

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Parts 212 and 236**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**45 CFR Part 410**

**RIN 1653-AA75, 0970-AC42**

**Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children**

**AGENCY:** U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS); U.S. Customs and Border Protection (CBP), DHS; Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** This final rule amends regulations relating to the apprehension, processing, care, custody, and release of alien juveniles. The rule replaces regulations that were promulgated in 1988 in response to a lawsuit filed in 1985 against the Attorney General and the Department of Justice's legacy U.S. Immigration and Naturalization Service (INS), in *Flores v. Meese*. In January 1997, the parties reached a comprehensive settlement agreement, referred to as the *Flores* Settlement Agreement (FSA). The FSA, as modified in 2001, provides that it will terminate forty-five days after publication of final regulations implementing the agreement. Since 1997, intervening legislation, including the Homeland Security Act of 2002 (HSA) and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), have significantly altered the governing legal authorities relating to the detention, custody, processing, and release of alien juveniles. This final rule adopts regulations that implement the relevant and substantive terms of the FSA, consistent with the HSA and the TVPRA, with some modifications discussed further below to reflect intervening statutory and operational changes while still providing similar substantive protections and standards. The final rule satisfies the basic purpose of the FSA in ensuring that all alien juveniles in the government's custody pursuant to its authorities under the immigration laws are treated with dignity, respect, and special concern for their particular vulnerability as minors, while doing so in a manner that is workable in light of subsequent statutory, factual, and operational

changes and builds on the government's extensive experience working under the FSA. Most prominently, in response to great difficulty working under the state-licensing requirement for family residential centers, the final rule creates an alternative to the existing licensed program requirement for ICE family residential centers, so that ICE may use appropriate facilities to detain family units together during their immigration proceedings, consistent with applicable law.

**DATES:** Effective October 22, 2019.

**ADDRESSES:** Comments and related materials received from the public, as well as background documents mentioned in this preamble as being available in the docket, are part of docket DHS Docket No. ICEB-2018-0002. For access to the online docket, go to <https://www.regulations.gov> and enter this rulemaking's eDocket number: DHS Docket No. ICEB-2018-0002 in the "Search" box.

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**I. Table of Abbreviations**

ACF—Administration for Children and Families  
 BPA—U.S. Border Patrol Agent  
 CBP—U.S. Customs and Border Protection  
 DHS—U.S. Department of Homeland Security  
 DOJ—U.S. Department of Justice  
 EOIR—Executive Office for Immigration Review  
 FRC—Family Residential Center  
 FSA—*Flores* Settlement Agreement  
 HHS—U.S. Department of Health and Human Services  
 HSA—Homeland Security Act of 2002  
 ICE—U.S. Immigration and Customs Enforcement  
 IIRIRA—Illegal Immigration Reform and Immigrant Responsibility Act of 1996  
 INA—Immigration and Nationality Act  
 INS—Immigration and Naturalization Service  
 JFRMU—Juvenile and Family Residential Management Unit  
 OFO—Office of Field Operations, U.S. Customs and Border Protection  
 OMB—Office of Management and Budget  
 ORR—Office of Refugee Resettlement, U.S. Department of Health and Human Services  
 PREA—Prison Rape Elimination Act of 2003  
 TVPRA—William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008  
 UAC(s)—Unaccompanied Alien Child(ren)  
 USCIS—U.S. Citizenship and Immigration Services  
 USBP—U.S. Border Patrol, U.S. Customs and Border Protection  
 YTD—Year to Date

## II. Executive Summary

### A. Purpose of the Regulatory Action

On September 7, 2018, the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS), (the “Departments”) published a notice of proposed rulemaking (NPRM or proposed rule) that would amend regulations related to the Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children. See Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children; Proposed Rule, 83 FR 45486 (Sept. 7, 2018). The proposed rule provided a 60-day public comment period ending on November 6, 2018.

This final rule adopts the proposed rule, with some changes in response to comments. The final rule parallels the relevant and substantive terms of the *Flores* Settlement Agreement (FSA), with changes as are necessary to implement closely-related provisions of the Homeland Security Act of 2002 (HSA), Public Law 107–296, sec. 462, 116 Stat. 2135, 2202, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110–457, title II, subtitle D, 122 Stat. 5044.

This final rule also takes into account changes in factual circumstances since the time the FSA was approved in 1997 as well as extensive experience over the past twenty years operating the immigration system under the FSA. The rule thus reflects the operational environment and ensures that the regulations accomplish a sound and proper implementation of governing Federal statutes—including statutes requiring DHS to retain custody of aliens arriving at or crossing our borders without inspection during the pendency of immigration proceedings. It carefully considers public comments, and sets forth for DHS a sustainable operational model of immigration enforcement, and for HHS, codifies existing policies, procedures, and practices related to the temporary care and custody of UACs.

For example, one shift since the FSA entered into force in 1997 has been the 2015 judicial interpretation of the agreement as applying to accompanied minors, *i.e.*, juveniles encountered with their parents or legal guardians. DHS strongly disagrees with that interpretation and disagrees that the FSA provisions were suited to handling the challenging circumstances that are presented—in exponentially more cases than in 1997—when aliens are apprehended in family units. Indeed, the Federal courts have agreed that the

FSA was not designed to address the current-day circumstances presented by accompanied minors. See *Flores*, 828 F.3d 898, 906 (9th Cir. 2016) (“the parties gave inadequate attention to some potential problems of accompanied minors”). The FSA’s application to accompanied minors has created a series of operational difficulties for DHS, most notably with respect to a state-licensing requirement for an ICE Family Residential Center (FRC) in which such parents/legal guardians may be housed together with their children during immigration proceedings, the need for custody of parents and accompanied minors as required by the immigration laws in certain circumstances, and avoiding the need to separate families to comply with the FSA when immigration custody is necessary for a parent.

Additionally, changes to the operational environment since 1997, as well as the enactment of the HSA and the TVPRA, have rendered some of the substantive terms of the FSA outdated or unsuited to current conditions at the border, similarly making simultaneous compliance with the HSA, the TVPRA, other immigration laws, and the FSA problematic without modification. These provisions are designed to implement the substantive and underlying purpose of the FSA, by ensuring that alien juveniles detained by DHS pursuant to the immigration laws, and UACs who are transferred to the temporary care and custody of HHS, are provided protections that are substantively parallel to protections under the FSA, taking into account intervening developments and changed circumstances. The Departments have also considered comments from the public, and this rule incorporates some adjustments from the proposed regulations based on those comments. The primary purpose of this rule is to codify the purposes of the FSA in regulations, namely, to establish uniform standards for the custody and care of alien juveniles during their immigration proceedings and to ensure they are treated with dignity and respect. The rule accordingly implements the FSA.

#### Summary of Key Provisions of the Final Rule

As part of the process of codifying the purpose of the FSA into regulations, the final rule clarifies and improves certain policies and practices related to:

- Parole

In the NPRM, DHS proposed to amend 8 CFR 212.5(b), *Parole of aliens into the United States*, by removing an

internal cross-reference to 8 CFR 235.3(b). Eliminating that cross-reference is required to clarify that the provisions in § 235.3(b) governing the parole of aliens in expedited removal proceedings (*i.e.*, those pending a credible fear determination or who have been ordered removed in the expedited removal process but still await removal) apply to all such aliens, including minors in DHS custody, and not just adults. The current cross-reference to § 235.3(b) within § 212.5(b) is confusing because it suggests, incorrectly, that the more flexible parole standards in § 212.5(b) might override the provisions in § 235.3(b) that govern parole when any alien, including a minor, is in expedited removal proceedings.

Many commenters expressed concern about a more restrictive parole standard that would allow minors in expedited removal proceedings who have not yet been found to have a credible fear of persecution (or who have been found to lack such a fear) to be paroled only on the basis of medical emergency or law enforcement necessity, the same standards applicable to adult aliens in expedited removal proceedings, while their credible fear claim remains pending.

Many commenters expressed concern about this standard, but it draws from the statute, which imposes a uniquely strong detention mandate for aliens in this cohort: such aliens “shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, *until removed*.” INA 235(b)(1)(B)(iii)(IV). Some commenters stated that accompanied minors would no longer be eligible for parole, which is incorrect, as they will be eligible under the same standard as adults in the same position. Additionally, other commenters mistakenly expressed that the FSA guaranteed parole, which it does not, nor does it provide a standard for parole. ICE will continue to exercise its parole authority, on a case-by-case basis, in appropriate circumstances, including when a family unit establishes credible fear of persecution or torture. The final rule preamble responds to these misconceptions, and the final regulatory text in § 236.3(j)(4) takes into account respondents’ concerns by stating clearly that parole for minors who are detained pursuant to section 235(b)(1)(B)(ii) of the INA or 8 CFR 235.3(c) will generally serve an urgent humanitarian reason if DHS determines that detention is not required to secure the minor’s appearance before DHS or the immigration court, or to ensure the minor’s safety or the safety of others. DHS may also consider aggregate and

historical data, officer experience, statistical information, or any other probative information in making these determinations.

- Licensing

Under the FSA, facilities that house children must be licensed “by an appropriate State agency to provide residential, group, or foster care services for dependent children.” FSA paragraph 6. The state-licensing requirement is sensible for unaccompanied alien children (UACs), because all States have licensing processes for the housing of unaccompanied juveniles who are by definition “dependent children,” and accordingly the rule does not change that requirement for those juveniles. But the need for the license to come specifically from a “State agency” (rather than a Federal agency) is problematic for DHS now that the FSA has been held in recent years to apply to accompanied minors, including those held at FRCs, because States generally do not have licensing schemes for facilities to hold minors who are together with their parents or legal guardians. The application of the FSA’s requirement for “state” licensing to accompanied minors has effectively required DHS to release minors and—to avoid family separation—their parents from detention in a non-state-licensed facility, even if the parent/legal guardian and child could and would otherwise continue to be detained together during their immigration proceedings, consistent with applicable law, including statutes that require detention in these circumstances pending removal proceedings or to effectuate a removal order. *See, e.g.*, INA 235(b)(1)(B)(iii)(IV).

DHS proposed to define “licensed facility” as an ICE detention facility that is licensed by the state, county or municipality in which it is located. But because most States do not offer a licensing program for family unit detention, DHS also proposed that where state licensing is unavailable, a facility will be licensed if DHS employs an outside entity to ensure that the facility complies with family residential standards established by ICE. Section 236.3(b)(9) requires DHS to employ third parties to conduct audits of FRCs to ensure compliance with ICE’s family residential standards. This rule adopts these provisions as final, and thus eliminates the barrier to the continued use of FRCs by creating a Federal alternative to meet the “licensed facility” definition.<sup>1</sup> The goal is to

provide materially identical standards for these facilities as what the FSA and state licensing would otherwise require, and thus implement the underlying purpose of the FSA’s licensing requirement, and in turn to allow families to remain together during their immigration proceedings in an appropriate environment.

Commenters stated that DHS has previously not shared the results of third-party audits. While ICE has publicly posted the results of all facility inspection reports submitted by third-party contractors within 60 days of inspection since May 2018, these posts have not included results of FRC inspections. *See* Facility Inspections, <https://www.ice.gov/facility-inspections> (last updated Mar. 15, 2019). To directly address the commenters’ concerns, the final rule provides that third-party inspections of FRCs will be posted in the same manner and adds the phrase “DHS will make the results of these audits publicly available” to the definition of “licensed facility.”

Commenters also stated that DHS should not be allowed to self-license detention facilities because current facilities do not have adequate oversight and, as a result, DHS is not currently capable of maintaining clean, humane, and safe detention centers. They cited the Office of the Inspector General, DHS, OIG–18–67 report, *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements* (June 26, 2018) to highlight the deficiencies in the agency’s self-inspections by third-party contractors. However, this report did not examine oversight of the FRCs. As such, it is of limited value in assessing ICE’s oversight of the FRCs. FRCs are subject to a different set of detention standards than other facilities and receive inspections more frequently, and by a larger number of outside entities than those detention centers reviewed in the OIG report. DHS also notes that ICE has already taken several steps to address OIG’s recommendations. The agency’s existing commitment to considering seriously OIG’s recommendations regarding detention facilities and instituting them as appropriate will not change as a result of this final rule. In this final rule, however, DHS has added to the definition of licensed facilities that audits will occur when an FRC opens and regularly going forward. In addition, DHS has added a more thorough explanation of its standards

and inspection processes to address the commenters’ underlying concern, to emphasize the important role third parties play in this process, and to underscore DHS’s commitment to ensuring that individuals in FRCs are indeed held in appropriate conditions and treated with dignity and respect.

The licensing change does not impact CBP facilities. Under the FSA, juveniles are transferred to licensed facilities “in any case in which [DHS] does not release a minor . . . .” FSA paragraph 19. Thus, the only facilities which must be licensed under the FSA are those facilities to which juveniles are transferred following their initial encounter. Facilities at which juveniles are held immediately following their arrest, including CBP holding facilities, are governed by paragraph 12 of the FSA, and are not required to be licensed under the FSA. Accordingly, these facilities are also not included within the definition of “licensed facility” in this rule. DHS notes that CBP facilities are also subject to regular oversight and inspection by entities such as CBP’s Office of Professional Responsibility (OPR), DHS’ Office of Inspector General, DHS’ Office of Civil Rights and Civil Liberties, and the Government Accountability Office.

- Bond Hearings

DHS proposed revisions to § 236.3(m) to state that bond hearings are only required for minors in DHS custody who are in removal proceedings under section 240 of the INA, to the extent permitted by 8 CFR 1003.19. DHS also proposed updating the language regarding bond hearings to be consistent with the changes in immigration law. Several commenters supported or acknowledged that proposed 8 CFR 236.3(m) maintained the process required by FSA paragraph 24(A), while another set of commenters did not explicitly endorse the provision but acknowledged that it provided the protections and processes required by the FSA. Other commenters expressed due process concerns.

DHS agrees with commenters that the proposed regulatory text at 8 CFR 236.3(m) reflects the provisions of the FSA regarding existence of bond redetermination hearings for minors in DHS custody who are in removal proceedings pursuant to INA 240, to the extent permitted by 8 CFR 1003.19. The understanding that the term “deportation hearings” in paragraph 24(A) of the FSA refers to what are now known as removal proceedings has been reiterated throughout the *Flores* litigation. Accordingly, FSA paragraph 24(A) requires bond redetermination

<sup>1</sup> The FSA defines the term “licensed program,” but because DHS does not operate programs outside

of facilities, the new DHS regulations would define the term “licensed facility.” The HHS regulations define the term “licensed program.”

hearings solely for those alien minors in DHS custody who are in removal proceedings under INA 240. Minors who are in expedited removal proceedings are not entitled to bond hearings; rather, DHS may parole such aliens on a case-by-case basis. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (holding that INA 235(b)(1) unambiguously prohibits release on bond and permits release only on parole). Minors in removal proceedings under INA 240 may appeal bond redetermination decisions made by an immigration judge to the Board of Immigration Appeals, in accordance with existing regulations found in 8 CFR 1003.19, and are informed of their right to review. Accordingly, DHS is not amending regulatory provisions regarding the bond provisions for minors based on public comments.

#### Major Commenter Concerns

- Trauma

Many commenters expressed serious concerns about child trauma. Comments focused on the trauma juveniles experience during their dangerous journey to the United States (often at the hands of smugglers and traffickers), trauma associated with experiences in their country of origin, the possibility of government custody-induced trauma in the United States, and in particular trauma caused by detention itself, and the need for trauma-related training and awareness throughout the immigration lifecycle, to include repatriation. Some commenters suggested, incorrectly, that the FSA explicitly prohibits the custody of children entirely and therefore, temporarily detaining family units together is unjustified.

DHS disagrees with the view that the FSA altogether prohibits detention of juveniles (including in family units). The FSA clearly contemplates, allows, and articulates standards for the custody of juveniles in a variety of circumstances. The final rule accordingly allows for the detention of minors as well. Moreover, DHS's experience shows that family units who are released often abscond, and detention is an important enforcement tool, particularly in controlling the border.

DHS acknowledges, however, that detention and custody may have negative impacts for minors and adults, and acknowledges the importance of identifying signs of trauma and ensuring that personnel are properly trained to identify and respond to signs of trauma, particularly among juveniles. DHS notes that this rule does not mandate detention for all family units. On the

contrary, DHS will make and record continuous efforts to release a minor in its custody and, as discussed more fully below, will generally consider paroling minors detained pursuant to INA 235(b)(1)(B)(ii) or 8 CFR 235.3(c) who do not present a safety risk or risk of absconding as serving an urgent humanitarian reason.

Moreover, DHS has adopted rigorous standards for facilities precisely to minimize further negative impacts on minors. DHS mandates training for personnel who regularly interact with minors and UACs during the course of their official duties. For example, ICE Enforcement and Removal Operations (ERO) officers receive training on family units and UACs in the Basic Immigration Enforcement Training Program (BIETP). The BIETP is the basic training for ERO officers and occurs at the beginning of their career.

Additionally, ERO's Field Office Juvenile Coordinators (FOJC) participate in annual training. This annual training focuses on policies, procedures and protocols in accordance with the FSA, HSA, and TVPRA. FOJCs constitute a specialized officer corps whose expertise informs colleagues and leaders often confronting high-profile cases involving UACs and family units. FOJCs liaise with HHS ORR's Federal Field Specialists, who make case-by-case placement decisions. FOJC training covers best practices for case processing, A-file management, docket management, age determination, child interviewing techniques, child development and trauma, screening for human trafficking, transport, the ORR placement process and an overview of FRCs and Family Residential Standards. FRCs are staffed with medical professionals and social workers specially trained to recognize the symptoms of trauma and provide appropriate treatment.

CBP generally employs contracted medical staff, who provide medical screening and appropriate triage to minors and UACs in custody along the southwest border. Where appropriations and funding permits, CBP also employs other contracted staff who are able to address the unique needs of juveniles. Additionally, all Border Patrol agents and CBP officers receive training related to the processing and interviewing of juveniles, screening UACs for trafficking concerns, and the appropriate custodial treatment of juveniles.

Separately, HHS ensures that ORR-funded care provider staff are trained in techniques for child-friendly and trauma-informed interviewing, ongoing assessment, observation, and treatment of the medical and behavioral health

needs of UACs. Care provider staff are trained to identify UACs who have been smuggled (*i.e.*, transported illegally over a national border) and/or trafficked into the United States. Care providers must deliver services that are sensitive to the age, culture, and native language of each child as well.

Each ORR-funded care provider program maintains ORR-approved policies and procedures for interdisciplinary clinical services, including standards on professional licensing and education for staff, according to staff role or discipline. Staff who are required to have professional certifications must maintain licensure through continuing education requirements, and all care provider staff must complete at a minimum 40 hours of training annually.

All UACs in HHS' care participate in weekly individual counseling sessions with trained social work staff, where the provider reviews the child's progress, establishes short term objectives, and addresses developmental and crisis-related needs. Clinical staff may increase these once-a-week sessions if a more intensive approach is needed. If children have acute or chronic mental health illnesses, HHS refers them for mental health services in the community.

UACs participate in informal group counseling sessions at least twice a week, where all children are present. The sessions give UACs who are new to the program the opportunity to get acquainted with staff, other children in HHS care, and the rules of the program. These sessions provide an open forum where everyone has an opportunity to speak. Together, UACs and care providers make decisions on recreational activities and resolve issues affecting the UACs in care.

- Best Interests of the Child

Commenters raised issues regarding what was in the best interests of the child. DHS and HHS recognize that this is the heart of the FSA. Both Departments take seriously their responsibility to provide appropriate care to juveniles, many of whom have recently endured a hazardous journey to the United States. Juveniles are subject to different custody protocols depending upon whether they are unaccompanied or part of a family unit. Under the HSA, responsibility for the apprehension, temporary detention, transfer, and repatriation of UACs is delegated to DHS; whereas the responsibility for coordinating and implementing the care and placement of UACs with sponsors is delegated to HHS.

CBP takes temporary custody of UACs apprehended and encountered at the border, while ICE handles custody transfer and repatriation responsibilities, apprehends UACs in the interior of the country, and represents the Federal Government in removal proceedings. Within 72 hours, UACs in DHS custody are generally transferred into HHS custody, absent exceptional circumstances. Minors who do not meet the statutory definition of a UAC, including accompanied minors who enter the country as part of a family unit, may be placed in FRCs. These FRCs are designed to take into account the best interests of children during custody, pursuant to applicable laws., including by keeping the child with his or her parent(s) as a family unit.

Several commenters suggested, incorrectly, that the FSA prohibits temporary custody of juveniles entirely and that, therefore, detention goes inherently against the best interests of a child. DHS notes that even the authors of the FSA understood some amount of physical custody was going to be necessary and appropriate, as discussed above. The conditions of facilities and shelters that house children in DHS custody are designed to afford a protective environment for the best interests of the child and must adhere to the statutory, regulatory, and court-ordered requirements and standards governing the care and custody of children. FRCs are also designed to allow the child to live with his or her family, and thus to preserve family unity even when custody is warranted. And HHS care-provider facilities undergo rigorous State licensing processes in order to serve as residential child care shelters for the temporary care of UACs. This final rule implements those care and custody requirements and standards in full force.

#### Summary of Changes From the Proposed Rule

Following careful consideration of the public comments received, the Departments have made several modifications to the regulatory text proposed in the NPRM. These changes are:

- Section 212.5(b) now provides that DHS is not precluded from releasing a minor who is not a UAC to someone other than a parent or legal guardian, specifically a brother, sister, aunt, uncle, or grandparent who is not in detention.
- Section 236.3(b)(2) defines *Special Needs Minor*. DHS agrees to remove “retardation” and replace it with “intellectual disability.”
- Section 236.3(b)(9), which defines *Licensed Facility*, requires DHS to employ third parties to conduct audits of FRCs to ensure compliance with ICE’s family residential standards. In response to comments and for full transparency, DHS is adding the phrase “DHS will make the results of these audits publicly available” to the definition. DHS has also included in the definition that audits will occur upon the opening of a facility and on a regular basis thereafter to address comments regarding oversight of current facilities.
  - In § 236.3(b)(11), which defines a *Non-Secure Facility*, DHS agrees with commenters that the intention of the proposed rule was to provide a definition of non-secure when the term was not otherwise defined under the state law where the facility is located. Given commenters’ concerns that the regulatory text was unclear, DHS will clarify the definition in this final rule and add “under state law” to the definition.
    - In § 236.3(f)(1) regarding transfer of UACs from DHS to HHS, DHS agrees to amend the proposed regulatory text to clarify that the reference to 8 U.S.C. 1232(a)(2) refers to the processing of a UAC from a contiguous country. DHS is deleting “subject to the terms of” and replacing it with “processed in accordance with.”
    - In § 236.3(f)(4)(i) regarding the transportation of UACs, DHS is amending the regulatory text to make clear that, as a general matter, UACs are not transported with unrelated detained adults. The two situations described in the regulatory text are limited exceptions to this general rule. DHS is adding the reference to unrelated “detained” adults, for clarity.
    - In § 236.3(g)(1)(i), DHS is amending the procedures applicable to the apprehension and processing of minors or UACs. The regulatory text will be clear that the notices required, including Form I-770, will be provided, read, or explained to all minors and UACs in a language and manner that they understand, not just to those minors believed to be less than 14 or who are unable to understand the notice, as was proposed in the NPRM.
    - In § 236.3(g)(2)(i) regarding DHS custodial care immediately following apprehension, DHS agrees to delete the term “exigent circumstances,” as it is redundant to “emergency.”
    - In § 236.3(i)(4), commenters requested additional language tracking the verbatim text of FSA Ex. 1 paragraph B and C. DHS reiterates that these standards in § 236.3(i)(4) apply to the non-secure, licensed facilities used for housing family units—FRCs.
- Section 236.3(j) and (n) now provide that DHS is not precluded from releasing a minor who is not a UAC to someone other than a parent or legal guardian, specifically a brother, sister, aunt, uncle, or grandparent who is not in detention and is otherwise available to provide care and physical custody.
  - DHS has added new § 236.3(j)(2)–(4) to identify the specific statutory and regulatory provisions that govern the custody and/or release of non-UAC minors in DHS custody based on the type and status of immigration proceedings.
    - DHS has added a new § 236.3(j)(4) to state clearly that the Department will consider parole for all minors who are detained pursuant to section 235(b)(1)(B)(ii) of the INA or 8 CFR 235.3(c), and that paroling such minors who do not present a safety risk or risk of absconding will generally serve an urgent humanitarian reason. Paragraph (j) now also states that DHS takes aggregate and historical data, officer experience, statistical information or any other probative information into account when determining whether release may be appropriate.
    - Section 236.3(o) is amended to clarify that the Juvenile Coordinator’s duty to collect statistics is in addition to the requirement to monitor compliance with the terms of the regulations.
      - In § 410.101, HHS agrees to amend the definition of “special needs minor,” replacing the term “retardation” with “intellectual disability.”
      - In § 410.201(e), HHS agrees with multiple legal advocacy organizations’ analysis that the FSA and TVPRA run in contradiction to each other on the placement of UACs in secure facilities based solely on the lack of appropriate licensed program availability; therefore, ORR is striking the following clause from this section: “. . . or a State or county juvenile detention facility.”
      - In § 410.202, in response to commenters’ concerns, HHS clarifies that it places UACs in licensed programs except if a reasonable person would conclude “based on the totality of the evidence and in accordance with subpart G” that the UAC is an adult.
      - In § 410.203, in response to commenters’ concerns, HHS clarifies that it reviews placements of UACs in secure facilities at least monthly and that the rule does not abrogate any requirements that HHS place UACs in the least restrictive setting appropriate to their age and any special needs.
      - In § 410.302(a), in response to commenters’ concerns, HHS clarifies that the licensed program providing care for a UAC shall make continual efforts at family reunification as long as the

UAC is in the care of the licensed program.

- In § 410.600(a) regarding transfer of UAC, the proposed regulatory text stated that, “ORR takes all necessary precautions for the protection of UACs during transportation with adults.”

However, as ORR does not transport adult aliens, HHS has decided to strike this language from the final rule.

- In § 410.700 HHS is adding the “totality of the evidence and circumstances” for age determinations standards to mirror the DHS standard in compliance with statute. *See* 8 U.S.C. 1232(b)(4).

- In § 410.810(b), HHS declines to place the burden of evidence in the independent internal custody hearings on itself; however, it has modified the rule text to indicate that HHS bears the initial burden of production supporting its determination that a UAC would pose a danger or flight risk if discharged from HHS’ care. The UAC bears the burden of persuading the independent hearing officer to overrule the government’s position, under a preponderance of the evidence standard.

#### B. Legal Authority

The Secretary of Homeland Security derives authority to promulgate these regulatory amendments primarily from the Immigration and Nationality Act (INA or Act), as amended, 8 U.S.C. 1101 *et seq.* The Secretary may “establish such regulations” as he deems necessary for carrying out his authorities under the INA. INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3). In addition, section 462 of the HSA and section 235 of the TVPRA prescribe substantive requirements and procedural safeguards to be implemented by DHS and HHS with respect to unaccompanied alien children (UACs).

Section 462 of the HSA also transferred to the Office of Refugee Resettlement (ORR) Director “functions under the immigration laws of the United States with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization.” 6 U.S.C. 279(a). The ORR Director may, for purposes of performing a function transferred by this section, “exercise all authorities under any other provision of law that were available with respect to the performance of that function to the official responsible for the performance of the function” immediately before the transfer of the program. 6 U.S.C. 279(f)(1).

Consistent with provisions in the HSA, the TVPRA places the

responsibility for the care and custody of all UACs who are not eligible to be repatriated to a contiguous country with the Secretary of Health and Human Services.<sup>2</sup> Prior to the transfer of the program, the Commissioner of Immigration and Naturalization, through a delegation from the Attorney General, had authority “to establish such regulations . . . as he deem[ed] necessary for carrying out his authority under the provisions of this Act.” INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3) (2002); 8 CFR 2.1 (2002). In accordance with the relevant savings and transfer provisions of the HSA, *see* 6 U.S.C. 279, 552, 557; *see also* 8 U.S.C. 1232(b)(1), the ORR Director now possesses the authority to promulgate regulations concerning ORR’s administration of its responsibilities under the HSA and TVPRA, and the FSA at paragraph 40 (as modified) specifically envisions promulgation of such regulations.

#### C. Costs and Benefits

This rule implements the FSA by establishing uniform standards for the custody and care of alien juveniles during their immigration proceedings and to ensure they are treated with dignity and respect. The rule adopts regulatory measures that materially parallel the FSA standards and protections, and also by codifying the current requirements for complying with the FSA, the HSA, and the TVPRA, and respond to changed factual and operational circumstances.

U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) encounter minors and UACs in different manners. CBP generally encounters UACs and minors at or near the border. In Fiscal Year (FY) 2017, CBP apprehended 113,920 juveniles.<sup>3</sup> In FY 2018, CBP apprehended 107,498 juveniles. Generally, ICE encounters minors either upon transfer from CBP to an FRC, or during interior enforcement actions. In FY 2017, 37,825 individuals were booked into ICE’s three FRCs, 20,606 of whom were minors. In FY 2018, 45,755 individuals were booked into ICE’s three FRCs, 24,265 of whom were minors. ICE generally encounters UACs when it transports UACs who are transferred from CBP custody to ORR custody, as well as during interior

<sup>2</sup> Some UACs from contiguous countries may be permitted to withdraw their application for admission and be repatriated. These UACs are not referred to HHS. 8 U.S.C. 1232(a)(2).

<sup>3</sup> Throughout this final rule, the Departments generally use the term “juvenile” to refer to any alien under the age of 18. For further explanation, see below for discussion of the terms “juvenile,” “minor,” and “unaccompanied alien child (UAC).”

enforcement actions. The Office of Refugee Resettlement (ORR) encounters UACs when they are referred to ORR custody and care by CBP, after border encounters, or by direct referral from ICE, after ICE-initiated interior immigration enforcement. It is important to note that HHS does not enforce immigration measures; that is the role and responsibility of HHS’ Federal partners within DHS. ORR is a child welfare agency and provides shelter, care, and other essential services to UACs, while working to reunite them with family or other approved sponsors as soon as possible, with safety governing the process. In FY 2017, 40,810 UACs were placed in ORR’s care. In FY 2018, 49,100 UACs were placed in ORR’s care. (Please note that these numbers may reflect UACs who were in ORR’s care from one fiscal year into the next.)

The Departments’ current operations and procedures for implementing the terms of the FSA, the HSA, and the TVPRA are the primary baseline against which to assess the costs and benefits of this rule. DHS and HHS already incur the costs for these operations; therefore, they are not costs of this rule.

The primary changes to DHS’s current operational environment resulting from this rule are implementing an alternative licensing process for FRCs and making changes to 8 CFR 212.5 to align parole for minors in expedited removal with all other aliens in expedited removal, consistent with the applicable statutory authority. Subject always to resource constraints, these changes may result in additional or longer detention for some groups of minors. Specifically, minors who are in expedited removal proceedings whose credible-fear determination is still pending or who lack a credible fear and are awaiting removal are more likely to be held until removal can be effectuated. Furthermore, minors who have been found to have a credible fear or who are otherwise in INA section 240 proceedings, and who pose a flight risk or danger if released, are more likely to be held until the end of their removal proceedings, although limited bed space in FRCs imposes a significant constraint on custody of this cohort. DHS estimates the total number of minors in FY 2017 in groups that might be detained longer was 2,787 and in FY 2018 was 3,663. The numbers of accompanying parents or legal guardians are not included in these estimates. While the above estimates reflects the number of minors in FY 2017 and FY 2018 in groups of individuals that would likely be held until removal can be effectuated, DHS is unable to forecast the future total

number of such minors that may experience additional or longer detention as a result of this rule, or for how much longer individuals may be detained because there are many other variables that may affect such estimates. DHS also notes that resource constraints on the availability of bed space mean that if some individuals are detained for longer periods of time, then less bed space will be available to detain other aliens, who in turn could be detained for less time than they would have been absent the rule. DHS is unable to provide an aggregate estimate of the cost of any increased detention on the individuals being detained. To the extent this rule results in filling any available bed space at current FRCs, this may thereby increase variable annual costs paid by ICE to operators of current FRCs.

DHS notes that while additional or longer detention could result in the need for additional bed space, there are many factors that would be considered in opening a new FRC and at this time ICE is unable to determine if this rule would result in costs to build additional bed space. If ICE awarded additional contracts for expanded bed space as a result of this rule, ICE would also incur additional fixed costs and variable costs to provide contracted services beyond current FRC capacity.

The primary purpose of the rule is to implement applicable statutory law and the FSA through regulations, to respond to changes in law and circumstances, and in turn enable termination of the agreement as contemplated by the FSA itself, in doing so DHS will move away from judicial governance to executive government via regulation. The result is to provide for the sound administration of the detention and custody of alien minors and UACs to be carried out fully, pursuant to the INA, HSA, TVPRA, and existing regulations issued by the Departments responsible for administering those statutes, rather than partially carried out via a decades-old settlement agreement. The rule ensures that applicable regulations reflect the Departments' current operations with respect to minors and UACs in accordance with the relevant and substantive terms of the FSA and the TVPRA, as well as the INA. Further, by modifying the literal text of the FSA (to the extent it has been interpreted to apply to accompanied minors) in limited cases to reflect and respond to intervening statutory and operational changes, DHS ensures that it retains discretion to detain families, as appropriate and pursuant to its statutory and regulatory authorities, to meet its enforcement needs, while still providing

protections to minors that the FSA intended.

#### D. Effective Date

This final rule will be effective on October 22, 2019, 60 days from the date of publication in the **Federal Register**.

### III. Background and Purpose

#### A. History

##### 1. The Flores Settlement Agreement

Prior to the enactment of the HSA, the Attorney General and the legacy INS had the primary authority to administer and enforce the immigration laws. In the period leading up to the *Flores* litigation in the mid-1980s, the general nationwide INS policy, based on regulations promulgated in 1963 and the Juvenile Justice and Delinquency Prevention Act of 1974, was that alien juveniles could petition an immigration judge for release from INS custody if an order of deportation was not final. See *Reno v. Flores*, 507 U.S. 292, 324–25 (1993). In 1984, the Western Region of the INS implemented a different release policy for juveniles, and the INS later adopted that policy nationwide. Under that policy, juveniles could only be released to a parent or a legal guardian. The rationale for the policy was two-fold: (1) To protect the juvenile's welfare and safety, and (2) to shield the INS from possible legal liability. The policy allowed such alien juveniles to be released to other adults only in unusual and extraordinary cases at the discretion of the District Director or Chief Patrol Agent. See *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1991) (en banc).

On July 11, 1985, four alien juveniles filed a class action lawsuit in the U.S. District Court for the Central District of California, *Flores v. Meese*, No. 85–4544 (C.D. Cal. filed July 11, 1985). The case “[ar]ose] out of the INS’s efforts to deal with the growing number of alien children entering the United States by themselves or without their parents (unaccompanied alien minors).” *Flores v. Meese*, 934 F.2d 991, 993 (9th Cir. 1990). The class was defined to consist of “all persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. 1252 by the INS within the INS’ Western Region and who have been, are, or will be denied release from INS custody because a parent or legal guardian fails to personally appear to take custody of them.” *Id.* at 994. The *Flores* litigation challenged “(a) the [INS] policy to condition juveniles’ release on bail on their parents’ or legal guardians’ surrendering to INS agents for interrogation and deportation; (b) the procedures employed by the INS in

imposing a condition on juveniles’ bail that their parents’ or legal guardians’ [sic] surrender to INS agents for interrogation and deportation; and (c) the conditions maintained by the INS in facilities where juveniles are incarcerated.” See *Flores* Compl. paragraph 1. The plaintiffs claimed that the INS’s release and bond practices and policies violated, among other things, the INA, the Administrative Procedure Act, and the Due Process Clause and Equal Protection Guarantee under the Fifth Amendment. See *id.* paragraphs 66–69.

Prior to a ruling on any of the issues, on November 30, 1987, the parties entered into a Memorandum of Understanding (MOU) on the conditions of detention. The MOU stated that minors in INS custody for more than 72 hours following arrest would be housed in facilities that met or exceeded the standards set forth in the April 29, 1987, U.S. Department of Justice Notice of Funding in the **Federal Register** and in the document “Alien Minors Shelter Care Program—Description and Requirements.” See Notice of Availability of Funding for Cooperative Agreements; Shelter Care and Other Related Services to Alien Minors, 52 FR 15569, 15570 (Apr. 29, 1987). The Notice provided that eligible grant applicants for the funding described in the Notice included organizations that were “appropriately licensed or can expeditiously meet applicable state licensing requirements for the provision of shelter care, foster care, group care and other related services to dependent children . . . .” *Id.*

At approximately the same time that the MOU was executed, the INS published a proposed rule on the Detention and Release of Juveniles to amend 8 CFR parts 212 and 242. See 52 FR 38245 (Oct. 15, 1987). The stated purpose of the rule was “to codify the [INS] policy regarding detention and release of juvenile aliens and to provide a single policy for juveniles in both deportation and exclusion proceedings.” Again, however, the proposed regulations did not address the considerations that might arise if the INS ever held an accompanied minor in custody along with his or her parent, together as a unit. For example, the preamble discussed the need to coordinate “family reunification” and “locating suitable placement of juvenile detainees,” but did not discuss preserving family unity when a minor is already in custody together with the parent. *Id.* (emphasis added).

The INS issued a final rule in May 1988. 53 FR 17449 (May 17, 1988). The rule provided for release to a parent,

guardian, or other relative, and discretionary release to other adults. *See* 53 FR at 17451. It also provided that when adults are in detention, INS would consider release of the adult and juvenile. *Id.*

On May 24, 1988, the district court where the original *Flores* case was filed held that the recently codified INS regulation, 8 CFR 242.24 (1988), governing the release of detained alien minors, violated substantive due process, and ordered modifications to the regulation. The district court also held that INS release and bond procedures for detained minors in deportation proceedings fell short of the requirements of procedural due process, and therefore ordered the INS “forthwith” to provide to any minor in custody an “administrative hearing to determine probable cause for his arrest and the need for any restrictions placed upon his release.” *Flores v. Meese*, 934 F.2d 991, 993 (9th Cir. 1990) (quoting the district court). The INS appealed, and the Ninth Circuit reversed the district court’s holdings that the INS exceeded its statutory authority in promulgating 8 CFR 242.24 and that the regulation violated substantive due process. The Ninth Circuit also reversed the district court’s procedural due process holding, identified the legal standard that the district court should have applied, and remanded the issue for the district court to further explore the issue. *Id.* at 1013. On rehearing en banc, however, the Ninth Circuit vacated the original panel’s opinion, affirmed the district court’s holding, and held that INS’s regulation was invalid because the regulation violated the alien child’s due process and habeas corpus rights, and detention where the alien child was otherwise eligible for release on bond or recognizance to a custodian served no legitimate purpose of the INS. *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1991) (en banc) (“The district court correctly held that the blanket detention policy is unlawful. The district court’s order appropriately requires children to be released to a responsible adult where no relative or legal guardian is available and mandates a hearing before an immigration judge for the determination of the terms and conditions of release.”).

The INS appealed, and in 1993, the U.S. Supreme Court rejected Plaintiffs’ facial challenge to the constitutionality of the INS’s regulation concerning the care of alien juveniles. *Reno v. Flores*, 507 U.S. 292 (1993). The Supreme Court held that the regulations did not violate any substantive or procedural due process rights or equal protection principles. *Id.* at 306, 309. According to the Court, the regulations did not

exceed the scope of the Attorney General’s discretion under the INA to continue custody over arrested aliens, because the challenged regulations rationally pursued the lawful purpose of protecting the welfare of such juveniles. *Id.* at 315.

The regulations promulgated in 1988 have remained in effect since publication but were moved to 8 CFR 236.3 in 1997. *See* 62 FR 10312, 10360 (Mar. 6, 1997). They were amended in 2002 when the authority to decide issues concerning the detention and release of juveniles was moved to the Director of the Office of Juvenile Affairs from the District Directors and Chief Patrol Agents. *See* 67 FR 39255, 39258 (June 7, 2002).

The Supreme Court’s decision in *Reno v. Flores* did not fully resolve all of the issues in the case. After that decision, the parties agreed to settle the matter and resolved the remainder of the litigation in the FSA, which the district court approved on January 28, 1997. In 1998, the INS published a proposed rule having a basis in the substantive terms of the FSA, entitled Processing, Detention, and Release of Juveniles. *See* 63 FR 39759 (July 24, 1998). Over the subsequent years, that proposed rule was not finalized. In 2001, as the original termination date of the FSA approached, the parties added a stipulation in the FSA, which terminates the FSA “45 days following defendants’ publication of final regulations implementing t[he] Agreement.” Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85–4544–RJK(Px) (C.D. Cal. Dec. 7, 2001). In January 2002, the INS reopened the comment period on the 1998 proposed rule, 67 FR 1670 (Jan. 14, 2002), but the rulemaking was ultimately abandoned. Thus, as a result of the 2001 Stipulation, the FSA has not terminated. The U.S. District Court for the Central District of California has continued to rule on various motions filed in the case and oversee enforcement of the FSA.

After the 2001 Stipulation, Congress enacted the HSA and the TVPRA, both of which impact the treatment of alien juveniles. Among other changes, the HSA created DHS and, along with the TVPRA, transferred the functions under the immigration laws with respect to the care and then custody of UACs referred by other Federal agencies to HHS ORR. The TVPRA also further regulated the Departments’ respective roles with respect to UACs. *See* 6 U.S.C. 111(a), 279; 8 U.S.C. 1232(b)(1).

The HSA also contained a general savings clause at 6 U.S.C. 552(a) with respect to the transfer of functions from the INS to ORR and DHS. The savings

clause has been interpreted by courts to have maintained the FSA as enforceable against HHS and DHS. By promulgating these final rules, HHS and DHS are completing an administrative action to terminate the FSA.

To summarize agency roles under the current statutory framework: DHS apprehends, provides care and custody for, transfers, and removes alien minors; DHS apprehends, transfers, and removes UACs; and HHS ORR provides for care and custody of UACs who are in Federal custody (other than those permitted to withdraw their application for admission) and referred to HHS ORR by other Departments.

## 2. The Reorganization of the Immigration and Naturalization Service

The FSA was entered into by the INS, which was under the U.S. Department of Justice, and the plaintiffs in the *Flores* lawsuit. INS had within it all of the immigration functions: Border patrol, detention, enforcement, deportation, investigations, and adjudication of immigration benefits. After the 9/11 attacks a major reorganization of the government took place, and most of the INS functions were transferred to the newly formed DHS in 2003 and divided into three distinct components. The U.S. Citizenship and Immigration Services (USCIS) took over adjudication of immigration benefits. ICE took over the investigative and enforcement functions of INS, which included longer-term detention of aliens when warranted. CBP took over the functions on the border, including apprehension of those entering illegally and inspections of individuals entering at ports of entry, as well as short-term detention for the purposes of processing aliens. The Homeland Security Act also transferred the responsibility for the care and custody of UACs to HHS’ ORR. 6 U.S.C. 279(a). The obligations under the FSA therefore also had to be divided after the reorganization.

In 2008, Congress passed the TVPRA, which further provided that all UACs in government custody (other than those able to withdraw their application for admission and be immediately repatriated) must be transferred to HHS ORR.

## 3. The Change in Migration Patterns and the Creation of the Family Residential Centers as a Response

When the FSA was first entered into and even when DHS was first created, migration at the southern border primarily consisted of single adults and unaccompanied juveniles, mostly in their teens. Since then, the numbers of minors, both accompanied and



unaccompanied, has skyrocketed. In 1993, for instance, the Supreme Court recognized that a surge of “more than 8,500” unaccompanied minors represented a “problem” that is “serious.” *Reno*, 507 U.S. at 294. Before 2012, the number of UACs encountered by the government stayed relatively consistent with an average of about 7,000 to 8,000 UACs typically placed in ORR custody each year before FY 2012.<sup>4</sup>

But that then changed. From Fiscal Year 2011 through 2018, apprehensions of UACs between ports of entry along the southwest border increased dramatically: Were as follows, resulting in a substantial net increase over that time period: FY 2011: 15,949; FY 2012: 24,403; FY 2013: 38,759; FY 2014: 68,541; FY 2015: 39,970; FY 2016: 59,692; FY 2017: 41,435; FY 2018: 50,036.<sup>5</sup> At ports of entry along the southwest border, 10,678 UACs were found inadmissible in FY 2016; 7,246 UACs were found inadmissible in FY 2017; and 8,624 UACs were found inadmissible in FY 2018.<sup>6</sup>

Additionally, a new trend also began of families with young children crossing the border. For family units, the overall numbers of apprehensions have increased dramatically: FY 2013: 14,855; FY 2014: 68,445; FY 2015: 39,838; FY 2016: 77,674; FY 2017: 75,622; FY 2018: 107,212.<sup>7</sup> At ports of entry, 26,062 family units were found inadmissible in FY 2016, 29,375 family units were found inadmissible in FY 2017, and 53,901 family units were found inadmissible in FY 2018.<sup>8</sup>

In FY 2019 so far, from October 2018 through June 2019, the total number of UAC apprehensions along the Southwest border was 63,624, and the total number of family unit apprehensions was 390,308. An additional 3,572 UACs and 37,573

family units have been found inadmissible at ports of entry.<sup>9</sup>

As the number of family units increased, the Government faced a new challenge: Housing children primarily in adult facilities, even with their parents, while still trying to provide all of the services juveniles need. In the early 2000s, the government created ICE Family Residential Centers (FRCs). By 2016, there were three FRCs. Unlike the CBP facilities where juveniles are temporarily held following apprehension or encounter (which are designed for short-term detention), FRCs are more akin to a dormitory setting. For example, the first FRC in Berks, Pennsylvania, was converted from a senior living center. It has suites where each family is housed separately. Beds, tables, chests of drawers, and other standard amenities are provided. Bedding, towels, basic clothing, and toiletries are provided. There is also a laundry facility on premises. There is a large community “living room” that has a large screen television, large cushioned couches and lounge chairs, a gaming area and a separate library that contains books, smaller television sets, video games, and board games. The facility also has an entire wing dedicated to classroom learning where minors at the facility go to school five days a week and study English and other age appropriate subjects. Another wing is a medical facility where minors and their parents receive any necessary medical care, including all immunizations required for later admission to U.S. public schools, and a treatment area for those who have entered the country with a communicable disease, such as tuberculosis. There are also phone banks to call relatives, consulates, or attorney/representatives.

In all FRCs, three hot “all-you-can-eat” meals a day are provided, and snacks are available throughout the day. All three FRCs offer a variety of indoor and outdoor daily recreation activities for children and adults, and a monthly recreational schedule is posted within communal areas in each facility. Indoor activities offered include a variety of sports (e.g., basketball, badminton, indoor soccer, and volleyball), group exercise classes, arts and crafts classes, karaoke, movie nights, and seasonal and holiday-themed activities. Outdoor recreational facilities include soccer fields, sand volleyball courts, handball courts, sand boxes, and play structures

with slides and jungle gyms. The facility is non-secure and a family is not physically prevented from leaving the facility.

The FRCs have video conferencing set up for court hearings and private meeting rooms so that families can meet with their attorneys or representatives. Child care is provided to the parents while they meet with their attorneys/representatives or attend their court hearings. Interpreting services are available 24 hours a day via telephone. Attorneys and representatives approved to appear at immigration court hearings are provided access to the residents at various times each week, enabling families to obtain counsel and not have to appear at immigration hearings as pro se respondents.

### B. Authority

#### 1. Statutory and Regulatory Authority

##### a. Immigration and Nationality Act and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

The INA, as amended, provides the primary authority for DHS to detain certain aliens for violations of the immigration laws. Congress expanded legacy INS detention authority in IIRIRA, Public Law 104–208, 110 Stat. 3009. In that legislation, Congress amended the INA by providing that certain aliens were subject to either mandatory or discretionary detention by the INS. This authorization flowed to DHS after the reorganization under the HSA. Specifically, DHS’s authority to detain certain aliens comes from sections 235, 236, and 241 of the INA, 8 U.S.C. 1225, 1226, and 1231. Section 235 of the INA, 8 U.S.C. 1225, provides that applicants for admission to the United States, including those subject to expedited removal, shall be detained during their removal proceedings, although such aliens may be released on parole in limited circumstances, consistent with the statutory standard set forth in INA 212(d)(5), 8 U.S.C. 1182(d)(5) and standards set forth in the regulations. Section 236 of the INA, 8 U.S.C. 1226, provides the authority to arrest and detain an alien pending a decision on whether the alien is to be removed from the United States, and section 241, 8 U.S.C. 1231, authorizes the detention of aliens during the period following the issuance of a final order of removal. Other provisions of the INA also mandate detention of certain classes of individuals, such as criminal aliens.

##### b. Homeland Security Act of 2002

As noted, the HSA, Public Law 107–296, 116 Stat. 2135, transferred most of

<sup>4</sup> See U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Alien Children Program, *Fact Sheet* (May 2014), [https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied\\_childrens\\_services\\_fact\\_sheet.pdf](https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied_childrens_services_fact_sheet.pdf).

<sup>5</sup> See U.S. Border Patrol, Total Unaccompanied Alien Children (0–17 years old Apprehensions), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-uacs-sector-fy2010-fy2018.pdf>.

<sup>6</sup> See <https://www.cbp.gov/newsroom/stats/office-sw-border-inadmissibles-fy2017>, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018>.

<sup>7</sup> See U.S. Border Patrol, Total Family Unit Apprehensions, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf>.

<sup>8</sup> See <https://www.cbp.gov/newsroom/stats/office-sw-border-inadmissibles-fy2017>, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018>.

<sup>9</sup> See U.S. Customs and Border Protection, Southwest Border Migration FY2019, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

the functions of the INS from DOJ to the newly-created DHS. DHS and its various components are responsible for border security, interior immigration enforcement, and immigration benefits adjudication, among other duties. DOJ's EOIR retained its pre-existing functions relating to the immigration and naturalization of aliens, including conducting removal proceedings and adjudicating defensive filings of asylum claims.

The functions regarding care of UACs were transferred from the INS to HHS ORR. The HSA states ORR shall be responsible to coordinate and implement the care and placement of UACs who are in Federal custody by reason of their immigration status. ORR was also tasked with identifying a sufficient number of qualified individuals, entities, and facilities to house UACs, and with ensuring that the interests of the child are considered in decisions and actions relating to his or her care and custody.

### c. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110-457, Title II, Subtitle D, 122 Stat. 5044 (codified in principal part at 8 U.S.C. 1232), states that consistent with the HSA, and except as otherwise provided with respect to certain UAC from contiguous countries (see 8 U.S.C. 1232(a)), the care and custody of all UACs, including responsibility for their detention, where appropriate, shall be the responsibility of HHS. The TVPRA, among other things, requires Federal agencies to notify HHS within 48 hours of apprehending or discovering a UAC, or receiving a claim or having suspicion that an alien in their custody is under 18 years of age. 8 U.S.C. 1232(b)(2). The TVPRA further requires that, absent exceptional circumstances, any Federal agency transfer a UAC to the care and custody of HHS within 72 hours of determining that an alien in its custody is a UAC. 8 U.S.C. 1232(b)(3).

The Secretary of HHS delegated the authority under the TVPRA to the Assistant Secretary for Children and Families, 74 FR 14564 (2009), who in turn delegated the authority to the ORR Director, 74 FR 1232 (2009).

### 2. Flores Settlement Agreement Implementation

As discussed above, in the 1990s, the U.S. Government and *Flores* plaintiffs entered into the FSA to resolve nationwide the ongoing litigation

concerning the INS's detention regulations for alien minors. The FSA was executed on behalf of the Government on September 16, 1996. The U.S. District Court for the Central District of California approved the FSA on January 28, 1997. The FSA became effective 30 days after its approval by the district court and provided for continued oversight by that court.

Paragraph 9 of the FSA explains its purpose: To establish a "nationwide policy for the detention, release, and treatment of minors in the custody of the INS." Paragraph 4 defines a "minor" as "any person under the age of eighteen (18) years who is detained in the legal custody of the INS," but the definition excludes minors who have been emancipated or incarcerated due to a criminal conviction as an adult. The FSA established procedures and conditions for processing, transportation, and detention following apprehension, and set forth the procedures and practices that the parties agreed should govern the INS's discretionary decisions to release or detain minors and to whom they should or may be released.

The FSA was originally set to expire within five years, but on December 7, 2001, the Parties agreed to a termination date of "45 days following defendants' publication of final regulations implementing this Agreement." However, the proposed rule that was published for that purpose was never finalized. See 67 FR 1670 (reopening the comment period for the 1998 proposed rule). A copy of the FSA and the 2001 Stipulation is available in the docket for this rulemaking. A principal purpose of these regulations is to "implement[] the Agreement," and in turn to terminate the FSA.

### 3. Recent Court Orders

#### a. Motion to Enforce I

On January 26, 2004, Plaintiffs filed their first motion to enforce the agreement, alleging, among other things, that CBP and ICE: (1) Regularly failed to release minors covered by the FSA to caregivers other than parents when parents refused to appear; (2) routinely failed to place detained class members in the least restrictive setting; (3) failed to provide class members adequate education and mental health services, and (4) exposed minors covered by the FSA to dangerous and unhealthy conditions. Ultimately, after a lengthy discovery process in which the government provided Plaintiffs numerous documents related to the government's compliance with the FSA, Plaintiffs filed a Notice of Withdrawal of

Motion to Enforce Settlement on November 14, 2005. The court dismissed the matter on May 10, 2006.

#### b. Motion To Enforce II

On February 2, 2015, Plaintiffs filed a second motion to enforce the agreement, alleging that CBP and ICE were in violation of the FSA because: (1) ICE's supposed no-release policy—*i.e.*, an alleged policy of detaining all female-headed families, including children, for as long as it takes to determine whether they are entitled to remain in the United States—violated the FSA; (2) ICE's routine confinement of class members in secure, unlicensed facilities breached the Agreement; and (3) CBP exposed class members to harsh and substandard conditions, in violation of the Agreement.

On July 24, 2015, the district court granted Plaintiffs' second motion to enforce and denied Defendant DHS's contemporaneous motion to modify the agreement. *Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015). The court found: (1) The FSA applied to all alien minors in government custody, including those accompanied by their parents or legal guardians; (2) ICE's continuing detention of minors accompanied by their mothers was a material breach of the FSA; (3) the FSA requires Defendant DHS to release minors with their accompanying parent or legal guardian unless this would create a significant flight risk or a safety risk; (4) DHS housing minors in secure and non-licensed FRCs violated the FSA; and (5) CBP violated the FSA by holding minors and UACs in facilities that were not safe and sanitary. *Id.* The Court ordered the government to show cause why certain remedies should not be implemented as a result of these violations.

The government filed a response to the Court's order to show cause on August 6, 2015. On August 21, 2015, the court issued a subsequent remedial order for DHS to implement six remedies. *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015). In the decision, the court clarified that, as provided in FSA paragraph 12(A), in the event of an emergency or influx, DHS need not transfer minors to a "licensed program" pursuant to the 3- and 5-day requirements of paragraph 12(A), but must transfer such minors "as expeditiously as possible." In the decision, the court referenced the Government's assertion that DHS, on average, would detain minors who are not UACs for 20 days—the general length of time required to complete credible or reasonable fear processing at that time for aliens in expedited

removal. The court agreed that if 20 days was “as fast as [the Government] . . . can possibly go,” the Government’s practice of holding accompanied minors in its FRCs, even if not “licensed” and “non-secure” per FSA paragraph 19, may be within the parameters of FSA paragraph 12(A). *Id.* at 914. In a decision issued on July 6, 2016, the Ninth Circuit agreed with the district court that during an emergency or influx, minors must be transferred “as expeditiously as possible” to a non-secure, licensed facility. *Flores v. Lynch*, 828 F.3d. 898, 902–03 (9th Cir. 2016). The Ninth Circuit affirmed the district court’s holding that the FSA applies to all alien minors and UACs in government custody and concluded the district court did not abuse its discretion in denying the Government’s motion to modify the FSA. The Ninth Circuit, however, reversed the district court’s determination that the FSA required the release of accompanying parents. *Id.*

The government maintains that the terms of the FSA were intended to apply only to those alien children in custody who are unaccompanied.

Nonetheless, reflecting existing circuit precedent that the FSA applies to accompanied minors, this rule applies to both accompanied and unaccompanied minors.

#### c. Motion To Enforce III

On May 17, 2016, plaintiffs filed a third motion to enforce the agreement, claiming that DHS was violating the agreement by: (1) Holding class members in CBP facilities that did not meet the requirements of the FSA; (2) failing to advise class members of their rights under the FSA; (3) making no efforts to release or reunify class members with family members; (4) holding class members routinely with unrelated adults; (5) detaining class members for weeks or months in secure, unlicensed facilities in violation of the FSA; and (6) interfering with class members’ right to counsel. The Government filed a response on June 3, 2016.

On June 27, 2017, the district court issued an opinion concluding that ICE had not complied with the FSA because it had failed to advise class members of their rights under the FSA, failed to make continuous efforts to release class members, and failed to release class members as required by FSA paragraphs 12(A) and 14. The Court also found that FRCs were unlicensed and secure. *Flores v. Sessions*, No. 2:85–cv–04544 (C.D. Cal. June 27, 2017). The district court, however, rejected the claims that ICE had impermissibly detained class

members with unrelated adults and interfered with class members’ right to counsel.

The district court also concluded that CBP acted in violation of the FSA in the Rio Grande Valley Border Patrol Sector. The court pointed to allegations that CBP failed to provide class members adequate access to food and water, detained class members in conditions that were not safe and sanitary, and failed to keep the temperature of the holding cells within a reasonable range. The court ordered the appointment of a Juvenile Coordinator for ICE and CBP, responsible for monitoring the agencies’ compliance with the Agreement. On August 15, 2019, the Ninth Circuit dismissed the Government’s appeal of that decision based on a lack of jurisdiction. *See Flores v. Barr*, No. 17–56297 (9th Cir. Aug. 15, 2019). On October 5, 2018, the U.S. District Court for the Central District of California appointed a Special Master/Independent Monitor to oversee compliance with the Agreement and with the June 27, 2017 Order. The Court’s order appointing the Monitor also allowed for oversight over HHS related to Motion to Enforce V, discussed below.

#### d. Motion To Enforce IV

On August 12, 2016, Plaintiffs filed a fourth motion to enforce the agreement, claiming that ORR violated the agreement by failing to provide UACs in ORR custody with a bond redetermination hearing by an immigration judge. The Government argued that the HSA and the TVPRA effectively superseded the FSA’s bond-hearing requirement with respect to UACs, that only HHS could determine the suitability of a sponsor (an essential part of release decision-making), and that immigration judges lacked jurisdiction over UACs in ORR custody.

On January 20, 2017, the court found that HHS breached the FSA by denying UACs the right to a bond hearing as provided for in the FSA. *Flores v. Lynch*, No. 2:850–cv–04544, 2017 WL 6049373 (C.D. Cal. Jan. 20, 2017). The district court agreed that only HHS could determine the suitability of a sponsor, but disagreed that subsequent laws fully superseded the FSA. The Government appealed to the Ninth Circuit. On July 5, 2017, the Ninth Circuit affirmed the district court’s ruling. The Ninth Circuit reasoned that if Congress had intended to terminate the settlement agreement in whole or in part through passage of the HSA or TVPRA, it would have said so specifically. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017). However, while

affirming the district court’s decision, the Ninth Circuit also acknowledged that determinations made at hearings held under Paragraph 24A of the FSA will not compel a child’s release, because “a minor may not be released unless the agency charged with his or her care identifies a safe and appropriate placement.” *Id.* at 868. The Government did not seek further review of the decision.

#### e. Motion To Enforce V

On April 16, 2018, Plaintiffs filed a fifth motion to enforce the agreement, claiming ORR unlawfully denied class members licensed placements, unlawfully medicated youth without parental authorization, and peremptorily extended minors’ detention on suspicion that available custodians may be unfit. On July 30, 2018, the district court issued an Order. *Flores v. Sessions*, 2:85–cv–04544–DMG–AGR (ECF No. 470, Jul. 30, 2018). The Order discussed the Shiloh Residential Treatment Center and placement therein, as well as informed consent for psychotropic drugs in such Center; placement in secure facilities; notice of placement in secure and staff-secure facilities; Director-level review of children previously placed in secure or staff-secure facilities; and other issues. Readers should refer to the full Order for details.

#### f. Motion for Relief From Settlement

On June 21, 2018, in accordance with the President’s June 20, 2018, Executive Order “Affording Congress an Opportunity to Address Family Separation,” the Government sought limited emergency relief from two provisions of the FSA—the release provision of Paragraph 14, as well as the licensing requirements of Paragraph 19. This relief was sought in order to permit DHS to detain alien family units together for the pendency of their immigration proceedings. The court denied this motion on July 9, 2018, and denied reconsideration of the motion on November 5, 2018.

That motion sought relief consistent with the proposed rule, although the proposed rule included some affirmative proposals (like the Federal-licensing regime) that were not at issue in that motion. For example, as discussed below, by creating an alternative for meeting the “licensed facility” definition for FRCs, the final rule will eliminate a barrier to keeping family units in custody during their immigration proceedings, consistent with applicable law, while still providing similar substantive protections to minors.

The issue of family separation and reunification continues to be the subject of litigation in multiple jurisdictions. This rule does not directly address matters related to that litigation. A significant purpose of this rule with regard to accompanied minors is to allow DHS to make decisions regarding the detention of families applying a single legal framework, and to enable DHS to hold a family together as a unit in an FRC when lawful and appropriate.

#### g. Motion To Enforce VI

On November 2, 2018, Plaintiffs filed their sixth motion to enforce, which requests the court to enjoin the Government from implementing regulations that fail to implement the FSA. Plaintiffs allege the Government's proposed rulemaking of September 2018 is an anticipatory breach of the FSA, claiming that DHS's portion of the proposed regulations proposed to detain accompanied children indefinitely and consign them to unlicensed family detention centers. Plaintiffs also claim that the proposed rule replaces mandatory protections with aspirational statements and does not provide certain protections granted minors. Plaintiffs also requested the court to provisionally adjudicate the Government in civil contempt to make it clear to that implementing the proposed regulations would place it in contempt. The motion is held in abeyance pending publication of this final rule and further briefing from the parties.

#### h. Motion To Enforce VII

On May 30, 2019, Plaintiffs filed a motion to enforce the FSA alleging that HHS' use of the Homestead influx shelter facility violates the FSA because the facility is not licensed, and, in Plaintiffs' opinion, HHS is not releasing UACs from the facility as expeditiously as possible. By agreement of the parties, the motion has been referred to mediation with the Monitor in order to avoid the need for adjudication by the district court.

#### i. Ex Parte Request for Temporary Restraining Order

On June 26, 2019, Plaintiffs filed an *ex parte* request for a temporary restraining order, which alleged that CBP facilities in the El Paso and Rio Grande Valley Border Patrol Sectors violated the terms of the FSA; that CBP failed to provide adequate medical care; and that CBP failed to comply with the release requirements of Paragraph 14 of the FSA. Plaintiffs requested emergency relief, including (1) immediate inspection of CBP facilities in the El

Paso and RGV Sectors by "a public health expert authorized to mandate a remediation plan that [CBP] must follow to make these facilities safe and sanitary;" (2) immediate access to CBP facilities in the El Paso and RGV Sectors by medical professionals "who can assess the medical and psychological needs of the children and triage appropriately;" (3) "deployment of an intensive case management team to focus on expediting the release of [certain UACs] to alleviate the backlog caused by the inadequate [HHS ORR] placement array;" and (4) that CBP be held in contempt. On June 28, 2019, the Court referred the TRO to an expedited mediation schedule in front of the independent monitor. Dkt. 576. On July 8, 2019, the court appointed a medical expert, who would "consult with and assist the [court-appointed independent monitor] in assessing child health and safety conditions in [CBP facilities]." Dkt. 591. On July 10, 2019, the parties engaged in mediation, and agreed that the court-appointed monitor would submit a draft report of findings and recommendations to the parties and the monitor, and that the parties would reconvene in mediation following the submission of that report. See Joint Status Report, Dkt. 599.

#### C. Basis and Purpose of Regulatory Action

1. Need for Regulations Implementing the Relevant and Substantive Terms of the FSA.

When DHS encounters a removable alien parent or legal guardian with his or her removable alien child(ren), it has, following initiation of removal proceedings, three primary options for purposes of immigration custody: (1) Release all family members into the United States; (2) detain the parent(s) or legal guardian(s) and either release the juvenile to another parent or legal guardian or transfer the juvenile to HHS as a UAC; or (3) detain the family unit together as a family by placing them at an appropriate FRC during their immigration proceedings. The practical implications of the FSA, as interpreted by the Federal district court and the court of appeals (and the lack of state licensing for FRCs), is to prevent the Government from using the third option for more than a limited period of time. This final rule will eliminate that barrier to the use of FRCs.

DHS believes there are several advantages to maintaining family unity during immigration proceedings. These include the child being under the care of the parent, immigration proceedings occurring together and any removal or release occurring at the same time. But

the practical implications of the FSA, as recently interpreted, and in particular the lack of state licensing for FRCs and the release requirements for minors who are not in state-licensed facilities, have effectively prevented DHS from using family detention for more than a limited period of time (typically approximately 20 days), and in turn often required the release of families regardless of the flight risk posed. DHS believes that combination of factors creates a powerful incentive for adults to bring juveniles on the dangerous journey to the United States and then put them in further danger by illegally crossing the United States border, in the expectation that coming as a family will result in an immediate release into the United States. At the same time, the alternative—that of separating family members so the adult may be detained pending immigration proceedings—should be avoided when possible, and has generated significant litigation. See, e.g., *Ms. L v. ICE*, No. 18–428 (S.D. Cal.).

This final rule serves to clear the way for the sensible use of FRCs when it is lawful and appropriate, to allow custody over a family unit as such. In particular, it creates a Federal licensing process to resolve the current problem caused by the FSA's state-licensing requirement that is ill-suited to family detention, and allows for compatible treatment of a family unit in immigration custody and proceedings by eliminating artificial barriers to that compatibility imposed by the FSA. Further, it helps to ensure that decisions to detain a family unit can be made under a single legal framework and that take into account the interest in family unity. In particular, the rule will ensure that custody decisions for both the parent and minor will be made pursuant to the existing statutes and regulations governing release on bond or parole (not under a freestanding FSA standard). Moreover, when exercising its parole discretion, DHS will continue to consider a detainee's status as a minor as a factor in exercising its parole discretion, on a case-by-case basis, and consistent with all requisite statutory and regulatory authority.

It is important that family detention be a viable option not only for the numerous benefits that family unity provides for both the family and the administration of the INA, but also due to the significant and ongoing surge of adults who have made the choice to enter the United States illegally with juveniles or make the dangerous overland journey to the border with juveniles, a practice that puts juveniles at significant risk of harm. The expectation that adults with juveniles

will remain in the United States outside of immigration detention may incentivize these risky practices.

In the summer of 2014, an unprecedented number of family units from Central America illegally entered or were found inadmissible to the

United States. In FY 2013, the total number of family units apprehended entering the United States illegally between ports of entry on the Southwest Border was 14,855. By FY 2014, that figure had increased to 68,445. See <https://www.cbp.gov/sites/default/files/>

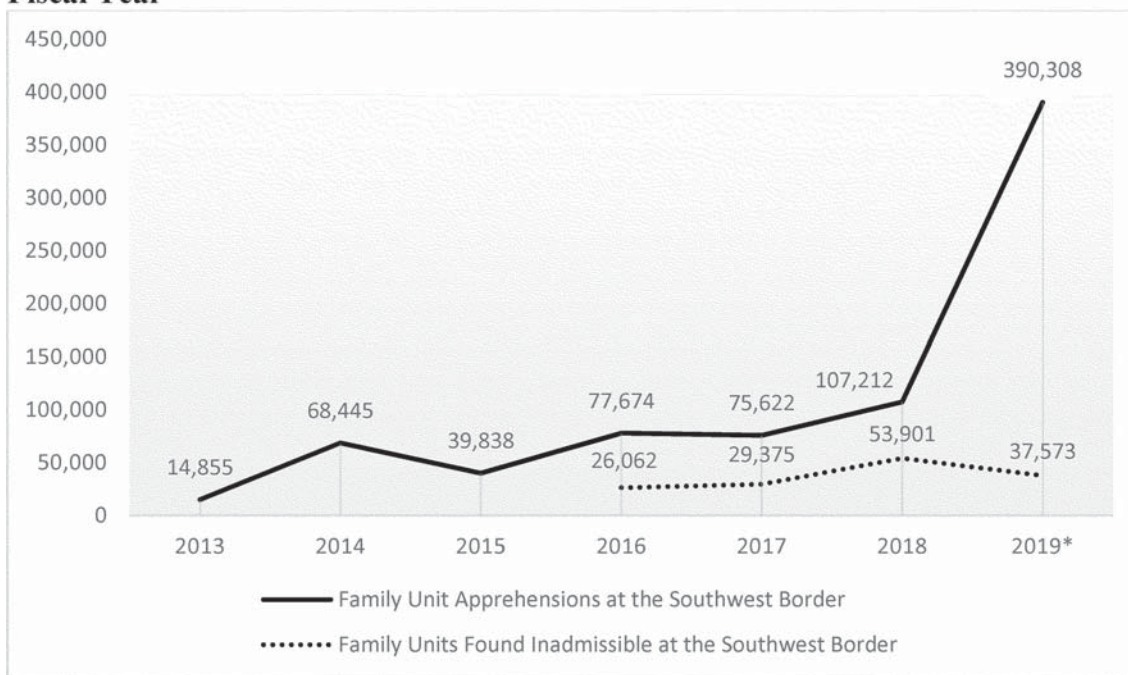
[assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf). By June of 2019, that figure had increased to 390,308, with an additional 37,573 found inadmissible at ports of entry.

TABLE 1—FAMILY UNIT APPREHENSIONS AND INADMISSIBLES AT THE SOUTHWEST BORDER BY FISCAL YEAR <sup>10</sup>

Fiscal year	Family unit apprehensions at the Southwest Border	Family units found inadmissible at the Southwest Border <sup>11</sup>
2013	14,855	
2014	68,445	
2015	39,838	
2016	77,674	26,062
2017	75,622	29,375
2018	107,212	53,901
2019*	390,308	37,573

\* Partial year data for FY 2019; through June.

Figure 1: Family Unit Apprehensions and Inadmissibles at the Southwest Border by Fiscal Year



\* Partial year data for FY 2019; through June.

Prior to 2014, given the highly limited detention capacity, the only option

<sup>10</sup> Note that Family Unit represents the number of individuals (either a child under 18 years old, parent or legal guardian) apprehended with a family member. See United States Border Patrol Total Family Unit Apprehensions By Month—FY 2013 through FY 2018 at <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf> (last visited May 10, 2019) See also U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019 at <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions#> (last visited August 5, 2019) See also Southwest Border Migration FY 2019 at <https://>

available to the Government for the large majority of family units entering the United States was to issue the family Notices to Appear and release the alien family to temporarily remain in the United States pending their removal proceedings. Thus, when an unprecedented number of families decided to undertake the dangerous journey to the United States in 2014,

[www.cbp.gov/newsroom/stats/sw-border-migration](https://www.cbp.gov/newsroom/stats/sw-border-migration) (last visited August 5, 2019).

<sup>11</sup> OFO did not start tracking family units until March of 2016.

DHS officials faced an urgent humanitarian situation. DHS encountered numerous alien families and juveniles who were hungry, thirsty, exhausted, scared, vulnerable, and at times in need of medical attention, with some also having been beaten, starved, sexually assaulted or worse during their journey to the United States.

DHS mounted a multi-pronged response to this situation. As one part of this response, DHS placed more families at the one existing FRC, stood up another FRC (which was later closed

down), and oversaw the development of additional FRCs to detain family units together, in a safe and humane environment, during the pendency of their immigration proceedings, which typically involved expedited removal. Although it is difficult to definitively prove a causal link given the many factors that influence migration, DHS's assessment is that this change was one factor that helped stem the border crisis, as it correlated with a significant drop in family migration: Family unit apprehensions on the Southwest Border dropped from 68,445 in FY 2014 to 39,838 in FY 2015.

Although the border crisis prompted DHS to increase its use of FRCs to hold family units together, DHS quickly faced legal challenges asserting that the FSA applied to accompanied minors and that family detention did not comply with the provisions of the FSA. In July 2015, the *Flores* court rejected the Government's position that the FRCs comply with the FSA and declined to modify the FSA to allow DHS to address this significant influx of family units crossing the border and permit family detention. See *Flores v. Lynch*, 828 F.3d 898, 909–10 (9th Cir. 2016). The Government had explained to the district court that declining to modify the FSA as requested would “mak[e] it impossible for ICE to house families at ICE [FRCs], and to instead require ICE to separate accompanied children from their parents or legal guardians.” *Flores v. Lynch*, No. 85–4544, Defendants' Opposition to Motion to Enforce, ECF 121 at 17 (C.D. Cal. Feb. 27, 2015).

When the courts then found the FSA to apply to accompanied minors—an interpretation with which the Government continues to disagree—the agencies faced new practical problems. Indeed, the government has never understood the FSA to apply to accompanied minors. The Supreme Court in *Flores* understood the case to involve “the constitutionality of institutional custody over unaccompanied juveniles.” 507 U.S. at 305; see *id.* at 315 (“[T]he INS policy now in place is a reasonable response to the difficult problems presented when the Service arrests unaccompanied alien juveniles.”).

The FSA in turn has FSA has no language directly addressing the specific issues raised by custody over families as a unit. The FSA explains that the settlement arose from a lawsuit about “detention and release of unaccompanied minors,” FSA paragraph 1 (emphasis added); it provides for the INS to make efforts at releasing a minor “to” a parent or guardian, not “with” a parent or

guardian, FSA paragraph 14, suggesting an underlying assumption that the minor is not already together with the parent as a family; the FSA indicates that the purpose of the release “to” another relative is to promote “family reunification,” which makes little sense if the family is already together as a unit, *id.*; the FSA generally requires custody to occur in a facility “licensed by an appropriate State agency,” FSA paragraph 6, but no State in the country had at the time an agency that would license facilities for holding families together in custody as a unit. The government used FRCs for more than 10 years—from 2001, when it first used the Berks facility to hold families in custody until 2014—with the class counsel's knowledge, and without the government ever considering that the FSA applied to minors accompanied by their parents.

The FSA requires DHS to transfer minors to a non-secure, licensed facility “as expeditiously as possible,” and further provides that a “licensed” facility is one that is “licensed by a State agency.” FSA paragraphs 6, 12(A). That prompted significant and ongoing litigation regarding the ability to obtain state licensing of FRCs, as many States did not have, and have not succeeded in putting in place, licensing schemes governing facilities that hold family units together. That litigation severely limited the ability to maintain detention of families together. Those limitations correlated with a sharp increase in family migration: The number of family units apprehended by CBP between the ports of entry along the Southwest Border again spiked—from 39,838 in FY 2015 to the highest level ever up until that time, 77,674 in FY 2016. In FY 2016, CBP also found 26,062 family units inadmissible at ports of entry along the Southwest Border. The number of such apprehensions and individuals found inadmissible along the Southwest Border has continued to rise, and reached 107,212 apprehensions between the ports of entry, and 53,901 family units found inadmissible at ports of entry in FY 2018. In the first nine months of FY 2019 (through June 30, 2019), the number of family unit apprehensions has already reached 390,308, a 469 percent increase from the same period in FY 2018. During this same time period, 37,573 family units have been found inadmissible at ports of entry along the Southwest Border.<sup>12</sup>

As long as the licensing must come from a State specifically (rather than

from the Federal Government), DHS's ability to effectively use family detention is unduly limited. A Federal program (especially immigration enforcement) that the Constitution and Congress commit to Federal authority and discretion should not depend on state licensing. And that is particularly true when a well-established state-licensing process does not already exist and the FSA, as the Ninth Circuit pointed out, “gave inadequate attention to some problems of accompanied minors” and “does not contain standards related to the detention of . . . family units.” *Flores*, 828 F.3d at 906. In order to avoid separating family units, DHS must release adult family members in cases where detention would otherwise be mandatory and DHS determines parole is not appropriate, or in cases where DHS and/or immigration courts believe detention of the parent is needed to ensure appearance at future removal proceedings or to prevent danger to the community.<sup>13</sup> Because of ongoing litigation concerning state licensure for FRCs, ICE must release minors who are a part of family units as expeditiously as possible, which means that ICE rarely is able to hold family units for longer than approximately 20 days. As such, of the 107,212 FY 2018 family unit apprehensions at the Southwest border, 45,755 individuals were booked into FRCs in FY 2018. The result is that many families are released in the interior of the United States, even in cases when DHS or immigration courts deem detention is needed to effectuate removal proceedings or even when there are safety concerns.

According to EOIR, 43 percent of cases completed from January 1, 2014 through March 31, 2019 involving family unit aliens who were in detention, released, failed to appear at the required proceedings, and were issued final orders of removal *in absentia*.<sup>14</sup>

<sup>13</sup> Current regulations address parole, including for juveniles in custody as well as parole for aliens subject to expedited removal. See 8 CFR 212.5(b)(3) (parole for juveniles); 8 CFR 235.3(b)(2)(iii), (b)(4)(ii) (limiting parole for those in expedited removal proceedings). While DHS is amending § 212.5(b) as a part of this regulation, this regulation is not intended to address or alter the standards contained in § 212.5(b) or § 235.3(b). To the extent that paragraph 14 of the FSA has been interpreted to require application of the juvenile parole regulation to release during expedited removal proceedings, see *Flores v. Sessions*, Order at 23–27 (June 27, 2017), this regulation is intended to permit detention in FRCs in lieu of release (except where parole is appropriate under 8 CFR 235.3(b)(2)(iii) or (b)(4)(ii)) in order to avoid the need to separate or release families in these circumstances.

<sup>14</sup> Of the 5,326 completed cases from January 1, 2014 through March 31, 2019 that started at an FRC,

<sup>12</sup> See Southwest Border Migration FY 2019, <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

**Table 2: I-862 by Immigration Judge Decisions, January 1, 2014-March 31, 2019**

	Removal Orders	Relief Granted	Termination	Voluntary Departure	Other	Grand Total
Total	3,969	883	275	187	12	5,326
<i>In Absentia</i>	2,281					
Not In Absentia	1,168					

Table 3 below reports DHS Office of Immigration Statistics (OIS) data on *in absentia* rates for aliens encountered at the Southwest Border by year of their initial enforcement encounter. For each of these initial encounter cohorts, the table reports on the number of aliens referred to EOIR, the number of EOIR cases completed (*i.e.* excluding cases that are still in proceedings), and the number of EOIR *in absentia* orders issued, as of the end of FY 2018. The bottom rows of the table show both the *in absentia* rate as a percentage of all referrals to EOIR, and as a percentage of all completed cases. DHS reports both statistics because DHS is aware that both indicators are biased indicators of the “true” rate at which people are

ordered removed *in absentia*. *In absentia* as a percent of all completed cases is biased upward (*i.e.*, tends to overestimate the true *in absentia* rate), especially for more recent fiscal years, because *in absentia* cases may take less time to complete cases with other types of final outcomes. The *in absentia* rates for people encountered in earlier years, such as FY 2014 and FY 2015, may be somewhat more meaningful than for those encountered more recently because the longer-standing cases have been working their way through proceedings for four to five years; but, more than half the cases remain in proceedings even for this longer-standing group. Viewing *in absentia* as a share of all referrals to EOIR is not

affected by that bias. However, this statistic is biased downward (*i.e.*, tends to be lower than the true *in absentia* rate), because it does not account for cases still in proceedings—again, more than half the cases—that may eventually result in an *in absentia* order. The “true” *in absentia* rate for encounters in any given fiscal year can’t be observed until all the cases from that year are completed, at which time the two statistics will be the same number. As seen in Table 3, DHS OIS has found that when looking at all family unit aliens encountered at the Southwest Border from FY 2014 through FY 2018, the *in absentia* rate for completed cases as of the end of FY 2018 was 66 percent.

**Table 3: Estimated *in absentia* Rate, Southwest Border Family Unit Encounters FY 2014 – FY 2018<sup>15</sup>**

Year of Encounter	2014	2015	2016	2017	2018	Total 2014-2018
Total Encounters	67,060	39,838	77,674	105,009	161,293	450,874
DHS referrals to EOIR	53,727	34,270	70,037	91,306	141,172	390,512
Completed EOIR cases*	23,083	13,531	18,150	15,319	12,064	82,147
EOIR <i>in absentia</i> orders**	17,644	9,056	12,464	12,104	2,862	54,130
Estimated <i>in absentia</i> rate - all referrals	33%	26%	18%	13%	2%	14%
Estimated <i>in absentia</i> rate - completed cases	76%	67%	69%	79%	24%	66%

\* DHS referrals to EOIR include CBP Notices to Appear (NTAs), ERO NTAs, positive USCIS fear determinations and negative USCIS fear determinations vacated by EOIR, and any other DHS NTAs reported by EOIR.

\*\* Completed EOIR cases includes EOIR removal orders/grants of voluntary departure and grants of relief.

Based on the similar timeframes of the two rates from EOIR and DHS OIS, DHS can assume that family units who did

not start their cases in FRCs have a higher *in absentia* rate. However, this does not account for other factors that

may or may not have an impact the likelihood of appearance, such as enrollment in a monitoring program or

2,281 were issued final orders of removal *in absentia*.

<sup>15</sup> DHS OIS estimates the *in absentia* rate by linking DHS and DOJ/EOIR records at the person-level as part of OIS’ Enforcement Lifecycle analysis. Family unit data are available for USBP

apprehensions beginning in FY 2014, and available for OFO encounters with inadmissible aliens beginning in FY 2016. Family unit data are available for USBP apprehensions beginning in FY 2014, and available for OFO encounters with inadmissible aliens beginning in FY 2016. DHS referrals to EOIR include CBP Notices to Appear

(NTAs), ERO NTAs, positive USCIS fear determinations and negative USCIS fear determinations vacated by EOIR, and any other DHS NTAs reported by EOIR. Completed EOIR cases include EOIR removal orders/grants of voluntary departure and grants of relief.

access to representation. However, DHS still concludes that the *in absentia* rates of family units even who started their cases at an FRC is a serious concern, and flight risk can warrant detention throughout proceedings. Statistics that purport to show lower *in absentia* rates often count all court appearances, rather than only completed cases, thus counting multiple times aliens who appear for multiple court appearances and often not counting the time when being absent is most likely—at hearings where proceedings are completed and likely to result in a removal order. Addressing DHS's ability to effectively use family detention through an alternative licensing that will help

ensure appropriate standards of care consistent with the terms of the FSA would enable DHS to ensure family units who are identified as flight risks appear at removal proceedings and for removal following the issuance of a final order.

ICE's mission is to remove individuals subject to final orders of removal. DHS OIS data show that, as of the end of FY 2018, aliens encountered from FY 2014 through FY 2018 and detained at the time a final order of removal was issued, were removed at a much higher rate than those not detained: 97 percent of aliens detained as compared to just over 18 percent of individuals not detained. See Table 4 below. The table reports for

all aliens (not just family units) who were encountered by DHS from FY 2014 through FY 2018 and ordered removed, if they have been removed or not removed as of the end of FY 2018, and if they were detained or not detained at the time the removal order was issued. As shown in the table, detaining a person until the time of removal correlates strongly with the likelihood that removal will be effectuated. ICE has finite resources and bed space at FRCs and this rule would provide DHS the ability to use its detention authority and existing space at FRCs where lawful and appropriate to effectuate removal of family units determined not to be eligible for relief.

**Table 4: Removal Status as of the end of FY 2018 by ICE Detention Status at the Time of Removal Order Issuance, for Aliens Encountered by DHS from FY 2014 – FY 2018 and Ordered Removed<sup>16</sup>**

Status	Total		Detained		Not Detained	
	Count	Percent	Count	Percent	Count	Percent
Removed	227,679	54.9	187,868	96.8	39,811	18.1
Not Removed	186,067	44.8	6,310	3.2	179,757	81.9
Missing *	1,191	0.3	0	0.0	0	0.0
<b>Total</b>	<b>414,937</b>	<b>100.0</b>	<b>194,178</b>	<b>100.0</b>	<b>219,568</b>	<b>100.0</b>

\* A total of 1,191 Alien Numbers provided by EOIR did not return a match in ICE data.

As described above, there have been several important changes in law and circumstance since the FSA was executed: (1) A significantly changed agency structure addressing the care and custody of juveniles, including the development of FRCs that can provide appropriate treatment for minors while allowing them to be held together with their families; (2) a new statutory framework that governs the treatment of UACs; (3) significant increases in the number of families and UACs crossing the border since 1997, thus affecting immigration enforcement priorities and national security; (4) a novel judicial interpretation that the FSA applies to accompanied minors; and (5) further recognition of the importance of keeping families together during immigration proceedings when appropriate, and the legal and practical implications of not providing uniform proceedings for family units in these circumstances. The Departments have thus determined that it is necessary to put into place regulations that will be consistent with the relevant and substantive terms of the FSA regarding the conditions for custodial settings for minors, but,

through Federal licensing of FRCs, will provide the flexibility necessary to protect the public safety, enforce the immigration laws, and maintain family unity given current challenges that did not exist when the FSA was executed. This rule provides DHS the option of keeping together families who must or should be detained at appropriately licensed FRCs for the time needed to complete immigration proceedings, subject to the sound implementation of existing statutes and regulations governing release on parole or bond.

## 2. Purpose of the Regulations

A principal purpose of this action is to implement the relevant and substantive terms of the FSA and provisions of the HSA and TVPRA where they necessarily intersect with the FSA's provisions, and taking into account the agencies' expertise in addressing current factual circumstances, thereby terminating the FSA, as provided for in FSA paragraph 40 as well as general principles governing termination of settlements or decrees in institutional litigation. As it accounts for circumstances that have

changed since the FSA was entered into and agency expertise in addressing current circumstances, the rule does not always track the literal text of the FSA, but provides similar substantive protections to juveniles. For example, the rule allows for detention of families together in federally-licensed programs (rather than facilities licensed specifically by a State). States generally do not have licensing schemes that apply to FRCs. Thus, the terms of the FSA currently impose a limitation on DHS's ability to detain family units together in an FRC during their immigration proceedings, consistent with applicable law. The Federal licensing process in turn will provide similar substantive protections regarding the conditions of such facilities, and thus implement the underlying purpose of the state-licensing requirement. These changes will allow for release in a manner consistent with the INA and applicable regulations. The rule also provides for third-party monitoring, and for publicizing the results of those inspections, to ensure that conditions

<sup>16</sup>DHS OIS.



on the ground in FRCs satisfy those standards.

This rule conforms to the FSA's guiding principle that the Government treats, and shall continue to treat, all juveniles in its custody with dignity, respect, and special concern for their particular vulnerability as minors.

The current DHS regulations on the detention and release of aliens under the age of 18 found at 8 CFR 236.3 have not been substantively updated since their promulgation in 1988.<sup>17</sup> DHS therefore is revising 8 CFR 236.3 to promulgate the relevant and substantive terms of the FSA as regulations. In addition, there are currently no HHS regulations on this topic. HHS is promulgating a new 45 CFR part 410 for the same reason.

As noted, these regulations implement the relevant and substantive terms of the FSA and related statutory provisions. Separate from the FSA, DHS has over time developed various policies and other sub-regulatory documents that address issues related to DHS custody of minor aliens and UACs.<sup>18</sup> In considering these regulations, DHS reviewed such policies, and determined that these regulations are compatible with them. Current policies on the custody, apprehension, and transportation of minors and UACs generally would not, therefore, need to be altered to bring them into conformity with this rule. This rule is not, however, intended to displace or otherwise codify such policies and procedures. Similarly, the rule is consistent with and does not abrogate existing ORR policies and procedures; nor does it necessitate any alteration in those policies and procedures, except in regards to the transfer of bond redetermination hearings from immigration courts to the HHS hearing officer as found at 8 CFR 410.810. Again, however, the idea is for the UAC to enjoy the same basic substantive protection (review of the

custody determination), but simply to shift review from DOJ to HHS given that Congress has made HHS responsible for custody and care of UACs.

Finally, this rule excludes those provisions of the FSA that are relevant solely by virtue of the FSA's existence as a settlement agreement. For instance, the FSA contains a number of provisions that relate specifically to class counsel and the supervising court with respect to the Departments' compliance with the FSA. Following termination of the FSA, such provisions will no longer be necessary, because compliance with the published regulations will replace compliance with the settlement agreement. As a result, they are not included in this rule.<sup>19</sup>

#### D. Severability

To the extent that any portion of this final rule is declared invalid by a court, the Departments intend for all other parts of the final rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect. Thus, even if a court decision invalidating a portion of this final rule results in a partial reversion to the current regulations or to the statutory language itself, the Departments intend that the rest of the final rule continue to operate, if at all possible in tandem with the reverted provisions.

#### IV. Summary of Changes in the Final Rule

Following careful consideration of public comments received and relevant data provided by stakeholders, DHS and HHS have amended the regulatory text proposed in the NPRM published in the **Federal Register** on September 7, 2018. As discussed elsewhere in this preamble, these changes in this final rule include the following:

- Section 212.5(b) now considers that DHS is not precluded from releasing a minor who is not a UAC to someone other than a parent or legal guardian, specifically a brother, sister, aunt, uncle, or grandparent who is not in detention.
- Section 236.3(b)(2) defines *Special Needs Minor* and includes the term "retardation," which commenters noted was an outdated term and should be removed. DHS agrees to replace that

term with "intellectual disability." HHS likewise agrees to use "intellectual disability" in the corresponding definition of *Special Needs Minor* at § 410.101.

- Section 236.3(b)(9), which defines *Licensed Facility*, requires DHS to employ third parties to conduct audits of FRCs to ensure compliance with family residential standards. Commenters stated that DHS has previously not shared the results of such audits. While ICE has publicly posted the results of facility inspection reports submitted by third-party contractors since May 2018, these posts have not included results of FRC inspections. To directly address the comment, the phrase "DHS will make the results of these audits publicly available" is added to the definition. DHS also adds to the final rule that the audits of licensed facilities will take place at the opening of a facility and take place on an ongoing basis.

- In § 236.3(b)(11), which defines a *Non-Secure Facility*, DHS agrees with commenters that a non-secure facility means a facility that meets the definition of non-secure under state law in the State in which the facility is located, as was intended by the language of the proposed rule, and is adding "under state law" to the definition to clarify this point.

- In § 236.3(f)(1) regarding transfer of UACs from DHS to HHS, DHS agrees to amend the proposed regulatory text to clarify that a UAC from a contiguous country who is not permitted to withdraw his or her application for admission, or if no determination can be made within 48 hours of apprehension or encounter, will be immediately transferred to HHS. The Departments believe that commenters misunderstood the intent of the regulatory text due to imprecise wording, which is now clarified by deleting "subject to the terms of" and replacing with "processed in accordance with."

- In § 236.3(f)(4)(i) regarding the transportation of UACs, DHS is amending the regulatory text to make it clear that, as a general matter, UACs are not transported with unrelated detained adults. The two situations described in the regulatory text are limited exceptions to this general rule. DHS is adding the specific reference to unrelated "detained" adults, for clarity.

- In § 236.3(g)(1)(i) regarding DHS procedures in the apprehension and processing of minors or UACs, Notice of Rights and Request for Disposition, DHS is removing the qualification that the notice will be read and explained when the minor or UAC is believed to be less than 14 years of age or is unable to

<sup>17</sup> See Detention and Release of Juveniles, 53 FR 17449 (May 17, 1988). When published as a final rule, the provisions applying to the detention and release of juveniles were originally placed in 8 CFR 242.24. After Congress passed IIRIRA, the former INS published a final rule updating several immigration-related provisions of the CFR and moved these provisions from § 242.24 of title 8 to § 236.3. See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Proceedings, 62 FR 10312 (Mar. 6, 1997).

<sup>18</sup> See, e.g., ICE, Family Residential Standards, <https://www.ice.gov/detention-standards/family-residential> (last visited May 1, 2019); CBP, National Standards on Transport, Escort, Detention, and Search (Oct. 2015), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf> (last visited May 1, 2019).

<sup>19</sup> For instance, paragraphs 32(A), (B), and (D), and 33 of the FSA grants *Flores* class counsel special access to covered minors and UACs and to certain facilities that hold such minors and UACs; it is unnecessary to codify these provisions in regulation. Similarly, paragraphs 29 to 31 include special reporting requirements with respect to class counsel and the supervising court; reporting to these entities would be unnecessary following termination of the FSA.

comprehend the information contained in the Form I-770, and is clarifying that the notice will be provided, read, or explained to all minors and UACs in a language and manner that they understand. DHS is making this change to avoid confusion related to DHS's legal obligations regarding this notice, while still acknowledging that it may be necessary to implement slightly different procedures depending on the particular minor or UAC's age and other characteristics.

- In § 236.3(g)(2)(i) regarding DHS custodial care immediately following apprehension, the proposed regulatory text stated that UACs “may be housed with an unrelated adult for no more than 24 hours except in the case of an emergency or exigent circumstances.” Commenters objected to the use of the term “exigent circumstances” as it was not defined. DHS agrees to delete the term “exigent circumstances” as it is redundant to “emergency.”

- In § 236.3(i)(4), commenters requested additional language tracking the verbatim text of FSA Ex. 1. In response to these comments, DHS added language of FSA Ex. 1 paragraph.

- Section 236.3(j) and (n) now consider that DHS is not precluded from releasing a minor who is not a UAC to someone other than a parent or legal guardian, specifically a brother, sister, aunt, uncle, or grandparent who is not in detention and is otherwise available to provide care and physical custody.

- DHS has added a new § 236.3(j)(4) to state clearly that the Department will consider parole for all minors who are detained pursuant to section 235(b)(1)(B)(ii) of the INA or 8 CFR 235.3(c) and that paroling such minors who do not present a safety risk or risk of absconding will generally serve an urgent humanitarian reason. DHS will also consider aggregate and historical data, officer experience, statistical information, or any other probative information in determining the detention of a minor.

- Section 236.3(o) is amended to clarify that the Juvenile Coordinator's duty to collect statistics is in addition to the requirement to monitor compliance with the terms of the regulations.

- In § 410.101, HHS agrees to amend the definition of “special needs minor,” replacing the term “retardation” with “intellectual disability.”

- In § 410.201(e), HHS agrees with multiple legal advocacy organizations' analysis that the FSA and TVPRA run in contradiction to each other in placing UACs in secure facilities based solely on the lack of appropriate licensed program availability; therefore, ORR is striking the following clause from this section:

“. . . or a State or county juvenile detention facility.”

- In § 410.202, in response to commenters' concerns, HHS clarifies that ORR places UACs in licensed programs except if a reasonable person would conclude, “based on the totality of the evidence and in accordance with subpart G” that the UAC is an adult.

- In § 410.203, in response to commenters' concerns, HHS clarifies that it reviews placements of UACs in secure facilities at least monthly and that the rule does not abrogate any requirements that ORR place UACs in the least restrictive setting appropriate to their age and any special needs.

- In § 410.302(a), in response to commenters' concerns, HHS clarifies that the licensed program providing care for a UAC shall make continual efforts at family reunification as long as the UAC is in the care of the licensed program.

