DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 410

RIN 0970–AC93

Unaccompanied Children Program Foundational Rule

AGENCY: 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 adopts and replaces regulations relating to key aspects of the placement, care, and services provided to unaccompanied children referred to the Office of Refugee Resettlement (ORR), pursuant to ORR's responsibilities for coordinating and implementing the care and placement of unaccompanied children who are in Federal custody by reason of their immigration status under the Homeland Security Act of 2002 (HSA) and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). This final rule establishes a foundation for the Unaccompanied Children Program (UC Program) that is consistent with ORR's statutory duties, for the benefit of unaccompanied children and to enhance public transparency as to the policies governing the operation of the UC Program. This final rule implements the 1997 *Flores* Settlement Agreement (FSA). As modified in 2001, the FSA provides that it will terminate 45 days after publication of final regulations implementing the agreement. ORR anticipates that any termination of the settlement based on this final rule would only be effective for those provisions that affect ORR and would not terminate provisions of the FSA that apply to other Federal Government agencies.

DATES: *This final rule is effective:* July 1, 2024.

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SUPPLEMENTARY INFORMATION:

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I. Table of Abbreviations

ACF—Administration for Children and Families
DHS—U.S. Department of Homeland Security
DOJ—U.S. Department of Justice
EOIR—Executive Office for Immigration Review
FSA—*Flores* Settlement Agreement
HHS—U.S. Department of Health and Human Services
HSA—Homeland Security Act of 2002
INS—Immigration and Naturalization Service
OMB—Office of Management and Budget
ORR—Office of Refugee Resettlement, U.S. Department of Health and Human Services
TVPRA—William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
UC Program—Unaccompanied Children Program

II. Executive Summary

A. Purpose of the Regulatory Action

On October 4, 2023, the Office of Refugee Resettlement (ORR) published a notice of proposed rulemaking (NPRM or proposed rule), to replace and supersede regulations at 45 CFR part 410, and to codify policies and requirements concerning the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to ORR.[1] The NPRM was based on statutory authorities and requirements provided under the Homeland Security Act of 2002 (HSA)[2] and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),[3] and proposed to implement the terms of the 1997 *Flores* Settlement Agreement (FSA) that create responsibilities for HHS and ORR. ORR proposed in the NPRM that the requirements apply to all care provider facilities, including both standard programs and non-standard programs, as defined below, unless otherwise specified (88 FR 68909). ORR noted that the proposed rule was necessary to codify a uniform set of standards and procedures that will help to ensure the safety and well-being of unaccompanied children in ORR care, implement the substantive terms of the FSA, and enhance public transparency as to the policies governing the operation of the Unaccompanied Children Program (UC Program).

The proposed rule provided a 60-day public comment period, which ended on December 4, 2023. This final rule responds to comments received and adopts the proposed rule, with some changes as discussed herein. ORR thanks the public for commenting on the NPRM.

B. Summary of Select Provisions

This final rule codifies ORR policies and requirements for the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to ORR, as discussed in section IV of this final rule. In subpart A, ORR is finalizing its proposal to define terms that are relevant to the criteria and requirements in the NPRM and to codify the general principles that apply to the care and placement of unaccompanied children in ORR care. In subpart B, ORR is finalizing its proposals regarding the criteria and requirements that apply with respect to placement of unaccompanied children at ORR care provider facilities, including specific criteria for placement at particular types of ORR care provider facilities. In subpart C, ORR is finalizing policies and procedures regarding the release of unaccompanied children from ORR care to vetted and approved sponsors. In subpart D, ORR is finalizing the standards and services that it must meet and provide to unaccompanied children in ORR care provider facilities. In subpart E, ORR is finalizing requirements for the safe transportation of unaccompanied children while in ORR's care. In subpart F, ORR is finalizing reporting requirements for care provider facilities such that ORR may compile and maintain statistical information and other data on unaccompanied children. In subpart G, ORR is finalizing requirements and policies regarding the transfer of unaccompanied children in ORR care. In subpart H, ORR is finalizing requirements for determining the age of an individual in ORR care. In subpart I, ORR is finalizing its proposal to codify requirements for emergency or influx facilities (EIFs), which are ORR facilities

that are opened during a time of emergency or influx. In subpart J, ORR is finalizing requirements regarding the availability of administrative review of ORR decisions. Finally, in subpart K, ORR is finalizing its proposal to establish an independent ombud's office that would promote important protections for all children in ORR care.

C. Summary of Costs and Benefits

This final rule codifies current ORR requirements for compliance with the FSA, court orders, and statutes, as well as certain requirements under existing ORR policy and cooperative agreements. As discussed in section VII.A of this final rule, HHS and ORR expect these requirements to impose limited additional costs, including those costs incurred by the Federal Government to increase the provision of legal services to unaccompanied children in limited circumstances, to supplement costs incurred by grant recipients in order to comply with the finalized requirements (see below), to establish a risk determination hearing process, and to establish the Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds) and other administrative staffing needs. In subpart D at § 410.1309, ORR is finalizing its proposal, to the greatest extent practicable, subject to available resources as determined by ORR, and consistent with section 292 of the Immigration and Nationality Act (INA) (8 U.S.C. 1362), that all unaccompanied children who are or have been in ORR care would have access to legal advice and representation in immigration legal proceedings or matters funded by ORR. In subpart J, ORR is finalizing the establishment of a risk determination hearing process. To facilitate this process, ORR has developed forms for use by unaccompanied children, their parents/legal guardians, or their legal representatives for which we estimate the costs of completion to range from $10,187 to $56,589 per year. In subpart K, ORR discusses the establishment of an Office of the Ombuds for the UC Program. In addition to the Ombuds position itself, ORR anticipates the need for support staff in the office. ORR estimates the annual cost of establishing and maintaining this office would be $1,718,529, which includes the cost of 10 full-time personnel, as discussed in further detail in VII.A.2 of this final rule.

ORR also notes that all care provider facilities and service providers discussed in this final rule are recipients of Federal awards (*e.g.,* cooperative agreements or contracts), and the costs of maintaining compliance with these proposed requirements are allowable costs under the Basic Considerations for cost provisions at 45 CFR 75.403 through 75.405,[4] in that the costs are reasonable, necessary, ordinary, treated consistently, and are allocable to the award. If there are additional costs associated with the policies discussed in this final rule that were not budgeted, and cannot be absorbed within existing budgets, the recipient would be able to submit a request for supplemental funds to cover the costs.

III. Background and Purpose

A. The UC Program

The purpose of this rule is to codify policies, standards, and protections for the UC Program, consistent with the HSA and TVPRA, and to implement the substantive requirements of the FSA as they pertain to ORR. On March 1, 2003, section 462 of the HSA transferred responsibilities for the care and placement of unaccompanied children from the Commissioner of the Immigration and Naturalization Service (INS) to the Director of ORR. The HSA defines certain relevant terms and establishes ORR responsibilities with respect to unaccompanied children. The HSA defines ''unaccompanied alien child,'' a term ORR uses synonymously with ''unaccompanied child,'' 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.'' [5] The TVPRA, meanwhile, added requirements for other executive branch departments and agencies to expeditiously transfer unaccompanied children in their custody to ORR's care and custody once identified, and together with HHS and other specified federal agencies to establish policies and programs to ensure unaccompanied children are protected from human trafficking and other criminal activities.[6] Both statutes are described in further detail in the paragraphs below. Pursuant to these statutory requirements, the UC Program provides a safe and appropriate environment for unaccompanied children in ORR custody. In most cases, unaccompanied children enter ORR custody via transfer from DHS. When DHS immigration officials, or officials from other Federal agencies or departments, transfer an unaccompanied child in their custody to ORR, ORR promptly places the unaccompanied child in the least restrictive setting that is in the best interests of the child, taking into consideration danger to self, danger to the community, and risk of flight. ORR considers the unique nature of each child's situation, the best interest of the child, and child welfare principles when making placement, clinical, case management, and release decisions. To carry out its statutory responsibilities, and consistent with its responsibilities under the FSA, ORR currently funds residential care providers that provide temporary housing and other services to unaccompanied children in ORR custody. These care providers have been primarily State-licensed and must also meet ORR requirements to ensure a high-quality level of care. These multiple providers comprise a continuum of care for children, including placements in individual and group homes, shelter, heightened supervision, secure facilities, and residential treatment centers. While in ORR custody, unaccompanied children are provided with classroom education, healthcare, socialization/recreation, mental health services, access to religious and legal services, and case management. Unaccompanied children generally remain in ORR custody until they are released to a vetted and approved parent or other sponsor in the United States, are repatriated to their home country, obtain legal status, or otherwise no longer meet the statutory definition of an unaccompanied child (*e.g.,* turn 18). Consistent with the limits of its statutory authority, and in accordance with current ORR policy, all children who turn 18 years old while in ORR's care and custody are transferred to DHS for a custody determination. Once transferred to DHS, that agency considers placement in the least restrictive setting available after taking into account the individual's danger to self, danger to the community, and risk of flight, in accordance with applicable legal authority.

B. History and Statutory Structure

1. HSA and TVPRA

The HSA abolished the former INS and created DHS. The HSA transferred many of the immigration functions from the INS to DHS, but it transferred functions under the immigration laws of the United States with respect to the care of unaccompanied children to ORR.[7] The HSA makes the ORR Director responsible for a number of functions with respect to unaccompanied children, including coordinating and implementing their care and placement, ensuring that unaccompanied children's interests are considered in actions and

decisions relating to their care, making and implementing placement determinations, implementing policies with respect to the care and placement of children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.[8] The HSA also states that ORR shall not release unaccompanied children from custody upon their own recognizance, and requires ORR to consult with appropriate juvenile justice professionals and certain Federal agencies in relation to placement determinations to ensure that unaccompanied children are likely to appear at all hearings and proceedings in which they are involved; are protected from smugglers, traffickers, and others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitative activity; and are placed in a setting in which they are not likely to pose a danger to themselves or others.[9] ORR notes that under its current policies, such consultation is subject to privacy protections for unaccompanied children. For example, ORR restricts sharing certain case-specific information with the Executive Office for Immigration Review (EOIR) and DHS that may deter a child from seeking legal relief. Subject to such protections, ORR provides notification of the placement decisions to U.S. Immigration and Customs Enforcement (ICE) and, if referred by U.S. Customs and Border Protection (CBP), to CBP. ORR provides the following notification information: identifying information of the unaccompanied child, ORR care provider name and address, and ORR care provider point of contact (name and telephone number).[10]

In 2008, Congress passed the TVPRA, which further elaborated duties with respect to the care and custody of unaccompanied children. The TVPRA provides that, except as otherwise provided with respect to certain unaccompanied children from contiguous countries,[11] and consistent with the HSA, the care and custody of all unaccompanied children, including responsibility for their detention, where appropriate, is the responsibility of the Secretary of HHS. The TVPRA states that each department or agency of the Federal Government must notify HHS within 48 hours upon the apprehension or discovery of an unaccompanied child or any claim or suspicion that a noncitizen individual in the custody of such department or agency is under the age of 18.[12] The TVPRA states further that, except in exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied child in its custody shall transfer the custody of such child to HHS not later than 72 hours after determining such child is an unaccompanied child. Furthermore, the TVPRA requires the Secretary of HHS and other specified Federal agencies to establish policies and programs to ensure that unaccompanied 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.[13] The TVPRA describes requirements with respect to safe and secure placements for unaccompanied children, safety and suitability assessments of potential sponsors for unaccompanied children, legal orientation presentations, access to counsel, and child advocates, among other requirements. HHS delegated its authority under the TVPRA to the Assistant Secretary for Children and Families, which then re-delegated the authority to the Director of ORR.[14]

2. The Flores Settlement Agreement Terms and Implementation

On July 11, 1985, four noncitizen children in INS [15] custody filed a class action lawsuit in the U.S. District Court for the Central District of California on behalf of a class of minors detained in the custody of the INS (*Flores* litigation).[16] At that time, the INS was responsible for the custody of minors entering the United States unaccompanied by a parent or legal guardian. 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.'' [17] The plaintiffs claimed that the INS's release and bond practices and policies violated, among other things, the INA, the Administrative Procedure Act (APA), and the Due Process Clause and Equal Protection Guarantee under the Fifth Amendment.[18] After over 10 years of litigation, the U.S. Government and *Flores* plaintiffs entered into the ''*Flores* Settlement Agreement,'' which was approved by the district court as a consent decree on January 28, 1997.[19]

The FSA applies to both unaccompanied children, as defined in the HSA, and to children accompanied by their parents or legal guardians,[20] but ORR notes that this final rule is intended specifically to codify requirements regarding the care of unaccompanied children who have been transferred to the care and custody of ORR. As relevant to ORR, the FSA imposes several substantive requirements for Government custody of unaccompanied children, including requiring that they be placed in the ''least restrictive setting appropriate to the minor's age and special needs,'' [21] and establishing a general policy favoring release of unaccompanied children where it is determined that detention of the unaccompanied child is not required either to secure the child's timely appearance for immigration proceedings or to ensure the unaccompanied child's safety or that of others.[22] When release is appropriate, the FSA establishes an order of priority with respect to potential sponsors. If no sponsor is available, an unaccompanied child will be placed at a care provider facility licensed by an appropriate State agency, or, in the discretion of the Government, with another adult individual or entity seeking custody. Under the original terms of the FSA, unaccompanied children whom the former INS was unable to release upon apprehension and detention remained in INS custody, typically in a licensed program, until they could be appropriately released; currently, under the FSA, unaccompanied children who are not released remain in ORR legal custody and may be transferred or released only under the authority of ORR. The FSA also mandates that any noncitizen child who remains in Government custody for removal proceedings is entitled to a bond hearing before an immigration judge, ''unless the [child] indicates on the Notice of Custody Determination form that he or she refuses such a hearing.'' [23] The FSA contains many other provisions relating to the care of unaccompanied children, including the minimum standards required at licensed care provider facilities described in Exhibit 1.

The FSA states that within 120 days of the final district court approval of the agreement, the Government shall initiate action to publish the relevant and substantive terms of the Agreement in regulation.[24] In 1998, the INS published a proposed rule based on the substantive terms of the FSA, entitled ''Processing, Detention, and Release of Juveniles.'' [25] Over the subsequent years, that proposed rule was not finalized. The FSA originally included a termination date, but in 2001, the parties agreed to extend the agreement

and added a stipulation that terminates the FSA ''45 days following defendants' publication of final regulations implementing t[he] Agreement.'' [26] In January 2002, the INS reopened the comment period on the 1998 proposed rule,[27] but the rulemaking was ultimately terminated. Thus, as a result of the 2001 Stipulation, the FSA remains in effect. 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.

3. The 2019 Final Rule

On September 7, 2018, DHS and HHS issued a joint proposed rule, entitled ''Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children'' (2018 Proposed Rule).[28] The purpose of the proposed rule was to implement the substantive terms of the FSA, and thus enable the district court to terminate the agreement. The rule proposed to adopt provisions that were intended to parallel the relevant substantive terms of the FSA, with some modifications to reflect statutory and operational changes put in place since the FSA was entered into in 1997, along with certain other changes.[29] A final rule was promulgated on August 23, 2019 (2019 Final Rule), which comprised two sets of regulations: one issued by DHS and the other by HHS. The HHS regulations addressed only the care and custody of unaccompanied children.[30] The DHS regulations addressed other provisions of the FSA that pertained to DHS, including the requirement that after DHS apprehends unaccompanied children it should transfer them to the custody of HHS.[31]

After DHS and HHS issued the 2018 Proposed Rule and before the 2019 Final Rule was published, plaintiffs in the *Flores* litigation filed a Motion to Enforce the FSA. The court deferred ruling on the Motion, ordering DHS and HHS to file a notice upon issuance of final regulations, which DHS and HHS did in August 2019. Later that month, DHS and HHS also filed a Notice of Termination and Motion in the Alternative to Terminate the FSA, while Plaintiffs filed a supplemental brief addressing their Motion to Enforce. Plaintiffs' Motion to Enforce presented the following two separate but related issues: (1) whether the 2019 Final Rule would effectively terminate the FSA, and (2) if not, to what extent the Court should enjoin the Government from implementing the 2019 Final Rule. On September 27, 2019, approximately one month after the 2019 Final Rule was published, the District Court for the Central District of California entered an Order granting Plaintiffs' Motion to Enforce insofar as it sought an order declaring that the Government failed to terminate the FSA, denied the Government's Motion to Terminate the FSA, and issued a permanent injunction consistent with its order.[32]

On December 29, 2020, in *Flores* v. *Rosen,* the U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the District Court Order.[33] Regarding the HHS regulations applicable to the care and custody of unaccompanied children in the 2019 Final Rule, the Court of Appeals held that the regulations were ''largely consistent'' with the FSA, with two exceptions.[34] First, it held that the HHS regulation allowing placement of a minor in a secure facility upon an agency determination that the minor is otherwise a danger to self or others broadened the circumstances in which a minor may be placed in a secure facility, and therefore was inconsistent with the FSA. Second, it held that provisions providing a hearing to unaccompanied children held in secure or staff-secure placement only if requested was inconsistent with the FSA's opt-out process for obtaining a bond hearing. Although the Ninth Circuit held that the majority of the HHS regulations could take effect, it also held that the District Court did not abuse its discretion in declining to terminate the portions of the FSA covered by those regulations, noting that the Government moved to ''terminate the Agreement in full, not to modify or terminate it in part.'' [35] Consistent with its findings, the Ninth Circuit held that the FSA ''therefore remains in effect, notwithstanding the overlapping HHS regulations'' and that the Government, if it wished, could move to terminate those portions of the FSA covered by the valid portions of the HHS regulations.[36]

Separately, a group of states brought litigation in the District Court for the Central District of California seeking to enjoin the Government from implementing the 2019 Final Rule (*California* v. *Mayorkas*), based on other grounds including the APA.[37] The court stayed the case, given the related litigation brought by *Flores* plaintiffs, which culminated in the Ninth Circuit decision in *Flores* v. *Rosen.* After that decision, the plaintiffs in *California* v. *Mayorkas* filed a supplemental briefing requesting a narrowed preliminary injunction, alleging that several portions of the HHS provisions of the 2019 Final Rule violated the APA. Subsequently, the parties entered into settlement discussions. On December 10, 2021, the parties informed the court that HHS did not plan to seek termination of the FSA under the terms of the stipulation or to ask the court to lift its injunction of the HHS regulations. Instead, HHS would consider a future rulemaking that would more broadly address issues related to the custody of unaccompanied children by HHS and that would replace the rule being challenged in *California* v. *Mayorkas.* Based on this agreement, the court ordered that the *California* v. *Mayorkas* litigation should be placed into abeyance with regard to the Plaintiffs' claims against HHS while HHS engaged in new rulemaking to replace and supersede the HHS regulations in the 2019 Final Rule.[38] Further, among other things, HHS agreed that while it engaged in new rulemaking, it would not seek to lift the injunction of the 2019 Final Rule or seek to terminate the FSA as to HHS under the 2019 Final Rule, and that it would make best efforts to submit an NPRM to OMB by April 15, 2023, providing quarterly updates to the Court should it not meet that deadline.[39] In accord with the relevant order, ORR made best efforts to submit the NPRM to OMB, and ultimately sent the document to OMB on April 28, 2023.[40] The NPRM initiated that broader rulemaking effort, and reflected the stipulated agreement in *California* v. *Mayorkas.* The NPRM applied, as relevant, the findings of the Ninth Circuit regarding the 2019 Final Rule in *Flores* v. *Rosen.* Because the permanent injunction of the 2019 Final Rule was never lifted, and the FSA continued to remain in effect, ORR does not anticipate that any third parties would have developed reliance interests on the HHS regulations in the 2019 Final Rule. Differences between the 2019 Final Rule and this final rule are discussed in relevant portions of the preamble below.

4. Lucas R. Litigation

Another ongoing lawsuit involving ORR, filed in 2018, also has ramifications for this rule. *Lucas R.* v. *Becerra,*[41] a class action lawsuit, was filed in the U.S. District Court for the Central District of California, alleging ORR had violated the FSA, the TVPRA, the U.S. Constitution, and section 504 of the Rehabilitation Act of 1973 (section 504). Based on the plaintiffs' allegations, the court certified five plaintiff classes comprising all children in ORR custody:

(1) who are or will be placed in a secure facility, medium-secure facility, or residential treatment center (RTC), or whom ORR has continued to detain in any such facility for more than 30 days, without being afforded notice and an opportunity to be heard before a neutral and detached

decisionmaker regarding the grounds for such placement (*i.e.,* the ''step-up class'');

(2) whom ORR is refusing or will refuse to release to parents or other available custodians within 30 days of the proposed custodian's submission of a complete family reunification packet on the ground that the proposed custodian is or may be unfit (*i.e.,* ''the unfit custodian class'');

(3) who are or will be prescribed or administered one or more psychotropic medications without procedural safeguards (*i.e.,* the ''drug administration class'');

(4) who are natives of non-contiguous countries and to whom ORR is impeding or will impede legal assistance in legal matters or proceedings involving their custody, placement, release, and/or administration of psychotropic drugs (*i.e.,* the ''legal representation class''); and

(5) who have or will have a behavioral, mental health, intellectual, and/or developmental disability as defined in 29 U.S.C. [section] 705, and who are or will be placed in a secure facility, medium-secure facility, or [RTC] because of such disabilities (*i.e.,* the ''disability class'').[42]

On August 30, 2022, the U.S. District Court for the Central District of California granted preliminary injunctive relief concerning the allegations of the unfit custodian, step-up, and legal representation classes. As of October 31, 2022, ORR implemented new policies and procedures on issues identified in the Court's preliminary injunction order, which ORR is codifying in this final rule. As stated in the NPRM, as of September 2023, ORR remained in active litigation in the *Lucas R.* class action. The proposed rule stated that depending on developments in the case, ORR may incorporate additional provisions in the final rule (88 FR 68913).

On January 5, 2024, the Court issued an order preliminarily approving settlement agreements that the parties negotiated regarding the legal representation, drug administration, and disability classes.[43] A final approval hearing is scheduled for May 2024. As discussed in this final rule, ORR is finalizing some proposals from the NPRM as modified to account for developments in the *Lucas R.* litigation. As described herein, in this final rule, ORR intends to codify the requirements of the *Lucas R.* preliminary injunction. In addition, in this final rule, ORR is incorporating the terms of the anticipated legal representation settlement, among other enhancements to legal services for unaccompanied children. However, ORR is not incorporating in the final rule all of the various detailed provisions in the settlements concerning the drug administration and disability classes, although ORR is incorporating many commenters' recommendations in these areas. The drug administration and disability settlements themselves contemplate implementation over time, thereby affording ORR an opportunity to see how the terms of those settlements work in practice as they are implemented, and to assess whether changes may be needed over time due to evolving circumstances. The disability settlement in particular requires that ORR work with experts to undertake a year-long comprehensive needs assessment to evaluate the adequacy of services, supports, and resources currently in place for children with disabilities in ORR's custody across its network, and to identify gaps in the current system, which will inform the development of a disability plan and future policymaking that best address how to effectively meet the needs of children with disabilities in ORR's care and custody. Therefore, while ORR is not codifying all the terms of the anticipated disability and drug administration settlement agreements in this final rule, ORR is implementing terms in this rule that broadly reflect its commitment to ensuring that unaccompanied children are protected from discrimination and have equal access to the UC Program, as is consistent with section 504, and that psychotropic medications are administered appropriately in the best interest of the child and with meaningful oversight.

C. Statutory and Regulatory Authority

As discussed above, under the HSA and TVPRA, the ORR Director[44] is responsible for the care and placement of unaccompanied children. Under the HSA, ORR is responsible for ''coordinating and implementing the care and placement of [unaccompanied children] who are in Federal custody by reason of their immigration status,'' ''identifying a sufficient number of qualified individuals, entities, and facilities to house [unaccompanied children],'' ''overseeing the infrastructure and personnel of facilities in which [unaccompanied children reside],'' and ''conducting investigations and inspections of facilities and other entities in which [unaccompanied children] reside, including regular follow-up visits to such facilities, placements, and other entities, to assess the continued suitability of such placements.''[45] Under the TVPRA, Federal agencies are required to notify HHS within 48 hours of apprehending or discovering an unaccompanied child or receiving a claim or having suspicion that a noncitizen in their custody is under 18 years of age.[46] The TVPRA further requires that, absent exceptional circumstances, any Federal department or agency must transfer an unaccompanied child to the care and custody of HHS within 72 hours of determining that a noncitizen child in its custody is an unaccompanied child. The TVPRA requires that HHS and other specified Federal agencies establish policies and programs to ensure that unaccompanied children are protected from traffickers and other persons seeking to victimize or exploit children.[47] Among other things, it also requires HHS to place unaccompanied children in the least restrictive setting that is in the best interest of the child, and states that in making such placements it may consider danger to self, danger to the community, and risk of flight. As previously discussed, the Secretary of HHS delegated the authority under the TVPRA to the Assistant Secretary for Children and Families,[48] who in turn delegated the authority to the Director of ORR.[49] It is under this delegation of authority that ORR now issues regulations describing how ORR meets its statutory responsibilities under the HSA and TVPRA and implements the relevant and substantive terms of the FSA for the care and custody of unaccompanied children.

In addition to requirements and standards related to the direct care of unaccompanied children, HHS is establishing a new UC Office of the Ombuds to create a mechanism that allows unaccompanied children and stakeholders to raise concerns with ORR policies and practices to an independent body. The Ombuds will be tasked with fielding concerns from any party relating to the implementation of ORR regulations, policies, and procedures; reviewing individual cases, conducting site visits and publishing reports, including reports on systemic issues in ORR custody, particularly where there are concerns about access to services or release from ORR care; and following up on grievances made by children, sponsors, or other stakeholders. As stated in the NPRM, at 88 FR 68913, HHS has authority to establish this office under its authority to ''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.''[50]

D. Basis and Purpose of Regulatory Action

The purpose of this rule is to finalize a regulatory framework that (1) codifies policies and practices related to the care

and custody of unaccompanied children, consistent with ORR's statutory authorities; and (2) implements relevant provisions of the FSA. The FSA describes ''minimum'' standards for care of unaccompanied children at licensed care provider facilities, but Congress subsequently enacted legislation establishing requirements for the UC Program. This final rule implements the protections set forth in the FSA and broadens them consistent with the current legal and operational environment, which has significantly changed since the FSA was signed over 25 years ago.

E. Severability

This is a comprehensive rule containing many subparts that address many distinct aspects of the UC Program. To the extent any subpart or portion of a subpart is declared invalid by a court, ORR intends for all other subparts to remain in effect. For example, ORR expects that if a court were to invalidate Subpart B (or any of Subpart B's discrete provisions) relating to the placement of a child, all other subparts—such as Subpart C (release of the child), Subpart D (minimum standards and services), Subpart E (transportation), etc.—may continue to operate and should remain operative independently of the invalidated subpart.

Additionally, each Subpart also contains many distinct provisions, many of which may also operate independently of one another; thus, the invalidation of one particular provision within a particular subpart would not necessarily have implications for other aspects of that subpart. For example, within Subpart D, the provision of access to routine medical and dental care, and other forms of healthcare at § 410.1307 would not be impacted by the invalidation of the provision of structured leisure time activities at § 410.1302(c)(4) or provision of legal services under § 410.1309. ORR intends that if one or more provisions within a subpart are invalidated, that all other provisions of that subpart (and all other subparts of the rule) remain in effect.

IV. Discussion of Elements of the Proposed Rule, Public Comments, Responses, and Final Rule Actions

Subpart A—Care and Placement of Unaccompanied Children

ORR proposed in the notice of proposed rulemaking (NPRM) to codify requirements and policies regarding the placement, care, and services provided to unaccompanied children in ORR custody (88 FR 68914). The following provisions identify the scope of this part, the definitions used throughout this part, and principles that apply to ORR placement, care, and services decisions.

ORR received many comments on the proposed rule that were not directed at any specific proposal and will address those here.

Comment: Many commenters supported the proposed rule, stating that it improved public transparency as to the policies governing the program and provided rights and protections for unaccompanied children. Many commenters supported codifying practices based on the HSA and TVPRA and implementing and enhancing the terms of the FSA and stated that a uniform set of standards and procedures would create conformity and clarity to provide for the well-being of unaccompanied children in ORR care. Several commenters cited ORR's efforts to clarify, strengthen, and codify these requirements and ensure the consistent implementation of child welfare principles and protections for children in ORR's custody. Another commenter commended ORR on its efforts to incorporate child-centered, trauma-informed principles into the regulatory standards for the UC Program and adopting more inclusive language. Other commenters appreciated that the provisions are tailored to the individualized needs of unaccompanied children and ensure protection from individuals who seek to exploit or victimize unaccompanied children.

Response: ORR thanks the commenters for their support.

Comment: One commenter encouraged ORR to provide clarity and more specifics in areas where appropriations would impact the ability to carry out the proposed rule.

Response: ORR thanks the commenter. As discussed in Section VI, funding for UC Program services is dependent on annual appropriations from Congress. The regulations specifically mention that post-release services (PRS) and funding for legal service providers are limited to the extent appropriations are available. The availability of child advocates and the enhancement of certain services, such as the transition to a community-based care model, are also impacted by appropriations. ACF's Justification of Estimates for Appropriation Committees provides additional information regarding the impact of its requested budget.[51]

Comment: One commenter indicated that sections within this document do not align with the latest policy updates.

Response: ORR thanks the commenter and has included discussion of policy updates throughout this final rule as applicable.

Comment: Some commenters expressed that the rule would circumvent accountability, provide less transparency, and harm children.

Response: ORR thanks the commenters for their comments. ORR believes that codifying these requirements will provide more accountability and will strengthen the UC Program to better protect children. The NPRM notice and comment process provided additional transparency and provided the public an opportunity to comment on ORR's processes and policies.

Comment: Many commenters expressed opposition to the rule and cited concerns that the proposed regulations did not do enough to prevent child trafficking.

Response: ORR appreciates and shares the public's concern for the welfare of unaccompanied children that come through its care, as well as the need to mitigate and prevent human trafficking. Among other similar responsibilities, HHS, together with other specified agencies, has a duty to ''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. . . .'' [52] Accordingly, these agencies, including ORR, have developed extensive policies and procedures to protect unaccompanied children and that are memorialized in subregulatory guidance and memoranda of agreement (MOA).[53] This rule contains provisions that are consistent with HHS's statutory responsibilities, many of which codify and strengthen current policy. For example, this rule codifies ORR's historic practice of screening all unaccompanied children for potential trafficking concerns, including during intake, assessments, and sponsor assessments, and its use of Significant Incident Reports to report such concerns. The rule also codifies the requirement that ORR refer concerns of human trafficking to ACF's Office on Trafficking in Persons (OTIP) within 24 hours in accordance with reporting requirements under the Trafficking Victims Protection Act of 2008. OTIP reviews the concerns to assess whether the unaccompanied child is eligible for benefits and services. Concerns of human trafficking are also reported to OTIP by post-release service providers, the ORR National Call Center (NCC),

legal services providers, law enforcement, child welfare entities, healthcare providers, other child-serving agencies, and advocates.

Under this rule, if ORR care provider staff, such as a case manager or clinician, suspect that a child is a victim of trafficking or is at risk of trafficking at any point during their interaction with an unaccompanied child, they must make a referral to HHS's ACF OTIP and to DHS's Homeland Security Investigations Division and DHS's Center for Countering Human Trafficking for further investigation. OTIP provides further assistance to ensure that victims can access appropriate care and services. Such care is then coordinated with ORR to provide direct referrals for grant-funded comprehensive case management services, medical services, food assistance, cash assistance, and health insurance tailored to the child's individual needs. While ORR does not retain legal custody of unaccompanied children post-release, ORR considers what, if any, additional action should be taken consistent with its legal authorities, including but not limited to: reporting the matter to local law enforcement; child protective services; or state child welfare licensing authorities; providing PRS to the released child and their sponsor, if the child is still under 18; requiring corrective action to be taken against a care provider facility to remedy any failure to comply with Federal and state laws and regulations, licensing and accreditation standards; ORR policies and procedures, and child welfare standards; or providing technical assistance to the care provider facility, as needed, to ensure that deficiencies are addressed.

Comment: One commenter stated their belief that the proposed rule was subject to the National Environmental Policy Act (NEPA) and argued that ORR must conduct an environmental assessment prior to finalizing this rule or it will be in violation of NEPA. The commenter pointed to the location of a facility in a community as having an environmental impact.

Response: ORR disagrees that an environmental assessment is necessary under NEPA for two reasons. NEPA applies when there are ''major Federal actions significantly affecting the quality of the human environment.'' 42 U.S.C. 4332(C). However, in this rule, HHS is not taking any Federal action that would ''affect'' the quality of the human environment because it is essentially memorializing aspects of existing UC Program procedures in a regulation, rather than where they reside now, in a settlement agreement, statutes, and the ORR UC policy guide. Because the rule, as a general matter, does not materially change the UC Program, it does not significantly affect the quality of the human environment to implicate NEPA. With respect to the ''risk determination hearings'' described at § 410.1903, ORR notes that those hearings already occur, but at DOJ instead of at HHS, as set forth in this rule.

With respect to the creation of the Office of the Ombuds, as described in subpart K, HHS has determined that the Ombuds Office falls under a categorical exclusion as delineated in the HHS General Administration Manual,[54] which describes certain categories of actions that do not require environmental review. Specifically, the Office of the Ombuds falls under Section 30–20–40(B)(2)(g), which excludes ''liaison functions (*e.g.,* serving on task forces, ad hoc committees or representing HHS interests in specific functional areas in relationship with other governmental and non-governmental entities).'' To carry out its responsibility to confidentially and informally receive and investigate complaints and concerns related to unaccompanied children's experiences in ORR care, the Office will liaise with stakeholders in the UC Program, including both governmental and non-governmental entities, and as such it is subject to the HHS categorical exclusion.

In general, HHS has determined that the rule falls under a categorical exclusion in section 30–20–40(B)(2)(f) of the HHS General Administration Manual, which provides that environment impact statements and environmental assessments are not required for ''grants for social services (*e.g.,* support for Head Start, senior citizen programs or drug treatment programs) except projects involving construction, renovation, or changes in land use.'' The UC Program provides grants for social services. Although the commenter points to locating a facility as having environmental impact, the rule does not in any way address issues relating to site selection for ORR facilities (*i.e.,* the rule does not describe projects involving construction, renovation, or changes in land use). To the extent the UC Program going forward may engage in such activities, ORR would engage in proper environmental review for each such activity. This rule, however, does not implicate environmental review.

Comment: One commenter stated their belief that the proposed rule did not include a cost estimate or financial analysis of what the burden would be to American taxpayers, and stated that before the rule is finalized, the Office of Management and Budget should review the rule.

Response: The proposed rule, and this final rule, provide a cost estimate in the section titled Economic Analysis. The Office of Management and Budget reviewed the proposed and final rules before publication.[55]

Final Rule Action: ORR will finalize the majority of the proposals, with some changes as discussed throughout this rule.

Section 410.1000 Scope of This Part

ORR proposed in the NPRM, at § 410.1000(a), that the scope of this part pertain to the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to ORR (88 FR 68914). As described in section III of this final rule, ORR's care, custody, and placement of unaccompanied children is governed by the HSA and TVPRA, and ORR provides its services to unaccompanied children in accordance with the terms of the FSA. ORR also clarified that part 410 would not govern or describe the entire program. For example, part 411 (describing requirements related to the prevention of sexual abuse of unaccompanied children in ORR care) would remain in effect under this rule. ORR notes that its current policies and practices are described in the online ORR Policy Guide,[56] Field Guidance,[57] manuals describing compliance with ORR policies and procedures, and other communications from ORR to care provider facilities. ORR will continue to utilize these vehicles for its subregulatory guidance and will revise them in connection with publication of the final rule as needed to ensure compliance with the final rule. The provisions of this part would, in many cases, codify existing ORR policies and practices. Further, ORR will continue to publish subregulatory guidance as needed to clarify the application of these regulations.

ORR also proposed, at § 410.1000(b), that the provisions of this part are separate and severable from one another and that if any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect (88 FR 68914). Additionally, ORR proposed in the NPRM at § 410.1000(c) that ORR does not fund or operate facilities other than standard programs, restrictive placements (which include secure facilities, including residential treatment centers, and heightened supervision facilities), or EIFs, absent a

specific waiver as described under § 410.1801(d) or such additional waivers as are permitted by law (88 FR 68914).

Comment: One commenter questioned the consistency of the level of detail used in the NPRM, stating that some parts of the proposed regulation were very detailed while other requirements were more general. The commenter suggested that the rule should include either a statement of general guiding principles from which specific policy and operational directives will be drawn or, conversely, should include all specific operational directives for all requirements, thus replacing existing or significantly modifying the existing ORR Policy Guide.

Response: ORR thanks the commenter for their comment. As clarified in the NPRM, part 410 will not govern or describe the entire program (88 FR 68914). Where the regulations contain less detail, subregulatory guidance will provide specific guidance on requirements. By keeping some of the requirements subregulatory, ORR will be able to make more frequent, iterative updates in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and care provider facilities. The requirements codified in this rule, on the other hand, may in the future be amended only through future notice and comment rulemaking or changes in law.

Comment: One commenter stated that while they appreciated the Administration's work to codify standards, they believe it is also important to preserve ORR's ability to nimbly respond to emerging issues through updates to its policy guide, as ORR did during the COVID–19 pandemic. The commenter recommended that ORR include language making it clear that nothing in the final rule precludes ORR from updating policy and guidance to address emergent situations while prioritizing the best interests of children.

Response: ORR reiterates the clarification that part 410 will not govern or describe the entire program and that further guidance will be provided through subregulatory guidance in order to remain nimble to changing circumstances as the commenter suggests.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1000 as proposed.

Section 410.1001 Definitions

ORR proposed in the NPRM, at § 410.1001, to codify the definitions of terms that apply to this part (88 FR 68914 through 68916). Some definitions are the same as those found in statute, or other authorities (*e.g.,* the definition of ''unaccompanied child'' is the same as the definition of ''unaccompanied alien child'' as found in the HSA, 6 U.S.C. 279(g)(2)). Notably, for purposes of this rule, ORR updated certain terms and definitions provided in the FSA (*e.g.,* the definition of ''influx''). In the NPRM, ORR provided an explanation for certain definitions, to further explain ORR's rationale when the rule applies the relevant terms. As discussed in this section, ORR is revising some of the proposed definitions.

ORR proposed in the NPRM the definition of ''care provider facility'' to generally describe any placement type for unaccompanied children, except out of network (OON) placements, and as a result is broader than the term ''standard program,'' provided below, which, for example, does not include EIFs (88 FR 68914). ORR also noted that this definition does not reference ''facilities for children with special needs,'' a term used in the definition of ''licensed program'' in the FSA and 45 CFR 411.5. ORR considered not using the term ''facilities for children with special needs'' within the part for the reasons set forth below in this section at the proposed definition of ''standard program.'' Moreover, ORR considered this definition for ''care provider facility'' to encompass any facility in which an unaccompanied child may be placed while in the custody of ORR, including any facility exclusively serving children in need of particular services and treatment.

ORR proposed in the NPRM a definition of ''disability'' that is distinct from the NPRM's proposed definition for a ''special needs unaccompanied child,'' discussed later in this section and which is derived specifically from the FSA (88 FR 68914). Although some unaccompanied children may have a disability and have special needs, the terms are not synonymous. For example, an unaccompanied child exiting ORR custody may be considered to have a disability within the definition set forth in section 504 even if the child does not require services or treatments for a mental and/or physical impairment.

ORR proposed in the NPRM a definition of ''emergency'' that differs from the definition previously finalized at 45 CFR 411.5, which defines the term as ''a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action'' (88 FR 68914). ''Emergency,'' for purposes of the proposed rule, would reflect the term's usage in the context of the requirements proposed in the NPRM.

With respect to the definition of the proposed term ''EOIR accredited representative,'' ORR noted in the NPRM that DOJ refers to these individuals simply as ''accredited representatives,'' see 8 CFR 1292.1(a)(4), but for purposes of the NPRM, ORR adopted the term ''EOIR accredited representative'' (88 FR 68914).

ORR proposed in the NPRM that the definition of ''heightened supervision facility'' incorporate language consistent with the definition of ''medium secure facility'' provided in the FSA at paragraph 8 (88 FR 68914). This term replaces the term ''staff secure facility'' as used under existing ORR policies. ORR decided to change its terminology because it had become clear that the prior term was not well understood and did not effectively convey information about the nature of such facilities.

ORR proposed in the NPRM that the definition of ''influx'' would change the threshold for declaring an influx, for ORR's purposes, from the FSA standard, which ORR believes is out of date considering current migration patterns and its organizational capacity (88 FR 68914 through 68915). The FSA defines influx as ''those circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program.'' ORR's definition, however, would not impact the rights, and responsibilities of other parties of the FSA. ORR believes that the proposed definition more appropriately reflects significantly changed circumstances since the inception of the FSA and provides a more realistic, fair, and workable threshold for implementing safeguards necessary in cases where a high percentage of ORR's bed capacity is in use. The 1997 standard of 130 minors awaiting placement does not reflect the realities of unaccompanied children referrals in the past decade, in which the number of unaccompanied children referrals each day typically exceeds, and sometimes greatly exceeds, 130 children. To leave this standard as the definition of influx would mean, in effect, that the program is always in influx status. Accordingly, ORR provided a more realistic and workable threshold for implementing safeguards necessary in cases where a high percentage of ORR bed capacity is in use.

With respect to the definition of ''post-release services,'' ORR noted in the NPRM that assistance linking families to educational resources may include but is not limited to, in appropriate circumstances, assisting with school enrollment; requesting an English language proficiency assessment; seeking an evaluation to determine whether the child is eligible

for a free appropriate public education (which can include special education and related services) or reasonable modifications and auxiliary aids and services under the Individuals with Disabilities Education Act or section 504; and monitoring the unaccompanied child's attendance and progress in school (88 FR 68915). ORR noted that while the TVPRA requires that follow-up services must be provided during the pendency of removal proceedings in cases in which a home study occurred, the nature and extent of those services would be subject to available resources.

ORR noted, in the NPRM, with respect to the proposed definition of ''runaway risk,'' the FSA and ORR policy currently use the term ''escape risk'' (88 FR 68915). See FSA paragraph 22 (defining ''escape risk'' as ''a serious risk that the minor will attempt to escape from custody,'' and providing a non-exhaustive list of factors ORR may consider when determining whether an unaccompanied child is an escape risk—*e.g.,* whether the unaccompanied child is currently under a final order of removal, the unaccompanied child's immigration history, and whether the unaccompanied child has previously absconded or attempted to abscond from Government custody). ORR proposed in the NPRM to update this term to ''runaway risk,'' which is a term used by state child welfare agencies and Federal agencies to describe children at risk from running away from home or their care setting (88 FR 68915). Rather than basing its determination of runaway risk solely on the factors described in the FSA, ORR proposed in the NPRM that such determinations must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away. This definition of runaway risk is consistent with how the term is used in the FSA to describe escape from ORR care, *i.e.,* from a care provider facility. ORR noted throughout the proposed rule that the TVPRA uses the term ''risk of flight,'' stating HHS ''may'' consider ''risk of flight,'' among other factors, when making placement determinations.[58] ORR understands that in the immigration law context, ''risk of flight'' refers to an individual's risk of not appearing for their immigration proceedings.[59] ORR proposed in the NPRM, with respect to its responsibilities toward unaccompanied children in its custody, to interpret ''risk of flight'' as including ''runaway risk,'' thereby adding runaway risk to the list of factors it would consider in making placement determinations. Runaway risk often overlaps with concern that an unaccompanied child may not appear for the child's immigration proceedings. ORR also noted that runaway risk may also relate to potential danger to self or the community, given the inherent risks to unaccompanied children who run away from custody (88 FR 68915).

With respect to the proposed definition of ''secure facility,'' ORR noted that the FSA uses but does not provide a definition for this term (88 FR 68915). Nevertheless, the proposed definition is consistent with the provisions of the FSA that apply to secure facilities. ORR also noted that the proposed definition differs from the definition in the 2019 Final Rule, which could have been read to indicate that any contract or cooperative agreement for a facility with separate accommodations for minors is a secure facility. Such a definition risks erroneously confusing other types of ORR placements that are not secure with secure placements and, therefore, ORR proposed in the NPRM an updated definition in the NPRM.

ORR proposed in the NPRM to change the definition of ''special needs unaccompanied child,'' to the term ''special needs minor'' as described within the FSA at paragraph 7 and by using the phrase ''intellectual or developmental disability'' instead of ''mental illness or retardation'' as used in the FSA (88 FR 68915). ORR understands that this update reflects current terminology which has superseded the terminology used in the FSA (''retardation''). Although an unaccompanied child with a disability, as defined in this section, could also be a ''special needs unaccompanied child'' as incorporated here, the definition of disability is broader and thus the terms are not synonymous. To further this clarification, ORR proposed in the NPRM a separate definition for disability earlier in this section that incorporates the meaning of the term across applicable governing statutory authorities. ORR also considered not defining and not using the term ''special needs unaccompanied child'' within the part for the reasons set forth below at proposed §§ 410.1103 and 410.1106.

ORR proposed in the NPRM a definition of ''standard program'' that reflects and updates the term ''licensed program'' at paragraph 6 of the FSA (88 FR 68915 through 68916). The FSA does not discuss situations where States discontinue licensing, or exempt from licensing, childcare facilities that contract with the Federal Government to care for unaccompanied children because such facilities provide shelter and services to unaccompanied children as has happened recently in some States.[60] ORR proposed in the NPRM a definition of ''standard program'' that is broader in scope to account for circumstances wherein licensure is unavailable in the State to programs that provide residential, group, or home care services for dependent children when those programs are serving unaccompanied children. ORR notes that most States where ORR has care provider facilities have not taken such actions, and that wherever possible standard programs would continue to be licensed consistent with current practice under the FSA. However, ORR considered substituting the term ''licensed program'' with the proposed updated term ''standard program'' in order to establish that the requirement that facilities in those States must still meet minimum standards, consistent with requirements for licensed facilities expressed in the FSA at Exhibit 1, in any circumstance in which a State will not license a facility because the facility is housing unaccompanied children.[61] ORR solicited comments on using the proposed definition of ''standard program'' in lieu of the term ''licensed program.''

ORR proposed in the NPRM a definition for ''standard program'' to encompass any program operating non-secure facilities that provide services to unaccompanied children in need of particular services and treatment or to children with particular mental or physical conditions (88 FR 68916). Given this, ORR believed the continued use of language such as ''facilities for children with special needs'' and ''facilities for special needs minors,'' as used in the FSA definition of ''licensed program,'' was unnecessary for this regulation, and potentially problematic for reasons discussed elsewhere within this section and at proposed §§ 410.1103 and 410.1106. ORR included this language to ensure consistency with the FSA, but it considered not using the term ''special needs unaccompanied child'' or specifying that facilities for special needs unaccompanied children operated by a standard program are covered by the requirements that apply to standard programs in the part. Therefore, ORR also solicited comments in this section on its proposal to not include in the definition of ''standard program'' the FSA terminology used in the term ''licensed program'' referencing facilities for special needs unaccompanied children or a facility for special needs unaccompanied children.

ORR proposed in the NPRM to define ''trauma bond'' consistent with how the Department of State's Office to Monitor and Combat Trafficking in Persons defines the term in its factsheet, Trauma

Bonding in Human Trafficking (88 FR 68916).[62]

ORR proposed in the NPRM to define ''trauma-informed,'' based upon its belief that a trauma-informed approach to the care and placement of unaccompanied children is essential to ensuring that the interests of children are considered in decisions and actions relating to their care and custody (88 FR 68916).[63] ORR interprets trauma-informed system, standard, process, or practices consistent with the 6 Guidelines To A Trauma-Informed Approach adopted by the Centers for Disease Control and Prevention (CDC) and developed by the Substance Abuse and Mental Health Services Administration (SAMHSA).

ORR received comments on the following definitions.

Attorney of Record

Comment: One commenter recommended changes to the definition of ''attorney of record.'' The commenter recommended that ORR revise the definition to specifically define an ''attorney'' as ''an individual licensed to practice law in any U.S. jurisdiction'' but then make clear that non-attorneys may represent a child in their immigration proceedings. The commenter also urged ORR to remove reference to the requirement that an attorney ''protects [unaccompanied children] from mistreatment, exploitation, and trafficking, consistent with 8 U.S.C. 1232(c)(5),'' explaining that the statute cited requires that HHS ensure counsel because that will protect unaccompanied children from mistreatment, exploitation, and trafficking, but not that counsel is required to protect the child. The commenter continued, that although in many instances having counsel will ensure a child's protection, the duty to protect, as outlined in the proposed definition, may conflict with an attorney's duty to represent the child's expressed interests as required by the rules of professional conduct.

Response: ORR thanks the commenter. The definition of attorney of record states that the attorney represents the unaccompanied child in legal proceedings, so ORR does not think it is necessary to also indicate that the attorney is licensed for such representation. ORR does agree with the commenter that the addition of the referenced language from the TVPRA improperly implies that the attorney is required to protect the child and that it should remove that language from the definition.

Final Rule Action: ORR is revising the proposed definition of ''attorney of record'' to remove the phrase ''and protects them from mistreatment, exploitation, and trafficking, consistent with 8 U.S.C. 1232(c)(5).''

Best Interest

Comment: Many commenters commented on the definition of ''best interest.'' Commenters recommended expanding the definition of ''best interest'' to more explicitly address the following factors: the impact of family relationships and importance of family integrity, the impact of Federal custody on an unaccompanied child's well-being, their safety, and their identity including their race, religion, ethnicity, sexual orientation, and gender identity.

Response: ORR thanks the commenters. ORR notes that the rule provides a non-exhaustive list of factors ORR may consider in evaluating what is in a child's best interest. ORR understands the listed factors to already encompass additional factors suggested by the commenters. Further, ORR notes that some of the factors recommended by commenters are also already provided as considerations for placement under § 410.1103. Having said that, ORR will further consider whether to expand on the definition of best interest in future policymaking.

Final Rule Action: ORR is finalizing the definition of ''best interest'' as proposed.

Care Provider Facility

Comment: One commenter supported the proposed term ''care provider facility,'' stating that by making it broader than ''standard program,'' it will help clarify the meaning of influx or emergency facilities. Another commenter recommended that the definition of ''care provider facility'' meet the definition of ''child care institution'' at section 472(c)(2)(A) of the Social Security Act in order to align all institutions and facilities serving vulnerable children residing within and across states, including but not limited to unaccompanied children.

Response: ORR thanks the commenter for their support. Regarding the definition in the Social Security Act, section 472(c)(2)(A) defines ''child care institution'' as ''a private child-care institution, or a public childcare institution which accommodates no more than 25 children, which is licensed by the State in which it is situated or has been approved by the agency of the State responsible for licensing or approval of institutions of this type as meeting the standards established for the licensing.'' Although ORR appreciates the comment, section 472 of the Social Security Act is specific to State payments to foster care programs and does not govern the ORR UC Program. Although ORR strives to place children in care settings with small numbers of children, it is not always possible to do so. Additionally, ORR has further requirements that care provider facilities must meet in addition to those relating to State licensing.

Final Rule Action: ORR is finalizing the term care provider facility as follows: *Care provider facility* means any physical site, including an individual family home, that houses one or more unaccompanied children in ORR custody and is operated by an ORR-funded program that provides residential services for unaccompanied children. Out of network (OON) placements are not included within this definition.

Case File

Comment: One commenter supported the inclusion of home study and PRS records as part of the case file definition and, by so doing, including such records as protected information, agreeing that unaccompanied children's case files and related information should receive strong safeguards from unauthorized access, misuse, and inappropriate disclosure. However, the commenter requested clarity regarding the meaning of ''correspondence'' within the definition, asking if it was meant to cover a limited set of materials regarding the child's unification, such as any correspondence with parents and sponsors done by ORR staff or provider case managers. The commenter expressed concern that this is not consistent with the other use of ''correspondence'' in the NPRM at § 410.1304(a)(2)(ii), where the word ''correspondence'' appears to be meant to include personal correspondence between the unaccompanied child and whomever the child wishes to correspond with, including a friend, relative, parent, attorney, or child advocate. Such materials should be the child's personal property and not the property of ORR.

Response: ORR thanks the commenter. ORR notes that the definition of case file is ''the physical and electronic records for each unaccompanied child that are pertinent to the care and placement of the child.'' Accordingly, personal correspondence that is not pertinent to the care and placement of the child would not be part of the case file. However, for the sake of clarity, ORR will revise the proposed definition to state that the case file includes ''correspondence regarding the child's case.''

Comment: One commenter did not support the statement within the proposed definition of case file that ''[t]he records of unaccompanied children are the property of ORR.'' The commenter acknowledged the importance of strong, universal standards governing children's records in order to consistently protect the confidentiality of their Personally Identifiable Information (PII) but stated that the ownership of children's records is a more complicated issue. The commenter stated, as an example, that when a child brings documents such as a birth certificate into custody, the Federal Government holds that document, but does not own it. The commenter stated that the birth certificate belongs to the child and the child's parent and legal guardian, and the document and its content can be shared with the child's or parent's consent.

Response: ORR notes that, consistent with UC Program's System of Records Notice (SORN), unaccompanied children have access to, and are entitled to copies of, their own case file records, consistent with the provisions of the Privacy Act, codified at 5 U.S.C. 552a.[64] An unaccompanied child's attorney of record also has the ability to request the child's full case file at any time. With respect to original documents such as a child's birth certificate, ORR notes that it is amending the definition of ''case file'' to note that it includes ''copies of'' birth and marriage certificates.

Final Rule Action: ORR is revising the proposed definition to add that case file materials include ''but are not limited to'' the materials listed in the definition. ORR is also adding the phrase ''regarding the child's case'' after ''correspondence.'' ORR is also adding ''copies of'' before birth and marriage certificates. Additionally, in order to be consistent with finalized § 410.1303(h)(2), ORR is adding ''except for program administration purposes'' at the end of the definition. ORR is otherwise finalizing the definition as proposed.

Close Relative

Final Rule Action: As discussed in § 410.1205, ORR is finalizing the definition of ''close relative'' as a type of potential sponsor, as follows: ''*Close relative* means a brother, sister, grandparent, aunt, uncle, first cousin, or other immediate biological relative, or immediate relative through legal marriage or adoption, and half-sibling.''

Community-Based-Care

Comment: One commenter did not support the proposed definition of community-based care, believing that it is overly broad. The commenter recommended retaining ''traditional foster care'' instead.

Response: ORR thanks the commenter for their comment. ORR notes that it is planning to transition to a community-based care model that will restructure ORR's existing transitional foster care and long-term foster care programs to operate within a continuum of care including basic and therapeutic foster family settings as well as supervised independent living group home settings, to more effectively place and support children in non-congregate settings. However, ORR plans to describe this transition in future policymaking, and therefore is not finalizing the term ''community-based care'' in this rule. ORR will consider this commenter's feedback as it continues transitioning to this model. Additional details and responses to public comments on community-based care are described in subpart B.

Final Rule Action: ORR is not finalizing codification of the definition for the term ''community-based care,'' though ORR has sought to provide further details relating to the broad standards applicable to the term in subpart B.

Disposition

Comment: One commenter stated that the proposed rule uses the term ''disposition'' as a term of art but does not define what disposition signifies, includes, or excludes.

Response: The term ''disposition'' appears three times in the regulation, twice as ''case disposition'' and once as the ''disposition of any actions in which the unaccompanied child is the subject.'' ORR believes that the meaning of disposition is clear in context and so the term does not necessitate a definition.

Final Rule Action: ORR is not finalizing a definition for ''disposition.''

Executive Office for Immigration Review (EOIR) Accredited Representative

Comment: One commenter recommended that ORR change the term ''EOIR accredited representative'' to ''DOJ accredited representative,'' stating that the term is commonly referred to as ''DOJ accredited representative'' and that adopting a different term in these proposed regulations will cause unnecessary confusion and be inconsistent with how representatives are referred to elsewhere.

Response: ORR thanks the commenter and agrees to revise the term to ''DOJ Accredited Representative.'' ORR is updating this term throughout the rest of this final rule, even where summarizing NPRM language which used the term ''EOIR accredited representative.''

Final Rule Action: ORR is revising the term to ''DOJ Accredited Representative'' and otherwise finalizing the definition of such term as proposed.

Emergency

Comment: Some commenters did not support the proposed definition of ''emergency,'' believing that it relaxes standards and changes a commonly understood term.

Response: The FSA defines emergency, for purposes of paragraph 12 of the FSA, as ''an act or event that prevents the placement of minors pursuant to paragraph 19 within the timeframe provided.'' In turn, paragraph 19 of the FSA describes the requirement to place unaccompanied children in licensed programs until they can be released to a sponsor—''provided, however, that in the event of an emergency a licensed program may transfer temporary physical custody of a minor prior to securing permission from the INS but shall notify the INS of the transfer as soon as is practicable thereafter, but in all cases within 8 hours.'' The FSA states at paragraph 12B that emergencies include ''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).'' In the NPRM, ORR 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 facilities) that prevents timely transport or placement of unaccompanied children, or impacts other conditions provided by this part (88 FR 68979). ORR is therefore codifying the term emergency as used in the FSA.

Final Rule Action: ORR is finalizing the term ''emergency'' as proposed.

Emergency or Influx Facility (EIF)

Comment: One commenter expressed concern that the proposed rule defined emergency or influx facility as ''a type of care provider facility that opens temporarily to provide shelter and services for unaccompanied children'' but does not define temporary. Another commenter urged ORR to incorporate additional language that unlicensed placements, such as emergency and influx sites, should only be utilized as a last resort.

Response: As stated in the NPRM, ORR has a strong preference to house unaccompanied children in standard programs (88 FR 68955). However, ORR notes that in times of emergency or influx, additional facilities may be needed on short notice to house unaccompanied children. Consistent with current policy, ORR intends that under this rule it will cease placements at EIFs if net bed capacity of ORR's standard programs that is occupied or held for placement of unaccompanied children drops below 85 percent for a period of at least seven consecutive days.

