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Re: Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, Docket ID: ACF-2015-0002

The American Civil Liberties Union (ACLU) submits these comments in response to the Interim Final Rule published in the Federal Register on December 24, 2014, proposing standards and procedures to prevent, detect, and respond to sexual abuse and sexual harassment involving unaccompanied children (“UCs”) in the Department of Health and Human Services Office of Refugee Resettlement (“ORR”) care-provider facilities. We do not address here the entirety of the rule, which seeks to achieve the important goal of increasing the safety of the vulnerable children in ORR care. Rather, we limit the scope of our comments to two specific issues: the proposal in the interim rule’s Section-by-Section discussion for working with contractors or grantees with religious or moral objections to providing certain services, and the interim rule’s scope of coverage and compatibility with overlapping child protection laws.

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

Because of the ACLU’s profound respect for and demonstrated commitment to both religious liberty and reproductive rights, as well as the rights of immigrants and individuals in detention, the ACLU is particularly well positioned to comment on these portions of the rule.

I. Refusals to Provide or Refer for Necessary Health Services

Subpart J of the interim rule addresses medical and mental health care for UCs in ORR custody, including access to emergency health services under Section 411.92 and ongoing medical and mental health care under Section 411.93. We greatly appreciate ORR's commitment "to providing resources and referrals for the full range of legally permissible services to UCs who need them, helping to facilitate access to these options, and doing so in a timely fashion and in a manner that respects the diverse religious and cultural backgrounds of UCs," as set forth in the Section-by-Section discussion of Subpart J.¹ However, that discussion also offers three ways for ORR to award contracts or grants to organizations even if they refuse to provide or refer for specific services ORR is obligated to provide to—and are needed by—UCs. In the context of this rule, these loopholes would be invoked by organizations opposed to providing referrals for contraception and abortion, among other vital services mandated by Subsection J of the rule.² By creating loopholes that allow organizations to refuse to provide services or information to UCs in government-funded programs based on religious objections, these options permit organizations to impose their religious views on UCs. The loopholes will lead to discrimination and cause serious harm to the well-being of the UCs. These options should be removed from the final rule.

Many of the children ORR serves have escaped rampant violence and sexual abuse in their home countries and have been abused sexually, physically, and emotionally during their journeys to the U.S.³ This history of abuse makes some even more vulnerable to further abuse after they arrive in the United States.⁴ Consequently, UCs must have immediate access to comprehensive health care, including reproductive health care services, when they reach ORR-funded facilities. Immediate access to care is particularly crucial for services like emergency contraception, which is only effective if taken within a few days of unprotected intercourse. The consequence of refusals to provide such care to the children in ORR's care, of course, is pregnancy and birth. Indeed, the government is obligated to provide these services to these children—without

¹ Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77, 767 (Dec. 24, 2014) (to be codified at 45 C.F.R. § 411).

² See, e.g., *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 476-77 (D. Mass. 2012), *vacated as moot sub nom.*, *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).

³ See, e.g., WOMEN'S REFUGEE COMM'N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA, (Oct. 2012), *available at*

https://womensrefugeecommission.org/component/docman/?task=doc_download&gid=844; CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM, (Feb. 2014), *available at* http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf; CTR. FOR AM. PROGRESS, FOSTERING SAFETY: HOW THE U.S. GOVERNMENT CAN PROTECT LGBT IMMIGRANT CHILDREN, (Sept. 2014), *available at* <https://www.americanprogress.org/issues/lgbt/report/2014/09/30/98059/fostering-safety/>.

⁴ See, e.g., ALLEN J. BECK, PAIGE M. HARRISON & PAUL GUERINO, U.S. DEP'T. OF JUSTICE BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09, (Jan. 2010), *available at* <http://www.bjs.gov/content/pub/pdf/svjfry09.pdf>; ALLEN J. BECK, ET. AL., U.S. DEP'T. OF JUSTICE BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012 (June 2013), *available at* <http://www.bjs.gov/content/pub/pdf/svjfry12.pdf>.

exception—under the terms of a 1997 settlement agreement.⁵ Any arrangement by which contractors or grantees can refuse to provide services will frustrate this obligation.⁶

Options (1) and (2) propose that organizations that refuse to provide or refer for certain services should serve only as sub-grantees or as members of a consortium, so that other organizations that will do so provide UCs with those particular services. However, UCs often receive nearly all services from one source, and the staff at the facility in which they are placed essentially serve as their lifeline to the rest of the world.⁷ Although on paper these two options may appear to provide some level of protection for the UCs, in the real world, most UCs who are placed with a provider that refuses services will have no access to services. These children are isolated and usually have limited English skills, and the facility staff is their only source of information about health care options. If their primary provider does not inform them of their options and facilitate their access to services, they simply will not be able to get them. Indeed, for many UCs, the proposed options will curtail access to critical care almost as surely as an outright ban. Moreover, even if these options were workable, they have the effect of stigmatizing UCs who seek care by sending the message that their primary caretakers disapprove of the services they need. That disapproval, moreover, thwarts ORR's goal of respecting the dignity of UCs.⁸ Thus, while on paper these arrangements may appear to provide some level of protection, on the ground they are of little help to isolated UCs with few if any outside contacts.

