical age assessments, at proposed § 410.1703(b)(8), ORR would codify a 75 percent probability threshold, that, when used in conjunction with other evidence, reflects a reasonable standard that would prevent inappropriate placements in housing intended for unaccompanied children. The examining doctor would be required to submit a written report indicating the probability percentage that the individual is a minor or an adult. If an individual's estimated probability of being 18 or older is 75 percent or greater according to a medical age assessment, then ORR would accept the assessment as one piece of evidence in favor of a finding that the individual is not an unaccompanied child. But consistent with the TVPRA, ORR would not be permitted to rely on such a finding alone; only if such a finding has been considered together with other forms of evidence, and the totality of the evidence supports such a finding would ORR determine that the individual is 18 or older. The 75 percent probability threshold applies to all medical methods and approaches identified by the medical community as appropriate methods for assessing age. Ambiguous, debatable, or borderline forensic examination results are resolved in favor of finding the individual is a minor. ORR believes that requirements at proposed § 410.1703 would enable ORR to utilize multiple forms of evidence.

Section 410.1704 Treatment of an Individual Who Appears To Be an Adult

Proposed § 410.1704 would codify the substantive requirement from paragraph 13 of the FSA regarding treatment of an individual who appears to be an adult. Specifically, if the procedures in this

subpart would result in a reasonable person concluding, based on the totality of the evidence, that an individual is an adult, despite the individual's claim to be under the age of 18, ORR would treat such person as an adult for all purposes. As provided in current ORR policy,¹³³ an individual in ORR care or their attorney of record may, at any time, present new information or evidence that they are 18 or older for re-evaluation of an age determination. If the new information or evidence indicates that an individual who is presumed to be an unaccompanied child is an adult, then ORR will coordinate with DHS to take appropriate actions, which may include transferring the individual out of ORR custody back to DHS custody.

Subpart I—Emergency and Influx Operations

In subpart I of this proposed rule, ORR proposes to codify guidelines applicable to emergency or influx facilities that ORR opens or operates during a time of and in response to emergency or influx. This subpart applies the requirement at paragraph 12.C of the FSA to have a written plan that describes the reasonable efforts the former INS, now ORR, will take to place all unaccompanied children as expeditiously as possible.

As a matter of policy, ORR has a strong preference to house unaccompanied children in standard programs; however, ORR recognizes that in times of emergency or influx additional facilities may be needed, on short notice, to house unaccompanied children. As used in this subpart, emergency means an act or event (including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or public health concerns at one or more facilities) that prevents timely transport or placement of unaccompanied children, or impacts other conditions provided by this part. Influx means a situation in which the net bed capacity of ORR's existing capacity in standard programs that is occupied or held for placement by unaccompanied children meets or exceeds 85 percent for a period of seven consecutive days. In this proposed rule, ORR defines "Emergency or Influx Facilities" as a single term to encompass a care provider facility opened in response to either an emergency or influx and to propose that such a facility would meet the minimum requirements

described in this subpart. These facilities may be contracted for and stood up in advance of an emergency or an influx in preparation of such an event, but no children would be placed in such a facility until an emergency or influx exists.

Importantly, this definition of "influx" departs from that used in the FSA which defined "influx" as a situation in which 130 or more unaccompanied children were awaiting placement. In this proposed rule, ORR takes a new approach to defining "influx" based on its experiences in the years after the settlement agreement and in light of the increased numbers of unaccompanied children over time. In this rule, ORR proposes to define an "influx" without reference to a set number of unaccompanied children, but rather to circumstances reflecting a significant increase in the number of unaccompanied children that exceeds the standard capabilities of the Federal Government to process and transport them timely and/or to shelter them with existing resources. ORR believes that using the 85 percent threshold provides a reasonable measure to determine when bed capacity in the standard programs is strained to the point that accepting referrals from DHS within 72 hours becomes very challenging. ORR notes that this 85 percent threshold would align with ORR's current practices and is based on ORR's experience with influx trends and organizational capacity. During these times of emergency or influx, ORR may house unaccompanied children at emergency or influx facilities. ORR notes that, consistent with current policy, placements of unaccompanied children at emergency or influx facilities during a period of influx cease when operational capacity in standard programs drops below 85 percent for a period of at least seven consecutive days.

Section 410.1800 Contingency Planning and Procedures During an Emergency or Influx

ORR recognizes that during times of emergency or when there is an influx of unaccompanied children, it is important to have policies and procedures in place to ensure that all unaccompanied children have their needs met and receive appropriate care and protection. ORR opens additional facilities in times of influx or emergency when its standard provider network does not have sufficient bed space available to provide shelter and services for children. Because these facilities are intended to be a temporary response to an influx or emergency, when speed

¹³³ ORR Policy Guide 1.6.2, "Instructions for Age Determinations". Available at: <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1>.

may be critical, they may not be licensed or may be exempted from licensing requirements by state or local licensing agencies, or both. Although ORR's preference is to place unaccompanied children in licensed facilities whenever possible, these emergency or influx facilities may be used to house unaccompanied children temporarily when time is of the essence. Regardless of licensure status, these facilities must meet ORR standards and must comply to the greatest extent possible with state child welfare laws and regulations. If there is a potential conflict between ORR's regulations and state law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. It is important to note, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties. ORR proposes at § 410.1800 to codify guidelines for contingency planning and procedures to use during an emergency or influx.

Under proposed § 410.1800(a), ORR would regularly reevaluate the number of placements needed for unaccompanied children to determine whether the number of shelters, heightened supervision facilities, and ORR transitional home care beds should be adjusted to accommodate an increased or decreased number of unaccompanied children eligible for placement in care in ORR custody provider facilities.

At § 410.1800(b), consistent with paragraph 12A of the FSA, ORR proposes that in the event of an emergency or influx that prevents the prompt placement of unaccompanied children in standard programs, ORR shall make all reasonable efforts to place each unaccompanied child in a standard program as expeditiously as possible. As described in proposed § 410.1800(a) and consistent with ORR's preference to place unaccompanied children in standard care provider facilities, ORR's commitment to regularly reevaluating the number of placements needed will help this effort to place unaccompanied children in licensed programs quickly.

At § 410.1800(c), ORR proposes that activities during an influx or emergency include the following: (1) ORR implements its contingency plan on emergencies and influxes, which may include opening facilities in times of emergency or influx; (2) ORR continually develops standard programs that are available to accept emergency or influx placements; and (3) ORR

maintains a list of unaccompanied children affected by the emergency or influx including each unaccompanied child's: (i) name; (ii) date and country of birth; (iii) date of placement in ORR's custody; and (iv) place and date of current placement.

Section 410.1801 Minimum Standards for Emergency or Influx Facilities

At § 410.1801(a), ORR notes that in addition to the standards it has for standard programs and restrictive placements, this section provides a set of minimum standards that must be followed for emergency or influx facilities. ORR notes, as described § 410.1000(c), that it does not operate facilities other than standard programs, restrictive placements, or emergency or influx facilities, absent a specific waiver as described below at § 410.1801(d) or such additional waivers as are permitted by law.

At § 410.1801(b), ORR proposes a list of minimum services that must be provided to all unaccompanied children in the care of emergency or influx facilities, and available at the time of the facility opening. These services, which are consistent with Exhibit 1 of the FSA, would apply the same minimum service requirements that apply under the FSA to standard care facilities to emergency or influx facilities. Under § 410.1801(b)(1), these proposed minimum services would require that emergency or influx facilities provide unaccompanied children with proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items. ORR proposes at § 410.1801(b)(2) that emergency and influx facilities provide unaccompanied children with appropriate routine medical and dental care; family planning services, including pregnancy tests; medical services requiring heightened ORR involvement; emergency healthcare services; a complete medical examination (including screenings for infectious diseases) generally within 48 hours of admission; appropriate immunizations as recommended by the Advisory Committee on Immunization Practices' Child and Adolescent Immunization Schedule and approved by HHS' Centers for Disease Control and prevention; administration of prescribed medication and special diets; and appropriate mental health interventions when necessary.

ORR believes that the unique needs and background of each unaccompanied child should be assessed by emergency or influx facilities to ensure that these needs are being addressed and

supported by the emergency or influx facility. Therefore, under proposed § 410.1801(b)(3), and consistent with ORR's existing policy and practice, ORR would require that each unaccompanied child receive an individualized needs assessment that includes: the various initial intake forms, collection of essential data relating to the identification and history of the child and the child's family, identification of the unaccompanied child's special needs including any specific problems which appear to require immediate intervention, an educational assessment and plan, and an assessment of family relationships and interaction with adults, peers and authority figures; a statement of religious preference and practice; an assessment of the unaccompanied child's personal goals, strengths and weaknesses; identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in connecting the child with family members.

Access to education services for unaccompanied children in care from qualified professionals is critical to avoid learning loss while in care and ensure unaccompanied children are developing academically. Under proposed § 410.1801(b)(4), ORR would require that emergency or influx facilities provide educational services appropriate to the unaccompanied child's level of development and communication skills in a structured classroom setting Monday through Friday, which concentrates primarily on the development of basic academic competencies, and secondarily on English Language Training. ORR proposes that, as part of these minimum services for unaccompanied children in emergency or influx facilities, the educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas should include Science, Social Studies, Math, Reading, Writing and Physical Education. The program must provide unaccompanied children with appropriate reading materials in languages other than English for use during leisure time.

ORR strongly believes that time for recreation is essential to supporting the health and wellbeing of unaccompanied children. Under proposed § 410.1801(b)(5), ORR would require that emergency or influx facilities provide unaccompanied children with activities according to a recreation and leisure time plan that include daily outdoor activity—weather permitting—

with at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (that should not include time spent watching television). Activities should be increased to a total of three hours on days when school is not in session.

The psychological and emotional wellbeing of unaccompanied children are an important component of their overall health and wellbeing, and therefore ORR is proposing that these needs must be met by emergency or influx facilities. Under proposed § 410.1801(b)(6), emergency or influx facilities would be required to provide at least one individual counseling session per week conducted by trained social work staff with the specific objective of reviewing the child's progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each child. Group counseling sessions are another way that the psychological and emotional wellbeing of unaccompanied children can be supported while in ORR care. Therefore, under § 410.1801(b)(7), ORR proposes that unaccompanied children would also receive group counseling sessions at least twice a week. Sessions are usually informal and take place with all unaccompanied children present. ORR believes that these group sessions would give new children the opportunity to get acquainted with staff, other children, and the rules of the program, as well as provide them with an open forum where everyone gets a chance to speak. Daily program management is discussed, and decisions are made about recreational and other activities. ORR notes that these group sessions would provide a meaningful opportunity to allow staff and unaccompanied children to discuss whatever is on their minds and to resolve problems.

At proposed § 410.1801(b)(8), emergency or influx facilities would be required to provide unaccompanied children with acculturation and adaptation services, which include information regarding the development of social and interpersonal skills which contribute to those abilities necessary to live independently and responsibly. ORR believes these services are important to supporting the social development and meeting the cultural needs of unaccompanied children in emergency or influx facilities. ORR proposes to require, under § 410.1801(b)(9), that emergency or influx facilities provide a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations, and the availability of legal assistance. In an

effort to support each child's spiritual and religious practices, ORR proposes at § 410.1801(b)(10), that emergency or influx facilities would be required to provide unaccompanied children access to religious services of the child's choice whenever possible. At the same time, with respect to the obligations of care provider facilities, ORR notes that it operates the Unaccompanied Children program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.¹³⁴

ORR proposes at § 410.1801(b)(11) that emergency or influx facilities would make visitation and contact with family members (regardless of their immigration status) available to unaccompanied children in such a way that is structured to encourage such visitation. ORR notes that the staff must respect the child's privacy while reasonably preventing the unauthorized release of the unaccompanied child. Under proposed § 410.1801(b)(12), unaccompanied children at emergency or influx facilities would have a reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband. ORR proposes at § 410.1801(b)(13) that unaccompanied children at emergency or influx facilities would be provided services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied child. Under proposed § 410.1801(b)(14), emergency or influx facilities would be required to provide unaccompanied children with legal services information, including the availability of free legal assistance, and that they may be represented by counsel at no expense to the government the right to a removal hearing before an immigration judge; the ability to apply for asylum with USCIS in the first instance; and the ability to request voluntary departure in lieu of deportation.

ORR proposes at § 410.1801(b)(15) that emergency or influx facilities, whether state-licensed or not, must

comply, to the greatest extent possible, with State child welfare laws and regulations (such as mandatory reporting of abuse), as well as State and local building, fire, health and safety codes, that ORR determines are applicable to non-State licensed facilities. If there is a potential conflict between ORR's regulations and state law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. It is important to note, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties. Under proposed § 410.1801(b)(16), emergency or influx facilities must deliver services in a manner that is sensitive to the age, culture, native language, and needs of each unaccompanied child. To support this proposed minimum service, emergency or influx facilities would be required to develop an individual service plan for the care of each child. Finally, proposed § 410.1801(b)(17) would require that the emergency or influx facility maintains records of case files and make regular reports to ORR. Emergency or influx facilities must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.

At § 410.1801(c), ORR proposes that emergency or influx facilities must do the following when providing services to unaccompanied children: (1) Maintain safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of minors; (2) Provide access to toilets, showers and sinks, as well as personal hygiene items such as soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items; (3) Provide drinking water and food; (4) Provide medical assistance if the unaccompanied child is in need of emergency services; (5) Maintain adequate temperature control and ventilation; (6) Provide adequate supervision to protect unaccompanied children; (7) separate from other unaccompanied children those unaccompanied children who are subsequently found to have past criminal or juvenile detention histories or have perpetrated sexual abuse that present a danger to themselves or others; (8) Provide contact with family members who were arrested with the unaccompanied child; and (9) Provide access to legal services as proposed at

¹³⁴ See 45 CFR 87.3(a).

§ 410.1309 in this proposed rule. ORR notes that these requirements are based in part on standards described in the FSA at paragraph 12A. Although ORR understands these requirements apply specifically to the conditions in DHS facilities following initial arrest or encounter by immigration officers at DHS, nevertheless, because they set out additional safeguards for unaccompanied children, ORR proposes to adopt them for purposes of emergency or influx facilities under this rule. In addition to these proposed minimum standards, ORR proposes in subpart D at § 410.1306, certain language access requirements for care provider facilities which directly relate to these minimum requirements described. Specifically, ORR proposes that care provider facilities be required to consistently offer unaccompanied children the option of interpretation services in their native or preferred language to the greatest extent practicable. This includes, but is not limited to, providing language access during intake and orientation, while receiving healthcare services, while receiving information related to the sexual assault and abuse program, and while being provided with legal services. Additionally, consistent with paragraph 12A of the FSA, ORR would transfer an unaccompanied child to another care provider facility if necessary to provide adequate language services. These language access requirements are intended to protect unaccompanied children's interests and ensure that they understand their legal rights and options available to them, the nature of ORR custody and the general ORR principles regarding their care, and that they have access to adequate and effective legal representation if necessary. Many of these services are provided by case managers, who must have a presence onsite at the emergency or influx facility.

At § 410.1801(d), ORR proposes certain scenarios in which ORR may grant waivers for an emergency or influx facility operator, either a contractor or grantee, from the standards proposed under § 410.1801(b). Specifically, waivers may be granted for one or all of the services identified under § 410.1801(b) if the facility is activated for a period of six consecutive months or less and ORR determines that such standards are operationally infeasible. For example, an emergency or influx facility operator may be unable to provide services at the site within the timeframe required by ORR. ORR determines whether certain standards are operationally infeasible on a case-

by-case basis, taking into consideration the circumstances presented by a specific emergency or influx facility. ORR also would require that such waivers be made publicly available.

Section 410.1802 Placement Standards for Emergency or Influx Facilities

ORR proposes at § 410.1802 to codify the criteria and requirements that apply to placement of unaccompanied children at emergency or influx facilities. ORR notes that these proposed requirements are consistent with existing ORR practices currently provided under section 7.2.1 of the ORR Policy Guide.¹³⁵

Under proposed § 410.1802(a), ORR would require that, to the extent feasible, unaccompanied children who are placed in an emergency or influx facility meet all of the following criteria: the child (1) is expected to be released to a sponsor within 30 days; (2) is age 13 or older; (3) speaks English or Spanish as their preferred language; (4) does not have a known disability or other mental health or medical issue or dental issue requiring additional evaluation, treatment, or monitoring by a healthcare provider; (5) is not a pregnant or parenting teen; (6) would not have a diminution of legal services as a result of the transfer to an unlicensed facility; and (7) is not a danger to themselves or to others (including not having been charged with or convicted of a criminal offense). Additionally, if ORR becomes aware that a child does not meet any of the criteria specified under § 410.1802(a) at any time after placement into an emergency or influx facility, ORR will transfer the unaccompanied child to the least restrictive setting appropriate for that child's need as expeditiously as possible. ORR believes that these proposed criteria will help to ensure that the unaccompanied child is placed in a setting that is appropriate to accommodate the child's specific needs.

ORR proposes at § 410.1802(b) that it shall also consider the following factors for the placement of an unaccompanied child in an emergency or influx facility: (1) the unaccompanied child should not be part of a sibling group with a sibling(s) age 12 years or younger; (2) the unaccompanied child should not be subject to a pending age determination; (3) the unaccompanied child should not be involved in an active State licensing, child protective services, or law enforcement investigation, or an

investigation resulting from a sexual abuse allegation; (4) the unaccompanied child should not have a pending home study; (5) the unaccompanied child should not be turning 18 years old within 30 days of the transfer to an emergency or influx facility; (6) the unaccompanied child should not be scheduled to be discharged in three days or less; (7) the unaccompanied child should not have a current set docket date in immigration court or State/family court (juvenile included), not have a pending adjustment of legal status, and not have an attorney of record or EOIR accredited representative; (8) the unaccompanied child should be medically cleared and vaccinated as required by the emergency or influx care facility (for instance, if the influx care facility is on a U.S. Department of Defense site); and (9) the unaccompanied child should have no known mental health, dental, or medical issues, including contagious diseases requiring additional evaluation, treatment, or monitoring by a healthcare provider. ORR believes that these proposed provisions will help support the safe and appropriate placement of unaccompanied children in ORR care.

Subpart J—Availability of Review of Certain ORR Decisions

Section 410.1900 Purpose of This subpart

Ensuring that placement decisions involving restrictive placements,¹³⁶ such as decisions to place unaccompanied children in a restrictive placement, to step-up a child to a more restrictive level of care, to step-down a child from one restrictive placement to another (e.g., from secure to a heightened supervision facility), or to continue to keep a child in a restrictive placement, are subject to review is fundamental to ensuring unaccompanied children are placed in the least restrictive setting that is in their best interest while also considering the safety of others and runaway risk. ORR believes that establishing the availability of administrative review helps ensure, for the minority of unaccompanied children that are placed in restrictive placements, that such placement is appropriate and based on clear and convincing evidence, as discussed in subpart B. ORR notes that its proposals in this subpart are consistent with the preliminary injunction issued on August 30, 2022 in *Lucas R. v. Becerra*, as discussed in section IV.A.4. of this proposed rule.

¹³⁵ ORR Policy Guide 7.2.1, "Criteria for Placement". Available at: <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-7>.

¹³⁶ In § 410.1001, restrictive placement is defined to include a secure facility, heightened supervision facility, or RTC.

Under proposed § 410.1900, ORR would establish that the purpose of this subpart is to describe the availability of review of certain ORR decisions regarding the care and placement of unaccompanied children.

Section 410.1901 Restrictive Placement Case Reviews

ORR is required under the TVPRA to place unaccompanied children in the least restrictive setting that is in their best interests, and in making placements may consider danger to self, danger to the community, and runaway risk.¹³⁷ ORR believes that this requirement entails consideration of the safety of individual unaccompanied children whom it places, as well as the other unaccompanied children who have already been placed at the same care provider facility. ORR continually and routinely assesses whether an unaccompanied child's placement in a restrictive placement meets the criteria for such placements as discussed in proposed § 410.1105 Criteria for Placing an Unaccompanied Child in Restrictive Placement. Under proposed § 410.1901(a), and consistent with the preliminary injunction in the *Lucas R.* case discussed above, in all cases involving restrictive placements, ORR would determine, based on clear and convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement. ORR is further proposing a requirement that the evidence supporting a restrictive placement decision be recorded in the unaccompanied child's case file.

ORR believes that it is imperative that unaccompanied children placed in restrictive placements understand the reasons for their placement and their rights, including their right to contest such a placement and their right to counsel. Therefore, under proposed § 410.1901(b), ORR would require that a written Notice of Placement (NOP) be provided to unaccompanied children no later than 48 hours after step-up to a restrictive placement, as well as at least every 30 days an unaccompanied child remains in a restrictive placement. ORR notes that whenever possible, ORR seeks to provide NOPs in advance of a step-up to a restrictive placement. ORR further proposes requiring that the NOP clearly and thoroughly set forth the reason(s) for placement and a summary of supporting evidence under proposed § 410.1901(b)(1); inform the unaccompanied child of their right to contest the restrictive placement before the Placement Review Panel (PRP) upon

receipt of the NOP, the procedures by which the unaccompanied child may do so, and all other available administrative review processes under § 410.1901(b)(2); and include an explanation of the unaccompanied child's right to be represented by counsel in challenging such restrictive placements under § 410.1901(b)(3). Finally, to ensure that the unaccompanied child understands the information provided under this paragraph, ORR is proposing that a case manager would be required to explain the NOP to the unaccompanied child, in the child's native or preferred language, depending on the child's preference, and in a way the child understands, under § 410.1901(b)(4). ORR notes that communications with unaccompanied children would be required to meet ORR's proposed language access standards under § 410.1306.

As part of ensuring that unaccompanied children are informed regarding their restrictive placement, it is critical that any legal counsel or other representative or advocate, and parent or guardian for an unaccompanied child also receive such notification. Therefore, under § 410.1901(c), ORR is proposing to require that the care provider facility provide a copy of the NOP to the unaccompanied child's legal counsel of record, legal service provider, child advocate, and to a parent or legal guardian of record, no later than 48 hours after step-up, as well as every 30 days the unaccompanied child remains in a restrictive placement. ORR notes that this proposed requirement may be subject to specific child welfare-related exceptions.

ORR believes that placements of unaccompanied children in restrictive placements should be routinely assessed to ensure they meet the criteria at proposed § 410.1105. If unaccompanied children do not meet the criteria, they should accordingly be stepped up or stepped down to a placement that is the least restrictive setting that is in their best interests, prioritizing their safety and the safety of others. Under proposed § 410.1901(d), ORR would establish regular administrative reviews for restrictive placements. ORR is proposing regular intervals for administrative reviews depending on the type of restrictive placement: 30-day, at minimum, for all restrictive placements under proposed § 410.1901(d)(1); more intensive 45-day reviews by ORR supervisory staff for unaccompanied children in secure facilities, under proposed

§ 410.1901(d)(2).¹³⁸ For unaccompanied children in RTCs, the 30-day review at proposed § 410.1901(d)(1) would be required to involve a psychiatrist or psychologist to determine whether the unaccompanied child should remain in restrictive residential care, under proposed § 410.1901(d)(3). ORR welcomes public comment on these proposals.

Section 410.1902 Placement Review Panel.

ORR believes that unaccompanied children who are placed in a restrictive placement should have the ability to request reconsideration of their placement at any time after receiving an NOP. Consistent with existing policy, under proposed paragraph (a), ORR would convene a Placement Review Panel (PRP) when an unaccompanied child requests reconsideration of their placement in a restrictive placement, for the purposes of reviewing the unaccompanied child's reconsideration request. Under current practice, the PRP is a three-member panel consisting of ORR's senior-level career staff with requisite experience in child welfare, including restorative justice, adverse childhood experiences, special populations, and/or mental health. Under proposed § 410.1902(a), upon request for reconsideration of their placement in a restrictive placement, ORR would afford the unaccompanied child a hearing before the PRP, at which the unaccompanied child may, with the assistance of counsel if preferred, present evidence on their own behalf. An unaccompanied child may present witnesses and cross-examine ORR's witnesses, if such witnesses are willing to voluntarily testify. ORR notes that an unaccompanied child and/or their legal counsel of record are provided with the child's case file information, in accordance with ORR's case file policies. An unaccompanied child that does not wish to request a hearing may also have their placement reconsidered by submitting a request for a reconsideration along with any supporting documents as evidence.

Under proposed § 410.1902(b), the PRP would afford any unaccompanied children in a restrictive placement the opportunity to request a PRP review as soon as the unaccompanied child receives a NOP and anytime thereafter.

Under proposed § 410.1902(c), ORR would require itself to convene the PRP within a reasonable timeframe, to allow

¹³⁸ If, hypothetically, an unaccompanied child was in secure care for 90 days, they would receive both their third 30-day review and their second, more intensive 45-day review concurrently.

¹³⁷ 8 U.S.C. 1232(c)(2)(A).

the unaccompanied child to have a hearing without undue delay. ORR would require, under proposed § 410.1902(d), that the PRP would issue a decision within 30 calendar days of the PRP request whenever possible. ORR believes these requirements would help ensure reconsideration requests are decided in a timely manner.

Finally, ORR believes ORR staff members should be recused from participation in a PRP under certain circumstances to help ensure an impartial reconsideration of an unaccompanied child's placement. Under proposed § 410.1902(e), ORR would require that an ORR staff member who was involved with the decision to step up an unaccompanied child to a restrictive placement may not serve as a Placement Review Panel member with respect to that unaccompanied child's placement.

ORR welcomes public comment on these proposals.

Section 410.1903 Risk Determination Hearings

The decision in *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017), held that notwithstanding the passage of the HSA and the TVPRA, unaccompanied children in ORR custody continue to have the ability to seek a bond hearing before an immigration judge in every case, unless waived by the unaccompanied child.¹³⁹ The proposed regulations under this section are intended to afford the same type of hearing for unaccompanied children, while recognizing that the HSA, enacted after the FSA went into effect, transferred the responsibility of care and custody of unaccompanied children from the former INS to ORR.¹⁴⁰

Under proposed § 410.1903, ORR would establish a hearing process that provides the same substantive protections as immigration court bond hearings under the FSA, but through an independent and neutral HHS hearing officer. Further, these hearings would take place at HHS rather than the Department of Justice (DOJ). This arrangement would parallel the arrangement under the FSA because when the FSA was enacted, the former INS, which then was responsible for the custody of unaccompanied minors, and the immigration courts were located in the same department, DOJ. Similarly, ORR proposes the availability of risk determination hearings before hearing officers who are within the same department, HHS, but independent of ORR. ORR believes that utilizing an

independent hearing officer within HHS would help prevent undue delay for a hearing while the unaccompanied child is in ORR care because generally HHS hearing schedules have greater availability in the short term, particularly as compared to immigration courts. ORR notes that it codified a similar provision in the 2019 Final Rule which the Ninth Circuit held was consistent with the FSA, except where it did not automatically place unaccompanied children in restrictive placements in bond hearings.¹⁴¹ ORR now proposes to implement a process substantially the same as the one in the 2019 Final Rule, but updated to conform with the Ninth Circuit's ruling.

