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FAIR is a nonprofit public interest organization working to end illegal immigration and to set levels of legal immigration that are consistent with the national interest.



FEDERATION FOR AMERICAN IMMIGRATION REFORM

December 4, 2023

Office of Refugee Resettlement
Administration for Children and Families
U.S. Department of Health and Human Services

RE: RIN 0970-AC93, The Unaccompanied Children Program Foundational Rule

The Federation for American Immigration Reform (FAIR) respectfully submits the following public comments to the Department of Health and Human Services (HHS) in response to the Department's Notice of Proposed Rulemaking (NPRM), as published in the Federal Register on October 4, 2023.

FAIR is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. Our organization examines trends and effects, educates the public on the impacts of sustained high-volume immigration, and advocates for sensible solutions that enhance America's environmental, societal, and economic interests today, and into the future.

FAIR has over three million members and supporters of all racial, ethnic, and religious backgrounds, and across the political spectrum. The organization was founded in 1979 and is headquartered in Washington, D.C.

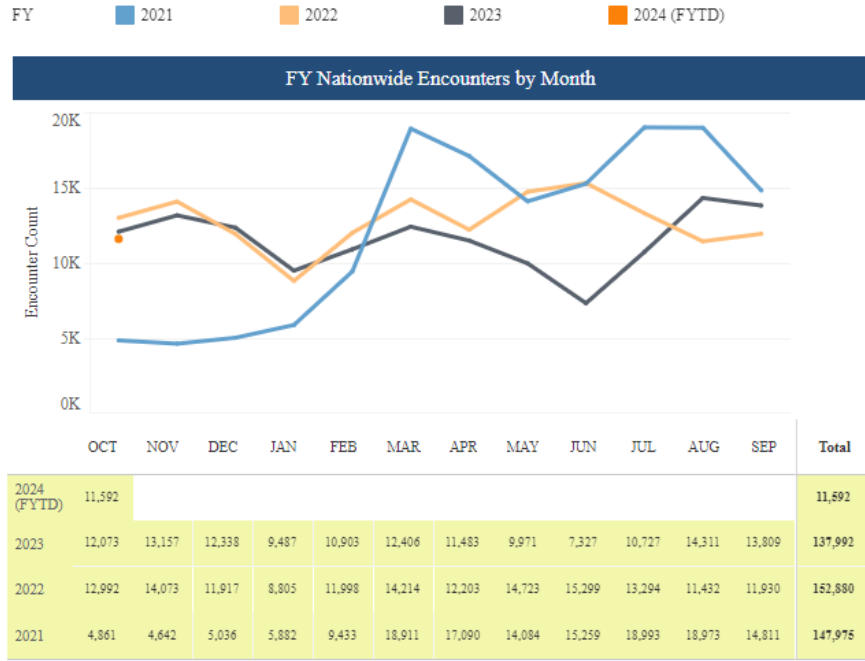
I. Background

Over the last three years, the Biden Administration has purposefully instituted one bad policy after another to dismantle our nation's border security and promote its open-borders agenda. One of the most tragic results of today's unprecedented border crisis is its toll on children and families.

The Biden border crisis has led to a dramatic spike in the number of unaccompanied alien children (UACs) arriving at our southern border



since January 2021. During each month of the Trump Administration, an average of 3,966 UACs were apprehended by Border Patrol between ports of entry. By contrast, under President Biden, the number of UACs encountered at the border has skyrocketed to more than four times the total of Fiscal Year (FY) 2020. From FY21-FY23, nearly 440,000 UACs were encountered by Customs and Border Protection (CBP).¹



The Trafficking Victims Protection Reauthorization Act (TVPRA), which was cosponsored by then-Senator Joe Biden, lays out the procedure for handling UACs once encountered at the border. If the child is from Canada or Mexico, they are screened and quickly returned to their home countries unless they are a victim of trafficking or have an asylum claim. However, if the UAC is from a noncontiguous country, CBP must turn over the UAC to the Office of Refugee Resettlement (ORR) within 72 hours after initial screening. ORR then has 20 days to detain the UAC under the dangerously flawed Flores Settlement.²

