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Office of Refugee Resettlement  
Administration for Children and Families  
Department of Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

Re: HHS Docket No. ACF-2023-0009, Comments in Response to Proposed Rulemaking:  
Unaccompanied Children Program Foundational Rule

Dear Mr. Biswas:

We write on behalf of the undersigned organizations and academics in response to the Office of Refugee Resettlement’s Notice of Proposed Rulemaking on the Unaccompanied Children Program Foundational Rule<sup>1</sup> (“Proposed Rule”) to address the sections that affect the reproductive justice rights of youth in ORR custody. The following comment expresses our support for many of these provisions and recommends changes that, if adopted, would strengthen ORR’s commitment to the health and well-being of youth in custody.

We recommend the following changes to the Proposed Rule, which are summarized at the end of this comment:

**1. Preserve abortion access as an essential family planning service**

**Comment on Proposed Rule 410.1001, “Definitions (Family planning services)”:**

We applaud ORR’s decision to include protections for abortion access in the Proposed Rule. Access to abortion is critically important for unaccompanied children. Many have been abused in their country of origin or have been sexually assaulted on their journey to the United States. Some children have become pregnant as a result of rape.<sup>2</sup> Regardless of how an unaccompanied youth became pregnant, ORR is required to ensure that they have access to abortion consistent with the settlement in *J.D. v. Azar*, and ORR’s Field Guidance to effectuate

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<sup>1</sup> Unaccompanied Children Program Foundational Rule, 88 Fed. Reg. 68908 (Oct. 4, 2023) (to be codified at 45 C.F.R. pt 410).

<sup>2</sup> Beatriz Guillén, *The reality of migrant women en route to the US: rapes and no access to hospitals*, EL PAÍS, (Mar. 17, 2023), <https://english.elpais.com/international/2023-03-07/the-reality-of-migrant-women-en-route-to-the-united-states-rape-d-and-unable-to-access-a-hospital.html>; Kids in Need of Defense, *Trapped and Targeted: Gender-based violence against children at the U.S.-Mexico Border*, (Sept. 2, 2020), <https://supportkind.org/wp-content/uploads/2020/09/Northern-Mexico-Border-GBV-Issue-Brief-9.2.20.pdf>.

the terms of that settlement.<sup>3</sup> We support the Proposed Rule’s codification of ORR’s requirement to transfer a minor seeking an abortion within three business days if abortion is unavailable in their area. This is an incredibly important requirement given that sixteen states have total or early abortion bans in effect.<sup>4</sup> It is incumbent upon ORR to provide access to abortion regardless of where the minor is located; indeed, ORR must ensure that a minor’s geographic location does not restrict their access to health care, including abortion. Unaccompanied immigrant youth must be permitted to make their own decisions about their medical care, their bodies, and their future.

We have two concerns, however. First, abortion should not be treated separately from other health care. The proposed regulation incorrectly categorizes abortion as distinct from “routine medical ... [and] family planning services.” To the contrary, abortion should be included in the definition of medical care and family planning services to avoid stigmatizing abortion care. We recommend ORR amend the definition of “Family planning services” in § 410.1001 Definitions to include abortion in the Final Rule.

Second, requiring heightened ORR involvement for abortion requests creates the potential that a future ORR director could abuse this process, which is what happened during the Trump administration. We understand that additional ORR involvement is needed when a minor needs to be transported from one state where abortion is prohibited to another state where abortion is legal, but we urge ORR to establish guardrails to ensure that a future presidential administration does not use the heightened involvement requirement to create obstacles or prevent minors from accessing abortion. If ORR maintains abortion in the definition of “Medical services requiring heightened ORR involvement” in § 410.1001 Definitions, we recommend ORR make clear that the heightened involvement requirement is *only* to ensure quick transportation or transfer, if needed, and to establish whether the abortion can be paid with federal funds consistent with the Hyde Amendment.<sup>5</sup>

## **2. Ensure pregnant youth are empowered to make informed decisions**

### **Comment on Proposed Rule 410.1001, “Definitions (Family planning services)”:**

We welcome ORR’s inclusion of “pregnancy testing and counseling” in the list of family planning services to which unaccompanied children are entitled. However, we recommend ORR clarify the meaning of pregnancy counseling. It is critical that youth are informed of and empowered to consider all pregnancy options, including abortion, adoption, and parenting. ORR should revise the list of family planning services at § 410.1001 and change “pregnancy testing and counseling” to “pregnancy testing and non-directive pregnancy counseling.”

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<sup>3</sup> See *supra* note 1 at 68946 n.112.

<sup>4</sup> Guttmacher Institute, *Interactive Map: US Abortion Policies and Access After Roe*, <https://states.guttmacher.org/policies/> (last updated Nov. 22, 2023).

<sup>5</sup> The Hyde Amendment is an annual appropriations rider that prohibits federal funds from being used to pay for an abortion unless the pregnancy is a result of rape or incest or the pregnant person’s life is in jeopardy. The United States Court of Appeals for the D.C. Circuit has held that ORR’s obligation to ensure that minors in their custody have access to abortion does not “involve government funding of abortion.” *J.D. v. Azar*, 925 F.3d 1291, 1327 (D.C. Cir. 2019).