Unlike typical "bond redetermination hearings" in the immigration court context, which refer to an immigration judge's review of a custody decision, including any bond set, by DHS,¹⁴² ORR does not require payment of money in relation to any aspect of its care and placement. Instead, the function of risk determination hearings in the ORR context is to determine whether an unaccompanied child would be a danger to the community or a runaway risk if released.¹⁴³ With respect to these functions, ORR notes, first, that consistent with its discretion as described at 8 U.S.C. 1232(c)(2)(A), it does not consider runaway risk when making release decisions regarding unaccompanied children in its care. As a result, unlike when the FSA was implemented in 1997, runaway risk is no longer a relevant issue in risk determination hearings for unaccompanied children.¹⁴⁴ Therefore, the relevant issue for risk determination hearings for unaccompanied children is whether they would present a danger if released from ORR custody. With respect to this function, ORR notes that for the great majority of unaccompanied children in ORR custody, it has determined they are not a danger and therefore has placed them in non-

restrictive placements such as shelters and group homes. These unaccompanied children remain in ORR care only because a suitable sponsor has not yet been found.

Under proposed § 410.1903(a), ORR would codify that all unaccompanied children in restrictive placements would be afforded a risk determination hearing before an independent HHS hearing officer to determine, through a written decision, whether the unaccompanied child would present a risk of danger to the community if released, unless the unaccompanied child indicates in writing that they refuse such a hearing. For all other unaccompanied children in ORR custody, ORR proposes that they may request such a hearing.

ORR is proposing to establish a process for providing notifications and receiving requests related to risk determination hearings. Under proposed § 410.1903(a)(1), ORR would require that requests under this section be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form. Under proposed § 410.1903(a)(2), unaccompanied children in restrictive placements based on a finding of dangerousness would automatically be provided a risk determination hearing, unless they refuse in writing. They would also receive a notice of the procedures under this section and would be able to use a form provided to them to decline a hearing under this section. ORR proposes that unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel. ORR would require that such choice be communicated to ORR in writing.

ORR is proposing to establish procedures related to risk determination hearings so that the roles of each party are clear. Under proposed § 410.1903(b), ORR would bear an initial burden of production, providing relevant arguments and documents to support its determination that an unaccompanied child would pose a danger if discharged from ORR care and custody. Then, ORR is proposing that the unaccompanied child would have a burden of persuasion to show that they would not be a danger to the community if released, under a preponderance of the evidence standard. ORR notes that it has established a subregulatory process to ensure access to case files and documents for unaccompanied children

¹⁴¹ See *Flores v. Rosen*, 984 F. 3d 720 (9th Cir. 2020).

¹⁴² See 8 CFR 1003.19, 1236.1.

¹⁴³ See *Flores v. Lynch*, 392 F. Supp. 3d 1144, 1150 (C.D. Cal. 2017) ("Assuming an immigration judge reduces a child's bond, or decides he or she presents no flight risk or danger such that he needs to remain in HHS/ORR custody, HHS can still exercise its coordination and placement duties under the TVPRA.").

¹⁴⁴ In contrast, under paragraph 14 of the FSA the former INS would detain a minor if detention was required "to secure his or her timely appearance before the INS or immigration court." As a result, as they pertained to the former INS, bond hearings afforded an opportunity for the unaccompanied children to have a hearing before an independent officer to determine whether the unaccompanied children in fact posed a risk of flight if released from custody.

¹³⁹ See FSA at paragraph 24A.

¹⁴⁰ See 6 U.S.C. 279(a).

and their legal counsel in a timely manner for these purposes. Under proposed paragraph (c), the unaccompanied child would have the ability to be represented by a person of the unaccompanied child's choosing, would be permitted to present oral and written evidence to the hearing officer, and would be permitted to appear by video or teleconference. Finally, ORR is proposing that ORR may also choose to present evidence at the hearing, whether in writing, or by appearing in person or by video or teleconference.

ORR is also proposing regulations related to hearing officers' decisions in risk determination hearings. First, under proposed paragraph (d), a decision that an unaccompanied child would not be a danger to the community if released would be binding upon ORR unless appealed. ORR believes that unaccompanied children must also have the availability to appeal decisions finding that they are a danger to the community if released. However, HHS does not have a two-tier administrative appellate system that closely mirrors that of the EOIR within the DOJ, where immigration court decisions may be appealed to the Board of Immigration Appeals. To provide similar protections without such a two-tier system, ORR is proposing to allow appeals to the Assistant Secretary of ACF or their designee. Therefore, under § 410.1903(e), ORR is proposing that decisions under this section may be appealed to the Assistant Secretary of ACF, or the Assistant Secretary's designee. ORR is proposing that appeal requests be in writing and be received by the Assistant Secretary or their designee within 30 days of the hearing officer's decision under § 410.1903(e)(1). Under § 410.1903(e)(2), ORR is proposing that the Assistant Secretary, or their designee, will reverse a hearing officer decision only if there is a clear error of fact, or if the decision includes an error of law. Further, under § 410.1903(e)(3), ORR is proposing that if the hearing officer finds that the unaccompanied child would not pose a danger to the community if released, and such decision would result in ORR releasing the unaccompanied child from its custody (e.g., because ORR had otherwise completed its assessment for the release of the unaccompanied child to a sponsor, and the only factor preventing release was its determination that the unaccompanied child posed a danger to the community), an appeal to the Assistant Secretary would not effect a stay of the hearing officer's decision, unless the Assistant Secretary or their designee issues a decision in writing

within five business days of such hearing officer decision that release of the unaccompanied child would likely result in a danger to the community. ORR is proposing to require that such a stay decision must include a description of behaviors of the unaccompanied child while in ORR custody and/or documented criminal or juvenile behavior records from the unaccompanied child demonstrating that the unaccompanied child would present a danger to community, if released.

Alternatively, ORR is considering an appeal structure under which a politically accountable official (e.g., the Assistant Secretary of ACF, or their designee) would have discretion to conduct de novo review of hearing officer determinations. As under the current proposed approach, the official conducting de novo review would be able to reverse hearing officer determinations. But unlike the current proposed approach, the official would not be constrained to reversing hearing officer determinations based only on clear error of fact, or error of law. Instead, the official would step into the position of the hearing officer and re-decide the issues. We request comments as to whether ORR should adopt this alternative scheme.

ORR reiterates that in the context of risk determination hearings, although a finding of non-dangerousness may result in an unaccompanied child's release, neither the hearing officer nor the Assistant Secretary, on appeal, may order the release or change of placement of an unaccompanied child. Placement and release decision-making authority is vested in the Director of ORR under the HSA and TVPRA.¹⁴⁵ The fundamental question at issue in an ORR risk determination hearing is whether an unaccompanied child would pose a danger to the community if released.¹⁴⁶

ORR is proposing under § 410.1903(f) that decisions under this section would

¹⁴⁵ See 8 U.S.C. 1232(c)(3); see also *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017) ("As was the case under the *Flores* Settlement prior to the passage of the HSA and TVPRA, the determinations made at hearings held under Paragraph 24A will not compel a child's release. Regardless of the outcome of a bond hearing, a minor may not be released unless the agency charged with his or her care identifies a safe and appropriate placement.").

¹⁴⁶ To the extent the hearing officer or Assistant Secretary, or designee, makes other findings with respect to the unaccompanied children, ORR will consider those in making placement and release decisions. For example, if a hearing officer finds that the child is not a flight risk, ORR will consider that finding when assessing the child's placement and conditions of placement—though the decision does not affect release because ORR does not make a determination of flight risk for purposes of deciding whether a child will be released.

be final and binding on the Department, meaning that when deciding whether to release an unaccompanied child (in accordance with the ordinary procedures on release for unaccompanied children as discussed in subpart C of this proposed rule), the ORR Director would not be able to disregard a determination that an unaccompanied child is not a danger. Further, in the case of an unaccompanied child who was determined to pose a danger to the community if released, the child would be permitted to seek another hearing under this section only if they can demonstrate a material change in circumstances. Similarly, because ORR may not have located a suitable sponsor at the time a hearing officer issues a decision, it may find that circumstances have changed by the time a sponsor is found such that the original hearing officer decision should no longer apply. Therefore, ORR is proposing that it may request the hearing officer to make a new determination under this section if at least one month has passed since the original decision, and/or ORR can show that a material change in circumstances means the unaccompanied child should no longer be released due to presenting a danger to the community. Based on experience under current policies, ORR believes one month is a reasonable length of time for a material change in circumstances to have occurred and best balances operational constraints with the safety concerns of all children under ORR care. It also ensures that children who have newly exhibited dangerous behaviors are accurately adjudicated. ORR notes that it previously proposed and finalized this same length of time (one month) in the 2019 Final Rule. ORR notes that because it always seeks to release an unaccompanied child to a sponsor whenever appropriate, ORR can make determinations to release a child previously determined to be a danger to the community without a new risk determination hearing because the purpose of a risk determination hearing is to ensure a child who is not a danger to the community is not kept in ORR custody.

ORR is proposing under § 410.1903(g) that this section cannot be used to determine whether an unaccompanied child has a suitable sponsor, and neither the hearing officer nor the Assistant Secretary, or the Assistant Secretary's designee, would be authorized to order the unaccompanied child released. This means that an unaccompanied child that has been determined by a hearing officer to not present a danger would only be released in accordance with the

ordinary procedures on release for unaccompanied children as discussed in subpart C of this proposed rule.

Finally, ORR is proposing under § 410.1903(h) that this section may not be invoked to determine an unaccompanied child's placement while in ORR custody or to determine level of custody for the unaccompanied child. Under this proposed section, the purpose of a risk determination hearing is only to determine whether an unaccompanied child presents a danger to the community if released, not to determine placement or level of custody. ORR would determine placement and level of custody as part of its ordinary procedures for the placement of unaccompanied children as discussed in subpart B of this proposed rule. That said, ORR would be able to take into consideration the hearing officer's decision on an unaccompanied child's level of danger (and runaway risk) for those purposes.

Subpart K—UC Office of the Ombuds

ORR proposes establishing an independent ombuds office that would promote important protections for all children in ORR care. An ombuds office to address unaccompanied children's issues does not currently exist, and ORR believes that the creation of an ombuds office would advance its duty to "ensur[e] that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child."¹⁴⁷ An ombuds for the UC Program would be an independent, impartial, and confidential public official with authority and responsibility to receive, investigate and informally address complaints about government actions, make findings and recommendations and publicize them when appropriate, and publish reports on its activities. Although an ombud's office would not have authority to compel ORR to take certain actions, ORR believes an Office of the Ombuds would provide a mechanism by which unaccompanied children, sponsors, and other stakeholders, including ORR agency staff and care provider facility staff, could confidentially raise concerns with an independent, impartial entity that could conduct investigations and make recommendations to ORR regarding program operations and decision-making, and refer concerns to other Federal agencies (e.g., HHS Office of the Inspector General, Department of Justice, etc.) or entities. ORR believes that an Office of the Ombuds is a sound solution to serve a similar function as

the oversight currently provided by the *Flores* monitor. While this proposed section would not create an oversight mechanism with authorities that equate with court oversight under a consent decree, ORR notes that it is important to maintain an independent mechanism to identify and report concerns regarding the care of unaccompanied children; it further believes that this independent mechanism should have the ability to investigate such claims, to work collaboratively with ORR to potentially resolve such issues, and publish reports on its activities. ORR therefore proposes to add new subpart K to part 410 to establish the UC Office of the Ombuds.

Key Principles of an Office of the Ombuds

ORR reviewed literature published by several national organizations—including the Administrative Conference of the United States (ACUS), American Bar Association (ABA), International Ombudsman Association (IOA), the United States Ombudsman Association (USOA), and the Coalition of Federal Ombudsman (COFO)—pertaining to standards of practice and establishment of ombuds offices.¹⁴⁸ The literature identifies independence, confidentiality, and impartiality as core standards of any Federal ombuds office. The literature also identifies common definitional characteristics among Federal ombuds offices, such as informality (*i.e.*, ombuds offices do not make decisions binding on the agency or provide formal rights-based processes for redress) and a commitment to credible practices and procedures. In addition, most ombuds offices adhere to the concepts of providing credible review of the issues that come to the office, a commitment to fairness, and assistance in the resolution of issues without making binding agency decisions.¹⁴⁹ These attributes align with ORR's goals for the creation of an office

that can provide an independent and impartial body that can receive reports and grievances regarding the care, placement, services, and release of unaccompanied children. ORR therefore proposes the creation of an Office of the Ombuds that incorporates lessons and recommendations identified in the 2016 ACUS report, follows the model of other established Federal ombuds offices, and takes into consideration feedback from interested parties.

Section 410.2000 Establishment of the UC Office of the Ombuds

ORR proposes, at § 410.2000, to establish a UC Office of the Ombuds. As the literature identified independence of the office as one of the key standards of an ombuds, ORR proposes in § 410.2000(a) that the ombuds will report directly to the ACF Assistant Secretary and will be managed as a distinct entity separate from the UC Program. ORR requests input on options relating to placement and reporting structure of this office within ORR or in another part of ACF.

At § 410.2000(b), ORR proposes that the UC Office of the Ombuds would be an independent, impartial office with authority to confidentially and informally receive and investigate complaints and concerns related to unaccompanied children's experiences in ORR care. This paragraph captures two additional key standards of an ombuds identified by literature: impartiality and confidentiality. ORR notes the UC Office of the Ombuds would not serve as a legal advocate for any person or issue binding decisions; rather, it would work as a neutral third party that can investigate concerns and attempt to resolve issues which are brought to the office. ORR intends for the UC Office of the Ombuds to be an additional resource for the UC Program and ORR, unaccompanied children, their sponsors and advocates, and other interested parties. The UC Office of the Ombuds will not supplant other roles and responsibilities of other entities such as the HHS/Office of Inspector General, ORR's own monitoring activities of its grants and contracts, or services included in this proposed rule, such as child advocate services (discussed in § 410.1308 of this proposed rule) or Legal Services (discussed in § 410.1309 of this proposed rule). Rather, the UC Office of the Ombuds would be responsible for acting as a neutral third party to receive, investigate, or address complaints about Government actions.

¹⁴⁸ For example, see Standards Committee of the United States Ombudsman Association, *Governmental Ombudsmen Standards* (2003) at 1, <https://www.usombudsman.org/wp-content/uploads/USOA-STANDARDS1.pdf> (promoting a model that defines a governmental ombudsman as an independent, impartial public official with authority and responsibility to receive, investigate or informally address complaints about Government actions, and, when appropriate, make findings and recommendations, and publish reports). See also Houk et al., *A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies*, Administrative Conference of the United States (2016) at 258–67, <https://www.acus.gov/report/ombudsman-federal-agencies-final-report-2016> ("2016 ACUS Report") (reviewing association standards and practices of different Federal ombudsman offices, and concluding that independence, confidentiality, and impartiality are essential to the ombudsman profession.).

¹⁴⁹ 2016 ACUS Report at 28.

¹⁴⁷ 6 U.S.C. 279(b)(1)(B).

Section 410.2001 UC Office of the Ombuds Policies and Procedures; Contact Information.

At proposed § 410.2001(a) and (b), the UC Office of the Ombuds shall develop and make publicly available the office's standards, practices, and policies and procedures giving consideration to the recommendations by nationally recognized ombuds organizations. ORR requests comments identifying potential standards, practices, and policies and procedures for ombuds consideration. For example, ORR requests comments regarding whether the UC Office the Ombuds should adopt standards, practices, and policies and procedures that are consistent with the ABA, IOA, USOA, COFO, or another nationally recognized ombuds organization that ORR should consider.

ORR further proposes in § 410.2001(c) that the UC Office of the Ombuds ensure that information about the office, including how to contact the office, is publicly available and that the office provide notice to unaccompanied children, sponsors, and others of its scope and responsibilities, in both English and other languages spoken and understood by unaccompanied children in ORR care. Notice shall be provided in an accessible manner, including through the provision of auxiliary aids and services and in clear, easily understood language, using concise and concrete sentences and/or visual aids. ORR's review of other ombuds office outreach activities found multiple approaches to raising awareness about an ombuds office, such as flyers, information posted at care provider facilities, a website and onsite visits to facilities or constituents.¹⁵⁰ ORR proposes providing the UC Office of the Ombuds with the discretion to determine the best approaches to providing outreach and awareness of the ability to act as a neutral third party, including visiting ORR facilities and publishing aggregated information annually about the number and types of concerns the UC Office of the Ombuds receives.

Section 410.2002 UC Office of the Ombuds Scope and Responsibilities

The 2016 ACUS Report described different kinds of ombuds offices which perform different functions based on their mandates. They may identify new issues and patterns of concerns that are not well known or are being ignored; support procedural changes; contribute

¹⁵⁰ See, e.g., 9 NYCRR 177.7 (NYS Office of Children and Family Services; Regulations for the Office of the Ombudsman; Visits to Facilities and Programs) and 6 U.S.C. 205 (Ombudsman for Immigration Detention).

to significant cost savings by dealing with identified issues, often at the earliest or pre-complaint stages, thereby reducing litigation and settling serious disputes; prevent problems through training and briefings; and serve as an important liaison between colleagues, units, or agencies.¹⁵¹ ORR intends to establish an ombuds office as an independent, impartial office with authority to receive and investigate issues and concerns related to unaccompanied children's experience in ORR care.

In § 410.2002(a), ORR proposes that the scope of the activities of the UC Office of the Ombuds may include: reviewing ORR compliance with Federal law and meeting with interested parties to hear input on ORR's implantation of and adherence to Federal law; visiting ORR facilities where unaccompanied children are or will be housed; investigating issues or concerns related to unaccompanied children's access to services while in ORR care; reviewing the implementation and execution of ORR policy and procedures; reviewing individual circumstances that raise concerns such as issues with access to services, communications with advocates or sponsors, transfers, or discharge from ORR care; and providing general education and information about ORR and the legal and regulatory landscape relevant to unaccompanied children. ORR proposes that the UC Office of the Ombuds may request information and documents from ORR and ORR care provider facilities and shall be provided with the information and documents to the fullest extent possible. ORR further proposes that the UC Office of the Ombuds may recommend new or revised UC Program policies and procedures, or other process improvements. ORR includes these anticipated areas of activity at proposed § 410.2002(a).

ORR anticipates that the UC Office of the Ombuds may have the opportunity to not only field individual concerns from unaccompanied children, their representatives, and program and facility staff, but may also identify patterns of concerns and may be well positioned to offer recommendations to improve ORR program processes and procedures. ORR proposes that, as an independent office reporting to the ACF Assistant Secretary, the UC Office of the Ombuds may determine its caseload and agenda and expects that such caseload may vary due to a variety of circumstances.

In § 410.2002(b), ORR proposes that, because the UC Office of the Ombuds is

not an enforcement entity, it should have the discretion to refer matters to other offices or entities, such as state or local law enforcement or the Office of Inspector General (OIG), as appropriate.

Finally, to assist the UC Office of the Ombuds in accomplishing its responsibilities, ORR proposes in § 410.2002(c) that the Ombuds must be able to meet with unaccompanied children in ORR care upon receiving a complaint or based on relevant findings during the course of investigating issues or concerns; have access to ORR facilities, premises, and case file information; and have access to care provider and Federal staff responsible for the children's care.

Section 410.2003 Organization of the UC Office of the Ombuds

The 2016 ACUS Report recommends that agencies should support the credibility of offices of the ombuds by selecting an ombuds with sufficient professional stature and requisite knowledge, skills, and abilities to effectively execute the duties of the office.¹⁵² This should include, at a minimum, knowledge of informal dispute resolution practices as well as, depending on the office mandate, familiarity with process design, training, data analysis, and facilitation and group work with diverse populations.¹⁵³ To align with the recommendations, ORR proposes in § 410.2003(a) that the UC Ombuds should be hired as a career civil servant. ORR believes that requiring the UC Ombuds position be hired as a career civil servant, rather than a political appointee, will support the important goal of impartiality. In § 410.2003(b), ORR proposes that the UC Ombuds have the requisite knowledge and experience to effectively fulfill the work and role, including membership in good standing in a nationally recognized organization, state bar association, or association of ombudsmen. Expertise should include but is not limited to informal dispute resolution practices, services and matters related to unaccompanied children and in child welfare, familiarity and experience with oversight and regulatory matters, and knowledge of ORR policy and regulations. In addition, ORR proposes in § 410.2003(c) that the Ombuds may engage additional staff as it deems necessary and practicable to support the functions and responsibilities of the Office; and, at § 410.2003(d), ORR proposes that the UC Ombuds shall establish procedures for training, certification, and continuing education

¹⁵² 2016 ACUS Report at 56.

¹⁵³ 2016 ACUS Report at 66.

¹⁵¹ 2016 ACUS Report at 2.

for staff and other representatives of the Office.

Section 410.2004 Confidentiality

At proposed § 410.2004(a), ORR proposes basic requirements that the Ombuds ensure that records and proceedings should be kept in a confidential manner, except to address an imminent risk of serious harm or in response to judicial action. Additionally, the Ombuds is prohibited from using or sharing information for any immigration enforcement related purpose. This proposal is in line with the 2016 ACUS Report identification of confidentiality of ombuds communications and proceedings as being of paramount importance to encourage reporting of concerns, thereby affording the ombuds the opportunity to assist the constituent and the agency in resolving the concern.¹⁵⁴ ORR also proposes at § 410.2004(b) that the UC Office of the Ombuds may accept reports from anonymous reporters.

To align to these goals and to help in the development of the UC Office of the Ombuds, ORR requests public comment on best practices for preserving the confidentiality of parties that may submit a complaint, as well as building trust in the confidentiality of the office so that individuals feel comfortable and safe, without the fear of retaliation, to report concerns.

Request for Information

ORR believes the UC Office of the Ombuds should be intentionally designed and requests any other comments and input on how the Ombuds should handle concerns relating to ORR practices. ORR therefore includes a request for information for additional public input on the proposed UC Office of the Ombuds. ORR seeks public comment on whether the Office should provide services relating to oversight in other areas, including more generalized concerns about ORR conduct and services. ORR also seeks comment on potential intersections between the Ombuds and other avenues for mitigation or redress of grievances (e.g., the ORR Placement Review Panel). Additionally, ORR seeks comment on additional independent and impartial mechanisms to address grievances or complaints related to children's experiences in ORR care.

Finally, ORR welcomes comments on other organizational and structural matters relevant to the proposed UC Office of the Ombuds.

VI. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), HHS is required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a control number assigned by OMB. This proposed rule does not require information collections for which HHS plans to seek OMB approval.

Under proposed § 410.1902, as discussed in section V. of this proposed rule, ORR proposes to establish processes for unaccompanied children to appeal the denial of release and for certain prospective sponsors to appeal sponsorship denials. While this appeals process may require unaccompanied children or prospective sponsors to submit information to ORR, information collections imposed subsequent to an administrative action are not subject to the PRA under 5 CFR 1320.4(a)(2). Therefore, ORR is not estimating any information collection burden associated with this process.

ORR has reviewed the requirements being codified in subparts A and B and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0554 (*Placement and Transfer of Unaccompanied Children into ORR Care Provider Facilities*) and OMB control number 0970–0547 (*Administration and Oversight of the Unaccompanied Children Program*). ORR is not proposing any new requirements which result in a change in burden.

ORR has reviewed the requirements being codified in subpart C and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0278 (*Family Reunification Packet for Sponsors of Unaccompanied Children*), OMB control number 0970–0552 (*Release of Unaccompanied Children from ORR Custody*) and OMB control number 0970–0553 (*Services Provided to Unaccompanied Children*). ORR is not proposing any new requirements which result in a change in burden.

ORR has reviewed the requirements being codified in subpart D and determined that the regulatory burden associated with reporting and

recordkeeping requirements is accounted for under OMB control number 0970–0547 (*Administration and Oversight of the Unaccompanied Children Program*), OMB control number 0970–0564 (*Monitoring and Compliance for Office of Refugee Resettlement (ORR) Care Provider Facilities*), and OMB control number 0970–0565 (*Legal Services for Unaccompanied Children*). ORR is not proposing any new requirements which result in a change in burden.

ORR has reviewed the requirements being codified in subparts E through I and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0554 (*Placement and Transfer of Unaccompanied Children into ORR Care Provider Facilities*). ORR is not proposing any new requirements which result in a change in burden.

ORR has reviewed the requirements being codified in subpart J and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0565 (*Legal Services for Unaccompanied Children*). ORR is not proposing any new requirements which result in a change in burden.

VII. Regulatory Impact Analysis

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a “significant regulatory action” as an action that is likely to result in a rule: (1) having an annual effect on the economy of \$200 million or more (adjusted every 3 years for changes in gross domestic product), or adversely affecting in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impact of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles

¹⁵⁴ 2016 ACUS Report at 41.

set forth in the Executive order. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. While there is uncertainty about the magnitude of effects associated with these regulations, it cannot be ruled out that they exceed the threshold for significance set forth in section 3(f)(1) of Executive Order 12866. Therefore, the regulation is section 3(f)(1) significant and has been reviewed by OMB.

A. Economic Analysis

1. Baseline of Current Costs

In order to properly evaluate the benefits and costs of regulations, agencies must evaluate the costs and benefits against a baseline. OMB Circular A–4 defines the “no action” baseline as “the best assessment of the way the world would look absent the proposed action.” ORR considers its current operations and procedures for implementing the terms of the FSA, the HSA, and the TVPRA to be an informative baseline for this analysis, from which it estimates the costs and benefits that would result from implementing the proposals in this proposed rule if finalized. The section below discusses some examples of the current cost for ORR’s operations and procedures under this baseline. The costs described below are already being incurred as part of ORR’s implementation of the terms of FSA, the HSA, and the TVPRA; however, the future in the absence of the rule is unclear, including because the end of temporary legal structures could change the UC Program’s operations. Relative to some future trajectories—that is, other analytic baselines—there could be additional new costs (and new effects more generally) associated with the policies being promulgated in this proposed rule.