The process to release unaccompanied alien children is expedited compared to that of a single adult coming over the border. It did not take long for the Mexican cartels and migrants to figure out that sending minors across the border alone all but guaranteed their quick release from federal custody. Under current policy, migrant parents are emboldened to send their children on the dangerous journey to the border under the care of cartels, who often exploit and harm them along the way. Open-borders policies embraced by the Biden

¹ [Nationwide Encounters | U.S. Customs and Border Protection \(cbp.gov\)](#)

² [Grand Jury Finds Biden Policies Facilitate Abuse of Children | FAIRUS.org](#)

Administration are contributing to a boom in the cartels' human trafficking and smuggling schemes.

In addition to encouraging minors to take the dangerous journey to the border, the Biden Administration has made no concerted effort to ensure the safety of UACs once released from federal custody to sponsors in the United States. In fact, a preliminary report issued by a Florida grand jury on March 29, 2023, exposed how the Administration is aiding and abetting the trafficking of UACs into the United States.

Not only did the report find that the government was waiving background checks to release unaccompanied alien children quickly, it also found that ORR often did not know where the children were going. According to the grand jury, ORR lost track of at least 20,000 UACs. Since January 2021, approximately 165,000 unaccompanied alien children were given to someone who was not their parent or legal guardian, 90,000 were turned over to someone who claimed to be a family member, and 30,000 were handed over to sponsors they did not previously know.³

To make matters worse, a New York Times report⁴ released earlier this year revealed that the Department of Homeland Security (DHS), and the Department of Health and Human Services (HHS) have lost track of roughly 85,000 unaccompanied alien children post-release.⁵ It is highly likely that many of these children were trafficked for cheap labor, sex, and other exploitative reasons.

In response to reports of widespread abuse of UACs, the director of ORR's Administration for Children and Families (ACF), Robin Dunn Marcos, was called to testify before Congress in April 2023. At a hearing before the House Oversight and Accountability Committee, Ms. Marcos was asked about the report that her agency has lost contact with 85,000 UACs. Marcos replied that she did not know the precise number of UACs who have disappeared from her agency's radar screen, adding that ACF's procedure is to make three phone calls to the numbers provided by the sponsors.

There's also an inherent lack of willingness by HHS to exert any oversight of these children once released. Part of the problem is that ORR exhibits a "dual personality" when it comes to taking responsibility for the children it has placed.

In an [internal audit](#), titled "Update on Efforts to Mitigate Child Labor Exploitation and Internal Audit on Placement Process Used to Transfer Custody of Unaccompanied

³ [8437d6e2-1c46-4575-bd21-47de83302c61 \(flcourts.gov\)](#)

⁴ <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>

⁵ [Secretary Mayorkas: Betraying the American People | Federation for American Immigration Reform \(fairus.org\)](#)

Children to Vetted Sponsors,” ORR reiterates that the agency’s “custodial responsibility ends when a child is released from ORR care.”⁶ The agency claims it does not have the legal authority to care for or monitor children once they are released to a sponsor. Nor has the agency ever asked for it. However, as noted in the report, “ORR is required by the [Trafficking Victims Protection Reauthorization Act] to provide follow-up services to unaccompanied children.” The law indeed requires ORR to conduct home studies in certain cases and states that the agency “may provide follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.” So, while it claims it cannot monitor children upon release, the agency touts the post-release services it provides to the children and their sponsors beyond what the law requires, including access to health and mental health care, school enrollment, and legal services.

The Administration’s policy regarding the care, and release of UACs has failed on many accounts. Unfortunately, the Unaccompanied Children Program Foundational Rule would advance more of the same policies, and promote the mass processing and release of UACs rather than prioritizing their safety and security.