- In § 410.600(a) regarding transfer of UAC, the proposed regulatory text states that, “ORR takes all necessary precautions for the protection of UACs during transportation with adults.” However, as ORR does not transport adult aliens, HHS has decided to strike this language from the final rule.

- In § 410.700 HHS is adding the “totality of the evidence and circumstances” for age determinations standards to mirror the DHS standard in compliance with statute. *See* 8 U.S.C. 1232(b)(4).

- In § 410.810(b), HHS declines to place the burden of evidence in the independent internal custody hearings on itself; however, it has modified the rule text to indicate that HHS does bear the initial burden of production supporting its determination that a UAC would pose a danger or flight risk if discharged from HHS' care. The UAC must bear the burden of persuading the independent hearing officer to overrule the government's position, under a preponderance of the evidence standard.

## V. Discussion of Public Comments and Responses

### A. Section-by-Section Discussion of the DHS Proposed Rule, Public Comments, and the Final Rule

#### 1. Parole (§ 212.5)

##### Summary of Proposed Rule

In § 212.5(b), DHS proposed to remove the cross-reference to § 235.3(b) as it currently appears in order to eliminate an ambiguity and to codify its longstanding understanding of how certain provisions in § 235.3(b)'s provisions relating to parole of aliens in

expedited removal proceedings who lack a credible fear (or have not yet been found to have a credible fear) apply both to adults and minors. Accordingly, such minors will be paroled only in cases of medical necessity or when there is a law enforcement need. This is the same standard that applies to adults in these same circumstances. These proposed changes also eliminate an existing tension with the text of the relevant statutory provision.

#### Public Comments and Responses

One commenter stated that it agreed with the determination that parole should be limited to cases of medical necessity or law enforcement need and that parole must be within the discretion of DHS. Many commenters, however, disagreed with the proposal and expressed concern about more restrictive parole standards, the impact on asylum seekers, and questioned the necessity for the proposed changes given existing discretionary parole authority.

#### Limiting Parole to Medical Necessity or Law Enforcement Need

*Comments.* Several commenters stated that the proposed parole standards are restrictive and will unnecessarily prevent the release of children who pose no flight or safety risk. Most of these commenters expressed concern that the removal of the cross-reference to § 235.3(b) allows for children to only be paroled if there is a “medical necessity or law enforcement need,” whereas the FSA allows children to be paroled when there is an “urgent humanitarian need or significant public benefit.” Some of these commenters stated that this limitation fails to consider the particular vulnerability of children as required by the FSA and is unnecessary due to the already high standard for the limited number of children who would qualify for parole under the prior standards.

Multiple commenters stated that children with urgent humanitarian needs such as pregnant young women and children with physical disabilities, cognitive impairments, or chronic medical conditions would likely no longer qualify for parole under the proposed regulations and the medical emergency standard.

A few commenters stated that DHS should continue the general policy to prioritize parole to ensure the best interests of minors and their placement in the least restrictive setting appropriate. Another commenter stated that the proposed regulations should be withdrawn and asked the following questions: (i) How large was the

population of minors who were in detention under § 235.3(c) and who were released on parole under § 212.5(b) on a yearly basis for the past five years; (ii) why is § 212.5(b) inappropriate for minors in removal proceedings under § 235.3(c); and (iii) why should accompanied minors not be permitted to be paroled on a case-by-case basis for an urgent humanitarian reason or a significant public benefit?

**Fewer Minors Paroled**

Multiple commenters stated that the proposed changes will result in children facing the same parole standards as adults and thereby being paroled less frequently. One of these commenters expressed concern that this would likely mean children will be detained beyond the 20 days that is generally the current practice permitted under the FSA. Another commenter stated that while the NPRM states that proposed § 236.3(j) “adds that any decision to release must follow a determination that such release is permitted by law, including parole regulations,” it does nothing to specify DHS parole procedures favoring the release of children, which the commenter contended was required by the FSA.

**Impact on Asylum Seekers**

Multiple commenters expressed concern about how the proposed changes to parole would impact asylum seekers. One of these commenters stated that the proposed rule provides no explanation for eliminating DHS’s authority to consider unique circumstances that may arise for children seeking asylum. Another commenter stated that asylum applicants in detention have historically had an opportunity to be released through parole provisions, and contended that the proposed parole standards would afford DHS broad

discretion to apply a new narrow standard, leaving survivors of sexual violence and other forms of trauma with minimal hope of release pending a lengthy adjudication of their complex, evidence-driven asylum claims. A different commenter stated that the proposed rule uses the detention of children to disincentivize asylum seekers from going forward with their asylum claims and that the changes will make it more difficult for certain vulnerable children and families in DHS custody to be paroled as they await an assessment of whether they have a credible fear of persecution.

**Existing Discretionary Parole Authority**

Other commenters pointed to existing discretionary parole authority and questioned the necessity of the proposed changes. One commenter likened the choice between detention and parole for children to the choice between incarcerating a minor or releasing them on probation, contending that detention alternatives are healthier for children and avoid expenses. Another commenter contended that ICE has the discretion to release on parole and that the new regulations place no meaningful limit on the ability of ICE to detain families during their proceedings. This commenter stated that DHS’s proposed regulations provided no review of a parole denial, and that the Attorney General indicated his intention to review and possibly reverse the long-standing precedent providing for individualized ICE custody determinations with review in immigration court for asylum seekers who have passed a credible fear interview.<sup>20</sup> The commenter urged that children and families be given a meaningful ability to seek redress of detention after a parole denial. Still another commenter, characterizing the

change as “severely restrict[ing]” parole for these individuals, stated that DHS’s claim that this change is intended by Congress is “belied” by INA 212(d)(5)(A), wherein Congress authorized discretionary parole on a case-by-case basis for urgent humanitarian reasons or significant public benefit.

**General Opposition to Proposed Changes**

Several commenters objected to any attempt to curtail parole in the name of family unity, contending that detention significantly harms children. Another commenter, perceived that this rule would limit opportunities for minors to be released from detention and asserted that the Administration should make every effort to ensure that children, and as applicable, children with families, spend as little time in detention as possible. This commenter stated that, in the case of a minor who is traveling with a family member, absent an indication of trafficking or unfitness on the part of the relative, it is in the best interest of the child to be paroled from detention with the relative. A different commenter requested that the final rule provide that all minors are bond and parole eligible.

*Response.* For more general concerns about the release of minors from DHS custody, see the discussion under § 236.3(j). For concerns about the negative effects of detention, see the discussion under § 236.3(h) regarding detention of family units.

DHS provides the following counts of adults and minors who were released from FRCs on parole in FY 2014 through 2018 in response to comments. There are also other means to effectuate release. See Table 10 for Average Length of Stay and Table 11 for reasons for release.

**Table 5: Release from Family Residential Centers on Parole**

Fiscal Year	Release on Parole	Total Book-ins	Percent
2014	235	601	39%
2015	771	10,921	7%
2016	7,107	42,695	17%
2017	8,006	37,515	21%
2018	10,146	45,755	22%

DHS notes that the changes under this provision are limited in scope and

intended not to foreclose the possibility of a minor’s release, but to clarify that

the provisions in § 235.3(b) governing the parole of aliens in expedited

<sup>20</sup> The Attorney General has since done so, in *Matter of M-S*, 27 I&N Dec. 509 (A.G. 2019).

removal (specifically those pending a credible fear interview or ordered removed in the expedited removal process) apply to all such aliens, and not merely adults. Parole of minors will be applied in accordance with applicable law, regulations, and policies, and DHS will consider parole for all minors in its custody who are eligible. The current cross-reference to § 235.3(b) within § 212.5(b) is confusing because it suggests, incorrectly, that the more flexible parole standards in § 212.5(b) might, for minors, override the provisions in § 235.3(b) that govern parole for any alien in expedited removal proceedings (*i.e.*, an alien who has been ordered removed or is still pending a credible-fear determination). See 8 CFR 235.3(b)(2)(iii), (b)(4)(ii). DHS disagrees with that interpretation of its current regulations, which, among other things, is in tension with the text of the relevant statutory provisions at 8 U.S.C. 1225(b)(1)(B)(iii)(IV) (“Any alien subject to [expedited removal] shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”). By its terms, § 235.3(c) applies only to arriving aliens who are placed into section 240 proceedings. Many of the comments on the proposal—for example, those urging DHS to adopt a more flexible parole standard or a general practice of paroling alien juveniles—largely amount to disagreement with DHS’s legal interpretation of INA 235(b)(1)(B)(iii)(IV), set out in the preamble of the NPRM, see 83 FR at 45502. But DHS is not persuaded that this legal interpretation is erroneous. Moreover, the FSA does not specifically discuss parole, much less require parole for urgent humanitarian reasons or significant public benefit. While the FSA expresses a preference for release for juveniles, it does not *require* release in all cases, and explicitly does not provide a specific standard for such release decisions.

DHS notes that many commenters appeared to confuse the proposed changes with changes that would be much broader in scope; for example, by eliminating from § 212.5(b) entire groups of aliens who have been or are detained from receiving case-by-case parole determinations and eliminating completely the “urgent humanitarian reasons” or “significant public benefit” justifications. As the regulatory language in the revised § 212.5(b) indicates, this is not the case. The intent of these provisions is only to remove the ambiguity in the current regulations that appears to erroneously apply the more

flexible standard of parole for arriving aliens (“urgent humanitarian reasons or significant public benefit”) placed in section 240 proceedings to minors placed in expedited removal, rather than the standards generally applicable to all aliens placed in expedited removal who have yet to have a credible fear interview or who have been ordered removed (“required to meet a medical emergency or is necessary for a legitimate law enforcement objective”).

The Attorney General’s recent decision in *Matter of M-S*, 27 I&N Dec. 509 (A.G. 2019), does not affect the parole standard applicable to the narrow category of aliens to whom the amendments to § 212.5(b) apply—specifically, aliens who are pending a credible fear interview or who have been ordered removed through the expedited removal process. In *Matter of M-S*, the Attorney General’s decision addressed aliens who enter the United States between the ports of entry, are processed for expedited removal, and are then placed into removal proceedings pursuant to INA 240 after establishing a credible fear. *Matter of M-S*, 27 I&N Dec. 509. Those aliens, he concluded, are ineligible for release on bond under INA 236(a) and may only be released from DHS custody through parole under INA 212(d)(5). *Id.* But that is a different category of aliens and the proposal here would do nothing to alter the standards governing the detention or release of those aliens. DHS will continue to apply its parole authority in these cases in accordance with applicable law, regulations, and policies. DHS also declines to adopt commenters’ suggestions that DHS codify a review process for denials of parole, which has never existed, given that the decision to grant parole is entirely discretionary. However, as previously explained, DHS’s current bed space at FRCs necessarily limits the number of family units who could be detained at any given time.

#### Changes to Final Rule

Accordingly, DHS is finalizing its regulation at 8 CFR 212.5(b) as proposed but is adding language to permit release of a minor to someone other than a parent or legal guardian, specifically an adult relative (brother, sister, aunt, uncle, or grandparent) not in detention. The reason for this change is explained in the section below regarding comments on proposed 8 CFR 236.3(j).

#### 2. Definitions § 236.3(b)

Minor § 236.3(b)(1) and Unaccompanied Alien Child (UAC) § 236.3(b)(3)

#### Summary of Proposed Rule

DHS proposed revisions to § 236.3(b)(1) to define a minor as any alien under 18 years of age who has not been emancipated or incarcerated for an adult criminal offense. DHS proposed to remove the definition of juvenile as it is too broad and replace it with the more specific terms minor and UAC. The difference between minor and UAC is that the term “minor” captures any alien under the age of 18 that is not defined as a UAC, for example, minors accompanied by their parents. Also, under these definitions, a “minor” cannot be legally emancipated or have been incarcerated due to an adult conviction, whereas the definition of UAC does not exclude these categories.

#### Public Comments and Response

*Comments.* One commenter stated that it was inconsistent with the FSA to delete the definition of “juvenile” and replace it with separate definitions for “minor” and “UAC,” thereby requiring different treatment between juveniles who are accompanied by their parent or legal guardians, and juveniles who are not. The commenter noted that although UACs must be transferred to ORR custody within 72 hours of apprehension, juveniles who did not meet this definition would not be transferred. The commenter also noted that under the NPRM, minors could be released only to a parent or legal guardian, whereas, the commenter contended, the FSA requires the release of all children to the least restrictive placement. The commenter concluded that adopting the two definitions would conflict with the FSA, which does not draw any distinctions between juveniles in ORR custody and juveniles in DHS custody.

*Response.* DHS disagrees that replacing the term juvenile with a definition for minor and a definition for UAC is inconsistent with the FSA or creates an improper distinction. The term “juvenile” originates not in the FSA, which did not use or define the term, but in existing DHS regulations. These regulations have not been updated since 1988 and do not reflect either the provisions of the FSA or any developments in law since that time. Accordingly, in updating the regulations to implement the FSA, DHS has adopted the same definition of “minor” as used in the FSA. Additionally, DHS has included the term UAC, as that term is defined in the HSA. Pursuant to the HSA and the TVPRA, ORR is

responsible only for the care and custody of UACs. See 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(b)(1). Because the HSA and the TVPRA specifically define UACs and impose certain requirements related only to UACs, the regulatory text must be able to distinguish between UACs and minors who do not meet the UAC definition. The term juvenile is too broad to provide a meaningful definition and does not track the language of the FSA.

#### Changes to Final Rule

DHS finalizes its definitions of minor and UAC as proposed and declines to make changes in response to public comments.

#### Special Needs Minor § 236.3(b)(2)

##### Summary of Proposed Rule

DHS did not propose any revisions to the FSA for the definition of special needs minor. Special needs minor is defined as any minor with physical disabilities, cognitive impairments or chronic medical conditions that was identified in the individualized needs assessment.

##### Public Comments and Response

*Comments.* Some commenters asked for expanded definitions of “special needs minor” or additional provisions relating thereto. One commenter stated the definition should be broadened to include developmental disability and learning disability. The commenter urged that it is important for children, particularly unaccompanied children, to be able to understand and follow instructions or directions given to them by Federal officials, attorneys, and care custodians in licensed facilities. The commenter also asserted that children with learning or developmental disabilities would be less likely to take advantage of the resources for which they are eligible and may not fully comprehend the life-changing decisions that they are asked to make during their immigration proceedings. Another commenter contended that the rule does not adequately discuss special needs or require DHS to consider a child’s disability in determining placement in a secure facility or even in a FRC.

One commenter also condemned the use of the “outdated” term “retardation” in the definition of special needs minor. The commenter stated that the term is used as a slur that dehumanizes, demeans, and does very real emotional harm to people with mental and developmental disabilities. The commenter acknowledged the term was used in the FSA agreement, but argued that it is inappropriate in a modern-day regulation.

*Response.* The regulatory language adopted the same definition of “special needs” as the definition used in the FSA. This definition includes any minor whose mental condition requires special services and treatment as identified during an individualized needs assessment. DHS disagrees that the definition should be expanded because the definition is broad enough to include minors with developmental and learning disabilities, if the special needs assessment determines that these conditions require special services and treatment.

The proposed regulatory language contains multiple provisions requiring DHS and HHS to consider a minor or UAC’s special needs, including provisions requiring consideration of special needs when determining placement. For example, 45 CFR 410.208 states that ORR will assess each UAC to determine if he or she has special needs and will, whenever possible, place a UAC with special needs in a licensed program that provides services and treatment for the UAC’s special needs. Title 8 CFR 236.3(g)(2) requires DHS to place minors and UACs in the least restrictive setting appropriate to the minor or UAC’s age and special needs. Title 8 CFR 236.3(i)(4) requires that facilities conduct a needs assessment for each minor, which would include both an educational assessment and a special needs assessment. Additionally, 8 CFR 236.3(g)(1) requires DHS to provide minors or UACs with Form I-770 and states that the notice shall be provided, read, or explained to the minor or UAC in a language and manner that he or she understands. These provisions ensure that a minor or UAC’s special needs are taken into account, including when determining placement.

#### Changes to Final Rule

DHS is amending the regulatory language to delete the term “retardation” and insert the term “intellectual disability.” HHS has also deleted this term in its regulatory language.

#### Unaccompanied Alien Child § 236.3(b)(3)

##### Summary of Proposed Rule

DHS proposed to define a UAC as provided in 6 U.S.C. 279(g)(2), which states that a UAC is a child under the age of 18 who has no lawful immigration status in the United States and who has no parent or legal guardian present in the United States who is available to provide care and physical custody.

#### Public Comments and Response

The comments received are discussed above in conjunction with the definition of “minor.”

#### Changes to Final Rule

DHS declines to change the proposed definition of UAC in response to public comments.

#### Custody § 236.3(b)(4)

##### Summary of Proposed Rule

The term custody is not defined in the FSA. DHS has defined custody as the physical and legal control of an institution or person.

##### Public Comments and Response

DHS did not receive any comments requesting a change to this definition.

#### Changes to Final Rule

DHS is not making changes from the proposed definition of custody in the final rule.

#### Emergency § 236.3(b)(5)

##### Summary of Proposed Rule

DHS proposed revisions to § 236.3(b)(5) to define emergency as an act or an event that prevents timely transport or placement of a minor, or could delay compliance with or temporarily excuse compliance with other provisions of the proposed rule. As discussed in the preamble to the proposed rule, the new definition of emergency has been added in the regulatory text. The new definition largely tracks the existing text of the FSA except that it reflects DHS’s recognition that emergencies may not only delay placement of minors but could also delay compliance with other provisions of the proposed rule or excuse noncompliance on a temporary basis.

##### Public Comments and Response

*Comments.* Several commenters expressed concern that the proposed “expanded” definition of “emergency” would grant DHS too much discretion to suspend compliance with certain FSA provisions relating to standards of care and custody for children, such as timely transport or placement of minors and other conditions implicating their basic services.

Some of these commenters contended that the definition would allow DHS to declare any situation an emergency and deny any and all protections to children. Several commenters stated that the expanded definitions of emergency would make ignoring limitations on transfer the “default” and compliance with the FSA timeframe the exception

rather than the rule. These commenters stated this would expose children to dangerous conditions documented repeatedly by government inspectors and outside researchers, including inadequate and inappropriate food, severely cold temperatures, bullying and abuse, and lack of medical care.

Other commenters had specific objections to the proposed definition. One contended that it was circular, defining an emergency primarily as an event that prevents compliance. Some expressed concern that events other than a natural disaster, facility fire, civil disturbance, and medical or public health concerns might also qualify as an emergency, leaving significant room for interpretation. Several commenters stated that the phrase “other conditions” would implicate the basic needs of the children which would further jeopardize their well-being, health, and safety and runs contrary to the explicit placement context of the FSA. Another commenter expressed concern that the language “medical or public health concerns at one or more facilities” which allow for a possible emergency in instances where several minors lack key vaccinations, or where a few minors may require treatment for chronic conditions such as asthma or diabetes.

With respect to the consequences of the emergency, commenters offered still other concerns. One commenter expressed concern with the language that minors must be transferred “as expeditiously as possible,” instead of including a defined period of 3 or 5 days, as the commenter believed required by the TVPRA.

A few commenters noted that, as a result of the proposed definition, minors may be held indefinitely in temporary CBP facilities that are intended only for short-term use and that are assertedly notorious for frigid temperature, deficient medical care, and other poor conditions (*i.e.*, sleeping in office buildings without beds or showers, or in tents, vans or buses without water and sanitation). One commenter expressed concern that, even without invoking an emergency, CBP is often grossly negligent towards children and those in its custody.

Several commenters contended that the proposed definition contradicts FSA paragraph 12A which provides no exception for housing minors with unrelated adults for longer than 24 hours, because they viewed the broad interpretation of emergency as allowing DHS to house children with unrelated adults indefinitely and for virtually any reason.

One commenter stated that the example provided by DHS regarding delayed access to a snack or meal seems reasonable; however, it would provide DHS the flexibility to label any act or event an emergency and that recommended that DHS: (1) Look into the definition of emergency in the American Bar Association’s (ABA) Unaccompanied Child Standards; and (2) adopt a more limited, non-circular definition of emergency, to avoid what the commenter considered an unnecessary relaxation of the FSA standards. Other commenters recommended that DHS instead ensure that non-perishable, nutritious food and bottled water in packs will be kept on site at all times in case of an emergency evacuation in order to ensure that nutritional needs of children are met.

Several commenters argued that DHS and HHS should provide more evidence and explanation of the need to expand the current definition; describe how the agencies arrived at these definitions; provide a timeframe for how long an emergency may last; and provide for the consequences for invoking the emergency when unwarranted.

One of these commenters recommended that DHS and HHS compile a comprehensive list of permissible emergency circumstances. One commenter noted that the proposed rule leaves the facility to decide the rationale and length of an emergency and recommended that DHS hold detention centers accountable to the maximum safety and compliance requirements and make no exemptions to the minimum standards in FRCs for detainees.

Several commenters addressed conduct in the event of an emergency. Some, for example, recommended that the proposed rule should clarify the circumstances that the Government would consider constituting emergencies, establish that any corresponding exemptions be limited in scope, and ensure that the fundamental needs of children are met, regardless of the circumstances constituting the “emergency.”

One commenter suggested that in cases of emergency, rather than devising means to delay the provision of basic services or care and timely placement or transfer, DHS should consider how provisions could be made to serve the children during transport and should prioritize emergency preparedness planning to ensure readiness to respond. And several commenters recommended that, from a public health perspective, designation of an emergency should trigger additional resources, prepared in advance through contingency planning

and made available through standing mechanisms.

*Response.* DHS notes that paragraph 12(B) of the FSA defines an emergency as “any act or event that prevents the placement of minors pursuant to paragraph 19 within the time frame provided” (*i.e.*, three days or five days, as applicable). The FSA also contains a non-exhaustive list of acts or events that constitute an emergency, such as “natural disasters (*e.g.*, earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies (*e.g.*, a chicken pox epidemic among a group of minors).” DHS notes that the definition of emergency contained within this provision does not depart from how the FSA defines an emergency act or event. Rather, this provision recognizes that, in rare circumstances, an emergency may arise, generally unanticipated, that affects more than just the transfer of a minor from one facility to another (*e.g.*, a natural disaster or facility fire may render CBP temporarily unable to provide contact between a minor and family members apprehended with him or her). As indicated in the NPRM, the impact, severity, and timing of a given emergency situation dictate the operational feasibility of providing certain items to minors, and thus the regulations cannot contain every possible reality DHS will face. The applicability of “emergency” is intended to be flexible to the extent it fits within the parameters set forth by the FSA. Therefore, DHS disagrees with commenters’ claim that the definition of emergency creates excessive discretion, allows DHS to declare an emergency for any reason, or unnecessarily relaxes the existing FSA standards.

DHS also notes that, during an emergency situation, it continues to make every effort to transfer minors and UACs as expeditiously as possible, and to provide all other required amenities as set out in the FSA. Depending on the severity of the emergency, the provision of one or more FSA requirements may be temporarily delayed for some minors and UACs. For instance, if a child in a CBP facility has a medical emergency such that he or she must be provided with urgent medical care, it may be necessary to temporarily delay the provision of meals to other minors and UACs during the time required to provide such medical care. As soon as the medical emergency subsides, however, CBP would resume the provision of meals to all other minors and UACs. Similarly, if a facility suffers an electrical failure, such that the air conditioning breaks, all minors and UACs in that facility may temporarily be

held in temperatures that do not comply with the applicable standards set out in the FSA. CBP would work to rectify the problem as quickly as possible, and would take steps to mitigate the problem (e.g., providing extra fans for the facility). Once the air conditioning is fixed, however, the minors and UACs would return to conditions consistent with the standards set out in the FSA. CBP also records the provision of food to minors and UACs, and records that CBP has routinely confirmed the availability of drinking water, operational toilets, and sinks, as well as the conditions in its hold cells (e.g., temperature, cleanliness) in its electronic systems of records. Any emergency situations requiring temporary suspension of the requirements set out in the FSA, as well as the conclusion of that emergency, is also recorded in the electronic systems of records. To the extent it is able, CBP also maintains a sufficient stockpile of supplies, such as snacks, at its facilities to ensure that there are sufficient supplies available in an emergency situation.

DHS disagrees with commenters' concern about minors being held "indefinitely" as a result of a declared emergency and emphasizes that when emergency conditions exist, transfer must still occur "as expeditiously as possible." DHS notes that the "as expeditiously as possible" time frame is derived from the FSA itself. The existence of an emergency under these regulations does not excuse DHS from transferring minors or UACs to licensed programs or HHS custody, respectively. DHS must still move as expeditiously as possible, given the emergency, to place minors and/or UACs.

DHS notes that the ABA's Unaccompanied Child Standards' concept of "emergency" appears to apply to a much narrower situation than the concept of "emergency" in the FSA, and declines to apply these standards to DHS's regulatory definition of emergency. The ABA concept of "emergency" appears to govern when it may be permissible to house minors and UACs with unrelated adults. The FSA definition of emergency covers a wider variety of situations than the ABA's provision. Accordingly, DHS has described such situations in other provisions of this rule. *See, e.g.*, 8 CFR 236.3(g)(2)(ii). DHS notes that these provisions of the proposed rule do incorporate and contemplate certain emergency exceptions.

#### Changes to Final Rule

DHS declines to change its proposed definition of emergency in response to public comments.

#### Escape-Risk § 236.3(b)(6)

##### Summary of Proposed Rule

The term "escape-risk" is defined in paragraph 22 of the FSA. DHS proposed to define escape-risk as a minor who attempts to escape from custody. DHS proposed requirements and clarification for the definition of escape-risk. A minor is an escape-risk if he or she is subject to a final order of removal, has a prior breach of bond, has failed to appear before DHS or immigration court, or has previously absconded from state or Federal custody.

##### Public Comments and Response

*Comments.* One commenter stated that the proposed rule definition of escape risk includes a child who "has previously absconded or attempted to abscond from state or Federal custody." The commenter argued that the FSA refers only to Federal custody and that the revised definition could include a child who has been ordered into foster care by a state juvenile court and then ran away from foster care. The commenter concluded children should not face detention in a secure facility because of such circumstances.

*Response.* In paragraph 22 of the FSA, escape risk is defined as "a serious risk that the minor will attempt to escape from custody." The NPRM adopted that same definition. Paragraph 22 of the FSA also provides a non-exhaustive list of factors to consider when determining whether a minor is an escape risk. Because the list of factors to consider is not exhaustive, it is not inconsistent with the FSA for DHS to consider additional factors in determining a minor's escape risk. DHS continues to find that whether the minor has previously absconded or attempted to abscond from state or Federal custody to be relevant to whether there is a risk the minor will attempt to escape from DHS custody.

#### Changes to Final Rule

DHS declines to change its proposed definition of escape risk in response to public comments.

#### Family Unit § 236.3(b)(7)

##### Summary of Proposed Rule

The term family unit is not defined in the FSA. DHS proposed to define family unit as two or more aliens consisting of a minor accompanied by a parent or legal guardian. If evidence shows the minor has no relation to the purported

parent or legal guardian, the individuals would not constitute a family unit, and, if no parent or legal guardian for the minor is in the United States or the parent or legal guardian in the United States is not available to provide care and physical custody, the minor would be a UAC.

##### Public Comments and Response

*Comments.* Commenters expressed concern that the proposed definition of family member seeks to narrow the definition of "family unit" by excluding adult family members other than the child and his/her biological parent(s) or legal guardian(s). The commenters wrote that DHS has ignored the reality in some foreign cultures that extended family members may be the sole caregivers for the children and recommended that DHS adopt a broad definition of "family unit" to comply with the FSA and accepted child welfare principles and practices.

One commenter stated that the proposed definition violates the best interest of the child standard because it separates children from their related, non-parent caregivers. The commenter stated that, although the FSA mandates that UACs be "segregated from unrelated adults," it requires that DHS provide access to "contact with family members that were arrested with the minor," hence recognizing a broader definition of "family." Likewise, the commenter stated that ORR's current definition of "family" and HHS' proposed regulations, which allow the release of a child to an adult seeking custody when family reunification is not possible, recognize a broader definition.

One commenter recommended that DHS adopt the broad definition of family similar to the "Standards for the Custody, Placement and Care; Legal Representation and Adjudication of Unaccompanied Alien Children in the United States" (UC Standards) and the ABA Civil Immigration Detention Standards. The commenter contends that nothing in the language of the TVPRA restricts DHS's ability to release a UAC to someone other than a parent or legal guardian and therefore there is no legal requirement to narrow the definition of "family member."

*Response.* DHS notes that the definition of "family unit" in this rule does not encompass a broader definition of family as proposed by the commenters because DHS must ensure it complies with the applicable laws and regulations governing the apprehension, processing, care, and custody of alien juveniles. The HSA and the TVPRA transferred to ORR HHS the

responsibility for the care and custody of UACs. A UAC, as defined in the HSA, is a minor under 18 years of age who lacks lawful immigration status in the United States and either lacks a parent or legal guardian in the United States or lacks a parent or legal guardian in the United States available to provide care and physical custody. See 6 U.S.C. 279(g)(2). Once an alien juvenile has been determined to be a UAC, DHS must transfer the UAC to the care and custody of HHS within 72 hours, absent exceptional circumstances (unless such a UAC is a national or habitual resident of a contiguous country and is permitted to withdraw his or her application for admission under section 1232(a)(2)). See 8 U.S.C. 1232(b)(3). Accordingly, DHS has no authority to release a UAC.

In accordance with the TVPRA, only non-UACs can be held in DHS custody at an FRC. By definition, a minor is not a UAC if he or she has an adult parent or legal guardian in the United States who is available to provide care and physical custody. The term “family unit” is defined to include those alien juveniles—minors who are accompanied by his/her/their adult parent(s) or legal guardian(s)—who are not UACs. Absent additional information available to DHS at the time of encounter indicating a parent or legal guardian was present in the United States and available to provide care and physical custody, if a juvenile alien is encountered or apprehended with an adult relative other than a parent or legal guardian, that juvenile alien lacks a parent or legal guardian in the United States available to provide care and physical custody of the juvenile. See 6 U.S.C. 279(g)(2). Thus, under the HSA and TVPRA, the juvenile alien would be determined to be a UAC and transferred to the care and custody of HHS. See 8 U.S.C. 1232(b)(3). Such a juvenile alien would not be detained in DHS custody at an FRC.

DHS notes that the commenter’s suggestion that DHS adopt ORR’s definition of “family” in the ORR proposed regulation at 45 CFR 410.300 is misguided, as that section does not contain a separate definition of “family” but instead identifies the types of potential sponsors to whom ORR may release a UAC. DHS notes that the term “family” encompasses a broader group of individuals than those individuals determined to be a “family unit.” HHS has unique authorities under the TVPRA and the HSA to determine whether release of a UAC to a sponsor—which may include an adult who is a member of the child’s family, but who is not a parent or legal guardian—is appropriate. DHS does not have any

similar authorities to release UACs to sponsors. For an additional discussion about the individuals to whom a non-UAC minor may be released, please see the discussion in Section B.10, Release of Minors from DHS Custody. The commenter also notes that the FSA requires DHS to provide “contact with family members that were arrested with the minor,” FSA paragraph 12, and thus “recognizes the broader definition of family.” However, this paragraph refers to procedures and temporary placement immediately following the arrest or apprehension of a minor. This paragraph acknowledges that a juvenile may be encountered with family members who are not parents or legal guardians, and that there is a meaningful benefit to providing contact with such family members. However, the FSA does not require DHS to detain juvenile aliens together with adult relatives who are not parents or legal guardians, and DHS is not permitted to detain UACs under the HSA and TVPRA.

DHS notes that the commenter recommends DHS adopt the broad definition of family similar to those described in the ABA “Standards for the Custody, Placement and Care; Legal Representation and Adjudication of Unaccompanied Alien Children in the United States” or the ABA Civil Immigration Detention Standards. However, those standards include family members who could not be detained together in DHS custody under the TVPRA and consistent with the HSA.

DHS also notes the commenter’s disagreement with DHS’s contention that the TVPRA restricts DHS’s ability to release a UAC to someone other than a parent or a legal guardian. As stated in the proposed rule, following the passage of the TVPRA, HHS is solely responsible for the care and custody of UACs, and DHS no longer has the authority to release a UAC. However, upon further consideration of the commenter’s contention and review of relevant statutes and case law, DHS has determined that the law does not prohibit DHS from releasing a non-UAC minor to someone who is not a parent or legal guardian. DHS acknowledges that this interpretation of the law differs from the interpretation represented to the U.S. Court of Appeals for the 9th Circuit in recent litigation, but is making this change upon due consideration. See Brief for Appellants, *Flores v. Sessions*, No. 17–56297 (9th Cir. Jan. 5, 2018). This is being permitted to facilitate transfers to non-parent family members when such a transfer is appropriate, that DHS has no

concerns about the minor’s safety upon such release, and no concerns about the adult relative’s ability to secure the non-UAC minor’s timely appearance before DHS or the immigration courts. Any release of a non-UAC minor to an adult relative other than a parent or legal guardian will be within the unreviewable discretion of DHS. DHS reiterates, however, that if no parent or legal guardian is in the United States and available to provide care and physical custody for an alien under the age of 18 with no lawful status, the juvenile meets the definition of a UAC and must be transferred to HHS custody as only HHS has the responsibility for the care, custody, and placement of UACs. See 6 U.S.C. 279(g)(2); 8 U.S.C. 1232(b)(1), (3).

#### Changes to Final Rule

DHS declines to change its proposed definition of family unit in response to public comments, but will change certain provisions regarding the release of minors as explained in subsequent sections.

#### Licensed Facility § 236.3(b)(9)

##### Summary of Proposed Rule

In § 236.3(b)(9), DHS proposed a definition for “licensed facility.” To parallel the provisions of FSA paragraph 6, DHS proposed that facilities that temporarily detain minors obtain licensing where appropriate licenses are available from a State, county, or municipality in which the facility is located. The proposed rule also eliminated existing barriers to the continued use of FRCs by creating an alternative to meet the licensed facility definition for such detention to provide reasonable assurances about the conditions of confinement at that facility, and thus to implement the underlying purpose of the FSA’s licensing requirement. DHS’s proposed definition considers a “licensed facility” to be one that is licensed by the State, county, or municipality in which it is located. If no such licensing scheme exists, DHS’s proposed that the facility will meet the definition of “licensed facility” if it complies with ICE’s family residential standards as confirmed by a third-party with audit experience hired for such a purpose.

##### Public Comments and Response

*Comments.* One commenter noted that she supports DHS-licensed facilities that would allow children to stay with their parents or relatives as long as possible, given that prolonged separation from families can be traumatic for children. The commenter stated that she would support these



facilities to detain families during their immigration proceedings if they are “consistent with applicable law.” Many other comments, however, raised issues such as a potential conflict of interest in permitting DHS to establish the licensing requirements for DHS facilities, whether Federal licensing standards would be as rigorous as state standards, alleged inconsistencies with the FSA, whether the Federal Government has authority to license detention facilities, and whether Federal licensing would provide adequate monitoring and oversight.

- Self-Licensing and Oversight

*Comments.* Numerous commenters recommended alternative language to the proposed definition of “licensed facility.” One commenter suggested that in all cases where a state, county, or municipality licensing program is unavailable that ICE’s family residential standards should align with applicable state child welfare laws and regulations—including all state and local building, fire, health, and safety codes. This commenter stated that in emergency situations where immediate or short-term solutions are needed, existing state licensed child welfare facilities should be considered as an option. Another commenter suggested that the period of detention should be shortened to 14 days. The commenter also objected to the proposed new limits on to whom children may be released, and the elimination of the requirement that detention centers be subject to State inspections. The commenter specifically suggested that detention centers be required to meet care requirements that apply to day care centers, such as having a small ratio of care givers to children, background checks, and check-in visits. Still other commenters stated that the proposed rule does not state who will propose the Federal licensing scheme for detention centers.

A few commenters stated that DHS’s difficulty licensing facilities under state licensing regimes results from the unacceptable conditions of confinement within DHS’s facilities rather than a failure of the state licensing processes. One commenter stated “In unlicensed facilities, children are at high risk for abuse and neglect, which in turn will ultimately result in high costs paid not only in the form of unnecessary suffering, the disintegration of the social fabric of our nation, but also by taxpayer money going towards Department of Children and Families, Department of Youth Services, and more state agencies responsible for welfare of youth.”

Numerous commenters stated that DHS should not be allowed to self-

license detention facilities because current facilities do not have adequate oversight and, as a result, DHS is not currently capable of maintaining clean, humane, and safe detention centers.

Multiple commenters cited to a June 2018 report from the DHS Office of Inspector General (OIG), which found that the Nakamoto Group, the third-party contractor ICE has most frequently used to conduct inspections at adult detention facilities, did not always examine actual conditions, was not consistently thorough, and frequently failed to identify compliance deficiencies.<sup>21</sup> According to the commenters, the report showed that the agency’s self-inspections by the Nakamoto Group have been lax and severely lacking. The report found that, in some instances, the Nakamoto Group even misrepresented results in their reports to ICE. The commenters also stated that the Nakamoto Group had standards that were very difficult to fail, and one commenter requested that DHS verify that the Nakamoto Group not serve as a third-party contractor for these licensed facilities.

Commenters also discussed other aspects of the OIG report. One commenter noted that the OIG report found that DHS–ICE existing inspections and monitoring mechanisms for detention facilities neither “ensure consistent compliance with detention standards, nor do they promote comprehensive deficiency corrections.” Some commenters noted that typically three to five inspectors have only three days to interview 85–100 detainees and perform and document their inspection, an amount of time that the OIG found insufficient to see if the facility was actually implementing its required policies. According to the commenters, the OIG also found that it could not characterize the interviews with detainees as sufficient because the conversations with detainees were not conducted in private and were in English only.

Yet another commenter cited the OIG report to state that inspections by third-party contractors did not insure minimum child welfare standards were met, and that although ICE completed oversight inspections every three years, it did not correct the problems it found.<sup>22</sup> Although the ICE Office of

<sup>21</sup> Department of Homeland Security Office of Inspector General, ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements: DHS OIG Highlights (OIG–18–67) (June 26, 2018) <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-8-67-Jun18.pdf>.

<sup>22</sup> Department of Homeland Security Office of Inspector General, ICE’s Inspections and Monitoring

Detention Oversight conducted more thorough inspections, the commenter noted that the OIG expressed concern that these inspections were done only once every three years with no follow-up to see if the problems were corrected.

A commenter stated that reports from private inspections are rarely available and, even when they are, do not inform the public about what standards were used as a base and how long non-compliance issues took to be resolved. These commenters pointed to the case of Danya International, a private contractor hired by DHS to inspect family detention centers for compliance with ICE’s internal standards, to highlight their concerns with the quality and lack of transparency in the inspections carried out by ICE’s third-party vendors. They stated that only three reports from Danya’s inspections have been released publicly. According to the commenters, the only information available about the remaining reports is an assertion by an ICE official in a court declaration that “Danya has generally found the FRCs to be compliant with a majority” of standards, and “[w]here Danya observed individual issues of non-compliance, the facilities took corrective action as appropriate and achieved compliance although this is a continuous process.” The commenters stated that the ICE descriptions were vague and provided very little information regarding which ICE standards were violated, or how severe or prolonged these violations were. The commenters claim that ICE denied requests for access to the reports even to DHS’s Advisory Committee on Family Residential Centers. They also asserted that DHS’s Office of Civil Rights and Civil Liberties (CRCL) has conducted more in-depth inspections of family detention centers, and what is publicly known from those inspections appears to undermine those conducted by DHS’s third-party vendors.

*Response.* DHS understands commenters’ concerns about the Federal Government setting its own standards instead of using state licensing standards; however, many States have no standards for facilities housing families. The Federal Government cannot require States to create regulatory structures to license and inspect FRCs. Therefore, to ensure compliance with the FSA in those States that do not have any applicable standards for the housing of family units, DHS established Family

of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements: DHS OIG Highlights (OIG–18–67) (June 26, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>; *Id.* at 6–8.

Residential Standards (FRS) in 2007 with the FSA as its base after a review of contemporaneous state codes of Pennsylvania and Texas. The first edition of the ICE FRS, released in 2007, was developed by independent subject matter experts (SMEs), government officials, and the nongovernmental organization (NGO) community. ICE's Juvenile and Family Residential Management Unit (JFRMU) engaged other DHS components in reviewing and providing input. Further, JFRMU sought various SMEs in areas such as emergency planning, detention administration, trauma informed care, child development, and legal rights and representation to evaluate the draft standards.

After several years of operations and data collection through a rigorous monthly and semiannual inspection program, ICE commenced a top-to-bottom review of the first-edition FRS. This review included an analysis of past and current best practices at FRCs, and focused on improving the standards to more effectively accommodate a

residential program. JFRMU established a review team led by a child-focused SME with proficiency in assessing conditions of confinement and residential programming. The team assessed FRC practices and policies, and conducted interviews with existing FRC management and direct care staff, as well as with FRC ICE/Enforcement and Removal Operations (ERO) staff, health care and mental health providers, and case management staff. These interviews allowed participants the opportunity to recommend improvements based on their experiences. The review team also sought to implement improvements to the standards that directly addressed feedback received from numerous private sector agencies and NGOs. The review team synthesized those findings and incorporated relevant changes into a second-edition FRS. The FRS continue to be improved based on best practices.

DHS notes that while the June 26, 2018, report issued by DHS OIG did make recommendations on how ICE could improve oversight over detention facilities, OIG did not specifically

examine oversight of the FRCs as part of the report. See Office of the Inspector General, Dep't of Homeland Security, OIG-18-67, ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements 2 n.1 (2018). As such, the report is of limited value in assessing ICE's oversight of the FRCs. FRCs are subject to a different set of standards—the Family Residential Standards (FRS)—than other facilities and receive inspections more frequently, and by a larger number of outside entities, than those detention centers reviewed in the OIG report. For instance, despite the ongoing litigation surrounding state licensure of the FRCs, the State of Texas and the Commonwealth of Pennsylvania regularly conduct both announced and unannounced inspections of FRCs, and the reports of those inspections are publicly available on the States' websites. Table 6 demonstrates the number of inspections ICE FRCs typically receive on a regular basis.

TABLE 6—FRC INSPECTIONS

FRC inspection type	Typical frequency of inspection
State inspectors .....	1 Standard by Standard Review when submitting the license applications. 3 unannounced inspections prior to granting a temporary 6-month provisional license. 3 additional unannounced inspections prior to granting a permanent non-expiring license. Unlimited, randomized, unannounced audits.
Danya (ICE contractor) .....	Monthly.
PREA .....	Every two years.
CRCL (DHS office) .....	Annual audits until 2018. Presently, will inspect if warranted based on complaints received.
IHSC .....	Annual.
OIG/GAO .....	Variable. Driven by OIG hotline and/or Congressional inquiries.
ICE ERO COR/Compliance .....	Weekly compliance audits/logs. Weekly COR meetings with Service Providers, IHSC, and ICE ERO.

Despite the OIG report's limited relevance to this situation, however, DHS notes that ICE has already taken several steps to address the recommendations set forth by OIG in the June 26, 2018 report. For instance, ICE has requested that OIG consider recommendation three, which addressed the development of a follow-up inspection process, resolved and closed due to progress made by ICE towards achieving this goal. In FY 2018, ICE Office of Detention and Oversight (ODO) conducted two follow-up inspections focused on areas where deficiencies were previously identified. And although not eliminating advanced notice for inspections because unannounced inspections would disrupt facility operations and the pre-

inspection documentation review, ODO has decreased the amount of advanced notice provided to facilities in preparation for an ODO inspection. Furthermore, ICE has continued to make progress addressing the other four recommendations.

The second recommendation regarded reinstatement of and documentation for a quality assurance program for contracted inspections of detention facilities, and in October 2018, the ERO Detention Standards Compliance Unit created a Quality Assurance Team (QAT) to perform quality management over ICE's contract inspectors. Moving forward, one QAT staff member will accompany ICE contract inspectors during their annual facility inspections. The fifth recommendation regarded the

development of protocols for ERO field offices to require facilities to implement corrective actions resulting from Detention Service Managers' identification of noncompliance with detention standards. The ERO Headquarters Detention Monitoring Unit (DMU) is continuing to work with field offices and unit staff enforce facility compliance to the ICE detention standards and to address deficiencies identified by the on-site Detention Services Manager and Detention Standards Compliance Officers.

More recent developments, specifically the release of the Joint Explanatory Statement (JES) to the Consolidated Appropriations Act, 2019, Public Law 116-6, have affected ICE's efforts to address certain

recommendations. The first recommendation was for ICE to revise the inspection scope and methodology and the JES contains ICE inspection requirements that have directly impacted how ERO and OPR conduct inspections. The fourth recommendation focused on verification of identified deficiencies and tracking of corrective actions. How ICE addresses the fourth recommendation will flow directly from decisions made in addressing the first. ICE continues internal dialogue to discuss full implementation of both recommendations.

ICE's existing commitment to seriously considering OIG's recommendations regarding detention facilities and instituting them as appropriate will not change as a result of this final rule.

DHS disagrees with the commenters' assertions that reports from CRCL inspections have undermined the results of third-party auditor inspection reports. DHS responds to the allegations raised by commenters about the July 17, 2018, correspondence from Dr. Scott Allen and Dr. Pamela McPherson elsewhere in this document but notes that the correspondence from these two CRCL contractors does not reflect the complete posture of CRCL inspection reports. In particular, many of the broad negative assessments raised in the contractors' correspondence are inconsistent with formal findings they provided to ICE in CRCL's Expert Reports. More importantly, however, DHS notes that nothing in this rule will negatively affect the frequency or manner in which CRCL conducts FRC inspections.

With respect to concerns raised about the use of specific third-party contractors the Nakamoto Group and Danya, DHS notes that all contractors used to conduct inspections of FRCs are required to have child welfare experience, a requirement that will not change as a result of this rulemaking. DHS declines to identify the names of particular contractors that DHS will employ to conduct compliance inspections through this rulemaking. DHS complies with Federal contracting law and cannot pre-determine which contractors to employ via this rulemaking.

In response to concerns raised by the commenters about transparency and accountability in the proposed FRC inspection process, the final rule includes a provision requiring the results of third-party audits to be posted publicly. Since May 2018, ICE has publicly posted the results of all facility inspection reports submitted by third-

party contractors within 60 days of inspection. See *Facility Inspections*, <https://www.ice.gov/facility-inspections>, (last updated Mar. 15, 2019). The final rule stipulates that third-party inspections of FRCs will be posted in the same manner.

For commenters' concerns about past failures to inspect facilities, please see the discussion in Section C. Other Comments Received, DHS Track Record with Detention.

- Inspections by Outside Sources

*Comments.* Many commenters suggested that in the creation of an alternative Federal licensing scheme, the following questions should be answered: Which third parties will be conducting audits of such facilities; what standards will be applied by those third parties; and how will DHS and HHS provide oversight over the third party auditors. A few commenters wrote that the proposed rule does not show how the third-party oversight system would work in practice. Multiple commenters suggested that inspections of detention facilities should be inspected by an outside source instead of being run and inspected by DHS.

One commenter stated that under the FSA, the Center for Human Rights and Constitutional Law must still be allowed to inspect every child detention site and to interview and evaluate the children.

Another commenter suggested that ICE and ORR consider issuing guidance to contractors, non-profits, and faith-based organizations that are tasked with assisting the Federal Government in the care or education of immigrant youth. The commenter also recommended the creation of a Blue Ribbon Panel to Assist with Creation of a new Federal Standard for dealing with asylum seekers. The commenter specifically suggested that ICE request the National Institute of Child Health and Human Development (NICHD) to establish such a panel to review standards for detaining family units and UACs.

*Response.* DHS declines to include further details about the use of third parties to conduct FRC inspections in the text of this rule. DHS notes, as stated elsewhere, that the results of these inspections will be posted publicly on DHS's website. DHS will require third parties to conduct inspections to ensure compliance with the ICE Family Residential Standards as well as the terms of this rule. While commenters raise concerns about private, for-profit contractors used for inspection of DHS facilities, such as the Nakamoto Group and Danya, DHS has the ability to penalize contractors for failing to comply with ICE's FRS as described

further below in the section responding to comments on the topic of "Danger Due to Lack of Oversight."

Existing family residential standards were created with a view to care for vulnerable populations such as minors. DHS is currently working on updating these standards to implement further improvements at FRCs. For this reason, DHS declines to adopt commenter's suggestions to establish additional panels for this purpose.

- DHS Licensing Is Inconsistent With FSA

*Comments.* Several commenters stated that the proposed licensing scheme would violate the FSA because it would place children in facilities that have not been licensed by state agencies. The commenters also contended that DHS proposed the scheme to avoid the FSA state licensing requirement. Multiple commenters stated that state licensing standards for the care of children in out-of-home settings exist to provide a baseline of protection for the health and safety of children. The commenters stated, citing researchers, that such licensing regulations can mitigate risks of injury or death, reduce the spread of communicable diseases, and set up conditions that promote positive child development.

Multiple commenters stated that the myriad of licensing challenges that have faced detention facilities demonstrate the importance of the state licensing requirement and the crucial role that licensing and monitoring can play in guarding against and identifying inappropriate conditions for children. The commenters cited, as an example, the closing of the T. Don Hutto Center in Texas after three years of operation due to lawsuits related to the center's poor conditions. The commenters also cited a 2016 revocation of a state child care license for the Berks County Residential Center contending that it demonstrated DHS's disregard for child care licensure standards and regulations. As a final example, the commenters stated that in late 2015, the Texas Department of Family Protective Services introduced a regulation called the "FRC rule" that would allow the Dilley detention center to detain children while exempt from statewide health and safety standards but that, in June 2016, a judge ruled that such an exemption could put children at risk of abuse, particularly due to shared sleeping spaces with non-related adults, a decision the commenter stated was upheld by a Federal judge in December 2016.

*Response.* DHS reiterates that, to the extent state licensing is available, DHS will seek licensure. DHS did not propose this alternative licensing process to avoid the FSA state licensing requirements. Rather, DHS proposed this process because DHS cannot control whether a State will provide such licensing in the first place. In States where licensing is unavailable, the minimum requirements of this regulation, which mirror those in Exhibit 1 of the FSA, and the Family Residential Standards will create conditions that are identical to those envisioned by the Agreement. A robust schedule of inspections, along with compliance mechanisms that create consequences for contractors, and increased transparency through publication of audit results, will ensure that these standards are met. In creating standards for family detention, DHS has learned from past litigation, including *In Re Hutto Family Detention Center*, No. A-07-CA-164-SS (W.D. Tex. Aug. 29, 2007), which was resolved through a settlement agreement that terminated in 2009.

Regarding the Berks FRC, this facility has been licensed since December 1, 1999, as a Child Residential and Day Treatment Facility under 55 Pa. Code 3800. The facility has been used to house family units since 2001 and the State has been regularly subjecting the facility to inspections since that time. The license was renewed every year until October 22, 2015, when the Pennsylvania Department of Human Services sent a letter stating that the agency was unaware that Berks housed families and that the license for the facility would not be renewed unless it turned into a children-only facility. However, on November 9, 2015, a new license was issued for the 2016-2017 operating period. The licensing matter has been in active litigation since that time, but a state court has temporarily reinstated the license of this facility pending litigation. *In the Appeal of Berks Cty. Residential Ctr.*, Docket No. 061-15-0025 (Commonwealth of Pennsylvania Department of Human Services, Bureau of Hearings and Appeals filed November 23, 2015). The Berks facility continues to be regularly inspected by the Pennsylvania Department of Human Services.

In Texas, an appeals court reinstated the regulation that codifies licensing for FRCs. *Texas Dep't of Family and Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433 (Tex. App. Nov. 28, 2018). Texas authorities have inspected the facilities at Dilley and Karnes regularly during the pendency of the

litigation, and the facilities will continue to seek licensure when that becomes available.

- Legally Insufficient Authority for Licensing

*Comments.* Numerous commenters questioned the legality of section 236.3(h). Most of these commenters stated that this provision violates the FSA and related court rulings. Specifically, commenters asserted that the proposed rule is contrary to the FSA because instead of expediting the release of children, it provides for the prolonged or indefinite detention of children and their families. One commenter stated that the arguments used to justify Federal licensure of FRCs in place of state licensure were unequivocally rejected on July 24, 2015, by the U.S. District Court for the Central District of California, which found that self-licensure would not satisfy the FSA's mandate to place unreleased children in a program, agency, or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services. This commenter also stated that the requirement for state licensure attaches to all facilities used for temporary detention or placement of alien children and any attempt by DHS and HHS to go around this requirement is not allowed under the FSA. A few commenters contended that it would take legislation or judicial action to change the feature of the FSA that requires children be housed in facilities that are state-licensed for the care of dependent children.

Several commenters also wrote that the Federal Government lacks the authority to license facilities for children because ensuring child welfare is a police power reserved to the States. The commenters stated that, as a result of this responsibility, States have the licensing and child welfare infrastructure to care for the health and well-being of children in its custody.

Several commenters also stated that the proposed Federal licensing process fails to comply with the requirements of Executive Order 13132, which requires consultation with the states and a federalism impact statement when a proposed rule raises significant federalism concerns, which the commenters state this rule raises.

*Response.* DHS reiterates that, to the extent state licensing is available, DHS will seek licensure from the State. However, DHS cannot control whether states provide such licensing, and in states where this option is unavailable, the minimum requirements of this regulation, which mirror those in

Exhibit 1 of the FSA, and the Family Residential Standards will create conditions that are equivalent to those envisioned by the FSA. A robust schedule of inspections, along with compliance mechanisms that create consequences for contractors, and increased transparency through publication, will ensure that these standards are met. *See* sections on "Danger due to lack of oversight" and "Self-Licensing and Oversight." DHS continues to disagree with court interpretations that extend the terms of the FSA to minors accompanied by their parents or legal guardians. DHS believes that it is preferable for family units to remain together during the pendency of immigration proceedings.

DHS has the sole legal authority to detain aliens for violations of immigration law; States do not. For this reason, the existence or non-existence of licensure in the States does not inform whether DHS can detain families who are in removal proceedings under Federal immigration law. DHS does not believe this rule raises significant federalism concerns under Executive Order 13132 because enforcing immigration laws falls within the sole purview of the Federal Government.

- Danger Due to Lack of Oversight

*Comments.* Commenters stated that the proposed regulations make clear that DHS does not intend to increase oversight of family detention centers as part of its new licensing authority. A commenter stated that DHS asserts in its proposed regulation that ICE currently meets the proposed licensing requirements because it currently requires family detention facilities to comply with ICE's detention standards and hires inspectors to monitor compliance, and therefore DHS would not incur additional costs in fulfilling the requirements of the proposed alternative licensing process.

Many commenters stated that holding children in facilities that are not licensed by state child welfare agencies is inhumane, dangerous, or unethical. Some commenters stated that there is no assurance of quality standards when the entity being licensed is setting the licensing standards and monitoring compliance with those standards and that there must be review or oversight by another entity. One commenter noted that the courts have already rejected DHS-licensed facilities and held that children who are not released should be housed in state-licensed facilities. Another commenter urged DHS to specify clear criteria for third party audits to ensure that any third party auditors are qualified to oversee

licensing of facilities holding children and apply appropriate criteria for the protection of children. The commenter requested that the public have an opportunity to comment on these criteria before a final rule was implemented.

Several commenters argued that DHS and HHS' track record for meeting state-licensing requirements heightened concerns that a self-licensing regime would not afford sufficient protection or oversight for children. A few commenters stated that self-inspections by DHS and its contractors are much weaker, and do not provide materially identical assurances about the conditions or protections that the FSA provides. One commenter pointed to its experience with the Pennsylvania facilities contracted to provide services to DHS, which had its license revoked by the State of Pennsylvania, and in the commenter's opinion reinforces the need for state licensing standards.

Several commenters stated that the lack of licensed facilities is due to problems with the facilities themselves, not with state licensing regimes. This commenter stated that a Texas judge denied licenses to family detention facilities in Karnes and Dilley because the emergency rule under which those facilities sought licenses would eliminate the minimum child safety standards applicable to childcare facilities in Texas. The commenter stated that, without accountability standards, there is no way to ensure conditions of care imposed by the Federal Government in detention facilities will meet the current minimum standard for keeping children safe. Another commenter stated that the absence of a general family detention licensing procedure is not an unexplained policy gap but the effect of a determination that such detention is neither recommended nor typically done.

*Response.* DHS disagrees with the assertion that it is incapable of providing meaningful oversight for FRCs. DHS employs third-party inspectors to ensure that DHS Service Providers (such as the contracted entities that run the daily operations of the FRCs) abide by the standards that DHS requires. The results of these inspections may prompt DHS to take corrective action against the Service Providers if necessary. For instance, ICE uses a Quality Assurance Surveillance Plan (QASP) for each service provider, and this QASP is based on the premise that the Service Provider is responsible for the day-to-day operation of the facility, as well as all management and quality control actions required to meet

the agreed-upon terms of the contract. The role of the Government in quality assurance and oversight is to ensure performance standards are achieved and maintained. The QASP is designed to provide an effective surveillance method to monitor the Service Provider's performance. Through the QASP, the Government validates that the Service Provider is complying with mandated quality standards in operating and maintaining facilities. These performance standards address all facets of detainee handling, including but not limited to safety, health, legal rights, and facility and records management.

The QASP contains a Performance Requirements Summary (PRS) which communicates what the Federal Government intends to qualitatively inspect. The PRS is based on the American Correctional Association (ACA) Standards for Adult Local Detention and ICE 2011 Performance Based National Detention Standards (PBNDS). The PRS identifies performance standards groups into nine functional areas, and quality levels essential for successful performance of each requirement. ICE uses the PRS when conducting quality assurance surveillance and oversight to guide inspections and review processes.

ICE monitors the Service Provider's compliance with performance standards using a variety of methods. All facilities are subject to a full annual inspection. Additionally, ICE may conduct routine, follow-up, or unscheduled ad hoc inspections as necessary (for instance, as a result of unusual incidents or data reflected in routine monitoring). At FRCs, ICE maintains an on-site presence in order to conduct more frequent oversight. Inspections and monitoring may involve direct observation of facility conditions and operations, review of documentation, and/or interviews with facility personnel and detainees.

In addition to routine and unscheduled monitoring, financial-based incentives are another way ICE holds Service Providers accountable. Performance of services and compliance with standards is essential for the Service Provider to receive the full payment identified in formal agreements or contracts. For example, ICE may withhold or deduct funds for unsatisfactory performance by the Service Provider that is recorded or observed through site inspections, document review, interviews, or other feedback. A Service Provider's performance is rated as either acceptable, deficient, or at-risk. Based on this rating, ICE may implement financial adjustments or penalties.

Financial deductions or withholdings may be a one-time event, or alternatively, may continue until the Service Provider has corrected the identified deficiency or made substantial progress toward correction.

In response to the commenter's concern about the status and availability of state licensure in Texas, DHS notes, as mentioned above, that an appeals court recently reinstated the regulation that codifies licensing for FRCs. *Texas Dep't of Family and Protective Servs. v. Grassroots Leadership, Inc.*, No. 03–18–00261–CV, 2018 WL 6187433 (Tex. App. Nov. 28, 2018).

Finally, DHS notes that although family detention is not needed as often at the state level does not mean that family detention is inappropriate in the Federal immigration context, particularly in circumstances involving control of the borders where Congress has generally expressed a mandate for detention of aliens pending removal proceedings and pending removal pursuant to a final order.

- Conflict of Interest

*Comments.* Several commenters asserted that allowing DHS to self-license facilities would be a conflict of interest “tantamount to the fox guarding the henhouse.” Many commenters stated that the Federal Government lacks the impartiality and expertise to ensure compliance with basic standards relating to the custody and care of migrant children. Another commenter asserted that the self-licensing process exists only to further the Administration's anti-immigration policy, and that a lack of oversight will result in facilities such as Tornillo in Texas with minimal safety and healthcare standards and several abuses. Several commenters contended that DHS would have no incentive to ensure compliance with baseline child protection standards since its principal objective is imprisonment rather than family detention. Some commenters stated that DHS's objective is to discriminate against Central American immigrants and one commenter said that removing the state licensing requirement is a cover allowing for more racial abuse “under the guise of deterrence.”

Some commenters stated that because of the unique vulnerability of children and their high risk for trauma, trafficking, and violence, independent licensing standards for detention facilities are of the utmost importance. One commenter stated that DHS should not be allowed to self-license because ICE's Inspector General has found self-auditing methods are “troubling and

inadequate.”<sup>23</sup> Another commenter stated that reports from physicians within DHS CRCL have found serious compliance issues in DHS-run facilities resulting in imminent risk of significant mental health and medical harm. Other commenters stated that the proposed third-party monitor is not credible or impartial because the third-party monitor would be paid by DHS. Another commenter stated that the proposed rule’s shift of the licensing authority from experienced and objective state licensers to an ICE contractor would have an inherent conflict of interest that would not assure the best welfare of traumatized children.

Relying on the alleged conflict of interest, several other commenters contended that the proposal would violate the FSA. For example, several commenters claimed that the licensing proposal would not comply with the FSA’s requirements to place detained minors in the “least restrictive setting” and treat minors with “dignity, respect and special concern for their particular vulnerability.” Another commenter stated that the licensing proposal is inconsistent with the FSA because it weakens oversight over FRCs and does not provide a way to ensure that residential standards set by ICE are a safe replacement for state licensing standards.

Another commenter stated that the purpose of the FSA, as confirmed by the district court, is to provide “the essential protection of regular and comprehensive oversight by an independent child welfare agency,” which the commenter stated is absent from the proposed regulation.

*Response.* Regarding concerns about lack of accountability see section on “Danger due to lack of oversight.” Concerns about incentive to comply and lack of oversight are addressed in the section “Self-Licensing and Oversight.”

DHS reiterates that it will seek state licensing where available. However, DHS disagrees with commenters that suggest DHS is unable to provide care for families due to perceived conflicts of interest in its alternative licensing proposal. DHS notes that the DHS has held families (at the Berks FRC) since 2001, long before courts extended the protection of the FSA to minors accompanied by their parents. In the ensuing decades, DHS has refined its standards to better accommodate the needs of family units.

DHS is statutorily authorized and indeed mandated in many

circumstances to detain aliens pending their removal from the United States. Congress has long been aware of the existence of alien family units seeking entry into the United States, but Congress has never specified the method through which DHS’s detention facilities must obtain licensure. Thus while commenters perceive the application of standards developed by DHS and other stakeholders as a conflict of interest, Congress has not determined that the creation or application of these standards constitute a conflict of interest.

Further, in advocating for state licensure as the only method of meeting the “licensed program” requirement of the FSA, commenters appear to presume that States face no conflict of interest when they license facilities for the services or care of dependent children. DHS has created detention standards for all other facilities in which it detains aliens, just as the Bureau of Prisons has also created standards for their own detention operations. DHS believes that the Federal Government is equally capable of overseeing compliance with its standards, standards which incorporate and in certain cases go beyond the minimum requirements of the FSA, without negatively impacting the care of minors in its custody due to perceived conflicts of interest. Relatedly, the very financial incentive that commenters contend would bias third-party examiners is the same financial incentive that DHS uses to achieve quality control. If DHS’s own inspections (*e.g.*, CRCL, OIG, third-party auditors, etc.) reveal that contractors are not adequately meeting DHS’s standards, such contractors can be penalized and replaced.

- Indefinite Detention of Children Due to Alternative Licensing

*Comments.* Multiple commenters stated that the proposal to create and self-license FRCs contravenes the FSA by attempting to allow for children to be placed in detention indefinitely. The commenters stated that detention centers are inappropriate long-term (indefinite) housing arrangements for families. They contended that the government is required to expeditiously release children to a parent or other family and if this is not possible, the government must release the child to a program licensed by a state child welfare agency program. Several commenters suggested that this new rule would restrict the ability to release families from government custody, resulting in indefinite detention. One commenter stated that indefinite detention would increase profits for

private companies and be more expensive for taxpayers.

*Response.* DHS disagrees with these assertions, and discusses commenters’ mischaracterization of DHS detention authority and practices subsequently in this rule. DHS considers that “indefinite detention” is inconsistent with the mission of the Department. The purpose of immigration detention is to effectuate removal, or for the alien to establish eligibility for relief, as quickly as possible. If the alien establishes that she merits relief from removal, she will be released and if not, she will be removed. The period of detention will last for as long as it takes to complete removal proceedings and no longer. ICE reports that the majority of minor and family unit removals involve countries in the Northern Triangle, and removals are normally effectuated promptly. Minors and family units are not likely to face long periods in detention because immigration proceedings involving detained family units and minors are placed on a priority docket by the Department of Justice, Executive Office for Immigration Review. Family units and minors can also benefit from release during the pendency of removal proceedings if they qualify for release on recognizance, parole, or other conditions.

Aliens subject to final orders of removal may generally remain detained for a reasonable period necessary to effectuate removal. For aliens detained pursuant to INA 241, 8 U.S.C. 1231, this includes a presumptively reasonable period of 180 days after a final order of removal has been issued, and thereafter, the alien must generally be released absent a significant likelihood of removal in the reasonably foreseeable future (in compliance with current law and regulation).

As Congress has recognized, detention is an important tool to ensure that proceedings are completed and that the immigration laws are enforced. EOIR data shows that of closed cases from January 1, 2013 through March 31, 2019 that started in an FRC, 43 percent of family units have received *in absentia* final orders of removal. DHS OIS has found that when looking at all family unit aliens encountered at the Southwest Border from FY 2014 through FY 2018, the *in absentia* rate for completed cases as of the end of FY 2018 was 66 percent. As a result, exercising the authority to detain minors in family units continues to be an important component of immigration enforcement. The ability to consider FRCs licensed through adherence to ICE’s Family Residential Standards is intended to facilitate that component of

<sup>23</sup> Office of Inspector General, “ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements” OIG 18–67 (June 26, 2018).

immigration enforcement, not to increase profits for private companies at the expense of taxpayers.

- **Miscellaneous Concerns**

*Comments.* Several commenters stated that ICE family detention standards which would be utilized in the proposal are typically not as stringent as state standards currently utilized. One commenter, for example, noted that ICE FRC standards permit the use of mechanical restraints on children over 14 years old, whereas the licensing regulations in Texas prohibit the use of such devices. The same commenter noted that the ICE FRC standard states that the facility must meet the “minimal nutritional needs of toddlers and infants,” whereas the Texas regulation for licensed residential facilities states the facility must “feed an infant whenever the infant is hungry.”

Several commenters suggested that FRCs do not exist under state licenses because States feel they are inadequate to house both adults and children. Such commenters noted that state agencies typically license only facilities for the care of children who are dependent on the State, typically due to child abuse and/or neglect and the need to be removed from the care of a parent or parents. The commenters argued that if parents are fit and available, a state government would never seek to lock up a child with a parent.

*Response.* Regarding any conflicts between state regulations and DHS standards, DHS will follow state regulations where there is licensing available for FRCs. The regulations express a preference for state licensing when that option is available at the location of the FRC. For example, if Texas licenses FRCs, state standards will be followed. Regarding the use of family detention in the state context, the role of the States and the Federal Government are different. States do not enforce immigration laws, only the Federal Government does so; consequently, the presence or absence of state regulations addressing the civil detention of family units for immigration purposes is not indicative of whether it is appropriate or not to detain family units in accordance with Federal law.

#### Changes to the Final Rule

In response to public comments, DHS is adding to the definition of licensed facility that DHS will make the results of audits publicly available. In addition the definition also now includes that audits will occur upon the opening of a facility and on a regular basis thereafter.

#### Influx § 236.3(b)(10)

##### Summary of Proposed Rule

The NPRM proposed to define *influx* as a situation when 130 or more minors or UACs are eligible for placement in a licensed facility. DHS is adopting this definition without change from the FSA except to reflect the transfer of responsibilities from legacy INS to DHS and ORR, and to reflect that DHS maintains custody of minors, as defined in this section, and UACs, for the short period pending their transfer to ORR.

##### Public Comments and Response

*Comments.* Numerous commenters expressed concern that the proposed definition of “influx” was developed based on data from the 1990s, is outdated, and, if implemented, will result in DHS and HHS operating within a *de facto* permanent state of “influx.” If able to operate in that status, the commenters contended that DHS and HHS would have broad discretion to circumvent compliance with the FSA, HSA, and TVPRA provisions and the time limits on transferring children out of DHS custody.

Many commenters expressed the view that DHS and HHS disingenuously argued that they operate within a constant state of influx even while overall border crossings are 20 percent of what they were when that term was defined in the FSA and border staffing has increased by almost three times.

A few commenters stated that the 130-influx standard also does not account for the expansions and contractions of the number of UACs in custody at the border, which have fluctuated by tens of thousands of juveniles every year since the peak in 2014. They contended that the variable number requires a more flexible influx baseline.

Some commenters objected to the proposed definition of influx on the basis that it enables each agency to excuse noncompliance even where it is not itself experiencing influx conditions. Commenters stated that DHS conceded in the NPRM that it has been dealing with an influx of minors for years. The commenters claimed that as a result, even where HHS may not satisfy its own “influx” criteria, it may rely on DHS “influx” conditions because the definition allows HHS criteria to be met “under . . . corresponding provisions of DHS regulations.”

One commenter recommended that the agencies include a third alternative criterion for designation of influx conditions to track the meaning of influx in the INA. The INA recognizes the threat posed to national security

where the Secretary of Homeland Security “determines that an actual or imminent influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate federal response. . . .” 8 U.S.C. 1103(a)(10). The commenter urged the agencies to consider a regulation that would define “urgent circumstances” to include the release without bond of a significant percentage of such minors, with or without a parent or legal guardian, near to the relevant Coast Guard or Border Patrol sector. The commenter ultimately proposed that influx conditions could exist when some combination of three criteria were present—the legacy FSA criterion of 130 minors, an alternative criterion that takes into account the problems created by lack of resources other than bed space, and a third criterion that aligns influx designations for minors with designations of influx conditions applicable to humanitarian entry in general. The commenter contended that such a standard would provide flexibility to respond to migrant crises that involve minor aliens in unpredictably dangerous ways.

One commenter maintained that, because the proposed rule changes the word “program” to “facility,” it could permit lengthier detention by a determination that there is an influx when more than 130 children are eligible for placement in any of the program’s facilities even if the program has the capacity to provide placement resources for well over 130 children. The commenter viewed the proposed definition of influx as placing less focus on the needs of children than on the proposed facilities to detain them.

Some commenters were concerned that the proposed definition of influx lifts the requirement that UACs be transferred from DHS to HHS custody within three to five days and allows for broad exemptions to existing child protections that could impact basic needs, such as the provision of snacks and meals to children in custody. The commenters stated the rule should be changed to clarify that any such exemptions must be limited in scope and ensure that the fundamental needs of children are met in a timely manner.

*Response.* As stated in the proposed rule, DHS agrees with the commenters’ observation that the definition of influx in the FSA, which was replicated in the proposed rule, renders the agency in an ongoing state of influx which has been the status quo for several years. DHS regularly has in its custody more than 130 minors and UACs eligible for placement in a licensed facility. For

instance, as described in Table 7, CBP encountered 107,498 minors and UACs in FY 2018. Additionally, in May of 2019, the USBP apprehended 11,507 UACs along the southwest border along with 84,532 family units (accompanied minors and their parents).<sup>24</sup> OFO encountered 386 UACs and 4,134 family units during the same time period. Thus, these numbers show that CBP regularly has more than 130 minors and UACs in custody eligible for placement in a licensed facility. However, DHS disagrees with the statement that such an operational reality permits it to circumvent compliance with requirements that stem from the FSA, given that this definition of “influx” was included in the FSA. DHS had determined that the definition of “influx” as it was written in the FSA remains relevant to current operational realities.

DHS believes that the FSA’s definition of influx is still relevant to today’s operations. Indeed, it is obvious that DHS has been in a state of influx, and has been for some period of time. As further explained in the proposed rule, the main implication of the threshold for an influx is that in general, under the FSA, DHS is required to transfer non-UAC minors to licensed facilities “as expeditiously as possible” rather than within either a 3- or 5-day timeframe. This makes sense given the need for DHS to have additional flexibility when it is dealing with anything other than a very small and manageable number of minors in its custody. Given that DHS is currently operating under an influx pursuant to the FSA, DHS currently moves to transfer all minors into licensed facilities as expeditiously as possible. CBP facilities are, as recognized by Congress in the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), intended to be short-term detention facilities, generally designed to hold individuals for 72 hours or less, during the duration of their immigration processing. *See* 6 U.S.C. 211(m)(3) (defining “short-term detention” as “detention in a U.S. Customs and Border Protection processing center for 72 hours or less, before repatriation to a country of nationality or last habitual residence”). CBP makes efforts to transfer all individuals, especially minors, out of CBP facilities as expeditiously as possible, and generally within 72 hours. Additionally, CBP prioritizes the processing of all minors and UACs, as a means to expedite the transfer of custody to ICE or HHS, and

to adhere to the TFTEA definition of short term holding, as well as the requirements currently applicable under the FSA, as well as the TVPRA. Thus, the definition of influx as provided in this rule would not change any aspect of current CBP operations, and therefore would not permit any change to the time that minors and UACs should remain in CBP custody.

DHS reiterates that the transfer time frames for the transfer of UACs from DHS to HHS are now governed by the TVPRA, rather than the timelines included in the FSA. The TVPRA requires DHS to transfer UACs to HHS within 72 hours of determining that an alien is a UAC, absent exceptional circumstances. This statute overrides any different period set out in the FSA.

As for the assertion that the proposed definition of influx could excuse non-compliance by one agency due to an influx facing the other, DHS notes that the definition as provided in the FSA does not establish the existence of an influx vis-à-vis each agency involved in the implementation of its terms. The 130 threshold in the FSA is the number of “minors eligible for placement in a licensed program . . . including those who have been so placed or are awaiting such placement.” FSA paragraph 12(B).

DHS disagrees with commenters’ contention that changing the term “licensed program” to “licensed facility” has any impact on the understanding of what constitutes an influx. Changing the term from “program” to “facility” does not affect the requirement to transfer minors as expeditiously as possible during an influx. As previously stated, the definition of influx as proposed is designed to implement the terms of the FSA while accounting for current operations of the Agency and the TVPRA.

#### Changes to Final Rule

DHS declines to change its proposed definition of influx in response to public comments.

#### Non-Secure Facility § 236.3(b)(11)

##### Summary of Proposed Rule

Non-Secure Facility is not defined in the FSA, other than to say that “homes and facilities operated by licensed programs, including facilities for special needs minors, shall be non-secure as required under state law.” FSA paragraph 6. DHS proposed to define a non-secure facility as a facility that meets the applicable State or locality’s definition of non-secure. If a State does not define “non-secure,” then a DHS facility shall be deemed non-secure if

egress from a portion of the facility’s building is not prohibited through internal locks within the building or exterior locks and egress from the facility’s premises is not prohibited through secure fencing around the perimeter of the building.

#### Public Comments and Response

*Comments.* Several commenters provided comments on the DHS definition of “non-secure.” Comments focused on the definition itself and its alignment with the meaning in the FSA, length of stay at a facility, reasons for placing an alien juvenile in a secure facility, having locked/un-locked areas, and ability of those in custody to come and go as they would like.

One commenter suggested that the proposed definition should explicitly defer to the definition of non-secure “under state law,” in order to comply with the language of FSA paragraph 6.

Several commenters objected to the idea that the definition would allow a family detention center to be a non-secure facility, stating that they were opposed to holding children in jail-like settings. One commenter stated that the fact that family detention centers are patrolled by ICE officers, commonly surrounded by barbed wire fencing, and have locked points of ingress and egress, invalidates the definition of non-secure. Another commenter stated that an environment that contains locks and fences does not align with the FSA which, though it did not define non-secure, said that children should be in the least restrictive environment. Another commenter expressed concern that there is no provision stating families can come and go as they desire, so families would be restricted in their movements or freedom.

*Response.* DHS notes that the definition of “non-secure” was intended to be subordinate to any definition that currently exists under state law and is applicable to a setting that houses minors. Accordingly, DHS accepts the commenter’s suggestion to add the language “under state law” into the definition of “non-secure” in this final rule.

DHS disagrees with the commenters’ assertions that FRCs are “jail-like settings.” Factors identified by commenters that commenters feel make FRCs secure do more to prevent unwanted intrusions into FRC properties than they do to prevent individuals housed at FRCs from leaving the property. Protections such as fencing, staff monitoring, and locks on doors that lead to the outside are basic safety measures that are often a part of facilities that are responsible for the care

<sup>24</sup> <https://www.cbp.gov/newsroom/stats/sw-border-migration>.



of children on a regular basis. These measures protect the children from strangers who are not FRC residents, and from hazards such as traffic and weather in the event they accidentally become separated from a parent. Individuals housed at these facilities are free to move within the facility on a daily basis, and ICE does not restrict individuals' movement within the FRCs for punitive reasons.

#### Changes to Final Rule

DHS agrees to amend the definition of *non-secure facility* in response to public comments to clarify that facilities will be deemed non-secure if they meet the definition of non-secure under state law where the facility is located.

#### Office of Refugee Resettlement (ORR) § 236.3(b)(12)

##### Summary of Proposed Rule

The definition of ORR is not defined in the FSA. DHS proposed to define ORR as the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement.

##### Public Comments and Response

DHS received no requests to change the definition as proposed in the regulatory text.

#### Changes to Final Rule

DHS is not changing the definition of ORR in the final rule.

#### 3. Age Determination § 236.3(c)

##### Summary of Proposed Rule

DHS proposed to codify in § 236.3(c) the FSA's reasonable person standard to determine whether a child is under or over the age of 18 and proposed adding that age determinations shall be based on the "totality of the evidence and circumstances." At times, making age determinations could include medical or dental examinations.

##### Public Comments and Response

Commenters generally expressed concern about how the proposed changes incorporate the FSA's reasonable person standard and standards regarding medical and dental examinations. They also questioned whether the proposed procedures are consistent with the TVPRA's requirement to rely on multiple forms of evidence for determining whether an alien is under or over the age of 18. Commenters expressed concern about a lack of sufficient guidance informing the totality of the evidence and circumstances threshold and an apparent lack of an appeals process for

challenging incorrect age determinations.

##### • Reasonable Person Standard

*Comments.* Several commenters expressed concern about how DHS would interpret and apply the FSA's reasonable person standard. Multiple commenters asserted that the proposed language fails to provide adequate specificity about the type and amount of evidence used to inform the standard. One commenter stated that the reasonable person standard must be informed by consideration of multiple forms of evidence pursuant to the TVPRA, whereas another commenter suggested incorporating informational interviews and attempts to gather documentary evidence as part of the standard. Another commenter stated that, pursuant to the FSA, the reasonable person standard must include consideration of and should be initially informed by the child's own statements regarding his or her own age. Multiple commenters expressed concern about how medical or dental examinations will or will not inform the reasonable person standard, with one commenter stating that the inclusion of unreliable medical procedures in the reasonable person standard introduces a further layer of arbitrariness to the process of age determination.

##### • Medical and Dental Examinations

*Comments.* Several commenters expressed concern about whether the proposed regulations adhere to the FSA's standards and medical ethics regarding medical and dental examinations. Some of the commenters referenced various reports and studies indicating that certain medical and dental examinations cannot provide accurate age estimates and that radiographs unnecessarily expose children to radiation when used for non-medical purposes. One medical professional cautioned against using dental radiographs for age determination, contending that such tests can only provide an approximate age estimate and may not be able to differentiate between an individual in his/her late teens versus an individual who is 20 or 21 years of age. The commenter also expressed concern about the possibility of the individual administering these tests not having the requisite expertise, and not obtaining the consent of the patient. One commenter referred to medical and dental examinations as "pseudo-science."

Multiple commenters expressed concern that the proposed procedures place inappropriate weight on medical

tests to determine whether children are younger than or older than 18 years of age. The commenters stated that the proposed procedures do not match FSA or TVPRA requirements for considering medical tests and are inconsistent with agency practice. For example, the commenters stated that the proposed procedures fail to indicate that medical tests cannot serve as the sole basis for age determinations, limit medical testing to bone and dental radiographs, and to account for evidence demonstrating the unreliability of medical tests to make accurate age determinations. One commenter expressed concern about the lack of specificity governing when medical and dental examinations will be used, the absence of guidance regarding who will make the age determination, and the level of training or expertise required to conduct such examinations and determinations. Some commenters stated that medical and dental examinations have been used abusively by DHS in the past.

Multiple commenters recommended that age determination procedures be used as a last resort, that age determination findings be shared with the child in writing and in a language he/she understands, that the findings be subject to appeal, and that age determination procedures be conducted by an independent, multidisciplinary team of medical and mental health professionals, social workers, and legal counsel. The commenters also recommended that children have the right to refuse a procedure which subjects them to medical risks, pursuant to the international norm of what is in the best interest(s) of the child as well as medical ethical principles of patient autonomy.

##### • Totality of the Evidence and Circumstances/TVPRA Standards

*Comments.* Several commenters expressed concern about age determinations being based on the "totality of the evidence and circumstances" and questioned whether that basis is consistent with the TVPRA's requirement to use multiple forms of evidence for determining whether a child is under or over 18 years of age.

Another commenter expressed support for DHS and HHS personnel maintaining the flexibility to use multiple methods for age determinations. The commenter stated that the proposed standards and thresholds are mandated for jurisdictional as well as medical reasons, because ORR does not have

custodial authority over individuals 18 years of age or older.

- **Incorrect Age Determinations/Appeal Process**

*Comments.* Several commenters expressed concern about the possibility of incorrect age determinations. For example, one commenter stated that the rule would reduce or eliminate the current ORR policy requiring a 75 percent probability threshold for age determinations. Other commenters stated that an individual claiming to be a minor should continue to be treated as a minor until age is confirmed through multiple forms of evidence, pursuant to the FSA. One of these commenters stated that it is more dangerous for a minor to be detained with adults than to have an individual who claims to be a minor, but is not, detained with other minors.

Many commentators expressed concern that the rule promotes the discriminatory and xenophobic treatment of immigrant people based on their race, ethnicity, and national origin. Multiple commenters noted that differences in race, ethnicity, gender, nutritional standards, and poverty impact perceptions of age and may negatively influence the age determination process leading to inaccurate age determinations. For example, one commenter cited articles concluding that the age of young people is often overestimated and exacerbated when there are differences in race. This commenter expressed concern that this would have disproportionate effects on certain indigenous populations. Another commenter cited a study indicating that “black felony suspects were seen as 4.53 years older than they actually were.”

Multiple commenters expressed concern about the lack of age determination appeal procedures. One of the commenters stated that the lack of an appeal mechanism compounds the possibility of arbitrary or baseless assessments, with serious consequences for minors in terms of their placement in and release from detention. Another commenter asked what remedy exists for a child falsely categorized as an adult and what repercussion a government official would face if he/she negligently or intentionally categorizes a child as an adult under this regulation. Another commenter stated that the ability to continually redetermine a child’s age, as permitted under the proposed procedures, puts children at risk of losing critical and necessary substantive and procedural protections.

One commenter suggested that providing a presumption of minor status when there is doubt, considering only

reliable evidence, and providing an appeals process would ensure fewer children find themselves incorrectly designated as adults. Another commenter suggested placing individuals in HHS custody, not DHS custody, during the age determination process.

Finally, one commenter expressed general concern about DHS and HHS using different language within the proposed regulations that may lead to disparate processes for determining age. The commenter stated that the proposed HHS language does not discuss the reasonable person standard, does not include a specific evidentiary standard through which to assess multiple forms of evidence, does discuss the non-exclusive use of radiographs where the DHS language does not mention radiographs as an option, and does not require a medical professional to administer the radiographs. The commenter suggested that DHS and HHS propose specific and identical language regarding age determination procedures and requirements.

*Response.* DHS initially notes that the “reasonable person” standard for age determination comes directly from the FSA. FSA paragraph 13 states that “[i]f a reasonable person would conclude that an alien detained by [DHS] is an adult despite his claims to be a minor, the INS shall treat the person as an adult for all purposes, including confinement and release on bond or recognizance.” The reasonable person standard does not require DHS to ignore claims made by an individual as to his or her age. Given that this language was agreed upon by all parties to the FSA as initially drafted, DHS disagrees that the standard lacks adequate specificity, and declines to further elaborate on the reasonable person standard in the regulatory text set forth in this rule.

DHS also disagrees with commenters that the text of this rule does not adhere to the FSA. First, FSA paragraph 13 states that aliens may be required to submit to a medical or dental examination or “other appropriate procedures” to verify his or her age. Second, despite commenters’ concerns about the use of radiographs, this method of age determination is specifically authorized by Congress as one form of evidence in the multiple forms of evidence to support a determination of age; DHS lacks the authority to amend the TVPRA that codified this practice. *See* 8 U.S.C. 1232(b)(4). Third, DHS disagrees with commenters’ assertions that DHS will place inappropriate weight on the use of medical tests in determining the age of an individual. DHS has incorporated a

totality of the evidence standard into this rule, and nowhere states that medical examinations will be the sole factor in determining the age of an individual. In fact, DHS internal guidance states that medical exams are a last resort after all other avenues have been exhausted. The guidance also acknowledges that cultural differences make medical examinations for age determination more difficult and requires at least a 75 percent probability of an alien being older than 18. HHS has similar guidance.

Commenters who proposed that age determination findings be shared with the child in writing, be subject to appeal, and be made by a multidisciplinary team of third parties fail to appreciate the operational necessity of determining an individual’s age as quickly as possible. If CBP encounters an individual at a port of entry who claims to be a minor, and has no accompanying parent or legal guardian, CBP must immediately determine the age of the individual, and accordingly whether the individual is a UAC, because DHS must transfer UACs to HHS custody within 72 hours of determining that a juvenile is a UAC. The volume of apprehensions and encounters at the border has increased so significantly in recent months that instituting appeal procedures and assessments by third-party committees could unnecessarily delay the UAC from receiving the services that he or she is otherwise provided under the law. Additionally, while commenters were concerned that the rule does not provide for an individual to decline the medical or dental examination for the purposes of age determinations, the TVPRA authorizes requiring such examinations. DHS also believes that the type of medical and dental examinations conducted for the purpose of age determination are not so invasive as to present significant medical risks such that an individual would want to decline the examination, particularly if the results of the examination can help demonstrate that the individual is a minor where other evidence would suggest the individual is an adult.

DHS disagrees with commenters that the “totality of the evidence and circumstances” standard conflicts with the TVPRA’s “multiple forms of evidence” requirement. DHS drafted the text of proposed 8 CFR 236.3(c)(1) specifically referencing 8 U.S.C. 1232(b)(4) to ensure that multiple forms of evidence were used in considering the totality of the evidence and circumstances. DHS declines to codify more specific processes for age determinations given the need for

flexibility in reviewing various types of evidence to make the most accurate age determination as possible.

Further, DHS notes that medical and dental examinations used in conjunction with the FSA's reasonable person standard are designed to protect against a situation in which a purported minor, who is in fact an adult, is placed in a facility with minors simply because he/she claims to be a minor. One commenter asserted that it is more dangerous for a minor to be detained with adults than to have an individual who claims to be a minor, but is not, detained with other minors. This commenter failed to appreciate, however, that the individual who claims to be a minor, but is not, is in fact, an adult. Similar to the commenter's initial concern, DHS strives to avoid situations in which an adult is unintentionally detained with minors simply because the adult claimed to be a minor because such situations may present danger to the minors. DHS also notes that the reasonable person standard coupled with the ability to conduct medical and dental examinations or other appropriate procedures is intended to defend against the effect of variables such as race, ethnicity, gender, etc., which could otherwise negatively impact an age determination. DHS strives to make the most accurate age determination possible, and may require various forms of evidence in order to make a valid assessment.

#### Changes to Final Rule

DHS declines to amend the proposed regulatory text regarding procedures for age determination in response to public comments.

#### 4. Determining Whether an Alien Is a UAC § 236.3(d)

##### Summary of Proposed Rule

DHS proposed to determine whether an alien is a UAC at the time of encounter or apprehension by an immigration officer and to allow immigration officers to re-evaluate a child's UAC status at each encounter consistent with the statutory definition of a UAC. Once the alien has reached the age of 18, has obtained lawful immigration status, or has a parent or legal guardian in the United States available to provide care and physical custody to the alien, the alien is no longer a UAC. When an alien minor is no longer a UAC, relevant ORR and ICE procedures shall apply.

##### Public Comments and Response

*Comments.* Commenters generally opposed moving ahead with the proposed provision because they believe

it will result in stripping UACs of vital protections mandated by Congress in the HSA and TVPRA. One commenter stated that the statutory language, the nature of the rights conferred, legislative history, and experience implementing the TVPRA, indicate that Congress intended for TVPRA protections to prevail throughout a UAC's legal proceedings, which would not be the case if UAC status was subject to limitless redeterminations. Another commenter stated that neither the HSA nor the TVPRA contain any mechanism for rescinding the protections accorded to UACs. The commenters recommended that once identified as a UAC, the individual should maintain this status for the duration of his/her immigration case. One commenter recommended striking proposed § 236.3(d) and the final sentence of proposed section 410.101 and codifying the current initial jurisdiction policy, set forth in USCIS' 2013 guidance, which provided that USCIS would take initial jurisdiction based on a previous UAC determination even after the applicant turns 18 or is reunited with a parent or legal guardian.

The commenters provided examples of the proposed provision undermining specific protections afforded by the TVPRA. Numerous commenters noted that the TVPRA provides UACs with a non-adversarial determination of their initial asylum claim at the USCIS Asylum Office, whereas the proposed provision would force children reuniting with their parent or turning 18 to immediately testify before an immigration judge in a more adversarial setting.

Another commenter stated that the one-year exemption given to UACs to file asylum claims is particularly important because it accommodates the needs and vulnerabilities of children fleeing persecution, who often require time before they feel comfortable confiding with the professionals preparing their legal cases.

Another commenter stated that the TVPRA requires HHS to make counsel available to UACs to the greatest extent practicable, including the appointment of counsel at government expense, where necessary, for all immigration processes and proceedings. The commenter suggested that UAC status should remain valid until the UAC's case concludes to ensure access to the resources needed to navigate the court system.

The commenters challenged the rationale for the proposed provision, stating that the act of reunifying with a parent or legal guardian or turning 18 does not eliminate the trauma and

persecution a child may have experienced in his/her country or diminish the child's vulnerability in the U.S. immigration system. Nor do either of these conditions lead to the automatic joinder of the child's case with that of the adult. And the commenters contended that UACs often have a need for the protections and specialized services that UAC status affords them even after reaching age 18 or being reunited with a parent or legal guardian. One commenter cited the findings of "Children on the Run," a report issued by the United Nations High Commissioner for Refugees (UNHCR) that found that the majority of children from the Northern Triangle countries and Mexico needed protection under international law.

The commenters expressed concerns over due process and administrative costs and delays related to changing UAC status mid-stream. One commenter contended that the screening of UACs by child welfare professionals for protection needs and by legal service providers for eligibility for legal relief, facilitates efficient filings and adjudications. According to that commenter, stripping children of the UAC-related protections would create and compound burdens on the system and the child.

Another commenter predicted a rush to file claims before a change in the child's status occurs, resulting in less comprehensive and well-prepared filings. The commenter stated that the proposed provision duplicates the labor of Federal agencies, as claims first filed with USCIS may be shifted to the caseload of EOIR.

Still another commenter stated that UAC's immigration proceedings can take several years to conclude, and if a minor reaches 18 in that time, this will create logistical burdens for the EOIR and DHS as cases currently in process will suddenly need to be handled differently.

Some commenters complained that § 236.3(d) lacks guidance on the methods immigration officers would use to make determinations at each encounter, thereby heightening the potential for arbitrary and capricious decision-making. They also thought the rule should address the consequences of erroneous re-determinations.

One commenter stated that § 236.3(d) raises due process, economic, and judicial resource concerns and DHS should withdraw the proposal.

*Response.* DHS disagrees with commenters' concerns about the impact on juvenile aliens if DHS's proposal is codified as part of the final rule. While commenters are correct that individuals

who no longer meet the definition of UAC will not receive certain protections that the law otherwise provides UACs, the Departments have the responsibility to promulgate regulations that codify a reasonable interpretation of the statutes which they administer. The plain language of 6 U.S.C. 279(g)(2) provides criteria for determining whether an individual is a UAC, and this regulation applies those criteria. With regard to the filing of asylum applications, DHS notes that an individual who is a UAC at the time of filing his or her application, regardless of the time it takes to adjudicate the application, will still be subject to USCIS' initial jurisdiction.

DHS believes the proposal for immigration officers to make UAC determinations at each encounter will ensure greater fidelity to the laws affording special legal protections to UACs, including USCIS' initial jurisdiction over any asylum application filed by a UAC, by limiting treatment of individuals as UACs to those who are, in fact, UACs. Ensuring the correct classification and treatment of individuals as either a UAC or not for jurisdictional and other purposes is, by definition, consistent with and reinforcing of the effective administration of judicial (and other) resources. Although in some instances the proposal may result in DHS expending additional resources to make more UAC determinations and may lead to more asylum claims being initially heard in immigration proceedings before EOIR rather than adjudicated by an asylum officer, there may also be instances wherein UAC redeterminations conserve resources by vesting jurisdiction with the proper entity at an earlier juncture. Whether resources are ultimately conserved or not will depend on the specific facts of the case at hand. Additionally, the TVPRA, 8 U.S.C. 1232(c)(5), does not require that counsel be provided at government expense to UACs. Rather, HHS is encouraged to use pro bono services, and the statute specifically says that counsel is at no expense to the government.

#### Changes to Final Rule

This final rule adopts the language of the proposed rule without change.

#### 5. Transfer of Minors Who Are Not UACs From One Facility to Another § 236.3(e)

##### Summary of Proposed Rule

DHS proposed that if there is an influx or emergency, DHS would transfer a minor who is not a UAC and who does not meet the criteria for

secure detention to a licensed facility as expeditiously as possible. The proposed rule also stated that DHS will abide by written guidance detailing all reasonable efforts that it takes to transfer non-UACs. The proposed provisions would make "as expeditiously as possible" a default for all transfers of non-UACs in an influx or emergency. The proposed provisions also made it clear that if an influx or emergency ceases to exist, the associated timelines for non-UAC minors would continue to apply.

##### Public Comments and Response

*Comment.* Commenters disagreed with the proposed language under § 236.3(e) for the transfer of minors who are not UACs from one DHS facility to another in the case of an emergency or influx. They said the proposed language allows DHS discretion that the FSA does not allow. In particular, they contended that the proposed language could allow DHS the authority to delay transfer or placement of minors, in addition to suspending other conditions, and lead to indefinite detention. They also stated that the written guidance referred to in § 236.3(e)(2) should be published and subject to public comments.

One commenter objected that the ORR regulation does not clearly identify specific behaviors or offenses that allow placement of a juvenile in a secure facility. The commenter further contended that the broad and non-specific list provided is not clear enough for children to understand and thus fails to put them on notice of the rules that may result in their being detained in a jail-like setting.

