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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
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February 13, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Ave., S.W.
Washington, D.C. 20201

Secretary Becerra:

On October 4, 2023, the Administration for Children and Families (ACF), an agency under the U.S. Department of Health and Human Services (HHS), published a notice of proposed rulemaking (the “proposed rule”), entitled “Unaccompanied Children Program Foundational Rule.”¹ The Office of Refugee Resettlement (ORR) Unaccompanied Children Program operates according to the policies and principles in the 1997 *Flores* Settlement Agreement (FSA), the Homeland Security Act of 2002, the Trafficking Victims Protection Reauthorization Act of 2008, and sub-regulatory and field guidance. Therefore, regulation is necessary to codify policies guiding the care and placement of unaccompanied children. Unfortunately, the proposed rule falls short by failing to fully protect children from exploitation and could lock ORR into policies that impede its ability to react to future changing immigration policies.

ORR’s proposed rule would govern the operation of the Unaccompanied Children Program, including implementing regulations consistent with the FSA, which limits the length of time and conditions under which the federal government can detain immigrant children, and to which the Unaccompanied Children Program is subject.² ORR had the opportunity to overhaul its policies in this proposed rule and implement a regulatory framework that would ensure the health and safety of this vulnerable population. Instead, ORR proposes to codify many existing failed policies that have resulted in ongoing scrutiny of ORR.

The proposed rule would thus make permanent policies that put unaccompanied children’s health and safety at risk. Reports from Congress, the HHS Office of Inspector General (OIG), and nonpartisan government watchdog groups have found that many existing policies failed to prevent the abuse of unaccompanied children and mismanagement of the Unaccompanied Children

¹ Unaccompanied Children Program Foundational Rule, 80 Fed. Reg. 68908 (proposed Oct. 4, 2023) (to be codified at 45 C.F.R. pt. 410).

² See Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. 1997).

Program. These are also the same policies that were in place in 2023, a year which saw a record number of unaccompanied children die in ORR custody, The New York Times and other media outlets publishing horrific reports of child labor exploitation, ORR violating caregivers’ religious freedoms and conscience protections, the chilling of whistleblowers, and a general lack of accountability to Congress.³

Codifies Inadequate Sponsor Vetting Requirements

ORR proposes to codify its inadequate sponsor vetting requirements. Under the subsection “Care and Placement of Unaccompanied Children,” it states that proposed provisions “would, in many cases, codify existing ORR policies and practices.”⁴ These policies and practices reward quick, not safe, releases—so much so that you compared them to Henry Ford’s assembly line.⁵ ORR must balance the goal of releasing children to sponsors in a timely manner, while also ensuring a safe unification remains the top priority.

The proposed rule would also retain for ORR complete discretion as to what constitutes sufficient sponsor vetting. ORR proposes to make *optional* requirements including “an investigation of the living conditions” and “the standard of care the child would receive,” as well as “verification of the identity and employment of the individuals offering support,” “interviews of members of the household,” and “a home visit.”⁶ ORR further proposes that it should be *optional* to review the “past criminal history” of a potential sponsor, “verify the validity of the sponsor identity document,” or conduct “biometric checks such as fingerprint-based criminal record checks.”⁷

Under the William Wilberforce Trafficking Victims Protection Reauthorization Act, ORR may not place an unaccompanied child with a sponsor unless it determines that the proposed sponsor is “capable of providing for the child’s physical and mental well-being.”⁸ This determination must include “an independent finding that the [sponsor] has not engaged in any activity that would indicate a potential risk to the child.”⁹ It is unclear how ORR could make such a finding if the agency opts not to review past criminal history, verify the validity of identity documents, or conduct a thorough background check. In the fall of 2023, a statewide grand jury in Florida found numerous cases of unaccompanied children being abused, recruited into gangs, and even sold into

³ E.g., Sen. Charles E. Grassley & Sen. Ron Wyden, *Exposing the Risks of Deliberate Ignorance: Years of Mismanagement and Lack of Oversight by the Office of Refugee Resettlement, Leading to Abuses and Substandard Care of Unaccompanied Alien Children*, U.S. SENATE COMM. ON FIN. (Oct. 28, 2021), <https://www.finance.senate.gov/imo/media/doc/102821%20Finance%20Committee%20Report%20ORR%20UAC%20Program.pdf>; Christi A. Grimm, Inspector Gen., *Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children*, U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. OF INSPECTOR GEN. (Sept. 2022), <https://oig.hhs.gov/oci/reports/OEI-07-21-00251.pdf>; Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 25, 2023), <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html?searchResultPosition=1>.