### **3. Guarantee access to comprehensive, evidence-based, medically accurate sex education**

#### **Comment on Proposed Rule 410.1001, “Definitions (Family planning services)”:**

ORR should ensure that youth are provided comprehensive, evidence-based, medically accurate sex education while in custody. Comprehensive sex education is an essential component of supporting young people’s health, well-being, and futures. The American Academy of Pediatrics and other leading health professional organizations support broad access to comprehensive, developmentally appropriate, evidence-based sex education.<sup>6</sup>

Comprehensive sex education programs have been shown to support “social-emotional learning, positive communication skills, and development of healthy relationships.”<sup>7</sup> Importantly for unaccompanied children—many of whom are survivors of physical or sexual trauma—sex education helps young people “understand, value, and feel autonomy over their bodies.”<sup>8</sup> Sex education can help prevent further violence against youth by teaching sexual refusal skills and addressing dating violence.<sup>9</sup>

In 2022, 85 percent of youth in ORR custody were between ages 13 and 17.<sup>10</sup> By guaranteeing access to comprehensive sex education, ORR can ensure that these young people have the tools and information they need to make healthy decisions when they are released to their families and communities in the United States.

ORR should modify the Proposed Rule to guarantee unaccompanied youth access to “comprehensive, evidence-based, medically accurate sex education.” We recommend the agency include sex education in the list of family planning services at § 410.1001 (Definitions). Alternatively, ORR could list provision of sex education among the requirements for care providers at § 410.1302(a) (Minimum standards applicable to standard programs).

### **4. Ensure appropriate placements for pregnant and parenting youth**

#### **Comment on Proposed Rule 410.1103, “Considerations generally applicable to the placement of an unaccompanied child”:**

We are encouraged by ORR’s recognition in the Preamble that pregnant and parenting youth are “best served in family settings.”<sup>11</sup> This important principle should be integrated into the text of the Final Rule. For example, the Proposed Rule at § 410.1103 states that a child’s status as

<sup>6</sup> American Academy of Pediatrics, *Patient Care: The Importance of Access to Comprehensive Sex Education*, <https://www.aap.org/en/patient-care/adolescent-sexual-health/equitable-access-to-sexual-and-reproductive-health-care-for-all-youth/the-importance-of-access-to-comprehensive-sex-education> (last visited Nov. 6, 2023).

<sup>7</sup> *Id.*

<sup>8</sup> Emily Bridges, et al., *Fact Sheets: Sexuality Education*, Advocates for Youth, (May 2014), <https://www.advocatesforyouth.org/resources/fact-sheets/sexuality-education-2/>.

<sup>9</sup> SIECUS Sex Ed for Social Change, *If/Then Series: Sexual Assault & Sex Ed Fact Sheet*, (Aug. 2020), <https://siecus.org/wp-content/uploads/2020/08/If-Then-Sexual-Assault-Final.pdf>.

<sup>10</sup> U.S. Dep’t of Health & Hum. Servs., Admin. of Child. & Fams., Office of Refugee Resettlement, *Fact Sheets and Data (current as of Oct. 13, 2023)*, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

<sup>11</sup> See *supra* note 1 at 68920.

pregnant or parenting is “relevant” to the child’s placement, but the Final Rule should go further to protect these particularly vulnerable youth by expressly adopting a priority for community-based care placement. This addition to the Proposed Rule would be consistent with Section 1.2.2 of the Unaccompanied Children Program Policy Guide, which provides, in part, that “ORR gives priority for transitional foster care placements to . . . teens who are pregnant or are parenting.”<sup>12</sup>

ORR should codify its commitment to place pregnant and parenting youth in environments that are most supportive of their health and well-being in its Final Rule. We recommend a new subsection (h) in § 410.1103, that explains pregnant and parenting unaccompanied children “shall be given priority to community-based care placements” or “transitional and long-term home care,” depending on the terminology for care provider types that ORR adopts.

## **5. Honor the dignity of young parents in custody**

### **Comment on Proposed Rule 410.1108, “Placement and Services for Children of Unaccompanied Children”:**

We appreciate ORR’s commitment to supporting parenting youth and their children. We offer a recommendation to modify the Proposed Rule to ensure that parenting youth can continue to develop as parents and protect the best interests of their children while they are in ORR custody.

Experiencing parental autonomy is essential for adolescent parents building healthy relationships with their children. For example, experiences associated with better outcomes for adolescent parents and their children include: (1) understanding and appreciating the attitudes, knowledge, and behaviors necessary to be a responsible and responsive parent, (2) achieving and maintaining a positive sense of self as an individual and as a young parent, and (3) having confidence and a sense of control over one’s life.<sup>13</sup> It would benefit parenting youth and their children if the Final Rule expressly recognized and supported the parenting youth’s role in decision-making about their child’s care.

Additionally, as ORR recognizes in the Preamble,<sup>14</sup> while the agency has custody of the unaccompanied youth, it is the unaccompanied youth that has custody of their child. As the custodial parent, the unaccompanied youth has a right to determine what is in their child’s best interest. Federal and care provider staff must actively consider and document the youth’s choices as a parent. For example, if the youth’s child has another parent or legal guardian present in the United States, it must be the unaccompanied youth—not ORR federal or care provider

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<sup>12</sup> U.S. Dep’t of Health & Hum. Servs., Admin. of Child. & Fams., Office of Refugee Resettlement, *Unaccompanied Children Program Policy Guide: Section 1.2.2 Children with Special Needs*, <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1#1.2.2> (last updated Nov. 14, 2023).

