



State of California
Office of the Attorney General

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ATTORNEY GENERAL

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Submitted via Federal eRulemaking Portal

The Honorable Xavier Becerra, Secretary
Robin Dunn Marcos, Director
Office of Refugee Resettlement
U.S. Department of Health and Human Services
330 C Street, S.W.
Washington, D.C. 20201

RE: Unaccompanied Children Program Foundational Rule, Document Number 2023-21168, 88 Fed. Reg. 68908

Dear Secretary Becerra and Director Dunn Marcos:

We, the Attorneys General of California, Connecticut, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington (States), write in response to the Department of Health and Human Services' (HHS) Unaccompanied Children Program Foundational Rule, 88 Fed. Reg. 68,908 (published Oct. 4, 2023) (Proposed Rule). Protecting immigrant children is important to our States. As of July 2020, 84 facilities licensed in our States were caring for unaccompanied children (UACs) in the custody of the Office of Refugee Resettlement (ORR).¹ Every year, thousands of children are released from immigration custody and reunified with family members or other adult sponsors who are residents of our States. These children become members of our communities, where they live in our neighborhoods, attend our schools, and grow into adults raising their own families. Together, 40 percent of all children who will be released from immigration custody by the federal government this year will come to our States.² Indeed, since Fiscal Year 2015, more than 68,000

¹ Gov't Accountability Off., GAO-20-609, *Unaccompanied Children: Actions Needed to Improve Grant Application Reviews and Oversight of Care Facilities* 7 (2020), <https://www.gao.gov/assets/gao-20-609.pdf>.

² Off. of Refugee Resettlement, *Unaccompanied Children Released to Sponsors by State* (Nov. 8, 2023), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>. In Fiscal Years 2022 and 2023, our States received approximately 40 percent of all unaccompanied children released from immigration custody by the federal government. *See id.*

UACs have been released to sponsors in California alone.³ Each of our States is committed to ensuring that all children who are cared for within our borders, including UACs, are provided with high standards of care in the least restrictive, most family-like conditions.

The States commend HHS on the significant steps it has taken to codify and improve protections for UACs in the custody of ORR. In particular, we welcome provisions in the Proposed Rule that govern language access, improve access to counsel, guarantee access to reproductive health care, emphasize the importance of community-based care, encourage comprehensive post-release services, and require the implementation of positive behavior management strategies. The Proposed Rule represents a significant step forward to improving conditions and care for UACs in ORR custody.

However, the States are concerned with provisions of the Proposed Rule that would permit the placement of UACs in unlicensed facilities.⁴ The States urge HHS to amend the Proposed Rule to require that all facilities housing UACs be state-licensed, including both standard programs and emergency and influx facilities. In the alternative, the States urge HHS to (1) require that all facilities that house UACs, including emergency and influx facilities, be state-licensed where licensure for such facilities is available; (2) require that all facilities that house UACs within a state's borders comply with state law and regulations applicable to facilities for the care of dependent children in addition to ORR standards; and (3) implement a more comprehensive regime for federal oversight of unlicensed facilities housing UACs. The States offer these recommendations in consideration of the States' compelling interest in and deep concern for the health, safety, and wellbeing of UACs, both those currently within our borders and those who will one day become members of our communities.

I. The States Support Elements of the Proposed Rule that Provide Enhanced Protections for UACs.

The Proposed Rule improves certain critical protections for UACs consistent with the purpose of the stipulated settlement in *Flores v. Reno*, No. 85-cv-4544 (C.D. Cal. Jan. 17, 1997) (*Flores* Settlement Agreement) and the States' standards for ensuring the rights and well-being of children residing in the States. The States applaud the inclusion of these increased protections and the effort to create comprehensive regulations to govern the placement and care of UACs.

A. Language Access

The States support the strong language access requirements included throughout the Proposed Rule. In particular, the States appreciate the requirements in proposed section 410.1306 that placements "consistently offer" all UACs the option of interpretation and translation services

³ *Id.*

⁴ Currently, Texas and Florida prohibit the licensure of facilities within their borders to care for UACs. 88 Fed. Reg. 68,908, 68,915-16.

in the UAC's native or preferred language and in a way the UAC understands; that language access considerations inform placement decisions; and that placements provide educational instruction, relevant materials, appropriate recreational reading materials, and documents that are part of the educational lessons in a format and language accessible to all UACs.⁵ The States also welcome the Proposed Rule's requirement that placements ensure effective communication with UACs with disabilities, including appropriate auxiliary aids and services.⁶

Language access is critical to ensuring UACs are able to participate fully in educational, legal, and other available services. Robust language access requirements are also important to the States. For example, California's Dymally-Alatorre Bilingual Services Act, Cal. Gov. Code § 7290 et seq., seeks to eliminate language barriers that preclude residents of California from having equal access to public services. Language access is also critical to ensure that UACs are able to effectively communicate with their caregivers about their needs and to reduce the isolation that comes with being unable to communicate. The States commend the efforts made to ensure that the Proposed Rule contains robust protections for all UACs who are non-primary English speakers.

B. Access to Counsel

The States appreciate the Proposed Rule's expansion of legal services for UACs. Access to legal services is critical in order for UACs to have information about their rights, legal protections, and available services while in the immigration system. In particular, access to counsel, where possible, is vital to ensure that UACs' due process rights are protected during the course of their immigration case.

In particular, the States strongly support the provisions in proposed section 410.1309, subsections (a)(4) and (b) that would provide ORR with the discretion, subject to available resources, to fund legal services for UACs, including direct immigration legal representation and access to counsel for enumerated non-immigration related matters.⁷ Studies have shown that access to counsel is vital for UACs to be able to effectively participate in their immigration cases and leads to just outcomes. According to a 2016 study by the American Immigration Council, detained immigrants with counsel are nearly 11 times more likely to pursue relief than those without representation and are twice as likely to obtain relief than detained immigrants without counsel.⁸ Similarly, a 2014 analysis of immigration court data found that 73 percent of UACs with representation were allowed to remain in the United States whereas only 15 percent of

⁵ 88 Fed. Reg. 68,908, 68,992-93.