The third option ORR proposes is even more problematic—it would require a grantee to notify a federal agency if a UC in its care requires services to which it objects. The federal agency would then either provide the services or transfer the UC to a grantee who will. Even on paper, it is clear that this process cannot be implemented in a way that ensures that all necessary services are made accessible to UCs in a timely and unimpeded manner that is respectful and non-stigmatizing. It would mean that UCs, during what is a difficult time, are handed off to a federal employee who is a total stranger. This would almost certainly result in unacceptable delay—especially problematic when it comes to services like emergency contraception, which is only effective if taken within a few days of unprotected intercourse. And again, this option comes

⁵ *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997).

⁶ We understand that some ORR contractors and grantees already operate under agreements with these loopholes that allow them to refuse to provide or refer for certain services mandated by Subsection J of the rule. As we explain, these loopholes have devastating impacts on the UCs. And regardless of ORR's loophole policy, it remains under an obligation to do everything possible to protect UCs in its care. Therefore, for these existing contracts or grants, ORR must (1) require providers to notify ORR of any objections they have to providing or referring for services; (2) require every team of contractors or grantees to disclose whether any provider organizations on the team have refused or intend to refuse to provide or refer for certain services; (3) when organizations have or will refuse, implement a plan to guarantee that all UCs served by those providers have access to the full range of legally permissible services, which will require active cooperation from providers to facilitate access to services that they refuse to provide themselves; and (4) closely monitor the arrangement. ORR must do everything in its power to ensure that these UCs have timely, unimpeded access to all legally permissible services in a manner that is respectful and non-stigmatizing; these procedures will, to some extent, protect UCs' access to all services to which they are entitled.

⁷ See WOMEN'S REFUGEE COMM'N, *What Happens When Unaccompanied Children Arrive at the U.S. Border*, June 2014, available at <http://www.womensrefugeecommission.org/component/content/article/155-new-program-pages/migrant-rights-and-justice/2065-what-happens-when-unaccompanied-children-arrive-at-the-u-s-border>.

⁸ See generally Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER 177, 188-91 (2015) (explaining that refusing to provide services perpetuates inequality and causes dignitary harm to those discriminated against).

with the stigma of the UC being sent away for this care and this care alone. This option must be rejected.

Providing exemptions to organizations that refuse to provide or refer for necessary services to UCs is by no means required. In general, exemptions for religion like this should lift an actual burden on religious exercise.⁹ However, there is no such burden here, because organizations that voluntarily enter into a contract or grant to provide specific services cannot claim to be burdened by those obligations to serve beneficiaries.¹⁰ Further, these grantees and contractors remain unfettered in their religious exercise outside the scope of the federally funded program.¹¹ But, even assuming a burden, exemptions that create a significant, harmful, discriminatory impact on beneficiaries, like this one does, are impermissible and must be barred.¹²

Moreover, allowing government-funded organizations to refuse to provide necessary services, raises constitutional concerns. Giving contractors and grantees the right to refuse to provide services amounts to giving them “the right to use taxpayer money to impose [their beliefs] on others.”¹³ An exemption like this, which discriminates against or otherwise harms others, has the impermissible effect of advancing religion.¹⁴ In order to avoid a constitutional violation, ORR should not provide exemptions.

⁹ E.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 613 n.59 (O’Connor, J., concurring) (“[A]n accommodation of religion, in order to be permitted under the Establishment Clause, must lift ‘an identifiable burden on the exercise of religion.’”) (quoting *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 57 n.45 (1985) (noting that when the challenged statute was passed, “there was no governmental practice impeding students from silently praying for one minute at the beginning of each school day; thus there was no need to ‘accommodate’ or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause”) (citations omitted)).

¹⁰ See *Locke v. Davey*, 540 U.S. 712 (2004) (distinguishing between coercive actions that substantially burden free exercise and a condition on funding that was “a relatively minor burden”); see generally IRA C. LUPU & ROBERT W. TUTTLE, ROUNDTABLE ON RELIGION & SOCIAL WELFARE POLICY, THE STATE OF THE LAW – 2008 33-37 (2008), available at http://www.rockinst.org/pdf/faith-based_social_services/2008-12-state_of_the_law.pdf. Cf. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2986 (2010) (student group seeking government subsidy “may exclude any person for any reason if it forgoes the benefits.”); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 803 (9th Cir. 2011). Nor does an obligation to provide certain services under a grant or contract amount to requiring the funded organization to adopt a particular belief. See *USAID v. Alliance for Open Soc’y Int’l*, 133 S. Ct. 2321, 2330-31 (2013).

¹¹ See generally *Alliance for Open Soc’y Int’l*, 133 S. Ct. at 2329-30. Nor is it a burden, that because the organizations do not get taxpayer funds, they perceive their “‘practice of religious beliefs [is] more expensive.’” *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) (quoting *Braunfeld v. Brown*, 366 U.S. 599 605 (1961) (plurality opinion)).