<sup>13</sup> Charlyn Harper Browne, *Expectant and Parenting Youth in Foster Care: Addressing Their Developmental Needs to Promote Healthy Parent and Child Outcomes*, Center for the Study of Social Policy 11, (Aug. 2015), <https://cssp.org/wp-content/uploads/2018/08/EPY-developmental-needs-paper-web-2.pdf>.

<sup>14</sup> See *supra* note 1 at 68926.

staff—who determines whether it is in their child’s best interest to be released to that parent or guardian.

We recommend that the Final Rule, at the beginning of § 410.1108, include an affirmative statement recognizing a parenting unaccompanied child’s “right to make informed choices about their child’s care, including, but not limited to, decisions about the child’s health care, diet, clothing, hygiene, religious and cultural practices, education, recreation, and daily activities.”

## **6. Preserve family unity for parenting youth and their children**

### **Comment on Proposed Rule 410.1108, “Placement and Services for Children of Unaccompanied Children”**

We appreciate regulations aimed at limiting the circumstances under which the government can separate a parenting youth in ORR custody from their children. However, we are concerned that the language in proposed § 410.1108(a) and (a)(3) is vague and fails to provide sufficient procedures to protect the rights of unaccompanied, parenting youth. Moreover, the regulations do not explain who will make determinations that lead to separation or how such determinations will be made. This may lead to improper family separations. Unaccompanied, parenting youth are also not offered any mechanism to challenge a separation under § 410.1108(a) or § 410.1108(a)(3). Finally, there is no language within the Proposed Rule regarding reunification of an unaccompanied, parenting youth separated from their children. We recommend ORR amend the Proposed Rule to conform with legal protections and standards under state child welfare law and that ORR add protections to the Final Rule to prevent the unnecessary separation of unaccompanied, parenting youth from their children while in ORR custody.

The mental and physical toll family separation has on children cannot be overstated. It has been found that when deprived of a caregiver, children’s brain development is altered.<sup>15</sup> Family bonds are crucial for child development, especially for infants and younger children,<sup>16</sup> which is why unaccompanied, parenting youth and their children should be placed and kept together to the greatest extent possible. We urge ORR to amend the Final Rule to reduce the risk of unjust family separations and minimize the harm of separating unaccompanied, parenting youth and their children when separation is necessary.

#### *Medical separations under § 410.1108(a)(1) must be limited*

Given the risk of harm to the unaccompanied, parenting youth and their children caused by separation, medical separations under § 410.1108(a)(1) should only occur when the hospital or other medical provider’s policies or needs require it. Moreover, medical separations should be as brief as possible. Understandably, certain medical needs will require unaccompanied,

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<sup>15</sup> Emily M. Cohodes, et al., *Migration-related trauma and mental health among migrant children emigrating from Mexico and Central America to the United States: Effects on developmental neurobiology and implications for policy*, J. FOR INT’L SOC’Y DEVELOPMENTAL PSYCHOBIOLOGY, Sept. 2021, 8, <https://onlinelibrary.wiley.com/doi/10.1002/dev.22158> (paid article available for purchase).

<sup>16</sup> *Id.* at 4.

parenting youth to be separated from their children for some time, but it must be made clear that as soon as possible, parenting youth must be reunified with their children after the necessary medical care is provided. Research has shown that even a brief separation can substantially traumatize children.<sup>17</sup> Younger immigrant children in particular experience “significant emotional harm” and “significant mental health distress”<sup>18</sup> when separated from a parent. Pediatric health experts have also found that parent-child separations can deteriorate the trust children have in their parents.<sup>19</sup> Moreover, in order to mitigate the harm of separation, in cases where either the parenting youth or their children is likely to require an extended period of hospitalization, ORR should place the parenting youth or their children in an ORR facility as close as possible to where the medical care is provided to allow for regular in-person visitation where possible.<sup>20</sup>

We also recommend that ORR amend § 410.1108(a)(3) to include critical language from the Unaccompanied Children Program Policy Guide. Section 1.2.7 states: “[t]he separation of an [unaccompanied child] from his or her siblings or from his or her child requires prior authorization of ORR.”<sup>21</sup> This prior authorization requirement serves as a critical accountability and oversight mechanism and ensures that a provider cannot unilaterally decide to separate an unaccompanied youth from their children without ORR approval. The Final Rule should include this requirement, and also require immediate notification of the parenting youth’s attorney and their Child Advocate, if one has been appointed.

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<sup>17</sup> Sarah A. Maclean, et al., *Characterization of the mental health of immigrant children separated from their mothers at the U.S.–Mexico border*, PSYCHIATRY RESEARCH 286, Apr. 2020, <https://projectlifeline.us/wp-content/uploads/2020/09/Mental-Health-of-Separated-Migrant-Children.pdf>.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> Julie Linton, *Testimony of Julie M. Linton, MD, FAAP, on Behalf of the American Academy of Pediatrics, Before the U.S. Senate Committee on the Judiciary*, (Mar. 6, 2019), <https://www.judiciary.senate.gov/imo/media/doc/Linton%20Testimony.pdf>.