One commenter stated that the entire transfer section does not speak to a minor who is not a UAC being transported to a facility that is an FRC or being held with their family. The commenter believes this could potentially create situations where children are separated from their parents, contrary to the intent of the FSA. The commenter is also concerned that future guidance about transportation requirements may not align with the FSA after the FSA is terminated. Another commenter stated that the proposal excludes transfers between DHS facilities of minors who are subject to secure detention, which means that they will not be transferred to a licensed facility in case of an emergency or influx nor transferred within the required time frame under the FSA.

One commenter stated that the proposed rule is an attempt to undermine DHS's obligations to quickly

transfer children out of inappropriate facilities and to provide children with care within a licensed facility. The commenter opined that not transferring the children into licensed facilities quickly would impede the children's ability to meet with counsel, have privacy and liberty rights, be educated, have access to social services, and protect their due process rights. In this commenter's estimation, this would lead to increased likelihood of abuse and violations of children's human rights as protected under domestic and international law.

Another commenter stated that this section will result in the disparate treatment between accompanied minors and UACs. This commenter stated that the perceived disparate treatment is contrary to the FSA and not mandated by Federal law and will, therefore, prevent the termination of the FSA if left in the final rule.

*Response.* DHS emphasizes that this provision does not change the FSA-derived transfer timeframes that have applied to non-UAC minors for decades. As noted in the proposed rule, DHS has continuously been dealing with an "influx" of minors and UACs, as the term is defined in the FSA. Through this provision, DHS seeks to clarify that the requirement to transfer non-UAC minors "as expeditiously as possible" is only applicable (*i.e.*, the "default") insofar as influx or emergency conditions persist. Absent influx or emergency conditions, this provision requires DHS to adhere to the same three-day and five-day transfer timeframes set forth in the FSA. For a further discussion of the term "emergency," please see the "emergency" definition in Section A. Definitions.

In response to one commenter's statement that this provision does not speak to FRCs, and another commenter's statement that it fails to address secure facilities, DHS notes that the NPRM specifically stated that licensed facilities must be non-secure and that "the only non-secure facilities in which ICE detains minors who are not UACs are the FRCs."<sup>25</sup> This language was intended to demonstrate that under this provision, non-UAC minors in DHS custody would generally be transferred to licensed, non-secure, FRCs.

DHS notes that one commenter expressed concern about disparate treatment between accompanied minors and UACs. As noted in the NPRM, UAC transfer requirements are specifically governed by the TVPRA, whereas this provision codifies transfer requirements of non-UAC minors pursuant to

<sup>25</sup> See p. 45498 of the NPRM.

paragraph 12(A) of the FSA. Absent emergency or influx conditions, this provision requires DHS to transfer non-UAC minors to a licensed facility within three days if the minor is apprehended in a district in which a licensed program is located. This is the same timeframe set forth by the TVPRA for transferring UACs into ORR custody.

#### Changes to Final Rule

The Department is finalizing this section as proposed with no changes.

#### 6. Transfer of UACs From DHS to HHS § 236.3(f)

##### Summary of the Proposed Rule

The standards contained in the proposed rule would require DHS to transfer UACs apprehended by DHS to ORR for care, custody, and placement. DHS would notify ORR of the apprehension within 48 hours and, transfer custody within 72 hours of determining that the juvenile is a UAC, absent exceptional circumstances. The proposed regulation recommended procedures for such transfer. For example, the proposed rule required that UACs only be transferred with an unrelated detained adult during initial encounter or apprehension to a DHS facility, or if separate transportation is impractical or unavailable. The proposal also provided that requirements consistent with TVPRA would govern the processing and transfer of UACs.

##### Public Comments and Response

*Comments.* A few commenters wrote that the FSA allows DHS to transport UACs with unrelated adults only if separate transportation “impractical,” but that the language in § 236.3(f) would permit DHS to transport UACs with unrelated adults if it is not “operationally feasible” to separate them. The commenters pointed out that if “operationally feasible” is interpreted to mean “convenient,” it would conflict with the FSA; therefore, they recommended that the final rule retain the language of the FSA or more clearly define “operationally feasible.”

Other commenters also took issue with the use of the word “unavailable” and “impractical.” One of these commenters did not agree with the government’s characterization that “unavailable” is added for clarification. This commenter contended that statutory construction says that every word should be considered, and none ignored; therefore, the addition of the word “unavailable” is neither supplemental nor clarifying and does not comply with the FSA. Another commenter was concerned that this provision would allow DHS to transport

UACs with unrelated adults due to poor planning by DHS causing vehicles to be unavailable and placing vulnerable children at risk of harm. This commenter also took issue with the use of the term “DHS facility” as a place to which transportation with unrelated adults can take place, which could encompass facilities much farther away than Border Patrol stations and ports of entry near the site of apprehension.

*Response.* In response to comments, DHS is making a minor change to the regulatory text of § 236.3(f)(4)(i) to make it clear that, as a general matter, UACs will not be transported with unrelated adults. Specifically, pursuant to CBP’s National Standards on Transport, Escort, Detention, and Search (TEDS) policy, UACs may not be transported with unrelated adults when separate transportation is immediately available. FSA paragraph 25A also provides that UACs may be transported with unrelated adults “when being transported from the place of arrest or apprehension to an INS office.” Thus, DHS updates the text in § 236.3(f)(4)(i) to reflect the general statement that UACs may not be transported with unrelated adults, as well as the two potential exceptions to this provision.

DHS notes that there may be situations in which separate transportation for UACs and unrelated adults is unavailable or impractical. For instance, in situations in which CBP apprehends a large group of aliens in a remote location, it would be impractical to transport any UACs in that group separately from unrelated adults in separate vehicles. To do so would cause a significant delay in transporting all of the aliens to the nearest DHS facility for processing and all appropriate amenities (e.g., the provision of food and water). Additionally, depending on the number of aliens encountered in a particular location or at a particular time, DHS’s operational realities may result in there not being a sufficient number of vehicles with proper security available to transport a UAC separately.

Additionally, as the proposed regulation notes, where separate transportation is impractical or unavailable, DHS is committed to ensuring that necessary precautions will be taken to ensure the UAC’s safety, security, and well-being. One of these precautions is ensuring that when a UAC is transported with any unrelated detained adult, DHS will separate the UAC from the unrelated adult(s) to the extent “operationally feasible.” In this context, “operationally feasible” can be described as mitigating all risk factors associated with transporting UACs with unrelated adults to the extent that the

benefit of doing so favors the UAC, other aliens, and DHS. For instance, UACs may be separated from unrelated adults by either a separate passenger compartment or an empty row of seats.

With respect to the commenters who were concerned about the addition of the term “or unavailable” to the conditions of transfer standard, DHS reiterates that it considers the term “unavailable” to be clarification only and not a substantive change to the current standard set forth in paragraph 25 of the FSA.

A commenter also took issue with the term “DHS facility,” but this language is consistent with paragraph 25A of the FSA, which states that “unaccompanied minors arrested or taken into custody by the INS should not be transported by the INS in vehicles with detained adults except when being transported from the place of arrest or apprehension to an INS office.” DHS believes that the term “DHS facility” is equivalent to “INS office” after the reorganization under the HSA. As described above, there are occasions where it is impractical to transport UACs without unrelated adults. For instance, if DHS encounters a large group of aliens in a remote area, it is in the best interest of both the aliens and DHS to transport the aliens for humanitarian reasons to the nearest DHS facility for processing and assessment. This provision is not intended to permit DHS to transport UACs beyond the minimum distance required to accomplish the operational necessity.

*Comment.* One commenter stated that this provision is contrary to the TVPRA because it does not take into consideration the requirements for those from contiguous countries. The commenter explained that under the TVPRA, the government must screen children from contiguous countries within 48 hours of apprehension or before return to their home country and “if the child does not meet such criteria [of 8 U.S.C. 1232(a)(2)], or if no determination can be made within 48 hours of apprehension,” these children must be transferred to ORR. This commenter feared that these children could face indefinite detention in unlicensed facilities in contravention with the TVPRA. This commenter also stated that the TVPRA does not allow for the exceptions to the 72-hour timeframe listed in the proposed rule because they do not meet the high bar of “exceptional circumstances” as intended under the TVPRA.

*Response.* DHS disagrees that proposed § 236.3(f) is contrary to the TVPRA provisions, but in light of the comment, is amending the regulatory

text to clarify that UACs from contiguous countries are to be treated in accordance with the TVPRA. Pursuant to the TVPRA, an agency has 48 hours to determine if UACs who are nationals or habitual residents of a country that is contiguous with the United States meet the criteria listed in 8 U.S.C. 1232(a)(2)(A). See 8 U.S.C. 1232(a)(4). If a UAC does not meet the criteria, or a determination about the criteria cannot be made within 48 hours of apprehension or encounter, the UAC must immediately be transferred to HHS in accordance with the procedures set forth in 8 U.S.C. 1232(b). The timeframe provided in section 1232(b) is the time frame set forth in § 236.3(f). The only exception to the 72-hour timeframe is if a UAC is able to withdraw his or her application for admission pursuant to 8 U.S.C. 1232(a)(2). Therefore, the provisions of § 236.3(f) and the 72-hour timeframe apply to UACs who are treated in accordance with the terms of 8 U.S.C. 1232(a)(4).

DHS disagrees with the assertion that the proposed rule includes exceptions to the 72-hour timeframe that are inconsistent with the TVPRA. Section 236.3(f)(3) states that “unless exceptional circumstances are present, DHS will transfer custody of a UAC as soon as practicable after receiving notification of an ORR placement, but no later than 72 hours after determining that the minor is a UAC.” This strictly conforms to the TVPRA. See 8 U.S.C. 1232(b)(3). The emergency and influx exceptions are only applicable to minors who are not UACs. The only exception to the 72-hour timeframe for the transfer of UACs from DHS to HHS (other than those processed in accordance with 8 U.S.C. 1232(a)(2)) is exceptional circumstances.

#### Changes to Final Rule

In response to commenters’ concerns about the operation of 8 U.S.C. 1232(a)(2), DHS is amending the proposed regulatory text in § 236.3(f)(1) to clarify that UACs from contiguous countries are to be treated in accordance with the TVPRA; specifically, if a UAC from contiguous country is not permitted to withdraw his or her application for admission or if no determination can be made within 48 hours of apprehension, then the UAC will be immediately transferred to HHS.

Additionally, DHS is amending the proposed regulatory text in § 236.3(f)(4)(i) regarding conditions of transfer of UACs with unrelated adults. The revisions better reflect current operational practices and clarify that generally UACs will not be transported with unrelated detained adults. DHS has

added the specific reference to unrelated “detained” adults, for clarity on this point.

#### 7. DHS Procedures in the Apprehension and Processing of Minors § 236.3(g)

##### Summary of the Proposed Rule

The proposed rule would require DHS to issue a Notice of Rights (Form I-770) and Request for Disposition and Custodial Care. It would also require the Form I-770 to be provided, read, or explained to the minor or UAC in a language or manner that the minor or UAC understands. The proposed regulation would also provide that the minors or UACs who enter DHS custody would be able to make a telephone call to a parent or close friend. The proposal would also require that every minor who is not a UAC and is in DHS custody will be given a list of free legal service providers. Additionally, section 236.3(g)(2) provides custodial standards immediately following apprehension.

##### Public Comments and Response

*Comments.* Several commenters asserted that the proposed rule disregards important legal protections provided by the TVPRA regarding DHS procedures upon apprehension of a minor or UAC. The commenters raised concerns about the possibility of indefinite detention, family separation, expanding the possibility of placing UACs in secure detention, failure of the proposed rule to adequately address conditions in CBP processing centers, and the treatment of apprehended minors.

Some commenters found § 236.3(g)(1) problematic because it does not provide a timeframe for the processing of children immediately following apprehension. A commenter asserted that the use of “as expeditiously as possible” rather than a specific timeframe will result in the indefinite detention of children and violate the protections afforded children under the International Covenant on Civil and Political Rights (ICCPR) Article 9. The commenter also raised concerns about the requirement that a child must request a voluntary departure or withdraw their application for admission before they are informed about the possibility of administrative or judicial review. The commenter asserted that a child has “no practical mechanism to assert his or her rights under the ICCPR until after they are processed by DHS, yet the child can be detained for an indefinite period prior to processing.”

Another commenter objected to language in the proposed regulation

stating that all minors or UACs who enter DHS custody will be issued Form I-770, as compared to the requirement that minors be issued the form upon apprehension. The commenter stated that apprehension at the border does not equate to being in DHS custody nor does it always prompt DHS custody. The commenter argued that notifying children of their rights at the earliest point of contact with DHS will ensure that all children will receive information that will benefit them thereafter and that DHS officers are reminded of their obligations when apprehending children.

One commenter claimed that the proposed regulation deviates from referenced paragraph 12(A) of the FSA by not requiring notification to minors of their rights, including the right to a bond redetermination hearing, if applicable, and that the Form I-770 does not include such notice.

*Response.* Proposed § 236.3(g) preserves the intent of the current regulations and is consistent with FSA paragraphs 12(A) and 24(D), continues to comply with *Perez-Funez v. INS*, 611 F. Supp. 990 (C.D. Cal. 1984), and complies with the TVPRA requirements.

With regard to the TVPRA, DHS currently screens all UACs from contiguous countries upon encounter and initial processing to determine whether such a UAC may be permitted to withdraw his or her application for admission. As stated in the NPRM, a UAC is provided with a Form I-770 Notice of Rights during this screening and initial processing. UACs from non-contiguous countries are not permitted to withdraw their application for admission under the TVPRA, but are nevertheless provided with a Form I-770 Notice of Rights.

DHS disagrees with the commenter that the proposed regulations violate Article 9 of the ICCPR. Detention under these regulations is in accordance with procedures established by law. See, e.g., sections 235, 236, and 241 of the INA, 8 U.S.C. 1225, 1226, and 1231.

Furthermore, all minors and UACs who enter DHS custody are provided with a Form I-770, Notice of Rights and Request for Disposition. When a minor is transferred to or remains in a DHS detention facility, he or she is currently provided with a Notice of Right to Judicial Review.

DHS notes that the notice is confusing in some respects, because 8 U.S.C. 1226(e) broadly prohibits judicial review of custody determinations both in bond hearings and via parole. A regulation (and a form) cannot vest Federal courts with jurisdiction. DHS accordingly will, in a future action,

amend this form to more accurately reflect the judicial review limits set forth in 8 U.S.C. 1226(e).

Additionally, the commenter's statement that a child has "no practical mechanism to assert his or her rights under the ICCPR until after they are processed by DHS," reflects a misunderstanding of Article 9 of the ICCPR. Article 9 does not grant an individual the right to contest the grounds for his or her detention before he or she is detained.

With respect to paragraph 12(A) of the FSA, DHS reiterates that all minors taken into DHS custody will be notified of rights, including a bond redetermination hearing where applicable. Section 236.3(g) of the final rule preserves the requirement of notification of rights using Form I-770, Notice of Rights and Request for Disposition. All minors who are not UACs who are transferred to or who remain in DHS custody in removal proceedings will be given a Notice of Right to Judicial Review, which notifies the minor of the right to seek judicial review in appropriate circumstances. In addition, DHS serves all aliens, including minors, with a custody determination form that indicates whether they have the right to seek a bond redetermination. These actions are consistent with the requirements of FSA paragraphs 12(A) and 24(A).

*Comments.* One commenter noted that the proposed rule failed to require that every child be placed in the least restrictive placement in the best interests of the child, as required by the TVPRA and subsequent HHS policies.

*Response.* DHS notes that this section of the regulations applies only to minors and UACs when they are held in DHS processing facilities immediately following their initial arrest, and thus the TVPRA provisions regarding HHS' placement of UACs do not apply.

Proposed § 236.3(g)(2)(i) states that "consistent with 6 CFR 115.114, minors and UACs shall be held in the least restrictive setting appropriate to the minor or UAC's age and special needs, provided that such setting is consistent with the need to protect the minor or UAC's well-being and that of others, as well as with any other laws, regulations, or legal requirements."

*Comments.* Several commenters raised concerns regarding conditions in CBP processing facilities, stating that conditions are subpar to those outlined in the FSA. Commenters identified a lack of access to legal counsel, lack of bedding, forcing children to sleep on cement floors, open toilets, confiscation of belongings, constant light exposure, insufficient food and water, no bathing

facilities, and extremely cold temperatures, which are traumatizing for children. Several commenters proposed that additional elements of custodial care following apprehension should be incorporated in § 236.3(g)(2) of the rule, including adding the term "bedding" to the listed elements facilities will provide; and striking the language "as appropriate" after "food and water" to avoid confusion, as food and water should never be withheld. Several commenters also recommended the rule should include custodial standards for architectural design, lighting, and mental health care services. Other commenters asked that DHS include provisions to address adequate temperature control in facilities that house children.

One commenter cited research and experience with family detention centers in the U.S. that shows that access to quality medical, dental and mental health care is limited for detainees. Specifically, the commenter contended that preventative care and mental health services are often lacking, and most detention centers relied on expensive emergency room visits to provide medical care, often after delay, increasing the detainees' severity of illness. The commenter also stated that the Infectious Disease Society of America has already found outbreaks of chicken pox, scabies and other infections among detainees, and that detention facilities are lacking in practices of hygiene and infection control, leading to conditions that will fuel the spread of infections.

One commenter also pointed out that contact with family members arrested at the same time should not be an issue because the family should all be housed together and this section should reflect the concept of family unity during apprehension and initial processing.

*Response.* DHS notes that the proposed text of § 236.3(g)(2) is, in substance, identical to the existing requirements in the FSA. Specifically, paragraph 12A of the Agreement requires that "following arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors. Facilities will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor." The text proposed in the NPRM at § 236.3(g)(2) provided that DHS will hold minors and UACs in facilities that

are safe and sanitary and that are consistent with DHS's concern for their particular vulnerability. Facilities will provide access to toilets and sinks, drinking water and food as appropriate, access to emergency medical assistance as needed, and adequate temperature and ventilation. DHS will provide adequate supervision and will provide contact with family members arrested with the minor or UAC in consideration of the safety and well-being of the minor or UAC, and operational feasibility. Thus, DHS has, through this provision, included the same terms used in the FSA, with such changes as are required by the HSA and the TVPRA.

DHS also notes that CBP policies serve to implement these protections and go beyond the requirements of the FSA and these regulations. Specifically, CBP's policy states that all individuals who may require additional care or oversight while in custody, including minors and UACs, will be treated with dignity, respect, and special concern for their particular vulnerability. TEDS also addresses the provision of all amenities provided for by the FSA. For example, TEDS provides that minors and UACs in CBP custody have access to restrooms and appropriate toiletry items (e.g., toilet paper and sanitary napkins); have access to drinking water at all times; are provided with four meals daily; and have access to milk, juice, and snacks at all times. TEDS also provides that minors and UACs are provided access to basic hygiene items and clean bedding, and that CBP makes reasonable efforts to provide showers (including soap and a towel) to minors and UACs approaching 48 hours in CBP custody. Additionally, CBP documents the provision of all required amenities, as well as welfare checks of all minors and UACs, in its electronic systems of records. CBP also documents that the temperature is appropriate and that the cleanliness of its hold rooms has been checked in its electronic systems of record.

CBP also notes that it has recently taken several steps to enhance the provision of medical care to minors and UACs in its custody. Specifically, CBP currently provides medical screening and triage for all UACs and minors along the southwest border. Following a screening, any minor or UAC who requires emergency medical care is transferred to the hospital or other nearby medical facility for appropriate emergency treatment.

DHS declines to add "bedding" to the list of items provided by facilities, as that term does not appear and is not defined in the FSA. DHS notes, however, that generally CBP provides clean bedding to all minors and UACs,

and that the provision of bedding is documented in CBP's electronic systems of record. Additionally, as noted above, the TEDS standards address these topics and more, and in many ways go over and above the requirements of the FSA, and these regulations. DHS also declines to delete the words "as appropriate" after "food and drinking water" since this is a reasonable limitation. The "as appropriate" phrase is derived from FSA paragraph 12A, and might apply in a situation in which a minor or UAC is in custody for a very short period of time.

*Comments.* One commenter recommended that the rule require that processing facilities not only be safe and sanitary but also provide a sense of comfort, including by prohibiting the use of wire fencing to separate youth and by providing access to beds, blankets, outdoor space, and comfort items (e.g., stuffed animals that be taken with the child/youth when they transfer to a licensed facility).

*Response.* The FSA requires that facilities in which minors and UACs are held immediately following arrest be "safe and sanitary" and reflect DHS's "concern for the particular vulnerability of minors." DHS's short-term holding facilities, in which minors and UACs are held immediately following arrest, are generally designed to hold individuals for 72 hours or less. See 6 U.S.C. 211(m)(3). Thus, they are not designed for long-term detention, and do not provide many of the characteristics of such long-term detention. As explained elsewhere in this rule, DHS makes efforts to transfer all minors and UACs out of such facilities as expeditiously as possible. Additionally, the TVPRA requires that DHS transfer all UACs to HHS within 72 hours absent "exceptional circumstances." Additionally, for the duration of time that minors and UACs do remain in CBP custody, CBP makes efforts to provide minors and UACs with appropriate safe and sanitary conditions, including hygiene products, showers where possible, and the opportunity to obtain clean clothes.

DHS notes that CBP facilities are also subject to several areas of oversight to ensure compliance with CBP policy and with the FSA requirements. First, CBP's Juvenile Coordinator conducts regular visits to CBP facilities across the southwest border, both announced and unannounced, to monitor compliance with the FSA requirements and with CBP policy related to the treatment of minors and UACs in CBP custody (including, for instance, determining whether facilities are safe and sanitary and whether minors and UACs have

access to adequate food and water). The Juvenile Coordinator also conducts reviews of juvenile custodial records as part of this monitoring roles. CBP also has Juvenile Coordinators in its field offices and sectors, who are responsible for managing all policies on the processing of juveniles within CBP facilities, coordinating within CBP and across DHS components to ensure the expeditious placement and transport of juveniles placed into removal proceedings by CBP, and informing CBP operational offices of any policy updates related to the processing of juveniles (e.g., through correspondence, training presentations). Moreover, CBP's Juvenile Coordinators serve as internal and external agency liaisons for all juvenile processing matters.

CBP's own Management Inspections Division (MID) also conducts visits to CBP facilities and monitors compliance with CBP's policies. Additionally, CBP is subject to regular oversight and inspection by CBP's Office of Professional Responsibility (OPR), DHS' Office of Inspector General, DHS' Office of Civil Rights and Civil Liberties, and the Government Accountability Office. Such inspection and oversight helps ensure that CBP facilities continue to meet the FSA requirements and remain safe and sanitary for minors and UACs.

*Comments.* One commenter noted that there is no mention in the rule of a minor's or UAC's ability to contact his or her consulate upon apprehension. The commenter alleged that consistent with the ABA UC Standards, upon apprehension, a child should immediately be informed, both orally and in writing, in the child's best language and where applicable, dialect, of the right to contact the child's parents and consulate.

*Response.* Section 236.3(g)(1) codifies requirements that derive directly from the FSA. This section, like Paragraph 12(A) of the FSA, applies to facilities in which minors and UACs are held during their initial processing. Paragraph 12(A) of the FSA provides that, immediately following arrest, minors be "provided with a notice of rights." And as indicated in § 236.3(g)(1)(i), all minors and UACs who enter DHS custody are provided a Form I-770, Notice of Rights and Request for Disposition. This form informs the minor or UAC that he or she may contact a parent, close relative, or friend. Thus, § 236.3(g)(1) codifies the requirements under the FSA, and no additional changes are required. DHS also notes that existing regulations at 8 CFR 236.1(e) provide that "every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the

country of his or her nationality in the United States."

*Comments.* One commenter recommended adding language that would keep minors together with the family members arrested with them, rather than simply providing contact; and recommended adoption of a rule governing housing minors with unrelated adults more closely mirroring the rules for UACs. The commenters noted that housing UACs with unrelated adults upon apprehension is addressed in the proposed rule but minors other than UACs are not mentioned in this section. The commenter stated that this could be highly problematic, pointing to studies that have shown children commingled with adults are more likely to commit suicide and to be physically or sexually assaulted.

Several commenters raised concerns that proposed language in 8 CFR 236.3(g) stating that children will be provided contact with family members only to the extent that it does not pose an "undue burden on agency operations" will weaken the protections against family separation and allow CBP to separate children from their families if the agency is merely inconvenienced. One commenter recommended that the rule should provide in § 236.3(g)(1) that every minor or UAC must receive assistance with contacting his or her parent, legal guardian, and/or counsel.

Another commenter objected to the provision that a child be provided contact with family members with whom the child was arrested "in consideration of the safety and well-being of the minor or UAC, and operational feasibility." The commenter claimed the reference to "operational feasibility" is not found in the FSA, which requires facilities to provide "contact with family members who were arrested with the minor" without qualification.<sup>26</sup> The commenter further stated that this language is also not found in existing regulations covering juvenile and family detainees.<sup>27</sup> The commenter concluded that the language conflicts with the FSA, as it allows the agency to restrict children's access to their families for its own convenience, with no specification as to the bounds of the vague term "operational feasibility."

*Response.* DHS notes that, as explained in the preamble to the NPRM, "DHS's use of 'operational feasibility' in

<sup>26</sup> FSA paragraph 12.

<sup>27</sup> See 6 CFR 114.14 (allowing juveniles to be held with adult family members "provided there are no safety or security concerns"); 115.114 (allowing unaccompanied juveniles to be held temporarily with non-parental adult family members when the agency determines it is appropriate).



this paragraph does not mean ‘possible,’ but is intended to indicate that there may be limited short-term circumstances in which, while a minor or UAC remains together with family members in the same CBP facility, providing such contact would place an undue burden on agency operations.” 83 FR 45500. The preamble went to provide several examples: “For instance, if a family member arrested with a minor or UAC requires short-term, immediate medical attention, CBP may be required to temporarily limit contact between that family member and the minor or UAC, in order to provide appropriate medical treatment. Or, CBP may have a legitimate law enforcement reason to temporarily limit contact between a minor or UAC and accompanying family members, such as when CBP decides it is in the minor or UAC’s best interest to interview all family members separately.” *Id.*

DHS reiterates its reasoning from the NPRM that CBP provides contact between the minor or UAC and accompanying family members unless CBP is concerned about the safety of the minor or UAC or there is a legitimate law enforcement reason not to provide contact on a temporary basis. It is never a matter of inconvenience. The proposed rule is much more detailed than FSA paragraph 12(A), which requires that the juvenile be provided contact with family members with whom he or she was arrested, and consistent with both FSA paragraph 11 and other DHS regulations on the prevention of sexual abuse and assault in its facilities. This provision takes into account the safety of the minor or UAC, and acknowledges that there may be some limited situations in which providing contact may not be in the minor or UAC’s best interests (*e.g.*, the accompanying family member has been observed to physically harm the minor or UAC, or a minor or UAC alleges physical abuse by the family member). Additionally, the term “operational feasibility” covers limited short-term circumstances where providing such contact would place an undue burden on agency operations. For example, if a family member requires short-term, immediate medical attention, CBP may be required to temporarily limit contact between that family member and the minor or UAC in order to provide the medical treatment. There may also be legitimate law enforcement reasons to interview family members separately.

*Comments.* Commenters expressed concern about the flexibility given to DHS to hold and transport UACs separately from unrelated adults based on emergencies or exigent

circumstances. Some commenters commented that DHS failed to define the “exigent circumstances” that would allow it to house a UAC with an unrelated adult beyond 24 hours. The commentator stated that allowing UACs to be housed with an unrelated adult for emergency or exigent circumstances contradicts the FSA and endangers children.

A few commenters stated that the provision allowing DHS to house UACs with unrelated adults for more than 24 hours based on emergencies or exigent circumstances is inappropriate and is contrary to 6 CFR 115.14(b), which prohibits the housing of children with adults unless the child is in the presence of an adult family member. And a different commenter took issue with the proposed rule’s distinction between UACs and minors when it comes to housing UACs with unrelated adults for up to 24 hours because minors should also not have to be housed with unrelated adults for more than 24 hours.

Other commenters focused on the term “operationally feasible” for purposes of the requirement to separate children from unrelated adults. Some commenters argued that the failure to define the term rendered the regulation unconstitutionally vague. One commenter requested that DHS and HHS clarify the percent of time they expect it will be operationally feasible to successfully transport and hold UACs separately from unrelated adults. The commenter asked whether DHS and HHS intend to rescind this policy and make it compliant with the FSA if they find that UACs are not held and transported separately from unrelated adults in most cases.

Another commenter asserted that DHS could dispense with contact with family members to accommodate “operational concerns” at a time when children need their family to insulate them from trauma and provide them comfort.

*Response.* The proposed regulation is designed to be consistent with the existing DHS regulations on the prevention of sexual abuse and assault in its facilities without diminishing any key protections set forth in the FSA. The proposed regulation at § 236.3(g)(2) contains the same limit as the FSA on the amount of time UACs can be housed with an unrelated adult (no more than 24 hours). The proposed regulation allows DHS to depart from this standard in emergencies, to the extent consistent with 6 CFR 115.14(b) and 115.114(b). DHS has decided to remove the reference to “exigent circumstances,” as DHS has already provided an explanation of the types of emergency

situations in which it may be necessary to hold a UAC with an unrelated adult for more than 24 hours. Any “exigent circumstances” would be largely redundant of such emergency situations. Thus, the proposed regulation at § 236.3(g)(2) is designed to be consistent with the existing DHS regulations on the prevention of sexual abuse and assault in its facilities without diminishing any key protections set forth in the FSA. DHS also notes that the proposed regulation addresses only DHS custodial care of UACs immediately following their apprehension. Pursuant to the TVRPA (and consistent with the HSA), once an alien juvenile is determined to be a UAC, DHS must transfer the UAC to the care and custody of HHS within 72 hours, absent exceptional circumstances.

DHS provides examples in the regulations of when it may be necessary to hold UACs with unrelated adults for more than 24 hours, including during a weather-related disaster or if an outbreak of a communicable disease requires the temporary commingling of the detainee population. These examples confirm that any emergencies would address temporary and unforeseen dangers or public safety threats. DHS is unable to provide an exact length of time, beyond 24 hours, that it may be necessary to house a UAC with an unrelated adult, as the length of time will vary based on the particular emergency warranting such a situation. However, DHS will not house a UAC with an unrelated adult for any longer than is required based on the specific facts of the particular emergency. Moreover, even under emergency circumstances, appropriate consideration is given to age, mental condition, physical condition, and other factors when placing UACs into space with unrelated adults.

Concerns about recognizing an exception to the 24-hour limit in an “emergency” are unfounded. The exceptions would only apply to the extent consistent with the existing DHS regulations on the prevention of sexual abuse and assault in DHS facilities at 6 CFR 115.14(b) and 115.114(b).

Similarly, the commenter’s concerns about distinguishing between UACs and minors for this requirement is misplaced because the FSA’s provision on the amount of time UACs can be housed with an unrelated adult applies only to unaccompanied *Flores* class members. See June 27, 2017 Order at 31, *Flores v. Sessions*, No. 85–4544 (C.D. Cal. filed July 11, 1985) (noting that “Paragraph 12A of the Agreement states that upon apprehension, Defendants

'will segregate unaccompanied minors from unrelated adults.'").

DHS also disagrees with commenters' concerns about the term "operationally feasible" because that term does not appear in the proposed regulatory text concerning the amount of time a UAC can be housed with an unrelated adult. This term is addressed above, in the discussion of providing contact between minors and UACs and family members with whom they were apprehended. And the proposed DHS regulatory text at § 236.3(f) contains a prohibition on transportation of UACs with unrelated adults in keeping with the FSA: A "UAC will not be transported with an unrelated detained adult(s) unless the UAC is being transported from the place of apprehension to a DHS facility or if separate transportation is otherwise impractical or unavailable."

#### Changes to Final Rule

DHS is amending the proposed regulatory text to remove the language "exigent circumstances" in response to public comments. DHS is also amending the regulatory text to clarify that the Form I-770 will be provided, read, or explained to all minors and UACs in a language and manner that they understand.

#### 8. Detention of Family Units § 236.3(h) Summary of Proposed Rule

DHS proposed to clarify that DHS may, pursuant to existing legal authorities, maintain and detain family units together in ICE custody. The proposal also provided that DHS would transfer family units to an FRC if DHS determined that detention of family units is required. The terms contained in the proposed rule set out and clarify requirements that must be met for a family to be detained together in an FRC.

#### Public Comments and Response

*Comments.* Some commenters noted that there may be times when a child needs to be detained, such as when no alternative exists that meets the needs of the child and ICE's security concerns. But most commenters on this topic expressed general opposition to the detention of family units. Many commenters discussed the negative impacts of detention on the well-being of children, while some commenters also stated that family detention has negative impacts on parents and the family unit itself. One commenter also stated that DHS has failed to justify detaining children because of a misdemeanor crime allegedly committed by a parent and that it must exhaust less restrictive alternatives.

Another stated that family immigration detention should only be used as a last resort where necessary to protect the best interests of the child, and only following an individualized assessment and judicial review.

With regard to the impact of family detention on family units, numerous commenters stated possible effects could include emotional distress, damage to family stability, the undermining of a parent's ability to appear as an authority figure and provide emotional support, and disruption of the parent/child bond, potentially leading to attachment issues. Several commenters also noted that, while they support the notion of family unity, they disagree with unity being created or maintained by family detention. Many commenters described the detention of family units as "inhumane," "immoral," "cruel," or contrary to our country's values. One commenter stated that the detention of family units is rooted in a white nationalist agenda.

- Trauma

*Comments.* As a reason for their opposition to the detention of family units, numerous commenters stated that the detention of families has serious and long-lasting negative impacts on the physical and mental well-being of children. Many commenters, including doctors, social workers, and organizations specializing in medicine or mental health, listed numerous possible negative effects of detention on children, such as: Trauma; developmental delays; anxiety; depression; Post Traumatic Stress Disorder (PTSD); regressive behaviors; withdrawal; self-injury; suicidal ideation; nightmares; night terrors; bed-wetting; delayed cognitive development; digestive disturbances; panic attacks; clinginess; withdrawal; attachment disorders; loss of appetite; and educational delays.

One commenter stated that parents who find themselves in this highly stressful situation are at risk of developing similar emotional problems, in addition to being less available and responsive to their children which, in turn, can interrupt the natural attachment between children and parents. One commenter, relying on such possible effects, stated that detention of innocent children should never occur in a civilized society, especially if there are less restrictive options, such as parole, because the risk of harm to children simply cannot be justified.

Several commenters relied on research in this area to support their

comments. For example, one commenter cited to a body of research linking the trauma of childhood detention with adverse outcomes, and a collection of articles that discusses the harm done to children from the toxic levels of stress and disruption in normal development that are inherent in being detained in U.S. custody.

Another commenter cited research to show that 44 percent of asylum seekers in the United States were torture survivors, and that detention was likely to compound the trauma already experienced by these individuals. Several commenters noted that detention is likely to re-traumatize mothers and children fleeing gender-based violence. Some commenters cited to the DHS Advisory Committee on Family Residential Centers Report that recommended DHS not detain families. One commenter suggested changes to the last sentence of the provision, "If DHS determines that detention of a family unit is required by law, or is otherwise appropriate, the family unit may be transferred to an FRC which is a licensed facility and non-secure." Specifically, the commenter suggested changing "may be" to "shall be." The commenter suggested adding "as available" or "as reasonably possible" to address a lack of space in FRCs.

- Indefinite Detention

Many commenters expressed concern that detention of family units would lead to prolonged or indefinite detention. For further discussion of this topic, see section "Indefinite Detention due to Alternative Licensing."

*Response.* DHS responds to the issues of alleged indefinite detention and the trauma caused by detention are in the sections devoted to these topics below. DHS believes that misconceptions about FRCs abound, and these misconceptions are reflected in the comments. Detention of family units in this context is related only to civil immigration proceedings and not criminal charges. FRCs are non-secure, meaning that families are not physically prevented from leaving the facility if they wish. While leaving an FRC could result in significant immigration consequences, the families are not in prison and the decision to stay or go is their own. FRCs have classrooms for the children's education, cafeterias for family meals, and outdoor and indoor recreation areas. There are no cages, prison cells, or prison bars. There are, however, windowed bedrooms with plenty of space for beds, chests of drawers, and tables. There are also communal areas with couches and television sets. There are entire medical

wings devoted to caring for the families, whether it is their initial intake screening where they are screened for communicable diseases, high blood pressure, and diabetes, or emergency situations where their trip from their home countries to the United States has caused them severe harm that requires hospitalization. ICE's Juvenile Family Residential Management Unit (JFRMU) is responsible for the ICE Family Residential program, and it periodically revises the Family Residential Standards that govern the program, consistent with best practices.

FRCs serve to encourage and strengthen family interaction and growth. Parents are expected to be responsible for their children and are encouraged to take an active role in their development. FRC staff counsel and mentor parents in appropriate non-physical behavior management techniques. Family units normally are assigned bedrooms together to further familial bonds. Centers provide age-appropriate play structures and recreational equipment for all residents. Mental health providers conduct weekly wellness checks on all juvenile residents. If additional treatment needs are identified during these checks, separate therapy sessions may also be established. Additionally, mental health providers are available to residents for adult counseling and family counseling needs. FRCs are not staffed by armed guards or uniformed ICE officers, rather they are staffed by facility counselors.

FRCs also provide liberal access to legal counsel and non-profit groups providing legal services. Interpreter services are available 24/7 via telephone. Private meetings rooms are available as is direct communication with the immigration courts.

FRCs also afford parents the ability to be parents; they exercise full parental rights. FRC staff do not make any decisions for the parents. If the parents do not want their children to participate in group activities, it is their choice. Similarly, if they do not want their children to be part of the individual or group mental health counseling sessions, it is the parent's choice. FRCs give parents and their children a chance to acclimate to the United States, get their bearings, find legal counsel, prepare their immigration cases, and in many cases be released after a finding of credible fear.

Medical issues at FRCs are managed by the ICE Health Service Corps (IHSC). The IHSC is responsible for providing direct care or oversight of care at FRCs to include medical, dental, and behavioral health care, and public health services. IHSC is made up of a

multi-sector, multidisciplinary workforce of over 1,100 employees that include U.S. Public Health Service (PHS) Commissioned Corps officers, Federal civil servants, and contract health professionals. IHSC provides medical case management and oversight of detainees housed at non-IHSC staffed detention facilities and also oversees the management of off-site specialty and emergency care services for all detainees in ICE custody.

IHSC utilizes health care standards drawn from the American Correctional Association (ACA), the National Commission on Correctional Health Care (NCCHC), the ICE National Performance-Based Detention Standards (PBNDs), as well as the ICE Family Residential Standards to ensure that quality, culturally competent, and trauma-informed care is provided to detainees in ICE custody. These standards support IHSC's internal quality improvement program. Moreover, IHSC employs staffing models at its facilities tailored to the population and needs of the community under its care. IHSC's mandate to provide direct care for ICE detainees obligates IHSC to deliver individualized care that must be properly documented in medical records for the well-being of the detainees. IHSC takes seriously all allegations of inappropriate health care and investigates these allegations to remedy any identified deficiencies and ensure the integrity of the care it provides to ICE detainees.

With respect to the report of that the DHS Advisory Committee on Family Residential Centers, DHS notes that the report was issued by a committee of private citizens acting outside the scope of the committee's charter. The report states that any detention of families "should be only long enough to process a family for release into alternatives to detention." But the report ignored DHS's legal authority to detain aliens in removal proceedings when legally required and when appropriate to ensure the alien presents himself for removal.

While DHS respects the views of the writers of the report, alternatives to detention (ATD) do not provide a means to effectively remove those who subject to a final removal order. For further discussion of this topic, see section on Alternatives to Detention.

Lastly, DHS does not concur with commenters' suggested changes to the text of the regulation. The word "may" in the proposed regulation accounts for the possibility that family units may be released at the time of encounter. The language in the regulation that states "as

reasonably possible" also accounts for a lack of bedside.

#### Changes to Final Rule

DHS declines to change the proposed regulatory text in response to public comments.

#### 9. Detention of Minors Who Are Not UACs in DHS Custody § 236.3(i)

##### Summary of Proposed Rule

The Departments proposed that a minor who is not a UAC and not released by DHS, may be held in DHS custody where he/she is detained in the least restrictive setting appropriate to the minor's age and special needs. Additionally, the proposal would permit minors to be placed temporarily in a non-secure licensed facility until they are released.

Section 236.3(i)(1) proposed to require that a minor who is not a UAC be transferred to state or county juvenile detention facilities, a secure DHS detention facility, or a DHS-contracted facility having separate accommodations for minors if the minor meets certain criteria, including the minor is charged with, is chargeable with, or convicted of a crime or has been charged with, is chargeable with, is the subject of delinquency proceedings or has been adjudicated as delinquent, committing, or making credible threats to commit, a violent or malicious act while in custody or while in the presence of an immigration officer; engaging, while in a licensed facility, in certain conduct that is unacceptably disruptive of the normal functioning of the licensed facility; being an escape risk; or for the minor's own security.

Section 236.3(i)(2) proposed to require DHS to place a minor in a less restrictive alternative if such an alternative is available and appropriate in the circumstances, even if the provisions of § 236.3(i)(1) apply. Additionally, it would require that the secure facilities used by DHS to detain non-UAC minors shall also permit attorney-client visits pursuant to applicable facility rules and regulations.

Section 236.3(i)(3) proposed that, unless a detention in a secure facility is otherwise required, DHS facilities used for the detention of minors would be non-secure.

Section 236.3(i)(4) proposed that all non-secure facilities used for the detention of non-UAC minors abide by the standards for "licensed programs." At a minimum, these standards must include, but are not limited to, proper physical care, including living accommodations, food, clothing, routine

medical and dental care, family planning services, emergency care (including a screening for infectious disease) within 48 hours of admission, a needs assessment including both educational and special needs assessments, educational services including instruction in the English language, appropriate foreign language reading materials for leisure time reading, recreation and leisure time activities, mental health services, group counseling, orientation including legal assistance that is available, access to religious services of the minor's choice, visitation and contact with family members, a reasonable right to privacy of the minor, and legal and family reunification services. Additionally, this section would require DHS to permit attorney-client visits pursuant to applicable facility rules and regulations in all licensed, non-secure facilities in which DHS places non-UAC minors.

Section 236.3(i)(5) would permit "licensed, non-secure facilities" to transfer temporary physical custody of minors prior to securing permission from the Government in the event of an emergency, provided that they notify the Government as soon as practicable, but in all cases within 8 hours.

#### Public Comments and Response

*Comments.* Some commenters argued that the proposals would eliminate important provisions in the FSA, including a guarantee that the standards would incorporate state welfare laws and the requirements to provide acculturation and adaptation services, provide family reunification services; to provide services in a manner that is sensitive to the age, culture, native language, and complex needs of each minor; to provide information regarding the right to request voluntary departure in lieu of deportation; to create an individualized plan for each minor that is tracked through a case-management system; to maintain protections to keep minor's personal information confidential and avoid unauthorized disclosures; and to maintain records and make regular reports to INS to ensure compliance with the FSA.

One commenter stated that § 236.3(i)(4) omits several provisions that were standards in the FSA, including family reunification services; the prohibition of "corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping;" the development of a "comprehensive, realistic individual plan for the care of each minor," coordinated through a case management system, which should be safeguarded to

preserve and protect confidential records; and regular record keeping and reporting. The commenter acknowledged that these provisions are found in other parts of the proposed rule concerning children in HHS custody, but asserted that there is no reason for a distinction between "alien minors" and "UACs" when it comes to these issues.

*Response.* This section is specifically about ICE custody of minors once a decision has been made not to release a minor, and the minor is not a UAC. The standards described are taken from Exhibit 1 of the FSA. The individualized plans, as one commenter calls them, are in § 236.3(i)(4)(iii), which mirrors Exhibit 1, paragraph 3 of the FSA. Family reunification provisions are not needed in this part of these regulations because minors in ICE custody are already housed with their parents or legal guardians. Similarly, case management services for minors in ICE custody are not needed the same way they are needed for UACs in HHS custody because minors in ICE custody are supervised by their parent or legal guardian. The parent or legal guardian is responsible for seeking any services or care that the minor requires while in DHS custody and fulfill the role of a case manager in seeking a continuum of care and services such as pediatric care, mental health services.

DHS disagrees with the commenter that this regulation does not provide services in a manner that is sensitive to the age, culture, native language, and complex needs of each minor. DHS has put numerous programs in place since the FSA was signed to take into account such needs. For example, it can generally provide interpretation services 24 hours a day via telephone. Further, DHS abides by language access policies that comply with the Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency*, although DHS declines to codify these language access policies in regulation in order to maintain necessary operational flexibility. Similarly, DHS declines to codify through this regulation any additional of the commenters' suggestions: Creating an individualized plan for each minor that is tracked through a case-management system; maintaining protections to keep minor's personal information confidential and avoid unauthorized disclosures; and maintaining records and making regular reports to DHS to ensure compliance with the FSA. Technology advances, privacy laws, and reporting over the last 20 years have now made these suggestions standard operating

practices, but codifying them through regulatory text limits DHS's operational flexibility to update and improve these practices as necessary.

DHS does not believe there is a need for advisals at FRCs regarding a minor's right to request voluntary departure in lieu of deportation. This is true because, DHS acknowledges parental rights for family units housed at FRCs and families are likely to make such decisions as a unit.

With respect to acculturation programs, DHS notes that the only difference between the FSA and the proposed language is that the FSA requires that the acculturation services contribute to the ability to "live independently and responsibly," whereas the proposed language requires that the services would contribute to the abilities needed "as age appropriate." After many years of experience, DHS has found that what a five-year-old needs to know about America is different from what teenager needs to know to successfully integrate into society.

DHS agrees to add the prohibitions in the FSA against corporal punishment, humiliation, mental abuse, and punitive interference with the daily functions of living, such as eating or sleeping to the regulation. DHS notes that these prohibitions have always been incorporated into personnel policies and contract vehicles with contractors who run ICE facilities. There are also mechanisms in place to monitor for such abuses. But DHS will add these provisions into the text of the regulation in response to commenters noting a lack of specific language addressing these issues in the proposed text. Such conduct is obviously inappropriate and has no place in any DHS facility.

#### Safety (§ 236.3(i))

*Comments.* Several commenters stated that there are numerous architectural layout and design problems with the facilities used to detain minors that would lead to an increase in injuries. DHS medical experts and non-profits reported instances of severe finger injuries resulting from the closure of heavy doors in a converted prison used as a family detention center. A few commenters stated that the facilities were likely to be inadequate because they would be hastily constructed. Several commenters also stated that the facilities often lack sufficient medical space and noted that in one case a gymnasium was used as an ad hoc overflow medical space.

Several commenters stated that there are not standards that limit the number

of room occupants or prevent minors from sharing a room with unrelated adults and/or adults of the opposite gender, which increases the risk of child abuse. Several commenters detailed that in current FRCs, families are typically placed in rooms that accommodate six people, which results in children sharing rooms with unrelated adults, including sleeping, dressing, and using the restroom without adequate privacy. Additionally, one commenter noted that most space in detention facilities are reserved for mothers and young children, so fathers and older siblings are often separated from their families.

Several commenters commented that placing children in detention is inherently abusive, that children are at an increased risk of physical, verbal, mental, and sexual abuse in detention, and cited reports of sexual or physical abuse in detention facilities. One commenter referenced a guard at the Berks facility who was convicted of raping a woman in front of her three-year old son. One commenter referenced a ProPublica investigation that found patterns of abuse of immigrant children in Federal custody.

*Response.* ICE facilities are inspected for safety by state and Federal inspectors. The examples put forth by commenters of injuries sustained by children are isolated incidences and not a pattern from unsafe conditions. DHS is acutely aware of safety standards and ensuring that anyone in DHS custody, but especially children, are housed in safe and sanitary conditions. With respect to housing at ICE facilities, DHS notes that it has systems in place to ensure the safety of the minors, such as the “Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities” (PREA) regulations and housing classifications that use restrictions by age and gender to inform the placement of families. Children remain in the care of their parents while housed at FRCs.

Regarding the commenter’s reference to the incident at Berks, DHS followed the Prison Rape Elimination Act of 2003 (PREA) protocol and other applicable policies to appropriately address the situation. The guard involved was immediately terminated from his position and ultimately prosecuted for his crime. ICE fully cooperated with local law enforcement in all stages of the investigation and prosecution of the case. DHS strives to ensure that nothing remotely similar ever occurs in its facilities.

DHS notes that all ICE facilities, including FRCs, are subject to PREA regulations. DHS also has several policies on point and requires staff to

participate in annual training related to PREA and sexual abuse and prevention initiatives.

#### Secure Facilities (§ 236.3(i)(1) and (2))

*Comments.* Several commenters expressed concern that factors proposed in the regulations for determining whether a child belongs in secure detention are overly broad, vague, or do not sufficiently incorporate the terms of the FSA. One commenter wrote that this section is in conflict with the TVPRA’s rules for when the government may place a child in secure detention, section 235(c)(2) of the TVPRA, because it broadens the criteria under which a child may be placed in a secure facility beyond the two factors contained in the TVPRA. The commenter stated that it is inadequately clear what would constitute a “pattern or practice of criminal activity” for a minor under this regulation, that the term “probable cause” is too vague, and the agencies are not able or qualified to make such a determination. The commenter also argued that the language should include the FSA’s list of examples of isolated and nonviolent offenses and petty offenses that would not rise to the level of justifying secure detention and its required finding that the child’s action involved violence against a person or the use or carrying of a weapon.

Several commenters wrote that § 236.3(i) affords an inappropriate level of discretion to DHS and shelter staff in determining a minor’s placement in a secure facility. The commenters stated that this section provides no clarity as to what would constitute an unacceptable level of disruption, how or on what basis staff will make the dangerousness determination, and which party will be responsible for making the determinations. One commenter recommended deleting provisions (i)(1)(i), (ii), (iv), and (v) as unacceptably broad and arbitrary language and noted that similar language included in the FSA has been interpreted by immigration officers to allow placement of a child in secure detention for minor matters such as shouting or smoking a cigarette. With respect to the language at (i)(1)(vi), the commenter recommended that the proposed rule add a separate provision that when a minor is at a demonstrated risk of harm from smugglers, traffickers, or others who might seek to victimize or otherwise engage him in criminal, harmful, or exploitative activity, the minor shall be placed in the least restrictive developmentally appropriate placement consistent with his safety and the safety of others. A few commenters stated that the rule must

include a provision) for a periodic reassessment of a minor’s placement in a secured facility at least every 30 days, as required by the TVPRA and a provision for independent review of a placement decision that satisfies due process requirements.

A few commenters wrote that studies show that LGBT youth face harsher penalties when engaging in the same behavior as their straight and cisgender counterparts, and that therefore the proposed rule’s inclusion of “chargeable” offenses is more likely to subject LGBT youth to placement in secure facilities. One of the commenter also wrote that including “engagement in unacceptably disruptive behavior that interferes with the normal functioning” of the shelter as a chargeable offense will likely lead to placement of more LGBT in secured facilities, because studies have shown that in the juvenile justice context LGBT youth are more likely to face criminal consequences for engaging in consensual sexual activity than straight or cisgender youth, and also that such conduct may be considered “unacceptably disruptive behavior” in detention facilities. These commenters also wrote that the placement of more LGBT youth in restrictive settings would increase the vulnerability of those minors to abuse.

One commenter wrote that the proposed rule’s omission of medium security facilities as an alternative detention facility is in violation of the FSA. The commenter noted that paragraph 23 of the FSA requires medium security facilities as one alternative in certain circumstances, but that the proposed rule states that because DHS only operates secure and non-secure facilities, a definition for medium security facilities is unnecessary. The commenter believed the proposed rule should be amended in order to implement the FSA’s terms.

Other commenters argued for additional provisions that should have been included relating to the placement of children in restrictive settings. This included a proposal that in determining placement in a secure facility, threats from a juvenile be “credible *and verified*” (as opposed to just credible threats as discussed in the proposed rule). Further, one commenter was concerned that “disruptive behavior” is too subjective as a criterion for placement in a facility and should be replaced. Additionally, one commenter proposed that secure placements should include the consultation of a mental health specialist.

*Response.* As explained in the NPRM, the proposed regulation reframed the FSA requirements for placing a child in

a secure facility from a negatively worded list to an affirmatively worded list. The FSA says that the provisions “shall not apply” in many instances. The proposed rule explains exactly when the provisions will apply. Not only was this done for clarity, but because the former INS and now DHS have found over 20 years of practice, that the FSA provisions are confusing enough that they may, in fact, result in placing more children in secure facilities than DHS believed should be subject to such provisions. DHS has been using this limited interpretation to use secure placement even though a different reading of the FSA may have resulted in more secure placements.

DHS also notes that the FSA did not define probable cause and neither did the proposed regulation, because this is a legal term of art that is already well-defined in case law and does not need to be defined in regulation. DHS also disagrees with one commenter’s assertion that the secure placement provisions conflict with the TVPRA’s requirements. Section 235(c)(2) of the TVPRA applies specifically to UACs, and does not apply to the minors in DHS custody who are not UACs.

One commenter brought up the possible disparity in treatment for LGBT youth. Specifically, this commenter presented data that LGBT youth are more likely to be charged with crimes because they are more likely to get into altercations due to their LGBT status. DHS takes all of this into consideration, and as stated above uses its discretion to ensure that no one is placed in secure facility that does not need to be in one. DHS believes that the proposed text rewording this provision actually lowers the chance for LGBT youth to be placed in secure facilities, rather than increasing it.

DHS declines to implement one commenter’s suggestion that threats be “verified” in addition to “credible.” The language of the FSA permits detention in a secure facility for “credible threats.” Implementing an additional requirement that the threat be “verified” imposes a vague, unduly restrictive requirement upon DHS officers that is not otherwise required under the law and could ultimately place other minors at risk.

DHS disagrees with one commenter’s assertion that FSA paragraph 23 requires the use of medium security facilities as part of DHS operations and that DHS is accordingly failing to implement the terms of the FSA by not using medium security facilities. The purpose of FSA paragraph 23 is to ensure that minors are not placed in a secure facility if less restrictive

alternatives are available. Thus the paragraph, by its terms, does not require DHS to use medium security facilities for this purpose. DHS abides by the criteria of the FSA when determining whether a minor should be placed in a secure facility. Those requirements are codified in regulation through this final rule.

#### Non-Secure (§ 236.3(i)(3))

*Comments.* A commenter stated that the Federal Government should not give States the responsibility to determine whether their detention facilities are non-secure because this will mean that the definition of a non-secure facility may vary state by state.

*Response.* FSA paragraph 6 requires a licensed facility to be “non-secure as required under state law” and licensed by an appropriate State agency. The proposed regulations generally mirror the FSA. For additional discussion of the definition of non-secure, please see the non-secure definition in Section B.2. Definitions.

#### Standards (§ 236.3(i)(4))

*Comments.* Multiple commenters stated that the proposed regulations would result in inadequate conditions that were neither safe nor humane for children. Several commenters stated that the proposed standards failed to meet the FSA standards for adequate food, water, and medical care and that the FSA standards should be retained. Some commenters reiterated the Federal Government voluntarily entered into the FSA, which requires that facilities provide children in their custody with access to sanitary and temperature-controlled conditions, water, food, medical assistance, ventilation, and adequate supervision, and contact with family members and that facilities ensure that children are not held with unrelated adults.

Numerous commenters raised concerns about reports of children suffering from subpar conditions and abusive treatment in detention centers. One commenter argued that existing facilities fail to comply with nutritional standards of the FSA and that families often do not have access to adequate food, water, or clothing. Some commenters asserted that the current detention centers fail to provide basic necessities, with children being unable to sleep from the lights shining all night, a lack of bedding, open toilets, being crammed into cages, icy temperatures and a lack of pediatricians, child and adolescent psychiatrists and pediatric nurses. Some of these commenters stated that constant illumination causes sleep deprivation, affects circadian

rhythms, and causes loss of muscle strength and inflammation. One commenter reported that she had twice toured the Tornillo Port of Entry Shelter and witnessed young children suffering from separation anxiety and other negative mental and physical effects due to incarceration and separation from their families. Two DHS medical professionals who had inspected existing facilities reported instances of neglect of children caused by failure to assess or accommodate the nutritional and medical needs of child detainees, including an infant who lost a third of its body weight due to an untreated disease, children vaccinated with adult doses, and children not being visited by a pediatrician in a timely manner.<sup>28</sup> An immigration attorney commented that her client’s nine-month old infant was not treated for pneumonia for over two days and that the mother and infant were not given any warm clothing and fed only three bologna sandwiches in a two-day period, which the child could not eat. Another commenter stated that in the Berks, Pennsylvania, facility, infants had been sent to the emergency room due to dehydration. Several commenters stated that there had been misconduct at existing government facilities, and cited a court order and a news report stating that facilities had provided medication to minors without parental consent, including psychotropic drugs, given psychotropic drugs disguised as vitamins and forcibly injected minors with sedatives. Commenters cited two DHS experts who reported that one facility was using medical housing for punitive segregation of families and children, which according to the commenters violates the standard of care for any detained person.

Several commenters objected to the proposed regulations on the ground that they would permit facilities to deny access to food, water or medical care in the event of an emergency. These commenters stated that emergency food and water should be readily available in advance of such emergencies and that the regulations should be amended to require provision for the basic needs of minors, regardless of whether there is an emergency. One commenter encouraged DHS to ensure that meals meet nutrition standards established by the U.S. Departments of Agriculture and Health and Human Services. The commenter said that breast-feeding infants should continue to have access to milk from

<sup>28</sup> Dr. Scott Allen and Dr. Pamela McPherson, Letter to the Senate Whistleblowing Caucus, July 17, 2018, <https://www.whistleblower.org/sites/default/files/Original%20Docs%20Letter.pdf>.

their mothers in all situations and DHS should identify those with special health care needs and to provide appropriate treatment according to evidence-based guidelines for care.

*Response.* DHS proposed to adopt the substantive standards of FSA Exhibit 1, and thus DHS disagrees with the commenters' characterization that the proposed standards fail to meet the requirements for food, water, and medical care required by the FSA. DHS proposed simply to adopt the substantive standards of FSA Exhibit 1. DHS notes that several of these comments appear to misunderstand the different types of facilities that are used to house minors by different components of DHS as well as its sister agencies.

DHS reiterates that these standards in § 236.3(i)(4) apply to the non-secure, licensed facilities used for housing family units—FRCs. At least some of the comments, however, appear to describe conditions at CBP facilities, which aliens may pass through during initial processing when first encountered. These facilities are not required to abide by the same Exhibit 1 standards under the FSA, which § 236.3(i)(4) incorporates. For instance, CBP processing facilities are very different from ICE FRCs. They operate 24/7 and thus need to have lights on at all times. These CBP facilities may also have temporary holding areas that are divided up that help separate minors and UACs from unrelated adults for the safety and protection of the children. Regardless of facility type, all DHS facilities (including CBP and ICE facilities) will continue to abide by the applicable standards that are consistent with the FSA, which are substantively incorporated into these regulations. Additionally, as described above, all DHS facilities are subject to inspection and monitoring by bodies such as the DHS OIG, DHS CRCL, and the GAO. CBP also has various internal methods for monitoring compliance with requirements that derive from the FSA, including the requirement that agents and officers document the provision or availability of all those requirements, as well as monitoring and inspection by CBP's Juvenile Coordinator and CBP's MID and OPR.

Regarding the comments relating to specific allegations of mistreatment and neglect of individuals in DHS custody, without sufficiently detailed information DHS is unable to investigate or otherwise substantiate these claims. DHS takes all allegations of misconduct seriously, and all allegations are referred to the appropriate investigative entity (e.g., the ICE and CBP Offices of

Professional Responsibility, the DHS OIG) for investigation and appropriate action.

Regarding comments related to emergencies, DHS notes that DHS facilities are equipped to provide bare essentials during emergencies; however, if evacuation is warranted during weather-related or other situations, it may become necessary to abandon everything and move minors and UACs to safety, which may include not providing them with a meal or snack at the designated time. The FSA does not speak to the issue of meals during emergencies. It only spoke to the ability to transfer children during an emergency. The proposed regulations speak to the same provisions during emergencies, recognizing that true emergencies are fluid and it is thus difficult to codify specific requirements in regulations in advance.

Regarding the comments about the use of psychotropic drugs, DHS notes that the news articles mentioned referred to allegations against HHS. HHS emphasizes that the primary mission and daily commitment of its UAC Program is to safeguard the health and wellbeing of children in our custody and care. HHS does not condone medicating a child for punitive reasons. All ORR staff and contractors engaged in the direct care of UACs are mandated reporters with the expectation that they will immediately seek to protect any UAC in our care from such harm and report to law enforcement and other appropriate authorities any allegation of abuse. Many UACs have endured extraordinarily challenging and traumatic childhood experiences that can manifest into mental illnesses—whether acute or chronic. In some cases, UACs are diagnosed and prescribed psychotropic medication by licensed psychiatrists. Furthermore, ORR only authorizes UACs to receive psychotropic medication to treat the specific diagnosis identified by licensed mental health professionals. In cases where ORR is able to locate and correspond with a UAC's parent or legal guardian, ORR informs the parent of the UAC's diagnosis, seeks their input on the course of treatment, and obtains their consent to administer medication. ORR care provider facilities are required to abide by state law. State law regulates the facility and mental health professionals' usage of psychotropic medication as well as the manner and reasons for administering the medication.

Interpreting Services (§ 236.3(i)(4))

*Comments.* Several commenters stated that FRCs would be unable to

provide adequate medical care because the facilities lack the necessary interpretation services for non-English language speakers. Several commenters noted that DHS has had difficulty providing language services for detained individuals, especially those that speak indigenous languages and that even telephonic translation has not been available in emergency situations. These commenters explained that without adequate interpretation services, individuals will be unable to properly communicate with the medical professions or understand their medical situations. Additionally, several commenters pointed out that in emergency situations, there is no reliable mechanism to allow detention center staff members to communicate effectively with all detainees.

*Response.* As stated above, DHS has put systems in place to provide appropriate language services for communications with minors. Whether it is during an emergency or during normal business operations, DHS typically is able to get the needed interpreter services very quickly and efficiently.

Provision of Medical Services (§ 236.3(i)(4)(ii))

*Comments.* Several comments focused on deficiencies in the existing and proposed provision of medical services. A medical doctor commented that the standards should include specialized training of medical professionals and staff due to the unique and complex problems present in a detention setting with children, including language barriers, limited resources, and lack of information about previous care. One commenter noted that there is no mechanism for health professionals to regularly monitor the conditions in DHS facilities and their appropriateness for children. Another commenter stated that detained minors are not given access to adequate or appropriate immunizations. One commenter stated that medication was confiscated and that limited medical screenings are conducted by non-medical staff, and another commenter observed that DHS has been unable to provide adequate observation of minors with suicidal tendencies or screening of minors for trauma. Still another commenter objected that the proposed regulations fails to require trauma informed care programming and to require facilities to screen for trauma, requirements the commenter viewed as essential to providing adequate medical care to individuals.

One commenter stated that the proposed regulations create an

administrative process that is inconsistent with the health needs of infants and young children because detention facilities are inadequately staffed with medical, mental health, and nutrition professionals. This commenter cited to instances of neglect of infant and children's nutritional needs. Additionally, this commenter cited articles regarding the benefits of breastfeeding, expressed concern that detained infants may lose access to breastmilk because of a breastfeeding mother's lack of access to a breast pump, supplemental foods that ensure a breastfeeding mother can produce enough breastmilk, and complimentary foods that assist the infant with the transition to solid food.

Several commenters stated that while ICE detention facilities are legally required to act affirmatively to prevent disability discrimination, minors with disabilities in detention centers have not been consistently provided appropriate accommodations, specialized medical care necessary to treat minors with disabilities and chronic health problems is nonexistent, and other critical services such as physical, occupational, and speech therapy and other early interventions are not generally available. These commenters note that these minors are particularly vulnerable, particularly when separated from their parents they lose their primary caregivers who possess knowledge of their health problems and the care they need. One commenter noted that there are reports of children with disabilities being restrained or sent to psychiatric hospitals or secure facilities because of behavioral issues that they cannot control except with proper medical care.

One commenter wrote that long-term detention of alien children constitutes a serious risk for infection disease and that those coming from particular geographic regions or at-risk populations are more prone to serious, and highly infectious, diseases such as tuberculosis and pneumonia. This commenter wrote that a minimum standard of care in a detention setting requires administration of appropriate screening tests (including for tuberculosis, pneumonia, and sexually transmitted diseases), interpretation and patient follow up for at-risk individuals, and sufficient resources for separation or isolation of potentially infectious individuals.

*Response.* The proposed regulations mirrored the FSA requirements for medical care. Medical care is provided in accordance with American Medical Association standards. As stated above, FRCs have medical staff on-site to care

for family units. They provide age appropriate vaccines and care for minor illnesses. FRCs refer any emergent or serious cases to hospitals for care as needed. Medical staff also make referrals to specialists as appropriate. Since parents are housed with their children at FRCs, they can make decisions regarding the care and treatment children receive at FRCs. Minors with special needs are evaluated in accordance with the FSA. In addition, individuals with disabilities are treated in accordance with specific laws and policies that provide for the provision of reasonable accommodations. See the section titled "Standards for Minors with Disabilities" immediately below for a more detailed response.

#### Standards for Minors With Disabilities (§ 236.3(i)(4)(iii))

*Comments.* Several comments were submitted concerning the standards of care of minors with disabilities. Some commenters stated that the proposed regulations do not contain enough guidance regarding the consideration of disability as part of placement determinations for children, and that requiring a psychologist or psychiatrist to determine whether a child is a danger to themselves or others is too little, too late to protect those with disabilities. One commenter wrote that the proposed rule should take into account studies suggesting that youth with disabilities in secure facilities are at high risk of unmet health needs, failure to provide appropriate accommodations, and harmful conditions, including use of restraints and solitary confinement. Another commenter stated that few children, if any, are screened for disability-related issues upon transfer from ICE to ORR custody, and a different commenter expressed concern that the proposed rule fails to guarantee special education for children with disabilities, in conflict with the U.S. Supreme Court case *Plyer v. Doe*, 457 U.S. 202 (1982), and The Individuals with Disabilities Education Act.

*Response.* The proposed regulatory language requires DHS and HHS to consider a minor's special needs, including provisions requiring consideration of special needs when determining placement. For example, 45 CFR 410.208 states that ORR will assess each UAC to determine if he or she has special needs and will, whenever possible, place a UAC with special needs in a licensed program that provides services and treatment for the UAC's special needs. Title 8 CFR 236.3(g)(2) requires DHS to place minors and UACs in the least restrictive setting

appropriate to the minor or UAC's age and special needs. Title 8 CFR 236.3(i)(4) requires that facilities conduct a needs assessment for each minor, which would include both an educational assessment and a special needs assessment. Additionally, 8 CFR 236.3(g)(1) requires DHS to provide minors with Form I-770 and states that the notice shall be provided, read, or explained to the minor or UAC in a language and manner that he or she understands. These provisions ensure that a minor or UAC's special needs are taken into account, including when determining placement.

In addition to these provisions, ICE has policies and regulations in place that protect individuals with disabilities and implement section 504 of the Rehabilitation Act of 1973. For example, 8 CFR part 15 prohibits discrimination against individuals with a disability, and requires that DHS facilities be accessible. In addition, specific policies prohibit discrimination and address how detainees with a disability may be provided with a reasonable accommodation. The Family Residential Standards require that minors have an Initial Education Assessment completed within three days of their arrival at the facility. Through this process, minors with learning disabilities are identified and provided with an Individual Education Program and access to special education services.

#### Education (§ 236.3(i)(4)(iv))

*Comments.* Multiple commenters stated that the proposed regulations would fail to provide adequate educational opportunities for minors and that placing minors in detention would negatively impact their educational development. A few commenters cited multiple studies to show that long-term detention of any form, even with a parent, has lasting negative effects on learning and development of minors, and especially young children.<sup>29</sup> Several commenters stated that minors in detention facilities are not receiving appropriate and challenging coursework that align with state or local educational standards, and as a result typically are unable to make meaningful academic progress. One commenter stated that children should not be deprived of education during detention because that would result in uneducated or illiterate future members of the community, who would be a detriment to the country.

<sup>29</sup> R. Kronick et al. *Asylum-seeking Children's Experiences of Detention in Canada: A Qualitative Study*, 85(3) AM. J. Orthopsychiatry 287 (2015);



One commenter stated that the minors should be placed in public schools in order to obtain necessary health socialization with other children and adults and avoid becoming second class citizens. Other commenters cited reports to show that children succeed emotionally and academically when they live in a stable home with an adult they trust and learn in a normal, structured and supportive classroom and not when the children are kept in indefinite detention without adequate services and protections. Commenters also cited to a study of children in immigration detention facilities in Australia, the United Kingdom, and the United States that shows that children react to detention with extreme distress, fear, and helplessness, all of which can result in a deterioration of functioning and impair the ability to learn.

Commenters stated that the proposed rule provides no assurance that the detention facilities will comply with the FSA's minimum standards for educational services and that the proposed rule does not address how DHS and HHS specifically intend to provide educational services appropriate to the minor's level of development in a structured classroom setting, as required by the FSA. One commenter stated that the proposed standards eliminate the requirement to provide education in languages other than English and, as a result, fail to ensure the minors are instructed in a language they can understand. Some commenters noted that DHS has had problems staffing detention facilities with bilingual teachers to meet the necessary educational needs, including special education services. Other commenters asserted that in unlicensed "emergency" or "influx" facilities, the Departments may opt to provide no educational services at all.

*Response.* The proposed regulations mirror Exhibit 1, paragraph 4 of the FSA except that the requirement for instruction in the minor's native language, which is substituted with a requirement the educational program design be appropriate for the minor's estimated length of stay and can include the necessary skills appropriate for transition into the U.S. school system. In practice, most educators who teach at FRCs are bilingual, typically in English and Spanish, and provide individualized education in a manner designed to be most effective for the minor. However, during a true emergency where children are evacuated to a different facility, it is likely that educational programs will be suspended just as they would be in the

local public school system under those same circumstances.

It is unclear why commenters believe that this regulatory requirement would allow DHS not to provide educational services. The same requirements for a structured classroom setting are in both the FSA and the proposed regulation. There is no requirement in the FSA requiring the government to explain how it plans to provide the educational services. It has been doing so for 20 years and the regulations will mandate that it continue to do so.

#### Recreation Time (§ 236.3(i)(4)(vi))

*Comments.* Several commenters stated that the proposed standards would provide minors and their families with insufficient opportunity for recreational activities. One commenter stated that recreational and social enrichment activities, such as opportunities for physical activity and creative expression, should be required. This commenter stated that at a minimum, the outdoor and major muscle activity standards set by the FSA should be retained. Some commenters stated that 13,000 children in custody have no recreational and educational opportunities in tent cities, but these commenters provided no data to support this contention.

A mental health professional wrote that adequate opportunities for play should be provided for young children separated from their parents because at that age all psychological issues, including grieving, are resolved primarily through play. According to the commenter, younger children will need opportunities to focus on grieving to allow them to focus on other tasks when needed, and that adolescent children need structured opportunities to gain a sense of control in their lives and information about their early history so as to avoid suicidal or antisocial tendencies.

A different commenter stated that providing daily activities for minors in the detention center means that detention facility staff replace parents as authority figures, parents do not have a say in how their children are treated, and the staff that interact most with minors during their recreation time are the lowest paid staff with the least amount of training and experience, which leads to widespread behavioral problems and mistreatment of the children by the staff.

*Response.* As stated previously, § 236.3(i) is about ICE facilities. The proposed regulation reflected all of the requirements of paragraph 5 of the FSA in requiring recreation and leisure time activities, including outdoor activities

when weather permits. The commenters did not explain why the FSA requirements are not sufficient to implement the FSA. Some commenters stated that children's time was being taken up by activities that kept them from their parents, but any activities outside the 1–3 hours required by the FSA are strictly voluntary on the part of both the parents and children in ICE facilities. It is unclear from the examples provided by the commenters which particular activities they believe were causing parents to feel that they were being deprived of time with their children and creating antisocial and suicidal tendencies in their children.

In response to the comment about "tent cities," DHS believes commenters are referring to HHS operations. The commenter may be addressing concerns regarding the Tornillo Influx Care Facility, which was closed and dismantled in January 2019. HHS notes that at no point did ORR house 13,000 UAC in "tent cities." HHS addresses concerns and comments on the Tornillo Influx Care Facility in its response below at "Procedures During an Emergency or Influx (45 CFR 410.209)."

The effects of trauma from the journey to the United States and detention in general are discussed in the trauma section.

#### Mental Health and Counseling (§ 236.3(i)(4)(vii) and (viii))

*Comments.* Several commenters expressed concern that the proposed regulations would not ensure appropriate mental health services. One commenter stated that detention facilities are not covered by HIPAA and thus social workers' notes may be used against the minors and their families in their deportation hearings when the children believe that the information will be kept confidential. This commenter pointed out that minors are unlikely to confide in social workers if they know that the information will not be kept confidential and this is detrimental to the minors' well-being and mental health. Another commenter stated that the proposed language could lead to fewer minors receiving counseling and a reduction in the length or quality of group counseling because the proposed language only requires a mental health wellness interaction and allows to be performed during other activities. The commenter also stated that the standards fail to require facilities to create appropriate rules and discipline standards and also fail to maintain the FSA limits of discipline standards.

Several commenters expressed concern that the FRCs would be unable

to provide adequate mental health services in a compassionate and responsive manner. One commenter stated that facilities must have mental health professionals that speak Spanish, have training in cultural diversity, and have experience with trauma. One commenter stated that meaningful access to trauma-informed mental health care, especially in the cases of sexual assault, is critical. A medical association recommended that each facility staff their leadership teams with psychiatrists to care for persons suffering post-traumatic symptoms and other migration-related syndromes of distress.

*Response.* In response to comments expressing concern over alleged lack of confidentiality of ICE detainee health records and the potential that some minors may forgo mental health treatment because of this concern, IHSC advises that, although ICE health records are not subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), ICE detainee health records are kept confidential as a matter of policy, and access to such records is restricted. In most cases, a detainee's health information will not be released unless the detainee signs an Authorization to Disclose/Obtain Information from their health record. In addition, employees are required to sign and annually affirm a statement to protect and maintain the confidentiality and privacy of patient care information. While it is true that detainee health records may, in some instances, be disclosed without consent, this practice is authorized under the Alien Health System of Records Notice (SORN)<sup>30</sup> consistent with DHS's mission to fully execute its law enforcement and immigration functions. In addition, such disclosures are also permitted under certain limited routine uses identified in the SORN. Pursuant to the SORN, however, DHS notes that this information may only be released for a purpose consistent with the purpose of the initial information collection. Thus, concerns that detainee health records will somehow always be relevant to a minor's removal proceeding such that an immigration judge will allow routine use of such records as part of a removal case are purely speculative and unfounded.

With respect to the remaining concerns about the provisions related to mental health counseling, DHS notes that the proposed regulatory text mirrored Exhibit 1, paragraphs 6 and 7 of the FSA regarding individual and

group counseling sessions. DHS added provisions to allow for assessments when minors refused to participate in counseling sessions and to combine the group sessions with other structured activities to remove the stigma of a "group counseling session" and encourage all minors to attend. DHS's years of experience have shown that too many minors decline to participate in counseling sessions when they are designated as such, and that children are more likely to participate in DHS group sessions are combined with other events. For those instances where children decline individual sessions, a mental health wellness interaction at least allows a counselor to do a wellness check and may be to get the minor to open up and have what professionals would call a counseling session. Adhering to the strict requirements of the FSA would not be workable, especially for teenagers who do not believe they will benefit from counseling.

Contact With Relatives and Attorneys (§ 236.3(i)(4)(xi), (xii), (xiii), and (xv))

*Comments.* Several commenters expressed concerns about the complexity of communications with individuals in detention. One commenter stated that it is extremely complicated for individuals, particularly children, to make phone calls in the detention center to their non-detained family and/or attorney because the detainee must either make a collect call or purchase a calling card. This commenter also noted that there is no method for non-detained individuals, such as attorneys or parents of detained minors, to make a phone call to a child in DHS custody. Another commenter stated that minors in existing facilities have been denied the opportunity to talk to family on the phone. One commenter expressed concern that the language in section 236.3(i)(4) regarding a minor's right to communicate privately and visit with guests, family members, and counsel is too restrictive and qualifying. The commenter recommended that detained minors have the right to receive regular and frequent visits from family and friends in circumstances that respect the minor's needs for privacy, contact, and unrestricted communication.

One commenter stated that proposed § 236.3(i)(4)(xiii) inappropriately restricts a child's ability to communicate with adult relatives in the United States and abroad to legal issues only when it is deemed "necessary." This commenter noted that there is no definition of "necessary" or who makes that determination, and no justification

for why detained minors should not universally be afforded visitation and contact with family members.

A foreign government wrote that, in accordance with the provisions of the Vienna Convention on Consular Relations, the proposed rule should grant access to consular officials to visit and interview alien children in the different stages of their processing.

*Response.* Non-secure, licensed ICE facilities must abide by standards that are set forth in 8 CFR 236.3(i)(4). A minor has the right to visitation and contact with family members, regardless of their immigration status. See 8 CFR 236.3(i)(4)(xi). DHS structures the visitation and contact with family members to encourage this visitation including requiring the staff at the ICE facility to respect the minor's privacy while reasonably preventing the unauthorized release of the minor and the transfer of contraband. A minor has a reasonable right to privacy in the facility which specifically includes the right to talk privately on the phone and visit privately with guests, as permitted by applicable facility rules and regulations. See 8 CFR 236.3(i)(4)(xii)(C) and (D). In addition to the right to talk privately on the phone, the DHS regulations specifically note that when necessary, arrangements will be made for communication with adult relatives living in the United States and in foreign countries regarding legal issues related to the release and/or removal of the minor. See 8 CFR 236.3(i)(4)(xiii). A commenter expressed concern about the "when necessary" language, but that language is used to convey that in most cases there would not be a need to communicate with other adult relatives because the minor is in custody with his or her parent. But nevertheless, if there is such a need it can be accommodated. Additionally, the minor has the right to receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband. See 8 CFR 236.3(i)(4)(xii)(E). All residents at FRCs have access to the internet to receive and send email.

One commenter stated that the regulations should grant access to consular officials to visit and interview minors in the different stages of their processing. The Vienna Convention on Consular Relations notes that consular functions include helping and assisting nationals, both individual and corporate, of the sending State; safeguarding the interests of minors; and representing or arranging appropriate representation for nationals of the sending State before tribunals and other authorities of the receiving State. See Article 5(e), (h), and (i). In addition, the

<sup>30</sup> DHS/ICE-013 Alien Health Records System, see 83 FR 12015 (Mar. 19, 2018).

Convention states that consular officers shall be free to communicate with nationals of the sending State and to have access to them; that the receiving State shall inform the consular post, if the national of the sending State so requests, of their detention; and that consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention to converse and correspond with the national and to arrange their legal representation. *See* Article 36. DHS is compliant with the Vienna Convention on Consular Relations and does not believe any changes need to be made to the text of the regulations to accomplish this.

#### Access to Legal Services (§ 236.3(i)(4)(xiv) and (xv))

*Comments.* Multiple commenters objected to the proposed rule on the ground that it would provide fewer legal protections for minors who may not understand the concept of the rights they are asked to waive, including an example of a five year old signing away her rights. One commenter asserted that minors must be provided with access to legal representation because children are the most vulnerable individuals in society with the most to lose and their human rights will otherwise be violated. Another commenter noted that children should never be presumed a threat to our society and that expecting minors to make legal arguments without an attorney is unreasonable and unacceptable when their liberty is at stake.

Several commenters expressed concern that the proposed rule would fail to provide minors with adequate access to legal services. Many commenters were concerned about how minors in detention centers would obtain access to legal services and whether minors were being properly apprised of their legal rights. Several commenters stated that minors would not have access to adequate legal services because most detention centers are located in rural and remote areas of the country where there is limited access to qualified immigration legal assistance. A commenter noted that non-profit organizations that provide pro bono immigration services to minors have encountered logistical difficulties accessing minors in detention and more resources must be allocated for each client.

Multiple commenters stated that numerous studies and data show that detention significantly raises barriers to access to legal counsel, but that legal representation was critical to obtaining relief before an immigration judge. One

commenter cited research explaining that in Houston from 2007–2012, 13 percent of detained respondents had counsel as opposed to 69 percent of those that were not detained. This commenter noted that immigrants without counsel are significantly more likely to be ordered removed than those with representation and cited supporting data including one study that stated that individuals without attorneys were granted relief at a rate of 4 percent compared to when all indigent immigrants in removal proceedings were provided attorneys and the rate increased to 48 percent.

Some commenters stated that the proposed rule improperly eliminates FSA provisions requiring class counsel's right to attorney-client visits for all types of placements and counsel's right to access facilities where minors have been placed. Another commenter stated that paragraph 32(A) of the FSA provided access to counsel to all children in custody including those whom counsel may not have met before the visit and expressed concern that the proposed regulations do not contain comparable language. One commenter recommended that the proposed rule should guarantee that minors will be permitted to visit with their attorney, child advocate, or other persons necessary for their representation, any day of the week, including holidays, and that such visits should be permitted at any time during the period of at least eight hours a day.

*Response.* DHS ensures that all minors know of their rights including their right to access counsel by providing them with this information during processing and when they are admitted to a detention facility.

Every minor who enters DHS custody, including minors and UACs who request voluntary departure or request to withdraw their application for admission, will be issued a Form I–770, Notice of Rights and Request for Disposition. *See* 8 CFR 236.3(g)(1)(i). The Form I–770 includes a statement informing the minor or UAC that they can make a telephone call to a parent, close relative, or friend. This is to ensure that the minor or UAC can contact an individual who has their best interest in mind because, as the above commenter states, children are the most vulnerable individuals in society. Additionally, to make sure that the minor properly understands their rights, proposed § 236.3(g)(1)(i) required the notice to be read and explained to the minor or UAC in a language and manner he or she understands if it is believed (based on all available evidence) that the minor is less than 14 years old or is

unable to understand the information. As explained above, DHS is changing this section such that the notice will be provided, read, or explained to *all* minors and UACs in a language and manner that they understand. Every minor who is not a UAC transferred to or who remains in a DHS facility will also be advised of their right to judicial review and will be provided with a current list of free legal service providers. *See* 8 CFR 236.3(g)(1)(ii) and (iii).

Additional protections support the right to counsel. Upon admission to a non-secure facility, a minor is provided with a comprehensive orientation including information about the availability of legal assistance, the availability of free legal assistance, the right to be represented by counsel at no expense to the Government, the right to apply to asylum or to request voluntary departure, and the right to attorney-client visits in accordance with applicable facility rules and regulations. *See* 8 CFR 236.3(i)(4)(ix), (xiv), and (xv). Minors in secure facilities are also permitted attorney-client visits in accordance with applicable facility rules and regulations. *See* 8 CFR 236.3(i)(2). The Family Residential Standards require access to counsel.

Regarding one commenter's example of a five-year old child signing a legal document that deprived her of her rights, the example may be referring to a *New Yorker* article about a child who signed an ORR form to indicate she did not need a custody hearing before an immigration judge as allowed for by paragraph 24 of the FSA.<sup>31</sup> This example does not speak to DHS custody of children, but HHS has responded to all substantive comments about its proposal to replace custody determination hearings before immigration judges with independent, internal HHS proceedings at section 410.810 of this rule. With respect to this specific example, HHS notes that both custody hearings under the FSA and the proposed internal hearings under this rule are only for UACs whom ORR will not discharge solely because they would be a danger to community. ORR did not consider the child in the article to be a danger to self or others, nor would it consider any five-year old in its care to be a danger.

#### Technical Drafting

*Comments.* One commenter noted that § 236.3(i) lists, as an exception to the least restrictive setting requirement,

<sup>31</sup> Available at <https://www.newyorker.com/news/news-desk/the-five-year-old-who-was-detained-at-the-border-and-convinced-to-sign-away-her-rights>.

“the need to ensure the minor’s timely appearance before DHS and the immigration courts” and cross-references 6 CFR 115.14 in doing so. The commenter noted that no such language is included in 6 CFR 115.14, and the group recommended striking the referenced language, as it appears to prioritize appearances before DHS over the minor’s special needs and well-being.

*Response.* DHS notes that 6 CFR 115.14 states that minors shall be detained in the least restrictive setting in accordance with the applicable laws, regulations, or legal requirements. FSA paragraph 14, which this section of the rule implements, recognizes that the Government has the authority to detain minors if it is necessary to secure the minor’s timely appearance before the Government or the immigration court, or to ensure the minor’s safety or that of others. DHS declines to amend this section.

#### Prison-Like Conditions

*Comments.* Multiple commenters stated that the proposed standards would result in conditions similar to prisons and that such conditions were inappropriate for minors. These commenters noted that prison-like facilities are antithetical to the healthy development of children and undermines the ability of parents to properly care for and nurture their children. Several commenters noted that it was never appropriate to place minors in prisons, jails, cages, or freezers and that the FSA explicitly prohibits jail-like conditions for minors.

One commenter said that, nevertheless, facilities for minors required badge checks three times a day, used electronically locked doors for access to basic areas such as the library, and limited and monitored access to telephones and email. Other commenters said that the detention standards would severely restrict the movement and freedom of minors, regulate meal breaks, and result in disruptive bed-checks every 15 minutes at night. They note that “non-secure” as defined in the regulation does not mean that families can come and go as they please, but rather that only one small portion of the facility must be unlocked.

*Response.* DHS does not put children in jails, prisons, cages, or freezers. Pursuant to § 236.3(i), when minors who are not UACs are detained in DHS custody (that is, when they are detained together with their parents or legal guardians in a FRC), the minors shall be detained in the least restrictive setting appropriate to the minor’s age and special needs. Unless a secure facility is

authorized under § 236.3(i), the minor will be placed in a licensed, non-secure facility. A non-secure facility means that a facility either meets the definition of non-secure in the State in which the facility is located or if no such definition exists under state law, a DHS facility is deemed non-secure if egress from a portion of the facility’s building is not prohibited through internal locks within the building or exterior locks and egress from the facility’s premises is not prohibited through secure fencing around the perimeter of the building. See 8 CFR 236.3(b)(11). All FRCs allow families open access during the day to libraries, gymnasiums, and other activities, and access to snacks and telephones in their living areas at all hours.

Although DHS maintains that its FRCs have been and continue to be non-secure, the comments received on this point demonstrate that DHS could take additional steps to ensure the public that DHS has no intention of running FRCs as secure facilities. To that end, DHS will be adding additional points of egress to the Dilley and Karnes facilities by September 30, 2019.

#### Changes to Final Rule

In response to comments, DHS adds additional language from FSA Exhibit 1 to the regulatory text at 8 CFR 236.3(i)(4).

#### 10. Release of Minors From DHS Custody (§ 236.3(j))

##### Summary of Proposed Rule

The terms contained in paragraph (j)(1) permitted release of a minor only to a parent or legal guardian who is available to provide care and custody, in accordance with the TVPRA, using the same factors for determining whether release is appropriate as are contained in paragraph 14 of the FSA, once it is determined that the applicable statutes and regulations permit release. Included in the relevant factors typically is consideration of whether detention is “required either to secure his or her timely appearance before [DHS] or the immigration court, or to ensure the minor’s safety or that of others.”

The terms contained in paragraph (j)(2) required DHS to use all available evidence, such as birth certificates or other available documentation, to ensure the parental relationship or legal guardianship is bona fide when determining whether an individual is a parent or legal guardian. Additionally, the terms contained in this subparagraph required DHS to treat a juvenile as a UAC and transfer him or

her into HHS custody, if the relationship cannot be established.

The terms contained in paragraph (j)(3) required DHS to assist with making arrangements for transportation and maintaining the discretion to provide transportation to the DHS office nearest the parent or legal guardian, if the relationship is established, but the parent or legal guardian lives far away.

The terms contained in paragraph (j)(4) required DHS to not release a minor to any person or agency whom DHS has reason to believe may harm or neglect the minor or fail to comply with requirements to secure the minor’s timely appearance before DHS or the immigration court.

#### Public Comments and Response

*Comments.* Commenters generally disagreed with DHS’s assertion that it does not have the authority to release a minor to anyone other than a parent or legal guardian. Several commenters expressed concern that the proposed changes codify family separation by not requiring DHS to consider releasing a parent and child simultaneously. Several commenters pointed to what they generally perceived as flaws in DHS’s interpretation of the FSA’s “general policy favoring release” as well as the requirement to release minors “without unnecessary delay.”

#### • Restricting Release to Parents and Legal Guardians Only

*Comments.* Many commenters expressed concern about restricting release of minors from DHS custody to parents and legal guardians. These commenters pointed to paragraph 14 of the FSA and the current language of 8 CFR 236.3, both of which articulate that minors may currently be released to parents, legal guardians, as well as other “adult relatives.” These commenters stated that restricting release to parents and legal guardians will increase the likelihood of family separation and detention time.

A significant number of commenters expressed concern that the TVPRA did not justify changing the conditions imposed by paragraph 14 of the FSA with regard to families with children, because the TVPRA only addresses unaccompanied children. These commenters further noted that a District Court has held that the TVPRA is not inconsistent with the FSA, and the government abandoned its appeal.<sup>32</sup>

Multiple commenters asked DHS to provide a more detailed justification to

<sup>32</sup> *Flores v. Johnson*, 212 F. Supp. 3d at 868–869; *Flores v. Sessions* 2018 U.S. App. LEXIS 20461 (9th Cir. Cal. Apr. 27, 2018).

explain why DHS does not have the legal authority to release children to anyone other than a parent or legal guardian, especially in light of rigorous suitability assessments. One of these commenters asserted that “circular citations” in the NPRM made it difficult to assess the rationale behind changing this provision. Other commenters stated that there is evidence indicating that placing a child with extended family members when parental custody is not viable results in improved outcomes for children and that doing so is preferable to detaining children in government custody for an undetermined amount of time.

Multiple commenters stated that the proposed changes create an inconsistency between DHS and HHS release procedures. These commenters stated that it makes no sense for DHS to separate a child from his or her parent, re-designate that child as a UAC, and transfer the child into HHS custody, only to have HHS potentially release that same child to an adult relative sponsor. They questioned why DHS could not simply maintain existing procedures and release minors to adult relatives, as appropriate.

A commenter stated that children who do not have a parent or legal guardian to whom they can be released often have a stronger defense against removal, including but not limited to eligibility for Special Immigrant Juvenile status. One commenter stated that restricting release to parents and legal guardians goes against common cultural practices in other parts of the world where extended family members play a prominent role in providing care and custody of children. Another commenter stated that many refugee children do not have parents in-country and disallowing extended family members from accepting immigrant minors would keep many refugee children in detention unnecessarily.

Multiple commenters expressed concern about DHS not implementing paragraph 15 of the FSA, which according to commenters, allows a parent to appoint a guardian with a notarized affidavit. One of these commenters stated that discontinuing the use of affidavits allowing parents to approve release of their child to an adult relative unnecessarily limits the options available and goes against the FSA’s general policy favoring release.

However, one commenter expressed support for the proposed changes and stated that given high absconder rates for minors and UACs, releasing minors to parents or legal guardians places the child in the best position to prepare for immigration proceedings. This

commenter noted that the HSA and TVPRA supersede the FSA and therefore DHS does not have statutory authority to release minors to anyone other than parents, legal guardians, or HHS.

- Simultaneous Release of Parent and Child

*Comments.* Several commenters stated that the proposed changes further codify family separation by eliminating the current requirement that DHS consider releasing a parent and child simultaneously. One commenter pointed Supreme Court’s opinion in *Flores v. Reno*, in which the majority stated, “[t]he parties to the present suit agree that the [INS] must assure itself that someone will care for those minors pending resolution of their deportation proceedings. That is easily done when the juvenile’s parents have also been detained and the family can be released together.” This commenter questioned how DHS and HHS can justify departing from the Supreme Court’s opinion under the proposed regulations.

One commenter expressed concern that eliminating current requirements to consider simultaneous release of parent and child will lead to either longer detention time for children and/or increased instances of family separation. Other commenters said the proposed changes go too far and eliminate the required evaluation, thereby reducing the likelihood of discretionary exercises of this existing authority. Another commenter stated that forcible separation of children from their parents is generally considered a war crime, or at least morally reprehensible.

- FSA’s “General Policy Favoring Release”

*Comments.* Several commenters expressed concern about the proposed changes not adhering to the FSA’s general policy favoring release and family reunification. Another commenter stated that the proposed regulations codify a change from the FSA’s general policy favoring release to indefinite detention. Another commenter expressed concern about longer detention times and costs. This commenter cited a report noting that the Tornillo detention center began operating in June 2018, expanded from 1,200 to 3,800 beds, and now has an estimated monthly cost of \$100 million.<sup>33</sup> A commenter expressed

<sup>33</sup> Summary of Proposed Regulations Regarding Children and Immigration Detention, National Immigration Forum, <https://immigrationforum.org/article/summary-of-proposed-regulations-regarding-children-and-immigration-detention/> (last visited Nov 6, 2018).

concern that the proposed changes contradict Congressional intent that children are to be reunified with a sponsor in the best interest of the child and in the “least restrictive” placement.<sup>34</sup> This commenter stated that the existing regulatory language comports with the fundamental right to family unity, whereas the proposed changes would interfere with this right.

- FSA’s Requirement To Release Children “Without Unnecessary Delay”

*Comments.* Several commenters stated that the proposed changes would delay release and prolong institutionalization swelling an already overburdened HHS shelter system. For example, one expressed concern that parents will not be incentivized to come forward and sponsor their child once they are transferred to HHS, further adding to increased detention times for children. This commenter pointed to an April 2018 Memorandum of Agreement between DHS and HHS requiring the collection of sponsor fingerprints for the purposes of immigration enforcement. Another commenter stated that the proposed changes are at odds with paragraph 14 of the FSA which is the heart of the settlement’s protections requiring DHS and HHS to release children without unnecessary delay. A commenter stated this would lead to long detention, placement in long-term foster care, or detention fatigue, potentially forcing a child to accept voluntary departure and risk re-exposure to the danger he or she fled from in the first place, rather than being able to pursue relief in the United States for which the child may qualify.

*Response.* DHS maintains its position that the FSA, when originally drafted, was never intended to apply to alien minors who were accompanied by their parents or legal guardians. DHS has also found that balancing its enforcement of immigration laws with its obligations to comply with the FSA as the courts have interpreted the Agreement has presented significant operational challenges. Nevertheless, this rule provides for the release of both accompanied minors and UACs, through the existing statutes and regulations, in a way that complies with the intent of the FSA, while allowing DHS to fulfill its statutory requirements.

The TVPRA mandates that the care and custody of UACs is solely the domain of HHS. Absent exceptional circumstances, DHS is required to transfer UACs to HHS within 72 hours of determining that an individual is a UAC. By definition, a UAC is a child

<sup>34</sup> See 8 U.S.C. 1232(b)(4).

who has no lawful immigration status in the United States, has not attained 18 years of age, and with respect to whom there is no parent or legal guardian in the United States or no parent or legal guardian in the United States is available to provide care and physical custody. 6 U.S.C. 279(g)(2). If a juvenile is encountered with the juvenile's parent or legal guardian, DHS is likely to consider the group a family unit and is unlikely to consider the juvenile a UAC. However, if the parent or legal guardian is required to be detained in a setting in which he/she cannot provide care and physical custody of that juvenile, for instance in criminal custody, the juvenile may become a UAC by operation of law.