While FAIR agrees with efforts to have the government regulate this space and getting out from under an activist judge’s settlement agreement that dictates policy in contradiction of the intent of the law, FAIR has several concerns with the NPRM. Below are some of the issues where we seek to provide input, and encourage the Department to reconsider its approach to better ensure the safety and security of unaccompanied alien children once released by HHS.

II. Subpart C—Releasing an Unaccompanied Child from ORR Custody

Unwillingness to Collect Immigration Status of Sponsors

Subpart C of the NPRM focuses on ORR's policies and procedures regarding release of an unaccompanied child from ORR custody to a sponsor. The biggest error in this rule is the refusal by HHS to collect immigration information on sponsors, including for law enforcement purposes. Specifically, the NPRM states,

ORR would not disqualify potential sponsors based solely on their immigration status. In addition, ORR proposes that it shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes. ORR will not share any immigration status information relating to potential sponsors with

⁶ <https://www.acf.hhs.gov/sites/default/files/documents/orr/update-on-efforts-to-mitigate-child-labor-exploitation-internal-audit-placement-process.pdf>

any law enforcement or immigration related entity at any time. To the extent ORR does collect information on the immigration status of a potential sponsor, it would be only for the purposes of evaluating the potential sponsor's ability to provide care for the child (*e.g.*, whether there is a plan in place to care for the child if the potential sponsor is undocumented and detained).

HHS claims it will not approve a release of a UAC to someone that may harm the child or would hinder the UAC's ability to comply with immigration proceedings, which is commendable. However, if a sponsor is an illegal alien him or herself, what makes ORR think that the sponsor would encourage a UAC to comply with immigration proceedings that could lead to removal from the country? Isn't it likely that an illegal alien who sponsors an unaccompanied child is also allowing, even encouraging, the child to work in the country illegally? The immigration status should be an important part of vetting sponsors to ensure UAC safety and compliance with immigration proceedings.

Release of Unaccompanied Children to Strangers

The rule does nothing to prevent unaccompanied alien children from being released to strangers and potential criminals, traffickers, and abusers. Subpart C of the NPRM describes sponsors to whom ORR may release an unaccompanied alien child. The rule lays out potential sponsors in order of preference, starting with parents and legal guardians. It then prioritizes other adult relatives. Further, if no familial relatives are able and willing, then ORR would potentially release to strangers. The rule states that a child could be released "to 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 release to family members does not appear to be a reasonable possibility." This could include sponsors who have sponsored other children, or individuals who treat the children more as a commodity than family.

FAIR recommends that ORR only release children to parents or legal guardians to ensure they are protected from criminals and perpetrators. Further, FAIR recommends that ORR explain how the agency will verify family members of UACs without DNA testing.

Release of Unaccompanied Children Without Doing a Home Study

According to adoption experts, home studies are a requirement for all adoptions that take place in the United States, and those who wish to foster children must also complete a home study.⁷ Home studies are a critical part of these processes to ensure children are placed in safe homes and not placed in dangerous settings.

⁷ Adoption and Surrogacy Choices of Colorado, <https://www.adoptionchoices.org/the-benefits-of-an-adoption-home-study/>

Under the law, HHS is required to do a home study in certain situations but are not precluded from conducting them in other instances. Specifically, 8 U.S.C. 1232(c)(3)(B) states:

Before placing the child with an individual, the Secretary of Health and Human Services shall determine whether a home study is first necessary. A home study shall be conducted for a child who is a victim of a severe form of trafficking in persons, a special needs child with a disability (as defined in section 12102 of title 42), a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence.

The NPRM explains that it will conduct home studies where the law requires but then limits home studies to those designated under existing HHS policy – that is 1) before releasing any child to a non-relative sponsor who is seeking to sponsor multiple children, or who has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children; and 2) before releasing any child who is 12 years old or younger to a non-relative sponsor. The NPRM could go further in requiring home studies and should consider other scenarios. In fact, the government, in the NPRM, does not discuss why it cannot do home studies in more cases, if not all cases. The rule does not discuss other home studies it considered to be required, beyond the two discretionary instances stated above. FAIR strongly recommends that ORR mandates home studies in all cases, at least and especially when being placed with anyone but a family member. FAIR also recommends that the agency conduct wellbeing follow-up calls in all instances, including when released to family members and legal guardians.