<sup>20</sup> These requirements align with the federal government’s obligations under the recently proposed Settlement Agreement in *Ms. L v. U.S. Immigration and Customs Enforcement*, a lawsuit brought on behalf of parents to challenge the Trump Administration’s Zero Tolerance and related family separation policies. Proposed Settlement Agreement, *Ms. L v. ICE*, Case No. 18-cv-00428 (S.D. Cal. Oct. 16, 2023), ECF No. 711-1, pp. 27, 35. The *Ms. L* Settlement Agreement, which has been preliminarily approved by the court, permits the Department of Homeland Security to separate a parent from their child on the basis of the parent’s hospitalization, only where “the needs, policies, and/or restrictions of the hospital or other care facility” require separation. *See id.* at 35; Order Granting Preliminary Approval of Proposed Settlement; Preliminarily Certifying Settlement Classes; Approving Class Notice, *Ms. L v. ICE*, Case No. 18-cv-00428 (S.D. Cal. Oct. 24, 2023), ECF No. 717. Moreover, the Settlement Agreement states that the parent is entitled to reunification with their child once the parent is released from the hospital. Proposed Settlement Agreement, *Ms. L v. ICE*, ECF No. 711-1, p. 35. The Settlement Agreement also requires that “[a]ny separated child...be placed in an ORR facility as close as possible to where the parent or Legal Guardian is receiving medical care if ORR has sufficient beds available within the demographic area to accommodate the child.” *Id.*

<sup>21</sup> U.S. Dep’t of Health & Hum. Servs., Admin. of Child. & Fams., Office of Refugee Resettlement, *Unaccompanied Children Program Policy Guide: Section 1.2.7 Placing Family Members*, <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1#1.2.7> (last updated Nov. 14, 2023).

*Sections 410.1108(a) and 410.1108(a)(3) lack necessary due processes protections and oversight*

Section 410.1108(a)(3) would allow ORR to separate an unaccompanied parenting youth from their children and transfer the child to another facility if the parenting youth 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).”<sup>22</sup> This standard contravenes ORR’s child welfare mandate and state child welfare standards aimed at protecting parental rights and advancing children’s best interests. The right of parents to the care and custody of their children is a fundamental right protected by the Constitution and the child welfare laws of all 50 states.<sup>23</sup> In addition, every state, the District of Columbia, and Puerto Rico require courts to consider the “best interests of the child” when making “placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights.”<sup>24</sup> The “importance of family integrity and preference for avoiding removal of the child from his/her home” is one of the most frequently stated guiding principles in state statutes setting forth factors to consider in any best interests analysis.<sup>25</sup> As HHS has explained, state child welfare agencies generally do not consider removal of a child from the care and custody of their parent absent an “immediate danger” to the child’s safety.<sup>26</sup>

Rather than conform with state child welfare laws protecting the best interests of children and parental rights, the Proposed Rule would permit ORR to remove children from their parent based merely on an *allegation* of abuse and neglect, even if it is not supported by the evidence. Such a standard fails to advance the best interests of either the unaccompanied, parenting youth or their children, fails to protect the constitutional rights of parenting youth to the care and custody of their children, and could cause harm to children from an unnecessary separation. We strongly urge the agency to change the regulations to conform to the “immediate danger” standard. Specifically, we recommend that ORR amend § 410.1108(a)(3) to state: “An adjudication using the standard of clear and convincing evidence determines the unaccompanied, parenting youth poses an immediate danger to their children’s safety, and that the risk cannot be mitigated by care provider staff, for example, by providing additional support to the unaccompanied, parenting youth or their children.”

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<sup>22</sup> See *supra* note 1 at 68984.

<sup>23</sup> *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (holding that the Due Process Clause of the Fourteenth Amendment “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children” and explaining that this right is “perhaps the oldest of the fundamental liberty interests recognized by [the] Court.”).

<sup>24</sup> U.S. Dep’t of Health & Hum. Servs., Admin. of Child. & Fams., Children’s Bureau, *Child Welfare Information Gateway: Determining the Best Interests of the Child* (Mar. 2016), [https://www.childwelfare.gov/pubpdfs/best\\_interest.pdf](https://www.childwelfare.gov/pubpdfs/best_interest.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> U.S. Dep’t of Health & Hum. Servs., Admin. of Child. & Fams., Children’s Bureau, *How the Child Welfare System Works*, 4, (Oct. 2020), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf>.

*ORR must ensure that unaccompanied, parenting youth are afforded due process, including the right to counsel, before their children are removed from their care*