If the juvenile becomes a UAC, DHS no longer has the legal authority to provide for the care and custody of the juvenile and must transfer the juvenile to HHS. Because DHS has no authority to provide for the care and custody of UACs, DHS cannot release a UAC but instead must transfer a UAC to HHS.

Regarding commenters' concerns about the implementation of paragraph 15 of the FSA, DHS notes that paragraph 15 does not provide a means by which a parent can appoint a guardian; rather, it requires that a potential sponsor sign an affidavit of support. With respect to the Tornillo facility, DHS notes that it is an HHS facility and § 236.3 does not apply to HHS facilities.

Upon consideration of the comments, however, DHS now agrees that DHS is not statutorily barred by the HSA and TVPRA from releasing a non-UAC minor to someone other than a parent or legal guardian. DHS acknowledges that this interpretation of the law differs from the interpretation DHS represented to the U.S. Court of Appeals for the 9th Circuit in recent litigation,<sup>35</sup> but after considering the comments received on this rulemaking and further reviewing the language of the HSA and the TVPRA, DHS has determined that this revised interpretation of these statutes is the best reading of them, and that allowing for such releases here is necessary and appropriate.

The current text of 8 CFR 236.3(b) permits release of a juvenile to an adult relative, specifically a brother, sister, aunt, uncle, or grandparent, who is not presently in detention. DHS believes that release of non-UAC minors to these other adult relatives may be lawful and appropriate in certain circumstances, provided that the Government has no concerns about the minor's safety upon such release, and it has no concerns

about the adult relative's ability to secure the non-UAC minor's timely appearance before DHS or the immigration courts. However, DHS will maintain a presumption for keeping minors with parents or legal guardians. Any release of a non-UAC minor to an adult relative other than a parent or legal guardian will be within the unreviewable discretion of DHS. DHS notes that the TVPRA and HSA provisions that apply to UACs cannot be superseded by the FSA or by existing regulations. The court decisions cited by commenters state that the TVPRA and HSA do not supersede the FSA solely as to the point that the FSA applies to both minors and UACs, and the Government is currently appealing these decisions.

DHS reiterates that it does not hold minors for extended periods of time without their parents or legal guardians, unless these minors are subject to secure detention. Regarding the comments about the FSA generally favoring release, DHS must release minors pursuant to the existing statutes and regulations; this includes release on parole. Consistent with the language of paragraph 14 of the FSA, DHS will consider parole for all minors in its custody who are eligible, and such consideration will include whether the minor presents a safety risk or risk of absconding. DHS believes that paroling such eligible minors detained pursuant to INA 235(b)(1)(B)(ii) or 8 CFR 235.3(c) who present neither a safety risk or risk of absconding will generally present an urgent humanitarian need. For more general concerns about parole, see the discussion above regarding § 212.5.

#### Changes to Final Rule

Accordingly, DHS amends its proposed regulatory text in 8 CFR 236.3(j) to not preclude release of a non-UAC minor to an adult relative (brother, sister, aunt, uncle, or grandparent) who is not in detention and is available to provide care and physical custody. Such release, if deemed appropriate, will be effectuated within the discretion of DHS. DHS also adds paragraph (j)(4) stating that DHS will consider parole for all minors who are detained pursuant to section 235(b)(1)(B)(ii) of the INA or 8 CFR 235.3(c) and that paroling such minors who do not present a safety risk or risk of absconding will generally serve an urgent humanitarian reason, and may also consider the minor's well-being. Lastly, DHS adds that it may consider aggregate and historical data, officer experience, statistical information, or any other probative information in making these determinations.

#### 11. Procedures Upon Transfer § 236.3(k) Summary of Proposed Rule

DHS proposed revisions to § 236.3(k) state that all minors or UACs transferred from one ICE placement to another will be transferred with all possessions and legal property. The proposed regulations added that a minor or UAC will not be transferred until a notice has been provided to their counsel, except in an unusual or compelling circumstance.

#### Public Comments and Response

*Comments.* One commenter commented that the requirements for providing notice to counsel prior to transferring a UAC or minor do not align with the ABA UC Standards, which recommends both oral and written notice to the child and his or her attorney prior to transfer to include, (1) the reason for transfer; (2) the child's right to appeal the transfer; and (3) the procedures for an appeal.

The ABA UC Standards further recommend that the notice include the date of transfer and the location, address, and phone number of the new detention facility, and the commenter urged DHS to include these provisions in the rule.

The commenter also raised a concern with the use of the terms "unusual and compelling circumstance" without further guidance. The commenter suggested that DHS adopt the language from the ABA UC Standards, which define "compelling and unusual circumstances" as the child posing an immediate threat to himself or others or the child posing an escape risk. A state agency similarly commented that the exception to providing prior notice to counsel in "unusual and compelling circumstances" is too broad and will "result in arbitrary and capricious application." Finally, a commenter urged DHS to include language from the ABA UC Standards addressing a right to an independent review of a transfer decision that places the burden of persuasion that a transfer is necessary on DHS and allows a dissatisfied minor or UAC to seek further *de novo* review in Federal court.

*Response:* DHS declines to adopt this suggestion to adopt the ABA UC standards because the standards impose requirements on DHS that exceed what the FSA requires and may place an undue burden on DHS operations or compromise the security of UACs and/or minors or DHS personnel and facilities. The proposed regulation at § 236.3(k) incorporates the transfer standards required by the FSA, as amended to account for the changes in law made by the HSA and TVPRA.

<sup>35</sup> See Brief for Appellants, *Flores v. Sessions*, No. 17-56297 (9th Cir. Jan. 5, 2018).

The FSA does not require DHS to provide notice of the transfer of a UAC or minor to anyone other than legal counsel. The FSA does not specify the form in which notice be provided nor does it specify that any other details (*i.e.*, date of transfer, location, address and phone number of new facility) must be disclosed. The FSA does not require DHS to provide an explanation of the reasons for a transfer or provide a process of administrative review and appeal of DHS's decision to transfer a UAC or a minor. However, paragraph 24B of the FSA provides a UAC or minor an opportunity to challenge that placement determination by seeking judicial review in any U.S. District Court with jurisdiction and venue over the matter, and the proposed regulation in § 236.3(g)(1)(ii) and (iii) provide that minors will receive notice of his or her right to judicial review, as well as be provided with the free legal service provider list.

DHS notes that the commenter's concern about the use of the term "unusual and compelling circumstances" without further guidance is misplaced, because the term is taken from paragraph 27 of the FSA. Paragraph 27 provides guidance on what could be "unusual and compelling circumstances," including "where the safety of the minor or others is threatened, or the minor has been determined to be an escape-risk, or where counsel has waived such notice." FSA paragraph 27. These illustrative definitions are included in proposed regulation § 236.3(k).

DHS declines to adopt the commenter's suggestion to substitute "unusual and compelling circumstances" as defined in the FSA with the ABA's definition of "compelling and unusual circumstances"; namely: "i. the Child poses an immediate threat to himself or others; or ii. the Custodial Agency has made an individualized determination that the Child poses a substantial and immediate escape risk." UC Standards section VII.H.2.c. By imposing a heightened standard of danger and escape risk to trigger the exception, the UC Standard definition potentially exposes the UAC or minor and others to a risk of harm or flight that was otherwise mitigated in the FSA. The definition is also unworkable as applied to DHS, because the UC Standards define "Custodial Agency" to exclude an Immigration Enforcement Agency. The UC Standards definition places undue burden on DHS operations and compromises the security of UACs and/or minors and DHS personnel and facilities.

#### Changes to Final Rule

Accordingly, DHS declines to amend the proposed regulatory provisions regarding monitoring based on public comments, and adopts the language proposed in the NPRM through this final rule.

#### 12. Notice to Parent of Refusal of Release or Application for Relief § 236.3(l)

##### Summary of Proposed Rule

DHS proposed to move and clarify current regulatory provisions in § 236.3(e) and (f) to a new § 236.3(l) to state that a parent shall be notified if a minor or UAC in DHS custody refuses to be released to his or her parent; or if the minor or UAC request any type of relief from DHS that would terminate the parent-child relationship, or the rights or interest are adverse to that of the parent(s). The proposed regulation balances the minor's or UAC's desire to take an action adverse to the wishes of his/her parent with the parent's or legal guardian's right to be notified and present their views to DHS, especially if the adverse action would terminate the parent-child relationship. The proposed regulatory text, as with existing regulations, does not allow the parent to request a hearing on the matter before an immigration judge.

##### Public Comments and Response

*Comments.* One commenter stated that the provision does not meet the stated purpose of this rulemaking because it does not implement the FSA, TVPRA, or HSA, but rather continues this dated provision. Several commenters stated that the proposed language does not explain how DHS will determine when a grant of relief will effectively terminate an inherent interest in a parent-child relationship or how DHS will determine when a child's rights and interests are adverse to the parents' rights and interests. One commenter is also worried that there is no provision in the proposed regulation about how DHS would determine whether such notification is prohibited by law or would pose a risk to the minor's safety or well-being. Another commenter urged a right to appeal.

When the original regulations were promulgated, the INS adjudicated applications and had custody of the children. Some commenters believe that ICE and CBP inherently lack the knowledge needed to understand the risks of revealing the type of application filed by a minor because neither organization knows about the content of immigration applications and might inadvertently put the child at risk or

thwart the child's ability to obtain humanitarian relief. These commenters suggest that the complex nature of the issues raised by this provision underscore the need for appointed counsel in immigration proceedings.

Several commenters recommended that DHS be required to appoint an independent advocate to be appointed for each child; one who represents the individual child's best interest and legal needs through the maze of bureaucracy.

*Response.* DHS has determined that the language of this provision is sufficiently detailed to guide decision-makers and that any further detailed explanation of terms is more appropriate for guidance documents and policies. Given DHS's experience that many legal representatives vigorously advocate for children in immigration proceedings, DHS declines to commit to appointing an independent child advocate at this time.

#### Changes to Final Rule

DHS declines to expand the provisions of 8 CFR 236.3(l) to provide a detailed explanation of the meaning of the terms in this paragraph.

#### 13. Bond Hearings § 236.3(m)

##### Summary of Proposed Rule

DHS's proposed revisions to § 236.3(m) state that bond hearings are only applicable to minors who are in removal proceedings under INA 240, to the extent permitted by 8 CFR 1003.19, and who are in DHS custody. DHS has also removed the term "deportation proceeding" from the existing regulation and updated the language with bond hearings to be consistent with the changes in immigration law. The proposed rule also adds language to specifically exclude certain categories of minors over whose custody immigration judges do not have jurisdiction.

##### Public Comments and Response

*Comments.* Several commenters wrote about the proposal to update the provision for bond hearings under DHS proposed 8 CFR 236.3(m) and HHS proposed 45 CFR 410.810. Because both provisions related to paragraph 24(A) of the FSA, comments sometimes transitioned fluidly between being directed toward DHS and HHS. The comments submitted can be grouped into two main categories: (1) That the changes to the bond hearing provision are incompatible with the text of the FSA and case law interpreting it and (2) that such changes raise due process concerns.

The most frequent comment was that the proposed transition of bond hearings from an immigration court to an

administrative setting does not comply with the FSA and applicable case law. The commenters reasoned that paragraph 24(A) of the FSA requires minors in deportation proceedings to be afforded a bond redetermination hearing before an immigration judge in every case. They further pointed to the decision in *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017), as evidence that the Ninth Circuit, in interpreting and applying the FSA had already ruled against the government when it argued that the limiting of bond hearings applied to minors in DHS custody only. Many of the commenters pointed to a quote from the court's decision discussing how the hearing is a "forum in which the child has the right to be represented by counsel, and to have the merits of his or her detention assessed by an independent immigration judge." Another commenter also wrote that the TVPRA and the HSA do not supersede the FSA or allow for inconsistent standards, which the commenter believed would result from the implementation of the proposed rule.

Many commenters wrote that the change threatened the due process rights of UACs. They stated that the proposed rule reverses a child's right to a bond hearing and instead creates an agency-run administrative process that poses threats to due process. These commenters wrote that as a matter of policy, immigration judges are best suited to rule on UAC bond hearings, as they have the relevant background and knowledge base to understand the situation and determine the appropriate course of action. Some of these commenters objected to the standard of proof required in bond hearings and said it should be by clear and convincing evidence. They reasoned that the clear and convincing evidence standard governs almost all civil detentions, with the exception of immigration detention, and a higher standard of proof should be applied where children's rights are at stake. Similarly, one commenter stated that the burden should never be on the child to show that he or she is not a danger to the community or a flight risk and asked that the burden be on the government, not the minor. Commenters also suggested that children and families should have access to legal counsel throughout the "immigration pathway" and that alternatives to detention, specifically "community-based case management" should be the government's default policy. Another commenter wrote urging the appointment of child advocates, hearings within 48 hours of request by

child or counsel, and procedures to ensure that all minors are informed of their right to request review of continued detention.

Some commenters who differentiated between the provisions applicable to DHS and HHS, supported or acknowledged that proposed 8 CFR 236.3(m) maintained the process required by FSA paragraph 24(A). One commenter wrote in support of proposed 8 CFR 236.3(m) because the provision clarifies that minors detained in DHS custody but *not* in section 240 proceedings are ineligible to seek review by an immigration judge of their DHS custody determination, consistent with the TVPRA. Other commenters did not explicitly endorse the provision, but acknowledged that it provided the protections and processes required by the FSA.

*Response.* For responses to comments relating to the HHS proposed hearings in 45 CFR 410.810, please see below in the HHS section by section comment analysis under § 410.810.

DHS agrees with commenters that the proposed regulatory text at 8 CFR 236.3(m) reflects the requirements of the FSA regarding existence of bond redetermination hearings for minors in DHS custody who are in removal proceedings pursuant to INA 240. The understanding that the term "deportation hearings" in paragraph 24(A) of the FSA refers to what are now known as removal proceedings has been reiterated throughout the *Flores* litigation. See Order Re: Plaintiff's Motion to Enforce at 2 n.2, *Flores v. Sessions*, No. 85–4544, (C.D. Cal. Jan. 20, 2017) ("The Court will therefore treat 'deportation proceedings' as written in the *Flores* Agreement as synonymous with 'removal proceedings.'"); see also *Flores v. Sessions*, 862 F.3d 863, 869 n.5 (9th Cir. 2017) ("Administrative removal proceedings to determine a non-citizen's right to remain in the United States have been re-designated as 'removal' rather than 'deportation' under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104–208, 110 Stat. 3009 (1996)"). Accordingly, the terms of FSA paragraph 24(A) requires bond redetermination hearings solely for those aliens who are in removal proceedings under INA 240 and who are otherwise entitled to bond under relevant Executive Office for Immigration Review regulations. Minors who are in proceedings other than removal proceedings under INA 240 (*i.e.*, expedited removal proceedings) are not entitled to bond hearings under the FSA. Under the INA, minors in

expedited removal proceedings are not afforded bond hearings; rather, DHS may parole such aliens on a case-by-case basis. See INA 235(b)(1)(B)(iii)(IV); Order Re: Motion to Enforce and Appoint a Special Monitor at 23, *Flores v. Sessions*, No. 85–4544 (C.D. Cal. June 27, 2017). DHS also notes that arriving aliens, even those in section 240 proceedings, are not entitled to bond. See INA 235(b)(2)(A); 8 CFR 1003.19(h)(2)(i)(B). DHS, therefore, will maintain the proposed language of 8 CFR 236.3(m) in this final rule.

DHS reiterates that the provision applies to minors in DHS custody; DHS has no authority to regulate custody determinations for individuals in the custody of another agency. See generally INA 103(a)(3); 5 U.S.C. 706(2)(c) (considering agency regulations that are "in excess of statutory jurisdiction" to be unlawful). In accordance with the relevant savings and transfer provisions of the HSA, see 6 U.S.C. 279, 552, 557; see also 8 U.S.C. 1232(b)(1), the ORR Director now possesses the authority to promulgate regulations concerning ORR's administration of its responsibilities under the HSA and TVPRA. Commenters who disagree with DHS's limiting proposed 8 CFR 236.3(m) to minors in DHS custody cite to a case relating to UACs and seem to disregard the distinction between DHS's proposed 8 CFR 236.3(m) and HHS' proposed 45 CFR 410.810 custody redetermination regulations for UACs. The commenters aver that minors other than those in DHS custody are entitled to individualized custody hearings. Though it is true under governing case law that paragraph 24(A) applies to both accompanied and unaccompanied minors in removal proceedings such that those aliens are entitled to individualized custody assessments, proposed 8 CFR 236.3(m)—as a DHS regulation—cannot extend to the cases of UACs in ORR custody. The paragraph expressly applies only to "*minors in DHS custody*;" by its terms, the group covered in this regulation does not overlap with the group addressed in the Ninth Circuit's 2017 *Flores* decision. The Departments refer commenters to HHS' response below, with respect to the hearings under 45 CFR 410.810. Though DHS and HHS hearings are separate and distinct from one another, both Departments are issuing regulations that are consistent with the FSA, HSA, and the TVPRA, and are justified by the different roles of each agency.

Proposed § 236.3(a)(1) codifies the FSA's general policy statement, found in paragraph 11 of the FSA, that minors and UACs in DHS custody shall be



treated with dignity, respect, and special concern for their particular vulnerability. The proposed language at § 236.3(m) does not represent a shifting in the burden of proof applicable in bond proceedings for minors in DHS custody. Aliens in DHS custody who are seeking bond have the burden to show that they do not present a danger or flight risk. See *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). Immigration Judges have broad discretion in determining whether an alien merits release on bond. See *id.* But the regulations maintain language from the FSA provision which specifies that a minor be given notice of the right to judicial review in the United States District Court.<sup>36</sup> Thus, the proposed language does not represent a shift from current practices.

Moreover, minors in DHS custody are accorded rights in bond proceedings that extend to aliens generally. An alien in DHS custody who is otherwise entitled to bond may seek a bond hearing before an immigration judge prior to the filing of the Notice to Appear containing the charges of removability. An alien may submit evidence and present arguments as to whether his or her release is authorized under the immigration laws and whether he or she merits release as a matter of discretion. An alien may be represented by an attorney or other representative of his or her choice at no expense to the government; Congress has not provided for government-funded counsel in bond proceedings, or in fact, in any immigration proceedings. Minors subject to 236.3(m) are necessarily not UACs without a parent or legal guardian in the United States available to provide for their care and physical custody. Moreover, bond hearing standards are not so complicated that many minors without representation would be unable to participate in a bond hearing with the assistance of an immigration judge. Aliens may appeal bond redetermination decisions made by an immigration judge to the Board of Immigration Appeals and are informed of their right to review. See 8 CFR 1236.1(d)(4); 1003.19(f).

#### Changes to Final Rule

DHS declines to amend the proposed regulatory provisions regarding bond hearings based on public comments.

<sup>36</sup> As previously stated, the rule does not itself provide for the right to judicial review as a regulation cannot vest Federal courts with jurisdiction.

#### 14. Retaking Custody of a Previously Released Minor § 236.3(n)

##### Summary of Proposed Rule

DHS proposed revisions to § 236.3(n) to state that if a minor is an escape-risk (as defined at § 236.3(b)(6)), a danger to the community or has a final order of removal, DHS may take the minor back into custody. The proposed regulation adds language to explain that if the minor no longer has a parent or legal guardian available to provide care and physical custody, the minor will be treated as a UAC and DHS will transfer him or her to the custody of HHS.

##### Public Comments and Response

*Comments.* Several commenters discussed § 236.3(n) in the proposed rule, which would provide for DHS to retake custody of a child when there is a material change of circumstances indicating the child is an escape risk, a danger to the community, or has a final order of removal. Several commenters expressed concern that § 236.3(n) is overly broad, is inconsistent with the FSA, or does not include adequate procedural safeguards to protect a child's rights.

One commenter stated that neither the FSA nor the current regulations provide for retaking custody of previously released juveniles if a juvenile becomes an escape-risk, becomes a danger to the community, or receives a final order of removal after being released. The commenter stated that this violates the FSA and lacks any limitations or procedural safeguards, including any independent review of the decision to retake custody of a child following release from ORR. The commenter additionally suggested, without providing any data to support this, that for-profit detention facilities would benefit from this as it would increase the number of detained persons and DHS could use the proposed regulation to retake custody of a child following an accidental or erroneous *in absentia* final order of removal.

Another commenter expressed concern that the proposed rule presents a danger for arbitrary application and needless traumatization. In considering retaking custody, this commenter recommended applying the standards for transfer outlined in the ABA's UC Standards.

Several commenters also stated concerns about adequate procedural protections to challenge DHS's actions after retaking custody of a previously released minor. One commenter wrote that the regulation is silent on who bears the burden of proof that there is a material change in circumstances.

Several commenters cited a recent ruling on *Saravia v. Sessions*, No. 18–15114 (9th Cir. 2017), by the U.S. Court of Appeals for the Ninth Circuit, which held that immigrant children are entitled to prompt hearings in which the Government bears the burden of demonstrating why there was a material change in circumstances. One commenter recommended the government immediately provide minors and UACs who are taken back into custody with an opportunity to contact family members as well as their attorneys.

One commenter stated that children who have been released from custody are at risk of receiving a final order of removal, and thus subject to DHS retaking custody, because they have a higher risk of missing a court appearance for reasons that are not intentional. This may be because they are under the control of the sponsor, lack the resources to travel to the immigration court, or are unable to independently seek legal counsel to assist with attendance. Several commenters opined that the rule would result in the increased policing of immigrant and non-immigrant members of communities of color in the country.

*Response.* DHS disagrees with commenters' statements that this provision presents a "danger of arbitrary application." Currently, there are no regulatory provisions for retaking custody of a previously released minor. Therefore, this provision is intended to provide regulatory guidance and clarity where it currently does not exist. As noted in the NPRM, a material change in circumstances could potentially be triggered by a released minor later becoming an escape-risk, becoming a danger to the community, receiving a final order of removal, and/or if there is no longer a parent or legal guardian available to care for the minor. DHS notes that the FSA's definition of escape risk allows consideration of, *inter alia*, whether "the minor has previously absconded or attempted to abscond from INS custody." This rule would specifically identify absconding from any Federal or state custody as a relevant factor, not just the custody of INS or its successor agencies. This change is consistent with the FSA, which provides only a non-exhaustive list of considerations. The purpose of providing this regulatory clarity is to ensure that release and custody determinations are generally informed by the same factors for consideration (*i.e.* if a minor is determined to be a danger to the community prior to release, that minor may not be released. Likewise, if that minor later becomes a

danger to the community, DHS seeks to regain custody of that minor).

In response to comments about the lack of procedural safeguards, including burden of proof and independent review of custody determinations, DHS notes that minors who are not UACs and who are taken back into DHS custody may request a custody redetermination hearing in accordance with 8 CFR 236.3(m) of this rule and to the extent permitted by 8 CFR 1003.19.

DHS notes the recommendation to ensure that minors and UACs who are taken back into custody are immediately provided with an opportunity to contact family members or legal counsel. These provisions and other detention standards are incorporated into § 236.3(i) describing standards for detention of minors in DHS custody who are not UACs.

#### Changes to Final Rule

DHS declines to amend the proposed regulatory provisions regarding retaking custody of previously released minors based on public comments.

#### 15. Monitoring § 236.3(o)

##### Summary of Proposed Rule

The terms contained in the proposed rule required CBP and ICE each to identify a Juvenile Coordinator for the purpose of monitoring statistics about UACs and minors who remain in DHS custody for longer than 72 hours. The statistical information may include, but would not be limited to, biographical information, dates of custody, placement, transfers, removals, or releases from custody. The juvenile coordinators may collect such data, if appropriate, and may also review additional data points should they deem it appropriate given operational changes and other considerations.

##### Public Comments and Response

*Comments.* Multiple commenters expressed concern that DHS's proposed changes would remove important protections for children by limiting monitoring and oversight performed by agencies; decreasing data collection requirements; eliminating attorney monitoring responsibilities; and implementing vague or broad Juvenile Coordinators duties that lack standard and omitted provisions of the FSA.

Some commenters expressed concern with respect to the proposed rule's Juvenile Coordinator monitor provision. Although a few of the commenters acknowledged that language in the proposed rule in part reflects monitoring provisions in FSA paragraph 28A, the commenters argued that the proposed rule omits important

collections of information regarding the placement of minors in more restrictive or secure facilities. Additionally, the commenters claimed that the proposed regulation omits associated FSA provisions requiring the Juvenile Coordinator to share reports with Plaintiffs' counsel and permit Plaintiffs' counsel to engage with the Juvenile Coordinator regarding implementation of the FSA. Another commenter complained that the proposed rule would direct the collection of information about minors who had been held in CBP or ICE custody for longer than 72 hours, but this scenario would not require DHS to do anything with this information or to provide it for independent oversight and review, or corrective action. A few commenters cited that paragraph 28(A) of the FSA requires a weekly collection of specific data from all ICE and CBP district offices and Border Patrol stations; however, the proposed rule does not set forth how frequently data collection is required, nor does it require CBP/ICE to collect the same types of information. Another commenter added that the proposed regulations provided no mandatory qualifications for the Juvenile Coordinator and the requirements necessary to become one are broad and unclear. As general practice, the commenter advised that any government official charged with making placement determinations for children, particularly children who have experienced trauma, should be required to have child welfare experience and qualifications, rather than law enforcement expertise. Another commenter recommended expanding immigration courts and appointing guardians for children so they are not alone in the process.

Commenters expressed concern with the Juvenile Coordinators provision, which allows for collection of hearing dates and "additional data points should they deem it appropriate given operational changes and other considerations" for aliens in DHS custody. The commenters voiced concern that statement is extremely broad and does not provide meaningful standards for monitoring. The commenter cited the legal case of *Checkosky v. SEC*, 139 F.3d 221, 226 (D.C. Cir. 1998). This commenter recommended the Government withdraw the rule or provide specific information about the persons to whom Juvenile Coordinators will report; operational changes and who would determine them; accountability; recordkeeping; resources; qualifications for Juvenile Coordinators; data sharing;

the process to receive additional data points or statistical inquiry suggestions; etc.

Some commenters objected to the elimination of the third-party monitoring by *Flores* plaintiffs' counsel and oversight of compliance with the FSA that results when the FSA is terminated. The commenters recounted recent reports and lawsuits before and after the proposed rule was published that they allege demonstrate the Government has not followed the terms of the FSA with respect to monitoring.<sup>37</sup> Some of these examples involved *ORR*, (*i.e.*, a July 2018 court order in *Flores v. Sessions* regarding Shiloh Residential Treatment Center and prescription of psychotropic medications, as well as placement in secure and staff-secure shelters and residential treatment centers (RTCs), and certain policies regarding release (such as requiring post-release service providers to be in place prior to release)). The commenter also noted the appointment of a Special Master/Independent Monitor in October 2018, to monitor compliance with the court's orders and to make findings of fact reports and recommendations.<sup>38</sup> The commenter claimed that the ability of *Flores* counsel to interview detained children in a confidential way allows them to share information about how they are being treated and has been critical to identify ill-treatment and non-compliance with FSA standards.

*Response.* Although commenters are concerned that the proposed regulation § 236.3(o) limits the monitoring and oversight of the Government's responsibilities set forth in the FSA, such concerns are misplaced. Many of the data collection, monitoring, and oversight provisions included in the FSA are provisions that were included to guide the operation of the agreement itself and, as such, are not relevant or substantive terms of the FSA. The FSA, as modified in 2001, provides that it will terminate 45 days after publication of final regulations implementing the agreement and accordingly, the terms that are not relevant or substantive, such as certain requirements to report to plaintiffs' counsel and to the court, will cease to apply to the parties to the agreement. DHS, in § 236.3(o), is adopting a policy specifically to provide for the data collection and monitoring to

<sup>37</sup> See, e.g., DHS OIG, ICE's Inspection and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements: DHS OIG Highlights (OIG-18-67), June 26, 2018 <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

<sup>38</sup> *Flores v. Sessions*, CV 85-4544-DMG, at 2 (C.D. Cal. Oct. 5, 2018), Order Appointing Special Master/Independent Monitor.

assist in its own internal monitoring, and while the provisions reflect those, as set forth under paragraph 28A of the FSA, such provision is an internal agency practice. The provisions of paragraph 28A exist solely in order for the Court and plaintiff's counsel to monitor compliance with the terms of the Agreement on behalf of the Class (see, for example, paragraph 28B regarding what plaintiff's counsel should do if the reporting and monitoring lead to reasonable suspicion that a minor should have been released.). That of monitoring provision for counsel is not appropriate for Federal regulations. Moreover, this rule will result in the termination of the FSA making that type of monitoring provision inapt.

The current regulations at 8 CFR 236.3(c) describe the duties of the Juvenile Coordinator, including the responsibility of locating suitable placements for juveniles. The language proposed at § 236.3(o) will provide for monitoring by the Juvenile Coordinators. This regulation will also eliminate the requirement in the current regulations that the Juvenile Coordinator locate a suitable placement for minors, as these duties are generally exercised by immigration officers and other employees at DHS (or by HHS and its grantees for UACs). The Juvenile Coordinator as described in the FSA is tasked with overseeing the compliance with the FSA. The CBP and ICE Juvenile Coordinators as described in the proposed regulation will be tasked with overseeing CBP and ICE's compliance with the regulations. This monitoring may involve whatever actions the Juvenile Coordinators determine is appropriate to monitor compliance, (including, for instance, conducting facility visits, reviewing agency policies and procedures, or interviewing employees and/or detainees). They will not make placement decisions.

As the FSA requires, the Juvenile Coordinators will also continue to collect data about placement in a detention facility. DHS notes that this data is currently collected by the ICE Juvenile Coordinator, as CBP does not maintain data about a minor's placement in a detention facility. Collecting data will be an additional part of the Juvenile Coordinator's duties (in addition to their role monitoring compliance with the terms of the regulations). In this final rule, DHS is amending the regulatory text to clarify that the Juvenile Coordinator's duty to collect statistics is in addition to the requirement to monitor compliance with the terms of the regulations.

The commenters' concerns that this rule omits important collection of information regarding the placement of minors in more restrictive or secure facilities misapprehends the omission of collection of reasons for placement in a detention facility or medium secure facility. In the discussion to proposed regulation § 236.3(b)—Definitions, DHS explains that it does not propose to adopt the FSA's term "medium security facility" because DHS does not maintain any medium security facilities for the temporary detention of minors and the definition is now unnecessary. In addition, § 236.3(o) includes the "reasons for a particular placement" in the list of statistical information that may be collected routinely by the Juvenile Coordinators, and both the discussion of the proposed regulation and § 236.3(o) itself propose two Juvenile Coordinators—one for ICE and one for CBP—and charge each with monitoring compliance with the requirements of these regulations, and with monitoring statistics about UACs and minors who remain in DHS custody for longer than 72 hours.

This requirement to collect statistical information about UACs and minors who remain in CBP or ICE custody for longer than 72 hours will necessarily capture the data set forth in paragraph 28A of the FSA without reference to location or frequency of collection. The proposed regulation specifies the statistical information to be collected as a baseline and allows the Juvenile Coordinators to review additional data points as appropriate given operational changes or other considerations. DHS believes that the commenter's concern that the proposed regulation contains no mandatory qualifications for the Juvenile Coordinator and that any government official charged with making placement decisions should be required to have child welfare experience is misplaced. Section 236.3(o) eliminates the requirement in the current regulation at 8 CFR 236.3(c) that the Juvenile Coordinator locate suitable placements for minors. DHS declines to adopt the commenter's suggestion as the Juvenile Coordinators are not responsible for placement determinations.

DHS rejects the suggestion that the text allowing Juvenile Coordinators to collect information on hearing dates if appropriate and "additional data points should they deem it appropriate given operational changes and other considerations" is overbroad and ill-defined. The proposed regulation allows the Juvenile Coordinators to collect the statistical information, as under paragraph 28A of the FSA, relevant to

monitor compliance and allows the Juvenile Coordinators flexibility to consider other data points (including immigration court hearing dates) as appropriate given operational changes and other considerations. *Checkosky*, 139 F.3d at 226, in which the U.S. Circuit Court for the District of Columbia dismissed disciplinary proceedings against two accountants after the SEC issued multiple inconsistent interpretations of a Commission rule, is inapposite here, since the proposed regulation and discussion make clear the statistical information to be collected and that the Juvenile Coordinators have discretion to collect and review additional data points where appropriate. DHS declines to provide more specific information, as the proposed regulation already provides information adequate to the task of the Juvenile Coordinator and the information covered by paragraph 28A of the FSA.

DHS has carefully considered commenters' proposal to continue monitoring by and reporting to *Flores* counsel to enforce the FSA but declines to adopt it based on the parties' agreement in 2001 that the FSA will terminate 45 days after publication of final regulations implementing the agreement. DHS is unable to comment on pending litigation concerning the FSA but notes that, though not required, the final regulation will codify the monitoring and statistical information collection requirements in paragraph 28A of the FSA, which do not exist in the current regulations.

DHS also disagrees with the suggestion that it has failed to provide adequate oversight over its detention facilities. DHS is committed to ensuring adequate oversight over its facilities. As described above, ICE FRCs are subject to regular audits by outside entities. Additionally, all DHS facilities (both CBP and ICE) are subject to inspection and monitoring by bodies such as the DHS OIG, DHS CRCL, and the GAO. DHS is also making it clear in this final rule that the CBP and ICE Juvenile Coordinators will have responsibility for monitoring compliance with these regulations, and not merely the responsibility to maintain statistics. Such monitoring of ongoing compliance may include oversight of DHS facilities. The purpose of this change is to ensure that an independent monitor will remain in place to help to ensure that all DHS facilities satisfy applicable standards at all times.

#### Changes to Final Rule

DHS is amending the regulatory provisions to make it more clear that the

Juvenile Coordinators will monitor compliance with the requirements of these regulations and, as an independent requirement, maintain statistics related to the placement of minors and UACs.

Section-by-Section Discussion of the HHS Proposed Rule, Public Comments, and the Final Rule

Subpart A—Care and Placement of Unaccompanied Alien Children (45 CFR part 410) Definitions (45 CFR 410.101)

DHS

Summary of Proposed Rule

HHS proposed to define “DHS” as the Department of Homeland Security. This term is not defined in the FSA.

Public Comments and Response

HHS did not receive any comments requesting a change to this definition.

Changes to Final Rule

HHS is not making any changes to this definition in the final rule.

Director

Summary of Proposed Rule

HHS proposed to define “director” as the Director of the Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), Department of Health and Human Services. This term is not defined in the FSA.

Public Comments and Response

HHS did not receive any comments requesting a change to this definition.

Changes to Final Rule

HHS is not making any changes to this definition in the final rule.

Emergency

Summary of Proposed Rule

HHS proposed to define “emergency” as an act or event (including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or public health concerns at one or more ORR facility) that prevents timely transport or placement of UACs, or impacts other conditions provided by this part. This definition incorporates the existing text of the FSA except for HHS’ recognition that emergencies may not only delay placement of UACs, but could also delay compliance with other provisions of the proposed rule or excuse noncompliance on a temporary basis.

Public Comments and Response

*Comments.* Several commenters expressed concern that the proposed

“expanded” definition of “emergency” would grant DHS too much discretion to suspend compliance with certain FSA provisions relating to standards of care and custody for children, such as timely transport or placement of minors and other conditions implicating their basic services.

Some commenters expressed concern that events other than a natural disaster, facility fire, civil disturbance, medical or public health concerns might also qualify as an emergency, leaving significant room for interpretation. Several commenters argued that the phrase “other conditions” would implicate the basic needs of the children, including timely transfer, provision of snacks and meals, prolonged detention, and would further jeopardize their well-being, health, and safety and runs contrary to the explicit placement context of the FSA.

Other commenters had specific objections to the proposed definition. One organization argued that the proposed rule defines emergency in a circular manner because the term is primarily defined as an event that prevents compliance.

A coalition expressed concern that the proposed provision that minors must be transferred “as expeditiously as possible,” can be broadly interpreted, instead of a defined period of three to five days. The same commenter also argued that this provision contravenes the TVPRA because it creates exceptions to the 72-hour timeframe for the required transfer of UACs to ORR that do not meet the high bar of “exceptional circumstances” as intended under the TVPRA.

An organization expressed concern that the proposed rule replaces the term “medical emergencies” with “medical or public health concerns at one or more facilities,” which would broaden the possible application of emergencies, allowing for a possible emergency in instances where several minors lack key vaccinations, or where a few minors may require treatment for chronic conditions such as asthma or diabetes.

An organization expressed concern that implementation of the proposed definition would take away the ability to monitor or check the decision whether to deem a situation as an emergency, as well as the conditions that would result from such a determination and recommended that the Departments provide the basis arriving at these definitions; provide a timeframe for how long may an emergency last; and provide for the consequences for invoking the emergency when unwarranted.

An organization recommended that DHS and HHS provide explanation and evidence of the need to expand the current definition and compile a comprehensive list of permissible emergency circumstances.

Two organizations recommended that the proposed rule should clarify the circumstances under which emergency waivers would be implemented, that any such exemptions be limited in scope and ensure that the fundamental needs of children are met, regardless of the circumstances requiring a waiver.

Several organizations and individual commenters recommended that from a public health perspective, designation of an emergency should trigger additional resources, prepared in advance through contingency planning and made available through standing mechanisms.

*Response.* HHS notes that paragraph 12(B) of the FSA defines an emergency as “any act or event that prevents the placement of minors pursuant to paragraph 19 within the time frame provided” (*i.e.*, three days or five days, as applicable). The FSA also contains a non-exhaustive list of acts or events that constitute an emergency, such as “natural disasters (*e.g.* earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies (*e.g.* a chicken pox epidemic among a group of minors).” HHS notes that the definition of emergency contained within this provision does not depart from how the FSA defines an emergency act or event. Rather, this provision recognizes that, in rare circumstances, an emergency may arise, possibly unanticipated, that impacts more than just the transfer of UACs from one facility to another. As indicated in the NPRM, the impact, severity, and timing of a given emergency situation dictate the operational feasibility of providing certain elements of care and custody to UACs, and thus the regulations cannot capture every possible reality HHS will face. The applicability of “emergency” is intended to be flexible to the extent it fits within the parameters set forth by the FSA. Therefore, HHS disagrees with commenters’ assertion that the definition of emergency creates “too much discretion” or allows HHS to declare an emergency “for whatever reason.”

HHS also notes that, during an emergency situation, it continues to make every effort to provide all required services and provide for UACs’ needs under the FSA as expeditiously as possible. Depending on the severity of the emergency, however, the provision of one or more FSA requirements may be temporarily delayed for some UACs.

For instance, if a facility is located in an area that is forecasted to be impacted by a hurricane and the UACs must be evacuated to another facility, it may be necessary to temporarily delay the provision of meals to those UACs during the time required to evacuate the facility. However, as soon as the UACs arrive at the other facility, ORR would resume the provision of meals to those UACs. Similarly, if a facility suffers an electrical failure, such that the air conditioning breaks, all UACs in that facility may temporarily be held in temperatures that do not comply with the FSA. ORR would work to rectify the problem as quickly as possible, and would take steps to mitigate the problem (e.g., providing extra fans for the facility). Once the air conditioning is fixed, however, the UACs would return to FSA-compliant conditions.

HHS also notes that placing UACs in licensed programs “as expeditiously as possible” is consistent with the spirit of the FSA’s language, but is also a more appropriate standard, since it provides the flexibility needed to respond to emergencies on a case-by-case basis. We interpret “as expeditiously as possible” as what is reasonably possible considering the circumstances of the particular emergency. At the same time, HHS notes that the requirements of the TVPRA still apply to transfers of UACs to ORR custody, and that the “exceptional circumstances” standard would still apply even with the publication of this final rule.

In response to one commenter’s concern that the proposed rule replaces the term “medical emergencies” with “medical or public health concerns at one or more facilities,” which would broaden the possible application of emergencies, HHS respectfully disagrees, and notes that the rule is consistent with the FSA. The FSA provides, as an example of a medical emergency, “a chicken pox epidemic among a group of minors.” The language of the rule is consistent with this example. HHS disagrees that the rule would broaden the scope of medical emergencies beyond what is already contemplated by the FSA.

Although many of the comments are beyond the scope of the FSA and the purposes of this rule in implementing the FSA, HHS will consider incorporating commenters’ recommendations into the written guidance implementing this provision, as appropriate and to the extent they do not conflict with the FSA or other governing statutes. This includes but is not limited to the recommendations to mandate contingency planning if an emergency situation can be anticipated,

reviewing the American Bar Association’s UC Standards, and clarifying roles and responsibilities regarding the officials who have the authority to declare an emergency.

#### Changes to Final Rule

HHS is not making any changes to this definition in the final rule.

#### Escape Risk

##### Summary of Proposed Rule

HHS proposed to define “escape risk” as a serious risk that a UAC will attempt to escape from custody. HHS is adopting this definition without change from the FSA.

##### Public Comments and Response

HHS did not receive any comments requesting a change to this definition that specifically named HHS, although please see the section of the preamble discussing § 236.3(b)(6) for responses to comments DHS received regarding its definition of escape risk.

#### Changes to Final Rule

HHS will not be making any changes to this definition in the final rule.

#### Final Rule

*Escape risk* means there is a serious risk that an unaccompanied alien child (UAC) will attempt to escape from custody.

#### Influx

##### Summary of Proposed Rule

The NPRM proposed to define “influx” as a situation when 130 or more minors or UACs are eligible for placement in a licensed facility under this part or corresponding provisions of DHS regulations, including those who have been so placed or are awaiting such placement. HHS is adopting this definition without change from the FSA with the clarification that DHS will maintain custody of UACs pending their transfer to ORR.

##### Public Comments and Response

*Comment.* Numerous commenters expressed concern that the proposed definition of “influx” was developed based on data from the 1990s and is outdated, and, if implemented, will result in DHS and HHS operating within a *de facto* permanent state of “influx.” If able to operate in that status, the commenters contended that DHS and HHS would have broad discretion to circumvent compliance with the FSA, HSA, and TVPRA provisions and the time limits on transferring children out of DHS custody.

Many commenters expressed the view that DHS and HHS disingenuously

argued that they operate within a constant state of influx even while overall border crossings are 20 percent of what they were when that term was defined in the FSA and border staffing has increased by almost three times.

A few commenters argued that the 130-influx standard also failed to account for the expansions and contractions of the number of UACs in border custody, which have fluctuated by tens of thousands of juveniles every year since the peak in 2014. The variable yearly numbers of UACs require a more flexible influx baseline.

Some commenters objected to the proposed definition of influx on the basis that it enables each agency to excuse noncompliance even where it is not itself experiencing influx conditions. Commenters stated that DHS conceded in the NPRM that it has continuously been dealing with an influx of minors for years. The commenters claimed that as a result, even where HHS may not satisfy the “influx” criteria itself, it may rely on DHS’s “influx” conditions because the definition allows HHS criteria to be met “under . . . corresponding provisions of DHS regulations.”

One commenter recommended that the agencies include a third alternative criterion for designation of influx conditions to track the meaning of influx in the INA. The INA recognizes the threat posed to national security where the Secretary of Homeland Security “determines that an actual or imminent influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate federal response.” 8 U.S.C. 1103(a)(10). The commenter urged the agencies to consider a regulation that would define “urgent circumstances” to include the release without bond of a significant percentage of such minors, with or without a parent or legal guardian, near to the relevant Coast Guard or Border Patrol sector. The commenter ultimately proposed that influx conditions could exist when some combination of three criteria were present—the legacy FSA criterion of 130 minors, an alternative criterion that takes into account the problems created by lack of resources other than bed space, and a third criterion that aligns influx designations for minors with designations of influx conditions applicable to humanitarian entry in general. The commenter contended that such a standard would provide flexibility to respond effectively to migrant crises that involve minor aliens in unpredictably dangerous ways.

One commenter maintained that, because the proposed rule changes the

word “program” to “facility,” it could permit lengthier detention by a determination that there is an influx when more than 130 children are eligible for placement in any of the program’s facilities, even if the program has the capacity to provide placement resources for well over 130 children. The commenter viewed the proposed definition of influx as placing less focus on the needs of children than on the proposed facilities to detain them.

Some commenters were concerned that the proposed definition of influx lifts the requirement that UACs be transferred from DHS to HHS custody within three to five days, and allows for broad exemptions to existing child protections that could impact basic needs, such as the provision of snacks and meals to children in custody. The commenters stated the rule should be changed to clarify that any such exemptions must be limited in scope and ensure that the fundamental needs of children are met in a timely manner.

*Response.* When there is a sharp increase, or “influx,” in the number of UACs entering the United States and Federal agencies are unable to transfer them into state-licensed, ORR-funded care provider facilities in a timely manner, ORR places certain UACs at an influx care facility. It is important to note that HHS does not enforce immigration laws or implement immigration policies. HHS provides shelter, care, and other essential services to UACs, while working to release them to appropriate sponsors, often members of the child’s family, without unnecessary delay.

Periodically, ORR operates influx care facilities to meet its statutory obligations to care for UACs transferred from DHS, during a time of high numbers of arrivals. ORR maintains the ability to rapidly set-up, expand, or contract influx infrastructure and services as needed. ORR has detailed policies that set forth criteria for when UACs may be placed at an influx care facility. Some of the criteria include a minor’s age (the minor must be between 13 and 17 years of age), medical and behavioral health conditions (no known special needs or issues), sibling status (no accompanying siblings below the age of 12), and pending reunification status (ability to be discharged to a sponsor expeditiously), among other considerations. (For a complete list of the requirements, please see the *ORR Policy Guide*, Section 1.7.3 Placement into Influx Care Facilities at <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.7.3>)

HHS is the primary regulator of influx care facilities and is responsible for their oversight, operations, physical plant conditions, and service provision. States do not license or monitor ORR influx care facilities because they are located on Federal enclaves. However, ORR influx care facilities operate in accordance with applicable provisions of the FSA, HSA of 2002, TVPRA, the Interim Final Rule on Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Alien Children, as well as ORR policy.

For the purposes of continuity of joint operations and for the reasons DHS explains above, HHS adopts the same definition of influx. DHS’s response to comments related to the definition of influx can be found above in the Section-by-Section Discussion under Influx § 236.3(b)(10).

#### Changes to Final Rule

HHS is not making any changes to this definition in the final rule.

#### Licensed Program

##### Summary of Proposed Rule

HHS proposed to define a “licensed program” as any program, agency, or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs UACs. All homes and facilities operated by a licensed program, including facilities for special needs UACs, are non-secure as required under State law. However, a facility for special needs UACs may maintain a level of security permitted under State law which is necessary for the protection of UACs or others in appropriate circumstances (*e.g.*, cases in which a UAC has drug or alcohol problems or is mentally ill). HHS is adopting this definition without change from the FSA with the clarification that the standards a licensed program must meet are set forth in § 410.402 of this rule instead of Exhibit 1 of the FSA.

#### Public Comments and Response

HHS did not receive any comments requesting a change to this definition.

#### Changes to Final Rule

HHS is not making any changes to this definition in the final rule.

#### ORR

##### Summary of Proposed Rule

HHS proposed to define “ORR” as the Office of Refugee Resettlement,

Administration for Children and Families, Department of Health and Human Services. This term is not defined in the FSA.

#### Public Comments and Response

HHS did not receive any comments requesting a change to this definition.

#### Changes to Final Rule

HHS is not making any changes to this definition in the final rule.

#### Secure Facility

##### Summary of Proposed Rule

HHS proposed to define a “secure facility” as a State or county juvenile detention facility or a secure ORR detention facility, or a facility with an ORR contract or cooperative agreement having separate accommodations for minors. A secure facility does not need to meet the requirements of § 410.402, and is not defined as a “licensed program” or “shelter” under this part. This term is not defined in the FSA, but is consistent with the provisions of the FSA applying to secure facilities.

#### Public Comments and Response

*Comment.* Most public comments regarding the definition of secure were directed towards the DHS portion of the rule. HHS did receive several comments regarding the *placement* of UAC in secure facilities; those comments and responses are captured in the discussion of §§ 410.203 and 410.205. Regarding the definition of secure as it relates to the facility’s physical plant, one commenter stated that the definition of non-secure does not comport with the intent of the FSA in the following areas: secure external fencing and locks (internal and external) effecting egress.

*Response.* The term “secure” is not defined in the FSA, however, HHS finds that the definition of “secure” in the proposed rule is consistent with the provisions in the FSA applying to secure facilities. In addition, HHS is committed to ensuring the security, safety, and well-being of all UACs, many of whom fled dangers in their home countries and endured abuse along their journey to the United States. Some children remain under threat of continued harm, including trafficking, fraud, ransom demands, and gang violence. Therefore, any security measures, such as fences and locked points of entry, are for the safety of UACs, to supervise public access to children, and protect them from harm, in keeping with child welfare practices in State-licensed facilities.

#### Changes to Final Rule

HHS will not be making any changes to this definition in the final rule.

#### Shelter

##### Summary of Proposed Rule

HHS proposed to define “shelter” as a licensed program that meets the standards set forth in § 410.402. Shelters include facilities defined as “licensed facilities” under the FSA, and also includes staff secure facilities (*i.e.*, medium secure facilities as defined by the FSA). Other types of shelters might also be licensed, such as long-term and transitional foster care facilities.

##### Public Comments and Response

HHS did not receive any comments requesting a change to this definition.

#### Changes to Final Rule

HHS is not making any changes to this definition in the final rule.

#### Special Needs Minor

##### Summary of Proposed Rule

HHS proposed to define a “special needs minor” as a UAC whose mental and/or physical condition requires special services and treatment by staff. A UAC may have special needs due to drug or alcohol abuse, serious emotional disturbance, mental illness or retardation, or a physical condition or chronic illness that requires special services or treatment. A UAC who has suffered serious neglect or abuse may be considered a special needs minor if the UAC requires special services or treatment as a result of neglect or abuse. This definition was adopted without change from the FSA.

##### Public Comments and Response

*Comment.* Some commenters asked for expanded definitions of “special needs minor” or additional provisions relating thereto. One commenter stated the definition should be broadened to include developmental disability and learning disability. The commenter urged that it is important for children, particularly unaccompanied children, to be able to understand and follow instructions or directions given to them by Federal officials, attorneys, and care custodians in licensed facilities.

Another commenter contended that the proposed rule does not adequately discuss special needs, even though many immigrant children entering the United States have disabilities.

The commenter also condemned the use of the outdated term “retardation” in the definition of special needs minor, stating that the term is used as a slur that dehumanizes, demeans, and does

real emotional harm to people with mental and developmental disabilities. The commenter acknowledged the term was used in the FSA agreement, but argued that it is inappropriate in a modern-day regulation.

*Response.* The regulatory language adopted the same definition of “special needs” as the definition used in the FSA. This definition includes any minor whose mental conditions require special services and treatment as identified during an individualized needs assessment. HHS disagrees that the definition should be expanded because the definition is broad enough to include minors with developmental and learning disabilities, if the special needs assessment determines that these conditions require special services and treatment.

The proposed regulatory language contains multiple provisions requiring DHS and HHS to consider a UAC’s special needs, including provisions requiring consideration of special needs when determining placement. For example, section 45 CFR 410.208 states that ORR will assess each UAC to determine if he or she has special needs and will, whenever possible, place a UAC with special needs in a licensed program that provides services and treatment for the UAC’s special needs. Section 8 CFR 236.3(g)(2) requires DHS to place minors and UACs in the least restrictive setting appropriate to the minor or UAC’s age and special needs. Section 8 CFR 236.3(i)(4) requires that facilities conduct a needs assessment for each minor, which would include both an educational assessment and a special needs assessment. Additionally, section 8 CFR 236.3(g)(1) requires DHS to provide minors and UACs with Form I-770 and states that the notice shall be provided, read, or explained to the minor or UAC in a language and manner that he or she understands. These provisions ensure that a minor’s or UAC’s special needs are taken into account, including when determining placement.

HHS agrees that the term “retardation” is outdated and is amending the regulatory language to delete this term. DHS has also deleted this term in its regulatory language.

##### Changes to Final Rule

HHS removed the term “retardation” from the final rule.

#### Sponsor

##### Summary of Proposed Rule

HHS proposed to define “sponsor” as an individual (or entity) to whom ORR releases a UAC out of ORR custody.

Sponsor is comparable to the term custodian, which is used but not defined in the FSA.

##### Public Comments and Response

HHS did not receive any comments requesting a change to this definition.

#### Changes to Final Rule

HHS is not making any changes to this definition in the final rule.

#### Staff Secure Facility

##### Summary of Proposed Rule

HHS proposed to define a “staff secure facility” as a facility that is operated by a program, agency, or organization licensed by an appropriate State agency and that meets the standards for licensed programs set forth in § 410.402. A staff secure facility is designed for a UAC who requires close supervision but does not need placement in a secure facility. It provides 24-hour awake supervision, custody, care, and treatment. It maintains stricter security measures, such as intensive staff supervision, than a shelter in order to control problem behavior and to prevent escape. A staff secure facility may have a secure perimeter but is not equipped internally with major restraining construction or procedures typically associated with correctional facilities. The term “staff secure facility” is used in the same sense as the FSA uses the term “medium security facility.”

##### Public Comments and Response

HHS did not receive any comments requesting a change to this definition.

#### Changes to Final Rule

HHS is not making any changes to this definition in the final rule.

#### Unaccompanied Alien Child (UAC)

##### Summary of Proposed Rule

HHS proposed to define a “UAC” as provided in 6 U.S.C 279(g)(2), which states that a UAC is a child under the age of 18 who has no lawful immigration status in the United States and who has no parent or legal guardian present in the United States or no parent or legal guardian in the United States is available to provide care and physical custody. When a child previously determined to have been a UAC has reached the age of 18, when a parent or legal guardian in the United States is available to provide care and physical custody for such a child, or when such a child has obtained lawful immigration status, the child is no longer a UAC. A child who is no longer a UAC is not eligible to receive legal protections limited to UACs.

## Public Comments and Response

*Comments.* Several organizations believed that the proposed rule directly contravenes the TVPRA and does not comport with the protective principles of the FSA by giving HHS and DHS unconstrained discretion to determine who meets the definition of a UAC, which could result in minors losing current protections under the FSA and TVPRA.

One commenter recommended striking proposed § 236.3(d) and the final sentence of proposed § 410.101 and codifying the current initial jurisdiction policy, as set forth in USCIS' 2013 guidance, which provided that USCIS would take initial jurisdiction based on a previous UAC determination even after the applicant turns 18 or is reunited with a parent or legal guardian.

Comments related to separate definitions for minor and UAC, as proposed by DHS in § 236.3(b)(1), are discussed above under the Section-by-Section Discussion of the DHS Proposed Rule, Public Comments, and the Final Rule.

*Response.* HHS adopted the definition of UAC as written in the HSA, 6 U.S.C. 279(g)(2), with no change. HHS must abide by this definition when evaluating if a child in HHS custody meets the definition of a UAC and, as such, does not have unconstrained discretion to determine who qualifies as a UAC. Operationally, HHS will continuously evaluate whether an individual is a UAC, because it is unlawful for HHS to maintain custody of any child who has obtained lawful immigration status or obtained 18 years of age while in custody. 6 U.S.C. 279(g)(2). HHS is required to promptly release from its custody any individual who no longer meets the HSA definition of a UAC. HHS notes that USCIS' initial jurisdiction policy was implemented for the purpose of administratively tracking a child's case and is unconnected to the services provided to the child. Once a UAC is released from ORR care and custody, the child is no longer considered a UAC. HHS only tracks released children (former UACs) for the provision of post-release case management and a safety and well-being follow-up call. HHS has a system by which to track these released children for service provision.

## Changes to Final Rule

Between the FSA and final rule, the only change HHS is making is substitution of the word "minor" with the word "UAC." The text of the FSA only uses the term minors, and HHS has

interpreted this term to include UACs who may or may not meet the definition of "minor" in the FSA. Given the subsequent enactment of the TVPRA, and the fact that HHS does not have custody of juveniles who are not UAC, HHS is expressly stating in this subpart that the provision applies to UACs and not "minors" as a whole.

## ORR Care and Placement of Unaccompanied Alien Children (45 CFR 410.102)

### Subpart B—Determining the Placement of an Unaccompanied Alien Child (45 CFR part 410)

#### Purpose of This Subpart (45 CFR 410.200)

#### Summary of Proposed Rule

As stated in § 410.200, this subpart of the proposed rule set forth factors that ORR considers when placing UACs.

#### Public Comments and Response

None.

*Changes to the Final Rule.* HHS is not making any changes to proposed § 410.200 in the final rule.

*Final rule.* 45 CFR 410.200—Purpose of this subpart.

This subpart sets forth what ORR considers when placing a UAC in a particular ORR facility, in accordance with the FSA.

#### Considerations Generally Applicable to the Placement of an Unaccompanied Alien Child (45 CFR 410.201)

#### Summary of Proposed Rule

Section 410.201 of the proposed rule addressed the considerations that generally apply to the placement of UAC. The provision generally paralleled the FSA requirements. The provision noted that ORR makes reasonable efforts to provide placements in the geographic areas where DHS apprehends the majority of UACs. ORR complied with this provision, as ORR maintains the highest number of UAC beds in the state of Texas where most UACs are currently apprehended.

*Comment.* Several organizations stated that the proposed rule conflicts with the FSA and current laws that encourage the placement of children in the least restrictive setting and favor release to a parent or family member.

In jointly submitted comments, multiple legal advocacy organizations argued that secure placement based on a lack of availability of licensed placements is statutorily barred by the TVPRA. The commenters cited the TVPRA's requirement that children under HHS custody "shall be promptly placed in the least restrictive setting that

is in the best interest of the child." 8 U.S.C. 1232(c)(2)(A). In making such placements, "the [HHS] Secretary may consider danger to self, danger to the community, and risk of flight." *Id.* The TVPRA also provides that "[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense." *Id.* The commenters thus argued that Congress made clear that the "best interest of the child" evaluation permits placement in a secure facility only under the limited finding of a 'danger to self or others' or a criminal charge; no other grounds are permissible, even those previously recognized in the FSA. In other words, according to the commenters, 8 U.S.C. 1232(c)(2)(A) prohibits secure placement based on issues unrelated to the best interests of the child, such as licensed shelter availability. As a result, the commenters argued that §§ 410.201(e) and 410.205 in the proposed rule are inconsistent with the terms of the FSA as amended by Congress by passage of the TVPRA.

*Response.* HHS notes that consistent with the TVPRA, 8 U.S.C. 1232(c)(2)(A), under the proposed rule, "ORR places each UAC in the least restrictive setting that is in the best interest of the child and appropriate to the UAC's age and special needs, provided that such setting is consistent with its interests to ensure the UAC's timely appearance before DHS and the immigration court." As specified in proposed rule § 410.203, however, ORR will only place a UAC in a secure facility if the UAC has been charged with or is chargeable with a crime, or has been determined to pose a danger to self or others. ORR does not place UACs in a secure facility such as a State or county juvenile detention facility based on issues unrelated to the best interests of the child. ORR does not consider emergency or influx facilities to be secure facilities.

*Comment.* Section 410.201 of the proposed rule outlined factors that determine where a child is placed including the timely appearance of children before DHS and the immigration courts. Two organizations commented that while this language is included in the FSA, it is not in the TVPRA, and this creates a conflict between the proposed regulation and Federal law. They argued that a child's appearance in immigration court should not be given priority over a child's best interest or special needs. One of these advocacy organizations argued that the proposed rule does not indicate how to prioritize each factor and that it allows HHS and DHS to focus on "their own



efficiencies for court and DHS adjudications” instead of the best interest of the child.

*Response.* HHS reiterates that this rule implements the terms of the FSA, and these comments go beyond the scope of the rule. But in response, HHS notes that the TVPRA at 8 U.S.C. 1232(c)(2)(A), states that when placing UAC, the HHS Secretary (whose authority is delegated to ORR) may consider not only danger to self, and danger to the community, but also risk of flight. Neither the TVPRA nor the FSA prescribe how ORR, in its discretion, is to evaluate the permissible factors in determining placement of a UAC. Like the TVPRA and the FSA, the rule describes general principles that govern placements of UACs. Also, ORR notes that per its policy, *see* ORR Guide, 1.4.1, “care providers must make every effort to place and keep children and youth in a least restrictive setting. For children who are initially placed in a least restrictive setting, care providers must provide support services and effective interventions, when appropriate, to help keep a child in the setting.” Moreover, in the ORR Guide, 1.2.5, ORR delineates factors which may indicate that a minor poses a risk of escape from ORR custody which it considers in making an informed placement decision, such as consideration whether the minor has an immigration history that includes failure to appear before DHS or the immigration courts. Notably, however, per ORR policy, “ORR does not place a child or youth in secure care solely because he or she may pose a risk of escape from ORR custody. However, ORR may place a child in a staff secure facility solely because he or she poses a risk of escape.” *Id.*

*Comment.* One advocacy organization commented that proposed § 410.201(d) did not include children’s access to showers or bedding and it limited children’s access to medical care to only emergencies.

The commenter further expressed concern that even though a minor who is in ORR custody may have contact with their family members who are not parents or legal guardians (for example, siblings) with whom they traveled to the United States and were arrested, the child should be permitted to be housed in family detention with those relatives consistent with their best interest.

*Response.* The language referenced by the commenter in proposed section 410.201 derives directly from paragraph 12 of the FSA, which pertains to services provided at emergency or influx facilities, as described at Exhibit 3. While State licensing standards do

not apply to these temporary influx programs, HHS is the primary regulator of influx care facilities and is responsible for their oversight, operations, physical plant conditions, and service provision. Influx care facilities operate in accordance with provisions of the FSA, the HSA, the TVPRA, the Interim Final Rule on Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Alien Children, as well as ORR policy. UACs at temporary influx programs still have access to services to the greatest extent possible UACs in ORR care at influx facilities always have access to showers and bedding, as well as necessary medical care services.

Additionally, § 410.101 defines UAC according to the definition set forth in the HSA. The HSA and the TVPRA only give ORR the authority to provide care and custody to individuals who meet that definition. DHS, not ORR, has the authority to detain minors and their family members together.

*Comment.* Several commenters including medical doctors and mental health professionals wrote about abuse allegedly taking place in detention facilities. They also mentioned allegations of abuse occurring within ORR custody such as in Southwest Key facilities in Arizona. An article in *Reveal* (Aura Bogado, Patrick Michels, Vanessa Swales, and Edgar Walters, published June 20, 2018), detailed several allegations of abuse at shelters serving children in ORR custody, including abuse allegations at Shiloh Treatment Center in Texas. These commenters expressed concern that the new rule would allow for longer periods of detention, which raises the risk of more abuse.

Some commenters cited an investigative report which they say showed that the Federal Government continues to place alien children in for-profit residential facilities where allegations of abuse have been raised and where the facilities have been cited for serious deficiencies. Allegations include failure to treat children’s sickness and injuries; staff drunkenness; sexual assault; failure to check employees’ backgrounds; failure to provide appropriate clothing for children; drugging; and deaths from restraint. The commenters stated that few companies lose grants from HHS based on such allegations.

*Response.* HHS agrees with the importance of immediately identifying and minimizing the risk that UACs suffer abuse. The rule is consistent with HHS’ existing obligations to protect the welfare of children. For example, the

TVPRA requires HHS to establish policies and programs to ensure that UACs are “protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.” 8 U.S.C. 1232(c)(1). Further, HHS operates under an Interim Final Rule, which describes HHS’ comprehensive approach to preventing, detecting, and responding to allegations of sexual abuse, sexual harassment, sexually inappropriate behavior. *See* Standards To Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 45 CFR part 411 (the “IFR”). Finally, in compliance with such IFR, ORR policies are designed to address any allegations of abuse swiftly and fully. As described in Section 5.5.2 of the ORR Guide, in addition to the routine monitoring process, ORR has an Abuse Review Team (ART) to review allegations of abuse (physical, sexual, negligent treatment) that are particularly serious or egregious. The team is composed of ORR staff with the appropriate expertise to assess and identify remedial measures to address these allegations, including ORR’s Monitoring Team, the Division of Health for Unaccompanied Children and ORR’s Prevention of Sexual Abuse Coordinator.

*Comment.* Various commenters wrote about the plight of Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual (LGBTQIA) and transgender and gender non-conforming (TGNC) children in custody. For brevity and because the vast majority of commenters used the acronym LGBTQ, HHS will do likewise; note that we also use the acronym LGBTQ consistent with ORR policy. Commenters expressed concern that LGBTQ youths would be mistreated and possibly abused if kept in custody for an extended period of time and one commenter was concerned in particular that their due process rights might be infringed. One commenter noted that youth who are identified as lesbian, gay, bisexual, or “other” reported a rate of sexual victimization by other youth in juvenile detention facilities at a rate of nearly seven times higher than straight youth.

*Response.* Even after publication of this rule, the IFR will continue to require ORR care provider programs to assess and periodically reassess UACs for risk of sexual victimization and abuse according to certain minimum criteria, including any gender nonconforming appearance or manner or identification as lesbian, gay, bisexual, transgender, questioning, or intersex and whether the UAC may

therefore be vulnerable to sexual abuse or sexual harassment; and train staff on communicating effectively and professionally with LGBTQ UACs. Further, as mandated by law, ORR places each UAC in the least restrictive setting that is in the best interests of the child. The rule is also consistent with, and would not abrogate existing ORR policies protecting LGBTQ youth from mistreatment and abuse. Per ORR Guide 1.2.1, when making a placement determination or recommendation, ORR and care providers consider whether the child or youth identifies as lesbian, gay, bisexual, transgender, questioning or intersex, or is gender non-conforming in appearance or manner. Moreover, section 3.5 of the ORR Guide articulates guiding principles for the care of UACs who identify as LGBTQ: “are treated with the same dignity and respect as other unaccompanied alien children”; “receive recognition of sexual orientation and/or gender identity”; “are not discriminated against or harassed based on actual or perceived sexual orientation or gender identity”; and “are cared for in an inclusive and respectful environment.” ORR care providers must “house LGBTQ youth according to an assessment of the youth’s gender identity and housing preference, health and safety needs, and State and local licensing standards.” *Id.* Section 3.5.5 of the ORR guide sets forth specific principles for housing LGBTQ children and youth in ORR care in a manner that treats them fairly and protects them from discrimination and abuse. Finally, Section 4 of the ORR Guide offers further guidance for ORR care providers in how to prevent, detect, and respond appropriately to sexual abuse and harassment, consistent with the IFR.

*Comment.* One commenter noted that the proposed rule failed to require that every child be placed in the least restrictive placement in the best interests of the child, as required by the TVPRA and subsequent HHS policies.

*Response.* The proposed rule is consistent with the TVPRA and UACs shall be held in the least restrictive setting appropriate to the UAC’s age and special needs, provided that such setting is consistent with the need to protect the minor or UAC’s well-being and that of others, as well as with any other laws, regulations, or legal requirements.

*Comment.* One commenter believes that children should be placed as soon as possible in homes with family or community members, not kept in shelters or government care for long periods.

*Response.* The proposed rule did not impact HHS’ policies or procedures for placing UACs in foster care, where UACs are placed in homes in the community, not in shelters or other ORR facilities. *See* ORR Policy Guide Sections 1.2.1 and 1.2.6. But, shelter placements are state-licensed and fully consistent with the FSA, which the rule implements.

#### Changes to the Final Rule

In response to public comments from multiple legal advocacy organizations that the FSA and TVPRA run in contradiction to each other on the placing of UACs in secure facilities based solely on the lack of appropriate licensed program availability, ORR is striking the following clause from § 410.201(e): “. . . or a State or county juvenile detention facility.”

Placement of an Unaccompanied Alien Child in a Licensed Program (45 CFR 410.202)

#### Summary of Proposed Rule

Section 410.202 of the proposed rule stated that ORR places a UAC into a licensed program promptly after a UAC is referred to ORR custody, except in certain enumerated circumstances. The FSA also recognized that in some circumstances, a UAC may not be placed in a licensed program. These circumstances include emergencies or an influx as defined in § 410.101 (in which case the UAC shall be placed in a licensed program as expeditiously as possible); where the UAC meets the criteria for placement in a secure facility; and as otherwise required by any court decree or court-approved settlement. Like the DHS portion of the proposed rule, proposed § 410.202 did not include the exception, which appears at paragraph 12(A)(4) of the FSA, that allows transfer within 5 days instead of 3 days in cases involving transport from remote areas or where an alien speaks an “unusual” language that requires the Government to locate an interpreter. As noted above, DHS has matured its operations such that these factors no longer materially delay transfer.

*Comment.* Commenters stated that unlike licensed shelter placements, many of ORR’s more restrictive settings closely resemble prison. Children may be under constant surveillance, required to wear facility uniforms, and have little control. These commenters stated that placement decisions have significant consequences for UACs.

*Response.* HHS recognizes that, as is consistent with paragraph 21 of the FSA and the TVPRA 8 U.S.C. 1232(c)(2)(A),

by definition a secure facility, such as a State or county juvenile detention facility, is a more restrictive setting than a shelter or a staff-secure facility. As stated in the proposed definition of “secure facility” (*see* § 401.101) and as is consistent with paragraph 21 of the FSA and the definition of “licensed program” in that agreement, such facilities do not need to meet the requirements of “licensed programs” as defined in § 401.101 under this subpart.

As the proposed rule indicates ORR only places a UAC in a secure facility in limited, enumerated circumstances where the UAC has been charged with a crime or is chargeable with a crime, or when the UAC is similarly a danger to self or others. This will be read in light of the other criteria in the regulations. In addition, the proposed rule is consistent with and does not abrogate ORR policies, under which the decision to place a UAC in a secure facility is then reviewed at least once monthly (*see* ORR Policy Guide, Section 1.4.2) to make sure that a less restrictive setting is not more appropriate.

The criteria for placement of UAC in a secure facility are discussed in accordance with section 410.203 of this part.

*Comment.* A commenter noted the importance of age determination because HHS only has jurisdiction over persons under 18 years of age.

*Response.* HHS agrees with the comment. Because HHS’ authority is only for individuals under 18, if a person is determined to be an adult, that person cannot be placed in HHS custody. Procedures for determining the age of an individual, and criteria for the treatment of an individual who appears to be an adult are discussed at greater length in accordance with §§ 410.700 and 410.701 of subpart G.

#### Changes to the Final Rule

HHS is not making any changes in the final rule to proposed § 410.202 which is consistent with the FSA and the TVPRA. However, HHS clarifies that it places UACs in licensed programs except if a reasonable person would conclude “based on the totality of the evidence and in accordance with subpart G” that the UAC is an adult.

Criteria for Placing an Unaccompanied Alien Child in a Secure Facility (45 CFR 410.203)

#### Summary of Proposed Rule

Section 410.203 of the proposed rule set forth criteria for placing UACs in secure facilities. HHS followed the FSA criteria, except that under the TVPRA, “[a] child shall not be placed in a secure

facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.” 8 U.S.C. 1232(c)(2)(A). With respect to these regulations, therefore, HHS did not include factor of being an escape risk, even though that was a permissible ground under the FSA for placement of a UAC in a secure facility.

In addition, HHS chose not to include in the proposed regulatory text the specific examples of behavior or offense that could result in the secure detention of a UAC under paragraph 21 of the FSA, because the examples are non-exhaustive and imprecise. For instance, examples listed in paragraph 21 of what may be considered non-violent, isolated offenses (e.g., breaking and entering, vandalism, or driving under the influence) could be violent offenses in certain circumstances depending upon the actions accompanying them. In addition, state law may classify these offenses as violent. Including these examples as part of codified regulatory text may inadvertently lead to confusion rather than clarity, and eliminate the ability to make case-by-case determinations of the violence associated with a particular act.

Under the proposed regulations, a UAC may be placed in a secure facility if ORR determines that the UAC has been charged with, is chargeable,<sup>39</sup> or has been convicted of a crime; or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act; and where ORR assesses that the crimes or delinquent acts were not:

- Isolated offenses that (1) were not within a pattern or practice of criminal activity and (2) did not involve violence against a person, or the use or carrying of a weapon; or
- Petty offenses, which are not considered grounds for a stricter means of detention in any case.
- While in DHS or ORR’s custody or while in the presence of an immigration officer, has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself/herself or others). Note: Because the FSA states that such acts would have occurred “while in INS custody” or “in the presence of an INS officer,” we proposed to evaluate such activities in either DHS or HHS custody or in the presence of an “immigration officer.”
- Has engaged while in a licensed program in conduct that has proven to be unacceptably disruptive of the

normal functioning of the licensed program in which the UAC is placed such that transfer is necessary to ensure the welfare of the UAC or others, as determined by the staff of the licensed program.

In addition, ORR proposed the following as warranting placement in a secure facility, even though the FSA does not specifically mention such criteria, if a UAC engages in unacceptably disruptive behavior that interferes with the normal functioning of a “staff secure” shelter, then the UAC may be transferred to secure facility. The FSA looks only to such disruptive behavior when it occurs in a “licensed” facility—which under the strict terms of the FSA does not include staff-secure facilities—even though all such facilities are indeed state-licensed, and the vast majority of such facilities receive the same licenses as non-secure shelters. Thus, under a strict interpretation of the FSA, UACs could be immediately transferred to a secure facility for disruptive behavior in a non-secure shelter, without first evaluating the UAC in a staff secure setting, where further disruption might lead a higher level of restriction in care.

The proposed rule would afford HHS the flexibility to first evaluate the UAC in a staff-secure setting, and then, if a UAC is significantly disrupting the operations of a staff-secure facility, transfer the UAC to protect the other children who remain within the staff secure facility.

In addition to the behaviors listed in paragraph 21 of the FSA as unacceptably disruptive—(e.g., drug or alcohol abuse, stealing, fighting, intimidation of others, etc.)—HHS adds to this list “displays sexual predatory behavior.”

In keeping with the July 30, 2018 order in *Flores v. Sessions*, the proposed rule stated that placement in a secure RTC may not occur unless a licensed psychologist or psychiatrist determined that the UAC poses a risk of harm to self or others. The proposed rule also stated that ORR may place a UAC in a secure facility if the UAC is “otherwise a danger to self or others,” which HHS will read in light of the other criteria in the FSA and is consistent with the plain language of the TVPRA. See 8 U.S.C. 1232(c)(2)(A).

Section 410.203 also sets forth review and approval of the decision to place a UAC in a secure facility consistent with the FSA. The FSA states that the determination to place a minor in a secure facility shall be reviewed and approved by the “regional juvenile coordinator.” The proposed rule used the term “Federal Field Specialist,” as

this is the official closest to such juvenile coordinator for ORR. (Note: Although not covered in the proposed rule, ORR also recognizes that the TVPRA at 8 U.S.C. 1232(c)(2)(A) delegates to the Secretary of HHS the requirement for prescribing procedures governing agency review, on a monthly basis, of secure placements. ORR directs readers to sections 1.4.2. and 1.4.7 of the ORR Policy Guide (available at: <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied>) for these procedurals under the TVPRA.)

*Comment.* Various organizations expressed concern that proposed § 410.203(b) fails to provide that HHS will review all secure placements monthly, as required by the TVPRA, and fails to specify how placements in staff secure or residential treatment centers will be reviewed. Commenting organizations also stated that this section fails to take into consideration the best interest of the child.

*Response.* HHS intends for proposed § 410.203(b) incorporates legal requirements such as monthly review of secure placements required by the TVPRA; this is indicated by the provision’s statement that review of secure placements is performed “consistent with legal requirements.” In addition, the rule is consistent with and does not abrogate current ORR policies and practices. Section 1.4.2 of the ORR Policy Guide states that, at least every 30 days, the care provider staff, in collaboration with the independent Case Coordinator and the ORR/Federal Field Specialist (FFS), reviews the placement of UACs not only into secure facilities, but also staff secure and RTC facilities in order to determine whether a new, less restrictive level of care is more appropriate. ORR refers the reader to Section 1.4.6 of the ORR Guide, which discusses RTC placements. Consistent with the TVPRA, see 8 U.S.C. 1232(c)(2)(A), ORR generally places UACs in the least restrictive setting that is in the best interest of the child. See ORR Policy Guide, Section 1.2.1.

*Comment.* One advocacy organization stated that the provisions in the proposed rule regarding when UACs can be placed in secure facilities violates the FSA because it allows HHS to place individuals in secure custody based on “danger to self or others”—a requirement not found in the FSA and so vague as to compromise the government’s obligation to place UACs in the least restrictive setting appropriate to their age and special needs.

*Response.* HHS notes that this language of “danger to self or others” as

<sup>39</sup> “Chargeable” means that ORR has probable cause to believe that the UAC has committed a specified offense.

permissible criteria for secure placements of UACs comes directly from the TVPRA. See 8 U.S.C. 1232(c)(2)(A). Additionally, as indicated in the proposed rule, the July 30, 2018 order in *Flores v. Sessions* mandated that placement of a UAC in a secure RTC may not occur unless a licensed psychologist or psychiatrist determined that the UAC poses a risk of harm to self or others. However, to respond directly to the concern that this provision is overly vague, HHS will add that nothing in the provision abrogates requirements to place UACs in the least restrictive setting appropriate to their age and special needs.

*Comment.* Several organizations stated that the language in § 410.203 is too vague and gives HHS broad discretion to place children in secure settings is contrary to the TVPRA and the FSA. A policy group stated, in particular, that the proposed regulation does not clearly identify specific behaviors or offenses that allow placement of a UAC in a secure facility. And where explanation of placement is authorized, it is not clear enough for children to understand because it is a broad and non-specific list, which is confusing for children and fails to put them on notice of the rules that may result in their being detained in a jail-like setting.

A couple of commenters discussed alleged missing provisions or provisions that should have been included related to the placement of children in restrictive settings. This included a proposal that HHS consider that in determining threats from children who the agency sought placement in a secure facility that those threats be “credible and verified” (as opposed to just credible threats as discussed in the proposed rule). Further, the commenter recommended removal of the term “disruptive behavior” as criteria for placement in a secure facility as the term is far too subjective. The commenter also stated that secure placements should include the consultation of a mental health specialist. Another commenter stated that HHS provisions to provide placement in the “least restrictive setting” require more specificity. Similarly, that commenter derided the use of criteria not directly related to violence as justification for placement in a restrictive setting and objected that there was no monthly review of these placements as required by 8 U.S.C. 1232(c)(1)(A).

*Response.* As explained in the proposed rule preamble, HHS chose not to include in the proposed regulatory text the specific examples of behavior or

offense that could result in the secure detention of a UAC listed in paragraph 21 of the FSA, because the examples are non-exhaustive and imprecise. For instance, examples listed in paragraph 21 of what may be considered non-violent, isolated offenses (e.g., breaking and entering, vandalism, or driving under the influence) could be violent offenses in certain circumstances depending upon the actions accompanying them. In addition, state law may classify these offenses as violent. Including these examples as part of codified regulatory text may inadvertently lead to confusion rather than clarity, and eliminate the ability to make case-by-case determinations of the violence associated with a particular act. Finally, ORR notes that the proposed rule does include a list of behaviors that may be considered unacceptably disruptive; HHS proposed to add “displays sexual predatory behavior” to the non-exhaustive list of examples provided at paragraph 21 of the FSA, including drug or alcohol abuse, stealing, fighting, and intimidation of others.

HHS discusses notification of secure placement further under § 410.206—Information for UACs concerning the reasons for his or her placement in a secure or staff secure facility. ORR also notes that all ORR programs have clinicians (see subpart D) that provide mental health services for UAC regardless of program type.

*Comment.* Two commenters also add that there is no consideration of disability as part of ORR’s placement determinations, particularly for secure facilities.

*Response.* ORR Federal Field Specialists review and approve all placements of UACs in secure facilities consistent with legal requirements. This review includes consideration of any disabilities identified as part of ORR’s intake assessment process for every UAC in care.

*Comment.* The commenter also found it unacceptable to move a child from “the least restrictive setting that is in the best interest of the child” for behaviors related to his or her disability without attempting first to ameliorate the need through the provisions of accommodations and individualized treatment.

*Response.* ORR acknowledges and appreciates the commenter’s feedback. The proposed rule did not impact ORR’s policies and procedures for ORR Federal Field Specialists to review and approve all placement changes of UAC in ORR care, including UACs with disabilities. (See ORR Policy Guide, Section 1.2.) Please see § 410.208 for information on

the proposed rule regarding special needs minors in ORR care.

*Comment.* Multiple organizations noted that research shows the children with disabilities in secure facilities may not have their individual needs met. One disability-rights organization objected that Section 504 of the Rehabilitation Act of 1973 is not addressed in the rule.

*Response.* ORR acknowledges and appreciates commenters’ feedback. The proposed rule did not impact ORR assessments or services based on each individual UAC needs, including any identified children with disabilities placed in any ORR facility, including secure facilities. ORR did not directly address Section 504 of the Rehabilitation Act of 1973, because the proposed rule did not impact ORR’s assessments or services for disabled children. ORR assessments and services for disabled UAC meet all requirements laid out in Section 504 of the Rehabilitation Act of 1973.

*Comment.* Another commenter stated that the rule does not provide adequate notice or opportunity to be heard in the event that a mental health professional believes that a youth poses a risk of harm and must be moved into a more restrictive setting. The commenter noted that such notice and opportunity to be heard is necessary to safeguard against violations of section 504 of the Rehabilitation Act of 1973.

*Response.* HHS agrees that, in situations where an individual poses a risk of harm to self or others, it is in the best interest of the individual, those detained with the individual, as well as the Federal employees overseeing the individual, to ensure a mental health professional’s concerns are addressed reasonably and efficiently. HHS provided specifically for this scenario (for purposes stemming from a licensed psychologist or psychiatrist determining the individual poses a risk of harm to self or others) in § 410.203(a)(4). Moreover, as noted in § 410.203(b), ORR Field Specialists review and approve all placements in this context consistent with the relevant legal requirements (including all relevant Acts of Congress).

#### Changes to the Final Rule

In response to public comments, HHS clarifies that it reviews placements of UACs in secure facilities on at least a monthly basis, and that, notwithstanding its ability under the rule to place UACs who are “otherwise a danger to self or others” in secure placements, this provision does not abrogate any requirements that HHS place UACs in the least restrictive

setting appropriate to their age and any special needs.

#### Considerations When Determining Whether an Unaccompanied Alien Child Is an Escape Risk (45 CFR 410.204)

##### Summary of Proposed Rule

Section 410.204 of the proposed rule described the considerations ORR takes into account when determining whether a UAC is an escape risk. This part is consistent with how the term “escape risk” is used in the FSA. Although the TVPRA removes the factor of being an escape risk as a ground upon which ORR may place a UAC in a secure facility, the factor of escape risk is still relevant to the evaluation of transfers between ORR facilities under the FSA as being an escape risk might cause a UAC to be stepped up from a non-secure level of care to a staff secure level of care where there is a higher staff-UAC ratio and a secure perimeter at the facility. Notably, an escape risk differs from a “risk of flight,” which is a term of art used in immigration law regarding an alien’s risk of not appearing for his or her immigration proceedings.

*Comment.* One organization noted that the TVPRA does not include escape risk as a factor for placement in a secure facility and disagrees with section 410.204 including this factor in placement decisions.

*Response.* HHS acknowledges that the TVPRA does not include escape risk as a factor for placement in a secure facility, and ORR does not propose to consider escape risk when determining whether to place UAC in a secure facility. As specified in proposed rule § 410.203, ORR will only place a UAC in a secure facility if the UAC has been charged with or is chargeable with a crime, or has been determined to pose a danger to self or others.

##### Changes to the Final Rule

HHS is not making any changes to proposed § 410.204 in the final rule.

#### Applicability of § 410.203 for Placement in a Secure Facility (45 CFR 410.205)

##### Summary of Proposed Rule

Section 410.205 of the proposed rule provided that ORR does not place a UAC in a secure facility pursuant to § 410.203 if less restrictive alternatives, such as a staff secure facility or another licensed program, are available and appropriate in the circumstances.

*Comment.* Several organizations argued the FSA and current laws encourage the placement of children in the least restrictive setting and favor release to a parent or family member.

They argue that the proposed rule is designed to place more children in the most restrictive setting, which is not in the best interest of the child. One commenter stated that the proposed rule eliminates the requirement that all UACs be housed in the least restrictive placement available.

*Response.* HHS agrees that the FSA and current laws encourage the placement of children in the least restrictive setting and that the FSA encourages release to a parent or family member. However, HHS disagrees that that the proposed rule is inconsistent with these goals. As the proposed rule indicates, for the protection of all UACs in its care and custody, HHS only places a UAC in a secure facility in limited, enumerated circumstances where the UAC has been charged with a crime or is chargeable with a crime, or when the UAC is a danger to self or others, which HHS reads in light of the other criteria in the FSA. When such placement criteria is met, a secure facility is in fact the least restrictive setting that is in the best interest of the child. Notably, ORR reviews the decision to place a UAC in a secure facility, in accordance with the TVPRA, at least once monthly to make sure that a less restrictive setting is not more appropriate. *See also* ORR Policy Guide, Section 1.4.2.

*Comment.* Several commenters contended that the proposed rule violates the TVPRA because it inserts availability and appropriateness factors as part of the placement decision. In 2008, Congress enacted a requirement that children under HHS custody “shall be promptly placed in the least restrictive setting that is in the best interest of the child.” 8 U.S.C. 1232(c)(2)(A). In making such placements, “the [HHS] Secretary may consider danger to self, danger to the community, and risk of flight.” *Id.* But “[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.” *Id.* These commenters argued that 8 U.S.C. 1232(c)(2)(A) accordingly prohibits secure placement based on issues unrelated to the best interests of the child, such as licensed shelter availability.

*Response.* Consistent with the TVPRA, 8 U.S.C. 1232(c)(2)(A), under the proposed rule, “ORR places each UAC in the least restrictive setting that is in the best interest of the child and appropriate to the UAC’s age and special needs, provided that such setting is consistent with its interests to ensure the UAC’s timely appearance before DHS and the immigration court.”

ORR will only place a UAC in a secure facility if the UAC has been charged with or is chargeable with a crime, or has been determined to pose a danger to self or others. Notwithstanding § 410.201(e) of the proposed rule, ORR does not place UAC in a secure facility such as a State or county juvenile detention facility based on issues unrelated to the best interests of the child, such as licensed shelter availability. ORR does not consider emergency or influx facilities to be secure facilities.

*Comment.* Several organizations stated that the final rule should have a mechanism that allows a minor to challenge their placement in a facility and whether the facility complies with FSA-required standards.

*Response.* HHS notes that nothing in the FSA contains the requirements commenters suggest with respect to an administrative appeal process (other than the hearings of paragraph 24(A) in the FSA). Nevertheless, pursuant to proposed § 410.206, within a reasonable period of time, minors transferred or placed in secure facilities are provided with a notice of the reasons for the placement in a language the UAC understands. In addition, ORR policy states that “After 30 days of placement in a secure or RTC facility, UAC may request the ORR Director, or the Director’s designee, to reconsider their placement. The ORR Director, or designee, may deny the request, remand the request to the ORR/FFS for further consideration, or approve the request and order the youth transferred to a staff secure or other care provider facility.” *See* ORR Guide, Section 1.4.7. Moreover, subpart H of this rule provides UAC with the opportunity to have an independent hearing officer review ORR’s decision as to whether the UAC presents a danger to self or others, or is a risk of flight.

##### Changes to the Final Rule

HHS is not making any changes in the final rule to proposed § 410.205 which is consistent with the FSA and the TVPRA.

#### Information for Unaccompanied Alien Children Concerning the Reasons for His or Her Placement in a Secure or Staff Secure Facility (45 CFR 410.206)

##### Summary of Proposed Rule

Section 410.206 of the proposed rule specified that, within a reasonable period of time, ORR must provide each UAC placed in or transferred to a secure or staff secure facility with a notice of the reasons for the placement in a language the UAC understands.

*Comment.* A policy group stated that the proposed regulation does not clearly identify specific behaviors or offenses that allow placement of a UAC in a secure facility. Further, the commenter stated that the notice of restrictive placement it is not clear enough for children to understand because it is a broad and non-specific list, which is confusing for children and fails to put them on notice of the rules that may result in their being detained in a jail-like setting.

*Response.* As explained in the proposed rule preamble, HHS chose not to include in the proposed regulatory text (see proposed rule, § 410.203) the specific examples of behavior or offense that could result in the secure detention of a UAC in paragraph 21 of the FSA because the examples are non-exhaustive and imprecise. ORR notes, however, that in addition to standard check boxes to indicate reasons why a UAC is being placed in a secure, RTC, or staff-secure facility, ORR's Notice of Placement in a Restrictive Setting as is required by proposed rule, § 410.206, provides a space for a narrative to be included which explains in greater detail why a particular restrictive setting is being recommended for a given UAC. The ORR form also specifically encourages a UAC to seek out assistance from his or her case manager at the ORR care provider facility, attorney, or legal service provider, if the UAC has have any questions about his or her placement, or their right to challenge it.

*Comment.* One commenter stated that the rule does not provide adequate notice or opportunity to be heard in the event that a mental health professional believes that a youth poses a risk of harm and must be moved into a more restrictive setting. The commenter stated that such notice and opportunity to be heard is necessary to safeguard against violations of section 504 of the Rehabilitation Act of 1973.

*Response.* HHS only places a UAC in an RTC if the youth is determined to be a danger to self or others by a licensed psychologist or psychiatrist. See ORR Policy Guide, Section 1.4.6. UACs have an opportunity to challenge such a placement in an RTC. Per ORR policy (see ORR Guide, Section 1.4.7): "After 30 days of placement in a secure or RTC facility, UAC may request the ORR Director, or the Director's designee, reconsider their placement. The ORR Director, or designee, may deny the request, remand the request to the ORR/FFS for further consideration, or approve the request and order the youth transferred to a staff secure or other care provider facility." The right to such administrative review is set forth on

ORR's Notice of Restrictive Placement form, which is provided to UACs. Included in the notice is information on the UAC's right to seek judicial review in a Federal District Court with jurisdiction and venue. Immediately upon placement in a secure facility, staff secure facility, or RTC, a UAC may ask a lawyer to assist him or her in filing a lawsuit in a Federal District Court, if he or she believes they have been treated improperly and/or inappropriately placed in a restrictive setting. A judge will decide whether or not to review the UAC's case to determine whether the UAC should remain in a restrictive setting. Requests for reconsideration of placement in a restrictive facility is a separate process and a separate determination from the 810 hearings, which determine whether a UAC is a danger to the community or flight risk if released from ORR custody.

Consistent with the Ninth Circuit Court of Appeals decision in *Flores v. Sessions* and paragraph 24A of the FSA, UACs also have the opportunity to seek a bond hearing with an immigration judge. This rule, at § 410.810, creates of an independent hearing officer process ("810 hearings") which would provide substantially the same "practical benefits" as a bond hearing under the FSA, as described by the Ninth Circuit. In a bond hearing, an immigration judge decides whether the child poses a danger to the community. Similarly, an independent hearing officer within HHS would decide on the same question in an 810 hearing under this rule. ORR would take such a decision into account when determining a UAC's continued placement while in care.

HHS notes that further information about the placement of special needs minors in ORR care is found in the discussion regarding proposed rule, § 410.208.

*Comment.* A commenter noted that there was no provision in the proposed rule for a periodic reassessment of a minor's placement at least every 30 days, as the commenter contends is required under 8 U.S.C. 1232(c)(2)(A), or for independent review of a placement decision that satisfies due process requirements. The commenter recommended the adoption of standards it developed for providing both of these protections, which the commenter believes are necessary to ensure secure placements are limited to extreme circumstances only.

*Response.* The proposed rule did not impact ORR's policies and procedures for the 30 day restrictive placement review, for all UACs placed in secure, staff secure, and RTCs. (See ORR Policy

Guide Section 1.4.2). HHS declines to adopt the standards suggested by the commenter because the rule implements and codifies both the FSA and other existing practices under the HSA and TVPRA.

*Comment.* Several commenters also expressed concern that the proposed rule § 410.206 weakened notice requirements for children placed in secure program.

*Response.* The proposed rule did not impact the notice requirements for children placed in secure programs. (See ORR Policy Guide Section 1.4.2)

#### Changes to Final Rule

HHS is not making any changes in the final rule to proposed § 410.206 which is consistent with the FSA.

Custody of an Unaccompanied Alien Child Placed Pursuant to This Subpart (45 CFR 410.207)

#### Summary of Proposed Rule

Section 410.207 of the proposed rule specified who has custody of a UAC under subpart B of these rules. The proposed regulation specified that upon release to an approved sponsor, a UAC is no longer in the custody of ORR. ORR would continue to have ongoing monitoring responsibilities under the HSA and TVPRA, but would not be the legal or physical custodian. See, e.g., 6 U.S.C. 279(b)(1)(L); 8 U.S.C. 1232(c)(3)(B). This interpretation accords with ORR's longstanding position, as well as provisions of the FSA (see e.g., paragraphs 15 through 17, discussing "release" from custody).

*Comment.* No public comments were submitted concerning this section of the proposed rule.

#### Changes to the Final Rule

HHS is not making any changes to the proposed rule.

Special Needs Minors (45 CFR 410.208)

#### Summary of Proposed Rule

In the proposed rule, ORR described ORR's policy regarding placement of a special needs minor. ORR also noted that an RTC may be considered a secure level of care and is discussed in proposed § 410.203.

*Comment.* Several comments submitted concerned the standards for ORR's care of children with disabilities. Two advocacy groups commented that the proposed regulations do not contain enough guidance regarding the consideration of a child's disability as part of a placement determination, and the provision which requires a psychologist or psychiatrist to determine whether a child is a danger

to themselves or others, is insufficient to protect children with disabilities.

Multiple legal and advocacy organizations noted that research shows that children with disabilities placed in secure facilities may not have their individual needs met. One of these commenters stated that the proposed rule should take into account studies suggesting youth with disabilities who are placed in secure facilities are at high risk of unmet health needs, fail to receive appropriate accommodations for their disabilities, and are subject to harmful conditions, including the use of restraints and solitary confinement. Another organization asserted that the proposed rule contains inadequate standards to address the needs of children with disabilities and fails to guarantee special education for children with disabilities, in conflict with the U.S. Supreme Court case *Plyler v. Doe*, 457 U.S. 202 (1982), and the Individuals with Disabilities Education Act. Another commenter, a disability-rights organization noted that Section 504 of the Rehabilitation Act of 1973 is not addressed in the rule.

Several organizations commented that education and special needs plans for UACs in ORR care are vague and that educational assessment needs to be defined. In addition, the organizations contended that the proposed rule needs to be more specific regarding how children's individualized educational needs will be met.

*Response.* Under the rule, ORR will individually assess each UAC to determine whether the UAC has special needs and place the UAC in the least restrictive setting appropriate to the UAC's age and individual special needs. The proposed language also requires ORR, whenever possible, to place a UAC with disabilities in licensed programs where children without special needs are placed but that can provide the services and treatment needed to accommodate such special needs. UACs are placed in more restrictive settings, such as a RTC, only if the facility is the least restrictive placement available that meets the needs of the UAC as required by the TVPRA. See 8 U.S.C.

1232(c)(2)(A). Moreover, consistent with the July 30, 2018 Order in *Flores v. Sessions*, § 410.203 states that "placement in a secure RTC may not occur unless a licensed psychologist or psychiatrist determines that the UAC poses a risk of harm to self or others."