Final Rule Action: For consistency and clarity, ORR is replacing the proposed second sentence of the definition, which read ''These facilities are not otherwise categorized as a standard or secure facility in this part'' with ''An EIF is not defined as a standard program, shelter, or secure facility under this part.'' ORR is also replacing the phrase ''they may not be licensed'' with ''they may be unlicensed'' to remove any possible implication that they are not allowed to be licensed. ORR is otherwise finalizing the term ''emergency or influx facility (EIF)'' as proposed.

Family Planning Services

Comment: A few commenters suggested that ORR amend the list of family planning services to include abortion, arguing that abortion should be included in the definition of family planning services to avoid stigmatizing abortion.

Response: ORR thanks the commenters for their comments. ORR notes that its proposed definition of ''family planning services'' is consistent with other HHS regulations and publications.[65] As noted in the NPRM, ORR has included abortion in the definition of medical services requiring heightened ORR involvement (88 FR 68979). One commenter suggested revising the definition by updating ''pregnancy testing and counseling'' in the list of family planning services to ''pregnancy testing and non-directive pregnancy counseling.'' ORR accepts the recommendation to update ''counseling'' to ''non-directive options counseling'' in the definition of Family Planning Services in the regulatory text, as it aligns with ORR's intended meaning and aligns with corresponding language in Field Guidance #21.

Final Rule Action: ORR is adding the phrase ''non-directive options'' before ''counseling'' and otherwise, finalizing the term ''Family Planning Services'' as proposed.

Heightened Supervision Facility

Comment: One commenter supported the inclusion in the term's definition that ''heightened supervision facilities'' ''provide supports'' to children with higher needs. The commenter encouraged ORR to eliminate the definition's focus on security and replace text with reference to additional personalized and intensive service provision.

Response: ORR thanks the commenter for their comment. ORR notes that the definition merely defines the facility and how it differs from a shelter facility. Heightened supervision facilities are required to meet the minimum standards for standard programs. ORR notes that it is important to describe the level of restriction at these facilities because certain requirements need to be met for children to be placed in heightened supervision facilities under subpart B and children have a right to review placement in these facilities under subpart J.

Final Rule Action: As further discussed at the preamble text for § 410.1302, ORR is adding the phrase ''or that meets the requirements of State licensing that would otherwise be applicable if it is in a State that does not allow state licensing of programs providing care and services to unaccompanied children,'' after ''licensed by an appropriate State agency.''

Influx

Comment: Many commenters supported the proposed definition of ''influx,'' noting that the updated definition is more realistic in light of recent immigration trends and would reduce the placement of unaccompanied children in emergency facilities. One commenter recommended that the definition be amended to account for the trajectory of incoming unaccompanied children to reach or exceed 85 percent of bed capacity within 30 days in order to trigger EIFs from cold to warm status.

Response: ORR thanks the commenters. ORR intends through this final rule to update the FSA definition of influx to account for current circumstances at the southern border. However, because migration patterns are unpredictable, ORR believes it is appropriate to maintain subregulatory procedures with respect to preparing for the use of EIFs, based on the definition of influx codified in this rule.

Comment: One commenter supported ORR's proposal to adopt a definition of ''influx'' that differs from the FSA, agreeing that the FSA standard set forth in 1997 does not reflect the realities of unaccompanied children awaiting placement that have been experienced in the last decade. However, the commenter expressed their view that ORR has consistently underutilized available licensed beds in its network and placed unaccompanied children in active influx care facilities when licensed facilities were available. The commenter stated further their concern that the proposed definition would have an influx hinge entirely on ORR's network capacity, as opposed to the actual numbers of unaccompanied children entering the agency's care. Another commenter requested clarification regarding the safeguards referenced in the definition of influx.

Response: ORR thanks the commenters. ORR appreciates the commenter's concern about basing the definition of influx on the net bed capacity of standard programs, however basing it on numbers of unaccompanied children proved insufficient as migration numbers greatly increased and the static number became outdated. The original intent of the FSA definition was to identify circumstances in which there is a sudden need to expand capacity and not sufficient time to use the ordinary supply-building process. Looking at referrals in relation to current net bed capacity of ORR's standard programs that is occupied or held for placement of unaccompanied children is a better way to reflect that need and sets the definition of influx at a level vastly higher than what would have been required had ORR maintained the FSA definition. ORR also notes that standard capacity beds may be unavailable for a variety of reasons including staffing shortages; licensing restrictions on age, gender, or ratios; or building issues (*e.g.,* water leaks) that prevent the safe placement of children. These causes of unavailability are not controlled by ORR, but are examples of issues that may restrict ORR's access to standard beds in its network of care on a given day. ORR will continue to monitor the numbers of unaccompanied children and the number of available standard placements to determine if further updates are needed in the future.

Final Rule Action: ORR is replacing the term ''for purposes of this part'' with ''for purposes of HHS operations'' and otherwise finalizing the definition of ''influx'' as proposed.

Least Restrictive Placement

Comment: One commenter expressed concern that ''least restrictive placement'' is not defined, and that it may be inferred that the least restrictive placement is by default, anything that is

not a ''restrictive placement,'' which is defined. The commenter expressed concern that the proposed regulations do not recognize the commenter's belief that some non-restrictive placements are more restrictive than other non-restrictive placements.

Response: ORR notes that it intends the term ''least restrictive placement'' be read consistent with the TVPRA requirement that unaccompanied children in the custody of HHS be ''promptly placed in the least restrictive setting that is in the best interest of the child,'' and that in making such placements HHS ''may consider danger to self, danger to the community, and risk of flight,'' among other requirements. 8 U.S.C. 1232(c)(2)(A).

Final Rule Action: ORR is not adopting a definition of ''least restrictive placement.''

LGBTQI+

Comment: A few commenters recommended expanding the definition of LGBTQI+, which the NPRM defined as meaning ''lesbian, gay, bisexual, transgender, queer or questioning, intersex,'' to include an explanation of the ''+'' symbol. The commenters stated their belief that expanding the definition would make the definition more complete and would better encompass the many other identities that make up the LGBTQI+ community.

Response: ORR thanks the commenters. ORR appreciates that the term LGBTQI+ is an umbrella term that is broader than the term LGBTQI, and accordingly has revised the regulatory definition to say that the term ''includes'' lesbian, gay, bisexual, transgender, questioning or intersex, as defined at 45 CFR 411.5. This change helps to make clear that the term LGBTQI+ includes additional identities such as non-binary.

Final Rule Action: ORR is revising the definition to replace ''means'' with ''includes'' and is otherwise finalizing the definition of LGBTQI+ as proposed.

Mechanical Restraints

Final Rule Action: For the reasons discussed in the preamble discussion of § 410.1304(e)(1), ORR is clarifying the definition of mechanical restraints by adding a second sentence to the definition, as follows: ''For purposes of the Unaccompanied Children Program, mechanical restraints are prohibited across all care provider types except in secure facilities, where they are permitted only as consistent with State licensure requirements.'' ORR is otherwise finalizing the definition as proposed.

Medical Services Requiring Heightened ORR Involvement

Comment: A few commenters recommended that ORR revise the definition of medical services requiring heightened ORR involvement to clarify that the heightened involvement is only to ensure quick transportation or transfer for abortion, as needed, and not to create obstacles to impede access to abortion.

Response: ORR acknowledges the importance of not creating obstacles to needed medical services, including but not limited to abortion, but does not believe that the definition of medical services requiring heightened ORR involvement needs to be modified in order to make this point clear. ORR is revising § 410.1307 to further clarify that ORR will not prevent unaccompanied children in ORR care from accessing healthcare services, including medical services requiring heightened ORR involvement and family planning services, and ORR must make reasonable efforts to facilitate access to those services if requested by the unaccompanied child.

Final Rule Action: ORR is finalizing the definition of ''medical services requiring heightened ORR involvement'' as proposed.

ORR Long-Term Home Care

Comment: One commenter stated they had no objection to the proposed change from ''long-term foster care'' to ''long-term home care.'' Another commenter suggested that the definition of ''ORR long-term home care'' be clarified to indicate whether children need to have viable legal cases in the particular State to be placed in that program versus the ''legal proceedings'' that all children in ORR care are in.

Response: ORR thanks the commenters. Part of the proposed definition reads that ''[a]n unaccompanied child may be placed in long-term home care if ORR is unable to identify an appropriate sponsor with whom to place the unaccompanied child during the pendency of their legal proceedings.'' ORR clarifies that the legal proceedings referenced are immigration legal proceedings and is amending the definition accordingly.

Final Rule Action: ORR is adding the word ''immigration'' before ''legal proceedings'' and is otherwise finalizing the definition of ''ORR long-term home care'' as proposed.

Out of Network (OON) Placement

Comment: Some commenters expressed concern that OON facilities were excluded from the definition of care provider facility and that the definition of OON placements does not require they are State licensed or follow the requirements of a standard program. Commenters requested clarification regarding standards applicable to OON placements. One commenter recommended that the definition of OON placement be revised to state that during an OON placement, the responsibility for reporting incidents related to the child, assessments, and ongoing case management would remain with the care provider facility.

Response: In response to the comments, ORR is adding to the definition of OON placement that OON placements are ''licensed by an appropriate State agency.'' ORR will vet the program to ensure that the program is in good standing with State licensing and is complying with all applicable State child welfare laws and regulations and all State and local building, fire, health, and safety codes. ORR further reiterates that an unaccompanied child may only be placed at an OON placement when such placement would be in the unaccompanied child's best interest. As stated in the NPRM, consistent with existing policies, in these circumstances, even though an unaccompanied child would be physically located at an OON placement, the unaccompanied child would remain in ORR legal custody (88 FR 68924). ORR also clarifies that an OON placement is not defined as a standard program under this part. However, as provided under ORR policy, the unaccompanied child's case manager would monitor the unaccompanied child's progress and ensure the unaccompanied child is receiving services.

Final Rule Action: ORR is adding the phrase ''that is licensed by an appropriate State agency'' after ''means a facility'' to the definition of out of network placement. ORR is also stating that such a placement is not defined as a standard program under this part. ORR is otherwise finalizing the definition as proposed.

Placement Review Panel

Comment: One commenter suggested revising the definition of ''placement review panel (PRP)'' to include additional information regarding timeframes for decision and specificity regarding the term ''ORR Senior Level Career Staff'' by including the job title or designation.

Response: ORR thanks the commenter for their feedback. Requirements for the PRP are addressed by ORR under § 410.1902, rather than in the definition of the PRP. ORR clarifies that ''ORR

Senior Level Career Staff'' means ORR staff at a senior level or above that is not politically appointed.

Final Rule Action: ORR is finalizing the definition of ''placement review panel'' as proposed.

Qualified Interpreter

Comment: One commenter suggested that the definition of a ''qualified interpreter'' for an individual with a disability be modified to include adherence to generally accepted ethics principles, including client confidentiality, to make it clear that individuals with disabilities are entitled to the same confidentiality and ethical protections as limited English proficient individuals.

Response: ORR thanks the commenter for catching a drafting error. ORR will restructure the proposed paragraph, moving former subparagraph (2)(iii) to become new paragraph (3), so that the ethical protections provision applies to the overall definition of ''qualified interpreter.''

Comment: One commenter suggested that the definition of ''qualified interpreter'' requires that interpreters are not only proficient in the language but also culturally competent.

Response: ORR thanks the commenter but notes that the definition of qualified interpreter for a limited English proficient individual includes a requirement that the interpreter be able to interpret ''effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary or terms without changes, omissions, or additions and while preserving the tone, sentiment, and emotional level of the original oral statement.'' This definition is consistent with another HHS regulation [66] and captures a requirement that the interpreter understand the cultural nuances of the language.

Final Rule Action: ORR is revising the proposed definition to move former subparagraph (2)(iii) to become new paragraph (3) such that the requirement to adhere to generally accepted interpreter ethics principles, including client confidentiality applies to both qualified interpreters for an individual with a disability and for a limited English proficient individual. ORR is finalizing the rest of the definition as proposed.

Runaway Risk

Comment: One commenter supported the proposed definition of ''runaway risk,'' noting that it is consistent with the FSA. The commenter also supported the proposed rule's clarification that this determination must consider the totality of the circumstances. Another commenter also supported replacing the term ''escape risk'' with a term such as ''child at risk of running away,'' stating that other terms are used in criminal or enforcement settings and are not appropriate to use in a child welfare setting.

Response: ORR thanks the commenters for their support for not using the term ''escape risk'' and instead using a term that relates to runaway risk, given that escape risk is relevant to a criminal setting. ORR notes that the definition of runaway risk requires a finding that it is ''highly probable or reasonably certain'' that a child will attempt to abscond from ORR care, whereas the FSA defines ''escape risk'' as meaning there is a ''serious risk'' that a minor will attempt to escape from custody. Per § 410.1105(b)(2)(ii) of this final rule, one of the factors ORR may consider for placement of children in heightened supervision facilities is whether a child is a runaway risk. Because a determination that a child is a runaway risk can result in their placement into a restrictive placement, ORR intends through this updated language to establish a clearer and higher standard than required by the FSA to determine such risk.

Comment: One commenter did not support the proposal to replace the term ''escape risk'' with ''runaway risk'' stating their belief that it was not consistent with the FSA because the FSA requires that a prior escape from custody lead to a more restrictive placement, while the proposed rule allows ORR to disregard that factor in determining whether an unaccompanied child is a runaway risk.

Response: ORR disagrees with the commenter that the proposal is inconsistent with the FSA. Section 410.1003(f) states that ORR will consider runaway risk in making placement determinations. The definition of runaway risk states that a prior attempt to run away cannot be the sole consideration but does not require ORR to disregard this factor in determining runaway risk. As finalized at § 410.1107(b), ORR considers whether a child has previously absconded or attempted to abscond from State or Federal custody when determining, in view of the totality of the circumstances, whether a child is a runaway risk for purposes of placement decisions.

Final Rule Action: ORR is finalizing the term ''runaway risk'' as proposed.

Seclusion

Comment: A few commenters asked for additional clarity in the definition of ''seclusion'' concerning what seclusion involves and how it works in practice.

Response: ORR emphasizes, as established at § 410.1304(c), that seclusion is prohibited at standard programs and RTCs, and as established at § 410.1304(e)(1), that seclusion is permitted at non-RTC secure facilities only in emergency safety situations. Further, ORR notes that, consistent with current policies, seclusion is permitted only after all other de-escalation strategies and less restrictive approaches have been attempted and failed; must involve continued monitoring or supervision by staff throughout the seclusion period; must never be used as a means of coercion, discipline, convenience, or retaliation; must be performed in a manner that is safe, proportionate, and appropriate to the severity of the underlying emergency risk to the safety of others necessitating the seclusion; must be appropriate and proportionate to the child's chronological and developmental age, size, gender, as well as physical, medical, and psychiatric condition, and personal history; must be utilized in the most child-friendly, trauma-informed way possible; and must only be utilized for the short amount of time needed to ameliorate the underlying emergency risk to the safety of others.

Final Rule Action: ORR is updating the definition of ''seclusion'' by adding ''is instructed not to leave or'' before ''is physically prevented from leaving'' while otherwise finalizing the definition as proposed.

Secure Facility

Comment: Some commenters did not support that the definition of ''secure facility'' states that secure facilities do not need to comply with the requirements for minimum standards of care and services applicable to all other standard programs under § 410.1302. The commenters stated their belief that exempting children in secure facilities from the right to receive the minimum standards of care afforded to children in all other placement types is unwarranted and would formalize differential treatment of children as to their basic needs. Some commenters encouraged ORR to eliminate the use of secure detention, with one commenter stating their belief that placement in secure facilities is out of step with ORR's mandate and inappropriate for any child not placed there under the authority of a juvenile court judge. That commenter recommended that ORR be explicit in the definition of and criteria for placement in secure facilities.

Response: ORR is revising its proposed regulation text to remove the

statement that a secure facility ''does not need to meet the requirements of § 410.1302.'' As discussed in the responses to comments in §§ 410.1301 and 410.1302, ORR is finalizing § 410.1302 such that the requirements of that section apply to secure facilities. ORR notes that this is consistent with current and historic practice, whereby ORR has required secure facilities to comply with FSA Exhibit 1 requirements even though the FSA itself does not require that. And as a practical matter, ORR currently has no secure facilities in its network of care provider facilities. As a result, ORR does not anticipate that this revision will implicate any reliance interests. Additionally, in response to commenters' concerns about the use of secure detention facilities, ORR is revising the definition to remove the explicit mention of ''a secure ORR detention facility, or a State or county juvenile detention facility''.

Final Rule Action: ORR is revising the definition of ''secure facility'' to remove the phrases ''a secure ORR detention facility, or a State or county juvenile detention facility'' and ''does not need to meet the requirements of § 410.1302.'' ORR is otherwise finalizing the definition as proposed.

Significant Incidents

Comment: One commenter stated that significant changes were made to reporting of significant incidents in policy updates in 2022 and 2023 and suggested that these changes should be incorporated into the final rule.

Response: ORR thanks the commenter. In the NPRM, ORR incorrectly included ''pregnancy'' in the list of significant incidents. Pregnancy is no longer reported as a significant incident but is instead documented in the Health Tab of the UC Portal. Accordingly, ORR is updating the definition of ''significant incidents'' to remove pregnancy. With regard to other policy updates, ORR reiterates that it is not codifying all of its policies and choosing for some policies to remain subregulatory such that they can be more easily updated as needed.

Final Rule Action: After consideration of public comments, ORR is removing pregnancy from the definition of significant incidents, but otherwise finalizing the term as proposed.

Special Needs Unaccompanied Child

Comment: Many commenters supported the proposal to not define or use the term ''special needs unaccompanied child'' and instead refer to children's individualized needs. Commenters agreed that the term is disfavored and is seen as degrading. One commenter stated the term individualized needs is more specific to the child rather than confusing that the child might have a disability. Some commenters further supported the proposal to remove ''facilities for children with special needs'' from the definition of standard program. Some commenters stated support for changing the term disability to special needs unaccompanied child.

Response: ORR is finalizing the use of ''individualized needs'' in many places in the regulations in lieu of the outdated term ''special needs.''

Final Rule Action: ORR is removing the term ''special needs unaccompanied child'' from the regulation.

Standard Program

Comment: One commenter was concerned that the definition of ''standard program'' in the NPRM requires all homes and facilities to be ''non-secure,'' whereas paragraph 6 of the FSA requires them to be ''non-secure as required by State law.'' The commenter expressed concerns that ORR could adopt a definition of non-secure that permits much more restrictive conditions than are currently permissible. The commenter contended further that, for the same reasons, if ORR chooses to retain the reference to ''a facility for special needs unaccompanied children'' in the definition of ''standard program'' it would be impermissible to replace the FSA's paragraph 6 reference to the ''level of security permitted under State law'' with undefined ''requirements specified by ORR if licensure is unavailable in the State.''

Response: ORR thanks the commenter and notes that it is revising the definition of ''standard program'' to include ''non-secure as required by State law.'' ORR is also revising the definition of ''standard program'' to not reference ''facilities for special needs unaccompanied children'' given the term ''special needs'' has become stigmatized. Instead, the definition of ''standard program'' includes ''facilities for unaccompanied children with specific individualized needs.''

Final Rule Action: ORR is revising the proposed definition of ''standard program'' by replacing the proposed phrase ''or that meets other requirements specified by ORR if licensure is unavailable in the State'' with ''or that meets the requirements of State licensing that would otherwise be applicable if it is in a State that does not allow State licensing,'' and by moving this language to the end of the relevant sentence. ORR is also revising the proposed definition so that the final rule states that all standard programs shall be ''non-secure as required under State law.'' ORR is also revising the proposed definition so that the final rule does not include the language ''facility for special needs unaccompanied children'' and instead includes the language ''facility for unaccompanied children with specific individualized needs.'' ORR is also revising the definition such that a facility for unaccompanied children with specific individualized needs may maintain that level of security permitted under state law and deleting the phrase ''or under the requirements specified by ORR if licensure is unavailable in the State.'' ORR is otherwise finalizing the term as proposed.

Transfer

Comment: Regarding the proposed definition of ''transfer,'' a few commenters had differing opinions on the statement in the NPRM that a transfer from a community-based placement to a shelter is not a step-up. The proposed rule stated that such transfer does not constitute a step-up because neither a community-based placement nor a shelter would be considered a secure placement. One commenter did not support the statement, stating that it fails to recognize that a large shelter facility is more restrictive than a foster care setting. However, another commenter supported the statement, but requested the addition of clarifying language that if the least restrictive placement for an unaccompanied child has been determined to be a shelter level of care, a community-based care facility shall also be considered an appropriate placement, without the need for a child in a restrictive placement to be first ''stepped down'' to a shelter level of care.

Response: As stated in the definition of ''transfer'' at § 410.1001, ORR uses the terms ''step-up'' and ''step-down'' to describe transfers of unaccompanied children to or from restrictive placements. All standard programs are non-restrictive settings. Because standard programs are non-restrictive settings, a transfer between those settings is not by definition a ''step-up'' or ''step-down.''

Final Rule Action: ORR is finalizing the definition of ''transfer'' as proposed.

Trauma-Informed

Comment: Some commenters supported ORR's inclusion of a trauma-informed approach, citing the importance of taking such an approach with the unaccompanied children population. A few commenters

recommended this approach be culturally and linguistically appropriate to better accommodate unaccompanied children's diverse experiences and to ensure continued connection to their language, culture, traditions, and community. However, one commenter warned that a trauma-informed approach is not accomplished through any single particular technique or checklist and requires ongoing organizational change and assessment.

Response: ORR thanks the commenters for their support. This rule establishes a definition of ''trauma-informed'' that ORR believes can accommodate the commenters' concerns, and ORR will consider their feedback as it develops additional guidance implementing a trauma-informed approach in relevant circumstances.

Final Rule Action: ORR is finalizing the term ''trauma-informed'' as proposed.

Unaccompanied Child/Children

Comment: Some commenters requested clarification of aspects of the definition of ''unaccompanied child,'' such as what constitutes an ''available'' parent or legal guardian, or whether children in particular circumstances meet the definition of ''unaccompanied child.''

Response: ORR notes that this final rule applies the statutory definition of ''unaccompanied alien child'' as provided in the HSA for purposes relevant to ORR. Other federal agencies also apply the HSA definition as relevant for their purposes. The statutory definition has three prongs: the child must have no lawful immigration status in the United States; the child must be under 18 years old; and the child must have no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody. The rule itself tracked the statutory definition and did not purport to interpret it, and accordingly, discussions of application of the statutory definition in particular circumstances are beyond the scope of the rule. ORR notes that it is not an immigration enforcement authority and would not go out into the community to take custody of any child. Rather, unaccompanied children enter ORR custody upon transfer of custody from another Federal department or agency. As discussed at the portion of the NPRM's preamble addressing § 410.1101, ORR may seek clarification about the information provided by the referring agency as needed to determine appropriate placement and how the referred individual meets the statutory definition of unaccompanied child (88 FR 68917). In such instances, ORR shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory time frames for transferring unaccompanied children to ORR.

Comment: One commenter recommended not using the term ''unaccompanied alien child,'' arguing that the word ''alien'' is dehumanizing.

Response: ORR agrees with the commenter and did not use the term ''alien'' in the proposed rule unless directly quoting the HSA or TVPRA. Similarly, in the final rule, ORR has updated the defined term ''unaccompanied alien child,'' as used in the HSA and TVPRA, to ''unaccompanied child.''

Final Rule Action: After consideration of public comments, ORR is finalizing the definition of ''unaccompanied child/children'' as proposed.

Section 410.1002 ORR Care and Placement of Unaccompanied Children

ORR proposed in the NPRM, at § 410.1002, a description of ORR's authority to coordinate and implement the care and placement of unaccompanied children who are in ORR custody by reason of their immigration status (88 FR 68916). ORR notes that this substantive requirement is aligned with the requirement established in the 2019 Final Rule at 45 CFR 410.102(a), concerning the scope of authority of ORR regarding the care and placement of unaccompanied children. That section of the 2019 Final Rule was not found to be inconsistent with the FSA by the 9th Circuit in *Flores* v. *Rosen,* but as discussed in section III.B.3 of this final rule, the 2019 Final Rule in its entirety is currently enjoined and will be superseded by the standards implemented in this final rule. Changes throughout this subpart to the standards set by the 2019 Final Rule are explained where relevant.

Comment: One commenter recommended that ORR include additional language to § 410.1002 to mention particular attention and respect for human rights for extremely high-risk populations and explicitly stating that ORR takes into consideration the child's Indigenous identity, membership, and or citizenship of a Native Nation.

Response: ORR thanks the commenter. Under § 410.1003(a), ORR requires that within all placements, unaccompanied children shall be treated with dignity, respect, and special concern for their particular vulnerability, which would include any considerations which would make the child high-risk. Additionally, under the definition of ''best interest,'' ORR is required to consider the unaccompanied child's cultural background, which would include membership or citizenship of a Native Nation.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1002 as proposed.

Section 410.1003 General Principles That Apply to the Care and Placement of Unaccompanied Children

ORR proposed in the NPRM, at § 410.1003, to describe principles that would apply to the care and placement for unaccompanied children in its custody (88 FR 68916 through 68917). These principles are based on ORR's statutory duties to provide care and custody for unaccompanied children in a manner that is consistent with their best interests.[67]

ORR proposed in the NPRM at § 410.1003(a), that for all placements, unaccompanied children shall be treated with dignity, respect, and special concern for their particular vulnerability as unaccompanied children. In addition to ORR's statutory authorities, finalizing this proposal is consistent with the substantive criteria set forth at paragraph 11 of the FSA, and current ORR policies.

ORR proposed in the NPRM at § 410.1003(b), that ORR shall hold unaccompanied children in facilities that are safe and sanitary and that are consistent with ORR's concern for the particular vulnerability of unaccompanied children. Finalizing this proposal is consistent with the substantive requirement from paragraph 12A of the FSA that ''[f]ollowing 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.'' ORR noted that although this provision applies to the arrest and detention of unaccompanied children prior to their placement in an ORR care provider facility, and not to unaccompanied children after they are placed in ORR's care, ORR proposed in the NPRM to adopt this standard for its facilities and custody of unaccompanied children as well. ORR also noted that it proposed in the NPRM the phrasing ''the particular vulnerability of unaccompanied children'' as opposed to ''the particular vulnerability of minors,'' as it believed that the specific vulnerability of the population of unaccompanied children should be considered when providing them with safe and sanitary conditions.

ORR proposed in the NPRM, at § 410.1003(c), that it would be required

to plan and provide care and services based on the individual needs of and focusing on the strengths of the unaccompanied child. As a complementary provision, ORR proposed in the NPRM, at § 410.1003(d), to encourage unaccompanied children, as developmentally appropriate and in their best interests, to be active participants in ORR's decision-making process relating to their care and placement. ORR believes that these collaborative approaches to care provision allow for the recognition of each child's specific needs and strengths while providing opportunities for unaccompanied children to become more empowered, resilient, and self-efficacious.

ORR proposed in the NPRM, at § 410.1003(e), to codify a requirement that care of unaccompanied children be tailored to the individualized needs of each unaccompanied child in ORR custody, ensuring the interests of the child are considered, and that unaccompanied children are protected from traffickers and other persons seeking to victimize or otherwise engage them in criminal, harmful, or exploitative activity,[68] both while in ORR custody and upon release from the UC Program. ORR recognizes the utmost importance of protecting unaccompanied children from traffickers and other persons seeking to victimize or otherwise engage in harmful activities, including unscrupulous employers. ORR believes the provisions that were proposed at § 410.1003(e) reinforce ORR's commitment to ensuring the best interests of unaccompanied children are considered and actions are taken to safeguard them from harm. ORR also believes that codifying the requirement to consider each unaccompanied child's individualized needs reinforces that unaccompanied children will be assessed by ORR to determine whether they may require particular services and treatment while in the UC Program, such as to address the ramifications of a history of severe neglect or abuse, as provided for in paragraph 7 of the FSA.

Consistent with the substantive criteria set forth in the TVPRA, 8 U.S.C. 1232(c)(2)(A), ORR proposed in the NPRM at § 410.1003(f) to require that unaccompanied children be promptly placed in the least restrictive setting that is in the best interest of the child, with placement considerations including danger to self; danger to the community; and runaway risk, as defined in § 410.1001. In addition to ORR's statutory authorities, finalizing the proposal is consistent with the substantive criteria set forth at paragraph 11 of the FSA, and current ORR policies.

ORR proposed in the NPRM, at § 410.1003(g), to require consultation with parents, legal guardians, child advocates, and attorneys of record or DOJ Accredited Representatives as needed when requesting information or consent from all unaccompanied children.

Comment: One commenter generally supported § 410.1003, stating that the provisions are tailored to the individualized needs of unaccompanied children and ensure protection from individuals who seek to exploit or victimize unaccompanied children like human traffickers and employers.

Response: ORR thanks the commenter for their comment.

Comment: A few commenters noted that the proposed rule alternated between stating what ORR ''shall'' do and state what ORR does in the present tense. Those commenters noted in § 410.1003, paragraph (a) states that ''unaccompanied children shall be treated with dignity, respect, and special concern'' while paragraph (f) states ''ORR places each unaccompanied child in the least restrictive setting that is in the best interests of the child.'' The commenters recommended that the Final Rule should consistently use ''shall'' rather than the present tense.

Response: ORR thanks the commenters for their comment. Although ORR intends for statements in the present tense in the regulation to be mandatory, for the sake of clarity, ORR will revise § 410.1003(f) to include the mandatory language ''shall.'' This revision makes the language consistent with § 410.1103(a). ORR further notes that it has made this revision throughout the finalized regulation text for consistency, clarity, and explicit alignment with ORR's statutory authorities and the FSA.

Comment: One commenter requested more clarity as to what standards are applicable to what types of programs, stating that in some sections the document is specific that principles are for standard and restrictive placements, inferring they are not applicable to emergency intake sites (EIS) and influx care facilities (ICF) but that in other sections the document is silent as to types of programs, leaving areas of ambiguity.

Response: As stated in finalized § 410.1301, the standards in subpart D apply to standard programs and secure facilities, and to other care provider facilities and PRS providers where specified. The standards for EIFs are in subpart I. If a requirement or standard states that it is for ''all care provider facilities,'' then that includes standard programs, restrictive placements, and EIFs. Additionally, the principles articulated in § 410.1003 refer to ''all placements,'' and therefore apply to all ORR placements without regard to the type of facility.

Comment: One commenter recommended that ORR add language to make clear that requirements for ORR to treat children with dignity, respect and special concern for their vulnerability under paragraph (a), applies to ORR staff, the staff of ORR subcontracted facilities, and any other stakeholder or interested person who interacts with the child while the child remains in the custody of ORR, or during the child's transport to or from an ORR care provider.

Response: ORR appreciates the commenter's comment. ORR notes, however, that these are general provisions that relate to ORR. Specifics about the requirements of care provider facilities, transportation, and other interested parties are in other parts of the regulation, such as §§ 410.1302, 410.1304, 410.1401, 410.1801. Those specific requirements are to ensure that unaccompanied children are treated with dignity, respect, and special concern for their particular vulnerability.

Comment: One commenter expressed concern that the proposed rule did not provide clear guidance on how to determine the best interests of the child in various situations, such as when there are conflicting preferences or claims from different sponsors, when there are concerns about the safety or suitability of a sponsor, or when there are special needs or circumstances of the child. The commenter expressed concerns that this would lead to confusion and inconsistency in decision-making, and potentially compromise the rights and well-being of the child. The commenter recommended that the final rule provide clear and comprehensive guidance on how to determine and apply the best interests of the child principle in various situations, taking into account the views and preferences of the child, the characteristics and circumstances of the sponsor, and the relevant legal and policy frameworks. The commenter also stated that the rule should provide for independent review and oversight of best interests determinations by qualified professionals.

Response: The definition of best interest includes a non-exhaustive list of factors to consider, as appropriate, when evaluating a child's best interests. The list is necessarily non-exhaustive because each child is unique and has

individual needs, background, and circumstances but the rule is explicit in emphasizing the importance of making decisions in the child's best interest.

Regarding the recommendation for independent review and oversight of determinations of best interest, ORR notes that it may appoint child advocates for victims of trafficking and other vulnerable children who are independent, qualified professionals who provide best interests determinations (BIDs). ORR considers such BIDs when making decisions regarding the care, placement, and release of unaccompanied children. Additionally, the rule provides for review of placement decisions, in subpart J, and an independent Office of the Ombuds, in subpart K.

Comment: Several commenters recommended that ORR include language affirmatively stating ORR's obligations to protect unaccompanied children in its care from discriminatory treatment and abuse, expressing concern over States adopting legislation that dismantles anti-discrimination protections for LGBTQI+ people.

Response: ORR agrees with the need to protect LGBTQI+ individuals from discrimination and believes that the language finalized at § 410.1003(a) protects unaccompanied children in its care from discriminatory treatment and abuse because it establishes the general principle that unaccompanied children shall be treated with dignity, respect, and special concern for their particular vulnerability. Further, as provided in current policy, ORR requires care provider facilities to operate their programs following certain guiding principles, including ensuring that LGBTQI+ children are treated with dignity and respect, receive recognition of their 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.

Comment: Some commenters expressed support for the proposal in paragraph (d) that unaccompanied children be active participants in ORR's decision-making process related to their care and placement.

Response: ORR thanks the commenters for their support.

Comment: One commenter recommended that ORR require that Indigenous cultural and language experts be required in the consultation process for Indigenous children to provide their free, prior, and informed consent.

Response: ORR thanks the commenter but notes that the suggestion is not required by statute or the FSA. ORR notes that it is finalizing language access requirements in § 410.1306.

Comment: One commenter recommended that ORR collaborate with non-governmental organizations and advocacy groups that are actively working in the field of child protection as they often have valuable insights and resources that can contribute significantly to the cause.

Response: ORR thanks the commenter and notes that it currently collaborates with and seeks input from advocacy groups and service providers, and that it intends to continue that practice under this final rule.

Comment: One commenter recommended that ORR prioritize identifying and adding facilities throughout the United States in more populous areas to ensure adequate access for children to legal, medical, and other services and to ease the burden on community organizations.

Response: ORR appreciates the commenter's recommendation and does consider whether the area is populous and the availability of services among many other factors when adding facilities through the United States. ORR notes, however, that it is limited by the grant and contract applications it receives and the locations in which qualifying proposals are located. ORR further notes that this rule does not address site selection for care provider facilities, and therefore it does not believe a change to the rule text concerning site selection is appropriate.

Comment: A few commenters recommended ORR have local law enforcement, county oversight, and State oversight regarding the nature of their operations in respective jurisdictions.

Response: ORR notes that local law enforcement and county and State Governments do have oversight into aspects of the care of unaccompanied children. For example, local law enforcement agencies investigate and prosecute State crimes, and State and local Governments license and investigate care provider facilities with respect to licensing requirements and allegations of child abuse and neglect. ORR notes that the role of local law enforcement and child protective services and licensing entities in the context of the UC Program is also discussed in the preamble to the Interim Final Rule, Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, codified at 45 CFR part 411.[69] Accordingly, ORR does not believe a revision to the rule is needed to specifically describe the role of State and local Governments as suggested.

Final Rule Action: After consideration of public comments, ORR is revising paragraph (f) to read ''In making placement determinations, ORR shall place each unaccompanied child in the least restrictive setting that is in the best interests of the child, giving consideration to the child's danger to self, danger to others, and runaway risk.'' All other paragraphs will be finalized as proposed.

Section 410.1004 ORR Custody of Unaccompanied Children

ORR proposed in the NPRM at § 410.1004 to describe the scope of ORR's custody of unaccompanied children (88 FR 68917). Consistent with its statutory authorities and the FSA, the provision specifies that all unaccompanied children placed by ORR in care provider facilities remain in the legal custody of ORR and may be transferred or released only with ORR approval.[70] The provision also provides that in the event of an emergency, a care provider facility may transfer temporary physical custody of an unaccompanied child prior to securing approval from ORR but shall notify ORR of the transfer as soon as is practicable thereafter, and in all cases within 8 hours.[71]

Comment: One commenter expressed concern that § 410.1004 uses the term ''legal custody'' without defining it. The commenter noted that custody can include actual, constructive, or legal custody and argued that if ORR claims legal custody over unaccompanied children, not just actual or constructive custody, it should outline all legal responsibilities owed or held over the child whether pursuant to Federal or State law.

Response: ORR interprets the term ''legal custody'' consistent with its statutory authorities and with its usage in the FSA. The TVPRA makes HHS responsible, consistent with the HSA, for the ''care and custody'' of unaccompanied children.[72] The HSA makes ORR responsible for ''coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status.'' [73] The FSA uses the term ''legal custody'' to define the scope of the agreement and of specific provisions.[74] ORR notes that in these contexts, it is assumed that ORR has the ability to provide care and supervision for children. So, consistent with a prior ruling interpreting the FSA, ORR understands the term ''legal custody'' to signify ''the right and responsibility to

care for the well-being of the child and make decisions on the child's behalf.'' [75]

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1004 as proposed.

Subpart B—Determining the Placement of an Unaccompanied Child at a Care Provider Facility

In the NPRM, ORR proposed in subpart B to codify the criteria and requirements that apply to the placement of unaccompanied children at particular types of care provider facilities (88 FR 68917 through 68927). The HSA makes ORR responsible for, among other things, ''coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status,'' ''making placement determinations for all unaccompanied alien children who are in Federal custody by reason of their immigration status,'' ''implementing the placement determinations,'' and ''implementing policies with respect to the care and placement of unaccompanied alien children.'' [76] In addition, ORR stated in the NPRM that proposed subpart B clarifies and strengthens placement criteria to better ensure appropriate placement based on each unaccompanied child's individual background, characteristics, and needs. ORR stated that it believes that these provisions can help to protect the interests of unaccompanied children in ORR care by supporting safe and appropriate placement in the least restrictive setting appropriate to the child's age and individualized needs, consistent with existing legal requirements and child welfare best practices.

Section 410.1100 Purpose of This Subpart

ORR proposed in the NPRM at § 410.1100 that the purpose of subpart B is to set forth the process by which ORR receives referrals from other Federal agencies and the factors ORR considers when placing an unaccompanied child in a particular care provider facility (88 FR 68917). In addition, ORR proposed in the NPRM at § 410.1100 to clarify that, as used in this subpart, ''placement determinations'' or ''placements'' refers to placements in ORR-approved care provider facilities during the time an unaccompanied child is in ORR care, and not to the location of an unaccompanied child once the child is released in accordance with provisions in subpart C.

ORR did not receive any comments on proposed § 410.1100.

Final Rule Action: ORR is finalizing this section as proposed.

Section 410.1101 Process for the Placement of an Unaccompanied Child After Referral From Another Federal Agency

ORR proposed in the NPRM, at § 410.1101, to codify the process for accepting referrals of unaccompanied children from another Federal agency and for placement of an unaccompanied child in a care provider facility upon such referral (88 FR 68917 through 68919). The TVPRA at 8 U.S.C. 1232(b)(3) requires any department or agency of the Federal Government that has an unaccompanied child in its custody to transfer the custody of such unaccompanied child to HHS no later than 72 hours after determining that the child is an unaccompanied child (unless there are exceptional circumstances).[77] ORR proposed in the NPRM at § 410.1101(a) to accept referrals of unaccompanied children transferred to its custody pursuant to the TVPRA (88 FR 68917). Further, consistent with existing policy and in cooperation with referring agencies, ORR proposed in the NPRM that it would accept such referrals at any time of day, every day of the year. In addition, ORR stated in the preamble to the NPRM that it may seek clarification about the information provided by the referring agency. ORR notes that it may seek such clarification as needed to determine appropriate placement and how the referred individual meets the statutory definition of unaccompanied child. ORR stated that in such instances, it shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory timeframes for transferring unaccompanied children to ORR.

ORR proposed in the NPRM at § 410.1101(b) and (c), timeframes for identifying and notifying a referring Federal agency of ORR's identification of an appropriate placement for an unaccompanied child, and for accepting transfer of custody of an unaccompanied child after the determination that the child is an unaccompanied child who should be transferred to ORR (88 FR 68917 through 68918). ORR proposed in the NPRM at § 410.1101(b) to codify its current policy that upon notification from any department or agency of the Federal Government that a child is an unaccompanied child and therefore must be transferred to ORR custody, ORR must identify an appropriate placement for the unaccompanied child and notify the referring Federal agency within 24 hours of receiving the referring agency's notification whenever possible, and no later than 48 hours of receiving the referring agency's notification, barring exceptional circumstances (see paragraph below). ORR stated in the NPRM that it believes that setting a maximum timeframe of 48 hours for ORR to identify a placement and notify a referring Federal agency of ORR's identification of a placement would help to expedite transfer of unaccompanied children from the referring Federal agency to ORR care, but also that certain exceptions to this timeframe may be necessary in certain circumstances, as discussed in the following paragraph. ORR further proposed in § 410.1101(c) that it would be required to work with the referring Federal department or agency to accept transfer of custody of the unaccompanied child, consistent with the statutory requirements at 8 U.S.C. 1232(b)(3).

As noted above, the TVPRA provides that referring Federal departments and agencies must transfer custody of unaccompanied children to HHS within 72 hours of determining the child is an unaccompanied child unless there are exceptional circumstances. In order to help facilitate this requirement in coordination with referring departments and agencies, ORR proposed in the NPRM at § 410.1101(b) and (c) internal timeframes for ORR to identify and notify referring Federal departments and agencies of placements and to accept transfer of custody from referring departments and agencies (88 FR 68917 through 68918). ORR also noted that it may, in certain ''exceptional circumstances,'' be unable to timely identify placements for and help facilitate other departments' and agencies' timely transfers of unaccompanied children to its custody. For purposes of § 410.1101(b) and (c), ORR proposed in the NPRM at § 410.1101(d) circumstances which would prevent ORR from timely identifying a placement for an unaccompanied child or accepting transfer of custody. At proposed § 410.1101(d), ORR described these exceptional circumstances consistent with those described in paragraph 12A of the FSA, even though, as ORR further explains below, it believes that paragraph 12A primarily concerns responsibilities of the former INS that now apply to immigration enforcement authorities and not ORR. Some of these circumstances were also incorporated into the 2019 Final Rule at § 410.202. The proposed ''exceptional circumstances,'' for ORR's purposes,

included the following: (1) any court decree or court-approved settlement that requires otherwise; (2) an influx, as defined in proposed § 410.1001; (3) an emergency, including a natural disaster, such as an earthquake or hurricane, and other events, such as facility fires or civil disturbances; (4) a medical emergency, such as a viral epidemic or pandemic among a group of unaccompanied children; (5) the apprehension of an unaccompanied child in a remote location; and (6) the apprehension of an unaccompanied child whom the referring agency indicates (i) poses a danger to self or others; or (ii) has been charged with or convicted of a crime, or is the subject of delinquency proceedings, a delinquency charge, or has been adjudicated delinquent, and additional information is essential in order to determine an appropriate ORR placement. Notably, ORR stated in the preamble to the proposed rule that the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR. In addition, ORR proposed in the NPRM that ''exceptional circumstances,'' for ORR's purposes, would include an act or event that could not be reasonably foreseen that prevents the placement or accepting transfer of custody of an unaccompanied child within the proposed timeframes. Given the mandate under the TVPRA, 8 U.S.C. 1232(c)(2), that ORR place an unaccompanied child in the least restrictive setting that is in the best interests of the unaccompanied child, subject to consideration of danger to self, danger to the community/others, and risk of flight, additional time may be needed in some circumstances to determine the most appropriate and safe placement that comports with the best interests of the unaccompanied child. Thus, ORR stated that it believes that this general exception for acts or events that could not be reasonably foreseen is appropriate to afford additional time to assess these considerations, though ORR is mindful of avoiding prolonged placements in DHS facilities that are not designed for the long-term care of children. As discussed previously, ORR proposed in the NPRM that these exceptional circumstances would modify the timeframes applicable to ORR under proposed § 410.1101(b) and (c).

In the NPRM, ORR noted that the FSA also includes an exception to these timeframe requirements for unaccompanied children who do not speak English and for whom an interpreter is unavailable. However, ORR did not propose to include this as an exceptional circumstance for purposes of § 410.1101(b) and (c). ORR stated that because ORR is able to serve unaccompanied children regardless of their primary language through the use of interpreters, ORR did not view this as an insurmountable impediment to the prompt placement of unaccompanied children. In addition, ORR noted that the FSA includes an exception in which a reasonable person would conclude that an individual is an adult despite the individual's claim to be an unaccompanied child. However, ORR did not propose to include this as an exceptional circumstance for purposes of § 410.1101(b) and (c) because ORR did not believe that such a situation poses the type of urgency inherent in exceptional circumstances as described above. For further information on ORR's proposed policies regarding age determinations, ORR referred readers to its discussion of subpart H.

In the NPRM, ORR stated that it seeks to accept transfer of unaccompanied children as quickly as possible after a placement has been identified within this timeframe (88 FR 68918). In identifying placements for unaccompanied children, ORR balances the need for expeditious identification of placement with the need to ensure safe and appropriate placement in the best interests of the unaccompanied child, which necessitates a comprehensive review of information regarding an unaccompanied child's background and needs before placement. ORR stated in the NPRM that, under existing policy, to determine the appropriate placement for an unaccompanied child, ORR requests and assesses extensive background information on the unaccompanied child from the referring department or agency, including the following: (1) how the referring agency made the determination that the child is an unaccompanied child; (2) health related information; (3) whether the unaccompanied child has any medication or prescription information, including how many days' supply of the medication will be provided with the unaccompanied child when the child is transferred into ORR custody; (4) biographical and biometric information, such as name, gender, alien number, date of birth, country of birth and nationality, date(s) of entry and apprehension, place of entry and apprehension, manner of entry, and the unaccompanied child's current location; (5) any information concerning whether the unaccompanied child is a victim of trafficking or other crimes; (6) whether the unaccompanied child was apprehended with a sibling or other relative; (7) identifying information and contact information for a parent, legal guardian, or other related adult providing care for the unaccompanied child prior to apprehension, if known, and information regarding whether the unaccompanied child was separated from a parent, legal guardian, or adult relative after apprehension, and the reason for separation; (8) if the unaccompanied child was apprehended in transit to a final destination, what the final destination was and who the unaccompanied child planned to meet or live with at that destination, if known; (9) whether the unaccompanied child is a runaway risk, and if so, the runaway risk indicators; (10) any information on a history of violence, juvenile or criminal background, or gang involvement known or suspected, risk of danger to self or others, State court proceedings, or probation; (11) if the unaccompanied child is being returned to ORR custody after arrest on alleged gang affiliation or involvement, ORR requests all documentation confirming whether the unaccompanied child is a *Saravia* class member and information on the *Saravia* hearing, including the date and time; [78] and (12) any particular needs or other information that would affect the care and placement of the unaccompanied child, including, as applicable, information about services, supports, or program modifications provided to the child on the basis of disability (88 FR 68918 through 68919).

Furthermore, the TVPRA places the responsibility for the transfer of custody on referring Federal agencies.[79] ORR custody begins when it assumes physical custody from the referring agency. ORR proposed in the NPRM at § 410.1101(e) to codify this practice, which is also consistent with current policies (88 FR 68919).

Note, ORR typically assumes physical custody when the unaccompanied child arrives at an ORR care provider facility (usually via transport by DHS). However, as described in current policies,[80] under certain extenuating and exceptional circumstances, ORR may assume physical custody of an unaccompanied child, and thereby legal custody, to facilitate release to a vetted sponsor without first placing the child at an ORR care provider facility. In these cases, federal partner agencies may notify ORR that a child will likely be determined to be unaccompanied. ORR may request additional information from the referring agency, or third-party partners, regarding any potential sponsors for the child, to begin the sponsor vetting process.[81]

Comment: A few commenters generally expressed support for the timeframes at proposed § 410.1101(b) and (c). These commenters supported the proposed timeframes for ORR to work with the referring department or agency to accept custody of unaccompanied children (within the 72 hour requirement applicable to the transferring agency under the TVPRA) and identify an initial placement (no later than 48 hours) because the proposed timeframes ensure that unaccompanied children are not held in detention in a restrictive setting at DHS or other referring agencies and recognize that children are best cared for by social welfare officers and not by immigration officials.

Response: ORR thanks commenters for their support of the proposed timeframes at § 410.1101(b) and (c). ORR notes that it is making a clarifying edit to add the phrase ''in its custody'' to the first sentence of paragraph (b) to clarify that, consistent with the TVPRA, a referring Federal department or agency must transfer unaccompanied children ''in its custody'' to ORR. This sentence now states, ''Upon notification from any department or agency of the Federal Government that a child in its custody is an unaccompanied child and therefore must be transferred to ORR custody . . .''.

Comment: Two commenters made recommendations regarding the notification and transfer process. One commenter recommended ''vigorous'' collaboration between ORR and other agencies and a clear description of responsibilities of these agencies to ensure effective implementation. Another commenter suggested that ORR consider codifying potential border unifications of children. The commenter noted that cases have recently been started while children are still in CBP custody, and that co-location of ORR providers with CBP could allow many parent and legal guardian sponsors to reunify with unaccompanied children without transferring the child to an ORR shelter. The commenter further stated this could also allow non-parent family members who are traveling with the child (grandparents, aunts, etc.) to submit the necessary documents to sponsor the child without ever needing to be separated.

Response: ORR thanks the commenters for their recommendations. With regard to the recommendation that there be ''vigorous'' collaboration between ORR and other agencies and a clear description of responsibilities to ensure effective implementation, ORR notes that ORR does in fact collaborate closely with referring agencies, including CBP, during the referral of unaccompanied children to ORR custody. For example, as specifically set forth at § 410.1101(c), as finalized in this rule, ORR works with the referring department or agency to accept transfer of custody of the unaccompanied child, consistent with the timeframe set forth in the TVPRA.[82] Furthermore, under existing policy, and as reflected in the NPRM, to determine the appropriate placement for an unaccompanied child, ORR requests and assesses extensive background information on the unaccompanied child from the referring agency, which ORR takes into consideration in placing a child in an ORR care provider facility. In addition, as ORR stated in the preamble to the NPRM, it may seek clarification about the information provided by the referring agency as needed to determine appropriate placement and how the referred individual meets the statutory definition of unaccompanied child (88 FR 68917). In such instances, ORR shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory time frames for transferring unaccompanied children to ORR. ORR has added language to the regulatory text at § 410.1101 to make more explicit the nature of this coordination.

Moreover, DHS and ORR are continuing to work together to improve information sharing and will collaborate on improved procedures for making age determinations, as required by the TVPRA, and other standards for determining whether an individual meets the statutory definition of unaccompanied child. The Departments will update existing memoranda of agreement, as appropriate. Seeking clarification will not preclude transfer of individuals determined by the referring agency to be unaccompanied children in accordance with statutory time frames, except in exceptional circumstances.

In regard to the suggestion to codify potential border unifications of unaccompanied children, ORR notes that this final rule codifies existing interagency practices regarding notification and transfer of unaccompanied children to ORR custody from other Federal agencies, consistent with requirements set out in the TVPRA. ORR is also currently operating an initiative to facilitate unification of unaccompanied children with their sponsors while minimizing the child's time in ORR custody. Because the standards codified in this final rule accord with current practices and are consistent with the statutory framework established by the HSA and TVPRA, ORR will finalize the current sections as proposed. But ORR notes that it may in the future consider alternative approaches, including approaches like the one raised in the comment.

Comment: Two commenters made recommendations or raised questions to clarify the language at proposed § 410.1101(d), which addresses exceptions to the timeframes at proposed § 410.1101(b) and (c). One commenter stated that proposed § 410.1101(d) is ambiguous, noting that while ''exceptional circumstances'' may be valid explanations for slower-than-required placements, an exceptional circumstance should not give license for ORR to place a child in care more slowly after a referral. The commenter stated that ORR should move with all due haste to place children in safe placements even in ''exceptional circumstances'' and recommended that ORR refine the rule to clarify that it always attempts to identify an appropriate placement within 48 hours but that such a timeframe may not be possible to achieve during exceptional circumstances. This commenter also noted that the proposed rule preamble states that ''the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR.'' The commenter recommended that this assurance be binding on ORR as it is minimally burdensome and suggested that ORR add language to this effect to any final rule.

One commenter asked whether § 410.1101(d)(6) means that secure and staff secure placements do not have to fall within the 48-hour placement timeline.

Response: ORR notes that § 410.1101(b) already provides that ORR shall identify an appropriate placement for the unaccompanied child and notify the referring Federal agency within 24 hours of receiving the referring agency's notification ''whenever possible,'' and ''no later than within 48 hours of receiving notification, barring exceptional circumstances'' (88 FR 68918). As a result, the rule already contemplates that ORR seeks to identify a placement as quickly as reasonably possible upon notification from a referring department or agency that a child is an unaccompanied child, including in situations where exceptional circumstances may apply. ORR does not view the proposed exceptional circumstances as a license to act more slowly in identifying an appropriate placement, but only as reasonable explanations for why it may not be possible to meet the proposed

timeframes despite ORR's efforts to do so in those exceptional cases.

In addition, as one commenter noted, the proposed rule preamble states, with respect to proposed § 410.1101(d)(6), that ''the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR.'' In proposed § 410.1101(d)(6)(ii), ORR added language at the end of the provision to qualify when the exceptional circumstance in paragraph (d)(6)(ii) would apply—that is, when ''additional information is essential in order to determine an appropriate ORR placement'' (88 FR 68918). To further clarify and qualify the application of this exception, ORR noted in the NPRM preamble that ''the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR.'' This language was intended to recognize the fact that in some cases, lack of appropriate information or documentation may not prevent ORR from timely identifying a placement or facilitating transfer of custody, and in those cases, ORR must comply with the proposed timeframes at § 410.1101(b) and (c). Thus, this language was intended to make clear ORR's limited use of this exception. As ORR believes the intent is sufficiently clear from the preamble text, ORR does not believe it is necessary to add language to this effect to the final rule.

Given these clarifications, ORR emphasizes that proposed § 410.1101(d)(6) does not mean that secure and heightened supervision placements do not have to meet the timeframes established in this section. First, as discussed above, this exception is not a license to act more slowly in situations that may fall within this proposed exception—ORR must still act expeditiously to identify placement within 48 hours to the extent possible. Second, not all secure or heightened supervision placements may meet the criteria set forth in proposed § 410.1101(d)(6)—for example, since as noted above and in the proposed regulation, in order to qualify for the exception at § 410.1101(d)(6)(ii), additional information must be essential in order to determine an appropriate ORR placement, and where it is not essential, as discussed above, the unavailability of documents will not necessarily prevent the prompt identification of a placement.

Comment: A few commenters expressed concern about the proposed timeframes at § 410.1101(b) and (c), stating that speed should never take priority over the safety and well-being of the children. One commenter also expressed concern with ORR's ability to meet the proposed timeframes.

Response: ORR does not agree that the proposed timeframes at § 410.1101(b) and (c) will result in expediency taking priority over the safety and well-being of unaccompanied children. As an initial matter, ORR notes that the timelines described in this section are consistent with statutory timelines provided in the TVPRA.[83] In addition, ORR believes that the proposed timeframes are reasonable and achievable while transferring custody and identifying placements in the best interests of the unaccompanied child. ORR notes that, in fiscal year 2023, ORR placed 99 percent of unaccompanied children in standard programs within 24 hours of receiving notification of their referrals. As noted in the NPRM, ORR balances the need for expeditious identification of placement with the need to ensure safe and appropriate placement in the best interests of the unaccompanied child, which involves a comprehensive review of information regarding an unaccompanied child's background and needs before placement. As further discussed in the NPRM, additional time may be needed in some circumstances to determine the most appropriate and safe placement that comports with the best interests of the unaccompanied child. Thus, ORR proposed in the NPRM to codify at § 410.1101(d) certain ''exceptional circumstances'' where it may be unable to timely identify placements for or facilitate other agencies' timely transfers of unaccompanied children to its custody in accordance with proposed § 410.1101(b) and (c) (88 FR 68918). ORR believes that codification of these exceptional circumstances will provide ORR the flexibility necessary to ensure the safety and well-being of each child are fully taken into account before a child is placed with a care provider facility.

Comment: Many commenters expressed concerns regarding specific exceptional circumstances set forth at proposed § 410.1101(d).

One commenter stated that ORR inappropriately defined influx as an ''exceptional circumstance'' at proposed § 410.1101(d)(2) that allows ORR to relieve itself of the duty to receive a child from other Federal agencies within 72 hours. The commenter stated that promulgating this proposal would allow ORR to absolve itself of the responsibility to comply with the terms of the FSA when it presents challenges to the agency, directly risking the safety of unaccompanied children. The commenter believed that ORR should be held to higher scrutiny, not less, when its facilities are overwhelmed because it is at these times that unaccompanied children are at heightened risk for exploitation, abuse, and mismanagement. The commenter requested that HHS make data available to the public regarding how frequently ''emergency'' or ''influx'' conditions are present.

A few commenters opposed the proposed exception at § 410.1101(d)(3) because it includes language that is beyond what is enumerated in the FSA. Specifically, the commenters noted that proposed § 410.1101(d)(3) states that an emergency would include ''a natural disaster, such as an earthquake or hurricane, and other events, such as facility fires or civil disturbances.'' The commenters believed that the addition of ''and other events'' would create a catch-all for anything ORR chooses to deem an emergency in the future and that expanding the term would result in situations that are detrimental to the health, safety and well-being of unaccompanied children.

Many commenters recommended deleting the exception at § 410.1101(d)(6), stating that the ORR Policy Guide permits no exception to the prompt transfer of children required by the TVPRA and that this marks a weakening of ORR's current policy, under which, if exceptional circumstances prevent the referring Federal agency from providing complete documentation, the care provider is not permitted to deny or delay admitting the child. These commenters also noted that this exception is absent from the FSA list of exceptions, including paragraph 12A. Commenters said that incomplete documentation about a child should never permit ORR to leave children in DHS custody beyond 72 hours, given the clear dangers to children's health and safety.