Moreover, the proposed regulations fail to ensure that a parenting youth is afforded an opportunity for a hearing before an independent adjudicator before they are separated from their children, in contravention of the parenting youth's due process rights. The U.S. Supreme Court has held that in cases of alleged abuse and neglect, parents are "constitutionally entitled [under the Due Process Clause] to a hearing on their fitness before their children are removed from their custody."<sup>27</sup> Accordingly, in cases where state child welfare agencies remove children from their parent's care, parents are entitled to a prompt hearing before an independent judge, often within 48 hours.<sup>28</sup> At these hearings, parents are able to present evidence, and the judge determines where the children will temporarily be placed pending court proceedings. A fact-finding adjudicatory hearing is later held where the parent and the state agency may present evidence, and the court determines whether the alleged maltreatment occurred and whether the court should continue to be involved.<sup>29</sup> Additionally, the vast majority of states appoint counsel for parents, given the parents' fundamental right to the care and custody of their children.<sup>30</sup> These procedural protections serve a critical function in ensuring that parents have an opportunity to be heard before their children are removed from their care and in preventing wrongful removals, and ORR should ensure that a parenting youth is not separated from their children without access to these or equivalent protections. As we explain below, we do not believe ORR has the authority to establish such protections within the agency in a manner that comports with the parenting youth's constitutionally protected rights, especially given the high risk of wrongful separation based on the subjective judgment of facility staff. Instead, the agency should, in the rare case of immediate danger to the children of an unaccompanied parenting youth in custody, turn to states to investigate and if necessary, adjudicate the rights of the unaccompanied parenting youth and their children.

Generally, most families become involved with state child welfare systems due to a report of suspected child abuse or neglect; these reports are often made pursuant to mandatory reporting obligations.<sup>31</sup> Increasingly, experts in child welfare and Congress have recognized that: (1) the vast majority of "neglect" allegations arise from situations related to living in impoverished communities,<sup>32</sup> or of implicit bias or explicit racism from government workers who are quick to identify "neglect" in families of color,<sup>33</sup> and (2) even when children are at risk of harm while

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<sup>27</sup> *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

<sup>28</sup> See generally U.S. Dep't of Health & Hum. Servs., Admin. of Child. & Fams., Children's Bureau, *Child Welfare Information Gateway: Understanding Child Welfare and the Courts* (Oct. 2016), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf>.

<sup>29</sup> *Id.*

<sup>30</sup> Vivek Sankaran, John Pollock, *A National Survey on a Parent's Right to Counsel in State-Initiated Dependency and Termination of Parental Rights Cases*, National Coalition for a Civil Right to Counsel, (Oct. 27, 2016), [http://civilrighttocounsel.org/uploaded\\_files/219/Table\\_of\\_parents\\_\\_RTC\\_in\\_dependency\\_and\\_TPR\\_cases\\_FINAL.pdf](http://civilrighttocounsel.org/uploaded_files/219/Table_of_parents__RTC_in_dependency_and_TPR_cases_FINAL.pdf).

<sup>31</sup> See *supra* note 27 at 3.

<sup>32</sup> See, e.g., U.S. Dep't of Health & Hum. Servs., Admin. of Child. & Fams., Children's Bureau, *Separating Poverty from Neglect in Child Welfare*, (Feb. 2023), <https://www.childwelfare.gov/pubPDFs/bulletins-povertyneglect.pdf>.

<sup>33</sup> See, e.g., Dorothy Roberts, *How Racial Bias Facilitated the US Child Welfare System's Targeting of Black Communities*, (Apr. 2022), LitHub, <https://lithub.com/how-racial-bias-facilitated-the-us-child-welfare-systems-targeting-of-black-communities/>; Sheila

living with a parent, it is often better for their long-term outcomes for them to remain with the parent while the family receives services rather than to separate the children from the parent.<sup>34</sup> In light of these factors, the judicial oversight and due process rights set forth in state laws become all the more important for protecting the rights of children at risk of separation from parents.

Because ORR staff and care facility staff are required to report suspected abuse and neglect to state child welfare agencies pursuant to state mandatory reporting obligations, a state child welfare agency should respond to an allegation by ORR of abuse and neglect by a parenting youth in state-licensed ORR custody, engage in an investigation, and initiate court proceedings regarding the children if there is immediate danger to the children's safety. In these cases, the parenting youth will be afforded an opportunity to be heard through the state child welfare system, and there will be independent judicial oversight of the decision to separate. However, in cases where state child welfare agencies are notified but do not intervene, ORR must otherwise ensure that the parent's due process rights are protected. ORR cannot remove children from a parenting youth without ensuring an opportunity for a hearing in state court with all the due process protections that follow, including access to counsel.

*ORR must make reasonable efforts to prevent separation and facilitate prompt reunification of families*

As currently written, § 410.1108 also has no provisions to ensure that ORR make reasonable efforts to prevent separation and to facilitate prompt reunification of parenting youth and their children when separation is no longer necessary. The regulations should be amended to require ORR to make such reasonable efforts, in alignment with federal and state law regarding the obligations of state child welfare agencies. Laws in all 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands require that state child welfare agencies make reasonable efforts to provide services and supports to prevent the removal of children from their home or to help families remedy the conditions that brought the children and family into the child welfare system so that the family can be reunited.<sup>35</sup> In 2018, the Family First Prevention Services Act (FFPSA) was signed into federal law with the specific intention to decrease the removal of children—including children subjected to maltreatment—from their families. The FFPSA makes federal funding available for preventative services for children who are at risk of being removed from their families and placed into foster care—in other words, federal funds can be applied toward services designed to keep children with their families even in situations where there is a history or risk of abuse and neglect by the parent.<sup>36</sup>

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D. Ards, et al., *Racialized Perceptions and Child Neglect*, Child and Youth Services Review, (Aug. 1, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3418824/pdf/nihms-370376.pdf>.