All UACs in ORR custody are provided access to educational services while in care. Under § 410.402, all licensed programs must identify a UAC's special needs, including any specific problems that appear to require

immediate intervention, as well as develop an individualized educational assessment and plan for each minor. ORR care providers must provide educational services appropriate to the UAC's level of development, literacy level, and linguistic or communication skills in a structured classroom setting, which concentrate mainly on the development of basic academic competencies and secondarily on English Language Training (ELT). Further guidance regarding academic educational services provided to UAC is included in ORR Guide, section 3.3.5, which again is consistent with and not abrogated by the rule. Care providers adapt or modify local educational standards to develop curricula and assessments, which must reflect cultural diversity and sensitivity. Remedial education and after school tutoring is provided as needed. Academic reports and progress notes are included and updated in the UAC's case file.

#### Changes to the Final Rule

HHS is not making any changes to proposed § 410.208 in the final rule, which adopts the special needs provision as found in the FSA, paragraph 7.

#### Procedures During an Emergency or Influx (45 CFR 410.209)

##### Summary of Proposed Rule

Section 410.209 describes the procedures ORR follows during an emergency or influx. The FSA defines "emergency" and "influx." Consistent with the FSA, the proposed rule states that UACs should be placed in a licensed program as "expeditiously as possible."

HHS proposed a written plan describing the reasonable efforts it will take to place all UACs as expeditiously as possible into a licensed shelter when there is an influx or emergency consistent with proposed § 410.209.

*Comment.* HHS received several comments on the use of influx facilities when there are not enough beds at licensed facilities during an emergency or influx. Many individuals wrote that UACs should not be detained in unlicensed or non-state licensed "tent cities," but instead should be treated with respect and dignity.

Commenters were concerned with ORR's use of unlicensed soft-sided structures to house UACs during an influx, referring to them as "tent cities." Commenters were concerned about the location of the Tornillo Influx Care Facility, especially the distance from El Paso, available services, and accommodations. Another commenter

compared "tent cities" to Japanese and German internment camps.

The commenters highlighted the facility's exemption from state oversight and licensing requirements and described cramped detention conditions existing there. Several commenters argued that placement of UACs in such facilities would be contrary to the TVPRA and the HSA, and undermine the FSA.

*Response.* The FSA contemplates scenarios when the U.S. government's ability to place every UAC in a licensed facility is not possible during an emergency or influx. The HSA and the TVPRA do not prohibit the use of unlicensed facilities in some circumstances. The proposed rule defines those circumstances in § 410.101—Definitions.

When there is a sharp increase, or "influx," in the number of UACs entering the United States and Federal agencies are unable to transfer them into state-licensed, ORR-funded care provider facilities in a timely manner, HHS may place certain UACs at influx care facilities. HHS has detailed policies for when children can be sheltered at a temporary influx care facility. The minor must be a youth between 13 and 17 years of age; have no known special medical or behavioral health conditions; have no accompanying siblings age 12 years or younger; and be able to be discharged to a sponsor quickly—among other considerations. (See ORR Policy Guide: Children Entering the United States Unaccompanied, Section 1.3.5).

HHS is the primary regulator of temporary influx care facilities and is responsible for their oversight, operations, physical plant conditions, and service provision. While states do not license or monitor influx care facilities, they operate in accordance with applicable provisions of the FSA, HSA, TVPRA, interim Final Rule on Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Alien Children, and ORR policy and procedures, and contract requirements.

HHS monitors temporary influx care facilities through assigned Project Officers, Federal Field Specialists, Program Monitors, and an Abuse Review Team, and all have the authority to issue corrective actions if needed to ensure the safety and wellbeing of all children in HHS' care.

HHS chooses locations for temporary influx care facilities based on a number of factors relevant to child welfare, which included size, types of housing structures, and time considerations. HHS assesses possible influx sites for suitability to temporarily house UACs.

HHS also seeks to limit the use of soft-sided temporary influx structures except as a last resort to prevent UACs from lengthy stays in U.S. Border Patrol stations or to address any other emergent issues that could cause a temporary inability to use one of our regular shelters.

HHS strives to provide a quality of care at temporary influx care facilities that is parallel to our state-licensed programs. Children in these facilities can participate in recreational activities and religious services appropriate to the child's faith, and receive case management, on-site education, medical care, legal services, and counseling.

HHS' goal is to place as many UACs as possible into permanent state-licensed facilities or transitional foster care while their sponsorship suitability determinations or immigration cases are adjudicated (in the event there is no sponsor available).

#### Changes to the Final Rule

HHS is not making any changes in the final rule to proposed § 410.209.

#### 45 CFR Part 410, Subpart C, Releasing an Unaccompanied Alien Child From ORR Custody

This subpart covers the policies and procedures used to release, without unnecessary delay, a UAC from ORR custody to an approved sponsor.

#### 45 CFR 410.300—Release a UAC From ORR Custody to an Approved Sponsor Summary of Proposed Rule

In the proposed rule, HHS described the policies and procedures used to release a UAC from ORR custody to an approved sponsor.

*Comment.* HHS did not receive any comments on this section.

#### Changes to Final Rule

HHS adopts the standard in the proposed rule.

#### 45 CFR 410.301—Sponsors to Whom ORR Releases an Unaccompanied Alien Child

#### Summary of Proposed Rule

In the NPRM, HHS proposed that it would release a UAC to a sponsor without unnecessary delay when ORR determines that continued custody of the UAC is not required to either secure the UAC's timely appearance before DHS or the Immigration Courts or to ensure the UAC's safety or the safety of others. HHS also listed individuals (and entities) to whom ORR releases a UAC. HHS refers to the individuals and entities in this list as "approved sponsors," regardless of their specific

relationship with the UAC. The list of approved sponsors follows the order of preference set out in the FSA.

*Comment.* A few commenters disagreed with HHS' proposed language under § 410.301, which they believed afforded ORR broad authority to deny family reunification and raises serious due process concerns. For instance, the commenters pointed out that § 410.301 permits ORR to deny reunification on the basis that the child's sponsor will not secure the child's appearance before DHS or the Immigration Courts, which they believe improper. They also raised concerns that the proposed rule does not establish any process by which the child is protected from an erroneous decision by being provided a notice of such a determination; presented with evidence supporting ORR's determination; or given an opportunity to contest such a determination and to present their own evidence in opposition to ORR's determination.

Two commenters highlighted that the process also lacks a delineated timeline for decision-making or release. Multiple organizations argued that reuniting children with their families as quickly as possible is in the child's best interest. These organizations noted that it is in recognition of this interest that the FSA requires ORR to make "prompt and continuous efforts" towards family reunifications and to release children from immigration related custody "without unnecessary delay."

*Response.* As stated above, the purpose of this rulemaking is to implement the provisions of the FSA. ORR derived language on denying UAC release verbatim from paragraph 14 of the FSA, which in itself was intended to address and fully settle Constitutional concerns, including due process issues, on behalf of the full class of UACs in INS legal custody, now HHS legal custody. The FSA did not include any provisions for the process urged by commenters. Similarly, the TVPRA—which includes Congress' detailed protections for UACs in the legal custody of HHS—did not include the process for challenging reunification urged by some commenters. ORR nevertheless notes that the various protections specified by commenters are addressed by ORR's existing policies (see ORR Policy Guide, section 2.7). Additionally, ORR notes that each case is unique and release decisions, by necessity, must be based on multiple factors, some of which are outside the agency's control (e.g., the time it takes for a sponsor to complete a sponsor application). ORR addresses timelines for its decision-making process and release recommendations in policies

and procedures that interpret ORR's authorities and require that the decision-making process and release recommendations be made in a timely manner.

*Comment.* A commenter who is a former director of ORR stated that during his tenure at ORR, the agency interpreted (and implemented) the TVPRA mandate of placing UACs in the "least restrictive setting" to require that children be released from congregate care to parents, other family members, or other responsible adults ("sponsors") as promptly as possible. The commenter further stated that sponsors' requests for reunification were denied only in narrow circumstances where reuniting a child with the sponsor would not be in the child's best interest. He also objected to the Director-level review and approval policy of the current Administration as needlessly delaying the release of children from ORR custody, putting children at risk of considerable harm, and violating the TVPRA. The commenter said that in circumstances where even short delays can have serious implications for child well-being, the delays that necessarily accompany this new layer of review pose a serious risk of harm. He also asserted that the Director-level review for dangerousness of the entire category of children previously in staff-secure or secure placements serves no conceivable purpose and was put into place in a manner contrary to any notion of responsible agency administration and management.

*Response.* HHS notes that the language regarding denying release of a minor derives from paragraph 14 of the FSA, and does not specify a regulatory requirement for a Director-level review. Likewise, ORR's current release policy, see ORR Policy Guide, section 2.7, does not include such a mandate for Director-level review. Additionally, ORR has an appeals process for when sponsorship is denied in ORR Policy Guide, section 2.7.7. This rule does not affect the appeals process for denying sponsorship.

#### Changes to Final Rule

While recognizing that ORR policy includes some of the process urged by commenters, the purpose of this final rule is to implement provisions of the FSA. HHS accordingly is not deviating from the language of the proposed rule. The rule adopts the substantive terms of the corresponding release provisions of the FSA, paragraph 14.



45 CFR 410.302—Sponsor Suitability Assessment Process Requirements Leading to Release of an Unaccompanied Alien Child From ORR Custody to a Sponsor

Summary of Proposed Rule

In the proposed rule, HHS outlined the process requirements leading to release of a UAC from ORR custody to a sponsor (also referred to as a “custodian”). The FSA at paragraph 17 allows ORR the discretion to require a suitability assessment prior to release, and the TVPRA provides that ORR may not release a UAC to a potential sponsor unless ORR makes a determination that the proposed custodian is “capable of providing for the child’s physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian’s identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.” 8 U.S.C.

1232(c)(3)(A). As such, the proposed rule requires a background check, including at least a verification of identity for potential sponsors in all circumstances. In accordance with the FSA, under the proposed rule, suitability assessments can include an investigation of the living conditions in which the UAC would be placed; the standard of care he or she would receive; interviews of household members; a home visit if necessary; and, follow-up visits after the child’s release from care. Furthermore, where the TVPRA requires a home study, as specified in 8 U.S.C. 1232(c)(3)(B), the proposed regulations acknowledge such requirement. The FSA says that the proposed sponsor must agree to the conditions of release by signing a custodial affidavit (Form I-134) and release agreement. However, the Form I-134 is a DHS form, and ORR does not use this form. Therefore, the proposed rule would have the sponsor sign an affirmation agreeing to abide by the sponsor care agreement, which is the agreement and accompanying form ORR has used so that the sponsor acknowledges his or her responsibilities.

Further, consistent with the FSA and the TVPRA, ORR’s suitability assessment includes biographic background checks (such as public records checks and sex offender registry checks) of potential sponsors, including biological parents, and household members, as well as fingerprinting only as is needed to ensure that release of a UAC to prospective sponsors is safe. Of note is that, in many, if not most cases,

as well, while a sponsor may be a biological parent, the child arrived unaccompanied, and may not have lived with the parent for much or a significant portion of his or her childhood, so background checks remain important for safety reasons. Such background checks of all potential sponsors and household members are consistent with various state child welfare provisions. For example, all states require background checks for prospective foster care and adoptive parents, and kinship caregivers typically must meet most of these same requirements. See “Background Checks for Prospective Foster, Adoptive, and Kinship Caregivers,” available at: <https://www.childwelfare.gov/pubPDFs/background.pdf#page=2&view=Who> (Aug. 4, 2018). As of the time of the publication of the report, in 48 states, all adults residing in the home also were subject to background checks. A criminal records check for adult sponsors and other household members will check the individual’s name in State, local or Federal law enforcement agencies’ records, including databases of records for any history of criminal convictions. Moreover, nearly all states require a check of national criminal records. See also 42 U.S.C. 671(a)(20) (providing that states receiving Federal funding for foster care and adoption assistance provide “procedures for criminal records checks, including fingerprint-based checks of national crime information databases (as defined in section 534(e)(3)(A) 1 of title 28), for any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved for placement of a child.”).

In § 410.302(e), HHS ORR proposed a list of conditions and principles of release. ORR also invited public comment on whether to set forth in the final rule ORR’s general policies concerning the following:

1. Requirements for home studies (see 8 U.S.C. 1232(c)(3)(B) for statutory requirements for a home study);
2. Denial of release to a prospective sponsor, criteria for such denial, and appeal; and
3. Post-release services requirements.

*Note:* In accordance with the *Flores v. Sessions* July 30, 2018 court order, ORR stated in the preamble that it will not have a blanket policy of requiring post release services to be scheduled prior to release—for those UACs who required a home study—but will evaluate such situations on case-by-case basis, based on the particularized needs of the UAC as well as the evaluation of the sponsor, and whether the suitability of the sponsor may depend upon having post release services in place prior to any

release. It is not necessary to include the policy on post-release services being in place, discussed above, explicitly in the regulation text, as the requirement for release without “unnecessary delay” is already included in the substantive rule, and this process is an interpretation of that requirement. Current policies are set forth in the ORR Policy Guide available at <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-at>; Sections 2.4 through 2.7.

*Comment.* Some organizations disagreed with HHS’ proposed language under § 410.302 because they thought it lacked accountability and oversight for ORR and establishes discretionary factors ripe for discriminatory application. The commenters noted that § 410.302(a) fails to establish any timeline requirements or requirements for prompt release. One commenter noted that HHS lacked requirements to make continuous efforts at release, and referenced agency practice as opposed to statutory and *Flores* requirements.

*Response.* HHS wishes to reiterate that this final rule is intended to implement the terms of the FSA (and the TVPRA and HSA to the extent such statutes directly affect FSA provisions). It is not designed to address litigation related to children separated from their parents. HHS disagrees with commenters who indicated that the agency did not follow statutory or FSA requirements; the language in § 410.302 is verbatim of language in paragraph 18 of the FSA that the licensed program “shall make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor.” Issues of timeline requirements are not included in the FSA. With respect to separated children, HHS notes that this rule is intended to implement the FSA, and it is beyond the scope of this rulemaking to incorporate any requirements stemming from ongoing litigation. Such requirements govern how a Federal agency interacts with, monitors, and oversees its grantees and contractors and are more appropriately discussed and defined in ORR policy while this rule focuses exclusively on codifying the FSA.

*Comment.* Organizations and commenters raised concerns that § 410.302(b) may lead to discrimination on account of economic status due to the lack of specificity in describing what standard of care is satisfactory for reunification, and what living conditions would raise concerns. They argue that poverty alone should not prevent a child’s release from government custody.

*Response.* HHS disagrees with the commenter's characterization of this requirement. Paragraph 17 of the FSA states specifically that the suitability assessment may include: "verification of identity and employment of the individuals offering support." ORR notes that the employment check is only one factor among many in the suitability assessment to ensure that the potential placement is in the child's best interest. Poverty, alone, will not prevent a UAC's release, but the TVPRA prohibits HHS from releasing a UAC unless it determines that a potential sponsor is "capable" of caring for the minor's "physical and mental well-being." Part of such analysis requires determining the sponsor's means to do so, which may include employment.

*Comment.* Many commenters believed that § 410.302(c) allows ORR to unnecessarily and inappropriately require a further suitability assessment and delay a child's placement with a sponsor. Several organizations argued that information obtained by ORR during the suitability assessment of a sponsor should not be shared with DHS for immigration enforcement purposes. In addition, some organizations said that sponsors should receive notice of the additional requirements and an opportunity to contest their necessity or to satisfy concerns in an alternate manner. One commenter suggested HHS could get the information it needs through its own Central Index System or the Executive Office for Immigration Review Hotline, which provides immigration hearing information. The commenter argued that the procedures in the proposed rule are contrary to children's best interests, which the law requires HHS to prioritize.

*Response.* The FSA does not include provisions for sponsors contesting the necessity of additional conditions. Instead, paragraph 17 of the FSA provides the discretion for the agency to conduct a suitability assessment prior to release. Such suitability assessment may include interviews of household members and may require home visits. In addition, ORR adheres to the TVPRA, which states that, "[b]efore placing the child with an individual, the Secretary of Health and Human Services shall determine whether a home study is first necessary." 8 U.S.C. 1232(c)(3)(B). ORR policies similarly allow the Office to use its discretion to provide home studies when it is in the best interest of the child, see ORR Policy Guide, section 2.4. Home studies—a common practice in State foster care systems—ensure that a home is investigated, especially in cases where there is concern about the sponsor, or the UAC is especially

vulnerable.<sup>40</sup> The agency is required to balance timely releases with ensuring the safety of UACs, including that they are not released to traffickers or others who would abuse or exploit them. Further, HHS notes section 224(a) of DHS's current fiscal year 2019 Appropriations Act<sup>41</sup> bars DHS, except in certain limited circumstances, from taking certain enforcement actions "against a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor of an unaccompanied alien child ['UAC'] . . . based on information shared by [HHS]." <sup>42</sup>

ORR notifies sponsors following its policies and procedures on the home study process.

Lastly, with regard to obtaining information through the Central Index System, HHS notes that this system is actually maintained by the U.S. Citizenship and Immigration Service, an agency within DHS.

*Comment.* Commenters also referred to the expanded suitability assessments, as described in § 410.302(c) and in the Memorandum of Agreement (MOA) between ORR, ICE, and CBP concerning information sharing (see ORR-ICE-CBP Memorandum of Agreement Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (Apr. 13, 2018)), as unnecessary, likely to deter potential sponsors from coming forward, and violative of DHS's own privacy policy and the privacy rights of potential sponsors. One commenter stated that HHS and DHS have never convincingly articulated why immigration status determinations merit the privacy risk to parents and relatives. Several commenters believed that HHS' pre-MOA suitability assessments were sufficiently robust without expanding data collection and exchange and

<sup>40</sup> See [https://www.childwelfare.gov/topics/outofhome/foster-care/fam-foster/foster-care-home-studies/#sl\\_examples](https://www.childwelfare.gov/topics/outofhome/foster-care/fam-foster/foster-care-home-studies/#sl_examples) for discussion of home studies in foster care. The interstate compact on the placement of children (ICPC) state pages also allows a comparison of individual states with respect to requirements for foster care. The Texas state page shows that the state requires a home study even when a relative will be caring for a foster child. <http://icpcstatepages.org/texas/relativestudies/>. The page for California shows that relative caregivers must be licensed, must receive a home study, must receive a criminal records check, must receive a child abuse and neglect check, and that the wait time is "3-6 Months" for "Complete applications for licensure and/or approval that do not have complications," and that "This process may take longer based on delays resulting from criminal background checks, exceptions and waivers, and need for corrections to foster family homes." <http://icpcstatepages.org/california/relativestudies/>.

<sup>41</sup> Consolidated Appropriations Act 2019, Public Law 116-6, section 224, 133 Stat. 13.

<sup>42</sup> CONSOLIDATED APPROPRIATIONS ACT, 2019, Public Law 116-6, February 15, 2019, 133 Stat. 13.

argued that the proposed rule fails to justify why additional steps are necessary to assess sponsor suitability. To support the assertion that pre-MOA suitability assessment policies were sufficient, the commenters referenced three reports published by the Government Accountability Office (dated 4/26/2018, 2/5/2016, and 7/14/2015) recommending improvements to HHS' care of UACs and pointed out that none of the reports made recommendations calling for enhancements to HHS' sponsor suitability assessments. One commenter also referenced a report written by the Senate Permanent Subcommittee on Investigations (dated 8/15/2018) that focused on procedures for distant relatives or non-relatives but made no recommendations for procedures for parental or close relative sponsors. The commenters pointed out that neither the TVPRA or the FSA require HHS to collect immigration status information on sponsors or other adult members of the household. They argued that the expanded collection and sharing of information about potential sponsors' immigration status serves no legitimate purpose in that, per the ORR Policy Guide, immigration status is not used to disqualify a potential sponsor. They also mentioned that there are alternative methods to obtain immigration status information that does not involve ICE, such as USCIS's Central Index System or the Executive Office for Immigration Review Hotline. The commenters posited that the practice of using information collected under the MOA for immigration enforcement purposes deters and/or delays family reunification because potential sponsors, many of whom are in the United States without legal immigration status, fear coming forward to sponsor children. The commenters also theorized that individuals who are lawfully present, including U.S. citizens, may also be deterred from sponsoring UAC in order to avoid interacting with ICE or exposing others living with or near them who lack legal immigration status to potential immigration enforcement. One commenter highlighted that further complications can arise when a household member refuses to undergo a background check. The commenter explained that sponsors may be forced to choose between leaving their home and leaving their child or loved one in Federal custody. The commenters suggested that HHS restrict access and use of data only to the vetting of potential sponsors. The commenters stated repurposing the data will

contribute to the fear that interacting with any government agency will bring about an enforcement action.

*Response.* Consistent with the FSA and TVPRA, the proposed rule would codify the FSA standard to release UACs to sponsors promptly and without unnecessary delay. HHS disagrees with the commenters' assertion that additional information, such as information about a sponsor's immigration status, or fingerprinting in certain cases, is unnecessary. The TVPRA requires HHS to conduct a suitability assessment and is clear that the standards it requires (verification of the custodian's identity and relationship to the child, if any, as well as a determination that a proposed sponsor is "capable of providing for the child's physical and mental well-being," including an "independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child") are the *minimum* standards required. The TVPRA also sets forth a general principle that HHS "establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity." 8 U.S.C. 1232(c)(1).

In order to carry out the Department's mission to ensure safe release of UAC to their sponsors, while protecting vulnerable children from traffickers or others seeking to victimize or exploit them, ORR must be able to fingerprint or apply suitability assessments as appropriate. The rule does not require fingerprinting or immigration status checks for all cases; ORR uses the information from background check results to make release decisions in the child's best interest. ORR also engages in information sharing with other Federal agencies to ensure that children are protected from smugglers, traffickers, or others who might seek to victimize or otherwise engage the child in criminal, harmful or exploitative activity, as required by the TVPRA, 8 U.S.C. 1232(c)(1). HHS acknowledges that some requirements of suitability assessments and information sharing are factors that may contribute to a longer reunification process in some cases, however, HHS must balance its mandate to promptly release the child with its equally important mandate of ensuring that the child be released into a safe environment.

HHS continuously evaluates its UAC Program and operations. As part of this ongoing review process, ORR evaluated the effect expanded suitability

assessments had on its mission of safe and timely release of UACs. This included evaluation of whether the expanded biometric background checks, as described in the ORR-ICE-CBP Information Sharing Memorandum of Agreement (Apr. 2018), yielded new information that enabled ORR to identify child welfare risks that the office would not have found under the prior policy, as well as whether a correlation existed between the expanded biometric background checks and UAC length of care in ORR custody ("length of care" refers to the total time that a UAC is under ORR care and custody; whereas "length of stay" refers to a UAC's placement at one specific care provider facility and does not account for time a UAC may have been placed at another care provider facility). ORR then issued a series of four operational directives (one in December 2018, one in March 2019, and two in June 2019) that modified the suitability assessment process to achieve an appropriate balance between safety and timeliness under the operating conditions faced by ORR.

Under the operational directives, ORR completes individualized suitability assessments of sponsors without obtaining fingerprints from all household members, or all parent/legal guardian or close relative sponsors in appropriate cases. ORR also permits under certain circumstances the release of children to other relatives who were their primary caregivers prior to receiving the results of a fingerprinting background check. Further, ORR no longer requires verification of immigration status information before releasing UAC to sponsors, or mandates Child Abuse and Neglect (CA/N) checks unless there is a specific and substantial child welfare concern.

Congress has prohibited HHS from using funds provided in the Emergency Supplemental Appropriations for Humanitarian Assistance and Security at the Southern Border Act, 2019 (Pub. L. 116-26) or previously appropriated funding to reverse the procedures of the first three operational directives, unless the Secretary determines that a change is necessary to protect an unaccompanied alien child from being placed in danger. Further the Secretary is required to submit the justification for the change in writing to the HHS/Office of Inspector General and to Congress prior to implementation of the proposed change. *See* section 403 of Public Law 116-26.

HHS disagrees with the commenters' assertion that immigration status checks are unnecessary. While ORR does not use immigration status to disqualify a

proposed sponsor, ORR does use the proposed sponsor's immigration status to determine whether a sponsor care plan is necessary in the event the sponsor is required to leave the United States.

Additionally, HHS notes section 224(a) of DHS's fiscal year 2019 appropriations bars DHS from taking certain enforcement actions "against a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor of an unaccompanied alien child ['UAC'] . . . based on information shared by" HHS. Per the June 10, 2019 Operational Directive, case managers working with ORR grantee care providers are to share this information with persons subject to fingerprint background checks.

*Comment.* Another commenter urged HHS to resist cooperating with DHS enforcement activities relating to sponsors, citing several immigration related contexts in which access to data has been limited to further a greater societal need. This commenter shared that numerous police departments resist working with or sharing information with immigration enforcement entities because doing so has demonstrably limited their ability to respond to crime; that individuals who applied for Deferred Action for Childhood Arrivals (DACA) were promised that the data in their DACA applications would not be proactively shared with ICE for enforcement purpose; and that there are also restrictions on what data the Internal Revenue Service (IRS) can share with DHS, despite mounting pressure to enable DHS to use IRS data for enforcement purposes. Similarly, another commenter proposed that HHS require information that relates to sponsors' and household members' criminal status and immigration status be sealed upon the conclusion of a suitability assessment.

*Response.* The MOA and information sharing with other agencies is not the subject of the FSA and the rules implementing such Agreement. In addition, HHS does not control how another Federal agency may use information HHS shares in order for HHS to carry out its FSA and/or TVPRA requirements. However, HHS notes that section 224(a) of DHS's fiscal year 2019 appropriations bars DHS from taking certain enforcement actions "against a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor of an unaccompanied alien child ['UAC'] . . . based on information shared by [HHS]."

*Comment.* One organization asserted that HHS would be violating the Fair Information Practice Principles (FIPP)

and the privacy rights of potential sponsors by using information from background checks to deport sponsors and other relatives. The commenters cited an April 27, 2017, memorandum issued by DHS in which DHS extended FIPPs protections to all persons regardless of citizenship or legal status; the commenters stated that HHS is aiding DHS in violating the spirit of two of the FIPPs principles: Individual participation and use limitation.

The commenters believe that meaningful consent is impossible here because HHS presents parents with a Hobson's choice: Either consent to the release of your personal information to DHS and face possible deportation, or allow your child to languish in Federal custody until he or she turns 18 and is transferred into ICE custody.

*Response.* HHS disagrees that any information it shares with DHS would violate FIPPs. Once again, HHS does not share information with DHS for law enforcement purposes and notes that section 224(a) of DHS's fiscal year 2019 appropriations bars DHS from taking certain enforcement actions "against a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor of an unaccompanied alien child ['UAC'] . . . based on information shared by [HHS]." Additionally, HHS' March and June 10, 2019 Operational Directives, specifically exempts the vast majority of parent (and legal guardian) and close relative sponsors from fingerprint background check requirements.

*Comment.* The commenters pointed out that § 410.302(f) of the proposed rule permits ORR to deny reunification on the basis that the child's sponsor will not secure the child's appearance before DHS or the immigration courts; does not establish any process by which the child may be protected from an erroneous decision; or be provided notice of such a determination or the evidence used to make it.

One organization proposed expanding the use of affidavits to require sponsors of children to submit sworn statements attesting that their homes are safe for children. Additionally, the commenter proposed that HHS create an appeals process for denying sponsorship and produce aggregated annual reports on sponsors it denies. Another commenter urged HHS to put requirements regarding home studies, denial of release to sponsors, and post release services in the policy and procedure guide, not the final rule.

*Response.* HHS notes that the language regarding denying release of a minor derives from paragraph 14 of the FSA. HHS refers readers to earlier

responses regarding including additional process or timelines that were not outlined or included in the FSA. Regarding the various denial procedures specified by commenters, the safety of UACs and others is paramount when deciding whether to approve or deny release to a sponsor, and the sponsor denial procedures which ORR implements appear in section 2.7 of the ORR Policy Guide. ORR notes that it is not possible to have specific timeframes for release because each case is unique, and decisions are based on multiple factors. However, ORR will address timelines for decision-making or release in policies and procedures interpreting the regulations with the understanding that all decisions be made in a timely manner. Historically, ORR utilizes a sponsor care agreement, in which the sponsor signs and affirms responsibility to provide for the physical and mental well-being of the minor, and the proposed rule will not affect this agreement. To ensure a sponsor's home is safe and appropriate for a UAC, ORR has policies and procedures in place to conduct a home study (see Section 2.4.2 of the ORR Policy Guide) and to provide post release services (see Section 6.2 of the ORR Policy Guide). ORR also has an appeal process for denying sponsorship (see section 2.7.7 of the ORR Policy Guide). The rule does not impact the requirements regarding home studies, post release services, and denial of release to sponsors in ORR's policies and procedures, nor the aggregated data reported by ORR in annual reports.

#### Changes to Final Rule

The rule adopts the substantive terms of the corresponding release and suitability provisions of the FSA, paragraphs 14 and 17. However, in response to commenters' concerns, HHS clarifies that the licensed program providing care for a UAC shall make continual efforts at family reunification as long as the UAC is in the care of the licensed program.

#### 45 CFR Part 410, Subpart D, Licensed Programs

##### 45 CFR 410.400—Purpose of This Subpart

#### Summary of Proposed Rule

In this subpart, HHS described the standards that licensed programs must meet in keeping with the FSA, including the general principles of the settlement agreement of treating all minors in custody with dignity, respect, and special concern for their particular vulnerability.

*Comment.* A commenter said that the United States government should utilize international rights-based standards for the care and treatment of children, who need special protections given their vulnerability.

*Response.* HHS notes that the proposed rule does not replace the requirements ORR has for licensed programs to provide a high-quality standard of care as outlined in ORR's Policy Guide. Rather, the rule adopts the FSA's minimum standards for licensed programs, found at Exhibit 1. Please see the introduction to the ORR Policy Guide and section 3.3 of the ORR Policy Guide for more information about ORR's special protections for vulnerable children.

#### Changes to the Final Rule

HHS is not making any changes in the final rule to § 410.400.

#### 45 CFR 410.401—Applicability of This Subpart

##### Summary of Proposed Rule

This subpart applies to all ORR licensed facilities providing care in shelters, staff secure facilities, residential treatment centers, or foster care and group homes.

*Comment.* Some commenters cited research indicating that the best practice is to place immigrant youth in foster family placements and not large detention or shelter settings. A different commenter suggested that children be placed in orphanages until they reached a certain age.

*Response.* ORR has foster care programs for some immigrant youth, and the proposed rule does not impact minimum standards for those programs. See Exhibit 1 of the FSA; see also ORR Policy Guide, Sections 1.4.4 and 3.6. ORR does not place children in orphanages; orphanages in the U.S. have been replaced by foster care systems.

#### Changes to the Final Rule

HHS is not making any changes in the final rule to § 410.401.

#### 45 CFR 410.402—Minimum Standards Applicable to Licensed Programs

##### Summary of Proposed Rule

In this subpart, ORR described the specific minimum standards of care each licensed program must follow.

Section 410.402 reflected the minimum standards of care listed in Exhibit 1 of the FSA, which are consistent with the *Flores v. Sessions* Court order of July 30, 2018, as they require that licensed programs comply with applicable state child welfare laws and regulations and that UACs be

permitted to “talk privately on the phone, as permitted by the house rules and regulations.” ORR expected licensed programs to easily meet those minimum standards and, in addition, to strive to provide additional care and services to the UACs in their care.

*Comment.* Many commenters stated that holding children in facilities that are not licensed by state child welfare agencies is inhumane and dangerous. Several commenters suggested that the proposed rule is vague and would harm children by overturning longstanding conditions that the government previously agreed to and which have effectively protected children.

*Response.* The rule adopts the FSA’s provisions regarding placement of UACs in state-licensed programs. Each licensed program must meet the minimum standards outlined by the FSA, which will effectively protect children.

*Comment.* One commenter urged HHS and DHS to protect the FSA, stating that knowingly exposing migrant children to prison like conditions, while simultaneously removing existing mechanisms for court monitoring and independent oversight, would be a deliberate violation of their human rights.

*Response.* ORR’s standards for licensed care provider programs are adopted from the FSA. For the UAC program, all licensed facilities must meet the minimum standards set forth in Exhibit 1 of the FSA.

*Comment.* Commenters noted that even under the current requirements around licensing, conditions could result in trauma. Commenters contend that children’s rooms are cramped and subject to uncomfortable temperatures and they cannot access medical attention right away. Commenters stated that unlike licensed shelter placements, many of ORR’s more restrictive settings closely resemble prison. Children may be under constant surveillance, required to wear facility uniforms, and have little control.

*Response.* In § 410.402 of the proposed rule, HHS outlined all the minimum standards applicable to licensed care provider programs for children in ORR’s care, and included requirements to comply with child welfare laws and regulations and all State and local building, fire, health, and safety codes. These minimum standards were adopted directly from Exhibit 1 of the FSA. Further, the proposed rule is consistent with and does not abrogate ORR’s policies and procedures for UAC services, including items provided to each UAC, safety

planning, and living arrangements (see ORR Policy Guide, Section 3).

*Comment.* Several commenters wrote about allegations of abuse taking place in detention facilities. They also mentioned allegations of abuse occurring within ORR custody such as in Southwest Key facilities in Arizona. Commenters also submitted an article from *Reveal* (Aura Bogado, Patrick Michels, Vanessa Swales, and Edgar Walters, published June 20, 2018) that detailed several allegations of abuse at shelters serving children in ORR custody, including abuse allegations at Shiloh Treatment Center in Texas. These commenters expressed their concern that the new rule would allow for longer periods of detention, which would raise the risk of abuse.

*Response.* HHS takes any and all allegations of abuse of UACs seriously. The proposed rule will not change ORR’s standards of care or reporting requirements. See IFR; ORR Guide, sections 3, 4, and 5.

*Comment.* Commenters wrote that many of the migrants who arrive in the United States have experienced trauma and thus, it is important for facilities to provide trauma-informed care to migrants to help them heal and achieve self-sufficiency.

*Response.* The proposed rule does not affect ORR’s mental health services for UACs. It adopts the FSA’s requirement that licensed programs provide appropriate mental health interventions when necessary and weekly individual counseling sessions by trained social services staff. Individual counseling sessions address crisis-related needs, including trauma. See also ORR Guide, section 3.3 for more information on counseling services for UAC.

*Comment.* Several commenters argued that education and special needs plans are vague and that educational assessment needs to be defined. In addition, they contended that the proposed rule needs to be more specific regarding how children’s specific education needs will be met. One commenter noted that few children, if any, are screened for disability-related issues upon transfer from ICE to ORR custody. Another commenter advocated that ORR should take into account the special needs of children, as is required under the Individuals with Disabilities Education Act (34 U.S.C. 1400 *et seq.*) and 34 CFR 300.7.

*Response.* The provision adopts the standards of Exhibit 1, including a requirement for licensed programs to deliver services in a manner sensitive to the complex needs of each individual UAC. HHS takes into account the special needs of children, through

education assessments and education services. See ORR Guide, sections 3.3 and 3.3.5. The proposed rule will not affect assessments and services.

*Comment.* One medical faculty group recommended that HHS strive to reduce trauma among families by adopting Substance Abuse and Mental Health Services Administration (SAMHSA) guidelines for a trauma-informed approach, which include: (1) Safety; (2) trustworthiness and transparency; (3) peer support; (4) collaboration and mutuality; (5) empowerment, voice and choice; and (6) sensitivity to cultural, historical, and gender issues. The commenters believe that the proposed changes to current regulations violate standards of trustworthiness, transparency, collaboration, and empowerment, and they and they urge that the current FSA standards be retained.

*Response.* HHS notes that it provides care for UACs, not adults. The proposed rule does not impact ORR’s policies and procedures for ORR services to UACs, as outlined. The proposed rule keeps the FSA minimum standards for licensed facilities. For responses regarding DHS FRCs, refer to Section 8 “Detention of Families.”

*Comment.* Several commenters argued that HHS omitted certain minimum standards. For instance, one organization found the minimum standards at section 410.402 did not provide sufficient safeguards for children’s health and safety, while another contended that HHS does not address the educational service requirement. Another interest group commented that the minimum standards do not address basic services such as the provision of food, water, and medical care.

*Response.* HHS notes that the proposed rule keeps the FSA standards for licensed facilities, including the provision of food, water, and medical care. The proposed rule does not impact the safeguards for child health and safety. See ORR Guide, sections 3.3 and 3.4. ORR’s policies and procedures also address the education service requirement. See ORR Guide, section 3.3.5. The proposed rule does not impact ORR’s education services.

*Comment.* An organization representing multiple welfare agencies recommended that HHS include trauma screenings and developmental learning; that outdoor activity time frames be expanded; that clinical services be trauma-informed; that celebration of cultural and religious celebrations be included; and that internet access for correspondence be required.

*Response.* HHS will address specific changes to UAC services through its policies and procedures.

*Comment.* Another organization found that service provisions in the proposed rule did not address the needs of victims of violence and sexual abuse, victims who are most likely going to be women and children.

*Response.* Because it adopted the provisions of Exhibit 1 of the FSA, the proposed rule did not change ORR's mental health services for UAC in care, including weekly individual counseling sessions by trained social work staff. Individual counseling sessions address any crisis-related needs, including sexual abuse and violence. *See* ORR Policy Guide, section 3.3.

*Comment.* One commenter contended that "the proposed rules are, at worst, expressly prohibited by the FSA and, at best, incompatible with the letter and spirit of the agreement." It also argued that the proposed new layer of Federal rules was duplicative of State law requirements already in place.

*Response.* HHS disagrees that the rule is prohibited by or incompatible with the FSA. In fact, the proposed rule adopts the FSA's minimum standards for ORR licensed facilities. HHS recognizes that the proposed rule may be duplicative of State licensing requirements in some respects, and any duplication issues will be addressed in ORR policies and procedures.

*Comment.* Several commenters asserted that UACs are housed in prison-like conditions, sleeping on cement floors, using open toilets, and suffering from exposure to extreme cold and insufficient food and water.

*Response.* HHS believes these public comments specifically refer to allegations about CBP facilities (see § 236.3(g)). HHS provides living standards meeting the minimum standards of the FSA. The proposed rule, as well as ORR policies and procedures, address food and water for UACs in care.

*Comment.* Many commenters and organizations argued the rule removes child protections set in both U.S. child welfare standards and the FSA, undermining the safety, development, and well-being of children. The commenter argued that the procedures that the proposed rule would codify are contrary to children's best interests, which the law requires HHS to prioritize.

One commenter stated harms may surface or be aggravated when unaccompanied minors are placed in confined, institutional settings and are separated from family members and other community affiliations.

*Response.* HHS notes that the proposed rule adopts FSA standards for licensed facilities. It requires licensed facilities to comply with all applicable state child welfare laws and regulations. The proposed rule also did not change ORR's services for UAC, which prioritize safety, development, and well-being of children. ORR's services for UAC are outlined in section 3.3 of the ORR Policy Guide. The proposed minimum standards for licensed facilities do not change ORR's policies for UACs to have a minimum of two phone calls per week with their family, and access to community outings. Please see section 3.3 of the ORR Policy Guide for more details.

*Comment.* A commenter advocated hiring of Spanish speaking counselors to hear asylum claims and provide education on birth control.

*Response.* HHS notes that it is not an immigration enforcement or adjudication agency, and does not hear asylum claims. The proposed rule did not impact HHS' services for UACs, and it adopts the FSA's requirement to deliver services in a manner sensitive to UACs' cultures and native languages. The proposed rule did not impact ORR's UAC family planning services. *See* ORR Guide, section 3.3.

*Comment.* A commenter suggested that ICE and ORR consider issuing guidance to contractors, non-profits and faith-based organizations that are tasked with assisting the Federal Government in the care or education of immigrant youth.

*Response.* HHS notes that ORR already issues guidance in the form of policies and procedures to the grantees it funds to support the provision of care and custody to UACs in its custody. The minimum standards ORR communicates are based on the FSA's minimum standards, which the proposed rule has adopted. As a result, the proposed rule did not impact ORR's guidance to contractors, non-profits, and faith-based organizations regarding services for UAC. For more information on ORR's guidance for UAC services, please see section 3.3 of the ORR Policy Guide.

*Comment.* One commenter said that children, whether unaccompanied or accompanied, should receive timely, comprehensive medical care that is culturally and linguistically-sensitive by medical providers trained to care for children. The commenter said that trauma-informed mental health screening should be conducted once a child is in the custody of US officials via a validated mental health screening tool, with periodic re-screening, additional evaluation, and care available for children and their parents.

*Response.* The proposed rule did not impact medical services or mental health services for UAC, which are culturally- and linguistically-appropriate as required by the FSA. *See also* ORR Guide, sections 3.4 and 3.3. The proposed rule does not impact ORR's mental health screening tools.

*Comment.* One organization objected that the proposed rule did not include provisions for ensuring availability of licensed programs in geographic areas where children are apprehended.

*Response.* The proposed rule did not impact the location of ORR licensed programs, nor the cultural and linguistic requirements for UAC services in ORR care.

*Comment.* One commenter is concerned that the proposed rule will put LGBTQ youth in more restrictive settings, increasing their vulnerability to abuse. Other commenters noted that due to negative stereotypes about LGBTQ people as being more likely to engage in coercive sexual activity, LGBTQ youth are more likely than their straight and cisgender counterparts to face criminal consequences for consensual sexual activity. Commenters also asserted that, in the juvenile justice system, LGBTQ youth are sometimes even classified as sexual offenders at intake.

*Response.* HHS recognizes that LGBTQ youth may have unique needs and concerns, which its care providers must provide for, under both the FSA and the proposed rule. In addition, the IFR requires staff training and efforts to protect LGBTQ youth from abuse. Further, the proposed rule is consistent with and does not abrogate existing ORR policies to protect and care for LGBTQ youth. *See* ORR Guide, section 3.5. The proposed minimum standards for licensed facilities do not impact the quality of care for these vulnerable youth.

*Comment.* One commenter claimed that the proposed rule is immoral as well as illegal under international law. The commenter cited to a portion of Article 12 of the Universal Declaration of Human Rights which states: "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honor or reputation. Everyone has the right to the protection of the law against such interference or attacks."

*Response.* HHS notes that the proposed rule adopts the FSA's minimum standards for licensed programs, which explicitly include a UAC's reasonable right to privacy. Because the rule adopts the FSA's standards, this provision does not impact the privacy standards set forth by the FSA for licensed facilities.

*Comment.* One organization recommended the government immediately provide minors and UACs who are taken back into custody with an opportunity to contact family members as well as their attorneys.

*Response.* As stated in both the FSA and the proposed rule, all UACs are provided the opportunity to talk privately on the phone subject to house rules. The proposed minimum standards for licensed facilities do not change ORR's policies for UAC to have a minimum of two phone calls per week with their families, and unrestricted access to preprogrammed phone to contact legal service providers. Please see section 3.3 and 4.10.1 of the ORR Policy Guide for more details.

*Comment.* One commenter noted that in a study of immigration court cases involving unaccompanied minors over a two year period, the presence of an attorney proved crucial to the fate of the children in those cases. In nearly three quarters of the cases (73 percent) where the child was represented, the court allowed the child to remain in the United States. The child was ordered removed in only 12 percent of these cases while the remaining 15 percent filed a voluntary departure order. Where the child appeared in immigration court alone without legal representation, only 15 percent were allowed to remain in the country. The rest of the unrepresented minor children in immigration court were ordered deported, 80 percent through the entry of a removal order, and 5 percent with a voluntary departure order.

Several commenters cited government statistics<sup>43 44</sup> that show that between 1997–2017, border arrests decreased from 1,412,953 to 310,531, while the number of border agents increased from 6,895 to 19,437. For unaccompanied children's cases in FY2017, nearly 60% were unrepresented.<sup>45</sup> Without an

attorney, children are five times more likely to be deported.<sup>46</sup>

*Response.* HHS notes that the proposed rule does not change ORR's policies for UAC in licensed facilities to have access to legal service providers. The proposed rule for minimum standards in licensed facilities states UAC in licensed facilities receive "Legal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the government, the right to a removal hearing before an immigration judge, the right to apply for asylum or to request voluntary departure in lieu of removal."

*Comment.* Another commenter supported locating children in facilities near relatives slated to receive custody, and streamlining the custody process.

*Response.* The proposed rule does not impact the location of ORR licensed programs, nor the procedures to approve release to appropriate sponsors.

#### Changes to the Final Rule

HHS is not making any changes in the final rule to § 410.402.

#### 45 CFR 410.403—Ensuring That Licensed Programs are Providing Services as Required by These Regulations

In this subpart, HHS describes how ORR will ensure licensed programs are providing the services required under § 410.402. As stated in this section, to ensure that licensed programs continually meet the minimum standards and are consistent in their provision of services, ORR monitors compliance with these rules. The FSA does not contain standards for how often monitoring shall occur, and this regulation does not propose to do so. At present, ORR provides further information on such monitoring in section 5.5 of the ORR Policy Guide (available at: <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-5#5.5>).

*Comment.* One commenter stated that having State licensing is important to ensure that facilities are investigated and violations are brought to light. The commenter noted that the Texas State health regulators documented roughly 150 standards violations at more than a dozen Southwest Key migrant children shelters across Texas, including: Children left unsupervised and harming themselves; staff members belittling children and shoving them; keeping

kids in un-air conditioned rooms in hot weather; and improper medical care. In the past five years, the commenter stated, police have responded to at least 125 calls reporting sex abuse offenses at shelters in Texas that primarily serve immigrant children, though psychologists have said that such records likely undercount the problems because many immigrant children do not report abuse for fear of affecting their immigration cases.

Commenters also cited an investigative report claiming that the Federal Government continues to place migrant children in for-profit residential facilities where allegations of abuse have been raised and where the facilities have been cited for serious deficiencies. Allegations include failure to treat children's sickness and injuries; staff drunkenness; sexual assault; failure to check employees' backgrounds; failure to provide appropriate clothing for children; drugging; and deaths from restraint. According to the commenters, few companies lose grants from DHS and HHS based on such allegations.

*Response.* HHS takes all and any allegations of abuse of UAC seriously. The proposed rule did not change ORR's standards of care of UAC and reporting requirements, as outlined in sections 3, 4, and 5 of the ORR Policy Guide. As under the FSA, licensed programs operating under the proposed rule are subject to state licensing standards, monitoring, and investigations. In addition, the proposed rule would not impact ORR's monitoring of licensed facilities for compliance with ORR policies and procedures, which occurs in addition to state monitoring. Please see section 5.5 of the ORR Policy Guide for more information on ORR monitoring of licensed facilities.

*Comment.* One commenter advocated HHS and other Federal departments should be held accountable for the fear and life-long psychological damage the commenter believes is being inflicted on alien minors coming into this country.

*Response.* HHS is committed to the physical and emotional safety and wellbeing of all children in ORR's care. HHS recognizes that many children and youth who come into the United States unaccompanied have experienced traumatic childhood events and that migration and displacement can contribute significantly to ongoing stressors and trauma in children. ORR care providers are trained in techniques for child-friendly and trauma-informed interviewing, assessment, and observation, and they deliver services in a manner that is sensitive to the age, culture, native, language, and needs of each child. In addition, when

<sup>43</sup> United States Border Patrol, Nationwide Illegal Alien Apprehensions Fiscal Years 1925–2017, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Apps%20FY1925-FY2017.pdf>.

<sup>44</sup> United States Border Patrol, Border Patrol Agent Staffing by Fiscal Year, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Staffing%20FY1992-FY2017.pdf>.

<sup>45</sup> See TRAC Immigration, "Juveniles—Immigration Court Deportation Proceedings" Tracker, <http://trac.syr.edu/phptools/immigration/juvenile/>. Select "Fiscal Year Began" from first drop-down menu and click "2017"; select "Outcome" from the middle pull-down menu, click "All"; select "Represented" from the last drop-down menu. Starting in FY2018, cases in TRAC include all juveniles, unaccompanied children and children who arrive as a family unit. This change was made because it is no longer possible to reliably distinguish these two separate groups in the court's records.

<sup>46</sup> Syracuse University, TRAC Immigration, "Representation for unaccompanied children in immigration court" (Nov. 24, 2014), <http://trac.syr.edu/immigration/reports/371/>.

discharging UACs, ORR may connect them with ongoing services as appropriate, for up to six months, at the discretion of the sponsor.

#### Changes to the Final Rule

HHS is not making any changes in the final rule to § 410.403.

#### 45 CFR Part 410, Subpart E— Transportation of an Unaccompanied Alien Child

#### 45 CFR 410.500—Conducting Transportation of an Unaccompanied Alien Child in ORR's Custody

#### Summary of Proposed Rule

In the proposed rule, HHS described how ORR conducts transportation for UACs in ORR's custody, substantively adopting the two provisions of the FSA that govern transportation. ORR proposed that UACs cannot be transported with unrelated detained adult aliens. The proposed rule also stated that when ORR plans to release a UAC from its custody under family reunification provisions (found in §§ 410.201 and 410.302), ORR assists without undue delay in making transportation arrangements. ORR may, in its discretion, provide transportation to a UAC.

#### Public Comments and Response

*Comment.* One commenter recommended that if an emergency or influx changes transportation rules, then such guidance, which is alluded to in the regulation, should be published and open to public comment or included in the regulatory text. The commenter is concerned that future guidance may not align with the FSA after the FSA is terminated.

*Response.* The proposed rule did not change the transportation rules for ORR transporting UACs during an emergency or influx. All ORR policies on influx facilities, including transportation, are publically online, in Section 1.7 of the ORR Guide. The proposed rule did not change ORR's policy of posting guidance publically online, including any future guidance that aligns with the proposed rule and the FSA, in the ORR Policy Guide.

*Comment.* An individual commenter stated that DHS did not define "operationally feasible," in § 236.3(f) for purposes of the requirement to transport and hold children separately from unrelated adults, and that DHS and HHS should clarify the percent of time they expect it will take to be operationally feasible to successfully transport and hold UAC separately from unrelated adults. The commenter asked whether DHS and HHS intend to rescind this

policy and make it compliant with the FSA if they find that UACs are not transported and held separately from unrelated adults in most cases.

Another individual suggested that the government should provide families and minors transportation to and from their immigration hearings.

Several advocacy organizations and a state's department of social services provided comments specific to DHS regarding a similar transportation provision in DHS's proposed rule as it related to transportation of children with unrelated detained adults. For more information on those comments please refer to the DHS comment sections regarding 8 CFR 236.3(f).

*Response.* The comments received by the Departments on transportation issues were more substantively concerned with DHS provisions than with ORR provisions. Although both ORR and DHS provided similar regulatory rules, HHS notes that it does not provide care to adult aliens but only for UACs as defined at 6 U.S.C. 279(g)(2).

There are only a few instances where ORR might transport an adult alien—in extremely limited emergency circumstances (*i.e.*, emergency medical care or evacuation); unknowingly, if ORR believes the person is a minor but he or she is later found to be an adult after making an age determination (*see* 8 CFR 236.3(c) and 45 CFR 410.700); or if a UAC turns 18 while in ORR custody.

Generally speaking, existing protocols between HHS and DHS provide that DHS is responsible for transferring a detained adult alien from ORR's care to DHS custody. *See* DHS-HHS Joint Concept of Operations, I. Transportation, July 31, 2018. In certain episodic emergencies, ORR may be required to transport an adult alien prior to DHS assuming custody of and transferring that adult alien to ICE detention. For instance, if the adult alien requires emergency medical care or evacuation from an ORR care provider facility due to a natural disaster, and transfer cannot possibly be completed by DHS due to the emergency, ORR may be responsible for transporting the adult alien to an emergency medical provider or assist in evacuating the adult alien. In these latter episodic emergencies (which are not exhaustive), under the rule, ORR does not transport UAC with unrelated adults in the agency's care.

In response to the comments regarding assisting UACs with transportation to immigration hearings, HHS notes that it is already required to transport UACs to immigration hearings by statute. *See* 6 U.S.C. 279(b)(2). HHS

also notes that these provisions of the rule are consistent with and do not abrogate existing ORR policies on transportation. *See* ORR Policy Guide, section 3.3.14 Transportation Services. As these provisions are intended to implement the FSA, HHS believes further specification in the final rule is unnecessary and redundant.

#### Changes to Final Rule

HHS is not deviating from the language of the proposed rule. The rule adopts the substantive terms of the corresponding transportation provisions of the FSA, paragraphs 25 and 26.

#### 45 CFR Part 410, Subpart F, Transfer of an Unaccompanied Alien Child

In this subpart, HHS set forth provisions for transferring a UAC between HHS facilities. In some cases, HHS may need to change the placement of a UAC. This may occur for a variety of reasons, including a lack of detailed information at the time of apprehension, a change in the availability of licensed placements, or a change in the UAC's behavior, mental health situation, or immigration case.

#### 45 CFR 410.600—Principles Applicable to Transfer of an Unaccompanied Alien Child

#### Summary of Proposed Rule

As specified in 45 CFR 410.600, HHS would adopt the FSA provisions concerning transfer of a UAC to ensure: (1) That a UAC is transferred with all of his or her possessions and legal papers, and (2) that the UAC's attorney, if the UAC has one, is notified prior to a transfer, with some exceptions.

#### Public Comments and Response

*Comment.* Two organizations commented that UACs should receive notice of placement in a more restrictive facility (*i.e.*, a "staff secure" facility) with enough time to protest the transfer before it happens.

*Response.* *See generally* response in § 410.206. With respect to the organizations' recommendation that UACs receive notice of placement in a more restrictive facility in such a manner as to allow them to argue against transfer before it occurs, HHS notes that the comment goes beyond the scope of the FSA, which this rule is intended to implement. As both the FSA and the proposed rule indicate, some circumstances necessitate quickly transferring a UAC (*e.g.*, threats to the safety of UACs or others). As a result, HHS will not add any new requirements to this provision. But HHS appreciates the commenter's contribution and will consider methods to enable greater



notice to UACs through subsequent policies.

*Comment.* One commenter stated that the rule does not provide adequate notice or opportunity to be heard in the event that a mental health professional believes that a youth poses a risk of harm and must be moved into a more restrictive setting. The commenter said that such notice and opportunity to be heard is necessary to safeguard against violations of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).

*Response.* HHS disagrees with the characterization that the final rule does not provide adequate notice or opportunity to be heard regarding a transfer to a more restrictive setting. In accordance with 45 CFR 410.206 of the final rule, ORR provides each UAC placed or transferred to a secure or staff secure facility with a notice of the reasons for the placement in a language the UAC understands, and does so within a reasonable amount of time. In addition, any UAC in ORR care also has an opportunity to challenge ORR Placement decisions in Federal District Court.

*Comment.* One commenter said that the requirements for providing notice to UAC counsel prior to transferring a UAC or minor do not align with the American Bar Association's standards for the custody, placement, care, legal representation, and adjudication of UACs, which recommends both oral and written notice to the child and the child's attorney prior to transfer to include the reason for transfer; the child's right to appeal the transfer; and the procedures for an appeal. The American Bar Association's standards further recommend that the notice include the date of transfer and the location, address, and phone number of the new facility.

The same commenter, along with a state agency, raised a concern that the exception to providing prior notice to counsel in "unusual and compelling circumstances" is too broad and will "result in arbitrary and capricious application."

*Response.* HHS declines to adopt the comment's suggestion that ORR adopt the ABA's standard for transfer of UAC in the "Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States." The language used in § 410.600 pulls its language directly from the FSA (paragraph 27), and the only difference between the ABA's suggested standard for transfer of UAC and the proposed rule is that counsel may be notified within 24 hours after a

UAC is transferred as opposed to 24 hours before. Specifically, under this rule, counsel maybe notified within 24 hours after a UAC is transferred (1) where the safety of the UAC or others has been threatened; (2) the UAC has been determined to be an escape risk consistent with § 410.204; or (3) where counsel has waived such notice. In all other circumstances, counsel will have advance notice of any transfers. HHS is not changing the final rule to include the American Bar Association's standard for the transfer of UAC.

#### Changes to Final Rule

In the proposed rule, HHS stated that it would take all necessary precautions for the protection of UAC during transportation with adults. This language runs in contradiction to 45 CFR 410.500(a), which states that ORR does not transport UAC with unrelated detained adult aliens. Therefore, the sentence from 45 CFR 410.600(a) that, "ORR takes all necessary precautions for the protection of UACs during transportation with adults," will be struck from the final rule.

HHS notes that there will be instances when UACs are transferred with adult staff members. These situations are covered under 45 CFR 411.13(a) of the Interim Final Rule (IFR) on the Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children. The IFR states, "Care provider facilities must develop, document, and make their best effort to comply with a staffing plan that provides for adequate levels of staffing, and, where applicable under State and local licensing standards, video monitoring, to protect [UACs] from sexual abuse and sexual harassment." This provision applies to transfers as well.

#### 45 CFR Part 410, Subpart G—Age Determinations

#### 45 CFR 410.700—Conducting Age Determinations

#### Summary of Proposed Rule

Section 410.700 incorporates both the provisions of the TVPRA, 8 U.S.C. 1232(b)(4), and the requirements of the FSA, in setting forth standards for age determinations. These take into account multiple forms of evidence, including the non-exclusive use of radiographs, and may involve medical, dental, or other appropriate procedures to verify age.

#### Public Comments and Response

*Comment.* A number of commenters expressed concern about whether the proposed regulations adhere to the

FSA's standards and medical ethics regarding medical and dental examinations. Some of the commenters referenced reports and studies indicating that certain medical and dental examinations cannot provide accurate age estimates and that radiographs unnecessarily expose children to radiation when used for non-medical purposes. One medical professional cautioned against using dental radiographs for age determination, contending that such tests can only provide an approximate age estimate and may not be able to differentiate between an individual in his/her late teens versus an individual who is 20 or 21 years of age. The commenter also expressed concern about the possibility of the individual administering these tests not having the requisite expertise, and not obtaining informed consent of the patient. One commenter referred to medical and dental examinations as "pseudoscience."

Multiple commenters expressed concern that the proposed procedures place inappropriate weight on medical tests to determine whether children are younger than or older than 18 years of age. The commenters stated that the proposed procedures do not match FSA or TVPRA requirements for considering medical tests and are inconsistent with agency practice. For example, the commenters stated that the proposed procedures fail to indicate that medical tests cannot serve as the sole basis for age determinations, limit medical testing to bone and dental radiographs, and to account for evidence demonstrating the unreliability of medical tests to make accurate age determinations.<sup>47</sup> One commenter expressed concern about the lack of specificity governing when medical and dental examinations will be used, the absence of guidance regarding who will make the age determination, and the level of training or expertise required to conduct such examinations and determinations.

Multiple commenters recommended that age determination procedures be used as a last resort, that age determination findings be shared with the child in writing and in a language he/she understands, that the findings be subject to appeal, and that age

<sup>47</sup> Section 235(b)(4) of the TVPRA ("to make a prompt determination of the age of an alien, which shall be used by the Secretary of Homeland Security and the Secretary of HHS for children in their respective custody. At a minimum, these procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien.").

determination procedures be conducted by an independent, multidisciplinary team of medical and mental health professionals, social workers, and legal counsel. The commenters also recommended that children have the right to refuse a procedure that subjects them to medical risks, pursuant to the international norm of what is in the best interest(s) of the child as well as medical ethical principles of patient autonomy.

Several commenters expressed concern about age determinations being based on the “totality of the evidence and circumstances” and questioned whether that basis is consistent with the TVPRA’s requirement to use multiple forms of evidence for determining whether a child is under or over 18 years of age. Another commenter expressed support for DHS and HHS personnel maintaining the flexibility to use multiple methods for age determinations. The commenter stated that the proposed standards and thresholds are mandated for jurisdictional as well as medical reasons, because ORR does not have custodial authority over individuals 18 years of age or older.

A number of commenters expressed concern about the possibility of incorrect age determinations. For example, one commenter stated that the rule would reduce or eliminate that the current ORR policy requiring a 75 percent probability threshold for age determinations.

Multiple commenters noted that differences in race, ethnicity, gender, nutritional standards, and poverty impact perceptions of age and may negatively influence the age determination process leading to inaccurate age determinations. For example, one commenter cited articles concluding that the age of young people is often overestimated and exacerbated when there are differences in race. This commenter expressed concern that this would have disproportionate effects on certain indigenous populations. Another commenter cited a study indicating that “black felony suspects were seen as 4.53 years older than they actually were.”

Multiple commenters expressed concern about the lack of age determination appeal procedures. One of the commenters stated that the lack of an appeal mechanism compounds the possibility of arbitrary or baseless assessments, with serious consequences for minors in terms of their placement in and release from detention. Another commenter asked what remedy exists for a child falsely categorized as an adult and what repercussion a government official would face if he/she

negligently or intentionally categorizes a child as an adult under this regulation. Commenters and organizations argued that the continual re-determination of a child’s UAC status would deny children of their right to due process, legal protections and access to social services if they were determined to not be a UAC.

One organization noted that the reassessment of a child exacerbates their vulnerability and contradicts the very purpose of U.S. anti-trafficking law. Organizations and commenters further noted if a child was determined to not be a UAC, many rights would be stripped from the child, including the right to have their asylum claims heard before the asylum office and the exception to the one-year filing deadline.

One commenter suggested that providing a presumption of minor status when there is doubt, considering only reliable evidence, and providing an appeals process would ensure fewer children find themselves incorrectly designated as adults. Another commenter suggested placing individuals in HHS custody, not DHS custody, during the age determination process.

One commenter expressed general concern about DHS and HHS using different language within the proposed regulations that may lead to disparate processes for determining age. The commenter stated that the proposed HHS language does not discuss the reasonable person standard, does not include a specific evidentiary standard through which to assess multiple forms of evidence, does discuss the non-exclusive use of radiographs whereas the DHS language does not mention radiographs as an option, and does not require a medical professional to administer the radiographs. The commenter suggested that DHS and HHS propose specific and identical language regarding age determination procedures and requirements.

Organizations and commenters argued that HHS should not have the authority to re-determine if a minor is a UAC or not because it impacts their immigration benefits and this is contrary to Federal law, *see e.g.*, 6 U.S.C. 279(a). They further argued that this would cause confusion to UAC on how and when they meet certain legal immigration obligations and it would likely impact their access to legal assistance. They noted that UAC receive access to *pro bono* legal services because of their UAC designation and by allowing ORR to re-determine their status would undercut ORR’s responsibility to facilitate access

to legal services which is not in the best interest of the child.

*Response.* HHS disagrees with commenters who stated that HHS’ proposals did not accord with the FSA, which states as follows: “If a reasonable person would conclude that an alien detained by the INS is an adult despite his claims to be a minor, the INS shall treat the person as an adult for all purposes, including confinement and release on bond or recognizance. The INS may require the alien to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age. If the INS subsequently determines that such an individual is a minor, he or she will be treated as a minor in accordance with this Agreement for all purposes.” FSA paragraph 13. The FSA uses a “reasonable person” standard and specifically states that the INS “may require” submitting to a medical or dental examination. Such language does not place restrictions on the authority for ORR to require a medical or dental examination. In addition, the TVPRA states: “The Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, shall develop procedures to make a prompt determination of the age of an alien, which shall be used by the Secretary of Homeland Security and the Secretary of Health and Human Services for children in their respective custody. At a minimum, these procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien.” Again, nothing in such language places limits on when radiographs may be required, although it does state that procedures shall take into account multiple forms of evidence, which is also reiterated in the rules at § 410.700.

Commenters suggested types of information that an agency can use in addition to medical and dental examinations and radiographs. While the FSA, the TVPRA and the proposed rule specifically list medical and dental examinations and radiographs, HHS provides, in policy, a list of additional information that can be considered, including the types of evidence suggested by commenters like the child’s statements.<sup>48</sup>

HHS believes the commenters’ concerns about the reliability of

<sup>48</sup> Office of Refugee Resettlement, Children Entering the United States Unaccompanied: Section 1, U.S. DEPT OF HEALTH & HUM. SERV. (Jan. 30, 2015, rev. Jul. 5, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1>.

radiographs and medical or dental examinations as part of an age determination process are addressed by the regulatory text requiring multiple forms of evidence, including “non-exclusive use of radiographs,” to determine age. Recognizing that there is no one test appropriate for every child in every case, HHS, in compliance with the TVPRA, requires in its rule “multiple” forms of evidence when conducting age determination. HHS interprets “multiple forms of evidence” to mean a totality of the evidence. Here, HHS is trying to avoid an instance where those determining age simply rely on two or three pieces of evidence, and ignore potentially reliable evidence merely because a standard of two or more pieces of evidence have been presented. But HHS notes that Congress chose to include radiographs as a type of evidence that agencies can use, and HHS will not exclude their consideration in this rule.

In addition, ORR states through guidance that the medical and dental examinations and radiographs, will be conducted by medical professionals with experience conducting age determinations and will take into account the child’s ethnic and genetic background.<sup>49</sup> Relying on experienced medical professionals also addresses concerns raised by commenters that the proposed rule fails to specify reliability standards or who will perform the tests. HHS depends on the experience and professional opinion of the medical professional choosing and performing an examination.

Similarly, HHS expects those professionals who perform those tests to do so in accordance with medical and ethical standards. HHS declines to add additional standards beyond the current standards that apply to all medical professionals.

HHS agrees with the commenter who noted the importance of age determination because HHS only has jurisdiction over persons under 18. If a person is determined to be an adult, that person cannot be placed in HHS custody even if that person is undergoing an age redetermination. If DHS has determined that an individual in its custody is an adult, but the individual claims otherwise, HHS cannot place an alien into HHS custody while the individual contests DHS’s determination.

Many commenters wrote about the requirement that age determinations be based on the “totality of the evidence and circumstances” DHS proposed in § 236.3(c). One commenter noted that HHS did not include this language in subpart G and expressed concern that this might create disparate processes. Based on the TVPRA, which requires HHS and DHS to use the same procedures, HHS has added the totality of the circumstances language to § 410.700 in this final rule. The explicit instruction that agencies use the totality of the evidence and circumstances when making an age determination enhances the TVPRA’s language of “multiple sources.”

In response to the request for additional clarity about what constitutes the totality of the evidence and the circumstances, HHS notes that each age determination is an adjudication, where the ORR responsible staff review the evidence in its totality. The ORR Guide at section 1.6 provides ample description of how ORR reviews the age determination process. While some evidence may be weighted more than other evidence, HHS will only make an age determination adjudication after weighing all of the evidence. Adding more specificity would take away from the holistic approach envisioned with the totality language and could lead to a situation where the agency is unable to consider relevant information because it was not listed.

One commenter was concerned that the totality of the evidence and circumstances language would impact HHS’ 75 percent probability threshold for age determinations. Under current HHS policy, “[I]f an individual’s estimated probability of being 18 or older is 75 percent or greater according to a medical age assessment, and this evidence has been considered in conjunction with the totality of the evidence, ORR may refer the individual to DHS.”<sup>50</sup> Adopting the totality of the evidence and circumstances language would not eliminate the 75 percent threshold because similar language already exists with that threshold in policy. ORR does not intend to revise its policy in this regard. The 75 percent threshold is consistent with totality of the evidence and circumstances language, and adds an additional requirement on the agency when making an age determination.

Several commenters raised concerns that the rule does not provide for an appeals process or a limit on the number of age determinations, allowing for continuous redeterminations. HHS policy allows an individual or his/her designated legal representative to present new information or evidence related to an age determination at any time.<sup>51</sup> A limitation on the number of times an age determination can occur is inappropriate. An arbitrary limit may negatively affect an individual who wishes to have an age redetermination. And if there is reason to believe that an individual is not in an appropriate placement, then safety concerns and statutory limits on jurisdiction may demand that an age determination take place. Additionally, the totality of the evidence and circumstances language requires the agency to consider all new evidence, regardless of whether there has already been an age determination. Therefore, HHS does not believe a formal appeals process or limitation on the number of age determinations is necessary or in the best interest of the agencies or UACs. Moreover, neither the FSA nor the TVPRA requires an appeals process for the age determination.

#### Changes to Final Rule

HHS will add the “totality of the evidence and circumstances” language into § 410.700 so that the age determinations decisions by HHS and DHS have the same standard. While the language of the DHS regulation differs slightly from the HHS language, primarily because DHS transfers adults and HHS does not, both provisions contain the same fundamental standards. These standards are the use of a totality of the evidence standard, including the non-exclusive use of radiographs; compliance with the FSA reasonable person standard; and authorization to require an individual to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify age.

#### 45 CFR 410.701—Treatment of an Individual Who Appears To Be an Adult Summary of Proposed Rule

Section 410.701 states that if the procedures of § 410.700 would result in a reasonable person concluding that an individual is an adult, despite his or her claim to be a minor, ORR must treat that person as an adult for all purposes. As

<sup>49</sup> Office of Refugee Resettlement, Children Entering the United States Unaccompanied: Section 1, U.S. DEP’T OF HEALTH & HUM. SERV. (Jan. 30, 2015, rev. Jul. 5, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1>.

<sup>50</sup> Office of Refugee Resettlement, Children Entering the United States Unaccompanied: Section 1, U.S. DEP’T OF HEALTH & HUM. SERV. (Jan. 30, 2015, rev. Jul. 5, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1>.

<sup>51</sup> Office of Refugee Resettlement, Children Entering the United States Unaccompanied: Section 1, U.S. DEP’T OF HEALTH & HUM. SERV. (Jan. 30, 2015, rev. Jul. 5, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1>.

with § 410.700, ORR may take into account multiple forms of evidence, including the non-exclusive use of radiographs, and may require such an individual to submit to a medical or dental examination conducted by a medical professional or other appropriate procedures to verify age.

#### Public Comments

Several commenters expressed concern about how DHS would interpret and apply the FSA's reasonable person standard and pointed to what they perceived as a lack of clarity on how the standard is defined. Multiple commenters expressed concern that the proposed language fails to provide adequate specificity about the type and amount of evidence used to inform the standard. For example, one commenter stated that the reasonable person standard must be informed by consideration of multiple forms of evidence pursuant to the TVPRA, whereas another commenter suggested incorporating informational interviews and attempts to gather documentary evidence as part of the standard. Another commenter stated that, pursuant to the FSA, the reasonable person standard must be initially informed by the child's own statements regarding his or her own age. Multiple commenters expressed concern about how medical or dental examinations will or will not inform the reasonable person standard, with one commenter stating that the inclusion of unreliable medical procedures in the reasonable person standard introduces a further layer of arbitrariness to the process of age determination.

Other commenters stated that an individual claiming to be a minor should continue to be treated as a minor until age is confirmed through multiple forms of evidence. One of these commenters stated that it is more dangerous for a minor to be detained with adults than to have an individual who claims to be a minor, but is not, detained with other minors.

Organizations noted that in the interest of administrative consistency, children designated as UACs should keep this designation throughout their removal proceedings.

*Response.* HHS notes that neither the FSA nor the TVPRA require that a specific amount of evidence be considered in an age determination; the TVPRA simply requires HHS to use multiple forms of evidence. Practically speaking, the same amount of evidence will not be available in every case, and requiring a specific amount of evidence would be arbitrary and operationally impractical. Relatedly, creating a

specific list of evidence that can be considered may lead to the exclusion of relevant information. Thus, HHS declines to make the suggestions made by the commenters; however, HHS has changed the proposed rule at § 410.700 to add the "totality of the circumstances" standard proposed by DHS to ensure that all evidence is included in the age determination process.

HHS declines to adopt a presumption that an individual is a minor until proven otherwise. Section 410.701 requires HHS to treat a person determined to be an adult as an adult and to follow the process outlined in § 410.700 to change an individual's status from a minor to adult. Additionally, in policy, HHS provides "[u]ntil the age determination is made, the unaccompanied alien child is entitled to all services provided to UAC in HHS care and custody."<sup>52</sup> While it is not clear what commenters intended by the phrases "presumption" and "proven otherwise," the commenters appeared to intend something more extensive than the ORR age determination process—such as, perhaps a judicial review or a standard higher than the reasonable person standard of the FSA. However, setting a presumption that individuals are minors until proven otherwise is not contemplated in the FSA nor by Congress. A presumption of minority is not consistent with the reasonable person standard, which allows for the agencies to look at the totality of the evidence and circumstances and determine whether someone is under 18. Thus, HHS declines to include this recommendation.

Relatedly, a commenter raised a concern that it is more dangerous for a minor to be housed with adults than it is for an adult to be housed with minors. However, this comment focused only on the individual adult who is the subject of the age determination and not the other UACs housed alongside him or her in a group home setting. HHS believes that both scenarios present a risk of harm and will not transfer a person until an age determination has been made.

Commenters wrote that, for administrative consistency, agencies should not conduct age determinations and the designation of UAC should last through the individual's removal proceedings. The comment about the UAC designation lasting throughout

removal proceedings is not related to the age determination regulation—which is about the proper placement of an individual (in DHS or ORR legal custody) and not removal proceedings. In addition, the suggestion is inconsistent with the FSA, which set standards specifically for people under 18. The suggestion also would violate the HSA and the TVPRA, both of which intended specific protections for people under 18. Congress also granted HHS and DHS the authority to conduct age determinations in 8 U.S.C. 1232(b)(4). The fact that Congress created the authority for DHS and HHS to conduct age determinations demonstrates that Congress recognized that children need protection and intended accuracy over administrative consistency.

#### Changes to Final Rule

HHS is not making any changes to the rule for § 410.701, but states that because such regulation refers back to § 410.700, it also will incorporate a totality of the evidence and circumstances standard.

#### 45 CFR Part, 410 Subpart H, Unaccompanied Alien Children's Objections to ORR Determinations 45 CFR 410.800–410.801—Procedures Summary of Proposed Rule

While the FSA at paragraph 24(B) and 24(C) contains procedures for judicial review of a UAC's shelter placement (including in secure or staff-secure), and a standard of review, the agreement is clear that a reviewing Federal District Court must have both "jurisdiction and venue." Once these regulations are finalized and the FSA is terminated, it would be even clearer that any review by judicial action must occur under a statute where the government has waived sovereign immunity, such as the Administrative Procedure Act. Therefore, HHS did not propose regulations for most of paragraphs 24(B) and 24(C) of the FSA, although it did propose that all UACs continue to receive a notice stating as follows: "ORR usually houses persons under the age of 18 in an open setting, such as a foster or group home, and not in detention facilities. If you believe that you have not been properly placed or that you have been treated improperly, you may call a lawyer to seek assistance. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form." The proposed rule also contained a requirement parallel to that of the FSA that when UACs are placed in a more restrictive level of care, such as a secure or staff secure facility, they receive a notice—

<sup>52</sup> Office of Refugee Resettlement, Children Entering the United States Unaccompanied: Section 1, U.S. DEP'T OF HEALTH & HUM. SERV. (Jan. 30, 2015, rev. Jul. 5, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1>.

within a reasonable period of time—explaining the reasons for housing them in the more restrictive level of care. Consistent with the July 30, 2018 order of the *Flores* court, the proposed rule stated that the notice must be in a language the UAC understands. Finally the proposed provision required that ORR promptly provide each UAC not released with a list of free legal services providers compiled by ORR and provided to UAC as part of a Legal Resource Guide for UAC (unless previously given to the UAC).

#### Public Comments and Response

*Comment.* Some commenters wrote that the proposed rule does not give UACs enough notice or access to information about his or her placement in a staff secure or secure facility; that UACs should be provided notice of the reasons for their placement in secure or staff secure placements, and have the opportunity to contest such placement, before they are referred to such facilities; and that placements must be accompanied by periodic reviews.

*Response.* This section is consistent with current ORR practice implementing statutory and FSA requirements (*see* paragraph 24A), by which children are provided a written explanation of the reasons for their placement at secure or staff secure care providers in a language they understand, within a reasonable time either before or after ORR's placement decision, *see* ORR Policy Guide, section 1.2.4 and 1.4.2. In many cases, ORR places children in restrictive placements because of new information or a child's disruptive behavior, which makes it impossible for the child to remain at a shelter care facility. For example, some shelter care providers are prohibited under their State licensing requirements to house children with violent criminal histories. When ORR discovers new information indicating such a history, it must immediately ensure the child is transferred or risk jeopardizing the shelter's licensing. Under ORR policy, care providers must provide written notice of the reasons for placement in secure or staff secure settings at least every 30 days a child is in such a placement. This requirement goes beyond the TVPRA, 8 U.S.C. 1232(c)(2)(A), which requires the Secretary to prescribe procedures to review placements in secure facilities, such as juvenile detention centers. The TVPRA is silent on staff-secure facilities—which generally are much like non-secure shelter facilities, but may include a higher staff-UAC ratio to manage behavior. In practice, care providers continuously assess a child's

behavior in order to ensure the child is properly placed in the least restrictive setting that is appropriate for the child's needs.

#### Changes to Final Rule

HHS has made no changes to the rule text at §§ 410.800–410.801 because the rule fully the relevant requirements of the FSA and TVPRA.

#### 45 CFR 410.810 “810 Hearings”

##### Summary of Proposed Rule

Consistent with subpart C, *see* § 410.301(a), HHS proposed an internal administrative hearing process to serve the relevant functions of bond redetermination hearings described in paragraph 24A of the FSA.

The proposed rule made no provision for immigration judges employed by the DOJ to conduct bond redetermination hearings for UACs under paragraph 24(A) of the FSA. DOJ has concluded that it no longer has statutory authority to conduct such hearings. In the HSA, Congress assigned responsibility for the “care and placement” of UACs to HHS' ORR, and specifically barred ORR from requiring “that a bond be posted for [a UAC] who is released to a qualified sponsor.” 6 U.S.C. 279(b)(1)(A), (4). In the TVPRA, Congress reaffirmed HHS' responsibility for the custody and placement of UACs. 8 U.S.C. 1232(b)(1), (c), and imposed detailed requirements on ORR's release of UACs to proposed custodians—including, for example, a provision authorizing ORR to consider a UAC's dangerousness and risk of flight in making placement decisions. 8 U.S.C. 1232(c)(2)(A). Congress thus appears to have vested HHS, not DOJ, with control over the custody and release of UACs, and to have deliberately omitted any role for immigration judges in this area.

Although in *Flores v. Sessions*, the Ninth Circuit concluded that neither the HSA nor the TVPRA superseded the FSA's bond-hearing provision. 862 F.3d at 881. The court did not identify any affirmative statutory authority for immigration judges employed by DOJ to conduct the custody hearings for UACs. “[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.” *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). HHS, however, as the legal custodian of UACs who are in Federal custody, clearly has the authority to conduct the hearings envisioned by the FSA. It also is sensible, as a policy matter, for HHS to conduct the hearings envisioned by the FSA, because unlike immigration courts, HHS as an agency has expertise in social welfare best practices, including child welfare

practices. Further, having an independent hearing process take place within the same Department is consistent the FSA at the time it was implemented, when both the former INS and EOIR were housed within DOJ.

HHS thus proposed regulations to afford the same type of hearing paragraph 24(A) calls for, while recognizing the transfer of responsibility of care and custody of UAC from the former INS to HHS ORR. Specifically, the proposed rule included provisions whereby HHS would create an independent hearing process that would be guided by the immigration judge bond hearing process currently in place for UACs under the FSA. The idea was to provide essentially the same substantive protections as immigration court custody hearings, but through a neutral adjudicator at HHS rather than DOJ.

Under the proposal, the Secretary would appoint independent hearing officers to determine whether a UAC, if released, would present a danger to community (or flight risk). The hearing officer would not have the authority to release a UAC, as the *Flores* court has already recognized that paragraph 24(A) of the FSA does not permit a determination over the suitability of a sponsor. Specifically, the Ninth Circuit explained that “as was the case when the *Flores* Settlement first went into effect, [a bond hearing] permits a system under which UACs will receive bond hearings, but the decision of the immigration judge will not be the sole factor in determining whether and to whose custody they will be released. Immigration judges may assess whether a minor should remain detained or otherwise in the government's custody, but there must still be a separate decision with respect to the implementation of the child's appropriate care and custody.” *Flores*, 862 F.3d at 878. The *Flores* district court, too, stated: “To be sure, the TVPRA addresses the safety and secure placement of unaccompanied children. . . . But identifying appropriate custodians and facilities for an unaccompanied child is not the same as answering the threshold question of whether the child should be detained in the first place—that is for an immigration judge at a bond hearing to decide. . . . Assuming an immigration judge reduces a child's bond, or decides he or she presents no flight risk or danger such that he or she needs to remain in HHS/ORR custody, HHS can still exercise its coordination and placement duties under the TVPRA.” *Flores v. Lynch*, No. CV 85–4544 DMG at 6 (C.D. Cal. Jan. 20, 2017).

Thus, the hearing officer would decide only the issues presented by paragraph 24(A) of the FSA—whether the UAC would present a danger to the community or a risk of flight (that is, not appearing for his or her immigration hearing) if released. For the majority of UACs in ORR custody, ORR has determined they are not a danger and therefore has placed them in shelters, group homes, and in some cases, staff secure facilities. For UACs that request a hearing, but ORR does not consider a danger, ORR will concur in writing and a hearing will not need to take place. In these cases, a hearing is not necessary or even beneficial and would simply be a misuse of limited government resources. However, for some children placed in secure facilities (or otherwise assessed as a danger to self or others), the hearing may assist them in ultimately being released from ORR custody in the event a suitable sponsor is or becomes available.

As is the case now, under section 2.9 of the ORR Policy Guide (available at: <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.9>), the hearing officer's decision that the UAC is not a danger to the community will supersede an ORR determination on that question. HHS does not have a two-tier administrative appellate system that mirrors the immigration judge-BIA hierarchy. To provide similar protections without such a rigid hierarchy, the proposed rule would allow appeal to the Assistant Secretary of ACF (if the appeal is received by the Assistant Secretary within 30 days of the original hearing officer decision). The Assistant Secretary would review factual determinations using a clearly erroneous standard and legal determinations on a de novo basis. Where ORR appeals, there would be no stay of the hearing officer's decision unless the Assistant Secretary finds, within 5 business days of the hearing officer decision, that a failure to stay the decision would result in a significant danger to the community presented by the UAC. That written stay decision must be based on clear behaviors of the UAC while in care, and/or documented criminal or juvenile behavior records from the UAC. Otherwise, a hearing officer's decision that a UAC would not be dangerous (or a flight risk) if released, would require ORR to release the UAC pursuant to its ordinary procedures on release as soon as ORR determined a suitable sponsor.

In accordance with the *Flores* district court's order analogizing *Flores* custody hearings to bond hearings for adults, immigration judges currently apply the

standard of *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).<sup>53</sup> Thus, under current practice, the burden is on the UAC to demonstrate that he or she would not be a danger to the community (or flight risk) if released. Due to the unique vulnerabilities of children and subsequent enactment of the TVPRA, however, HHS requested comments on whether the burden of proof should be on ORR to demonstrate that the UAC would be a danger or flight risk if released.

Under the proposed rule, ORR also would take into consideration the hearing officer's decision on a UAC's level of dangerousness when assessing the UAC's placement and conditions of placement, but, consistent with current practice under the FSA, the hearing officer would not have the authority to order a particular placement for a UAC.

If the hearing officer determines that the UAC would be a danger to the community (or a flight risk) if released, the decision would be final unless the UAC later demonstrates a material change in circumstances to support a second request for a hearing. Similarly, because ORR might not have yet located a suitable sponsor at the time a hearing officer issues a decision, ORR might find that circumstances have changed by the time a sponsor is found such that the original hearing officer decision should no longer apply. Therefore, the proposed regulation stated that ORR could request the hearing officer to make a new determination if at least one month had passed since the original decision, and ORR could show that a material change in circumstances meant the UAC should no longer be released due to danger (or flight risk).

Requests for hearings under this section ("810 hearings") could be made by the child in ORR care, by a legal representative of the child, or by parents/legal guardians on their child's behalf. These parties could submit a written request for the 810 hearing to the care provider using an ORR form<sup>54</sup> or through a separate written request that provides the same information requested in the ORR form, because the questions to be adjudicated at 810 hearings are relevant mainly to UACs placed in secure, RTC, and staff secure facilities. ORR would provide a notice of the right to request the 810 hearing to these UACs. Technically, a UAC in

<sup>53</sup> The *Flores* District Court specifically cited the law of 8 U.S.C. 1226 and 8 CFR 1003.19, 1236.1(d). See *Flores v. Sessions*, 2:85-cv-04544, *supra* at 2, 6.

<sup>54</sup> The form currently used under the FSA is available at [https://www.acf.hhs.gov/sites/default/files/orr/request\\_for\\_a\\_flores\\_bond\\_hearing\\_01\\_03\\_2018e.pdf](https://www.acf.hhs.gov/sites/default/files/orr/request_for_a_flores_bond_hearing_01_03_2018e.pdf) (last visited Aug. 12, 2018).

any level of care may request an 810 hearing, but hearings for children in non-restrictive placements (e.g., shelter placements) would likely be unnecessary, because ORR would likely stipulate that such children, by virtue of their placement type are not dangerous or flight risks. HHS also stated that it expected that the hearing officer would create a process for UACs or their representatives to directly request a hearing to determine danger (or flight risk). During the 810 hearing, the UAC could choose to be represented by a person of his or her choosing, at no cost to the government. The UAC could present oral and written evidence to the hearing officer and could appear by video or teleconference. ORR could also choose to present evidence either in writing, or by appearing in person, or by video or teleconference.

Because the 810 hearing process would be unique to ORR and HHS, if a UAC turned 18 years old during the pendency of the hearing, the deliberations would have no effect on DHS detention (if any).

HHS invited public comment on whether the hearing officers for the 810 hearings should be employed by the Departmental Appeals Board, either as Administrative Law Judges or hearing officers, or whether HHS would create a separate office for hearings, similar to the Office of Hearings in the Centers for Medicare & Medicaid Services. See [https://www.cms.gov/About-CMS/Agency-Information/CMSLeadership/Office\\_OHI.html](https://www.cms.gov/About-CMS/Agency-Information/CMSLeadership/Office_OHI.html).

While the FSA contains procedures for judicial review of a UAC's placement in a secure or staff secure shelter, and a standard of review, once these regulations are finalized and the FSA is vacated, HHS did not propose any regulations for such review by Federal courts should occur under extant statutory authorizations, including, where applicable, the APA, and not via HHS regulations or a consent decree.

#### Public Comments and Response

Several commenters wrote about the proposal to update the provision for bond hearings under DHS proposed 8 CFR 236.3(m) and "810 hearings" under HHS proposed 45 CFR 410.810. Because both provisions related to paragraph 24A of the FSA, comments sometimes transitioned fluidly between being directed toward DHS and HHS. As with the comments related to 8 CFR 236.3(m), the comments related to 810 hearings largely concerned compatibility with the text of the FSA and case law interpreting the FSA, and due process concerns. However,

commenters expressed various other concerns as well.

*Comment.* Many comments argued that the proposed transition of bond hearings from a DOJ-based administrative immigration court to an administrative setting in HHS does not comply with the FSA and applicable case law. The commenters reasoned that paragraph 24(A) of the FSA requires minors in deportation proceedings to be afforded a bond redetermination hearing before an immigration judge in every case. They further pointed to the decision in *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017) as evidence that the Ninth Circuit, in interpreting and applying the FSA had already ruled against the government when it argued that the limiting of bond hearings applied to minors in DHS custody only. Many of the commenters pointed to a quote from the court's decision discussing how the hearing is a "forum in which the child has the right to be represented by counsel, and to have the merits of his or her detention assessed by an independent immigration judge." Another commenter also wrote that the TVPRA and the HSA do not supersede the FSA or allow for inconsistent standards, which the commenter believed would result from the implementation of the proposed rule.

*Response.* HHS disagrees with commenters who suggested that § 410.810 does not comply with the FSA and applicable case law. HHS submits that 810 hearings provide substantively the same functions as bond hearings under paragraph 24A of the FSA, as expressed by the *Flores* court and the Ninth Circuit (e.g., independent review of ORR determinations as they relate to a child's dangerousness and risk of flight and due process protections). The Ninth Circuit found that bond hearings under paragraph 24A of the FSA "do not afford unaccompanied minors the same rights that may be gained through an ordinary bond hearing," and that a favorable finding does not entitle minors to release; however, it also stated that bond hearings provide UACs with certain "practical benefits." *Flores*, 862 F.3d at 867. These benefits include providing a forum in which a child has the right to be represented by counsel to examine and rebut the government's evidence, and build a record regarding the child's custody. *Id.* 810 hearings provide UACs with all of these benefits, and take place before an independent adjudicator in a role similar to immigration judges under current practice. In addition, commenters are incorrect that the immigration judge is any more independent than would be the hearing officer under the 810

hearing process. As noted below, at the time the FSA was signed, INS and the immigration courts both resided within the DOJ—similar to what HHS is finalizing in this rule, where an independent HHS office would operate the hearings. Moreover, immigration judges are not administrative law judges, but rather are "attorneys whom the Attorney General appoints as administrative judges." 8 CFR 1003.10(a). Immigration judges act as the Attorney General's "delegates" in the cases that come before them. Immigration judges are governed by decisions by the Attorney General (through a review of a decision of the BIA, by written order, or by determination and ruling pursuant to section 103 of the Immigration and Nationality Act). 8 CFR 1003.10(d). Thus, HHS does not believe that the administrative process of § 410.810 is any less independent than the process the Parties agreed to in the FSA.

*Comment.* A couple of commenters wrote that moving bond redetermination hearings from EOIR to HHS is inconsistent with protections for UACs in the FSA, the HSA, and the TVPRA—which protect children from prolonged detention.

*Response.* As stated above, HHS disagrees with commenters regarding the FSA, HSA, and TVPRA. Section 810 hearings would provide both practical benefits and due process in a manner consistent with paragraph 24A of the FSA, as interpreted most recently by the Ninth Circuit. The rule would allow requests to be made by UACs themselves, or their parents, legal guardians, or legal representatives. HHS notes that this provision mirrors current practice, and so there is no reason to expect a reduction in the number of UACs receiving 810 hearings, as compared to those who receive bond hearings. Since the Ninth Circuit held in 2017 that paragraph 24A of the FSA would require bond hearings for determinations of dangerousness and risk of flight, every child in ORR custody has been afforded the opportunity to request a bond hearing. In addition, legal service providers funded by ORR have explained the nature of bond hearings, including procedures to request them, to UACs during orientation and legal screenings. The alternative to allowing UACs to request such hearings would be to place every UAC in an 810 hearing as a default. This would impose a heavy burden on government resources while providing no benefit for the overwhelming majority of UACs, most of whom are in shelter-level care and therefore are not considered dangerous

or flight risks to begin with. The alternative to allowing UACs to request such hearings would be to place every UAC in an 810 hearing as a default. This would impose a heavy burden on government resources while providing no benefit for the overwhelming majority of UACs, most of whom are in shelter-level care and therefore are not considered dangerous or flight risks to begin with. The best solution is, as written in the rule, to notify children in more restrictive placements of their right to request 810 hearings, connect them with legal service providers, and allow them to decide whether to request a hearing. Consistent with existing practice, the rule does not impose any timeframe within which UACs must request 810 hearings. Also, if UACs can demonstrate a material change in circumstances, they are free to request 810 hearings even if they previously had one that resulted in a negative decision.

*Comment.* A commenter noted that that under the proposed rule, the hearing officers cannot make decisions on placement or release. To the commenter, this limitation does not make sense because in other child welfare determinations, judges do make decisions about placement and reunification for children that are not in the custody of their parents. This commenter also wrote that the limitation is inconsistent with the Ninth Circuit's interpretation of the FSA because the court rejected ORR's argument that it has sole authority to determine placement and make release decisions.

*Response.* HHS does agree that the original *Flores* court ruling created a bond hearing procedure whose utility relates mainly to providing due process protections to UACs, but does not extend to the ability to order ORR to release a child. However, that is explicit in the text of the Ninth Circuit's ruling, which HHS is now attempting to incorporate into this rule implementing the FSA.

*Comment.* A group of commenters recognized the distinction between the DHS and HHS provisions relating to bond hearings, but disagreed that proposed 8 CFR 236.3(m) properly implemented section 24(A) of the FSA in light of *Flores*, 862 F.3d 863. They restated the court's discussion of the important policy interests served by allowing children a bond hearing.

*Response.* These comments refer to the bond hearings proposed by DHS, which are separate and distinct from the 810 hearings proposed by HHS. HHS has proposed an independent adjudication process responsive to the policy interests served by immigration

judges in bond redetermination hearings. In 810 hearings, UACs, their legal representatives, or their parents or legal guardians would be able to request review of ORR findings regarding a child's danger to self or others, and the child's flight risk. The child's independent hearing officers would not have the authority to order release of UACs from ORR custody, and would not have authority to make placement decisions. See *Flores v. Sessions*, 862 F.3d 863, 867 (9th Cir. 2017) (acknowledging that a favorable finding in a hearing under paragraph 24A does not entitle minors to release because "the government must still find a safe and secure placement into which a child can be released.") The UAC would be permitted to have representation of his or her choosing at no cost to the government; and the UAC would be able to present oral and written evidence. The proposed rule would both provide these practical benefits while at the same time streamlining the current process. For example, under the current system, if a UAC is moved to a different venue during the pendency of a bond redetermination hearing, the case must also be transferred to the new venue, typically resulting in a delay of weeks. In contrast, such a case would not be interrupted under the proposed rule, because the proposed rule would establish a centralized hearing office.

*Comment.* Multiple commenters opposed the language proposed under § 410.810 because bond redetermination hearings would be conducted by HHS, not EOIR, a change that would, in the opinion of the commentators, remove the opportunity for a ruling by an independent or neutral arbiter. Commenters wrote that HHS would be the "judge and jailer" of UACs and that there would be no meaningful independent review of HHS decisions. Commenters argued that immigration judges, who are employed by DOJ can serve as neutral arbiters and afford UACs a meaningful opportunity to challenge HHS' decisions. Commenters wrote that the lack of independence undermines due process protections for UACs, and for this reason, immigration judges should continue to conduct bond redetermination hearings.

*Response.* HHS notes that by its own terms, § 410.810 calls for an independent hearing officer to preside over these hearings. This is a departure from what was envisioned in the FSA, because in 1997, both INS and EOIR were located within DOJ. In other words, *Flores* counsel agreed that immigration judges in EOIR were sufficiently independent from INS, such that they could make independent bond

redetermination rulings. Arguably, one of the reasons for inserting paragraph 24A into the FSA was to provide exactly the kind of independent review of decisions made by the former INS, which at the time was responsible for both the care of minors, and for initiating immigration enforcement actions against them. If they were sufficiently independent at that time, then having independent hearing officers located within HHS under the proposed rule should also be acceptable now, especially since ORR is not a law or immigration enforcement agency, and 810 hearings are not related to removal proceedings initiated by DHS. The same reasoning applies to comments questioning the independence of any appeal of 810 hearing decisions. Just as the BIA, like immigration courts, is an administrative appellate body within DOJ, so too in this case another office within the same department would serve as the appellate body for 810 hearings.