¹² See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (Kennedy, J. concurring and controlling opinion) (no accommodation should “unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling”); *id.* at 2760 (religious accommodation would have “precisely zero” impact on third parties); see also *Holt v. Hobbs*, 135 S. Ct. 853, 867 (Ginsburg, J. concurring) (accommodation “would not detrimentally affect others”). Moreover, the government has a compelling interest in fulfilling its legal obligations to provide these vulnerable children with vital medical care, including reproductive health care.

¹³ *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 n.26 (D. Mass. 2012), vacated as moot sub nom., *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013); cf. *U.S. v. Lee*, 455 U.S. 252, 261 (1982) (rejecting requested exemption from paying social security taxes that would “operate[] to impose the employer’s religious faith on employees”).

¹⁴ E.g., *Estate of Thornton v. Caldor*, 472 U.S. 703, 709-10 (1985); see also, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2004).

Furthermore, ORR must avoid the discrimination that comes with providing these exemptions. The harm discussed above falls almost entirely upon girls who are the primary recipients of most, if not all, of the services to which some grantees may object. Many of the services to which grantees are likely to object, such as emergency contraception and abortion are among the most essential medical services for girls who have survived sexual assault.¹⁵ Simply put, this is discrimination and the government may not engage in discrimination or provide funding to private organizations that do so.¹⁶

II. Abuse Reporting Consistent with Existing Child Protection Laws and Broad Goals of PREA

Existing child protection laws establish affirmative abuse reporting obligations for federal employees and contractors. The Victims of Child Abuse Act of 1990 (“VCAA”); 42 U.S.C. § 13031 and implementing regulations require covered professionals¹⁷ working in a federally operated or contracted facility—including detention facility employees, social workers, and counselors—who learn of “facts that give reason to suspect that a child has suffered an incident of child abuse”¹⁸ to report those facts to state child protective services and/or the Federal Bureau of Investigation (“FBI”).¹⁹ There is no temporal or geographic limitation on this requirement—covered professionals must report suspected abuse allegations, regardless of when or where the abuse occurred.²⁰ Failure to timely report suspected child abuse is a criminal offense.²¹ These

¹⁵ See INT’L RESCUE COMM., IRC FIELD VISIT TO TEXAS AND ARIZONA: KEY FINDINGS & RECOMMENDATIONS FOR POLICY MAKERS (Oct. 2014), *available at* <http://www.rescue.org/sites/default/files/resource-file/Unaccompanied%20children%20in%20the%20U.S.%20IRC%20report.pdf>; Douglas S. Bishop, MD & Rina Ramirez, MD, *Caring for Unaccompanied Minors from Central America*, AM. FAM. PHYSICIAN, 90(9):656-9 (Nov 1, 2014).

¹⁶ *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989); *Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974).

¹⁷ 42 U.S.C. § 13031(b) enumerates categories of mandated reporters. Covered professions include medical professionals and “persons performing a healing role” (42 U.S.C. § 13031(b)(1)); mental health professionals (42 U.S.C. § 13031(b)(2)); “[s]ocial workers, licensed or unlicensed marriage, family, and individual counselors” (42 U.S.C. § 13031(b)(3)); “[t]eachers, teacher’s aides or assistants, school counselors and guidance personnel, school officials, and school administrators (42 U.S.C. § 13031(b)(4)); “[c]hild care workers and administrators (42 U.S.C. § 13031(b)(5)); “[l]aw enforcement personnel, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees,” 42 U.S.C. § 13031(b)(6); and foster parents. (42 U.S.C. § 13031(b)(7)). The law also requires dissemination of a standard abuse reporting form to all mandated reporter groups (42 U.S.C. § 13031(e)), and periodic training of specified professionals (42 U.S.C. § 13031(h)).

¹⁸ 42 U.S.C. § 13031(c)(1) defines “child abuse” as “the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.” The term “negligent treatment” means “the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child.” 42 U.S.C. § 13031(c)(7). As noted *infra*, allegations of inadequate food, clothing, shelter and medical care, among other harms in federal detention facilities – from which the vast majority of children in ORR custody have been transferred—are longstanding and well-documented. *See, e.g.,* Letter from ACLU et al. to Megan H. Mack, Officer for Civil Rights & Civil Liberties, U.S. Dep’t of Homeland Sec. and John Roth, Inspector Gen., U.S. Dep’t of Homeland Sec. 2 (June 11, 2014), *available at* <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>.

¹⁹ 42 U.S.C. § 13031(d); 28 C.F.R. § 81.2–81.3.