Taxpayer Funded Services

According to HHS budget in brief for FY2024, ORR was seeking to obligate \$510 million “to support continuing efforts to expand the scope of post-release services and the number of children who receive them.”⁸ The budget proposal also requested \$360 million for legal services and \$175 million to expand the number of children who receive direct legal representation.

⁸ <https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2024-congressional-justification.pdf>

According to [8 U.S.C. 1232\(c\)\(3\)\(B\)](#), HHS must conduct follow-up services, during the pendency of removal proceedings in certain situations. However, the law does not describe the services to be provided nor does it require the provision of services outside of situations where a child is subject to a home study. Through this rule and in practice today, ORR is utilizing millions in taxpayer money for services rather than stopping the surge of unaccompanied alien children or overseeing their placements. The funding priorities of ORR also seem to be misplaced, and ORR should reconsider how they are using finite resources and whether some post-release services should be eliminated in order to use the funding for other useful and critical needs (such as technology, home studies, oversight, fraud and abuse prevention, etc.).

The rule states, “ORR believes that providing necessary services after an unaccompanied child's release from ORR care is essential to promote the child's safety and well-being.” The rule also lists the types of services that would be available. It reads:

Specifically, ORR proposes to codify the availability of PRS to support unaccompanied children and sponsors in accessing services in the following areas: placement and stability; immigration proceedings; guardianship; legal services; education; medical services; individual mental health services; family stabilization and counseling; substance use; gang prevention; education about employment laws and workers' rights; and other specialized services based on need and at the request of unaccompanied children. In addition, ORR believes that PRS should specifically include service areas such as: assisting in school enrollment, including connecting unaccompanied children and sponsors to educational programs for students with disabilities where appropriate; ensuring access to family reunification and medical support services, including support and counseling for the family and mental health counseling; supporting sponsors in obtaining necessary medical records and necessary personal documentation; and ensuring that sponsors of unaccompanied children with medical needs receive support in accessing appropriate medical care.

FAIR is concerned that other vulnerable children (including those found to be abused, neglected or abandoned) in the United States may not be afforded similar taxpayer funded services that unaccompanied alien children are currently receiving or would receive under the NPRM. HHS should provide info on how post-release services offered to UACs compare to those offered to children in the U.S. foster care system.

Additionally, FAIR is concerned that taxpayer funds are being used to provide legal representation to people who are in the country illegally, even if they are children. The TVPRA makes it clear that access to legal counsel must be consistent with section 292 of the Immigration and Nationality Act (INA). The law states that HHS should, to the greatest extent possible and consistent with section 292 of the INA, ensure that unaccompanied

alien children have counsel to represent them in legal proceedings and to protect them against mistreatment, trafficking and exploitation. However, this does not mean that taxpayers should be footing the bill. The law states that “HHS shall make every effort to utilize the services of pro-bono counsel who agree to provide representation to such children without charge.”

The FY23 funding bill provides \$29 million for the Justice Department's Legal Orientation Program (LOP), which empowers nongovernmental organizations (NGOs) to coach large groups of detained aliens on immigration court proceedings. Additionally, program participant organizations often blur the line between providing basic information about the process and providing legal advice.

FAIR does not believe that the rule is consistent with INA section 292 and that HHS should better explain to the public how it utilizes funds to provide access to legal representation.

III. Subpart H---Age Determinations

The TVPRA requires HHS, in consultation with DSH, to devise age determination procedures for aliens without lawful status. The NPRM, through Subpart H, provides guidelines for determining the age of an individual in ORR care, and generally proposes only to conduct age determination procedures if “there is a reasonable suspicion that the individual is not a minor.”