*Comment.* Other commenters were concerned simply with the change in process. They stated that the NPRM reverses a child's right to a bond hearing and instead creates an agency-run administrative process that poses threats to due process. While most of these commenters did not provide a justification for their opposition to the proposed change, one commenter stated he opposed the jailing of children and families on moral grounds and suggested the government focus on keeping families together, alternatives to detention, and full due process. Finally, in addition to the *Flores v. Sessions* justification, several groups wrote that as a matter of policy, immigration judges are best suited to rule on UAC bond hearings as they have the relevant background and knowledge base to understand the situation and determine the appropriate course of action—or, alternatively, that HHS lacks the appropriate expertise or experience with the issues associated with child custody or child welfare to conduct such hearings.

*Response.* HHS is unable to respond to comments stating that 810 hearings would violate due process, but offering no specifics. Ultimately the benefit of an administrative process is for the agency to avoid erroneous determinations, and HHS believes that the 810 hearings meet any relevant due process requirements for that process. HHS again notes that the rule provides substantially "practical benefits" as described by the Ninth Circuit, which largely described provision of due process (e.g., an independent decision-making authority to review ORR child welfare decisions,

access to counsel, the ability for children to confront the evidence and establish a record).

With respect to comments arguing that the government has a moral duty to keep families together, HHS believes that these comments are really about other issues addressed in this preamble, not about the 810 hearings and exceed the scope of this rulemaking, especially because neither bond hearings under the FSA nor 810 hearings, in and of themselves, prevent family reunification. In providing for an independent review of ORR determinations of a child's dangerousness and risk of flight, 810 hearings serve a similar function to the bond hearings described by the Ninth Circuit in 2017 and thus may serve to promote family integrity. But ultimately, ORR has a statutory duty to ensure safe release of UACs under the HSA and TVPRA, and a similar duty under the FSA.

With respect to the comment that immigration judges are best situated to decide on the questions raised by these hearings, HHS respectfully disagrees. HHS believes that an independent hearing office within HHS, the government agency with specific and relevant expertise in child welfare, would be best suited to adjudicate 810 hearings. As acknowledged by the Ninth Circuit, in *Flores* custody hearings, even favorable rulings do not entitle UACs to release. This is because, under the HSA and TVPRA, the government must still identify safe and secure placements for UACs in its care. *Id.* In light of the separation of the former INS's functions in the HSA and TVPRA, at least one court has distinguished ORR custody of UACs, which it termed "child welfare custody," from immigration detention. See *Beltran v. Cardall*, 222 F. Supp. 3d 476, 488 (E.D. Va. 2016) (internal citations omitted) (noting that ORR does not withhold discharge of UACs to sponsors due to pending removal proceedings, but does withhold discharge due to child welfare concerns as established in the TVPRA; and noting that Congress intentionally withheld from ORR any role in removal proceedings pending against UACs). ORR's purposes for assessing a child's dangerousness and flight risk relate to its duty to effect safe releases of children, and not to any immigration detention purpose. This makes 810 hearings fundamentally a review of child welfare determinations, and we believe such reviews more appropriately occur within the government agency with direct child welfare expertise, rather than in immigration courts.



Congress itself endorsed HHS' child welfare expertise when it transferred responsibility for the care and custody of UACs from the former INS to HHS Immigration courts adhere closely to the language of the 9th Circuit decision in 2017 on bond hearings, including its understanding of the limited scope of the hearings (*i.e.*, to decide only on questions of dangerousness and flight risk, not on release or sponsor suitability). Especially with respect to issues associated with child custody or child welfare, an internal HHS hearing office could fulfill the same role as immigration judges, only with greater familiarity and expertise than judges trained to adjudicate cases relating more directly to immigration status and detention.

*Comment.* Several commenters wrote that the proposed rule would prolong detention of UACs, which is detrimental to the UACs. Some commenters wrote that detention would be prolonged because of the lack of process provided to UACs under the rule and a lack of access to counsel. Another commenter claimed that by placing the onus on UACs—who lack familiarity with their rights and the immigration process in general—to request a redetermination hearing, the rule will inevitably lead to fewer minors receiving such hearings and, therefore, prolonged detention.

*Response.* HHS notes that 810 hearings as described in the rule are modeled substantively after existing bond hearing practices. Under current practice, UACs do not receive automatic hearings before immigration judges. Also, like bond hearings, favorable 810 hearing decisions in and of themselves do not result in discharge of UACs from ORR custody. Also as with bond hearings, UACs are entitled to be represented by counsel at no expense to the government. HHS does not intend to use 810 hearings to prolong “detention” of UACs in ORR custody. As indicated already, ORR does not detain UACs, rather, it provides temporary care and custody of UACs and has a general policy favoring release to suitable sponsors. For these reasons, HHS disagrees that instituting the 810 hearings as proposed would prolong the length of time UACs remain in ORR custody.

*Comment.* Another commenter wrote regarding the practices that should be adopted to protect due process of minors in bond hearings including: Appointment of child advocates, hearings within 48 hours of request by child or counsel, and ensuring all minors are informed of their right to request review of their continued detention.

*Response.* Although this comment appears to be directed to bond hearings for minors in DHS custody, HHS responds as follows with respect to 810 hearings for UACs in ORR custody. HHS notes that, as previously discussed, 810 hearings preserve the substantive benefits of bond hearings as described by the *Flores* court and the Ninth Circuit. Regarding child advocates, HHS notes that ORR already appoints child advocates, where they are available, for victims of trafficking and other vulnerable children. HHS may establish further policies that include children seeking 810 hearings as another category of children for whom ORR should appoint child advocates, but believes it is not possible to mandate child advocates for all children requesting hearings because child advocates are not available in all ORR care provider locations. In any case, nothing in the FSA, or TVPRA, or case law requires child advocates during the bond or 810 hearings.

Regarding the commenter's suggestion that hearings be scheduled within 48 hours of request, HHS notes that bond hearings in the immigration court have rarely, if ever, occurred within 48 hours of the initial request. Where there have been special circumstances (*e.g.*, a child with an imminent 18th birthday), courts have made special arrangements to hear such cases. HHS intends that the independent hearing officer in 810 hearings will similarly prioritize such cases. But it would be inappropriate to apply a one-size-fits-all timeframe on these scheduling matters, and nothing in the FSA or TVPRA includes such time limits.

Regarding review of placement, § 410.810 already states that UACs placed in secure or staff secure facilities will receive a notice of the procedures under this section and may use a form to make a written request for an 810 hearing. Because the questions at issue in 810 hearings are dangerousness and flight risk, 810 hearings are relevant in almost all cases only to children in secure, and potentially staff secure facilities. For purposes of 810 hearings, HHS plans to treat RTCs as secure facilities. HHS does not consider children in shelter or other less restrictive placements to be dangerous or flight risks; if they were, they would not be placed there. As a result, such children would not require 810 hearings—though the rule would not preclude such children from requesting them. Based on HHS' experiences with bond hearings, except in unusual circumstances, in these cases ORR would stipulate to the independent hearing officer that it does not consider

the children to be dangerous or flight risks.

*Comment.* One commenter noted that if the only review of HHS decisions happens within HHS' apparatus, there is a high chance that due process rights will be violated and that Federal courts have struck down similar agency actions.

*Response.* HHS has already discussed both the procedural guarantees and other practical benefits that 810 hearings would afford UACs and incorporates those discussions here. Similarly, HHS has discussed at length the point about the independence of 810 hearing officers and incorporates that discussion here as well.

With respect to the commenter's claim that this rule would violate a 2016 decision of the Eastern District of Virginia,<sup>55</sup> HHS notes that the process at issue in that case was distinguishable from 810 hearings. That case concerned ORR's release process with respect to a parent seeking to sponsor her child. In contrast, as already discussed, under the Ninth Circuit ruling in *Flores v. Sessions*, the purpose of custody hearings, and 810 hearings by extension, is to decide on the questions of a UAC's dangerousness and flight risk—not release from ORR custody. Considering that different context and the “practical benefits” for UACs discussed by the Ninth Circuit, HHS is confident that 810 hearings satisfy any applicable due process requirements.

*Comment.* Several commenters wrote that under the proposed rule UACs do not have adequate notice of the hearing, time to prepare for the hearing, or access to the evidence supporting HHS' determination of dangerousness and/or flight risk.

*Response.* HHS notes that under the rule, UACs have notice of their right to request an 810 hearing as soon as they enter a secure or staff secure care provider facility. Further, they have the right to counsel, and counsel has the ability request the child's full case file at any time. Even if a UAC who requests an 810 hearing does not have an attorney, ORR will provide the UAC with the information and evidence it used as its basis for determining dangerousness and flight risk. In HHS' experience participating in custody hearings before the immigration courts, representatives for UACs (almost all UACs requesting bond hearings have had free legal representation), and ORR have cooperated to ensure hearings take place promptly and that all stakeholders have access to the evidence provided by

<sup>55</sup> See *Beltran v. Cardall*, 222 F. Supp. 3d 476 (E.D. Va. 2016).

both parties. HHS anticipates that the 810 hearing process would similarly allow the parties and counsel for the parties to cooperate.

*Comment.* Some commenters claimed that HHS is incapable of or not authorized to provide a bond redetermination hearing.

*Response.* Under the proposed rule, 810 hearings would not mimic the proceedings of an Article 3 court but would instead serve to review ORR child welfare-based determinations regarding dangerousness and flight risk. Child welfare determinations are clearly within the responsibility vested in the Secretary of HHS under the TVPRA for the care and custody of UACs.

*Comment.* Many commenters wrote that without more information about procedures to protect due process rights in 810 hearings, the hearing process does not meet the requirements set out in the APA for agency decision making.

*Response.* disagrees with the suggestion that the proposed rule provides inadequate information about procedures in 810 hearings. As explained in the rule, 810 hearings will decide on specific questions noted in the rule, allow for the introduction of evidence, be subject to a preponderance of the evidence standard, result in a written decision, and subject to appeal.

810 hearings are not removal hearings, nor adjudications required by statute to be determined on the record after opportunity for an agency hearing. Where matters of immigration detention and removal are involved, this rule provides for bond hearings for accompanied children in § 236.3(m). HHS notes that 810 hearings flow from HHS' duty to provide care and custody to UACs, and the APA is satisfied by HHS' promulgation of this rule after notice and comment.

*Comment.* Commenters wrote that the role of a UAC's attorney in an 810 hearing was unclear. They also contended that UACs would not have adequate assistance because UACs would not receive government appointed attorneys to represent them during the 810 hearings.

*Response.* HHS anticipates that counsel for UACs would have the same role and ability to represent their clients in 810 hearings as they do for UACs in bond hearings. For example, they will be able to request their clients' case files, present evidence, and cross-examine the government's evidence. In practice, essentially all UACs in bond hearings have had counsel.

Nevertheless, Congress did not require the government to pay for counsel in any circumstance, and that counsel may be present at no expense to the

Government. 8 U.S.C. 1232(c)(5), incorporating 8 U.S.C. 1362.

*Comment.* Several commenters took exception with placing the burden of proof in 810 hearings on the UAC, and with the standard of evidence applicable to hearings. Some commenters expressed concerns that the rule would result in a shifting of the burden of proof from the government to prove that the child is a safety or flight risk to the alien child to prove that he or she is not. The commenters suggest this is inconsistent with the FSA and *Flores v. Sessions*, 862 F.3d at 867–68.

*Response.* HHS believes that it may, in this rule, recognize the child welfare nature of ORR care and custody of UAC. As a result, although HHS will not place the burden of proof on the government in 810 hearings, it has modified the rule to state that the government does bear an initial burden to produce evidence supporting its determination of the UAC's dangerousness or flight risk. Once the government produces its evidence, the UAC bears the burden of persuading the hearing officer to overrule the government's determination, under a preponderance of the evidence standard.

*Comment.* Several commenters urged HHS to both assume the burden of proof and adopt a clear and convincing standard of proof for bond hearings. They stated that the clear and convincing evidence standard is the governing standard in almost all civil detentions, with the exception of immigration detention. Specifically, the standard of evidence for the government should be clear and convincing, which is a higher standard than preponderance of the evidence.

*Response.* HHS will assume the burden of producing documentation and evidence supporting its finding of a UAC's dangerousness or flight risk, which the UAC must then successfully rebut before an 810 hearing officer, under a preponderance of the evidence standard. See *Flores v. Lynch*, No. CV854544DMGAGR, 2017 WL 6049373AsAsA20, 2017, at \*2 (citing *Matter of Guerra*, 24 I & N Dec. 37 (BIA 2006) to support the proposition that aliens in custody must establish that they do not present a danger to persons or property and are not flight risks). Although ORR and EOIR implemented *Flores* bond redetermination hearings by immigration judges equivalent to bond hearings in the adult context (where the burden is on the alien to demonstrate they are not a danger or risk of flight), in practice ORR has produced the evidence supporting its determination of the UAC's dangerousness or level of flight risk, which the UAC has then

attempted to rebut. HHS believes it is closest to current bond hearings to have the burden of persuasion on the UAC, and to apply a preponderance of the evidence standard rather than a clear and convincing standard.

Requiring UACs to bear the burden of persuasion under a preponderance of the evidence standard allows HHS to balance the equities of UACs in care with its responsibility under the FSA to ensure public safety. See FSA paragraph 14 (describing ORR's general policy favoring release, together with its responsibility to ensure the safety of the UAC and others when it releases a UAC). To the extent the courts have ordered ORR to provide bond hearings to UAC under Paragraph 24A of the FSA, they have not imposed a standard of evidence. Rather, one of the cases cited by the *Flores* district court, *Matter of Guerra*, stated, "An Immigration Judge has broad discretion in deciding the factors that he or she may consider in custody redeterminations. The Immigration Judge may choose to give greater weight to one factor over others, as long as the decision is reasonable." 24 I & N Dec. at 40. Further, ORR custody of UACs is not the equivalent of civil detention or immigration detention; and even if it were, determining the proper standard of proof for Paragraph 24A bond hearings or the proposed section 810 hearings would depend first on the text of any applicable statutes and case law.<sup>56</sup> The TVPRA and HSA do not speak to the issue of bond hearings or their equivalent for UAC in ORR custody, but the relevant case law has applied existing immigration court practices calling for broad discretion by the hearing officer in these cases. Finally, we also note that the regulation specifically provides that UACs will have access to counsel for 810 hearings.

*Comment.* Organizations noted § 410.810 fails to take the best interest of the child into consideration. Another organization argued that the hearing officer's work should be reviewed under "substantial evidence" to ensure they considered the best interest of the child.

*Response.* As mentioned above, Congress recognized that HHS has expertise in child welfare and is the most capable agency to make decisions that factor in the best interest of the child. In 2008, Congress enacted a requirement that children under HHS custody "shall be promptly placed in

<sup>56</sup> See *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018) (finding in part, with respect to certain adult bond hearings, that nothing in the text of the relevant statute "even remotely support[ed]" the imposition of clear and convincing standard of proof).

the least restrictive setting that is in the best interest of the child.” 8 U.S.C. 1232(c)(2)(A). In making such placements, “the [HHS] Secretary may consider danger to self, danger to the community, and risk of flight.” *Id.* The 810 hearing does not require a formal best interest determination, just as immigration courts and the FSA do not require a best interest determination for a bond hearing nor does the FSA require this. As noted above, the scope of an 810 hearing is also limited to the question of whether the UAC poses a danger or a flight risk, although these are not the only factors when determining release. ORR takes the best interest of the child into account, in addition to potential danger or flight risk, when making a decision about release.

HHS declines to require the hearing officer’s work be reviewed under “substantial evidence.” As already explained, HHS will apply a preponderance of the evidence standard of evidence for 810 hearings.

*Comment.* Other comments concerned the appeals process for 810 hearings. Several commenters expressed concern about the proposed appeals of HHS hearing officers going to the Assistant Secretary for Children and Families. One commenter wrote the Assistant Secretary would create a bottleneck for cases, but others were concerned that, because the Assistant Secretary is a political appointee, the appeal decisions would be politicized.

*Response.* HHS believes that directing all 810 hearings appeals through a dedicated office will result in efficiencies. Only a limited number of bond hearings have been requested each year—approximately 70 in the past year—and an even smaller number were appealed. HHS anticipates a manageable number of appellate cases in any given year, not a bottleneck. In addition, HHS does not believe that it is improper to vest an appellate decision of this sort in the Assistant Secretary, who is an Officer of the United States and therefore legitimately exercises significant authority pursuant to our laws. *See Lucia v. SEC.*, 138 S.Ct. 2044 (2018).

*Comment.* Several commenters argued that 810 hearings should only occur in person because video or telephonic conferencing is not child friendly and that they should follow best practices used in state juvenile custody determinations.

*Response.* HHS anticipates that the procedures governing 810 hearings to develop more fully with experience. As written, the rule provides for minimum requirements. But HHS declines to

impose the sorts of protocols recommended by the commenters recommended by the commenters. Just as ORR makes child welfare decisions on an individualized basis, so too does HHS envision a process by which the individual needs of UACs requesting 810 hearings can be accommodated. HHS accordingly declines to require all hearings to take place in person, or to state that video or telephonic conferencing is necessarily not child friendly. Neither the FSA nor the TVPRA impose such a requirement.

*Comment.* One commenter complained that the proposed rule does not provide information about the qualifications for HHS hearing officers.

*Response.* As indicated above, HHS invited comments on whether hearing officers should be employed by the Departmental Appeals Board, either as Administrative Law Judges or hearing officers, or whether HHS would create a separate office for hearings, similar to the Office of Hearings in the Centers for Medicare & Medicaid Services. But the comments received did not make responsive suggestions. As a result, HHS maintains that 810 hearings will be conducted by independent hearing officers to be identified by HHS.

*Comment.* Two commenters wrote that creating a new custody redetermination process at HHS would create a fragmented and uncoordinated administrative processes resulting in confusion and contradictory results between HHS and EOIR. One commenter wrote that in addition to bond redetermination cases remaining with EOIR, immigration judges should be charged with informing UACs of their rights, and appeals to the BIA should be heard and decided within 48 or 72 hours of the appeal.

*Response.* As an initial matter HHS disagrees with the commenter that housing hearings within HHS will result in a fragmented process. One of the benefits of moving these child welfare hearings to an independent HHS office is to allow continuity of child welfare decision-making within the Department. Moreover, HHS proposed an independent hearing process to replace the current regime of custody hearings before immigration judges. Immigration judges would play no role in informing UACs of their rights regarding 810 hearings, including information on the opportunity for appeal, which are distinct from immigration enforcement proceedings. HHS has, however, considered this comment with respect to the 810 hearing process and notes that, typically, immigration judges have informed UACs and ORR of their rights to appeal bond hearing decisions

concurrently with the issuance of those decisions. HHS anticipates that it will create a new bilingual form that will explain the 810 hearings process, notify UACs of their rights within the administrative process, and allow UACs to formally request an 810 hearing—or withdraw a request. If a child speaks a language other than English or Spanish, HHS will use interpretation services to convey the form’s meaning and content to the UAC. But the timetable for appellate decisions proposed by the commenter is not practically feasible, nor even required by regulations governing BIA appeals of bond determinations by immigration judges.

*Comment.* One commenter argued that according to his observations of bond redetermination hearings, the process is currently disorganized and inefficient, and insufficiently protects UACs. He further contended that that in the hearings he observed, the immigration judge disagreed with HHS’ assessment of the dangerousness of the child. The commenter concluded that HHS officials are thus incapable of providing an adequate bond hearing to a UAC.

*Response.* Based on the context of this comment, the commenter appears to have confused bond hearings under paragraph 24A of the FSA, with *Saravia* hearings. *See Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017), *aff’d sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018). *Saravia* hearings originated in a case in which DHS had re-apprehended based on gang affiliation certain UACs whom ORR had discharged to sponsors. The District Court for the Northern District of California ordered that, going forward, any such UACs must be afforded a hearing before an immigration judge, in which the burden is on the government to demonstrate that circumstances changed sufficiently to justify re-apprehension and referral to ORR custody. ICE counsel, not HHS, represents the government in *Saravia* hearings. In contrast, ICE counsel does not represent the government in UAC bond redetermination hearings under the FSA; HHS does. Anecdotal information that an immigration judge disagreed with ORR’s original judgment to release a particular child to a sponsor, in the context of a *Saravia* hearing, is insufficient to establish that an independent hearing officer unaffiliated with ORR is unable to make an appropriate child welfare determination.

*Comment.* One commenter objected that the 810 hearings do not provide an opportunity for sponsors to participate in the bond redetermination case to

show that the child has an appropriate sponsor.

*Response.* HHS reiterates that neither bond hearings nor the proposed 810 hearings make determinations on release, let alone release to particular sponsors. Sponsor suitability determinations are within ORR's statutory mandate, and are a separate question from the analysis done in the current bond hearings or the proposed 810 hearings. As a result, potential sponsors need not always be afforded the right to participate in 810 hearings. Having said that, UACs are frequently sponsored by their parents, and the rule allows parents or legal guardians to request 810 hearings on their children's behalf, just as they are able to request bond hearings on their children's behalf presently. In these situations, the rule would not prevent parents from participating in the hearings. For example, they could testify or present evidence, or could argue on behalf of their children.

*Comment.* Some commenters disagreed with the agency's analysis that EOIR lacks the authority to hear UAC bond redetermination hearings because Congress did not authorize EOIR to hear these cases and because release authority for UAC rests solely with HHS. These commentators supported their objection by citing to the Ninth Circuit's analysis of these issues. One commenter noted that the BIA has held that immigration courts can rule on UAC bond redeterminations cases.

*Response.* HHS disagrees with the commenter's conclusion regarding the Ninth Circuit's analysis as it pertains to the bond hearing requirement under paragraph 24A of the FSA (for the reasons stated above, as well as in the NPRM). In addition, Congress also has already determined that HHS is the agency with expertise in child-welfare issues, including in making release determinations that are in best interest of the child. Immigration judges—sitting in a different Department of the Executive Branch, and generally able to release individuals “on bond” on their own recognizance, are unfamiliar with the HHS system and do not always recognize the limits of their authorities (*i.e.*, to determine only dangerousness or risk of flight, without necessarily being able to release a child for whom a suitable custodian has not yet been determined). While the Ninth Circuit itself recognized that the “bond hearing” under FSA paragraph 24A would not result in a dispositive release decision, this limitation on the authority of immigration courts is not a limitation typically experienced with such

administrative courts. Thus, not only do the statutory authorities support an HHS administrative process for the hearings that will affect HHS legal custody, but also, even if the statutes could be read to allow EOIR to retain authority over the UAC bond hearings, the Government nonetheless has the authority to implement the FSA by moving the hearings to an HHS framework. The language of the HSA shows that Congress knows how to preserve DOJ authorities where it chooses to do so. In the rule of construction governing immigration benefits, Congress stated that “Nothing in this section may be construed to transfer the responsibility for adjudicating benefit determinations under the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) from the authority of any official of the Department of Justice, the Department of Homeland Security, or the Department of State.” 6 U.S.C. 279(c). No similar language exists for bond hearings. Such a discrepancy shows that where Congress wished to preserve DOJ authority for UACs, it did so explicitly. In addition, Congress has recognized that HHS would assume responsibilities that previously resided within the Department of Justice. *See* 6 U.S.C. 279(f)(1) (authorizing Federal officials to perform the functions, and exercise the authorities under “any other provision of law,” that were “available with respect to the performance of that function to the official responsible for the performance of the function immediately before the effective date” of the HSA). Finally, even assuming commenters are correct in their analysis (which HHS disputes), binding HHS (and EOIR) to the commenters' reading of Paragraph 24A would mean that the Government is indefinitely bound by a decades-old consent decree—a consent decree signed by an Administration no longer in office, that can never be altered, even through Congress' sanctioned method of adopting binding policies through notice and comment rulemaking under the Administrative Procedure Act. HHS does not believe such an unyielding and indefinite hold on agency policy-making, across Administrations, can arise from a consent decree, especially where, as here, Congress abolished the signatory to the Agreement and divided its responsibilities among new Parties. Decisions on whether a minor must be maintained in HHS custody solely due to his or her danger or risk of flight are properly within the purview of the very agency charged with making child-welfare determinations. Once Congress made clear that UACs are to be the

responsibility of an agency not involved in immigration enforcement, it does not make sense for the immigration courts—which are primarily involved in aspects of such immigration enforcement—to retain jurisdiction.

BIA precedent is not dispositive on the question of whether immigration judges may review custodial determinations of ORR. While the district court and Ninth Circuit may have altered this ruling as it pertained to implementation of the FSA, a final rule that provides the substantive elements and practical benefits of bond hearings, especially protection of UACs' due process rights, settles the matter as it relates to HHS custody of UACs. DHS immigration detention is a separate matter, and this rule provides for bond hearings for minors in DHS custody.

*Comment.* Commenters argue that it would be inefficient and more expensive to create a new type of tribunal system for UAC bond redetermination cases.

*Response.* Although it would arguably be less expensive for HHS to preserve UAC bond redetermination hearings in the immigration court system rather than creating a new process within HHS, there are at least two efficiencies that would result from a new independent hearing process. First, removing these cases from immigration court dockets would allow the courts to focus on cases within their expertise and authority (*i.e.*, immigration detention and removal hearings). It is well known that the immigration courts face an extreme backlog of cases, with many aliens waiting months if not longer for their hearings. The sudden addition of UAC custody hearings in 2017, which the immigration courts prioritized in terms of scheduling, only added to the already heavy caseload placed on the immigration courts. Second, placing 810 hearings within an independent HHS office would also promote the speed of adjudications and appeals through the development of specific expertise, and through centralization. Currently, bond hearings take place around the country, in courtrooms with varying rules and scheduling demands. By centralizing all 810 hearings in an independent office within HHS, protocols would be standardized. In addition, the independent hearing office would accrue specialized expertise and at least in theory be able to make adjudications more quickly and effectively than immigration judges who remain largely unfamiliar with ORR policies and practices.

*Comment.* One commenter asserted that 810 hearings fail to protect rights

under the INA and international customary law.

*Response.* As noted above, the purpose of this final rule is to promulgate final rules implementing the FSA, and HHS believes the 810 hearing process does so. HHS is not aware of any provision in the INA or customary international law that would preclude this process and so it does not accept that 810 hearings are governed by customary international law. The commenter appears to suggest that there are requirements of impartial custodial review under customary international law, but it is not clear what the commenter's argument is. Without taking a position on this assertion and as HHS already stated, 810 hearings will be conducted by independent hearing officers.

*Comment.* One commenter wrote that the proposed 810 hearings ignore the interest that state courts may have in the custody of a child in the state, particularly if state courts had previously been involved in the child's life through, for example, a custody hearing.

*Response.* State courts have no jurisdiction over UACs, who are in Federal custody, other than that which ORR specifically consents to in writing. *See, e.g.,* FSA at paragraph 24B (permitting UACs to seek judicial review of placement decisions not in state court, but rather in the United States District Court with jurisdiction and venue). *See also Perez-Olano, et al. v. Eric Holder et al.*, Case No. CV 05–3604 (C.D. Cal., Dec. 14, 2010) (creating a uniform notification process for notifying UAC in Federal custody of their right to seek Special Immigrant Juvenile status; establishing procedures for the Federal Government and UAC and UAC representatives to follow for filing specific consent requests to juvenile court jurisdiction).

#### Changes to Final Rule

HHS has changed the final rule text to make clear that once the UAC has made a claim that s/he is not dangerous or a risk of flight, HHS bears the initial burden to produce evidence supporting its determination of dangerousness or flight risk; however, the UAC, who may introduce his or her own evidence, bears the burden of persuading the independent hearing officer to overrule HHS, under a preponderance of the evidence standard.

#### C. Other Comments Received

##### 1. Detention as Deterrent

##### Public Comments and Response

*Comments.* Many commenters stated the Government failed to provide data and/or methodologies used to make an assessment regarding detention as a deterrent, and multiple others stated that detention has been shown to be an ineffective deterrent. Several commenters stated that while harsher enforcement may impact migration flows, so do push factors, something for which they say the proposed rule did not account.

Various commenters asserted that using detention of families or individuals as a way to deter migration is unlawful. One commenter added that deterrence is a concept that applies in the criminal justice system, not the civil immigration context. Commenters pointed out that the Supreme Court has ruled that civil detention may not be used as a mechanism for deterrence and that detention used as a deterrent abandons the protections of the due process clause of the Fifth Amendment. A few commenters insisted that the government must show the justification for detaining immigrants outweighs countervailing liberty interests and that detaining asylum seekers to deter other migrants does not meet the standard. A few commenters stated that detention as a deterrent has been both proven ineffective and decied as unlawful by a Federal judge.<sup>57</sup> Others stated that when the previous administration attempted a similar policy of detaining families for the purpose of deterring future migration, a Federal court issued a preliminary injunction blocking the practice.

Multiple commenters stated that DHS makes a flawed assertion in the proposed rule by stating that a 20-day limit on family detention imposed as part of a July 2015 court ruling “correlated with a sharp increase in family migration.” These commenters argued that available evidence indicates the increase in migration is more directly related to root causes of poverty and violence in migrants' home countries and that the NPRM erroneously presented correlation as causation.

Numerous commenters cited research and testimonials indicating that the migration trend from the Northern Triangle is due to high rates of violence in that region. They cited statistics about significant danger accompanying travel to the United States to underscore

the severity of the situation that they are fleeing. Several commenters asserted that the families who would be affected by this rule have grounds for asylum, citing USCIS data showing that nearly 88 percent of families in its detention centers have exhibited credible fear. The commenters stated that the rules set forth in the NPRM will not deter these individuals who are trying to save their lives and the lives of their children. Commenters suggested that by ignoring violence and persecution as a migratory cause, DHS evades its responsibilities as a signatory to the 1967 Protocol Relating to the Status of Refugees; increases likely litigation regarding protection of asylum seekers; risks returning asylum seekers to persecutory harm; and risks undermining confidence in the rule of law in the United States by both asylum seekers and U.S. citizens.

Several commenters mentioned that the migrants have no or minimal knowledge of U.S. immigration laws, while others noted that the policy is ineffective even if migrants are aware of the consequences of entering the United States illegally.

One commenter stated that the NPRM shows the government is struggling to comply with the FSA and is attempting to alter the standards agreed upon by the parties in the FSA. The commenter stated that the FSA was focused on establishing procedures and conditions that meet child welfare principles, but the purposes demonstrated in the NPRM are in direct contrast to the FSA's intent. The commenter asserted that the proposed rule cannot be interpreted as a good faith attempt to be consistent with the FSA's provisions.

Commenters also stated concern with family “incarceration.” For example, one commenter stated that incarceration of families is a cruel response to the humanitarian crisis at the border and will exacerbate the trauma that survivors of violence have endured. The commenter stated that many women and children arriving at the border from the Northern Triangle are fleeing terrible violence at the hands of intimate partners, criminal gangs, or police or other authorities, who perpetrate these acts of violence without any accountability.

*Response.* As DHS specified in the proposed rule, the primary objective of the rule is to implement the FSA in regulations, thereby terminating the FSA; it is not to utilize detention as a deterrent to migration. Congress has authorized DHS, as a general matter, to detain aliens during the immigration enforcement process to ensure that, at the conclusion of that process, they can be removed if so ordered. In some

<sup>57</sup> *R.I.L.R. v. Johnson*, 80 F. Supp. 3d 164, (D.D.C. 2015).

circumstances, detention is at the discretion of DHS and, in others, detention is mandatory. Detained cases are handled by the immigration courts on a priority basis, and DHS's policy preference is to be able to exercise its discretion to maintain custody in appropriate family unit cases pending the completion of removal proceedings. This rule will enable DHS to maintain family unity while also enforcing the laws passed by Congress, including appropriately exercising the enforcement discretion Congress has vested in DHS. To the extent that the effect of enforcing the laws passed by Congress is to deter some migrants from making the journey to the United States, that effect is merely a result of enforcing the laws currently in place.

Commenters misinterpreted DHS's position concerning the operational consequences of the FSA. In particular, the absence of state licensing for FRCs has prevented the Government from maintaining custody of many families for a period of time sufficient to resolve their immigration cases, including expedited removal proceedings. This often leads to the release of families, many of whom abscond, adding to a large alien fugitive backlog, as discussed elsewhere in this rule. DHS has encountered cases where this confluence of the FSA and its interpretation have created an incentive for adults to bring minors to the United States with the aim of securing prompt release from custody. That being said, consistent with the view expressed by many commenters, DHS acknowledges that the incentive structure informing the decision of migrants whether to travel to the United States is complex and multifaceted, and that potential detention for criminal or civil violations of U.S. law is not the only consideration at issue. This rule does not purport to—and indeed, cannot—address all potential incentives for migrants to travel to the United States, including “push factors” such as those described in the comments.

DHS declines to amend the proposed regulatory text in the final rule in response to these public comments.

## 2. Indefinite Detention

### Public Comments and Response

*Comments.* Many commenters stated that they were concerned that minors, particularly accompanied minors, could be detained indefinitely under the proposed rule. They requested that DHS maintain a fixed detention limitation for children and that families with children be released rather than detained. Many commenters also requested that DHS

maintain the existing list of relatives to whom it will release children.

Many commenters stated that the proposed rule is contrary to the principles underlying the FSA, namely that immigrant children are uniquely vulnerable and, thus, should be released from detention as quickly as possible. These commenters expressed concern that the proposed rule fails to prioritize community placement, and they argued that elimination of the 20-day limitation on detention conflicts with the FSA's general policy favoring release as “expeditiously as possible” without “unnecessary delay.” Many commenters wrote that the proposed rule constitutes a modification of the FSA, rather than a codification of it, and could not be used to justify termination of the FSA. These commenters noted that the FSA's detention limitation applies to both accompanied and unaccompanied children under a 2015 District Court ruling.

Several other commenters stated that the proposed rule violates the FSA's requirement that children be placed in the least restrictive setting, along with additional Federal laws. One commenter stated that the least restrictive setting requirement should be interpreted consistently with similar language in the Individuals with Disabilities Education Act (IDEA), which requires that students with disabilities be placed in the least restrictive appropriate setting possible. The commenter wrote that the IDEA and the FSA are both intended to prevent disadvantaged children from being taken advantage of by those in power, and that the FSA's “least restrictive setting” language should therefore be interpreted to prohibit detention in most circumstances. Another commenter stated that indefinite detention of children would violate the Child Abuse Prevention and Treatment Act, a Federal law which prohibits caretakers of children from causing, or failing to mitigate serious imminent threats of, physical and emotional harm. Still other commenters wrote that indefinite detention runs contrary to the spirit of the Family First Prevention Services Act, a Federal law which attempted to reduce the number of children in congregate settings. These commenters stated that indefinite detention contradicts best practices, state policy, and Federal policy in the criminal justice, juvenile detention, and child welfare areas.

Other commenters recommended specific changes to the language of the rule to avoid the prospect of indefinite detention. One commenter recommended adding language

regarding continuing efforts to release minors and reunify families for the duration of a child's time in custody to § 410.201(f). Another commenter wrote that the possibility of indefinite detention is exacerbated by the use of permissive and future-tense verbs (“may” and “will”) rather than the mandatory verbs found in the FSA (“shall” and “must”). This commenter recommended retaining the verbs used in the FSA. This commenter also wrote that the “or is otherwise appropriate” clause should be stricken from § 236.3(h) because it provides an opportunity for indefinite detention.

Many commenters stated that the TVPRA did not justify changing the conditions imposed by paragraph 14 of the FSA with regard to accompanied minors, because the TVPRA only addresses UACs and, in any event, is not inconsistent with the FSA.

Many commenters expressed concern that indefinite detention would violate detained children's human rights or civil liberties. These commenters asserted that detaining migrants in order to deter migration violates international prohibitions on torture. One commenter stated that prolonged detention of asylum seekers violates Article 31(1) of the UN Refugee Convention. Another commenter stated that detaining children for prolonged periods of time violates international law protecting the dignity of the family unit as well as guidance from the United Nations that children should not be detained due to migration status. Another commenter wrote that the indefinite detention of children violates Articles 37, 22, and 9 of the United Nations Convention on the Rights of the Child. One commenter wrote that the proposed rule should explicitly mandate consideration of the best interest of the child in order to comply with these provisions of international law. This commenter also stated that indefinite detention violates Article V of the American Declaration of the Rights and Duties of Man.

Many commenters expressed concern that prolonged or indefinite detention would negatively impact detained children's health, growth, and development. These commenters stated that, while there is no safe amount of detention, harms to children from detention increase as the length of detention increases. They argued that the conditions in existing detention facilities are inappropriate for, and dangerous to, children and do not provide sufficient medical and developmental services to children.

Specific concerns were raised with respect to the mental health of children including the prospect that detention

could cause depression, suicidal ideation, and anxiety. Many commenters stated that indefinite detention could cause behavioral changes in children after release and inhibit their educational attainment and success in life. Several commenters worried that prolonged detention may cause “toxic stress,” and one commenter stated that the trauma caused by detention could require years of psychotherapy and medications. Another commenter stated that, although parents can typically buffer children from stressful situations, when the parent is also experiencing intense stress, the parent’s “buffering capacity” may be undermined and lead to additional harm to the child.

One commenter expressed concern that prolonged family detention would force children and their families to give up their culture. This commenter described a state’s experience with Native American assimilation and Japanese-American internment and the negative effects these events had on those communities and noted that it does not want the United States to return to this past practice of childhood detention.

Finally, one commenter expressed concern that indefinite detention of immigrant children could lead to indefinite confinement of U.S. citizen children abroad because the proposed rule would damage the reputation and credibility of the United States abroad.

*Response.* This rule does not contemplate or authorize “indefinite detention” of anybody, much less minors. “Indefinite detention” is inconsistent with DHS’s mission. The purpose of immigration detention is to effectuate removal and to keep custody over an alien while a decision is made on whether removal should occur. If the alien establishes that she merits relief from removal, she will be released at the end of the proceedings; if not, she will be removed. That is not “indefinite detention” because it has a definite end point, namely, the end of proceedings and removal itself. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018); *Demore v. Kim*, 538 U.S. 510, 529 (2003). ICE notes that the majority of minor and family unit removals involve countries in the Northern Triangle, and removals are normally effectuated promptly in these countries. DHS notes that minors and family units are not likely to face long periods in detention because immigration proceedings involving detained family units and minors are placed on a priority docket by EOIR. Family units and minors can also benefit from release during the pendency of removal proceedings if

they qualify for release on recognizance, bond, or parole.

Aliens subject to final orders of removal may remain in custody until removal can be effectuated. For those aliens detained pursuant to INA 241, this includes a presumptively reasonable period of 180 days after a final order of removal has been issued, and thereafter, the alien must generally be released absent a significant likelihood of removal in the reasonably foreseeable future (in compliance with current law and regulation).

Detention remains an important tool to ensure that proceedings are completed. EOIR found that for completed cases from January 1, 2014, through March 31, 2019 that started at an FRC, 43 percent of family unit members were issued final orders of removal *in absentia* out of a total of 5,326 completed cases. DHS OIS has found that when looking at all family unit aliens encountered at the Southwest Border from FY 2014 through FY 2018, the *in absentia* rate for completed cases as of the end of FY 2018 was 66 percent. As a result, the authority to detain minors in family units continues to be an important component of immigration enforcement. But “indefinite detention” is not consistent with DHS’s mission.

DHS reiterates that while this rule would allow DHS to hold non-UAC minors with their parents or legal guardians at FRCs for more than 20 days, this intent does not clash with the intent of the FSA. The FSA provides that minors subject to its provisions will all be transferred to a licensed program until they can be released. FSA paragraphs 12A, 14, 19. The provisions of this rule will allow properly managed FRCs to qualify as licensed, non-secure facilities once its terms go into effect, and the FSA itself provides no specific time limit for a minor to be in a licensed program. That ICE generally does not hold family units in FRCs beyond approximately 20 days is a result of a district court opinion holding that ICE’s FRCs, as they currently exist under law, are not appropriately licensed and are not “non-secure.” Once this rule permits properly managed FRCs to qualify as licensed, non-secure facilities, their operation will be consistent with the operation of licensed programs under the FSA. Importantly, as explained previously, FRCs are designed to be a safe location where families can be together in an environment that will foster their children’s development during the pendency of immigration proceedings. They are not secure facilities—which means that, while it is discouraged,

individuals in those facilities can exit them. Doing so, however, may give rise to arrest given that those in the facilities are subject to apprehension under the immigration laws and, in many instances, mandatory immigration detention.

Bond determinations will be made pursuant to the ordinary statutory and regulatory standards, under which an alien is released if he can establish he is not a flight risk or danger. See INA 236(a). The rule here would not alter such authorities governing custody, but instead would allow the determination of whether to detain a family to be made under all appropriate legal authorities, and not under the FSA system through which a different set of rules applies to the minor and another to his parent(s) even though they are being held together in the same place.

DHS has added new language at § 236.3(j)(4) to state clearly that paroling minors in DHS custody pursuant to section 235(b)(1)(B)(ii) of the INA or 8 CFR 235.3(c) who do not present a safety risk or risk of absconding will generally serve an urgent humanitarian reason. DHS adds that it may also consider aggregate and historical data, officer experience, statistical information, or any other probative information in determining whether detention of a minor is required to secure the minor’s timely appearance before DHS or the immigration court or to ensure the minor’s safety and well-being or the safety of others. Furthermore, current limitations on bed space in FRCs are significant and will likely mean that, as a practical matter, unless the amount of bed space is significantly expanded or the number of families drops dramatically, families that have established a credible fear and who are not a flight risk or danger will often be released from detention. For a discussion release of minors from DHS custody, please see Section B.10., Release of Minors from DHS Custody.

#### Changes to Final Rule

DHS is amending § 236.3(j)(4) to state that paroling minors in DHS custody pursuant to section 235(b)(1)(B)(ii) of the INA or 8 CFR 235.3(c) who do not present a safety risk or risk of absconding will generally serve an urgent humanitarian reason.

#### 3. Alternatives to Detention

##### Public Comments and Response

*Comments.* Many commenters proposed alternatives to keeping family units or unaccompanied minors in detention. Several commenters pointed to the Juvenile Detention Alternatives

Initiative (JDAI) as evidence that alternatives to detention are effective and preferable over detention. Numerous commenters recommended use of the Family Case Management Program instead of detention, because the program is significantly cheaper and is effective at ensuring that a family appears for their immigration proceedings.

Commenters compared ATD programs such as the Intensive Supervision Appearance Program (ISAP) at \$4 per day per person and the Family Case Management Pilot Program (FCMP) at approximately \$36 per family per day to the cost of detention, which they cited as approximately \$319 per individual per day in FY 2019. One commenter estimated that the costs of detention for a family of two in an FRC for 40 days, the average time to process an individual on the detained docket costs would be \$25,520 ( $\$319 \times 2 \text{ people} \times 40 \text{ days}$ ). The commenter estimated the costs of ISAP for the head of household at \$3,008 for 752 days, the average time to process an individual on the non-detained docket ( $\$4 \times 752 = \$3,008$ ).

The commenters noted that participants in the FCMP had a 100 percent attendance record at court hearings and a 99 percent rate of check-ins and appointments with ICE.<sup>58</sup> The commenters also stated that the FCMP would have fewer negative impacts on the well-being of minors when compared to detention, and that the Program resulted in, among other things, lower return-rates of children into foster programs and lower rates of abuse, neglect, or other crimes when compared to minors and families in detention.

Relatedly, several commenters stated that DHS should utilize a community-based, case-management program as an alternative to detention. The commenters stated that such a program should provide case management services, facilitate access to legal counsel, and facilitate access to safe and affordable housing. They cited studies showing that a sense of belonging in schools and neighborhoods is a strong factor for positive health outcomes for immigrant and refugee families. The commenters also stated that such a program has been shown to substantially increase program compliance, without the extensive use of electronic monitoring, and cited pilot programs conducted by the Lutheran Immigration and Refugee Service and

the Vera Institute of Justice as support. Still other commenters presented alternatives to detention. Some commenters stated DHS should more heavily rely on NGOs, non-profits, and religious organizations to provide necessary services, including housing, to immigrants and ensure that they attend their immigration hearings. One commenter focused on foster family placement, stating that it would provide better outcomes for youth than detention or large shelter placement.

Several commenters stated that DHS should release more aliens on bond, or if the aliens lack any indicia of being a flight risk, on their own recognizance. Several commenters supported electronic monitoring as an alternative to detention. Other commenters, however, expressed concern that electronic monitoring can be stigmatizing for aliens and interfere in daily life activities, and stated that such monitoring, while preferable to detention, should only be used as a last resort, such as when the alien is a flight risk, presents a safety concern, or otherwise would be a candidate for secure detention.

One commenter expressed support for a program that includes a combination of electronic ankle monitors, voice-recognition software, and unannounced home visits, and stated that similar programs have been found to be affordable and highly effective. One commenter, citing a GAO report,<sup>59</sup> noted that a similar program resulted in over 99 percent of aliens with a scheduled court hearing appearing at their scheduled court hearings, and more than 95 percent of aliens with a scheduled final hearing appearing at their final removal hearing.

Several commenters stated that providing needed services to alien families and minors would help ensure their attendance at court hearings. Several commenters stated that DHS should provide legal orientation programs to aliens to help ensure their appearance at hearings, as well as inform families of their legal rights and obligations. These commenters expressed a belief that the high rate of *in absentia* removal orders is because asylum seekers lack basic information about the immigration process. Another commenter suggested that the government provide the families and minors with case workers, transportation to and from their hearings, and a small financial incentive

for showing up at their hearings. The commenter also suggested that aliens who appear at their hearings should also have their immigration cases looked upon more favorably.

Finally, commenters cited to a report on a non-profit organization's case management program, the Family Placement Alternatives (FPA), piloted in 2015. The commenters present the FPA as a human-centric alternative to detention through a holistic social service approach. The report highlights the benefits of community-based services and cites several examples of immigrants who were able to navigate the asylum system better with the help of an assigned case manager. The report also annexes several findings directly related to compliance with removal proceedings, discusses the cost-effectiveness of running the program and recommends its adoption on a larger scale.

*Response.* DHS agrees with the commentators that ATD has an important role to play as an effective compliance tool for some aliens. DHS accordingly uses ATD in some cases, consistent with resource limitations, and will continue to do so. But ATD is only a partial solution, not a complete answer. Congress has authorized, and in some instances required, immigration detention as a tool for fulfilling ICE's mission. Although ATD can be used as an effective compliance tool, unlike detention, such alternatives generally do not provide a means to effectively remove those who are illegally present and have a final order of removal. Moreover, DHS does not have the resources to keep aliens on ATD throughout proceedings, or to locate and arrest those who abscond. Enrolling aliens in ATD instead of detaining and removing them also contributes to the growing immigration court backlog. Many of those in the program are enrolled for years (as opposed to an average length of stay in detention of 30–40 days). ATD thus cannot completely replace immigration detention.

ICE is, however, currently utilizing ATD for certain qualified family units. The current ATD—Intensive Supervision Appearance Program (ISAP) is a flight-mitigation program that uses technology and case management tools to facilitate compliance with release conditions, court appearance, and final orders of removal while allowing aliens to remain in their community—contributing to their families and community organizations and, if necessary, wrapping up their affairs in the United

<sup>58</sup> Citing the U.S. Dept. of Homeland Security Office of Inspector General, Rep. No. OIG-18-22, U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program Contract (2017).

<sup>59</sup> Report to Congressional Committees, Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program, U.S. Government Accountability Office, Nov. 2014.



States—as they move through immigration proceedings.

ATD–ISAP may be appropriate for aliens who are in some stage of removal proceedings and released from DHS custody pursuant to an order of release on recognizance, an order of supervision, or a grant of parole or bond, *e.g.*, individuals considered not to be a danger to the community or a high flight risk. The ATD–ISAP contractor provides case managers who supervise participants utilizing a combination of home visits, office visits, alert response, court tracking, and technology. Case managers also provide referrals to a multitude of social services. Because of the nature of the program, juveniles cannot be participants, but family units (at least one adult and minor children) can be enrolled via an adult Head of Household. Of the approximately 100,000 participants currently enrolled in ATD–ISAP, about 50 percent are family units.

Data maintained by ICE show that historically family units on ATD tend to abscond at a higher rate than non-family unit participants. ICE considers an absconder from the ATD program to be an individual who has failed to report, who has been unresponsive to attempts by the Government to contact him or her, and whom the Government has been unable to locate. In FY 2018, the absconder rate for family units was 30 percent, significantly higher than the 19 percent absconder rate for non-family unit participants. Because ICE lacks sufficient resources to locate, arrest, and remove the tens of thousands of family units who have been ordered removed but are not in ICE custody, most of these aliens remain in the country, contributing to the more than 564,000 fugitive aliens as of September 8, 2018. Such at-large apprehensions present a danger to ICE officers, who are the victims of assaults in the line of duty, and significantly increases the operational burden of effectuating removal. Therefore, although ATD–ISAP is useful and indeed used by ICE for many families, it is not a complete answer for the enforcement of immigration law with respect to family units.

The Juvenile Detention Alternatives Initiatives (JDAI), was developed as a pilot project in the early 1990s by a private philanthropy based in Baltimore, and has since expanded to over 300 jurisdictions. The purpose of JDAI is to reduce reliance on local confinement of youth involved in the penal system, based on the premise that placing juveniles in locked detention pending court hearings increases the odds that the child would be found

delinquent and committed to corrections facilities, in turn damaging prospects for future success. The JDAI's core strategies include collaboration with juvenile court officers, prosecutors and defense counsel, and objective risk assessment of the youth to determine whether home confinement and self-reporting instead of detention will assure compliance with court appearances. JDAI is essentially a flight mitigation tool for the penal system with some similarities to ATD–ISAP in administrative removal proceedings. Accordingly, the JDAI is not suitable for managing family units and/or juveniles who are not otherwise involved in the penal system.

Commenters referenced the FCMP as a much cheaper alternative than detention. While the ATD–ISAP program has some elements of a case management program, the FCMP itself is a program no longer used by DHS. The FCMP was launched by DHS in early 2016, as an alternative to detention for family units who illegally entered the United States with a credible fear that might qualify them for protection from removal. The FCMP, which was implemented in only a few cities, aimed to promote compliance with immigration obligations for Heads of Household who are a low public-safety risk and who were residing or intending to reside in those few cities, and who were not considered appropriate for traditional ATD programs or who were not eligible for placement in FRCs, *e.g.*, pregnant or nursing women, or mothers with young children. Under the program, families were given a caseworker who helped educate them on their rights and responsibilities, and helped families settle in, assisting with things like accessing medical care and attorneys, and ensuring they made it to their court appearances.

ICE terminated the FCMP in June 2017, after completing a top-down review of the pilot year (January 2016—June 2017), based on the finding that the FCMP cost around \$38.47 per family, per day (or roughly \$16.73 per individual), while traditional ATD—Intensive Supervision Appearance Program (ISAP III) cost ICE approximately \$4.40 per individual, per day. FCMP subcontracted out many of its case management services to NGOs, non-profits and religious organization which drove up the average cost per participant. ICE concluded that money it would save by discontinuing the FCMP could be better used by instead supporting other ATD services for more families.

While it is true that *per day*, any ATD program could be less expensive than

the daily cost of detention, immigration judges process the cases of those in custody much faster than those on the non-detained docket<sup>60</sup> meaning that the ultimate gap in cost is often considerably smaller than appears when looking only at the per day costs. Indeed, in some circumstances where a non-detained case takes unusually long, detention can be more cost effective in the long run even though the per day cost is higher.<sup>61</sup>

Additionally, in the long run, the most important factor that determines if an alien is removed when a final order is issued is whether the person is in detention when this occurs. If an alien is not detained at the time, in many cases ICE will have to expend significant resources to locate, detain, and subsequently remove the alien in accordance with the final order.

Regarding commenters' reference to the non-profit organizations' Family Placement Alternatives program, such a program, as with the FCMP, is not suitable for the purpose of effectuating removal.

#### Changes to Final Rule

DHS declines to amend the proposed regulatory provisions in the final rule in response to these public comments.

#### 4. DHS Track Record With Detention Public Comments and Response

*Comments.* Several commenters discussed DHS's track record with detention. In general, comments focused on the following areas: Inadequate conditions at existing facilities; and problems hiring staff in remote DHS facilities.

Multiple commenters stated that ICE-run facilities have a history of poor conditions and compliance issues and stated that ICE could not be trusted to detain families in adequate and safe conditions. Some commenters contended that governmental facilities had failed to provide adequate access to care and safety for children in DHS and HHS custody, even though those facilities were presumably operating in accordance with current FSA stipulations. These commenters stated

<sup>60</sup> See Trac Immigration, Table 1. Pending Cases and Wait Times Until Hearings Scheduled by Court Location, Report date June 8, 2018 <https://trac.syr.edu/immigration/reports/516/include/table1.html>.

<sup>61</sup> See Congressional Budget Justification FY 2018—Volume II, U.S. Immigration and Customs Enforcement, page 50, “An average daily rate for family beds can be calculated by dividing the total funding requirement of \$291.4 million by the projected average daily population (ADP) of 2,500 for a rate of \$319.37.” <https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20CJ%20VOL%20II.PDF>.

that given the less rigorous standards and oversight envisaged by the proposed regulations, these breaches are likely to continue and proliferate if the FSA is weakened.

According to these commenters, a report by Human Rights First<sup>62</sup> supports their contention that ICE-run detention facilities historically and routinely fail to meet even their own minimum standards of care. Some commenters reported that visits to family detention centers reveal discrepancies between the standards outlined by ICE and the actual services provided, including inadequate or inappropriate immunizations, delayed medical care, inadequate education services, and limited mental health services.

Multiple commenters referenced a letter from two DHS physicians to the Senate Whistleblowing Caucus, in which the experts stated that after conducting ten investigations over four years at ICE family detention facilities, they had concluded that children housed in ICE family detention centers are at high risk of harm, due to serious compliance issues such as lack of timely access to medical care, lack of sufficient medical staffing, inadequate trauma care and counseling, and inadequate access to language services.<sup>63</sup>

Several commenters stated that DHS has been unable to staff facilities in a timely manner with qualified pediatricians, psychiatrists, child and adolescent psychiatrists, mental health clinicians, and pediatric nurses, particularly in remote areas. These commenters stated that without adequate staffing, the facilities could not provide adequate health services. Commenters cited to several incidents that they believe exhibited this lack of adequate care.

Commenters relied on several reports for these arguments. They pointed to a DHS Inspector General report on an ICE-run adult detention facility that they stated revealed astonishingly substandard and harmful conditions,<sup>64</sup>

and to July 2018 reports filed in Federal court that allegedly documented unsafe and unhealthy conditions in DHS-run facilities where children were housed after being separated from their parents at the border.

Commenters also pointed out that in January 2016, the Pennsylvania Department of Human Services revoked the child care license of the Berks County Residential Center because DHS was found to be using its license inappropriately. Yet, the facility continued to operate for a year with a suspended license. According to one of the commenters, the Berks County facility amassed an atrocious record of health concerns, inadequate medical attention, alleged sexual misconduct, and other harmful conditions because there was no proper oversight.

*Response.* DHS agrees with the commentators that it is critical that conditions in DHS facilities live up to applicable standards, particularly when it involves the treatment of children. That is the whole point of the standards. The proposed rule here would do nothing to weaken them.

To further emphasize its commitment to its standards, DHS is adding regulatory text to confirm that it will publicly post the results of the third-party inspections of ICE FRCs on DHS's website to ensure as much transparency as possible within the inspection and alternative licensing process. See discussion of inspection comments and responses. Moreover, DHS is modifying the regulatory text to provide that audits of licensed facilities will take place at the opening of a facility and take place on an ongoing basis, and DHS is modifying the language regarding the juvenile coordinators, to be clear that their role includes ongoing monitoring of compliance with the standards in the regulations.

DHS further notes that under this rule, FRCs will not be exempt from state licensing standards, so long as the State in which they are located maintains a licensing process for facilities that hold minors together with their parents. Accordingly, the Berks FRC will continue to receive regular scheduled and unscheduled inspections by the Commonwealth of Pennsylvania even after this rule goes into effect. CRCL conducted an onsite investigation at Berks in 2017 and sent the Expert Reports with Recommendations to ICE on July 21, 2017. The Medical Expert did not find alarming incidents of medical care failures. DHS notes that the only facilities required to be

licensed under this rule (and under the FSA) are the FRCs. Thus, these licensing requirements—and the public reporting of inspections—do not apply to DHS' short-term holding facilities (such as CBP facilities). DHS notes, however, as described above, that CBP facilities are subject to inspection and monitoring by outside entities.

DHS also disagrees with some of the commenters' specific assertions. Many of the commenters made broad, generalized allegations that ICE has abused children in detention, failed to uphold its own Family Residential Standards, and generally failed to provide care and safety to the minors in its custody, among other issues. Even though those commenters cited to studies such as the one provided by Human Rights First<sup>65</sup> or the American Academy of Pediatrics<sup>66</sup> and asserted that these studies supported their allegations, DHS review of these studies uncovered no specific instances of abuse, neglect, or failure to abide by standards provided with enough detail for DHS to investigate. For those generalized allegations that did not provide details sufficient for DHS to substantiate the allegations, DHS cannot respond to the commenters effectively. DHS declines to amend the proposed regulatory text of this rule based on those broad, unsubstantiated allegations.

However, DHS does have a complaint and grievance process in place. Aliens in DHS custody who have a specific complaint about a staff member can file a grievance either directly with OIG by emailing [DHSOIGHOTLINE@dhs.gov](mailto:DHSOIGHOTLINE@dhs.gov) or to the facility's grievance committee or designated grievance staff. Grievance forms are available in common areas along with a locked box where residents can deposit the grievances. Detailed procedures for filing grievances at FRCs are in the FRS. The procedures make accommodations for language barriers as well as physical and mental disabilities and allow for help with filling the forms by other staff members and legal representatives. They provide for informal and formal grievances, emergency grievances, and appeals. The FRS also prohibit retaliation by staff against residents for filing grievances.

Aliens in DHS custody, community faith-based organizations, non-governmental organizations (NGOs), community leaders, immigration lawyers, and members of the public

<sup>62</sup> Human Rights First, "Family Detention: Still happening, Still Damaging," (October 2015 Human Rights First report) (discussing reports of substandard care at family detention centers including Karnes, Dilley, and Berks).

<sup>63</sup> *Id.* at 4; see also Academic Pediatric Association, et al., July 24, 2018 Letter to Congress (letter submitted by 14 medical and mental health associations seeking congressional oversight of DHS-run facilities, and stressing that conditions in DHS facilities, which include open toilets, constant light exposure, insufficient food and water, no bathing facilities, extremely cold temperatures, and forcing children to sleep on cement floors, are traumatizing for children.)

<sup>64</sup> See September 27, 2018 Office of Inspector General Management Alert—Issues Requiring

Action at the Adelanto ICE Processing Center in Adelanto, California, OIG-18-86.

<sup>65</sup> <https://www.humanrightsfirst.org/resource/family-detention-still-happening-still-damaging>.

<sup>66</sup> [https://pediatrics.aappublications.org/lens/pediatrics/139/5/e20170483#content/citation\\_reference\\_63](https://pediatrics.aappublications.org/lens/pediatrics/139/5/e20170483#content/citation_reference_63).

with allegations regarding conditions at DHS facilities can file complaints with either the DHS Office of the Inspector General (OIG) or with CRCL via the internet at <https://www.dhs.gov/file-civil-rights-complaint> or through the CBP infocenter (OIG and CBP forward the complaints to CRCL). Complaints filed with CRCL are processed and uploaded into a database housing all complaints. The CRCL team meets weekly to discuss all complaints received that week. They decide which allegations will be opened for formal investigation. Allegations that are not open for investigation, remain in the database and are reviewed quarterly to identify trends or systemic issues. If trends or systemic issues are found, then those cases can be opened for investigation.

Another method of receiving complaints is through DHS's CRCL Community Engagement Team. Team Members go out into community, develop a rapport with NGOs, faith-based organization leaders, lawyers, and community members. Team Members hold community roundtable events at which they discuss DHS policies, procedures implemented across the Department, and what it means for the community. The community in turn has the ability to identify how it has affected them and if necessary file complaints through these Team Members.

When CRCL opens a formal investigation, the OIG is contacted and given the right of first refusal to investigate. If OIG turns down the opportunity to investigate, then CRCL performs the investigation. Depending on the type of complaint, the investigation could be conducted offsite or onsite. If offsite, CRCL will work with the respective DHS component to gather documentation specific to the allegations. If onsite, CRCL will conduct the investigation at the facility, which, for ICE, includes interviewing ICE detainees.

On-site investigations are of the facility policy and operations, and do not address personnel misconduct issues. The CRCL Compliance Branch goes to the ICE or CBP facilities to conduct on-site investigations. The team is comprised of a combination of the following, depending on the allegations presented: Policy advisors with investigative authority, a medical consultant, a corrections consultant, an environmental health and safety consultant, a suicide prevention consultant, and a mental health consultant. The team will always look into medical care/treatment, and the overall conditions of detention (food preparation, cleanliness, safety issues,

grievance process, and the use of segregation). The team reviews the facilities policy and procedures to ensure the center is properly documenting its actions and incidences at the center and is in compliance with applicable standards. If problems are found at the facility, the team compiles a report of expert recommendations. The expert recommendations are issued to the relevant DHS component, who then has opportunity to concur, partially concur, or non-concur with recommendations and perform remediation. If recommendations are not implemented, CRCL has the ability to re-inspect facilities, and if necessary can issue a recommendation that DHS close a facility, or remove ICE detainees from a detention facility.

The public can find highlights of these Expert Recommendations in CRCL's Annual Report to Congress. CRCL also has a Transparency Initiative in which they are moving documents to the internet. As of this publication, two reports have been uploaded, but more are expected in the future.

CRCL conducts 10–12 site visits a year at ICE facilities with 1–2 of them at FRCs. These visits have brought about major improvements in recent years, and CRCL continues to monitor implementation of their Expert Recommendations.

#### Changes to Final Rule

For purposes of clarity, DHS is adding language to the final rule at 8 CFR 236.3(i)(4)(xx) explaining that licensed facilities will maintain a grievance filing process and requiring aliens in these facilities to avail themselves of this process if they wish to report a formal grievance. DHS also is adding language in 8 CFR 236.3(o) to make it more clear that the juvenile coordinator will monitor compliance with the regulation.

#### 5. Due Process, Constitutional, Administrative Procedure Act, and International Law Violations Public Comments and Response

*Comments.* Numerous commenters made general allegations that the rule was arbitrary and capricious and does not withstand the requirements of the APA. As case law makes clear, arbitrary and capricious review requires that an agency apply reasoned decision making when proposing new regulations and provide a rational explanation of the changes.<sup>67</sup> The commenters claimed that the Departments had failed to do so with respect to the cost calculations

(response in the E.O. 12866 section of this final rule), new licensing process, hearings, definitions of influx and emergency, age determinations, and redetermining of UAC status at every encounter. The commenters also faulted the Departments for allegedly not taking into account the trauma detention causes children and various reports related to detention.

One commenter asserted that the failure to discuss the preliminary injunction in the *Saravia v. Sessions*, lawsuit is *per se* arbitrary and capricious because it is a relevant source of law that governs their obligations on this issue.

*Response.* Many of these commenters' concerns about arbitrary and capricious decision-making will not be addressed in this section of the rule, but have been addressed throughout this rule in response to specific comments. This rule represents the result of reasoned decision making, and the Departments have provided rational explanations of their choices throughout. In particular, the Departments have discussed the *Saravia* injunction above and noted that it addressed a discrete legal issue not addressed by the FSA and therefore not the focus of this rule. See *Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018). The purpose of this rule is to implement the FSA in light of the changed circumstances and accumulated agency experience since the signing of the agreement over 20-years ago. In doing so, DHS has carefully assessed and explained its changes. The Departments will continue to abide by all relevant court orders.

*Comments.* Some commenters raised due process concerns. These comments included general attacks on the supposed "deterrence rationale" of the rule and the prospect of longer detention, which some commenters claimed would reduce access to legal services or prevent children from participating in their immigration proceedings. The comments also included more specific objections to the ongoing redetermination of UAC status, hearing provisions, and process surrounding re-taking custody of a previously released minor.

*Response.* The Departments disagree that the proposed regulations violate the due process clause of the Fifth Amendment for all of the reasons explained throughout the preamble. Multiple procedural safeguards exist in this context, including those contained in section 462 of the HSA and section 235 of the TVPRA with respect to UACs, the INA more broadly, and the

<sup>67</sup> *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

provisions of this rule implementing the relevant and substantive terms of the FSA.

Regarding comments that detention will impact access to legal services, the rule specifically provides for attorney-client visits (in accordance with applicable facility rules and regulations) for those minors in ICE FRCs, as well as a comprehensive orientation session upon admission, including information on the availability of legal assistance. See 8 CFR 236.3(i)(4)(ix). While in a licensed facility each UAC in ORR custody will also be provided with information regarding the right to a removal hearing before an immigration judge, the right to apply for asylum, and the right to request voluntary departure in lieu of removal. See 45 CFR 410.402(c)(14). HHS care and custody will not prevent access to legal assistance or the possibility of administrative hearings.

DHS also disagrees that detention in FRCs will make it harder for children accompanied by their parents or legal guardians to meaningfully participate in their immigration proceedings; rather, keeping families together in custody as a unit will remove the possibility of the family missing a hearing, while also ensuring that the family can decide as a unit how to handle their ongoing removal proceedings.

When it comes to redetermining UAC status upon each encounter, DHS notes that the statutory definition of UAC indicates that the status could change if an individual turns 18, gains legal status, or is placed with a parent or legal guardian. See 6 U.S.C. 279(g). Reflecting that plain language, two circuit courts have held that an individual who was initially designated as a UAC can subsequently cease to be a UAC. See *e.g.*, *Mazariegos-Diaz v. Lynch*, 605 Fed. Appx. 675, 676 (9th Cir. 2015) (unpublished) (finding a 20-year-old was no longer a UAC for purposes of applying for asylum under the TVPRA); see also, *Harmon v. Holder*, 758 F.3d 728, 733–34 (6th Cir. 2014) (finding asylum applications filed under TVPRA UAC provisions must be filed while the applicant remains in that status). And the Office of General Counsel for the Department of Justice, EOIR, has found that immigration judges have authority to assess whether a UAC continues to meet the statutory definition. See DOJ EOIR OGC Memorandum, *Legal Opinion re: EOIR's Authority to Interpret the Term Unaccompanied Alien Child for Purpose of Applying Certain Provisions of the TVPRA*, Sept. 19, 2017, at 9 (“Our interpretation is consistent with the purpose of the TVPRA, which is to provide protections and rights to

individuals who remain unaccompanied, under the age of eighteen, and without legal status during removal proceedings.”). Notably, however, a redetermination will not affect USCIS jurisdiction over an asylum application where it had initial jurisdiction based on the applicant’s classification on the date of filing.

The proposed regulations on bond hearings also comport with due process. The proposed regulations (§ 236.3(m)) provide for a bond hearing by an immigration judge (to the extent permitted by 8 CFR 1003.19) for minors who are in removal proceedings under the INA 240 and who are in DHS custody. Those who are not in section 240 proceedings are ineligible to seek review by an immigration judge of their DHS custody determination, but may be considered for release on parole. And DHS is modifying the regulatory text to provide that parole of minors detained pursuant to section 235(b)(1)(B)(ii) of the INA or 8 CFR 235.3(c) who are not a flight risk or a danger will generally serve an urgent humanitarian reason. Separately, § 410.810 provides for an independent hearing officer process, guided by the immigration judge bond hearing process currently in place for UACs in ORR custody under the FSA.

The Department disagrees that the lack of a specific time frame in the rule governing re-apprehension of a previously released minor violates the minor’s due process rights. Section 236.3(n) sets out the scenarios in which a previously released minor becomes an escape-risk, a danger to the community, subject to a final removal order, or lacking a parent or legal guardian available to care for the minor and must be taken back into custody. A custody redetermination hearing may be requested in accordance with § 236.3(m) (to the extent permitted by 8 CFR 1003.19). And although the regulations are silent as to how long after re-apprehension a redetermination hearing will occur, it will be within a reasonable time frame and any issues regarding the justification for the re-apprehension will be appropriately dealt with in the hearing (if necessary).

*Comments.* One individual stated that the proposed regulations violate the Constitution’s separation of powers. The commenter stated that the Naturalization Clause in Article I, section 8, clause 4 gives Congress plenary power to establish a uniform Rule of Naturalization, and that the provisions contained in the proposed regulation are wholly within Congress’ purview. This commenter stated the proposed regulations also usurp the role

of the judiciary in ensuring compliance with the FSA.

*Response.* As stated in the NPRM, Congress provided authority for DHS to detain certain aliens for violations of the immigration laws through the INA and expanded legacy INS’s detention authority in IIRIRA. See 83 FR 45486 at 45490 (Sept. 7, 2018). As stated elsewhere in this document, this rulemaking is designed to implement the relevant and substantive terms of the FSA, in keeping with the terms of the FSA itself. For more detailed information regarding the authority to promulgate these regulations, please see the discussion of the statutory and regulatory authority in the NPRM. *Id.*

*Comments.* Another commenter stated that the proposed regulations “implicate the Constitution’s Article III prohibition on Advisory Opinions” because the rule “undermine[s] and nullif[ies]” the FSA. This commenter also stated the proposed regulations implicate violations of the Fourth, Sixth, Seventh, and Eighth Amendments, but did not provide an explanation for this assertion. A second commenter stated that the proposed regulations violate the Eighth Amendment because, in the commenter’s view, the proposed regulations can lead to indefinite detention in violation of the principle of proportionate sentencing.

*Response.* This rule does not implicate the Constitutional prohibition on Article III courts issuing advisory opinions. These regulations are being issued by Federal agencies, not courts, and the FSA itself provides that it will terminate upon issuance of regulations.

DHS cannot reply to vague assertions regarding violations of certain amendments without further explanations from the commenters, which were not provided. Regarding proportionate sentencing, this rulemaking does not address sentencing at all. DHS does not impose any kind of criminal punishment. Immigration detention is civil in nature and effectuates enforcement of the immigration laws. For a discussion on commenters’ concerns regarding indefinite detention, see the section on this issue entitled “Indefinite Detention due to Alternative Licensing.”

*Comments.* One commenter stated that the proposed regulations are in contravention of the due process clause of the Fourteenth Amendment.

*Response.* The Fourteenth Amendment’s due process clause applies to States, not the Federal Government.

*Comments.* One commenter also stated that the proposed regulations do not provide for any notice to the UAC

of a custody determination or the evidence used to make it.

*Response.* As stated in the NPRM, independent hearing officers would determine whether a UAC, if released, would present a danger or a flight-risk and issue the decision in writing. See 83 FR 45486 at 45490 (Sept. 7, 2018). The government bears the initial burden of production, thereby giving the UAC notice of the custody determination and the evidence supporting it. The UAC then would bear the ultimate burden of proof would shift to the government, which would use a preponderance of the evidence standard.

*Comments.* Several commenters contended that the proposed regulations are unconstitutionally vague, *ultra vires*, overbroad, and “generally lack enforcement and oversight of the Government’s actions.” Specifically, the commenters stated that the rule is vague insofar as it fails to define the implications of giving DHS the power to handle immigration benefits and enforcement, unconstitutional insofar as it lacks specific standards of care and due process protections, and overbroad in failing to establish concrete guidelines with respect to “ongoing” determination of UAC qualifications.

*Response.* General comments regarding DHS’s authority to handle immigration benefits and enforcement are beyond the scope of this rulemaking. With respect to the specific regulations at issue here, the Departments reject the suggestion that they are vague, *ultra vires*, or overbroad for all of the reasons already discussed above. The regulations contain appropriate standards of care and due process protections, as well as concrete guidelines with respect to the assessment of an individual’s UAC status, consistent with the statutory protections and FSA that the regulations are designed to implement. The Departments also disagree with the commenter stating that the regulations lack enforcement and oversight, especially considering the portions of the rulemaking regarding licensed programs standards that licensed programs must meet in keeping with the principles of treating minors and UACs in custody with dignity, respect, and special concern for their particular vulnerability. See *e.g.*, § 410.402 concerning the minimum standards applicable for licensed programs. DHS is also modifying the regulatory text in several respects, in response to comments, to clarify requirements of oversight and monitoring to ensure that DHS facilities satisfy applicable standards.

*Comments.* Several commenters argued that the rule violates international laws, pointing to provisions of international documents relating to privacy, special care and concern for the wellbeing of children, and torture and cruel, inhuman or degrading treatment or punishment. Multiple commenters emphasized that the U.N. Special Rapporteur on torture has stated that ill treatment can amount to torture if it is “intentionally used to deter, intimidate, or punish migrants or their families . . . or to coerce people into withdrawing asylum requests.” One commenter stated that the FSA is grounded in international human rights law principles, and therefore that these regulations must not violate them.

*Response.* The provisions codified in this rule are consistent with the FSA and international law. Nothing in the proposed rule authorizes the intentional infliction of ill treatment on families or anybody else, and much less for the purpose of intimidating, punishing, or coercing migrants and their families. To the contrary, consistent with the basic goal of the FSA, the proposed rule aims to avoid ill treatment of families who remain in custody by requiring FRCs to abide by stringent standards regarding conditions of confinement, and providing for third-party auditing of compliance and the public posting of the results of those audits.

#### Changes to Final Rule

DHS declines to amend the proposed regulatory provisions to the final rule in response to these public comments, but notes that DHS is modifying the regulatory text in places to clarify oversight and monitoring requirements.

#### 6. Adherence to the Flores Settlement Agreement

##### Public Comments and Response

*Comments.* Many commenters provided comments regarding whether the proposed rule sufficiently implemented the FSA to trigger the termination of the FSA. Some commenters stated that the government cannot change the terms of the FSA through rulemaking, but can only do so with a motion to the court that approved the FSA. Others voiced opposition to ending the FSA at all, stating that it had sufficiently protected the well-being of minors.

Many commenters suggested that the rule did not adequately implement the FSA sufficient to trigger its termination. Some of these commenters stated that the rule removed mandatory terms, such as “shall” or “must,” when describing the obligations of the government, and

that removing such terms would transform specific FSA provisions from express obligations into non-binding statements of agency activity.

One commenter stated that the government’s proposed standards violate paragraph 12 of the FSA by creating exceptions for when the government will place minors with their family members based on the “well-being” of the minor or operational feasibility and expanding the emergency exception that would allow a minor to be detained with an unrelated adult for more than 24 hours. Another commenter stated that the provisions regarding when UACs can be placed in secure facilities violates the FSA because it allows HHS to place individuals in secure custody based on “danger to self or others”—a requirement the commenter stated is not found in the FSA. The commenter also expressed concern that the proposed rule fails to provide that HHS will review all secure placements monthly and to specify how placements in staff secure or residential treatment centers will be reviewed.

Several commenters stated that the final rule should have a mechanism such as paragraph 24B of the FSA that allows minors to challenge their placement in a facility and whether the facility complies with FSA-required standards. One of these commenters criticized the explanation in the NPRM that a child could utilize the legal procedures under the APA to challenge her placement as woefully lacking the protections afforded by the FSA. This commenter also states that any arguments by DHS or HHS that they are not subject to all of the provisions in the FSA is inaccurate because the FSA explicitly extends to any successors, therefore, these provisions must be included in the regulations of both agencies.

One commenter stated that the proposed regulations add additional requirements to the custodian affidavit that are not required by the FSA, and which could lead to a decrease in the number of willing custodians. Specifically, the requirements that the custodian ensure the UAC report for removal, if so ordered, and that the custodian report to ORR and DHS no later than 24 hours after learning that the UAC has disappeared are not required by the FSA, and could have negative impacts on the custodian/UAC relationship, which is not in the best interests of the minor. The commenter suggested that any required reporting after the disappearance of a UAC be made to the local police, who are better suited to find a missing person.

*Response.* It was never the intent of the Government when signing the original FSA or its modification in 2001 that the agreement would remain in place permanently, and the FSA expressly provides for termination upon issuance of regulations implementing the agreement. The public generally was not given a chance to comment on the FSA as it can with notice and comment rulemaking. Notice and comment rulemaking allows people to influence policy by providing thoughtful comments on proposed regulatory text so that agencies can make, where appropriate, corresponding changes in the final rule. Merely publishing the FSA online would not provide the safeguards and review process of a rulemaking that has gone through notice and comment and is published in the Code of Federal Regulations. Indeed, DHS and HHS are making several changes to this final rule based on comments received from the public.

Some commenters opined that the government cannot change the FSA without court approval and that this rulemaking process is, therefore, not valid. But the regulations here are not themselves changing the FSA; they are implementing it with appropriate modifications to reflect changes in circumstance and accumulated agency experience. The FSA also plainly contemplates that a notice-and-comment process would occur, which presupposes some flexibility in how to implement the agreement in regulations.

Commenters claimed that DHS (and presumably HHS) did not use mandatory implementation language such as “will” and “shall.” But in those provisions that require the government to provide services or benefits to minors or UACs, the regulatory text does indeed use the words “will,” “shall,” and “must.” For example, in § 236.3(i)(4) that replicates the requirements of Exhibit 1 of the FSA, it clearly states that the “standards shall include . . .” and then lists everything that must be provided when in ICE facilities. On the other hand, when it could benefit the minor or UAC that the government not act in a strict manner, the regulatory text uses “may.” For example, in discussing re-assumption of custody by DHS of a previously released minor section, § 236.3(n), states “DHS may take a minor back into custody if there is a material change in circumstances . . .” DHS is also modifying the language of § 236.3(j) to provide that for minors detained pursuant to INA 235(b)(1)(B)(ii) or 8 CFR 235.3(C), parole “will” generally be warranted when the minor is not a flight risk or danger. Therefore, DHS does not agree with the

commenter’s assessment. As for HHS’ portion of the rule, the regulations are binding on the shelters that ORR regulates, whether or not the rule uses the words “will,” “shall,” and “must.”

One commenter also stated that DHS is not complying with paragraph 12 of the FSA because it is carving out exceptions that do not appear in the FSA such as taking into consideration the well-being of a child or expanding the meaning of emergency in the FSA. DHS disagrees with this commenter. The provisions of paragraph 12 state that a child who could not be released according to paragraph 14 or transferred to a licensed program pursuant to paragraph 19 cannot be held with unrelated adults for more than 24 hours. The solution in such cases, according to paragraph 12, is that the INS could transfer the unaccompanied minor to a county juvenile detention center or any other INS detention facility. The proposed provision gives DHS some leeway to avoid such transfers in cases of emergencies, while maintaining the requirement that UACs are provided adequate supervision and that their safety and well-being is taken into consideration. The definition of emergency in paragraph 12B speaks to exactly the same principles as the proposed definition, *i.e.* natural disasters, facility fires, civil disturbances, and medical emergencies that prevent the timely transfer or placement of minors or UACs. Nothing in the proposed definition would allow the government the ability to house UACs with unrelated adults beyond 24 hours as a matter of course.

Commenters expressed concern over the HHS criteria that allows for UACs to be placed in a secure facility, asserting that the criteria—“danger to self or others”—is not found in the FSA. In Paragraph 21, the FSA defines conditions on which a minor may be placed in a State or juvenile detention facility (*i.e.*, a secure facility), which include a determination that the minor “has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others)” while in custody; “has engaged, while in a licensed program, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program in which he or she has been placed and removal is necessary to ensure the welfare of the minor or others;” and/or “must be held in a secure facility for his or her own safety.” HHS’ own policy and this rule’s criteria on UAC placements in secure facilities parallel the conditions set forth in Paragraph 21 of the FSA.

Commenters also asserted that minors should have a mechanism for challenging their placement in a facility. Immediately upon placement in an HHS secure facility, staff secure facility, or residential treatment center (RTC), UACs have the right to file an APA claim in Federal District Court, if they believe they have been treated improperly and/or inappropriately placed in a restrictive setting. A judge will then decide whether or not to review the UAC’s case to determine whether they should remain in a restrictive setting. After 30 days of placement of an HHS secure or RTC setting, UACs may request the ORR Director, or his or her designee, reconsider their placement, as described in ORR’s Policy Guide at section 1.4.2. This policy also describes the requirements for 30 day placement reviews for UACs in restrictive settings.

Commenters also believed that DHS needs to add specific language similar to paragraph 24B of the FSA into the rule. But the provisions in § 236.3(g)(1)(ii) speak to this by stating that a minor will be given the same Notice of Right to Judicial Review under the regulation as is given under the FSA regarding judicial review in the United States District Court if the facility where he or she is housed does not meet the standards in § 236.3(i). And the preamble specifically stated that the Notice of Right to Judicial Review will be the same as in Exhibit 6 of the FSA (*see* 83 FR 45500). The Notice in Exhibit 6 states: “The INS usually houses persons under the age of 18 in an open setting, such as a foster or group home, and not in detention facilities. If you believe that you have not been properly placed or that you have been treated improperly, you may ask a Federal judge to review your case. You may call a lawyer to help you do this. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form.” Moreover, a regulation cannot confer jurisdiction on Federal court

#### Changes to Final Rule

DHS declines to amend the proposed regulatory provisions in the final rule in response to these public comments.

#### 7. Appearance at Hearings

##### Public Comments and Response

*Comments.* Multiple commenters stated that the proposed regulation provides no support for its claim that families present a flight risk, fail to appear to the required proceedings, or do not seek asylum relief.

Commenters provided empirical research or anecdotal evidence indicating that asylum-seekers released from detention have a high appearance rate for their immigration hearings. For example, one commenter cited results from a 2016 study which used immigration court data from the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, which estimated an overall appearance rate of 76.6 percent at immigration court in 2015 and found that releasing individuals on bond did not make a significant impact on who absconds. Another commenter cited a recent study published in the *California Law Review*, which found that 86 percent of families, and 96 percent of families applying for asylum, who were released from detention attended all their court hearings.

Commenters further pointed to the high compliance rates of those enrolled in an ATD program. In particular, commenters quoted from DHS's May 2017 Congressional Budget Justification, in which ICE stated that, historically, DHS has experienced strong cooperation from aliens in ATD through their immigration proceedings. The commenter added that any lack of data on rates of compliance or removal for those on ATD is a failure of the department for not collecting the information.

*Response.* ICE's objective and mission is to effectuate removals of individuals with final orders of removal. The most effective means to achieve this is using detention. This rule creates a path to ensure that individuals comply with their appearance obligations and are not issued orders of removal *in absentia*. In particular, through the alternative Federal licensing system, the rule enables ICE to hold families in custody during the full course of immigration proceedings, consistent with Congress's mandate of detention for certain aliens. The rule would also provide for custody (through the denial of bond or parole, as applicable) if a minor poses a flight risk or danger to the community.

DHS does not dispute that many families who are released thereafter appear at all their hearings throughout their immigration proceedings, but many fail to appear, which is a serious concern. The studies and data cited by commenters regarding percentage of final orders issued *in absentia* to members of a family unit are skewed by the fact that they review data over a period from 2001–2016. Several variables changed in the year 2014 that render the data from before that time an inaccurate reflection of current ICE operational concerns. With the

exception of the T. Don Hutto Residential Center between 2006–2009, the only facility used as an FRC from 2001–2014 was the Berks FRC (Berks) in Berks County, Pennsylvania, which has had a capacity of no more than 96 residents since its inception. In response to the influx of UACs and family units in 2014 in the Rio Grande Valley, ICE opened FRCs in Artesia, New Mexico, in June 2014 (closed in December 2014), Karnes County, Texas, in July 2014, and Dilley, Texas, in December 2014. The Artesia facility had a capacity of approximately 700 during its time as an FRC, while the Dilley FRC opened with a capacity of 2,400, and the Karnes FRC opened with a capacity of 830. Given that FRC capacity, the number of family units with the potential to be detained was drastically larger by mid-2014 than for the thirteen years prior. Accordingly, the data on *in absentia* removal order rates from 2014 to the present is a more reliable source of information for the purposes of this rulemaking. EOIR found that for completed cases from January 1, 2014 through March 31, 2019 that started at an FRC, 43 percent of family unit members were issued final orders of removal *in absentia* out of a total of 5,326 completed cases. DHS OIS has found that when looking at all family unit aliens encountered at the Southwest Border from FY 2014 through FY 2018, the *in absentia* rate for completed cases as of the end of FY 2018 was 66 percent.

While DHS does not dispute the data presented on past ATD programs, there continued to be a significant portion of participants who did not comply fully with final removal orders. The ATD program is not sufficiently resourced to ensure that all family units can be enrolled in ATD through the duration of their proceedings, or to ensure that ICE can quickly respond to alerts or provide adequate oversight of program participants. ATD is less effective than detention at ensuring compliance with removal orders issued by immigration judges, although the ATD program is effective at more closely monitoring a small segment of the non-detained population and allows for much greater oversight than traditional release with very little supervision at all.

Even if the commenters' studies and data accurately reflected the rates at which alien family unit members fail to show up to their immigration hearings, however, the number of aliens who fail to abide by immigration law and disappear into the interior of the United States would still be a significant problem. *See Demore*, 538 U.S. at 523 (describing as “striking” statistics

indicating that one in four to one in five released aliens failed to appear). ICE cannot carry out its mission to enforce the immigration laws if aliens fail to attend their immigration hearings and abscond into the interior in the United States. DHS's approach to immigration detention of family units reflected in this rule, which allows for immigration officers to make decisions about parole on a case-by-case basis, will allow ICE to appropriately use the statutorily-authorized tools to carry out its mission.

#### Changes to Final Rule

DHS declines to amend the proposed regulatory provisions in the final rule in response to these public comments.

#### 8. Asylum Is a Right

##### Public Comments and Response

*Comments.* Many commenters submitted comments declaring that the government is obligated to uphold the rights of asylum seekers and accordingly: Asylum seekers should not be detained; should be given temporary asylum pending a formal determination; and should not be put at a disadvantage in pursuing their asylum claim through detention.

Some commenters stated that any person seeking asylum is not an illegal immigrant, but one who should be protected under international law and given temporary asylum with an opportunity to contribute to our society. One commenter stated that seeking asylum is a humanitarian right, not a crime, and it is inhumane to jail children to punish their families for seeking safety. The commenter further stated, citing *Plyler*, that the government cannot control the conduct of adults by punishing their children.

*Response.* Nothing in this rule changes an asylum-seeker's legal right to apply for asylum, nor prevents asylum-seekers from availing themselves of the procedures to which they are entitled under U.S. law. This rule also does not and cannot amend statutory provisions regarding the asylum process for minor aliens, their accompanying parents or legal guardians, or UACs.

DHS disagrees with the suggestion that detention infringes upon the asylum application process. Congress expressly provided for detention of certain aliens during section 240 removal proceedings, *see* 8 U.S.C. 1225(b)(2)(A) (“shall” detain), including for consideration of an application for asylum, 8 U.S.C. 1225(b)(1)(B)(ii). *See also* 8 U.S.C. 1226(a) (“may” detain, without any exception for aliens seeking asylum). Family units housed at FRCs have access to legal service providers

and law libraries to pursue their asylum claims during their stay. Furthermore, this rule codifies the FSA requirement that FRCs provide legal services information and allow attorney-client visits at the FRC itself. USCIS asylum officers can conduct credible-fear assessments on-site at FRCs or through virtual teleconferencing while the individuals are housed at FRCs. Similarly, UACs are able to file for asylum after they are issued Notices to Appear and placed into immigration proceedings under section 240 of the INA. And as stated in the proposed rule, USCIS maintains initial jurisdiction over their claims.

#### Changes to Final Rule

DHS declines to amend its proposed regulatory text in response to these public comments.

#### 9. Legal Authority Questioned

##### Public Comments and Response

*Comments.* Thousands of commenters asked the Departments to withdraw the proposed rule. Most stated it did not comply with the principles in the FSA. Some even went so far as to say that ICE should be abolished. Many commenters stated that if the government believed the terms of the FSA were no longer appropriate or practicable it should file a motion under Federal Rules of Civil Procedure 60(b)(5) for relief from judgment in the district court that has retained jurisdiction over the implementation and enforcement of the FSA. One commenter stated that this regulation was a unilateral attempt to overturn a stipulated agreement and suggested that the administration should respond to comments by explaining under what legal authority it seeks to change the stipulated agreement.

*Response.* This regulation implements the relevant and substantive terms of the FSA. Codification of the regulations is authorized by the Agreement and needed to preserve the terms of the Agreement while adapting to the statutory changes made by the HSA and TVPRA that affect the processing and care of minors in DHS custody and UACs in HHS custody, as well as substantial changes in circumstance and agency experience. Codification of these regulations will allow DHS and HHS to realistically manage the treatment of minors and UACs, respectively, in their custody in a way that affords substantively equivalent protections as those in the settlement agreement while enforcing the immigration laws effectively. These regulations largely parallel the FSA, often in language

borrowed verbatim from the FSA, and DHS and HHS have noted the ways in which these regulations deviate from the precise scheme set forth in the FSA, as well as the reasons for the changes.

#### Changes to Final Rule

DHS declines to amend the proposed regulatory provisions of the final rule in response to these public comments.

#### 10. LGBTQ

##### Public Comments and Response

*Comments.* Various commenters wrote about the plight of Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual (LGBTQIA) and transgender and gender non-conforming (TGNC) children in custody. For brevity and because the vast majority used the acronym LGBTQ, we will do likewise. Several commenters were worried that LGBTQ youths would be mistreated and possibly abused if kept in custody for an extended period of time, and one was concerned that their due process rights might be infringed. Some stated that detention centers often segregate the LGBTQ population because they are more likely to be subject to violence, including sexual abuse and assault. Others said that ICE's method of placing the LGBTQ population in solitary confinement is inappropriate and causes irreparable psychological harm. Others suggested that LGBTQ people, particularly those living with HIV, face delays in receiving life-saving treatment while in detention. Still others expressed concern that detention puts LGBTQ individuals at a disadvantage for establishing the facts of their asylum claims. Multiple commenters said that more and more LGBTQ individuals will be fleeing the Northern Triangle countries because civil society organizations there are reporting that LGBTQ people are at high risk for violence and extortion by gangs and organized criminal groups, hate crimes, and abuse by authorities.

*Response.* DHS takes very seriously the safety of LGBTQ individuals in ICE custody. Because this rule does not address the circumstances of detention for all aliens in ICE custody, and only addresses the circumstances of minors, their accompanying family members, and UACs, DHS limits the response that follows to the concerns raised by commenters as it pertains to these distinct categories of LGBTQ aliens.

DHS notes that the requirements of PREA and its implementing regulations apply to FRC operations and include provisions on LGBTQ screening and safety. ICE ERO also promulgated a Transgender Care Memorandum that it

provides to several facilities as a set of best practices. DHS notes that it has responded to concerns about medical care delays in the section on "DHS Track Record With Detention."

ICE does not segregate LGBTQ aliens in FRCs from the rest of the population. Minors are with their accompanying parents and would not be segregated. While segregation may occur in a secure juvenile facility, ICE only employs such measures for the alien's own safety.

DHS disagrees with the commenter's suggestion that LGBTQ individuals are disproportionately disadvantaged in establishing their claim to asylum while housed at an FRC. LGBTQ individuals have the same access to legal service providers and law libraries as any other alien housed at an FRC; there is no segregation.

#### Changes to Final Rule

DHS declines to amend the proposed regulatory provisions of the final rule in response to these public comments.

#### 11. Family Reunification

##### Public Comments and Response

*Comments.* A few commenters disagreed with the proposed language under § 410.302(c), in which ORR may require further suitability assessment of proposed sponsors, including fingerprint-based background and criminal records checks on the prospective sponsors and on adult residents of the prospective sponsor's household. The commenters believed that expanded suitability assessments, as described in § 410.302(c) and in the Memorandum of Agreement (MOA) between ORR, ICE, and CBP concerning information sharing (see, ORR-ICE-CBP Memorandum of Agreement Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (April 13, 2018)), are unnecessary and cause needless delays in the release of UAC by deterring potential sponsors from coming forward and violate DHS's own privacy policy and the privacy rights of potential sponsors.

*Response.* Under 8 U.S.C. 1232(c)(3)(C), "Not later than 2 weeks after receiving a request from the Secretary of Health and Human Services, the Secretary of Homeland Security shall provide information necessary to conduct suitability assessments from appropriate Federal, State, and local law enforcement and immigration databases." The provisions in § 410.302(c) pertaining to suitability assessments are consistent with paragraph 17 of the FSA; and to the extent the section updates the language



of the FSA, does so to follow the requirements for safety and suitability assessments in the TVPRA. However, as noted previously, in its ongoing effort to streamline suitability assessments so as to reduce the time UAC spend in ORR care and prevent any unnecessary delay in releasing them safely to an appropriate sponsor, ORR has recently issued four new Operational Directives that eliminate the burden of fingerprinting for many sponsors, including most parents or legal guardians and close relatives, and allow for UAC to be released to other relative sponsors under most circumstances before fingerprint results are available. And, again, ORR refers to section 224(a) of DHS's current fiscal year 2019 Appropriations Act which generally preclude DHS from taking certain enforcement actions "against a sponsor, potential sponsor, or member of a household of a sponsor or potential sponsor of an unaccompanied alien child ['UAC'] . . . based on information shared by [HHS]." <sup>68</sup>

12. Executive Order 12866, 13563 and 13771

Comments. Public Comments and Response

*Comments.* Several commenters stated that the NPRM violates Executive Orders 12866, 13563, and 13771.

With respect to E.O. 12866, commenters stated that the rule should have been deemed economically significant. An economically significant rule is one where the Office of Information and Regulatory Affairs determines that the rule may have an impact of \$100 million or more in any given year. Rules designated as such are reviewed by the Office of Information and Regulatory Affairs. Commenters complained that the rule did not provide a cost estimate, consider alternatives to detention, or account for construction costs of facilities or health related costs. They also said that HHS had not reasonably estimated the cost of the rule and that DHS failed to maximize net benefits as required by E.O. 12866. With respect to E.O. 13563, commenters similarly stated that the agencies had failed to provide a reasonable cost estimate, bypassing or violating the requirements of both E.O. 12866 and E.O. 13563. With respect to E.O. 13771, which directs the executive branch to prudently manage the cost of planned regulations, the commenter said the proposed rule creates an increased burden to the Federal Government to create and operationalize

the new licensing process and reduces states' flexibility in determining how facilities in their states should meet legal mandates.

*Response.* Because this rule codifies current HHS operations, including those regarding secure HHS facilities and UAC health-related costs, HHS anticipates no significant cost effect from this rule. HHS notes that the costs for implementing the 810 hearings is described later in this rule and are estimated to average \$250,000 per year.

DHS disagrees that it failed to adequately assess the costs and benefits of this rule. DHS provided the costs of the current operations and procedures for implementing the terms of the FSA, the HSA, and the TVPRA in the NPRM at 83 FR 45513, discussed reasonable alternatives to the proposed rule at 83 FR 45520, and considered qualitative benefits such as protecting the safety of minors and the public at 83 FR 45520. In addition, as described in the proposed rule, a primary source of new costs due to this rule will be as a result of the alternative FRC licensing process and changes to ICE's current practice for parole determinations. These changes may result in additional or longer detention for certain minors and their accompanying adult, thereby increasing the per-person, per-day variable FRC costs paid by ICE. DHS provided an estimated number of minors in FY 2017 that would have been affected had the rule been in place, and per-person, per-day unit costs for each of the current FRCs. For those costs and benefits that DHS was not able to quantify and monetize, the NPRM included a qualitative description and a reasoned discussion about why they could not be quantified. DHS provided enough information on the unit costs of the rule so that commenters could provide meaningful comments. In fact, some commenters used the data DHS provided, along with their own assumptions, to make their own estimates of the cost of the rule.