²⁰ *See* U.S. Dep’t of Justice, Office of Legal Counsel, Assistant Att’y Gen.’s Mem. for the Gen. Counsel, U.S. Dep’t of Veteran’s Affairs 5 (May 29, 2012), *available at* <http://www.justice.gov/sites/default/files/olc/opinions/2012/05/31/aag-reporting-abuse.pdf> (“... section 13031 is

provisions and their requirements extend to all federal personnel, including ORR and its contractors, who may be subject to additional obligations under applicable State child protection laws.²²

The Introduction to the interim rule acknowledges that “[a] number of UCs in ORR care have been sexually abused prior to entering ORR custody.” This includes children abused in their home countries or in transit to the United States.²³ It can also include children assaulted in the custody of U.S. Customs and Border Protection (“CBP”), where allegations of abuse and neglect are longstanding and well-documented.²⁴ The Department of Homeland Security (“DHS”) has acknowledged “recurring problems”²⁵ and oversight failures that jeopardize the safety and well-

best read to impose a reporting obligation on all persons who, while engaged in the covered professions and activities on federal lands or in federal facilities, learn of facts that give reason to suspect that child abuse has occurred, *regardless of where the abuse might have occurred or where the suspected victim is cared for or resides.*”) (emphasis added).

²¹ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 209, 120 Stat. 587, 615; 18 U.S.C. § 2258.

²² U.S. Dep’t. of Justice, Office of Justice Programs, Office for Victims of Crime, Att’y Gen. Guidelines for Victim and Witness Assistance 18 (May 2005), available at http://www.justice.gov/archive/olp/ag_guidelines.pdf (“All Federal law enforcement personnel have obligations under State and Federal law to report suspected child abuse”).

²³ See Erin Siegal McIntyre & Deborah Bonello, *Is Rape the Price to Pay for Migrant Women Chasing the American Dream?*, FUSION (Sept. 10, 2014), <http://fusion.net/story/17321/is-rape-the-price-to-pay-for-migrant-women-chasing-the-american-dream/>; CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEFENSE, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM (Feb. 2014), available at http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf; AMNESTY INT’L, INVISIBLE VICTIMS: MIGRANTS ON THE MOVE IN MEXICO (2010), available at <http://www.amnesty.org/en/library/asset/AMR41/014/2010/en/8459f0ac-03ce-4302-8bd2-3305bdae9cde/amr410142010eng.pdf>.

²⁴ See Letter from ACLU et al. to Megan H. Mack, Officer for Civil Rights & Civil Liberties, U.S. Dep’t of Homeland Sec. and John Roth, Inspector Gen., U.S. Dep’t of Homeland Sec. 2 (June 11, 2014), available at <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>; NAT’L IMMIGRANT JUSTICE CTR., UNACCOMPANIED IMMIGRANT CHILDREN: A POLICY BRIEF 3 (2014), available at <https://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Policy%20Brief%20-%20Unaccompanied%20Immigrant%20Children%20FINAL%20Winter%202014.pdf>; WOMEN’S REFUGEE COMM’N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 22 (2012), available at http://womensrefugeecommission.org/component/docman/doc_download/844-forced-from-home-the-lost-boys-and-girls-of-central-america; FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, SEEKING PROTECTION, ENDURING PROSECUTION: THE TREATMENT AND ABUSE OF UNACCOMPANIED UNDOCUMENTED CHILDREN IN SHORT-TERM IMMIGRATION DETENTION 7-14 (2009), available at <http://www.firrp.org/media/BPAbuseReport.pdf>; WOMEN’S REFUGEE COMM’N, HALFWAY HOME: UNACCOMPANIED IMMIGRANT CHILDREN IN IMMIGRATION CUSTODY 9-11 (2008), available at <http://www.firrp.org/media/BPAbuseReport.pdf>. These reports alone account for over 1,600 documented allegations of child abuse and/or neglect in CBP custody since 2008, and yet every indication is that they represent only a fraction of total incidents. See *American Civil Liberties Foundation of Arizona v. Dept. of Homeland Sec.*, Case No. 2:15-cv-00247 (D. Ariz. filed Feb. 11, 2015).

²⁵ Press Release, U.S. Dep’t of Homeland Sec., Office of Inspector Gen., *Improvements Continue at Detention Centers* (Oct. 6, 2014), available at http://www.oig.dhs.gov/assets/pr/2014/oigpr_100214.pdf; see also Interview by Steve Inskeep, NAT’L PUB. RADIO, with R. Gil Kerlikowske, Comm’r, U.S. Customs and Border Prot. (July 18, 2014), available at <http://www.npr.org/2014/07/18/332286063/transcript-commissioner-kerlikowske-full-interview>. (In response to unaccompanied children’s complaints of abuse and neglect in CBP custody that he characterized as “being put in excessively uncomfortable rooms, being left with the lights on all night so that they couldn’t sleep, being denied medical care,” CBP Commissioner Gil Kerlikowske acknowledged those complaints were “absolutely spot on.”).

being of unaccompanied children in CBP detention facilities.²⁶ Still, CBP detention facilities lack binding detention standards,²⁷ and DHS has declined to promulgate PREA standards specific to unaccompanied children.²⁸

The vast majority of children in ORR custody are transferred directly from CBP custody, and ORR providers have documented—and reported—many allegations of abuse and neglect of children in those facilities.²⁹ Numerous confirmed instances of assault by CBP officials in recent years, including sexual assault of minors, have drawn widespread condemnation.³⁰ Indeed, it was in large part due to the inability of then-INS to protect children from harm that responsibility for the care of unaccompanied children was transferred to ORR,³¹ following years of civil rights litigation and the historic *Flores* settlement.³²