⁶ 88 Fed. Reg. 68,908, 68,943.

⁷ 88 Fed. Reg. 68,908, 68,995-96.

⁸ Am. Immigr. Council, *Access to Counsel in Immigration Court* (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

unrepresented children were allowed to stay.⁹ The States urge that resources be allocated to fund legal services for UACs currently or previously in ORR care.

C. Access to Reproductive Care

The States support the provisions in the Proposed Rule that seek to protect UACs' access to medical services that require heightened ORR involvement, including access to abortion care.¹⁰ In particular, the States welcome the provisions of the Proposed Rule that require ORR to, if necessary, provide UACs with transportation across state lines to guarantee access to medical services, including abortion care, regardless of whether ORR is prohibited from paying for the medical care itself.¹¹ The Proposed Rule also rightly recognizes the importance of considering a UAC's health status, including information regarding the UAC's reproductive health status, in the determination of the most appropriate placement for the UAC.¹² The States also support the requirement that emergency and influx facilities provide family planning services, pregnancy tests, and medical services requiring heightened ORR involvement such as abortion care to UACs.¹³ It is critical that UACs in ORR's care have access to timely and appropriate medical care, including the full panoply of reproductive health services. Such access is vital to UACs' physical, mental, and emotional growth and development, as well as their long-term health.

The requirements that ORR ensure that UACs have access to reproductive health services are consistent with the States' similar interests in supporting access to reproductive health care services. Three of the States—California, Michigan, and Vermont—have recently amended their constitutions to protect personal reproductive rights, including the right to abortion.¹⁴ Other States continue to protect the right to abortion by statute.¹⁵ The States strongly support HHS's efforts to ensure ongoing access to these critical health care services for UACs in its care.

D. Post-Release Services

The States also support the Proposed Rule's expansion of post-release services for UACs. This will foster UACs' safe integration into their local communities by assisting them in obtaining critical services, including education, legal services, health insurance, mental health

⁹ TRAC Immigr., *Representation for Unaccompanied Children in Immigration Court* (Nov. 25, 2014), <https://trac.syr.edu/immigration/reports/371/>.

¹⁰ 88 Fed. Reg. 68,908, 68,980, 68,993-94, 68,998-99.

¹¹ 88 Fed. Reg. 68,908, 68,994.

¹² 88 Fed. Reg. 68,908, 68,921.

¹³ 88 Fed. Reg. 68,908, 68,999.

¹⁴ See Cal. Const., art. I, § 1.1 (guaranteeing right to reproductive freedom); Mich. Const., art. I, § 28; Vt. Const., ch. I, art. 22. Other States similarly protect personal reproductive rights, including the right to an abortion, through their constitutions.

¹⁵ See, e.g., Del. Code Ann. tit. 24, § 1790; 775 Ill. Comp. Stat. 55/1-15; Me. Rev. Stat. Ann. tit. 22, §§ 1597-A, 1598; N.J. Stat. Ann. § 10:7-2; N.Y. Pub. Health Law § 2599-aa (2019); Wash. Rev. Code § 9.02.100.

services, and counseling.¹⁶ The States particularly welcome the Proposed Rule’s expansion of post-release services to any case where a home study is conducted and to UACs with mental health and 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.¹⁷ The Proposed Rule would rightfully require that providers furnish post-release services that are sensitive to the individual needs of the UAC and in a way that the child effectively understands—regardless of spoken language, reading comprehension, or disability—to ensure meaningful access to all UACs, including those with disabilities or limited English proficiency.¹⁸ This expansion of post-release services will provide much-needed support to UACs as they transition from ORR’s care to the care of their sponsors.

E. Community-Based Care

In addition, the States strongly support the Proposed Rule’s emphasis on a community-based care model that would allow for the care of UACs in community-based placements that operate in a manner consistent with the States’ licensing standards.¹⁹ As ORR notes, a community care model would allow UACs to be integrated into their local communities in the States, attend local schools, and be involved in “extracurricular, enrichment, cultural, and social activities” in their local communities, which would promote the health, safety and best interests of the UACs.²⁰ The States have a strong interest in ensuring that UACs residing in the States are cared for in a safe and stable placement in the community where they will not suffer further unnecessary trauma. Community-based care has been a part of good child welfare practice for decades.²¹ Keeping children in their local communities has positive effects on the child’s well-being and allows the child to form critical bonds with individuals in their community and at school.²²

F. Positive Behavior Supports

The States also support the Proposed Rule’s requirement that care provider facilities for UACs use evidence-based, trauma-informed, and culturally sensitive behavior management strategies.²³ This requirement aligns with the States’ laws regarding the care of children placed in group care facilities. For example, California law requires staff in group care facilities to employ trauma-informed, evidence-based de-escalation and intervention techniques when responding to the behavior of a child residing in the facility, and law enforcement may only be

¹⁶ 88 Fed. Reg. 68,908, 68,988.

¹⁷ 88 Fed. Reg. 68,908, 68,933, 68,988.

¹⁸ *Id.*

¹⁹ 88 Fed. Reg. 68,908, 68,919-20.

²⁰ 88 Fed. Reg. 68,908, 68,920.

²¹ See Child Welfare Information Gateway, *Community-based Resources: Keystone to the System of Care* (Oct. 2009), <https://www.childwelfare.gov/pubPDFs/community.pdf>.

²² *Id.*

²³ 88 Fed. Reg. 68,908, 68,991-92.

used as a last resort once all other de-escalation and intervention techniques have been exhausted.²⁴ California law also requires these facilities to develop protocols that identify and describe collaborative relationships with community-based service organizations that provide culturally relevant and trauma-informed services to the children served by the facility to prevent, or as an alternative to, arrest, detention, and incarceration for system-impacted youth.²⁵ The States encourage ORR to incorporate these same child welfare standards into the Final Rule.