A few commenters expressed concern with the exception provided under proposed § 410.1101(d)(7), which described an exception for acts or events ''that could not be reasonably foreseen that prevents the placement of or accepting transfer of custody of an unaccompanied child within the timeframes in paragraph (b) or (c) of this section.'' The commenter said that this language was overly broad and would allow ORR to make placement decisions that would be inconsistent with the FSA and noted that the proposed rule did not identify any specific circumstances not already covered by the FSA's current exceptions that required a delay in placement in the past.

Response: As discussed in the NPRM, ORR proposed in the NPRM at § 410.1101(b) and (c) internal

timeframes for ORR to identify and notify referring Federal agencies of placements and to accept transfer of custody from referring agencies, but noted that in certain ''exceptional circumstances'' additional time may be needed to identify safe and appropriate placements that comport with the best interests of the unaccompanied child or to help facilitate other agencies' transfers of unaccompanied children to ORR custody (88 FR 68917 through 68918). Thus, for purposes of § 410.1101(b) and (c), ORR proposed in the NPRM at § 410.1101(d) circumstances which may prevent ORR from timely identifying a placement for an unaccompanied child or accepting transfer of custody (88 FR 68918). ORR intended that all of the exceptional circumstances at proposed § 410.1101(d) serve the purpose of protecting the health and safety of unaccompanied children, as the application of such exceptions will provide ORR the time, if necessary, in certain circumstances to ensure appropriate and safe placement.

With respect to the comment that the proposed exception at § 410.1101(d)(2) would allow ORR to absolve itself of the responsibility to comply with the terms of the FSA when it presents challenges to the agency, risking the safety of unaccompanied children, ORR notes that paragraph 12A of the FSA specifically provides an exception to the timeframe for placement in a licensed program in the event of an influx of unaccompanied children into the United States, stating that in those situations, children must be placed into such programs as expeditiously as possible. Thus, ORR believes that the exception at proposed § 410.1101(d)(2) is consistent with the FSA. Moreover, as noted at subpart I, the definition of influx in this rule sets a substantially higher threshold for when circumstances can be considered an influx than is required under the FSA. ORR emphasizes that in every case, ORR seeks to identify a placement and accept transfer of custody of an unaccompanied child as quickly as possible upon notification from a referring Federal department or agency that a child is an unaccompanied child, including in situations where exceptional circumstances may apply. As discussed previously, the proposed exceptional circumstances were not intended as a license to act more slowly in identifying an appropriate placement, but rather as circumstances in which it may not be possible to meet the proposed timeframes despite ORR's best efforts to do so. Further, because the exception at § 410.1102(d)(2) would provide ORR with additional time, if necessary, to determine a safe and appropriate placement for an unaccompanied child, ORR believes that this exception helps to protect and serve the best interests of such children rather than risk their safety. ORR notes that it makes data available to the public regarding the use of EIFs.[84]

Furthermore, ORR disagrees with the comment that the proposed exception at § 410.1101(d)(3), specifically the addition of the phrase ''and other events,'' would create a catch-all for anything ORR chooses to deem an emergency in the future and expand the term in ways that are detrimental to the health, safety, and well-being of unaccompanied children. First, ORR believes that the definition of ''emergency'' is consistent with the FSA. ORR notes that the definition of ''emergency'' in the FSA is in fact broad, defining ''emergency'' as ''any act or event that prevents the placement of minors pursuant to paragraph 19 within the timeframe provided.'' While the FSA states that ''[s]uch emergencies include natural disasters . . ., facility fires, civil disturbances, and medical emergencies,'' ORR views these as *examples* of what would qualify as an ''emergency'' under the broad definition that precedes this list. As noted previously, because the purpose of this exception is to provide ORR with additional time, if necessary, to determine a safe and appropriate placement for an unaccompanied child, we believe that this exception would help to protect and serve the best interests of such children rather than risk their safety. To address commenters' concern with reference to ''other events'' and further clarify that the events listed are examples of the types of emergencies that would qualify as exceptional circumstances, ORR is finalizing revisions to § 410.1101(d)(3) to list relevant examples and delete reference to ''and other events.''

ORR also disagrees with the commenters that recommended deleting the exception at § 410.1101(d)(6) and stated that it is inconsistent with the FSA and the ORR Policy Guide. ORR notes that the FSA includes an exception to the placement timeframes at paragraph 12A for situations where a child meets the criteria for placement in a secure facility under paragraph 21. The exception at proposed § 410.1101(d)(6) does not delineate all five of the potential situations set forth at paragraph 21 of the FSA (*i.e.,* the unaccompanied child (A) ''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''—subject to certain exceptions; (B) ''has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in INS legal custody or while in the presence of an INS officer;'' (C) ''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, as determined by the staff of the licensed program (Examples: drug or alcohol abuse, stealing, fighting, intimidation of others, etc. This list is not exhaustive.);'' (D) is an escape risk; or (E) ''must be held in a secure facility for his or her own safety, such as when the INS has reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.'').[85] But ORR believes the five potential situations described at paragraph 21 are described by sub-paragraphs (d)(i) and (d)(ii)—*i.e.,* all the potential circumstances listed in FSA paragraph 21 essentially concern whether a child poses a danger to self or others, or has been charged with or convicted of a crime or is the subject of delinquency charges or proceedings. But further, by omitting some of the situations set forth in paragraph 21 of the FSA that justify secure placement and by adding the requirement at proposed § 410.1101(d)(6)(ii) that ''additional information'' must be ''essential in order to determine an appropriate placement,'' ORR is narrowing the application of this exception in a manner it believes adequately implements FSA paragraph 21. In addition, ORR stated in the NPRM preamble that ''the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR'' (88 FR 68918). This language was intended to recognize that lack of appropriate information or documentation may not always be an appropriate justification for delaying timely identification of placement or acceptance of transfer of custody. As such, ORR further limited the exception at proposed § 410.1101(d)(6)(ii) to those situations where additional documentation is absolutely necessary to appropriately place an unaccompanied child, acknowledging that timely transfer and placement would still take place whenever possible even in the absence of certain information or documentation. Given these additional restrictions on the use

of proposed § 410.1101(d)(6) as an exceptional circumstance, we believe this provision reasonably ensures ORR's timely acceptance of transfer and identification of placement of unaccompanied children whenever possible, even in the absence of documentation.

In addition, ORR disagrees with the comment that proposed § 410.1101(d)(6) should be deleted because it is inconsistent with and weakens current ORR policies under which a care provider may not deny or delay admitting the unaccompanied child if exceptional circumstances prevent the referring Federal agency from providing complete documentation. ORR notes that this provision of the ORR Policy Guide does not relate to the required timeframes applicable to ORR at § 410.1101(b) and (c) or the exceptions to such timeframes described at § 410.1101(d)(6). Paragraphs (b) and (c) of § 410.1101 set forth the timeframes within which ORR must identify and notify the referring Federal agency of appropriate placement and work with the referring Federal agency to accept transfer of custody, and § 410.1101(d) provides exceptions applicable to ORR's obligation to meet these timeframes (88 FR 68917 through 68918). By contrast, the policy identified by the commenter sets forth obligations applicable to the care provider facility—specifically, restrictions on the care provider facility's ability to deny or delay admitting a child after transfer of custody to ORR has occurred and the care provider facility has been identified as an appropriate placement. The ''exceptional circumstances'' referred to in that provision apply to the referring Federal agency and relate to its ability to provide complete documentation; this term does not refer to the exceptional circumstances that apply to ORR's ability to meet timeframes under § 410.1101(b) and (c).

With respect to § 410.1101(d)(7), after consideration of comments received on this provision, ORR is removing this exception from the regulation text in this final rule. To date, ORR has not identified any specific circumstances not already covered by § 410.1101(d)(1) through (d)(6) that have required a delay in placement, and thus ORR believes it is not necessary to include this exception at this time.

Comment: A few commenters recommended that the final rule reintroduce a State licensing requirement in every provision of the proposed rule where the FSA, specifically at paragraph 19, requires State-licensed placement.

Response: ORR refers the commenters to its discussion of State licensing at the preamble text for § 410.1302. The definition of ''standard program'' in this final rule is broader in scope than the FSA definition of ''licensed placement'' to account for changed circumstances since the FSA went into effect, where certain States have made licensure unavailable to ORR care provider facilities because they care for unaccompanied children. Having said that, at § 410.1302(a) of this final rule, if a standard program is in a State that does not license care provider facilities because they serve unaccompanied children, the standard program must still meet the State licensing requirements that would apply if the State allowed for licensure. Similarly, ORR is revising § 410.1302(b) to expressly provide that all standard programs, whether or not licensed, must comply with all State child welfare laws and regulations and all State and local building, fire, health, and safety codes even if licensure is unavailable in their State to care provider facilities providing care and services to unaccompanied children. Similarly, in this final rule, ORR has revised § 410.1101(b) to state that ORR will identify a standard program placement for an unaccompanied child, unless one of the listed exceptions in § 410.1101 applies.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1101 with the following modifications: first, to revise § 410.1101(b) to (1) add the phrase ''in its custody'' to the first sentence of paragraph (b) to clarify that, under the TVPRA, a referring Federal department or agency must transfer unaccompanied children *in its custody* to ORR, and (2) state that ORR will identify a standard program placement for an unaccompanied child, unless one of the listed exceptions in § 410.1104 applies; second, to make a clarifying revision to the § 410.1101(d) introductory text to add the word ''timely'' before ''accept'' so that the word ''timely'' is read to modify both ''identify a placement'' and ''accept transfer of custody''; third, to amend § 410.1101(d)(3) to state, ''An emergency, including a natural disaster such as an earthquake or hurricane, a facility fire, or a civil disturbance;'' fourth, to remove the exceptional circumstance at § 410.1101(d)(7); and fifth, to add an additional sentence to § 410.1101(b) stating, ''ORR may seek clarification about the information provided by the referring agency as needed. In such instances, ORR shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory time frames.''

Section 410.1102 Care Provider Facility Types

Under § 410.1102, ORR described the types of care provider facilities in which unaccompanied children may be placed (88 FR 68919 through 68920). The basis for this section is ORR's statutory authority to make placement determinations for unaccompanied children in its care, as well as other responsibilities such as implementing policies with respect to their care and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.[86] Specifically, this section proposed that ORR may place an unaccompanied child in a care provider facility as defined at § 410.1001, including but not limited to shelters, group homes, individual family homes, heightened supervision facilities, or secure facilities, including RTCs. ORR proposed in the NPRM that it may also place unaccompanied children in OON placements under certain, limited circumstances. OON placements may include an OON RTC (which would need to meet the standards that apply to RTCs that are ORR care provider facilities), or a temporary stay at hospital (for example, for surgery). For purposes of this final rule, ORR notes as a general matter that it may place an unaccompanied child in an OON placement if it determines that a child has a specific need that cannot be met within ORR's network of facilities, where no in-network care provider equipped to meet the child's needs has the capacity to accept a new placement, or where transfer to a less restrictive facility is warranted and ORR is unable to place the child in a less restrictive in-network facility. ORR proposed in the NPRM to make such placements taking into account the considerations and criteria set forth in §§ 410.1103 through 410.1109 and § 410.1901, as further discussed below. In addition, in times of influx or emergency, as further discussed in subpart I (Emergency and Influx Operations), ORR proposed in the NPRM that it may place unaccompanied children in facilities that may not meet the standards of a standard program, but rather meet the standards in subpart I. ORR believes that this provision is consistent with the FSA requirement that unaccompanied children be placed in licensed programs until such time as release can be effected or until immigration proceedings are concluded, except that in the event of an emergency or influx of children into the United

States, ORR must place unaccompanied children into licensed programs as expeditiously as possible.[87]

Consistent with proposed § 410.1102, ORR stated in the preamble to the NPRM that it would place unaccompanied children in group homes or individual family homes, including long-term and transitional home care settings, as appropriate, based on the unaccompanied child's age and individualized needs and circumstances (88 FR 68919). Definitions of ''ORR long-term home care'' and ''ORR transitional home care'' were proposed in § 410.1001, which ORR stated would replace the terms ''long-term foster care'' and ''transitional foster care'' as those terms are used in the definition of ''traditional foster care'' provided at 45 CFR 411.5. ORR stated in the preamble of the NPRM that where possible, it believes that based on an unaccompanied child's age, individualized needs, and circumstances, as well as a care provider facility's capacity, it should favor placing unaccompanied children in transitional and long-term home care settings while they are awaiting release to sponsors. Having said that, ORR noted that efforts to place more unaccompanied children out of congregate care shelters that house more than 25 children together is a long-term aspiration, given the large number of children in its custody and the number of additional programs that would be required to care for them in home care settings or small-scale shelters of 25 children or less. ORR stated that given this reality, care provider facilities structured and licensed to accommodate more than 25 children continue to serve a vital role in meeting this need.

Finally, as discussed in the preamble to the proposed rule, ORR was considering replacing its current long-term and transitional home care placement approach with a community-based care model that would expand upon the current types of care provider facilities that may care for unaccompanied children in community-based settings (88 FR 68919 through 68920). ORR stated that this is in line with a vision of moving towards a framework of community-based care as described in the NPRM and in the following paragraphs. ORR stated that it believes such a framework would be consistent with the language of the proposed rule and that ORR would be able to implement it in a manner consistent with the proposed rule.

ORR stated in the preamble to the NPRM that if it were to finalize the community-based care model, references to ORR long-term home care and ORR transitional home care would be replaced with the term community-based care, and ORR would define ''community-based care'' in § 410.1001 as an ORR-funded and administered family or group home placement in a community-based setting, whether for a short-term or a long-term placement (88 FR 68919). ORR stated that the definition of ''community-based care'' encompasses the term ''traditional foster care'' that is codified at existing § 411.5.

For a more detailed discussion of ORR's proposed community-based care model, ORR refers readers to the NPRM preamble (88 FR 68919 through 68920). ORR welcomed public comment on its vision of community-based care, its inclusion as a care provider facility type in place of ORR's current long-term and transitional home care placement approach, and any other concerns relevant to this change based on existing language in the NPRM.

Comment: Many commenters supported the proposed development and implementation of a community-based care model. A number of commenters stated that they supported including the community-based care model in the final rule because such a model aligns with Federal and State child welfare policies, which recognize the importance of allowing unaccompanied children to experience normal childhood freedoms and opportunities to the greatest extent possible. Some commenters specifically expressed support for the implementation of the Reasonable and Prudent Parent standard, the provision of ''a continuum of care,'' and the integration of unaccompanied children with their local communities and schools. Some commenters also noted that expanding care to include small community-based group homes and semi-independent living for older children will allow ORR to reduce reliance on congregate care settings, help unaccompanied children develop life skills, and offer both potential cost-savings and improvements in the quality-of-care children receive. Many commenters offered recommendations related to the development and implementation of a community-based care model. For example, commenters recommended that ORR develop timelines and a transition plan as well as additional operational details; ensure placements are smaller, home-like settings that allow children to have private spaces and input into their own schedules and participation in community; prioritize developing family-based and/or community-based placements that can accommodate the needs of children with disabilities; and ensure that community-based care programs have the proper amount of resources and support to provide adequate care for unaccompanied children and to facilitate their integration into the community.

Response: ORR thanks commenters for the many comments and recommendations regarding ORR's planned efforts toward the development of a community-based care model and agrees with the many potential benefits of such a model cited by commenters. So that ORR may more fully consider the comments and recommendations it received, ORR is not finalizing the community-based care model in this final rule but will consider all comments and recommendations received as it continues to transition to such a model.

Comment: A few commenters expressed concerns with the use of large congregate care facilities, recommending that that congregate care facilities be limited to 25 or fewer beds and that ORR prioritize placements in the least restrictive settings possible, including family or small community-based settings. One of these commenters also recommended limiting placement in congregate facilities unless the unaccompanied child has specific therapeutic needs where treatment cannot be provided in a home or community-based environment. This commenter also recommended that if family-based placement is unavailable and congregate placement is necessary, ORR should cease placing unaccompanied children in unlicensed facilities.

Response: ORR believes that where possible, based on an unaccompanied child's age, individualized needs, and circumstances, as well as a care provider facility's capacity, it should prioritize placing unaccompanied children in transitional and long-term home care settings while they are awaiting release to sponsors, so as to limit the time spent in large congregate care facilities. Currently, under existing policy, a child is a candidate for long-term home care if the child is expected to have a protracted stay in ORR and is under the age of 17 and 6 months at the time of placement, unless waived by both the referring and receiving Federal Field Specialist (FFS), who will take into account the best interests of the child.

As ORR explained in the NPRM, however, efforts to place more unaccompanied children out of congregate care shelters that house more than 25 children together is a long-term aspiration, given the large number of children in its custody and the number

of additional programs that would be required to care for them in home care settings or small-scale shelters of 25 children or less (88 FR 68919). As ORR noted in the NPRM, given this reality, care provider facilities that accommodate more than 25 children continue to serve a vital role in meeting this need. ORR notes that such facilities are required to be State-licensed, or if they are located in States that will not license care provider facilities housing unaccompanied children under this rule, ORR still requires them to follow State licensing requirements. In addition, all ORR standard programs must follow the minimum standards and provide the required services established at subpart D.

In response to the request that ORR cease placing unaccompanied children in unlicensed facilities, ORR notes that pursuant to § 410.1001, as finalized in this rule, standard programs must be licensed by an appropriate State agency, or meet the requirements of State licensing if they are in a State that does not allow State licensing of programs that provide services to unaccompanied children. As provided in § 410.1104, ORR will place unaccompanied children in standard programs that are not restrictive placements, except where a child meets criteria for restrictive placement, or in the event of an influx or emergency in which case ORR must make all reasonable efforts to place children in standard programs as expeditiously as possible. As provided in § 410.1102, in times of influx or emergency, ORR may place unaccompanied children in emergency or influx facilities that may not meet the standards of a standard program. In situations where unaccompanied children are placed in programs that are not standard programs, ORR implements other safeguards to protect their safety and well-being. Specifically, ORR imposes minimum standards for such emergency and influx facilities at subpart I (as finalized in this rule) to ensure the safety and well-being of children placed in such facilities. In the case of secure facilities, which are not standard programs, under this final rule, secure facilities are required to meet the minimum standards under § 410.1302.

Comment: Many commenters expressed concern that the NPRM does not specify the circumstances in which unaccompanied children would be placed in OON placements and requested additional clarification. These commenters stated that while proposed § 410.1105(c)(2) provides criteria for OON RTC placements, the proposed rule does not provide criteria for other OON placements. One commenter specifically cautioned against overreliance on OON placements, including OON RTCs or OON placements that would meet the definition of heightened supervision facilities as defined in proposed § 410.1001. This commenter noted that children placed in OON placements tend to face more challenges than children placed in-network that negatively impact their well-being and legal case. For instance, according to the commenter, staff at OON placements usually lack experience serving migrant populations or unaccompanied children, and children in OON placements frequently face additional language access barriers, which can delay their access to critical information and services. Additionally, the commenter stated that OON placements are diffusely located, often far from any legal service provider, making children's access to in-person legal meetings infrequent or entirely infeasible. In addition, some commenters noted that in the past, some unaccompanied children placed out-of-network have not received minimum required services, such as educational services and outdoor recreation, and that care and treatment provided by OON placements can vary widely. These commenters emphasized that thorough vetting and independent oversight of OON placements is critical and appreciated the proposed rule's reference to consulting with non-governmental stakeholders such as protection and advocacy (P&A) agencies to assess OON placements. They welcomed further discussion with ORR about policies and procedures to monitor OON placements. One commenter expressed the view that it is not feasible for ORR to sufficiently vet OON RTCs for placement due to the overwhelming number of unaccompanied children.

Commenters also made several recommendations for the final rule. First, commenters recommended that, to ensure unaccompanied children placed in OON placements have the same rights and protections as other unaccompanied children, the final rule should state that children may be placed in an OON placement only if it is the least restrictive, most integrated placement appropriate, that OON placements must be State-licensed to care for dependent children, and that children in OON placements must receive all the minimum services for standard programs, including those specified in proposed § 410.1302. Commenters further recommended that a child not be transferred to a restrictive OON placement unless they meet the criteria for transfer to the same level of restrictive placement within the ORR network. In addition, a few commenters recommended that the final rule state that any secure OON placement must satisfy the secure placement criteria in paragraph 21 of the FSA. Finally, one commenter, while understanding that it would not be feasible for all OON placements to be State-licensed, recommended that ORR include in the final rule that OON placements meet the other requirements for licensed facilities outlined in the FSA.

Response: Section 410.1102, as finalized in this rule, provides that ORR may place unaccompanied children in OON placements under certain, limited circumstances. Consistent with current policies, such circumstances include where ORR determines that a child has a specific need that cannot be met within the ORR network of care provider facilities, where no in-network care provider facility equipped to meet the child's needs has the capacity to accept a new placement, or where transfer to a less restrictive facility is warranted and ORR is unable to place the child in a less restrictive in-network care provider facility. With respect to OON RTCs in particular, as proposed, under § 410.1105(c)(2) ORR will place an unaccompanied child at an OON RTC when a licensed clinical psychologist or psychiatrist consulted by ORR or a care provider facility has determined that the unaccompanied child requires a level of care only found in an OON RTC (either because the unaccompanied child has identified needs that cannot be met within the ORR network of RTCs or no placements are available within ORR's network of RTCs), or that an OON RTC would best meet the unaccompanied child's identified needs. Consistent with § 410.1103, ORR will only place unaccompanied children in an OON placement if it is the least restrictive placement (consistent with the FSA) and in the child's best interest (consistent with the TVPRA), and ORR is revising § 410.1102 to clarify this.

To clarify its intent under this final rule, ORR notes that it makes every effort to place children within the ORR-funded care provider facility network. However, there may be instances when ORR determines there is no in-network care provider facility available to provide specialized services to meet an unaccompanied child's identified needs, or no in-network care provider facility equipped to meet those needs with the capacity to accept a new placement. In those cases, ORR will consider an OON placement.

ORR disagrees with one commenter's assertion that it is not feasible to appropriately vet OON RTCs or any OON placement. Under current policies, which ORR has incorporated in the final rule at § 410.1001, OON providers must be licensed by State licensing authorities and vetted prior to placement to ensure the provider is in good standing and is complying with all applicable State welfare laws and regulations and all State and local building, fire, health, and safety codes. Further, as noted in the NPRM, ORR may confer with other Federal agencies and non-governmental stakeholders, such as the P&A systems, when vetting OON RTCs (88 FR 68925). In addition, an ORR FFS and the FFS Supervisor must approve any OON placement as the least restrictive setting appropriate for the child's needs.

In response to commenters' concerns regarding the additional challenges faced by children placed in OON programs, and that unaccompanied children placed in OON facilities receive appropriate services to meet their needs, ORR notes that the case manager who is assigned to a child placed in an OON facility [88] will administer the case management services and maintain weekly contact with the child and the child's OON provider to ensure that both the case manager and ORR FFS are receiving weekly updates on the child's progress. Thus, the case manager would monitor the unaccompanied child's care and ensure the unaccompanied child is receiving services. The case manager also provides updates to the child's attorney of record.

ORR concurs with the commenters that any OON secure placement would need to satisfy the secure placement criteria in paragraph 21 of the FSA, which are implemented at § 410.1105. In addition, ORR concurs that children may not be placed in an OON restrictive facility unless they meet the criteria for placement or transfer to the same level of restrictive placement within ORR's network. ORR notes that § 410.1105(c)(2) already states that the criteria for placement in or transfer to RTCs within the ORR network apply to placement or transfer to OON RTCs. ORR refers readers to the section of this final rule addressing § 410.1105 for further information regarding criteria for placement in restrictive facilities.

As clarified in the preamble section discussing § 410.1000, part 410 will not govern or describe the entire program. Where the regulations contain less detail, subregulatory guidance such as the ORR Policy Guide, Field Guidance, manuals describing compliance with ORR policies and procedures, and other communications from ORR to care provider facilities will provide specific guidance on relevant requirements in a manner consistent with this final rule. ORR is not proposing to codify all of its existing requirements regarding OON placements in this final rule due to the complexity and quantity of those existing requirements, and because of its intention to iteratively refine and update those requirements in keeping with best practices and allow continued responsiveness to the needs of unaccompanied children and care provider facilities.

Comment: A few commenters expressed concern with use of foster care or group homes. These commenters stated that the foster system in the United States is significantly fragmented, contributing to a prevalence of trafficking activities. One commenter noted that addressing this issue is crucial for enhancing the effectiveness and safety of the foster care system and should be addressed before placing unaccompanied children there. Another commenter expressed concern that ORR's proposed placement provisions would allow unaccompanied children to be placed into foster care facilities that may not meet the standards of a standard program.

Response: ORR notes that ORR only uses licensed foster care programs, which must meet the requirements applicable to a standard program under this final rule, including those specified under subpart D. Thus, ORR has in place standards and requirements to protect the children's safety and well-being.

Comment: A few commenters stated that the final rule must specify that until an unaccompanied child is placed in a program licensed by the State to provide services for dependent children, the child ''shall be separated from delinquent offenders'' (except as provided in paragraph 21 of the FSA). The commenters noted that paragraph 12A of the FSA provides that ''minors shall be separated from delinquent offenders,'' but that this protection does not appear in the NPRM. Commenters disagreed with ORR's statement in the NPRM (88 FR 68922) that this provision is not applicable because it relates to the initial apprehension of unaccompanied children (before ORR involvement) and stated that paragraph 12A of the FSA is not limited to initial apprehension. Rather, according to the commenters, paragraph 12A covers situations where ''there is no one to whom the INS may release the minor pursuant to paragraph 14, and no appropriate licensed program is ''immediately available for placement pursuant to paragraph 19.'' Commenters noted that the definition of licensed program in paragraph 6 of the FSA specifies that a licensed program must be ''licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children'' and that these two paragraphs of the FSA work together: prior to licensed placement, unaccompanied children must be separated from minors adjudicated delinquent; after licensed placement, children must be placed in a facility licensed by the State to serve dependent (rather than delinquent) children. The commenters expressed concern that the proposed rule permits children to be placed in ''standard programs'' that lack State licensure as well as in unlicensed emergency and influx facilities, yet it offers no assurances that unaccompanied children in these placements will be treated as dependent minors. The commenter further noted that the proposed rule did not specify any required standards for OON facilities or any placement criteria for OON non-RTCs and stated that this would permit ORR to place children in OON facilities that are licensed for minors adjudicated delinquent, in violation of the FSA.

Response: As an initial matter, ORR has revised the final rule at § 410.1001 to require that OON placements be licensed by an appropriate State agency. OON placements are vetted prior to ORR placing a child there to ensure the program is in good standing with State licensing authorities and is complying with all applicable State welfare laws and regulations and State and local building, fire, health, and safety codes. For further discussion of standards and placement criteria for OON placements, ORR refers readers to a response addressing OON placements in this preamble section. ORR also revised the final rule at § 410.1302 to require that standard programs be State licensed by an appropriate State agency to provide residential, group, or transitional or long-term home care services for dependent children or meet the requirements of State licensing that would otherwise be applicable if it is in a State that does not allow State licensing of programs providing care and services to unaccompanied children. An extensive discussion of those revisions is provided in the preamble related to § 410.1302.

ORR further notes that, as discussed in the NPRM, the plain language of paragraph 12A of the FSA applies to DHS placements, not ORR placements. Paragraph 12A states that ''[f]ollowing arrest'' of an unaccompanied child if there is ''no appropriate licensed

program . . . immediately available'' the INS may place an unaccompanied child in an ''INS detention facility, or other INS-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility,'' however unaccompanied children ''shall be separated from delinquent offenders'' in those facilities. Paragraph 12A then requires the INS to transfer unaccompanied children from those initial placements within three or five days, depending on the circumstances, to a licensed placement under paragraph 19 of the FSA. Therefore, the language of paragraph 12A regarding ''separation from delinquent offenders'' is most fairly read to apply to DHS's initial placements after arrest. This interpretation of the FSA is consistent with the current statutory framework, where the referring Federal department or Federal agency (usually DHS) is required to transfer an unaccompanied child in its custody to ORR within 72 hours of determining the child is an unaccompanied child, absent exceptional circumstances. Once a child is transferred to ORR's custody, ORR will place the child consistent with this part. In any event, practically speaking, unaccompanied children are not placed with ''delinquent offenders.'' FSA paragraph 12A refers to ''delinquent offenders'' as juveniles who are detained in a ''State or county juvenile detention facility,'' presumably following arrest or conviction of a crime. Because ORR provides care and custody only for unaccompanied children, the only possible scenario in which an unaccompanied child could be placed with ''delinquent offenders'' is possibly in the context of OON secure placements. Accordingly, ORR is updating § 410.1102 to state that unaccompanied children shall be separated from delinquent offenders in OON placements (except those unaccompanied children who meet the requirements for a secure placement pursuant to § 410.1105).

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1102 as proposed, with the following modifications. First, ORR is revising § 410.1102 to state that ORR may place unaccompanied children in OON placements if ORR determines that a child has a specific need that cannot be met within the ORR network of care provider facilities, where no in-network care provider facility equipped to meet the child's needs has the capacity to accept a new placement, or where transfer to a less restrictive facility is warranted and ORR is unable to place the child in a less restrictive in-network care provider facility. Second, ORR is revising § 410.1102 to state that ORR may place unaccompanied children in OON placements, subject to § 410.1103, to clarify that ORR will only place unaccompanied children in an OON placement if it is the least restrictive placement (consistent with the FSA) and in the child's best interest. Third, ORR is revising § 410.1102 to state that unaccompanied children shall be separated from delinquent offenders in OON placements (except those unaccompanied children who meet the requirements for a secure placement pursuant to § 410.1105). Finally, at this time, ORR is not finalizing a community-based care model as described in the NPRM in order to allow additional time to consider the comments and recommendations received on a possible future community-based care model.

Section 410.1103 Considerations Generally Applicable to the Placement of an Unaccompanied Child

ORR proposed in the NPRM at § 410.1103 considerations generally applicable to the placement of unaccompanied children consistent with the TVPRA, 8 U.S.C. 1232(c)(2)(A), and the FSA (88 FR 68920 through 68922). The TVPRA mandates that ORR place each unaccompanied child in the least restrictive setting that is in the best interest of the unaccompanied child and specifies that HHS may consider danger to self, danger to community, and risk of flight. Similarly, paragraph 11 of the FSA requires that each unaccompanied child be placed in the least restrictive setting appropriate to the child's age and ''special needs,'' provided that such setting is consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and protecting the unaccompanied child's well-being and that of others. Consistent with the statutory mandate and the FSA provision, as well as existing policy, ORR proposed in the NPRM at § 410.1103(a) that it would place each unaccompanied child in the least restrictive setting that is in the best interest of the unaccompanied child and appropriate to the unaccompanied child's age and individualized needs, provided that such setting is consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and protecting the unaccompanied child's well-being and that of others.

As discussed in the NPRM, ORR considers the following factors when evaluating an unaccompanied child's best interest: the unaccompanied child's expressed interests, in accordance with the unaccompanied child's age and maturity; the unaccompanied child's mental and physical health; the wishes of the unaccompanied child's parents or legal guardians; the intimacy of relationship(s) between the unaccompanied child and the child's family, including the interactions and interrelationship of the unaccompanied child with the child's parents, siblings, and any other person who may significantly affect the unaccompanied child's well-being; the unaccompanied child's adjustment to the community; the unaccompanied child's cultural background and primary language; length or lack of time the unaccompanied child has lived in a stable environment; individualized needs, including any needs related to the unaccompanied child's disability; and the unaccompanied child's development and identity (88 FR 68920). ORR also noted that its care provider facilities are usually congregate care settings. As a result, consistent with prioritizing the safety and well-being of all unaccompanied children when making a placement determination, ORR stated that it evaluates the best interests of both the individual unaccompanied child being placed and the best interests of the other unaccompanied children at the care provider facility where the individual unaccompanied child may be placed. ORR noted that the factors and considerations in § 410.1103(b) and § 410.1105 also are evaluated in determining the best interest of the child for purposes of placement.

ORR also proposed to use the term ''individualized needs,'' in § 410.1103(a), rather than ''special needs'' (as used in the FSA and regulations established in the 2019 Final Rule at 45 CFR 410.201(a)), because it believes the term ''special needs'' has created confusion. ORR explained that the term ''special needs'' may imply that, in determining placement, ORR considers only a limited range of needs that fall within a special category (88 FR 68920 through 68921). Instead, in assessing the appropriate placement of an unaccompanied child, ORR stated that it takes into account any need it becomes aware of that is specific to the individual being assessed, regardless of the nature of that need. In addition, ORR noted that the term ''special needs'' may imply that, in determining placement, ORR considers only those needs related to an unaccompanied child's disability, which as explained, is not the case. To avoid the suggestion

that, in determining placement of an unaccompanied child, ORR only takes into account a limited range of needs that fall within a special category, ORR proposed in the NPRM the broader term ''individualized needs'' for purposes of § 410.1103(a).

ORR further noted that as used in the FSA, including the considerations required at paragraph 11, ''special needs'' is not synonymous with disability or disability-related needs. As explained in the NPRM, the term ''special needs'' has no clear legal definition; of note, it is not used in section 504 or the HHS implementing regulations at 45 CFR part 85. Aside from its particular usage in the FSA, the term ''special needs'' is often understood to be a placeholder or euphemism for ''disability.'' As with the term ''handicapped,'' ORR was concerned about perpetuating language that many individuals now find stigmatizing. For these reasons, as discussed above at § 410.1001, ORR invited comments concerning the continued use of the terms ''special needs minor'' or ''special needs unaccompanied child'' but included these terms in the NPRM in order to ensure consistency with the FSA.

Under § 410.1103(b), consistent with existing policy and with certain requirements under the TVPRA,[89] ORR proposed in the NPRM that it would consider additional factors that may be relevant to the unaccompanied child's placement, to the extent such information is available, including but not limited to the following: danger to self and the community or others, runaway risk, trafficking in persons or other safety concerns, age, gender, LGBTQI+ status or identity,[90] disability, any specialized services or treatment required or requested by the unaccompanied child, criminal background, location of a potential sponsor and safe and timely release options, behavior, siblings in ORR custody, language access, whether the unaccompanied child is pregnant or parenting, location of the unaccompanied child's apprehension, and length of stay in ORR custody (88 FR 68921). ORR stated that it believes that this information, to the extent available, is necessary for a comprehensive review of an unaccompanied child's background and needs and for appropriate and safe placement of an unaccompanied child.

In addition, with respect to the consideration of whether any specialized services or treatments are required, ORR explained in the NPRM that it is aware of the importance of ascertaining an unaccompanied child's health status upon entering ORR care in order to ensure the most appropriate placement, which includes the following: the need for proximity to medical specialists; the child's reproductive health status, including information relating to pregnancy or post-partum status, use of birth control, any recent procedures, medications, or current needs related to pregnancy; and whether the child is a victim of a sex crime (*e.g.,* sexual assault, sex trafficking); and other healthcare needs (88 FR 68921). ORR relies on such information provided from referring Federal agencies to make appropriate placements. For further discussion of proposed policies related to access to medical care, ORR referred readers to § 410.1307(b). ORR stated that when it receives a referral of an unaccompanied child from another Federal agency, ORR documents and reviews the unaccompanied child's biographical and apprehension information, as submitted by the referring Federal agency in ORR's case management system, including any information about an unaccompanied child's health status, including their reproductive health status, and need for medical specialists.

Under § 410.1103(c), ORR proposed in the NPRM that it would be able to utilize information provided by the referring Federal agency, child assessment tools, interviews, and pertinent documentation to determine the placement of all unaccompanied children (88 FR 68921). In addition, ORR proposed in the NPRM that it may obtain any relevant records from local, State, and Federal agencies regarding an unaccompanied child to inform placement decisions. ORR explained that such information is vital in carrying out ORR's general duty to coordinate the care and placement of unaccompanied children, including determining whether a restrictive placement may be necessary.[91] ORR proposed in the NPRM to add these provisions to the regulations to clarify the broad range of information it may utilize in making placement determinations.

The TVPRA requires that the placement of an unaccompanied child in a secure facility be reviewed at a minimum on a monthly basis to determine if such placement remains warranted.[92] In the NPRM, ORR noted that it exceeds the statutory requirement here because under its current policies all restrictive placements, including secure placements, must be reviewed at least every 30 days (88 FR 68921). ORR proposed in the NPRM at § 410.1103(d) to codify the practice of reviewing restrictive placements at least every 30 days to determine if such placements remain warranted.

Additionally, ORR proposed in the NPRM at § 410.1103(e) to codify its existing policy that ORR make reasonable efforts to provide placements in those geographical areas where DHS encounters the majority of unaccompanied children (88 FR 68921). ORR stated that it believes this provision is justified in order to facilitate the orderly and expeditious transfer of children from DHS border facilities to ORR care provider facilities, which is in the child's best interest. ORR further stated that this requirement reflects the requirement at paragraph 6 of the FSA. ORR noted that in making any placement decision, it also would take into account the considerations set forth in § 410.1103(a) and (b).

Finally, ORR proposed in the NPRM at § 410.1103(f) to codify a requirement that care provider facilities accept all unaccompanied children placed by ORR at their facilities, except in limited circumstances (88 FR 68921 through 68922). ORR explained that such a requirement is consistent with ORR's authority to make and implement placement determinations, and to oversee its care provider facilities, as established at 6 U.S.C. 279(b)(1). Consistent with existing policy, ORR proposed in the NPRM under § 410.1103(f), that a care provider facility may only deny ORR's request for placement based on the following reasons: (1) lack of available bed space; (2) the placement of the unaccompanied child would conflict with the care provider facility's State or local licensing rules; (3) the initial placement involves an unaccompanied child with a significant physical or mental illness for which the referring Federal agency does not provide a medical clearance; or (4) in the case of the placement of an unaccompanied child with a disability, the care provider facility concludes it is unable to meet the child's disability-related needs without fundamentally altering its program, even by providing reasonable modifications and even with additional support from ORR. ORR proposed in the NPRM that if a care provider facility wishes to deny a placement, it must make a written request to ORR providing the individualized reasons for the denial. ORR proposed in the NPRM that any such request must be approved by ORR before the care provider facility may deny a placement. In addition, ORR proposed in the NPRM at § 410.1103(f) that it would be able to follow up with a care provider facility about a placement denial to find a solution to the reason for the denial.

ORR did not propose to codify in subpart B the provisions finalized in the 2019 Final Rule at § 410.201(b) or (e), which were based on requirements set forth in paragraph 12A of the FSA. The 2019 Final Rule at § 410.201(b) provided that ORR separates unaccompanied children from delinquent offenders. However, ORR noted in the NPRM that paragraph 12A of the FSA concerns detention of unaccompanied children following arrest by the former INS, and currently DHS, before transfer of custody to ORR. ORR explained that it is not involved in the apprehension or encounter of unaccompanied children or their immediate detention following apprehension or encounter and thus ORR proposed in the NPRM to omit this provision from this regulation. Having said that, ORR proposed in the NPRM that it will apply the facility standards described as paragraph 12A of the FSA to its care provider facilities, consistent with standards set forth in subpart D (Minimum Standards and Required Services) and subpart I (Emergency and Influx Operations) (88 FR 68922).

The 2019 Final Rule at § 410.201(e) provides that if there is no appropriate licensed program immediately available for placement, and no one to whom ORR may release an unaccompanied child, the unaccompanied child may be placed in an ORR-contracted facility having separate accommodations for children, or a State or county juvenile detention facility where such child shall be separated from delinquent offenders, and that every effort must be taken to ensure the safety and well-being of the unaccompanied child detained in these facilities. ORR proposed in the NPRM omitting this provision from these regulations (88 FR 68922). This provision was also based on paragraph 12A of the FSA, which concerns detention of unaccompanied children following arrest by the former INS, and currently following encounter by DHS, before transfer of custody to placement in an ORR care provider facility. Instead, consistent with existing policies, under § 410.1101(b), ORR proposed in the NPRM to identify an appropriate placement for the unaccompanied child at a care provider facility within 24 hours of receiving the referring agency's notification, whenever possible, and no later than 48 hours of receiving such notification, barring exceptional circumstances. Also, as further discussed in the next section (addressing § 410.1104), in the event of an emergency or influx of unaccompanied children into the United States, ORR proposed in the NPRM to place unaccompanied children as expeditiously as possible in accordance with subpart I (Emergency and Influx Operations).

Comment: Many commenters supported the requirement at proposed § 410.1103(a) that ORR place each unaccompanied child in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child's age and individualized needs. A few commenters specifically commended ORR for the proposal to codify the requirement that care for unaccompanied children be tailored to their individualized needs, emphasizing that this is a significant step that helps ensure the welfare and well-being of unaccompanied children, protects them from potential exploitation, and aligns with recognized child welfare best practices. These commenters applauded ORR for taking this crucial step to prioritize the best interests of the child.

Some of these commenters also provided recommendations to further strengthen or clarify the proposed provisions at § 410.1103(a). One commenter recommended that ORR strengthen language regarding the use of least restrictive settings by stating that unaccompanied children should be placed in the least restrictive setting that is appropriate for their needs and safety, which could include foster care, family homes, or other community-based settings, but that institutional settings should be the last possible option and not considered unless absolutely necessary. One commenter stated that if family-based placement is unavailable and congregate placement is necessary, ORR shelter facilities should require review by legal advocates (lawyers, judges, others) to ensure that the situation is the least restrictive and most appropriate available setting for the unaccompanied child.

A few commenters stated that the primary relevant factors to consider when determining a child's placement should be the best interests of the child, which they believed should be a mix of the factors laid out in both §§ 410.1001 and 410.1103. While the commenters agreed that ORR may consider additional factors, based on each child's individual circumstances to ensure that child's safety and to meet individualized needs, they believed that the prevailing factors for this determination, which should be reflected in the regulations, are the best interest factors. These commenters also recommended that ORR should separate the safety and immigration enforcement considerations, the latter of which are secondary to the best interests of the child and should be considered separately.

Response: ORR agrees that each unaccompanied child should be placed in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child's age and individualized needs, and that consideration of each child's individualized needs is a key component to ensuring their safety and welfare.

Consistent with 8 U.S.C. 1232(c)(2)(A), when determining placement of an unaccompanied child, ORR places the unaccompanied child in the least restrictive setting that it determines is in the best interest of the child. And, consistent with the FSA at paragraph 11, ORR places an unaccompanied child in the least restrictive setting appropriate to the child's age and special needs, provided that such setting is consistent with its interests to ensure the child's timely appearance before DHS and the immigration courts and to protect the child's well-being and that of others. ORR implements these requirements by assessing a broad range of factors and criteria as set forth at §§ 410.1103 and 410.1105.

In response to the commenter that recommended ORR strengthen the language regarding the use of least restrictive settings by providing that unaccompanied children should be placed in the least restrictive setting that is appropriate for their needs and safety, which could include foster care, family homes, or other community-based settings, but that institutional settings should be the last possible option and not considered unless absolutely necessary, ORR notes that the considerations recommended by the commenter are already part of the best interest assessment performed by ORR in determining an appropriate placement under § 410.1103. Under proposed § 410.1103(a) and (b), ORR would consider a child's individualized needs and safety through assessment of the various factors presented in those subsections. In addition, as discussed above and in the NPRM, where possible, ORR agrees that based on an unaccompanied child's age, individualized needs, and circumstances, as well as a care provider facility's capacity, it should favor placing unaccompanied children in transitional and long-term home care settings rather than institutional settings while they are awaiting release to sponsors (88 FR 68919). Having said that, as ORR has previously noted, efforts to place more unaccompanied children out of congregate care shelters

that house more than 25 children together is a long-term aspiration, given the number of children in its custody and the number of additional programs that would be required to care for them in home care settings or small-scale shelters of 25 children or less. Given this reality, care provider facilities structured and licensed to accommodate more than 25 children continue to serve a vital role in meeting this need.

In response to the comment asserting that if family-based placement is unavailable and congregate placement is necessary, ORR shelter facilities should require review by legal advocates (lawyers, judges, others) to ensure that the situation is the least restrictive and most appropriate available setting for the unaccompanied child, while the commenter did not make a specific recommendation for changes to the rule text, ORR notes that its current placement process, as codified in this final rule, is consistent with requirements under the statute and FSA. As noted previously, the statute [93] expressly makes ORR ''responsible for making and implementing placement determinations for all unaccompanied children who are in Federal custody by reason of their immigration status'' and does not contemplate external review by legal advocates. Furthermore, ORR believes that the commenter's suggestion is impracticable, especially if it refers to the initial transfer of unaccompanied children from other Federal agencies, given the 72 hour timeframe required by statute.[94] Finally, ORR notes that shelter facilities, as well as family-based placements, are not considered restrictive facilities, and that ORR has codified in this rule, at § 410.1901, procedures for review of restrictive placements such as heightened supervision and secure facilities.

Finally, given the language of the statute [95] and paragraph 11 of the FSA, ORR does not believe it would be appropriate to separate the safety and immigration considerations and consider them as secondary under proposed § 410.1103(a). Thus, ORR is finalizing § 410.1103 to require that ORR place unaccompanied children in the least restrictive setting that is in the best interest of the child and appropriate to the child's age and individualized needs, provided that this setting is consistent with ensuring the child's timely appearance before DHS and the immigration courts and protecting the unaccompanied child's well-being and that of others.

Comment: One commenter questioned whether there is any objective procedure that can be applied in determining ''the least restrictive setting that is in the best interests of the child, taking into consideration danger to self, danger to the community, and risk of flight'' (quoting from proposed rule preamble at section IV.A, 88 FR 68910). The commenter expressed concern that the evaluation of such topics with regard to an individual may be subjective and asked if there is an objective procedure to apply to these situations to ensure an unbiased placement.

Response: ORR notes that it was unclear what the commenter meant by an ''objective procedure'' to determine the least restrictive setting in the best interest of a child. Having said that, ORR notes that several of the potential factors for consideration described at § 410.1103(b) are based on concrete, objective measures (*e.g.,* age, siblings in ORR custody, location of the child's apprehension, length of stay in ORR custody). Nevertheless, to determine an appropriate placement that is in an unaccompanied child's best interest, ORR believes it must also consider other factors that reflect a child's individualized needs and circumstances, but which may not be as concrete as age or length of stay in ORR custody. Therefore, ORR believes the proposed framework of requiring consideration of a non-exhaustive list of factors is a reasonable method of assessing appropriate placements that are in a child's best interest. Under this rule, ORR will take into account a broad range of factors, as provided at § 410.1103 and the definition of ''best interest'' at § 410.1001. In particular, § 410.1103(b) provides a list of 17 factors that ORR considers as relevant to a child's placement, including, among others, the specific factors noted by the commenter (danger to self, danger to the community/others, and runaway risk). Furthermore, the definition of best interest at § 410.1001 sets forth specific factors that ORR will take into account in determining a child's best interest. The consideration of factors set forth at § 410.1103 and the definition of ''best interest'' at § 410.1001 necessarily will vary for each child and involve some judgment based on each child's unique, individualized needs and experiences and on information obtained by ORR from various sources as provided at § 410.1103(c), including the referring Federal agency, assessments performed of the child, interviews, pertinent documentation, and records from local, State, and Federal agencies regarding the child.

Comment: Many commenters opposed the language at proposed § 410.1103(a) requiring that the placement setting be ''consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts.'' These commenters stated that this language should be removed because it is inconsistent with ORR's child welfare mandate. These commenters further asserted that ORR does not operate as an immigration enforcement agency and compliance with immigration court obligations is not an appropriate consideration for ORR placement decisions; instead, these commenters believed that consideration of ''risk of flight'' as it relates to immigration proceedings (as opposed to flight from a custodial setting), lies squarely with DHS. These commenters stated that placement decisions should be guided by a determination that the placement is in the least restrictive setting in the best interest of the child.

Response: As discussed previously, the HSA [96] requires ORR to consult with DHS in making placement decisions to ensure that children are likely to appear for all hearings and proceedings in which they are involved. Similarly, paragraph 11 of the FSA requires that each unaccompanied child be placed in the least restrictive setting appropriate to the child's age and special needs, provided that such setting is consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and protecting the unaccompanied child's well-being and that of others. Consistent with the statutory mandate and the FSA provision, ORR is finalizing the language at § 410.1103(a) as proposed, requiring that the placement setting be consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts.

Comment: Many commenters supported the proposed rule's requirement that gender and LGBTQI+ status or identity be considered when making placement decisions. A number of commenters, while supporting these requirements, also provided recommendations to strengthen the consideration of these factors to ensure LGBTQI+ children receive the support they need. These commenters noted that when LGBTQI+ children are discriminated against or mistreated, their mental and physical health suffers, whereas supportive placement options support their stability and mitigate safety risks. Commenters recommended that ORR add language to the final rule that requires care provider facilities to consult with LGBTQI+ children in making placement decisions, in order to ensure that ORR has an adequate

understanding of the child's wishes, needs, and concerns with respect to placement. One commenter specifically recommended that language be added to the rule to ensure that the privacy needs of LGBTQI+ children are accommodated.

Response: ORR agrees that the consideration of an unaccompanied child's gender and LGBTQI+ status or identity is important in determining a safe and appropriate placement for such children. To align with the revision to § 410.1210(c)(3), ORR is updating § 410.1103(b)(7) to ''LGBTQI+ status or identity'' and will refer instead to ''LGBTQI+ status or identity'' in the preamble of this final rule.

Regarding commenters' recommendations, ORR notes that consistent with current policy, under this rule, ORR will require care provider facilities to operate their programs following certain guiding principles, including ensuring that LGBTQI+ children are treated with dignity and respect, receive recognition of their 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.[97] ORR agrees that it is essential to ensure the safety and well-being of each child. Under § 410.1103(b)(7), ORR intends, consistent with current policies, that care provider facilities conduct an individualized assessment of each LGBTQI+ child's needs, and according to that assessment address each LGBTQI+ child's housing preferences and health and safety needs. If a child expresses safety or privacy concerns or the care provider facility otherwise becomes aware of such concerns, the care provider facility must take reasonable steps to address those concerns.

Further, as finalized at § 410.1001, ORR considers an unaccompanied child's expressed interests when evaluating what is in the child's best interests, in accordance with the child's age and maturity. Under § 410.1302(c), all standard programs and secure facilities are required to provide or arrange an individualized needs assessment for unaccompanied children, and provide regular individual and group counseling sessions. These requirements also apply to EIFs, as described at § 410.1801(b). Further, case managers are responsible for developing individual service plans for each unaccompanied child. ORR believes that these provisions will ensure that LGBTQI+ children are consulted in making placement determinations when appropriate and that ORR has an adequate understanding of the child's wishes, needs, and concerns with respect to placement.

ORR will continue to monitor the implementation of its existing policies to protect LGBTQI+ children with respect to placement determinations and consider the recommendations as needed in future policymaking. ORR notes that addressing these concerns through its policies allows ORR to make more frequent, iterative updates in keeping with best practices, to communicate its requirements in greater detail, and to be responsive to the needs of unaccompanied children and care provider facilities.

Comment: One commenter expressed concern that § 410.1103(b) allows for unacceptable discretion by listing the factors that ''may be relevant''; the commenter stated that gender and age are factors that should always be a consideration in any child's proper placement.

Response: At § 410.1103(b), ORR includes a non-exhaustive list of factors, some of which, including gender and age, will be relevant in most or all placements. ORR believes that a factor's relevance may vary depending on a child's unique needs and circumstances. For example, ORR acknowledges that consideration of a child's gender identity is of particular relevance in placement decisions. In addition, under current ORR policy, children who are under 13 years of age are given priority for transitional foster care placements; thus, in assessing foster care placements, age is an essential factor to consider.[98] To clarify ORR's intent that certain factors may be relevant in most or all placements, while other factors may not be relevant to every unaccompanied child's situation, depending on each child's individualized needs, ORR is revising § 410.1103(b) introductory language to replace the phrase ''that may be relevant'' with ''to the extent they are relevant.''

Comment: A number of commenters expressed concern with, or asked for further clarification regarding, ORR's proposal to consider gender and/or LGBTQI+ status or identity in determining placement. Two commenters expressed concern about the impact of these requirements on faith-based providers that provide such services to unaccompanied children. One commenter also asked for clarification regarding how the best interests of the child are evaluated in the context of the unaccompanied child's expressed interests and the unaccompanied child's development and identity. Another commenter believed that there is no legitimate reason for a child's self-identified gender or LGBTQI+ status or identity to be considered in placement, and expressed concern that the proposed regulation discriminates against religious ORR staff members, faith-based foster care providers and parents by forcing them to choose between their deeply held convictions and their desire to live out their faith by caring for unaccompanied children.

A few commenters expressed concern that the proposed rule did not explain how a child's LGBTQI+ status or identity should impact a placement. One of these commenters asked how, and at what age, ORR would ascertain a child's LGBTQI+ status or identity.

A few commenters also asked ORR to clarify whether ORR's definition of a suitable placement for an unaccompanied child would match the definition of a ''safe and appropriate placement'' for LGBTQI+ children in foster care as recently proposed by the HHS ACF Children's Bureau (88 FR 66752). These commenters opposed ORR adopting the standard proposed by the Children's Bureau.

Response: Although ORR is respectful of different views, it reiterates the importance of taking gender and LGBTQI+ status or identity into account as set out in this rule. In determining an appropriate placement, ORR takes into account a broad range of factors, not just gender and LGBTQI+ status or identity, as set forth at § 410.1103 and the definition of ''best interest'' at § 410.1001. Thus, when evaluating the child's best interest ORR considers the whole person including consideration of the unaccompanied child's expressed interests and the unaccompanied child's development and identity, depending on the child's age, maturity, and individualized needs, as well as information from a variety of sources as specified at § 410.1103(c). Because each child has unique needs and experiences, the consideration of the factors set forth at § 410.1103 and the definition of ''best interest'' at § 410.1001 necessarily will vary for each child.

ORR staff members, care provider facilities, and foster parents that serve and care for unaccompanied children in ORR custody agree to do so consistent with ORR's policies and requirements, including those that pertain to LGBTQI+ children. ORR wishes to make clear that it operates the UC Program in compliance with the requirements of federal religious freedom laws, including the Religious Freedom Restoration Act, and applicable Federal conscience protections, as well as all

other applicable Federal civil rights laws and applicable HHS regulations. HHS regulations state, for example: ''A faith-based organization that participates in HHS awarding-agency funded programs or services will retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs.'' [99] These regulations also make clear that HHS may make accommodations, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.[100] Regarding commenters' request for clarification on whether ORR is adopting the standard proposed by the Children's Bureau in the NPRM on safe and appropriate placement requirements under titles IV–E and IV–B of the Social Security Act for children in foster care who identify as LGBTQI+,[101] ORR notes that the Children's Bureau and ORR are distinct offices within ACF and the programs they administer are governed by distinct statutory authorities. As such, the rule proposed by the Children's Bureau would not govern the UC Program. ORR determines whether a placement is safe and suitable for an unaccompanied child in accordance with 8 U.S.C. 1232(c) and the provisions set forth in subpart B of this rule.

Comment: Some commenters opposed the proposed rule's reference to what they described as the ''non-scientific, undefined'' term ''gender'' rather than ''sex'' of the child. Two commenters expressed the view that the proposed placement criteria would result in placements that compromise the privacy and safety of girls in ORR custody.

Response: ORR notes that the terms ''gender'' and ''sex'' are not synonymous, and are separately defined in existing ORR regulations at 45 CFR 411.5. As such, ORR declines to list ''sex'' as a factor in lieu of ''gender.'' Further, under § 410.1103(a), as finalized in this rule, ORR considers a child's gender identity as one of many factors, when making placement determinations because ORR believes that such identity has significant implications for reaching placement decisions that protect the safety and well-being of unaccompanied children. ORR notes that § 410.1103(b) is a non-exhaustive list of the factors ORR considers, and thus ORR could also consider a child's sex, as relevant, for purpose of placement.

ORR disagrees that the consideration of gender in placement decisions will diminish privacy or safety. If a child expresses safety or privacy concerns, or the care provider facility otherwise becomes aware of such concerns, the care provider facility must take reasonable steps to address those concerns.

Comment: Many commenters stated that criminal background or history (proposed § 410.1103(b)(10)) should be removed as a factor because it is overbroad and permits the consideration of unsupported allegations and criminal charges that have not resulted in convictions. These commenters stated that, at most, ORR should only consider confirmed or verified criminal convictions for children charged as adults and only when it is necessary to appropriately care for the child or others. These commenters stated that ORR should not consider juvenile delinquency adjudications because criminal laws do not treat children the same as adults, and juvenile delinquency adjudications are not considered criminal convictions. These commenters also expressed the view that consideration of criminal history risks straying from ORR's role under the TVPRA and expressed concern that an incorrect assessment of a child's previous contact with the criminal or juvenile justice system can lead to a child's wrongful placement or transfer to a restrictive setting or prolonged stay in such placements. In addition, many commenters stated ORR should ensure that juvenile records remain confidential and are not used against children, particularly to place children in restrictive, punitive settings.

A few commenters believed that children escaping a nation in which forced gang recruitment is common should not be penalized for suspected gang affiliation and one commenter noted that ORR should assume all children who migrate here are traumatized, and thus should be placed in warm and supportive environments rather than secure placements.

Response: ORR appreciates commenters' concerns regarding the consideration of a child's criminal background and history in determining appropriate placement; however, ORR continues to believe that consideration of this factor is necessary and appropriate in determining placement that is in the best interest of both the unaccompanied child and other children at the care provider facility under consideration. ORR believes that is appropriate to consider all information that may pertain to a child's potential connections to criminal activity, including criminal charges, convictions, juvenile delinquency adjudications, and suspected gang involvement or affiliation, to get a complete picture of the child's experiences and individualized needs and any potential risk to the child or to others in a care provider facility in which a child may be placed. Also, it is important to note that no child is automatically placed in a restrictive facility; instead, the child's placement will depend on the nature of any criminal background and the consideration of other factors at § 410.1103(b), including whether there exists a danger to self or others, and whether the child meets the specific criteria at § 410.1105 for a restrictive placement. Thus, consistent with its role under the TVPRA, ORR assesses many factors and applies various criteria before making a placement. ORR recognizes that children escaping a nation in which gang-related violence is common may be traumatized and takes this into consideration as part of its best interests assessment (see, in particular, the definition of ''best interest'' in § 410.1101) along with the broad array of other information to determine appropriate placement.

