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May 27, 2025

Toby Biswas

Director of Policy, Division of Unaccompanied Children
Unaccompanied Children Bureau
Administration for Children and Families
Department of Health and Human Service

Re: Comment in Response to the DHHS, ACF Interim Final Rule; Unaccompanied Children Program Foundational Rule; Update to Accord with Statutory Requirements, ACF-2025-0003, RIN 0970-AD16

Submitted via Regulations.gov

Dear Director Biswas,

The Immigrant Legal Resource Center (ILRC) submits the following comment in response to the U.S. Department of Health and Human Services Interim Final Rule; Unaccompanied Children Program Foundational Rule; Update to Accord with Statutory Requirements, published on March 25, 2025 ("IFR").

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity.

The ILRC is also a leader in interpreting immigration relief for immigrant youth. The ILRC has a long history of producing trusted legal resources including webinars, trainings, and manuals such as *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*. Through our extensive network with service providers, immigration practitioners, and immigration benefits applicants, we have developed a profound understanding of the barriers faced by vulnerable immigrants – including children and young people – and low-income communities of color. It is through this lens that we provide the following comment on the interim final rule.

I. The legal justification for the IFR is inadequate.

ILRC strongly recommends reconsidering, in its entirety, the IFR. The justification for the rescission of 45 CFR § 410.1201(b) is that 8 USC § 1373 "unambiguously limits ORR's authority."

We strongly disagree with the Department of Health and Human Services (HHS) on this point; we also note that HHS conducted no meaningful analysis, and we outline our concerns below.

The Trafficking Victims Protection and Reauthorization Act (TVPRA) imposes certain obligations on the Office of Refugee Resettlement (ORR) regarding its care and custody of unaccompanied children. ORR's legal obligations with respect to unaccompanied children cannot be fulfilled if 45 CFR § 410.1201(b) is rescinded.⁸ 8 USC § 1232(c)(2)(A) unequivocally mandates that an unaccompanied child¹ be placed "in the least restrictive setting that is in the best interest of the child." ORR cannot fulfill this obligation if ORR disqualifies potential sponsors based on their immigration status, which is highly discriminatory and contravenes broadly anti-discrimination policies for program eligibility and administration.² Furthermore, HHS's regulations expressly incorporate the provision under Title VI of the Civil Rights Act (42 USC § 2000d) that no person shall be subjected to discrimination under any program based on national origin.³ Clearly, HHS cannot abide by this provision without reinstating the rescinded provision.

Additionally, if ORR shares the immigration status of potential sponsors with any law enforcement or immigration enforcement agency, this will have a powerful chilling effect on prospective sponsors.⁴ Prospective sponsors who lack lawful immigration status will now fear that stepping forward could expose them or their families to enforcement actions, dissuading exactly the community-based caregiving that HHS's regulations seek to foster.⁵ With fewer prospective sponsors coming forward, this undoubtedly will cause a delay in finding suitable caregiving homes for unaccompanied children, which contravenes 45 CFR § 410.1201(a): "ORR *shall* release a child for its custody without unnecessary delay" (emphasis added).

Turning to HHS's IFR justification that the rescinded provision contravenes 8 USC § 1373, HHS provided no analysis for this assertion. As such, we are providing an in-depth analysis for consideration. To be clear, 8 USC § 1373 does not impose an affirmative duty to share information or collect citizenship or immigration status information. Rather, it precludes government entities from enacting policies that would bar such sharing when the information is already in their possession and is requested. Thus, to the extent ORR believes that it cannot restrict sharing of immigration status information, it should strictly limit its collection of that information. Among the other actions that 8 USC § 1373 does not require are inquiring into or collecting a potential sponsor's citizenship or immigration status or sharing other personal information. As such, the portion of 45 CFR § 410.1201(b) that provides HHS "shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes" should not be rescinded, as it in no way conflicts with 8 USC § 1373.

Moreover, the third portion of 45 CFR § 410.1201(b): "ORR shall not share any immigration status information relating to potential sponsors with any law enforcement or immigration enforcement related entity at any time" should not be rescinded because it does not contravene 8 USC § 1373. Congress enacted 8 USC § 1373 to prohibit state and local laws or policies that prevented cooperation with the then-INS: "[T]he Senate report appears to be focused on state and local disclosure prohibitions and restrictions" and likewise the house report at this time

¹ ILRC prefers to use the term "unaccompanied child" or "UC" because the term "alien" has a pejorative meaning.