²⁶ Mem. to U.S. Dep’t of Homeland Sec. Sec’y Jeh C. Johnson from U.S. Dep’t of Homeland Sec. Inspector Gen. John Roth on Oversight of Unaccompanied Alien Children 2-3 (July 30, 2014), *available at* http://www.oig.dhs.gov/assets/Mgmt/2014/Over_Un_Ali_Chil.pdf (noting CBP’s system for documenting compliance with guidelines for detaining unaccompanied children is “unreliable due to frequent system outages which have resulted in inconsistent reporting. As a result, [it] is not a reliable tool for CBP to provide increased accountability for [children’s] safety and well-being during all phases of CBP’s custody process.”); *see also* U.S. DEP’T OF JUSTICE OFFICE OF INSPECTOR GEN., REPORT NUMBER I-2001-009: UNACCOMPANIED JUVENILES IN INS CUSTODY (Sept. 28, 2001), *available at* <http://www.justice.gov/oig/reports/INS/e0109/> (“[D]eficiencies in the handling of juveniles continue to exist in some INS districts, Border Patrol sectors, and headquarters that could have potentially serious consequences for the well-being of the juveniles.”).

²⁷ *See Bunikyte ex rel. Bunikiene v. Chertoff*, 2007 WL 1074070 at *2 (W.D.Tex. 2007) (“[T]he provisions of this settlement agreement, entered over ten years ago, were never intended to be permanent authority, much less the *only* binding authority setting standards for the detention of minor aliens. The *Flores* Settlement was intended as a stopgap measure until the United States could promulgate reasonable, binding standards for the detention of minor [sic] in immigration custody Despite the passage of just over a decade, neither DHS nor Congress has yet promulgated binding rules regarding standards for the detention of minors.”).

²⁸ Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities; 79 Fed. Reg. 13, 115, (Mar. 7, 2014) (to be codified at 6 C.F.R. pt. 115), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/html/2014-04675.htm>.

²⁹ A series of ORR Special Incident Reports from March 2011-March 2013, made public last year, contain dozens of allegations of abuse and neglect by immigration officials, the vast majority involving U.S. Border Patrol. In some cases, it appears ORR shelter workers may have been inconsistent in reporting allegations to child protective services. *See also* Jessica Bakeman, *New York Quietly Expands Role in Caring for Immigrant Children*, CAPITAL NEW YORK (Oct. 20, 2014), <http://www.capitalnewyork.com/article/albany/2014/10/8554559/new-york-quietly-expands-role-caring-immigrant-children> (“When the children arrive at New York-area airports from the federal facilities, they often require extensive medical care for broken bones that healed improperly or illnesses such as appendicitis and pneumonia, nonprofit officials said . . . ‘Some of them have not eaten for long periods of time,’ said Henry Ackermann, chief development officer at [ORR subcontracted] Abbott House . . . ‘They come to us malnourished. They come to us sometimes with unset broken arms or legs, with bronchial or respiratory issues.’”).

³⁰ *See, e.g.,* Melissa del Bosque, *Border Patrol Agent’s Assault of Three Women Shakes Border Community*, TEXAS OBSERVER (Mar. 21, 2014), <http://www.texasobserver.org/border-patrol-agents-assault-three-women-shakes-border-community/>; *see also* *Border Agent Seen Punching Teen Went Unpunished*, AP (Oct. 2, 2014), <http://www.usatoday.com/story/news/nation/2014/10/02/border-agent-teen/16618647/>.

³¹ 6 U.S.C. § 279(a); *see also* WOMEN’S COMM’N FOR REFUGEE WOMEN AND CHILDREN, PRISON GUARD OR PARENT? INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN (May 2002), *available at* <http://www.refworld.org/docid/49ae53f32.html>; HUMAN RIGHTS WATCH, DETAINED AND DEPRIVED OF RIGHTS: CHILDREN IN THE CUSTODY OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE (Dec. 1998), *available at* <http://www.hrw.org/reports/1998/12/01/detained-and-deprived-rights>; AMNESTY INT’L, UNITED STATES OF AMERICA: HUMAN RIGHTS CONCERNS IN BORDER REGION WITH MEXICO (1998), *available at* <http://www.amnesty.org/en/library/asset/AMR51/003/1998/en/b6fa13de-e821-11dd-9deb-2b812946e43c/amr510031998en.pdf>; HUMAN RIGHTS WATCH, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED

The interim rule provides many important protections to enhance the safety and well-being of unaccompanied children in ORR custody. However, to ensure the rules are consistent with regard to existing child abuse reporting laws and the zero tolerance goals of PREA, as well as ORR's mandate to consider the child's best interests,³³ and to ensure the detection of and appropriate response to child sexual abuse some key revisions are necessary. Concerns about the selected subparts of the interim rule and the ACLU's recommendations follow below.