⁴ Unaccompanied Children Program Foundational Rule, 80 Fed. Reg. at 68914.

⁵ Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 25, 2023), <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html?searchResultPosition=1>.

⁶ Unaccompanied Children Program Foundational Rule, 80 Fed. Reg. at 68928.

⁷ *Id.*

⁸ 8 U.S.C. § 1232(c)(3)(A).

⁹ *Id.*

sex slavery.¹⁰ The Florida grand jury implicated the sub-regulatory guidance ORR now seeks to codify as contributing to these horrific outcomes, pointing out that “The only mandatory requirement is completion and submission of the sponsorship application,” and “No finding during the vetting process is automatically disqualifying” for a potential sponsor.¹¹

In addition, in 2022, the HHS OIG released a chilling report detailing 2021 Biden administration field guidance that eliminated crucial elements of the sponsor vetting process to expedite a child’s release from ORR custody.¹² Field guidance can play an important role addressing short term policy goals and supplementing ORR standard procedures. However, this field guidance eliminated (1) third-party review of the sponsor vetting process and (2) existing requirements that required case managers to assess the quality of the child’s relationships with their potential sponsors. The removal of these requirements rewards speed of release over the safety of children and should be reconsidered.

Finally, ORR notes in the proposed rule that it is not proposing to require a sponsor to seek permission to transfer the custody of an unaccompanied child, even though ORR acknowledges it needs this information to protect against trafficking and evaluate future sponsor suitability.¹³ With child labor violations at their highest level in nearly two decades,¹⁴ it is incumbent upon ORR to strategically advance policies that protect children from exploitation and collect data to inform future policy changes that ensure safer releases to sponsors.

Undermines State Licensing Requirements and Jeopardizes the Health and Well-Being of Unaccompanied Children

ORR proposes eliminating the term “licensed program,”—which has been used pursuant with the requirements of the FSA for decades—and replacing it with the term “standard program” in order to circumvent state-specific licensing requirements.¹⁵ ORR attempts to justify the change as a needed response to states choosing to discontinue licensing ORR facilities, but this change appears to violate the terms of the FSA.

The FSA clearly states that unaccompanied children “shall be placed temporarily in a licensed program” until released from ORR custody.¹⁶ Under the FSA, a “licensed program” is defined as a program “licensed by an appropriate *State agency* to provide residential, group, or foster care services for dependent children.”¹⁷ ORR notes that unlicensed facilities will still have to meet the

¹⁰ Ashley Moody, Att’y Gen., State of Fla., Comment Letter on Unaccompanied Children Program Foundational Rule (Dec. 4, 2023), https://www.myfloridalegal.com/sites/default/files/2023-12/orr-comment_final.pdf.

¹¹ Ashley Moody, Att’y Gen., State of Fla., Comment Letter on Unaccompanied Children Program Foundational Rule, Appendix A (Dec. 4, 2023), <https://www.myfloridalegal.com/sites/default/files/2023-12/appendix-a.pdf>.

¹² Christi A. Grimm, Inspector Gen., *Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children*, U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. OF INSPECTOR GEN. (Sept. 2022), <https://oig.hhs.gov/oci/reports/OEI-07-21-00251.pdf>.

¹³ Unaccompanied Children Program Foundational Rule, 80 Fed. Reg. at 68930.

¹⁴ Lauren Kaori Gurley, *Child labor violations soared in fiscal 2023*, WASH. POST (Oct. 19, 2023), <https://www.washingtonpost.com/business/2023/10/19/child-labor-violations-2023/>.

¹⁵ Unaccompanied Children Program Foundational Rule, 80 Fed. Reg. at 68915.

¹⁶ Stipulated Settlement Agreement ¶ 19, *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. 1997).

¹⁷ Stipulated Settlement Agreement ¶ 6, *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. 1997) (emphasis added).

“minimum standards” required by the FSA.¹⁸ However, the FSA makes clear that “A licensed program must also meet those standards for licensed programs set forth in Exhibit 1”—the “Minimum Standards for Licensed Programs.”¹⁹ Given that the FSA states, in no uncertain terms, that facilities housing unaccompanied children must be *both* state licensed *and* compliant with the minimum standards, ORR’s changes to these requirements contradict the FSA’s requirements. ORR should therefore revisit these provisions, as novel licensing requirements that conflict with the FSA are unlikely to withstand scrutiny from the courts.