DHS agrees with commenters, however, that this rule *may* result in costs, benefits, or transfers in excess of \$100 million in any given year and therefore is economically significant, particularly in light of the urgent crisis at the border. DHS acknowledged in the proposed rule that, as the rule itself allows greater flexibility for operational decisions, but does not itself make those decisions, it did not know if this rule would result in the development of new FRCs, how many individuals would be detained at FRCs after the rule is effective, or for how much longer individuals will be detained, because such facts depend on many unknown

factors including the population of aliens crossing the border and how many aliens are processed for expedited removal, express a fear of return, are found to have a credible fear, and ultimately seek asylum. Since the proposed rule was published, DHS has seen a large spike in the number of family units apprehended or found inadmissible at the Southwest Border. As of June 2019, with three months remaining in FY 2019, CBP has apprehended over 390,000 family units between the ports of entry on the southwest border, as compared to 107,212 family units in all of FY 2018.<sup>69</sup> Consequently, because the costs of this rule are dependent on a number of factors outside of this rulemaking, some of which have changed since the NPRM was published, the Departments consider this rule to be economically significant. DHS has assessed the costs and benefits of the rule accordingly in the E.O. 12866 section of this rulemaking.

DHS responds to comments about ATD earlier in the rule.

Finally, DHS notes that E.O. 13771 determinations are made at the final rule stage of the rulemaking process. The Office of Information and Regulatory Affairs has determined that this is a regulatory action under E.O. 13771.

#### Changes to Final Rule

In this final rule, the Departments now consider this rule to be economically significant.

#### 13. Alternative Methodology To Estimate Impacts

##### Public Comments and Response

*Comments.* Many commenters who stated the rule would lead to increased detention periods and a need to expand detention capacity cited the estimated costs derived from the published report by the Center for American Progress, *The High Costs of the Proposed Flores Regulation*, by Philip Wolgin, published on October 19, 2018, by the Center for American Progress.

That report estimated that, under the proposed rule, DHS would incur new annual costs of between \$201 million and \$1.3 billion. The paper considered two scenarios to establish this range of estimated costs. The first scenario included four assumptions: That the amount of people booked into FRCs

<sup>68</sup> CONSOLIDATED APPROPRIATIONS ACT, 2019, Pub. L. 116-6, February 15, 2019, 133 Stat 13.

<sup>69</sup> See United States Border Patrol Southwest Border Migration FY2018 at <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018> (last visited June 13, 2019). See also Southwest Border Migration FY 2019 at <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last visited June 5, 2019).

would remain the same as in FY 2017, that the average length of stay for all individuals in FRCs would increase from 14.2 days to 47.4 days, that children who received negative credible fear determinations or final orders of removal would be held for longer periods of time, and that the average daily cost of a family detention bed would stay the same. Based on these assumptions, the paper estimated DHS would incur additional detention costs of approximately \$194 million annually.

Under scenario two, the paper assumed that every alien apprehended in a family unit would be detained in an FRC; that the number of individuals apprehended as a part of a family unit in FY 2018 (which the paper indicated to be 107,063), would remain the same, and that the average length of detention would be 47.4 days. Applying an average daily cost, the paper estimated additional detention costs of approximately \$1.24 billion annually.

Additionally, the paper assumed that ICE would need to acquire new facilities or beds in either scenario one or two, and it estimated that cost to be between \$72 million and \$520 million. It did so by modeling its anticipated daily detention populations from the scenarios above, factoring out the current detention capacity, and then estimating the number of new beds needed to house the number of detainees it projected under each of the two scenarios. Using the cost of converting the Karnes facility and the opening of the Dilley facility as baselines, the paper estimated ICE would need to spend between \$72 million and \$104 million in one-time startup costs to increase detention capacity for scenario one. For scenario two, the paper estimated that range to be between \$468 million and \$520 million. The paper concluded that as a result of the proposed rule, DHS would spend between \$2 billion and \$12.9 billion over a decade.

*Response.* While DHS appreciates the paper's input and further analysis, DHS does not believe that it supports a reliable quantified estimate. For example, the paper used average length of stay data from FY 2014 to assume the average length of stay after this rule would be 47.4 days, despite DHS's explanation in the NPRM that the average length of stay in the past is not a reliable source for future projections because it reflects other intervening policy decisions not directly affected by this rule. Additionally, the paper assumes that all family units will have their average length of stay increased as a result of this rule, but the proposed rule explained that generally only

certain groups of aliens are likely to have their length of stay at an FRC increased as a result of this rule, such as those who received a negative credible fear determination. The paper also assumes that ICE operates in an environment free of resource constraints and would be able to detain without regard to the agency's finite resource availability; as DHS explains in the final rule, expanding FRC capacity would require additional appropriations. This regulation alone is not sufficient. For more information about these groups of people, please see the E.O. 12866 section of this rule. The paper's estimates of the additional number of facilities needed relied upon these same questionable assumptions. This rule does not mandate operational requirements pertaining to new FRCs. Many factors, including factors outside of the scope of the final rulemaking that cannot be predicted (such as future congressional appropriations) or are presently too speculative, would need to be considered by DHS prior to opening new detention space. For example, DHS decisions to increase FRC capacity would consider the costs associated with housing families and the availability of future Congressional appropriations.

This commenter's analysis makes assumptions about the average length of stay, the population to be detained, and the need for and size of additional facilities, that ICE cannot reliably predict due to other factors outside the scope of this rulemaking, as discussed in the NPRM at 83 FR 45518 and 83 FR 45519. The large spike in the number of family units apprehended or found inadmissible at the Southwest Border since the publication of the proposed rule underscores the difficulties in reliably making quantitative estimates in this space. For all the reasons discussed above, DHS declines to incorporate in this final rule the commenter's proposed assumptions about the average length of stay, the increased number of family units held at FRCs, and the increased number of beds needed as a result of this rule.

#### Changes to Final Rule

As discussed previously, the Departments now consider this rule to be economically significant.

#### 14. Congressional Review Act Public Comments and Response

*Comments.* Relying on the same position paper discussed above, many commenters stated that the new costs of the rule would exceed \$100 million annually, and it thus constitutes a major

rule under the terms of the Congressional Review Act.

*Response.* The CRA delays implementation, and provides a mechanism for congressional disapproval, of regulations designated as "major rules" by the Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs. Such a designation is made where OMB finds the rule has resulted in or is *likely* to result in (a) an annual effect on the economy of \$100,000,000 or more; (b) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. 804(2). Determinations by OMB under the CRA are not subject to judicial review. 5 U.S.C. 805.

This regulation does not represent a decision on whether and in which circumstances to detain families for longer periods of time, though it does allow for such a decision to be made. Such decisions depend on operational and other considerations outside the scope of this regulation. For instance, DHS notes that it recently made the decision to use Karnes FRC for the detention of single adult women temporarily to deal with the ongoing migration influx.

While DHS cannot conclusively determine the impact on detention costs due to factors outside of the scope of this regulation, beginning with the fluctuating number of families apprehended at the Southwest border, it does acknowledge the three existing FRCs could potentially reach capacity as a result of additional or longer detention for certain individuals. There are many factors that would be considered in opening a new FRC or expanding a current FRC, some of which are outside the scope of this regulation, such as whether such a facility would be appropriate based on the population of aliens crossing the border, anticipated capacity, projected average daily population, competing detention needs for non-family populations, and projected costs. Moreover, such a decision depends on receiving additional resources from Congress, and ICE has to balance the detention of families with the detention and removal of single adults. If bed space were increased following this rule, the cost would depend on the type of facility, facility size, location, and a number of

other variables. However, ICE notes as an example that an additional 960 beds at Dilley would cost approximately \$80 million.

While Executive Order 12866 has a standard of whether the rule *may* have an impact of \$100 million or more in any given year, the CRA standard is whether a rule has or is *likely* to have an impact of \$100 million or more. In the vast majority of cases, if a rule is economically significant it is also major. In this case, however, given budget uncertainties, ICE's overall need to prioritize bed space for operational considerations (such as the recent use of the Karnes FRC for single adult female detention), and other operational flexibilities left in place under the rule, it does not appear *likely* that this rule will result in an economic impact of \$100 million or more. The Office of Information and Regulatory Affairs has thus determined that this rule is not major under 5 U.S.C 805.

#### Changes to Final Rule

Based in part on the developments discussed above, OIRA has determined that this rule is economically significant.

#### 15. Cost Analysis

Comments and responses pertaining to the Departments' costs analysis, costs to taxpayers, data, and proposed alternatives follow.

#### Public Comments and Response

Many commenters objected that the Departments did not provide an estimated total cost for the proposed rule. Other commenters added that various issues should have been addressed in the rule's cost benefit analysis, such as the impact to detention costs, the need to quantify benefits, and other generalized statements about the added cost that would result from the proposed rule. Some commenters mistakenly suggested that the NPRM concluded that there would be no additional costs due to the proposed rule.

##### a. Costs Not Included in the Analysis

*Comments.* Multiple commenters suggested that the final rule should not proceed until HHS re-analyzes the cost of imposing the final rule. They said it could cost ORR as much as \$800/day to house a UAC and thus, even without increase in the number of UACs housed in ORR shelters, it would cost ORR more than \$5.1 million a day to house UACs, or \$1.87 billion annually. This is more than \$800 million beyond the requested amount for FY 2019, and does

not take into account any other functions of ORR.

Commenters implored HHS to provide a justification that the proposed rule does not create any significant new costs.

Commenters stated that DHS conceded that the proposed regulations could lead to "additional or longer detention for certain minors" and that the Departments could not evade their responsibility to assess the economic and other impacts of the proposal by referring to uncertainties largely of its own making. Various commenters stated the Departments should have considered the additional costs of providing education, food, medical care, and other services families in prolonged detention.

Three commenters requested that ORR specifically look into the cost of housing children at its secure facilities like Yolo County Juvenile Detention Facility, which can be significantly more expensive than shelter placements.

Others said that the Departments should quantify the social costs of care for the children who may experience trauma as a result of indefinite detention, including the potential lifetime economic burden for children who experienced maltreatment, which one commenter estimated to cost \$124 billion.

Another commenter estimated that the cost to detain migrant children would be similar to the cost to incarcerate an juvenile, which the commenter asserted, without supporting detail, to be \$148,767 per year, though the commenter also added that infants and toddlers would require additional costs.

Commenters stated the Departments should also have developed a cost analysis of the zero-tolerance policy for each state it impacted and the cost of the proposed new alternative licensing and auditing process for DHS facilities.

*Response.* The cost for education, food, medical care, unique care needs for infants and toddlers, or other services families are part of the current DHS operational costs described in the baseline of the rule. DHS agrees that there will be additional costs resulting from additional or longer detention for some families, as discussed in the proposed rule and in the E.O. 12866 section of this rule. Although current FRCs are largely funded through fixed-price agreements and thus generally are not dependent on the number of beds filled, there are some variable costs added on a monthly basis that depend on the number of individuals held at certain FRCs (e.g. a per student, per-day

education cost). DHS discusses increased variable costs at these FRCs in the NPRM and in the E.O. 12866 section of this final rule. A cost analysis of the zero-tolerance policy is not part of the scope of this rulemaking. The fixed costs for current FRCs would generally not change as a result of additional or longer detention for some families. If ICE awarded additional contracts for expanded bed space as a result of this rule, ICE would also incur additional fixed costs and variable costs.

DHS disagrees that this rule need account for the social economic impacts of indefinite detention and maltreatment, because this rule will not result in either indefinite detention or maltreatment of minors in DHS custody. While this rule may result in some minors being detained for a longer period of time, that detention (like the detention that currently occurs) will occur with those minors' parents or legal guardians and will be consistent with both the statutory frameworks governing detention and the DHS policies for parole of aliens, including family units who have demonstrated a credible fear. Such detention is also consistent with the FSA's recognition that the government may need to detain minors to secure their timely appearance in immigration proceedings or to ensure their safety, as has been underscored by the significant numbers of final orders of removal that have recently been entered *in absentia* for family units. Neither Congress nor the *Flores* court has ever taken the position that detention of minors is *per se* maltreatment; to the contrary, both the immigration statutes and the FSA recognize that detention may be appropriate in some circumstances. And any detention carried out by DHS is done while immigration proceedings are ongoing or removal orders effectuated; DHS is not in the business of indefinite detention and nothing in this rule authorizes it to be.

Families and minors often arrive at the border having faced trauma in their journey, and these are costs not attributed to this rule. Although numerous commenters have proffered arguments and evidence about potential trauma that may result from immigration detention itself, Congress has already made a judgment that detention of alien minors in some circumstances is appropriate. This rule merely facilitates DHS's efforts to comply with that judgment while maintaining the discretion that DHS has long exercised to parole families. DHS recognizes that detention and custody may have negative impacts for some individuals, but as experience has

shown a high rate of absconding for family units, detention is an important enforcement tool. DHS notes that this final rule does not mandate detention for all family units; on the contrary, parole will be considered for all minors in detention, and the minor's well-being will be considered when determining whether release may be appropriate.

Because this rule codifies current HHS operations, including those regarding secure HHS facilities and UAC health-related costs, HHS anticipates no significant cost effect from this rule. (HHS notes that the costs for implementing the 810 hearings is described later in this rule and could average \$250,000.) Rather, the primary cost driver for HHS is the migration patterns that influence the number of children referred to HHS and the rate at which HHS discharges children to sponsors. Neither of those factors are influenced by this rule.

Additionally, DHS currently audits its FRCs in how they meet the standards of its Family Residential Standards and will continue to use this existing process, so that cost is included in the baseline of the rule and would not change as a result of the new licensing process. The new licensing process will not change the standards used in the audits and will not result in new costs.

#### b. Benefits Analysis

*Comments.* Commenters maintained that the benefits discussed in the proposed rule do not justify the costs. A commenter stated the benefits described in the proposed rule are not tangible benefits of implementing the rule and that any accounting of the benefits should include a contrasting of the current costs such as an estimate of the medical attention required for families and juveniles who DHS has apprehended, and how many would be disincentivized by the proposed rule to attempt entry to the United States. One commenter stated that although the proposed regulation claims to promote family unity, it is missing current "baseline" data on family unity (*i.e.*, how often accompanied minors are released with their parents, versus to a relative or family friend).

*Response.* DHS included a qualitative explanation of the benefits of this rule in the NPRM at 83 FR 45520. The primary purpose of the rule is to ensure that applicable regulations reflect the current conditions of DHS detention, release, and treatment of minors and UACs, in accordance with the relevant and substantive terms of the FSA, the HSA, and the TVPRA, as well as changed circumstances and operational experience. There is a benefit to having

set rules (in the CFR), such as the ability for the Departments to move from judicial governance via a settlement agreement to executive governance via regulation. Under the FSA, the government operates in an uncertain environment subject to future court interpretations of the FSA that may be difficult or operationally impractical to implement or could otherwise hamper operations. With the regulations, DHS and HHS, along with members of the public, would have certainty as to the agencies' legal obligations.

After considering the relevant factors, DHS believes the benefits of this rule justify the costs. ICE's objective and mission is to enforce immigration laws and effectuate removals. As discussed previously, the *in absentia* rate from EOIR of family unit members with completed cases that started at an FRC from January 1, 2014 through March 31, 2019 has been approximately 43 percent. DHS OIS has found that when looking at all family unit aliens encountered at the Southwest Border from FY 2014 through FY 2018, the *in absentia* rate for completed cases as of the end of FY 2018 was 66 percent. Restrictions placed on ICE's ability to detain families at FRCs through the pendency of their removal proceedings have stymied the effectiveness of FRCs as an immigration enforcement tool. The costs associated with this rule will thus ensure family detention remains an effective enforcement tool (NPRM at 83 FR 45520). The rule will thereby contribute to public safety and maintain the integrity of the U.S. immigration system by allowing ICE to better enforce immigration laws and effectuate removals.

#### c. Cost of New FRC

*Comments.* Commenters stated that DHS would need to increase the capacity of its current facilities to detain families, resulting in the acquisition or construction of a new FRC, and the cost of which was not specified in the NPRM.

*Response.* In the proposed rule, ICE said at that time it was unable to determine with certainty how the number of FRCs will change due to this rule because of the factors discussed in the NPRM at 83 FR 45519, such as whether a such a facility would be appropriate based on the population of aliens crossing the border, anticipated capacity, projected average daily population, projected costs, and available funding from Congress. ICE is still unable to determine how the number of FRCs may change due to the rule. Instead, this rule allows for the possibility of the existing FRCs to be

used to effectively enforce immigration consequences. If bed space were increased as a result of this rule, the cost would depend on the type of facility, facility size, location, and a number of other variables. ICE notes as an example that a buildout of 960 beds at Dilley would cost approximately \$80 million.

#### d. Increased Length of Detention and Increased Detention Costs

*Comments.* Some commenters stated the rule would result in longer detention periods and an increased number of families detained. The commenters noted that immigration cases are currently waiting for review an average of 721 days, or multiple years, and immigrants would stay in detention during the process.

One commenter said that even minors in expedited removal proceedings could experience extended periods of detention based on the availability of asylum officers to conduct the credible-fear interview, the time to obtain a review from an immigration judge for a negative decision, and delays in filing a Notice to Appear. Another commenter said that detaining families during the entirety of their immigration proceedings, would likely cause the expensive costs of family detention to skyrocket by \$2 billion at the low end, and as much as \$12.9 billion at the high end.

*Response.* DHS agrees that this rule may result in longer detention of some minors, and their accompanying parent or legal guardian in FRCs as discussed in the proposed rule. But DHS continues to believe that the average effect of this rule on the length of stay cannot be predicted using historical data because of many factors, such as the number of arriving family units in a facility at a given day, the timing and outcome of immigration court proceedings before an immigration judge, whether an individual is eligible for and granted parole or bond, issuance of travel documents by foreign governments, transportation schedule and availability, the availability of bed space in an FRC, a family's composition (for instance, Dilley currently only houses families with female heads of household, Karnes is currently holding single adults, but was previously designated for families with male heads of household), and other laws, regulations, guidance, and policies regarding removal not subject to this rule (NPRM at 83 FR 45518). In addition, the average length of stay in the past, prior to the court decisions in 2015 and 2017, is not a reliable source for future projections because it reflects other intervening policy decisions made

but that will not be directly affected by this rule (NPRM at 83 FR 45518).

e. Population in Detention Is Greater Than Estimated

*Comments.* Commenters stated the proposed rule would result in more families and minors being detained, citing data about the increase in CBP family unit apprehensions from 14,855 at the Southwest border in FY 2013 to 77,802 in FY 2018. Another commenter cited from an article in the New York Times that said since the summer of 2017, the number of migrant children being detained increased to 12,800, which was described as a concern given the proposal to detain more children.

Commenters lamented that HHS had failed to adjust its UAC residency growth rate or adjust any of the costs associated with increased UAC in the ORR system. The commenters claimed that HHS would need to shift essential resources away from their appropriated purpose to make up for the lack of funding.

*Response.* While the urgent humanitarian crisis at the border continues, the population in DHS custody will continue to change. But this rule will not result in prolonged detention of all family unit members encountered by CBP; as discussed previously, generally only certain groups of aliens are likely to have their length of stay in an ICE FRC increased as a result of this rule, among other factors.

HHS reiterates that, aside from 410,810 hearings for which HHS will incur some initial start-up costs, estimated at an average of \$250,000, the rule codifies current HHS operations, including regarding secure HHS facilities as well as UAC health-related costs. There is no significant cost effect from the rule for HHS. Rather, the primary cost drivers for HHS are migration patterns that influence the number of UACs referred to HHS and the rate at which HHS discharges children to sponsors, and—neither of these factors is influenced by this rule.

f. Rule Should Have Total Cost Estimate

*Comments.* Many commenters stated the NPRM should have included a total cost estimate. A few commenters stated the Department could have been made a cost estimate with the available data on detention operations discussed in the NPRM, as was done by a third party who applied the variable costs to estimate total detention costs. Another commenter indicated DHS has access to data sources that would have enabled DHS to provide a total cost estimate, or it could have consulted with vendors

who could provide facilities that would adhere to the proposed licensing standards.

Lastly, in response to the request for comments, on calculating costs to the government and individuals and on costs for 810 hearings, commenters added that the variables DHS sought comment on are under DHS's control.

*Response.* DHS explained in the proposed rule the many factors that would influence total costs are not within government—particularly the executive branch's—control. DHS described and monetized where possible the types of costs that would result from this rule. DHS provided the per-person, per-day variable costs that DHS would incur as a result of additional or longer detention for certain minors and their accompanying adult. DHS also provided an estimate of the number of minors who in FY 2017 comprised the groups of aliens who would likely have been detained longer at an FRC had this rule been in effect. In this final rule DHS has added the number of such minors for FY 2018. But DHS cannot provide a reliable forecast of the future number of such minors, the availability of bed space in an environment of finite resources, or the increased length of stay, and both are necessary to calculate a total cost for increased detention costs. DHS also cannot say with certainty if this rule will result in an increase in family beds.

DHS notes that some commenters have used unsupported assumptions about the important cost drivers of this rule and then applied such assumptions to the per-person, per-day costs in order to calculate a total cost. These commenters have not calculated a total cost of the rule. As previously explained, DHS is unable to forecast the future total number of such minors that may experience additional or longer detention as a result of this rule or for how much longer individuals may be detained because there are many other variables that may affect such estimates. In addition, DHS does not know how this rule might impact the number of FRCs as factors outside of the scope of the rulemaking cannot be predicted (such as future congressional appropriations). Consequently, providing a reliable total cost estimate of this rule is not possible given the many factors outside of the government's control.

This rule codifies current HHS operations—with the exception of § 410.810—so there is no significant cost effect from the rule for HHS. Rather, the primary cost drivers for HHS are migration patterns that influence the number of children referred to HHS and

the rate at which HHS discharges children to sponsors, and neither of these factors is influenced by this rule.

g. Scope of Impact Should Include Parents

*Comments.* A commenter stated the data presented in Table 12 of the NPRM at 83 FR 45519, estimating the number of minors likely to experience an extended detention period, was inaccurate. The commenter explained that it was only because of the FSA licensing requirement that the 99 percent of the detained population in FRCs estimated in the NPRM were released, and allowing DHS-licensed facilities could prolong detention. In addition, the commenter stated that DHS had not calculated the costs of increased detention of parents in the rule.

*Response.* DHS agrees that Table 12 of the NPRM at 83 FR 45519 represents minors only, and stated as such in the title of the table: "FY 2017 Minors at FRCs Who Went Through Credible Fear Screening Process." The FSA only applies to juveniles. This rule parallels the FSA and is principally concerned with minors. The adults detained at FRCs are included in the number of book-ins (Table 9), average length of stay (Table 10), and release reasons (Table 11).

With respect to the 99 percent of the 14,993 minors who were found to have credible fear and released on parole or on their own recognizance, DHS disagrees with the commenter's assertion that they were released solely due to the practice of applying a 20-day limit for unlicensed facilities; other factors were relevant to those determinations, including limitations on bed space and decisions regarding release on bond or parole. This rule generally would not change how DHS exercises its authority to release minors with credible fear. The analysis in this final rule has been updated with FY 2018 data. See the E.O. 12866 section of this final rule. DHS's estimates of the impact of the rule on detention of families are discussed above.

Changes to Final Rule

The Departments decline to amend the final rule analysis as proposed by commenters.

h. Costs to Taxpayers

*Comments.* Multiple commenters stated the proposal's use of long-term detention would be expensive and burdensome for taxpayers, significantly expanding the Federal deficit. Many commenters stated that this use of taxpayer money would be wasteful, a

misuse of financial resources, and unnecessary given the less costly alternatives to detention available. Some commenters stated that they did not want their or any other American's tax dollars, to pay for the detention of people seeking a better life.

Several commenters stated the government should re-direct those resources toward addressing root causes of child and family migration from Central America. This commenter recommended re-establishing the Central American Minors program instead of expanding detention capacity.

Several commenters raised specific fiscal concerns with utilizing soft-sided structures for influx purposes and transferring funds for that purpose from the National Institutes of Health, Head Start, Centers for Disease Control, or the National Cancer Institute.

*Response.* DHS acknowledges that this rule could increase costs to taxpayers, such as higher variable costs at FRCs, but believes the benefits of the ability of ICE to effectuate removal and carry out its mission justify the costs. The agency publishes detailed budget reports of the operations and resources required to fulfill its mission, including the current costs of family detention and alternatives to detention. The agency utilizes multiple types of resources in the course of enforcing immigration laws as needed to maximize the use of its budget.

The alternative uses of funds suggested by commenters do not meet the objectives of the proposed rule. As circumstances change at the southern border the agency can redirect resources in order to react in a timely manner.

HHS disagrees that using soft-sided structures during an influx necessitates exercising the Secretary's transfer authority as described in the comments.

#### Changes to Final Rule

The Departments decline to amend the final rule analysis as proposed by commenters.

#### i. Comments Regarding the Cost of Litigation

*Comments.* Several commenters stated that the proposed regulation will be enjoined by the Federal courts. One of these commenters stated that DHS is ignoring the history of the last 30 years and inviting expensive and time-consuming litigation.

*Response.* DHS notes that the original complaint in *Flores v. Meese*, No. 85–4544 (C.D. Cal.) was filed on July 11, 1985—more than 30 years ago. In 1996, the parties entered into the FSA, which was approved by the court on January 28, 1997. There has been litigation over

the meaning and enforcement of the FSA for many years, including six separate motions to enforce, one motion for relief, and one temporary restraining order. Recent litigation regarding the FSA began in February 2015 after the Federal Government's response to the surge of aliens crossing the U.S.-Mexico border in 2014, including the use of family detention at FRCs. DHS faces perpetual, recurring, and open-ended litigation over the FSA and its implementation, especially in light of the judicial determination that the FSA applies to accompanied minors, and the government anticipated litigation related to this rulemaking. Indeed, the *Flores* Plaintiffs already filed a motion alleging anticipatory breach of the FSA based on the publication of the NPRM. See *Flores v. Barr*, No. 85–4544 (C.D. Cal.) (ECF No. 516). The court deferred ruling on the motion until the publication of final regulations. *Id.* at ECF No. 525.

Nevertheless, the clearest path forward to reduce the litigation burden and establish consistency with statutory law and to enhance the sound administration of the immigration laws is through the promulgation of regulations, governing the subjects that are committed to the authority of DHS and HHS, and to terminate the FSA, as the FSA itself contemplates. Among other things, the promulgation of regulations provides a single vehicle for further updates while allowing for future modification to adapt to operational and legal changes and to reflect appropriate input from the public as provided for by the APA.

As indicated in the NPRM, the Departments considered not promulgating this rule but ultimately concluded that continuing to operate absent regulatory action would likely require the Government to operate through non-regulatory means in an uncertain environment subject to unknown future court interpretations of the FSA that may be difficult or operationally impracticable to implement or could otherwise hamper operations. Failing to promulgate this rule also would leave unaddressed the statutory amendments in the HSA and TVPRA that have affected certain portions of the FSA. HHS, having not been an original party to the FSA but as a successor agency with respect to some of its requirements, will benefit from rules that clearly delineate ORR's responsibilities from that of other Federal partners.

Finally, DHS notes that legacy INS's successors are obligated under the FSA to initiate action to publish the relevant and substantive terms of the FSA as

regulations, pursuant to the 2001 Stipulation.

#### Changes to Final Rule

DHS declines to amend the final rule analysis as proposed by commenters.

#### j. GAO Report on Improving Cost Estimates for Detention

*Comments.* Commenters suggested that DHS implement the U.S. Government Accountability Office (GAO) guidelines for reliable cost estimates of detention resources. The commenters stated that GAO previously identified errors and inconsistencies in ICE's budgets and estimated costs and made recommendations for improvements. The commenters suggested that DHS improve its process for estimating costs of detention resources before promulgating regulations that would result in the expansion of its existing programs.

*Response.* As explained above, ICE is unable to estimate how the number of FRCs may change due to this rule alone. There is no reliable method to estimate what number of families encountered would be detained at an FRC, or for how long, due to factors outside of the scope of this rule, including the number of families apprehended or found inadmissible, the composition of families, the need of bed space for detention of single adults (such as with the conversion of Karnes to a single adult facility), funding, the need to balance the detention of families with the detention and removal of single adults, and outcomes from the credible fear process. However, this rule will allow DHS to use existing FRCs effectively. As a result, some families will experience longer detention periods, but—given finite resources and bed space—this also means that many other families will experience less detention than they do in the status quo.

#### Changes to Final Rule

Accordingly, DHS declines to change the final rule analysis as proposed by commenters.

#### k. Comments on Additional Costs to Sponsors

*Comments.* One commenter expressed concern that the proposed rule failed to account for the additional costs to HHS and to potential sponsors of UACs—which the commenter characterized as “astronomical”—due to the additional burden on potential sponsors to secure release of their children and the increasing population of UACs in ORR custody resulting from the proposed rule.

The commenter contended that the expanded definitions of “emergency” and “influx,” along with recently promulgated sponsorship review procedures, will require sponsors to spend more time and money to secure the release of children in HHS custody. This commenter expressed concern that the NPRM does not account for the public burden caused by sponsors dropping out of the onerous sponsorship process or being rejected from sponsorship.

*Response.* The proposed regulations for assessing a sponsor are consistent with the Departments’ current operations and procedures for implementing the terms of the FSA, the HSA, and the TVPRA. As a result, there are no new burdens to sponsors based on this rule. Indeed, the DHS and HHS definitions of emergency and influx substantively mirror the definition in the FSA, and HHS’ sponsorship review procedures are part of the baseline costs of existing operations. As a result, there are no new burdens to sponsors based on this rule.

#### Changes to Final Rule

The Departments decline to amend the final rule analysis as proposed by commenters.

#### l. Comments on Impact on Private Detention Centers

*Comments.* Various commenters said that the rule was partially driven by private companies who would profit from the widened use of detention.

One commenter added that the government historically has prioritized the profits of private companies ahead of the care for immigrant families. As an example of this profit motive, another commenter said that the GEO Group and its lobbyist attempted to have the Texas legislature pass a bill that would have waived the standards for childcare facilities, enabling the facility in Karnes County to hold families for longer periods.

Some commenters explicitly stated they did not want for profit facilities to be used, because it would lead to traumatized children, and families.

*Response.* The government is not adopting this rule to increase any third-party’s profits. The government is adopting this rule for the many reasons discussed above. This rule would directly regulate DHS and HHS, indirectly affecting private entities to the extent that DHS or HHS contract with them. As permitted by Federal law, DHS contracts with private contractors and a local government to operate and maintain FRCs, and with private contractors to provide transportation of

minors and UACs. Nothing in this rule alters any aspect of government contracting law.

DHS does not exclusively contract with for-profit entities.

HHS currently contracts with one private contractor to operate and maintain an influx facility for UACs. Because this rule serves to implement and codify both the FSA and other existing practices under the HSA and TVPRA, HHS does not anticipate that publication of the rule would cause an increase in costs, as compared to anticipated costs in the absence of a rule.

#### Changes to Final Rule

DHS and HHS decline to amend the final rule as proposed by commenters.

#### m. Recommendations To Redirect Resources

*Comments.* Multiple commenters made alternative policy recommendations they deemed a better use of resources, to resolve the humanitarian crisis at the border.

Some commenters proposed hiring additional immigration judges to address the backlog of cases and urged the use of social workers and the provision of legal services to assist asylum seekers.

Several commenters stated the government should focus on addressing the root causes of migration from Central America by providing additional assistance in the region to strengthen the protection systems. They highlighted the Central American Minors Program as a means of avoiding children from having to migrate and make the dangerous journey without any guarantee of admission. Some of these commenters also suggested supporting infrastructure projects and job creation in the countries migrants are leaving or exploring solutions like the Marshall Plan, the American aid package provided in 1948 to rebuild Western Europe post World War II.

Another commenter stated the funds used for family detention would be better spent on domestic programs to benefit the American people such as infrastructure jobs, provide slots in a Head Start program, or fund healthcare for low income adults.

*Response.* These recommendations do not meet the objectives of the rulemaking and are largely beyond its scope. DHS has statutory obligations to fulfill with respect to immigration enforcement and custody of minors, including detention in some circumstances. HHS’ statutory obligations govern the care and custody of UACs. This rule will better enable the

Departments to carry out these statutory obligations in the light of operational realities. Many of these objections would be better addressed to Congress.

#### Changes to Final Rule

The Departments declines to amend the final rule in response to these comments.

#### 16. Executive Order 13045

##### Public Comments and Response

*Comments.* One commenter agreed with the Departments’ assessment that the proposed rule would not create an environmental risk to children’s health or safety. This commenter stated that the rule did not address the abuse and drugging of children at the Shenandoah Valley Juvenile Center or the Shiloh RTC (or at other detention facilities around the country). This commenter cited two articles from the website of the National Center for Biotechnology Information, which is part of the United States National Library of Medicine, and stated that the government’s own data shows that detaining children is a risk to the children’s health and development. Without providing support or specifics, the commenter said that “the claim that detention is not a risk to children’s health or their safety is as false as it is absurd.”

*Response.* E.O. 13045 applies to economically significant rules, and the Departments have now determined that this rule is economically significant. Executive Order 13045 addresses environmental health risks and safety risks to children, which it defines as “risks to health or to safety that are attributable to products or substances that the child likely to come in contact with or ingest (such as air we breathe, the food we eat, the water we drink or use for recreation, soil we live on the products we use or are exposed.” The commenter does not reference any such “products or substances.” The Departments have determined that this rule does not create an environmental health risk or safety risk that may disproportionately affect children. The rule is largely codifying the Departments’ current procedures and policies for implementing the FSA, HSA, and TVPRA.

#### Changes to Final Rule

The Departments are not making changes in the final rule in response to these comments.

#### 17. Family Assessment

##### Public Comments and Response

*Comments.* One commenter disagreed specifically with DHS’s assessment

under section 654 of the Treasury General Appropriations Act that the rule will not have an impact on family well-being and might even “strengthen the stability of the family and the authority and rights of parents in the education, nurture, and supervision of their children. . . .” 83 FR at 45524. The commenter relied on the finding of the U.S. Immigration and Customs Enforcement’s Advisory Committee on Family Residential Centers that “detention is generally neither appropriate nor necessary for families—and . . . detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children.”

*Response.* DHS has reviewed this final rule in light of the comment received and in accordance with the requirements of section 654 of the Treasury General Appropriations Act, 1999, Public Law 105–277. With respect to the criteria specified in section 654(c)(1), for DHS, the rule places a priority on the stability of the family and the authority and rights of parents in the education, nurture, and supervision of their children, within the immigration detention context, as parents maintain parental rights and supervision of their children within FRCs. This rule provides an option for families to stay together where detention is required. With respect to family well-being, this final rule codifies current requirements of settlement agreements, court orders, and statutes.

#### Changes to Final Rule

The Departments are not making changes in the final rule in response to this comment.

#### 18. Family Separation

##### Public Comments and Response

*Comments.* Commenters wrote about the long-lasting effects of family separation on children and their families. Commenters stated that separating children from their parents causes toxic stress, which may place children at risk of developing post-traumatic stress disorder (PTSD) and substance abuse in later life.

Many commenters stated that evidence-based research has shown that even a short period of family separation is extremely harmful to infants and young children and a more prolonged separation can result in depression, high levels of anxiety and other symptoms including incessant crying, lack of appetite, failure to achieve cognitive and social learning, and loss of previously acquired skills. Commenters

referenced letters from mothers separated from their young children at the border of the United States where they sought asylum about the traumatic effects of such separation.

Some commenters believed that the trauma children experience from family separation and prolonged detention can turn into intergenerational trauma in families and cultural communities.

*Response.* DHS is sympathetic to the difficulties created by family separation, especially to children. This is precisely why the government’s preference is to keep families together so that they can provide the necessary emotional support for each other as they go through their immigration proceedings, and thus to have the option to keep a family in detention as a unit, when detention rather than release is warranted for a family unit. This rule aims to ameliorate the disparate treatment of a parent and minor in the immigration system under the FSA. This rule does not address the circumstances in which it may be necessary to separate a parent from his or her child. For more on the services provided by FRCs see Section V. A. 8. *Detention of Family Units* above.

#### Changes to Final Rule

DHS is not making changes in the final rule in response to these comments.

#### 19. Trauma

##### Public Comments and Response

*Comments.* Similar to the comments discussed above, the Departments received many comments about trauma associated with detention. Multiple commenters wrote that detaining children causes trauma, with some expressing the view that it amounts to abuse or child maltreatment and violates prohibitions against torture and ill treatment under U.S. and international law.

Many of these commenters referenced a policy statement by the American Academy of Pediatrics which stated “there is no evidence indicating that any time in detention is safe for children,” and opined that “[q]ualitative reports about detained unaccompanied immigrant children in the United States found high rates of post-traumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems.”<sup>70</sup> Another commenter wrote that extending detention beyond 20 days increases the risk for toxic stress which can negatively impact the child’s

<sup>70</sup> American Academy of Pediatrics, “Detention of Immigrant Children” *Pediatrics* Volume 139, number 4, Apr. 2017.

health and well-being. One commenter stated that traumas experienced by children are the most difficult to treat, particularly traumas that occurred before the child was able to talk about his or her feelings. Commenters also referred to studies that show detained children suffer from physical illnesses such as sleep disorders, loss in appetite, headaches and abdominal pain in addition to mental health illnesses such as depression and post-traumatic stress disorder (PTSD). Several commenters referred to a 2004 study conducted by the Australian Human Rights Commission and Equal Opportunities Commission that highlighted similar negative developmental and physical health consequences of detention for children.

Another commenter referenced a statement by the United Nations High Commissioner for Human Rights that states UNHCR is opposed to detention of children for immigration reasons because of the negative health impacts.

Additional commenters wrote that detention constitutes a type of adverse childhood experience (ACE) that can cause irreparable harm including negative health outcomes in adulthood, higher rates of mental health problems, substance abuse, poorer educational outcomes, and poorer vocational outcomes. Commenters also asserted that detention can have a negative effect on the academic, cognitive, and social development of children, leading to impaired or delayed cognitive development that continues after a child is released from detention. Commenters cited several studies reaching similar conclusions. Several commenters also wrote that the trauma experienced by children in detention can be passed through generations.

Commenters also wrote that detention negatively impacts family relationships because it undermines parental authority and parental capacity to respond appropriately to children’s needs.

*Response.* DHS understands that trauma is an issue for asylum-seekers and others who have entered the United States, and tries to mitigate it where possible. But not all factors are in the control of DHS. For example, a study conducted by Danish scientists found that relocating several times during the asylum process and the length of the pendency of the asylum case contributed to the mental health issues experienced by asylum-seeking children, even children detained with their parents in Red Cross facilities. The study also stated that additional studies are needed to determine if other factors such as parental stress and previous



trauma cause additional trauma for those seeking asylum.<sup>71</sup>

Consistent with the recommendations of scientists, ICE provides medical care and educational services in ICE facilities. CBP also provides medical screening to all minors and UACs who enter CBP custody along the southwest border. CBP's medical screenings are designed to ensure that any minors or UACs with emergent health needs are immediately referred for appropriate emergency care. It is difficult to gauge how much experiences in the juvenile's home country and the harsh trip to the United States, which is ripe with exploitation and abuse, affected a particular juvenile before he or she ever arrives at the border. But DHS has taken several important steps to address these issues.

The research on child detention states that children who are detained are at a significantly higher rate of psychological distress. Multiple accommodations for a Family Centered and Trauma Informed Approach are being implemented within the ICE residential facilities in order to decrease the effects of trauma on minors in detention.

Research of the Australian Psychological Society (APS) recommends that children and families should be accommodated separately from other detainees. Appropriate resources with indoor and outdoor spaces should be provided for children. The APS suggests that mental health services be offered to detainees, including children, which includes access to appropriately trained clinical providers. Educational opportunities should be available, along with medical care.

ICE currently has three facilities that house alien family units. From the outset, minors in FRCs are detained along with their parent or legal guardian, who can provide care and support. DHS believes that affording parents full control over their children at FRCs and respecting their rights as parents plays an important role in minimizing and addressing trauma.

Furthermore, all ICE-detained individuals have access to care on a 24/7 basis. Mental health services include crisis-intervention, various therapeutic treatment modalities to include, talk therapy, educational group behavior modification, medication treatment and case management services. Also included are groups on trauma,

domestic violence, grief and loss, parenting skills and information regarding minors in a residential setting. For minors there is a focus on Bullying Prevention and Social Skills Training. Each facility works with a local school providing education for each grade level along with IEP's if needed. Minors attend class and have access to both indoor and outdoor recreation. There is space for minors to play and explore in order to properly socialize among their peers. In a case where there may be abuse allegations, an investigation is documented under PREA Protocol and a minor will have both a medical and mental health evaluation. If necessary, Child Protective Services (CPS) will be contacted to do a full investigation. The parent and the minor will both be offered treatment as required or not by CPS. Children's Advocacy Centers will also be contacted to aid the minor and parent through the legal process and the forensic interview.

In addition, all minors along with their accompanying parent or legal guardian caregiver are seen weekly by a licensed mental health care provider through "Weekly Mental Health Checks." Mental health providers include psychiatrists, clinical social workers and psychologists and pediatricians.

Everyone entering an FRC is screened for both physical and mental health issues and trauma. ICE also maintains mental health professionals on staff to conduct both individual and group sessions to help residents with their trauma issues. Additionally, FRCs provide safe settings for minors to access educational services year round.

DHS believes affording parents full control over their children at FRCs and respecting their rights as parents can also play a role in addressing this problem.

DHS argues that this rule is about ensuring the care of minors in government custody while enforcing the immigration laws as laid out by Congress, in light of the FSA and operational realities. And those immigration laws set out detention as a key component of immigration enforcement. Enforcement of the immigration laws is a core DHS mission that cannot be ignored and must be balanced with the needs to ensure the care of minors in DHS custody and relevant legal obligations.

Separately, as the nation's leading immigrant child welfare agency, ORR is deeply committed to the physical and emotional safety and wellbeing of all UACs in its temporary care. ORR-funded care providers must be aware of the physical and psychological impacts

of forced displacement, migration, and childhood trauma and conduct holistic, child-centered assessments of the medical and behavioral health needs of UACs. Care providers must also understand the developmental stages of children and adolescents and how the stressors of temporary government custody affect children at each stage. UAC clinical services should be evidence-based therapeutic interventions and be structured so that clinicians have continuous supervision and access to the support they need as they work with vulnerable and traumatized children and youth.

DHS acknowledges that it must try to balance its mission of promoting homeland security and public safety against the vulnerabilities of many aliens in its custody, including juveniles in particular. HHS is committed to continuously reassessing its policies, procedures, and operations to align with state-of-the-science research and best practices in child welfare service provision.

#### Changes to Final Rule

The Departments are not making changes in the final rule in response to these comments.

## VI. Statutory and Regulatory Requirements

### A. Executive Orders 12866 and 13563: Regulatory Review and Executive Order 13771

Executive Orders 12866 ("Regulatory Planning and Review") and 13563 ("Improving Regulation and Regulatory Review") direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs") directs agencies to reduce regulation and control regulatory costs and provides that "for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process."

This rule has been designated a "significant regulatory action" that is economically significant under section 3(f)(1) of Executive Order 12866.

<sup>71</sup> Signe S. Nielsen, "Mental health among children seeking asylum in Denmark—the effect of length of stay and number of relocations: A cross-sectional study," *BMC Public Health*, Aug. 19, 2008.

Accordingly, this rule has been reviewed by the Office of Management and Budget (OMB). This rule is a regulatory action per Executive Order 13771.

#### Changes From the Proposed Rule

In response to commenters, DHS has made the following changes to the proposed rule in this final rule. Most of these changes are points of clarification and do not add costs or change the impact of the rule. Section 212.5(b) now considers that DHS is not precluded from releasing a minor who is not a UAC to someone other than a parent or legal guardian, specifically a brother, sister, aunt, uncle, or grandparent who is not in detention.

Section 236.3(b)(2), which defines *Special Needs Minor*, used the term “retardation.” Commenters noted this was an outdated term, and DHS agrees to replace it with “intellectual disability.” This clarification does not add new costs to the rule.

Section 236.3(b)(9), which defines *Licensed Facility*, includes the requirement that DHS employ third parties to conduct audits of FRCs to ensure compliance with the Family Residential Standards. Commenters stated that DHS has previously not shared the results of such audits. Although ICE has shared these results publicly, DHS is expressly providing that “DHS will make the results of these audits publicly available.” DHS also adds to the final rule that the audits of licensed facilities will take place at the opening of a facility and take place on an ongoing basis. Since this procedure is already in practice, there is minimal burden from this change.

In § 236.3(b)(11), which defines a *Non-Secure Facility*, DHS agrees with commenters that a non-secure facility means a facility that meets the definition of non-secure under state law in the state in which the facility is located, as was intended by the language of the proposed rule, and is adding “under state law” to the definition to clarify this point. This clarification does not add new costs to the rule.

In § 236.3(f)(1) regarding transfer of UACs from DHS to HHS, DHS agrees to amend the proposed regulatory text to clarify that a UAC from a contiguous country who is not permitted to withdraw his or her application for admission or for whom no determination can be made within 48 hours of apprehension, will be immediately transferred to HHS. This clarification does not add new costs to the rule.

In § 236.3(f)(4)(i), DHS clarifies that UACs will generally not be transported with unrelated detained adults, subject to certain exceptions spelled out in the rule. This is a clarification and thus does not add any new costs to the rule.

In § 236.3(g)(1)(i) regarding DHS procedures in the apprehension and processing of minors or UACs, Notice of Rights and Request for Disposition, DHS is removing a qualification on the requirement that the notice be read and explained to a minor or UAC in a language and manner the minor or UAC understands if the minor is believed to be under 14 or is unable to comprehend the information on the form. DHS had proposed to do so only for minors or UACs believed to be less than 14 years of age, or unable to comprehend the information contained in the Form I-770. DHS is changing this language to make it clear that the form will be provided, read, or explained to *all* minors and UACs in a language and manner that they understand. DHS is making this change to avoid confusion related to DHS’s legal obligations regarding this notice while still acknowledging that it may be necessary to implement slightly different procedures depending on the particular minor or UAC’s age and other characteristics. This change will result in some additional operational burden. Specifically, while the Form I-770 is already issued to all minors and UACs, the updated language makes clear that the form will both be issued to all minors and UACs, and that CBP has some obligation to make sure that all minors and UACs understand the form’s contents. The exact method by which this will happen may vary based on the particular minor or UAC. Thus, this language will require some degree of operational change, although CBP is not able to quantify the operational burden.

In § 236.3(g)(2)(i) regarding DHS custodial care immediately following apprehension, the proposed rule that UACs “may be housed with an unrelated adult for no more than 24 hours except in the case of an emergency or exigent circumstances.” Commenters objected to the use of the term “exigent circumstances” as it was not defined. DHS believes “exigent circumstances” because it is redundant to “emergency” and thus agrees to delete the term. This is a clarification and does not add new costs to the rule.

In § 236.3(i)(4), commenters requested additional language tracking the verbatim text of FSA Ex. 1. In response to these comments, DHS added language of FSA Ex. 1 paragraph B and C. These standards have always been in place

and thus will not result in new costs to the rule.

Section 236.3(j) and (n) now provide that DHS is not precluded from releasing a minor who is not a UAC to someone other than a parent or legal guardian, specifically a brother, sister, aunt, uncle, or grandparent who is not in detention and is otherwise available to provide care and physical custody.

DHS has added new paragraphs at § 236.3(j)(2)–(4) to identify the specific statutory and regulatory provisions that govern the custody and/or release of non-UAC minors in DHS custody based on the type and status of immigration proceedings.

DHS has added a new § 236.3(j)(4) to state clearly that the Department will consider parole for all minors in its custody pursuant to section 235(b)(1)(B)(ii) of the INA or 8 CFR 235.3(c) and that paroling such minors who do not present a safety risk or risk of absconding will generally serve an urgent humanitarian reason. DHS adds that it may also consider aggregate and historical data, officer experience, statistical information, or any other probative information in determining whether detention of a minor is required to secure the minor’s timely appearance before DHS or the immigration court. This change is a point of clarification on the process for discretionary release and does not add new costs or change the impact of the rule.

DHS clarifies in § 236.3(o) that the Juvenile Coordinator’s duty to collect statistics is in addition to the requirement to monitor compliance with the terms of the regulations. This is a clarification point and does not add new costs or change the impact of the rule.

In response to comments on the status of the Dilley and Karnes FRCs to be non-secure, ICE has agreed to add several new points of egress along their perimeters by September 30, 2019. The estimated construction cost at Dilley is between \$5,000 and \$6,000. There is no additional cost to DHS for this construction at Karnes, and the private contractor, the GEO Group, did not provide an estimate of the cost they would incur for adding the new points of egress and thus DHS is unable to quantify this cost.

DHS agrees with commenters that this rule *may* result in costs, benefits, or transfers in excess of \$100 million in any given year and therefore is economically significant. DHS stated in the proposed rule that the cost of this rule depended on a number of unknown factors, including the population of aliens crossing the border. Since the proposed rule was published, DHS has

seen a large spike in the number of family units apprehended or found inadmissible at the Southwest Border. As of June 2019, with three months remaining in FY 2019, CBP has apprehended over 390,000 family units between ports of entry on the Southwest Border, as compared to 107,212 family units in all of FY 2018.<sup>72</sup> Consequently, as noted in the NPRM, because the costs of this rule are dependent on a number of factors outside of this rulemaking, some of which have changed since the NPRM, the Departments now consider this rule to be economically significant.

In response to commenters, HHS has made the following changes to the proposed rule in this final rule. Most of these changes are points of clarification and do not add costs or change the impact of the rule.

Section 410.101, which defines *Special Needs Minor*, included the term “retardation.” Commenters noted this was an outdated term, and HHS agrees to replace it with “intellectual disability.” This clarification does not add new costs to the rule.

In § 410.203, HHS is making a change to make more explicit the fact that ORR reviews placements of minors in secure facilities on at least a monthly basis. HHS is also making a change to make more explicit the fact that, notwithstanding its ability under the rule to place UACs who are “otherwise a danger to self or others” in secure placements, this provision does not abrogate any requirements to place UACs in the least restrictive setting appropriate to their age and special needs. This clarification does not add new costs to the rule.

In 45 CFR 410.600(a), HHS stated that it would take all necessary precautions for the protection of UAC during transportation with adults. This language runs in contradiction to 45 CFR 410.500(a), which states that ORR does not transport UAC with adult detainees. Therefore, the sentence from 45 CFR 410.600(a) that reads, “ORR takes all necessary precautions for the protection of UACs during transportation with adults,” will be struck from the final rule. This revision does not add new costs to the rule.

ORR notes that there will be instances when UACs are transferred with adult staff members. These situations are covered under 45 CFR 411.13(a) of the

Interim Final Rule (IFR) on the Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children. The IFR states, “Care provider facilities must develop, document, and make their best effort to comply with a staffing plan that provides for adequate levels of staffing, and, where applicable under State and local licensing standards, video monitoring, to protect UCs from sexual abuse and sexual harassment.” This provision applies to transfers as well.

In § 410.700 relating to age determination decisions, HHS will add “totality of the evidence and circumstances” language so that the age determinations decisions by HHS and DHS are based on the same standard, as required by law (see 8 U.S.C. 1232(b)(4)). This addition does not add costs to the rule.

The NPRM proposed to include that bond hearings for UACs be transferred from the immigration courts to a hearing officer housed within HHS, where the burden would be on the UAC to show that s/he will not be a danger to the community (or risk of flight) if released, using a preponderance of the evidence standard. HHS declines to shift the ultimate burden of proof to itself. However, it clarifies that HHS bears the burden of initial production, under which it must present evidence supporting its determination of the UAC’s dangerousness or flight risk. The UAC would bear the burden of persuasion, rebutting HHS’ evidence to the hearing officer’s satisfaction under a preponderance of the evidence standard. The changes to the 810 hearing process do not add new costs to the rule in beyond those that will be incurred by the Department to perform the hearings as envisioned in the NPRM.

#### 1. Quantitative Background

The FSA has been in place for more than two decades and sets limits on the length of time and conditions under which children can be held in immigration detention. In 1985, two organizations filed a class action lawsuit on behalf of alien children detained by the former INS challenging procedures regarding the detention, treatment, and release of children. After many years of litigation (including an appeal to the United States Supreme Court) and advocacy (civil society organizations, including human rights groups, faith-based institutions, political leaders, and concerned citizens) the parties reached a settlement in 1997. HHS assumed responsibility of UACs and created, within ORR, the UAC Program in 2003. The FSA has served as the foundation

for ORR’s UAC Program since its inception.

The FSA itself anticipated that its terms would be implemented through Federal regulations issued in accordance with the APA: “Within 120 days of the final district court approval of this Agreement, the INS shall initiate action to publish the relevant and substantive terms of this Agreement as a Service regulation. The final regulations shall not be inconsistent with the terms of this Agreement.” This rule aims to codify the terms of the FSA as envisioned by the parties to the settlement more than 20 years ago, taking into account current circumstances and changes in the law since that time. The original FSA had a termination clause that terminated the agreement the earlier of five years from court approval of the agreement, or three years after the court determines the INS is in substantial compliance with the agreement. In 2001, the parties modified the agreement and agreed that it would terminate 45 days after the promulgation of regulations implementing the agreement. By codifying current requirements of the FSA and court orders enforcing terms of the FSA, as well as relevant provisions of the HSA and TVPRA, the Departments are implementing the intent of the FSA and make permanent the requirements to protect children and provide them with safe and sanitary accommodations. The Federal Government’s care of minors and UACs has complied with the FSA and related court orders for more than 20 years, and complies with the HSA and TVPRA.

The rule applies to minors and UACs encountered by DHS, and in some cases, their families. CBP and ICE encounter minors and UACs in different manners. CBP generally encounters minors and UACs at the border. Generally, ICE encounters minors either upon transfer from CBP to an FRC, or during interior enforcement actions.

#### CBP

CBP’s facilities at Border Patrol stations and ports of entry (POEs) are processing centers, designed for the temporary holding of individuals. CBP’s facilities are not designed to accommodate large numbers of minors and UACs waiting for transfer to ICE or ORR, even for the limited period for which CBP generally expected to have custody of minors and UACs, 72 hours or less. Although minors and UACs in CBP facilities are not provided the same amenities that will be available to them in longer-term facilities, all minors and UACs in CBP facilities are provided access to safe and sanitary facilities;

<sup>72</sup> See United States Border Patrol Total Family Unit Apprehensions By Month—FY 2013 through FY 2018 at <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf> (last visited May 10, 2019). See also Southwest Border Migration FY 2019 at <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last visited June 5, 2019).

functioning toilets and sinks; food; drinking water; emergency medical assistance, as appropriate; and adequate temperature control and ventilation. Minors and UACs are also provided access to basic hygiene items and clean bedding, and CBP makes reasonable efforts to provide minors and UACs with showers where approaching 48 hours in custody, and clean clothes. To ensure their safety and well-being, UACs in CBP facilities are supervised and are generally segregated from

unrelated adults; older, unrelated UACs are generally segregated by gender. Additionally, CBP provides medical screening to all minors and UACs along the southwest border, and refers any minor or UAC with an emergent medical need to the hospital or other nearby medical facility for appropriate emergency treatment.

CBP has apprehended or encountered 65,593 minors accompanied by their parent(s) or legal guardian(s), and 56,835 UACs on average annually for

the last three complete fiscal years. In FY 2018, CBP apprehended or encountered approximately 107,498 alien minors or UACs. Apprehensions or encounters in FY 2019 to date have surpassed FY 2018 annual totals.<sup>73</sup> The table below shows the annual number of accompanied minors (that is, minors accompanied by their parent(s) or legal guardian(s)) and UACs CBP has apprehended or encountered in FYs 2010 through 2018.

TABLE 7—U.S. CUSTOMS AND BORDER PROTECTION ACCOMPANIED MINORS AND UNACCOMPANIED ALIEN CHILDREN NATIONWIDE APPREHENSIONS AND ENCOUNTERS FY 2010–FY 2018

Fiscal year	Accompanied minors	UACs	Total
2010	22,937	19,234	42,171
2011	13,966	17,802	31,768
2012	13,314	27,031	40,345
2013	17,581	41,865	59,446
2014	55,644	73,421	129,065
2015	45,403	44,910	90,313
2016	74,798	71,067	145,865
2017	64,628	49,292	113,920
2018	57,353	50,145	107,498

CBP makes a case by case determination as to whether an alien is a UAC based upon the information and evidence available at the time of encounter. When making this determination, CBP follows section 462(g)(2) of the HSA, which defines a UAC as a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

Once CBP determines that an alien is a UAC, CBP must process the UAC consistent with the provisions of the TVPRA, which requires the transfer of a UAC who is not statutorily eligible to withdraw his or her application for admission into the custody of ORR within 72 hours of determining that the juvenile meets the definition of a UAC, except in exceptional circumstances.

If, upon apprehension or encounter, CBP determines that an alien is a minor who is part of a family unit, the family unit is processed accordingly and transferred out of CBP custody. If appropriate, the family unit may be transferred to an ICE FRC. If the FSA were not in place, CBP would still make a determination of whether an alien was

a UAC or part of a family unit upon encountering an alien, in order to determine appropriate removal proceedings pursuant to the TVPRA.

ICE

When ICE encounters a juvenile during an interior enforcement action, ICE performs an interview to determine the juvenile’s nationality, immigration status, and age. Pursuant to the TVPRA, an alien who has been encountered and has no lawful immigration status in the United States, has not attained 18 years of age, and has no parent or legal guardian in the United States available to provide care and physical custody will be classified as a UAC. The number of juvenile arrests made by ICE is significantly smaller than CBP across all fiscal years as shown in below. A non-UAC minor would have to be arrested to be booked into an FRC.

TABLE 8—FY 2014–FY 2018 JUVENILE BOOK-INS WITH ICE AS ARRESTING AGENCY

Fiscal year	Book-ins of accompanied minors	UAC book-ins
2014	3	285
2015	8	200
2016	108	164
2017	123	292

TABLE 8—FY 2014–FY 2018 JUVENILE BOOK-INS WITH ICE AS ARRESTING AGENCY—Continued

Fiscal year	Book-ins of accompanied minors	UAC book-ins
2018	102	343

Once ICE determines that an alien is a UAC, ICE must process the UAC consistent with the provisions of the TVPRA, which requires the transfer of a UAC into the custody of ORR within 72 hours of determining that the juvenile meets the definition of a UAC, except in exceptional circumstances.

At the time that the FSA was agreed to in 1997, INS enforcement efforts mainly encountered single adults, and only adult detention facilities were in operation. Prior to 2001, when a decision was made to detain an adult family member, the other family members were generally separated from that adult. However, beginning in 2001, in an effort to maintain family unity, INS began opening FRCs to accommodate families who were seeking asylum but whose cases had been drawn out. INS initially opened what today is the Berks FRC (Berks) in Berks, Pennsylvania, in 2001. ICE also operated the T. Don Hutto medium-

<sup>73</sup> See U.S. Customs and Border Protection, Southwest Border Migration FY 2019 at <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

security facility in Taylor, Texas as an FRC from 2006 to 2009. In response to the influx of UACs and family units in 2014 in the Rio Grande Valley, ICE opened FRCs in Artesia, New Mexico in June of 2014; Karnes County, Texas in July of 2014; and Dilley, Texas in December of 2014. The Artesia facility, which was intended as a temporary facility while more permanent facilities were contracted for and established, was closed on December 31, 2014.

The South Texas FRC in Dilley, Texas (Dilley) has 2,400 beds, Berks has 96

beds, and the Karnes County Residential Center in Karnes County, Texas (Karnes) has 830 beds. The capacity of the three FRCs provide for a total of 3,326 beds. Currently, the Karnes FRC houses male heads of household, the Berks FRC houses dual parent families, and the Dilley FRC houses female heads of household (though ICE has transitioned Karnes to housing single adult females as of the time of this rule to reflect operational considerations). As a practical matter, given varying family sizes and compositions, and housing

standards, not every available bed will be filled at any given time, and the facilities may still be considered to be at capacity even if every available bed is not filled. ICE did not maintain a consistent system of records of FRC intakes until July 2014. Since 2015, there has been an annual average of 35,032 intakes of adults and minors at the FRCs. The count of FRC intakes from July 2014 through FY 2019 Year-to-Date (YTD) is shown in Table 9 below.

TABLE 9—FRC INTAKES FY 2014–FY 2019 YTD

Fiscal year	FRC intakes	FRC adult intakes	FRC minor intakes
Q4 2014*	1,589	711	878
2015	13,206	5,964	7,242
2016	43,342	19,452	23,890
2017	37,825	17,219	20,606
2018	45,755	21,490	24,265
2019 YTD**	26,869	12,654	14,215

\* 2014 only includes the fourth quarter of FY 2014: July, August, and September.  
 \*\* Through April 4, 2019.

Due to court decisions in 2015 and 2017, DHS ordinarily uses its FRCs for the detention of non-UAC minors and their accompanying parent(s) or legal guardian(s) for periods of up to approximately 20 days. This is generally

the period of time required for USCIS to conduct credible fear proceedings. Since 2016, the average number of days from the book-in date to the release date at all FRCs for both minors and adults has been less than 15 days. Table 10 shows

the average number of days from book-in date to release date at FRCs for FY 2014 through FY 2019 YTD (April 4, 2019), based on releases by fiscal year. Data on releases are available for all four quarters of FY 2014.

TABLE 10—AVERAGE NUMBER OF DAYS FROM BOOK-IN DATE TO RELEASE DATE AT FRCs FY 2014–FY 2019 YTD

Fiscal year	Average number of days	Average days for minors (<18 years old)	Average days for adults (≥18 years old)
2014	47.4	46.7	48.4
2015	43.5	43.1	44.0
2016	13.6	13.6	13.6
2017	14.2	14.2	14.1
2018	17.1	17.1	17.1
2019 YTD*	12.4	12.3	12.5

\* Through April 4, 2019.

Table 11 shows the reasons for the release of adults and minors from FRCs in FY 2017 and FY 2018. As it indicates, the large majority of such individuals were released on an order of their own recognizance or paroled.

TABLE 11—REASONS FOR RELEASE

Reason for release	FY 2017 percent	FY 2018 percent
Order of Recognizance	76.9	76.7
Paroled	21.3	22.1
Order of Supervision	1.7	1.1
Bonded Out	0.1	<0.0
Prosecutorial Discretion	<0.0	<0.0

Table 12 shows the number of adults and minors removed from the United States from FRCs since FY 2014. Removals include returns. Returns include Voluntary Departures (including Voluntary Returns)<sup>74</sup> and Withdrawals Under Docket Control.

TABLE 12—REMOVALS FROM FRCs FY 2014–FY 2019 YTD

Fiscal year	Removals
Q4 2014*	390

<sup>74</sup> For the purposes of this table, Voluntary Return refers to the DHS grant of permission for an alien to depart the United States, while Voluntary Departure refers to the immigration judge's grant of permission for an alien to depart the United States.

TABLE 12—REMOVALS FROM FRCs FY 2014–FY 2019 YTD—Continued

Fiscal year	Removals
2015	430
2016	724
2017	977
2018	968
2019 YTD**	496

\* 2014 only includes the fourth quarter of 2014: July, August, and September.  
 \*\* Includes October 2018–March 2019.

The FSA does not impose requirements on secure facilities used for the detention of juveniles. Juveniles may be placed in secure facilities if they meet the criteria listed in paragraph 21 of the FSA.

The rule also applies to UACs who have been transferred to HHS care and custody. Upon referral, HHS promptly places UACs in the least restrictive setting that is in the best interests of the child, taking into consideration danger to self or others and risk of flight. HHS considers the unique nature of each child’s situation and incorporates child welfare principles when making placement and release decisions that are in the best interest of the child.

HHS places UACs in a network of more than 100 shelters in 17 states. For the first nine years of the UAC Program at HHS, less than 8,000 UACs were served annually. Since FY 2012, this number has increased dramatically, with a total of 13,625 children referred to HHS by the end of FY 2012. Between FY 2012 and FY 2018, HHS received a total of 316,454 UACs.

TABLE 13—UAC REFERRALS TO HHS FY 2008–FY 2018

Fiscal year	Referrals
2008	6,658
2009	6,089
2010	7,383
2011	6,560
2012	13,625
2013	24,668
2014	57,496
2015	33,726
2016	59,170
2017	40,810
2018	49,100

For FY 2018 the average length of care (the time a child has been in custody, since the time of admission) for UACs was approximately 60 days. The majority (more than 85 percent) of UACs are released to suitable sponsors who are family members within the United States. UACs who are not released to a sponsor typically age out or receive an order of removal and are transferred to DHS; are granted voluntary departure and likewise transferred to DHS for removal; or, obtain immigration legal relief and are no longer eligible for placement in ORR’s UAC program.

TABLE 14—PERCENTAGE OF UACs BY DISCHARGE TYPE FY 18

Discharge type	Percentage of UACs
Age Out	4.0
Age Redetermination	2.2
Immigration Relief Granted	0.2
Local Law Enforcement	0.0
Ordered Removed	0.2
Other	4.5
Runaway from Facility	0.4
Runaway on Field Trip	0.1
Reunified (Individual Sponsor)	85.8

TABLE 14—PERCENTAGE OF UACs BY DISCHARGE TYPE FY 18—Continued

Discharge type	Percentage of UACs
Reunified (Program/Facility)	0.7
Voluntary Departure	2.0
Total	100.0

2. Baseline of Current Costs

In order to properly evaluate the benefits and costs of regulations, agencies must evaluate the costs and benefits against a baseline. OMB Circular A–4 defines the “no action” baseline as “the best assessment of the way the world would look absent the proposed action.” It also specifies that the baseline “should incorporate the agency’s best forecast of how the world will change in the future,” absent the regulation. The Departments consider their current operations and procedures for implementing the terms of the FSA, the HSA, and the TVPRA to be the primary baseline for this analysis, from which they estimate the costs and benefits of the rule. The Departments also consider how current operations and procedures could change, in the absence of this rule, depending on a number of factors.

The baseline encompasses the FSA that was approved by the court on January 28, 1997. It also encompasses the 2002 HSA legislation transferring the responsibility for the care and custody of UACs, including some of the material terms of the FSA, to ORR, as well as the substantive terms of the 2008 TVPRA. Finally, it includes the July 6, 2016 decision of the Ninth Circuit affirming the district court’s finding that the FSA applies to both accompanied and unaccompanied minors, and that such minors shall not be detained in unlicensed and secure facilities that do not meet the requirements of the FSA. See *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016). The section below discusses some examples of the current cost for the Departments’ operations and procedures under the baseline. Because the costs described below are already being incurred, they are not costs of this rule.

DHS

CBP incurs costs to comply with the FSA, including those related to facility configurations, custodial requirements, and compliance monitoring. To comply with the terms of the FSA, for example, CBP reallocates space in its facilities to allow for separate holding areas for families and/or UACs. Pursuant to the FSA, CBP provides minors and UACs

access to food; drinking water; functioning toilets and sinks; adequate temperature and ventilation; emergency medical care, if needed; and safe and sanitary facilities. Thus, CBP incurs costs for, among other things, the purchase of food; bottled water; first aid kits; hygiene items; blankets, mats, or cots; and age-appropriate transport and bedding. To ensure compliance with the FSA, CBP has also added fields in its electronic systems of records, so that CBP officers and Border Patrol agents can continuously record the conditions of the hold rooms and all custodial activities related to each minor or UAC, such as medical care provided, welfare checks conducted, and any separation from accompanying family members.

CBP experiences other baseline costs from its national and field office Juvenile Coordinators. Under current practice, as described above, the national CBP Juvenile Coordinator oversees agency compliance with the FSA requirements and with policy related to the treatment of minors and UACs in CBP custody. The national CBP Juvenile Coordinator monitors CBP facilities and processes through site visits and review of juvenile custodial records. Along with the national CBP Juvenile Coordinator role, CBP has field office and sector Juvenile Coordinators who are responsible for managing all policies on the processing of juveniles within CBP facilities, coordinating within CBP and across DHS components to ensure the expeditious placement and transport of juveniles placed into removal proceedings by CBP, and informing CBP operational offices of any policy updates related to the processing of juveniles (e.g., through correspondence, training presentations). Moreover, CBP’s Juvenile Coordinators serve as internal and external agency liaisons for all juvenile processing matters.

CBP’s baseline costs also include the use of translation services, including contracts for telephonic interpretation services.

ICE also incurs facility costs to comply with the FSA. The costs of operation and maintenance of the ICE FRCs for FY 2015–2019 are listed in Table 15, provided by the ICE Office of Acquisition Management. The costs account for the implementation of the FSA requirements, including the cost for the facility operators to abide by all relevant state standards. Two of the FRCs are operated by private contractors, while one is operated by a local government, under contract with ICE. These are the amounts that have been paid to private contractors or to the

local government to include beds, guards, health care, and education.

TABLE 15—CURRENT COSTS FOR FRCs

Fiscal year	FRC costs
2015 .....	\$323,264,774
2016 .....	312,202,420
2017* .....	232,244,792
2018 .....	224,321,766

\* Revised from NPRM at 83 FR 45513 with final costs.

The FRC costs are fixed-price agreements with variable costs added on a monthly basis. Overall, the fixed-price agreements are not dependent on the number of detainees present or length of stay, with some exceptions. At Berks, the contract includes a per-person, per-day fee charged in addition to the monthly fixed rate. At two of the FRCs, Berks and Karnes, education is provided per the standards of a licensed program set forth in the FSA, at a per-student, per-day cost. Since FRCs are currently at limited available capacity and the configuration of limited available capacity varies from day to day across all FRCs, the number of children and adults vary at Berks day to day and the number of children at Karnes vary day to day. Thus, these costs charged to ICE vary from month to month.

In addition to the above example of baseline costs to operate the FRCs DHS (particularly CBP and ICE) incurs costs to process, transfer, and provide transportation of minors and UACs from the point of apprehension to DHS facilities; from the point of apprehension or from a DHS facility to HHS facilities; between facilities; for the purposes of release; and for all other circumstances, in compliance with the FSA, HSA, and TVPRA.

The baseline costs also include bond hearings for minors and family units who are eligible for such hearings. When a minor or family unit seeks a bond, ICE officers must review the request and evaluate the individuals' eligibility as well as, where appropriate, set the initial bond amount. Further, should the minor or family unit seek a bond redetermination hearing before an immigration judge, ICE must transport or otherwise arrange for the individuals to appear before the immigration court. ICE's baseline costs also include the use of translation services, including contracts for telephonic interpretation services.

ICE also incurs baseline costs related to its Juvenile and Family Residential Management Unit (JFRMU), which was created in 2007. JFRMU manages ICE's policies affecting alien juveniles and

families. The role of ICE's Juvenile Coordinator is within JFRMU. In addition to the national ICE Juvenile Coordinator role, ICE has field office and sector Juvenile Coordinators whose responsibilities mirror those of CBP's. In addition, compliance with the Flores court's mandate is monitored by weekly reports identifying any minors in custody over 20 days at FRCs and reviewing the reasons provided by the field office. Additionally, weekly audits of 5 percent of the FRC population is done by reviewing files and ensuring that minors are served with the required forms—Notice of Rights, Designated Sponsor Form, and the Parole Review Worksheet. JFRMU consists of specialized Federal staff, as well as contract subject matter experts in the fields of child psychology, child development, education, medicine, and conditions of confinement. JFRMU establishes policies on the management of family custody, UACs pending transfer to the ORR, and UACs applying for Special Immigrant Juvenile status. JFRMU continues to pursue uniform operations throughout its program through implementation of family residential standards. These standards are continually reviewed and revised as needed to ensure the safety and welfare of families awaiting an immigration decision while housed in a family residential facility. DHS conducts an inspection of each FRC at least annually to confirm that the facility is in compliance with ICE Family Residential Standards.

The baseline costs include the monitoring of FSA compliance and reporting to the court. Since 2007, JFRMU has submitted Flores Reports annually, bi-annually, or monthly for submission to the court through DOJ.

In addition, DHS considered how DHS's current procedures and operations might change in the future in the absence of this rule. For example, DHS has seen a large spike in the number of family units apprehended or found inadmissible at the Southwest Border.<sup>75</sup> As of June 2019, with three months remaining in FY 2019, CBP has apprehended over 390,000 family units between the ports of entry on the Southwest Border, so far this fiscal year, as compared to 107,212 family units in all of FY 2018. As of this same date, 33,950 family units have been found

<sup>75</sup> See United States Border Patrol Total Family Unit Apprehensions By Month—FY 2013 through FY 2018 at <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf> (last visited May 10, 2019). See also Southwest Border Migration FY 2019 at <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last visited June 5, 2019).

inadmissible at ports of entry along the Southwest border. This spike in numbers has placed significant strains on ICE and CBP. In light of this ongoing, urgent humanitarian crisis, and apart from this rule, ICE could potentially build out the existing space at the Dilley facility. An additional 960 beds at Dilley would cost approximately \$80 million. The decision for a buildout would be based on emerging operational, policy, and agency needs and available funding. ICE could also require additional transportation funding to transport these family units out of CBP custody. CBP may also expend additional funding to build and maintain any appropriate temporary facilities. Because these change could happen in the absence of this rule, they would not be an impact of this rule but would be part of baseline costs.

HHS' baseline costs were \$1.4 billion in FY 2017. HHS funds private non-profit and for-profit agencies to provide shelter, counseling, medical care, legal services, and other support services to UACs in custody. Funding levels for non-profit organizations totaled \$912,963,474 in FY 2017. Funding levels for for-profit agencies totaled \$141,509,819 in FY 2017. Program funded facilities receive grants or contracts to provide shelter, including therapeutic care, foster care, shelter with increased staff supervision, and secure detention care. The majority of program costs (approximately 80 percent) are for bed capacity care. Other services for UACs, such as medical care, background checks, and family reunification services, make up approximately 15 percent of the budget. In addition, some funding is provided for limited post-release services to certain UACs. Administrative expenses to carry out the program total approximately five percent of the budget.

Influx costs to the program vary year to year, and are dependent on migration patterns and the resulting numbers of UACs cared for by HHS. In FY 2016, for instance, HHS total approved funding for the UAC program was \$743,538,991, with \$224,665,994 going to influx programming. In FY 2017, the total funding was \$912,963,474, with \$141,509,819 for influx.

These are examples of the types of costs the Departments incur under current operations, and are not a result of this rule.

3. Costs

This rulemaking would implement the relevant and substantive terms of the FSA, with limited changes necessary to implement closely related provisions of

the HSA and TVPRA, and to ensure that the regulations set forth a sustainable operational model of immigration enforcement in light of changes in law, circumstance, as well as agency experience. While this rule itself does not require in any particular outcome, it does allow for several policy outcomes, to include longer detention periods for some individuals, in particular families during expedited removal proceedings or families in section 240 proceedings who pose a flight risk or danger, which may lead to the construction of additional bed space or facilities, given other external factors. This section assesses the cost of these possible policy outcomes as compared to the current operational environment (the Departments' primary assessment of what the world would be like absent this rule).

The primary changes to the current operational environment resulting from this rule are implementing an alternative licensing process, making changes to ICE parole determination practices to align them with applicable statutory and regulatory authority, and

shifting hearings from DOJ to HHS. The alternative license for FRCs and changes to parole determination practices may result in additional or longer detention for certain individuals, but DHS is unable to estimate the costs of this to the Government or to the individuals being detained because DHS is not sure how many individuals will be detained at FRCs after this rule is effective or for how much longer individuals may be detained because there are so many other variables that may affect such estimates. It is possible that some families will experience longer detention periods, but—given finite resources and bed space at FRCs—this also means that many other families will experience less detention than under the current status in which DHS generally detains for only 20 days. DHS is also unable to provide an estimate of the cost of any increased detention on the individuals being detained. ICE notes that while longer detention for certain family units could result in the need for additional space, the decision to increase bed space would be based on

a number of factors, and at this time ICE is unable to determine if this rule would result in additional bed space. This rule does not require the addition of new bed space, but by allowing alternative licensing for FRCs it does remove a barrier to DHS's use of its Congressionally-authorized detention authority, allowing families to stay together through the duration of their immigration proceedings. If bed space were increased, the cost would depend on the type of facility, facility size, location, available funding, and a number of other variables. However, ICE notes as an example that an additional 960 beds at Dilley would cost approximately \$80 million.

Table 16 shows the changes to the DHS current operational status compared to the FSA. It contains a preliminary, high-level overview of how the rule would change DHS's current operations, for purposes of the economic analysis. The table does not provide a comprehensive description of all provisions and their basis and purpose.

TABLE 16—FSA AND DHS CURRENT OPERATIONAL STATUS

FSA paragraph No.	Description of FSA provision	DHS cite (8 CFR)	DHS change from current practice
1, 2, 3	"Party," "plaintiff" and "class member" definitions	N/A	None. ( <i>Note:</i> These definitions are only relevant to the FSA insofar as the FSA exists in the form of a consent decree. Following promulgation of a final rule, the definitions would no longer be relevant. As a result, the rule does not include these definitions.)
4	"Minor" definition	236.3(b)(1)	None.
5	"Emancipated minor" definition	236.3(b)(1)(i)	None.
6	"Licensed program" definition	236.3(b)(9)	FSA defines a "licensed program" as one licensed by an appropriate State agency. DHS would not define "licensed program," but instead would define a "licensed facility" as an ICE detention facility that is licensed by the state, county, or municipality in which it is located. DHS would also add an alternative licensing process for FRCs, if the state, county, or municipality where the facility is located does not have a licensing process for such facilities. ( <i>Note:</i> In response to comments, DHS will post the results of third-party audits of its licensed facility standards on a public-facing website. The definition now specifies that audits will occur upon the opening of an FRC and on a regular ongoing basis thereafter).
6+ Exhibit 1	Exhibit 1, standards of a licensed program	236.3(i)(4)	DHS provides requirements that licensed facilities must meet. ( <i>Note:</i> Compared with Exhibit 1, these requirements contain a slightly broadened educational services description to capture current operations and add that program design should be appropriate for length of stay (see paragraph (i)(4)(iv)); amend "family reunification services" provision to more appropriately offer communication with adult relatives in the U.S. and internationally, since DHS only has custody of accompanied minors so reunification is unnecessary (see § 236.3(i)(4)(iii)(H)).)
7	"Special needs minor" definition and standard	236.3(b)(2)	None. ( <i>Note:</i> In response to public comments, DHS replacing the term "retardation" with the term "intellectual disability.")
8	"Medium security facility" definition	N/A	None. ( <i>Note:</i> DHS only has secure or non-secure facilities, so a definition of "medium security facility" is unnecessary. As a result, the rule lacks such a definition, even though the FSA contains one.)



TABLE 16—FSA AND DHS CURRENT OPERATIONAL STATUS—Continued

FSA paragraph No.	Description of FSA provision	DHS cite (8 CFR)	DHS change from current practice
9 .....	Scope of Settlement Agreement, Effective Date, and Publication.	N/A .....	None. ( <i>Note:</i> This provision imposes a series of deadlines that passed years ago, and/or do not impose obligations on the parties that continue following termination of the FSA. As a result, the rule does not include this provision.)
10 .....	Class Definition .....	N/A .....	None. ( <i>Note:</i> Provision is specific to the litigation and is not a relevant or substantive term of the FSA, so it is not included in the rule.)
11 .....	Place each detained minor in least restrictive setting appropriate for age and special needs. No requirement to release to any person who may harm or neglect the minor or fail to present minor before the immigration court.	236.3(g)(2)(i), (i), (j)(4)	None. ( <i>Note:</i> § 236.3(j) tracks FSA paragraph 14, which is consistent with FSA paragraph 11 but uses different terms.)
11 .....	The INS treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors.	236.3(a)(1) .....	None.
12(A) .....	Expediently process the minor .....	236.3(e), (f), & (g)(2)(i).	None. ( <i>Note:</i> The rule reflects the fact that the TVPRA (rather than the FSA) governs the processing and transfer of UACs. The rule also makes clear that generally, unless an emergency or influx ceases to exist, the transfer timelines associated with an emergency or influx continue to apply for non-UAC minors.)
12(A) .....	Shall provide the minor with notice of rights .....	236.3(g)(1)(i) .....	None (with the exception that the Form I-770 will be provided, read, or explained to <i>all</i> minors and UACs in a language and manner that they understand).
12(A) .....	Facilities must be safe and sanitary including toilets and sinks, water and food, medical assistance for emergencies, temperature control and ventilation, adequate supervision to protect minor from others.	236.3(g)(2)(i) .....	None.
12(A) .....	Contact with family members who were arrested with the minor.	236.3(g)(2)(i) .....	None. ( <i>Note:</i> The rule contains a slightly different standard than appears in the FSA. The rule provides for contact with family members apprehended with both minors and UACs. Additionally, the rule invokes operational feasibility and consideration of the safety or well-being of the minor or UAC in facilitating contact. The FSA generally prioritizes the safety and well-being of the minor and that of others, but does not include these provisos.)
12(A) .....	Segregate unaccompanied minors from unrelated adults, unless not immediately possible (in which case an unaccompanied minor may not be held with an unrelated adult for more than 24 hours).	236.3(g)(2)(i) .....	None. ( <i>Note:</i> The rule would allow UACs to be held with unrelated adults for no more than 24 hours except in cases of emergency.)
12(A), 12(A)(1)–(3), 12(B).	Transfer in a timely manner: Three days to five days max with exceptions, such as emergency or influx, which requires placement as expeditiously as possible.	236.3(b)(5), (b)(10), (e)(1).	None. ( <i>Note:</i> Following the TVPRA, the transfer provisions in FSA paragraph 12(A) apply to DHS only for accompanied minors. In addition, the rule’s definition of “emergency” clarifies that an emergency may create adequate cause to depart from any provision of § 236.3, not just the transfer timeline.)
12(A)(4) .....	Transfer within 5 days instead of 3 days in cases involving transport from remote areas or where an alien speaks an “unusual” language.	N/A .....	None. ( <i>Note:</i> Although DHS is not proposing a change in practice, it does not propose to codify this exception from the FSA in § 236.3(e) because operational improvements have rendered the exception unnecessary.)
12(C) .....	Written plan for “emergency” or “influx” .....	236.3(e)(2) .....	None. ( <i>Note:</i> Like the FSA, the rule requires a written plan. The written plan is contained in a range of guidance documents.)
13 .....	Age determination .....	236.3(c) .....	None. ( <i>Note:</i> The rule includes a “totality of the circumstances” standard; the FSA does not contain a standard that conflicts with “totality of the circumstances.”)
14 .....	Release from custody where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor’s safety or that of others. Release is to, in order of preference: Parent, legal guardian, adult relative, adult or entity, licensed program, adult seeking custody.	236.3(j) (release generally).	The rule details the statutory and regulatory provisions that govern the custody and release of non-UAC minors. The rule also clarifies that for minors detained pursuant to INA 235(b)(1)(B)(ii) or 8 CFR 235.3(c), parole will generally serve an urgent humanitarian reason if DHS determines that detention is not required to secure the minor’s timely appearance before DHS or the immigration court, or to ensure the minor’s safety and well-being or the safety of others. In addition, the rule codifies the list of individuals to whom a non-UAC minor can be released. Per the TVPRA, DHS does not have the authority to release UACs.
15 .....	Before release from custody, Form I-134 and agreement to certain terms must be executed. If emergency, then minor can be transferred temporarily to custodian but must notify INS in 72 hours.	N/A .....	None. ( <i>Note:</i> The rule does not codify this portion of the FSA, because (1) the TVPRA has overtaken this provision in part, and (2) these requirements, which are primarily for DHS’s benefit, are not currently implemented.)

TABLE 16—FSA AND DHS CURRENT OPERATIONAL STATUS—Continued

FSA paragraph No.	Description of FSA provision	DHS cite (8 CFR)	DHS change from current practice
16	INS may terminate the custody if terms are not met	N/A	None. ( <i>Note:</i> The rule does not codify this portion of the FSA, because (1) the TVPRA has overtaken this provision in part, and (2) these requirements, which are primarily for DHS's benefit, are not currently implemented.)
17	Positive suitability assessment	N/A	None. ( <i>Note:</i> The rule does not codify this portion of the FSA, because the TVPRA has overtaken this provision. Per the TVPRA, DHS does not have the authority to release UACs.)
18	INS or licensed program must make and record the prompt and continuous efforts on its part toward family reunification efforts and release of minor consistent with FSA paragraph 14.	236.3(j)	None.
19	INS custody in licensed facilities until release or until immigration proceedings are concluded. Temporary transfers in event of an emergency.	236.3(i), (i)(5)	None.
20	INS must publish a "Program Announcement" within 60 Days of the FSA's approval.	N/A	None. ( <i>Note:</i> This provision imposes a deadline that passed years ago. As a result, the rule does not include this provision.)
21	Transfer to a suitable State or county juvenile detention facility if a minor has been charged or convicted of a crime with exceptions.	236.3(i)(1)	None. ( <i>Note:</i> The rule clarifies some of the exceptions to secure detention, consistent with current practice and in line with the intent underlying FSA paragraph 21(A)(i)–(ii). The rule also removes the specific examples used in FSA.)
22	Escape risk definition	236.3(b)(6)	None. ( <i>Note:</i> The rule uses final order of "removal" rather than deportation or exclusion, and considers past absconding from state or Federal custody; and not just DHS or HHS custody.)
23	Least restrictive placement of minors available and appropriate.	236.3(i)(2)	None.
24(A)	Bond redetermination hearing afforded	236.3(m)	None. ( <i>Note:</i> The rule adds language to specifically exclude those aliens for which IJs do not have jurisdiction, as provided in 8 CFR 1003.19.)
24(B)	Judicial review of placement in a particular type of facility permitted or that facility does not comply with standards in Ex. 1.	N/A	None. ( <i>Note:</i> The rule does not expressly provide for judicial review of placement/compliance, as a regulation cannot confer jurisdiction on Federal court.)
24(C)	Notice of reasons provided to minor not in a licensed program/judicial review.	N/A	None.
24(D)	All minors "not released" shall be given Form I-770, notice of right to judicial review, and list of free legal services.	236.3(g)(1)	None. ( <i>Note:</i> The rule requires DHS to provide the notice of right to judicial review and list of counsel to those minors who are not UACs and who are transferred to or remain in a DHS detention facility. The corresponding FSA provisions apply to minors "not released." The difference in scope is a result of the TVPRA and reflects the relationship between paragraph 12(A), which applies to the provision of certain rights (largely contained on the I-770) immediately following arrest, and Paragraph 28(D), which applies to all minors who are "not released," and so are detained by DHS. The language does not reflect a change in practice. The rule also includes more detailed language with respect to the Form I-770 than the FSA; this language comes from current 8 CFR 236.3, and is consistent with the requirements of Paragraph 12(A).)
24(E)	Additional information on precursors to seeking judicial review.	N/A	None. ( <i>Note:</i> Responsibilities of the minor prior to bringing litigation are not relevant or substantive terms of the FSA, and are not included in the rule.)
25	Unaccompanied minors in INS custody should not be transported in vehicles with detained adults except when transport is from place of arrest/apprehension to an INS office, or when separate transportation would otherwise be impractical.	236.3(f)(4)	None. ( <i>Note:</i> The rule makes a clarifying change: The rule adds "or unavailable" as an exception to "impractical.")
26	Provide assistance in making transportation arrangement for release of minor to person or facility to whom released.	236.3(j)(3)	None. ( <i>Note:</i> The rule would remove the reference to release to a "facility." Referral to HHS is a transfer, not a release.)
27	Transfer between placements with possessions, notice to counsel.	236.3(k)	None.
28(A)	INS Juvenile Coordinator to monitor compliance with FSA and maintain records on all minors placed in proceedings and remain in custody for longer than 72 hours.	236.3(o)	None. ( <i>Note:</i> The rule requires collection of relevant data for purposes of monitoring compliance. The list of data points is similar to the list in 28(A) but not identical.)
28(B)	Plaintiffs' counsel may contact INS Juvenile Coordinator to request an investigation on why a minor has not been released.	N/A	This provision would no longer apply following termination of the FSA. ( <i>Note:</i> Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule.)
29	Plaintiffs' counsel must be provided information pursuant to FSA paragraph 28 on a semi-annual basis; Plaintiffs' counsel have the opportunity to submit questions.	N/A	This provision would no longer apply following termination of the FSA. ( <i>Note:</i> Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule.)

TABLE 16—FSA AND DHS CURRENT OPERATIONAL STATUS—Continued

FSA paragraph No.	Description of FSA provision	DHS cite (8 CFR)	DHS change from current practice
30	INS Juvenile Coordinator must report to the court annually.	N/A	This provision would no longer apply following termination of the FSA. (Note: Special provisions for reporting to the court are not relevant or substantive terms of the FSA, and are not included in the rule.)
31	Defendants can request a substantial compliance determination after one year of the FSA.	N/A	None. (Note: This provision imposed a timeframe related to court supervision of the FSA. As a result, the rule does not include this provision.)
32(A), (B), and (D)	Attorney-client visits with class members allowed for Plaintiffs' counsel at a facility.	N/A	Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule.
32(C)	Agreements for the placement of minors in non-INS facilities shall permit attorney-client visits, including by class counsel.	236.3(i)(4)(xv)	None. (Note: Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, so the reference to class counsel is not included in the rule.)
33	Plaintiffs' counsel allowed to request access to, and visit licensed program facility or medium security facility or detention facility.	N/A	Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule.
34	INS employees must be trained on FSA within 120 days of court approval.	N/A	None. (Note: This provision imposed a deadline that passed years ago. As a result, the rule does not include this provision.)
35	Dismissal of action after court has determined substantial compliance.	N/A	None. (Note: Provisions specific to terminating the action are not relevant or substantive terms of the FSA, and are not included in the rule.)
36	Reservation of Rights	N/A	None. (Note: This provision is only relevant to the FSA insofar as the FSA exists in the form of a consent decree. Following promulgation of a final rule, it would no longer be relevant. As a result, the rule does not include this provision.)
37	Notice and Dispute Resolution	N/A	None. (Note: This provision provides for ongoing enforcement of the FSA by the district court. As a result, the rule does not include this provision.)
38	Publicity—joint press conference	N/A	None. (Note: This provision relates to an event that occurred years ago. As a result, the rule does not include this provision.)
39	Attorneys' Fees and Costs	N/A	None. (Note: This provision imposed a deadline that passed years ago. As a result, the rule does not include this provision.)
40	Termination 45 days after publication of final rule	N/A	None. (Note: Provisions specific to terminating the FSA are not relevant or substantive terms, and are not included in the rule.)
41	Representations and Warranty	N/A	None. (Note: This provision is only relevant to the FSA insofar as the FSA exists in the form of a consent decree. Following promulgation of a final rule, it would no longer be relevant. As a result, the rule does not include this provision.)

TABLE 17—FSA AND HHS CURRENT OPERATIONAL STATUS

FSA paragraph No.	Description of FSA provision	HHS cite (45 CFR)	HHS change from current practice
1, 2, 3	"Party," "plaintiff" and "class member" definitions	N/A	None. (Note: These definitions are only relevant to the FSA insofar as the FSA exists in the form of a consent decree. Following promulgation of a final rule, the definitions would no longer be relevant. As a result, the rule does not include these definitions.)
4	"minor"	N/A	HHS uses the statutory term "unaccompanied alien child" (UAC) as HHS only provides care and custody to UAC as defined under 6 U.S.C. 279(g)(2) pursuant to 8 U.S.C. 1232(b)(1).
5	"emancipated minor"	N/A	Term only has significant for DHS portion of the joint rule.
6	"licensed program"	410.101	Adopted in relevant part, but replaces "minor" with "UAC" as HHS only provides care and custody to UAC.
7	"special needs minor"	410.101; 410.208	None. (Note: In response to public comments, HHS replacing the term "retardation" with the term "intellectual disability.")
8	"medium secure facility"	N/A	None. (Note: ORR does not use medium secure facilities.)
9	Scope of Settlement Agreement, Effective Date, and Publication.	N/A	None. (Note: This provision imposes a series of deadlines that passed years ago, and/or do not impose obligations on the parties that continue following termination of the FSA. As a result, the rule does not include this provision.)
10	Class Definition	N/A	None. (Note: Provision is specific to the litigation and is not a relevant or substantive term of the FSA, so it is not included in the rule.)

TABLE 17—FSA AND HHS CURRENT OPERATIONAL STATUS—Continued

FSA paragraph No.	Description of FSA provision	HHS cite (45 CFR)	HHS change from current practice
11	Statements of General Applicability	410.102	None. (Note: The HHS portion of the rule only applies to UAC in HHS care and custody).
12(A)	Procedures and Temporary Placement Following Arrest	410.201(a)–(d); 410.209.	None. (Note: ORR is not involved in the apprehension of UAC or their immediate detention following arrest. HHS adopts standards of 12A for its care provider facilities).
12(B); 12(C)	Defining “emergency” and “influx”	410.101	None.
13	Placing aliens who appear to be adults; age determinations.	410.202(a)(4); 410.700–410.701.	None (Note: Section 410.202(a)(4) conforms with the FSA requirement that allows the government to not place an alien who appears to be the reasonable person to be an adult in HHS custody. Sections 410.700–410.701 set forth the requirements for age determinations in compliance with 8 U.S.C. 1232(b)(4)).
14	Release from custody where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor’s safety or that of others. Release is to, in order of preference: Parent, legal guardian, adult relative, adult or entity, licensed program, adult seeking custody.	410.300–410.301	None.
15	Before release from custody, Form I–134 and agreement to certain terms must be executed. If emergency, then minor can be transferred temporarily to custodian but must notify INS in 72 hours.	410.302(e)	None.
16	INS may terminate the custody if terms are not met	N/A	N/A.
17	Positive suitability assessment	410.302(c)–(d)	None.
18	INS or licensed program must make and record the prompt and continuous efforts on its part toward family reunification efforts and release of minor consistent with FSA paragraph 14.	410.201(f); 410.302(a)	None.
19	INS custody in licensed facilities until release or until immigration proceedings are concluded. Temporary transfers in event of an emergency.	410.207	None.
20	INS must publish a “Program Announcement” within 60 Days of the FSA’s approval.	N/A	None. (Note: This provision imposes a deadline that passed years ago. As a result, the rule does not include this provision).
21	Transfer to a suitable State or county juvenile detention facility if a minor has been charged or convicted of a crime with exceptions.	410.203	None. (Note: Pursuant to 8 U.S.C. 1232(c)(2)(A), HHS can only place a UAC in a secure facility (which are state or county juvenile detention facilities) if they are a danger to self or others or has been charged with committing a criminal offense. Therefore HHS has removed the factors listed in FSA paragraph 21C–D as considerations for a secure placement (escape-risk and to protect UAC from smugglers, respectively). Additionally, HHS adds the requirements of the TVPRA to place a UAC in the least restrictive setting appropriate).
22	Escape risk definition	410.101; 410.204	None. (Note: HHS does not use escape risk as a factor for placing a minor in an unlicensed “secure” facility as explained above).
23	Least restrictive placement of minors available and appropriate.	410.201(a); 410.203(d); 410.205.	None. (Note: HHS adds that placement in the least restrictive setting include the best interest standard which was not included into the FSA. Additionally, as noted previously ORR does not maintain “medium secure” facilities).
24(A)	Bond redetermination hearing afforded	410.800–410.801; 410.810.	HHS is transferring bond hearings to an independent hearing officer housed within HHS who uses the same standards as immigration judges in bond hearings to determine whether a UAC is a danger to others or risk of flight.
24(B)	Judicial review of placement in a particular type of facility permitted or that facility does not comply with standards in Ex. 1.	N/A	None. (Note: The rule does not expressly provide for judicial review of placement/compliance, as a regulation cannot confer jurisdiction on Federal court).
24(C)	Notice of reasons provided to minor not in a licensed program/judicial review.	410.206; 410.207	None. (Note: ORR provides UAC in secure or staff-secure the reasons for their placement and notice of judicial review).
24(D)	All minors “not released” shall be given Form I–770, notice of right to judicial review, and list of free legal services.	410.801(b)	Provides administrative review notice for UAC.
24(E)	Additional information on precursors to seeking judicial review.	N/A	None. (Note: Responsibilities of the minor prior to bringing litigation are not relevant or substantive terms of the FSA, and are not included in the rule).
25	Unaccompanied minors in INS custody should not be transported in vehicles with detained adults except when transport is from place of arrest/apprehension to an INS office, or when separate transportation would otherwise be impractical.	410.500(a)	None. (Note: HHS does not have adults in custody).
26	Provide assistance in making transportation arrangement for release of minor to person or facility to whom released.	410.500(b)	None. (Note: The provision references UAC sponsors).