II. The States Oppose Provisions of the Proposed Rule that Would Permit Placement of UACs in Unlicensed Facilities.

Although the States applaud the provisions of the Proposed Rule that expand and strengthen protections for UACs, the States are deeply concerned about provisions of the Proposed Rule that would permit the placement of UACs in “standard programs” or emergency or influx facilities that are not state-licensed. For nearly twenty-five years, the *Flores* Settlement Agreement has protected UACs in the custody of ORR by ensuring that, with certain limited exceptions, they are placed in facilities licensed by the states. This structure accords with the states’ longstanding responsibility to regulate child welfare and to care for the wellbeing of the children in our States. As State Attorneys General, we have a duty to protect the rights of our most vulnerable populations, safeguard their health and safety, and defend state laws. The Proposed Rule undermines the States’ protection of UACs by allowing multiple types of unlicensed facilities. Specifically, the Proposed Rule inappropriately (1) defines “standard program” to include facilities that are not licensed in states which have chosen not to license facilities housing UACs, and (2) sanctions the operation of emergency or influx facilities without a state license.

Permitting UACs to be housed in unlicensed facilities would intrude on a traditional area of state regulation and expertise, risks lowering the standards of care for these children, and would create a future risk of sanctioning the operation of secure facilities and family detention facilities that the States have refused to license due to the harms they inflict on children. Animated by a desire to ensure that UACs are housed in conditions that are safe and healthy, that promote children’s well-being, and that comply with the standards that the States have developed through long experience, the States urge HHS to require that all facilities housing UACs be state-licensed, including both standard programs and emergency or influx facilities. In the alternative, the States urge HHS to (1) require that all facilities that house UACs, including emergency and influx facilities, be state-licensed where licensure is available; (2) require that all facilities that house UACs within a state’s borders comply with state law and regulations applicable to

²⁴ Cal. Health & Safety Code, § 1531.6 (b)(1), (3); *see also* 10-148 Me. Code R. ch. 35, §§ 2(3), 5(A)(2)(b),(e); Mich. Comp. Laws § 722.112d (restricting use of restraints and seclusion for youth in licensed care child facilities); Mich. Admin. Code R. 400.8140 (requiring positive methods of discipline for youth in licensed congregate care facilities); N.J. Admin. Code 3A:56-6.13, 6.14, 10.14; Wash. Rev. Code §§ 13.34.420 (requiring qualified residential treatment programs to use trauma-informed treatment model), 13.40.020(6)(c), 72.01.412(10)(c).

²⁵ Cal. Health & Safety Code § 1531.6 (b)(5).

facilities for the care of dependent children in addition to ORR standards; and (3) put in place a more comprehensive regime for oversight of unlicensed facilities housing UACs.

A. The States have long-standing experience and expertise in the licensing and oversight of residential placements for children.

Ensuring child welfare, including establishing and enforcing standards of care and for licensing of residential placements for children, is a police power vested in the states.²⁶ States accordingly have a long history of enacting child welfare laws that guide the care and protection of minor children who cannot remain safely at home. Massachusetts passed such a law in 1866.²⁷ From the first emergence of child welfare systems in this country, states have played an important role in licensing children's residential placements. As historians have recognized, "[r]elated to the development of state systems of child care was the introduction of state policies and procedures for licensing and regulating child care facilities."²⁸ Accordingly, states have licensed and monitored placements for over a century. By the 1890s, the states understood supervision over child caring agencies to encompass the principles that: (1) the state should know where its dependent children are; and (2) state agents should visit and inspect these institutions and agencies at regular intervals, and full reports should be made to the state.²⁹ Leaders in the child welfare field have long recognized "the importance of instituting strong regulatory systems, including licensing, service monitoring, and case accountability to protect the interests of children in the child care system."³⁰

Over decades of experience in administering their child welfare systems, the States have developed expertise in creating and enforcing standards for the care of youth in children's residential facilities that reflect the States' critical interest in protecting the physical, emotional, and psychological health of all children within their borders.³¹ As a result, each of the States has comprehensive standards and licensing procedures to ensure that residential

²⁶ See, e.g., *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); *H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000); *Schall v. Martin*, 467 U.S. 253, 265 (1984) (states must "play [their] part as *parens patriae*" where "parental control falters....").

²⁷ See An Act Concerning the Care and Education of Neglected Children, 1866 Mass. Acts ch. 283; see also Mass. Gen. Laws ch. 119, § 1.

²⁸ Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, in *Child Welfare for the Twenty-first Century: A Handbook of Practices, Policies, and Programs* at 17 (2005), <http://www.garymallon.com/archive/spring2013/cw702/05.McGowanChildWelfareHistory.Final.02.25.2012.pdf>.

²⁹ *Id.* at 17-18 (quoting Grace Abbot, *The Child and the State* 17-18 (1938)).

³⁰ *Id.* at 18.

³¹ See, e.g., *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982) (holding that a State's "interest" in "safeguarding the physical and psychological well-being of a minor ... is a compelling one"); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (noting that a State "has an independent interest in the well-being of its youth," and recognizing "'society's transcendent interest in protecting the welfare of children'" (citation omitted)).

placements for children provide the care and services necessary to support children's healthy development in settings that further their best interests.