Furthermore, in assessing criminal background, ORR closely considers information obtained from a variety of sources, as provided at § 410.1103(c), including the referring Federal agency, assessments performed of the child, interviews, pertinent documentation, and records from local, State, and Federal agencies regarding the child. Thus, ORR acquires and evaluates criminal background information in collaboration with other professionals and agencies with expertise in these matters, and disagrees with comments that this factor is overbroad, permits the consideration of unsupported allegations, or causes ORR to stray from ORR's role under the TVPRA. In fact, ORR's role under the TVPRA (8 U.S.C. 1232(c)(2)(A)) is to determine appropriate placement in the least restrictive setting that is in the best interest of the unaccompanied child, giving due consideration to danger to self, danger to the community, and risk of flight. In considering a child's criminal background as described above, ORR is fulfilling its statutory role.

Comment: Many commenters opposed the inclusion of behavior as a factor at proposed § 410.1103(b)(12), asserting that this factor is vague and overbroad. These commenters stated that ORR and its care provider facilities often rely heavily on ''Significant Incident Reports'' (SIRs) as evidence of ''bad

behavior'' in determining a child's level of placement, and expressed concern that the information in SIRs may not provide a full picture of the child or adequately note the significant trauma that may have contributed to a child's behavior, prompting a child to be inappropriately stepped up to an even more restrictive environment or delay a child's transfer to a long-term foster care placement.

In addition, many commenters stated that behavior should be deleted as a factor because it is duplicative of § 410.1103(b)(9), which requires an assessment of ''[a]ny specialized services or treatment required or requested by the unaccompanied child'' as a factor for consideration in placement. These commenters further noted that behavioral issues exhibited by children are often manifestations of stress, detention fatigue, and trauma, and typically indicate a child's need for additional support and services. Commenters further stated that, if ORR includes ''behavior'' as a factor for consideration in placement, the language at least should be amended to ''the child's need for behavioral supports and services.''

Response: ORR continues to believe that consideration of behavior is appropriate in determining placement that is in the best interest of the unaccompanied child and other children at the care provider facility under consideration. While the term ''behavior'' could entail a broad range of considerations, ORR believes this is necessary for ORR and its care provider facilities to obtain a complete picture of the child's individualized needs. In response to commenters' concerns, while ORR and its care provider facilities use SIRs as evidence of a child's behavior in determining a child's level of placement, under existing policy and under § 410.1103, ORR and its care provider facilities also take into account other factors to obtain a complete picture of the child and the broader context of the child's behavior before making this determination, including the child's mental and physical health and other individualized needs as set forth in the definition of ''best interest'' at § 410.1001.

ORR disagrees that listing ''behavior'' as a factor is duplicative and already captured under § 410.1103(b)(9) (specialized services or treatment required or requested). While ORR agrees that behavioral issues exhibited by children can be manifestations of stress, detention fatigue, and trauma, and may indicate a child's need for additional support and services, the causes of behavioral issues and whether they necessitate additional services or treatment may vary from child to child depending on each child's individual experiences and needs. Thus, ORR does not agree that this factor is already captured under § 410.1103(b)(9); instead, ORR believes that for purposes of clarity and to ensure that behavior is specifically included as part of a comprehensive consideration of a child's needs, it should be included as a separate factor at § 410.1103(b)(12).

ORR also does not believe it is necessary to amend the language at § 410.1103(b)(9) to state ''the child's need for behavioral supports and services'' as requested by commenters. ORR recognizes that a child's behavior is often connected to other needs, such as mental health needs, or that behavioral supports or services may be appropriate in certain cases but believes that the need for ''supports and services'' may vary from child to child in light of the child's stage of development and the circumstances the child is facing. ORR believes that reflecting the factor as ''behavior'' allows for a more comprehensive consideration of the behavioral manifestations that could impact placement. ORR will consider further addressing and clarifying the application of behavior in future policymaking.

Comment: Many commenters supported the consideration of a child's status as pregnant or parenting in § 410.1103(b)(15) and supported ORR's recognition in the preamble that pregnant and parenting youth are ''best served in family settings.'' These commenters recommended that ORR go further to protect these particularly vulnerable youth by codifying a new subsection (h) in § 410.1103 that explains pregnant and parenting unaccompanied children ''shall be given priority to community-based care placements'' or ''transitional and long-term home care,'' depending on the terminology for care provider types that ORR adopts. Commenters noted that this addition to the proposed rule would be consistent with section 1.2.2 of the UC Program Policy Guide, which provides, in part, that ''ORR gives priority for transitional foster care placements to . . . teens who are pregnant or are parenting.'' One commenter applauded ORR's recognition that unaccompanied children who are pregnant and/or parenting need particular kinds of placements and services, noting that data show that many teenage parents in foster care have experienced maltreatment, endured multiple placements, and been separated from parents and other important people, resulting in significant trauma. The commenter encouraged ORR to make specific recommendations to address the needs of pregnant and/or parenting youth who may come into the agency's care to ensure their safety, health, and well-being.

Response: As noted by commenters, under current ORR policy, teenagers who are pregnant or are parenting are a priority group for transitional foster care. ORR does not propose to adopt in the regulation text each of its existing policies regarding transitional foster care, including this provision, because of the sheer number of those requirements and because keeping those requirements in subregulatory guidance will allow ORR to make more appropriate, timely, and iterative updates in keeping with best practices and be continually responsive to the needs of unaccompanied children and care provider facilities. As clarified in § 410.1000, part 410 will not govern or describe the entire program. Where the regulations contain less detail, subregulatory guidance such as the ORR Policy Guide, Field Guidance, manuals describing compliance with ORR policies and procedures, and other communications from ORR to care provider facilities will provide specific guidance on requirements.

Comment: One commenter asked ORR to clarify (1) whether it believes that it is in the best interest of the child to place a pregnant child in States that have more permissive abortion laws or less permissive abortion laws; (2) to what extent do State laws on abortion factor into the ''best interests of the child,'' if at all; and (3) whether the availability of medical services for abortion takes precedence over placing an unaccompanied child with family or relatives who are located in a State where such services are not available.

Response: The factors outlined at § 410.1103 pertain to ORR's process for placing an unaccompanied child in a particular care provider facility. ORR makes decisions whether to release the unaccompanied child to family or relatives in accordance with subpart C of this part.

Consistent with the ''best interest'' definition and placement considerations at §§ 410.1001 and 410.1103, respectively, if a child expresses the need for medical services of any kind, access to medical services is one factor ORR considers in determining a placement that is in the best interest of the unaccompanied child and appropriate to the child's age and individualized needs. ORR further notes

that while access to medical services is an important factor in determining placement, it is not the sole factor assessed under § 410.1103(b). For example, ORR also considers release to family or relatives who are determined to be suitable sponsors under §§ 410.1201 through 410.1204. For every child in its custody ORR evaluates the best interest of the child taking into account each child's individual needs and circumstances. For further discussion of an unaccompanied child's access to medical care, ORR refers readers to the discussion of § 410.1307 of this final rule.

Comment: One commenter stated that the language and list of factors identified in § 410.1103(b) are not sufficiently comprehensive and conflate best interest considerations with immigration enforcement and safety considerations. The commenter provided suggested language that incorporates best interest factors included in the NPRM (88 FR 68920), factors under proposed § 410.1103, and factors used in best interest determinations in family and child welfare courts. Specifically, the commenter recommended revising the structure and content of § 410.1103(b) to first include the best interest factors set forth in the NPRM preamble (88 FR 68920), followed by certain factors in § 410.1103(b), and finally, certain new factors such as impact on the child of current ORR placement; size of proposed placement, whether a child placed in a particular jurisdiction is likely to obtain legal relief, and caretaker's ability to provide for the child's physical and mental well-being. A few other commenters also encouraged ORR to consider the impact of the placement on the child's legal case or potential legal relief when making placement decisions.

Finally, to distinguish best interest and least restrictive setting considerations from those regarding community safety or flight risk, the commenter recommended incorporating danger to community and flight risk in § 410.1103(b) to be considered separately in making placement decisions. The commenter stated that danger to community and flight risk would encompass assessment of behavior, criminal history, and trafficking risk making the listing of these three factors separately unnecessary.

Response: ORR appreciates the commenter's recommendations. As to the commenter's suggestion to incorporate the best interest standards set forth in the NPRM preamble (88 FR 68920) into § 410.1103(b), ORR believes that such standards are already adequately incorporated into § 410.1103 through the reference to ''best interest'' in § 410.1103(a) and thus it is not necessary to individually include such factors in § 410.1103(b). In regard to two of the new factors recommended by the commenter, impact of any previous placement and the size of the proposed placement, ORR notes that it does in fact consider these in determining the least restrictive placement that is in the best interest of the child and that is appropriate to the child's age and individualized needs, whether upon initial placement or transfer. In regard to the suggestion that ORR consider whether a child placed in a particular jurisdiction is likely to obtain legal relief, ORR notes that for most unaccompanied children in ORR custody, immigration proceedings begin after the child has been released to a sponsor. Immigration proceedings may commence for children who are in ORR custody for longer periods, in particular for those children placed in ORR long-term home care. ORR notes that under existing policy, in making a long-term home care referral and placement decision that is in the child's best interest, ORR considers the legal service provider's (LSP) recommendation of preferred locations for placement. ORR intends to continue this policy under this final rule. With respect to the commenter's suggestion to consider the caretaker's ability to provide for the child's physical and mental well-being (as required by the TVPRA, 8 U.S.C. 1232(c)(3)(A)), ORR notes that this factor applies when assessing release of a child, rather than placement in an ORR care provider facility, and is in fact taken into consideration under § 410.1202, as finalized in this rule.

Finally, ORR does not agree that danger to community and flight risk adequately encompass the separate considerations of behavior, criminal history, and trafficking risk. ORR further believes that including each of these five factors separately in § 410.1103(b) provides greater clarity as to the types of considerations that may be relevant in determining placement for an unaccompanied child. ORR believes that it is not necessary to distinguish best interest and least restrictive setting considerations from those regarding community safety or flight risk for purposes of § 410.1103(b) because all of these factors are potentially relevant to determining the least restrictive setting in the best interest of the child.

Comment: A few commenters encouraged ORR to consider access to counsel when making placement decisions.

Response: ORR notes that it provides unaccompanied children with access to legal services and information pursuant to § 410.1309, as finalized in this rule. Additionally, access to counsel is not limited by placement, and so it is not a factor considered in placement decisions. ORR refers readers to the discussion of § 410.1309 later in this final rule for further information.

Comment: One commenter noted that the proposed rule fails to take into account the impact of transfers on unaccompanied children when determining placement. This commenter recommended that for significant subpopulations of unaccompanied children (including tender-age children, children with identified autism-spectrum disorders, and children with impaired functioning in emotional domains related to the formation of stable attachments), ORR should have a strong preference for the use of a single placement and explicitly weigh the disruption of a transfer as part of any evaluation for transfer placement suitability. The commenter noted that transfers are inherently destabilizing for unaccompanied children and should be minimized.

Response: As part of its evaluation of whether a transfer is in the best interests of the child, ORR assesses various factors provided at § 410.1103 and in the definition of best interest at § 410.1001, as relevant, including the potential impacts of a transfer on a child given the child's age, maturity, mental and physical needs, and any other individualized needs, including needs related to the child's disability. Because it already intends such factors to be considered when making placement determinations, at this time, ORR does not believe it necessary to make the changes to the rule text as suggested by the commenter.

Comment: One commenter noted that the current rule gives ORR authority to consider the factors at § 410.1103(b) and questioned why ORR is proposing a new rule to authorize such consideration. This commenter asked ORR to explain why these factors are not already being considered.

Response: ORR thanks the commenter for its question. As discussed in the NPRM and this final rule regarding the scope of this rule regarding § 410.1000, ORR's current policies, including policies concerning considerations generally applicable to the placement of an unaccompanied child, are described in various policy documents, field guidance, manuals, and communications from ORR to care provider facilities (88 FR 68914). But ORR does not have a regulation that

comprehensively codifies such standards. Further, as discussed in section III.B.3 of the proposed rule and this final rule, the 2019 Final Rule is currently subject to an injunction. ORR is issuing this final rule to more broadly codify and address issues related to custody of unaccompanied children by HHS, consistent with ORR's statutory authorities and to implement relevant provisions of the FSA. This final rule codifies, at § 410.1103, the factors that ORR currently applies in determining appropriate placement.

Comment: Some commenters generally opposed application of factors at § 410.1103(b), expressing concern that the factors would be insufficient to enable ORR or its contractors to identify patterns of trafficking. One commenter believed the proposed rule does not give ORR employees evaluating children's placement sufficient guidance on what factors should be considered and how to protect children from traffickers or persons seeking to victimize unaccompanied children.

Response: ORR takes seriously its responsibility when making placement determinations to consider the best interests of unaccompanied children and specifically to protect them from trafficking risk.[102] Section 410.1103(b) helps to protect the safety and well-being of unaccompanied children under ORR care by explicitly listing factors that ORR considers in determining an appropriate placement in the best interest of an unaccompanied child, including trafficking and safety concerns, criminal background, danger to self, danger to community/others, and runaway risk. While relevant to placement decisions, the factors in § 410.1103(b) also allow ORR to potentially identify patterns in the information provided which can assist in efforts to protect the unaccompanied child's safety. This final rule details trafficking protection and prevention efforts related to sponsor vetting and post-release services, policies regarding trafficking concern referrals to other agencies, and access to child advocates and legal services providers. ORR will also consider providing additional guidance regarding application of these factors and how to protect children from traffickers or persons seeking to victimize them in future policymaking.

Comment: Many commenters recommended that ORR shorten frequency of restrictive placement reviews to ''at least every 14 days'' to ensure compliance with its legal obligation under the TVPRA to place children in the least restrictive setting in their best interest. These commenters noted that the TVPRA requires that ORR review the placement of children in secure facilities (the most restrictive level of placements) on a monthly basis ''at a minimum'' and that by extending the TVPRA's 30-day minimum standard from secure settings to all restrictive settings, the proposed language sets an unacceptably low expectation for ORR's mandate. The commenters believed that proposed § 410.1103(d) overlooks the opportunity to expect more prompt reviews as a norm and ignores statutory support and evidence that children require faster reviews while in restrictive settings.

Response: ORR appreciates the commenters' recommendations, but ORR continues to believe that requiring review of all restrictive placements at least every 30 days is a reasonable standard and consistent with the TVPRA.[103] The TVPRA requires that the placement of an unaccompanied child in a secure facility be reviewed, at a minimum, on a monthly basis, and sets no review frequency for heightened supervision facilities. Thus, as noted in the NPRM, ORR exceeds the statutory requirement by requiring at § 410.1103(d), consistent with its existing policy, that all restrictive placements be reviewed at least every 30 days to determine whether a new level of care is appropriate (88 FR 68998). Having said that, ORR does note that § 410.1103(d) states that restrictive placements must be reviewed ''at least'' every 30 days, allowing ORR and its care provider facilities the flexibility to assess placements more frequently as determined appropriate in any given case. Thus, we believe that the frequency of reviews required under § 410.1103(d) will reasonably allow ORR to determine whether a restrictive placement continues to be warranted in accord with its statutory responsibilities, but also in a way that gives it the ability to respond flexibly in cases warranting more frequent review.

Comment: A few commenters stated that they believe that proposed § 410.1103(e) not only violates the State licensing requirement of the FSA but could lead to unlicensed placements being favored over State-licensed placements. Commenters noted that paragraph 6 of the FSA provides that the Government ''shall make reasonable efforts to provide licensed placements in those geographic areas where the majority of minors are apprehended, such as southern California, southeast Texas, southern Florida and the northeast corridor.'' However, the commenters noted that proposed § 410.1103(e), by contrast, states that ''ORR shall make reasonable efforts to provide placements in those geographical areas where DHS encounters the majority of unaccompanied children.'' The commenters believed that by omitting the term ''licensed'' from this provision, the proposed rule violates the FSA State licensing requirement and could have the effect of prioritizing unlicensed placements in Texas over licensed placements in other geographic areas, undermining the purpose of paragraph 6 and the FSA as a whole.

Response: ORR notes that this final rule has revised § 410.1103(e) to state that ORR shall make reasonable efforts to provide ''licensed'' placements in those geographical areas where DHS encounters the majority of unaccompanied children. In addition, ORR refers the commenters to the discussion of State licensing in the preamble related to § 410.1302 of this final rule further below.

Comment: One commenter suggested that by focusing placement in limited geographic areas (near the Southwest Border) under proposed § 410.1103(e), ORR does not appear to consider whether unaccompanied children might require greater care. The commenter questioned why ORR would want to confine unaccompanied children to a small number of facilities in one area of the country and suggested that this forces ORR to construct new facilities to support them. One commenter emphasized that placement of children in geographic areas near prospective sponsors is also important, especially for children whose prospective sponsors are parents or legal guardians. The commenter described certain benefits when a child receives a placement near the prospective sponsor, including improved sponsor response to the sponsor application, decreased stress for the unaccompanied child, and improved efficiencies in legal representation.

Another commenter expressed concern that proposed § 410.1103(e) prioritizes speed when placing children instead of safety.

Response: Consistent with paragraph 6 of the FSA, § 410.1103(e) provides that ORR shall make reasonable efforts to provide licensed placements in those geographical areas where DHS encounters the majority of unaccompanied children. As discussed in the NPRM, ORR believes that this provision is justified in order to facilitate the orderly and expeditious transfer of children from DHS border facilities to ORR care provider facilities, which is in the child's best interest (88 FR 68921). ORR notes, however, that this provision does not require that ORR place unaccompanied children in these

geographic areas in every case, but instead requires that ORR make reasonable efforts to do so. ORR acknowledges that in some cases, placement in the specified areas may not be appropriate or possible, for example, when there is not sufficient capacity at certain types of care provider facilities to adequately meet the needs of a child. In addition, § 410.1103(e) does not displace the requirement at § 410.1103(a) that ORR must place each child in the least restrictive setting that is in the best interest of the child and appropriate to the child's age and individualized needs, or the requirement at § 410.1103(b) that ORR must consider numerous factors that may be relevant to such placements. Thus, after considering the relevant factors at § 410.1103, including the best interest considerations at § 410.1001, ORR could determine in some cases that it is in the best interest of the child to be placed in areas outside the geographic areas where DHS encounters the majority of unaccompanied children, including, in appropriate cases, geographic areas near prospective sponsors.

Finally, in response to the comment that § 410.1103(e) prioritizes speed over safety when placing children, ORR notes that this provision is written consistently with the FSA at paragraph 6, but also in accord with ORR's statutory responsibility to consider the best interests of unaccompanied children. While expeditious placement is important, because for example it minimizes the amount of time children spend in Border Patrol facilities that are not designed to care for children, ORR considers multiple factors, not time alone, in determining a placement that is in the best interest of an unaccompanied child to ensure that safety and well-being of the child and others.

Comment: Many commenters supported ORR's proposed restrictions at § 410.1103(f) on the circumstances in which care provider facilities may deny placements of unaccompanied children, stating that the issue of care provider facilities improperly denying placements to children has been a longstanding problem, especially for unaccompanied children with disabilities. In addition, these commenters supported proposed § 410.1103(g), stating that these provisions will provide greater transparency and accountability to ensure that care provider facilities do not deny placements to children on improper bases.

Response: ORR agrees with the commenters that § 410.1103(f) and (g) will help ensure that unaccompanied children, including those with disabilities, are not denied placement in appropriate care provider facilities.

Comment: Many commenters provided recommendations to strengthen § 410.1103(f) and (g). These commenters recommended that § 410.1103(f) specify that if a care provider facility denies placement to a child with a disability under any of the subparagraphs of § 410.1103(f), ORR will promptly find the child another placement in the most integrated setting appropriate. In addition, with respect to § 410.1103(g), commenters further recommended that ORR set a strict timeframe of 72 hours within which care provider facilities must respond to a placement request, stating that ORR should not permit care provider facilities to avoid their obligations by delaying or failing to respond to placement requests. These commenters further recommended that ORR set a strict timeframe within which ORR staff must respond to any written request by a care provider facility for authorization to deny placement, and that if ORR denies the care provider facility's request, the care provider facility should be required to arrange promptly for the child's transfer to its facility.

Commenters also stated that the regulations should provide for monitoring and oversight of provider compliance with respect to placement requests, given the findings of the May 2023 report issued by the HHS Office of Inspector General (OIG) [104] that ''ORR staff and care provider facility staff did not document information critical to the transfer of unaccompanied children'' and ''did not have a process in place to track denied transfers,'' and the longstanding issue of improper placement denials by providers. Specifically, these commenters stated that ORR should track care provider facilities' written requests for authorization to deny placements and ORR's responses to those requests and order corrective actions, such as re-training, for care provider facilities that have had their requests denied on multiple occasions. Furthermore, the commenters stated that for accountability and oversight, ORR should publish aggregate data regarding care provider facility compliance and provide data regarding corrective actions to the Ombudsperson for review.

Response: ORR notes that whenever a care provider facility denies placement of a child, with or without a disability, it makes every effort to promptly identify another placement in the least restrictive, most integrated setting that is in the child's best interest and appropriate to the child's needs. ORR has procedures in place to ensure that transfers happen within a reasonable timeframe which may vary depending on the facts of a particular case to ensure that placements are made in the child's best interest. Given this, ORR does not believe it is necessary or appropriate to codify a strict timeframe as requested by commenters.

With respect to the recommendation that, if ORR denies the care provider facility's request to deny placement, the care provider facility should be required to arrange promptly for the child's transfer to its facility, ORR notes that, in these cases, ORR expects the care provider facility to arrange promptly for the child's transfer. As provided at § 410.1103(g), ORR may also follow up with a care provider facility about a placement denial to find a solution to the reason for the denial. Given this, ORR expects that the reason for the requested denial may be resolved in many cases through such follow-up such that a child may be promptly transferred to such facility without issue. However, if the care provider facility nevertheless continues to deny placement of the child, ORR will impose corrective actions as appropriate. ORR also notes that it has established a Transfer Review Panel to help conduct oversight of care provider facility transfer decisions to track when denials occur and help resolve challenges to placement that might arise.

Finally, with respect to commenters' recommendations that the regulations provide for monitoring and oversight of care provider facility compliance with respect to placement requests and that ORR publish aggregate data regarding care provider facility compliance and provide data regarding corrective actions to the Ombudsperson for review, ORR will take them under consideration and may address them in future policymaking.

Comment: One commenter opposed proposed § 410.1103(f), stating that it eliminates the discretion Florida's childcare providers have when it comes to accepting placement of unaccompanied children. The commenter stated that care provider facilities must maintain autonomy to determine which children they are willing to accept for placement and may have reasons for denying a placement beyond those provided in § 410.1103(f). The commenter provided examples of other circumstances in which, in the commenter's view, a Florida care provider facility should have the independent discretion to deny placement, including where the care

provider facility determines that placement of the child would pose a risk to another child for whom the facility is already providing care (such as when a child has an emotional or behavioral disturbance that cannot be managed); where a care provider facility determines that placement would pose a risk to the child, such as placement of a young child in a group home that is currently caring for teenagers; or where the care provider facility determines that it does not have the resources to appropriately care for the child.

One commenter sought clarification about whether the intent of proposed § 410.1103(f) and (g) was to remove the care provider facility's autonomy to decide for itself whether it meets one of the criteria at proposed § 410.1103(f), noting that the two subsections seem to conflict with one another. In addition, the commenter stated that follow-up with the care provider facility after submitting a written placement denial request will likely take more time than the 48 hours allowed (as provided under § 410.1101(b)), and asked whether, in this case, the child would then be placed at the care provider facility regardless of whether ORR's decision process has been completed.

Response: As noted in the NPRM, the requirements at § 410.1103(f) and (g) are consistent with ORR's authority under the HSA [105] to make and implement placement determinations, and to oversee its care provider facilities. ORR further notes its care provider facilities agree, as a condition of their funding, to abide by ORR policies, which include policies regarding the placement of unaccompanied children. ORR believes that the provisions at § 410.1103(f) and (g) are reasonable and necessary to enable prompt placement of unaccompanied children, including children with disabilities, in the least restrictive, most integrated setting appropriate to their needs as mandated by the TVPRA and as is consistent with section 504, and to ensure that children do not remain unnecessarily in restrictive placements even after ORR and care provider facility staff have determined that they should be stepped down to a less restrictive placement. As provided at § 410.1103(g), care provider facilities must submit a written request to ORR for authorization to deny placement, which must be approved by ORR before the care provider facility may deny placement. Certain examples provided by the commenter of other circumstances in which a care provider facility should have the independent discretion to deny placement involve factors (danger to self and the community/others) considered by ORR under § 410.1103 prior to making a placement determination in the best interests of the child, and thus in most cases, at the time a placement determination is made, these should not be issues. However, as provided at § 410.1103(g), in any case, ORR may follow up with a care provider facility about a placement denial to find a solution to the reason for the denial.

Finally, ORR will make every effort to promptly approve or deny a care provider facility's written placement denial request, or work with the facility to resolve the issue raised in the request. If ORR believes it cannot make a determination on the request within the 48-hour timeframe set forth at § 410.1101(b), ORR will evaluate the circumstances and the best interests of the child in each individual case to determine how to proceed.

Final Rule Action: At § 410.1103(b) introductory language, ORR is replacing the phrase ''that may be relevant'' with ''to the extent they are relevant.'' In addition, at § 410.1103(b)(7), ORR is replacing ''LGBTQI+ status'' with ''LGBTQI status or identity.'' Also, at § 410.1103(e), ORR is revising ''placement'' to state ''licensed placement.'' Finally, at § 410.1103(f)(4), ORR is revising the phrase ''altering its program'' to ''altering the nature of its program'' consistent with references to this standard in other sections of this final rule. Otherwise, ORR is finalizing § 410.1103 as proposed in the NPRM.

Section 410.1104 Placement of an Unaccompanied Child in a Standard Program That Is Not Restrictive

ORR proposed in the NPRM at § 410.1104 to codify substantive criteria for placement of an unaccompanied child in a standard program that is not a restrictive placement (88 FR 68922). The TVPRA requires ORR to promptly place unaccompanied children ''in the least restrictive setting that is in the best interest of the child,'' and states that in making such placements ORR ''may consider danger to self, danger to the community, and risk of flight.'' [106] ORR also noted that under paragraph 19 of the FSA, with certain exceptions, an unaccompanied child must be placed temporarily in a licensed program until release can be effectuated or until immigration proceedings are concluded. Consistent with the TVPRA and existing policy, ORR proposed in the NPRM at § 410.1104, to place all unaccompanied children in a standard program that is not a restrictive placement (in other words, that is not a heightened supervision facility) after the unaccompanied child is transferred to ORR legal custody, except in the following circumstances: (a) the unaccompanied child meets the criteria for placement in a restrictive placement set forth at § 410.1105; or (b) in the event of an emergency or influx of unaccompanied children into the United States, in which case ORR shall place the unaccompanied child as expeditiously as possible in accordance with subpart I (Emergency and Influx Operations). These exceptions are consistent with placement considerations described in the TVPRA at 8 U.S.C. 1232(c)(2)(A) (noting, for example, that in making placements HHS ''may consider danger to self, danger to the community, and risk of flight''), and exceptions provided for in section paragraph 19 of the FSA.

ORR did not propose to codify certain other exceptions described in the FSA and included in the 2019 Final Rule at § 410.202(b) and (d). The 2019 Final Rule at § 410.202(b) provided that unaccompanied children do not have to be placed in a standard program as otherwise required by any court decree or court-approved settlement. ORR stated in the NPRM that it did not believe it was necessary to include this exception, as any court decree or settlement that would require ORR to implement placement criteria that differ from those at § 410.1104 would take effect pursuant to its own terms even without specifying these potential circumstances in the regulation. Section 410.202(d) provided that an unaccompanied child does not have to be placed in a standard program if a reasonable person would conclude that the unaccompanied child is an adult despite the individual's claims to be a child. ORR stated that it also did not believe it was necessary to include this exception in § 410.1104 because a person determined by ORR to be an adult (has attained 18 years of age) would be excluded from the definition of unaccompanied child and thus would not be placed in any ORR care provider facility (ORR referred readers to subpart H for discussion of age determinations).

Comment: One commenter stated that ORR should view congregate shelters as semi-restrictive in nature and stated that there is a continuum of restrictiveness among the placements categorized as non-restrictive. Specifically, this commenter recommended that ORR distinguish in § 410.1104 between non-restrictive placements based on the size and duration of stay of the children housed in those placements. The commenter noted that congregate shelters, particularly when they have a capacity over 25 children, impose significant restrictions on children (asserting, for example, that doors are

locked, children are required to be in certain locations at certain times and do not attend local schools, meal times have strict schedules, and recreation is limited), and thus should be classified as semi-restrictive and used sparingly. The commenter further stated that a presumption should be incorporated, consistent with child welfare standards, that no later than 2 weeks after ORR assumes custody, the child should be placed in a community-based or family placement. The commenter added that ORR should have the burden of justifying placement of children in large congregate shelters for longer than two weeks, and that family and small community-based placements are the least restrictive alternative to release and should be the norm for placing children. Another commenter similarly stated that while shelters operate at a lesser degree of restriction than heightened supervision facilities and secure facilities, larger shelters have an institutional nature where children are under constant supervision by staff and are not permitted to depart and return at will. This commenter also urged ORR to pay particular attention to situations where children remain in such shelter settings for prolonged periods because the restrictions in place and the separation of children from the local community can begin to manifest as more detention-like the longer a child remains there.

Response: As described at § 410.1102, ORR utilizes various types of non-restrictive placements, including shelters, group homes, and individual family homes. Such care provider facilities may vary in terms of the number of children they house (*e.g.,* based on their physical capacity and licensure requirements) but these are not restrictive placements. ORR recognizes that, as noted by commenters, larger shelters may generally be more institutional in nature than smaller, home-like settings. Consistent with these comments, ORR believes that where possible, based on an unaccompanied child's age, individualized needs, and circumstances, as well as a care provider facility's capacity, it should prioritize placing unaccompanied children in transitional and long-term home care settings while they are awaiting release to sponsors, so as to limit the time spent in large congregate care facilities. However, as discussed previously in this final rule preamble addressing comments under § 410.1102, efforts to place more unaccompanied children out of congregate care shelters that house more than 25 children together is a long-term aspiration, given the large number of children in its custody and the number of additional programs that would be required to care for them in home care settings or small-scale shelters of 25 children or less.

Comment: One commenter recommended that the proposed language at § 410.1104 (''ORR places all unaccompanied children in standard programs'') should state instead that ORR ''shall place'' all unaccompanied children in standard programs. In addition, the commenter stated that the TVPRA (8 U.S.C. 1232(c)(2)(A)) requires that children ''promptly'' be placed in such settings. Thus, the commenter further recommended that, consistent with the TVPRA, ORR revise the language to clarify that ORR is required to ''promptly'' place unaccompanied children in the least restrictive setting pursuant to an individualized determination of the child's best interest.

Response: ORR intended for the language at § 410.1104 to reflect a mandatory obligation, and thus as the commenter recommended, ORR is revising the introductory language at § 410.1104 to state that ORR ''shall place'' all accompanied children in standard programs. With respect to the recommendation that ORR add the word ''promptly,'' ORR believes that the timeframe for identifying placement under § 410.1101(b) satisfies the prompt placement requirement set forth in the TVPRA, and thus is not adding this word to § 410.1104. The purpose of § 410.1104 is to establish ORR's obligation to place unaccompanied children in standard programs as opposed to restrictive placements or emergency or influx facilities, except in the circumstances delineated in paragraphs (a) and (b)—rather than to establish a timeline for such placement. Finally, ORR notes that the ''least restrictive setting'' and ''best interest'' requirements are addressed in § 410.1103(a), and thus ORR does not believe it is necessary to add that language to § 410.1104 as recommended by the commenter.

Comment: A few commenters stated that proposed § 410.1104 is not consistent with the FSA because it does not include a requirement that all determinations to place a minor in a secure facility will be reviewed and approved by the regional juvenile coordinator, as required at paragraph 23 of the FSA. The commenters asserted that the Placement Review Panel cannot substitute for this safeguard.

Response: ORR notes that criteria for placing unaccompanied children in restrictive placements, including secure placements, are set forth at § 410.1105. Nevertheless, ORR agrees that paragraph 23 of FSA states that all determinations to place a minor in a secure facility will be reviewed and approved by the regional juvenile coordinator. This was a reference to a specific position that existed at the INS in 1997. To comply with this requirement, ORR Federal field staff, which is an equivalent position to the regional juvenile coordinator, will perform the function described in the FSA with respect to reviewing and approving such placement determinations. Accordingly, as provided in the next section of this preamble, ORR is revising § 410.1105(a)(1) to provide that all determinations to place an unaccompanied child in a secure facility (that is not an RTC) will be reviewed and approved by ORR Federal field staff.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1104 as proposed with one modification. ORR is revising § 410.1104 to state that ORR ''shall place'' all unaccompanied children in standard programs in order to clarify the mandatory nature of its obligation under this section.

Section 410.1105 Criteria for Placing an Unaccompanied Child in a Restrictive Placement

ORR proposed in the NPRM at § 410.1105 to address the criteria for placing unaccompanied children in restrictive placements (88 FR 68922 through 68925). ORR proposed in the NPRM at § 410.1001 to define restrictive placements to include secure facilities, heightened supervision facilities, and RTCs. The criteria for placement in each of these facilities are further discussed below.

ORR proposed in the NPRM at § 410.1105(a) to address placement at secure facilities that are not RTCs. ORR proposed in the NPRM at § 410.1105(a)(1) that consistent with existing policies, it may place an unaccompanied child in a secure facility (that is not also an RTC) either upon referral from another agency or department of the Federal Government (*i.e.,* as an initial placement), or through a transfer to another care provider facility after the initial placement.

ORR proposed in the NPRM at § 410.1105(a)(2), that it would not place an unaccompanied child in a secure facility (that is not also an RTC) if less restrictive alternative placements are available. ORR noted that such placements must also be appropriate under the circumstances and in the best interests of the unaccompanied child. In

determining whether there is a less restrictive placement available to meet the individualized needs of an unaccompanied child with a disability, consistent with section 504, ORR explained that it must consider whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child with a disability to be placed in that less restrictive facility. However, ORR stated that it is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. ORR noted that the proposed regulation text is consistent with 8 U.S.C. 1232(c)(2)(A). Also, ORR noted that this requirement is consistent with paragraph 23 of the FSA, which provides that ORR may not place an unaccompanied child in a secure facility if there are less restrictive alternatives that are available and appropriate in the circumstances. Under the FSA, less restrictive alternatives include transfer to (a) a medium security facility, which is equivalent to ''heightened supervision facility'' as defined at proposed § 410.1001, or (b) another licensed program, a term which ORR noted that, for purposes of the proposed rule, is superseded by ''standard program'' as defined at proposed § 410.1001. Consistent with the FSA, ORR further proposed in the NPRM at § 410.1105(a)(2) that it may place an unaccompanied child in a heightened supervision facility or other non-secure care provider facility as an alternative, provided that the unaccompanied child does not pose a danger to self or others. ORR stated that it believes that such alternative placements may not be appropriate for unaccompanied children who pose a danger to self or others, as less restrictive placements may not have the level of staff supervision and requisite security procedures to address the needs of such unaccompanied children.

ORR proposed in the NPRM to place unaccompanied children in secure facilities (that are not RTCs) in limited, enumerated circumstances set forth at § 410.1105(a)(3). Specifically, ORR proposed in the NPRM that it may place an unaccompanied child in a secure facility (that is not an RTC) only if the unaccompanied child meets one of three criteria. First, ORR proposed in the NPRM at § 410.1105(a)(3)(i) that it may place the unaccompanied child in a secure facility (that is not an RTC) if the unaccompanied child has been charged with, or convicted of, a crime, or is the subject of delinquency proceedings, a delinquency charge, or has been adjudicated delinquent, and where ORR deems that those circumstances demonstrate that the unaccompanied child poses a danger to self or others, not including: (1) 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 (2) a petty offense, which is not considered grounds for stricter means of detention in any case. ORR noted in the NPRM that these provisions were also included in the 2019 Final Rule at § 410.203(a)(1), except that as proposed, § 410.1105(a)(3) omits language from the FSA and previous § 410.203(a)(1) that allows an unaccompanied child to be placed in a secure facility if the unaccompanied child is ''chargeable with a delinquent act'' (which under the FSA, means that ORR has probable cause to believe that the unaccompanied child has committed a specified offense). ORR stated that it believes it is appropriate to omit such language because being ''chargeable'' with an offense is not a permissible reason for placement in a secure facility identified by the TVPRA.[107] Further, because it is not a law enforcement agency, unlike the former INS, ORR stated that it is not in a position to make determinations such as whether an unaccompanied child is ''chargeable'' with an offense. Even without this language, ORR stated that it believes finalizing this provision as proposed is consistent with the substantive criteria of the FSA. Furthermore, consistent with 8 U.S.C. 1232(c)(2)(A) (which does not list runaway risk as a permissible reason for placement in a secure facility), ORR did not propose runaway risk as a factor in determining placement in a secure facility, even though that is a permissible ground under the FSA for placement in a secure facility.

Second, ORR proposed in the NPRM at § 410.1105(a)(3)(ii) that it may place an unaccompanied child in a secure facility (that is not an RTC) if the unaccompanied child, while in DHS or ORR custody, or while in the presence of an immigration officer, ORR official, or ORR contracted staff, has committed, or has made credible threats to commit, a violent or malicious act (whether directed at the unaccompanied child or others). The 2019 Final Rule at § 410.203(a)(2) and paragraph 21B of the FSA contain a similar provision, except that in contrast to § 410.203(a)(2) and the FSA, finalizing this provision as proposed in the NPRM would include acts committed in the presence of an ''ORR official or ORR contracted staff.'' ORR stated that it believes the addition of this language is appropriate given that ORR officials and contracted staff would more often be in a position to observe an unaccompanied child's behavior and actions and to assess whether an unaccompanied child has committed, or made credible threats to commit, the acts referenced in this provision. Again, ORR stated it does not believe this change constitutes a substantive deviation from the requirements of the FSA.

Third, ORR proposed in the NPRM at § 410.1105(a)(3)(iii) that it may place an unaccompanied child in a secure facility (that is not an RTC) if the unaccompanied child has engaged, while in a restrictive placement, in conduct that has proven to be unacceptably disruptive of the normal functioning of the care provider facility, and removal from the facility is necessary to ensure the welfare of the unaccompanied child or others, as determined by the staff of the care provider facility (*e.g.,* substance or alcohol use, stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR determines the unaccompanied child poses a danger to self or others based on such conduct. The 2019 Final Rule contained a similar provision at § 410.203(a)(3), which was based on paragraph 21C of the FSA. But in contrast to § 410.203(a)(3) of the 2019 Final Rule and the FSA, ORR noted that the proposed provision in the NPRM requires that the conduct at issue be engaged in while in a ''restrictive placement,'' rather than a ''licensed program.'' ORR stated that it believes such disruptive behavior should initially result in potential transfer to a heightened supervision facility before placement in a secure facility (that is not an RTC)—in other words, that disruptive behavior in a standard program that is not a restrictive placement should not result in immediate transfer, or ''step-up,'' to a secure facility. As discussed above, the 2019 Final Rule was intended to implement the provisions of the FSA that relate to HHS. However, ORR proposed in the NPRM this change in order to ensure that unaccompanied children in such circumstances are stepped up to a more structured program rather than being immediately placed in a secure facility. ORR stated in the NPRM that it believes this update is consistent with its authorities under the HSA and TVPRA[108] and does not believe it constitutes a substantive deviation from the requirements of the

FSA, which provides that unaccompanied children ''may'' be transferred to secure facilities based on unacceptably disruptive conduct where transfer is necessary to ensure the welfare of the unaccompanied child or others but does not require such transfer (88 FR 68923).[109]

ORR proposed in the NPRM at § 410.1105(b) to outline the policies and criteria that it would apply in placing unaccompanied children in heightened supervision facilities. ORR noted in the NPRM that the term ''heightened supervision facility'' as defined at § 410.1001 would be used in place of the term ''medium secure'' facility provided in the FSA and in place of the term ''staff secure facility'' currently used by ORR at 45 CFR part 411 and in its subregulatory guidance. ORR stated that it believes the term ''heightened supervision facility'' better reflects the nature and purpose of such facilities, which is to provide care to unaccompanied children who require close supervision but do not need placement at a secure facility, including an RTC. As reflected in the proposed definition, ORR stated that heightened supervision facilities maintain stricter security measures than a shelter such as intensive staff supervision in order to provide supports, manage problem behavior, and prevent an unaccompanied child from running away. ORR proposed in the NPRM at § 410.1105(b)(1) that it may place unaccompanied children in this type of facility either as an initial placement (upon referral from another agency or department of the Federal Government) or through a transfer from the initial placement. Furthermore, ORR proposed in the NPRM, at § 410.1105(b)(2), to codify factors it would consider in determining whether to place an unaccompanied child in a heightened supervision facility. Specifically, ORR stated it would consider if the unaccompanied child (1) has been unacceptably disruptive to the normal functioning of a shelter such that transfer is necessary to ensure the welfare of the unaccompanied child or others; (2) is a runaway risk, based on the criteria at proposed § 410.1107; (3) has displayed a pattern of severity of behavior, either prior to entering ORR custody or while in ORR care, that requires an increase in supervision by trained staff; (4) has a non-violent criminal or delinquent history not warranting placement in a secure facility, such as isolated or petty offenses as described previously; or (5) is assessed as ready for step-down from a secure facility, including an RTC. ORR stated that it believes each of these proposed criteria identifies pertinent background and behavioral concerns that may warrant heightened supervision, rather than placement in a secure facility, including an RTC, consistent with the purpose of heightened supervision facilities.

ORR proposed in the NPRM at § 410.1105(c) the criteria it would consider for placing an unaccompanied child in an RTC, as defined at proposed § 410.1001. ORR stated in the NPRM that it would place an unaccompanied child in an RTC only if it is the least restrictive setting that is in the best interest of the unaccompanied child and appropriate to the unaccompanied child's age and individualized needs, consistent with the TVPRA at 8 U.S.C. 1232(c)(2)(A) (''an unaccompanied alien child shall be promptly placed in the least restrictive setting that is in the best interest of the child.''). Similar to other secure facilities and heightened supervision facilities, ORR proposed in the NPRM that an unaccompanied child may be placed at an RTC both as an initial placement upon referral from another agency or department of the Federal Government, and upon transfer from another care provider facility. In addition, ORR proposed in the NPRM at § 410.1105(c)(1) that an unaccompanied child who has serious mental or behavioral health issues may be placed in an RTC only if the unaccompanied child is evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file or referral documentation by a licensed psychologist or psychiatrist that an RTC is appropriate. ORR stated that this requirement is consistent with the factors the Secretary of HHS may consider under the TVPRA at 8 U.S.C. 1232(c)(2)(A) in making placement determinations for unaccompanied children and was also included in the 2019 Final Rule at § 410.203(a)(4).[110] ORR also noted that when it determines whether placement in an RTC, or any care provider facility is appropriate, it considers the best interests not only of the unaccompanied child being placed, but also the best interests of other unaccompanied children who are housed at the proposed receiving care provider facility, including their safety and well-being. ORR stated that it believes it is authorized to consider these factors under the TVPRA.[111] ORR also noted that it considers the safety of care provider facility staff when making placement determinations for unaccompanied children, consistent with its duty to oversee the infrastructure and personnel of facilities in which unaccompanied children reside.[112] ORR further stated that for an unaccompanied child with one or more disabilities, consistent with section 504, the determination whether to place the unaccompanied child in an RTC would need to consider whether reasonable modifications to policies, practices, and procedures in the unaccompanied child's current placement or any provision of auxiliary aids or services, could sufficiently reduce the danger to the child or others. However, ORR noted that it is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. Finally, consistent with its existing policies, ORR proposed in the NPRM at § 410.1105(c)(1) that it would use the criteria for placement in a secure facility described at § 410.1105(a) to assess whether the unaccompanied child is a danger to self or others. ORR stated that it believes it is appropriate to apply these criteria in making this assessment in the context of RTC placement because all secure facilities (including RTCs) are intended for unaccompanied children who pose a danger to self and others (although RTCs are intended for unaccompanied children who also have a serious mental health or behavioral health issue that warrants placement in an RTC).

Consistent with existing policies, under § 410.1105(c)(2), ORR proposed in the NPRM that it would be able to place an unaccompanied child at an out-of-network (OON) RTC when a licensed clinical psychologist or psychiatrist consulted by ORR or a care provider facility has determined that the unaccompanied child requires a level of care only found in an OON RTC (either because the unaccompanied child has identified needs that cannot be met within the ORR network of RTCs or no placements are available within ORR's network of RTCs), or that an OON RTC would best meet the unaccompanied child's identified needs. Also consistent with existing policies, ORR noted that in these circumstances, even though an unaccompanied child would be physically located at the OON RTC, the unaccompanied child would remain in ORR's legal custody. ORR stated that it would monitor the unaccompanied child's progress and ensure the unaccompanied child is receiving required services. ORR explained that OON RTCs are vetted prior to placement to ensure that the program is in good standing and is complying with all

applicable State welfare laws and regulations and all State and local building, fire, health, and safety codes. ORR further explained that it also may confer with other Federal agencies and non-governmental stakeholders, such as the protection and advocacy (P&A) systems, when vetting OON RTCs to determine, in its discretion, the appropriateness of such OON RTCs for placement of unaccompanied children. ORR noted that it appreciates that P&As may have valuable information relating to the vetting process because they may have prior experience with certain facilities with respect to their past care and treatment of individuals with disabilities (*e.g.,* findings of abuse and neglect, compliance issues).

ORR proposed in the NPRM at § 410.1105(c)(3) that the criteria for placement in or transfer to an RTC would also apply to transfers to or placements in OON RTCs (that is, the clinical criteria considered in placing an unaccompanied child at an RTC level of care would not change regardless of whether the RTC is in ORR's network or OON). ORR proposed in the NPRM at § 410.1105(c)(3) to permit care provider facilities to request that ORR transfer certain unaccompanied children to RTCs. ORR noted that proposed § 410.1601(d) further addresses when a care provider facility may make such a request.

Comment: Several commenters expressed support for ORR's proposal to reduce the use of restrictive placements and establish clearer guidelines for when such placements are deemed appropriate, in accordance with the terms of the FSA. These commenters noted that restrictive placements can have a lasting impact on the well-being of unaccompanied children and should be considered a measure of last resort. Commenters stated that by undertaking measures to minimize their use and providing explicit guidelines for their application, as well as processes for contesting these placement decisions, ORR is taking a commendable step in safeguarding the rights and safety of these vulnerable children.

One commenter specifically agreed with the proposal to exclude language from § 410.1105(a)(3)(i) that would allow ORR to make determinations regarding secure facility placement based on whether an unaccompanied child is ''chargeable.''

Response: ORR notes that for the reasons set forth in the NPRM (88 FR 68923), ORR is finalizing proposed § 410.1105(a)(3)(i), which excludes language that would allow ORR to make determinations regarding secure facility placement based on whether an unaccompanied child is ''chargeable.''

Comment: One commenter urged ORR to prioritize locating restrictive programs in geographic locations where there exists a continuum of care that includes all levels of placement, including community-based care, stating that this would allow for children in restrictive care who are ready to transition to less restrictive settings (including community-based care) to be easily and quickly stepped-down. The commenter further noted that this would also enable co-located programs in the same region to share resources, build expertise in the needs of unaccompanied children, and gain greater familiarity with local programs in ways that can better support children's timely transfer to less restrictive care settings.

Response: ORR believes this suggestion is worthy of greater consideration and may consider it in future policymaking. ORR also notes that § 410.1103(f) and (g), as finalized in this rule, will help to ensure that children in restrictive placements who are assessed by ORR and the care provider facility as ready to step down to a less restrictive placement (including community-based care) are promptly transitioned to appropriate facilities consistent with their best interests. In each case, ORR takes into account the factors set forth at § 410.1103 to the extent relevant, as well as the factors set forth at § 410.1105 as appropriate, in determining and planning such transitions to ensure a safe and appropriate placement. In this manner, ORR facilitates prompt placement of unaccompanied children, including children with disabilities, in the least restrictive, most integrated setting appropriate to their needs as mandated by the TVPRA and as is consistent with section 504.

Comment: Many commenters expressed the view that proposed § 410.1105 uses undefined and vaguely worded provisions, including the terms ''unacceptably disruptive,'' ''severity of behavior,'' ''malicious,'' and other critical terms, and various assessments for agency decision points. One commenter specifically noted their concern that the reliance on subjective assessments and the absence of clear benchmarks allows for differing interpretations among staff, which could lead to inconsistencies in decision-making or manipulation of the rules which may put children at risk.

While many commenters appreciated that the NPRM at § 410.1105(a)(3)(iii) limited the ''unacceptably disruptive'' criteria for secure placement to behavior that occurs in a restrictive placement, such that for example unacceptably disruptive behavior in a shelter would not lead to immediate step-up to a secure facility, they expressed that the ''unacceptably disruptive'' criteria for placement in either a secure or heightened supervision facility was inappropriately vague and created a high risk that children would be punished through step-up to more restrictive facilities for behaviors that are a manifestation of their disabilities.

Several commenters stated that if a child with a disability is considered for step-up to a more restrictive facility based on their behavior, the rule should require a ''manifestation determination'' (which could be similar to the determination under the Individuals with Disabilities Education Act (IDEA)) to determine whether the child's behavior is linked to their disability and/or is the result of a failure to provide the child with reasonable modifications and services. These commenters stated that if a child's behavior is a manifestation of their disability, ORR must conduct a functional behavioral assessment and develop (or review) a behavior intervention plan for the child instead of changing their placement.

Some commenters noted that children in secure facilities often have unmet behavioral health needs or unaddressed mental health disabilities. Commenters also expressed that a child whose behavior is deemed disruptive should be assessed by trained professionals and given services and supports necessary to meet their individualized needs instead of being stepped up to a more restrictive setting. One commenter noted that ''disruptive'' behavior is often a child's way of communicating that they feel disrespected, unheard, or that their needs are not being met. Furthermore, the commenter noted that Black children and children from other marginalized groups are more likely to be considered ''disruptive'' due to systemic racism. The commenter noted that this bias can be compounded if there is a lack of cultural humility and competency on the part of ORR subcontracted staff.

One commenter expressed the view that criteria such as risk of flight, danger to self or others, or criminal history were broad and vague, stating that this would violate the children's right to liberty and placement in the least restrictive setting and expose them to harmful and traumatic conditions.

Many commenters expressed the view that § 410.1105(b)(2)(v) is ambiguous and greater guidance is needed. The commenters recommended the

development of specific behavioral criteria to indicate the need for a heightened supervision setting or a return to a standard shelter setting, which could include failure of an established behavior management plan, behavioral reports of threats of safety to self or others, or conversely the absence of such reports and completion of an established behavior plan.

Response: ORR believes that the ''unacceptably disruptive'' criterion, as it relates to both secure facilities (that are not RTCs) (at § 410.1105(a)(3)(iii)) and heightened supervision facilities (at § 410.1105(b)(2)(i)), is consistent with the TVPRA, under which the Secretary may consider danger to self and community in making placements, and reasonably reflects pertinent behavioral concerns that may warrant placement in such restrictive settings. Further, as noted in the NPRM, this ''unacceptably disruptive'' criterion for placement in secure facilities (that are not RTCs) is consistent with paragraph 21 of the FSA. ORR notes that § 410.1105(a)(3)(iii) provides specific requirements and guardrails with respect to the circumstances in which placement in a secure facility (that is not an RTC) may be warranted where a child's behavior, while in a restrictive placement (but not a shelter), has proven to be unacceptably disruptive of the normal functioning of a care provider facility. In order for an unaccompanied child's disruptive behavior to warrant placement in a secure facility (that is not an RTC), removal of the child from the less restrictive facility must be necessary to ensure the welfare of others, as determined by the staff of the care provider facility (*e.g.,* stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR must determine that the child poses a danger to others. Similarly, § 410.1105(b)(2)(i), addressing heightened supervision facilities, provides additional guidance with respect to the application of this criterion, providing that a child must be unacceptably disruptive to the normal functioning of a shelter such that transfer to the heightened supervision facility is necessary to ensure the welfare of the child or others. Applying this criterion requires care provider facility staff and ORR to make determinations based on individual circumstances and in the best interests of both the child whose placement is at issue and the best interests of other children in the relevant facility. As a result, ORR believes it promotes necessary flexibility in application of this criterion to not include a definition of the term ''unacceptably disruptive.''

ORR notes that it has protections in place to ensure that children with identified or suspected disabilities are assessed by trained professionals and given services and supports necessary to meet their individualized needs. As provided by § 410.1106, ORR must assess each unaccompanied child in its care, including any child with a disability, to determine whether the unaccompanied child requires particular services and treatment by staff, or particular equipment to address their individualized needs. If so, ORR must place the unaccompanied child, whenever possible, in a standard program in which the unaccompanied child with individualized needs can interact with children without those individualized needs to the fullest extent possible, but which provides services and treatment, or equipment for such individualized needs. Additionally, pursuant to the new § 410.1105(d), and consistent with section 504 and § 410.1311(c), ORR's determination under § 410.1105 whether to place an unaccompanied child with one or more disabilities in a restrictive placement (or to transfer an unaccompanied child to such a placement) shall include consideration of whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement (which could be the child's current placement) or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. However, ORR is not required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity.

In response to commenters' specific recommendation for a ''manifestation determination'' to determine whether the child's behavior is linked to their disability and/or is the result of a failure to provide the child with reasonable modifications and services, ORR notes that, while the IDEA does not govern the placement of children with disabilities in ORR custody, as is consistent with the new § 410.1105(d), ORR will assess whether a child's behavior is related to the child's disability or failure to receive the necessary reasonable modifications and services. ORR may consider commenters' recommendations concerning functional behavioral assessments and behavior intervention plans in future policymaking, which may be informed by the anticipated year-long comprehensive disability needs assessment that ORR will undertake working with experts, and the development of a disability plan. In addition, ORR refers readers to § 410.1304 for discussion of its requirements regarding behavioral management strategies and interventions.

In response to comments regarding the need to be sensitive to factors such as racial or cultural bias that could potentially influence whether a child is determined to be ''unacceptably disruptive,'' both the NPRM and this final rule include provisions to specifically require that within all placements, unaccompanied children are treated with dignity, respect, and special concern for their particular vulnerability; to ensure services are provided based on their individualized needs and best interests; and to ensure that care provider facilities deliver services in a manner that is sensitive to the age, culture, native language, and complex needs of unaccompanied children.[113]

With respect to the terms risk of flight, danger to self or others, or criminal history, which one commenter stated are vague or broad, consideration of these terms is consistent with the TVPRA, which provides that ORR may, in determining the least restrictive placement in a child's best interest, consider danger to self, danger to the community, and risk of flight in making placements and states that a child may 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 a criminal offense.[114]

With respect to the recommendation to provide greater guidance regarding § 410.1105(b)(2)(v) through the development of specific behavioral criteria to indicate the need for a heightened supervision setting or a return to a standard shelter setting, ORR will consider the commenters' recommendations and may provide further instruction in future policymaking.

Comment: Several commenters recommended that the clear and convincing standard of proof should be added to §§ 410.1105(a) and 410.1105(b), consistent with the standard in §§ 410.1901(a) and 410.1105(c)(1), to clarify that clear and convincing evidence is required not just in RTC placement determinations, but in all other restrictive placement determinations as well.

Response: As reflected in § 410.1901(a), in all cases involving placement in a restrictive setting, including placement in secure facilities (including RTCs) and heightened supervision facilities, ORR must determine, based on clear and

convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement. ORR agrees that for clarity and consistency, the clear and convincing evidence standard of proof should be added to § 410.1105(a) and (b). Thus, ORR is finalizing revisions to § 410.1105(a)(1) and (b)(1) to state that the placement determinations under paragraphs (a) and (b) must be made based on clear and convincing evidence documented in the unaccompanied child's case file.

Comment: Several commenters urged ORR to remove the use of secure facilities from its provider network and eliminate reference to such facilities in the final rule, because in their view children housed in secure facilities face disparate treatment and lasting harm. The commenters also stated that ORR is under no statutory or judicial obligation to create a regulatory scheme that places children in secure facilities (*e.g.,* under the TVPRA or the FSA). One commenter further stated that ORR provided no justification for failing to apply the standards delineated in § 410.1302 to secure facilities.

One commenter asserted that the continuing use of secure facilities under the proposed rule will place children at high risk of ongoing constitutional rights violations, expressing concern that unaccompanied children placed in such facilities lack appropriate mental health evaluations and services, and could be subjected to mechanical restraints or seclusion, as well as discriminatory verbal abuse.

A few commenters expressed concern that unaccompanied children are placed in secure facilities at the discretion of Federal officials, rather than by a judge's order in a proceeding where the child is represented, which one commenter noted is required for children placed in these kinds of restrictive facilities in other contexts.

Response: In response to commenters' requests that ORR discontinue the use of secure facilities, ORR notes that although neither the TVPRA nor the FSA require the placement of children in secure facilities, both 8 U.S.C. 1232(c)(2)(A) and paragraph 21 of the FSA nevertheless contemplate the placement of children in secure facilities in certain limited circumstances. ORR continues to believe that in certain rare situations it may be necessary to place children in such facilities to ensure the safety and well-being of the child or others. Thus, § 410.1105(a), as finalized in this rule, includes criteria, consistent with the TVPRA and the FSA, for placing an unaccompanied child in a secure facility (that is not an RTC). ORR notes that, consistent with the TVPRA, in all cases where an unaccompanied child is placed in a secure facility (including an RTC), such a setting must be the least restrictive setting that is in the best interests of the child and appropriate to the child's age and individualized needs, which is assessed taking into account numerous factors to the extent they are relevant to such a placement, including danger to self, danger to community/others, and criminal background.