Referrals of unaccompanied children to the UC Program vary considerably from one year to the next, even from month to month, and are largely unpredictable. Funding for the UC Program’s services are dependent on annual appropriations, which rely in part on fluctuating migration numbers. For example, in fiscal year (FY) 2019, the UC Program served 69,488 unaccompanied children and received \$1.3 billion in appropriations.¹⁵⁵ In contrast, in FY 2022, ORR served 128,904 unaccompanied children and

received \$5.5 billion in appropriations.¹⁵⁶ Appropriations account for uncertainty inherent in migration numbers by providing additional resources in any month when the UC Program receives referrals over a certain threshold. For example, in FY 2023, a contingency fund provided \$27 million for each increment of 500 referrals (or pro rata share) above a threshold of 13,000 unaccompanied children referrals in a month.¹⁵⁷

The UC Program funds private non-profit and for-profit agencies to provide shelter, counseling, medical care, legal services, and other support services to children in custody. In addition, some funding is provided for limited post-release services to certain unaccompanied children. Care provider facilities receive grants or contracts to provide shelter, including therapeutic care, foster care, shelter with increased staff supervision, and secure detention care. The majority of program costs (approximately 82 percent) are for care in ORR shelters. Other services for unaccompanied children, such as medical care, background checks, and family unification services, make up approximately 16 percent of the budget. Administrative expenses to carry out the program total approximately 2 percent of the budget.

2. Estimated Costs

This proposed rule would codify current ORR and HHS requirements for compliance with the HSA, the TVPRA, the FSA, court orders, and other requirements described under existing ORR policies and cooperative agreements. Because the majority of requirements being codified in this proposed rule are already enforced by ORR, ORR does not expect this proposed rule to impose any additional costs aside from those costs incurred by the Federal Government to establish the risk determination hearing process described in proposed § 410.1903 and the UC Office of the Ombuds described in proposed subpart K. Existing staff are currently responsible for conducting both Internal Compliance Reviews and Placement Review Panels as described in §§ 410.1901 and 410.1902, respectively, therefore no additional cost will be incurred.

In § 410.1309, ORR is proposing to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8

U.S.C. 1362), that all unaccompanied children who are or have been in ORR care would have access to legal advice and representation in immigration legal proceedings or other matters, consistent with current policy. ORR is also proposing that to the extent that appropriations are available, and insofar as it is not practicable to secure pro bono counsel for unaccompanied children as specified at 8 U.S.C. 1232(c)(5), ORR would have discretion to fund legal service providers to provide direct immigration legal representation.

In § 410.1903, ORR proposes to establish a hearing process that provides the same substantive protections as immigration court bond hearings under the FSA, but through an independent and neutral HHS adjudicator. This proposal would shift responsibility for these hearings from DOJ to HHS. ORR estimates that some resources will be required to implement this shift. ORR believes that this burden will fall on DOJ and HHS staff, and estimates that it will require approximately 2,000–4,000 hours to implement. This estimate reflects six to 12 staff working full-time for two months to create the new system. After this shift in responsibility has been implemented, ORR estimates that the rule will lead to no change in net resources required for risk determination hearings, and therefore estimate no incremental costs or savings. ORR seeks public comment on these estimates.

In subpart K, ORR discusses its proposal to establish an Office of the Ombuds for the UC Program. Although the scope of the proposed Office of the Ombuds may be varied, ORR anticipates that it would provide a mechanism by which unaccompanied children, sponsors, and other relevant parties could raise concerns, be empowered to independently investigate claims, issue findings and make recommendations to ORR, and refer findings to other Federal agencies or Congress as appropriate. ORR proposes that the Ombuds role would be filled by a career civil servant who has expertise in dispute resolution, familiarity with oversight and regulatory matters, experience working with unaccompanied children or in child welfare, and knowledge of ORR policy and regulations. In addition to the Ombuds position itself, ORR anticipates the need for support staff as well. In order to estimate the costs associated with the proposed Office of the Ombuds and its potential staffing requirements, ORR conferred with budgetary experts and analyzed the needs anticipated to accommodate the likely case load. ORR assumes the Ombuds would be a GS–15

¹⁵⁵ Annual Report to Congress, Office of Refugee Resettlement (FY 2019), <https://www.acf.hhs.gov/sites/default/files/documents/orr/orr-arc-fy2019.pdf>.

¹⁵⁶ ACF, Justification of Estimates for Appropriations Committees, page 70, (FY 2024) <https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2024-congressional-justification.pdf>.

¹⁵⁷ *Id.* at 77.

(\$176,458 per year) while support staff would consist of one GS-14 (\$150,016 per year), four GS-13s (\$126,949 per year), and four GS-12s (\$106,759 per staff per year). For estimating purposes, ORR assumes each position will be a Step 5 and include a factor 36.25% for overhead, per OMB.¹⁵⁸ In total, ORR estimates the cost of establishing this office would be \$1,718,529 per year $[(\$176,458 + 150,016 + (\$126,949 \times 4) + (\$106,759 \times 4) \times 136.25\%]$. ORR

¹⁵⁸ https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A76/a76_incl_tech_correction.pdf.

welcomes comments on the proposed staffing and structure for the Office of the Ombuds.

ORR also notes that all care provider facilities discussed in this proposed rule are ORR grantees and the costs of maintaining compliance with these requirements are allowable costs to grant awards under the Basic Considerations for cost provisions at 45 CFR 75.403 through 75.405, in that the costs are reasonable, necessary, ordinary, treated consistently, and are allocable to the award. Additional costs associated with the policies discussed in this proposed rule that were not

budgeted, and cannot be absorbed within existing budgets, would be allowable for the grant recipient to submit a request for supplemental funds to cover the costs.

Table 1 shows the changes to ORR's current operational status compared to the FSA. It contains a preliminary, high-level overview of how the rule would change ORR's current operations, for purposes of the economic analysis. The table does not provide a comprehensive description of all provisions and their basis and purpose.

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Table 1—FSA AND ORR CURRENT OPERATIONAL STATUS

FSA paragraph No.	Description of FSA provision	ORR cite (45 CFR)	ORR change from current practice
1, 2, 3	“Party, “plaintiff” and “class member” definitions	N/A	None. (Note: These definitions are only relevant to the FSA as it is a consent decree. The proposed rule does not include them because following the promulgation of a final rule, these definitions would no longer be relevant.)
4	“Minor” definition	410.1001	ORR uses the term “unaccompanied child/children” (UC) that has the same meaning as the statutory term “unaccompanied alien child” (UAC) as defined under 6 U.S.C. 279(g)(2) pursuant to 8 U.S.C. 1232(b)(1).
5	“Emancipated minor” definition	N/A	“Emancipated minor” does not appear in the proposed rule; and is only relevant to other agencies.
6	“Licensed program” definition	410.1001	FSA defines a “licensed program” as one licensed by an appropriate State agency. ORR proposes the term “standard program” to replace “licensed program.” The proposed definition of “standard program” is broader in scope to account for circumstances wherein licensure is unavailable in the state to childcare facilities that provide residential, group, or home care services for UC. ORR notes that it also proposes to define “care provider facility” as a term to encompass virtually all placement types for UC, including standard programs and non-standard programs. These proposals would not result in additional costs beyond current practice.
7	“Special needs minor”	410.1001, 410.1103, 410.1106 410.1302	None. (Note: ORR proposes to use the term “UC with special needs” in this rule to replace the term “special needs minor” that is used in the FSA. For the final rule, ORR is considering further updating the language by replacing “special needs” with “individualized needs,” and to use the terms “intellectual or developmental disability” and “emotional disorder or disability” or “mental health disorder” to replace the FSA term “mental illness or retardation.”)

FSA paragraph No.	Description of FSA provision	ORR cite (45 CFR)	ORR change from current practice
8	“Medium security facility”	410.1001	None. (Note: ORR proposes to use the term “heightened supervision facility” that incorporates language consistent with the term “medium secure facility” in the FSA.)
9	Scope of Settlement Agreement, Effective Date, and Publication	N/A	None. (Note: This provision imposes a series of deadlines that passed years ago, and/or do not impose obligations on ORR that would continue following termination of the FSA. As a result, the proposed rule does not include this provision.)
10	Class Definition	N/A	None. (Note: This provision is specific to the litigation that culminated in the FSA and is not a relevant or substantive term of the FSA, so it is not included in the proposed rule.)
11	Statements of General Applicability	410.1003,	None. (Note: The proposed rule would only apply to the care of UC in ORR custody.)
12(A)	Procedures and Temporary Placement Following Arrest	410.1103, 410.1800, 410.1801	None. (Note: ORR is not involved in the apprehension of UC or their immediate detention following arrest. ORR is proposing to adopt standards of paragraph 12(A), as applicable, for its care provider facilities.)
12(B); 12(C)	Defining “emergency” and “influx”	410.1001	<p>ORR is proposing to define “influx” respective to the capacity at a facility over a given period of time, rather than a static number of UC eligible for placement because it more accurately reflects current circumstances. ORR is not proposing changes to the definition of “emergency.” The proposals would not result in additional costs beyond current practice.</p> <p>ORR is proposing a new term, “emergency or influx facility” that means a facility opened in times of emergency or influx where such emergency or influx prevents the placement of minors in standard programs. ORR is proposing a single set of standards for an emergency or influx facility, which would apply to such a facility whether it was opened in response to an “emergency” or an “influx.” This would not result in additional costs beyond current practice.</p>
13	Age determination	410.1700 through 410.1704	None (Note: Sections 410.1700 through 410.1704 set forth the requirements for age determinations in compliance with 8 U.S.C. 1232(b)(4) They would not result in additional costs beyond current practice.)

FSA paragraph No.	Description of FSA provision	ORR cite (45 CFR)	ORR change from current practice
14	Release from custody where the INS determines that the detention of the minor is not required either to secure the minor's timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others. Release is to, in order of preference: parent, legal guardian, adult relative, adult or entity, licensed program, adult seeking custody.	410.1201(a)	None.
15	Before release from custody, Form I-134 and agreement to certain terms must be executed. If emergency, then minor can be transferred temporarily to custodian but must notify INS in 72 hours.	410.1202, 410.1203, 410.1204	None. (Note: unlike the former INS, ORR does not issue Form I-134. Rather, under current practice, ORR requires sponsors to sign an affidavit consistent with the requirements described in FSA para. 15)
16	INS may terminate the custody if terms are not met.	N/A	N/A.
17	Positive suitability assessment	410.1202, 410.1203, 410.1204	None.
18	INS or licensed program must make and record the prompt and continuous efforts on its part toward family reunification efforts and release of minor consistent with FSA paragraph 14.	410.1203(a)	None.
19	INS custody in licensed facilities until release or until immigration proceedings are concluded. Temporary	410.1004	None.

FSA paragraph No.	Description of FSA provision	ORR cite (45 CFR)	ORR change from current practice
	transfers in event of an emergency		
20	INS must publish a “Program Announcement” within 60 Days of the FSA’s approval.	N/A	None. (Note: This provision imposes a deadline that passed years ago. As a result, the proposed rule does not include this provision).
21(A)	Transfer to a suitable State or county juvenile detention facility if a minor has been charged or convicted of a crime with exceptions	410.1105(a)	None. (Note: Pursuant to 8 U.S.C. 1232(c)(2)(A), ORR can only place a UC in a secure facility (which are state or county juvenile detention facilities) if they are a danger to self or others or has been charged with committing a criminal offense. Therefore, ORR has removed the factors listed in FSA paragraph 21D–E as considerations for a placement in a secure facility (escape-risk and to protect UC from smugglers, respectively). Additionally, ORR adds the requirements of the TVPRA to place a UC in the least restrictive setting appropriate). This does not result in additional costs beyond current practice.
21(C)	Transfer to a suitable State or county juvenile detention facility if a minor has engaged, while in a licensed program, in conduct that has proven to be unacceptably disruptive to the normal functioning of the licensed program and removal is necessary to ensure the welfare of the minor and others	410.1105(a)	ORR proposes to require that the conduct at issue be engaged in while in a “restrictive placement” rather than a “licensed program” to ensure that unaccompanied children in such circumstances are initially stepped up to a heightened supervision facility rather than immediately placed in a secure facility. This does not result in additional costs beyond current practice.
22	Escape risk definition	410.1001, 410.1107	ORR is proposing to update the term “escape risk” to “runaway risk” which is a term used by state child welfare agencies and Federal agencies to describe children at risk from running away from home or their care setting. ORR also proposes to update the definition provided in the FSA which provides a non-exhaustive list of factors ORR may consider

FSA paragraph No.	Description of FSA provision	ORR cite (45 CFR)	ORR change from current practice
			when determining whether an unaccompanied child is an escape risk. Rather than basing its determination of runaway risk solely on such factors, ORR proposes under this rule that such determinations must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away. (Note: ORR does not use escape or runaway risk as a factor for placing a UC in a secure facility, as explained above. UC who present a runaway risk may be placed in a heightened supervision facility). There would be no additional costs beyond current practice.
22(B)	Voluntary departure is a factor to consider when determining whether a minor is an escape-risk.	410.1107(b)	ORR is proposing to not consider previous voluntary departure as a risk factor when determining runaway risk.
23	Placement of minors in least restrictive setting available and appropriate	410.1103, 410.1104, 410.1105	None. (Note: ORR adds that placement in the least restrictive setting include the best interest standard which was not included into the FSA. This does not result in additional costs beyond current practice.)
24(A)	Bond redetermination hearing afforded	410.1903	The proposed rule would establish a risk determination hearing process that provides the same substantive protections as immigration court bond hearings under the FSA, but through an independent and neutral adjudicator at HHS rather than the Department of Justice to determine whether a UC is a danger to others. Costs related to bond hearings are discussed in the Estimated Cost section of this NPRM. ORR does not consider runaway risk when making release decisions regarding UC in its care.
24(B)	Judicial review of placement in a particular type of facility permitted or that facility does not comply with standards in Ex. 1	N/A.	None. (Note: The proposed rule does not expressly provide for judicial review of placement/compliance, as a regulation cannot confer jurisdiction on Federal court.)
24(C)	Notice of reasons provided to minor not in a licensed program/judicial review	410.1901(b), 410.1306(c)(4)	None. (Note: The proposed rule would require that a written Notice of Placement (NOP) be provided to UC in a restrictive placement containing notice of their right to

FSA paragraph No.	Description of FSA provision	ORR cite (45 CFR)	ORR change from current practice
			review before a Placement Review Panel. This would not result in additional costs beyond current practice.)
24(D)	All minors “not released” shall be given Form I-770, notice of right to judicial review, and list of free legal services.	410.1901, 410.1109(a)	None. (Note: See above note. A list of free legal services is provided to all UC in ORR’s legal custody regardless of the type of facility they are placed in. This would not result in additional costs beyond current practice.)
24(E)	Additional information on precursors to seeking judicial review	N/A	None. (Note: Responsibilities of the UC prior to bringing litigation are not relevant or substantive terms of the FSA, and are not included in the proposed rule.)
25	Unaccompanied minors in INS custody should not be transported in vehicles with detained adults except when transport is from place of arrest/apprehension to an INS office, or when separate transportation would otherwise be impractical.	N/A	N/A. (Note: ORR does not have adults in custody.)
26	Provide assistance in making transportation arrangement for release of minor to person or facility to whom released.	410.1401(b)	None.
27	Transfer between placements with possessions, notice to counsel	410.1601	None.
28(A)	INS Juvenile Coordinator to monitor compliance with FSA and maintain records on all minors placed in proceedings and remain in custody for longer than 72 hours	410.1303, 410.1500, 410.1501	None. (Note: This provision is mainly specific to other agencies. ORR would monitor compliance to the proposed rule’s provisions through its policies and procedures that implement the FSA.)
28(B)	Plaintiffs’ counsel may contact INS Juvenile Coordinator to request an investigation on why	N/A	Note: Special provisions for Plaintiffs’ counsel are not relevant or substantive terms of the FSA, and are not included in the proposed rule.

FSA paragraph No.	Description of FSA provision	ORR cite (45 CFR)	ORR change from current practice
	a minor has not been released.		
29	Plaintiffs' counsel must be provided information pursuant to FSA paragraph 28 on a semi-annual basis; Plaintiffs' counsel has the opportunity to submit questions.	N/A	Note: Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the proposed rule.
30	INS Juvenile Coordinator must report to the court annually	N/A	Note: Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the proposed rule.
31	Defendants can request a substantial compliance determination after one year of the FSA.	N/A	None. (Note: This provision imposed a timeframe related to court supervision of the FSA and is therefore not relevant to and is not included in the proposed rule.)
32(A), (B), (C), and (D)	Attorney-client visits with class members allowed for Plaintiffs' counsel at a facility	N/A	Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the proposed rule.
33	Plaintiffs' counsel allowed to request access to, and visit licensed program facility or medium security facility or detention facility	N/A	Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA and are not included in the proposed rule.
34	INS employees must be trained on FSA within 120 days of court Approval.	N/A	None. (Note: This provision imposed a deadline that passed years ago. As a result, the proposed rule does not include this provision.)
35	Dismissal of action after court has determined substantial compliance	N/A	None. (Note: Provisions specific to terminating the action are not relevant or substantive terms of the FSA, and are not included in the proposed rule.)
36	Reservation of Rights	N/A	None. (Note: This provision is only relevant to the FSA insofar as the FSA exists in the form of a consent decree. Following promulgation of a final rule, it would no longer be relevant for ORR. As a result, the proposed rule does not include this provision.)
37	Notice and Dispute Resolution	N/A	None. (Note: This provision provides for ongoing enforcement of the FSA by the

FSA paragraph No.	Description of FSA provision	ORR cite (45 CFR)	ORR change from current practice
			district court. As a result, the proposed rule does not include this provision.)
38	Publicity—joint press conference	N/A	None. (Note: This provision relates to an event that occurred years ago. As a result, the proposed rule does not include this provision.)
39	Attorneys' Fees and Costs	N/A	None. (Note: This provision imposed a deadline that passed years ago. As a result, the proposed rule does not include this provision.)
40	Termination 45 days after publication of final rule	N/A	None. (Note: Provisions specific to terminating the FSA are not relevant or substantive terms, and are not included in the proposed rule.)
41	Representations and Warranty	N/A	None. (Note: This provision is only relevant to the FSA insofar as the FSA exists in the form of a consent decree. The proposed rule does not include this provision because following the promulgation of a final rule, it would terminate the FSA as an agreement binding on ORR.)
Exhibit 1	Minimum Standards for Licensed Programs	410.1300 through 410.1309	ORR proposes minimum standards and requirements for standard programs (see note above regarding the definition of licensed program), and for non-standard programs where specified. ORR proposes standards above and beyond the terms of the FSA related to reporting, monitoring, and quality control provisions, behavior management, staff training, and care manager requirements, language access services, healthcare services, child advocates, and legal services. None of this would result in additional costs beyond current practice.
Exhibit 2	Instructions to Service Officers re: Processing, Treatment, and Placement of Minors	N/A	None. (Note: ORR provides notice to its Federal, contractor, and care provider facility staff of provisions for the processing, treatment, and placement of UC in the ORR Policy Guide and Manual of Procedures. The provisions specified in Ex. 2 are incorporated into these documents.)
Exhibit 3	Contingency Plan	410.1800, 410.1801	None. (Note: The proposed rule also includes provisions for facilities used in times of influx or emergency. These provisions would not result in additional costs beyond current practice.)

FSA paragraph No.	Description of FSA provision	ORR cite (45 CFR)	ORR change from current practice
Exhibit 4	Agreement Concerning Facility Visits Under Paragraph 33	N/A	Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the proposed rule.
Exhibit 5	List of Organizations to Receive Information	N/A	Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA and are not included in the proposed rule.
Exhibit 6	Notice of Right to Judicial Review	410.1109(a)	None. (Note: The proposed rule does not expressly provide for judicial review of placement/compliance, as a regulation cannot confer jurisdiction on Federal court.)

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ORR seeks public comment on any additional costs associated with the proposals in this proposed rule which have not been otherwise addressed.

3. Benefits

The primary benefit of the proposed rule would be to ensure that applicable regulations reflect ORR's custody and treatment of unaccompanied children in accordance with the relevant and substantive terms of the FSA, the HSA, and the TVPRA. Additionally, the proposed codification of minimum standards for licensed facilities and the release process, ensures a measure of consistency across the programs network of standard facilities. ORR also anticipates that many of the previously discussed costs will be partially offset by a reduction in legal costs and staff time associated with the FSA and associated motions to enforce that require significant usage of staff time—often at extremely short notice—and require ORR to pay attorneys' fees.

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small business, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Individuals are not considered by the RFA to be a small entity.

The purpose of this action is to promulgate regulations that implement the relevant and substantive terms of the FSA and provisions of the HSA and TVPRA where they necessarily intersect with the FSA's provisions. Publication of final regulations would result in

termination of the FSA, as provided for in FSA paragraph 40. The FSA provides standards for the detention, treatment, and transfer of minors and unaccompanied children. Section 462 of the HSA and section 235 of the TVPRA prescribe substantive requirements and procedural safeguards to be implemented by ORR with respect to unaccompanied children. Additionally, court decisions have dictated how the FSA is to be implemented.¹⁵⁹

Section 462 of the HSA also transferred to the ORR Director “functions under the immigration laws of the United States with respect to the care of unaccompanied children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization.”¹⁶⁰ The ORR Director may, for purposes of performing a function transferred by this section, “exercise all authorities under any other provision of law that were available with respect to the performance of that function to the official responsible for the performance of the function” immediately before the transfer of the program.¹⁶¹

Consistent with provisions in the HSA, the TVPRA places the responsibility for the care and custody of unaccompanied children with the Secretary of Health and Human Services.¹⁶² Prior to the enactment of the HSA, the Commissioner of Immigration and Naturalization, through a delegation from the Attorney General, had authority “to establish such regulations . . . as he deems necessary for carrying out his authority

under the provisions of this Act.”¹⁶³ In accordance with the relevant savings and transfer provisions of the HSA,¹⁶⁴ the ORR Director now possesses the authority to promulgate regulations concerning ORR's administration of its responsibilities under the HSA and TVPRA.

This proposed rule would directly regulate ORR. As of June 2018, ORR is funding non-profit and private organizations to provide shelter, counseling, medical care, legal services, and other support services to unaccompanied children in custody. Because the requirements being codified in this proposed rule are already enforced by ORR, ORR does not expect this proposed rule to impose any additional costs to any of their grantees or contractors related to the provision of these services. It is possible that some grantees or contractors may experience costs to remedy any unmet requirements, however ORR is unable to make any specific assumptions due to the unique nature of each grantee and contractor. Additional costs associated with remedial actions necessary to meet requirements promulgated in this proposed rule that were not budgeted, and cannot be absorbed within existing budgets, would be allowable for the grant recipient to submit a request for supplemental funds to cover the costs.

The SBA size standard for NAICS 561210 Facilities Support Services is \$38.5 million. The SBA size standards for NAICS 561612 Security Guards and Patrol Services is \$20.3 million. Currently, ORR funds 52 grantees to provide services to unaccompanied children. ORR finds that all 52 current grantees are non-profits that do not

¹⁵⁹ See, e.g., *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017); *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016); *Flores v. Sessions*, No. 2:85-cv-04544 (C.D. Cal. June 27, 2017).

¹⁶⁰ 6 U.S.C. 279(a).

¹⁶¹ 6 U.S.C. 279(f)(1).

¹⁶² 8 U.S.C. 1232(b)(1) (referencing 6 U.S.C. 279).

¹⁶³ INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3) (2002); 8 CFR 2.1 (2002).

¹⁶⁴ See 6 U.S.C. 279(e) and (f). See also 6 U.S.C. 552, 557; 8 U.S.C. 1232(b)(1).

appear to be dominant in their field. Consequently, ORR believes all 52 grantees are likely to be small entities for the purposes of the RFA. The proposed changes to ORR regulations would not directly financially impact any small entities. ORR reiterates that additional costs associated with remedial actions necessary to meet requirements promulgated in this proposed rule that were not budgeted, and cannot be absorbed within existing budgets, would be allowable for the small entity grantee to submit a request for supplemental funds to cover the costs.

ORR requests information and data from the public that would assist in better understanding the direct effects of this proposed rule on small entities. Members of the public should submit a comment, as described in this proposed rule under Public Participation, if they think that their business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it. It would be helpful if commenters provide as much information as possible as to why this proposed rule would create an impact on small businesses.

ORR is unaware of any relevant Federal rule that may duplicate, overlap, or conflict with the proposed rule and is not aware of any alternatives to the proposed rule which accomplish the stated objectives that would minimize economic impact of the proposed rule on small entities. ORR requests comment and also seeks alternatives from the public that will accomplish the same objectives and minimize the proposed rule's economic impact on small entities.

Based on this analysis, the Secretary proposes to certify that the proposed rule, if finalized, will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. The current threshold after adjustment for inflation is \$177 million, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not mandate any requirements that meet or exceed the threshold for state, local, or tribal governments, or the private sector.

Though this rule would not result in such an expenditure, we do discuss the

effects of this rule elsewhere in this preamble. Additionally, UMRA excludes from its definitions of "Federal intergovernmental mandate," and "Federal private sector mandate" those regulations imposing an enforceable duty on other levels of government or the private sector which are a "condition of Federal assistance" 2 U.S.C. 658(5)(A)(i)(I), (7)(A)(i). The FSA provides ORR with no direct authority to mandate binding standards on facilities of state and local governments or on operations of private sector entities. Instead, these requirements would impact such governments or entities only to the extent that they make voluntary decisions to contract with ORR. Compliance with any standards that are not already otherwise in place resulting from this rule would be a condition of ongoing Federal assistance through such arrangements. Therefore, this rulemaking contains neither a Federal intergovernmental mandate nor a private sector mandate.

D. Paperwork Reduction Act

All Departments are required to submit to OMB for review and approval, any reporting or recordkeeping requirements inherent in a rule under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995) (codified at 44 U.S.C. 3501 *et seq.*). This proposed rule does not create or change a collection of information, therefore, is not subject to the Paperwork Reduction Act requirements.

However, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), ORR submitted a copy of this section to the Office of Management and Budget (OMB) for its review. This proposed rule complies with settlement agreements, court orders, and statutory requirements, most of whose terms have been in place for over 20 years. This proposed rule would not require additional information collection requirements beyond those requirements. The reporting requirements associated with those practices have been approved under the requirements of the Paperwork Reduction Act and in accordance with 5 CFR part 1320. ORR received approval from OMB for use of its forms under OMB control number 0970–0278, with an expiration date of August 31, 2025. Separately, ORR received approval from OMB for its placement and service forms under OMB control number 0970–0498, with an expiration date of August 31, 2023. A form associated with the specific consent process is currently pending approval with OMB (OMB Control Number 0970–0385).