² See, e.g., 8 USC § 1621(d); 45 CFR §§ 92.1(a), 92.4, 92.5(a).

³ 45 CFR § 92.101(a)(1).

⁴ Sponsor is defined at 45 CFR § 410.1001 ("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.")

⁵ See 45 CFR § 410.1201(a).

“applied only to state and local prohibitions or restrictions on disclosure, not federal ones.”⁶ The application of 8 USC § 1373 to HHS regulations goes against congressional intent. Indeed, case law supports this argument, in that 8 USC § 1373 has only been litigated in relation to state and local policies.⁷ Additionally, courts have already found 8 USC § 1373 unconstitutional under the Tenth Amendment.⁸ While these courts found the statute unconstitutional only as applied to state and local policies, their rulings reinforce that 8 USC § 1373 was intended to govern state and local governments—not federal agencies. Even if HHS concludes that this specific portion of 45 CFR § 410.1201(b) contravenes 8 USC § 1373, it should still limit rescission to that single portion—leaving intact the remainder of 45 CFR § 410.1201(b), which plainly lies outside § 1373’s prohibitory scope. Nonetheless, we strongly urge HHS to fully reinstate the entire non-disclosure safeguard to ensure ORR’s compliance with its TVPRA-mandated least-restrictive, non-discrimination obligations, as well as its obligations under its own regulations to release children without unnecessary delay.

II. The IFR is contrary to children's best interests, as it has and will prolong detention times and delay reunification with close family members.

The compounded harmful effects of prolonged detention on migrant children are well-documented,⁹ as are the benefits of family reunification. Studies by medical and psychological professionals have repeatedly shown that children who are exposed to prolonged periods of detention suffer various levels of trauma.¹⁰ By implementing the IFR, HHS has elected to prioritize immigration enforcement over the best interests of the children in its care, in direct conflict with the TVPRA’s requirement that HHS place children “in the least restrictive setting that is in the best interest of the child.”¹¹ ORR is not an immigration enforcement agency, so elevating immigration enforcement over its statutorily mandated care of vulnerable children is clearly at odds with the law.¹²

⁶ See Department of Justice, Office of Legal Counsel, Memorandum Opinion for the General Counsel Department of Commerce, *Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information*, (May 18, 1999), available at <https://www.justice.gov/olc/opinion/relationship-between-illegal-immigration-reform-and-immigrant-responsibility-act-1996> (finding that the federal statute 13 USC § 9(a) that covers census information confidentiality has not been repealed by 8 USC § 1373(a)).

⁷ See, e.g., *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Steinle v. City and County of San Francisco*, et. al, No. 3:16-cv-02859 (N.D. Cal. filed Jan. 6, 2017) *upheld by United States v. California*, 921 F.3d 865 (9th Cir. 2019).

⁸ See, e.g., *City of Philadelphia v. Sessions*, No. CV 17-3894, 2018 WL 2725503, at *31 (E.D. Pa. June 6, 2018); *City of Chicago v. Sessions*, No. 1:17-cv-05720 (N.D. Ill. Jul. 27, 2018).

⁹ See Julie M. Linton, et al., Detention of Immigrant Children, 139 *Pediatrics* no. 5 (2017, reaffirmed 2022), <https://doi.org/10.1542/peds.2017-0483> (policy statement raising concerns about the harmful effects of government custody on children); American College of Physicians, *ACP Says Family Detention Harms the Health of Children, Other Family Members*, (July 5, 2018), <https://www.acponline.org/acp-newsroom/acp-says-family-detention-harms-the-health-of-children-other-family-members> (discussing the harms inflicted upon children by family separation and detention).

¹⁰ See M. von Werthern, et al., The Impact of Immigration Detention on Mental Health: A Systematic Review, 18 *BMC Psychiatry* 382 (2018), <https://doi.org/10.1186/s12888-018-1945-y> (discussing the prevalence of mental health conditions in children of various ages post-detention).

¹¹ 8 USC § 1232(c)(2)(A).