For example, each of the States follows a policy of placing children in the least restrictive setting to meet their particular needs.³² Similarly, each State maintains a comprehensive licensing scheme for all placements used to house children.³³ Each State's comprehensive child welfare system seeks to protect the personal rights, health, and safety of children in residential facilities. For example, California has long maintained a "foster youth bill of rights," which ensures that children in residential facilities have, among other rights, the right to not be locked in any portion of their placement facility; visit and contact siblings and family members; have social contacts with individuals outside the child welfare system; attend religious services; participate in extracurricular activities; be placed in out-of-home care in accordance with their gender identity; attend school in the community; and receive prompt, comprehensive medical care.³⁴ Each State has a robust system for ensuring meaningful oversight, accountability and enforcement of these licensed placements.³⁵ And to ensure that all children in the State enjoy the protection of these standards and oversight, each State prohibits the operation of unlicensed children's residential facilities.³⁶

³² See, e.g., Cal. Welf. & Inst. Code §§ 706.6(c)(2)(B), (d)(2), 16001.9(a)(4), 16501(j); Mass. Gen. Laws ch. 119 § 32; Del. Code Ann. tit. 29, § 9003(a)(4); D.C. Mun. Regs. tit. 29, § 6201.3; Mich. Comp. Laws § 722.958b(3)(h); Minn. Stat. § 260C.181, subd. 2; Nev. Rev. Stat. § 432B.390; N.J. Stat. Ann. § 9:6B-4(g); N.M. Stat. Ann. § 32A-6A-12 (2015); N.Y. Comp. Codes R. & Regs. tit. 18, § 430.11(d); Or. Admin. R. 413-070-0625(1)(g); Wash. Rev. Code § 74.13.065; 11 Pa. Cons. Stat. § 2633(4); N.J. Admin. Code § 3A:12-1.7(b)(14); 20 Ill. Comp. Stat. 505/7.3a(c)(2); 705 Ill. Comp. Stat. 405/2-27-405/2-27.2; Ill. Admin. Code tit. 89, § 301.60(b)(1); Me. Dep't of Health & Human Services, Child and Family Services Manual § 3.4.

³³ See, e.g., Cal. Code Regs. tit. 22, div. 6; Conn. Gen. Stat. § 17a-145(a); D.C. Code § 4-1303.01a, et seq.; D.C. Code § 7-2101, et seq.; D.C. Mun. Regs. tit. 29, § 6201, et seq.; D.C. Mun. Regs. tit. 29, § 6301, et seq.; Me. Rev. Stat. tit. 22, §§ 7801, 8101 et seq.; Nev. Rev. Stat. §§ 432A.131, 432A.141; N.M. Stat. Ann. §§ 32A-4-8 (2019), 40-7a-1 et seq. (2011); N.Y. Const. art. XVII; N.Y. Soc. Serv. Law §§ 34, 34-a; 62 Pa. Cons. Stat. §§ 901-922, 62 Pa. Cons. Stat. §§ 1001-1088, 55 Pa. Code ch. 3800; Mass. Gen. Laws ch. 15D, §§ 2(c), 6, 7; 606 Mass. Code Regs. 3, 5; Wash. Rev. Code ch. 74.15; Wash. Admin. Code ch. 110-145; N.J. Stat. Ann. §§ 30:4C-27.6 to .7; N.J. Admin. Code §§ 3A:51-2.1 to -2.7; 225 Ill. Comp. Stat. 10/7; 89 Ill. Admin. Code Parts 401-404.

³⁴ Cal. Welf. & Inst. Code § 16001.9. Other States likewise maintain foster youth bills of rights. See, e.g., Del. Code Ann. tit. 13, § 2522; Nev. Rev. Stat. §§ 432.525, 432.530, 432.535; N.J. Stat. Ann. § 9:6B-4; Or. Rev. Stat. § 418.202; 11 Pa. Cons. Stat. § 2633; R.I. Gen. Laws § 42-72-15; Me. Dep't of Health & Human Services, Child and Family Services Manual § 3.9(VIII)(A).

³⁵ See, e.g., Cal. Health & Safety Code §§ 1550-1557.5; Me. Rev. Stat. tit. 22, §§ 4099-J to 4099-P; Mass. Gen. Laws ch. 15D; Del. Code Ann. tit. 14, § 3004A; D.C. Code §§ 7-2105 & 7-2108; D.C. Mun. Regs. tit. 29, § 6201, et seq.

³⁶ See, e.g., Cal. Health & Safety Code § 1509; Mass. Gen. Laws ch. 15D, § 6; Del. Code Ann. tit. 14, § 3004A; D.C. Code § 7-2102; 225 Ill. Comp. Stat. 10/3; Me. Rev. Stat. tit. 22, §§ 7801, 8101; 10-148 Me. Code R. chs. 35, 37; Mich. Comp. Laws § 722.115m(2); Minn. Stat. § 245A.03, subd. 1; Nev. Rev. Stat. § 432A.131; N.Y. Soc. Serv. Law §§ 371, 460-a, 460-b; Or. Rev. Stat. § 418.990(3); 55 Pa. Code §§

The federal government has long relied on the states' collective experience, expertise, and particular interest in maintaining standards of care for children within their borders to ensure that unaccompanied children in federal immigration custody are placed in facilities that are safe and healthy for children. Since 1997, the states' licensing standards have governed residential placements for children in federal immigration custody within each of the states pursuant to the *Flores* Agreement and federal law. *See, e.g., Flores v. Lynch*, 828 F.3d 898, 906 (9th Cir. 2016) ("obvious purpose" of requiring placement of unaccompanied immigrant children in state-licensed facilities is to "use the existing apparatus of state licensure to independently review detention conditions"). Consistent with this landscape, the federal government has never—for immigration purposes or in any other child welfare context—licensed facilities for children. Instead, the federal government has appropriately relied on the states' decades of experience in licensing such facilities and enforcing the standards developed by the states.

B. The Proposed Rule fails to adequately describe the standards under which unlicensed facilities would be required to operate, risking placement of UACs in harmful conditions.

The Proposed Rule appropriately recognizes that, in most cases, facilities that house UACs must be licensed by an appropriate state agency.³⁷ However, the Proposed Rule departs from this general approach for standard programs where "licensure is unavailable to programs providing services to unaccompanied children" in the state in which the facility operates.³⁸ In such cases, standard programs will be required to meet minimum standards that are outlined in the Proposed Rule and also to "meet other requirements specified by ORR," which are not further described in the Proposed Rule.³⁹

Similarly, the Proposed Rule would not require emergency or influx facilities to be state-licensed, instead providing that such facilities "may not be licensed or may be exempted from licensing requirements by State and/or local licensing agencies."⁴⁰ The Proposed Rule would require emergency or influx facilities to meet certain minimum standards outlined in the Proposed Rule.⁴¹ The Proposed Rule would permit those standards to be waived for facilities operating for less than six months where ORR determines the standards are operationally infeasible.⁴²

20.21, 20.51, 3800.11; R.I. Gen. Laws § 42-72.1-4(a); Wash. Rev. Code § 74.15.150; Wash. Admin. Code § 110-145-1310.