E. Executive Order 13132: Federalism

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed rule would implement ORR statutory responsibilities and the FSA by codifying ORR practices that comply with the terms of the FSA and relevant law for the care and custody of unaccompanied children. In proposing to codify these practices, ORR was mindful of its obligations to meet the requirements of Federal statutes and the FSA while also minimizing conflicts between State law and Federal interests. At the same time, ORR is also mindful that its fundamental obligations are to ensure that it implements its statutory responsibilities and the agreement that the Federal Government entered into through the FSA.

Typically, ORR enters into cooperative agreements or contracts with non-profit and private organizations to provide shelter and care for unaccompanied children in a facility licensed by the appropriate state or local licensing authority if the state licensing agency provides for licensing of facilities that provide services to unaccompanied children. Where ORR enters into a cooperative agreement or contract with a facility, ORR requires that the organization administering the facility abide by all applicable State or local licensing regulations and laws. ORR designed agency policies and proposed regulations, as well as the terms of ORR cooperative agreements and contracts with the agency's grantees/contractors, to complement applicable State and licensing rules, not to supplant or replace the requirements.

Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Notwithstanding the determination that the formal consultation process described in Executive Order 13132 is not required for this rule, ORR welcomes any comments from representatives of State and local juvenile or family residential facilities—among other individuals and groups—during the course of this rulemaking.

F. Executive Order 12988: Civil Justice Reform

This proposed rule meets the applicable standards set forth in

sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

VIII. Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing criteria specified in the law. This regulation will not have an impact on family well-being as defined in this legislation, which asks agencies to assess policies with respect to whether the policy: strengthens or erodes family stability and the authority and rights of parents in the education, nurture, and supervision of their children; helps the family perform its functions; and increases or decreases disposable income.

IX. Alternatives Considered

ORR considered several alternatives to the proposed regulations set forth in this proposed rule. First, ORR considered not promulgating this proposed rule in which it proposes to codify requirements that would protect unaccompanied children in ORR care. However, ORR decided not to pursue this alternative as it would likely require the Government to operate through non-regulatory means in an uncertain environment subject to currently unknown future court interpretations of the FSA that may be difficult or operationally impracticable to implement and that could otherwise hamper operations. Furthermore, ORR believes that this proposed rule is warranted at this time in order to codify a uniform set of standards and procedures open to public inspection and feedback that will help to ensure the safety and wellbeing of unaccompanied children in ORR care, implement the substantive terms of the FSA, and enhance public transparency as to the policies governing the operation of the UC Program.

Once ORR decided to pursue proposing a framework of regulatory requirements through a proposed rule, it considered the scope of a proposed rule and whether to propose additional regulations addressing further areas of authority under the TVPRA, such as those related to asylum proceedings for unaccompanied children. ORR rejected this alternative in order to solely focus this proposed rule on proposing requirements that relate specifically to

the care and placement of unaccompanied children in ORR custody, pursuant to 6 U.S.C. 279 and 8 U.S.C. 1232, and that would implement the terms of the FSA. ORR notes that its decision to propose more targeted regulations in this proposed rule does not preclude ORR or other agencies from subsequently issuing regulations to address broader issues, including issues ORR has declined to address at this time that are the subject of pending litigation, as noted in this preamble.

After considering these alternatives, ORR determined to draft the proposed standards to reflect and be consistent with current ORR practices and requirements, proposing enhanced standards, procedures, and oversight mechanisms to help ensure the safety and wellbeing of unaccompanied children in ORR care where appropriate, consistent with ORR's statutory authorities and the FSA. In this way, it would be possible to propose standards and requirements that are uniform across care provider facilities and in a way that accords with the way the UC Program functions. Legacy INS's successors are obligated under the FSA to initiate action to publish the relevant and substantive terms of the FSA as regulations. In the 2001 Stipulation, the parties agreed to a termination of the FSA "45 days following the defendants' publication of final regulations implementing this Agreement." In 2020, the U.S. Court of Appeals for the Ninth Circuit ruled that if the Government wishes to terminate those portions of the FSA covered by valid portions of HHS regulations, it may do so by proposing regulations. In this proposed rule, ORR is therefore proposing to codify terms of the FSA that prescribe ORR responsibilities for unaccompanied children in order to ensure that unaccompanied children continue to be treated in accordance with the FSA, the HSA, and the TVPRA.

Robin Dunn Marcos, Director, Office of Refugee Resettlement approved this document on September 18, 2023.

Jeff Hild, Acting Assistant Secretary of the Administration for Children and Families, approved this document on September 20, 2023.

List of Subjects in 45 CFR Part 410

Administrative practice and procedure, Aliens, Child welfare, Immigration, Reporting and recordkeeping requirements, Unaccompanied children.

■ For the reasons set forth in the preamble, we propose to revise 45 CFR part 410 to read as follows:

PART 410—CARE AND PLACEMENT OF UNACCOMPANIED CHILDREN

Subpart A—Care and Placement of Unaccompanied Children

Sec.

- 410.1000 Scope of this part.
- 410.1001 Definitions.
- 410.1002 ORR care and placement of unaccompanied children.
- 410.1003 General principles that apply to the care and placement of unaccompanied children.
- 410.1004 ORR custody of unaccompanied children.

Subpart B—Determining the Placement of an Unaccompanied Child at a Care Provider Facility

- 410.1100 Purpose of this subpart.
- 410.1101 Process for the placement of an unaccompanied child after referral from another Federal agency.
- 410.1102 Care provider facility types.
- 410.1103 Considerations generally applicable to the placement of an unaccompanied child.
- 410.1104 Placement of an unaccompanied child in a standard program that is not restrictive.
- 410.1105 Criteria for placing an unaccompanied child in a restrictive placement.
- 410.1106 Unaccompanied children who need particular services and treatment.
- 410.1107 Considerations when determining whether an unaccompanied child is a runaway risk for purposes of placement decisions.
- 410.1108 Placement and services for children of unaccompanied children.
- 410.1109 Required notice of legal rights.

Subpart C—Releasing an Unaccompanied Child From ORR Custody

- 410.1200 Purpose of this subpart.
- 410.1201 Sponsors to whom ORR releases an unaccompanied child.
- 410.1202 Sponsor suitability.
- 410.1203 Release approval process.
- 410.1204 Home studies.
- 410.1205 Release decisions; denial of release to a sponsor.
- 410.1206 Appeals of release denials.
- 410.1207 Ninety (90)-day review of pending release applications.
- 410.1208 ORR's discretion to release an unaccompanied child to the Unaccompanied Refugee Minors Program.
- 410.1209 Requesting specific consent from ORR regarding custody proceedings.
- 410.1210 Post-release services.

Subpart D—Minimum Standards and Required Services

- 410.1300 Purpose of this subpart.
- 410.1301 Applicability of this subpart.
- 410.1302 Minimum standards applicable to standard programs.
- 410.1303 Reporting, monitoring, quality control, and recordkeeping standards.
- 410.1304 Behavior management and prohibition on seclusion and restraint.
- 410.1305 Staff, training, and case manager requirements.

- 410.1306 Language access services.
- 410.1307 Healthcare services.
- 410.1308 Child advocates.
- 410.1309 Legal services.
- 410.1310 Psychotropic medications.
- 410.1311 Unaccompanied children with disabilities.

Subpart E—Transportation of an Unaccompanied Child

- 410.1400 Purpose of this subpart.
- 410.1401 Transportation of an unaccompanied child in ORR's care.

Subpart F—Data and Reporting Requirements

- 410.1500 Purpose of this subpart.
- 410.1501 Data on unaccompanied children.

Subpart G—Transfers

- 410.1600 Purpose of this subpart.
- 410.1601 Transfer of an unaccompanied child within the ORR care provider facility network.

Subpart H—Age Determinations

- 410.1700 Purpose of this subpart.
- 410.1701 Applicability.
- 410.1702 Conducting age determinations.
- 410.1703 Information used as evidence to conduct age determinations.
- 410.1704 Treatment of an individual who appears to be an adult.

Subpart I—Emergency and Influx Operations

- 410.1800 Contingency planning and procedures during an emergency or influx.
- 410.1801 Minimum standards for emergency or influx facilities.
- 410.1802 Placement standards for emergency or influx facilities.

Subpart J—Availability of Review of Certain ORR Decisions

- 410.1900 Purpose of this subpart.
- 410.1901 Restrictive placement case reviews.
- 410.1902 Placement Review Panel.
- 410.1903 Risk determination hearings.

Subpart K—Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds)

- 410.2000 Establishment of the UC Office of the Ombuds.
- 410.2001 UC Office of the Ombuds policies and procedures; contact information.
- 410.2002 UC Office of the Ombuds scope and responsibilities.
- 410.2003 Organization of the UC Office of the Ombuds.
- 410.2004 Confidentiality.

Authority: 6 U.S.C. 279, 8 U.S.C. 1103(a)(3), 8 U.S.C. 1232.

Subpart A—Care and Placement of Unaccompanied Children

§ 410.1000 Scope of this part.

(a) This part governs those aspects of the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to the Unaccompanied Children Program (UC

Program) as authorized by section 462 of the Homeland Security Act of 2002, Public Law 107–296, 6 U.S.C. 279, and section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110–457, 8 U.S.C. 1232.

This part includes provisions implementing the settlement agreement reached in *Jenny Lisette Flores v. Janet Reno, Attorney General of the United States*, Case No. CV 85–4544–RJK (C.D. Cal. 1996).

(b) The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

(c) ORR does not fund or operate facilities other than standard programs, restrictive placements (which includes secure facilities, including residential treatment centers, and heightened supervision facilities), or emergency or influx facilities, absent a specific waiver as described under § 410.1801(d) or such additional waivers as are permitted by law.

§ 410.1001 Definitions.

For the purposes of this part, the following definitions apply.

ACF means the Administration for Children and Families, Department of Health and Human Services.

Attorney of record means an attorney who represents an unaccompanied child in legal proceedings or matters and protects them from mistreatment, exploitation, and trafficking, consistent with 8 U.S.C. 1232(c)(5), subject to the consent of the unaccompanied child. In order to be recognized as an unaccompanied child's attorney of record by the Office of Refugee Resettlement (ORR), for matters within ORR's authority, the individual must provide proof of representation of the child to ORR. ORR notes that that attorneys of record may engage with ORR in the course of this representation in order to obtain custody-related document and to engage in other communications necessary to facilitate the representation.

Best interest is a standard ORR applies in determining the types of decisions and actions it makes in relation to the care of an unaccompanied child. When evaluating what is in a child's best interests, ORR considers, as appropriate, the following in exhaustive list of factors: the unaccompanied child's expressed interests, in accordance with the unaccompanied child's age and maturity; the unaccompanied child's mental and physical health; the wishes of the unaccompanied child's parents or

legal guardians; the intimacy of relationship(s) between the unaccompanied child and the child's family, including the interactions and interrelationship of the unaccompanied child with the child's parents, siblings, and any other person who may significantly affect the unaccompanied child's well-being; the unaccompanied child's adjustment to the community; the unaccompanied child's cultural background and primary language; length or lack of time the unaccompanied child has lived in a stable environment; individualized needs, including any needs related to the unaccompanied child's disability; and the unaccompanied child's development and identity.

Care provider facility means any physical site that houses unaccompanied children in ORR custody, operated by an ORR-funded program that provides residential services for children, including but not limited to a program of shelters, group homes, individual family homes, residential treatment centers, secure or heightened supervision facilities, and emergency or influx facilities. Out of network (OON) facilities are not included within this definition.

Case file means the physical and electronic records for each unaccompanied child that are pertinent to the care and placement of the child. Case file materials include biographical information on each unaccompanied child; birth and marriage certificates; various ORR forms and supporting documents (and attachments, e.g., photographs); incident reports; medical and dental records; mental health evaluations; case notes and records, including educational records clinical notes and records; immigration forms and notifications; legal papers; home studies and/or post-release service records on a sponsor of an unaccompanied child; family reunification information including the sponsor's individual and financial data; case disposition; correspondence; and Social Security number (SSN); juvenile/criminal history records; and other relevant records. The records of unaccompanied children are the property of ORR, whether in the possession of ORR or a grantee or contractor, and grantees and contractors may not release these records without prior approval from ORR.

Case manager means the individual that coordinates, in whole or in part, assessments of unaccompanied children, individual service plans, and efforts to release unaccompanied children from ORR custody. Case managers also ensure services for

unaccompanied children are documented within the case files for each unaccompanied child.

Chemical restraints include, but are not limited to, drugs administered to children to chemically restrain them, and external chemicals such as pepper spray or other forms of inflammatory and/or aerosol agents.

Child advocates means third parties, appointed by ORR consistent with its authority under TVPRA at 8 U.S.C. 1232(c)(6), who make independent recommendations regarding the best interests of an unaccompanied child.

Clear and convincing evidence means a standard of evidence requiring that a factfinder be convinced that a contention is highly probable—*i.e.*, substantially more likely to be true than untrue.

Corrective action means steps taken to correct any care provider facility noncompliance identified by ORR.

DHS means the U.S. Department of Homeland Security.

Director means the Director of the Office of Refugee Resettlement (ORR), Administration for Children and Families, Department of Health and Human Services.

Disability means, with respect to an individual, the definition provided by section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102, which is adopted by reference in section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), and its implementing regulations, 45 CFR 84.3 (programs receiving Department of Health and Human Services (HHS) financial assistance) and 85.3 (programs conducted by HHS), as well as in the TVPRA at 8 U.S.C. 1232(c)(3)(B).

Discharge means an unaccompanied child that exits ORR custody, or the act of an unaccompanied child exiting ORR custody.

Emergency means an act or event (including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or public health concerns at one or more facilities) that prevents timely transport or placement of unaccompanied children, or impacts other conditions provided by this part.

Emergency incidents means urgent situations in which there is an immediate and severe threat to a child's safety and well-being that requires immediate action, and also includes unauthorized absences of unaccompanied children from a care provider facility. Emergency incidents include, but are not limited to:

(1) Abuse or neglect in ORR care where there is an immediate and severe threat to the child's safety and well-being, such as physical assault resulting

in serious injury, sexual abuse, or suicide attempt;

(2) Death of an unaccompanied child in ORR custody, including out-of-network facilities;

(3) Medical emergencies;

(4) Mental health emergencies requiring hospitalization; and

(5) Unauthorized absences of unaccompanied children in ORR custody.

Emergency or influx facility means a type of care provider facility that opens temporarily to provide shelter and services for unaccompanied children during an influx or emergency. These facilities are not otherwise categorized as a standard or secure facility in this part. Because of the emergency nature of emergency or influx facilities, they may not be licensed or may be exempted from licensing requirements by State and/or local licensing agencies. Emergency or influx facilities may also be operated on federally-owned or leased properties, in which case, the facility may not be subject to State or local licensing standards.

Emergency safety situation means a situation in which a child presents a risk of imminent physical harm to themselves, or others, as demonstrated by overt acts or expressed threats.

Executive Office for Immigration Review accredited representative, or *EOIR accredited representative*, means a representative of a qualified nonprofit religious, charitable, social service, or other similar organization established in the United States and recognized by the Department of Justice in accordance with 8 CFR part 1292. An EOIR accredited representative who is representing a child in ORR custody may file a notice of such representation in order to receive updates on the unaccompanied child.

Family planning services include, but are not limited to, Food and Drug Administration (FDA)-approved contraceptive products (including emergency contraception), pregnancy testing and counseling, sexually transmitted infection (STI) services, and referrals to appropriate specialists. ORR notes that the term "family planning services" does not include abortions. Instead, abortion is included in the definition of *medical services requiring heightened ORR involvement*, and is further discussed in § 410.1307.

Family Reunification Packet means an application and supporting documentation which must be completed by a potential sponsor who wishes to have an unaccompanied child released from ORR to their care. ORR uses the application and supporting documentation, as well as other

procedures, to determine the sponsor's ability to provide for the unaccompanied child's physical and mental well-being.

Heightened supervision facility means a facility that is operated by a program, agency or organization licensed by an appropriate State agency and that meets the standards for standard programs set forth in § 410.1302, and that is designed for an unaccompanied child who requires close supervision but does not need placement in a secure facility, including a residential treatment center (RTC). It provides 24-hour supervision, custody, care, and treatment. It maintains stricter security measures than a shelter, such as intensive staff supervision, in order to provide supports, manage problem behavior, and prevent children from running away. A heightened supervision facility may have a secure perimeter but shall not be equipped internally with major restraining construction or procedures typically associated with juvenile detention centers or correctional facilities.

HHS means the U.S. Department of Health and Human Services.

Home study means an in-depth investigation of the potential sponsor's ability to ensure the child's safety and well-being, initiated by ORR as part of the sponsor suitability assessment. A home study includes an investigation of the living conditions in which the unaccompanied child would be placed if released to a particular potential sponsor, the standard of care that the unaccompanied child would receive, and interviews with the proposed sponsor and other household members. A home study is conducted for any case where it is required by the TVPRA, this part, and for other cases at ORR's discretion, including for those in which the safety and well-being of the unaccompanied child is in question.

Influx means, for purposes of this part, a situation in which the net bed capacity of ORR's standard programs that is occupied or held for placement by unaccompanied children meets or exceeds 85 percent for a period of seven consecutive days.

Legal guardian means an individual who has been lawfully vested with the power, and charged with the duty of caring for, including managing the property, rights, and affairs of, a child or incapacitated adult by a court of competent jurisdiction, whether foreign or domestic.

Legal service provider means an organization or individual attorney who provides legal services to unaccompanied children, either on a pro bono basis or through ORR funding

for unaccompanied children's legal services. Legal service providers provide Know Your Rights presentations and screenings for legal relief to unaccompanied children, and/or direct legal representation to unaccompanied children.

LGBTQI+ means lesbian, gay, bisexual, transgender, queer or questioning, and intersex.

Mechanical restraint means any device attached or adjacent to the child's body that the child cannot easily remove that restricts freedom of movement or normal access to the child's body.

Medical services requiring heightened ORR involvement means:

- (1) Significant surgical or medical procedures;
- (2) Abortions; and
- (3) Medical services necessary to address threats to the life of or serious jeopardy to the health of an unaccompanied child.

Notification of Concern (NOC) means an instrument used by home study and post-release services providers, ORR care providers, and the ORR National Call Center staff to document and notify ORR of certain concerns that arise after a child is released from ORR care and custody.

Notice of Placement (NOP) means a written notice provided to unaccompanied children placed in restrictive placements, explaining the reasons for placement in the restrictive placement and kept as part of the child's case file. The care provider facility where the unaccompanied child is placed must provide the NOP to the child within 48 hours after an unaccompanied child's arrival at a restrictive placement, as well as at minimum every 30 days the child remains in a restrictive placement.

ORR means the Office of Refugee Resettlement, Administration for Children and Families, U.S. Department of Health and Human Services.

ORR long-term home care means an ORR-funded family or group home placement in a community-based setting. An unaccompanied child may be placed in long-term home care if ORR is unable to identify an appropriate sponsor with whom to place the unaccompanied child during the pendency of their legal proceedings. "Long-term home care" has the same meaning as "long-term foster care," as that term is used in the definition of *traditional foster care* provided at 45 CFR 411.5.

ORR transitional home care means an ORR-funded short-term placement in a family or group home. "Transitional home care" has the same meaning as

"transitional foster care," as that term is used in the definition of *traditional foster care* provided at 45 CFR 411.5.

Out of network placement (OON) means a facility that provides physical care and services for individual unaccompanied children as requested by ORR on a case-by-case basis, that operates under a single case agreement for care of a specific child between ORR and the OON provider. OON may include hospitals, restrictive settings, or other settings outside of the ORR network of care.

Peer restraints mean asking or permitting other children to physically restrain another child.

Personal restraint means the application of physical force without the use of any device, for the purpose of restraining the free movement of a child's body. This does not include briefly holding a child without undue force in order to calm or comfort them.

Placement means delivering the unaccompanied child to the physical custody and care of either a care provider facility or an alternative to such a facility. An unaccompanied child who is placed pursuant to this part is in the legal custody of ORR and may only be transferred or released by ORR. An unaccompanied child remains in the custody of a referring agency until the child is physically transferred to a care provider facility or an alternative to such a facility.

Placement Review Panel means a three-member panel consisting of ORR's senior-level career staff with requisite experience in child welfare that is convened for the purposes of reviewing requests for reconsideration of restrictive placements. An ORR staff member who was involved with the decision to step up an unaccompanied child to a restrictive placement may not serve as a Placement Review Panel member with respect to that unaccompanied child's placement.

Post-release services (PRS) mean follow-up services as that term is used in the William Wilberforce Trafficking Victims Protection Reauthorization Act at 8 U.S.C. 1232(c)(3)(B). PRS are ORR-approved services which may, and when required by statute must, be provided to an unaccompanied child and the child's sponsor, subject to available resources as determined by ORR, after the child's release from ORR custody. Assistance may include linking families to educational and community resources, home visits, case management, in-home counseling, and other social welfare services, as needed. When follow-up services are required by statute, the nature and extent of those

services would be subject to available resources.

Program-level events mean situations that affect the entire care provider facility and/or unaccompanied children and its staff within and require immediate action and include, but are not limited to:

- (1) Death of a staff member, other adult, or a child who is not an unaccompanied child but is in the care provider facility's care under non-ORR funding;
- (2) Major disturbances such as a shooting, attack, riot, protest, or similar occurrence;
- (3) Natural disasters such as an earthquake, flood, tornado, wildfire, hurricane, or similar occurrence;
- (4) Any event that affects normal operations for the care provider facility such as, for instance, a long-term power outage, gas leaks, inoperable fire alarm system, infectious disease outbreak, or similar occurrence.

Prone physical restraint means a restraint restricting a child's breathing, restricting a child's joints or hyperextending a child's joints, or requiring a child to take an uncomfortable position.

PRS provider means an organization funded by ORR to connect the sponsor and unaccompanied child to community resources for the child and for other child welfare services, as needed, following the release of the unaccompanied child from ORR custody.

Psychotropic medication(s) means medication(s) that are prescribed for the treatment of symptoms of psychosis or another mental, emotional, or behavioral disorder and that are used to exercise an effect on the central nervous system to influence and modify behavior, cognition, or affective state. The term includes the following categories:

- (1) Psychomotor stimulants;
- (2) Antidepressants;
- (3) Antipsychotics or neuroleptics;
- (4) Agents for control of mania or depression;
- (5) Antianxiety agents; and
- (6) Sedatives, hypnotics, or other sleep-promoting medications.

Qualified interpreter means:

- (1) For an individual with a disability, an interpreter who, via a video remote interpreting service (VRI) or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

(2) For a limited English proficient individual, an interpreter who via a remote interpreting service or an on-site appearance:

- (i) Has demonstrated proficiency in speaking and understanding both spoken English and at least one other spoken language;
- (ii) Is able to interpret effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary or terms without changes, omissions, or additions and while preserving the tone, sentiment, and emotional level of the original oral statement; and
- (iii) Adheres to generally accepted interpreter ethics principles, including client confidentiality.

Qualified translator means a translator who:

- (1) Has demonstrated proficiency in writing and understanding both written English and at least one other written non-English language;
- (2) Is able to translate effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary or terms without changes, omissions, or additions and while preserving the tone, sentiment, and emotional level of the original written statement; and
- (3) Adheres to generally accepted translator ethics principles, including client confidentiality.

Release means discharge of an unaccompanied child to an ORR-vetted and approved sponsor. After release, ORR does not have legal custody of the unaccompanied child, and the sponsor becomes responsible for providing for the unaccompanied child's physical and mental well-being.

Residential treatment center (RTC) means a sub-acute, time limited, interdisciplinary, psycho-educational, and therapeutic 24-hour-a-day structured program with community linkages, provided through non-coercive, coordinated, individualized care, specialized services, and interventions. RTCs provide highly customized care and services to individuals following either a community-based placement or more intensive intervention, with the aim of moving individuals toward a stable, less intensive level of care or independence. RTCs are a type of secure facility and are not a standard program under this part.

Restrictive placement means a secure facility, including RTCs, or a heightened supervision facility.

Runaway risk means it is highly probable or reasonably certain that an unaccompanied child will attempt to abscond from ORR care. Such

determinations must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away.

Seclusion means the involuntary confinement of a child alone in a room or area from which the child is physically prevented from leaving.

Secure facility means a State or county juvenile detention facility or a secure ORR detention facility, or a facility with an ORR contract or cooperative agreement having separate accommodations for minors, in a physically secure structure with staff able to control violent behavior. ORR uses a secure facility as the most restrictive placement option for an unaccompanied child who poses a danger to self or others or has been charged with having committed a criminal offense. A secure facility does not need to meet the requirements of § 410.1302 and is not defined as a standard program or shelter under this part.

Shelter means a kind of standard program in which all of the programmatic components are administered on-site, consistent with the standards set forth in § 410.1302.

Significant incidents mean non-emergency situations that may immediately affect the safety and well-being of a child. Significant incidents include, but are not limited to:

- (1) Abuse or neglect in ORR care;
- (2) Sexual harassment or inappropriate sexual behavior;
- (3) Staff Code of Conduct violations;
- (4) Contact or threats to an unaccompanied child while in ORR care from trafficking or smuggling syndicates, organized crime, or other criminal actors;
- (5) Incidents involving law enforcement on site;
- (6) Potential fraud schemes perpetrated by outside actors on unaccompanied children's sponsors;
- (7) Pregnancy;
- (8) Separation from a parent or legal guardian upon apprehension by a Federal agency;
- (9) Mental health concerns; and
- (10) Use of safety measures, such as restraints.

Special needs unaccompanied child means an unaccompanied child whose mental and/or physical condition requires special services and treatment by staff. An unaccompanied child may have special needs due to alcohol or substance use, serious emotional disturbance, mental illness, intellectual or developmental disability, or a physical condition or chronic illness that requires special services or treatment. An unaccompanied child

who has suffered serious neglect or abuse may be considered a special needs minor if the child requires special services or treatment as a result of neglect or abuse.

Sponsor means an individual (or entity) to whom ORR releases an unaccompanied child out of ORR custody, in accordance with ORR's sponsor suitability assessment process and release procedures.

Staff Code of Conduct means the set of personnel requirements established by ORR in order to promote a safe environment for unaccompanied children in its care, including protecting unaccompanied children from sexual abuse and sexual harassment.

Standard program means any program, agency, or organization that is licensed by an appropriate State agency, or that meets other requirements specified by ORR if licensure is unavailable in the State to programs providing services to unaccompanied children, to provide residential, group, or transitional or long-term home care services for dependent children, including a program operating family or group homes, or facilities for special needs unaccompanied children. A standard program must meet the standards set forth in § 410.1302. All homes and facilities operated by a standard program, including facilities for special needs unaccompanied children, shall be non-secure. However, a facility for special needs unaccompanied children may maintain that level of security permitted under State law, or under the requirements specified by ORR if licensure is unavailable in the State, which is necessary for the protection of an unaccompanied child or others in appropriate circumstances.