ORR stresses that secure facilities will be required to meet the standards set forth at subpart D, including the minimum standards under § 410.1302. The standards at subpart D include many of the protections that commenters have requested, including significant ones addressing minimum standards applicable at standard and secure facilities, monitoring and quality control, behavior management, staff trainings, language access, child advocates, legal services, health care services, and children with disabilities.[115] For example, ORR notes that the final regulations prohibit the use or threatened use of corporal punishment (§ 410.1304(a)(1)), prohibit the use of prone physical restraints, chemical restraints, or peer restraints for any reason in any care provider facility setting (§ 410.1304(a)(3)), and allow secure facilities, that are not RTCs, to use personal restraints, mechanical restraints, and/or seclusion in emergency safety situations, and as consistent with State licensure requirements (§ 410.1304(e)(1)). ORR believes that restraints and seclusion should only be used after de-escalation strategies and less restrictive approaches have been attempted and failed. As discussed in the NPRM (88 FR 68942), in secure facilities, not including RTCs, there may be situations where an unaccompanied child becomes a danger to other unaccompanied children, care provider facility staff, or property. As a result, such secure facilities may need to employ more restrictive forms of behavior management than shelters or other types of care provider facilities in emergency safety situations or during transport to or at immigration court or asylum interviews when there are certain imminent safety concerns.

With respect to protecting children from verbal abuse, ORR notes that within all placements, unaccompanied children must be treated with dignity, respect, and special concern for their particular vulnerability (§§ 410.1003(a), 410.1300) and that the definition of ''significant incidents'' includes abuse or neglect (§ 410.1001). Additionally, if ORR determines that any such staff behavior is occurring, it has authority to take actions including stopping placement and actions pursuant to 45 CFR part 75 (*e.g.,* 45 CFR 75.371).

In response to the concern that unaccompanied children are placed in secure facilities by Federal officials rather than by a judge's order, ORR notes that the TVPRA provides for placement by the Secretary and does not require a judge's order. Specifically, the TVPRA requires the Secretary to place unaccompanied children in its custody in the least restrictive setting that is in the best interest of the child, and states that such placements may be in restrictive settings if certain conditions are met (that is, a child may 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).[116] Nevertheless, to guard against the inappropriate placement of a child in a secure facility, this final rule also provides for review of decisions to place unaccompanied children in restrictive placements.[117]

Comment: One commenter recommended removing § 410.1105 in its entirety, stating that ORR will violate section 504 and the Supreme Court's decision in *Olmstead* v. *L.C.,* 527 U.S. 581 (1999) by placing children, especially children with disabilities, in segregated, secure facilities (including RTCs). The commenter asserted that section 504's implementing regulations require that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities with the ''most integrated setting'' being one that ''enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.''

Furthermore, the commenter stated that placing unaccompanied children who are a danger to themselves in secure facilities means that children with mental health disabilities can be placed in more restrictive settings simply because of their disability, which the commenter asserted violates both the letter and the spirit of section 504. The commenter also noted that although proposed § 410.1105(c)(1) requires a dangerousness determination for children with ''serious'' mental or behavioral issues by licensed clinicians in the RTC context, there is no similar requirement for other secure facilities, or other restrictive placements. The commenter further expressed that there is no definition for what a ''serious'' mental or behavioral issue is versus a ''non-serious'' one, and there is no

information about who will make that determination prior to referring the child for evaluation to a licensed professional. Thus, the commenter stated that ORR's new rule would not protect children with disabilities from inappropriately remaining in overly restrictive settings, and that § 410.1105(a)(1) will put children with disabilities and those with the most need for community care in the most restrictive settings.

Finally, the commenter expressed the view that ORR does not conduct a sufficient individualized, fact-dependent inquiry in each case, or provide any information about how children may obtain such accommodations, nor what kind of accommodations can be provided that are rooted in community care.

Response: ORR does not agree that the final rule will violate section 504 or the Supreme Court's decision in *Olmstead* v. *L.C.,* 527 U.S. 581 (1999) by providing for placement of unaccompanied children, including children with mental health or other disabilities, in secure facilities (including RTCs), in the limited circumstances provided in § 410.1105. As noted above, ORR is adding new § 410.1105(d) to state that for an unaccompanied child with one or more disabilities, consistent with section 504 and § 410.1311(c), as revised in this rule, ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement (or to transfer an unaccompanied child with one or more disabilities to such a placement) shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement (which could be the child's current placement) or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. However, ORR is not required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. Furthermore, pursuant to § 410.1311(a), ORR shall provide notice to the unaccompanied child of the protections against discrimination under section 504 and HHS implementing regulations at 45 CFR part 85 assured to children with disabilities and notice of available procedures for seeking reasonable modifications or making a complaint about alleged discrimination. Thus, the final rule includes provisions to prevent children with disabilities, including those with mental health needs, from being placed in the most restrictive placements simply by virtue of needing specialized care, and to facilitate placement in the least restrictive, most integrated setting consistent with their best interests and appropriate to their age and individualized needs. ORR will consider providing additional guidance regarding the placement of children with disabilities, including information regarding what kind of accommodations can be provided that are rooted in community care, as requested by commenters, in future policymaking which may be informed by the findings of the anticipated year-long comprehensive disability needs assessment and the development of the disability plan as discussed at Section III.B.4.

Moreover, the final rule includes certain guardrails such as the clear and convincing evidence standard at § 410.1901, that serve to protect children from being inappropriately placed in restrictive facilities (both as an initial matter, and upon review at least every 30 days). For a child with a serious mental or behavioral issue in particular, § 410.1105(c)(1) specifies that the child may be placed in an RTC only if the child is evaluated and determined to be a danger to self or others by a licensed clinical psychologist or psychiatrist, which includes a determination by clear and convincing evidence that RTC placement is appropriate. Thus, a trained mental health professional will make the determination regarding whether RTC placement is appropriate. In regard to the clear and convincing evidence standard applicable to placement in RTCs under § 410.1105(c)(1), ORR clarifies that its intent is that there must be a determination of clear and convincing evidence before placing any child in an RTC. To clarify this requirement, ORR is finalizing revisions to § 410.1105(c)(1) to provide that the child must be evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file, *including* documentation by a licensed psychologist or psychiatrist that placement in an RTC is appropriate.

Comment: One commenter opposed the use of both secure facilities and heightened supervision facilities, stating that the use of secure facilities, and heightened supervision facilities where there is not an individualized assessment indicating how the child's best interests are best served there, are impermissible restrictions on liberty and dangerous and detrimental to the well-being of unaccompanied children. The commenter recommended that, in accordance with international standards (*e.g.,* the United Nations Convention on the Rights of the Child; United Nations High Commissioner for Refugees (UNHCR), Refugee Children: Guidelines on Protection and Care; UNHCR Position Regarding the Detention of Refugee and Migrant Children in the Migration Context), ORR should end the use of all secure facilities and limit the use of heightened supervision facilities to programs that provide specialized therapeutic care to children for whom it is determined to be in their best interests. The commenter encouraged ORR to develop additional alternatives to detention, such as specialized post-release services and specialized transitional homes designed to support children to return to community living. The commenter also recommended that, rather than placing unaccompanied children with behavioral problems in restrictive settings, ORR should adopt a psychosocial/social work approach based on best interests assessments to help them improve behavior.

In addition, the commenter recommended strengthening the assessment of the child's best interest in cases involving prolonged detention/family separation, using an individualized assessment rather than generalized criteria or factors, and reviewing the practices utilized for assessing and weighing community risk. The commenter also recommended that while use of secure and heightened supervision continues to exist, ORR should take all necessary steps to place children in the least restrictive setting for the shortest period of time and prioritize appointment of child advocates and legal representation for all children in secure and heightened supervision facilities.

Response: ORR appreciates the commenter's concerns, but for the same reasons explained in previous responses to comments related to secure facilities, ORR does not believe the use of secure or heightened supervision facilities in the limited circumstances set forth at § 410.1105 will constitute an impermissible restriction on liberty or will be dangerous and detrimental to the well-being of unaccompanied children. As discussed further in subpart D of this final rule, both secure facilities and heightened supervision facilities will be required to meet the standards set forth at subpart D, including the minimum standards under § 410.1302. ORR continues to believe that in certain situations it may be necessary to place children in such facilities to ensure the safety and well-being of the child or

others. ORR notes that, consistent with the TVPRA and § 410.1103, in all cases, such settings must be the least restrictive setting that is in the best interests of the child and appropriate to the child's age and individualized needs, which are assessed on an individual basis for each child considering numerous factors to the extent they are relevant to such a placement, including danger to self, danger to community/others, and criminal background.

Comment: A few commenters recommended that ORR remove the clause, ''provided that the unaccompanied child does not pose a danger to self or others'' from § 410.1105(a)(2). The commenters asserted that because ''danger to self or others'' is already a requirement for secure placement (at §§ 410.1105(a)(3), (c)), this additional clause (''provided that the unaccompanied child does not pose a danger to self or others'') renders § 410.1105(a)(2) meaningless. The commenters further stated that this additional language is unnecessary because paragraph 23 of the FSA and § 410.1105(a)(2) of the NPRM already limit alternative placements to those that are ''available and appropriate under the circumstances,'' noting that ORR is not required to make an unsafe placement because such a placement would not be ''appropriate.'' The commenters also cautioned that a child who poses a danger to self or others at one point in time can sometimes be safely and appropriately placed in a less restrictive setting with reasonable modifications that mitigate danger. These commenters also recommended that ORR remove this clause from § 410.1105(a)(2) because it suggests ORR considers a staff-secure facility an alternative to a secure facility. However, the commenters noted that a child who is not a danger to self or others does not qualify to be placed in an RTC or secure facility, therefore staff secure is not an alternative to placement in a secure facility. The commenters stated that the final rule should mirror the language of paragraph 23 of the FSA and eliminate this clause, ''provided that the unaccompanied child does not pose a danger to self or others.'' Some commenters also recommended that ORR update language throughout § 410.1105 by removing ''danger to self'' as a criterion for placement in a secure facility (that is not an RTC), noting that ORR policy and practice has typically been to place children who pose a danger to self in an RTC or staff secure setting rather than a secure facility that is not an RTC.

Response: ORR appreciates the commenter's recommendations and agrees that a child who poses a danger to self or others at one point in time can be stepped down to a less restrictive facility at a later time. ORR also acknowledges that a child's danger to self should not be the sole basis for placement in a secure facility (that is not an RTC). Therefore, in this final rule, ORR is amending § 410.1105(a)(2) to state that it shall place an unaccompanied child in a heightened supervision facility or other non-secure facility as an alternative to a secure facility (that is not an RTC), provided that the unaccompanied child does not ''currently'' pose a danger to others and does not need placement in an RTC pursuant to § 410.1105(c). ORR agrees to make a clarifying edit in the regulatory text by striking reference to ''danger to self'' in § 410.1105(a)(2) and § 410.1105(a)(3)(i), (ii), and (iii), as well as adding an affirmative statement in § 410.1105(a)(1) that a finding that a child poses a danger to self shall not be the sole basis for a child's placement in a secure facility (that is not an RTC). In addition, because ORR is striking ''danger to self'' in § 410.1105(a)(3)(iii), ORR is deleting ''substance or alcohol use'' from the examples of ''unacceptably disruptive'' conduct addressed in that paragraph. Finally, because the criteria for assessing dangerousness under § 410.1105(a) and (c) now differ, ORR is revising § 410.1105(c)(1) to remove the last sentence (''In assessing danger to self or others, ORR shall use the criteria for placement in a secure facility at paragraph (a) of this section). To help ensure that a child in a restrictive placement is promptly stepped down to a less restrictive placement if appropriate and in the child's best interest, ORR notes that at § 410.1901(d), ORR is required to ensure the following automatic administrative reviews: (1) at minimum, a 30-day administrative review for all restrictive placements; and (2) a more intensive 90-day review by ORR supervisory staff for unaccompanied children in secure facilities.

Comment: Many commenters provided other recommendations with respect to language in proposed § 410.1105(a)(2). While many commenters supported ORR's proposal that, consistent with section 504, ORR would consider whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow an unaccompanied child with a disability to be placed in that less restrictive facility, some commenters stated that the proposed rule should mandate an analysis of reasonable modifications and auxiliary aids and services to permit a child to be placed in a less restrictive facility. These commenters stated that to adequately protect children's rights, the consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement must be explicitly incorporated into the regulation text and apply both to an initial transfer decision and to a child's 30-day restrictive placement case review under proposed §§ 410.1105, 410.1601, and 410.1901.

A few commenters stated that, consistent with DOJ's position on section 504's integration mandate, the final rule should also specify that the consideration of less restrictive alternatives will include consideration of community-based placement options such as individual foster homes, noting that children who struggle in congregate care placements often do much better in a community placement.

Finally, one commenter noted that in proposed § 410.1105(a)(2), secure placements must be appropriate under the circumstances and in the best interests of the child, but stated that this is contradictory, as secure placements will almost never be in the best interest of the child, especially when they have a disability and that no accommodation in secure detention could adequately meet the needs of children with disabilities. The commenter stated that these children require professional care by licensed providers in the community.

Response: ORR agrees that the consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement should be explicitly incorporated into the regulation text and apply both to an initial transfer decision and to a child's 30-day restrictive placement case review under proposed §§ 410.1105, 410.1601, and 410.1901. Accordingly, as noted, ORR is adding new § 410.1105(d) to state that for an unaccompanied child with one or more disabilities, consistent with section 504, ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. Section 410.1105(d) further states that ORR's

consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement shall also apply to transfer decisions under § 410.1601 and will be incorporated into restrictive placement case reviews under § 410.1901. In addition, § 410.1105(d) clarifies that ORR is not required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity.

In response to the recommendation that the final rule also specify that the consideration of less restrictive alternatives will include consideration of community-based placement options, ORR agrees that the consideration of less restrictive alternatives under § 410.1105(a)(2) would include consideration of non-restrictive community-based alternatives, such as individual foster homes, as available and appropriate under the circumstances. However, ORR does not believe it is necessary to include this provision in the regulation text at § 410.1105(a)(2). ORR believes that under § 410.1102, it is sufficiently clear that community-based placements such as individual family homes and groups homes, are among the types of less restrictive placement alternatives available for unaccompanied children based on an assessment of a child's best interest, age, and individualized needs, as well as the best interests of others. ORR also agrees that there are many advantages to community-based care, and as discussed previously in the preamble to this final rule, ORR is currently studying and developing a community-based care model for future implementation.

ORR emphasizes its preference to not place unaccompanied children in secure placements except in limited circumstances where the safety and well-being of the child or other unaccompanied children in care requires it, and refers the commenter to its response to the comments above concerning secure and heightened supervision placements, and the placement of children with disabilities in such settings. ORR is committed to placing children in the least restrictive setting in their best interests and ensuring that such placements are able to meet the individualized needs of children with disabilities.

Comment: Several commenters recommended that ORR eliminate the use of secure facilities, but in the alternative recommended that ORR make certain revisions to the criteria at § 410.1105(a)(3) to implement substantial additional safeguards.

First, commenters recommended that ORR revise § 410.1105(a)(3)(i) to delete ''or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent,'' stating that the TVPRA and Supreme Court precedent provide justification for not considering delinquency records (whether in the form of charges or adjudications) in placing children in restrictive settings. Commenters noted that Congress omitted any reference to juvenile delinquency adjudications in the TVPRA, instead requiring that ORR refrain from placing children in secure settings absent dangerousness or a criminal charge which indicated that Congress did not view delinquency charges or adjudications as pertinent to restrictive placements. Further, the commenters cited *Roper* v. *Simmons,* 543 U.S. 551, 569–70 (2005), to assert that the Supreme Court has recognized that children lack maturity and responsibility and as a result engage in impulsive actions and are more susceptible to negative influences. Commenters concluded that, as such, children's criminal or delinquent history should have little, if any, bearing on placement decisions, and that ORR must not draw conclusions about a child's character based on violations of the law, even in in the context of criminal convictions.

Second, commenters recommended that ORR amend the end of § 410.1105(a)(3)(i) to state ''and where ORR determines by clear and convincing evidence that those circumstances demonstrate that the unaccompanied child poses a danger to self or others,'' stating that this would better align with the proposed rule's goal to codify the use of placement review panels under proposed § 410.1901(a). Commenters further stated that ORR must make a measured, supported assessment to ensure that no child is harmed by an improper transfer.

Third, commenters stated that ORR should delete § 410.1105(a)(3)(ii), because its consideration is already captured under the dangerousness assessment under § 410.1105(a)(3)(i) and the evaluation of maliciousness goes beyond ORR's expertise and is best suited for law enforcement agencies.

Fourth, commenters recommended that ORR delete § 410.1105(a)(3)(iii), which they stated is similarly redundant of the dangerousness assessment ORR performs in each case and in the view of these commenters, has led to improper placement of children in restrictive settings.

Response: ORR declines to make commenters' recommended revisions to § 410.1105(a)(3).

First, inclusion of the phrase at § 410.1105(a)(3)(i), ''or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent,'' is consistent with the TVPRA and the FSA at paragraph 21. The TVPRA 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 . . .''.[118] ORR believes this language encompasses consideration of whether the unaccompanied child is the subject of delinquency proceedings, a delinquency charge, or has been adjudicated delinquent. In addition, delinquency proceedings, charges, or adjudications may be relevant to determining whether a child ''poses a danger to self or others.'' [119] Furthermore, ORR notes that the language identified by the commenters is consistent with paragraph 21 of the FSA.[120] ORR continues to believe that it is imperative to consider a child's criminal background, including delinquency proceedings, delinquency charges, or delinquency adjudications, in order to determine the least restrictive placement in the best interests of the child, as appropriate to the child's age and individualized needs and to protect the safety and well-being of other children in ORR's care and custody.

Second, in response to the recommendation that ORR amend § 410.1105(a)(3)(i), ORR is adding an explicit reference to the clear and convincing evidence standard to § 410.1105(a)(1) and thus it is not necessary to revise § 410.1105(a)(3)(i) as requested by the commenters.

Third, ORR does not agree that § 410.1105(a)(3)(ii) should be deleted. The language at § 410.1105(a)(3)(ii) is intended to capture circumstances that are not covered under paragraph (a)(3)(i)—that is, where a child has not been charged with or convicted of a crime, and is not the subject of delinquency proceedings, does not have a delinquency charge, and has not been adjudicated delinquent, but has engaged in behavior that would justify placement in a secure facility (that is not an RTC) based on danger to others. With respect to the concern regarding the term ''malicious,'' due to the individualized nature of placement determinations, including placements in restrictive settings, ORR believes it is necessary to allow for flexibility in its interpretation and application of this term for purposes of § 410.1105(a), to allow for a complete assessment of each case and to accommodate the different circumstances in which such behavior

may occur. ORR also notes that while § 410.1105(a)(3) describes the circumstances under which an unaccompanied child may be placed in a secure facility (that is not an RTC), any placement determination must be consistent with the TVPRA requirement that it be in the least restrictive setting that is in the best interest of the child. As a result, ORR reviews multiple relevant factors when placing a child in a secure facility (that is not an RTC), not only the factors described at § 410.1105(a)(3).

Fourth, in response to the commenters' recommendation to delete § 410.1105(a)(3)(iii), ORR believes that paragraph (a)(3)(iii) is necessary to encompass additional situations that may not be covered under paragraphs (a)(3)(i) and (a)(3)(ii), that may warrant a determination that placement in a secure facility (that is not an RTC) is necessary because of danger to others, such as stealing, fighting, intimidation of others, or sexually predatory behavior. In response to the commenters concern that the language at § 410.1105(a)(3)(iii) has led to improper placement of children in restrictive settings, ORR refers readers to responses to similar comments in this section addressing the use of the term ''unacceptably disruptive.''

Comment: Several commenters asserted that a dangerousness determination for placement of a child with a disability in a secure facility should be consistent with section 504. Commenters stated that the proposed rule should therefore specify that a child with a disability will not be deemed to pose a danger to self or others unless they pose a ''direct threat'' which cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.

A number of commenters recommended that if ORR determines that a child with a disability's placement in a less restrictive setting amounts to a direct threat, even with reasonable modifications, the child should be placed in a Qualified Residential Treatment Program (QRTP),[121] rather than a secure juvenile detention facility which the commenters stated is harmful to children and especially inappropriate for children with disabilities. These commenters further stated that updated assessments must be conducted regularly, including when a child's placement is in a segregated setting, to determine if a more integrated setting, such as a family placement, is appropriate.

Response: ORR agrees with commenters that the determination relating to danger for placing a child with a disability in a secure facility including an RTC should be consistent with section 504. ORR notes that the TVPRA, 8 U.S.C. 1232(c)(2)(A) permits consideration of whether the child is a danger to self or others in any placement determination, and specifically states that a child may 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 a criminal offense. Thus, ORR believes it is appropriate to consider whether the child is a danger to self or others in order to identify a placement that best protects the safety and well-being of the child and others. However, as noted in a previous response in this section, ORR acknowledges that a child's danger to self should not be the sole basis for placement in a secure facility (that is not an RTC) and is making edits in the regulatory text by striking reference to ''danger to self'' in § 410.1105(a)(2) and § 410.1105(a)(3)(i), (ii), and (iii) as well as adding an affirmative statement to that effect in § 410.1105(a). In addition, as discussed previously, before placing any child in a secure facility, including an RTC, ORR determines if less restrictive alternatives in the best interest of the child are available and appropriate, and in doing so, ORR will consider whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow an unaccompanied child with a disability to be placed in that less restrictive facility, consistent with section 504. ORR refers the reader to prior responses to comments concerning the placement of children with disabilities in restrictive facilities.

ORR will consider the commenters' recommendations regarding incorporation of the ''direct threat'' standard and placement in QRTPs and may address them further in future policymaking. Further, ORR notes that placements in restrictive settings are regularly reviewed to determine if a less restrictive placement is appropriate. As provided in § 410.1901, and finalized in this rule, ORR will conduct a review of all restrictive placements, including RTCs, at least every 30 days, and reviews of RTC placements must involve a psychiatrist or psychologist to determine whether the child should remain in restrictive residential care. ORR must also ensure a more intensive 90-day review by ORR supervisory staff for children in secure facilities.

Comment: Many commenters recommended revisions to § 410.1105(c). First, commenters recommended that the term ''serious mental health and behavioral issues'' should be replaced by ''serious mental health and behavioral needs'' to focus on the child's needs and reduce stigma. Second, commenters recommended that ORR add the following language to § 410.1105(c): ''ORR shall not consent to a child's placement in an RTC when the child has a disability and, with services or reasonable modifications, the child can be served in a more integrated setting.''

Response: ORR does not believe it is necessary or appropriate to change the term ''serious mental health and behavioral issues'' to ''serious mental health and behavioral needs.'' ORR believes that the term ''serious mental health and behavioral issues'' encompasses an assessment of whether there are ''serious mental health and behavioral needs'' and does not detract from a consideration of the child's needs. However, as noted above, ORR is adding new § 410.1105(d) to state that for an unaccompanied child with one or more disabilities, consistent with section 504 and § 410.1311(c), ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement such as an RTC shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. Finally, per § 410.1105(c), an unaccompanied child with serious mental health or behavioral health issues may only be placed into an RTC if the unaccompanied child is evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file, including documentation by a licensed psychologist or psychiatrist that an RTC is appropriate.

Comment: One commenter recommended that ORR provide interpretation for Indigenous children to ensure Indigenous children are not being placed in restrictive placements due to misunderstandings arising from difficulties in communication between the child and ORR staff, discrimination, or intimidation.

Response: ORR provides access to interpretation services as provided in § 410.1306. In particular, standard programs and restrictive placements

must prioritize the ability to provide in-person, qualified interpreters for unaccompanied children who need them, particularly for rare or indigenous languages. After the standard programs and restrictive placements make reasonable efforts to obtain in-person, qualified interpreters, then they may use professional telephonic interpreter services.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1105 with the following modifications. First, ORR is revising § 410.1105(a) to provide that all determinations to place an unaccompanied child in a secure facility (that is not an RTC) will be reviewed and approved by ORR Federal field staff. Second, ORR is revising § 410.1105(a)(1) and (b)(1) to state that the placement determinations under paragraphs (a) and (b) must be made based on clear and convincing evidence documented in the unaccompanied child's case file. Third, ORR is removing references to ''danger to self'' in § 410.1105(a)(2) and § 410.1105(a)(3)(i), (ii), and (iii) and is adding an affirmative statement to § 410.1105(a)(1) that a finding that a child poses a danger to self shall not be the sole basis for a child's placement in a secure facility that is not an RTC. Fourth, because ORR is striking ''danger to self'' in § 410.1105(a)(3)(iii), ORR is deleting ''substance or alcohol use'' from the examples of ''unacceptably disruptive'' conduct addressed in that paragraph. Fifth, ORR is amending § 410.1105(a)(2) to state that it ''shall'' place an unaccompanied child in a heightened supervision facility or other non-secure facility as an alternative to a secure facility (that is not an RTC), provided that the unaccompanied child does not ''currently'' pose a danger to others and does not need placement in an RTC pursuant to the standard set forth at § 410.1105(c). Sixth, at the end of the first sentence of § 410.1105(c)(1), ORR is revising the phrase ''that RTC is appropriate'' to state ''that placement in an RTC is appropriate'' to clarify that the determination made in that paragraph relates to placement. Seventh, to clarify that there must be a determination of clear and convincing evidence for each child placed in an RTC, ORR is finalizing revisions to § 410.1105(c)(1) to provide that the child must be evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file, *including* documentation by a licensed psychologist or psychiatrist that placement in an RTC is appropriate. Eighth, ORR is revising § 410.1105(c)(1) to remove the last sentence (''In assessing danger to self or others, ORR shall use the criteria for placement in a secure facility at paragraph (a) of this section.''). Finally, ORR is adding new § 410.1105(d) to state that for an unaccompanied child with one or more disabilities, consistent with section 504, ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. Section 410.1105(d) further states that ORR's consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement shall also apply to transfer decisions under § 410.1601 and will be incorporated into restrictive placement case reviews under § 410.1901. Section 410.1105(d) further clarifies that ORR is not required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. ORR is otherwise finalizing § 410.1105 as proposed.

Section 410.1106 Unaccompanied Children Who Need Particular Services and Treatment

ORR proposed in the NPRM at § 410.1106 to codify the requirements for ORR when placing unaccompanied children assessed to have a need for particular services, equipment, and treatment by staff (88 FR 68925). This section implements and updates paragraph 7 of the FSA, which requires ORR to assess unaccompanied children to determine if they have ''special needs,'' and, if so, to place such unaccompanied children, whenever possible, in licensed programs in which ORR places unaccompanied children without ''special needs,'' but which provide services and treatment for such ''special needs.'' As indicated by the definition for ''special needs unaccompanied child'' from the FSA and included in NPRM at § 410.1001, an unaccompanied child is considered to have ''special needs'' if ORR determines that the unaccompanied child has a mental and/or physical condition that requires particular services and treatment by staff. ORR may determine that an unaccompanied child needs particular services and treatment by staff for a variety of reasons including, but not limited to, those delineated within the definition of ''special needs unaccompanied child'' and specified in paragraph 7 of the FSA. For this reason, ORR proposed this section in the NPRM without limiting its scope to ''special needs unaccompanied child.'' ORR noted that an unaccompanied child may need particular services and treatment due to a disability, as defined at § 410.1001, but not all unaccompanied children with disabilities necessarily require particular services and treatment by staff. Likewise, an unaccompanied child does not need to have been identified as having a disability to be determined to require particular services and treatment to meet their individualized needs.

To avoid confusion, ORR refers in this section to unaccompanied children with ''individualized needs'' rather than using the outdated ''special needs'' terminology found in the FSA at paragraph 7. As noted above regarding § 410.1103, the term ''special needs'' has created confusion and may imply that in determining placement, ORR considers only a limited range of needs that fall within a special category. Instead, in assessing the appropriate placement of an unaccompanied child, ORR proposed in the NPRM to consider any need it becomes aware of that is specific to each unaccompanied child being assessed, regardless of the nature of that need. The examples provided in this section of individualized needs that may require particular services, equipment, and treatment by staff are illustrative, and not exhaustive. Furthermore, as also discussed at §§ 410.1001 and 410.1103, ORR was concerned about using the term ''special needs'' given its association as a placeholder or euphemism for disability whereas this section does not apply only to unaccompanied children with disabilities who require particular services and treatment.

ORR also noted that this section incorporates the preference for inclusive placements that serve unaccompanied children with a diversity of needs, including the need for particular services or treatments, whenever possible, as provided in paragraph 7 of the FSA, and particular equipment. This section is distinct from, but in alignment with, HHS's implementing regulation for section 504 at 45 CFR 85.21(d) that prohibits discrimination on the basis of disability by requiring that the agency administer programs and activities in the most integrated setting appropriate to the needs of individuals with disabilities. The most

integrated setting appropriate to the needs of an individual with a disability is a setting that enables individuals with disabilities to interact with individuals without disabilities to the fullest extent possible.[122]

Comment: One commenter recommended that the individualized assessment be evidence-based, trauma-informed, developmentally appropriate, culturally competent, and conducted in the child's preferred language. Additionally, the commenter recommended ORR adopt a strength-based needs assessment for children whose behavior indicates a need for services and/or supports and the possible strengths to assist with treatment to address the child's behavioral issues and needs. The commenter also recommended that a qualified individual with expertise or experience with the unaccompanied child's particular disability (as applicable) and who is known and trusted by the child conduct the assessment in a comfortable community-based setting to effectively identify a child's needs for particular services, equipment, and treatment. Lastly, the commenter recommended that needs assessments and integrated placement determinations be completed in a timely manner for children with and without disabilities.

Response: As clarified in § 410.1000, ORR does not intend 45 CFR part 410 to govern or describe the entire UC Program, including the specific procedures for how ORR is to assess an unaccompanied child to identify the child's individualized needs during placement. Where the regulations contain less detail, ORR plans to issue subregulatory guidance and other communications from ORR to care provider facilities to provide specific guidance on requirements. To the extent the commenter's recommendations do not reflect existing ORR policies, ORR may consider them for future policymaking.

Comment: One commenter expressed concern that § 410.1106 is unclear whether it incorporates evaluations for disability, as required by the anticipated *Lucas R.* settlement, into the assessment that determines whether the child needs particular services and treatment. Additionally, several commenters recommended a more formal evaluation for disability, stating this is required to ensure ORR protects the child's rights under section 504. These commenters recommended that the final rule require a prompt evaluation of an unaccompanied child suspected of having a disability by a qualified professional in circumstances where the child: (1) requests an evaluation for disability, (2) is psychiatrically hospitalized or evaluated for psychiatric hospitalization, or (3) is being considered for transfer to a restrictive setting based on danger to self or others. According to the commenters, such an evaluation for disability should consider the child's need for reasonable modifications and auxiliary aids and services. Further, a few commenters recommended including in the final rule a requirement that the child's attorney or child advocate can request an evaluation of the child for disability by a provider of their choice at no cost to the child. Finally, these commenters recommended that individualized assessments for unaccompanied children with disabilities or suspected disabilities be based on current medical knowledge and the best available objective evidence, which include evaluations of the services and supports that would enable children to live with their family.

Response: Consistent with its discussion of the *Lucas R.* litigation at section III.B.4, ORR is not incorporating the requirements related to more formal evaluations for disability in the proposed disability class settlement, or other recommended requirements for such evaluations in this final rule. However, ORR will continue to evaluate possible policy updates as the anticipated settlement is implemented, and the year-long needs assessment process is completed, and the disability plan developed.

Comment: Several commenters recommended ORR clarify that assessments or evaluations for disability do not delay a child's release.

Response: ORR clarifies in this final rule that an assessment of the unaccompanied child for particular services and treatment by staff or equipment to address their individualized needs should not delay the child's release. This is consistent with § 410.1311(e)(3), which prohibits ORR from delaying release of a child with one or more disabilities solely because post-release services are not in place before or following the child's release.

Comment: A few commenters recommended ORR clarify § 410.1106 with respect to whether unaccompanied children with individualized needs are placed in integrated placements which provide services and treatment for such individualized needs. One commenter recommended ORR clarify whether the last sentence of the regulation text should refer to unaccompanied children with individualized needs instead of unaccompanied children with disabilities. Another commenter recommended ORR clarify what ''reasonable modifications to the program'' means.

Response: Consistent with FSA paragraph 7, ORR is clarifying in the final rule that if ORR determines that an unaccompanied child's individualized needs require particular services and treatment by staff or particular equipment, ORR shall place the unaccompanied child, whenever possible, in a standard program in which the unaccompanied child with individualized needs can interact with children without those individualized needs to the fullest extent possible, but which provides services and treatment or equipment for such individualized needs. ORR has removed the reference to ''reasonable modifications'' for clarity and notes that this language has been incorporated into § 410.1311(c).

Comment: One commenter requested ORR clarify how care provider facilities would communicate transfers of unaccompanied children who need particular services and treatment and whether or not ORR would mandate that care provider facilities accept these children if the facilities have capacity. The commenter recommended ORR require care provider facilities to accept transfers or emergency transfers and not unnecessarily delay placement on the basis that they are unable to meet the children's needs. Further, the commenter requested ORR clarify how a care provider facility protects other children in the facility when there is no placement available for a child with emergency behavioral health needs and how the facility can ensure proper care of that child in the interim. Specifically, the commenter requested that ORR clarify what circumstances may warrant psychiatric hospitalization and what support ORR would provide to the care provider facility to make transfer decisions.

Response: ORR appreciates the commenter's request for clarification. ORR's transfer process for unaccompanied children, including children who need particular services and treatment is described at § 410.1601, which discusses ORR's finalized requirements regarding the transfer process, including communication about the timeframe, alternate placement recommendations at § 410.1601(a)(1), medical clearance at § 410.1601(a)(2), and advanced notification at § 410.1601(a)(3). Additionally, ORR notes that it does not intend this final rule to govern or describe the entire UC Program, and where a regulation contains less detail, additional detail to implement the

requirement may be issued in subregulatory guidance. To the extent the commenter's recommendations are not already captured in this final rule, ORR may consider them for future policymaking.

Final Rule Action: After consideration of public comments, ORR is making the following modifications to § 410.1106. ORR is revising the first sentence of § 410.1106 by adding ''and custody'' to clarify that unaccompanied child requires particular services and treatment by staff to address their individual needs while in the care ''and custody'' of the UC Program. ORR is revising the last sentence of § 410.1106 to state ''If ORR determines that an unaccompanied child's individualized needs require particular services and treatment by staff or particular equipment, ORR shall place the unaccompanied child, whenever possible, in a standard program in which the unaccompanied child with individualized needs can interact with children without those individualized needs to the fullest extent possible, but which provides services and treatment or equipment for such individualized needs.'' Otherwise, it is finalizing § 410.1106 as proposed in the NPRM.

Section 410.1107 Considerations When Determining Whether an Unaccompanied Child is a Runaway Risk for Purposes of Placement Decisions

ORR proposed in the NPRM at § 410.1107 to codify factors that it considers in determining whether an unaccompanied child is a runaway risk for purposes of placement decisions (88 FR 68925 through 68926). As described in § 410.1001, the FSA and ORR policy currently use the term ''escape risk,'' and ORR proposed in the NPRM to update the terminology to ''runaway risk'' and also proposed to update the definition provided in the FSA. ORR noted that the TVPRA provides that HHS ''may'' consider ''risk of flight,'' among other factors, when making placement determinations.[123] (ORR notes that 8 U.S.C. 1232(c)(2)(A) does not list risk of flight as a ground for placing an unaccompanied child in a secure facility. Therefore, even though paragraph 21D of the FSA states that being an escape risk (or runaway risk as finalized in this rule) is a ground upon which ORR may place an unaccompanied child in a secure facility, ORR did not propose in the NPRM that runaway risk is a basis for placement in a secure facility.). ORR proposed in the NPRM to interpret ''risk of flight,'' which is used in immigration law regarding an individual's risk of not appearing for their immigration proceedings, as including runaway risk. In its discretion, ORR considers these runaway risk factors when evaluating whether to transfer an unaccompanied child to another care provider facility, in accordance with § 410.1601. For example, an unaccompanied child may be transferred from a non-secure level of care to a heightened supervision facility where there is higher staff ratio and a secure perimeter (stepped up) if ORR determines the unaccompanied child is a runaway risk in accordance with § 410.1107.

ORR proposed in the NPRM at § 410.1107(a) through (c) to codify the risk factors to consider when evaluating whether an unaccompanied child is a runaway risk for purposes of placement. These factors are consistent with paragraph 22 of the FSA, which are also included in the 2019 Final Rule at § 410.204. Specifically, ORR proposed in the NPRM to consider the following factors: (a) whether the unaccompanied child is currently under a final order of removal (*i.e.,* the unaccompanied child has a legal duty to report for deportation); (b) whether the unaccompanied child's immigration history includes: (1) a prior breach of bond, (2) a failure to appear before DHS or the immigration court, (3) evidence that the unaccompanied child is indebted to organized smugglers for their transport, or (4) a previous removal from the U.S. pursuant to a final order of removal; and (c) whether the unaccompanied child has previously absconded or attempted to abscond from State or Federal custody. ORR noted that under paragraph 22B of the FSA, a voluntary departure from the U.S. by the unaccompanied child is also listed as a risk factor. Based on ORR's experience in placing unaccompanied children, ORR did not propose to codify whether the child's immigration history includes a voluntary departure because this factor has not been relevant in determining whether the child is a runaway risk.

ORR noted that paragraph 22 of the FSA provides a non-exhaustive list of factors to consider when evaluating runaway risk.[124] [125] Consistent with this language, as well as with ORR's authority generally to consider runaway risk in making placement determinations, ORR proposed in the NPRM additional factors at § 410.1107(d) and (e) for ORR to consider when determining whether an unaccompanied child is a runaway risk for purposes of placement decisions. ORR proposed in the NPRM at § 410.1107(d) to require ORR to consider whether the unaccompanied child has displayed behaviors indicative of flight or has expressed intent to run away. ORR proposed in the NPRM at § 410.1107(e), to consider evidence that the unaccompanied child is indebted to, experiencing a strong trauma bond to, or is threatened by a trafficker in persons or drugs, in determining whether the unaccompanied child is a runaway risk. ORR developed this proposal through its practical experience of making runaway risk placement decisions and believes it is appropriate to add as an additional factor to consider. ORR sought public comment on these proposed factors and welcomed feedback on other factors ORR should or should not consider when determining if an unaccompanied child is a runaway risk for purposes of placement decisions.

Comment: ORR received comments in support of ORR's proposal to not codify voluntary departure as a runaway risk factor, which is an immigration history factor from paragraph 22 of the FSA. One commenter stated the factors listed in the FSA are aids to assess the likelihood a child will abscond from ORR custody and are not determinative. The commenter stated there is no reason to include a factor in the final rule if it is not useful in predicting whether the child will attempt to abscond from ORR custody.

Response: ORR agrees that voluntary departure from the United States by the unaccompanied child is not a relevant factor in determining whether the child is a runaway risk and has not included an immigration history that includes a voluntary departure as a factor in § 410.1107.

Comment: A few commenters recommended that ORR not finalize the immigration history factors in § 410.1107(b) that ORR proposed in the NPRM to use when determining whether an unaccompanied child is a runaway risk for placement. These commenters expressed concern that an unaccompanied child's immigration history is outside of the child's control and is not predictive or useful in determining whether the child is a runaway risk. One commenter stated that the immigration factors ORR proposed in the NPRM at § 410.1107(b) are unnecessary as they reflect the immigration enforcement role of the former INS and are not appropriate to ORR's distinct role as a custodian of unaccompanied children. Another commenter recommended that ORR not assess flight risk based on an unaccompanied child's negative prior immigration history because, as ORR acknowledged in the preamble in the NPRM, it is not a law enforcement

agency. Additionally, this commenter stated that in their experience serving unaccompanied children, they have not seen any correlation between a prior receipt of a final order of removal or a failure to appear and the risk that children will run away from care provider facilities. Instead, the commenter stated children are more likely to stay in the care provider facilities and work with their legal services provider, attorney, or representative to resolve the prior receipt of a final order of removal. A separate commenter expressed concern that ORR conflates two different risks of flight in § 410.1107, stating a ''runaway risk'' from a shelter program is different from risk of flight in immigration proceedings; the commenter stated risk of flight exceeds ORR's purview, authority, and expertise. Specifically, the commenter stated that ORR conflates actions taken by others on the child's behalf (*e.g.,* prior breach of bond or failure to appear) with actions taken by the child (*e.g.,* child has previously absconded or attempted to abscond from State or Federal custody).

Response: ORR thanks the commenters for their recommendations to not finalize the immigration history factors at § 410.1107(b). ORR agrees that these factors are typically outside an unaccompanied child's control and do not predict whether a child will run away from a care provider facility based on ORR's experience in placing unaccompanied children. Similar to ORR's reasoning for not finalizing voluntary departure as a factor, it is ORR's experience that the unaccompanied child's immigration history has not been relevant in determining whether the child is a runaway risk. Accordingly, ORR is not finalizing the immigration history factors at § 410.1107(b).

Comment: ORR received comments related to how ORR weighs the factors listed at proposed § 410.1107(c) and (d) when determining an unaccompanied child's runaway risk. One commenter agreed that ORR should consider an unaccompanied child's prior escape when making a placement decision. Another commenter recommended ORR make a determination of runaway risk based on the totality of the circumstances and not base its determination on the child's attempt to run away, stating the proposed runaway risk factors are overbroad and do not reflect whether the unaccompanied child is a runaway risk. A different commenter expressed concern that the proposal at § 410.1107(d) is overbroad and asserted that a statement from the child that the child is going to leave does not require a step-up to a more restrictive placement but better services and a better care environment.

Response: ORR has provided a definition of ''runaway risk'' at § 410.1001 of this rule, pursuant to which ORR's determination that an unaccompanied child is a runaway risk must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away or a statement from the child that the child is going to leave or runaway. ORR applies this ''totality of the circumstances'' standard when making determinations under § 410.1107. ORR will monitor implementation of this regulation and, if needed, will take the commenter's recommendations into consideration for future policymaking. ORR further notes that an unaccompanied child is only placed in a heightened supervision facility after consideration of the criteria at § 410.1105(b)(2) and based on clear and convincing evidence supporting the placement change.

Comment: One commenter recommended removing all references to indebtedness in proposed § 410.1107(b)(3) and (e) because indebtedness does not relate to flight risk and the commenter stated this is an unacceptable rationale for placing a child in a restrictive placement. The same commenter recommended that ORR not incorporate the term ''trauma bond'' in proposed § 410.1107(e) because there is ''no medical standard for diagnosis . . . nor any agreed upon definition.''

Response: ORR is not finalizing the factors at § 410.1107(b), which includes indebtedness to smugglers at § 410.1107(b)(3). Additionally, ORR agrees with the commenter that indebtedness to a trafficker in persons or drugs is not relevant in determining whether the unaccompanied child is a runaway risk. Similar to ORR's reasoning for not finalizing voluntary departure and immigration history as factors, whether the unaccompanied child is indebted to a trafficker in persons or drugs has not been relevant in ORR's experience in determining whether the child is a runaway risk. Accordingly, ORR is revising § 410.1107(e) as proposed in the NPRM to remove ''indebted to.''

Additionally, ORR does not agree with the commenter's recommendation to not incorporate the term ''trauma bond'' § 410.1107(e) as proposed in the NPRM and believes that it is appropriate to use the term ''trauma bond'' in § 410.1107(e), which is consistent with how the Department of State's Office to Monitor and Combat Trafficking in Persons defined the term in its factsheet, Trauma Bonding in Human Trafficking.[126] ORR believes there is a generally accepted definition of ''trauma bond'' and defined the term at § 410.1001 so that readers can understand how ORR uses the term in 45 CFR part 410.

Comment: A number of commenters opposed ORR codifying runaway risk factors for placement determinations at § 410.1107, stating ORR does not have the capacity to make this assessment because, as ORR stated in the preamble for § 410.1105(a)(3), that ''because it is not a law enforcement agency, unlike the former INS, ORR is not in a position to make determinations such as whether an unaccompanied child is 'chargeable.' ''

Response: As an initial matter, ORR notes that it is unclear whether commenters were challenging ORR's authority to assess whether an unaccompanied child is a runaway risk or ORR's ability to do so when exercising such authority. Under the HSA and TVPRA, ORR is responsible for the care and placement of unaccompanied children. The TVPRA, at 8 U.S.C. 1232(c)(2), provides that ORR may consider the child's risk of flight in determining the least restrictive setting to place the child that is in the child's best interest. Therefore, ORR clarifies that it has the legal authority to determine whether an unaccompanied child is a runaway risk. ORR's statement in the NPRM preamble for § 410.1105(a)(3) relates to its proposal to not codify that an unaccompanied child may be placed in a secure facility if the unaccompanied child is ''chargeable with a delinquent act.'' As stated in the preamble to the NPRM, ORR is not a law enforcement agency and is therefore unable to make a probable cause determination whether a child is ''chargeable'' (88 FR 68923). However, the language at § 410.1105(a)(3) does not have bearing on ORR's authority or ability to assess an unaccompanied child's runaway risk; when ORR assesses runaway risk it is not deciding whether an unaccompanied child is ''chargeable with a delinquent act.''

Final Rule Action: After consideration of public comments, ORR is making the following modifications. ORR is not finalizing § 410.1107(b) as proposed in the NPRM. ORR is updating the numbering for proposed § 410.1107(c) through (e) and finalizing as § 410.1107(b) through (d). ORR is revising proposed § 410.1107(e), which is now § 410.1107(d), to state ''Evidence that the unaccompanied child is experiencing a strong trauma bond to or is threatened by a trafficker in persons

or drugs.'' ORR is otherwise finalizing § 410.1107 as proposed in the NPRM.

Section 410.1108 Placement and Services for Children of Unaccompanied Children

ORR proposed in the NPRM at § 410.1108, the requirements for the placement of children of unaccompanied children and services they would receive while in ORR care (88 FR 68926). ORR believes that when unaccompanied children are parents of children, it is in the best interests of the children to be placed in the same facility as their parents, who are also unaccompanied children. Accordingly, ORR proposed in the NPRM at § 410.1108(a) to codify its existing policy that it will place unaccompanied children and their children together at the same care provider facilities, except in unusual or emergency situations. ORR considered limiting the proposal to the biological children of unaccompanied children. However, at the time of intake and placement, it may not be known whether the children are the biological children of the unaccompanied children. Accordingly, ORR did not limit the proposal to the biological children of unaccompanied children and instead proposed broader language to allow for flexibility in placing unaccompanied children and their children to account for other situations (for example, the unaccompanied child may not be the biological parent of a child but is the child's caretaker).

Consistent with existing policy, and with its responsibility to consider the best interests of children in making placement decisions, ORR proposed in the NPRM that unusual or emergency situations would include, but not be limited to: hospitalization or need for a specialized care or treatment setting that cannot provide appropriate care for the child of the unaccompanied child; a request by the unaccompanied child for alternate placement of the child of the unaccompanied child; and when the unaccompanied child is the subject of substantiated allegations of abuse or neglect against the child of the unaccompanied child (or temporarily in urgent cases where there is sufficient evidence of child abuse or neglect warranting temporary separation for the child's protection). ORR proposed in the NPRM to codify these requirements into regulation at § 410.1108(a)(1) through (3).

ORR is aware that children of unaccompanied children may not be unaccompanied children within the definition provided in the HSA at 6 U.S.C. 279(g)(2). For example, a child born in the United States will likely be a U.S. citizen at birth under section 1401(a) of the INA, 8 U.S.C. 1401(a), and the U.S. Constitution, as amended, XIV section 2. Additionally, a noncitizen child who is in the custody of a parent who is an unaccompanied child who is available to provide care and physical custody, may not be an unaccompanied child. ORR understands that it has custody of the unaccompanied child, consistent with its statutory authorities, and that the unaccompanied child has custody of their child. ORR does not seek to place the parent and child in different facilities or shelters except in the limited circumstances noted above. ORR understands this to be consistent with its responsibility to consider the interests of unaccompanied children.[127] If the child who is in the custody of their unaccompanied child parent has another parent who is a citizen present in the U.S., ORR would consider whether it is in the best interests of the child to place the child with the unaccompanied child parent or the parent who is a U.S. citizen. ORR requested comments regarding this interpretation of its authorities under the TVPRA and the HSA, because neither statute expressly contemplates scenarios where an unaccompanied child is a parent.

ORR proposed in the NPRM at § 410.1108(b) to describe requirements for providing services to children of unaccompanied parenting children while in ORR care. ORR proposed in the NPRM at § 410.1108(b)(1), that children of unaccompanied children would receive the same care and services as ORR provides to the unaccompanied children, as appropriate, regardless of the children's immigration or citizenship status. Additionally, U.S. citizen children of unaccompanied children would be eligible for mainstream public benefits and services to the same extent as other U.S. citizens (for example, Medicaid). Application(s) for public benefits and services shall be submitted on behalf of the U.S. citizen children of unaccompanied children by the care provider facilities. This may include, but is not limited to, helping file for birth certificates or other legal documentation as necessary. Further, ORR proposed in the NPRM at § 410.1108(b)(2), that utilization of those public benefits and services should be exhausted to the greatest extent practicable for U.S. citizen children of unaccompanied children before ORR-funded services are utilized for these children.

Comment: A number of commenters expressed concerns about the possibility under § 410.1108(a) of the NPRM that ORR might separate parenting unaccompanied children from their own children under unusual or emergency circumstances. Some commenters recommended that ORR not provide for such separations under any circumstances, with some recommending relying on State child welfare agencies for any determination of the need to separate parenting unaccompanied children from their own children. Others recommended that ORR revise § 410.1108(a) to specify that ORR may only separate an unaccompanied parenting child from their child in unusual or in emergency situations where keeping the parenting child and child together poses an immediate danger to the children's safety. Some commenters recommended that a separation should occur only if there has been an adjudication using clear and convincing evidence that the unaccompanied child poses an immediate danger to their child that cannot be mitigated. Commenters also recommended that if such separations were to occur, ORR should address due process concerns, specify who will make the decision, and build in a requirement for prior authorization from ORR before care provider staff are able to separate unaccompanied sibling children or an unaccompanied parenting child from their child. One commenter recommended that in the event of a separation, ORR should provide guidance on the circumstances when ORR would separate unaccompanied parenting children from their children, the basis for separating them, how long that separation could last, and whether the parenting unaccompanied child can challenge the separation. Commenters also discussed the importance of legal counsel for a parent facing separation and their recommendation to discuss the rights of parents during a period of separation, and recommended ORR require immediate notification to the unaccompanied parenting child's attorney or child advocate, if appointed, of the separation. Some commenters noted the importance of services to facilitate unifications.

Additionally, commenters recommended that ORR incorporate provisions describing the ability of parenting unaccompanied children to continue making parental decisions on behalf of their child, as appropriate, including making informed decisions about health, diet, religion, and other matters. Commenters also recommended ORR require documentation of the recommendation to separate parenting unaccompanied children from their

children, as well as include provisions describing the swift unification of parenting unaccompanied children with their children where appropriate. Finally, some commenters recommended that separations on the basis of medical need be permitted only upon the recommendation of health care professionals, and the placement of parenting unaccompanied children, or their child, be as close as possible to where the underlying medical care is taking place.

Response: ORR's guiding policy is to maintain family unity of the parenting unaccompanied child and their child. ORR wants to clearly state that it would not separate a parenting unaccompanied child from their own child absent compelling circumstances where the life or safety of a child is at risk or the parent or child needs hospitalization or specialized care. Having said this, the commenters raised concerns that have led ORR to conclude that further policy development is needed to address the extreme circumstances noted in the NPRM, and therefore, ORR is not adopting § 410.1108(a) as proposed in the NPRM. Instead, ORR is codifying its general policy at § 410.1108(a) that ORR shall accept referrals for placement of parenting unaccompanied children who arrive with children of their own to the same extent that it receives referrals of other unaccompanied children and shall prioritize placing and keeping the parent and child together in the interest of family unity.

Comment: One commenter expressed concern about the requirement that the public benefits and services for U.S. citizen children of unaccompanied parenting children must be utilized and exhausted to the greatest extent practicable before utilizing ORR-funded services. Specifically, the commenter expressed concern that delays in public benefit applications, or lack of eligibility for services, could impede these children from timely accessing medical and psychiatric services while in ORR care and custody. To address this concern, the commenter recommended ORR clarify in the final rule that public benefits and services shall be exhausted to the greatest extent practicable before utilizing ORR-funded services unless doing so causes a delay or material change in the quality of necessary medical or psychiatric treatment of the child.

Response: ORR does not expect that delays in public benefit applications and ineligibility for services would impede the ability of a child of an unaccompanied parenting child to access medical and mental health services. ORR will monitor implementation of this regulation for any unintended consequences and as needed, will consider the commenter's recommendation for future policymaking.

Final Rule Action: For the reasons stated, ORR is revising § 410.1108(a) to state ''ORR shall accept referrals for placement of parenting unaccompanied children who arrive with children of their own to the same extent that it receives referrals of other unaccompanied children and shall prioritize placing and keeping the parent and child together in the interest of family unity.'' ORR is not finalizing § 410.1108(a)(1) through (3) as proposed in the NPRM. Otherwise, it is finalizing § 410.1108 as proposed in the NPRM.

Section 410.1109 Required Notice of Legal Rights

ORR proposed in the NPRM at § 410.1109(a), that it would be required to promptly provide each unaccompanied child in its custody with the information described in § 410.1109(a)(1) through (3) in a language and manner the unaccompanied child understands (88 FR 68926 through 68927). First, ORR proposed in the NPRM at § 410.1109(a)(1), to require that unaccompanied children in ORR custody be promptly provided with a State-by-State list of free legal service providers compiled and annually updated by ORR and that is provided to unaccompanied children as part of a Legal Resource Guide for unaccompanied children. This requirement is consistent with TVPRA at 8 U.S.C. 1232(c)(5) (requiring that HHS ''ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking,'' and that to the greatest extent practicable HHS ''make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.''). In addition, the requirement is consistent with the HSA at 6 U.S.C. 279(b)(1)(I) (requiring ORR to compile, update, and publish ''at least annually a State-by-State list of professionals or other entities qualified to provide guardian and attorney representation services for unaccompanied alien children.''). ORR noted that the list of free legal service providers may also be compiled and updated by an ORR contractor or grantee.

ORR proposed in the NPRM at § 410.1109(a)(2), that it would also be required to provide the following explanation of the right of potential review: ''ORR usually houses persons under the age of 18 in the least restrictive setting that is in an unaccompanied child's best interest, and generally not in restrictive placements (which means secure facilities, heightened supervision facilities, or residential treatment centers). 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.'' ORR noted in the NPRM that this requirement updates language described in the requirement to deliver a similar notice under Exhibit 6 of the FSA,[128] to reflect current placement requirements detailed in this rule. The FSA language, for example, refers to the former INS, instead of ORR, and to ''detention facilities'' rather than restrictive settings or placements.

ORR also proposed at § 410.1109(a)(3) that a presentation regarding their legal rights would be provided to each unaccompanied child as provided under § 410.1309(a)(2). ORR referred readers to § 410.1309(a) for additional information regarding this presentation. ORR stated that it would take appropriate steps to ensure that the information it presents to unaccompanied children is communicated effectively to individuals with disabilities, including through the provision of auxiliary aids and services as required by section 504 and HHS's implementing regulations at 45 CFR 85.51. ORR also stated that it would take reasonable steps to ensure that individuals with limited English proficiency have a meaningful opportunity to access information and participate in ORR programs, including through the provision of interpreters or translated documents. ORR requested comments on steps ORR should take to ensure that it provides effective communication to unaccompanied children who are individuals with disabilities. ORR also requested comment on steps ORR should take to ensure meaningful access to unaccompanied children who are limited English proficient regarding information about and participation in ORR programs.

Finally, ORR proposed in the NPRM that under § 410.1109(b), consistent with ORR's existing policy, ORR shall not engage in retaliatory actions against

legal service providers or any other practitioner because of advocacy or appearance in an action adverse to ORR. ORR proposed in the NPRM this text, notwithstanding the general presumption that government agencies and officials act with integrity and regularity,[129] to further express ORR's intent to promote and protect unaccompanied children's ability to access legal counsel. As noted below, in this final rule, ORR is deleting § 410.1109(b) because it is redundant of § 410.1309(e). For discussion regarding the availability of administrative review of ORR placement decisions, ORR referred readers to subpart J.

Comment: One commenter recommended that proposed § 410.1109(a)(1) (which requires that ORR provide each child in its custody with a State-by-State list of free legal service providers compiled and annually updated by ORR) be strengthened by adding that information will also be made accessible by other means, and not solely via a printed list. The commenter cautioned that printed lists that require regular updating become quickly outdated and that accessibility of written information may be hindered for children with limited literacy. In addition, the commenter noted that many unaccompanied children communicate and receive information via WhatsApp, Facebook Messenger, or other apps. Finally, the commenter noted that supplementary means of making information accessible, such as through The International Rescue Committee's ORR-funded ImportaMi program, have been very effective for ensuring children's greater access to critical information.

Response: ORR appreciates the commenter's recommendations and will consider making the list required under § 410.1109(a)(1) accessible by electronic means as well as enhancing access to such information. The specific requirement at § 410.1109(a)(1) for a list does not preclude ORR from making this information available through other means as there are continuing developments in technologies.

Comment: One commenter recommended that § 410.1109 be more precise so that the unaccompanied child is proactively assigned a lawyer or authorized immigration advocate at the Government's expense and a translator to explain and act in the child's best interest.