Subpart A - Section 411.10

Subpart A of the interim rule addresses coverage of ORR care provider facilities. Section 411.10 Part (d) provides:

For the purposes of this part, the terms related to sexual abuse and sexual harassment refer specifically to the sexual abuse or sexual harassment of a UC that occurs at an ORR care provider facility while in ORR care and custody. Incidents of past sexual abuse or sexual harassment or sexual abuse or sexual harassment that occurs in any other context other than in ORR care and custody are not within the scope of this regulation.

Part (d) conflicts with ORR providers' affirmative child abuse reporting obligations under established law. As noted, the VCAA requires covered professionals to report allegations of abuse—including abuse that occurs outside of the facilities in which it is reported—to specified state and/or federal authorities.³⁴ The proposed interim rule is at odds with these requirements. At a minimum, the limitation suggested by Part (d) invites confusion with existing legal obligations, potentially subjecting ORR providers to criminal liability under 18 U.S.C. § 2258 if they fail to report facts that give reason to suspect that a child has suffered abuse outside of ORR custody.³⁵

Part (d) also undermines PREA's zero tolerance approach to sexual assault, and the rule's stated intention "to prevent, detect, and respond to sexual abuse and sexual harassment involving unaccompanied children." Notably, the Department of Justice ("DOJ") final rule specifically directs facility personnel on how to respond to abuse alleged to have occurred at other

IMMIGRANT CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE (April 1997), available at <http://www.hrw.org/sites/default/files/reports/us974.pdf>.

³² See *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

³³ 6 U.S.C. § 279.

³⁴ See Mem. from U.S. Dep't of Justice, Office of Legal Counsel, Assistant Att'y Gen's to the Gen. Counsel, U.S. Dep't of Veteran's Affairs 7 (May 29, 2012), available at <http://www.justice.gov/sites/default/files/olc/opinions/2012/05/31/aag-reporting-abuse.pdf> (noting presumption that "Congress intended to require the reporting of abuse *discovered* by covered professionals in the course of their covered activities on all federal lands and in all federal facilities, not simply abuse that occurs on the lands and in the facilities where children are cared for or reside.")

³⁵ Interim rule Section 411.31(a)(8) requires training on "Procedures for reporting knowledge or suspicion of sexual abuse and sexual harassment as well as how to comply with relevant laws related to mandatory reporting." If Part (d) exempts from coverage sexual abuse arising outside of the care provider facility, which other child protection laws do not, care providers are likely to have difficulty discerning "how to comply with relevant laws related to mandatory reporting."

facilities.³⁶ As the Department of Justice has recognized, PREA calls for national standards on, in addition to specifically enumerated topics, “such other matters as may reasonably be related to the detection, prevention, reduction, and punishment of prison rape,”³⁷ which provides “a broad scope of authority to combat sexual abuse in confinement facilities.”³⁸ ORR’s rules should explicitly embrace that authority to better protect and support the children in its care, consistent with its institutional purpose.

Finally, restricting coverage to exclude outside incidents of abuse from reporting requirements would create a significant gap in the government’s response to sexual abuse of unaccompanied children, especially considering frequent allegations of abuse and neglect in CBP detention facilities and the inability of DHS’s dysfunctional oversight system to respond.³⁹ DHS already fails to account for unaccompanied children under its PREA regulations, despite their unique vulnerabilities and based in large part on its reasoning that ORR is primarily responsible for their care.⁴⁰ In declining to issue PREA regulations specific to unaccompanied children, DHS stated:

“With respect to juveniles detained outside of family units, as noted above, unaccompanied alien children are generally placed with ORR almost immediately; ORR is responsible for making decisions related to the care and custody of such children in their charge. For the 72-hour intervening period up to which DHS may generally maintain custody, concerns about abuse should be alleviated by the strong requirements in both subparts that generally prohibit juveniles from being held with adult detainees in non-familial situations.”⁴¹

³⁶ 28 C.F.R. 115.363 (a) “Upon receiving an allegation that a resident was sexually abused while confined at another facility, the head of the facility that received the allegation shall notify the head of the facility or appropriate office of the agency where the alleged abuse occurred *and shall also notify the appropriate investigative agency.*” (emphasis added.).

³⁷ 42 U.S.C. 15606(e)(2)(M).

³⁸ U.S. DEP’T OF JUSTICE, NATIONAL STANDARDS TO PREVENT, DETECT, AND RESPOND TO PRISON RAPE, 16 (Mar. 16, 2012), *available at* http://ojp.gov/programs/pdfs/prea_final_rule.pdf; 28 C.F.R. Part 115.