Tender age means twelve years of age or younger.

Transfer means the movement of an unaccompanied child from one ORR care provider facility to another ORR care provider facility, such that the receiving care provider facility takes over physical custody of the child. ORR sometimes uses the terms "step up" and "step down" to describe transfers of unaccompanied children to or from restrictive placements. For example, if ORR transfers an unaccompanied child from a shelter facility to a heightened supervision facility, that transfer would be a "step up," and a transfer from a heightened supervision facility to a shelter facility would be a "step down." But a transfer from a shelter to a community-based care facility, or vice versa, would be neither a step up nor a step down, because both placement types are not considered restrictive.

Trauma bond means when a trafficker uses rewards and punishments within cycles of abuse to foster a powerful emotional connection with the victim.

Trauma-informed means a system, standard, process, or practice that realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in unaccompanied children, families, staff, and others involved with the system; and responds by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively resist re-traumatization.

Unaccompanied child/children means a child who:

(1) Has no lawful immigration status in the United States;

(2) Has not attained 18 years of age; and

(3) With respect to whom:

(i) There is no parent or legal guardian in the United States; or

(ii) No parent or legal guardian in the United States is available to provide care and physical custody.

Unaccompanied Refugee Minors (URM) Program means the child welfare services program available pursuant to 8 U.S.C. 1522(d).

§ 410.1002 ORR care and placement of unaccompanied children.

ORR coordinates and implements the care and placement of unaccompanied children who are in ORR custody by reason of their immigration status.

§ 410.1003 General principles that apply to the care and placement of unaccompanied children.

(a) Within all placements, unaccompanied children shall be treated with dignity, respect, and special concern for their particular vulnerability.

(b) ORR shall hold unaccompanied children in facilities that are safe and sanitary and that are consistent with ORR's concern for the particular vulnerability of unaccompanied children.

(c) ORR plans and provides care and services based on the individual needs of and focusing on the strengths of the unaccompanied child.

(d) ORR encourages unaccompanied children, as developmentally appropriate and in their best interests, to be active participants in ORR's decision-making process relating to their care and placement.

(e) ORR strives to provide quality care tailored to the individualized needs of each unaccompanied child in its custody, ensuring the interests of the child are considered, and that

unaccompanied children are protected from traffickers and other persons seeking to victimize or otherwise engage them in criminal, harmful, or exploitative activity, both while in ORR custody and upon release from the UC Program.

(f) In making placement determinations, ORR places each unaccompanied child in the least restrictive setting that is in the best interests of the child, giving consideration to the child's danger to self, danger to others, and runaway risk.

(g) When requesting information or consent from unaccompanied children ORR consults with parents, legal guardians, child advocates, and attorneys of record or EOIR accredited representatives as needed.

§ 410.1004 ORR custody of unaccompanied children.

All unaccompanied children placed by ORR in care provider facilities remain in the legal custody of ORR and may be transferred or released only with ORR approval; provided, however, that in the event of an emergency, a care provider facility may transfer temporary physical custody of an unaccompanied child prior to securing approval from ORR but shall notify ORR of the transfer as soon as is practicable thereafter, and in all cases within 8 hours.

Subpart B—Determining the Placement of an Unaccompanied Child at a Care Provider Facility

§ 410.1100 Purpose of this subpart.

This subpart sets forth the process by which ORR receives referrals of unaccompanied children from other Federal agencies and the factors ORR considers when placing an unaccompanied child in a particular care provider facility. As used in this subpart, "placement determinations" or "placements" refers to placements in ORR-approved care provider facilities during the time an unaccompanied child is in ORR care, and not to the location of an unaccompanied child once the unaccompanied child is released in accordance with subpart C of this part.

§ 410.1101 Process for placement of an unaccompanied child after referral from another Federal agency.

(a) ORR accepts referrals of unaccompanied children, from any department or agency of the Federal Government at any time of day, every day of the year.

(b) Upon notification from any department or agency of the Federal Government that a child is an unaccompanied child and therefore

must be transferred to ORR custody, ORR identifies an appropriate placement for the unaccompanied child and notifies the referring Federal agency within 24 hours of receiving the referring agency's notification whenever possible, and no later than within 48 hours of receiving notification, barring exceptional circumstances.

(c) ORR works with the referring Federal Government department or agency to accept transfer of custody of the unaccompanied child, consistent with the statutory requirements at 8 U.S.C. 1232(b)(3).

(d) For purposes of paragraphs (b) and (c) of this section, ORR may be unable to timely identify a placement for and accept transfer of custody of an unaccompanied child due to exceptional circumstances, including:

(1) Any court decree or court-approved settlement that requires otherwise;

(2) An influx, as defined at § 410.1001;

(3) An emergency, including a natural disaster, such as an earthquake or hurricane, and other events, such as facility fires or civil disturbances;

(4) A medical emergency, such as a viral epidemic or pandemic among a group of unaccompanied children;

(5) The apprehension of an unaccompanied child in a remote location;

(6) The apprehension of an unaccompanied child whom the referring Federal agency indicates:

(i) Poses a danger to self or others; or

(ii) Has been charged with or has been convicted of a crime, or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent, and additional information is essential in order to determine an appropriate ORR placement; or

(7) An act or event that could not be reasonably foreseen that prevents the placement of or accepting transfer of custody of an unaccompanied child within the timeframes in paragraph (b) or (c) of this section.

(e) ORR takes legal custody of an unaccompanied child begins when it assumes physical custody from the referring agency.

§ 410.1102 Care provider facility types.

ORR may place unaccompanied children in care provider facilities as defined at § 410.1001, including but not limited to shelters, group homes, individual family homes, heightened supervision facilities, or secure facilities, including RTCs. ORR may place unaccompanied children in out-of-network (OON) placements under certain, limited circumstances. In times

of influx or emergency, as further discussed in subpart I of this part, ORR may place unaccompanied children in facilities that may not meet the standards of a standard program, but rather meet the standards in subpart I.

§ 410.1103 Considerations generally applicable to the placement of an unaccompanied child.

(a) ORR shall place each unaccompanied child in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child's age and individualized needs, provided that such setting is consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and in protecting the unaccompanied child's well-being and that of others.

(b) ORR considers the following factors that may be relevant to the unaccompanied child's placement, including:

- (1) Danger to self;
- (2) Danger to the community/others;
- (3) Runaway risk;
- (4) Trafficking in persons or other safety concerns;
- (5) Age;
- (6) Gender;
- (7) LGBTQI+ status;
- (8) Disability;
- (9) Any specialized services or treatment required or requested by the unaccompanied child;
- (10) Criminal background;
- (11) Location of potential sponsor and safe and timely release options;
- (12) Behavior;
- (13) Siblings in ORR custody;
- (14) Language access;
- (15) Whether the unaccompanied child is pregnant or parenting;
- (16) Location of the unaccompanied child's apprehension; and
- (17) Length of stay in ORR custody.

(c) ORR may utilize information provided by the referring Federal agency, child assessment tools, interviews, and pertinent documentation to determine the placement of all unaccompanied children. ORR may obtain any records from local, State, and Federal agencies regarding an unaccompanied child to inform placement decisions.

(d) ORR shall review, at least every 30 days, the placement of an unaccompanied child in a restrictive placement to determine whether a new level of care is appropriate.

(e) ORR shall make reasonable efforts to provide placements in those geographical areas where DHS encounters the majority of unaccompanied children.

(f) A care provider facility must accept the placement of unaccompanied children as determined by ORR, and may deny placement only for the following reasons:

- (1) Lack of available bed space;
- (2) Placement of the unaccompanied child would conflict with the care provider facility's State or local licensing rules;
- (3) Initial placement involves an unaccompanied child with a significant physical or mental illness for which the referring Federal agency does not provide a medical clearance; or
- (4) In the case of the placement of an unaccompanied child with a disability, the care provider facility concludes it is unable to meet the child's disability-related needs, without fundamentally altering its program, even by providing reasonable modifications and even with additional support from ORR.

(g) Care provider facilities must submit a written request to ORR for authorization to deny placement of unaccompanied children, providing the individualized reasons for the denial. Any such request must be approved by ORR before the care provider facility may deny a placement. ORR may follow up with a care provider facility about a placement denial to find a solution to the reason for the denial.

§ 410.1104 Placement of an unaccompanied child in a standard program that is not restrictive.

ORR places all unaccompanied children in standard programs that are not restrictive placements, except in the following circumstances:

- (a) An unaccompanied child meets the criteria for placement in a restrictive placement set forth in § 410.1105; or
- (b) In the event of an emergency or influx of unaccompanied children into the United States, in which case ORR shall place the unaccompanied child as expeditiously as possible in accordance with subpart I of this part.

§ 410.1105 Criteria for placing an unaccompanied child in a restrictive placement.

(a) *Criteria for placing an unaccompanied child in a secure facility that is not a residential treatment center.* (1) ORR may place an unaccompanied child in a secure facility (that is not an RTC) either at initial placement or through a transfer to another care provider facility from the initial placement.

(2) ORR will not place an unaccompanied child in a secure facility (that is not an RTC) if less restrictive alternatives in the best interests of the unaccompanied child

are available and appropriate under the circumstances. ORR may place an unaccompanied child in a heightened supervision facility or other non-secure care provider facility as an alternative, provided that the unaccompanied child does not pose a danger to self or others.

(3) ORR may place an unaccompanied child in a secure facility (that is not an RTC) only if the unaccompanied child:

- (i) Has been charged with or has been convicted of a crime, or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent, and where ORR deems that those circumstances demonstrate that the unaccompanied child poses a danger to self or others, not including:
 - (A) An isolated offense that was not within a pattern or practice of criminal activity and did not involve violence against a person or the use or carrying of a weapon; or
 - (B) A petty offense, which is not considered grounds for stricter means of detention in any case;
- (ii) While in DHS or ORR's custody, or while in the presence of an immigration officer or ORR official or ORR contracted staff, has committed, or has made credible threats to commit, a violent or malicious act (whether directed at the unaccompanied child or others); or
- (iii) Has engaged, while in a restrictive placement, in conduct that has proven to be unacceptably disruptive of the normal functioning of the care provider facility, and removal is necessary to ensure the welfare of the unaccompanied child or others, as determined by the staff of the care provider facility (e.g., substance or alcohol use, stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR determines the unaccompanied child poses a danger to self or others based on such conduct.

(b) *Criteria for placing an unaccompanied child in a heightened supervision facility.* (1) ORR may place an unaccompanied child in a heightened supervision facility either at initial placement or through a transfer to another facility from the initial placement.

(2) In determining whether to place an unaccompanied child in a heightened supervision facility, ORR considers if the unaccompanied child:

- (i) Has been unacceptably disruptive to the normal functioning of a shelter such that transfer is necessary to ensure the welfare of the unaccompanied child or others;
- (ii) Is a runaway risk;
- (iii) Has displayed a pattern of severity of behavior, either prior to

entering ORR custody or while in ORR care, that requires an increase in supervision by trained staff;

(iv) Has a non-violent criminal or delinquent history not warranting placement in a secure facility, such as isolated or petty offenses as described in paragraph (b)(2)(iii) of this section; or

(v) Is assessed as ready for step-down from a secure facility, including an RTC.

(c) *Criteria for placing an unaccompanied child in an RTC.* (1) An unaccompanied child with serious mental health or behavioral health issues may be placed into an RTC only if the unaccompanied child is evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file or referral documentation by a licensed psychologist or psychiatrist that an RTC is appropriate. In assessing danger to self or others, ORR uses the criteria for placement in a secure facility at paragraph (a) of this section.

(2) ORR may place an unaccompanied child at an OON RTC when a licensed clinical psychologist or psychiatrist consulted by ORR or a care provider facility has determined that the unaccompanied child requires a level of care only found in an OON RTC either because the unaccompanied child has identified needs that cannot be met within the ORR network of RTCs or no placements are available within ORR's network of RTCs, or that an OON RTC would best meet the unaccompanied child's identified needs.

(3) The criteria for placement in or transfer to an RTC also apply to transfers to or placements in OON RTCs. Care provider facilities may request ORR to transfer an unaccompanied child to an RTC in accordance with § 410.1601(d).

§ 410.1106 Unaccompanied children who need particular services and treatment.

ORR shall assess each unaccompanied child in its care to determine whether the unaccompanied child requires particular services and treatment by staff to address their individual needs while in the care of the UC Program. An unaccompanied child's assessed needs may require particular services, equipment, and treatment by staff for various reasons, including, but not limited to disability, alcohol or substance use, a history of serious neglect or abuse, tender age, pregnancy, or parenting. If ORR determines that an unaccompanied child's individualized needs require particular services and

treatment by staff or particular equipment, ORR shall place the unaccompanied child, whenever possible, in a licensed program in which unaccompanied children with disabilities can interact with people without disabilities to the fullest extent possible, and shall make reasonable modifications to its programs, including the provision of services, equipment and treatment, so that children with disabilities can have equal access to the program in the most integrated setting appropriate.

§ 410.1107 Considerations when determining whether an unaccompanied child is a runaway risk for purposes of placement decisions.

When determining whether an unaccompanied child is a runaway risk for purposes of placement decisions, ORR considers, among other factors, whether:

(a) The unaccompanied child is currently under a final order of removal.

(b) The unaccompanied child's immigration history includes:

(1) A prior breach of a bond;

(2) A failure to appear before DHS or the immigration court;

(3) Evidence that the unaccompanied child is indebted to organized smugglers for the child's transport; or

(4) A previous removal from the United States pursuant to a final order of removal.

(c) The unaccompanied child has previously absconded or attempted to abscond from State or Federal custody.

(d) The unaccompanied child has displayed behaviors indicative of flight or has expressed intent to run away.

(e) Evidence that the unaccompanied child is indebted to, experiencing a strong trauma bond to, or is threatened by a trafficker in persons or drugs.

§ 410.1108 Placement and services for children of unaccompanied children.

(a) *Placement.* If unaccompanied children and their children are referred together to ORR, ORR shall place the unaccompanied children and their children in the same facility, except in unusual or emergency situations. Unusual or emergency situations include, but are not limited to:

(1) The unaccompanied child requires alternate placement due to hospitalization or need for a specialized care or treatment setting that cannot provide appropriate care for the child of the unaccompanied child;

(2) The unaccompanied child requests alternate placement for the child of the unaccompanied child; or

(3) The unaccompanied child is the subject of allegations of abuse or neglect

against the child of the unaccompanied child (or temporarily in urgent cases where there is sufficient evidence of child abuse or neglect warranting temporary separation for the child's protection).

(b) *Services.* (1) ORR provides the same care and services to the children of unaccompanied children as it provides to unaccompanied children, as appropriate, regardless of the children's immigration or citizenship status.

(2) U.S. citizen children of unaccompanied children are eligible for public benefits and services to the same extent as other U.S. citizens. Application(s) for public benefits and services shall be submitted on behalf of the U.S. citizen children of unaccompanied children by care provider facilities. Utilization of those benefits and services shall be exhausted to the greatest extent practicable before ORR-funded services are utilized.

§ 410.1109 Required notice of legal rights.

(a) ORR shall promptly provide each unaccompanied child in its custody, in a language and manner the unaccompanied child understands, with:

(1) A State-by-State list of free legal service providers compiled and annually updated by ORR and that is provided to unaccompanied children as part of a Legal Resource Guide for unaccompanied children;

(2) The following explanation of the right of potential review: "ORR usually houses persons under the age of 18 in the least restrictive setting that is in an unaccompanied child's best interest, and generally not in restrictive placements (which means secure facilities, heightened supervision facilities, or residential treatment centers). If you believe that you have not been properly placed or that you have been treated improperly, you may call a lawyer to seek assistance. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form."; and

(3) A presentation regarding their legal rights, as provided under § 410.1309(a)(2).

(b) ORR shall not engage in retaliatory actions against legal service providers or any other representative because of advocacy or appearance in an action adverse to ORR.

Subpart C—Releasing an Unaccompanied Child From ORR Custody

§ 410.1200 Purpose of this subpart.

This subpart covers the policies and procedures used to release, without

unnecessary delay, an unaccompanied child from ORR custody to a vetted and approved sponsor.

§ 410.1201 Sponsors to whom ORR releases an unaccompanied child.

(a) Subject to an assessment of sponsor suitability, when ORR determines that the detention of the unaccompanied child is not required either to secure the child's timely appearance before DHS or the immigration court, or to ensure the minor's safety or that of others, ORR shall release a minor from its custody without unnecessary delay, in the following order of preference, to:

- (1) A parent;
- (2) A legal guardian;
- (3) An adult relative;
- (4) An adult individual or entity

designated by the parent or legal guardian as capable and willing to care for the unaccompanied child's well-being in:

(i) A declaration signed under penalty of perjury before an immigration or consular officer; or

(ii) Such other document that establishes to the satisfaction of ORR, in its discretion, the affiant's parental relationship or guardianship;

(5) A standard program willing to accept legal custody; or

(6) An adult individual or entity seeking custody, in the discretion of ORR, when it appears that there is no other likely alternative to long term custody, and family reunification does not appear to be a reasonable possibility.

(b) ORR shall not disqualify potential sponsors based solely on their immigration status and shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes. ORR will not share any immigration status information relating to potential sponsors with any law enforcement or immigration enforcement related entity at any time.

(c) In making determinations regarding the release of unaccompanied children to potential sponsors, ORR shall not release unaccompanied children on their own recognizance.

§ 410.1202 Sponsor suitability.

(a) Potential sponsors shall complete an application package to be considered as a sponsor for an unaccompanied child. The application package may be obtained from either the care provider facility or ORR directly.

(b) Prior to releasing an unaccompanied child, ORR shall conduct a suitability assessment to determine whether the potential

sponsor is capable of providing for the unaccompanied child's physical and mental well-being. At minimum, such assessment shall consist of review of the potential sponsor's application package, including verification of the potential sponsor's identity, physical environment of the sponsor's home, and relationship to the unaccompanied child, if any, and an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the unaccompanied child. ORR may consult with the issuing agency (*e.g.*, consulate or embassy) of the sponsor's identity documentation to verify the validity of the sponsor identity document presented.

(c) As part of its suitability assessment, ORR may also require such components as an investigation of the living conditions in which the unaccompanied child would be placed and the standard of care the unaccompanied child would receive, verification of the employment, income, or other information provided by the potential sponsor as evidence of the ability to support the child, interviews with members of the household, a home visit or home study as discussed at § 410.1204, background and criminal records checks, which may include a fingerprint based background check, on the potential sponsor and on adult residents of the potential sponsor's household. Any such assessment also takes into consideration the wishes and concerns of the unaccompanied child.

(d) ORR shall assess the nature and extent of the potential sponsor's previous and current relationship with the unaccompanied child, and the unaccompanied child's family, if applicable. ORR may deny release to unrelated individuals who have applied to be a sponsor but who have no pre-existing relationship with the child or the child's family prior to the child's entry into ORR custody.

(e) ORR shall consider the potential sponsor's motivation for sponsorship; the unaccompanied child's preferences and perspective regarding release to the potential sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the potential sponsor, as applicable.

(f) ORR shall evaluate the unaccompanied child's current functioning and strengths in conjunction with any risks or concerns such as:

(1) Victim of sex or labor trafficking or other crime, or is considered to be at risk for such trafficking due, for example, to observed or expressed

current needs, *e.g.*, expressed need to work or earn money;

(2) History of criminal or juvenile justice system involvement (including evaluation of the nature of the involvement, for example, whether the child was adjudicated and represented by counsel, and the type of offense) or gang involvement;

(3) History of behavioral issues;

(4) History of violence;

(5) Any individualized needs, including those related to disabilities or other medical or behavioral/mental health issues;

(6) History of substance use; or

(7) Parenting or pregnant

unaccompanied child.

(g) For individual sponsors, ORR shall consider the potential sponsor's strengths and resources in conjunction with any risks or concerns that could affect their ability to function as a sponsor including:

(1) Criminal background;

(2) Substance use or history of abuse or neglect;

(3) The physical environment of the home; and/or

(4) Other child welfare concerns.

(h) ORR shall assess the potential sponsor's:

(1) Understanding of the unaccompanied child's needs;

(2) Plan to provide adequate care, supervision, and housing to meet the unaccompanied child's needs;

(3) Understanding and awareness of responsibilities related to compliance with the unaccompanied child's immigration court proceedings, school attendance, and U.S. child labor laws; and

(4) Awareness of and ability to access community resources.

(i) ORR shall develop a release plan that will enable a safe release to a potential sponsor through the provision of post-release services if needed.

§ 410.1203 Release approval process.

(a) ORR or the care provider providing care for the unaccompanied child shall make and record the prompt and continuous efforts on its part towards family unification and the release of the unaccompanied child pursuant to the provisions of this section. These efforts include intakes and admissions assessments and the provision of ongoing case management services to identify potential sponsors.

(b) If a potential sponsor is identified, ORR shall explain to both the unaccompanied child and the potential sponsor the requirements and procedures for release.

(c) Pursuant to the requirements of § 410.1202, the potential sponsor shall

complete an application for release of the unaccompanied child, which includes supporting information and documentation regarding the sponsor's identity; the sponsor's relationship to the child; background information on the potential sponsor and the potential sponsor's household members; the sponsor's ability to provide care for the unaccompanied child; and the sponsor's commitment to fulfill the sponsor's obligations in the Sponsor Care Agreement, which requires the sponsor to:

(1) Provide for the unaccompanied child's physical and mental well-being;

(2) Ensure the unaccompanied child's compliance with DHS and immigration courts' requirements;

(3) Adhere to existing Federal and applicable state child labor and truancy laws;

(4) Notify DHS, the Executive Office for Immigration Review (EOIR) at the Department of Justice, and other relevant parties of changes of address;

(5) Provide notice of initiation of any dependency proceedings or any risk to the unaccompanied child as described in the Sponsor Care Agreement; and

(6) In the case of sponsors other than parents or legal guardians, notify ORR of a child moving to another location with another individual or change of address. Also, in the event of an emergency (*e.g.*, serious illness or destruction of the home), a sponsor may transfer temporary physical custody of the unaccompanied child to another person who will comply with the Sponsor Care Agreement, but the sponsor must notify ORR as soon as possible and no later than 72 hours after the transfer.

(d) ORR shall conduct a sponsor suitability assessment consistent with the requirements of § 410.1202.

(e) ORR shall not be required to release an unaccompanied child to any person or agency it has reason to believe may harm or neglect the unaccompanied child or fail to present the unaccompanied child before DHS or the immigration courts when requested to do so.

(f) During the release approval process, ORR shall educate the sponsor about the needs of the unaccompanied child and develop an appropriate plan to care for the unaccompanied child.

§ 410.1204 Home studies.

(a) As part of assessing the suitability of a potential sponsor, ORR may require a home study. A home study includes an investigation of the living conditions in which the unaccompanied child would be placed and takes place prior to the child's physical release, the standard of care the child would

receive, and interviews with the potential sponsor and others in the sponsor's household.

(b) ORR requires home studies under the following circumstances:

(1) Under the conditions identified in TVPRA at 8 U.S.C. 1232(c)(3)(B), which requires home studies for the following:

(i) A child who is a victim of a severe form of trafficking in persons;

(ii) A special needs child with a disability (as defined in 42 U.S.C. 12102);

(iii) A child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened; or

(iv) A child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence.

(2) Before releasing any child to a non-relative sponsor who is seeking to sponsor multiple children, or who has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children.

(3) Before releasing any child who is 12 years old or younger to a non-relative sponsor.

(c) ORR may, in its discretion, initiate home studies if it determines that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child.

(d) The care provider must inform the potential sponsor whenever a home study is conducted, explaining the scope and purpose of the study and answering the potential sponsor's questions about the process. In addition, the home study report, as well as any subsequent addendums if created, will be provided to the potential sponsor if the release request is denied.

(e) An unaccompanied child for whom a home study is conducted shall receive post-release services as described at § 410.1210.

§ 410.1205 Release decisions; denial of release to a sponsor.

(a) A potential sponsorship will be denied, if as part of the sponsor assessment process described at § 410.1202 or the release process described at § 410.1203, ORR determines that the potential sponsor is not capable of providing for the physical and mental well-being of the unaccompanied child or that the placement would result in danger to the unaccompanied child or the community.

(b) ORR shall adjudicate a potential sponsor who is an unaccompanied child's parent or legal guardian within 10 calendar days of receipt of a completed sponsor application or Family Reunification Package (FRP). If ORR denies release of an unaccompanied child to a potential sponsor who is a parent or legal guardian, it must notify the potential sponsor of the denial in writing via a Notification of Denial letter, which includes:

(1) An explanation of the reason(s) for the denial;

(2) Evidence and information supporting ORR's denial decision, including the evidentiary basis for the denial;

(3) Instructions for requesting an appeal of the denial;

(4) Notice that the potential sponsor may submit additional evidence, in writing before a hearing occurs, or orally during a hearing;

(5) Notice that the potential sponsor may present witnesses and cross-examine ORR's witnesses, if such witnesses are willing to voluntarily testify; and

(6) Notice that the potential sponsor may be represented by counsel in proceedings related to the release denial at no cost to the Federal Government.

(c) ORR shall inform the unaccompanied child, the unaccompanied child's child advocate, and the unaccompanied child's counsel (or if the unaccompanied child has no attorney of record or EOIR accredited representative, the local legal service provider) of a denial of sponsorship involving an unaccompanied child's parent or legal guardian.

(d) If the sole reason for denial of release is a concern that the unaccompanied child is a danger to self or others, and the potential sponsor is the unaccompanied child's parent or legal guardian, ORR must send the unaccompanied child a copy of the Notification of Denial described at paragraph (b) of this section. If the parent or legal guardian is not already seeking an appeal, the child may seek an appeal of the denial.

(e) ORR shall permit unaccompanied children to have the assistance of counsel, at no cost to the Federal Government, with respect to release or the denial of release to a proposed sponsor.

§ 410.1206 Appeals of release denials.

(a) Denied parent or legal guardian sponsors to whom ORR must send Notification of Denial letters pursuant to § 410.1205 may seek an appeal of ORR's decision by submitting a written request

to the Assistant Secretary of ACF, or the Assistant Secretary's neutral and detached designee.

(b) The requestor may seek an appeal with a hearing or without a hearing. The Assistant Secretary, or their neutral and detached designee, will acknowledge the request for appeal within a reasonable time.