Response: As described at § 410.1109(a)(1), ORR shall provide each unaccompanied child in its custody, in a language and manner the unaccompanied child understands, with a State-by-State list of free legal service providers compiled and annually updated by ORR and that is provided to unaccompanied children as part of a Legal Resource Guide for unaccompanied children. ORR refers readers to the discussion of §§ 410.1306 and 410.1309 in this final rule for more information about language access services (including translator services) and legal services available to unaccompanied children.

Comment: Several commenters stated that proposed § 410.1109(a)(2) provides for a notice of rights that includes some language similar to FSA Exhibit 6 but omits providing a statement of the right to ask a Federal judge to review the child's case, and thus recommended that the final rule include a statement informing the unaccompanied child of the right to seek review of a placement determination or noncompliance with FSA Exhibit 1 standards in a United States District Court with jurisdiction. The commenters noted that the preamble states the proposed rule does not expressly provide for judicial review of placement or compliance because a regulation cannot confer jurisdiction on a Federal court (88 FR 68975). However, the commenters contended that this limitation is not an obstacle to informing children of their right to potential judicial review in a court with jurisdiction and venue.

Response: Section 410.1109(a)(2) provides an explanation of the right to contact a lawyer to receive advice about challenging a placement determination or improper treatment. As noted by the commenters, the language in § 410.1109(a)(2) is slightly different than the language in FSA Exhibit 6. The final rule language, however, more accurately accounts for recent changes in the law and current placement requirements. For instance, as a result of the *Lucas R.* case, ORR now has a nationwide and more robust process for administrative review of restrictive placements which unaccompanied children may avail themselves of as discussed further in § 410.1902. At the time the FSA was approved, no such administrative review existed. Unaccompanied children are also entitled to a risk determination hearing in some cases, as discussed further in § 410.1903. FSA Exhibit 6 simply advised that the child ''may ask a federal judge to review [their] case'' and ''may call a lawyer to help [them] do this.'' The final rule recognizes the complexities of the current process and advises that the child ''may call a lawyer to seek assistance and get advice about your rights to challenge this action.'' During that call, the lawyer would be able to explain to the child the placement review panel process detailed in § 410.1902, or the risk determination hearing process in § 410.1903, for example, or other potential avenues for relief. ORR believes that the explanation of the right of potential review provided in § 410.1109(a)(2) is more accurate than the language in FSA Exhibit 6.

Comment: Many commenters recommended that ORR take additional steps and that the rule include additional details to ensure adequate communication assistance and access so that unaccompanied children understand their legal rights. Specifically, these commenters recommended that ORR take the following steps to ensure adequate communication access to unaccompanied children with disabilities: (1) Identify community members who can facilitate communication with children with disabilities (such as sign language interpreters, advocates for persons with disabilities, inclusive education or special education teachers, or other caregivers of children with disabilities, or speech therapists); (2) For children with visual disabilities, describe the surroundings and introduce people present, and ask permission if offering to guide or touch the child or his or her assistive devices, such as wheelchairs or white canes; (3) For children with hearing disabilities, provide sign language interpreters and use visual aids; (4) If the child has difficulty communicating or understanding messages (such as children with disabilities), ensure the use of clear verbal communication and simple language, ask children to repeat information back and repeat as many times as necessary, in different ways and check for their understanding; (5) For children for whom there are concerns regarding capacity to make decisions regarding their case, ensure that children are quickly referred for a child advocate.

Response: ORR thanks commenters for their recommendations. As proposed, under § 410.1109(a)(3), ORR will provide unaccompanied children a presentation regarding their legal rights as provided under § 410.1309(a)(2). In providing this presentation, ORR will take appropriate steps to ensure that the information it presents to unaccompanied children is communicated effectively to children with disabilities, including through the provision of auxiliary aids and services as required by section 504 and HHS's implementing regulations at 45 CFR 85.51. ORR will also take reasonable steps to ensure that individuals with limited English proficiency have a

meaningful opportunity to access information and participate in ORR programs, including through the provision of interpreters or translated documents. ORR appreciates the specific steps recommended by commenters and will consider including these recommendations in future policymaking. ORR refers readers to proposed § 410.1309(a) for additional information regarding the legal rights presentation.

Comment: One commenter recommended that § 410.1109(a)(3) include a clarification that the legal rights presentation is funded and provided through a contracted provider separate from the care provider facility and that this must be provided within a certain number of days.

Response: Section 410.1309(a)(2)(A), as finalized in this rule, provides that the legal rights presentation shall be provided by an independent legal service provider that has appropriate qualifications and experience, as determined by ORR, to provide such a presentation, and § 410.1309(a)(2)(B) provides the timeframe within which such presentation must be provided. As such, ORR does not believe it is necessary to include this information in § 410.1109, as finalized in this rule. ORR refers readers to proposed § 410.1309(a) for additional information regarding the legal rights presentation.

Final Rule Action: After consideration of public comments, ORR is amending the notice described at § 410.1109(a)(2), adding to the second sentence of the notice that an unaccompanied child may call a lawyer to seek assistance ''and to get advice about your rights to challenge this action.'' In addition, ORR is not finalizing § 410.1109(b) because it is redundant of § 410.1309(e). ORR believes that eliminating this redundancy will enhance clarity as to the applicable requirements regarding retaliation against legal service providers and prevent potential confusion.

Subpart C—Releasing an Unaccompanied Child From ORR Custody

Section 410.1200 Purpose of This Subpart

This subpart describes ORR's policies and procedures regarding release, without unnecessary delay, of an unaccompanied child from ORR custody to a vetted and approved sponsor. ORR proposed in the NPRM to define release in subpart A as the ORR-approved transfer of an unaccompanied child from ORR care and custody to a vetted and approved sponsor in the United States. Accordingly, ORR stated that release does not include discharge for other reasons, including but not limited to the child turning 18, attaining legal immigration status, or being removed to their home country.

As discussed in this subpart of the NPRM, once an unaccompanied child is released by ORR to a sponsor, that unaccompanied child is no longer in ORR's custody (88 FR 68927). The TVPRA distinguishes unaccompanied children in HHS custody from those released to ''proposed custodians'' determined by ORR to be ''capable of providing for the child's physical and mental well-being.'' [130] In addition, under the FSA, once an unaccompanied child is released to a sponsor, the sponsor assumes physical custody.[131] ORR stated in the NPRM that this subpart includes the process for determining that sponsors are able to care for the child's physical and mental well-being.

In the NPRM, subpart C also proposed notice and appeal processes and procedures that certain potential sponsors will be afforded (88 FR 68927). ORR proposed in the NPRM that parents or legal guardians of an unaccompanied child who are denied sponsorship of that unaccompanied child be afforded the ability to appeal such denials. ORR noted that because issues relating to procedures for non-parent relatives are currently in litigation in the *Lucas R.* case, they are not part of this rulemaking. For the purposes of this final rulemaking, ORR has made certain updates relevant to release of unaccompanied children, consistent with its discussion of the *Lucas R.* case at Section III.B.4 above.

Comment: One commenter stated the proposed rule is silent on planning for transition-age youth who will age-out from ORR custody. The commenter recommended that ORR develop plans for every unaccompanied child in its custody at least 60 days in advance of their 18th birthday, and the plans should identify safe placement, social support services, employment assistance, and public benefits. Additionally, the commenter recommended ORR develop plans in conjunction with the unaccompanied child and their families, track the plans to ensure effectiveness, and regularly review and evaluate the plans for any necessary changes.

Response: ORR thanks the commenter for their recommendations. ORR notes that under current policies, which are consistent with this final rule, it requires care provider facilities to create written plans regarding unaccompanied children expected to turn 18 while still in ORR custody. Consistent with ORR's current policies, each post-18 plan should, at a minimum, identify an appropriate non-secure placement for the child and identify any necessary social support services for the child. Additionally, the plan is to include an assessment and recommendation of any ongoing supporting social services the youth may require, an assessment of whether the youth is a danger to the community or risk of flight, identification of any special needs, and arrangements for transportation after the youth ages out to either the non-secure placement option or to DHS where appropriate. Such plans must be completed at least two weeks before an unaccompanied child turns 18. ORR will study the commenter's recommendations and may consider them for future policymaking.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1201 Sponsors to Whom ORR Releases an Unaccompanied Child

ORR proposed in the NPRM at § 410.1201 the sponsors to whom ORR may release an unaccompanied child and criteria that ORR employs when assessing a potential sponsor (88 FR 68927 through 68928). As discussed, the HSA makes ORR responsible for making and implementing placement determinations for unaccompanied children.[132] In addition to these statutory requirements, the FSA establishes a general policy favoring release of unaccompanied children to sponsors, and further describes a preferred order of release, which ORR has incorporated into its policies.[133]

Consistent with its statutory authority and the FSA, ORR proposed in the NPRM at § 410.1201(a) potential sponsors in order of release preference. ORR noted that this order of preference reflects its strong belief that, generally, placement with a vetted and approved family member or other vetted and approved sponsor, as opposed to placement in an ORR care provider facility, whenever feasible, is in the best interests of unaccompanied children. ORR proposed in the NPRM, at § 410.1201(a) to codify the following order of preference for release of unaccompanied children: (1) to a parent; (2) to a legal guardian; (3) to an adult relative; (4) to an adult individual or entity, designated by the parent or legal guardian as capable and willing to care for the unaccompanied child's well-being through a declaration signed by the parent or legal guardian under penalty of perjury before an immigration or consular officer, or through such

other document(s) that establish(es) to the satisfaction of ORR, in its discretion, the affiant's maternity, paternity, or guardianship; (5) to a standard program willing to accept legal custody of the unaccompanied child; or (6) 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. ORR stated that possible scenarios in which ORR envisions (6) may be applicable include, for example, foster parents or other adults who have built or are building a relationship with an unaccompanied child while in ORR care, such as a teacher or coach, and in which it is possible to ensure that a healthy and viable relationship exists between the unaccompanied child and potential sponsor. However, under current ORR policy, care provider staff, contractors, and volunteers may not have contact with any unaccompanied children outside of the care provider facility beyond that necessary to carry out job duties while the child is in ORR care. ORR proposed in the NPRM at § 410.1202, as discussed below, sponsor suitability assessment process, which includes an assessment of the potential sponsor's previous and existing relationship with the unaccompanied child.

ORR proposed in the NPRM under § 410.1201(b), consistent with existing policy, that it would not disqualify potential sponsors based solely on their immigration status. In addition, ORR proposed in the NPRM that it shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes. ORR stated that it will not share any immigration status information relating to potential sponsors with any law enforcement or immigration related entity at any time. ORR further stated that 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 detained).

ORR proposed in the NPRM under § 410.1201(c), that, in making determinations regarding the release of unaccompanied children to potential sponsors, ORR shall not release unaccompanied children on their own recognizance.

Comment: Several commenters supported the proposal at § 410.1201(a) to prioritize placement with family members. One commenter appreciated the preference provided to family members, stating that placement with family members provides connection to the child's language, culture, and community. This commenter further recommended that ORR apply the principles of the Indian Child Welfare Act (ICWA) to the care and placement of unaccompanied children, ensuring their continued connection to their language, culture, traditions, and community. Another commenter recommended placing unaccompanied children with sponsors who are members of the Indigenous community from which the child originates and who understand the specific needs of an Indigenous child to ensure the child's welfare and rights are protected. One commenter specifically supported the proposed rule's presumption of unifying unaccompanied children with their parents because the commenter believed that it comports with international standards under Article 9 of the Convention on the Rights of the Child.

Response: ORR thanks the commenters for their recommendations, and believes that the potential sponsors prioritized under § 410.1201(a)(1) through (4) reflect the preference to place an unaccompanied child with a potential sponsor who will likely be able to provide a connection to the unaccompanied child's language, culture, and community by virtue of the fact that they are known to the unaccompanied child because they are a family member or legal guardian, or known to the unaccompanied child's parent or legal guardian. In reference to Indigenous children, ORR notes that ICWA does not govern the UC program. However, ORR notes that under current policies it considers the linguistic and cultural background of the unaccompanied child and sponsor.

Comment: A few commenters expressed strong support for the list of potential sponsors and order of release preference proposed at § 410.1201(a), stating that that it aligns with central principles of the FSA.

Response: ORR agrees that the list of potential sponsors and order of release preference proposed at § 410.1201(a) aligns with central principles of the FSA.

Comment: One commenter recommended that ORR explicitly state that unification with family is the primary goal for unaccompanied children whenever possible.

Response: ORR agrees that it is obligated to ensure that programs make prompt and continuous efforts toward family unification and release of children consistent with FSA paragraph 14 and the TVPRA,[134] and this remains unchanged in this final rule at § 410.1201(a). ORR also reiterates its strong belief, expressed in the NPRM, that placement with a vetted and approved family member or other vetted and approved sponsor, as opposed to continued placement in an ORR care provider facility, is generally in the best interests of unaccompanied children whenever feasible.[135]

Comment: One commenter was encouraged to see that ORR has explicitly included youth participation in decision-making as a foundational principle that applies to the care and placement of unaccompanied children in § 410.1003(d) and stated that this principle should also apply to releases to sponsors.

Response: ORR thanks the commenter for their recommendation and will take it into consideration in future policymaking in this area. ORR notes that § 410.1202(c) provides that ORR's sponsor suitability assessments shall take into consideration the wishes and concerns of the unaccompanied child.

Comment: Many commenters opposed the release of unaccompanied children to unrelated or distantly related sponsors. A few commenters expressed concern that non-relative or distant relative sponsors are not sufficiently vetted by ORR prior to release, which commenters believed could lead to increased risk of child trafficking and exploitation. One commenter recommended that ORR only release unaccompanied children to parents or legal guardians to ensure that unaccompanied children are not released to strangers, potential criminals, traffickers, and abusers. Several commenters expressed concern that proposed § 410.1201(b) could result in placement with unknown sponsors, without sufficient follow-up or enforcement to ensure children are protected from trafficking.

Response: ORR emphasizes its commitment to prevention of child trafficking and exploitation and believes that codifying these protective measures, many of which already exist in policy guidance, will strengthen its ability to do so. Specifically, ORR emphasizes that decisions to place a child with a sponsor are undertaken in accordance with its responsibility to ensure the safety and best interest of the child and only after the sponsor has been thoroughly vetted and approved by ORR, consistent with statutory requirements set forth in the TVPRA and further elaborated in this subpart. Consistent with the FSA, ORR agrees that priority should be given to a parent, legal guardian, or adult relative of the

child. However, as is also consistent with the FSA, in some cases individuals who are closely related to the child are either unable or unwilling to provide care. In such cases, ORR next prioritizes placement with another adult designated by the child's parent or legal guardian as verified by a signed declaration or other documentation that establishes a parental relationship per § 410.1201(a)(4)(i) through (ii). This usually necessitates that the individual is known to the parent or legal guardian and therefore is not a stranger. Furthermore, at § 410.1202(d), ORR stated that ORR may deny release to unrelated individuals who have applied to be a sponsor but who have no pre-existing relationship with the child or the child's family prior to the child's entry into ORR custody. Consistent with the FSA, ORR notes that a lack of a pre-existing relationship with the child would not categorically disqualify a potential sponsor, but lack of such relationship may be a factor in ORR's overall suitability assessment and when determining whether placing the child with a vetted and approved family member or other vetted and approved sponsor, as opposed to remaining in an ORR care provider facility, is in the best interests of the child. In addition, at § 410.1202(e), ORR provides that ORR shall consider the sponsor's motivation for sponsorship; the unaccompanied child's preferences and perspective regarding release to the potential sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the potential sponsor, as applicable.

Comment: Many commenters expressed concern with proposed § 410.1201(a)(6), which may permit the release of unaccompanied children to potential sponsors with whom an unaccompanied child has built a healthy and viable relationship while in ORR care. The commenters believed that an unaccompanied child and a potential sponsor cannot develop a bond over 14–30 days that would be sufficient to be awarded custody and noted that ORR has not included bonding thresholds into any stage of the release process.

Response: ORR thanks the commenters for their concern. ORR first notes that § 410.1201(a)(6) is consistent with the FSA at paragraph 14. Further, ORR notes that it did not require a specific minimum timeframe to determine if there is a relationship between the child and prospective sponsor seeking custody because a decision on such a threshold alone is likely to be arbitrary. ORR notes that there are additional substantive factors to consider to ensure that a healthy and viable relationship exists between the unaccompanied child and potential sponsor. ORR notes that every prospective sponsor is subject to a sponsor suitability assessment under § 410.1203(d). Furthermore, at § 410.1202(d), ORR stated that ORR shall assess the nature and extent of the potential sponsor's previous and current relationship with the unaccompanied child, and the unaccompanied child's family, if applicable. Lack of a pre-existing relationship with the child does not categorically disqualify a potential sponsor, but lack of such a relationship may be a factor in ORR's overall suitability assessment. ORR emphasizes that the criteria for ensuring a healthy and viable relationship with a non-relative prospective sponsor only apply when a parent, guardian, or relative is unable or unwilling to sponsor within 30 days of the child being in ORR care. ORR believes that it is important to consider placements with non-relatives who are assessed as suitable sponsors to avoid the child's placement in institutional care for longer than necessary.

Comment: Several commenters expressed concern with the interpretation of ''standard program'' as proposed under § 410.1201(a)(5). Several commenters noted that the language in proposed § 410.1201(a) mirrors that of paragraph 14 of the FSA, except that paragraph (a)(5) refers to ''a standard program willing to accept legal custody'' as opposed to ''a licensed program willing to accept legal custody.'' These commenters expressed concern that the proposed rule's elimination of the FSA's ''licensed program'' requirement in the release context would allow an unaccompanied child to be released from ORR custody for long-term placement in a facility that is not licensed or monitored by any State. Commenters further stated that it is not clear what ''a standard program willing to accept legal custody'' means in the release context because the proposed rule defines ''standard program'' within the framework of ORR care providers.

Response: ORR thanks the commenters for their input. ORR notes that it is updating the language at § 410.1201(a)(5) of this final rule to replace ''standard program,'' as used in the NPRM, with ''licensed program,'' consistent with the FSA.

Comment: Many commenters expressed support for § 410.1201(b). Many commenters stated that disclosing a sponsor's immigration status to immigration authorities or other law enforcement agencies, including DHS, could have a chilling effect on an eligible individual who wants to sponsor a child and may lead to a prolonged stay in ORR custody because qualified sponsors would be discouraged from coming forward to care for the child. One of these commenters further stated that this proposal would encourage more suitable individuals, including relatives, with cultural competency to sponsor a child without fear of adverse immigration action.

Response: ORR thanks the commenters for their feedback.

Comment: Many commenters, while strongly supporting proposed § 410.1201(b), made recommendations that they believed would strengthen the provision. First, these commenters urged ORR to clarify that it will not share any sponsor information with law enforcement or immigration enforcement entities except as needed to complete background checks or by judicial order. In addition, the commenters recommended that ORR make clear that both the unaccompanied child's and sponsor's personal information and ORR case files (including counseling and case management notes and records) will be maintained separately from the child or sponsor's immigration files (''A-files'') and will be provided to law enforcement or immigration enforcement only at the request of the individual (child or sponsor) or by judicial order. The commenters explained that without this protection, children and their sponsors' engagement with ORR in the unification process could easily be used to undermine sponsor placements that would otherwise be safe and stable. The commenters further noted that such protections would be consistent with ORR's clear mandate as a child welfare entity rather than as an arm or extension of law or immigration enforcement entities. One commenter stated that while they support ORR's decision to not ask about immigration status of a potential sponsor, it was concerned about ORR's ability to effectively implement this protection. Specifically, the commenter stated that ORR's ability to verify a sponsor's employment essentially serves as an immigration status verification, which it believed poses a risk for undocumented sponsors if their employers are contacted by ORR. The commenter was concerned that this provision will prevent potential sponsors from coming forward to take custody of an unaccompanied child. One commenter recommended that ORR include a specific and clear exception to share information with law enforcement

in the case a sponsor is a trafficker or could otherwise harm the child.

Response: ORR appreciates the commenters' recommendations. ORR notes that it proposed in the NPRM that it shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes (88 FR 68928). ORR further stated in this paragraph that it will not share any immigration status information relating to potential sponsors with 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 detained). ORR prioritizes the prevention of human trafficking and the best interests of children but does not believe it is necessary to establish a specific exception in this section to allow disclosures to law enforcement if there is evidence of human trafficking because ORR already has policies in place to refer such cases to the proper Federal agency. Current ORR policies require the ORR NCC to report, as appropriate, matters of concern to ORR, local law enforcement, and/or local child protective services, and refers potential victims of human trafficking or smuggling to OTIP, and that a child be referred to a child advocate for support if a historical disclosure is made related to labor or sex trafficking. ORR further notes that the purpose of verification of the identity and income of the individuals offering support is to ensure the care and safety of the child and not to confirm immigration status. As a matter of practice, ORR notes that it does not routinely contact employers unless that information is provided as a source of verification of income on a sponsor application. ORR also notes that records in the case file are only related to services provided and case management of the child and not the child or sponsor's immigration status and are required to be protected from unauthorized disclosure. ORR does not maintain ''A-files'' on either unaccompanied children or potential sponsors, as that is a function performed by other Federal agencies, which are responsible for immigration enforcement.

Comment: One commenter expressed support for proposed § 410.1201(b), noting that it would prohibit use of sponsors' information in ways that are contrary to children's best interests and enable ORR to remain focused on the well-being and safety of unaccompanied children and its child protection mission, rather than diverting this critical attention to immigration enforcement purposes that are the purview of DHS. This commenter further urged ORR to add provisions codifying restrictions on the sharing of information or notes from mental health counseling provided to children in ORR custody, noting that past sharing of ORR information with ICE or EOIR has undermined children's rights, including the right to due process, as information collection intended to help identify children's protection needs and to aid them in healing from trauma were misused against children in removal proceedings.

Response: ORR thanks the commenter for their support and appreciates the commenter's recommendations. Safeguarding and maintaining the confidentiality of unaccompanied children's case file records is critical to carrying out ORR's responsibilities under the HSA and the TVPRA. ORR notes that confidentiality of the child's records including mental health treatment are protected from disclosure at care provider facilities, and PRS providers may not release unaccompanied children's case file records or information contained in the case files for purposes other than program administration without prior approval from ORR. As stated at finalized § 410.1303(h)(2), however, limited disclosures of mental health treatment are authorized for program administration purposes, such as to expeditiously provide emergency services and routine treatment, without waiting for approval from ORR.

Comment: Many commenters opposed proposed § 410.1201(b). Many commenters believed this information should be used to make sponsor assessments and should be shared with other agencies to protect unaccompanied children. One commenter expressed concern that the proposed provision could result in placing a child with a person currently under a deportation order, or not communicating to law enforcement that a potential sponsor had been ordered removed due to criminal convictions or illegally re-entry. Another commenter opposed proposed § 410.1201(b), stating that immigration status should be an important part of vetting sponsors to ensure safety of unaccompanied children and compliance with immigration proceedings. One commenter stated that the proposed rule should facilitate, not restrict, information sharing between Federal Government agencies and State and local law enforcement and that the proposed restrictions at § 410.1201(b) are overbroad.

Response: ORR thanks the commenters for their concern, and emphasizes that assessment of suitability of a sponsor includes a thorough background check to assess whether the sponsor has a criminal history, or any other factors that call into question the suitability of the sponsor. ORR also notes that at § 410.1210(i)(4)(i), this final rule also requires PRS providers concerned about an unaccompanied child's safety and well-being to document and report a Notification of Concern (NOC) to ORR and, as applicable, to other investigative agencies (*e.g.,* law enforcement or child protective services). However, ORR notes that it is not an immigration enforcement agency, and does not have statutory authorization to investigate the immigration status of potential sponsors. The HSA and the TVPRA do not make any mention of a sponsor's potential immigration status as a prerequisite to receive an unaccompanied child into their custody and do not imbue ORR with the authority to inquire into immigration status as a condition for sponsorship. As a result, to the extent ORR does collect information on the immigration status of a potential sponsor, it would be only for the purpose 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 detained). ORR does not share immigration status information relating to potential sponsors with any law enforcement or immigration entity at any time. In reference to the comment concerning misrepresentation of an individual's age, in cases where ORR reasonably suspects that an individual in its custody is not a minor and subsequently determines that such individual has reached the age of 18, ORR follows all required procedures including referral for a transfer evaluation with DHS/ICE. If the individual is determined to be an adult based on the age determination, the individual is transferred to the custody of DHS/ICE.

Comment: One commenter recommended that ORR amend its proposal to prioritize uniting unaccompanied children with their families in their home countries. This commenter stated that ORR should work with DHS to ensure that all unaccompanied children are united safely in their home countries, stating that repatriating and uniting unaccompanied children in their home

countries, rather than in the United States, is the most humane policy that maintains the integrity of the immigration system, consistent with Federal immigration law. The commenter further stated that this policy would eliminate any incentive to send minors alone or with smugglers to cross the border and mitigate the humanitarian crisis that has strained the immigration system's limited resources. Furthermore, the commenter stated that amending this proposal to prioritize the repatriation of unaccompanied children furthers congressional intent in enacting the TVPRA as set forth at 8 U.S.C. 1232(a)(5).

Response: ORR acknowledges the commenter's concern, and notes that unaccompanied children generally remain in ORR custody until they are released to a parent or other sponsor in the United States, are repatriated to their home country by DHS, obtain legal status, or otherwise no longer meet the statutory definition of unaccompanied child (*e.g.,* turn 18). ORR notes that it is not an immigration enforcement agency and is not authorized to make decisions regarding repatriating individuals in their country of origin; such decisions are in the purview of DHS and DOJ. In cases where appropriate, ORR may unite children with a parent abroad. ORR believes, consistent with its statutory responsibilities, that placement with a vetted and approved family member or other vetted and approved sponsor is generally in the best interest of the child. Subject to vetting and approval, if a parent or legal guardian is already in the United States, ORR does not believe delaying placement with a sponsor for the sake of uniting children with a parent abroad would necessarily be in the best interest of the child.

Comment: A few commenters commented on the verification of familial relationships under proposed § 410.1201. A few commenters recommended that ORR explain how it will verify familial relationships without DNA testing. Another commenter recommended that ORR amend proposed § 410.1201 to make any adult who claims a familial relationship with an unaccompanied child but fails a DNA test or provides false identity documentation, barred from sponsoring an unaccompanied child.

Response: ORR thanks the commenters for their recommendations. ORR recognizes the utility of DNA testing in the context of law enforcement activities undertaken by other agencies. ORR notes that the TVPRA requires ORR's sponsor suitability determination to include, ''at a minimum,'' 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.[136] However, the use of DNA testing raises multiple issues and is outside the scope of this rule. ORR does not agree that it should implement a regulation barring any sponsor who claims a familial relationship with a child that cannot be proven through analysis of DNA since ORR accepts other evidence of a familial or pre-existing relationship, including a child's birth certificate and sponsor identity documentation. While DNA testing may establish a biological relationship, not all familial relationships are biological. While a parent or other adult relatives are given priority when evaluating release to a sponsor, ORR also releases children to willing and able adults designated by the child's parent or guardian and vetted and approved by ORR when there is no parent or other adult relative willing or able to care for the minor's well-being in order to protect the best interests of the child. In reference to false identity documentation, § 410.1202 provides that to ensure the best interest of the child, ORR may require a positive result in a suitability assessment of an individual or program prior to releasing an unaccompanied child to that individual or entity, which includes discretion to deny sponsorship if identity cannot be verified. Under current ORR policy, in the case of a potential sponsor who is neither a parent or legal guardian, nor a close relative, and lacks a bona fide relationship to the child, if a sponsor, household member, or adult caregiver provides any false information in the sponsor application and/or accompanying documents or submits fraudulent documents for the purposes of obtaining sponsorship of the child, ORR will report the incident to HHS Office of the Inspector General (OIG).

Final Rule Action: After consideration of public comments, ORR is finalizing the language of § 410.1201 as proposed in the NPRM.

Section 410.1202 Sponsor Suitability

Before releasing an unaccompanied child to a sponsor, ORR has a responsibility to ensure that the sponsor is capable of providing for the child's physical and mental well-being and has not engaged in activity that would indicate a potential risk to the child.[137] Further, under the FSA, ORR may require a positive result in a suitability assessment of an individual or program prior to releasing an unaccompanied child to that individual or entity, which may include an investigation of the living conditions in which the unaccompanied child would be placed, the standard of care the child would receive, verification of the identity and employment of the individuals offering support, interviews of members of the household, and a home visit. The FSA also provides that any such assessment should also take into consideration the wishes and concerns of the minor. In the NPRM, ORR stated that it believes this assessment of suitability may also include review of the potential sponsor's or adult household member's past criminal history, if any, and fingerprint background checks, as discussed subsequently in this section (88 FR 68928).

Consistent with statutory authorities, the FSA, and existing policy, ORR proposed in the NPRM at § 410.1202(a) to require potential sponsors to complete an application package to be considered as a sponsor for an unaccompanied child (88 FR 68928). ORR stated that an application package will be made available in the potential sponsor's native or preferred language from either the care provider facility or from ORR directly.

Also consistent with existing policy, ORR proposed in the NPRM at § 410.1202(b) to establish that suitability assessments will be conducted for all potential sponsors prior to release of a child to such a potential sponsor and described the minimum requirements for a suitability assessment (88 FR 68928). Consistent with ORR's responsibilities under 8 U.S.C. 1232(c)(3)(A), and with its current policies, ORR stated that suitability assessments would, at minimum, consist of review of the potential sponsor's application package described in § 410.1202(a), including verification of the potential sponsor's identity and the potential sponsor's relationship to the child. ORR further stated that it may consult with the issuing agency (*e.g.,* consulate or embassy) of the sponsor's identity documentation to verify the validity of the sponsor identity document presented and may also conduct a background check on the potential sponsor.

ORR proposed in the NPRM at § 410.1202(c) through (i) additional requirements or discretionary provisions related to completion of a suitability assessment (88 FR 68928 through 68929). These proposed requirements were in addition to those described in the TVPRA at 8 U.S.C. 1232(c)(3)(A) (describing ''minimum'' requirements for suitability assessments), and ORR proposed such

requirements in the NPRM consistent with its authority to implement policies regarding the care and placement of unaccompanied children as described at 6 U.S.C. 279(b)(1)(E). ORR proposed in the NPRM under § 410.1202(c) to utilize discretion to evaluate the overall living conditions into which the unaccompanied child would be placed upon release to the potential sponsor. Proposed paragraph (c) therefore provided that ORR may interview members of the potential sponsor's household, conduct a home visit or home study pursuant to § 410.1204, and conduct background and criminal records checks, which may include biometric checks such as fingerprint-based criminal record checks on a potential sponsor and on adult household members, consistent with the TVPRA requirement to make an independent finding that the potential sponsor has not engaged in any activity that would indicate a potential risk to the child. ORR proposed in the NPRM at § 410.1202(c) to permit ORR to verify the employment, income, or other information provided by the individuals offering support. The TVPRA at 8 U.S.C. 1232(c)(3) does not require a verification of the sponsor's employment. However, ORR proposed in the NPRM including this as a permissible consideration as part of the suitability assessment to ensure sponsors can show they have resources to provide for the child's physical and mental well-being upon release. ORR stated in the NPRM that although it believes this information may be relevant, it would not automatically deny an otherwise qualified sponsor solely on the basis of low income or employment status (either formal or informal). Finally, ORR proposed in the NPRM under § 410.1202(c) to require that any suitability assessment also take into consideration the wishes and concerns of the unaccompanied child, consistent with FSA paragraph 17.

As part of a suitability assessment and the determination whether a potential sponsor is capable of providing for an unaccompanied child's physical and mental well-being, ORR proposed in the NPRM including additional assessment components to evaluate the environment into which the unaccompanied child may be placed. ORR proposed in the NPRM under § 410.1202(d) to assess the nature and extent of the sponsor's previous and current relationship with the unaccompanied child and, if applicable, the child's family. ORR proposed in the NPRM that it would be able to deny release of an unaccompanied child to unrelated sponsors who have no pre-existing relationship with the child or the child's family prior to the child's entry into ORR custody. ORR stated that it intended that this language be read consistently with proposed § 410.1201(a)(4), such that ORR may release an unaccompanied child to an individual with no pre-existing relationship with the child if the individual is designated by the child's parent or legal guardian, but ORR would not be required to do so. Additionally, ORR proposed in the NPRM under § 410.1202(e) to consider the sponsor's motivation for sponsorship; the opportunity for the potential sponsor and unaccompanied child to build a healthy relationship while the child is in ORR care; the unaccompanied child's preferences and perspective regarding release to the sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the sponsor, as applicable.

ORR proposed in the NPRM at § 410.1202(f) considering risks and concerns specific to the individual child that should be evaluated in conjunction with the child's current functioning and strengths (88 FR 68929). ORR proposed in the NPRM that these shall include risks or concerns such as: (1) whether the unaccompanied child is a victim of sex or labor trafficking or other crime, or is considered to be at risk for such trafficking due to, for example, observed or expressed current needs (*e.g.,* expressed need to work or earn money because of indebtedness or financial hardship); (2) the child's history of involvement with the criminal justice system or juvenile justice system (including evaluation of the nature of the involvement, such as whether the child was adjudicated and represented by counsel, and the type of offense), or gang involvement; (3) the child's history of behavioral issues; (4) the child's history of violence; (5) any individualized needs, including those related to disabilities or other medical or behavioral/mental health issues; (6) the child's history of substance use; and/or (7) the child is either a parent or is pregnant.

ORR proposed in the NPRM at § 410.1202(g) a non-exhaustive list of factors that it would consider when evaluating a potential sponsor's ability to ensure the physical or mental well-being of a child (88 FR 68929). ORR proposed in the NPRM considering the potential sponsor's strengths and resources in conjunction with any risks or concerns including: (1) the potential sponsor's criminal background; (2) the potential sponsor's current illegal drug use or history of abuse or neglect; (3) the physical environment of the home; and/or (4) other child welfare concerns. ORR noted that the term ''other child welfare concerns'' is intentionally broad to allow for discretion and notes that the term may include the well-being of any other unaccompanied children currently or previously under the potential sponsor's care. Pursuant to section 504 and HHS's implementing regulations at 45 CFR part 85, ORR noted that it shall not discriminate against a qualified individual with a disability when evaluating their capability to serve as a sponsor. In addition, ORR noted that it does not consider these listed risks or concerns as necessarily disqualifying to potential sponsorship. However, in keeping with its responsibility to ensure the safety and well-being of the child, ORR must assess the extent to which any of these risks or concerns could be detrimental to, or seriously impede a potential sponsor's capability to, provide for the unaccompanied child's physical and emotional well-being. ORR must give thorough consideration to the sponsor's specific situation and whether reasonable adaptations could be made to a release plan to ensure the unaccompanied child's safety and well-being as required by proposed § 410.1202(i).

ORR proposed in the NPRM at § 410.1202(h) to assess the potential sponsor's understanding of the unaccompanied child's needs, plan to provide the child with adequate care, supervision, and housing, understanding and awareness of responsibilities related to compliance with the unaccompanied child's immigration court proceedings, school attendance, and U.S. child labor laws, as well as awareness of and ability to access community resources (88 FR 68929).

Finally, ORR proposed in the NPRM at § 410.1202(i) to develop a release plan that could enable a safe release to the potential sponsor through the provision of post-release services, if needed (88 FR 68929).

Comment: Several commenters supported the proposed changes to the sponsor suitability assessment, stating the additional vetting process ensures specific standards and services are met, considers the unaccompanied child's wishes and concerns in the sponsor suitability assessment, and ensures the child's safety. One commenter noted that these changes recognize the right of the child's effective participation in this process and comply with international standards.

Response: ORR thanks the commenters for their comments.

Comment: One commenter supported the increased focus on the vulnerability of unaccompanied children to child labor exploitation, specifically the proposal requiring an unaccompanied child's potential sponsor to demonstrate understanding and awareness of the sponsor's responsibilities related to compliance with the child's immigration court proceedings, school attendance, and U.S. child labor laws. The commenter stated these proposals will ensure unaccompanied children and their sponsors are informed of their rights with respect to safe and appropriate work for children.

Response: ORR thanks the commenter for their feedback.

Comment: A few commenters expressed concern that the potential sponsor suitability assessment criteria are vague, unclear, may not directly relate to the safety of the unaccompanied child, and may be overly burdensome and prohibitive to potential sponsors. One of these commenters recommended ORR evaluate the list of sponsor suitability assessment criteria and remove all those not directly related to the safety of the unaccompanied child. Another commenter recommended ORR provide clear and predictable criteria to assess sponsor suitability applications to lead to clear and predictable decisions.

Response: ORR believes that all the factors considered are directly related to ORR's statutory responsibility under the TVPRA to make the requisite determination whether a potential sponsor is capable of providing for the unaccompanied child's physical and mental well-being.[138] The potential sponsor is subjected to an evaluation of their criminal background, substance use or history of abuse or neglect; the physical environment of the home; and/or other child welfare concerns. ORR added other child welfare concerns to account for policy changes or individualized needs that this rule may not anticipate. ORR studied best practices in child welfare in other contexts and adapted them to ORR's unique context involving the care of unaccompanied children, specifically with respect to evaluating the unaccompanied child's current functioning and strengths in conjunction with any risks or concerns such as sex or labor trafficking, and any individualized needs, including those related to disabilities or other medical or behavioral/mental health issues. ORR will continue to study and monitor the effectiveness of these suitability assessment criteria as they are implemented and may engage in future policymaking to continue to improve them, as appropriate.

Comment: Several commenters had recommendations for verifying the sponsor's suitability, including identification documents, additional scrutiny of the sponsor's application, and other requirements. A few commenters recommended verifying the sponsor's identification with the issuing Government. A few commenters also recommended other State, local, or Federal agencies verify the sponsors' identity. One commenter recommended that State and local law enforcement should have a role in verifying sponsors, stating this would increase accountability. Another commenter also recommended that DHS conduct sponsor vetting. One commenter recommended a single entity conduct the verification process for the validity of sponsor identity documents and verify identity documents with the issuing Government when there is doubt. Another commenter recommended routinely validating the sponsor's identity documentation with the issuing agency, consulate, or embassy, regardless of whether there is doubt. One commenter recommended requiring the sponsor to present at least two identity documents. One commenter recommended a requirement that a potential sponsor who is not a biological parent or court-ordered legal guardian submit themselves and the unaccompanied child to a family court for a formal legal determination.

Response: ORR proposed in the NPRM at § 410.1202(d) that it would conduct a suitability assessment to verify at a minimum the sponsor's identity among other elements in the potential sponsor's application package. ORR notes that even though it does not specify required types or the quantity of identification documents that must be submitted, in the NPRM ORR proposed that, as appropriate in individual cases, it may consult with the issuing agency (*e.g.,* consulate or embassy) of the sponsor's identity documentation to verify the validity of the sponsor identity document presented and may also conduct a more extensive background check on the potential sponsor (88 FR 68928). However, ORR believes that requiring all of these approaches in every case would be unnecessary and would likely result in unnecessary delays in placement of the child with a suitable sponsor, particularly when ORR is often able to verify identity without consulting with other agencies. ORR notes that as the Federal custodian it—as opposed to local family courts—is the agency statutorily responsible under the TVPRA for making suitability determinations of potential sponsors seeking the release of unaccompanied children to them.[139]

Comment: One commenter recommended that potential sponsors provide evidence they are respected and responsible citizens, and if they have previously sponsored children, how many they have sponsored, records of sponsorship, the location of the children, and the children's current health and well-being.

Response: ORR notes that the TVPRA only requires that potential sponsors be determined to be capable of providing for the physical and mental well-being of the unaccompanied children that they sponsor. ORR emphasizes that, consistent with the TVPRA, the suitability assessment required at § 410.1202 will include consideration of the following: the potential sponsor's strengths and resources in conjunction with any risks or concerns that could affect their ability to function as a sponsor including: (1) criminal background; (2) substance use or history of abuse or neglect; (3) the physical environment of the home; and/or (4) other child welfare concerns, which may include the well-being of other children currently or previously under the potential sponsor's care. ORR further notes that, as required under § 410.1204 and consistent with existing policy, ORR will conduct a home study before releasing any child to a potential non-relative sponsor who is seeking to sponsor multiple children or who has previously sponsored children.

Comment: Several commenters emphasized the importance of thoroughly vetting sponsors to ensure the safety and well-being of unaccompanied children. However, some of these commenters did not support the potential sponsor suitability assessment process at § 410.1202 because commenters believed the verification process is inadequate to protect children from sponsors who may abuse, exploit, or victimize them. Additionally, commenters expressed concern that the sponsors may submit false or invalid documentation, that ORR may be unable to verify the relationship between the unaccompanied children and the sponsors, and that ORR may be unable to detect sponsor fraud. One commenter did not support the sponsor suitability proposals because they think the measures provide too much discretion in evaluating suitability, require a minimal review of the potential sponsor's application, and place too much trust in the potential sponsor's

statements in the application without independent verification.

Response: ORR notes that verification of documentation submitted in the sponsor application may include an investigation of the living conditions and standards of care in which the unaccompanied child would be placed, verification of the identity and employment of the individuals offering support, interviews of members of the household, and a home visit. ORR also notes that § 410.1202(c), consistent with the FSA, provides that a sponsor suitability assessment should take into consideration the wishes and concerns of the minor. ORR notes that all assessments of suitability include review of past criminal history, if any, and a background check, which may include fingerprinting of the sponsor and household members.

Comment: Several commenters expressed concern that the proposed background checks are insufficient to vet sponsors and recommended stricter background checks, including an FBI fingerprint check, for all potential sponsors. One commenter recommended background checks of abductions or alerts as part of the sponsor's suitability assessment, while another commenter recommended local law enforcement conduct investigations of sponsors. In addition to recommending more stringent background checks, one commenter recommended that if a potential sponsor refuses to submit to a security and background check, ORR should bar the potential sponsor from receiving custody of the unaccompanied child.

Response: ORR thanks the commenters for their recommendations. ORR emphasizes that it utilizes critical background check requirements for potential sponsors in all cases. What varies however, is which combination of background check requirements apply to individual sponsors or a sponsor household given specific factors, including the closeness of the relationship between the sponsor and the child. For example, measures such as public records checks and sex offender registry checks (through the U.S. Department of Justice National Sex Offender registry) are conducted for all sponsors. Other measures like the FBI background check are conducted for some sponsors, which per current ORR policy includes proposed sponsors who are unrelated, more distant relatives, or immediate relatives (*e.g.,* aunt, uncle, first cousin) who were not previously the child's primary caregiver.

Comment: One commenter expressed concern that ORR is releasing children to sponsors prior to a response from ACF's OTIP.

Response: In placing a child with a sponsor, ORR stated in the NPRM that at minimum, a sponsor suitability review shall consist of verification of the potential sponsor's identity, physical environment of the sponsor's home, relationship to the unaccompanied child, if any, and an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the unaccompanied child (88 FR 68985). Independent findings include information such as Government reports, background check results from other entities (like the FBI), third-party reviews of the case by a social worker not employed by the care provider, and information from state databases such as sex offender registry lists. ORR notes that it requires that OTIP be notified if during their initial intake, the unaccompanied child's responses to questions during any examination or assessment indicate the possibility that the unaccompanied child may have been a victim of human trafficking or labor exploitation. ORR also notes that its case managers are trained to identify common human trafficking indicators through their sponsor assessments, identity verification processes, and interviews, and ORR works closely with OTIP whenever there are any potential signs of trafficking in a case. If ORR has no further concerns about a release to a sponsor upon investigation of issues that come up during assessment, placement with a sponsor may move forward; however, a home study may be warranted, pursuant to the requirements and procedures at § 410.1204 below.

Comment: A number of commenters expressed concern that ORR releases unaccompanied children to unemployed sponsors, stating this is an indicator for trafficking. Some commenters expressed concern that ORR does not require potential sponsors to have a means to support unaccompanied children. Other commenters, however, recommended ORR clarify in the final rule that the risks and concerns listed in § 410.1202 do not necessarily disqualify a potential sponsor. Another commenter recommended ORR clarify that a potential sponsor's financial situation does not disqualify the potential sponsor unless it is so severe as to raise concerns about the sponsor's ability to meet the unaccompanied child's basic needs.

Response: ORR notes that while the TVPRA at 8 U.S.C. 1232(c)(3) does not require verification of the sponsor's employment, the FSA does include employment as one possible factor in sponsor suitability. ORR proposed in the NPRM at § 410.1202 to include this as a permissible consideration as part of the suitability assessment to ensure sponsors can show they have adequate resources to provide for the child's physical and mental well-being (88 FR 68928 through 68929). However, ORR will not deny an otherwise qualified sponsor solely on the basis of low income or employment status.

Comment: A few commenters expressed concern about ORR releasing unaccompanied children to non-relative sponsors due to safety and well-being concerns about the children. One of these commenters recommended ORR revise § 410.1202 to bar potential non-relative sponsors who already have custody of an unaccompanied child from receiving custody of other non-relative unaccompanied children to decrease the risk that ORR releases these unaccompanied children to sponsors who may traffic, abuse, or exploit them. Another commenter recommended additional assessment of non-relative sponsors who are responsible for several unaccompanied children and involving other agencies when further investigation is needed, especially in cases of suspected smuggling or trafficking.

Response: ORR believes that the policies codified in this section provide important protections which decrease the risk of release to sponsors who would traffic, abuse, or exploit children. Specifically, under § 410.1202(d), ORR will assess the nature and extent of the potential sponsor's previous and current relationship with the unaccompanied child, and the unaccompanied child's family, if applicable, and may deny release to unrelated individuals who have applied to be a sponsor but who have no preexisting relationship with the child or the child's family prior to the child's entry into ORR custody Furthermore, ORR will consider the potential sponsor's motivation for sponsorship; the unaccompanied child's preferences and perspective regarding release to the potential sponsor; and the preferences of the unaccompanied child's parent or legal guardian and perspective on release to ORR. While ORR does not believe it would be able to serve the best interests of children in their custody by broadly excluding non-relative sponsors who already have custody of another unaccompanied child, under ORR policy such sponsorships are subject to a mandatory home study. ORR notes that under § 410.1205(a), a sponsorship would be denied if, as part of the sponsor assessment process described at

proposed § 410.1202 or the release process described at § 410.1203, ORR determines that the potential sponsor is not capable of providing for the physical and mental well-being of the unaccompanied child or that the placement would result in danger to the unaccompanied child or the community.

Comment: One commenter expressed concern that the proposed rule did not contain any protocols or information sharing requirements when ORR determines that an adult has fraudulently claimed to be a parent or relative of an unaccompanied child. Another commenter suggested that fraudulent representations made by a potential sponsor regarding their relationship to the unaccompanied child should be a crime and that such representations should be reported to ICE and applicable State law enforcement agency.

Response: Under current ORR policy, in the case of a potential sponsor who is neither a parent or legal guardian, nor a close relative, and who lacks a bona fide pre-existing relationship with the unaccompanied child, or if a sponsor, household member, or adult caregiver provides any false information in the sponsor application and/or accompanying documents or submits fraudulent documents for the purposes of obtaining sponsorship of the child, ORR will report the incident to the HHS Office of the Inspector General (OIG). ORR also notes that notification of fraud is further addressed in current ORR policy, which provides that ORR may deny release if it is determined that fraudulent documents were submitted during the sponsor application process.

Comment: One commenter recommended that if an unaccompanied child refuses a DNA test, the child should remain in ORR's custody.

Response: ORR refers readers to the response above in § 410.1201 on using DNA to identify relationships between unaccompanied children and potential sponsors and reiterates that ORR releases children to willing and able adults designated by the child's parent or guardian who may not have a biological relationship with the child, and thus such relationships are not DNA-confirmable. ORR vets and approves such non-biological relative sponsors when there is no parent or other adult relative capable of providing for the child's physical and mental well-being. Furthermore, ORR believes that it is important that any disclosure of unaccompanied children's information is compatible with program goals and protects the safety and privacy of unaccompanied children.

Comment: Several commenters expressed a belief and concern that case managers are not allowed to ask potential sponsors how many children they have sponsored, stating this question is necessary to ensure there is no child trafficking. A few commenters also expressed the belief that case managers are prohibited from fully investigating sponsors and are instead compelled to expedite unifications without conducting comprehensive safety assessments of the placement. A few commenters expressed concern that they believe case managers may risk termination if they call law enforcement to investigate sponsors and suspicious activities. One commenter recommended that case managers who report such concerns should not be subject to disciplinary action, including termination.

Response: ORR notes that current policy not only permits case managers to evaluate if a potential sponsor has served as a sponsor before, but actually requires such an evaluation. Section 410.1202 sets out parameters that specifically require certain issues be evaluated, considered, or assessed, and ORR policy requires an evaluation of information relating to prior sponsorship as a vital part of the case manager's role in the sponsor assessment process. ORR's decision not to include detailed standards about all of the areas of potential inquiry by case managers in this regulation is not indicative of an inability or unwillingness to collect such vital information. ORR also notes that it provides for ongoing case management services and disagrees that case managers are compelled to expedite release to a sponsor. ORR further notes that its sponsor suitability assessment process has no effect on existing whistleblower protections, which remain in place and continue to be a key mechanism for ensuring the safety and well-being of all children in ORR care. Moreover, case managers are required to report safety concerns to local law enforcement and other appropriate investigative authorities (*e.g.,* child protection agencies) in the course of reviewing a potential sponsor's application. In addition, independent of case manager communications and findings, current ORR policy requires additional scrutiny of potential sponsors who have previously sponsored children, such as through mandatory home studies.

Comment: Many commenters expressed concern that ORR does not propose to vet all members of each potential sponsor's household. Several commenters recommended that ORR vet and conduct background checks on all other adults that may be present in any potential sponsor's household to ensure the safety of unaccompanied children from unlawful employment and trafficking.

Response: ORR notes that proposed § 410.1202(c) requires background and criminal records checks, which when safety concerns are present, may include a fingerprint-based background check on the potential sponsor and on any adult resident of the potential sponsor's household. Details regarding background check requirements and applicability to specific categories of potential sponsors, adult household members, and adults identified in the sponsor care plan are discussed further in the ORR Policy Guide. ORR also uses home visits and home studies in mandatory and discretionary cases to further evaluate the suitability of a home to receive unaccompanied children. ORR additionally notes that its case managers are specially trained to look for indicators of human trafficking in a household while they complete sponsor vetting. Those requirements are now codified in this final rule. In addition, ORR is further clarifying at § 410.1202(c) to state that the sponsor suitability assessment shall include all needed steps to determine that the potential sponsor is capable of providing for the unaccompanied child's physical and mental well-being.

Comment: One commenter expressed concern about ORR's ability to thoroughly assess potential sponsors' suitability within 10 to 20 days to allow for release of the unaccompanied children within 30 days of placement at a care provider facility.

Response: ORR has found that 10 to 20 days is generally sufficient to thoroughly assess sponsor suitability and notes that additional time may be needed for a home study or other background checks in some cases. ORR is finalizing revisions to § 410.1205(b) to include that it will adjudicate the completed sponsor application of a parent or legal guardian or brother, sister, or grandparent, or other close relative sponsor within 10 calendar days of receipt of that application, absent an unexpected delay (such as a case that requires completion of a home study). ORR will also adjudicate the completed sponsor application for other close relatives who were not previously the child's primary caregiver within 14 calendar days of receipt of that application, absent an unexpected delay (such as a case that requires completion of a home study).

Comment: A few commenters expressed concern that proposed

§ 410.1202(d) denies release to an unrelated individual with whom the unaccompanied child does not have a pre-existing relationship. One of these commenters stated the proposal is inconsistent with the FSA because it would make the release priorities in paragraph 14D and 14F of the FSA optional for ORR and the FSA does not permit ORR to decline consideration of a potential sponsor due to a lack of a pre-existing relationship with the child. Additionally, the commenter stated this proposal is not needed to ensure safe placement and could result in unnecessary delays to release. The commenter also noted that the proposed rule does not include the opportunity for a potential sponsor to build a relationship with the unaccompanied child as described in ORR's current policy. To be consistent with the FSA and ORR policy, the commenter recommended the final rule state the potential sponsor's lack of a pre-existing relationship will not automatically disqualify a potential sponsor from consideration and, if necessary to ensure a safe release, ORR will provide an opportunity for a potential sponsor to establish a relationship with an unaccompanied child while the child is in ORR custody.

Response: Under § 410.1202(d), ORR will assess the nature and extent of the sponsor's previous and current relationship with the unaccompanied child and, if applicable, the child's family. ORR proposed in the NPRM that it would be able to deny release of an unaccompanied child to unrelated sponsors who have no pre-existing relationship with the child or the child's family prior to the child's entry into ORR custody (88 FR 68929). The final rule at § 410.1201(a)(4) recognizes, however, that lack of a pre-existing relationship with the child does not categorically disqualify a potential sponsor, but the lack of such relationship may be a factor in ORR's overall suitability determination. ORR notes, to further clarify its explanation in the preamble to the NPRM, that it intends that this proposed language be read consistently with proposed § 410.1201(a)(4) and (6), which implement FSA paragraphs 14D and F, respectively, such that ORR may release an unaccompanied child to an individual with no pre-existing relationship with the child after a suitability assessment, but ORR would not be required to do so. Additionally, § 410.1202(e) requires ORR to consider the sponsor's motivation for sponsorship; the opportunity for the potential sponsor and unaccompanied child to build a healthy relationship while the child is in ORR care; the unaccompanied child's preferences and perspective regarding release to the sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the sponsor, as applicable (88 FR 68929).

Comment: One commenter recommended the sponsor suitability assessment consider the child's best interests in making any unification decisions, including the harm to the child's well-being of continued Federal custody and the benefits of release to a community placement. The commenter also recommended consideration of the sponsor's ability to provide for the child's welfare. This commenter expressed concern that the proposal at § 410.1202(f)(1) to evaluate the unaccompanied child's risk of labor trafficking, including observed or expressed need to work or earn money, are overly broad risk assessment factors that do not adequately consider cultural norms in the families of unaccompanied children. The commenter recommended ORR identify and adopt a verified assessment tool to determine whether a child is at risk for trafficking in order to avoid prolonged Federal custody for a child while the suitability assessment process ensues.

Response: ORR notes that a child expressing the need to work would not alone be considered a disqualifying factor but may warrant further inquiry during the sponsor suitability assessment. ORR is required to consider the best interest of the child and identify risk for child trafficking when making placements. A child's desire to make money is potentially an indicator that they are more vulnerable to exploitation and are at heightened risk. With respect to assessment tools, ORR notes that it utilizes several standardized screening tools for sex and labor trafficking available to federal agencies.

Comment: A few commenters expressed concern that, without more context and explanation of what it means to evaluate the unaccompanied child's individualized needs related to any disability as part of ORR's assessment of a potential sponsor, care provider facilities could discriminate against children with disabilities by adding obstacles not faced by children without disabilities. The commenters recommended the final rule state that consideration of a child's disability or disabilities must explicitly consider the potential benefit to the child of release to a community placement with a sponsor and the potential harm to the child of continued ORR custody. Further, the commenters recommended the final rule clearly state that a child's disability is not a reason to delay or deny release to a sponsor unless the sponsor is determined to be incapable of providing for the child's physical and mental well-being despite documented efforts by ORR to educate the sponsor about the child's needs and to assist the sponsor in accessing and coordinating post-release services and supports. Lastly, the commenters recommended the final rule require that when the sponsor needs support or training to meet the child's disability-related needs, such support and training should be provided as a reasonable modification for the child and to enable the child to live in the most integrated setting appropriate to their needs.

Response: ORR notes that it has a statutory duty under the TVPRA to assess the suitability of a potential sponsor before releasing a child to that person,[140] and such an assessment must necessarily include an assessment of the potential sponsor's ability to meet the child's disability-related needs (which may also require the provision of PRS). ORR agrees that under this subpart, a potential sponsor's capability to provide for the physical and mental well-being of the child must necessarily include explicit consideration of the impact of the child's disability or disabilities, and whether PRS are needed to meet the child's disability-related needs. Correspondingly, ORR must consider the potential benefits to the child of release to a community-based setting. Thus, under § 419.1202(f)(5), ORR is finalizing that it will assess any individualized needs of the unaccompanied child, including those related to disabilities or other medical or behavioral/mental health issues, and under § 410.1202(h)(1) will assess the sponsor's understanding of the child's needs as a part of determining the sponsor's suitability. ORR notes that § 410.1311(e)(2) as proposed in the NPRM states that ORR will affirmatively assist sponsors in accessing PRS to support the disability-related needs of a child upon release (88 FR 68952). ORR believes that a child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the child that cannot be mitigated through the provision of services and reasonable modifications, and ORR has documented its efforts to educate the sponsor about the child's disability-related needs and coordinated PRS. Additionally, unaccompanied children with disabilities should have an equal opportunity for prompt release, and for

that reason ORR proposed under § 410.1311(c)(3) that release will not be delayed solely because PRS is not in place. ORR also agrees that consideration must be given to the explicit benefits of community-based settings and is therefore modifying § 410.1311(e)(1) to state that ORR must consider the potential benefits to the child of release to a community-based setting.

Final Rule Action: After consideration of public comments, ORR is finalizing its proposal as proposed, with amendments to § 410.1202(c), clarifying that ORR's suitability assessment of potential sponsors ''shall include taking all needed steps to determine that the potential sponsor is capable of providing for the unaccompanied child's physical and mental well-being;'' and § 410.1202(d), clarifying that lack of a pre-existing relationship with the child does not categorically disqualify a potential sponsor, but the lack of such relationship will be a factor in ORR's overall suitability assessment. ORR will use its discretion to review the totality of the evidence.

Section 410.1203 Release Approval Process

ORR proposed in the NPRM under § 410.1203 a process for approving an unaccompanied child's release (88 FR 68929 through 68930). ORR proposed in the NPRM at § 410.1203(a) to codify the FSA requirement that ORR make and record timely and continuous efforts towards safe and timely release of unaccompanied children. These efforts include intakes and admissions assessments and the provision of ongoing case management services to identify potential sponsors.