³⁷ See 88 Fed. Reg. 68,908, 68,981 (standard program definition); 88 Fed. Reg. 68,908, 68,989.

³⁸ 88 Fed. Reg. 68,908, 68,989.

³⁹ *Id.*

⁴⁰ 88 Fed. Reg. 68,908, 68,979.

⁴¹ 88 Fed. Reg. 68,908, 68,999.

⁴² *Id.*

The States commend the improvements in the minimum standards for standard programs and emergency or influx facilities outlined in the Proposed Rule. In particular, the States support the inclusion of requirements that both types of facility provide an individualized needs assessment and an individualized services plan for each child.⁴³ The States likewise support the requirement that facilities provide services in a manner that is sensitive to the age, culture, native language and needs of each child.⁴⁴ And, as discussed in further detail above, the States applaud requirements that standard programs implement trauma-informed positive behavior management systems.⁴⁵ These minimum standards represent important protections for UACs in ORR's care and custody.

However, despite these positive elements of the minimum standards outlined in the Proposed Rule, the States are concerned that the minimum standards for both standard programs and emergency or influx facilities do not address all of the issues for which the States have developed licensing standards for children's residential facilities. For example, California's state licensing standards require that facilities maintain minimum staff-to-child ratios; the minimum standards outlined in the Proposed Rule for emergency or influx facilities include no such staffing requirements.⁴⁶ Many of the States' licensing schemes include specifications as to the size and maintenance of living quarters that are absent from the minimum standards.⁴⁷ Certain of the States' licensing schemes require that children be allowed independence and access to the community, as appropriate, including access to participation in recreational, cultural, and extra-curricular activities outside the facility; the minimum standards do not contain such requirements.⁴⁸ Nor is it clear whether other requirements subsequently developed by ORR for unlicensed standard programs would be consistent with or address all issues addressed by the States' standards. The States recommend that the minimum standards and any other requirements that ORR develops for standard programs and emergency or influx facilities address the issues for which the States have developed licensing standards, including but not limited to the examples identified above. The States strongly suggest that ORR look to

⁴³ 88 Fed. Reg. 68,908, 68,990; 69,000.

⁴⁴ *Id.*

⁴⁵ 88 Fed. Reg. 68,908, 68,991-92

⁴⁶ Cal. Code Regs. tit. 22, § 84065.5; *see also* 606 Mass. Code Regs. 3.07(2).

⁴⁷ Cal. Code Regs. tit. 22, § 84087; 606 Mass. Code Regs. 3.08(7); Ill. Admin. Code tit. 89, §§ 402.9, 403.26, 404.44(j); 10-148 Me. Code R. ch. 35, § 5(Q)(18), (21); 10-148 Me. Code R. ch. 37, § 5(P)(16), (19)-(20); Mich. Admin. Code R. 400.8167 (indoor space per child requirement); Mich. Admin. Code R. 400.8380 (maintenance of premises); N.J. Admin. Code § 3A:56-4.1 (initial facility approval requirements), 3A:56-4.4 (maintenance and sanitation requirements); N.Y. Comp. Codes R. & Regs. tit. 18, § 448.3(d)(1)-(9); Wash. Rev. Code §§ 43.185C.295, 74.15.030; Wash. Admin. Code ch. 110-145.

⁴⁸ Cal. Code Regs. tit. 22, § 89379; Ill. Admin. Code tit. 89, § 404.34; 10-148 Me. Code R. ch. 35, § 5(F)(23); Mich. Admin. Code R. 400.8170 (access to outdoor play); N.J. Admin. Code § 3A:56-6.8(a); N.Y. Comp. Codes R. & Regs. tit. 18, §§ 441.25, 442.20, 448.3(d)(1); Wash. Admin. Code ch. 110-145.

the States' licensing standards and requirements for guidance in developing and elaborating its own standards.⁴⁹

As described above, each of the States have developed comprehensive licensing standards over decades of experience. In order to ensure that UACs in ORR's care and custody are protected by these comprehensive, state-specific standards, the States urge ORR to revise the Proposed Rule to require that all facilities housing UACs be state-licensed. However, should ORR determine to permit the use of unlicensed facilities, with a view to protecting the health and safety of UACs housed in such unlicensed facilities, the States urge that the Proposed Rule be revised to clearly require that standard programs and emergency and influx programs meet both ORR requirements *and* applicable state laws and regulations.

Specifically, the States recommend that proposed section 410.1302, subsection (b), governing standard programs, be revised as follows: "(b) Comply with all applicable State child welfare laws, ~~and~~ regulations, *and standards*, ~~and~~ all State and local building, fire, health, and safety codes, ~~or~~ *and* other requirements specified by ORR if licensure is unavailable in their State to care provider facilities providing services to unaccompanied children." The States recommend that proposed section 410.1801, subdivision (b)(15), governing emergency or influx facilities, be revised as follows: "(15) Emergency or influx facilities, whether state-licensed or not, must comply, ~~to the greatest extent possible~~, with *all applicable* State child welfare laws, ~~and~~ regulations (such as mandatory reporting of abuse), *and standards*, as well as State and local building, fire, health and safety codes, ~~that ORR determines are applicable to non-State licensed facilities.~~"

Concerns about the health and safety of UACs detained in unlicensed facilities in the past underscore the importance of ensuring that all facilities housing UACs are state-licensed or, at minimum, required to comply with state licensing regulations. In 2018 and 2019, HHS housed thousands of children in facilities, including in Tornillo, Texas, and Homestead, Florida, that were not licensed for the residential care of children.⁵⁰ Conditions at these facilities were inconsistent with the standards required of state-licensed facilities. In Tornillo, "[c]hildren spent weeks crammed 20 to a tent, languishing in the desert, far away from sponsors and attorneys, and without adequate access to basic needs such as schools or a firm roof over their head."⁵¹ Observers at the Tornillo facility noted that facility "felt like a prison or jail."⁵² Similarly, "Homestead [had] the feel of a secure detention facility," was "surrounded

⁴⁹ See Exec. Order No. 13132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

⁵⁰ *Unaccompanied Alien Children: An Overview*, Congressional Research Service, R43599, Sept. 1, 2021 at 20-22, <https://sgp.fas.org/crs/homesecc/R43599.pdf>.