(c) If the sole reason for denial of release is concern that the unaccompanied child is a danger to self or others, the unaccompanied child also may seek an appeal of the denial as described in paragraphs (a) and (b) of this section. If the unaccompanied child expresses a desire to seek an appeal, the unaccompanied child may consult with their attorney of record or a legal service provider for assistance with the appeal. The unaccompanied child may seek such appeal at any time after denial of release while the unaccompanied child is in ORR custody.

§ 410.1207 Ninety (90)-day review of pending release applications.

(a) ORR Federal staff who supervise case management services performed by ORR grantees and contractors shall review all pending sponsor applications or Family Reunification Packets (FRP) for unaccompanied children who are in ORR custody for 90 days after the complete sponsor application or FRP has been submitted to identify and resolve in a timely manner the reasons that a release application remains pending and to determine possible steps to accelerate the unaccompanied child's safe release.

(b) Upon completion of the initial 90-day review, unaccompanied child case managers or other designated agency or care provider staff shall update the potential sponsor and unaccompanied child on the status of the case, explaining the reasons that the release process is incomplete. Case managers or other designated agency or care provider staff shall work with the potential sponsor, relevant stakeholders, and ORR to address the portions of the sponsorship application or FRP that remain unresolved.

(c) For cases that are not resolved after the initial 90-day review, ORR Federal staff supervising the case management process shall conduct additional reviews at least every 90 days until the pending sponsor application or FRP is resolved. ORR may in its discretion and subject to resource availability conduct additional reviews on a more frequent basis than every 90 days.

§ 410.1208 ORR's discretion to release an unaccompanied child to the Unaccompanied Refugee Minors Program.

(a) An unaccompanied child may be eligible for services through the ORR Unaccompanied Refugee Minors (URM) Program. Eligible categories of unaccompanied children include:

(1) Cuban and Haitian entrant as defined in section 501 of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, and as provided for at 45 CFR 400.43;

(2) An individual determined to be a victim of a severe form of trafficking as defined in 22 U.S.C. 7105(b)(1)(C);

(3) An individual DHS has classified as a Special Immigrant Juvenile (SIJ) under section 101(a)(27)(f) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(27)(f), and who was either in the custody of HHS at the time a dependency order was granted for such child or who was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, at the time such dependency order was granted;

(4) U nonimmigrant status recipients under 8 U.S.C. 1101(a)(15)(U); or

(5) Other populations of children as authorized by Congress.

(b) With respect to unaccompanied children described in paragraph (a) of this section, ORR will evaluate each unaccompanied child case to determine whether it is in the child's best interests to be referred to the URM Program.

(c) When ORR discharges an unaccompanied child pursuant to this section to receive services through the URM Program, legal responsibility of the child, including legal custody or guardianship, must be established under State law as required by 45 CFR 400.115. Until such legal custody or guardianship is established, the ORR Director retains legal custody of the child.

§ 410.1209 Requesting specific consent from ORR regarding custody proceedings.

(a) An unaccompanied child in ORR custody is required to request specific consent from ORR if the child seeks to invoke the jurisdiction of a juvenile court to alter the child's custody status or release from ORR custody.

(b) If an unaccompanied child seeks to invoke the jurisdiction of a juvenile court for a dependency order to petition for SIJ classification or to otherwise permit a juvenile court to establish jurisdiction regarding a child's placement and does not seek the juvenile court's jurisdiction to determine or alter the child's custody status or release, the unaccompanied

child does not need to request specific consent from ORR.

(c) Prior to a juvenile court determining or altering the unaccompanied child's custody status or release from ORR, attorneys or others acting on behalf of an unaccompanied child must complete a request for specific consent.

(d) ORR shall acknowledge receipt of the request within two business days.

(e) Consistent with its duty to promptly place unaccompanied children in the least restrictive setting that is in the best interest of the child, ORR shall consider whether ORR custody is required to:

(1) Ensure a child's safety; or

(2) Ensure the safety of the community.

(f) ORR shall make determinations on specific consent requests within 60 business days of receipt of a request. When possible, ORR shall expedite urgent requests.

(g) ORR shall inform the unaccompanied child, or the unaccompanied child's attorney or other authorized representative of the decision on the specific consent request in writing, along with the evidence utilized to make the decision.

(h) The unaccompanied child, the unaccompanied child's attorney of record, or other authorized representative may request reconsideration of ORR's denial with the Assistant Secretary for ACF within 30 business days of receipt of the ORR notification of denial of the request. The unaccompanied child, the unaccompanied child's attorney, or authorized representative may submit additional (including new) evidence to be considered with the reconsideration request.

(i) The Assistant Secretary for ACF or designee considers the request for reconsideration and any additional evidence, and sends a final administrative decision to the unaccompanied child, or the unaccompanied child's attorney or other authorized representative, within 15 business days of receipt of the request.

§ 410.1210 Post-release services.

(a) *General.* (1) Before releasing unaccompanied children, care provider facilities shall work with sponsors and unaccompanied children to prepare for safe and timely release of the unaccompanied children, to assess whether the unaccompanied children may need assistance in accessing community resources, and to provide guidance regarding safety planning and accessing services.

(2) ORR shall conduct PRS, during the pendency of removal proceedings, for unaccompanied children for whom a home study was conducted pursuant to § 410.1204. An unaccompanied child who receives a home study and PRS may also receive home visits by a PRS provider.

(3) To the extent that ORR determines appropriations are available, and in its discretion, ORR may conduct PRS in additional cases involving unaccompanied children with mental health or other needs who could benefit from ongoing assistance from a community-based service provider. ORR shall determine the level and extent of PRS, if any, based on the needs of the unaccompanied children and the sponsors and the extent appropriations are available.

(4) ORR shall not delay the release of an unaccompanied child if PRS are not immediately available.

(b) *Service areas.* PRS include services in the areas listed in paragraphs (b)(1) through (12) of this section, which shall be provided in a manner that is sensitive to the individual needs of the unaccompanied child and in a way they effectively understand regardless of spoken language, reading comprehension, or disability to ensure meaningful access for all eligible children, including those with limited English proficiency. The comprehensiveness of PRS shall depend on the extent appropriations are available.

(1) *Placement stability and safety.* PRS providers shall work with sponsors to address challenges in parenting and caring for unaccompanied children. This may include guidance about maintaining a safe home; supervision of unaccompanied children; protecting unaccompanied children from threats by smugglers, traffickers, and gangs; and information about child abuse, neglect, separation, grief and loss, and how these issues affect children.

(2) *Immigration proceedings.* The PRS provider shall help facilitate the sponsor's plan to ensure the unaccompanied child's attendance at all immigration court proceedings and compliance with DHS requirements.

(3) *Guardianship.* If the sponsor is not a parent or legal guardian of the unaccompanied child, then the PRS provider shall provide the sponsor information about the benefits of obtaining legal guardianship of the unaccompanied child. If the sponsor is interested in becoming the unaccompanied child's legal guardian, then the PRS provider may assist the sponsor in identifying the legal resources to do so.

(4) *Legal services.* PRS providers shall assist sponsors in accessing relevant legal service resources including resources for immigration matters and unresolved juvenile justice issues.

(5) *Education.* PRS providers shall assist sponsors with school enrollment and addressing issues relating to the unaccompanied children's progress in school, including attendance. PRS providers may also assist with alternative education plans for unaccompanied children who exceed the State's minimum age requirement for mandatory school attendance. PRS providers may also assist sponsors with obtaining evaluations for unaccompanied children reasonably suspected of having a disability to determine eligibility for a free appropriate public education (which can include special education and related services) or reasonable modifications and auxiliary aids and services.

(6) *Employment.* PRS providers shall educate sponsors on U.S. child labor laws and requirements.

(7) *Medical services.* PRS providers shall assist the sponsor in obtaining medical insurance for the unaccompanied child if available and in locating medical providers that meet the individual needs of the unaccompanied child and the sponsor. If the unaccompanied child requires specialized medical assistance, the PRS provider shall assist the sponsor in making and keeping medical appointments and monitoring the unaccompanied child's medical requirements. PRS providers shall provide the unaccompanied child and sponsor with information and referrals to services relevant to health-related considerations for the unaccompanied child.

(8) *Individual mental health services.* PRS providers shall provide the sponsor with relevant mental health resources and referrals for the unaccompanied child. The resources and referrals shall take into account the individual needs of the unaccompanied child and sponsor. If an unaccompanied child requires specialized mental health assistance, PRS providers shall assist the sponsor in making and keeping mental health appointments and monitoring the unaccompanied child's mental health requirements.

(9) *Family stabilization/counseling.* PRS providers shall provide the sponsor with relevant resources and referrals for family counseling and/or individual counseling that meet individual needs of the unaccompanied child and the sponsor.

(10) *Substance use.* PRS providers shall assist the sponsor in locating resources to help address any substance use-related needs of the unaccompanied child.

(11) *Gang prevention.* PRS providers shall provide the sponsor information about gang prevention programs in the sponsor's community.

(12) *Other services.* PRS providers may assist the sponsor and unaccompanied child with accessing local resources in other specialized service areas based on the needs and at the request of the unaccompanied child.

(c) *PRS for unaccompanied children requiring additional consideration.* Additional unaccompanied children may be referred to PRS based on their individual needs, including, but not limited to:

(1) Unaccompanied children in need of particular services or treatment;

(2) Unaccompanied children with disabilities;

(3) LGBTQI+ status unaccompanied children;

(4) Unaccompanied children who are adjudicated delinquent or who have been involved in, or are at high risk of involvement with the juvenile justice system;

(5) Unaccompanied children who entered ORR care after being separated by DHS from a parent or legal guardian;

(6) Unaccompanied children who are victims of human trafficking or other crimes;

(7) Unaccompanied children who are victims of, or at risk of, worker exploitation;

(8) Unaccompanied children who are at risk for labor trafficking;

(9) Unaccompanied children who are certain parolees; and

(10) Unaccompanied children enrolled in school who are chronically absent or retained at the end of their school year.

(d) *Assessments.* The PRS provider shall assess the released unaccompanied child and sponsor for PRS needs and shall document the assessment. The assessment shall be developmentally appropriate, trauma-informed, and focused on the needs of the unaccompanied child and sponsor.

(e) *Ongoing check-ins and in-home visits.* (1) In consultation with the released unaccompanied child and sponsor, the PRS provider shall make a determination regarding the appropriate methods, timeframes, and schedule for ongoing contact with the released unaccompanied child and sponsor based on the level of need and support needed.

(2) PRS providers shall make monthly contact, at a minimum, with their

assigned released unaccompanied children and their sponsors, either in person or virtually for six (6) months after release.

(3) PRS providers shall document all ongoing check-ins and in-home visits, as well as document progress and outcomes of their home visits.

(f) *Referrals to community resources.*

(1) PRS providers shall work with released unaccompanied children and their sponsors to access community resources.

(2) PRS providers shall document any community resource referrals and their outcomes.

(g) *Timeframes for PRS.* (1) For a released unaccompanied child who is required under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to receive PRS, the PRS provider shall to the greatest extent practicable start services within two (2) days of the unaccompanied child's release from ORR care. If a PRS provider is unable to start PRS within two (2) days of the unaccompanied child's release, PRS shall start no later than 30 days after release.

(2) For a released unaccompanied child who is referred by ORR to receive PRS but is not required to receive PRS following a home study, the PRS provider shall to the greatest extent practicable start services within two (2) days of accepting a referral.

(h) *Termination of PRS.* (1) For a released unaccompanied child who is required to receive PRS under the TVPRA at 8 U.S.C. 1232(c)(3)(B), PRS for the unaccompanied child shall continue until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure, immigration status, or the child receives an order of removal, whichever occurs first.

(2) For a released unaccompanied child who is not required to receive PRS under the TVPRA at 8 U.S.C. 1232(c)(3)(B), but who receives PRS as authorized under the TVPRA, PRS for the unaccompanied child shall presumptively continue for not less than six months or until the unaccompanied child turns 18, whichever occurs first; or until the PRS provider assesses the unaccompanied child and determines PRS are no longer needed, but in that case for not less than six months.

(i) *Records and reporting requirements for PRS providers—(1) General.* (i) PRS providers shall maintain comprehensive, accurate, and current case files on unaccompanied children that are kept confidential and secure at all times and shall be accessible to ORR upon request. PRS providers shall keep all case file

information together in the PRS provider's physical and electronic files.

(ii) PRS providers shall upload all PRS documentation on services provided to unaccompanied children and sponsors to ORR's case management system within seven (7) days of completion of the services.

(2) *Records management and retention.* (i) PRS providers shall have written policies and procedures for organizing and maintaining the content of active and closed case files, which incorporate ORR policies and procedures. The PRS provider's policies and procedures shall also address preventing the physical damage or destruction of records.

(ii) Before providing PRS, PRS providers shall have established administrative and physical controls to prevent unauthorized access to both electronic and physical records.

(iii) PRS providers may not release records to any third party without prior approval from ORR.

(iv) If a PRS provider is no longer providing PRS for ORR, the PRS provider shall provide all active and closed case file records to ORR according to instructions issued by ORR.

(3) *Privacy.* (i) PRS providers shall have written policy and procedure in place that protects the sensitive information of released unaccompanied children from access by unauthorized users.

(ii) PRS providers shall explain to released unaccompanied children and their sponsors how, when, and under what circumstances sensitive information may be shared while the unaccompanied children receive PRS.

(iii) PRS providers shall have appropriate controls on information-sharing within the PRS provider network, including, but not limited to, subcontractors.

(4) *Notification of Concern.* (i) If the PRS provider is concerned about the about the unaccompanied child's safety and well-being, the PRS provider shall document a Notification of Concern (NOC) and report the concern(s) to ORR, and as applicable, the appropriate investigative agencies (including law enforcement and child protective services).

(ii) PRS providers shall document and submit NOCs to ORR within 24 hours of first suspicion or knowledge of the event(s).

(5) *Case closures.* (i) PRS providers shall formally close a case when ORR terminates PRS in accordance with paragraph (h) of this section.

(ii) ORR shall provide appropriate instructions, including any relevant

forms, that PRS providers must follow when closing a case.

Subpart D—Minimum Standards and Required Services

§ 410.1300 Purpose of this subpart.

This subpart covers standards and required services that care provider facilities must meet and provide in keeping with the principles of treating unaccompanied children in custody with dignity, respect, and special concern for their particular vulnerability.

§ 410.1301 Applicability of this subpart.

This subpart applies to all standard programs and to non-standard programs where specified.

§ 410.1302 Minimum standards applicable to standard programs.

Standard programs shall:

(a) Be licensed by an appropriate State or Federal agency, or meet other requirements specified by ORR if licensure is unavailable to programs providing services to unaccompanied children in their State, to provide residential, group, or foster care services for dependent children.

(b) Comply with all applicable State child welfare laws and regulations and all State and local building, fire, health, and safety codes, or other requirements specified by ORR if licensure is unavailable in their State to care provider facilities providing services to unaccompanied children. If there is a potential conflict between ORR's regulations and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. It is important to note, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.

(c) Provide or arrange for the following services for each unaccompanied child in care:

(1) Proper physical care and maintenance, including suitable living accommodations, food that is of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development, which can be accomplished by following the U.S. Department of Agriculture (USDA) Dietary Guidelines for Americans, and appropriate for the child and activity level, drinking water that is always available to each unaccompanied child, appropriate clothing, personal grooming and hygiene items, access to toilets and

sinks, adequate temperature control and ventilation, and adequate supervision to protect unaccompanied children from others;

(2) An individualized needs assessment that shall include:

- (i) Various initial intake forms;
- (ii) Essential data relating to the identification and history of the unaccompanied child and family;
- (iii) Identification of the unaccompanied child's special needs including any specific problems that appear to require immediate intervention;
- (iv) An educational assessment and plan;
- (v) whether an indigenous language speaker;
- (vi) An assessment of family relationships and interaction with adults, peers and authority figures;
- (vii) A statement of religious preference and practice;
- (viii) An assessment of the unaccompanied child's personal goals, strengths and weaknesses; and
- (iv) Identifying information regarding immediate family members, other relatives, godparents, or friends who may be residing in the United States and may be able to assist in family reunification;

(3) Educational services appropriate to the unaccompanied child's level of development, communication skills, and disability, if applicable, in a structured classroom setting, Monday through Friday, which concentrate primarily on the development of basic academic competencies and secondarily on English Language Training (ELT), including:

- (i) Instruction and educational and other reading materials in such languages as needed;
 - (ii) Instruction in basic academic areas that include science, social studies, math, reading, writing, and physical education; and
 - (iii) The provision to an unaccompanied child of appropriate reading materials in languages other than English for use during the unaccompanied child's leisure time;
- (4) Activities according to a recreation and leisure time plan that include daily outdoor activity, weather permitting, at least one hour per day of large muscle activity and one hour per day of structured leisure time activities, which do not include time spent watching television. Activities must be increased to at least three hours on days when school is not in session;

(5) At least one individual counseling session per week conducted by certified counseling staff with the specific objectives of reviewing the

unaccompanied child's progress, establishing new short and long-term objectives, and addressing both the developmental and crisis-related needs of each unaccompanied child;

(6) Group counseling sessions at least twice a week;

(7) Acculturation and adaptation services that include information regarding the development of social and inter-personal skills that contribute to those abilities necessary to live independently and responsibly;

(8) An admissions process, including:

- (i) Meeting unaccompanied children's immediate needs to food, hydration, and personal hygiene including the provision of clean clothing and bedding;

- (ii) An initial intakes assessment covering biographic, family, migration, health history, substance use, and mental health history of the unaccompanied child. If the unaccompanied child's responses to questions during any examination or assessment indicate the possibility that the unaccompanied child may have been a victim of human trafficking or labor exploitation, the care provider facility must notify the ACF Office of Trafficking in Persons within twenty-four (24) hours;

- (iii) A comprehensive orientation regarding program purpose, services, rules (provided in writing and orally), expectations, their rights in ORR care, and the availability of legal assistance, information about U.S. immigration and employment/labor laws, and services from the Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds) in simple, non-technical terms and in a language and manner that the child understands, if practicable; and
- (iv) Assistance with contacting family members, following the ORR Guide and the care provider facility's internal safety procedures;

(9) Whenever possible, access to religious services of the unaccompanied child's choice, celebrating culture-specific events and holidays, being culturally aware in daily activities as well as food menus, choice of clothing, and hygiene routines, and covering various cultures in children's educational services;

(10) Visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation. Standard programs should provide unaccompanied children with at least 15 minutes of phone or video contact three times a week with parents and legal guardians, family members, and caregivers located in the United States and abroad, in a private space that ensures confidentiality and at no cost to

the unaccompanied child, parent, legal guardian, family member, or caregiver. The staff shall respect the unaccompanied child's privacy while reasonably preventing the unauthorized release of the unaccompanied child;

(11) Assistance with family unification services designed to identify and verify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for release of the unaccompanied child;

(12) Legal services information regarding the availability of free legal assistance, and that they may be represented by counsel at no expense to the government, the right to a removal hearing before an immigration judge; the ability to apply for asylum with U.S. Citizenship and Immigration Services (USCIS) in the first instance, and the ability to request voluntary departure in lieu of removal; and

(13) Information about U.S. child labor laws and education around permissible work opportunities in a manner that is sensitive to the age, culture, and native language of each unaccompanied child.

(d) Deliver services in a manner that is sensitive to the age, culture, native language, and the complex needs of each unaccompanied child.

(e) Develop a comprehensive and realistic individual service plan for the care of each unaccompanied child in accordance with the unaccompanied child's needs as determined by the individualized needs assessment. Individual plans must be implemented and closely coordinated through an operative case management system. Service plans should identify individualized, person-centered goals with measurable outcomes and with steps or tasks to achieve the goals, be developed with input from the unaccompanied child, and be reviewed and updated at regular intervals. Unaccompanied children ages 14 and older should be given a copy of the plan, and unaccompanied children under age 14 should be given a copy of the plan when appropriate for that particular child's development. Individual plans shall be in that child's native language or other mode of auxiliary aid or services and/or use clear, easily understood language, using concise and concrete sentences and/or visual aids and checking for understanding where appropriate.

§ 410.1303 ORR Reporting, monitoring, quality control, and recordkeeping standards.

(a) *Monitoring activities.* ORR monitors all care provider facilities for

compliance with the terms of the regulations in this part and 45 CFR part 411. ORR monitoring activities include:

(1) Desk monitoring that is ongoing oversight from ORR headquarters;

(2) Routine site visits that are day-long visits to facilities to review compliance for policies, procedures, and practices and guidelines;

(3) Site visits in response to ORR or other reports that are for a specific purpose or investigation; and

(4) Monitoring visits that are part of comprehensive reviews of all care provider facilities.

(b) *Corrective actions.* If ORR finds a care provider facility to be out of compliance with the regulations in this part and 45 CFR part 411 or sub-regulatory policies such as its guidance and the terms of its contracts or cooperative agreements, ORR will communicate the concerns in writing to the care provider facility director or appropriate person through a written monitoring or site visit report, with a list of corrective actions and child welfare best practice recommendations, as appropriate. ORR will request a response to the corrective action findings from the care provider facility and specify a time frame for resolution and the disciplinary consequences for not responding within the required timeframes.

(c) *Monitoring of secure facilities.* At secure facilities, in addition to other monitoring activities, ORR reviews individual unaccompanied child case files to make sure children placed in secure facilities are assessed at least every 30 days for the possibility of a transfer to a less restrictive setting.

(d) *Monitoring of long-term home care and transitional home care facilities.* ORR long-term home care and transitional home care facilities are subject to the same types of monitoring as other care provider facilities, but the activities are tailored to the foster care arrangement. ORR long-term home care and transitional home care facilities that provide services through a sub-contract or sub-grant are responsible for conducting annual monitoring or site visits of the sub-recipient, as well as weekly desk monitoring. Upon request, care provider facilities must provide findings of such reviews to the designated ORR point of contact.

(e) *Care provider facility quality assurance.* ORR requires care provider facilities to develop quality assurance assessment procedures that accurately measure and evaluate service delivery in compliance with the requirements of the regulations in this part, as well as those delineated in 45 CFR part 411.

(f) *Reporting.* Care provider facilities shall report to ORR any emergency incident, significant incident, or program-level event and in accordance with any applicable Federal, State, and local reporting laws. Such reports are subject to the following rules:

(1) Care provider facilities must document incidents with sufficient detail to ensure that any relevant entity can facilitate any required follow-up; document incidents in a way that is trauma-informed and grounded in child welfare best practices; and update the report with any findings or documentation that are made after the fact.

(2) Care provider facilities must never: fabricate, exaggerate, or minimize incidents; use disparaging or judgmental language about unaccompanied children in incident reports; use incident reporting or the threat of incident reporting as a way to manage the behavior of unaccompanied children or for any other illegitimate reason.

(3) Care provider facilities are prohibited from using reports of significant incidents as a method of punishment or threat towards any child in ORR care for any reason.

(4) The existence of a report of a significant incident may not be used by ORR as a basis for an unaccompanied child's step up to a restrictive placement or as the sole basis for a refusal to step a child down to a less restrictive placement. Care provider facilities are likewise prohibited from using the existence of a report of a significant incident as a basis for refusing an unaccompanied child's placement in their facilities. Reports of significant incidents may be used as examples or citations of concerning behavior; however, the existence of a report itself is not sufficient for a step up, a refusal to step down, or a care provider facility to refuse a placement.

(g) *Develop, maintain, and safeguard each individual unaccompanied child's case file.* This paragraph (g) applies to all care provider facilities responsible for the care and custody of unaccompanied children, whether the program is a standard program or not.

(1) Care provider facilities and PRS providers must preserve the confidentiality of unaccompanied child case file records and information, and protect the records and information from unauthorized use or disclosure;

(2) The records included in unaccompanied child case files are the property of ORR, whether in the possession of ORR or a care provider facility or PRS provider, and care provider facilities and PRS providers may not release those records without

prior approval from ORR except for limited program administration purposes;

(3) Care provider facilities and PRS providers must provide unaccompanied child case file records to ORR immediately upon ORR's request; and

(4) Employees, former employees, or contractors of a care provider facility or PRS provider must not disclose case file records or information about unaccompanied children, their sponsors, family, or household members to anyone for any purpose, except for purposes of program administration, without first providing advanced notice to ORR to allow ORR to ensure that disclosure of unaccompanied children's information is compatible with program goals and to ensure the safety and privacy of unaccompanied children.

(h) *Records.* Maintain adequate records in the unaccompanied child case file and make regular reports as required by ORR that permit ORR to monitor and enforce the regulations in this part and other requirements and standards as ORR may determine are in the interests of the unaccompanied child.

§ 410.1304 Behavior management and prohibition on seclusion and restraint.

(a) Care provider facilities must develop behavior management strategies that include evidence-based, trauma-informed, and linguistically responsive program rules and behavior management policies that take into consideration the range of ages and maturity in the program and that are culturally sensitive to the needs of each unaccompanied child. The behavior management strategies must not use any practices that involve negative reinforcement or involve consequences or measures that are not constructive and are not logically related to the behavior being regulated. Care provider facilities must not:

(1) Use or threaten use of corporal punishment, significant incident reports as punishment, unfavorable consequences related to family/sponsor unification or legal matters (*e.g.*, immigration, asylum); use forced chores or work that serves no purpose except to demean or humiliate the child, forced physical movement, such as push-ups and running, or uncomfortable physical positions as a form of punishment or humiliation; search an unaccompanied child's personal belongings solely for the purpose of behavior management; apply medical interventions that are not prescribed by a medical provider acting within the usual course of professional practice for a medical diagnosis or that

increase risk of harm to the unaccompanied child or others; and

(2) Use any sanctions employed in relation to an individual unaccompanied child that:

(i) Adversely affect an unaccompanied child's health, or physical, emotional, or psychological well-being; or

(ii) Deny unaccompanied children meals, hydration, sufficient sleep, routine personal grooming activities, exercise (including daily outdoor activity), medical care, correspondence or communication privileges, or legal assistance.

(3) Use prone physical restraints, chemical restraints, or peer restraints for any reason in any care provider facility setting.

(b) Involving law enforcement should be a last resort. A call by a facility to law enforcement may trigger an evaluation of staff involved regarding their qualifications and training in trauma-informed, de-escalation techniques.

(c) Standard programs and RTCs are prohibited from using seclusion as a behavioral intervention. Standard programs and RTCs are also prohibited from using restraints, except as described at paragraphs (d) and (f) of this section.

(d) Standard programs and RTCs may use personal restraint only in emergency safety situations.