ORR proposed in the NPRM at § 410.1203(b), that if a potential sponsor is identified, ORR would provide an explanation to both the unaccompanied child and the potential sponsor of the requirements and procedures for release.

ORR proposed in the NPRM at § 410.1203(c) the information that a potential sponsor must provide to ORR in the required sponsor application package for release of the unaccompanied child. ORR proposed in the NPRM that information requirements include supporting information and documentation regarding: the sponsor's identity; the sponsor's relationship to the child; background information on the potential sponsor and the potential sponsor's household members; the sponsor's ability to provide care for the child; and the sponsor's commitment to fulfill the sponsor's obligations in the Sponsor Care Agreement. ORR noted that the Sponsor Care Agreement, which ORR proposed in the NPRM shall be made available in a potential sponsor's native or preferred language pursuant to § 410.1306(f), requires a potential sponsor to commit to (1) provide for the unaccompanied child's physical and mental well-being; (2) ensure the unaccompanied child's compliance with DHS and immigration courts' requirements; (3) adhere to existing Federal and applicable State child labor and truancy laws; (4) notify DHS, EOIR at the Department of Justice, and other relevant parties of changes of address; (5) provide notice of initiation of any dependency proceedings or any risk to the unaccompanied child as described in the Sponsor Care Agreement; and (6) in the case of sponsors other than parents or legal guardians, notify ORR of a child moving to another location with another individual or change of address. ORR also proposed that in the event of an emergency (for example, a serious illness or destruction of the sponsor's home), a sponsor may transfer temporary physical custody of the unaccompanied child, but the sponsor must notify ORR as soon as possible and no later than 72 hours after the transfer. ORR noted that this departs from the 2019 Final Rule and the FSA to the extent that ORR did not propose to require the sponsor to seek ORR's permission to transfer custody of the unaccompanied child. ORR further noted that this departure reflects that ORR does not retain legal custody of an unaccompanied child after the child is released to a sponsor. However, ORR retains an interest in knowing this information for the provision of post-release services, tracking concerns related to potential trafficking, and for potential future sponsor assessments should the child's sponsor step forward to sponsor a different child.[141]

ORR proposed in the NPRM at § 410.1203(d), to conduct a sponsor suitability assessment consistent with the requirements of § 410.1202.

ORR proposed in the NPRM at § 410.1203(e), consistent with existing policies, to not release an unaccompanied child to any person or agency it has reason to believe may harm or neglect the unaccompanied child, or that it has reason to believe will fail to present the unaccompanied child before DHS or the immigration courts when requested to do so. For example, ORR stated that it would deny release to a potential sponsor if the potential sponsor is not willing or able to provide for the unaccompanied child's physical or mental well-being; the physical environment of the home presents risks to the unaccompanied child's safety and well-being; or the release of the unaccompanied child to that potential sponsor would present a risk to the child or others.

Furthermore, ORR proposed in the NPRM at § 410.1203(f), that ORR shall educate the potential sponsor about the needs of the unaccompanied child as part of the release process and would also work with the sponsor to develop an appropriate plan to care for the unaccompanied child if the child is released to the sponsor. ORR stated that such plans would cover a broad range of topics including providing the unaccompanied child with adequate care, supervision, access to community resources, housing, and education. Regarding education, ORR understands that under the laws of every State, children up to a certain age must attend school and have a right to attend public school. Public schools may not refuse to enroll children, including unaccompanied children, because of their (or their parents or sponsors') immigration status or race, color, or national origin.[142] ORR also understands that school districts may not insist on documentation requirements that effectively prevent enrollment of an unaccompanied child.[143]

For purposes of this final rule, ORR notes that it typically begins to identify and assess potential sponsors for unaccompanied children as soon as they are physically transferred to ORR custody. But consistent with current policies,[144] in some exceptional circumstances (*e.g.,* when ORR takes part in interagency humanitarian missions and other similar special operations), when notified by another federal agency with custody of the child that that the child will likely be determined to be unaccompanied, ORR may begin vetting potential sponsors for a child before the child is physically transferred to ORR custody. In these cases, ORR would not wait for the child to be placed in an ORR care provider facility to begin the release process. Nevertheless, the release process for these unaccompanied children would continue to be governed by the TVPRA and HSA.

Comment: A few commenters expressed concerns and made recommendations regarding the release approval timeframe. A few commenters expressed concern that the proposed rule does not specify how long an unaccompanied child can stay in ORR custody before being released to a sponsor or another appropriate placement. The commenters stated that this creates uncertainty and

inconsistency in the release process, which could potentially prolong the detention of some children who could be safely released sooner, and that the rule should establish a clear and reasonable timeframe for the release of unaccompanied children from ORR custody. One commenter specified that the timeframe should consider children's best interests, safety, and well-being, and should also provide for exceptions and extensions to the timeframe in certain circumstances, such as when there are delays in identifying or verifying a sponsor, when there are pending legal proceedings, or when there are individualized needs or circumstances of the child. This commenter suggested adding a new paragraph to § 410.1203 that would specify requirements regarding the timeframe for release approval.

Response: Under proposed § 410.1203(a), which ORR is finalizing in this final rule, ORR or the care provider facility providing care for the unaccompanied child must make and record the prompt and continuous efforts on its part toward family unification and release of the child. ORR notes that transfer of physical custody of the child must occur as soon as possible once an unaccompanied child is approved for release. ORR acknowledges that the final rule does not specify how long an unaccompanied child can stay in ORR custody before being released to a sponsor or another appropriate placement. However, ORR makes every effort to quickly and safely release unaccompanied children to a sponsor determined by ORR to be suitable pursuant to the procedures in subpart C. Rather than specifying a particular timeframe for release, ORR believes that flexibility is necessary to consider the individual circumstances of each case, including delays in identifying or verifying a sponsor, pending legal proceedings, or individualized needs or circumstances of the child, including any individualized needs of a child with a disability, to ensure that children are placed with suitable sponsors who are capable of providing for their physical and mental well-being. ORR notes that on average, most releases occur much earlier than 90 days from ORR gaining custody with an average time of a 27-day length of stay in ORR's custody prior to release in fiscal year 2023.[145] ORR notes that, in the interest of the timely and efficient placement of unaccompanied children with sponsors, § 410.1207, as revised in this final rule, requires ORR supervisory staff who supervise field staff to conduct automatic review of all pending sponsor applications. The first automatic review shall occur within 90 days of an unaccompanied child entering ORR custody to identify and resolve the reasons that a sponsor application remains pending in a timely manner, as well as to determine possible steps to accelerate the children's safe release.

Comment: Many commenters recommended that the final rule include a provision specifically requiring that ORR and care provider facilities engage in release planning for youth who will age out of ORR custody at age 18 beginning on their 17th birthday, or if they enter custody after that time, as soon as they enter custody. The commenters stated that prompt and timely age-out planning is important because children in ORR custody who age out face the possibility of being transferred to adult detention in an ICE facility, and abrupt transitions out of a child welfare setting without sufficient planning and support can further traumatize children and leave them vulnerable to homelessness, exploitation, and trafficking.

Response: ORR agrees that prompt and timely age out planning is important. ORR's existing requirements in subregulatory guidance include after care planning to prepare unaccompanied children for post-ORR custody. Under current ORR policies, care provider facilities create long term plans to address the individualized needs of each unaccompanied child following release from ORR, and whenever possible, this involves releasing an unaccompanied child to the care of a family member. However, in some situations, release to a family member is not an option for the child. In those instances, the care provider facility must explore other planning options for the future. These include planning for teenagers turning 18 years of age, and ''aging out'' of ORR custody. ORR, however, has not designated a specific timeframe within which such planning must start as it believes that flexibility is necessary based on the individualized needs and circumstances of each child. ORR will consider commenters' recommendations and may further address them in future policymaking.

Comment: A few commenters stated that the final rule should further clarify that a child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the child that cannot be mitigated through the provision of services and reasonable modification. The commenters emphasized that this assistance must be directly tied to the sponsor evaluation process to make clear that sponsors should not be denied prior to such support being offered.

Response: ORR agrees that a child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the child that cannot be mitigated through the provision of services and reasonable modifications. Thus, under § 419.1202(f)(5), ORR is finalizing that it will evaluate any individualized needs of the unaccompanied child, including those related to disabilities or other medical or behavioral/mental health issues, and under § 410.1202(h)(1) will assess the sponsor's understanding of the child's needs as a part of determining the sponsor's suitability. ORR notes that § 410.1311(e)(2) as proposed in the NPRM states that ORR will affirmatively assist sponsors in accessing PRS to support the disability-related needs of a child upon release. ORR agrees that unaccompanied children with disabilities should have an equal opportunity to be promptly released, and for that reason proposed under § 410.1311(c)(3) that release will not be delayed solely because PRS is not in place.

Comment: Many commenters did not support the proposal in the NPRM at § 410.1203(c) that the sponsor application must include background information on the potential sponsor's household members because ORR has stated previously this is not mandatory. In addition, the commenters did not support the proposal that the sponsor application must include information regarding the sponsor's identity, because commenters believe that ORR does not impose requirements for a standard form of identity or accept expired documents.

Response: ORR is required under the TVPRA to verify the sponsor's identity and the sponsor application is a means for ORR to collect standard forms of identification that can be verified by the issuing agency. With respect to information about an individual's household members, ORR is required to establish the number and identity of individuals in the household in order to perform background checks and to evaluate the environment into which the unaccompanied child may be placed. With respect standardization of documentation of identity, ORR notes Government-issued identification is consistent with international standards and since it may come in various forms from a multitude of countries, ORR does not believe it is practical to require standardization of identity documents if

they serve to identify the individual in their country of origin.

Comment: A few commenters expressed concern that there is insufficient oversight of sponsors after an unaccompanied child is released and that the proposed rule does not require ORR to terminate custody agreements when sponsors fail to adhere to them. Specifically, commenters stated that ORR should be required to terminate custody agreements where it is determined that the child's safety or well-being is at risk (*e.g.,* in cases where the sponsor has abused or trafficked a child) or the potential sponsor has committed fraud to acquire custody.

Response: ORR notes that although its custody terminates when a child is released to a sponsor, ORR may assist children after release by providing post-release services (PRS) as mandated or authorized by the TVPRA for children who can benefit from ongoing assistance from social service providers in their community. At § 410.1210(b)(1) as proposed in the NPRM and finalized, ORR will require that PRS providers work with sponsors to address challenges in parenting and caring for unaccompanied children. This may include guidance about maintaining a safe home; supervision of unaccompanied children; protecting unaccompanied children from threats by smugglers, traffickers, and gangs; and information about child abuse, neglect, separation, grief and loss, and how these issues affect unaccompanied children. ORR notes that custody determinations involving released children fall within the jurisdiction and applicable law of the state in which the released child resides.

Comment: Many commenters strongly supported the proposed regulation at § 410.1203(c)(3) requiring potential sponsors to adhere to existing Federal and State child labor laws as part of the Sponsor Care Agreement, stating that this was a much-needed step toward ensuring that unaccompanied children and their sponsors are informed of their rights with respect to safe and appropriate work for children.

Response: ORR thanks the commenters for their support.

Comment: A few commenters expressed concern regarding proposed § 410.1203(c)(5) which requires sponsors to provide notice of initiation of any dependency proceedings. One commenter believed that ORR has no authority to mandate ongoing updates by sponsors, particularly given that ORR has acknowledged in the preamble that once a child is released from care, they are no longer in ORR custody and ORR has not placed a time limit after which sponsors would no longer be required to make such notifications. This commenter recommended that ORR strike paragraph (c)(5) from § 410.1203, or at a minimum require notifications only within a specified, reasonable time limit, such as 30 days, or only require them of children receiving PRS mandated by the TVPRA. Another commenter stated that the proposed notification requirement would be burdensome to sponsors because custody or dependency proceedings are often started to seek the judicial determinations required for Special Immigrant Juvenile (SIJ) classification. The commenter further noted that while ORR states that it has an interest in this information for PRS, to address any trafficking concerns, or for potential future sponsor assessments regarding the same sponsor, to accomplish this goal, it should be sufficient for the sponsor to notify ORR if a case has been opened regarding the unaccompanied child with the State's child welfare agency due to allegations of abuse, abandonment, or neglect.

Response: ORR believes that, although it does not retain custody of a child post-release, it has authority under the TVPRA to ask that sponsors provide notice on an ongoing basis of the initiation of any dependency proceedings involving the child in order to provide PRS if needed, to address any trafficking concerns, or for potential future sponsor assessments regarding the same sponsor. ORR does not believe there is enough of a distinction between the burden of notifying ORR if a case has been opened with the State's child welfare agency and the initiation of proceedings in family court to require one but not the other. With respect to requiring notifications only with a specified, reasonable limit, ORR believes that this would result in an undue delay in addressing any potential concerns if such a case moves forward within whatever timeframe ORR were to specify before ORR has knowledge of it.

Comment: Many commenters expressed concern regarding the requirements at proposed § 410.1203(c)(6) for a sponsor to notify ORR post-release that a child is moving to another location with another individual or of a change of address. Many commenters opposed proposed § 410.1203(c)(6) because the proposed notification requirements do not go far enough to protect unaccompanied children. Some of these commenters expressed concern that, in their view, ORR assumes no role or responsibility in preventing a child's sponsor from transferring responsibility for the child's care after placement. Another commenter expressed concern specifically regarding the proposed 72-hour notification requirement at § 410.1203(c)(6) when a sponsor transfers physical custody of the unaccompanied child in the event of an emergency. The commenter stated that by providing the sponsor three days to notify ORR of the transfer, ORR may lose the child's location and lose the ability to prevent the re-trafficking of the child and noted that there may be little recourse against the sponsor. In contrast, a few commenters expressed concern that the notification requirements at proposed § 410.1203(c)(6) go too far. One commenter sought clarification regarding the purpose, scope, and penalty for non-compliance with the requirement at § 410.1203(c)(6), expressing concern that the proposed notification requirements amount to unwarranted Government intrusion where there is no evidence of a safety concern to justify continued oversight or monitoring. The commenter further stated that this proposed policy is inconsistent with ORR's past statements that its obligation to the unaccompanied child ends with the release of that child to a sponsor. Another commenter opposed proposed § 410.1203(c)(6), stating that ORR has no authority to mandate ongoing updates by sponsors, particularly given that ORR has acknowledged in the preamble that once a child is released from its care, they are no longer in ORR legal custody and that ORR has not placed a time limit after which sponsors would no longer be required to make such notifications. The commenter further stated that the proposed change of address notifications are duplicative, given that children and their sponsors have an independent responsibility to notify EOIR and the DHS of any change of address under proposed § 410.1203(c)(4). Thus, the commenter recommended that ORR strike paragraph (c)(6) from § 410.1203, or at a minimum require notifications only within a specified, reasonable time limit, such as 30 days, or only require them of children receiving PRS mandated by the TVPRA.

Response: ORR disagrees that it has no authority to specify, as a condition of release, that a sponsor agree to a 72-hour notification requirement when transferring custody of a child. Furthermore, ORR believes 72 hours is a reasonable time in which to inform ORR of a transfer of custody and that it is sufficient for maintaining an ability to contact the child to initiate or continue to provide PRS. ORR notes that while

certain cases mandate PRS, all released children are still eligible to receive PRS. ORR does not consider this notification part of monitoring as it does not propose to impose penalties or take specific action related to the transfer of custody. ORR acknowledges that it cannot require sponsors to seek permission to transfer custody of a child from the sponsor to someone else because ORR no longer has custody over children after they are discharged from its care. However, ORR needs to maintain and update records of the child's location in order to be able to provide PRS on a mandatory or discretionary basis while the child remains eligible for such services during the pendency of their removal proceedings.

Comment: Many commenters recommended that the proposed rule include a provision codifying ORR's ability to keep families together by expediting the release of unaccompanied children to relatives with whom they are traveling who qualify as close relative sponsors. Specifically, the commenters stated that instead of separating families and causing additional trauma, ORR staff could meet with children and relatives at the border and begin the process of qualifying the adult family member as a close relative sponsor, including verifying family relationships and ensuring that adult relatives do not pose a risk of trafficking or other immediate danger to the child. The commenters recommended that if the adult relative is approved as a close relative sponsor, CBP would release the adult and ORR would release the child into the custody of the family member (with the child designated as unaccompanied, which the commenter stated provides critical protections to children during their immigration case).

Response: ORR notes that it is not an immigration enforcement agency, and its statutory authority is limited to the care and placement of unaccompanied children transferred by other Federal departments or agencies to ORR custody. ORR, therefore, cannot evaluate sponsors or relatives the child has traveled with upon the child's entry to the United States at the border before the child has been identified as an unaccompanied child within the definition of this rule. ORR agrees that if a parent or adult relative is in the United States and able, willing and qualified to sponsor a child, they are first in the order of priority for those eligible to be sponsors. ORR also notes that its policy is not to separate family members that arrive at the border together; DHS refers children to ORR within the parameters of the TVPRA but the vetting process for sponsorship is not immediate. Further, ORR notes that it has a pilot project with DHS under which it attempts to quickly reunify unaccompanied children with accompanying relatives, consistent with both agencies' authorities. However, it is outside the scope of ORR's statutory authority to codify in this final rule practices that pertain to DHS operations.

Comment: One commenter noted that the proposed rule does not specify what the best interests of the child are when there are conflicting claims from different sponsors, which could lead to putting the child back into a potentially dangerous situation.

Response: ORR notes that when there are multiple potential sponsors, ORR observes the following order of priority: parent, legal guardian, adult relative, or another adult designated by the parent or legal guardian as capable and willing to care for the minor's well-being, as is consistent with the FSA paragraph 14. ORR notes that at § 410.1001 contains a non-exhaustive list of factors that ORR considers when evaluating what is in a child's best interests. Included on this list are the unaccompanied child's expressed interests, in accordance with the unaccompanied child's age and maturity; the unaccompanied child's mental and physical health; the wishes of the unaccompanied child's parents or legal guardians; the intimacy of relationship(s) between the unaccompanied child and the child's family, including the interactions and interrelationship of the unaccompanied child with the child's parents, siblings, and any other person who may significantly affect the unaccompanied child's well-being. ORR would therefore balance these and additional factors stated at § 410.1001 and in this section when considering sponsor suitability, including when there are multiple potential sponsors. ORR further notes that pursuant to § 410.1203(e), ORR shall not be required to release an unaccompanied child to any person or agency it has reason to believe may harm or neglect the unaccompanied child or fail to facilitate the unaccompanied child's appearance before DHS or the immigration courts when required to do so.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1204 Home Studies

The TVPRA requires a home study be performed for the release of an unaccompanied child in certain circumstances.[146] Therefore, ORR proposed in the NPRM both required and discretionary home studies depending upon specific circumstances, including when the safety and well-being of the child is in question (88 FR 68930 through 68931).

ORR proposed in the NPRM at § 410.1204(a), that, as part of its sponsor suitability assessment, it may require a home study which includes an investigation of the living conditions in which the unaccompanied child would be placed, the standard of care the child would receive, and interviews with the potential sponsor and others in the sponsor's households. If ORR requires a home study, it shall take place prior to the child's physical release.

ORR proposed in the NPRM at § 410.1204(b), three circumstances in which a home study shall be required. First, ORR proposed that a home study be required under the conditions identified in the TVPRA at 8 U.S.C. 1232(c)(3)(B) which include, '' . . . 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.''

Second, ORR proposed that a home study be required 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. Third, ORR proposed that a home study be required before releasing any child who is 12 years old or younger to a non-relative sponsor. ORR believes that these latter two categories are consistent with the statutory requirement that HHS determine that a potential sponsor ''is capable of providing for the child's physical and mental well-being,'' [147] and to ''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.'' [148]

ORR proposed in the NPRM at § 410.1204(c), to have the discretion to initiate home studies if it determines that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child.

ORR proposed in the NPRM at § 410.1204(d), that the care provider would inform a potential sponsor whenever it plans to conduct a home study, explain the scope and purpose of the study to the potential sponsor, and answer questions the potential sponsor has about the process. ORR also proposed that it would provide the home study report to the potential sponsor if the request for release is denied, as well as any subsequent addendums, if created.

Finally, ORR proposed in the NPRM at § 410.1204(e) that an unaccompanied child for whom a home study is conducted shall receive post-release services as described at § 410.1210. This requirement would be consistent with 8 U.S.C. 1232(c)(3)(B), which states that ''The Secretary of Health and Human Services shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.''

Comment: A number of commenters strongly supported proposed § 410.1204(b), which requires home studies under conditions specified in the TVPRA at 8 U.S.C. 1232(c)(3)(B) and codifies existing ORR policy to conduct home studies for children in additional vulnerable situations as specified at § 410.1204(b)(2) and (3), stating that such provisions would provide additional safeguards and care for unaccompanied children. One commenter specifically commended the requirement at § 410.1204(b)(2) to conduct a home study prior to releasing a child to a non-relative sponsor who intends to sponsor multiple children, or has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children, and for tender age children, noting that this not only ensures a suitable environment for multiple children but also promotes sponsor compliance with the child welfare standards of ORR and State jurisdictions and helps to prevent trafficking and other exploitative situations.

Response: ORR thanks the commenters for their support.

Comment: A number of commenters expressed concern regarding various aspects of proposed § 410.1204(b), recommending that home studies be mandated in additional situations. A number of commenters recommended that ORR be required to conduct home studies for all potential sponsor placements, not just those set forth in proposed § 410.1204(b), with one commenter recommending an automated process for home studies. A number of commenters recommended that home studies should be required for all potential placements with sponsors who are not parents, legal guardians, or close relatives. Several commenters stated that a home study should be required whenever a child is being released to a non-parent or non-family member. One commenter stated that although some discretion regarding waiver of home studies may be appropriate where the potential sponsor is a close relative of the child, any stranger or potential sponsor not previously approved for placement should always be subject to a home study to reduce the risk of an abusive sponsorship and the re-exploitation of the child. One commenter stated that a home study should be required before releasing any child who is 12 years old or younger regardless of the relationship to the sponsor.

Response: At § 410.1204(b), ORR is finalizing circumstances that would mandate home studies that are authorized under the TVPRA (*i.e.,* § 410.1204(b)(1)) or that ORR believes are consistent with the statutory requirement that HHS determine that a potential sponsor ''is capable of providing for the child's physical and mental well-being,'' [149] and to ''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.'' [150]

Additionally, ORR is finalizing at § 410.1204(c) a provision providing ORR with the discretion to initiate home studies if it determines that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child. ORR believes that this requirement provides ORR the flexibility to determine whether there are additional circumstances that warrant a home study to ensure the unaccompanied child's safety and well-being post-release, which may encompass some of the circumstances commenters described. Finally, as ORR implements the regulations, it will take into consideration the commenters' recommendations and determine whether additional policymaking is needed. Therefore, ORR declines to finalize additional circumstances beyond what it proposed in the NPRM.

Comment: A number of commenters noted that § 410.1204(b)(1)(i) in the NPRM does not clearly define ''severe'' human trafficking and recommended that this qualifier be removed since, in their view, all forms of human trafficking are inherently severe. The commenter further noted that if the intention is to align with the TVPRA, they believed the existing proposed provisions adequately cover these requirements, making the specification of ''severe'' redundant.

Response: ORR clarifies in the final rule that it intends for the meaning of ''severe form of trafficking'' to have the same meaning as defined at 22 U.S.C. 7102(11) (''severe form of trafficking'' means ''(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.'').

Comment: Some commenters expressed concern that children will be released to persons who will exploit them since ORR has no mechanism to determine if a child has been sexually abused other than question-answer testimony.

Response: ORR disagrees that it has no mechanisms in place to determine if a child has been a victim of sexual abuse and harassment and may be exploited by a potential sponsor(s). ORR has long screened all unaccompanied children for potential sexual abuse and harassment concerns, including during intake, assessments, sponsor assessments, and Significant Incident Reports. Under § 410.1204(b)(1)(ii), if the unaccompanied child has been a victim of sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, ORR requires a home study to assess the suitability of the sponsor. Additionally, as part of the sponsor suitability assessment under § 410.1202(c), and further described in ORR polices, ORR vets potential sponsors by conducting background checks of all potential sponsors and adult household members to determine if they have engaged in any activity that would indicate a potential risk to the child's safety and well-being, and these background checks include searches of State child abuse and neglect registries. Further, while ORR does not retain legal custody post-release, ORR notes that for a child receiving PRS, the PRS provider

assesses the child's risk factors, including sexual abuse and/or harassment, and educates the child and sponsor on these risks, and will submit a NOC to ORR and report to the appropriate State and local authorities if the PRS provider becomes aware of any sexual abuse. Based on the above, ORR has mechanisms in place to evaluate whether the unaccompanied child may have been a victim of sexual abuse and/or harassment or is at risk of being a victim, and to evaluate whether a sponsor may pose a risk to the child's safety and well-being.

Comment: A number of commenters recommended that ORR limit the circumstances in which home studies would be mandated. A number of commenters recommended that home studies required by the TVPRA due to trafficking concerns be limited to cases where there has been a formal designation by OTIP, expressing concern that care provider facilities and ORR staff have an overly broad perspective of trafficking, which may lead to home studies that derail sponsorships for reasons not related to the safety of the child. In addition, these commenters stated that the rule should not require home studies in circumstances beyond those identified in the TVPRA, stating that home studies should be recommended but not mandatory in circumstances where a child may be released 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; or where the child is 12 years old or younger and being released to a nonrelative sponsor. These commenters expressed concern that ORR defines ''non-relative'' very broadly, including for example, godparents or close family friends, to the detriment of the child's well-being, and recommended that the proposed rule leave space for ORR to make common sense decisions based on the individual circumstances of the child in situations where home studies are not mandatory under the TVPRA. Furthermore, a number of commenters recommended limiting the use of home studies to the most serious circumstances, stating that while home studies can be valuable in certain limited circumstances, they should be used relatively rarely because they are intrusive and risk causing unnecessary delays in release and unification which may exacerbate a child's trauma. These commenters recommended that the proposed regulations include an explicit requirement that decision-making around home studies take into consideration the effect that prolonged custody and separation from family will have on the well-being of the child, noting that it is often the traumatizing effects of detention and detention fatigue that cause the mental or behavioral health issues that trigger the home study.

Response: ORR notes that it has been its policy since 2015 to require a home study 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, or before releasing any child who is 12 years old or younger to a non-relative sponsor. ORR proposed in the NPRM to codify these factors at § 410.1204(b)(2) and (3) because it believes they are consistent with HHS's authority under the TVPRA and HSA.[151] Based on ORR's experience under current policy, the circumstances under § 410.1204(b)(2) and (3) are important circumstances where there may be potential risk to the unaccompanied child if released to these types of potential sponsors, and ORR requires additional information to determine that the sponsor is able to care for the health, safety, and well-being of the child. Accordingly, ORR declines in this final rule to limit the situations mandating a home study to only those required under the TVPRA.

Comment: A number of commenters generally expressed concern with the limited circumstances in which home studies are mandated under proposed § 410.1204(b) and ORR's proposed discretionary approach under proposed § 410.1204(c), suggesting that under the proposed rule there may be potential gaps in ensuring the welfare of unaccompanied children. A number of commenters further noted that ORR is not an investigative agency, recommending that responsibility for home studies be assigned to an agency equipped for this purpose.

Response: As stated above, at § 410.1204(b), ORR is finalizing circumstances that would mandate home studies that are authorized under the TVPRA (*i.e.,* § 410.1204(b)(1)) or that it has determined are consistent with HHS's authority under the TVPRA and HSA.[152] Similarly, ORR is exercising this authority under § 410.1204(c) to specify that ORR would have the discretion to initiate home studies if it determines that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child. ORR believes that this requirement provides ORR the flexibility to determine whether a home study is warranted if additional information could be gathered to ensure the unaccompanied child's safety and well-being post-release. ORR will take into consideration the commenters' recommendations and determine whether future policymaking is needed.

Lastly, ORR acknowledges the commenters' recommendation that ORR is not an investigative agency and another agency should perform the home studies. However, ORR disagrees with this recommendation since it is ORR's statutory duty under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to perform home studies in certain circumstances. ORR also notes that it engages with qualified home study providers to conduct home studies.[153]

Comment: A number of commenters expressed concern that proposed § 410.1204(c) uses language on discretionary home studies that is overly expansive and recommended that ORR adopt more limiting language. Specifically, the commenters noted that the language, ''is likely to provide additional information which could assist in determining'' sponsor suitability, is too broad. The commenters stated that home studies should only be used in the most serious circumstances due to their intrusive nature and the risk of causing unnecessary delays to release and unification.

Response: ORR declines to finalize more limiting language. As stated above, it is ORR's statutory duty under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to perform home studies in certain circumstances to protect the health and welfare of unaccompanied children. ORR's policy is that even in circumstances where a home study is not required, a home study may be conducted if it is likely to provide additional information to determine that the sponsor is able to care for the health, safety and well-being of the child. Based on ORR's experience, ORR believes that it is necessary for it to have the flexibility to determine whether a home study is likely to provide additional information, which could assist in assessing the sponsor's suitability and sponsor suitability assessments vary by each assessment.

Additionally, ORR declines to limit § 410.1204(c) to the ''most serious circumstances'' as recommended by commenters. ORR believes this language is too limiting and may result in some potential sponsors not receiving a home study when they should have.

Comment: A number of commenters expressed concern with ORR's proposal

at § 410.1204(d) to inform the potential sponsor whenever it plans to conduct a home study and explain the scope and purpose of the study. Specifically, the commenters expressed concern that this notification may negatively impact the validity of some home studies by allowing sponsors time to prepare.

Response: ORR declines to update its long-standing policy under which it informs the sponsor when it plans to conduct a home study. ORR believes it is important to inform the sponsor that a home study will be conducted so that it can be timely scheduled and completed expeditiously. Additionally, it is important that the sponsor is informed about the home study's scope and purpose because the sponsor may not have previously participated in a home study nor understand what it entails.

Comment: A number of commenters expressed concern about sharing home study reports with sponsors who were denied because such reports may contain confidential information related to the child's history, noting that sharing such information with a denied sponsor without the child's consent is in violation of ORR's own policies. Commenters expressed concern that children often are referred for home studies due to past abuse, neglect, or trauma, and that, depending on their age, they may not consent to having their information shared with the potential sponsor in the home study report. These commenters recommended that the child's wishes always be considered when it comes to sharing confidential information with sponsors, particularly with nonparent sponsors; and in the case of a parent or relative, these commenters recommended ORR provide a summary with general reasoning as to why the release request was denied to assist parents/family in understanding what has occurred while also protecting the child's information. Other commenters stated that sponsors should receive an explanation as to why they were denied, but that ORR should protect the child's right to confidentiality, and in cases where it is determined that the sponsor's intentions may be malicious, the report should not be shared at all.

Response: ORR is revising § 410.1204(d) to remove that the home study report, as well as any subsequent addendums if created, will routinely be provided to the potential sponsor if the release request is denied, although in some cases it may need to be disclosed in whole or in part, subject to legally required redactions or child welfare considerations, as a part of the evidentiary record.

Comment: A number of commenters recommended limiting the scope of home studies and setting time limits for completing them. These commenters recommended that ORR adopt policies that tailor the scope of the home study to the reason that it is required, providing, as an example, that if a home study is required based on a child's disability, the home study should be limited in scope to uncover only information relevant to what services, supports, referrals, or information that ORR and PRS providers can give to the sponsor to meet the child's disability-related needs (noting that ORR should not require FBI fingerprint background checks of other adults in the home in home studies related to disability). These commenters also recommended placing time limits on the home study process to mitigate the tendency of home studies to prolong the unification process and the child's time in custody, recommending that, at a minimum, ORR should codify the time limits in the current version of the ORR Policy Guide, which require the home study report to be completed within 10 days. The commenters further recommended that the regulations include an explicit provision stating that a delay in completing a home study will not delay the release of a child to a sponsor. A number of commenters also noted that the proposed rule does not include information regarding ORR's existing time limits related to completing a home study and the 3-day deadline for accepting a case and requested clarification regarding why this provision was omitted.

Response: ORR disagrees with the commenters' recommendation to tailor the home study to the reason requiring a home study. In the commenter's example that an unaccompanied child and potential sponsor who are mandated to receive a home study because the child has a disability, the home study may uncover other risks that impact whether the sponsor is able to care for the health, safety, and well-being of the child. Additionally, ORR declines to limit the background check process for adult household members because this requirement provides important additional information related to the home environment post-release, to help ensure the child's safety and well-being after release.

ORR did not finalize a time limit on the home study and is choosing to leave such requirement as subregulatory guidance which will allow ORR to make more appropriate, timely, and iterative updates to its policies. This allows ORR to keep with best practices and be responsive to the needs of unaccompanied children.

Lastly, the TVPRA requires a home study be performed for the release of an unaccompanied child in certain circumstances. ORR does not believe it is appropriate to release these unaccompanied children before a home study is performed due to the other circumstances described in § 410.1204(b)(2) and (c) because the home study is an important safeguard to ensure the potential sponsor is able to take care of the health, safety, and well-being of the child.

Final Rule Action: After consideration of public comments, ORR is making the following modifications to regulatory language at §§ 410.1204(b) and 410.1204(e). ORR is revising § 410.1204(b) to state that ORR ''shall require'' home studies in order to clarify the mandatory nature of its obligation under this section. Additionally, ORR is revising § 410.1204(b)(1)(ii) to remove ''special needs'' and add at the end of the sentence ''who needs particular services or treatment.'' ORR notes that this revision is consistent with ORR's update to § 410.1001 removing the term ''special needs unaccompanied child.'' ORR is revising § 410.1204(d) to remove the following language from the proposed regulatory text: ''In addition, the home study report, as well as any subsequent addendums if created, will be provided to the potential sponsor if the release request is denied.'' Finally, ORR is revising § 410.1204(e) to state ''An unaccompanied child for whom a home study is conducted shall receive an offer of post-release services as described at § 410.1210.'' This update is consistent with ORR's modified language at § 410.1210(a)(3), which clarifies that PRS are voluntary for the unaccompanied child and sponsor and is revised to state in its discretion, ORR may offer PRS for all released children. ORR is otherwise finalizing this section as proposed.

Section 410.1205 Release Decisions; Denial of Release to a Sponsor

ORR proposed in the NPRM under § 410.1205 to address the situations in which ORR denies the release of an unaccompanied child to a potential sponsor (88 FR 68931). ORR proposed in the NPRM at § 410.1205(a), that a sponsorship would be denied if, as part of the sponsor assessment process described at § 410.1202 or the release process described at § 410.1203, ORR determines that the potential sponsor is not capable of providing for the physical and mental well-being of the unaccompanied child or that the placement would result in danger to the

unaccompanied child or the community.

ORR proposed in the NPRM at § 410.1205(b), that if ORR denies release of an unaccompanied child to a potential sponsor who is a parent or legal guardian, ORR must notify the parent or legal guardian of the denial in writing. ORR stated that such Notification of Denial letter would include (1) an explanation of the reason(s) for the denial; (2) evidence and information supporting ORR's denial decision, including the evidentiary basis for the denial; (3) instructions for requesting an appeal of the denial; (4) notice that the potential sponsor may submit additional evidence, in writing before a hearing occurs, or orally during a hearing; (5) notice that the potential sponsor may present witnesses and cross-examine ORR's witnesses, if such witnesses are willing to voluntarily testify; and (6) notice that the potential sponsor may be represented by counsel in proceedings related to the release denial at no cost to the Federal Government. Relatedly, ORR proposed in the NPRM in § 410.1205(c), that if a potential sponsor who is the unaccompanied child's parent or legal guardian is denied, ORR shall inform the unaccompanied child, the child advocate, and the unaccompanied child's attorney of record or DOJ Accredited Representative (or if the unaccompanied child has no attorney of record or DOJ Accredited Representative, the local legal service provider) of that denial.

ORR proposed in the NPRM at § 410.1205(d) that if the sole reason for denial of release is a concern that the unaccompanied child is a danger to self or the community, ORR must send the unaccompanied child a copy of the Notification of Denial letter, in a language that the child understands, described at § 410.1205(b). ORR also proposed that if the potential sponsor who has been denied is the unaccompanied child's parent or legal guardian and is not already seeking appeal of the decision, the unaccompanied child may appeal the denial.

ORR proposed in the NPRM at § 410.1205(e) to recognize that unaccompanied children may have the assistance of counsel, at no cost to the Federal Government, with respect to release or the denial of release to a potential sponsor.

ORR noted that as part of the *Lucas R.* litigation, it is currently subject to a preliminary injunction that includes certain requirements regarding notification and appeal rights for individuals who have applied to sponsor unaccompanied children, including certain potential sponsors who are not an unaccompanied child's parent or legal guardian. ORR noted that it is complying with the requirements of applicable court orders and has issued subregulatory policy guidance to do so. ORR stated that once the *Lucas R.* litigation is resolved, ORR would evaluate whether further rulemaking is warranted.

Comment: As to providing written notice to potential close relative sponsors, a number of commenters criticized the provisions in proposed § 410.1205 because they did not fully incorporate the terms of the *Lucas R.* preliminary injunction and recommended that the final rule require full written notice to not only parents or legal guardians but also close relative sponsors. In particular, commenters expressed concern that § 410.1205(b) does not afford full written notice of a sponsorship denial to potential close relative sponsors, which is inconsistent with the *Lucas R.* preliminary injunction.

Response: ORR agrees with the commenters that potential close relative sponsors should be afforded full written notice of a denial decision. The court in *Lucas R.* found that these additional procedures ''would reduce the risk that [unaccompanied children] will be erroneously deprived of their interest in (1) familial association with parents and close family members and (2) being free from physical restraint in the form of unnecessarily prolonged detention, when a sponsor is available.'' [154] Accordingly, ORR has revised § 410.1205(c) (redesignated) to require the ORR Director or their designee who is a neutral and detached decision maker to promptly notify a potential sponsor who is a parent or legal guardian or close relative of a denial in writing via a Notification of Denial Letter. ORR notes that consistent with existing policy and the *Lucas R.* preliminary injunction, ORR is finalizing at § 410.1001 the following definition of ''close relative'': ''*Close relative* means a brother, sister, grandparent, aunt, uncle, first cousin, or other immediate biological relative, or immediate relative through legal marriage or adoption, and half-sibling.''

While ORR also agrees that the denial letter to parents, legal guardians, and close relatives should contain the information specified in § 410.1205(c), ORR has also modified § 410.1205(c)(2) (redesignated) to advise the potential sponsor that they have the opportunity to examine the evidence upon request but to recognize that ORR may not provide evidence and information, or part thereof, to the potential sponsor if ORR determines that providing such evidence and information would compromise the safety and well-being of the unaccompanied child or is not permitted by law. ORR has encountered instances where a child requests not to be released to a close relative due to prior sexual abuse (*e.g.,* by the close relative's children). As the court in *Lucas R.* noted, ''[d]enials of sponsorship applications can be based on sensitive grounds . . . that could cause distress to the minor. Release of such information . . . may . . . cause unnecessary pain to all parties involved.'' [155] In those instances, ORR will nevertheless notify the unaccompanied child and the unaccompanied child's attorney of the denial and will provide them with the opportunity to request to inspect the evidence, so the child's ''interests are sufficiently protected.'' [156]

Comment: Commenters also noted that proposed § 410.1205(d) did not provide the notice required by the *Lucas R.* preliminary injunction to an unaccompanied child denied release solely on the basis of danger to self or others, and also fails to provide notice to the unaccompanied child's attorneys.

Response: ORR acknowledges that the *Lucas R.* preliminary injunction also requires that if the sole reason for denial of release is a concern that the unaccompanied child is a danger to self or others, ORR must provide the child and their counsel full written notice of the denial and the right to appeal, regardless of the relationship between the potential sponsor and child. ORR agrees with the commenters and is clarifying at § 410.1205(f) (as redesignated in this final rule) that if a denial is solely due to a concern that the unaccompanied child is a danger to self or others, ORR will provide the child and their counsel, if the child is represented by counsel, a copy of the Notification of Denial Letter, and that the child may seek an appeal of the denial.

Comment: Some commenters stated that ORR should do more than the minimum required by the *Lucas R.* preliminary injunction to extend the notification and appeal procedures to all unaccompanied children. These commenters recommended that ORR provide full written notice of sponsorship denials to all affected potential sponsors and unaccompanied children because all unaccompanied children, regardless of the type of potential sponsor, have a constitutional liberty interest, and a significant liberty interest derived from the TVPRA in family placement and freedom from

institutional restraints. Some commenters stated that, for unaccompanied children seeking release to any sponsor irrespective of the sponsor's relationship with the child, written justification of sponsorship denial is particularly important since the unaccompanied child may have few, if any, other release options. Commenters noted that providing written justifications of sponsorship denials to all sponsors aligns with the principle that ORR, unaccompanied children, and their potential sponsors share a strong interest in preventing erroneous sponsorship denials. These commenters stated that unaccompanied children and potential sponsors should receive formal notice of sponsorship denials and the reasons underlying the decisions, unless there are particularized child welfare reasons to withhold specific information, because unaccompanied children often are uncertain about the status of their sponsorship applications or lack clear understanding of why it is delayed or denied, which can severely impact the unaccompanied child's mental health. Commenters noted that there is minimal burden on ORR to provide written notice of denial to all affected sponsors and unaccompanied children compared to the importance of adequate notice and accurate release decisions.

Response: ORR is committed to ensuring that unaccompanied children are promptly released to sponsors who are capable of providing for their physical and mental well-being, as required by the TVPRA and other authorities. ORR has affirmed at § 410.1205 and § 410.1206 its longstanding commitment to providing potential parent and legal guardian sponsors full written notification of a denial and the right to appeal a denial decision. ORR has also affirmed its commitment at § 410.1205 and § 410.1206 to extending those same rights to close relative sponsors. At this time, ORR is not incorporating into this rulemaking the same requirements for other potential sponsors, such as distant relatives and unrelated adult individuals, which the court in *Lucas R.* did not require, because ORR continues to assess the administrative burden and appropriateness of providing full written notice and appeal rights to potential sponsors who may have an attenuated relationship with the unaccompanied child they are seeking to sponsor. Notably, the court in *Lucas R.* found that unaccompanied children with potential sponsors who are distant relatives or unrelated individuals designated by parents, and children without any identified sponsors, ''require little or no additional procedural protection.'' [157]

Comment: Some commenters stated that § 410.1205(b) does not meet the requirements in the *Lucas R.* preliminary injunction because it only provides a deadline for adjudicating parent and legal guardian sponsorship applications but fails to provide a deadline for adjudicating close relative sponsorship applications, which the commenters stated can result in delays in release that violate due process. Commenters noted that the preliminary injunction requires that completed sponsorship applications for parents or legal guardians, siblings, grandparents, or other close relatives who previously served as the child's primary caregiver be processed within 10 days and that sponsorship applications for other immediate relatives who have not previously served as the child's primary caregiver be processed within 14 days. These commenters recommended ORR adopt in the final rule the sponsorship application adjudication timeframes set forth in the *Lucas R.* preliminary injunction.

Response: ORR agrees with the commenters that providing timeframes for adjudicating completed sponsorship applications ensures timely releases of unaccompanied children to parents, legal guardians, and other close family members. Accordingly, consistent with the *Lucas R.* preliminary injunction, ORR is finalizing revisions to § 410.1205(b) to include that it will adjudicate the completed sponsor application of a potential parent or legal guardian or brother, sister, or grandparent, or other close relative sponsor who has been the child's primary caregiver within 10 calendar days of receipt of that application. ORR will also adjudicate the completed sponsor application for other close relatives who were not previously the child's primary caregiver within 14 calendar days of receipt of that application. If there are unexpected delays such as a case that requires the completion of a home study, background checks, or other required assessments, ORR is not required to complete its adjudication in the timeframes provided. Furthermore, a completed application is one in which a sponsor has submitted the application along with all required supporting documentation.

Comment: Commenters also recommended the final rule require that the ORR Director, or a designee who is a neutral and detached decision maker, automatically review all denials of sponsorship applications submitted by parents or legal guardians and close relative potential sponsors, which they stated is an important safeguard to protect against erroneous release denials, avoid the need for appeal, and prevent any consequential delays in the unaccompanied child's release to a suitable sponsor.

Response: ORR agrees and is adding § 410.1205(d) to require automatic review of those sponsor application denials by the ORR Director or a neutral and detached designee.

Comment: Commenters expressed concern that § 410.1205(c) does not provide unaccompanied children the right to inspect the evidence underlying ORR's release denial decisions as required by the *Lucas R.* preliminary injunction. These commenters recommended ORR update the final rule with this notice provision.

Response: ORR agrees and has included at § 410.1205(e) (redesignated) new language that requires ORR to inform an unaccompanied child, the unaccompanied child's child advocate, and the child's counsel (or if the unaccompanied child has no attorney of record or DOJ Accredited Representative, the local legal service provider) of a denial of release to a potential parent or legal guardian or close relative sponsor and inform them that they have the right to inspect the evidence underlying ORR's decision upon request unless ORR determines that providing the evidence is not permitted by law.

Comment: Many commenters expressed concern that it is infeasible and problematic to expect an unaccompanied child to retain counsel at no cost to the Government.

Response: Under proposed § 410.1205(e), which ORR is finalizing in this rule as § 410.1205(g), ORR must permit an unaccompanied child to have the assistance of counsel, at no expense to the Federal Government, with respect to release or the denial of release to a potential sponsor. This provision was not intended to set forth an expectation that the child retain counsel, but rather to require ORR to permit the child to retain counsel if the child chooses to do so at no expense to the Federal Government. ORR refers readers to the discussion of § 410.1309 for additional information regarding legal services.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1205 with the following modifications. ORR is revising the beginning of § 410.1205(a) to state: ''A potential sponsorship shall be denied . . .'' ORR is finalizing revisions to § 410.1205(b) to require ORR to adjudicate the completed sponsor

application of a parent or legal guardian; brother, sister or grandparent; or other close relative who has been the child's primary caregiver within 10 calendar days of receipt of that application, absent an unexpected delay (such as a case that requires completion of a home study) and to require ORR to adjudicate the completed sponsor application of other close relatives who were not the unaccompanied child's primary caregiver within 14 calendar days of receipt of that application, absent an unexpected delay (such as a case that requires completion of a home study). ORR is adding a new § 410.1205(c), which includes portions of proposed § 410.1205(b), to recognize that if ORR denies release of an unaccompanied child to a potential parent or legal guardian or close relative sponsor, the ORR Director or their designee who is a neutral and detached decision maker shall promptly notify the potential sponsor of the denial in writing via a Notification of Denial Letter. ORR is also finalizing revisions to § 410.1205(c)(2) (redesignated) to recognize that it shall provide the potential parent or legal guardian or close relative sponsor the evidence and information supporting ORR's denial decision and shall advise the potential sponsor that they have the opportunity to examine the evidence upon request, unless ORR determines that providing the evidence and information, or part thereof, to the potential sponsor would compromise the safety and well-being of the unaccompanied child or is not permitted by law. ORR is also revising § 410.1205(c)(3) to clarify that sponsors will receive notice that they may request an appeal of a denial to the Assistant Secretary for Children and Families, or a designee who is a neutral and detached decision maker, as well as instructions for doing so, in order to be consistent with the *Lucas R.* preliminary injunction. ORR is also revising § 410.1205(c)(5) (redesignated) to clarify that both the potential sponsor's and ORR's witnesses must be willing to voluntarily testify. This paragraph now states that the Notification of Denial letter must include notice that the potential sponsor may present witnesses and cross-examine ORR's witnesses, if such sponsor and ORR witnesses are willing to voluntarily testify. Additionally, ORR is adding a new § 410.1205(d) to specify that the ORR Director, or a designee who is a neutral and detached decision maker, shall review denials of completed sponsor applications submitted by parent or legal guardian or close relative potential sponsors. ORR is also clarifying at § 410.1205(e) (as redesignated in the final rule) that it will inform the unaccompanied child, the unaccompanied child's child advocate, and the unaccompanied child's counsel (or if the unaccompanied child has no attorney of record or DOJ Accredited Representative, the local legal service provider) of a denial of release to the unaccompanied child's parent or legal guardian or close relative potential sponsor and inform them that they have the right to inspect the evidence underlying ORR's decision upon request unless ORR determines that disclosure is not permitted by law. Finally, ORR is finalizing revisions to § 410.1205(f) (as redesignated in this final rule) to state that if the sole reason for denial of release is a concern that the unaccompanied child is a danger to self or others, ORR shall provide the child and their counsel (if represented by counsel) full written notice of the denial (regardless of the relationship of the child to the sponsor), and to state that the child has the right to appeal the denial. ORR is also redesignating proposed § 410.1205(e) as § 410.1205(g).

Section 410.1206 Appeals of Release Denials

ORR proposed in the NPRM at § 410.1206 to establish procedures for parents and legal guardians of unaccompanied children to appeal a release denial (88 FR 68931). As discussed above, ORR is responsible for making and implementing placement determinations for unaccompanied children and must do so in a manner that protects the best interest of the unaccompanied children.[158] Further, the TVPRA requires HHS, among other agencies, to establish policies and programs to ensure that unaccompanied 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.[159] ORR also recognized the strong interest of parents and legal guardians in custody of their children. Consistent with its statutory responsibilities and existing policy, ORR proposed in the NPRM to create an administrative appeal process for parents and legal guardians who are denied sponsorship of an unaccompanied child. Subject to the availability of resources, as determined by ORR, ORR stated that it may consider providing language services to parents and legal guardians during the appeals process, if the parent or guardian is unable to obtain such services on their own.

ORR proposed in the NPRM at § 410.1206(a) that parents and legal guardians of unaccompanied children who are denied sponsorship by ORR may seek an appeal of ORR's decision by submitting a written request to the Assistant Secretary of ACF or the Assistant Secretary's neutral and detached designee.

ORR proposed in the NPRM at § 410.1206(b), that parents and legal guardians of unaccompanied children who are denied sponsorship by ORR may seek an appeal either with or without a hearing and pursuant to processes described by ORR in agency guidance. ORR proposed in the NPRM that the Assistant Secretary or their neutral and detached designee will acknowledge the request for appeal within a reasonable time.

Additionally, ORR proposed in the NPRM at § 410.1206(c) to establish a procedure for the unaccompanied child to also appeal a release denial if the sole reason for denial is a concern that the unaccompanied child poses a danger to self or others. In such a case, ORR proposed in the NPRM that the unaccompanied child may seek an appeal of the denial as described in § 410.1206(a), and if the unaccompanied child expresses a desire to appeal, the unaccompanied child may consult with their attorney of record or a legal service provider for assistance with the appeal. ORR also proposed that the unaccompanied child may seek such appeal at any time after denial of release while still in ORR custody.

Comment: A few commenters expressed concern that limiting the potential sponsor's right to appeal a sponsorship denial to parents and legal guardians directly conflicts with the *Lucas R.* preliminary injunction which extended notice and appeal procedures to other immediate relative sponsors, and these commenters recommended the final rule clarify that immediate relative sponsors have a right to appeal a sponsorship denial. Additionally, the commenters stated that ORR has not identified any administrative burden from broadening eligibility to appeal sponsorship denials to close relative sponsors, and the commenters stated that extending the appeals process to unaccompanied children with potential close relative sponsors will not result in substantial additional burden to ORR.

Response: ORR is revising § 410.1206 to provide that parents and legal guardians and close relative potential sponsors to whom ORR's Director or their designee, who is a neutral and detached decision maker, must send Notification of Denial letters pursuant to § 410.1205 may seek an appeal of ORR's

denial decision by submitting a written request to the Assistant Secretary of ACF, or their neutral and attached designee.

Comment: A number of commenters recommended that ORR expand the ability to appeal a release denial to all other potential sponsors including distant relatives and unrelated adult individuals, expressing that essential procedural protections must be available to all unaccompanied children in the unification process, with the assistance of their potential sponsors if desired.

Response: ORR is finalizing this rule to provide potential parent and legal guardian and close relative sponsors the right to appeal a denial decision, which is incorporated at § 410.1206 and is consistent with the *Lucas R.* preliminary injunction. At this time, ORR is not incorporating additional procedures related to other potential sponsors because ORR continues to assess the administrative burden and appropriateness of providing appeals to potential sponsors who may have an attenuated relationship, or no relationship at all, with the unaccompanied child they are seeking to sponsor.[160]

Comment: A few commenters stated that § 410.1205(c) omits three critical procedural protections required under the *Lucas R.* preliminary injunction to ensure a meaningful sponsor appeal process that complies with due process. First, the commenters stated that § 410.1205(c) does not fully incorporate the *Lucas R.* preliminary injunction because it does not contain deadlines for appeal processing and casefile delivery consistent with ORR's legal obligations under the injunction and stated that these timing requirements are meant to avoid prolonged delays in adjudication, which can constitute a deprivation of due process. The commenters noted that § 410.1206(c) requires only that the Assistant Secretary, or their neutral and detached designee, ''acknowledge the request for appeal within a reasonable time'' and does not provide any timeline to complete the appeal process.

Next, these commenters expressed concern that § 410.1205(c) does not fully incorporate the *Lucas R.* preliminary injunction because it does not contain the obligation for ORR to deliver an unaccompanied child's casefile, apart from legally required redactions, to the potential sponsor's or the unaccompanied child's counsel within a reasonable timeframe, and the commenters believed this requirement is critical ''to effectuate'' an unaccompanied child's right to counsel and facilitate their due process rights. The commenters noted that § 410.1309(c)(2) provides for release of a child's casefile to their counsel, but it does not specify a reasonable timeframe for delivery. The commenters recommended that at a minimum, a child's casefile must be provided to counsel a reasonable time before the hearing.

Lastly, the commenters stated that § 410.1205(c) does not fully incorporate the *Lucas R.* preliminary injunction because the proposed rule does not provide for a written decision or any notice at all to the potential sponsor and the child of the outcome of the appeal process.

Response: ORR thanks the commenters for their concerns and recommendations. ORR notes that the commenters' concerns and recommendations related to § 410.1205(c) have been addressed by ORR in § 410.1206, which relates to the appeals process for denials of releases to parents and legal guardians and close relative potential sponsors.

To address the commenters' concerns that the proposed rule did not contain deadlines for appeal processing at § 410.1206(b), ORR is specifying that the Assistant Secretary, or their neutral and detached designee, will acknowledge a request for an appeal within five (5) business days of receipt. Further, to be consistent with the *Lucas R.* preliminary injunction, ORR is specifying at § 410.1206(c) that the unaccompanied child may consult with their attorney of record at no cost to the Federal Government when the child expresses a desire to seek an appeal.

Additionally, under new § 410.1206(d), ORR is codifying that it will deliver the evidentiary record, including any countervailing or otherwise unfavorable evidence, apart from any legally required redactions, to a denied parent or legal guardian or close relative potential sponsor within a reasonable timeframe to be established by ORR, unless ORR determines that providing the evidentiary record, or part(s) thereof, to the potential sponsor would compromise the safety and well-being of the unaccompanied child. Although the *Lucas R.* preliminary injunction states that ORR ''shall deliver a minor's complete case file'' to the parent or legal guardian or close relative potential sponsor, ORR is instead incorporating a requirement that it will automatically provide to the potential sponsor the evidentiary record including any countervailing or otherwise unfavorable evidence, and not the complete case file. ORR is adopting this approach because it has become clear to ORR that automatically providing a child's entire case file—which may include records related to mental health, medical decisions, sensitive family information, sexual abuse, and other sensitive information—to a potential sponsor is not only unnecessary but also presents potential safety and well-being concerns for the unaccompanied child and does not provide additional procedural protections for the unaccompanied child or the potential sponsor. For instance, in many cases a denial is due to a potential sponsor's criminal history. Automatically providing the child's complete case file to those potential sponsors is unnecessary and offers them no additional procedural protections as the only document at issue is the potential sponsor's criminal history report (which would be provided as part of the evidentiary record). Additionally, ORR believes that automatically providing the evidentiary record to denied parent or legal guardian or close relative potential sponsors is consistent with the *Lucas R.* Court's holding that ''[s]o long as a minor and minor's counsel are notified of the denial and have the opportunity to request to inspect the evidence, minor's interests are sufficiently protected.'' For those reasons, ORR will automatically provide the evidentiary record to parent or legal guardian or close relative potential sponsors, but not the child's entire case file, which includes many records that are sensitive and often irrelevant to the hearing and disclosure would be potentially damaging to the child. Notably, ORR has committed to ensuring that the potential sponsor has all information and evidence related to ORR's denial decision including information that may be considered countervailing information and that may support the denied potential sponsor's argument on appeal, as stated at § 410.1206(d).

Consistent with the *Lucas R.* preliminary injunction, in the case of a parent or legal guardian potential sponsor, ORR is codifying at § 410.1206(e) that it will provide the parent or legal guardian potential sponsor with the child's complete case file, but only upon request and within a reasonable timeframe to be established by ORR. In many cases, it is unnecessary for a parent or legal guardian potential sponsor to review the child's entire case file in order to effectively challenge a release denial. Therefore, ORR is codifying that it will only provide the unaccompanied child's complete case file, apart from any legally required redactions, to a parent

or legal guardian potential sponsor if requested, unless providing the complete case file, or part(s) thereof, would compromise the safety and well-being of the unaccompanied child. For the reasons noted above, ORR will not provide upon request a child's complete case file to a potential close relative sponsor since case files contain many records that are sensitive and irrelevant to the hearing and disclosure of the entirety of the case file would be potentially damaging to the child. Also, consistent with the *Lucas R.* preliminary injunction, ORR is codifying that it will provide the unaccompanied child and their counsel the unaccompanied child's complete case file, apart from any legally required redactions, but only upon request. ORR recognizes that delivery of the evidentiary record and complete case file (if requested, and as applicable) must occur to provide sufficient time for review of the materials in advance of the hearing.