The NPRM further states that “ORR may consider information or documentation to make an age determination, including but not limited to: (1) birth certificate, including a certified copy, photocopy, or facsimile copy if there is no acceptable original birth certificate and proposes that ORR may consult with the consulate or embassy of the individual's country of birth to verify the validity of the birth certificate presented; (2) authentic government-issued documents issued to the bearer; (3) other documentation, such as baptismal certificates, school records, and medical records, which indicate an individual's date of birth; (4) sworn affidavits from parents or other relatives as to the individual's age or birth date; (5) statements provided by the individual regarding the individual's age or birth date; (6) statements from parents or legal guardians; (7) statements from other persons apprehended with the individual; and (8) medical age assessments, which should not be used as a sole determining factor but only in concert with other factors.” The NPRM also allows for the use of medical and dental examinations. However, it would “require that procedures for determining the age of an individual consider the totality of the circumstances and evidence rather than rely on any single piece of evidence to the exclusion of all others.”

Media accounts and internal investigations into the UAC program have detailed abuse in the program, including that adult aliens are posing as minors to avoid detention. In one account, the El Paso Sector said that it identified 10 adults posing as minors -- amid

hundreds of such encounters in fiscal year 2022. Using forged documents, three adults aged between 21 and 22 were also encountered in one instance with one adult and nine unaccompanied minors. El Paso Sector Border Patrol Chief Gloria Chavez even stated that "Transnational Criminal Organizations exploit migrants convincing them to pose as minors in order to be processed as such."⁹

One way to quickly determine the age of an alien is through use of rapid DNA testing. Such testing was conducted by ICE under a pilot program in 2019, after DHS encountered a surge of families at the Southwest border. According to an Inspector General report, "ICE HSI and CBP officials said testing with Rapid DNA helped deter and investigate false claims about parent-child relationships."¹⁰

Thus, FAIR encourages ORR to include, in the final rule, a provision to clearly allow for rapid DNA testing, not only for age determinations but also for verifying familial relationships. Doing so will deter and detect fraud and abuse and better protect children who are truly unaccompanied and trafficked.

IV. Subpart F—Data and Reporting Requirements

Subpart F of the NPRM outlines the type of information that care provider facilities must report to ORR. As stated in the rule, "ORR is required to maintain statistical and other information on unaccompanied children for whom ORR is responsible, including information available from other government agencies and including information related to a child's biographical information, the date the child entered federal custody due to immigration status, documentation of placement, transfer, removal, and release from ORR facilities, documentation of and rationale for any detention, and information about the disposition of any actions in which the child is the subject."

The rule states that information to be collected includes:

- Biographical information, such as an unaccompanied child's name, gender, date of birth, country of birth, and whether of indigenous origin and country of habitual residence;
- Date on which the unaccompanied child came into federal custody by reason of immigration status;
- Information relating to the unaccompanied child's placement, removal, or release from each care provider facility in which the child has resided, including the date and to whom and where placed, transferred, removed, or released in

⁹ <https://www.foxnews.com/politics/border-patrol-nab-hundreds-illegal-immigrant-adults-posing-children>

¹⁰ <https://www.oig.dhs.gov/sites/default/files/assets/2022-02/OIG-22-27-Feb22.pdf>

any case in which the unaccompanied child is placed in detention or released, an explanation relating to the detention or release; and

- Disposition of any actions in which the child is the subject.

FAIR believes that collecting more information would help with the administration and oversight of the unaccompanied alien child program. Transparency and additional data points are critical to ensuring that the government is properly executing its authority and protecting children. FAIR recommends the following data to be collected and reported to the public:

- Biological relatives (if any) in the U.S., and why they were not placed with those relatives
- Criminal history, including after being released to a sponsor, and actions that were taken based on that information
- Number of UACs that receive access to legal representation and how that legal representation was provided
- Number of UACs that have received post-release services, and what those services entail
- Number of UACs that have reported, after transferred to HHS, information on being trafficked or abused, and actions that were taken based on that information
- Number of UACs that have received home visits and how many received well-being calls, and the outcomes of those efforts
- Number of UACs that have been released to a sponsor but then run away or are taken from sponsors and put into the domestic child welfare system

V. Subpart K—Unaccompanied Children Office of the Ombuds

In the NPRM, ORR proposes creating an ombuds office that would “promote important protections for all children in ORR care” – which is exactly the mission of ORR. The NPRM states that “an ombuds office to address unaccompanied children's issues does not currently exist, and ORR believes that the creation of an ombuds office would advance its duty to “ensur[e] that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child.”