(e) Secure facilities, except for RTCs:

(1) May use personal restraints, mechanical restraints and/or seclusion in emergency safety situations.

(2) May restrain an unaccompanied child for their own immediate safety or that of others during transport to an immigration court or an asylum interview.

(3) May restrain an unaccompanied child while at an immigration court or asylum interview if the child exhibits imminent runaway behavior, makes violent threats, demonstrates violent behavior, or if the secure facility has made an individualized determination that the child poses a serious risk of violence or running away if the child is unrestrained in court or the interview.

(4) Must provide all mandated services under this subpart to the unaccompanied child to the greatest extent practicable under the circumstances while ensuring the safety of the unaccompanied child, other unaccompanied children at the secure facility, and others.

(f) Care provider facilities may only use soft restraints (e.g., zip ties and leg or ankle weights) during transport to and from secure facilities, and only when the care provider believes a child poses a serious risk of physical harm to

self or others or a serious risk of running away from ORR custody.

§ 410.1305 Staff, training, and case manager requirements.

(a) Standard programs, restrictive placements, and post-release service providers shall provide training to all staff, contractors, and volunteers, to ensure that they understand their obligations under ORR regulations in this part and policies and are responsive to the challenges faced by staff and unaccompanied children at the facility. All trainings should be tailored to the unique needs, attributes, and gender of the unaccompanied children in care at the individual care provider facility. Standard programs and restrictive placements must document the completion of all trainings in personnel files. All staff, contractors, and volunteers must have completed all required background checks and vetting for their respective roles prior to service provision and care provider facilities must provide documentation to ORR of compliance;

(b) Standard programs and restrictive placements shall meet the staff to child ratios established by their respective States or other licensing entities, or ratios established by ORR if State licensure is not available; and

(c) Standard programs and restrictive placements must have case managers based on site at the facility.

§ 410.1306 Language access services.

(a) *General.* (1) To the greatest extent practicable, standard programs and restrictive placements shall consistently offer unaccompanied children the option of interpretation and translation services in their native or preferred language, depending on the unaccompanied children's preference, and in a way they effectively understand. If after taking reasonable efforts, standard programs and restrictive placements are unable to obtain a qualified interpreter or translator for the unaccompanied children's native or preferred language, depending on the children's preference, standard programs and restrictive placements shall consult with qualified ORR staff for guidance on how to ensure meaningful access to their programs and activities for the children, including those with limited English proficiency.

(2) Standard programs and restrictive placements shall prioritize the ability to provide in-person, qualified interpreters for unaccompanied children who need them, particularly for rare or indigenous languages. After the standard programs and restrictive placements take reasonable efforts to obtain in-person,

qualified interpreters, then they may use professional telephonic interpreter services.

(3) Standard programs and restrictive placements shall translate all documents and materials shared with the unaccompanied children, including those posted in the facilities, in the unaccompanied children's native or preferred language, depending on the children's preference, and in a timely manner.

(b) *Placement considerations.* ORR shall make placement decisions for the unaccompanied children that are informed in part by language access considerations and other factors as listed in § 410.1103(b). To the extent appropriate and practicable, giving due consideration to an unaccompanied child's individualized needs, ORR shall place unaccompanied children with similar language needs within the same standard program or restrictive placement.

(c) *Intake, orientation, and confidentiality.* (1) Prior to completing the UC Assessment and starting counseling services, standard programs and restrictive placements shall provide a written notice of the limits of confidentiality they share while in ORR care and custody, and orally explain the contents of the written notice to the unaccompanied children, in their native or preferred language, depending on the children's preference, and in a way they can effectively understand.

(2) Standard programs and restrictive placements shall conduct assessments and initial medical exams with unaccompanied children in their native or preferred language, depending on the children's preference, and in a way they effectively understand.

(3) Standard programs and heightened supervision facilities shall provide a standardized and comprehensive orientation to all unaccompanied children in their native or preferred language, depending on the children's preference, and in a way they effectively understand regardless of spoken language, reading comprehension level, or disability.

(4) For all step-ups to and step-downs from restrictive placements, standard programs and restrictive placements shall explain to the unaccompanied children why they were placed in a restrictive setting and/or if their placement was changed and do so in the unaccompanied children's native or preferred language, depending on the children's preference, and in a way they effectively understand. All documents shall be translated into the unaccompanied children's and/or

sponsor's native or preferred language, depending on the children's preference.

(5) If unaccompanied children are not literate, or if the documents provided during intakes and/or orientation are not translated into a language that they can read and effectively understand, the standard program or restrictive placement shall have a qualified interpreter orally translate or sign language translate and explain all the documents in the unaccompanied children's native or preferred language, depending on the children's preference, and confirm with the unaccompanied children that they fully comprehend all material.

(6) Standard programs and restrictive placements shall provide information regarding grievance policies and procedures in the unaccompanied children's native or preferred language, depending on the children's preference, and in a way they effectively understand.

(7) Standard programs and restrictive placements shall educate unaccompanied children on ORR's sexual abuse and sexual harassment policies in the unaccompanied children's native or preferred language, depending on the children's preference, and in a way they effectively understand.

(8) Standard programs and restrictive placements shall notify the unaccompanied children that the standard programs and restrictive placements shall accommodate the unaccompanied children's language needs while they remain in ORR care.

(9) For paragraphs (c)(1) through (8) of this section, standard programs and restrictive placements shall document that the unaccompanied children acknowledge that they effectively understand what was provided to them in the child's case files.

(d) *Education.* (1) Standard programs and heightened supervision facilities shall provide educational instruction and relevant materials in a format and language accessible to all unaccompanied children, regardless of the child's native or preferred language, including, but not limited to, providing services from an in-person, qualified interpreter, written translations of materials, and professional telephonic interpretation when in-person interpretation options have been exhausted.

(2) Standard programs and heightened supervision facilities shall provide unaccompanied children with appropriate recreational reading materials in languages in formats and languages accessible to all

unaccompanied children for use during their leisure time.

(3) Standard programs and heightened supervision facilities shall translate all ORR-required documents provided to unaccompanied children that are part of educational lessons in formats and languages accessible to all unaccompanied children. If written translations are not available, standard programs and heightened supervision facilities shall orally translate or sign language translate all documents, prioritizing services from an in-person, qualified interpreter and translation before using professional telephonic interpretation and translation services.

(e) *Religious and cultural accommodations.* If an unaccompanied child requests religious and/or cultural information or items, the standard program or heightened supervision facility shall provide the requested items in the unaccompanied child's native or preferred language, depending on the child's preference, and as long as the request is reasonable.

(f) *Parent and sponsor communications.* Standard programs and restrictive placements shall utilize any necessary professional interpretation or translation services needed to ensure meaningful access by an unaccompanied child's parent(s), guardian(s), and/or potential sponsor(s). Standard programs and restrictive placements shall translate all documents and materials shared with the parent(s), guardian, and/or potential sponsors in their native or preferred language, depending on their preference.

(g) *Healthcare services.* While providing or arranging healthcare services for unaccompanied children, standard programs and restrictive placements shall ensure that unaccompanied children are able to communicate with physicians, clinicians, and healthcare staff in their native or preferred language, depending on the unaccompanied children's preference, and in a way the unaccompanied children effectively understand, prioritizing services from an in-person, qualified interpreter before using professional telephonic interpretation services.

(h) *Legal services.* Standard programs and restrictive placements shall make qualified interpretation and/or translation services available to unaccompanied children, child advocates, and legal service providers upon request while unaccompanied children are being provided with those services. Such services shall be available to unaccompanied children in enclosed, confidential areas.

(i) *Interpreter's and translator's responsibility with respect to confidentiality of information.* Interpreters and translators shall keep all information about the unaccompanied children's cases and/or services, confidential from non-ORR grantees, contractors, and Federal staff. Interpreters and translators shall not disclose case file information to other interested parties in the unaccompanied child's cases.

§ 410.1307 Healthcare services.

(a) ORR shall ensure that all unaccompanied children in ORR custody will be provided with routine medical and dental care; access to medical services requiring heightened ORR involvement, consistent with paragraph (c) of this section; family planning services; and emergency healthcare services.

(b) Standard programs and restrictive placements shall be responsible for:

(1) Establishment of a network of licensed healthcare providers established by the care provider facility, including specialists, emergency care services, mental health practitioners, and dental providers that will accept ORR's fee-for-service billing system;

(2) A complete medical examination (including screening for infectious disease) within 2 business days of admission, excluding weekends and holidays, unless the unaccompanied child was recently examined at another facility and if unaccompanied children are still in ORR custody 60 to 90 days after admission, an initial dental exam, or sooner if directed by State licensing requirements;

(3) Appropriate immunizations as recommended by the Advisory Committee on Immunization Practices' Child and Adolescent Immunization Schedule and approved by HHS' Centers for Disease Control and Prevention;

(4) An annual physical examination, including hearing and vision screening, and follow-up care for acute and chronic conditions;

(5) Administration of prescribed medication and special diets;

(6) Appropriate mental health interventions when necessary;

(7) Having policies and procedures for identifying, reporting, and controlling communicable diseases that are consistent with applicable State, local, and Federal laws and regulations.

(8) Having policies and procedures that enable unaccompanied children, including those with language and literacy barriers, to convey written and oral requests for emergency and non-emergency healthcare services;

(9) Having policies and procedures based on State or local laws and regulations to ensure the safe, discreet, and confidential provision of prescription and nonprescription medications to unaccompanied children, secure storage of medications, and controlled administration and disposal of all drugs. A licensed healthcare provider must write or orally order all nonprescription medications, and oral orders must be documented in the unaccompanied child's file; and

(10) Medical isolation may be used according to the following requirements:

(i) An unaccompanied child may be placed in medical isolation and excluded from contact with the general population in order to prevent the spread of an infectious disease due to a potential exposure, protect other unaccompanied children, and care provider facility staff for a medical purpose or as required under State, local, or other licensing rules, as long as the medically required isolation is limited only to the extent necessary to ensure the health and welfare of the unaccompanied child, other unaccompanied children at a care provider facility and care provider facility staff, or the public at large.

(ii) Standard programs and restrictive placements must provide all mandated services under this subpart to the greatest extent practicable under the circumstances to unaccompanied children in medical isolation. Medically isolated unaccompanied children still must be supervised under State, local, or other licensing rules, and, if multiple unaccompanied children are in medical isolation, they should be placed in units or housing together (as practicable, given the nature or type of medical issue giving rise to the requirement for isolation in the first instance).

(c) *Access to medical care*—(1) *Initial placement and transfer*

considerations—(i) *Initial placement*. Consistent with § 410.1103, when placing an unaccompanied child, ORR considers the child's individualized needs and any specialized services or treatment required or reasonably requested. Such services or treatment include but are not limited to access to medical specialists, family planning services, and medical services requiring heightened ORR involvement. When such care is determined to be medically necessary during the referral, intake process, Initial Medical Exam, or at any point while the unaccompanied child is in ORR custody, or the unaccompanied child reasonably requests such medical care while in ORR custody, ORR shall, to the greatest extent possible, identify available and appropriate bed space and

place the unaccompanied child at a care provider facility that is able to provide or arrange such care, is in an appropriate location to support the unaccompanied child's healthcare needs, and affords access to an appropriate medical provider who is able to perform any reasonably requested or medically necessary services.

(ii) *Transfers*. If an appropriate initial placement is not immediately available or if the unaccompanied child's need or request for medical care is identified after the Initial Medical Exam, care providers shall immediately notify ORR and ORR shall, to the greatest extent possible, transfer the unaccompanied child needing medical care to an ORR program that meets the qualifications in paragraph (c)(1)(i) of this section.

(2) *Transportation*. ORR shall ensure unaccompanied children have access to medical care, including transportation across State lines and associated ancillary services if necessary to access appropriate medical services, including access to medical specialists, family planning services, and medical services requiring heightened ORR involvement. The requirement in this paragraph (c)(2) applies regardless of whether Federal appropriations law prevents ORR from paying for the medical care itself. If there is a potential conflict between ORR's regulations in this part and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. It is important to note, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.

(d) *Notifications*. Care provider facilities shall notify ORR within 24 hours of an unaccompanied child's need or request for medical services requiring heightened ORR involvement or the discovery of a pregnancy.

§ 410.1308 Child advocates.

(a) *Child advocates*. This section sets forth the provisions relating to the appointment and responsibilities of independent child advocates for child trafficking victims and other especially vulnerable unaccompanied children.

(b) *Role of the child advocate*. Child advocates are third parties who make independent recommendations regarding the best interests of an unaccompanied child. Their recommendations are based on information obtained from the unaccompanied child and other sources

(including, but not limited to, the unaccompanied child's parents, the family, potential sponsors/sponsors, government agencies, legal service providers, protection and advocacy system representatives in appropriate cases, representatives of the unaccompanied child's care provider, health professionals, and others). Child advocates formally submit their recommendations to ORR and/or the immigration court, where appropriate, in the form of best interest determinations (BIDs).

(c) *Responsibilities of the child advocate*. The child advocate's responsibilities include, but are not limited to:

(1) Visiting with their unaccompanied child clients;

(2) Explaining the consequences and potential outcomes of decisions that may affect their unaccompanied child;

(3) Advocating for their unaccompanied child client's best interest with respect to care, placement, services, release, and within proceedings to which the child is a party;

(4) Providing best interest determinations, where appropriate and within a reasonable time to ORR, an immigration court, and/or other stakeholders involved in a proceeding or matter in which the unaccompanied child is a party or has an interest; and,

(5) Regularly communicating case updates with the care provider facility, ORR, and/or other stakeholders in the planning and performance of advocacy efforts, including updates related to services provided to an unaccompanied child after their release from ORR care.

(d) *Appointment of child advocates*. ORR may appoint child advocates for unaccompanied children who are victims of trafficking or especially vulnerable.

(1) An interested party may refer an unaccompanied child to ORR for a child advocate after notifying ORR that a particular unaccompanied child who is currently in or was previously in, ORR's care and custody, is a victim of trafficking or is especially vulnerable. As used in this paragraph (d)(1), *interested parties* means individuals or organizations involved in the care, service, or proceeding involving an unaccompanied child, including but not limited to, ORR Federal or contracted staff; an immigration judge; DHS Staff; a legal service provider, attorney of record, or EOIR accredited representative; an ORR care provider; healthcare professional; or a child advocate organization.

(2) ORR shall make an appointment decision within five (5) business days of

a referral for a child advocate, except under exceptional circumstances which may delay a decision regarding an appointment. ORR will appoint child advocates for unaccompanied children who are currently in or were previously in ORR care and custody. ORR does not appoint child advocates for unaccompanied children who are not in or were not previously in ORR care and custody.

(3) Child advocate appointments terminate upon the closure of the unaccompanied child's case by the child advocate; when the unaccompanied child turns 18; or when the unaccompanied child obtains lawful immigration status.

(e) *Child advocate's access to information.* After a child advocate is appointed for an unaccompanied child, the child advocate shall be provided access to materials to effectively advocate for the best interest of the unaccompanied child. Child advocates shall be provided access to their clients during normal business hours at an ORR care provider facility and shall be provided access to all their client's case file information and may request copies of the case file directly from the unaccompanied child's care provider without going through ORR's standard case file request process.

(f) *Child advocate's responsibility with respect to confidentiality of information.* Child advocates must keep the information in the case file, and information about the unaccompanied child's case, confidential. Child advocates shall not disclose case file information except to ORR grantees, contractors, and Federal staff. Child advocates shall not disclose case file information to other parties, including parties with an interest in a child's case. With regard to an unaccompanied child in ORR care, ORR shall allow the child advocate of that unaccompanied child to conduct private communications with the unaccompanied child, in a private area that allows for confidentiality for in-person and virtual or telephone meetings.

(g) *Non-retaliation against child advocates.* ORR shall presume that child advocates are acting in good faith with respect to their advocacy on behalf of unaccompanied children, and shall not retaliate against a child advocate for actions taken within the scope of their responsibilities. For example, ORR shall not retaliate against child advocates because of any disagreement with a best interest determination in regard to an unaccompanied child, or because of a child advocate's advocacy on behalf of an unaccompanied child.

§ 410.1309 Legal services.

(a) *Unaccompanied children's access to immigration legal services—(1) Purpose.* This paragraph (a) describes ORR's responsibilities in relation to legal services for unaccompanied children, consistent with 8 U.S.C. 1232(c)(5).

(2) *Orientation.* An unaccompanied child in ORR's legal custody shall receive:

(i) An in-person, telephonic, or video presentation concerning the rights and responsibilities of undocumented children in the immigration system, presented in the language of the unaccompanied child and in an age-appropriate manner.

(A) Such presentation shall be provided by an independent legal service provider that has appropriate qualifications and experience, as determined by ORR, to provide such presentation and shall include information notifying the unaccompanied child of their legal rights and responsibilities, including protections under child labor laws, and of services to which they are entitled, including educational services. The presentation must be delivered in the language of the unaccompanied child and in an age-appropriate manner.

(B) Such presentation must occur within 10 business days of child's admission to ORR, within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care or ORR transitional home care), and every 6 months for unrepresented children who remain in ORR custody, as practicable. If the unaccompanied child is released before 10 business days, a legal service provider shall follow up as soon as practicable to complete the presentation, in person or remotely.

(ii) Information regarding the availability of free legal assistance and that they may be represented by counsel at no expense to the government.

(iii) Notification regarding the child's ability to petition for SJJ classification, to request that a juvenile court determine dependency or placement in accordance with § 410.1209, and notification of the ability to apply for asylum or other forms of relief from removal.

(iv) Information regarding the unaccompanied child's right to a removal hearing before an immigration judge, the ability to apply for asylum with USCIS in the first instance, and the ability to request voluntary departure in lieu of removal.

(v) A confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or EOIR accredited

representative) to determine possible forms of relief from removal in relation to the unaccompanied child's immigration case, as well as other case disposition options such as, but not limited to, voluntary departure. Such consultation shall occur within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care or ORR transitional home care) or upon request from ORR. ORR shall request an additional legal consultation on behalf of a child, if the child has been identified as:

(A) A potential victim of a severe form of trafficking;

(B) Having been abused, abandoned, or neglected; or

(C) Having been the victim of a crime or domestic violence; or

(D) Persecuted or in fear of persecution due to race, religion, nationality, membership in a particular social group, or for a political opinion.

(vi) An unaccompanied child in ORR care shall be able to conduct private communications with their attorney of record, EOIR accredited representative, or legal service provider in a private enclosed area that allows for confidentiality for in-person, virtual, or telephone meetings.

(3) *Accessibility of information.* In addition to the requirements in paragraphs (a)(1) and (2) of this section for orienting and informing unaccompanied children of their legal rights and access to services while in ORR care, ORR shall also require this information be posted for unaccompanied children in an age-appropriate format and translated into each child's preferred language, in any ORR contracted or grant-funded facility where unaccompanied children are in ORR care.

(4) *Direct immigration legal representation services for unaccompanied children currently or previously under ORR care.* To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR shall fund legal service providers to provide direct immigration legal representation for certain unaccompanied children, subject to ORR's discretion and available appropriations. Examples of direct immigration legal representation include, but are not limited to:

(i) For unrepresented unaccompanied children who become enrolled in ORR Unaccompanied Refugee Minor (URM) programs, provided they have not yet obtained immigration relief or reached 18 years of age at the time of retention of an attorney;

(ii) For unaccompanied children in ORR care who are in proceedings before the Executive Office for Immigration Review (EOIR), including unaccompanied children seeking voluntary departure, and for whom other available assistance does not satisfy the legal needs of the individual child;

(iii) For unaccompanied children released to a sponsor residing in the defined service area of the same legal service provider who provided the child legal services in ORR care, to promote continuity of legal services; and

(iv) For other unaccompanied children, to the extent ORR determines that appropriations are available.

(b) *Legal services for the protection of unaccompanied children's interests in certain matters not involving direct immigration representation*—(1) *Purpose.* This paragraph (b) provides for the use of additional funding for legal services, to the extent that ORR determines it to be available, to help ensure that the interests of unaccompanied children are considered in certain matters relating to their care and custody, to the greatest extent practicable.

(2) *Funding.* To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR may fund access to counsel for unaccompanied children, including for purposes of legal representation, in the following enumerated non-immigration related matters, subject to ORR's discretion and in no particular order of priority:

(i) ORR appellate procedures, including Placement Review Panel (PRP), under § 410.1902, and risk determination hearings, under § 410.1903;

(ii) For unaccompanied children upon their placement in ORR long-term home care or in a residential treatment center outside a licensed ORR facility, and for whom other legal assistance does not satisfy the legal needs of the individual child;

(iii) For unaccompanied children with no identified sponsor who are unable to be placed in ORR long-term home care or ORR transitional home care;

(iv) For purposes of judicial bypass or similar legal processes as necessary to enable an unaccompanied child to access certain lawful medical procedures that require the consent of the parent or legal guardian under State law, and when the unaccompanied child is unable or unwilling to obtain such consent;

(v) For the purpose of representing an unaccompanied child in state juvenile

court proceedings, when the unaccompanied child already possesses SIJ classification; and

(vi) For the purpose of helping an unaccompanied child to obtain an employment authorization document.

(c) *Standards for legal services for unaccompanied children.* (1) In-person meetings are preferred during the course of providing legal counsel to any unaccompanied child under paragraph (a) or (b) of this section, though telephonic or teleconference meetings between the unaccompanied child's attorney or EOIR accredited representative and the unaccompanied child may substitute as appropriate. Either the unaccompanied child's attorney, EOIR accredited representative, or a care provider staff member or care provider shall always accompany the unaccompanied child to any in-person courtroom hearing or proceeding, in connection with any legal representation of an unaccompanied child pursuant to this section.

(2) Information and notice shared with an unaccompanied child's attorney or EOIR accredited representative. Upon receipt by ORR of proof of representation and authorization for release of records signed by the unaccompanied child or other authorized representative, ORR shall share, upon request, the unaccompanied child's complete case file apart from any legally required redactions to assist in the legal representation of the unaccompanied child.

(d) *Grants or contracts for unaccompanied children's immigration legal services.* (1) This paragraph (d) prescribes requirements concerning grants or contracts to legal service providers to ensure that all unaccompanied children who are or have been in ORR care have access to counsel to represent them in immigration legal proceedings or matters and to protect them from mistreatment, exploitation and trafficking, to the greatest extent practicable, in accordance with the TVPRA [at 8 U.S.C. 1232(c)(5)] and 292 of the Immigration and Nationality Act [at 8 U.S.C. 1362].

(2) ORR may make grants, in its discretion and subject to available resources—including formula grants distributed geographically in proportion to the population of released unaccompanied children—or contracts under this section to qualified agencies or organizations, as determined by ORR and in accordance with the eligibility requirements outlined in the authorizing statute, for the purpose of providing immigration legal

representation, assistance and related services to unaccompanied children who are in ORR care, or who have been released from ORR care and living in a State or region.

(3) Subject to the availability of funds, grants or contracts shall be calculated based on the historic proportion of the unaccompanied child population in the State within a lookback period determined by the Director, provided annually by the State.

(e) *Non-retaliation against legal service providers.* ORR shall presume that legal service providers are acting in good faith with respect to their advocacy on behalf of unaccompanied children and ORR shall not retaliate against a legal service provider for actions taken within the scope of the legal service providers' responsibilities. For example, ORR shall not engage in retaliatory actions against legal service providers or any other representative for reporting harm or misconduct on behalf of an unaccompanied child.

§ 410.1310 Psychotropic medications.

(a) Except in the case of a psychiatric emergency, ORR shall ensure that, whenever possible, authorized individuals provide informed consent prior to the administration of psychotropic medications to unaccompanied children.

(b) ORR must ensure meaningful oversight of the administration of psychotropic medication(s) to unaccompanied children.

§ 410.1311 Unaccompanied children with disabilities.

(a) ORR must provide notice to the unaccompanied children in its custody of the protections against discrimination under section 504 of the Rehabilitation Act at 45 CFR part 85 assured to children with disabilities in its custody. ORR must also provide notice of the available procedures for seeking reasonable modifications or making a complaint about alleged discrimination against children with disabilities in ORR's custody.

(b) ORR shall administer the UC Program in the most integrated setting appropriate to the needs of unaccompanied children with disabilities in accordance with 45 CFR 85.21(d), unless ORR can demonstrate that this would fundamentally alter the nature of its UC Program.

(c) ORR shall provide reasonable modifications needed for an unaccompanied child with one or more disabilities to have equal access to the UC Program. ORR is not required, however, to take any action that it can demonstrate would result in a

fundamental alteration in the nature of a program or activity.

(d) Where applicable, ORR shall document in the child's ORR case file any services, supports, or program modifications being provided to an unaccompanied child with one or more disabilities.

(e) In addition to the requirements for release of unaccompanied children established elsewhere in this part and through any subregulatory guidance ORR may issue, ORR shall adhere to the following requirements when releasing unaccompanied children with disabilities to a sponsor:

(1) ORR's assessment under § 410.1202 of a potential sponsor's capability to provide for the physical and mental well-being of the child must necessarily include explicit consideration of the impact of the child's disability or disabilities.

(2) In conducting PRS, ORR and any entities through which ORR provides PRS shall make reasonable modifications in their policies, practices, and procedures if needed to enable released unaccompanied children with disabilities to live in the most integrated setting appropriate to their needs, such as with a sponsor. ORR is not required, however, to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. ORR will affirmatively support and assist otherwise viable potential sponsors in accessing and coordinating appropriate post-release community-based services and supports available in the community to support the sponsor's ability to care for a child with one or more disabilities, as provided for under § 410.1210.

(3) ORR shall not delay the release of a child with one or more disabilities solely because post-release services are not in place before the child's release.

Subpart E—Transportation of an Unaccompanied Child

§ 410.1400 Purpose of this subpart.

This subpart concerns the safe transportation of each unaccompanied child while in ORR's care.

§ 410.1401 Transportation of an unaccompanied child in ORR's care.

(a) ORR care provider facilities shall transport an unaccompanied child in a manner that is appropriate to the child's age and physical and mental needs, including proper use of car seats for young children, and consistent with § 410.1304.

(b) When ORR plans to release an unaccompanied child from its care to a

sponsor under the provisions at subpart C of this part, ORR assists without undue delay in making transportation arrangements. In its discretion, ORR may request the care provider facility to transport an unaccompanied child. In these circumstances, ORR may, in its discretion, reimburse the care provider facility or directly pay for the child and/or sponsor's transportation, as appropriate, to facilitate timely release.

(c) The care provider facility shall comply with all relevant State and local licensing requirements and state and Federal regulations regarding transportation of children, such as meeting or exceeding the minimum staff/child ratio required by the care provider facility's licensing agency, maintaining and inspecting all vehicles used for transportation, etc.