³⁹ See Damien Cave, *Complaints of Abuse by Border Agents Often Ignored, Records Show*, N.Y. TIMES (May 5, 2014), http://www.nytimes.com/2014/05/06/us/complaints-of-abuse-by-border-agents-often-ignored-records-show.html?_r=2 (97 percent of the 809 abuse complaints filed against Border Patrol agents between January 2009 and January 2012 resulted in the classification “no action taken.”); see also Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, POLITICO (Nov./Dec. 2014), http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220.html#.VOZRW_nF8ud (“In Obama’s first year, CBP and DHS leadership even ordered the agency to change its definition of ‘corruption’ to downplay the number of total incidents.”); Andrew Becker, *Border Agency’s Former Watchdog Says Officials Impeded His Efforts*, WASH. POST (Aug. 16, 2014), http://www.washingtonpost.com/politics/border-agencys-former-watchdog-says-officials-impeded-his-efforts/2014/08/16/ce143288-2304-11e4-8593-da634b334390_story.html (former head of CBP Internal Affairs describing CBP as an agency “rife with coverups and corruption” where officials have “distorted facts to try to hide any missteps.”); Anne Werner, *Border Patrol Killings Face Renewed Scrutiny*, CBS NEWS (Aug. 18, 2014), <http://www.cbsnews.com/news/investigating-unresolved-deaths-on-the-border/>; Carrie Johnson, *Former Border Protection Insider Alleges Corruption, Distortion in Agency*, NPR (Aug. 28, 2014), <http://www.npr.org/2014/08/28/343748572/former-border-protection-insider-alleges-corruption-distortion-in-agency>.

⁴⁰ Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities; 79 Fed. Reg. 13, 115, (Mar. 7, 2014) (to be codified at 6 C.F.R. pt. 115), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/html/2014-04675.htm>.

⁴¹ *Id.*

The agency's assumptions that children are "generally" placed with ORR "almost immediately" and are "generally" not held with adults are highly questionable, as many of the human rights reports cited herein and ORR's own experience confirm. Regardless, with DHS deferring responsibility for unaccompanied children under PREA to ORR, it is critical that ORR's rule not create a situation wherein neither DHS nor ORR responds to the needs of children who have suffered sexual abuse in CBP custody.

For all of these reasons, we urge ORR to remove the proposed language in Part (d) and to replace it with the following:

For the purposes of this part, unless otherwise provided, the terms related to sexual abuse and sexual harassment refer to sexual abuse or sexual harassment of a UC that is reported while a UC is in ORR care and custody, including sexual abuse or sexual harassment that occurs at an ORR provider facility, as well as incidents of past sexual abuse or sexual harassment, or sexual abuse or sexual harassment that occurs outside of ORR care and custody.

Unaccompanied children who have been sexually assaulted need access to multiple avenues of reporting and appropriate medical and support services. To the extent any requirements related to oversight of investigation or record keeping do not logically apply to instances of sexual abuse that occur outside of ORR custody, the agency can specify exemptions where appropriate; the baseline, however, should be to respond to the needs of all children who have experienced sexual abuse, regardless of where it occurs, consistent with existing law, PREA's intent, and ORR's established role as care provider to a particularly vulnerable population.

Subpart A - Section 411.22

Section 411.22 is directed at ensuring proper investigation of allegations and appropriate agency oversight. In light of the applicable reporting obligations under existing child protection laws, noted above, several provisions in Section 411.22 related to the role of ORR care providers, state child protection agencies, and federal law enforcement agencies require clarification. For example, Part (a) provides that abuse allegations will be immediately referred to "all appropriate investigating authorities, including Child Protective Services, the State or local licensing agency, and law enforcement." As in Section 411.10, the proposed language risks confusing the obligations of ORR care providers under existing law. Specifically, 28 C.F.R. § 81.2 requires that abuse reports are made "to the local law enforcement agency or local child protective services agency that has jurisdiction to investigate reports of child abuse...provided that such agencies, if non-federal, enter into formal written agreements to do so with the Attorney General, her delegate, or a federal agency with jurisdiction for the area or facility in question." If non-federal agencies do not enter into formal written agreements to investigate, 28 C.F.R. § 81.3 designates the Federal Bureau of Investigation as the agency to receive and investigate reports of child abuse made pursuant to 42 U.S.C. 13031 "until such time as another agency qualifies as a designated agency under § 81.2." The proposed rule's imprecise list of "all appropriate investigating authorities" should be clarified to specify the agencies to which abuse reports must be directed, consistent with the VCAA and its implementing regulations.

Similarly, Part (b) requires providers to “maintain or attempt to enter into a written memorandum of understanding or other agreement specific to investigations of sexual abuse and sexual harassment with the law enforcement agency, designated State or local Child Protective Services, and/or the State or local licensing agencies...as appropriate.” This language appears to be consistent with 28 C.F.R. § 81.2, but omits reference to that regulation’s requirement that allegations be referred to the FBI when no written agreement with state or local child protective agencies exists. Parts (d) and (e), which provide for referrals to the Department of Justice for further investigation “in accordance with its policies and procedures and any memoranda of understanding,” also fails to specify under what circumstances that would happen. These Section 411.22 provisions should be clarified to be consistent with 28 C.F.R. § 81.2–81.3.

Finally, because victims may qualify for legal relief on the basis of a sexual assault, including U Visa certification, Section 411.22 should include provisions to ensure that unaccompanied children are placed in direct contact with a legal service provider who can evaluate and explain eligibility for relief. Care providers should be directed to assist as necessary, including working with local law enforcement and providing U visa eligible children with a Form I-918, Supplement B.