TABLE 17—FSA AND HHS CURRENT OPERATIONAL STATUS—Continued

FSA paragraph No.	Description of FSA provision	HHS cite (45 CFR)	HHS change from current practice
27	Transfer between placements with possessions, notice to counsel.	410.600	None.
28(A)	INS Juvenile Coordinator to monitor compliance with FSA and maintain records on all minors placed in proceedings and remain in custody for longer than 72 hours.	410.403	None. (Note: This provision is mainly specific to DHS. HHS monitors compliance to the rules provisions through its policies and procedures that implement the FSA).
28(B)	Plaintiffs' counsel may contact INS Juvenile Coordinator to request an investigation on why a minor has not been released.	N/A	This provision would no longer apply following termination of the FSA. (Note: Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule).
29	Plaintiffs' counsel must be provided information pursuant to FSA paragraph 28 on a semi-annual basis; Plaintiffs' counsel have the opportunity to submit questions.	N/A	This provision would no longer apply following termination of the FSA. (Note: Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule).
30	INS Juvenile Coordinator must report to the court annually.	N/A	This provision would no longer apply following termination of the FSA. (Note: Special provisions for reporting to the court are not relevant or substantive terms of the FSA, and are not included in the rule).
31	Defendants can request a substantial compliance determination after one year of the FSA.	N/A	None. (Note: This provision imposed a timeframe related to court supervision of the FSA. As a result, the rule does not include this provision).
32(A), (B), (C), and (D).	Attorney-client visits with class members allowed for Plaintiffs' counsel at a facility.	N/A	Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule.
33	Plaintiffs' counsel allowed to request access to, and visit licensed program facility or medium security facility or detention facility.	N/A	Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule.
34	INS employees must be trained on FSA within 120 days of court approval.	N/A	None. (Note: This provision imposed a deadline that passed years ago. As a result, the rule does not include this provision).
35	Dismissal of action after court has determined substantial compliance.	N/A	None. (Note: Provisions specific to terminating the action are not relevant or substantive terms of the FSA, and are not included in the rule).
36	Reservation of Rights	N/A	None. (Note: This provision is only relevant to the FSA insofar as the FSA exists in the form of a consent decree. Following promulgation of a final rule, it would no longer be relevant. As a result, the rule does not include this provision).
37	Notice and Dispute Resolution	N/A	None. (Note: This provision provides for ongoing enforcement of the FSA by the district court. As a result, the rule does not include this provision).
38	Publicity—joint press conference	N/A	None. (Note: This provision relates to an event that occurred years ago. As a result, the rule does not include this provision).
39	Attorneys' Fees and Costs	N/A	None. (Note: This provision imposed a deadline that passed years ago. As a result, the rule does not include this provision).
40	Termination 45 days after publication of final rule	N/A	None. (Note: Provisions specific to terminating the FSA are not relevant or substantive terms, and are not included in the rule).
41	Representations and Warranty	N/A	None. (Note: This provision is only relevant to the FSA insofar as the FSA exists in the form of a consent decree. Following promulgation of a final rule, it would no longer be relevant. As a result, the rule does not include this provision).
Exhibit 1	Minimum Standards for Licensed Programs	410.402	None.
Exhibit 2	Instructions to Service Officers re: Processing, Treatment, and Placement of Minors.	N/A	None (Note: ORR provides notice to its Federal, contractor, and care provider staff of provisions for the processing, treatment, and placement of UAC in the ORR Policy Guide and Manual of Procedures. The provisions specified in Ex. 2 are incorporated into these documents).
Exhibit 3	Contingency Plan	410.209	None. (Note: The rule also makes provisions for influx care facilities).
Exhibit 4	Agreement Concerning Facility Visits Under Paragraph 33.	N/A	Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule.
Exhibit 5	List of Organization to Receive Information	N/A	Special provisions for Plaintiffs' counsel are not relevant or substantive terms of the FSA, and are not included in the rule.
Exhibit 6	Notice of Right to Judicial Review	N/A	None. (Note: The rule does not expressly provide for judicial review of placement/compliance, as a regulation cannot confer jurisdiction on Federal court).

a. DHS

A primary change to DHS's current operational environment resulting from

this rule is implementing an alternative licensing process. To codify the requirements of the FSA, facilities that

hold minors obtain state, county, or municipal licensing where appropriate licenses are available. If no such

licensing regime is available, however, DHS will employ an outside entity to ensure that the facility complies with family residential standards established by ICE and that meet the requirements for licensing under the FSA, thus fulfilling the intent of obtaining a license from a state or local agency. This provides effectively the same substantive assurances that the state-licensing requirement exists to provide.

ICE currently meets the licensing requirements established by this rule by requiring FRCs to adhere to the Family Residential Standards and monitoring the FRCs' compliance through an existing contract. Thus, DHS will not incur additional costs in fulfilling the requirements of the alternative licensing process, given the third party licensing will continue to perform auditing reports that currently take place. However, most states do not offer licensing for facilities like the FRCs.<sup>76</sup> Therefore, to meet the terms of the FSA, minors who are not UACs are generally held in FRCs for less than approximately 20 days (see Table 10). As all FRCs would be licensed, or considered licensed, under this rule, the rule would allow the government to extend detention of some minors, and their accompanying parent or legal

guardian, in FRCs beyond the approximate 20 day point.

ICE is unable to estimate how long detention would be extended for some categories of minors and their accompanying adults in FRCs due to this rule. The average length of stay in the past is not a reliable source for future projections, and the average length of stay prior to the court decisions in 2015 and 2017 reflect other policy decisions that will not be directly affected by this rule. The number of days some minors and their accompanying adults may be detained depends on several factors, including a number of factors that are beyond the scope of this rule. These may include the number of minors and their accompanying adults who arrive in a facility on a given day; the timing and outcome of immigration court proceedings before an immigration judge; whether an individual is eligible for and granted parole or bond; issuance of travel documents by foreign governments; transportation schedule and availability; the availability of bed space in an FRC; and other laws, regulations, guidance, and policies regarding removal not subject to this rule.

Although DHS cannot reliably predict the increased average length of stay for

affected minors and their accompanying parents or legal guardians in FRCs, DHS recognizes that generally only certain groups of aliens are likely to have their length of stay in an FRC increased as a result of this rule, among other factors. For instance, aliens who have received a positive credible fear determination, and who are a flight risk or danger, may be more likely to be held throughout their asylum proceedings. Likewise, aliens who have received a negative credible fear determination, have requested review of the determination by an immigration judge, had the negative determination upheld, and are awaiting removal, are likely to be held until removal can be effectuated. In FY 2017, 16,807 minors in FRCs went through the credible fear screening process and were released. In FY 2018, 22,352 minors in FRCs went through the credible fear screening process and were released. Table 18 shows for FY 2017 and FY 2018 the number of minors who went through the credible fear screening process who were released from FRCs. It does not include those minors who were removed while detained at an FRC. Those minors who were removed from an FRC would not have their lengths of stay increased pursuant to the changes in this rule.

TABLE 18—FY 2017 & FY 2018 MINORS AT FRCs WHO WENT THROUGH CREDIBLE FEAR SCREENING PROCESS

	Numbers of minors at FRCs	
	FY 2017	FY 2018
Positive Credible Fear Determinations .....	14,993	20,219
Negative Credible Fear Determinations .....	349	358
Immigration Judge Review Requested .....	317	309
Immigration Judge Review Not Requested .....	32	49
Administratively Closed .....	1,465	1,775

Of the 14,993 minors in FY 2017 and the 20,219 in FY 2018 who had positive credible fear determinations, about 99 percent were paroled or released on their own recognizance. The remaining one percent of minors are those in categories that might have their length of stay in an FRC increased due to this rule.

Separate from the population of minors referenced in Table 18, members of a family unit with administratively final orders of removal are likely to be held until removed after this rule is finalized. 842 such minors who were detained and released at FRCs during FY 2017 and 1,434 such minors who were detained and released at FRCs during FY 2018 either had final orders

of removal at the time of their release or subsequently received final orders of removal following their release within the same FY. Minors like these 842 in FY 2017 and 1,434 in FY 2018 may be held in detention longer as a result of this rule. While DHS generally expects an increase in the average length of stay to affect only these groups, there may be others who may be affected such as family units who are not eligible for parole.

In FY 2017, the total number of minors who might have been detained longer at an FRC is estimated to be the number of minors in an FRC who were not paroled or released on order of their own recognizance (131), plus the number of such minors who had

negative credible fear determinations (349), plus administratively closed cases (1,465), plus those who were released and either had final orders of removals at the time of their release or subsequently received final orders following their release (842), or 2,787. In FY 2018, the total number of minors who might have been detained longer at an FRC is estimated to be the number of minors in an FRC who were not paroled or released on their own recognizance (96), plus the number of such minors who had negative credible fear determinations (358), plus administratively closed cases (1,775), plus those who were released and either had final orders of removal at the time of their release or subsequently received

<sup>76</sup> See the discussion of the definition of "licensed facility" supra.

final orders following their release (1,434), or 3,663. While the above analysis reflects the number of minors in these groups in the FY 2017 and 2018, DHS is unable to forecast the future total number of such minors. The numbers of accompanying parents or legal guardians are not included in this estimate. The 3,663 minors and their parents or legal guardians will not all be encountered at the same time, but over the course of a year, and would be detained at one of the three existing FRCs during their removal proceedings.

The remaining factor in estimating the costs attributed to a potentially increased length of stay for these groups of minors and their accompanying parent or legal guardian are the per-person per-day cost to provide detention services. As discussed previously, current FRCs are largely funded through fixed-price agreements based on the full capacity of our current facilities and thus are not primarily dependent on the number of beds filled. Accordingly, facilities are generally ready to accommodate the number of families stipulated in their contracts. Therefore, DHS believes the best proxy for the marginal cost of services for filling any available bed space at current FRCs are the variable contract costs paid by ICE to the private contractor and government entity who operate and maintain the FRCs. The fixed and variable contract costs were obtained from ICE Office of Acquisition Management. For Berks, there is a \$16 per-person, per-day fee in addition to the monthly fixed contract rate. Assuming that the contract terms are the same in the future, an increased number of days that all individuals would be at an FRC may also increase this total variable fee amount. Due to the uncertainty surrounding estimating an increased length of stay and the number of aliens this may affect, the total incremental cost of this per-day per-person fee is not estimated.

Educational services are provided at the Berks and Karnes FRCs at a variable cost per-student, per-day. The cost at Karnes is \$75 per-student, per-day. The FY 2018 costs for education at Berks was \$75,976 per month. The FY 2017 costs at Berks for education was \$79 per-student, per-day. There is a fixed monthly cost for educational services at Dilley of \$342,083; it is not dependent on the number of students per day. Assuming again that future contract terms are the same, the total education cost may increase if certain aliens, like the groups described above, are detained longer. However, the incremental variable education cost is not estimated because of the uncertainty

surrounding the factors that make up the estimate of the average length of stay and the number of minors that may have an increased length of stay.

These variable costs represent the marginal cost for filling any available bed space at current facilities. They are not, however, representative of the total additional cost for bed space beyond existing contracts. If ICE awarded additional contracts for expanded bed space as a result of this rule, ICE would also incur additional fixed costs and variable costs. ICE estimates under existing contracts it would spend \$319.37 per person per day (\$319.37 includes both fixed and variable) to provide contracted services at an FRC and assumes a similar per-person per-day cost were ICE to expand the number of beds beyond current FRC capacity as a result of this rule.<sup>77</sup>

DHS notes that while additional or longer detention could result in the need for additional bed space—another potential policy outcome as a result of this rule—at this time, ICE is unable to determine how the number of FRCs may change due to this rule and thus if this rule would result in costs for building additional bed space. There are many factors that would be considered in opening a new FRC, some of which are outside the scope of this regulation, such as whether such a facility would be appropriate, based on the population of aliens crossing the border, anticipated capacity, projected average daily population, and projected costs. Moreover, such a decision depends on receiving additional resources from Congress, and ICE has to balance the detention of families with the detention and removal of single adults.

While DHS cannot conclusively determine the impact on detention costs due to factors outside of the scope of this regulation, beginning with the fluctuating number of families apprehended at the Southwest border, it does acknowledge the three existing FRCs could potentially reach capacity as a result of additional or longer detention for certain individuals. This estimate is based on current contract terms staying the same in the future and reflects an increase in the average length of stay for the affected groups of minors, potentially up to 2,878 using FY 2017 data and 3,663 using FY 2018 data, plus their accompanying parent or legal guardian. If bed space were increased as

a result of this rule, the cost would depend on the type of facility, facility size, location, and a number of other variables. ICE notes as an example that an additional 960 beds at Dilley would cost approximately \$80 million.

This rule also changes current ICE practices for parole determinations to align them with applicable statutory and regulatory authority. ICE is currently complying with the June 27, 2017, court order while it is on appeal. In complying, every detained minor in expedited removal proceedings and awaiting a credible fear determination or determined not to have a credible fear receives an individualized parole determination under the considerations laid out in 8 CFR 212.5(b). However, under the rule, ICE would revert to its practice prior to the 2017 court order for those minors in expedited removal proceedings, using its parole authorities under 8 CFR 235.3 for this category of aliens in accordance with the standards implemented by Congress. *See* 8 U.S.C. 1225(b)(1)(B)(iii)(IV) (“Any alien subject to [expedited removal] shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”). For aliens who are in expedited removal proceedings and are pending a credible fear determination or who have been found not to have such fear, release on parole can only satisfy this standard when there is a medical necessity or a law enforcement need. This change may result in fewer such minors or their accompanying parent or legal guardians being released on parole. Aliens in expedited removal proceedings are not generally detained in mandatory custody for long periods of time. Either a removal order is issued within a short amount of time or a Notice to Appear is issued, which may make the alien eligible for various forms of release. Consequently, DHS does not anticipate that these changes will result in extended periods of detention for minors who are in expedited removal proceedings.

The TVPRA reinterpretation may also change the current DHS operations of releasing minors only to parents or legal guardians by adding language to permit release of a minor to someone other than a parent or legal guardian, specifically an adult relative (brother, sister, aunt, uncle, or grandparent) not in detention. DHS is unable to estimate the potential costs and burden of training CBP and ICE officers to operationalize this change in regards to vetting these adult relatives and coordinating the releases. DHS expects that this change may increase the releases of accompanied minor children from DHS custody in

<sup>77</sup> See Congressional Budget Justification FY 2018—Volume II, U.S. Immigration and Customs Enforcement, page 50, “An average daily rate for family beds can be calculated by dividing the total funding requirement of \$291.4 million by the projected average daily population (ADP) of 2,500 for a rate of \$319.37.”

FRCs and could increase the detention of single adults.

With respect to CBP, the rule is not anticipated to have an impact on current operations because CBP is currently implementing the relevant and substantive terms of the FSA, the HSA, and the TVPRA.

#### b. HHS

HHS has complied with the FSA since the HSA's transfer of responsibility to ORR for the care and custody of UAC in 2002. The rule would implement the provisions of the FSA, and related statutes. Accordingly, HHS does not expect this rule to impose any additional costs, beyond those costs incurred by the Federal Government to establish the 810 hearings process within HHS.

This rule will shift responsibility for custody redetermination hearings for UACs, now to be referred to as 810 hearings, from DOJ to HHS. We estimate that some resources will be required to implement this shift. We believe that this burden will fall on DOJ and HHS staff, and we estimate that it will require approximately 2,000–4,000 hours to implement. This estimate reflects six to 12 staff, at the Federal General Schedule (GS)13–15 pay level, working full-time for two months to create the new system. The costs to implement the 810 hearings could average \$250,000 or more, paid for by ORR out of the Refugee and Entrant Assistance Appropriation Account. Ongoing annual costs would include one administrative judge or hearing officer, one full-time administrative assistant or law clerk, an estimated 50 hours of interpretation services based on an average of 70 cases per year (half of which the government anticipates that it will not dispute), and 1.5 FTE for ORR staff at the GS 13 level. HHS estimates annual costs to be an average of \$445,000. After this shift in responsibility has been implemented, we estimate that the rule will lead to no change in net resources required for 810 hearings, and therefore estimate no incremental costs or savings.

#### 4. Benefits

The primary purpose of the rule is to adopt uniform standards for the custody and care of alien juveniles during their immigration proceedings and to ensure that they are treated with dignity and respect, in light of intervening changes in law, circumstance, and agency experience. The rule would thus implement the FSA and thereby terminate it. There are added benefits of having set rules (in the CFR), such as the ability for the Departments to move from judicial governance via a consent

decree and shift to executive government via regulation. Under the FSA, the government operates in an uncertain environment subject to future court interpretations of the FSA that may be difficult or operationally impractical to implement or could otherwise hamper operations. With the regulations, DHS and HHS, along with members of the public, would have certainty as to the agencies' legal obligations and operations.

Without codifying the FSA as in this rule, family detention is a less effective tool to meet the enforcement mission of ICE. In many cases, families do not appear for immigration court hearings after being released from an FRC, and even when they do, many more fail to comply with the lawfully issued removal orders from the immigration courts and some families engage in dilatory legal tactics when ICE works to enforce those orders. In addition, if an alien is not detained at the time a final order of removal is issued, in many cases ICE will have to expend significant resources to locate, detain, and subsequently remove the alien in accordance with the final order.

Further, according to EOIR, since January 1, 2014, there have been 3,969 final removal orders issued for 5,326 cases that began in FRCs and were completed as of March 31, 2019. Of these final removal orders, 2,281 were issued *in absentia*. In other words, of completed cases that began in FRCs, 43 percent were final orders of removal issued *in absentia*. (See Table 2). DHS OIS has found that when looking at all family unit aliens encountered at the Southwest Border from FY 2014 through FY 2018, for family units who were detained at FRCs and for those who were not detained at FRCs, the *in absentia* rate for completed cases as of the end of FY 2018 was 66 percent. (See Table 3). Based on the similar timeframes of these two rates, DHS can assume that family units who did not start their cases in FRCs have a higher *in absentia* rate. However, this does not account for other factors that may or may not have an impact the likelihood of appearance, such as enrollment in a monitoring program or access to representation. However, DHS still concludes that the *in absentia* rates of family units even who started their cases at an FRC warrants detention throughout proceedings.

By departing from the FSA in limited cases to reflect the intervening statutory and operational changes and agency experience, DHS is reflecting its existing discretion to detain families together, as appropriate, given enforcement needs,

which will ensure that family detention remains an effective enforcement tool.

This rule does not require the addition of new bed space, but by allowing alternative licensing for FRCs it does remove a barrier to DHS's use of its Congressionally-authorized detention authority, allowing families to stay together through the duration of their immigration proceedings.

By codifying the FSA, HHS has opened the underlying basis for its policies and procedures for notice and comment. The discussion our final rule in the preamble explains that HHS is and large adopting the specific text from the FSA with little variance. The main exception would be the transfer bond redetermination hearings from courts to a hearing officer within HHS. HHS believes this will result in more expedient review of cases, with new added protections for UAC (by placing the burden of initial production on the government) to deny release of a UAC based on danger or risk of flight.

The regulations are also designed to eliminate judicial management, through the FSA, of functions Congress delegated to the executive branch.

#### 5. Conclusion

This rule implements the provisions of the FSA, the HSA, and the TVPRA, in light of current circumstances and considering public input received on the NPRM. The Departments consider current operations and procedures for implementing the terms of the FSA, the HSA, and the TVPRA to be the baseline for this analysis. Because these costs are already being incurred, they are not costs of this rule. The primary source of new costs for the rule would be a result of the alternative licensing process, changes to current ICE parole determination practices to align them with applicable statutory and regulatory authority, and the costs of shifting hearings from DOJ to HHS. ICE expects the alternative licensing process and changes to current parole determination practices to extend detention of certain minors in FRCs. This may result in additional or longer detentions for certain minors, increasing annual variable costs paid by ICE to the operators of current FRCs and costs to the individuals being detained. In addition, if ICE awarded additional contracts for expanded bed space as a result of this rule, ICE would also incur additional fixed costs and variable costs. But due to the uncertainty surrounding estimating an increased length of stay and the number of aliens this may affect, this incremental cost is not quantified.



## 6. Alternatives

### a. No Regulatory Action

The Departments considered not promulgating this rule. The Departments had been engaged in this alternative prior to proposing this rule, which has required the Government to adhere to the terms of the FSA, as interpreted by the courts, which also rejected the Government's efforts to amend the FSA to help it better conform to existing legal and operational realities. Continuing with this alternative would likely require the Government to operate through non-regulatory means in an uncertain environment subject to currently unknown future court interpretations of the FSA that may be difficult or operationally impracticable to implement and that could otherwise hamper operations. The Departments also reject this alternative because it does not address the current conflict between certain portions of the FSA, the HSA, and the TVPRA or the current operational environment, as the FSA is over twenty years old.

### b. Comprehensive FSA/TVPRA/Asylum Regulation

The Departments considered proposing within this regulatory action additional regulations addressing further areas of authority under the TVPRA, to include those related to asylum proceedings for UACs. The Departments rejected this alternative in order to focus this regulatory action on implementing the terms of the FSA, and provisions of the HSA and TVPRA where they intersect with the FSA's provisions. Promulgating this more targeted regulation does not preclude the Departments from subsequently issuing regulations to address broader issues.

### c. Promulgate Regulations—Preferred Alternative

Legacy INS's successors are obligated under the FSA to initiate action to publish the relevant and substantive terms of the FSA as regulations. In the 2001 Stipulation, the parties agreed to a termination of the FSA "45 days following the defendants' publication of final regulations implementing this Agreement." Under this alternative, the Departments are proposing to implement the FSA and thereby to terminate it. In particular, the Departments are publishing regulations that generally mirror the relevant and substantive terms of the FSA as regulations, while maintaining the operational flexibility necessary to continue operations and ensuring that

minors and UACs continue to be treated in accordance with the HSA, and the TVPRA, and accounting for changes in law, agency expertise, current operational circumstances, and public comment pursuant to the rulemaking provisions of the APA.

### B. Regulatory Flexibility Act

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

A final regulatory flexibility analysis follows.

1. A statement of the need for, and objectives of, the rule.

The purpose of this action is to promulgate regulations that implement the relevant and substantive terms of the FSA. This rule implements the relevant and substantive terms of the FSA and provisions of the HSA and TVPRA where they necessarily intersect with the FSA's provisions. Publication of final regulations will result in termination of the FSA, as provided for in FSA paragraph 40.

2. A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

DHS did not receive any public comments raising issues in response to the initial regulatory flexibility analysis and did not make any revisions to the final rule for small entities.

Section 462 of the HSA also transferred to the ORR Director "functions under the immigration laws of the United States with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization." 6 U.S.C. 279(a). The ORR Director may, for purposes of performing a function transferred by this section, "exercise all authorities under any other provision of law that were available with respect to the performance of that function to the official responsible for the performance of the function" immediately before the transfer of the program. 6 U.S.C. 279(f)(1).

Consistent with provisions in the HSA, and 8 U.S.C. 1232(a), the TVPRA places the responsibility for the care and custody of UACs with the Secretary of Health and Human Services. Prior to the transfer of the program, the Commissioner of Immigration and Naturalization, through a delegation from the Attorney General, had authority "to establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this Act." INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3) (2002); 8 CFR 2.1 (2002). In accordance with the relevant savings and transfer provisions of the HSA, see 6 U.S.C. 279, 552, 557; see also 8 U.S.C. 1232(b)(1); the ORR Director now possesses the authority to promulgate regulations concerning ORR's administration of its responsibilities under the HSA and TVPRA.

The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

DHS did not receive comments from the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule.

4. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

This rule would directly regulate DHS and HHS. DHS contracts with private contractors and a local government to operate and maintain FRCs, and with private contractors to provide transportation of minors and UACs. This rule would indirectly affect these entities to the extent that DHS contracts with them under the terms necessary to fulfill the FSA. To the degree this rule increases contract costs to DHS private contractors, it would be incurred by the Federal Government in the cost paid by the contract.

ICE currently contracts with three operators of FRCs, two of which are businesses and the other a local governmental jurisdiction. ICE and CBP also each have one contractor that provides transportation. To determine if the private contractors that operate and maintain FRCs and the private contractors that provide transportation are small entities, DHS references the Small Business Administration (SBA) size standards represented by business average annual receipts. SBA's Table of Small Business Size Standards is matched to the North American Industry Classification System (NAICS)

for these industries.<sup>78</sup> To determine if the local government that operates and maintains an FRC is a small entity, DHS applies the 50,000 size standard for governmental jurisdictions.

DHS finds that the revenue of the private contractors that operate and maintain two of the three FRCs to be greater than the SBA size standard of the industry represented by NAICS 531110: Lessors of Residential Buildings and Dwellings. The size standard classified by the SBA is \$38.5 million for lessors of buildings space to the Federal Government by Owners.<sup>79</sup> The county population of the local government that operates and maintains the other FRC is over 50,000, based on 2018 U.S. Census Bureau annual resident population estimates.<sup>80</sup>

DHS finds that the revenue of the two private contractors that provide transportation to minors, in some cases their family members, and to UACs for DHS to be greater than the SBA size standard of these industries.<sup>81</sup> The SBA size standard for NAICS 561210 Facilities Support Services is \$38.5 million. The SBA size standards for NAICS 561612 Security Guards and Patrol Services is \$20.5 million.

The changes to DHS regulations would not directly impact any small entities.

Currently, HHS funds 53 grantees to provide services to UACs. HHS finds that most of the 53 current grantees, the majority of which are non-profits (49 out of 53), do not appear to be dominant in their field. Consequently, HHS believes all 53 grantees are likely to be small entities for the purposes of the RFA.

5. A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The rule would implement the relevant and substantive terms of the FSA in regulations. ICE believes the FRCs, which are operated and

maintained by private contractors or a local government, comply with these provisions, and will continue to comply through future contract renewals. To the extent this rule increases variable contract costs, such as a per student per day education cost, to any detention facilities, the cost increases would be passed along to the Federal Government in the cost paid for the contract. However, DHS cannot say with certainty how much, if any, increase in variable education costs would result from this rule.

A primary source of new costs for the rule is as a result of the alternative licensing process. ICE currently fulfills the requirements being finalized as an alternative to licensing through its existing FRC contracts. To codify the requirements of the FSA, this rule requires that facilities that hold minors obtain state, county, or municipal licensing where appropriate licenses are available. If no such licensing regime is available, however, DHS will employ an outside entity with relevant audit experience to ensure that the facility complies with family residential standards established by ICE and that meet the requirements for licensing under the FSA. That would fulfill the goals of obtaining a license from a state or local agency. Most States do not offer licensing for facilities like the FRCs.<sup>82</sup> Therefore, to meet the terms of the FSA, minors are generally held in FRCs for less than 20 days (see Table 10). As all FRCs would be licensed under this rule, the rule may result in extending detention of some minors and their accompanying parent or legal guardian in FRCs beyond 20 days. Additionally, this rule would change ICE parole determination practices, which may result in fewer aliens being paroled.

An increase in the average length of detention may increase the variable costs paid by ICE to the private contractors who operate and maintain current FRCs, as compared to the current operational environment. In addition, if ICE awarded additional contracts for expanded bed space as a result of this rule, ICE would also incur additional fixed costs and variable costs. Due to many uncertainties surrounding the forecast, DHS is unable to estimate the incremental variable costs due to this rule. Refer to Section VI.A. Executive Orders 12866 and 13563: Regulatory Review for the description of the uncertainties. In addition, DHS notes that additional or longer detention could result in the need for additional bed space; however, there are many

factors that would be considered in opening a new FRC and at this time ICE is unable to determine if this rule would result in additional bed space.

As discussed above, DHS would incur these potential costs through the cost paid for the contract with these facilities, and could incur costs to build new facilities or add additional beds. There are no cost impacts on the contracts for providing transportation because this rule codifies current operations.

6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

The Departments are not aware any alternatives to the rule which accomplish the stated objectives that would minimize economic impact of the rule on small entities.

#### C. Small Business Regulatory Enforcement Fairness Act of 1996

As indicated in the Executive Orders 12866, 13563: Regulatory Review, Section VII, the rule may have an effect on the government and its contractors who provide operation and maintenance of its family residential facilities. DHS and HHS prepared both initial and final RFA analyses.

#### D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, 109 Stat. 48 (codified at 2 U.S.C. 1501 *et seq.*), is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure of \$100 million or more (adjusted annually for inflation) in any 1 year by State, local, and tribal governments, in the aggregate, or by the private sector. 2 U.S.C. 1532(a). The value equivalent of \$100 million in 1995 adjusted for inflation to 2017 levels by the Consumer Price Index for All Urban Consumer (CPI-U) is \$161 million.

This rule may not exceed the \$100 million expenditure threshold in any 1 year when adjusted for inflation. Though this rule would not result in such an expenditure, the Departments discuss the effects of this rule elsewhere

<sup>78</sup> U.S. Small Business Administration, Tables of Small Business Size Standards Matched to NAICS Codes (Oct. 1, 2017), available at [https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table\\_2017.xlsx](https://www.sba.gov/sites/default/files/files/Size_Standards_Table_2017.xlsx).

<sup>79</sup> DHS obtained NAICS codes and 2018 annual sales data from *Hoovers.com*.

<sup>80</sup> Annual Estimates of the Resident Population for Counties: April 1, 2010 to July 1, 2018. Source: U.S. Census Bureau, Population Division, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-counties-total.html>.

<sup>81</sup> DHS obtained NAICS codes and 2018 annual sales data from *Hoovers.com* and *ReferencesUSA.com*.

<sup>82</sup> See the discussion of the definition of “licensed facility” *supra*.

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

#### E. Congressional Review Act

While Executive Order 12866 has a standard of whether the rule *may* have an impact of \$100 million or more in any given year, the CRA standard is whether a rule has or is *likely* to have an annual impact of \$100 million or more. In the vast majority of cases, if a rule is economically significant it is also major. In this case, however, given budget uncertainties, ICE’s overall need to prioritize bed space for operational considerations (such as the recent use of the Karnes FRC for single adult female detention), and other operational flexibilities preserved under this rule, it is not *likely* that this rule will result in an annual economic impact of \$100 million or more. The Office of Information and Regulatory Affairs has thus determined that this rule is not major under 5 U.S.C. 804.

The Departments note, however, that the rule will still be published with a 60-day delayed effective date.

#### F. Paperwork Reduction Act

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

However, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), ACF submitted a copy of this section to OMB for its review.

This rule complies with settlement agreements, court orders, and statutory requirements, most of whose terms have been in place for over 20 years. This rule would not require additional information collection requirements beyond those requirements. The reporting requirements associated with those practices have been approved under the requirements of the Paperwork Reduction Act and in accordance with 5 CFR part 1320. ACF received approval from OMB for use of its forms on June 26, 2019, with an expiration date of June 30, 2022 (OMB Control Number 0970–0278). Separately, ACF received approval from OMB for its placement and service forms on July 6, 2017, with an expiration date of July 31, 2020 (OMB Control Number 0970–0498); a form associated with the specific consent process is currently pending approval with OMB (OMB Control Number 0970–0385).

#### G. Executive Order 13132: Federalism

This final rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule implements the FSA by codifying the Departments’ practices that comply with the terms of the FSA and relevant law for the processing, transfer, and care and custody of alien juveniles. In codifying these practices, the Departments were mindful of their obligations to meet the requirements of the FSA while also minimizing conflicts between State law and Federal interests.

Insofar as the rule sets forth standards that might apply to immigration detention facilities and holding facilities operated by contract with State and local governments and private entities, this rule has the potential to affect the States, although it would not affect the relationship between the National Government and the States or the distribution of power and responsibilities among the various levels of government and private entities. With respect to the State and local agencies, as well as the private entities, that contract with DHS and operate these facilities across the country, the FSA provides DHS with no direct authority to mandate binding standards on their facilities. But these requirements will impact the State, local, and private entities only to the extent that they make voluntary decisions to contract with DHS for the processing, transportation, care, or custody of alien juveniles. This

approach is fully consistent with DHS’s historical relationship to State and local agencies in this context.

Typically, HHS enters into cooperative agreements or contracts with non-profit organizations to provide shelter, care, and physical custody for UACs in a facility licensed by the appropriate State or local licensing authority. Where HHS enters into cooperative agreements or contracts with a state licensed facility, ORR requires that the non-profit organization administering the facility abide by all applicable State or local licensing regulations and laws. ORR designed agency policies and these regulations as well as the terms of HHS cooperative agreements and contracts with the agency’s grantees/contractors to complement appropriate State and licensing rules, not supplant or replace the requirements.

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

#### H. Executive Order 12988: Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, *Civil Justice Reform*, to minimize litigation, eliminate ambiguity, and reduce burden.

#### I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 requires agencies to consider the impact of rules that significantly impact the supply, distribution, and use of energy. DHS has reviewed this rule and determined that it is not a “significant energy action” under the order because, while it is a “significant regulatory action” under Executive Order 12866, it does not have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, this rule does not require a Statement of Energy Effects under Executive Order 13211.

#### J. National Environmental Policy Act (NEPA)

The Departments certified that the proposed rule did not require an Environmental Assessment or Environmental Impact Statement under the National Environmental Policy Act (NEPA) because it is an action that does

not individually or cumulatively have a significant effect on the human environment and it is covered within each Department's list of Categorically Excluded (CATEX) actions.

*Comments.* The Departments received two comments representing the views of eight organizations on this certification. The commenters contend that:

- None of the cited CATEXs apply to the proposed rule;
- the rulemaking will likely have significant effects resulting from the expansion of the detention system that would constitute "extraordinary circumstances" invalidating the use of any categorical exclusions;
- the rulemaking is part of a larger action, invalidating the reliance on a categorical exclusion;
- NEPA applies to broad Federal actions, such as the adoption of new agency programs;
- that the proposed rule significantly changes DHS's operation with regard to unaccompanied alien children and family units entering the United States;
- the proposed rule will cause the construction of dozens of new facilities;
- that the proposed rule, if implemented, would require indefinite detention of family units.

The commenters contend that if the final rule adopts everything in the proposed rule, new facilities will be required to be built, and the construction and operation of these facilities will produce environmental effects such as pollution, increased flooding risk, and destruction of wildlife habitats, wetlands, and scenic areas. The commenters also suggested that surrounding communities, migrant children, and construction workers might be exposed to toxic contaminants and increased traffic and garbage from the operations of these facilities.

One of the commenters stated that DHS was incorrect in its application of a CATEX to the proposed rule because DHS was evaluating the proposed rule only (the implementation of the FSA), instead of considering the rulemaking as part of a larger action that includes the Zero Tolerance Policy<sup>83</sup> and the implementation of Executive Order 13841, *Affording Congress an Opportunity to Address Family Separation*, June 20, 2018.

One commenter stated that neither DHS CATEX identified in the proposed rule, CATEX A3(b) or A3(d), is applicable and that the proposed rule is a new policy and regulation that would

require indefinite detention, which affects the quality of the human environment. Another commenter stated that neither the HHS CATEX nor the two DHS CATEXs identified in the proposed rule apply. The commenter said that HHS relied on a CATEX for grants for social services because its state licensed facilities are operated under social service grants, but that the CATEX includes an exception for projects that involve construction, renovation, or any changes in land use. The commenter suggested that HHS' contention that the exception does not apply because HHS lacks construction authority is simply an attempt to evade further NEPA review. Additionally, this commenter contended that HHS' authority and actions with respect to UACs reach beyond giving grants to state-licensed facilities because they make age determinations, transfer children between HHS facilities, determine if a child is an escape risk, and release the children from HHS custody. The same commenter claimed that the Departments' CATEXs fail because NEPA makes it unlawful to apply CATEXs if there is the potential for significant impacts.

*Response.* The commenters suggested that the proposed rule will likely have significant environmental effects resulting from the expansion of the detention system, but neither the proposed rule nor the final rule specify or compel any expansion in detention capacity. DHS has indicated in the NPRM that it is unable to determine how the number of FRCs might change due to this final rule. Many factors, including factors outside of the scope of the final rulemaking that cannot be predicted (such as congressional appropriations) or are presently too speculative, would need to be considered by DHS prior to opening new detention space.

While the new construction, renovation, or repurposing of facilities for FRCs is one potential future consequence of the final rule, the final rule itself does not prescribe increases in FRC capacity or propose any locations where new facilities might be built. The final rule also does not require longer detention of family units. Although longer detention is made possible by the final rule, the environmental impacts from the operation of existing FRCs would not foreseeably change with longer periods of detention for members of alien family units. Potentially longer detention times do not translate to changes in capacity of FRCs; it could just mean that certain members of alien family units are detained for longer periods of time

whilst others are released. Thus, existing FRC capacity levels would not necessarily change.

Substantive proposals regarding FRC space that could be meaningfully analyzed in accordance with the NEPA have not been proposed. The extent to which new FRCs are constructed, or existing FRCs are utilized, is dependent on numerous factors outside the scope of the final rule, which does not mandate operational requirements pertaining to new FRCs. For example, DHS/ICE decisions to increase FRC capacity would consider the costs associated with housing families and the availability of Congressional appropriations. The final rule neither prescribes expansion of detention space nor describes any substantive, reliable information regarding change in detention capacity that could be reasonably evaluated under NEPA. Thus, the commenters' suggestions that the proposed rule will result in "tremendous growth" in detention capacity with "cumulatively significant impacts on the human environment" or that it will result in the "construction of dozens of new encampments and detention facilities" are highly speculative and not supported by the rulemaking.

The commenters also suggested that extraordinary circumstances exist due to the degree to which the proposed rule will affect sensitive environments, public health and safety, and cumulative impacts. But again, the final rule has no immediate significant effect on the environment, and any future effect related to hypothetical circumstances is too speculative to evaluate. The final rule does not compel the new development or repurposing of FRCs or changes in FRC capacity. Thus, there is no substantive nexus of the final rule with environmental health and safety at FRCs that would pose an extraordinary circumstance.

One commenter suggested that an EIS should be prepared because the effects of the regulatory changes are highly controversial, but highly controversial for NEPA purposes means there is a substantial dispute as to the size, nature, or effect of an action. The existence of public opposition to a use does not of itself make a proposal highly controversial. DHS has determined that the effects of the final rule are not highly controversial in terms of scientific validity, are not likely to be highly uncertain, and are not likely to involve unique or unknown environmental risks. If, in the future, DHS were to propose the construction or renovation of facilities for FRCs, those projects would be subjected to

<sup>83</sup> See Memorandum from Jeff Sessions to Federal Prosecutors along the Southwest Border, *Zero-Tolerance for Offenses under 8 U.S.C. 1325(a)* (Apr. 6, 2018).

appropriate NEPA analysis for their potential environmental impact at that time. DHS has determined that this action is not highly controversial and does not require an environmental impact statement (EIS). No extraordinary circumstances exist that preclude reliance upon CATEX A3(d).

The final rule is not part of a larger action as some have suggested. The final rule is not a part of a larger action because it does not trigger other actions and does not depend on concurrent, previous, or future actions for its rationale. The final rule does not compel a program of detaining children and families. As noted in the NPRM, DHS currently has three primary options for purposes of immigration custody: (1) Release all family members into the United States, (2) detain the parent(s) or legal guardian(s) and either release the juvenile to another parent or legal guardian or suitable adult relative, or transfer the child to HHS to be treated as UAC, or (3) detain the family unit together by placing them at an appropriate FRC during their immigration proceedings.

If, in the future, DHS proposes to commit funds to acquire, build, or renovate facilities to house family units, DHS might be considering actions beyond administrative and regulatory activities falling under CATEX A3(d), and would need to evaluate the proper level of environmental review required under NEPA at that time. However, as noted previously, this final rule does not compel or prescribe that DHS commit funds for family residential detention space, and no substantive proposals for additional FRC space that could be meaningfully analyzed under NEPA have been proposed.

The final rule promulgates regulations that will reflect changes in the authorities governing the detention of unaccompanied alien children and alien family units. The final rule neither proposes any actions that would significantly impact the human environment nor compels irreversible and irretrievable commitments of resources. The final rule fits completely within CATEX A3(d), and there are no extraordinary circumstances that would preclude the application of this CATEX. Therefore, it is appropriate for DHS to exclude the final rule from further environmental review using CATEX A3(d).

HHS disagrees with commenters who contend NEPA applies to the HHS portion of the rule or requires an environmental assessment or impact statement for such portion. NEPA does not apply to the HHS portion of the rule, because that portion does not change

HHS' UAC Program's procedures. The UAC Program is already run in compliance with the FSA and applicable statutes, including as set forth in this final rule. NEPA applies when there are "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332. However, in this rule HHS is not taking any Federal action that makes major changes the status quo or changes government policy such that it would "affect" the quality of the human environment. Rather, HHS merely memorializes some of the existing UAC program procedures in a regulation, rather than where they reside now, in a settlement agreement, statutes, and the ORR UAC policy guide. Because the rule does not change the UAC Program, it does not significantly affect the quality of the human environment to implicate NEPA. Some commenters have pointed out that the section "810" hearings as a change from the Flores settlement agreement. With respect to 810 hearings, those hearings also already occur, but at one component of the government—DOJ—instead of at HHS, as set forth in this rule.

The rule neither increases nor fundamentally changes the nature of those hearings, and transferring the hearings process has no environmental effect. Moreover, hearings, in themselves, do not affect human environment. Therefore, NEPA also does not apply to that part of the rule.

In addition, to the extent the HHS portion of the rule could be considered subject to NEPA, HHS has determined that it falls into several exclusions. First, it falls into a programmatic exclusion, by which HHS has determined that the rule will not significantly affect the human environment or affect an asset. Under HHS policy programmatic exclusions are available in instances where the program has reviewed the actions being taken and concluded that the program or activity will not normally "significantly affect" the human environment; or will not normally affect an asset. In this case, again, HHS is merely codifying provisions already found in a settlement agreement and thus has concluded that the final rule does not affect the human environment, because it does not change the human environment as compared to functions currently in operation. In addition, HHS is subject to the categorical exclusion listed in section 30–20–40 of the General Administration Manual (available at: <https://www.hhs.gov/hhs-manuals/gam-part-30/302000/index.html>) for grants for social services, as the UAC program operates pursuant to grants—and for

adoption of regulations and guidelines pertaining to such grants. It is notable that both the Homeland Security Act and the TVPRA encouraged HHS to use grant programs to carry out the program. 6 U.S.C. 279(b)(3) (encouraging ORR to use the "refugee children foster care system program" established using grants for unaccompanied refugee minors); 8 U.S.C. 1232(i) (authorizing use of grants to carry out the UAC program).

If, in the future, HHS will commit funds for projects involving construction, renovation, or changes in land use, HHS would go beyond the CATEX at 30–20–40, and thus would need to evaluate the proper level of environmental review required under NEPA at that time.

HHS disagrees with commenters who contend the HHS portion of the rule will involve a change in the capacity of the UAC program or will change activities such as the construction of facilities. Changes to the UAC program's capacity and need for facilities occur, or do not occur, under the norms that govern the UAC program preexisting this rule—the FSA, applicable statutes, and ORR's UAC policy guide. This rule does not change those norms, but merely places some in regulations. Changes to capacity of the program or to construction or use of facilities occur for other reasons, such as because of increases in UAC crossing the border, and are not attributable to the codification of these rules.

#### *K. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights*

This final rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*.

#### *L. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

Executive Order 13045 requires agencies to consider the impacts of environmental health risk or safety risk that may disproportionately affect children. The Departments have reviewed this final rule and determined that this rule is an economically significant rule but does not create an environmental risk to health or risk to safety that may disproportionately affect children. Therefore, the Departments have not prepared a statement under this executive order.

### M. National Technology Transfer and Advancement Act

The National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, the Departments did not consider the use of voluntary consensus standards.

### N. Family Assessment

The Departments have reviewed this rule in accordance with the requirements of section 654 of the Treasury General Appropriations Act, 1999, Public Law 105–277. The impacts of the rule on families and family well-being are myriad and complex, and discussed in greater detail elsewhere in the preamble. In general, with respect to family well-being, this final rule substantially codifies current requirements of settlement agreements, court orders, and statutes, most of whose terms have been in place for over 20 years, as well as HHS' related authorities. The changes implemented by this rule are a result of intervening statutes or operational realities. With respect to the criteria specified in section 654(c)(1), for DHS, the rule places a priority on the stability of the family and the authority and rights of parents in the education, nurture, and supervision of their children, within the immigration detention context, as parents maintain parental rights and supervision of their children within FRCs. This rule provides an option for families to stay together where detention is required and appropriate, but also provides for release in some circumstances. The rule also codifies in regulation certain statutory policies with respect to the treatment of UACs. For HHS, the primary specific change in the rule beyond current practice is the movement of hearings from DOJ to HHS pursuant to § 410.810. That specific change does not have a particular impact on family well being.

### List of Subjects

#### 8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

#### 8 CFR Part 236

Administrative practice and procedure, Aliens, Immigration.

#### 45 CFR Part 410

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

### DEPARTMENT OF HOMELAND SECURITY

#### 8 CFR Chapter I

For the reasons set forth in the preamble, parts 212 and 236 of chapter I of title 8 are amended as follows:

#### PART 212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 1. The authority citation for part 212 continues to read as follows:

**Authority:** 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1185 note (section 7209 of Pub. L. 108–458), 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 CFR part 2.

■ 2. Amend § 212.5 by revising paragraphs (b) introductory text, (b)(3) introductory text, and (b)(3)(i) and (ii) to read as follows:

#### § 212.5 Parole of aliens into the United States.

\* \* \* \* \*

(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(c) of this chapter would generally be justified only on a case-by-case basis for “urgent humanitarian reasons or “significant public benefit,” provided the aliens present neither a security risk nor a risk of absconding:

\* \* \* \* \*

(3) Aliens who are defined as minors in § 236.3(b) of this chapter and are in DHS custody. The Executive Assistant Director, Enforcement and Removal Operations; directors of field operations; field office directors, deputy field office directors; or chief patrol agents shall follow the guidelines set forth in § 236.3(j) of this chapter and paragraphs (b)(3)(i) through (ii) of this section in determining under what conditions a minor should be paroled from detention:

(i) Minors may be released to a parent, legal guardian, or adult relative (brother, sister, aunt, uncle, or grandparent) not in detention.

(ii) Minors may be released with an accompanying parent or legal guardian who is in detention.

\* \* \* \* \*

#### PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

■ 3. The authority citation for part 236 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 6 U.S.C. 112(a)(2), 112(a)(3), 112(b)(1), 112(e), 202, 251, 279, 291; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1232, 1357, 1362; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

■ 4. Section 236.3 is revised to read as follows:

#### § 236.3 Processing, detention, and release of alien minors.

(a) *Generally.* (1) DHS treats all minors and unaccompanied alien children (UACs) in its custody with dignity, respect and special concern for their particular vulnerability.

(2) The provisions of this section apply to all minors in the legal custody of DHS, including minors who are subject to the mandatory detention provisions of the INA and applicable regulations, to the extent authorized by law.

(b) *Definitions.* For the purposes of this section:

(1) *Minor* means any alien who has not attained eighteen (18) years of age and has not been:

(i) Emancipated in an appropriate state judicial proceeding; or

(ii) Incarcerated due to a conviction for a criminal offense in which he or she was tried as an adult.

(2) *Special needs minor* means a minor whose mental and/or physical condition requires special services and treatment as identified during an individualized needs assessment as referenced in paragraph (i)(4)(iii) of this section. A minor may have special needs due to drug or alcohol abuse, serious emotional disturbance, mental illness or intellectual disability, or a physical condition or chronic illness that requires special services or treatment. A minor who has suffered serious neglect or abuse may be considered a minor with special needs if the minor requires special services or treatment as a result of the neglect or abuse.

(3) *Unaccompanied alien child* (UAC) has the meaning provided in 6 U.S.C. 279(g)(2), that is, a child who has no

lawful immigration status in the United States and who has not attained 18 years of age; and with respect to whom: There is no parent or legal guardian present in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody. An individual may meet the definition of UAC without meeting the definition of minor.

(4) *Custody* means within the physical and legal control of an institution or person.

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

(6) *Escape-risk* means that there is a serious risk that the minor will attempt to escape from custody. Factors to consider when determining whether a minor is an escape-risk include, but are not limited to, whether:

(i) The minor is currently subject to a final order of removal;

(ii) The minor's immigration history includes: A prior breach of bond, a failure to appear before DHS or the immigration courts, evidence that the minor is indebted to organized smugglers for his transport, or a voluntary departure or previous removal from the United States pursuant to a final order of removal; or

(iii) The minor has previously absconded or attempted to abscond from state or Federal custody.

(7) *Family unit* means a group of two or more aliens consisting of a minor or minors accompanied by his/her/their adult parent(s) or legal guardian(s). In determining the existence of a parental relationship or a legal guardianship for purposes of this definition, DHS will consider all available reliable evidence. If DHS determines that there is insufficient reliable evidence available that confirms the relationship, the minor will be treated as a UAC.

(8) *Family Residential Center (FRC)* means a facility used by ICE for the detention of family units.

(9) *Licensed facility* means an ICE detention facility that is licensed by the state, county, or municipality in which it is located, if such a licensing process exists. Licensed facilities shall comply with all applicable state child welfare laws and regulations and all state and local building, fire, health, and safety codes. If a licensing process for the detention of minors accompanied by a parent or legal guardian is not available in the state, county, or municipality in which an ICE detention facility is

located, DHS shall employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE. Such audits will take place at the opening of a facility and on a regular, ongoing basis thereafter. DHS will make the results of these audits publicly available.

(10) *Influx* means a situation in which there are, at any given time, more than 130 minors or UACs eligible for placement in a licensed facility under this section or corresponding provisions of ORR regulations, including those who have been so placed or are awaiting such placement.

(11) *Non-secure facility* means a facility that meets the definition of non-secure under state law in the state in which the facility is located. If no such definition of non-secure exists under state law, a DHS facility shall be deemed non-secure if egress from a portion of the facility's building is not prohibited through internal locks within the building or exterior locks and egress from the facility's premises is not prohibited through secure fencing around the perimeter of the building.

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

(c) *Age determination.* (1) For purposes of exercising the authorities described in this part, DHS shall determine the age of an alien in accordance with 8 U.S.C. 1232(b)(4). Age determination decisions shall be based upon the totality of the evidence and circumstances.

(2) If a reasonable person would conclude that an individual is an adult, despite his or her claim to be under the age of 18, DHS may treat such person as an adult for all purposes, including confinement and release on bond, recognizance, or other conditions of release. In making this determination, an immigration officer may require such an individual to submit to a medical or dental examination conducted by a medical professional or other appropriate procedures to verify his or her age.

(3) If an individual previously considered to have been an adult is subsequently determined to be under the age of 18, DHS will then treat such individual as a minor or UAC as prescribed by this section.

(d) *Determining whether an alien is a UAC.* (1) *Time of determination.* Immigration officers will make a determination as to whether an alien under the age of 18 is a UAC at the time

of encounter or apprehension and prior to the detention or release of such alien.

(2) *Aliens who are no longer UACs.* When an alien previously determined to have been a UAC has reached the age of 18, when a parent or legal guardian in the United States is available to provide care and physical custody for such an alien, or when such alien has obtained lawful immigration status, the alien is no longer a UAC. An alien who is no longer a UAC is not eligible to receive legal protections limited to UACs under the relevant sections of the Act. Nothing in this paragraph affects USCIS' independent determination of its initial jurisdiction over asylum applications filed by UACs pursuant to section 208(b)(3)(C) of the Act.

(3) *Age-out procedures.* When an alien previously determined to have been a UAC is no longer a UAC because he or she turns 18 years old, relevant ORR and ICE procedures shall apply.

(e) *Transfer of minors who are not UACs from one facility to another.* (1) In the case of an influx or emergency, as defined in paragraph (b) of this section, DHS will transfer a minor who is not a UAC, and who does not meet the criteria for secure detention pursuant to paragraph (i)(1) of this section, to a licensed facility as defined in paragraph (b)(9) of this section, which is non-secure, as expeditiously as possible. Otherwise, to the extent consistent with law or court order, DHS will transfer such minor within three (3) days, if the minor was apprehended in a district in which a licensed program is located, or within five (5) days in all other cases.

(2) In the case of an emergency or influx, DHS will abide by written guidance detailing all reasonable efforts that it will take to transfer all minors who are not UACs as expeditiously as possible.

(f) *Transfer of UACs from DHS to HHS.* (1) All UACs apprehended by DHS, except those who are processed in accordance with 8 U.S.C. 1232(a)(2), will be transferred to ORR for care, custody, and placement in accordance with 6 U.S.C. 279 and 8 U.S.C. 1232.

(2) DHS will notify ORR within 48 hours upon the apprehension or discovery of a UAC or any claim or suspicion that an unaccompanied alien detained in DHS custody is under 18 years of age.

(3) Unless exceptional circumstances are present, DHS will transfer custody of a UAC as soon as practicable after receiving notification of an ORR placement, but no later than 72 hours after determining that the minor is a UAC per paragraph (d) of this section. In the case of exceptional circumstances, DHS will abide by

written guidance detailing the efforts that it will take to transfer all UACs as required by law.

(4) The following relate to the conditions of transfer of UACs with unrelated detained adults:

(i) UACs will not generally be transported with unrelated detained adults. A UAC will not be transported with an unrelated detained adult(s) unless the UAC is being transported from the place of apprehension to a DHS facility or if separate transportation is otherwise impractical or unavailable.

(ii) When separate transportation is impractical or unavailable, necessary precautions will be taken to ensure the UAC's safety, security, and well-being. If a UAC is transported with any unrelated detained adult(s), DHS will separate the UAC from the unrelated adult(s) to the extent operationally feasible and take necessary precautions for protection of the UAC's safety, security, and well-being.

(g) *DHS procedures in the apprehension and processing of minors or UACs*—(1) *Processing*—(i) *Notice of rights and request for disposition*. Every minor or UAC who enters DHS custody, including minors and UACs who request voluntary departure or request to withdraw their application for admission, will be issued a Form I-770, Notice of Rights and Request for Disposition, which will include a statement that the minor or UAC may make a telephone call to a parent, close relative, or friend. The notice shall be provided, read, or explained to the minor or UAC in a language and manner that he or she understands. In the event that a minor or UAC is no longer amenable to voluntary departure or to a withdrawal of an application for admission, the minor or UAC will be issued a new Form I-770 or the Form I-770 will be updated, as needed.

(ii) *Notice of Right to Judicial Review*. Every minor who is not a UAC who is transferred to or remains in a DHS detention facility will be provided with a Notice of Right to Judicial Review, which informs the minor of his or her right to seek judicial review in United States District Court with jurisdiction and venue over the matter if the minor believes that his or her detention does not comply with the terms of paragraph (i) of this section. The Notice shall be read and explained to the minor in a language and manner that he or she understands.

(iii) *Current list of counsel*. Every minor who is not a UAC who is transferred to or remains in a DHS detention facility will be provided the free legal service provider list, prepared pursuant to section 239(b)(2) of the Act.

(2) *DHS custodial care immediately following apprehension*. (i) Following the apprehension of a minor or UAC, DHS will process the minor or UAC as expeditiously as possible. Consistent with 6 CFR 115.114, minors and UACs shall be held in the least restrictive setting appropriate to the minor or UAC's age and special needs, provided that such setting is consistent with the need to protect the minor or UAC's well-being and that of others, as well as with any other laws, regulations, or legal requirements. DHS will hold minors and UACs in facilities that are safe and sanitary and that are consistent with DHS's concern for their particular vulnerability. Facilities will provide access to toilets and sinks, drinking water and food as appropriate, access to emergency medical assistance as needed, and adequate temperature and ventilation. DHS will provide adequate supervision and will provide contact with family members arrested with the minor or UAC in consideration of the safety and well-being of the minor or UAC, and operational feasibility. UACs generally will be held separately from unrelated adult detainees in accordance with 6 CFR 115.14(b) and 115.114(b). In the event that such separation is not immediately possible, UACs in facilities covered by 6 CFR 115.114 may be housed with an unrelated adult for no more than 24 hours except in the case of an emergency.

(ii) Consistent with the statutory requirements, DHS will transfer UACs to HHS in accordance with the procedures described in paragraph (f) of this section.

(h) *Detention of family units*. DHS's policy is to maintain family unity, including by detaining families together where appropriate and consistent with law and available resources. If DHS determines that detention of a family unit is required by law, or is otherwise appropriate, the family unit may be transferred to an FRC which is a licensed facility and non-secure.

(i) *Detention of minors who are not UACs in DHS custody*. In any case in which DHS does not release a minor who is not a UAC, said minor shall remain in DHS detention. Consistent with 6 CFR 115.14, minors shall be detained in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with the need to protect the minor's well-being and that of others, as well as with any other laws, regulations, or legal requirements. The minor shall be placed temporarily in a licensed facility, which will be non-secure, until such time as release can be effected or until the minor's

immigration proceedings are concluded, whichever occurs earlier. If immigration proceedings are concluded and result in a final order of removal, DHS will detain the minor for the purpose of removal. If immigration proceedings result in a grant of relief or protection from removal where both parties have waived appeal or the appeal period defined in 8 CFR 1003.38(b) has expired, DHS will release the minor.

(1) A minor who is not a UAC referenced under this paragraph (i)(1) may be held in or transferred to a suitable state or county juvenile detention facility, or a secure DHS detention facility, or DHS contracted facility having separate accommodations for minors, whenever the Field Office Director and the ICE supervisory or management personnel have probable cause to believe that the minor:

(i) Has been charged with, is chargeable with, or has been convicted of a crime or crimes, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act or acts, that fit within a pattern or practice of criminal activity;

(ii) Has been charged with, is chargeable with, or has been convicted of a crime or crimes, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act or acts, that involve violence against a person or the use or carrying of a weapon;

(iii) Has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in Federal or state government custody or while in the presence of an immigration officer;

(iv) Has engaged, while in the licensed facility, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed facility in which the minor has been placed and transfer to another facility is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed facility;

(v) Is determined to be an escape-risk pursuant to paragraph (b)(6) of this section; or

(vi) Must be held in a secure facility for his or her own safety.

(2) DHS will not place a minor who is not a UAC in a secure facility pursuant to paragraph (i)(1) if there are less restrictive alternatives that are available and appropriate in the circumstances, such as transfer to a facility which would provide intensive staff supervision and counseling services or another licensed facility. All determinations to place a minor in a



secure facility will be reviewed and approved by the ICE Juvenile Coordinator referenced in paragraph (o) of this section. Secure facilities shall permit attorney-client visits in accordance with applicable facility rules and regulations.

(3) Unless a secure facility is otherwise authorized pursuant to this section, ICE facilities used for the detention of minors who are not UACs shall be non-secure facilities.

(4) Non-secure, licensed ICE facilities to which minors who are not UACs are transferred pursuant to the procedures in paragraph (e) of this section shall abide by applicable family residential standards established by ICE. At a minimum, such standards shall include provisions or arrangements for the following services for each minor who is not a UAC in its care:

(i) Proper physical care and maintenance, including suitable living, accommodations, food and snacks, appropriate clothing, and personal grooming items;

(ii) Appropriate routine medical, mental health and dental care, family planning services, and emergency health care services, including a complete medical examination (including screening for infectious disease) within 48 hours of admission, excluding weekends and holidays, unless the minor was recently examined at another facility; appropriate immunizations in accordance with the U.S. Public Health Service (PHS), Centers for Disease Control and Prevention; administration of prescribed medication and special diets; appropriate mental health interventions when necessary;

(iii) An individualized needs assessment which includes:

(A) Various initial intake forms;

(B) Essential data relating to the identification and history of the minor and family;

(C) Identification of the minor's special needs including any specific problem(s) which appear to require immediate intervention;

(D) An educational assessment and plan;

(E) An assessment of family relationships and interaction with adults, peers and authority figures;

(F) A statement of religious preference and practice;

(G) An assessment of the minor's personal goals, strengths and weaknesses; and

(H) Identifying information regarding immediate family members, other relatives, godparents, or friends who may be residing in the United States and

may be able to assist in family reunification;

(iv) Educational services appropriate to the minor's level of development and communication skills in a structured classroom setting, Monday through Friday, which concentrates primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). The educational program should include subjects similar to those found in U.S. programs and include science, social studies, math, reading, writing, and physical education. The program design should be appropriate for the minor's estimated length of stay and can include the necessary skills appropriate for transition into a U.S. school district. The program should also include acculturation and adaptation services which include information regarding the development of social and interpersonal skills that contribute to those abilities as age appropriate;

(v) Appropriate reading materials in languages other than English for use during the minor's leisure time;

(vi) Activities according to a recreation and leisure time plan which shall include daily outdoor activity, weather permitting, at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (this should not include time spent watching television). Activities should be increased to a total of three hours on days when school is not in session;

(vii) At least one individual counseling session or mental health wellness interaction (if the minor does not want to participate in a counseling session) per week conducted by trained social work staff with the specific objectives of reviewing the minor's progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each minor;

(viii) Group counseling sessions at least twice a week. This is usually an informal process and takes place with all the minors present and can be held in conjunction with other structured activities. It is a time when new minors present in the facility are given the opportunity to get acquainted with the staff, other children, and the rules of the program. It is an open forum where everyone gets a chance to speak. Daily program management is discussed and decisions are made about recreational activities, etc. It is a time for staff and minors to discuss whatever is on their minds and to resolve problems;

(ix) Upon admission, a comprehensive orientation regarding program intent, services, rules (written

and verbal), expectations and the availability of legal assistance;

(x) Whenever possible, access to religious services of the minor's choice;

(xi) Visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation. The staff shall respect the minor's privacy while reasonably preventing the unauthorized release of the minor and preventing the transfer of contraband;

(xii) A reasonable right to privacy, which shall include the right to:

(A) Wear his or her own clothes, when available;

(B) Retain a private space in the residential facility for the storage of personal belongings;

(C) Talk privately on the phone, as permitted by applicable facility rules and regulations;

(D) Visit privately with guests, as permitted by applicable facility rules and regulations; and

(E) Receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband;

(xiii) When necessary, communication with adult relatives living in the United States and in foreign countries regarding legal issues related to the release and/or removal of the minor;

(xiv) Legal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the Government, the right to apply for asylum or to request voluntary departure;

(xv) Attorney-client visits in accordance with applicable facility rules and regulations;

(xvi) Service delivery is to be accomplished in a manner which is sensitive to the age, culture, native language, and the complex needs of each minor;

(xvii) Parents/legal guardians will be responsible for supervising their children and providing parental support in managing their children's behavior. Licensed facility rules and discipline standards shall be formulated with consideration for the range of ages and maturity in the program and shall be culturally sensitive to the needs of alien minors. DHS shall not subject minors to corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping. Any sanctions employed shall not adversely affect a minor's health, or physical or psychological well-being; or deny minors regular meals, sufficient sleep, exercise, medical care, correspondence privileges, or legal assistance;

(xviii) Licensed facilities will maintain and safeguard individual case records. Agencies and organizations will maintain a system of accountability which preserves the confidentiality of client information and protects the records from unauthorized use or disclosure;

(xix) Licensed facilities will maintain adequate records and make regular reports as required by DHS that permit DHS to monitor and enforce the regulations in this part and other requirements and standards as DHS may determine are in the best interests of the minors; and

(xx) Licensed facilities will maintain a grievance and complaint filing process for aliens housed therein and post information about the process in a common area of the facility. Aliens will be required to follow the proscribed process for filing formal and informal grievances against facility staff that comports with the ICE Family Residential Standards Grievance Procedures. Complaints regarding conditions of detention shall be filed under the procedures required by the DHS Office of the Inspector General or the DHS Office of Civil Rights and Civil Liberties. Staff is prohibited from retaliating against anyone who files, or on whose behalf is filed, a grievance or complaint. In the event of an emergency, a licensed, non-secure facility described in this paragraph (i) may transfer temporary physical custody of a minor prior to securing permission from DHS, but shall notify DHS of the transfer as soon as is practicable thereafter, but in all cases within 8 hours.

(j) *Release of minors who are not UACs from DHS custody.* (1) DHS will make and record prompt and continuous efforts on its part toward the release of the minor who is not a UAC.

(2) If a minor who is not a UAC is in expedited removal proceedings (including if he or she is awaiting a credible fear determination), or is subject to a final expedited removal order, custody is governed by § 235.3(b)(2)(iii) or (b)(4)(ii) of this chapter, as applicable.

(3) If a minor who is not a UAC is subject to pending removal proceedings under section 240 of the Act, DHS will consider whether to release the minor pursuant to section 212(d)(5) or section 236(a), and the implementing regulations in 8 CFR 212.5 and § 235.3, as applicable.

(4) The parole of minors who are not UACs who are detained pursuant to section 235(b)(1)(B)(ii) of the Act or § 235.3(c) of this chapter will generally serve an urgent humanitarian reason

warranting release on parole if DHS determines that detention is not required to secure the minor's timely appearance before DHS or the immigration court, or to ensure the minor's safety and well-being or the safety of others. In making this determination, DHS may consider aggregate and historical data, officer experience, statistical information, or any other probative information. The determination whether to parole a minor who is not a UAC is in the unreviewable discretion of DHS.

(5) If DHS determines to release a minor who is not a UAC during removal proceedings under section 240 of the Act, the following procedures shall apply:

(i) If a parent or legal guardian is available to provide care and physical custody, DHS will make prompt and continuous efforts to release the minor to that parent or legal guardian. Nothing in this paragraph (j)(5)(i) precludes the release of a minor who is not a UAC to an adult relative (brother, sister, aunt, uncle, or grandparent) who is not in detention and is available to provide care and physical custody. Release of a minor who is not a UAC to an adult relative other than a parent or legal guardian is within the unreviewable discretion of DHS.

(ii) Prior to releasing a minor who is not a UAC to an adult relative pursuant to paragraph (j)(5)(i) of this section, DHS will use all available reliable evidence to determine whether the relationship is bona fide. If no reliable evidence is available that confirms the relationship, DHS may continue to keep the minor who is not a UAC in custody or treat the minor as a UAC and transfer the UAC to HHS custody, as outlined in paragraph (f) of this section.

(iii) DHS shall assist without undue delay in making transportation arrangements to the DHS office nearest the location of the relative to whom a minor is to be released. DHS may, in its discretion, provide transportation to minors.

(iv) Nothing herein shall require DHS to release a minor to any person or agency whom DHS has reason to believe may harm or neglect the minor or fail to present him or her before DHS or the immigration courts when requested to do so.

(k) *Procedures upon transfer—(1) Possessions.* Whenever a minor or UAC is transferred from one ICE placement to another, or from an ICE placement to an ORR placement, he or she will be transferred with all possessions and legal papers; provided, however, that if the minor or UAC's possessions exceed the amount normally permitted by the

carrier in use, the possessions shall be shipped to the minor or UAC in a timely manner.

(2) *Notice to counsel.* A minor or UAC who is represented will not be transferred from one ICE placement to another, or from an ICE placement to an ORR placement, until notice is provided to his or her counsel, except in unusual and compelling circumstances, such as where the safety of the minor or UAC or others is threatened or the minor or UAC has been determined to be an escape-risk, or where counsel has waived such notice. In unusual and compelling circumstances, notice will be sent to counsel within 24 hours following the transfer.

(1) *Notice to parent of refusal of release or application for relief.* (1) A parent shall be notified of any of the following requests if the parent is present in the United States and can reasonably be contacted, unless such notification is otherwise prohibited by law or DHS determines that notification of the parent would pose a risk to the minor's safety or well-being:

(i) A minor or UAC in DHS custody refuses to be released to his or her parent; or

(ii) A minor or a UAC seeks release from DHS custody or seeks voluntary departure or a withdrawal of an application for admission, parole, or any form of relief from removal before DHS, and that the grant of such request or relief may effectively terminate some interest inherent in the parent-child relationship and/or the minor or UAC's rights and interests are adverse with those of the parent.

(2) Upon notification, the parent will be afforded an opportunity to present his or her views and assert his or her interest to DHS before a determination is made as to the merits of the request for relief.

(m) *Bond hearings.* Bond determinations made by DHS for minors who are in removal proceedings pursuant to section 240 of the Act and who are also in DHS custody may be reviewed by an immigration judge pursuant to 8 CFR part 1236 to the extent permitted by 8 CFR 1003.19. Minors in DHS custody who are not in section 240 proceedings are ineligible to seek review by an immigration judge of their DHS custody determinations.

(n) *Retaking custody of a previously released minor.* (1) In addition to the ability to make a UAC determination upon each encounter as set forth in paragraph (c) of this section, DHS may take a minor back into custody if there is a material change in circumstances indicating the minor is an escape-risk, a danger to the community, or has a final

order of removal. If the minor is accompanied, DHS shall place the minor in accordance with paragraphs (e) and (i) of this section. If the minor is a UAC, DHS shall transfer the minor into HHS custody in accordance with paragraph (e) of this section.

(2) DHS may take a minor back into custody if there is no longer a parent, legal guardian, or other adult relative (brother, sister, aunt, uncle, or grandparent) available to care for the minor. If the minor is a UAC, DHS will transfer custody to HHS as outlined in paragraph (e) of this section.

(3) Minors who are not UACs and who are taken back into DHS custody may request a custody redetermination hearing in accordance with paragraph (m) of this section and to the extent permitted by 8 CFR 1003.19.

(o) *Monitoring.* (1) CBP and ICE each shall identify a Juvenile Coordinator for the purpose of monitoring compliance with the terms of this section.

(2) In addition to the monitoring required by paragraph (o)(1) of this section, the Juvenile Coordinators shall collect and periodically examine relevant statistical information about UACs and minors who remain in CBP or ICE custody for longer than 72 hours. Such statistical information may include but not necessarily be limited to:

- (i) Biographical information;
- (ii) Dates of custody; and
- (iii) Placements, transfers, removals, or releases from custody, including the reasons for a particular placement.

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 45 CFR Chapter IV

■ For the reasons set forth in the preamble, chapter IV of title 45 of the Code of Federal Regulations is amended by adding part 410 to read as follows:

## PART 410—CARE AND PLACEMENT OF UNACCOMPANIED ALIEN CHILDREN

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

### Subpart A—Care and Placement of Unaccompanied Alien Children

#### § 410.100 Scope of this part.

This part governs those aspects of the care, custody, and placement of unaccompanied alien children (UACs)

agreed to in the settlement agreement reached in *Jenny Lisette Flores v. Janet Reno, Attorney General of the United States*, Case No. CV 85–4544–RJK (C.D. Cal. 1996). ORR operates the UAC program as authorized by section 462 of the Homeland Security Act of 2002, Public Law 107–296, 6 U.S.C. 279, and section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110–457, 8 U.S.C. 1232. This part does not govern or describe the entire program.

#### § 410.101 Definitions.

*DHS* means the Department of Homeland Security.

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

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

*Escape risk* means there is a serious risk that an unaccompanied alien child (UAC) will attempt to escape from custody.

*Influx* means a situation in which there are, at any given time, more than 130 minors or UACs eligible for placement in a licensed facility under this part or corresponding provisions of DHS regulations, including those who have been so placed or are awaiting such placement.

*Licensed program* means any program, agency, or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs UAC. A licensed program must meet the standards set forth in § 410.402. All homes and facilities operated by a licensed program, including facilities for special needs minors, are non-secure as required under State law. However, a facility for special needs minors may maintain that level of security permitted under State law which is necessary for the protection of a UAC or others in appropriate circumstances, e.g., cases in which a UAC has drug or alcohol problems or is mentally ill.

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

*Secure facility* means a State or county juvenile detention facility or a secure ORR detention facility, or a facility with an ORR contract or cooperative agreement having separate accommodations for minors. A secure facility does not need to meet the requirements of § 410.402, and is not defined as a “licensed program” or “shelter” under this part.

*Shelter* means a licensed program that meets the standards set forth in § 410.402.

*Special needs minor* means a UAC whose mental and/or physical condition requires special services and treatment by staff. A UAC may have special needs due to drug or alcohol abuse, serious emotional disturbance, mental illness, intellectual disability, or a physical condition or chronic illness that requires special services or treatment. A UAC who has suffered serious neglect or abuse may be considered a special needs minor if the UAC requires special services or treatment as a result of neglect or abuse.

*Sponsor*, also referred to as custodian, means an individual (or entity) to whom ORR releases a UAC out of ORR custody.

*Staff secure facility* means a facility that is operated by a program, agency or organization licensed by an appropriate State agency and that meets the standards for licensed programs set forth in § 410.402. A staff secure facility is designed for a UAC who requires close supervision but does not need placement in a secure facility. It provides 24-hour awake supervision, custody, care, and treatment. It maintains stricter security measures, such as intensive staff supervision, than a shelter in order to control problem behavior and to prevent escape. A staff secure facility may have a secure perimeter but is not equipped internally with major restraining construction or procedures typically associated with correctional facilities.

*Unaccompanied alien child (UAC)* means:

(1) An individual who: Has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom:

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

(2) When an alien previously determined to have been a UAC has reached the age of 18, when a parent or legal guardian in the United States is available to provide care and physical custody for such an alien, or when such alien has obtained lawful immigration

status, the alien is no longer a UAC. An alien who is no longer a UAC is not eligible to receive legal protections limited to UACs.

#### **§ 410.102 ORR care and placement of unaccompanied alien children.**

(a) ORR coordinates and implements the care and placement of UAC who are in ORR custody by reason of their immigration status.

(b) For all UACs in ORR custody, DHS and DOJ (Department of Justice) handle other matters, including immigration benefits and enforcement matters, as set forth in their respective statutes, regulations and other authorities.

(c) ORR shall hold UACs in facilities that are safe and sanitary and that are consistent with ORR’s concern for the particular vulnerability of minors.

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

#### **Subpart B—Determining the Placement of an Unaccompanied Alien Child**

##### **§ 410.200 Purpose of this subpart.**

This subpart sets forth what ORR considers when placing a UAC in a particular ORR facility, in accordance with the Flores settlement agreement.

##### **§ 410.201 Considerations generally applicable to the placement of an unaccompanied alien child.**

(a) ORR places each UAC in the least restrictive setting that is in the best interest of the child and appropriate to the UAC’s age and special needs, provided that such setting is consistent with its interests to ensure the UAC’s timely appearance before DHS and the immigration courts and to protect the UAC’s well-being and that of others.

(b) ORR separates UACs from delinquent offenders.

(c) ORR makes reasonable efforts to provide placements in those geographical areas where DHS apprehends the majority of UAC.

(d) Facilities where ORR places UACs will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if a UAC is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect UAC from others, and contact with family members who were arrested with the minor.

(e) If there is no appropriate licensed program immediately available for placement of a UAC pursuant to this subpart, and no one to whom ORR may release the UAC pursuant to subpart C of this part, the UAC may be placed in an ORR-contracted facility, having

separate accommodations for minors, or a State or county juvenile detention facility. In addition to the requirement that UACs shall be separated from delinquent offenders, every effort must be taken to ensure that the safety and well-being of the UAC detained in these facilities are satisfactorily provided for by the staff. ORR makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible.

(f) ORR makes and records the prompt and continuous efforts on its part toward family reunification. ORR continues such efforts at family reunification for as long as the minor is in ORR custody.

##### **§ 410.202 Placement of an unaccompanied alien child in a licensed program.**

ORR places UACs into a licensed program promptly after a UAC is transferred to ORR legal custody, except in the following circumstances:

(a) A UAC meeting the criteria for placement in a secure facility set forth in § 410.203;

(b) As otherwise required by any court decree or court-approved settlement; or,

(c) In the event of an emergency or influx of UACs into the United States, in which case ORR places the UAC as expeditiously as possible in accordance with § 410.209; or

(d) If a reasonable person would conclude that the UAC is an adult despite his or her claims to be a minor.

##### **§ 410.203 Criteria for placing an unaccompanied alien child in a secure facility.**

(a) Notwithstanding § 410.202, ORR may place a UAC in a secure facility if the UAC:

(1) Has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act, and where ORR deems those circumstances demonstrate that the UAC poses a danger to self or others. “Chargeable” means that ORR has probable cause to believe that the UAC has committed a specified offense. The provision in this paragraph (a)(1) does not apply to a UAC whose offense is:

(i) An isolated offense that was not within a pattern or practice of criminal activity and did not involve violence against a person or the use or carrying of a weapon; or

(ii) A petty offense, which is not considered grounds for stricter means of detention in any case;

(2) While in DHS or ORR’s custody or while in the presence of an immigration officer, has committed, or has made credible threats to commit, a violent or

malicious act (whether directed at himself/herself or others);

(3) Has engaged, while in a licensed program or staff secure facility, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program or staff secure facility in which he or she has been placed and removal is necessary to ensure the welfare of the UAC or others, as determined by the staff of the licensed program or staff secure facility (e.g., drug or alcohol abuse, stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR determines the UAC poses a danger to self or others based on such conduct;

(4) For purposes of placement in a secure residential treatment centers (RTC), if a licensed psychologist or psychiatrist determines that the UAC poses a risk of harm to self or others; or

(5) Is otherwise a danger to self or others.

(b) ORR Federal Field Specialists review and approve all placements of UAC in secure facilities consistent with legal requirements.

(c) ORR reviews, at least monthly, the placement of a UAC into a secure, staff secure, or RTC facility to determine whether a new level of care is more appropriate.

(d) Notwithstanding ORR's ability under the rules in this subpart to place UACs who are "otherwise a danger to self or others" in secure placements, the provision in this section does not abrogate any requirements to place UACs in the least restrictive setting appropriate to their age and special needs.

**§ 410.204 Considerations when determining whether an unaccompanied alien child is an escape risk.**

When determining whether a UAC is an escape risk, ORR considers, among other factors, whether:

(a) The UAC is currently under a final order of removal;

(b) The UAC's immigration history includes:

(1) A prior breach of a bond;

(2) A failure to appear before DHS or the immigration court;

(3) Evidence that the UAC is indebted to organized smugglers for his or her transport; or

(4) A voluntary departure or a previous removal from the United States pursuant to a final order of removal; and

(c) The UAC has previously absconded or attempted to abscond from state or Federal custody.

**§ 410.205 Applicability of § 410.203 for placement in a secure facility.**

ORR does not place a UAC in a secure facility pursuant to § 410.203 if less restrictive alternatives are available and appropriate under the circumstances. ORR may place a UAC in a staff secure facility or another licensed program as an alternative to a secure facility.

**§ 410.206 Information for unaccompanied alien children concerning the reasons for his or her placement in a secure or staff secure facility.**

Within a reasonable period of time, ORR provides each UAC placed or transferred to a secure or staff secure facility with a notice of the reasons for the placement in a language the UAC understands.

**§ 410.207 Custody of an unaccompanied alien child placed pursuant to this subpart.**

A UAC who is placed in a licensed program pursuant to this subpart remains in the custody of ORR, and may only be transferred or released under its authority. However, in the event of an emergency, a licensed program may transfer temporarily the physical placement of a UAC prior to securing permission from ORR, but must notify ORR of the transfer as soon as possible, but in all cases within eight hours of the transfer. Upon release to an approved sponsor, a UAC is no longer in the custody of ORR.

**§ 410.208 Special needs minors.**

ORR assesses each UAC to determine if he or she has special needs, and if so, places the UAC, whenever possible, in a licensed program in which ORR places unaccompanied alien children without special needs, but which provides services and treatment for such special needs.

**§ 410.209 Procedures during an emergency or influx.**

In the event of an emergency or influx that prevents the prompt placement of UAC in licensed programs, ORR makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible using the following procedures:

(a) ORR maintains an emergency placement list of at least 80 beds at programs licensed by an appropriate state agency that are potentially available to accept emergency placements.

(b) ORR implements its contingency plan on emergencies and influxes.

(c) Within one business day of the emergency or influx, ORR, if necessary, contacts the programs on the emergency placement list to determine available placements. To the extent practicable,

ORR will attempt to locate emergency placements in geographic areas where culturally and linguistically appropriate community services are available.

(d) In the event that the number of UAC needing placement exceeds the available appropriate placements on the emergency placement list, ORR works with governmental and nongovernmental organizations to locate additional placements through licensed programs, county social services departments, and foster family agencies.

(e) ORR maintains a list of UACs affected by the emergency or influx including each UAC's:

(1) Name;

(2) Date and country of birth;

(3) Date of placement in ORR's custody; and

(4) Place and date of current placement.

(f) Each year ORR reevaluates the number of regular placements needed for UAC to determine whether the number of regular placements should be adjusted to accommodate an increased or decreased number of UAC eligible for placement in licensed programs.

**Subpart C—Releasing an Unaccompanied Alien Child from ORR Custody**

**§ 410.300 Purpose of this subpart.**

This subpart covers the policies and procedures used to release, without unnecessary delay, a UAC from ORR custody to an approved sponsor.

**§ 410.301 Sponsors to whom ORR releases an unaccompanied alien child.**

(a) ORR releases a UAC to an approved sponsor without unnecessary delay, but may continue to retain custody of a UAC if ORR determines that continued custody is necessary to ensure the UAC's safety or the safety of others, or that continued custody is required to secure the UAC's timely appearance before DHS or the immigration courts.

(b) When ORR releases a UAC without unnecessary delay to an approved sponsor, it releases in the following order of preference:

(1) A parent;

(2) A legal guardian;

(3) An adult relative (brother, sister, aunt, uncle, or grandparent);

(4) An adult individual or entity designated by the parent or legal guardian as capable and willing to care for the UAC's well-being in:

(i) A declaration signed under penalty of perjury before an immigration or consular officer; or

(ii) Such other document that establishes to the satisfaction of ORR, in

its discretion, the affiant's parental relationship or guardianship;

(5) A licensed program willing to accept legal custody; or

(6) An adult individual or entity seeking custody, in the discretion of ORR, when it appears that there is no other likely alternative to long term custody, and family reunification does not appear to be a reasonable possibility.

**§ 410.302 Sponsor suitability assessment process requirements leading to release of an unaccompanied alien child from ORR custody to a sponsor.**

(a) The licensed program providing care for the UAC shall make and record the prompt and continuous efforts on its part towards family reunification and the release of the UAC pursuant to the provisions of this section.

(b) ORR requires a background check, including verification of identity and which may include verification of employment of the individuals offering support, prior to release.

(c) ORR also may require further suitability assessment, which may include interviews of members of the household, investigation of the living conditions in which the UAC would be placed and the standard of care he or she would receive, a home visit, a fingerprint-based background and criminal records check on the prospective sponsor and on adult residents of the prospective sponsor's household, and follow-up visits after release. Any such assessment also takes into consideration the wishes and concerns of the UAC.

(d) If the conditions identified in TVPRA at 8 U.S.C. 1232(c)(3)(B) are met, and require a home study, no release to a sponsor may occur in the absence of such a home study.

(e) The proposed sponsor must sign an affidavit of support and a custodial release agreement of the conditions of release. The custodial release agreement requires that the sponsor:

(1) Provide for the UAC's physical, mental, and financial well-being;

(2) Ensure the UAC's presence at all future proceedings before DHS and the immigration courts;

(3) Ensure the UAC reports for removal from the United States if so ordered;

(4) Notify ORR, DHS, and the Executive Office for Immigration Review of any change of address within five days following a move;

(5) Notify ORR and DHS at least five days prior to the sponsor's departure from the United States, whether the departure is voluntary or pursuant to a grant of voluntary departure or an order of removal;

(6) Notify ORR and DHS if dependency proceedings involving the UAC are initiated and also notify the dependency court of any immigration proceedings pending against the UAC;

(7) Receive written permission from ORR if the sponsor decides to transfer legal custody of the UAC to someone else. Also, in the event of an emergency (e.g., serious illness or destruction of the home), a sponsor may transfer temporary physical custody of the UAC prior to securing permission from ORR, but the sponsor must notify ORR as soon as possible and no later than 72 hours after the transfer; and

(8) Notify ORR and DHS as soon as possible and no later than 24 hours of learning that the UAC has disappeared, has been threatened, or has been contacted in any way by an individual or individuals believed to represent an immigrant smuggling syndicate or organized crime.

(f) ORR is not required to release a UAC to any person or agency it has reason to believe may harm or neglect the UAC or fail to present him or her before DHS or the immigration courts when requested to do so.

**Subpart D—Licensed Programs**

**§ 410.400 Purpose of this subpart.**

This subpart covers the standards that licensed programs must meet in keeping with the principles of treating UACs in custody with dignity, respect and special concern for their particular vulnerability.

**§ 410.401 Applicability of this subpart.**

This subpart applies to all licensed programs, regardless of whether they are providing care in shelters, staff secure facilities, residential treatment centers, or foster care and group home settings.

**§ 410.402 Minimum standards applicable to licensed programs.**

Licensed programs must:

(a) Be licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children;

(b) Comply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes;

(c) Provide or arrange for the following services for each UAC in care, including:

(1) Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items;

(2) Appropriate routine medical and dental care, family planning services, and emergency health care services, including a complete medical

examination (including screening for infectious disease) within 48 hours of admission, excluding weekends and holidays, unless the UAC was recently examined at another facility; appropriate immunizations in accordance with the U.S. Public Health Service (PHS), Center for Disease Control; administration of prescribed medication and special diets; appropriate mental health interventions when necessary;

(3) An individualized needs assessment that must include:

(i) Various initial intake forms;

(ii) Essential data relating to the identification and history of the UAC and family;

(iii) Identification of the UAC's special needs including any specific problems that appear to require immediate intervention;

(iv) An educational assessment and plan;

(v) An assessment of family relationships and interaction with adults, peers and authority figures;

(vi) A statement of religious preference and practice;

(vii) An assessment of the UAC's personal goals, strengths and weaknesses; and

(viii) Identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in family reunification;

(4) Educational services appropriate to the UAC's level of development and communication skills in a structured classroom setting, Monday through Friday, which concentrate primarily on the development of basic academic competencies and secondarily on English Language Training (ELT), including:

(i) Instruction and educational and other reading materials in such languages as needed;

(ii) Instruction in basic academic areas that include science, social studies, math, reading, writing, and physical education; and

(iii) The provision to a UAC of appropriate reading materials in languages other than English for use during the UAC's leisure time;

(5) Activities according to a recreation and leisure time plan that include daily outdoor activity, weather permitting, at least one hour per day of large muscle activity and one hour per day of structured leisure time activities, which do not include time spent watching television. Activities must be increased to at least three hours on days when school is not in session;

(6) At least one individual counseling session per week conducted by trained social work staff with the specific objectives of reviewing the UAC's progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each UAC;

(7) Group counseling sessions at least twice a week. This is usually an informal process and takes place with all the UACs present. This is a time when new UACs are given the opportunity to get acquainted with the staff, other children, and the rules of the program. It is an open forum where everyone gets a chance to speak. Daily program management is discussed and decisions are made about recreational and other program activities, etc. This is a time for staff and UACs to discuss whatever is on their minds and to resolve problems;

(8) Acculturation and adaptation services that include information regarding the development of social and inter-personal skills that contribute to those abilities necessary to live independently and responsibly;

(9) Upon admission, a comprehensive orientation regarding program intent, services, rules (provided in writing and verbally), expectations and the availability of legal assistance;

(10) Whenever possible, access to religious services of the UAC's choice;

(11) Visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation. The staff must respect the UAC's privacy while reasonably preventing the unauthorized release of the UAC;

(12) A reasonable right to privacy, which must include the right to:

(i) Wear his or her own clothes, when available;

(ii) Retain a private space in the residential facility, group or foster home for the storage of personal belongings;

(iii) Talk privately on the phone, as permitted by the house rules and regulations;

(iv) Visit privately with guests, as permitted by the house rules and regulations; and

(v) Receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband;

(13) Family reunification services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for release of the UAC; and

(14) Legal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the

government, the right to a removal hearing before an immigration judge, the right to apply for asylum or to request voluntary departure in lieu of removal;

(d) Deliver services in a manner that is sensitive to the age, culture, native language and the complex needs of each UAC;

(e) Formulate program rules and discipline standards with consideration for the range of ages and maturity in the program and that are culturally sensitive to the needs of each UAC to ensure the following:

(1) UAC must not be subjected to corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping; And

(2) Any sanctions employed must not:

(i) Adversely affect either a UAC's health, or physical or psychological well-being; or

(ii) Deny UAC regular meals, sufficient sleep, exercise, medical care, correspondence privileges, or legal assistance;

(f) Develop a comprehensive and realistic individual plan for the care of each UAC in accordance with the UAC's needs as determined by the individualized needs assessment.

Individual plans must be implemented and closely coordinated through an operative case management system;

(g) Develop, maintain and safeguard individual client case records. Licensed programs must develop a system of accountability that preserves the confidentiality of client information and protects the records from unauthorized use or disclosure; and

(h) Maintain adequate records and make regular reports as required by ORR that permit ORR to monitor and enforce the regulations in this part and other requirements and standards as ORR may determine are in the interests of the UAC.

**§ 410.403 Ensuring that licensed programs are providing services as required by the regulations in this part.**

ORR monitors compliance with the terms of the regulations in this part.

**Subpart E—Transportation of an Unaccompanied Alien Child**

**§ 410.500 Conducting transportation for an unaccompanied alien child in ORR's custody.**

(a) ORR does not transport UACs with adult detainees.

(b) When ORR plans to release a UAC from its custody under the family reunification provisions at §§ 410.201 and 410.302, ORR assists without undue delay in making transportation arrangements. ORR may, in its

discretion, provide transportation to UAC.

**Subpart F—Transfer of an Unaccompanied Alien Child**

**§ 410.600 Principles applicable to transfer of an unaccompanied alien child.**

(a) ORR transfers a UAC from one placement to another with all of his or her possessions and legal papers.

(b) If the UAC's possessions exceed the amount permitted normally by the carrier in use, the possessions are shipped to the UAC in a timely manner.

(c) ORR does not transfer a UAC who is represented by counsel without advance notice to his or her legal counsel. However, ORR may provide notice to counsel within 24 hours of the transfer in unusual and compelling circumstances such as:

(1) Where the safety of the UAC or others has been threatened;

(2) The UAC has been determined to be an escape risk consistent with § 410.204; or

(3) Where counsel has waived such notice.

**Subpart G—Age Determinations**

**§ 410.700 Conducting age determinations.**

Procedures for determining the age of an individual must take into account the totality of the circumstances and evidence, including the non-exclusive use of radiographs, to determine the age of the individual. ORR may require an individual in ORR's custody to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age. If ORR subsequently determines that such an individual is a UAC, he or she will be treated in accordance with ORR's UAC regulations in this part for all purposes.

**§ 410.701 Treatment of an individual who appears to be an adult.**

If, the procedures in § 410.700 would result in a reasonable person concluding that an individual is an adult, despite his or her claim to be under the age of 18, ORR must treat such person as an adult for all purposes.

**Subpart H—Unaccompanied Alien Children's Objections to ORR Determinations**

**§ 410.800 Purpose of this subpart.**

This subpart concerns UACs' objections to ORR placement.

**§ 410.801 Procedures.**

(a) For UACs not placed in licensed programs, ORR shall—within a

reasonable period of time—provide a notice of the reasons for housing the minor in secure or staff secure facility. Such notice shall be in a language the UAC understands.

(b) ORR shall promptly provide each UAC not released with:

(1) A list of free legal services providers compiled by ORR and that is provided to UAC as part of a Legal Resource Guide for UAC (unless previously given to the UAC); and

(2) The following explanation of the right of potential review:

“ORR usually houses persons under the age of 18 in an open setting, such as a foster or group home, and not in detention facilities. If you believe that you have not been properly placed or that you have been treated improperly, you may call a lawyer to seek assistance. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form.”

#### **§ 410.810 Hearings.**

(a) A UAC may request that an independent hearing officer employed by HHS determine, through a written decision, whether the UAC would present a risk of danger to the community or risk of flight if released.

(1) Requests under this section may be made by the UAC, his or her legal representative, or his or her parent or legal guardian.

(2) UACs placed in secure or staff secure facilities will receive a notice of the procedures under this section and may use a form provided to them to make a written request for a hearing under this section.

(b) In hearings conducted under this section, HHS bears the initial burden of production to support its determination that a UAC would pose a danger or flight risk if discharged from HHS' care and custody. The burden of persuasion is then on the UAC to show that he or she will not be a danger to the community or flight risk if released, using a preponderance of the evidence standard.

(c) In hearings under this section, the UAC may be represented by a person of his or her choosing, at no cost to the government. The UAC may present oral and written evidence to the hearing officer and may appear by video or teleconference. ORR may also choose to present evidence either in writing, or by appearing in person, or by video or teleconference.

(d) A hearing officer's decision that a UAC would not be a danger to the community (or risk of flight) if released is binding upon ORR, unless the provisions of paragraph (e) of this section apply.

(e) A hearing officer's decision under this section may be appealed to the Assistant Secretary of the Administration for Children and Families. Any such appeal request shall be in writing, and must be received within 30 days of the hearing officer decision. The Assistant Secretary will reverse a hearing officer decision only if there is a clear error of fact, or if the decision includes an error of law. Appeal to the Assistant Secretary shall not affect a stay of the hearing officer's decision to release the UAC, unless within five business days of such hearing officer decision, the Assistant

Secretary issues a decision in writing that release of the UAC would result in a significant danger to the community. Such a stay decision must include a description of behaviors of the UAC while in care and/or documented criminal or juvenile behavior records from the UAC demonstrating that the UAC would present a danger to community if released.

(f) Decisions under this section are final and binding on the Department, and a UAC may only seek another hearing under this section if the UAC can demonstrate a material change in circumstances. Similarly, ORR may request the hearing officer to make a new determination under this section if at least one month has passed since the original decision, and ORR can show that a material change in circumstances means the UAC should no longer be released.

(g) This section cannot be used to determine whether a UAC has a suitable sponsor, and neither the hearing officer nor the Assistant Secretary may order the UAC released.

(h) This section may not be invoked to determine the UAC's placement while in HHS custody. Nor may this section be invoked to determine level of custody for the UAC.

**Kevin K. McAleenan,**

*Acting Secretary, Department of Homeland Security.*

**Alex M. Azar II,**

*Secretary, Department of Health and Human Services.*

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