Further, the NPRM states, “ORR believes an Office of the Ombuds would provide a mechanism by which unaccompanied children, sponsors, and other stakeholders, including ORR agency staff and care provider facility staff, could confidentially raise concerns with an independent, impartial entity that could conduct investigations and make recommendations to ORR regarding program operations and decision-making.”

First, not only is the NPRM suggesting that an Ombuds office exist to do the job that ORR was directed by Congress to do, but the rule does not explain the authority by which a new office can be created without consent of Congress. A newly created office such as this should be established by legislation, as was the case for several other agencies, including the Citizenship and Immigration Services Ombudsman (via the Homeland Security Act) and the U.S. Small Business Administration Office of the National Ombudsman (via the Small Business Regulatory Enforcement Fairness Act).

ORR should explain the authority it has to create a new, unregulated office because there is no legal basis for this proposal in the proposed rule. Further, the agency should explain why other governmental entities – such as the Government Accountability Office or the Office of the Inspector General – are not suited to undertake the same efforts and why duplication is necessary.

Second, it remains unclear what the true goal of the new office would be and what authorities it would be granted under this rulemaking. While the NPRM contemplates several responsibilities – ranging from monitoring compliance, engaging with interested parties, visiting ORR facilities, investigating issues, and reviewing policies and procedures – the mission needs to be clarified. Will the Ombuds be focused on complaints and concerns arising in individual cases or will it be duplicative of other oversight entities, such as the Inspector General? Will the office act more as an advocate rather than a neutral arbiter? How will the Ombuds relay such concerns to ORR and how will HHS ensure that it is not getting in the way of efficient government functioning, especially when it comes to unaccompanied children? Will the Ombuds publish an annual report on its work for public consumption?

The rule contemplates an ombuds that is not only independent and impartial, but also serves as a confidential official with authority to investigate and address complaints about government action. ORR should better outline the work and authorities of the new office, if retained in the final rule, and how it would be transparent and forthcoming with Congress and the public on the work it will do.

Third, the new office will require millions in taxpayer dollars to establish and manage its operations. Funding for unaccompanied alien children would be better spent on oversight (such as home studies), improvement in facilities, and curbing fraud, abuse and exploitation. ORR needs to explain how the office will be funded, not using appropriations that are intended for true services and programming of the UAC program. If it plans to establish the office from reprogramming existing funds, what would be cut from ORR's budget?

Finally, given the tendency of this administration to hire NGO leaders and place those advocates within government agencies, it is concerning that the ombudsman who takes on this role will be more of steward for external parties, not for government or taxpaying

citizens. What will be the requirements for anyone hired to be the ombudsman? Will it be headed by a political appointee or senior executive within HHS? The Ombudsman should have familiarity with HHS functions, policies and procedures, and should not be a political pawn to advance open-border policies.

In conclusion, there is no legal basis for this office and ORR should not be using finite resources to fund this office rather than using such funds for other oversight functions of the program, and thus FAIR recommends that the final rule not include subpart K.

VI. Conclusion

FAIR strongly urges that the Unaccompanied Children Program Foundational Rule be substantially revised in many aspects. The rule implements ill-advised policies that would seriously jeopardize the safety of UACs by aiming to process and release as many as possible, as quickly as possible. As outlined above, there are several provisions that should be withdrawn entirely and some areas that must be improved significantly. Instead of continuing to reinforce the harmful effects of current processes, HHS and ORR should focus on repairing the considerable damage already done.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dan Stein', with a stylized flourish at the end.

Dan Stein
President