The proposed rule also announces that ACF is currently developing a notice of proposed rulemaking to create a federal licensing scheme for ORR facilities located in states where licensure is unavailable.²⁰ This is an area historically regulated by the states. State licensing allows states to tailor requirements for their state’s specific needs and resources. State licensing agencies are also in the best position to provide ongoing monitoring and oversight of child care facilities—a task in which ORR has shown itself to be deficient. In fact, the HHS OIG repeatedly cited facilities that ORR does monitor for violations and poor living conditions.²¹

Infringes on Conscience and Religious Freedom Protections by Prioritizing Transportation for Abortion

ORR proposes to codify a number of new Biden administration policies that infringe on the conscience and religious freedom protections of ORR staff and providers. Specifically, the proposed rule would codify field guidance stating that the ORR Intakes Team “*must* prioritize placement of pregnant UC . . . in states without abortion bans and with broad access to reproductive health care for minors” during initial placement of unaccompanied children when referred to ORR from the Department of Homeland Security.²² This requires ORR to prioritize the placement of *any* pregnant unaccompanied child in states without abortion bans, without evaluating other health, safety, and well-being considerations—regardless of whether the unaccompanied child has requested an abortion.

ORR further proposes to codify field guidance that states that “ORR *must* ensure . . . that the care provider assists in the transportation of the UC *for the purpose of an abortion*, which may include travel across state lines.”²³ Notwithstanding ORR’s cursory reference to the Religious Freedom

¹⁸ Unaccompanied Children Program Foundational Rule, 80 Fed. Reg. at 68916.

¹⁹ Stipulated Settlement Agreement ¶ 6, *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. 1997); Stipulated Settlement Agreement, Exhibit 1, *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. 1997).

²⁰ Unaccompanied Children Program Foundational Rule, 80 Fed. Reg. at Footnote 52.

²¹ *E.g.*, Christi A. Grimm, Inspector Gen., *Office of Refugee Resettlement’s Influx Care Facility and Emergency Intake Sites Did Not Adequately Safeguard Unaccompanied Children From COVID-19*, U.S. DEP’T OF HEALTH & HUM. SERVS. OFF. OF INSPECTOR GEN. (June 2022), <https://oig.hhs.gov/oas/reports/region6/62107002.pdf>; Letter from Daniel R. Levinson, Inspector Gen., U.S. Dep’t of Health & Hum. Servs. to Lynn Johnson, Assistant Sec’y, Admin. for Child. & Fams. (Nov. 27, 2018), <https://oig.hhs.gov/oas/reports/region12/121920000.pdf>.

²² Off. of Refugee Resettlement, Admin. for Child. & Fams., FG-#21, Compliance with *Garza* Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare (Nov. 10, 2022) (emphasis added), <https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf>; Unaccompanied Children Program Foundational Rule, 80 Fed. Reg. at 68946.

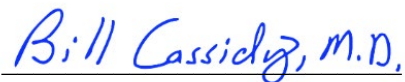
²³ Off. of Refugee Resettlement, Admin. for Child. & Fams., FG-#21, Compliance with *Garza* Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare (Nov. 10, 2022) (emphasis added), <https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf>.

Restoration Act (RFRA) and other federal conscience protections in the preamble, the text of the proposed rule shows a disregard for these longstanding religious freedom and conscience protection laws. Under RFRA, “the government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”²⁴ A requirement for caregivers, even those who may hold strong religious beliefs opposing abortion, to assist in the transportation of unaccompanied children for the purpose of an abortion is a violation of RFRA and its religious freedom protections. Directing federally-funded providers to facilitate the transportation of unaccompanied children for purposes of obtaining an abortion also raises the question of whether ORR’s proposal complies with the Hyde Amendment’s prohibition on federal funding for abortion.

Given the clear conflicts the proposed rule has with federal religious freedom and conscience protection laws, as well as its attempts to circumvent state laws that protect unborn life, ORR should not only remove these illegal pro-abortion requirements from its proposed rule, but should also rescind its current field guidance that provides the basis for the proposed rule.

As the first-ever comprehensive regulation for a program mired in controversy and inept leadership, this proposed rule falls inexcusably short. It is the duty of HHS and ORR to ensure this vulnerable population is not at an increased risk of exploitation due to a regulation that continues a number of existing policies that have failed children. For these reasons, I request that you make significant changes to the proposed rule that balance the need for regulatory action with the dynamic situation at the southern border.

Sincerely,



Bill Cassidy, M.D.

Ranking Member

Senate Committee on Health,
Education, Labor, and Pensions

cc:

Robin Dunn Marcos, Director, Office of Refugee Resettlement

Jeff Hild, Acting Assistant Secretary, Administration for Children and Families

²⁴ 42 U.S.C. § 2000bb-1.