(d) If there is a potential conflict between ORR's regulations in this part and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. It is important to note, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.

(e) The care provider facility shall conduct all necessary background checks for drivers transporting unaccompanied children, in compliance with § 410.1305(a).

(f) If a care provider facility is transporting an unaccompanied child, it shall assign at least one transport staff of the same gender as the child being transported to the greatest extent possible under the circumstances.

Subpart F—Data and Reporting Requirements

§ 410.1500 Purpose of this subpart.

ORR maintains statistical and other data on the unaccompanied children for whom it is responsible. ORR shall be responsible for coordinating with other Departments to obtain some of the statistical data and shall obtain additional data from care provider facilities. This subpart describes information that care provider facilities shall report to ORR such that ORR may compile and maintain statistical information and other data on unaccompanied children.

§ 410.1501 Data on unaccompanied children.

Care provider facilities are required to report information necessary for ORR to maintain data in accordance with this section. Data include:

(a) Biographical information, such as an unaccompanied child's name, gender, date of birth, country of birth, whether of indigenous origin, and country of habitual residence;

(b) The date on which the unaccompanied child came into Federal custody by reason of the child's immigration status;

(c) Information relating to the unaccompanied child's placement, removal, or release from each care provider facility in which the unaccompanied child has resided, including date and to whom and where placed, transferred, removed, or released;

(d) In any case in which the unaccompanied child is placed in detention or released, an explanation relating to the detention or release;

(e) The disposition of any actions in which the unaccompanied child is the subject;

(f) Information gathered from assessments, evaluations, or reports of the child; and,

(g) Data necessary to evaluate and improve the care and services for unaccompanied children.

Subpart G—Transfers

§ 410.1600 Purpose of this subpart. This subpart provides guidelines for the transfer of an unaccompanied child.

§ 410.1601 Transfer of an unaccompanied child within the ORR care provider facility network.

(a) *General requirements for transfers.* The care provider facility shall continuously assess unaccompanied children in their care to review whether the children's placements are appropriate. An unaccompanied child shall be placed in the least restrictive setting that is in the best interests of the child, subject to considerations regarding danger to self or the community and runaway risk. Care providers shall follow ORR guidance, including guidance regarding placement considerations, when making transfer recommendations.

(1) If the care provider facility identifies an alternate placement for the unaccompanied child that would best meet the child's needs, the care provider facility shall make a transfer recommendation to ORR for approval within three (3) business days of identifying the need for a transfer.

(2) The care provider facility shall ensure the unaccompanied child is medically cleared for transfer within three (3) business days of ORR identifying the need for a transfer, unless otherwise waived by ORR. For an unaccompanied child with acute or

chronic medical conditions, or seeking medical services requiring heightened ORR involvement, the appropriate care provider facility staff and ORR shall meet to review the transfer recommendation. If a child is not medically cleared for transfer within three (3) business days, the care provider facility shall notify ORR, and ORR shall review and determine if the child is fit for travel. If ORR determines the child is not fit for travel, ORR shall notify the care provider facility of the denial and specify a timeframe for the care provider facility to re-evaluate the child for transfer.

(3) Within 48 hours prior to the unaccompanied child's physical transfer, the referring care provider facility shall notify all appropriate interested parties of the transfer, including the child's attorney of record or EOIR accredited representative, legal service provider, or child advocate, as applicable. However, such advance notice is not required in unusual and compelling circumstances, such as the following in which cases notices shall be provided within 24 hours following transfer:

(i) Where the safety of the unaccompanied child or others has been threatened;

(ii) Where the unaccompanied child has been determined to be a runaway risk consistent with § 410.1108; or

(iii) Where the interested party has waived such notice.

(4) The unaccompanied child shall be transferred with the child's possessions and legal papers, including, but not limited to:

(i) Personal belongings;

(ii) The transfer request and tracking form;

(iii) 30-day medication supply, if applicable;

(iv) All health records; and

(v) Original documents (including birth certificates).

(5) If the unaccompanied child's possessions exceed the amount permitted normally by the carrier in use, the care provider shall ship the possessions to a subsequent placement of the unaccompanied child in a timely manner.

(b) *Restrictive care provider facility placements and transfers.* When an unaccompanied child is placed in a restrictive setting (secure, heightened supervision, or residential treatment center), the care provider facility in which the child is placed and ORR shall review the placement at least every 30 days to determine whether a new level of care is appropriate for the child. If the care provider facility and ORR determine in the review that continued

placement in a restrictive setting is appropriate, the care provider facility shall document the basis for its determination and, upon request, provide documentation of the review and rationale for continued placement to the child's attorney of record, legal service provider, and/or child advocate.

(c) *Group transfers.* At times, circumstances may require a care provider facility to transfer more than one (1) unaccompanied child at a time (*e.g.*, emergencies, natural disasters, program closures, and bed capacity constraints). For group transfers, the care provider facility shall follow ORR guidance and the requirements in paragraph (a) of this section.

(d) *Residential treatment center placements.* A care provider facility may request ORR to transfer an unaccompanied child in its care to a residential treatment center (RTC), pursuant to the requirements described at § 410.1105(c). The care provider facility shall review the placement of a child into an RTC every 30 days in accordance with paragraph (b) of this section.

(e) *Emergency placement changes.* An unaccompanied child who is placed pursuant to subpart B of this part remains in the legal custody of ORR and may only be transferred or released by ORR. However, in the event of an emergency, a care provider facility may temporarily change the physical placement of an unaccompanied child prior to securing permission from ORR but shall notify ORR of the change of physical placement, as soon as possible, but in all cases within eight hours of transfer.

Subpart H—Age Determinations

§ 410.1700 Purpose of this subpart.

This subpart sets forth the provisions for determining the age of an individual in ORR custody.

§ 410.1701 Applicability.

This subpart applies to individuals in the custody of ORR. To meet the definition of an unaccompanied child and remain in ORR custody, an individual must be under 18 years of age.

§ 410.1702 Conducting age determinations.

Procedures for determining the age of an individual must take into account the totality of the circumstances and evidence, including the non-exclusive use of radiographs, to determine the age of the individual. ORR may require an individual in ORR's custody to submit to a medical or dental examination, including X-rays, conducted by a

medical professional or to submit to other appropriate procedures to verify their age. If ORR subsequently determines that such an individual is an unaccompanied child, the individual will be treated in accordance with ORR's UC Program regulations in this part for all purposes.

§ 410.1703 Information used as evidence to conduct age determinations.

(a) ORR considers multiple forms of evidence in making age determinations, and determinations are made based upon a totality of evidence.

(b) ORR may consider information or documentation to make an age determination, including but not limited to:

(1) If there is no original birth certificate, certified copy, or photocopy or facsimile copy of a birth certificate acceptable to ORR, ORR may consult with the consulate or embassy of the individual's country of birth to verify the validity of the birth certificate presented.

(2) Authentic government-issued documents issued to the bearer.

(3) Other documentation, such as baptismal certificates, school records, and medical records, which indicate an individual's date of birth.

(4) Sworn affidavits from parents or other relatives as to the individual's age or birth date.

(5) Statements provided by the individual regarding the individual's age or birth date.

(6) Statements from parents or legal guardians.

(7) Statements from other persons apprehended with the individual.

(8) Medical age assessments, which should not be used as a sole determining factor but only in concert with other factors. If an individual's estimated probability of being 18 years or older is 75 percent or greater according to a medical age assessment, and the totality of the evidence indicates that the individual is 18 years old or older, ORR must determine that the individual is 18 years old or older. The 75 percent probability threshold applies to all medical methods and approaches identified by the medical community as appropriate methods for assessing age. Ambiguous, debatable, or borderline forensic examination results are resolved in favor of finding the individual is a minor.

§ 410.1704 Treatment of an individual who appears to be an adult.

If the procedures in this subpart would result in a reasonable person concluding that an individual is an adult, despite the individual's claim to

be under the age of 18, ORR shall treat such person as an adult for all purposes.

Subpart I—Emergency and Influx Operations

§ 410.1800 Contingency planning and procedures during an emergency or influx.

(a) ORR regularly reevaluates the number of placements needed for unaccompanied children to determine whether the number of shelters, heightened supervision facilities, and ORR transitional home care beds should be adjusted to accommodate an increased or decreased number of unaccompanied children eligible for placement in care in ORR care provider facilities.

(b) In the event of an emergency or influx that prevents the prompt placement of unaccompanied children in standard programs, ORR shall make all reasonable efforts to place each unaccompanied child in a standard program as expeditiously as possible.

(c) ORR activities during an influx or emergency include the following:

(1) ORR implements its contingency plan on emergencies and influxes, which may include opening facilities to house unaccompanied children and prioritization of placement at such facilities of certain unaccompanied children;

(2) ORR continually develops standard programs that are available to accept emergency or influx placements; and

(3) ORR maintains a list of unaccompanied children affected by the emergency or influx including each unaccompanied child's:

- (i) Name;
- (ii) Date and country of birth;
- (iii) Date of placement in ORR's custody; and
- (iv) Place and date of current placement.

§ 410.1801 Minimum standards for emergency or influx facilities.

(a) In addition to the "standard program" and "restrictive placements" defined in this part, ORR provides standards in this section for all emergency or influx facilities.

(b) Emergency or influx facilities must provide the following minimum services for all unaccompanied children in their care:

(1) Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items.

(2) Appropriate routine medical and dental care; family planning services, including pregnancy tests; medical services requiring heightened ORR

involvement; and emergency healthcare services; a complete medical examination (including screenings for infectious diseases) within 48 hours of admission, excluding weekends and holidays, unless the unaccompanied child was recently examined at another ORR care provider facility; appropriate immunizations as recommended by the Advisory Committee on Immunization Practices' Child and Adolescent Immunization Schedule and approved by HHS' Centers for Disease Control and Prevention; administration of prescribed medication and special diets; and appropriate mental health interventions when necessary.

(3) An individualized needs assessment, which includes the various initial intake forms, collection of essential data relating to the identification and history of the child and the child's family, identification of the unaccompanied child's special needs including any specific problems which appear to require immediate intervention, an educational assessment and plan, and an assessment of family relationships and interaction with adults, peers and authority figures; a statement of religious preference and practice; an assessment of the unaccompanied child's personal goals, strengths and weaknesses; identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in connecting the child with family members.

(4) Educational services appropriate to the unaccompanied child's level of development and communication skills in a structured classroom setting Monday through Friday, which concentrates primarily on the development of basic academic competencies, and secondarily on English Language acquisition. The educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas should include science, social studies, math, reading, writing, and physical education. The program must provide unaccompanied children with appropriate reading materials in languages other than English for use during leisure time.

(5) Activities according to a recreation and leisure time plan that include daily outdoor activity—weather permitting—with at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (that should not include time spent watching television). Activities should be

increased to a total of three hours on days when school is not in session.

(6) At least one individual counseling session per week conducted by trained social work staff with the specific objective of reviewing the child's progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each child.

(7) Group counseling sessions at least twice a week. Sessions are usually informal and take place with all unaccompanied children present. The sessions give new children the opportunity to get acquainted with staff, other children, and the rules of the program. It is an open forum where everyone gets a chance to speak. Daily program management is discussed and decisions are made about recreational and other activities. The sessions allow staff and unaccompanied children to discuss whatever is on their minds and to resolve problems.

(8) Acculturation and adaptation services, which include information regarding the development of social and interpersonal skills which contribute to those abilities necessary to live independently and responsibly.

(9) A comprehensive orientation regarding program intent, services, rules (written and verbal), expectations, and the availability of legal assistance.

(10) Whenever possible, access to religious services of the child's choice.

(11) Visitation and contact with family members (regardless of their immigration status), which is structured to encourage such visitation. The staff must respect the child's privacy while reasonably preventing the unauthorized release of the unaccompanied child.

(12) A reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

(13) Services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied child.

(14) Legal services information, including the availability of free legal assistance, and that they may be represented by counsel at no expense to the government, the right to a removal hearing before an immigration judge, the ability to apply for asylum with USCIS

in the first instance, and the ability to request voluntary departure in lieu of deportation.

(15) Emergency or influx facilities, whether state-licensed or not, must comply, to the greatest extent possible, with State child welfare laws and regulations (such as mandatory reporting of abuse), as well as State and local building, fire, health and safety codes, that ORR determines are applicable to non-State licensed facilities. If there is a potential conflict between ORR's regulations and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. It is important to note, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.

(16) Emergency or influx facilities must deliver services in a manner that is sensitive to the age, culture, native language, and needs of each unaccompanied child. Emergency or influx facilities must develop an individual service plan for the care of each child.

(17) The emergency or influx facility maintains records of case files and make regular reports to ORR. Emergency or influx facilities must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.

(c) Emergency or influx facilities must do the following when providing services to unaccompanied children:

- (1) Maintain safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of minors;
- (2) Provide access to toilets, showers and sinks, as well as personal hygiene items such as soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items;
- (3) Provide drinking water and food;
- (4) Provide medical assistance if the unaccompanied child is in need of emergency services;
- (5) Maintain adequate temperature control and ventilation;
- (6) Provide adequate supervision to protect unaccompanied children;
- (7) Separate from other unaccompanied children those unaccompanied children who are subsequently found to have past criminal or juvenile detention histories or have perpetrated sexual abuse that present a danger to themselves or others;

(8) Provide contact with family members who were arrested with the unaccompanied child; and

(9) Provide access to legal services described in § 410.701(a).

(d) ORR may grant waivers for an emergency or influx facility from standards under paragraph (b) of this section, if the facility is activated for a period of six consecutive months or less and such standards are operationally infeasible and done in accordance with law. Such waiver must be made publicly available.

§ 410.1802 Placement standards for emergency or influx facilities.

(a) Unaccompanied children who are placed in an emergency or influx facility must meet all of the following criteria to the extent feasible. If ORR becomes aware that a child does not meet any of the following criteria at any time after placement into an emergency or influx facility, ORR will transfer the unaccompanied child to the least restrictive setting appropriate for that child's need as expeditiously as possible.

- (1) Is expected to be released to a sponsor within 30 days;
 - (2) Is age 13 or older;
 - (3) Speaks English or Spanish as their preferred language;
 - (4) Does not have a known disability or other mental health or medical issue or dental issue requiring additional evaluation, treatment, or monitoring by a healthcare provider;
 - (5) Is not a pregnant or parenting teen;
 - (6) Would not have a diminution of legal services as a result of the transfer to an unlicensed facility; and
 - (7) Is not a danger to self or others (including not having been charged with or convicted of a criminal offense).
- (b) ORR shall also consider the following factors for the placement of an unaccompanied child in an emergency or influx facility:
- (1) The unaccompanied child should not be part of a sibling group with a sibling(s) age 12 years or younger;
 - (2) The unaccompanied child should not be subject to a pending age determination;
 - (3) The unaccompanied child should not be involved in an active State licensing, child protective services, or law enforcement investigation, or an investigation resulting from a sexual abuse allegation;
 - (4) The unaccompanied child should not have a pending home study;
 - (5) The unaccompanied child should not be turning 18 years old within 30 days of the transfer to an emergency or influx facility;

(6) The unaccompanied child should not be scheduled to be discharged in three days or less;

(7) The unaccompanied child should not have a current set docket date in immigration court or State/family court (juvenile included), not have a pending adjustment of legal status, and not have an attorney of record or EOIR accredited representative;

(8) The unaccompanied child should be medically cleared and vaccinated as required by the emergency or influx care facility (for instance, if the influx care facility is on a U.S. Department of Defense site); and

(9) The unaccompanied child should have no known mental health, dental, or medical issues, including contagious diseases requiring additional evaluation, treatment, or monitoring by a healthcare provider.

Subpart J—Availability of Review of Certain ORR Decisions

§ 410.1900 Purpose of this subpart.

This subpart describes the availability of review of certain ORR decisions regarding the care and placement of unaccompanied children.

§ 410.1901 Restrictive placement case reviews.

(a) In all cases involving placement in a restrictive setting, ORR shall determine, based on clear and convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement. The evidence supporting a restrictive placement decision shall be recorded in the unaccompanied child's case file.

(b) ORR shall provide an unaccompanied child with a Notice of Placement (NOP) no later than 48 hours after step-up to a restrictive placement, as well as every 30 days the unaccompanied child remains in a restrictive placement.

(1) The NOP shall clearly and thoroughly set forth the reason(s) for placement and a summary of supporting evidence.

(2) The NOP shall inform the unaccompanied child of their right to contest the restrictive placement before a Placement Review Panel (PRP) upon receipt of the NOP and the procedures by which the unaccompanied child may do so. The NOP shall further inform the unaccompanied child of all other available administrative review processes.

(3) The NOP shall include an explanation of the unaccompanied child's right to be represented by counsel in challenging such restrictive placement.

(4) A case manager shall explain the NOP to the unaccompanied child, in a language the unaccompanied child understands.

(c) The care provider facility shall provide a copy of the NOP to the unaccompanied child's legal counsel of record, legal service provider, child advocate, and to a parent or legal guardian of record, no later than 48 hours after step-up as well as every 30 days the unaccompanied child remains in a restrictive placement.

(d) ORR shall further ensure the following automatic administrative reviews:

(1) At minimum, a 30-day administrative review for all restrictive placements;

(2) A more intensive 45-day review by ORR supervisory staff for unaccompanied children in secure facilities; and

(3) For unaccompanied children in RTCs, the 30-day review at paragraph (d)(1) of this section must involve a psychiatrist or psychologist to determine whether the unaccompanied child should remain in restrictive residential care.

§ 410.1902 Placement Review Panel.

(a) An unaccompanied child placed in a restrictive placement may request reconsideration of such placement. Upon such request, ORR shall afford the unaccompanied child a hearing before the Placement Review Panel (PRP) at which the unaccompanied child may, with the assistance of counsel if preferred, present evidence on their own behalf. An unaccompanied child may present witnesses and cross-examine ORR's witnesses, if such witnesses are willing to voluntarily testify. An unaccompanied child that does not wish to request a hearing may also have their placement reconsidered by submitting a request for a reconsideration along with any supporting documents as evidence.

(b) The PRP shall afford any unaccompanied child in a restrictive placement the opportunity to request a PRP review as soon as the unaccompanied child receives a Notice of Placement (NOP).

(c) ORR shall convene the PRP in a reasonable timeframe without undue delay in all requisite cases.

(d) The PRP shall issue a decision within 30 calendar days of the PRP request whenever possible.

(e) An ORR staff member who was involved with the decision to step up an unaccompanied child to a restrictive placement may not serve as a Placement Review Panel member with respect to that unaccompanied child's placement.

§ 410.1903 Risk determination hearings.

(a) All unaccompanied children in restrictive placements shall be afforded a hearing before an independent HHS hearing officer to determine, through a written decision, whether the unaccompanied child would present a risk of danger to the community, unless the unaccompanied child indicates in writing that they refuse such a hearing. All other unaccompanied children in ORR custody may request such a hearing.

(1) Requests under this section must be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form.

(2) Unaccompanied children placed in restrictive placements based on a finding of dangerousness shall be provided a risk determination hearing automatically, whether or not they request one, unless they refuse the hearing in writing. Unaccompanied children placed in restrictive placements shall receive a notice of the procedures under this section and may use a form provided to them to decline a hearing under this section. Unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel.

(b) In hearings conducted under this section, ORR bears the initial burden of production to support its determination that an unaccompanied child would pose a danger if discharged from ORR's care and custody. The burden of persuasion is then on the unaccompanied child to show that they will not be a danger to the community if released, using a preponderance of the evidence standard.

(c) In hearings under this section, the unaccompanied child may be represented by a person of their choosing. The unaccompanied child may present oral and written evidence to the hearing officer and may appear by video or teleconference. ORR may also present evidence at the hearing, whether in writing, or by appearing in person or by video or teleconference.

(d) A hearing officer's decision that an unaccompanied child would not be a danger to the community if released is binding upon ORR, unless the provisions of paragraph (e) of this section apply.

(e) A hearing officer's decision under this section may be appealed by either the unaccompanied child or ORR to the

Assistant Secretary of ACF, or the Assistant Secretary's designee.

(1) Any such appeal request shall be in writing and must be received by ACF within 30 days of the hearing officer decision.

(2) The Assistant Secretary, or the Assistant Secretary's designee, shall review the record of the underlying hearing, and will reverse a hearing officer decision only if there is a clear error of fact, or if the decision includes an error of law.

(3) If the hearing officer's decision found that the unaccompanied child would not pose a danger to the community if released from ORR custody, and such decision would result in ORR releasing the unaccompanied child from its custody (e.g., because the only factor preventing release was ORR's determination that the unaccompanied child posed a danger to the community), an appeal to the Assistant Secretary shall not effect a stay of the hearing officer's decision, unless the Assistant Secretary issues a decision in writing within five business days of such hearing officer decision that release of the unaccompanied child would result in a danger to the community. Such a stay decision must include a description of behaviors of the unaccompanied child while in ORR custody and/or documented criminal or juvenile behavior records from the unaccompanied child demonstrating that the unaccompanied child would present a danger to community if released.

(f) Decisions under this section are final and binding on the Department, and an unaccompanied child who was determined to pose a danger to the community if released may only seek another hearing under this section if the unaccompanied child can demonstrate a material change in circumstances. Similarly, ORR may request the hearing officer to make a new determination under this section if at least one month has passed since the original decision, and/or ORR can show that a material change in circumstances means the unaccompanied child should no longer be released due to presenting a danger to the community.

(g) This section cannot be used to determine whether an unaccompanied child has a suitable sponsor, and neither the hearing officer nor the Assistant Secretary may order the unaccompanied child released.

(h) This section may not be invoked to determine the unaccompanied child's placement while in ORR custody. Nor may this section be invoked to determine level of custody for the unaccompanied child.

Subpart K—Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds)

§ 410.2000 Establishment of the UC Office of the Ombuds.

(a) The Unaccompanied Children Office of the Ombuds (hereafter, the “UC Office of the Ombuds”) is located within the Office of the ACF Assistant Secretary, and reports to the ACF Assistant Secretary.

(b) The UC Office of the Ombuds shall be an independent, impartial office with authority to receive reports, including confidential and informal reports, of concerns regarding the care of unaccompanied children; to investigate such reports; to work collaboratively with ORR to potentially resolve such reports; and issue reports concerning its efforts.

§ 410.2001 UC Office of the Ombuds policies and procedures; contact information.

(a) The UC Office of the Ombuds shall develop appropriate standards, practices, and policies and procedures, giving consideration to the recommendations by nationally recognized Ombudsperson organizations.

(b) The UC Office of the Ombuds shall make its standards, practices, certain reports and findings, and policies and procedures publicly available.

(c) The UC Office of the Ombuds shall make information about the office and how to contact it publicly available, in both English and other languages spoken and understood by unaccompanied children in ORR care. The Ombuds may identify preferred methods for raising awareness of the office and its activities, which may include, but not be limited to, visiting ORR facilities or publishing aggregated information about the type and number of concerns the office receives, as well as giving recommendations.

§ 410.2002 UC Office of the Ombuds scope and responsibilities.

(a) The UC Office of the Ombuds may engage in activities consistent with § 410.2100, including but not limited to:

(1) Receiving reports from unaccompanied children, potential sponsors, other stakeholders in a child’s case, and the public regarding ORR’s adherence to its own regulations and standards.

(2) Investigating implementation of or adherence to Federal law and ORR regulations, in response to reports it receives, and meeting with interested

parties to receive input on ORR’s compliance with Federal law and ORR policy;

(3) Requesting and receiving information or documents, such as the Ombuds deems relevant, from ORR and ORR care provider facilities, to determine implementation of and adherence to Federal law and ORR policy;

(4) Preparing formal reports and recommendations on findings to publish or present, including an annual report describing activities conducted in the prior year;

(5) Conducting investigations, interviews, and site visits at care provider facilities as necessary to aid in the preparation of reports and recommendations;

(6) Visiting ORR care providers in which unaccompanied children are or will be housed;

(7) Reviewing individual circumstances, including but not limited to concerns about unaccompanied children’s access to services, ability to communicate with service providers, parents/legal guardians of children in ORR custody, sponsors, and matters related to transfers within or discharge from ORR care;

(8) Making efforts to resolve complaints or concerns raised by interested parties as it relates to ORR’s implementation or adherence to Federal law or ORR policy;

(9) Hiring and retaining others, including but not limited to independent experts, specialists, assistants, interpreters, and translators to assist the Ombuds in the performance of their duties;

(10) Making non-binding recommendations to ORR regarding its policies and procedures, specific to protecting unaccompanied children in the care of ORR;

(11) Providing general educational information about pertinent laws, regulations and policies, ORR child advocates, and legal services as appropriate; and

(12) Advising and updating the Director of ORR, Assistant Secretary, and the Secretary, as appropriate, on the status of ORR’s implementation and adherence with Federal law or ORR policy.

(b) The UC Office of the Ombuds may in its discretion refer matters to other Federal agencies or offices with jurisdiction over a particular matter, for further investigation where appropriate, including to Federal or State law enforcement.

(c) To accomplish its work, the UC Office of the Ombuds may, as needed, have timely and direct access to:

- (1) Unaccompanied children in ORR care;
- (2) ORR care provider facilities;
- (3) Case file information;
- (4) Care provider and Federal staff responsible for children’s care; and
- (5) Statistical and other data that ORR maintains.

§ 410.2003 Organization of the UC Office of the Ombuds.

(a) The UC Ombuds shall be hired as a career civil servant.

(b) The UC Ombuds should have the requisite knowledge and experience to effectively fulfill the work and the role, including membership in good standing of a nationally recognized organization, association of ombudsmen, or State bar association throughout the course of employment as the Ombuds, and to also include but not be limited to having demonstrated knowledge and experience in:

- (1) Informal dispute resolution practices;
- (2) Services and matters related to unaccompanied children and child welfare;
- (3) Oversight and regulatory matters; and
- (4) ORR policy and regulations.

(c) The Ombuds may engage additional staff as it deems necessary and practicable to support the functions and responsibilities of the Office.

(d) The Ombuds shall establish procedures for training, certification, and continuing education for staff and other representatives of the Office.

§ 410.2004 Confidentiality.

(a) The Ombuds shall manage the files, records, and other information of the program, regardless of format, and such files must be maintained in a manner that preserves the confidentiality of the records except in instances of imminent harm or judicial action and is prohibited from using or sharing information for any immigration enforcement related purpose.

(b) The UC Office of the Ombuds may accept reports of concerns from anonymous reporters.

Dated: September 22, 2023.

Xavier Becerra,

Secretary, Department of Health and Human Services.

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