<sup>34</sup> Family First Prevention Services Act, 42 U.S.C. § 622 (2018); *The Family First Prevention Services Act*, Nat'l Conf. for State Legislatures, (June 27, 2019), <https://www.ncsl.org/human-services/family-first-prevention-services-act>.

<sup>35</sup> U.S. Dep't of Health & Hum. Servs., Admin. of Child. & Fams., Children's Bureau, *Child Welfare Information Gateway: Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, (Sept. 2019), <https://www.childwelfare.gov/pubPDFs/reunify.pdf>.

<sup>36</sup> Family First Prevention Services Act, 42 U.S.C. § 622 (2018); *The Family First Prevention Services Act*, Nat'l Conf. for State Legislatures, (June 27, 2019), <https://www.ncsl.org/human-services/family-first-prevention-services-act>.

Similarly, ORR should be required to make all reasonable efforts to minimize the separation of a parenting youth from their children, including ensuring the parenting youth and their children have access to the services they need to safely reunify as soon as possible. Such funding and services should be utilized to mitigate possible harm and danger to children and expedite reunification of separated parenting youth and their children. We recommend that § 410.1108(a)(3) include a provision to require ORR to make such reasonable efforts to prevent removal and facilitate reunification whenever possible.

It is particularly important that ORR add the above language to the Final Rule and to ensure family integrity and prevent unjust family separations, in light of the long history of immigrants and people of color in the U.S. enduring family separations at the hands of government officials. Under past and current U.S. immigration policies, the federal government has separated families unnecessarily and even punitively to attempt to deter migration. Moreover, immigrant parents and parents of color in this country are routinely separated from their children under paternalistic child welfare policies or because of criminalization and mass incarceration.<sup>37</sup> The right of a parent to the care and custody of their children is protected by the U.S. Constitution,<sup>38</sup> and the rights of unaccompanied, parenting youth must be equally protected.

*Section 410.1108 should include provisions ensuring that unaccompanied, parenting youth have access to counsel when making decisions that impact the parenting youth's and their children's rights*

Proposed § 410.1108(a)(2) allows for an unaccompanied, parenting youth to request “alternate placement for the child of the unaccompanied child.” Unaccompanied, parenting youth should be as informed as possible in making decisions about their children and even more so when it involves separation, as separation could have unintended consequences such as barriers to reunification. Therefore, ORR should ensure that parenting youth have an opportunity to consult with counsel specializing in the rights of unaccompanied children prior to making a decision to authorize an alternative placement for their children that would result in the parenting youth's separation from the child. In addition, ORR should be required to document, to the extent practicable, and follow the parenting youth's wishes for their child's placement. Requiring such documentation will ensure accountability to prevent improper separations.

Proposed § 410.1108(b)(2) requires care providers to apply on behalf of U.S. citizen children of unaccompanied, parenting youth for government benefits for which the children are eligible. Again, unaccompanied, parenting youth should be afforded an opportunity to consult

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<sup>37</sup> Christie Renick, *The Nation's First Family Separation Policy*, THE IMPRINT, (Oct. 9, 2018), <https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431>; American Friends Service Committee, *Worried about family separation? It's time to look at the prison system*, (Jul. 9, 2018), <https://afsc.org/news/worried-about-family-separation-its-time-look-prison-system>; Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME, (Mar. 17, 2021), <https://time.com/5946929/child-welfare-black-families/>.

<sup>38</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (holding that the Due Process Clause of the Fourteenth Amendment “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children” and explaining that this right is “perhaps the oldest of the fundamental liberty interests recognized by [the] Court.”).

with counsel before applying for government benefits for their children so that they can be fully informed and advised of any potential legal implications or consequences.

## **7. Guarantee access to prenatal and postnatal care**

### **Comment on Proposed Rule 410.1307, “Healthcare services”:**

ORR recognizes that the provision of health care to children in custody is “foundational to their health and wellbeing and to supporting their childhood development.”<sup>39</sup> Access to prenatal and postnatal care, including appropriate access to physicians, nurses, midwives, and doulas,<sup>40</sup> is a critical component of fulfilling ORR’s commitment to the health of youth in its care. These reproductive health care services are especially important for pregnant and parenting youth, because pregnancy in adolescence is associated with a higher risk of adverse medical outcomes for both the parent and child.<sup>41</sup>

Section 410.1307(b) provides a list of services for which care providers are responsible, such as initial and annual medical examinations, immunizations, administration of prescribed medications and special diets, mental health interventions, and more. Adding prenatal and postnatal care to this list would ensure that care providers understand their specific duties toward pregnant and parenting youth.

We recommend ORR modify the list of services in § 410.1307(b) to state that care providers shall be responsible for “prenatal and postnatal care” for unaccompanied children.

## **8. Protect youth’s privacy in health care decisions**

### **Comment on Proposed Rule 410.1307, “Healthcare services”:**

Numerous health professional organizations, including the American Academy of Pediatrics, agree that access to confidential reproductive health care is critical to improving the health of young people.<sup>42</sup> Youth in ORR custody must be able to decide for themselves whether or not to share their health care information with others, such as their parent, guardian, or sponsor.

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<sup>39</sup> See *supra* note 1 at 68945.