Subpart D- Sections 411.31 & Section 411.33

Subpart D contains provisions for facility staff training (Section 411.31) and unaccompanied child education (Section 411.33). Care provider facilities are directed to train all employees who may have contact with unaccompanied children on several enumerated provisions for fulfilling their responsibilities under PREA. Each care provider facility must also ensure that children are informed of the care provider facility’s “zero tolerance policies for all forms of sexual abuse and sexual harassment in an age and culturally appropriate fashion and in accordance with § 411.15,” through education on multiple enumerated topics.

For the reasons already stated, the training and educational standards should not be limited to detecting and reporting abuse that arises at the facility. Many of the enumerated requirements under Sections 411.31 and 411.33—while critical for detecting abuse arising in ORR facilities—are forward-looking in nature,⁴² and do not adequately account for the fact that significant numbers of unaccompanied children will have suffered past abuse, including sexual abuse. We therefore recommend the addition of enumerated topics under Sections 411.31 and 411.33 to address prior forms of abuse arising outside of ORR custody. Alternatively, or in addition, existing provisions should be amended as follows (recommended additions are underlined):

Section 411.31(a)(2) The right of UCs and staff to be free from sexual abuse and sexual harassment and from retaliation for reporting sexual abuse and sexual harassment, regardless of where it occurred.

⁴² For example, Section 411.31(a)(4), “Recognition of situations where abuse may occur;” Section 411.31(a)(5), “Recognition of physical, behavioral, and emotional signs of sexual abuse and methods of preventing and responding to such occurrences;” and Section 411.31(a)(6), “How to avoid inappropriate relationships with UCs.”

Section 411.31(a)(1) An explanation of the UC's right to be free from sexual abuse and sexual harassment as well as the UC's right to be free from retaliation for reporting such incidents, regardless of where it occurred.

Section 411.31 (a)(2) Definitions and examples of UC-on-UC sexual abuse, staff-on-UC sexual abuse, previous incidents of sexual abuse and/or sexual abuse arising in other facilities, coercive sexual activity, appropriate and inappropriate relationships, and sexual harassment.

In order to fully prevent, detect, and respond to sexual abuse and sexual harassment involving unaccompanied children in ORR's care provider facilities, and to comply with and avoid sanction under existing federal child protection laws, it is critical that staff be aware of their obligation to report and respond to allegations of abuse in prior settings, and that children be encouraged to report such incidences of abuse.

Subpart F - 411.52

Subpart F addresses reporting requirements. Section 411.51(d) provides, “All allegations or knowledge of sexual abuse and sexual harassment by staff or UCs must be immediately reported to the State or local licensing agency, the State or local Child Protective Services agency, State or local law enforcement, and to ORR according to ORR's policies and procedures.” Again, this language is inconsistent with 28 C.F.R. § 81.3, which designates the Federal Bureau of Investigation as the agency to receive and investigate reports of child abuse in the event state or local agencies have not entered into formal written agreements to be designated to investigate reports of child abuse. Additionally, for consistency, the reporting requirements under Subpart F should include reference to the abuse reporting form required by 42 U.S.C. § 13031(e), which mandated reporters, including ORR care provider facilities, are required to use under the VCAA.

Finally, Subpart F should require additional reporting requirements for abuses that occurred in outside facilities, particularly CBP detention facilities. In light of the many deficiencies and abuses associated with CBP detention and the particular vulnerability of unaccompanied children to abuse in federal custody, ORR care providers should document allegations of CBP abuse and ensure they are reported not only to each designated law enforcement agencies, but also to CBP Internal Affairs and the DHS Office of Inspector General.

III. Conclusion

Many of the children in ORR custody have experienced serious trauma, and ORR has a legal obligation to provide them with timely, unimpeded access to the health care they need in a manner that is respectful and non-stigmatizing. In the final rule, ORR should reject the notion that contractors or grantees receiving government funds can shirk their responsibilities to provide services to the UCs in their care by striking the workaround language in the section-by-section discussion of Subpart J. These changes will help ORR to fulfill its important obligations to the children it serves.

ORR should not limit coverage solely to abuse incidents arising at ORR facilities because doing so would deprive many unaccompanied children who have been sexually assaulted access to critical services and safety measures. A rule that forecloses reporting of any manner of child sexual abuse is inconsistent with existing child protection laws and the broad aims of the statute, and would deny necessary protection to a particularly vulnerable population to which ORR is legally obligated to provide care.

HHS has stated, “Sexual violence and abuse are an assault on human dignity and have devastating, lifelong mental and physical effects on an individual. HHS is committed to an absolute zero tolerance policy against sexual abuse and sexual harassment in its care provider facilities and seeks to ensure the safety and security of all UCs in its care.”⁴³ We applaud this goal and encourage the agency to implement the full range of available protections to accomplish it.

Sincerely,



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⁴³ Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77, 768 (Dec. 24, 2014) (to be codified at 45 C.F.R. pt.411).