⁵¹ Sen. Dianne Feinstein, *Letter to Dep't of Homeland Security Re: DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children* (Nov. 6, 2018) at 2.

⁵² Margaret Hartmann, *Reporters Tour Texas Facility Where Migrant Children are Detained*, New York Magazine (June 14, 2018), <https://nymag.com/intelligencer/2018/06/reporter-migrant-children-incarcerated-in-texas-facility.html>.

by tall perimeter walls” and had “a 24/7 security patrol”; “[c]hildren [were] not able to leave Homestead freely.”⁵³ Then-Senator Kamala Harris called conditions at the Homestead facility “a human rights abuse.”⁵⁴ More recently, whistleblowers have described troubling conditions at the Fort Bliss Emergency Intake Site, including crowded conditions that made effective supervision of youth impossible, failure to provide clean bedding or clothing, and delays in providing medical or mental health care.⁵⁵ Lengthy stays at the Fort Bliss facility in these conditions caused deterioration in the mental health of unaccompanied children, including increased risk of self-harm.⁵⁶

C. *The Proposed Rule fails to adequately describe the oversight and enforcement regimes that would ensure unlicensed facilities meet minimum standards.*

In addition to the standards for licensing facilities, the States conduct robust oversight to ensure that facilities are continuing to comply with minimum standards. The States would recommend the adoption of similar oversight for any unlicensed facilities housing UACs. For example, California state law requires an initial evaluation visit within 90 days of the initial issuance of a license, provides for unannounced visits and visits on a regular schedule, permits public inspection of all reports and plans of correction for facilities, contains a process for receiving complaints about a facility and resolving such complaints through onsite inspections within ten days of receipt, outlines the process for suspension and revocation of licenses for facilities, and provides for civil penalties for noncompliance.⁵⁷ Other States also perform monitoring and enforcement functions.⁵⁸ The States’ oversight mechanisms and processes are critical to ensure that children are not housed in conditions that are harmful to their health and safety.

⁵³ Amnesty Int’l, *No Home for Children: The Homestead “Temporary Emergency” Facility* 21 (2019), https://www.amnestyusa.org/wp-content/uploads/2019/07/Homestead-Report_1072019_AB_compressed.pdf.

⁵⁴ Ben Smith, *Kamala Harris: The Waving Meme Moment was “Heartbreaking”*, BuzzFeed News (Aug. 15, 2019), https://www.buzzfeednews.com/article/bensmith/kamala-harris-the-waving-meme-moment-was-heartbreaking?bftwnews&utm_term=4ldqpgc#4ldqpgc.

⁵⁵ Gov’t Accountability Project, *Letter to House of Representatives, Senate, Office of Special Counsel, and Office of Inspector General, Dep’t of Health & Human Services Re: Protected Whistleblower Disclosures of Gross Mismanagement by the Department of Health and Human Services at Fort Bliss, Texas Causing Specific Dangers to Public Health and Safety* (July 7, 2021) at 7-10, <https://whistleblower.org/wp-content/uploads/2021/07/070721-Fort-Bliss-Whistleblowers-Disclosure.pdf>.

⁵⁶ Camilo Montoya-Galvez, *Migrant Children Endure “Despair and Isolation” Inside Tent City in the Texas Desert*, CBS News (June 22, 2021), <https://www.cbsnews.com/news/immigration-migrant-children-fort-bliss-tent-city-texas/>.

⁵⁷ Cal. Health & Safety Code §§ 1534, 1538, 1550-1557; Cal Code Regs. tit. 22, § 87844.

⁵⁸ Ill. Admin. Code tit. 89, §§ 383.25-383.85; Mich. Comp. Laws §§ 722.115, 722.118a, 722.120; N.J. Stat. Ann. §§ 30:1-14, 1-15, 30:4C-4, 30-11B-4; N.J. Admin. Code 3A:56-1.1(b), (f), (g); N.Y. Soc. Serv. Law §§ 460-c, 460-d; N.Y. Comp. Codes R. & Regs. tit. 18, § 441.7; Wash. Rev. Code §§ 74.13.031(6), 74.13.260.

Due to the states' expertise in this area, ORR has long relied on the states' oversight and enforcement functions to ensure, in the first instance, that UACs are housed in safe and appropriate conditions. However, ORR has struggled in the past to provide consistent supplemental monitoring of its contracted, state-licensed facilities. For example, in 2016, the Government Accountability Office found that, although contracted state-licensed facilities were largely providing required services, ORR's on-site monitoring visits had been inconsistent and ORR had not received complete case files for review.⁵⁹ In September 2020, the Government Accountability Office found that ORR had failed to obtain and review state licensing citations, failed to conduct timely audits and site visits, and experienced months-long delays in providing facilities with monitoring reports and required corrective actions.⁶⁰ And in May 2023, HHS's Office of Inspector General found that ORR had failed to ensure that ORR and care provider staff followed required procedures when transferring children due to limitations in ORR's quality control procedures and oversight.⁶¹

The States appreciate that the Proposed Rule describes general ORR monitoring activities for standard programs. However, the States are concerned that the Proposed Rule does not contain any description of heightened oversight procedures for unlicensed standard programs to replace the oversight that otherwise would have been provided by the relevant state licensing agency.⁶² The States are likewise concerned that the Proposed Rule contains no explanation of how ORR will provide oversight to emergency or influx facilities or ensure that such facilities comply with ORR's standards and with state law.⁶³ And while the States welcome the proposed creation of an Office of the Ombuds, such an office fulfills a different purpose and, by design, lacks enforcement authority. Where a State will not be providing oversight in the first instance, more robust and detailed requirements for ORR's oversight mechanisms is critical. The monitoring regime described in the Proposed Rule is insufficient to replace the oversight provided by state licensing and enforcement agencies, and creates a significant risk that UACs will be placed in facilities that do not meet required minimum standards.