<sup>40</sup> Doula care can provide culturally appropriate support tailored to the unique needs of parenting youth, and doula care is associated with a lower rate of birth complications. Emily Adams, *Promoting Maternal and Child Health Through State Medical Coverage for Doula Care*, Zero to Three, (2022), <https://www.zerotothree.org/wp-content/uploads/2022/08/ZTT-Doula-Brief-FINAL-8-4-22.pdf>; U.S. Dep’t of Health and Human Servs., Office of Health Policy, *Issue Brief: Doula Care and Maternal Health: An Evidence Review* (Dec. 13, 2022), <https://aspe.hhs.gov/sites/default/files/documents/dfcd768f1caf6fabf3d281f762e8d068/ASPE-Doula-Issue-Brief-12-13-22.pdf>.

<sup>41</sup> Marvi V Maheshwari, et al., *Maternal and Neonatal Outcomes of Adolescent Pregnancy: A Narrative Review*, CUREUS 14(6), (June 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9282583/>.

<sup>42</sup> American Academy of Pediatrics Committee on Adolescence, *The Adolescent’s Right to Confidential Care When Considering Abortion*, PEDIATRICS 139(2), (Feb. 2017), [http://publications.aap.org/pediatrics/article-pdf/139/2/e20163861/1061444/peds\\_20163861.pdf](http://publications.aap.org/pediatrics/article-pdf/139/2/e20163861/1061444/peds_20163861.pdf).

ORR should modify the Proposed Rule to integrate the confidentiality requirements contained in the September 2020 Policy Memorandum on Medical Services Requiring Heightened ORR Involvement.<sup>43</sup> We recommend the final rule add a clause (e) in § 410.1307, stating that: “ORR federal staff and care providers shall not communicate information about a UC’s pregnancy (including the fact of the pregnancy) or decision whether to have an abortion (before or after the abortion), without the UC’s informed consent, to individuals other than necessary staff members or the UC except in emergency situations when the UC is unable to communicate pregnancy-related information themselves.”<sup>44</sup>

As ORR has already recognized, pregnancy and abortion-related information may be disclosed to an applicant or approved sponsor *only* in specific circumstances: (1) “regarding a serious health complication arising from pregnancy, birth, or abortion that ORR finds in good faith the UC may experience or require follow-up care to address after having been transferred to the custody of that applicant or approved sponsor”; or, (2) “ORR federal staff has found in good faith that ORR must communicate the information to confirm that the applicant or approved sponsor can provide the financial and emotional support needed by the UC associated with carrying the pregnancy to term, giving birth, and/or parenting.”<sup>45</sup> ORR should, in the Final Rule, adopt this language in the proposed subsection (e) in § 410.1307 with the important caveat of requiring the youth’s informed consent before this information is shared.

We encourage ORR to modify the Proposed Rule to ensure young people’s privacy is protected while they are in custody and they are not deterred from accessing reproductive health care.

### Conclusion

We thank ORR for the opportunity to comment on the Proposed Rule. We are encouraged by the provisions that honor the unique needs of pregnant and parenting youth. The changes we offer to the Proposed Rule would help ORR achieve its goal of providing the specialized care young people need while they wait to be united with their families and communities in the United States and would further protect the reproductive justice rights of all youth in ORR custody. We urge ORR to adopt our recommendations and improve protections for youth in the Final Rule.

### Summary of Recommendations

Proposed Rule Section	Recommendations
§ 410.1001 “Definitions” (family planning services)	<ul style="list-style-type: none"> <li>Amend the list of family planning services to include abortion.</li> </ul>

<sup>43</sup> U.S. Dep’t of Health & Hum. Servs., Admin. of Child. & Fams., Office of Refugee Resettlement, *Policy Memorandum: Medical Services Requiring Heightened ORR Involvement*, (Sept. 29, 2020), [https://www.acf.hhs.gov/sites/default/files/documents/orr/garza\\_policy\\_memorandum.pdf](https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf).

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.*

	<ul style="list-style-type: none"> <li>● Change “pregnancy testing and counseling” in the list of family planning services to “pregnancy testing and non-directive pregnancy counseling.”</li> <li>● Add “comprehensive, evidence-based, medically accurate sex education” to the list of family planning services.</li> </ul>
<p>§ 410.1001 “Definitions” (Medical services requiring heightened ORR involvement)</p>	<ul style="list-style-type: none"> <li>● Clarify the narrow purpose of including abortion in “Medical services requiring heightened ORR involvement.”</li> </ul>
<p>§ 410.1103 “Considerations generally applicable to the placement of an unaccompanied child”</p>	<ul style="list-style-type: none"> <li>● Add a new subsection (h) in § 410.1103 that explains pregnant and parenting youth “shall be given priority to community-based care placements” or “transitional and long-term home care.”</li> </ul>
<p>§ 410.1108 “Placement and Services for Children of Unaccompanied Children”</p>	<ul style="list-style-type: none"> <li>● Amend the title to state: “Placement and services for children of unaccompanied <del>children</del>, <b>parenting youth children</b>”</li> <li>● Add, to the beginning of the section, an affirmative statement recognizing a parenting youth’s “right to make informed choices about their child’s care, including, but not limited to, decisions about the child’s health care, diet, clothing, hygiene, religious and cultural practices, education, recreation, and daily activities.”</li> <li>● Amend § 410.1108(a) to state: “Placement. If unaccompanied, parenting youth <del>children</del> and their children are referred together to ORR, ORR shall place the unaccompanied, parenting youth children and their children in the same facility, <del>except in unusual or emergency situations</del>. <b>ORR must make all reasonable efforts to prevent unnecessary separation, and where separation is necessary, to facilitate reunification as soon as possible.</b>”</li> <li>● Amend § 410.1108(b) to state: “<b>Separation. The separation of an unaccompanied, parenting youth from their children requires prior authorization of ORR. ORR should immediately notify the unaccompanied, parenting youth’s legal services provider and Child Advocate, if one has been appointed, of any separation. ORR may only separate an unaccompanied, parenting youth from their child <del>except in unusual or in</del> emergency situations where</b></li> </ul>