¹² See Office of Refugee Resettlement, An Office of the Administration for Children & Families, <https://acf.gov/orr> (“The mission of the Office of Refugee Resettlement (ORR) is to promote the health, well-being, and stability of refugees, unaccompanied alien children, and other eligible individuals and families, through culturally responsive, trauma-informed, and strengths-based services. Our vision is for all new arrivals to be welcomed with equitable, high-quality services and resources so they can maximize their potential.”).

The IFR has already led to an increase in detention time for children in ORR custody. Since the IFR's implementation in March 2025, there has been a demonstrable increase in length of stay for children in ORR custody and decrease in the rate of reunification.¹³ The average length of stay for children released from ORR custody rose to 112 days in March 2025, when the IFR took effect, and rose again to 217 days in April 2025. The data for the previous months of Fiscal Year 2025 averaged between 35 and 49 days.¹⁴

The longer detention times can be attributed, in large part, to ORR's denial of sponsorship applications based on immigration status and the higher risk of enforcement that sponsors are facing under the IFR.¹⁵ Many sponsors already provided their personal information in reliance on ORR's assurances that their information would not be collected or shared for enforcement purposes, but going forward potential sponsors will be much more reluctant to come forward. Sponsors now must choose between exposing themselves and their household members to immigration enforcement in order to reunite with children in custody or foregoing sponsoring children out of ORR custody. Parents or legal guardians who would have gone through the process to reunite with their minor children may decline to come forward, pushing reunification efforts to more distant relatives or unrelated sponsors, at odds with HHS's own order of preference for sponsors to whom it releases children.¹⁶

In short, unaccompanied children will spend more time in government custody because of the IFR, which is clearly detrimental to children and no doubt imposes additional costs on HHS. Further, a child who could have been reunited with a parent in the United States will now potentially have to be reunited with another, more distant family member or unrelated adult, in conflict with HHS's obligation to place children in settings that are in their "best interest."¹⁷

Alternatively, undocumented sponsors who do come forward to reunite with children, who consequently are targeted by ICE, run the risk of detention and deportation and further family separation. This undermines ORR's mission to place children in safe and stable homes. The Trump administration has made no secret of its intentions to arrest and deport as many people as possible by using any means necessary, and those statements have had the intended effect of causing fear in immigrant communities across the country. The use of Homeland Security Investigation (HSI) wellness checks on released unaccompanied children are contributing to the atmosphere of fear and intimidation perpetuated by the administration's rhetoric. Sponsors are already declining to come forward for fear of enforcement and children in government custody are being harmed as a result.

The IFR has already proven to have a detrimental effect on the children in ORR custody and should be rescinded immediately.

III. Conclusion

In conclusion, the ILRC strongly urges HHS to rescind the IFR in its entirety. The legal justification for the IFR is inadequate, as the proffered justification only pertains to one clause of the entire subsection (b) of 45 CFR 410.1201

¹³ See Office of Refugee Resettlement, Fact Sheets and Data, <https://acf.gov/orr/about/ucs/facts-and-data>, current as of May 12, 2025.

¹⁴ *Id.*

¹⁵ In March and April 2025, ORR also changed its Policy Guide to impose new requirements on potential sponsors that impede noncitizen sponsors' ability to comply with the sponsor application process. See ORR Policy Guide § 2.2.4.

¹⁶ 45 CFR § 410.1201(a) ("ORR shall release a child from its custody without unnecessary delay, in the following order of preference: (1) A parent, (2) A legal guardian...").

¹⁷ 8 USC § 1232(c)(2)(A).

that the IFR deletes. Even as to the provision of subsection (b) that is related to the IFR's justification ("ORR shall not share any immigration status information relating to potential sponsors with any law enforcement or immigration enforcement related entity at any time"), the legal justification is flawed in that this provision does not contravene 8 USC § 1373, as discussed above. Moreover, the impact of the IFR is contrary to children's best interests, as it has and will prolong detention times and delay reunification with close family members. These impacts are squarely at odds with HHS's statutory and regulatory obligations. For these reasons, the ILRC strongly urges HHS to rescind the IFR in its entirety. If in the future, HHS develops a more complete rationale for this rule change, we would welcome the opportunity to comment on it.

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