There are also significant concerns that unlicensed ORR emergency and influx facilities have previously operated without requiring criminal or child abuse and neglect background

⁵⁹ Gov't Accountability Off., GAO-16-180, *Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care* 24-28 (2016), <https://www.gao.gov/assets/gao-16-180.pdf>.

⁶⁰ Gov't Accountability Off., GAO-20-609, *Unaccompanied Children: Actions Needed to Improve Grant Application Reviews and Oversight of Care Facilities* 16-18, 32-36 (2020), <https://www.gao.gov/assets/gao-20-609.pdf>.

⁶¹ Dep't of Health and Human Services, Off. of Inspector Gen., *The Office of Refugee Resettlement Needs to Improve its Oversight Related to the Placement and Transfer of Unaccompanied Children* (May 2023), <https://oig.hhs.gov/oas/reports/region6/62007002.pdf>.

⁶² 88 Fed. Reg. 68,908, 68,991.

⁶³ 88 Fed. Reg. 68,908, 68,999-69,000.

checks.⁶⁴ The Proposed Rule does not clearly require background checks for staff in emergency or influx facilities. By contrast, California law requires that all staff at licensed children's residential facilities undergo a stringent background check that includes checks of the Federal Bureau of Investigation's and the California Department of Justice's criminal records, the California Child Abuse Central Index, and the state child abuse registry of any state in which a prospective staff member has resided in the past five years.⁶⁵ Other States follow similar procedures regarding background checks for facility staff.⁶⁶

The States urge that all facilities housing UACs should be state-licensed to ensure that UACs enjoy the protections of state oversight and enforcement. However, consistent with the States' deep concern for the welfare of UACs, should HHS determine to permit the use of unlicensed facilities, the States recommend that the Proposed Rule be revised to include, at a minimum, the following monitoring and enforcement functions for facilities that are not state-licensed: (1) requirements for inspection, screening, and documentation review prior to the placement of any UACs in a facility; (2) requirements for criminal and child abuse and neglect background checks for all facilities housing UACs in ORR care, including emergency and influx facilities; (3) requirements for frequency of monitoring visits and evaluations, including both scheduled and unannounced visits, and for review of documentation and case files; (4) a procedure for receiving, investigating, and responding to complaints within a specified timeframe; and (5) a framework for the enforcement of standards, including procedures for suspension or termination of a facility for failure to comply with state laws, regulations, and codes or with ORR standards. These minimum monitoring and enforcement functions are critical to protecting the health, safety, and welfare of any UACs in ORR custody.

D. The States strongly oppose any attempt to operate unlicensed facilities within their States, including family detention facilities.

Finally, the States are concerned with the implications of ORR sanctioning the operation of unlicensed facilities within the States. As described above, establishing and enforcing standards of care for licensing of residential placements for children is a core police power vested in the states, which have consistently required that such placements be licensed. In exercising that police power, States have made a considered policy decision *not* to license certain types of facilities. For example, the States generally do not permit "secure" or locked children's

⁶⁴ Off. of Inspector Gen., Dep't of Health & Human Services, *The Tornillo Influx Care Facility: Concerns About Staff Background Checks and Number of Clinicians on Staff (A-12-19-20000)* (Nov. 27, 2018) at 1, 6, <https://oig.hhs.gov/oas/reports/region12/121920000.pdf>; Amnesty International, *No Home for Children: The Homestead "Temporary Emergency" Facility*, *supra* note 533 at 20-21.

⁶⁵ See Cal. Health & Safety Code §§ 1522, 1522.1.

⁶⁶ See, e.g., Mass. Gen. Laws ch. 15D, § 7(a); Del. Code Ann. tit. 14, § 3004A; 10-148 Me. Code R. ch. 16, at § 2(H); Mich. Comp. Laws § 722.115d; Nev. Rev. Stat. §§ 432A.175, 432A.1755, 432A.1785; N.J. Admin. Code §§ 3A:55-5.1(b)(3), 3A:55-5.6 to -5.9; N.M. Stat. Ann. § 32A-15-3; N.Y. Soc. Serv. Law § 378-a; 55 Pa. Code § 3800.51; R.I. Gen. Laws § 42-72.1-3(e)(9); Wash. Admin. Code § 110-145-1510.

residential facilities, except as necessary for the child’s safety or the safety of others, or in connection with a juvenile offense.⁶⁷ State licensing standards generally require that children in residential facilities have freedom of egress from these facilities; the independence appropriate to their age, maturity and capability; and the ability to participate in activities in the community.⁶⁸

A Proposed Rule that sanctions ORR’s use of unlicensed facilities raises serious concerns that in the future the federal government may seek to expand the use of other types of unlicensed facilities—most saliently, facilities for the detention of families—in the States. This concern is not unfounded: the federal government has attempted to do before. See *Flores v. Rosen*, 984 F.3d 720, 739-40 (9th Cir. 2020) (enjoining proposed regulations that would have permitted family detention in States that did not license family detention facilities). The harms such facilities inflict on children is well documented,⁶⁹ and for that reason, the States have uniformly declined to license such facilities. Any plan to employ unlicensed secure facilities, which children are not allowed to leave, including family detention facilities, would harm the States, not only as to their interest in enforcing their duly-enacted laws and regulations, but also in their compelling interest of protecting the welfare of the States’ children.