**keeping the parenting youth and child together poses an immediate danger to the children’s safety. Unusual or Emergency situations that may but do not necessarily pose an immediate danger to the children’s safety include, but are not limited to:**

(1) The unaccompanied, **parenting youth child or their children** requires alternate placement due to hospitalization or need for a specialized care or treatment setting that **requires separation of the unaccompanied, parenting youth from their children in order to receive treatment that cannot provide appropriate care for the child of the Unaccompanied child;**

(2) **After consulting with counsel specializing in the rights of unaccompanied children,** the unaccompanied, **parenting youth child** requests alternate placement for their child and **ORR agrees to document and, to the extent practicable, follow the parent’s wishes for their child’s placement; of the unaccompanied child;** or

(3) **An adjudication using the clear and convincing evidence standard determines that the unaccompanied, parenting youth child poses an immediate danger to their children’s safety, and that the risk cannot be mitigated by care provider staff, for example, by providing additional support to the unaccompanied, parenting youth or their child. 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).”**

- Amend § 410.1108(c)(2) to state: “(2) U.S. citizen children of unaccompanied, parenting youth 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 **after consulting with the unaccompanied parenting youth’s legal services provider.** Utilization of those benefits and services shall be exhausted to the greatest extent practicable before ORR-funded services are utilized.”

<p>§ 410.1307 “Health care services”</p>	<ul style="list-style-type: none"> <li>● Amend the list of services in § 410.1307(b) to state that care providers shall be responsible for “prenatal and postnatal care.”</li> <li>● Add a new subsection (e) to § 410.1307 to incorporate certain requirements from the “Notification” section of the Sept. 29, 2020 Policy Memorandum on Medical Services Requiring Heightened ORR Involvement, and add requirement of obtaining the youth’s informed consent prior to disclosure.</li> </ul>
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Sincerely,

Abortion on Our Own Terms  
 Acacia Center for Justice  
 Access Reproductive Justice  
 Advocates for Basic Legal Equality, Inc (ABLE)  
 Alianza Americas  
 American Immigration Council  
 Americans for Immigrant Justice  
 Angry Tias and Abuelas of the RGV  
 Asian Pacific Institute on Gender-Based Violence  
 Avow Texas  
 Black Women for Wellness Action Project  
 Capital Area Immigrants' Rights (CAIR) Coalition  
 Center for Gender & Refugee Studies  
 Center for Law and Social Policy  
 Central American Resource Center - CARECEN- of California  
 Church World Service  
 Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR)  
 Community Legal Services in East Palo Alto  
 Empowering Pacific Islander Communities  
 Essential Access Health  
 Florence Immigrant and Refugee Rights Project  
 Freedom Network USA  
 Frontera Fund  
 Galveston-Houston Immigrant Representation Project  
 Grassroots Leadership  
 HIAS Pennsylvania  
 Houston Immigration Legal Services Collaborative  
 Human Rights Initiative of North Texas  
 If/When/How: Lawyering for Reproductive Justice  
 Immigration Center for Women and Children  
 Immigrant Defenders Law Center  
 International Rescue Committee  
 Jane's Due Process  
 JFCS Pittsburgh

Justice in Motion  
Justice Action Center  
Juvenile Law Center  
Kids in Need of Defense (KIND)  
La Raza Centro Legal  
Law Office of Daniela Hernandez Chong Cuy  
Law Office of Helen Lawrence  
Law Office of Miguel Mexicano PC  
Lawyers for Good Government  
Legal Services for Children  
Los Angeles Center for Law and Justice  
LSN Legal LLC  
Martinez & Nguyen Law, LLP  
Maternal and Child Health Access  
Michigan Immigrant Rights Center  
Migration Matters  
MYA Network  
National Immigrant Justice Center  
National Immigration Law Center (NILC)  
National Latina Institute for Reproductive Justice  
National Resource Center on Domestic Violence  
OneAmerica  
PHR Student Advisory Board  
Project Lifeline  
Rocky Mountain Immigrant Advocacy Network  
Safe Passage Project  
South Asian Public Health Association  
South Dakota Voices for Peace  
South Texans for Reproductive Justice  
Sueños Sin Fronteras de Tejas  
Sunita Jain Anti-Trafficking Initiative at Loyola Law School  
Texas Civil Rights Project  
The Community Law Office  
The Immigration Project  
The National Domestic Violence Hotline  
UC Davis Immigration Law Clinic  
UCSF Bixby Center for Global Reproductive Health  
United We Dream  
VECINA  
Women's Refugee Commission  
Witness at the Border  
Young Center for Immigrant Children's Rights

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