E. The States propose amendments to the Proposed Rule.

For the reasons described above, the States strongly urge HHS to revise the definition of “standard program” to require that all homes and facilities operated by such programs be state-licensed and to update proposed section 410.1302, subsections (a) and (b), consistent with that requirement. The States further urge HHS to revise the definition of “emergency or influx facility” and proposed section 410.1801 to require that emergency or influx facilities be state-licensed.⁷⁰

⁶⁷ See, e.g., Del. Code Ann. tit. 10 § 1007, id. tit. 16, §§ 5001-5011; D.C. Code § 2-1515.01, et seq.; Ill. Admin. Code tit. 89, §§ 411.10, 411.110(g); Mich. Comp. Laws § 712A.15(4); N.Y. Comp. Codes R. & Regs. tit. 9, §§ 180-1.1–180.1.21, 180-3.1–180-3.32, and id. tit. 18 §§ 450.1–450.10; 55 Pa. Code §§ 3800.271–3800.283.

⁶⁸ See, e.g., Del. Code Ann. tit. 13, §§ 2502, 2522; 20 Ill. Comp. Stat. 505/7.3a(c)(2), Ill. Admin. Code tit. 89, § 404.34; Mich. Comp. Laws § 722.958b; N.Y. Comp. Codes R. & Regs. tit. 18, § 441.25; Or. Admin. R. 413-200-0335(4), 413-200-0356.

⁶⁹ Children who are detained in family detention facilities experience increased Post-Traumatic Stress Disorder (PTSD), elevated emotional problems, increased problems with peers, high rates of anxiety, depression, suicidal behavior, and other behavioral problems, and regressive behavioral changes, including decreased eating, sleep disturbances, clinginess, withdrawal, self-injurious behavior, and aggression. Rhitu Chatterjee, *Lengthy Detention of Migrant Children May Cause Lasting Trauma, Say Researchers*, NPR (Aug. 23, 2019), <https://www.npr.org/sections/health-shots/2019/08/23/753757475/lengthy-detention-of-migrant-children-may-create-lasting-trauma-say-researchers>; Julie M. Linton et al., *Detention of Immigrant Children*, 139(5) *Pediatrics* e20170483 (2017), <https://publications.aap.org/pediatrics/article/139/5/e20170483/38727/Detention-of-Immigrant-Children>.

⁷⁰ State licensing for emergency and influx facilities is potentially available in California, for example, where such facilities could seek licensure as group homes or transitional shelters. See Cal. Code Regs. tit. 22, § 84000 et seq.; Cal. Health & Safety Code § 1502.3.

However, should HHS retain the proposed definitions of “standard program” and “emergency or influx facility,” the States propose alternative recommendations consistent with the States’ deep concern with the health and wellbeing of UACs in ORR custody.

First, as discussed above, the States recommend that the Proposed Rule be revised to require facilities operating without a license to comply with all relevant state licensing regulations and standards. Specifically, the States recommend that proposed section 410.1302, subsection (b), be revised as follows: “(b) Comply with all applicable State child welfare laws, ~~and regulations, and standards, and~~ all State and local building, fire, health, and safety codes, ~~or~~ *and* other requirements specified by ORR if licensure is unavailable in their State to care provider facilities providing services to unaccompanied children.”

Second, the States recommend that proposed section 410.1801 be revised to require that an emergency or influx facility be licensed by an appropriate State agency if State licensure is available. The States also recommend that proposed section 410.1801, subdivision (b)(15), governing emergency or influx facilities, be revised as follows: “(15) Emergency or influx facilities, whether state-licensed or not, must comply, ~~to the greatest extent possible,~~ with *all applicable* State child welfare laws, ~~and regulations (such as mandatory reporting of abuse), and standards,~~ as well as State and local building, fire, health and safety codes, ~~that ORR determines are applicable to non-State licensed facilities.~~”

Third, the States strongly urge that, in the event ORR places children in facilities that are not state-licensed, ORR provide a level of oversight that is commensurate with what would otherwise have been provided by the state. With respect to facilities that are not state-licensed, the States recommend that the Proposed Rule be revised to include, at a minimum, the following monitoring and enforcement functions for facilities that are not state-licensed: (1) requirements for inspection, screening, and documentation review prior to the placement of any UACs in a facility; (2) requirements for criminal and child abuse and neglect background checks for all facilities housing UACs in ORR care, including emergency and influx facilities; (3) requirements for frequency of monitoring visits and evaluations, including both scheduled and unannounced visits, and for review of documentation and case files; (4) a procedure for receiving, investigating, and responding to complaints within a specified timeframe; and (5) a framework for the enforcement of standards, including procedures for suspension or termination of a facility for failure to comply with state laws, regulations, and codes or with ORR standards. And the States urge ORR to allocate sufficient staffing and other resources to ensure that oversight of any unlicensed facilities is as robust as that which would otherwise have been provided by the state in which the facilities are located.

The States welcome the steps that HHS has taken to develop a comprehensive regulatory regime to govern the care of UACs in the custody of ORR. In particular, the States strongly support provisions of the Proposed Rule that improve UAC’s language access and access to counsel and reproductive health care, strengthen post-release services, prioritize community-based care, and require the implementation of positive behavior management systems.

However, the States are opposed to the provisions of the Proposed Rule that would permit UACs to be housed in unlicensed facilities. The licensing and oversight of children's residential facilities is a core police power of the states, and the States have developed comprehensive licensing regimes over the course of many decades to ensure that children housed in these facilities are healthy and safe and that their rights are protected. The States strongly recommend that the Proposed Rule be revised to require that any facilities housing UACs be state-licensed. Should HHS nevertheless determine to permit the use of certain unlicensed facilities, consistent with the States' compelling interest and concern for the health, safety, and well-being of UACs, the States strongly recommend that the Proposed Rule be revised to require that all facilities be licensed where licensure is available and that all facilities be required to comply with all relevant state laws. The States further urge HHS to ensure that comprehensive oversight mechanisms are developed and implemented to ensure that unlicensed facilities are compliant with state law and ORR policy.

Sincerely,



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December 4, 2023
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A handwritten signature in blue ink, appearing to read "Bob Ferguson". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

BOB FERGUSON
Washington State Attorney General