Further, at § 410.1206(f), ORR is codifying that the appeal process, including the notice of the decision on appeal sent to the potential sponsor, shall be completed within 30 calendar days of the potential sponsor's request for an appeal, unless an extension of time is granted by the Assistant Secretary or their designee for good cause. Under § 410.1206(g), ORR is codifying that the appeal of a release denial shall be considered, and any hearing shall be conducted, by the Assistant Secretary, or their neutral and detached designee. Further, ORR is codifying at § 410.1206(g) that upon making a decision to reverse or uphold the decision denying release to the potential sponsor, the Assistant Secretary or their neutral and detached designee, shall issue a written decision, either ordering release to the potential sponsor or denying release to the potential sponsor within the timeframe described in § 410.1206(f). Additionally, at § 410.1206(g), ORR is codifying that if the Assistant Secretary, or their neutral and detached designee, denies release to the potential sponsor, the decision shall set forth detailed, specific, and individualized reasoning for the decision. ORR is also codifying at § 410.1206(g) that ORR shall notify the unaccompanied child and the child's attorney of the denial. At § 410.1206(g), ORR is codifying that ORR shall inform the potential sponsor and the unaccompanied child of any right to seek review of an adverse decision in the United States District Court. ORR is codifying at § 410.1206(i) that if a child is released to another sponsor during the pendency of an appeal under this section, the appeal will be deemed moot. At § 410.1206(j)(1), ORR is codifying that a denied parent or legal guardian or close relative potential sponsor to whom ORR must send Notification of Denial letters pursuant to § 410.1205, has the right to be represented by counsel in proceedings related to the release denial, including at any hearing, at no cost to the Federal Government, which is consistent with the *Lucas R.* preliminary injunction. Lastly, at § 410.1206(j)(2), ORR is codifying that the unaccompanied child has the right to consult with counsel during the potential sponsor's appeal process at no cost to the Federal Government.

Comment: A few commenters recommended that ORR guarantee access to interpreters in the final rule for unaccompanied children and their potential sponsors during sponsorship appeals and provide written decisions translated into the sponsors' and the unaccompanied children's preferred language(s). These commenters stated that the additional cost of providing interpretation and translation services during sponsorship appeals is unlikely to create undue burden on ORR because it is already providing these services to unaccompanied children. Commenters further asserted that, in their view, the minimal burden on ORR to provide interpretation and translation services to unaccompanied children and sponsors during sponsorship appeals outweighs the significant due process concerns if they are unable to meaningfully engage in the appeals process. These commenters stated that ORR's decision-makers will also be deprived of relevant information if potential sponsors and children cannot communicate during the appeals process.

Response: ORR thanks the commenters for their recommendations. ORR agrees that unaccompanied children and their potential sponsors should have language access services during the appeal process and that language access is a critical component of procedural due process. Accordingly, ORR is adding § 410.1206(h) to require that ORR shall make qualified interpretation and/or translation services available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors upon request for the purpose of appealing denials of release. Such services shall be available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors in enclosed, confidential areas.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1206 with modifications. ORR is revising the beginning of § 410.1206(a) to state ''Denied parents and legal guardians and close relative potential sponsors to whom ORR's Director or their designee, who is a neutral and detached decision maker, must send Notification of Denial letters . . .'' ORR is revising § 410.1206(b) to remove ''will'' and replace with ''shall'' and to remove ''a reasonable time'' and replace with ''five business days of receipt.'' ORR is revising the second sentence of § 410.1206(c) to add ''at no cost to the Federal Government'' after ''attorney of record.'' ORR is adding § 410.1206(d) to state ''ORR shall deliver the full evidentiary record including any countervailing or otherwise unfavorable evidence, apart from any legally required redactions, to the denied parent or legal guardian or close relative potential sponsor within a reasonable timeframe to be established by ORR, unless ORR determines that providing the evidentiary record, or part(s) thereof, to the potential sponsor would compromise the safety and well-being of the unaccompanied child.'' ORR is adding at § 410.1206(e) to state ''ORR shall deliver the unaccompanied child's complete case file, apart from any legally required redactions, to a parent or legal guardian potential sponsor on request within a reasonable timeframe to be established by ORR, unless ORR determines that providing the complete case file, or part(s) thereof, to the parent or legal guardian potential sponsor would compromise the safety and well-being of the unaccompanied child. ORR shall deliver the unaccompanied child's complete case file, apart from any legally required redactions, to the unaccompanied child and the unaccompanied child's attorney on request within a reasonable timeframe to be established by ORR.''

ORR is adding § 410.1206(f) to state ''The appeal process, including notice of decision on appeal sent to the potential sponsor, shall be completed within 30 calendar days of the potential sponsor's request for an appeal, unless an extension of time is granted by the Assistant Secretary or their designee for good cause.'' ORR is adding § 410.1206(g) to state ''The appeal of a release denial shall be considered, and any hearing shall be conducted, by the Assistant Secretary, or their neutral and detached designee. Upon making a decision to reverse or uphold the decision denying release to the potential sponsor, the Assistant Secretary or their neutral and detached designee, shall issue a written decision, either ordering release or denying release to the

potential sponsor within the timeframe described in § 410.1206(f). If the Assistant Secretary, or their neutral and detached designee, denies release to the potential sponsor, the decision shall set forth detailed, specific, and individualized reasoning for the decision. ORR shall also notify the unaccompanied child and the child's attorney of the denial. ORR shall inform the potential sponsor and the unaccompanied child of any right to seek review of an adverse decision in the United States District Court.'' ORR is adding § 410.1206(h) to state ''ORR shall make qualified interpretation and/or translation services available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors upon request for the purpose of appealing denials of release. Such services shall be available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors in enclosed, confidential areas.'' ORR is adding § 410.1206(i) to state ''If a child is released to another sponsor during the pendency of the appeal process, the appeal will be deemed moot.'' ORR is adding § 410.1206(j)(1) to state ''Denied parent or legal guardian or close relative potential sponsors to whom ORR must send Notification of Denial letters pursuant to § 410.1205 have the right to be represented by counsel in proceedings related to the release denial, including at any hearing, at no cost to the Federal Government.'' Lastly, ORR is adding § 410.1206(j)(2) to state ''The unaccompanied child has the right to consult with counsel during the potential sponsor's appeal process at no cost to the Federal Government.'' ORR is otherwise finalizing the proposals as proposed.

Section 410.1207 Ninety (90)-day Review of Pending Sponsor Applications [161]

In the interest of the timely and efficient placement of unaccompanied children with vetted and approved sponsors, ORR proposed in the NPRM, at § 410.1207, a process to review sponsor applications that have been pending for 90 days (88 FR 68931 through 68932). Consistent with existing policy, ORR proposed in the NPRM that § 410.1207(a) would require ORR Federal staff, who supervise case management services performed by ORR grantees and contractors, to review all pending sponsor applications for unaccompanied children who have been in ORR custody for 90 days after submission of the completed sponsor application or in order to identify and resolve the reasons that a sponsor application remains pending in a timely manner, as well as to determine possible steps to accelerate the children's safe release.

ORR proposed in the NPRM at § 410.1207(b) that, upon completion of the review, UC Program case managers or other designated agency or care provider staff must update the potential sponsor and unaccompanied child on the status of the case and explain the reasons that the release process is incomplete. ORR proposed in the NPRM that UC Program case managers or other designated agency or care provider staff would work with the potential sponsor, relevant stakeholders, and ORR to address the portions of the sponsorship application that remain unresolved.

Further, to ensure that timeliness of placement remains a priority, for cases that are not resolved after the initial 90-day review, ORR proposed in the NPRM that ORR Federal staff supervising the case management process would conduct additional reviews at least every 90 days until the pending sponsor application is resolved as described in § 410.1207(c).

Comment: A few commenters expressed concern that § 410.1207(a) does not meet the requirements in the *Lucas R.* preliminary injunction because by requiring the FFS with responsibility for the child's case to conduct a 90-day review, this provision fails to meet the injunction's requirement to elevate problems to more senior officials and is wholly inconsistent with the need for supervisory review in the first place. These commenters recommended that ORR clarify in the final rule that the 90-day review will be conducted by ORR staff with supervisory responsibilities over the program's regularly assigned FFS.

Response: ORR agrees with the commenters that ORR supervisory staff, not the FFS, should conduct the 90-day review because it affords neutral and detached review by senior staff. ORR also notes that this is consistent with the *Lucas R.* preliminary injunction. Accordingly, ORR is revising §§ 410.1207(a) and (c) to require ORR supervisory staff who supervise field staff to perform the 90-day review of pending sponsor applications.

For consistency with both the *Lucas R.* preliminary injunction and ORR's current policy,[162] ORR is finalizing additional revisions to § 410.1207(a) to clarify when the first automatic review occurs after the potential sponsor submits a sponsor application. ORR is finalizing at § 410.1207(a) that ORR supervisory staff who supervise field staff shall conduct an automatic review of all pending sponsor applications. Although the *Lucas R.* preliminary injunction states that the ''first automatic review shall occur 90 days after the [sponsor application] is submitted . . .,'' ORR is instead incorporating a requirement that the first automatic review shall occur within 90 days of an unaccompanied child entering ORR custody to identify and resolve in a timely manner the reasons that a sponsor application remains pending and to determine possible steps to accelerate the unaccompanied child's safe release. ORR notes that this requirement means that the first automatic review will usually occur earlier than what the *Lucas R.* preliminary injunction requires—but in no case later than what the preliminary injunction requires.

Comment: One commenter recommended updates to the 90-day review of pending sponsor applications, including reviewing the unaccompanied child's case to determine whether there are any barriers to release and actions to be taken to expedite a child's release. The commenter also recommended ongoing reviews every 90 days until release.

Response: ORR thanks the commenter for the recommendations to update the 90-day review of pending sponsor applications. ORR agrees with the recommendation to review an unaccompanied child's case to determine whether there are any barriers to release and actions to be taken to expedite a child's release. Accordingly, at § 410.1207(c), ORR is finalizing a cross-reference to § 410.1207(a) to require that for cases that are not resolved after the initial 90-day review, ORR supervisory staff who supervise field staff shall conduct additional reviews at least every 90 days to resolve in a timely manner the reasons that a sponsor application remains pending and to determine possible steps to accelerate the unaccompanied child's safe release until the pending sponsor application is resolved. ORR also notes that this requirement is consistent with the *Lucas R.* preliminary injunction. Finally, ORR notes that the final rule provides for additional reviews ''at least'' every 90 days, which ORR believes addresses the commenter's recommendation, and ORR intends to provide reviews more frequently than 90 days when appropriate.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1207 with modifications. ORR is making technical corrections to the heading and regulation text of § 410.1207 by replacing ''release application(s)'' with the term ''sponsor

application(s).'' ORR is revising § 410.1207(a) to state ''ORR supervisory staff who supervise field staff shall conduct an automatic review of all pending sponsor applications. The first automatic review shall occur within 90 days of an unaccompanied child entering ORR custody to identify and resolve in a timely manner the reasons that a sponsor application remains pending and to determine possible steps to accelerate the unaccompanied child's safe release.'' ORR is revising § 410.1207(b) and (c) to remove ''or FRP.'' ORR is revising § 410.1207(c) to remove ''ORR Federal staff supervising the case management process'' and replace with ''ORR supervisory staff who supervise field staff.'' ORR is also revising § 410.1207(c) to add ''as provided in § 410.1207(a)'' after ''additional reviews.'' ORR is otherwise finalizing its proposal as proposed.

Section 410.1208 ORR's Discretion to Place an Unaccompanied Child in the Unaccompanied Refugee Minors Program

ORR proposed in the NPRM, at § 410.1208, specific eligibility criteria for release of an unaccompanied child to the Unaccompanied Refugee Minors (URM) Program (88 FR 68932). The TVPRA permits ORR to place unaccompanied children in a URM Program, pursuant to section 412(d) of the INA, if a suitable family member is not available to provide care.[163] ORR proposed in the NPRM, at § 410.1208(a), that unaccompanied children may be eligible for services through the ORR URM Program, including unaccompanied children in the following categories: (1) Cuban and Haitian entrant as defined in section 501 of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, and as provided for at 45 CFR 400.43; (2) an individual determined to be a victim of a severe form of trafficking as defined in 22 U.S.C. 7105(b)(1)(C); (3) an individual DHS has classified as a Special Immigrant Juvenile (SIJ) under section 101(a)(27)(J) of the INA, 8 U.S.C. 1101(a)(27)(J), and who was either in the custody of HHS at the time a dependency order was granted for such child or who was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, at the time such dependency order was granted; (4) an individual with U nonimmigrant status under 8 U.S.C. 1101(a)(15)(U), as authorized by TVPRA, pursuant to section 1263 of the Violence Against Women Reauthorization Act of 2013, which amends section 235(d)(4) of the TVPRA to add individuals with U nonimmigrant status who were in ORR custody as unaccompanied children eligible for the URM Program; or (5) other populations of children as authorized by Congress.

ORR proposed in the NPRM that with respect to unaccompanied children described in proposed paragraph (a) of this section, under § 410.1208(b), ORR would evaluate each case to determine whether it is in an unaccompanied child's best interests to be referred to the URM Program.

ORR noted in the NPRM that under § 410.1208(c), when it discharges an unaccompanied child pursuant to this section to receive services through the URM Program, relevant requirements of the ORR Refugee Resettlement Program regulations would apply, including the requirement that the receiving entity establish legal responsibility of the unaccompanied child, including legal custody or guardianship, under State law.[164] ORR proposed in the NPRM at § 410.1208(c), that until such legal custody or guardianship is established, the ORR Director would retain legal custody of the child.

Comment: Many commenters requested that ORR retain legal custody of children released under the URM Program out of concern for and to ensure protection of unaccompanied children.

Response: ORR appreciates the concern for the well-being of unaccompanied children; however, ORR does not retain legal custody of children placed in the URM program in accordance with the URM program's statutory design. Pursuant to 8 U.S.C. 1522(d)(2)(B)(ii), ''[t]he Director [of ORR] shall attempt to arrange for the placement under the laws of the States of such unaccompanied refugee children, who have been accepted for admission to the United States, before (or as soon as possible after) their arrival in the United States. During any interim period while such a child is in the United States or in transit to the United States but before the child is so placed, the Director shall assume legal responsibility (including financial responsibility) for the child, if necessary, and is authorized to make necessary decisions to provide for the child's immediate care.''

At § 410.1208(c), ORR clarifies that the ORR Director shall retain legal custody of an unaccompanied child until the required legal custody or guardianship is established under State law. ORR believes that it protects and benefits the child to clarify ORR's ongoing responsibility as the child's custodian during the transition into the URM Program until the State or its designee establishes legal responsibility. ORR evaluates each case to determine whether it is in the child's best interest to be placed in the URM Program. This best interest determination involves the consideration of a variety of factors, including, among others, the child's mental and physical well-being and individualized needs, to ensure they are protected from traffickers and other persons seeking to victimize or otherwise engage them in criminal, harmful, or exploitative activity.[165]

For further clarity, ORR is revising § 410.1208 to replace ''release and ''discharge'' with ''place'' to better reflect how those terms are defined at § 410.1001 and the requirements finalized at § 410.1208. ORR is also revising ''referred to'' with ''placed in'' at § 410.1208(b) to reflect this clarification.

Comment: One commenter expressed concern that the use of the term ''dependency order'' in proposed § 410.1208(a)(3) will cause confusion because there are other types of orders in cases involving SIJ classification, and recommended that ORR update the language to ''dependency and/or custody order'' to align with SIJ classification regulations and other Government resources such as the United States Citizenship and Immigration Services' (USCIS) Policy Manual and to clarify URM eligibility for SIJ-classified noncitizens.

Response: ORR notes that the TVPRA, at 8 U.S.C. 1232(d)(4)(A), uses the term ''dependency order'' in describing categories of children who are eligible for placement and services in the URM Program under 8 U.S.C. 1522(d). ORR appreciates the commenter's recommendation but believes that the term ''dependency order'' is sufficiently clear to identify the children that may be eligible for services through the URM Program.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1208 as proposed with the following modifications. ORR is revising the heading of § 410.1208 by replacing ''release'' with ''place,'' and ''to'' with ''in.'' ORR is revising § 410.1208(b) by replacing ''will'' with ''shall'' and ''referred to'' with ''placed in.'' ORR is revising § 410.1208(c) by replacing ''discharges'' with ''places'' and adding ''shall'' after ''ORR Director.'' ORR is revising § 410.1208(a)(2) to replace ''22 U.S.C. 7105(b)(1)(C)'' with ''22 U.S.C. 7102(11).'' The definitions used within 28 U.S.C. Chapter 78, including 22 U.S.C. 7105(b)(1)(C), are set forth at 22 U.S.C. 7102. As such, ORR determined that 22 U.S.C. 7102(11), which sets forth the definition of ''severe forms of

trafficking in persons,'' is a more appropriate citation for what constitutes a victim of a severe form of trafficking as the term is used at § 410.1208(a)(2).

Section 410.1209 Requesting Specific Consent From ORR Regarding Custody Proceedings

ORR proposed in the NPRM at § 410.1209 to address the specific consent process as informed by the TVPRA. Specific consent is a process through which an unaccompanied child in ORR custody obtains consent from HHS to have a State juvenile court make decisions concerning the unaccompanied child's placement or custody (88 FR 68932 through 68933). As relevant to this section, ORR noted that the TVPRA modified section 101(a)(27)(J) of the INA, concerning SIJ classification.[166] To obtain SIJ classification under the TVPRA modifications, a child must be declared dependent or legally committed to, or placed under the custody of, an individual or entity by a State juvenile court. However, an unaccompanied child in ORR custody who seeks to invoke the jurisdiction of a State juvenile court to determine or alter their custody status or placement must first receive ''specific consent'' from HHS to such jurisdiction. For example, if an unaccompanied child wishes to have a State juvenile court of competent jurisdiction, not HHS, move them out of HHS custody and into a State-funded foster care home, the unaccompanied child must first receive ''specific consent'' from HHS to go before the State juvenile court. If the unaccompanied child wishes to go to State juvenile court to be declared dependent in order to petition for SIJ classification (*i.e.,* receive an ''SIJ-predicate order'') in accordance with applicable statutory eligibility requirements, the unaccompanied child does not need HHS's consent. Although the TVPRA transferred authority to grant specific consent from DHS to ORR, DHS retains sole authority over the ultimate determination on SIJ classification. ORR notes that although the TVPRA refers to special immigrant ''status,'' [167] in this final rule ORR uses the term special immigrant ''classification,'' consistent with current USCIS policy.[168] For this reason, ORR will use ''SIJ classification'' in its discussion for consistency even where commenters used the synonymous terms Special Immigrant Juvenile Status or SIJS.

ORR proposed in the NPRM at § 410.1209(a) that an unaccompanied child in ORR custody is required to request specific consent from ORR if the unaccompanied child seeks to invoke the jurisdiction of a State juvenile court to determine or alter the child's custody status or release from ORR custody.

ORR proposed in the NPRM that under § 410.1209(b), if an unaccompanied child seeks to invoke the jurisdiction of a State juvenile court for a dependency order so that they can petition for SIJ classification or to otherwise permit a State juvenile court to establish jurisdiction regarding placement, but does not seek the State juvenile court's jurisdiction to determine or alter the child's custody status or release, the unaccompanied child would not need to request specific consent from ORR.

ORR proposed in the NPRM at § 410.1209(c) through (g) the process to make a specific consent request to ORR. ORR proposed in the NPRM at § 410.1209(c), that prior to a State juvenile court determining or altering the unaccompanied child's custody status or release from ORR, attorneys or others acting on behalf of an unaccompanied child would be required to complete a request for specific consent. ORR proposed in the NPRM at § 410.1209(d) to acknowledge receipt of the request within two business days.

ORR proposed in the NPRM at § 410.1209(e) that it will consider whether ORR custody is required to (1) ensure a child's safety; or (2) ensure the safety of the community. ORR noted in the NPRM that, as ORR does not consider runaway risk for purposes of release, it did not intend to do so here for purposes of adjudicating specific consent requests (88 FR 68932). ORR noted that such requirements would be consistent with 8 U.S.C. 1232(c)(2)(A) (stating that when making placement determinations, HHS ''may consider danger to self, danger to the community, and risk of flight.'').

ORR proposed in the NPRM at § 410.1209(f), that ORR shall make determinations on specific consent requests within 60 business days of receipt. ORR proposed in the NPRM that it shall attempt to expedite urgent requests when possible.

ORR proposed in the NPRM at § 410.1209(g), that it shall inform the unaccompanied child, the unaccompanied child's attorney, or other authorized representative of the unaccompanied child of the decision on the specific consent request in writing, along with the evidence used to make the decision.

Finally, ORR proposed in the NPRM at § 410.1209(h) and (i) detailed procedures related to a request for reconsideration in the event ORR denies specific consent. ORR proposed in the NPRM at § 410.1209(h), that the unaccompanied child, the child's attorney of record, or other authorized representative would be able to request reconsideration of ORR's denial with the Assistant Secretary for ACF within 30 business days of receipt of the ORR notification of denial of the request. The unaccompanied child, the child's attorney, or the child's authorized representative may submit additional (including new) evidence to be considered with the reconsideration request.

ORR proposed in the NPRM at § 410.1209(i), that the Assistant Secretary for ACF or designee would consider the request for reconsideration and any additional evidence and send a final administrative decision to the unaccompanied child, the child's attorney, or the child's other authorized representative, within 15 business days of receipt of the request.

Comment: In response to ORR stating in the preamble for § 410.1209 that specific consent is a process through which an unaccompanied child in ORR custody obtains consent from HHS to have a State juvenile court make decisions concerning the unaccompanied child's placement or custody, a number of commenters recommended that ORR should demonstrate to all 50 States a quantified analysis before finalizing any changes proposed to this section.

Response: ORR appreciates the commenters' recommendation and thinks it is important to codify the existing process into the final rule. ORR will continue to study its policies and propose future changes to this section if it determines changes are necessary.

Comment: A few commenters recommended revising proposed § 410.1209(b) to prevent unintended immigration consequences for a child in ORR custody who is petitioning for SIJ classification. Specifically, the commenters recommended replacing the proposed language at § 410.1209(b) with the following: ''An unaccompanied child in ORR custody need not request ORR's specific consent before a juvenile court exercises jurisdiction to enter findings or orders that do not alter the child's custody status or placement with ORR.''

Response: ORR appreciates the commenters for their recommended revisions to § 410.1209(b). The language proposed at § 410.1209(b) is consistent with the language ORR uses in its current policy guidance, such as ORR's Program Instruction ''Specific Consent Requests,'' [169] which was issued on December 24, 2009. In this final rule,

ORR declines to revise § 410.1209(b) and will consider whether revisions are needed in future policymaking. Accordingly, ORR is finalizing § 410.1209(b) as proposed.

Comment: One commenter recommended ORR revise § 410.1209(b) and (c) to remove the term ''determining'' and only use the term ''altering'' because the term ''altering'' is consistent with § 410.1209(a) and the SIJ classification regulations, and use of ''determining'' may cause confusion and prevent a State court from making a factual determination that the child is in ORR custody. Additionally, to clarify that specific consent is only required when there is a request to alter the child's custody status or release from ORR, the commenter recommended ORR add a subsection requiring that when ORR is considering whether specific consent is required, it must make an assessment taking into account the proposed alternative custody arrangement, if any, specified in the request for specific consent that the child would be seeking from the juvenile court.

Response: ORR appreciates the commenters' recommendation, however, ORR notes that the current language reflects its longstanding policy in this area.[170] ORR also notes that the INA, at 8 U.S.C. 1101(a)(27)(J)(iii)(I), uses ''determine,'' providing: ''[N]o juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction.'' ORR declines to change the language it has used for so long without thoroughly reviewing the need to do so, which will require additional ORR time and resources. Accordingly, ORR is finalizing § 410.1209(b) and (c) as proposed.

ORR notes that its proposal in the NPRM at § 410.1209(a) to only use the term ''alter'' was a technical error. As explained in the preamble to the NPRM, ORR intended § 410.1209(a) to state that an unaccompanied child in ORR custody is required to request specific consent from ORR if the unaccompanied child seeks to invoke the jurisdiction of a State juvenile court to determine or alter the child's custody status or release from ORR custody (88 FR 68932). ORR is codifying in the final rule at § 410.1209(a) the language ''to determine or alter'' and not only ''to alter.'' Additionally, ORR appreciates the commenter's recommendation to add that when ORR considers whether specific consent is required, ORR should make an assessment taking into account the proposed alternative custody arrangement. At § 410.1209(f), ORR is finalizing that it will make a determination on specific consent. ORR clarifies that when making the determination, ORR would assess the specific consent, including any proposed alternative custody arrangement, before it issues its determination. ORR does not believe it is necessary to codify this as a new paragraph under § 410.1209. ORR will consider whether to issue additional subregulatory guidance, as needed, to provide more detail.

Comment: A few commenters recommended ORR narrow the timeframe in § 410.1209(f) within which ORR must determine whether to provide specific consent to 30 business days of receipt of a request to do so. Additionally, the commenters recommended that, for children expected to age out of ORR care and custody in 14 days or less, ORR must make a determination within 72 hours of the specific consent request. Lastly, the commenters recommended ORR add language to § 410.1209(f) to explicitly state that ORR must make its best efforts to expedite urgent requests.

Response: ORR thanks the commenters for their recommendations. ORR believes that 60 days is a reasonable timeframe for it to make determinations on specific consent requests. The 60-day timeframe allows time for thorough review, to make any requests for additional information if needed, and for the unaccompanied child, the child's attorney, or others acting on the child's behalf, to submit such additional information. Additionally, ORR notes that 60 days is the maximum amount of time that ORR would take to review a specific consent request, and ORR may make a determination in less than 60 days.

Additionally, ORR explains that under § 410.1209(f), an unaccompanied child expected to age out of ORR care and custody within 14 days or less may ask ORR to expedite their request. ORR believes this standard is appropriate to ensure it makes an immediate determination for unaccompanied children expected to age out of ORR care and custody when ORR has the resources to do so. As ORR implements the requirements under § 410.1209(f), it will monitor for any unintended consequences and consider the commenters' recommendations for future policymaking, as needed.

Comment: One commenter recommended a technical correction to proposed § 410.1209(i) to update the numbering to § 410.1209(h)(1).

Response: ORR appreciates the commenter's recommendation and clarifies that it intentionally numbered the section as § 410.1209(i) and not § 410.1209(h)(1) because it intended for it to be the lower-case letter ''i'' and not the roman numeral ''i.''

Comment: A few commenters recommended ORR add a new paragraph to § 410.1209 stating: ''A child who has been released by ORR to a sponsor is no longer in the actual or constructive custody of ORR, and therefore, ORR's specific consent is not required before a juvenile court exercises jurisdiction over the child's custody or placement.''

Response: ORR thanks the commenter for their recommendation and believes it is unnecessary to codify that ORR's specific consent is not required once the child is released from ORR custody. ORR believes that § 410.1209(a) is clear that the specific consent request requirements only apply when the unaccompanied child is in ORR's custody (*e.g.,* § 410.1209(a) states ''[a]n unaccompanied child in ORR custody is required to request specific consent from ORR. . .'').

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1209 as proposed with the following changes. ORR is making a technical correction to add ''determine or'' to § 410.1209(a) to codify the rule as explained in the preamble to the NPRM at § 410.1209(a) to state: ''An unaccompanied child in ORR custody is required to request specific consent from ORR if the unaccompanied child seeks to invoke the jurisdiction of a State juvenile court to determine or alter the child's custody status or release from ORR custody.'' ORR is revising the beginning of § 410.1209(i) to state: ''The Assistant Secretary, or their designee, shall consider . . .''.

Section 410.1210 Post-Release Services.

ORR proposed in the NPRM at § 410.1210 the requirements for post-release services (PRS) (88 FR 68933 through 68936). The TVPRA authorizes, and in some cases requires, HHS to provide follow-up services during the pendency of removal proceedings for certain unaccompanied children.[171] ORR provides PRS by funding providers to facilitate access to relevant services. 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.

As further discussed below, ORR notes that since it published the NPRM, ORR revised its policies regarding

PRS.[172] ORR's updated PRS policies are consistent with the description of potential updates described in the NPRM and with the provisions of this final rule. Additionally, ORR's updated PRS policies are consistent with ORR's discussion of expanded PRS as described in the preamble to the NPRM (*e.g.,* with respect to updating ''levels'' of PRS). ORR refers to the policies in several places below to indicate existing practices that respond to concerns expressed in various comments. Further, ORR is incorporating various updates to § 410.1210 to align with its updated PRS policies—notably at §§ 410.1210(a)(2) and (3); (e); (g)(1) and (2); (h)(1) and (2); and (i)(5)—and its statutory authority.[173] In some instances, updates in this final rule further clarify provisions described in the NPRM or respond to comments received in response to the NPRM. ORR also notes that the expansion of PRS described in this final rule are responsive to concerns raised by multiple commenters about the importance of improving and strengthening PRS. Finally, ORR notes that updates expressed in this final rule will not adversely affect any third party's reliance interests because all PRS providers have followed ORR's updated policies since January 2024.

ORR proposed in the NPRM at § 410.1210(a)(1), that consistent with existing policy, care provider facilities would work with sponsors and unaccompanied children to prepare them for an unaccompanied child's safe and timely release, to assess the sponsors' ability to access community resources, and to provide guidance regarding safety planning and accessing services (88 FR 68933).

ORR proposed in the NPRM at § 410.1210(a)(2) and (3), circumstances when ORR would be required to provide PRS to unaccompanied children (88 FR 68933). Consistent with 8 U.S.C. 1232(c)(3)(B), under § 410.1210(a)(2), ORR proposed in the NPRM to conduct follow-up services, or PRS, during the pendency of removal proceedings for unaccompanied children for whom a home study was conducted. ORR proposed in the NPRM to apply this requirement to any case where a home study is conducted, including home studies that are explicitly required by the TVPRA and those that ORR performs under other circumstances as described at § 410.1204. ORR proposed in the NPRM, at § 410.1210(a)(3), that it would have the discretion, to the extent ORR determines that appropriations are available, to provide PRS to unaccompanied children with mental health or other needs who would benefit from the ongoing assistance of a community-based service provider, even if their case did not involve a home study pursuant to § 410.1204. ORR noted that § 410.1210(c) further lists certain situations where ORR may, within its discretion, refer unaccompanied children for PRS. ORR proposed in the NPRM to expand upon the situations whereby ORR may provide PRS. ORR stated in the NPRM that ORR's then current practice, described in the ORR Policy Guide at section 6.2,[174] required ORR to provide PRS for an unaccompanied child whose sponsor required a home study[175] or for whom ORR determines the release is safe and appropriate but the unaccompanied child and sponsor would benefit from ongoing assistance from a community-based service provider. ORR also proposed in the NPRM that PRS furnished to these unaccompanied children may include home visits by the PRS provider. ORR sought public comment on proposed § 410.1210(a)(2) and (3), particularly with respect to the possible expansion of PRS to additional unaccompanied children.

ORR is aware of concerns that, in some cases, release of unaccompanied children to sponsors may be unduly delayed by a lack of available PRS providers and services near the sponsor. Accordingly, ORR proposed in the NPRM in § 410.1210(a)(4) that ORR would not delay the release of an unaccompanied child if PRS are not immediately available (*e.g.,* due to a referral delay or waitlist for PRS). ORR noted that § 410.1210(g) specifies the timeframes in which PRS providers are required to start PRS for unaccompanied children once they are released from ORR care.

ORR proposed in the NPRM at § 410.1210(b), the types of services that would be available as part of PRS, and stated the services were as described in ORR policies (88 FR 68933).[176] ORR proposed in the NPRM that PRS providers would be required to ensure PRS are furnished in a manner that is sensitive to the individual needs of the unaccompanied child and in a way the child effectively understands regardless of spoken language, reading comprehension, or disability to ensure meaningful access for all eligible children, including those with limited English proficiency. ORR proposed in the NPRM that the comprehensiveness of PRS shall depend on the extent appropriations are available. Specifically, ORR proposed in the NPRM 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 believed 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 unification 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. ORR noted in the NPRM that it proposed to codify at § 410.1210(b) services areas as covered in its policies.[177] As stated in the NPRM, in conducting PRS, ORR and any entities through which ORR provides PRS shall make reasonable modifications in their policies, practices, and procedures if needed to enable released unaccompanied children with disabilities to live in the most integrated setting appropriate to their needs, such as with a sponsor. ORR is not required, however, to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. Additionally, ORR is aware of the importance of health literacy for unaccompanied children to increase awareness of health issues and to ensure continuity of care after their release, and so proposed at § 410.1210(b)(7) that PRS providers would be required to provide unaccompanied children and sponsors with information and services relevant to health-related considerations for the unaccompanied child. In the NPRM, ORR sought public comment on this paragraph, specifically on how to protect the comprehensiveness of PRS against significant reductions in funding allocated to PRS while still balancing the need to maintain funding for capacity during emergencies and influxes. ORR also sought public comment on what other services should be within the scope of PRS.

ORR proposed in the NPRM at § 410.1210(c) to require that unaccompanied children with specific

needs receive additional consideration of those needs and may be referred for PRS to address those needs (88 FR 68934). Consistent with 8 U.S.C. 1232(c)(3)(B), ORR proposed in the NPRM that unaccompanied children who would receive additional consideration include those who are especially vulnerable, such as unaccompanied children in need of particular services or treatment; unaccompanied children with disabilities; unaccompanied children with LGBTQI+ status or identity; unaccompanied children who are adjudicated delinquent or have been involved in, or are at high risk of involvement with, the juvenile justice system; unaccompanied children who entered ORR care after being separated from a parent or legal guardian by DHS; unaccompanied children who are victims of human trafficking or other crimes; unaccompanied children who are victims of worker exploitation; unaccompanied children who are at risk of labor trafficking; unaccompanied children enrolled in school who are chronically absent or retained at the end of their school year; and certain parolees. ORR typically considers certain parolees who are also unaccompanied children to include unaccompanied Afghan children, unaccompanied Ukrainian children, and other children who are in the UC Program (such as those eligible for humanitarian parole). ORR noted that it may refer unaccompanied children for PRS, based on these concerns, even after they have been released. Such referrals may be made pursuant to ORR becoming aware of the situations listed above—*e.g.,* through post-release Notifications of Concern (NOC) or calls to the NCC. In that event, ORR would require the relevant PRS provider to follow up with the child and assess whether PRS would be appropriate.

ORR proposed in the NPRM, at § 410.1210(d), that the PRS provider assigned to a particular unaccompanied child's case would assess the released unaccompanied child and sponsor for services needed and document the assessment (88 FR 68934). The assessment would be developmentally appropriate for the unaccompanied child, meaning the PRS provider would be required to tailor it to the released unaccompanied child's level of cognitive, physical, and emotional ability. Further, ORR proposed that the assessment be trauma-informed, as defined in § 410.1001, and consistent with the *6 Guidelines To A Trauma-Informed Approach* developed by the CDC in collaboration with the SAMHSA.[178] ORR proposed that during the assessment, PRS providers would also identify any traumatic events and symptoms by using validated screening measures developed for use when screening and assessing trauma in children.

In the preamble to the NPRM, ORR noted that under existing policy, ORR provides Safety and Well-Being Follow Up Calls (SWB calls) for all unaccompanied children who are released to sponsors. The purpose of SWB calls is to determine whether the child is still residing with the sponsor, is enrolled in and/or attending school, is aware of upcoming court dates, and is safe. ORR understands that these calls are authorized under 8 U.S.C. 1232(c)(3)(B), as a form of follow-up service. Although ORR proposed in the NPRM to continue conducting SWB calls, ORR did not propose to codify them, so as to preserve its flexibility in making continuous improvements to the reach and nature of the SWB calls, and in integrating them into the suite of available PRS. ORR sought public comment on whether it should codify SWB calls in this final rule or in future rulemaking and whether it should integrate SWB call into PRS, and if so, what factors ORR should consider in integrating SWB calls into PRS. ORR notes that in this final rule, it is not codifying SWB calls.

ORR considered codifying a requirement that the PRS provider's assessment include a recommendation regarding the ''level'' of PRS to be provided in direct response to the unaccompanied child's and the sponsor's needs, based on regular and repeated assessments. In the NPRM at § 410.1210(b), ORR proposed that PRS include a range of services (88 FR 68933). But ORR noted that unaccompanied children and sponsors receiving PRS do not necessarily require follow-up services in every service area, but rather have individual needs reflecting their own circumstances. Similarly, ORR believes that the appropriate level of involvement by the PRS provider in coordinating the delivery of those services should accord with the unaccompanied child's and/or sponsor's individual needs. Consistent with this approach, in the NPRM, ORR stated that at the time, it provided two ''levels'' of PRS—Level One and Level Two.[179] Level One services included assessments of the needs of unaccompanied children and their sponsors in accessing community services, including enrolling in school. Further, unaccompanied children and their sponsors received Level One services if they did not require intensive case management as provided with Level Two PRS. Unaccompanied children and their sponsors received Level Two services if they received Level One Services, and the PRS providers assessed them to need more intensive case management, or the unaccompanied children required a higher level of services as assessed during the unaccompanied children's release from ORR care (*e.g.,* during the sponsor suitability assessment). Level Two services provided a higher level of engagement between the PRS provider and the unaccompanied child and sponsor and included regularly scheduled home visits (at least once a month), ongoing needs assessments of the unaccompanied child, comprehensive case management, and access to therapeutic support services. In the NPRM, ORR considered updating the levels of PRS available to unaccompanied children and sponsors, from a framework that contains two levels of PRS to a framework that contains three levels, and stated further, that ORR was considering codifying this PRS level framework. To that end, ORR sought input from the public on one potential way to update its policies to incorporate additional levels, as described below.

ORR considered requiring the PRS provider's assessment to include the level of PRS recommended to be provided in direct response to the unaccompanied child's and the sponsor's needs, based on regular and repeated assessments. Under a revised framework for PRS levels, ORR considered an option in which Level One PRS would include safety and well-being virtual check-ins; [180] Level Two PRS would cover case management services; and Level Three PRS would include intensive home engagements. Additionally, ORR considered requiring that a released unaccompanied child may receive one or more levels of PRS depending on the needs and circumstances of the unaccompanied child and sponsor. ORR considered codifying a requirement that PRS providers would be required to furnish specific levels of PRS to unaccompanied children required to receive PRS under the TVPRA to ensure the safety and well-being of these unaccompanied children post-release and their successful transition into the community. ORR noted that it was considering time limits on the availability of PRS at each level that the PRS provider would furnish to the unaccompanied child and sponsor, which at a minimum would be furnished for six months after release.

For example, an unaccompanied child and sponsor referred to Level Three PRS would receive this level of service for at least six months after release, and ORR would subsequently assess every 30 days thereafter whether services are still needed. Further, ORR considered requiring PRS providers to furnish levels of PRS to unaccompanied children required to receive PRS under the TVPRA and their sponsors for timeframes that may continue beyond the timeframes to be established for the levels. ORR noted that the timeframes for providing PRS would not extend past the circumstances in which PRS would be terminated as specified in § 410.1210(h).

ORR notes, however, that this final rule does not codify these updates. ORR believes it is more appropriate for this final rule to establish general standards for the provision of PRS, rather than specific methods of implementing PRS. As with other topics not codified in this rule, ORR believes that this approach will enable it to make more frequent, iterative policy updates, in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and PRS providers, as informed by the implementation of its updated policies and this final rule.

ORR proposed in the NPRM at § 410.1210(e)(1), that the PRS provider would, in consultation with the unaccompanied child and sponsor, decide the appropriate methods, timeframes, and schedule for ongoing contact with the released unaccompanied child and sponsor based on the level of need and support needed (88 FR 68935). PRS providers would be required in § 410.1210(e)(2) to make, at a minimum, monthly contact with their assigned released unaccompanied children and their sponsors, either in person or virtually for six months after release. ORR considered limiting the minimum monthly contact to unaccompanied children and sponsors receiving Level Two and/or Level Three PRS. ORR sought public comment on this proposal including consideration of applicable factors that should be included in determining how often PRS providers would be required to contact their assigned unaccompanied children and sponsors after release. ORR proposed in the NPRM at § 410.1210(e)(3), that PRS providers would be required to document all ongoing check-ins and in-home visits as well as the progress and outcomes of those home visits.

ORR proposed in the NPRM at § 410.1210(f)(1), that PRS providers would work with released unaccompanied children and their sponsors to ensure they can access community resources (88 FR 68935). ORR opted not to enumerate ways that PRS providers could comply with this requirement, because the nature of such assistance would vary by case. ORR anticipates that PRS providers could assist unaccompanied children and sponsors with issues such as making appointments; communicating effectively with their service provider; requesting interpretation services, if needed; understanding a service's costs, if applicable; enrollment in school, or where accessible and needed, preschool or daycare; and other issues relevant to accessing relevant services. ORR also anticipated that PRS providers would assist released unaccompanied children and sponsors in accessing the following community-based resources: legal services; education and English classes; youth- and community-based programming; medical care and behavioral healthcare; services related to the unaccompanied children's cultural and other traditions; and supporting unaccompanied children's independence and integration.

ORR proposed in the NPRM at § 410.1210(f)(2), that PRS providers would be required to document any community resource referrals and their outcomes (88 FR 68935).

ORR proposed in the NPRM at § 410.1210(g) to codify timeframes for when PRS providers would be required to start PRS (88 FR 68935). ORR noted that although the TVPRA mandates PRS in certain cases, it does not address the timing of providing PRS. In the NPRM, ORR proposed in the NPRM at § 410.1210(g)(1) to codify its policies specifying a timeframe for the delivery of PRS to released unaccompanied children who are required to receive PRS pursuant to the TVPRA at 8 U.S.C. 1232(c)(3)(B).[181] Upon finalization, PRS providers would be required, to the greatest extent practicable, to start services within two (2) days of the unaccompanied children's release from ORR care. Further, as proposed in the NPRM, PRS shall start no later than 30 days after release if PRS providers are unable to start services within two (2) days of release. At § 410.1210(g)(2) of the NPRM, ORR proposed to codify its policy [182] that for released unaccompanied children who are referred to PRS but who are not mandated to receive PRS following a home study, PRS providers would be required, to the greatest extent practicable, to start services within two (2) days of accepting a referral.

ORR proposed in the NPRM at § 410.1210(h) the circumstances required for termination of PRS, which ORR stated in the NPRM were based on ORR's policies (88 FR 68935).[183] At § 410.1210(h)(1), ORR proposed in the NPRM to require that PRS for an unaccompanied child required to receive PRS pursuant to the TVPRA at 8 U.S.C. 1232(c)(3)(B) would continue until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure or lawful immigration status, or the child receives an order of removal. In the event an unaccompanied child is granted voluntary departure or receives an order of removal, PRS would be discontinued until the child is repatriated, and PRS would end once the unaccompanied child's case is closed. ORR proposed in the NPRM at § 410.1210(h)(2), to require that PRS for an unaccompanied child receiving PRS, but who is not required to receive PRS following a home study, would continue for not less than six months or until the unaccompanied child turns 18, whichever occurs first; or until the PRS provider assesses the unaccompanied child and determines PRS are no longer needed, but in that case for not less than six months.

Finally, at § 410.1210(i) of the NPRM, ORR proposed records and reporting requirements for PRS providers (88 FR 68935 through 68936). Keeping accurate and confidential records is important to ensure the security of all information the PRS provider documents about the unaccompanied child and sponsor. Accordingly, ORR proposed in the NPRM at § 410.1210(i)(1)(i), to require PRS providers to maintain comprehensive, accurate, and current case files that are kept confidential and secure, and that are accessible to ORR upon request. PRS providers would be required to keep all case file information together in the PRS provider's physical and electronic files. Section 410.1210(i)(1)(ii) would also require PRS providers to upload all documentation related to services provided to unaccompanied children and sponsors to ORR's case management system, as available, within seven (7) days of completion of the services.

To prevent unauthorized access to electronic and paper records, ORR proposed in the NPRM at § 410.1210(i)(2)(i) to require PRS providers establish and maintain written policies and procedures for organizing and maintaining the content of active and closed case files (88 FR 68936). Under § 410.1210(i)(2)(ii), prior to providing PRS, PRS providers would be required to have established administrative and physical controls to prevent unauthorized access to the records that include keeping sensitive

health information in a locked space when not in use. ORR believes that any information collected from the unaccompanied child or sponsor should not be shared for any other purposes except for coordinating services for them. ORR therefore proposed at § 410.1210(i)(2)(iii) to codify a requirement that PRS providers may not release records to any third party without the prior approval of ORR. If a PRS provider is no longer providing PRS for ORR, ORR proposed in the NPRM that the PRS provider would be required to provide all active and closed case file records in their original format to ORR according to ORR's instructions.

ORR proposed in the NPRM at § 410.1210(i)(3) requirements to protect the privacy of all unaccompanied children receiving PRS (88 FR 68936). Under § 410.1210(i)(3)(i), PRS providers would be required to have a written policy and procedure that protects the sensitive information of released unaccompanied children from access by unauthorized users, such as encrypting electronic communications (including, but not limited to, email and text messaging) containing sensitive healthcare or identifying information of released unaccompanied children. PRS providers would be required under § 410.1210(i)(3)(ii) to explain to released unaccompanied children and their sponsors how, when, and under what circumstances sensitive information may be shared during the course of their PRS. PRS providers would also be required to have appropriate controls on information sharing within the PRS provider network. ORR believes these controls are necessary to ensure that sensitive information is not exploited by unauthorized users to the detriment of the released unaccompanied children.

ORR proposed in the NPRM that if a PRS provider is concerned about the unaccompanied child's safety and well-being, it must notify ORR and other appropriate agencies of such concerns (88 FR 68936). Section 410.1210(i)(4)(i) covers the procedures and requirements regarding such NOCs. A PRS provider concerned about an unaccompanied child's safety and well-being would be required to document and report a NOC to ORR and, as applicable, to other investigative agencies (*e.g.,* law enforcement or child protective services). ORR stated in the NPRM, consistent with current policies,[184] that it anticipated that situations when PRS providers would submit a NOC would include: an emergency; a current case of human trafficking; abuse, abandonment, neglect, or maltreatment; a possible exploitative employment situation; kidnapping, disappearance, or a runaway situation; alleged criminal activity; involvement of child protective services; potential fraud, such as document fraud or the charging of unlawful fees; a behavioral incident involving the unaccompanied child that raises safety concern; media attention; a sponsor declines services; contact or involvement with organized crime; the PRS provider is unable to contact the unaccompanied child within 30 days of release; or when the PRS provider loses contact with a child who is receiving PRS, and there are safety concerns. Consistent with ORR's PRS policies,[185] it clarifies in this final rule that PRS providers would also submit a NOC if they suspect: human trafficking; abuse abandonment, or maltreatment; or contact or involvement with organized crime.

Additionally, under § 410.1210(i)(4)(ii) of the NPRM, ORR proposed that a PRS provider would be required to submit a NOC to ORR within 24 hours of first knowledge or suspicion of events raising concerns about the unaccompanied child's safety and well-being, and to document the NOC (88 FR 68936).

ORR proposed in the NPRM at § 410.1210(i)(5) to codify requirements for PRS providers regarding case closures (88 FR 68936). ORR proposed that a case file be formally closed when the PRS are terminated by ORR, and that ORR would supply instructions, including relevant forms, that the PRS provider would be required to follow when closing out a case. For example, similar to current practice, ORR anticipates that it may require PRS providers to complete a case closure form and upload it to ORR's online case management system within 72 hours of a case's closure.

Comment: A few commenters supported ORR codifying requirements for PRS because these services support the unaccompanied children's successful transition into their community. Additionally, a few commenters supported ORR's proposal at §§ 410.1210(a)(2) and 410.1204(e) that all children for whom a home study was conducted would receive PRS. Notably, a commenter stated these unaccompanied children present a high level of risk and need continued services after release to maintain their safety and well-being. A few commenters also supported the proposal at § 410.1210(a)(4) that ORR would not delay release if PRS were not immediately available for the child.

Response: ORR thanks the commenters for their support.

Comment: A commenter expressed concern that the language at § 410.1210(a)(2) where ORR proposed that an unaccompanied child who receives a home study and PRS ''may'' also receive home visits by a PRS provider, seemingly makes home visits optional and recommended making home visits required.

Response: ORR clarifies that the use of the word ''may'' in this sentence does not mean that home visits are optional for children receiving PRS. ORR uses the term ''may'' to accommodate children who receive virtual visits, such as those that receive Level One PRS under ORR's revised PRS policies. ORR clarifies that under existing policies, Level One PRS includes virtual visits and Level Two and Three PRS includes in-home visits.

Comment: Several commenters urged that PRS should always be voluntary and not required of the child and sponsor. Further, another commenter recommended changing the language from ''shall'' to ''may'' or ''as needed'' throughout § 410.1210(b) to allow PRS providers to assist based on their discretion, resources, and the children's and sponsors' needs.

Response: ORR agrees, and notes that it lacks statutory authority to make PRS mandatory. It was not ORR's intent in the NPRM to suggest that PRS be mandatory. Further, ORR notes that although it is statutorily required to provide follow-up services to unaccompanied children in certain circumstances,[186] it cannot force children or their sponsors to accept PRS. Accordingly, ORR is not finalizing § 410.1210(a)(2) as proposed and is revising this section to state that ORR shall offer PRS for unaccompanied children for whom a home study was conducted pursuant to § 410.1204. Additionally, ORR is revising § 410.1210(g)(1), (g)(2), (h)(1), and (h)(2) to reflect that PRS are voluntary by adding ''an offer of PRS,'' and ORR is clarifying at § 410.1210(h)(1) and (h)(2) that PRS are offered until one of the termination conditions are met. Further, ORR is removing the proposed language ''during the pendency of removal hearings'' at § 410.1210(a)(2) to align with the language used in § 410.1204.

Because ORR is updating § 410.1210(a)(2) to reflect that PRS services are voluntary for sponsors and unaccompanied children, ORR does not agree with the commenter's recommendations to also update § 410.1210(b) from ''shall'' to ''may'' and clarifies that § 410.1210(b) lists the minimum service areas that PRS includes but does not require all unaccompanied children and sponsors to receive these services. During the PRS provider's assessment of the

unaccompanied child and sponsor, ORR intends under this final rule that the PRS provider will determine which specific PRS are appropriate based on the unaccompanied child's and sponsor's needs.[187]

Comment: A number of commenters supported ORR expanding access to PRS to all unaccompanied children after release from ORR care and custody because PRS would benefit all children. Specifically, a few commenters stated that expanding access to all unaccompanied children fosters their safe integration into their local communities by assisting them in obtaining critical services, including education, legal services, health insurance, mental health services and counseling. Another commenter stated that PRS are vital to ensure children and sponsors have access to services after release because they support safe and stable home placements.

Additionally, a few commenters supported extending PRS home visits to children with mental health or other needs who could benefit from ongoing assistance from a community-based provider. A few other commenters recommended ORR clarify that children with mental health or other needs who did not receive a home study are eligible for PRS.

Lastly, one commenter expressed concern that ORR proposed in the NPRM to limit additional consideration for PRS to vulnerable and/or high-risk unaccompanied children at § 410.1210(c), and the commenter recommended not limiting PRS to this population of children and expanding access to all children who need PRS.

Response: ORR thanks the commenters and agrees that PRS can benefit all unaccompanied children by assisting them with obtaining critical services to support their safe integration into their local communities and safe and stable home placements. Further, ORR believes the TVPRA authorizes it to offer PRS to all released unaccompanied children, because in its experience all releases from ORR custody ''involve[e] children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.'' [188] Accordingly, ORR is not finalizing § 410.1210(a)(3) as proposed in the NPRM, and is instead revising this section to state that to the extent that ORR determines appropriations are available, and in its discretion, ORR may offer PRS for all released children.

Additionally, ORR clarifies that all unaccompanied children, even if they did not receive a home study, are eligible for PRS, subject to available appropriations.

Finally, ORR acknowledges the commenter's concern regarding limiting PRS to unaccompanied children who require additional consideration under § 410.1210(c). ORR believes that expanding PRS to all children, to the extent appropriations are available, addresses the commenter's concern. To the extent appropriations are unavailable, ORR is clarifying at § 410.1210(a)(3) that it may give additional consideration, consistent with § 410.1210(c), for PRS cases involving unaccompanied children with mental health needs or other needs who could particularly benefit from ongoing assistance from a community-based service provider, to prioritize cases as needed.

Comment: A few commenters also recommended that ORR create a publicly accessible plan for achieving universal PRS by 2025 due to concerns about ORR's funding levels and PRS provider capacity. Another commenter recommended the public plan include guidelines to ensure children can make meaningful decisions about receiving PRS where the sponsor decides not to participate. A separate commenter recommended the public plan explain how ORR plans to expand PRS providers' capacity to meet that goal. Further, a few commenters had recommendations on ORR expanding its network of PRS providers to provide universal PRS and reduce delays. One commenter recommended ORR leverage its existing networks with national, State, and community-based providers to expand access to PRS for all unaccompanied children and their sponsors. Another commenter recommended PRS providers that are easily accessible, available in various locations, and able provide culturally appropriate services.

Response: ORR does not believe a regulatory mandated plan is necessary to move forward efforts to expand PRS to the extent appropriations allow. However, it will take these recommendations into consideration as needed as it develops future policies in this area.

ORR also appreciates the recommendation to leverage existing networks but notes that detailing specific plans to leverage existing networks of organizations and providers to broaden access to PRS is outside the scope of this rule. ORR will take the recommendation into consideration for future policymaking in this area.

Comment: A commenter recommended that ORR use a standardized assessment to assess an unaccompanied child's mental and behavioral health prior to release and use the information gathered in the assessment to make evidence-informed decisions to determine the level of need and whether PRS are necessary.

Response: Under current policy, ORR determines the appropriate level for which to refer all children to PRS depending on the needs and the circumstances of the case. Although the design of a standardized assessment is outside the scope of this rule, ORR will take the recommendation into consideration for future policymaking in this area.

Comment: A few commenters expressed concern about ORR not delaying release if PRS are not immediately available for an unaccompanied child. One commenter asserted that ORR's sole focus is speed of release. Another commenter expressed concern that the unavailability of PRS combined with a policy to not postpone release due to such unavailability could mean that thousands of unaccompanied children will be released to sponsors with no PRS.

Response: ORR does not agree that ORR's sole focus is speed nor that this will increase the number released children without PRS. ORR prioritizes the safety and well-being of all unaccompanied children when releasing them to sponsors, consistent with its statutory responsibilities, and notes that pursuant to subpart C, ORR is explicitly codifying measures to protect the safety of children it releases from custody (*e.g.,* to support children being released to thoroughly vetted sponsors who can take care of children's safety and well-being post-release).

Further, in the NPRM, ORR acknowledged that it was aware of concerns that, in some cases, release of unaccompanied children to sponsors may be unduly delayed by a lack of available PRS providers and services near the sponsor and therefore proposed at § 410.1210(a)(4), that it would not delay release if PRS are not immediately available (88 FR 68933).

Comment: A few commenters had recommendations for how PRS providers should furnish PRS. One commenter recommended updating the language in § 410.1210(b) that states ''in a way they effectively understand regardless of spoken language, reading comprehension, or disability to ensure meaningful access for all eligible children, including those with limited English proficiency'' to read, ''in a developmentally, culturally, and trauma-informed way that ensures effective understanding, regardless of

age, reading comprehension, or disability to ensure meaningful access for all eligible children, including those with limited English or Spanish proficiency.'' This commenter recommended the changed language to recognize that many children may speak an Indigenous language as their preferred language. Further, a separate commenter recommended that ORR guarantee language access in PRS so that PRS take place in the child and the sponsor's preferred language(s).

Another commenter recommended PRS be furnished in a manner sensitive to the individual needs of the sponsor in addition to the individual needs of the unaccompanied child. This commenter also recommended that PRS be furnished in a way that sponsors effectively understand regardless of spoken language, reading comprehension, or disability to ensure meaningful access for sponsors. Additionally, this commenter recommended adding ''or preferred languages other than English'' after ''with limited English proficiency.''

Response: As previously stated, ORR is articulating here the broad policies governing PRS and not all of the operational specifics of PRS implementation. With respect to more detailed requirements for PRS providers, ORR notes that many of the commenters' recommendations are reflected in its revised PRS policies. For example, under current ORR policy, which is consistent with this final rule, PRS providers must use evidence-based child welfare best practices that are culturally- and linguistically-appropriate to the unique needs of each child and are grounded in a trauma-informed approach. Additionally, under ORR policy, PRS providers must make every effort to conduct PRS in the preferred language of the released child, which would include languages other than English as recommended by the commenter. If the PRS provider is not highly proficient in the child's preferred language, they must use an interpreter. ORR policy also requires that PRS case managers may help connect children with communities, groups, and activities that foster the growth of their personal beliefs and practices and that celebrate their cultural heritage.[189]

ORR recognizes its obligation under applicable laws, regulations, and guidance from the Department, and as set forth in Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency,* to ensure meaningful access to its programs and services for individuals with limited English proficiency (LEP); this obligation extends to LEP sponsors when communicating with PRS providers and participating in PRS. As noted above, ORR did not intend for this section to describe all of the specific requirements of implementation of PRS requirements. ORR appreciates and will consider the recommendations received for further improving access to and participation by sponsors with respect to PRS in future policymaking in this area.

Comment: One commenter recommended ORR revise § 410.1210(b)(1) through (12) to require PRS providers to deliver education, information, and assistance to unaccompanied children and sponsors and not just sponsors. This commenter stated that the children may be responsible for many aspects of their care or need the information provided to the sponsors. Another commenter recommended ORR revise § 410.1210(b)(12) to make additional service areas at the request of the sponsor in addition to the unaccompanied child.

Response: ORR agrees that PRS providers should deliver education, information, and assistance to unaccompanied children in addition to the sponsors when appropriate. Accordingly, ORR is revising § 410.1210(b)(1), (b)(3) through (6), and (b)(8) through (11) to state that the PRS provider will deliver education, information, and assistance, where appropriate, to the unaccompanied children in addition to the sponsors.

ORR declines to add ''children'' into the PRS services listed at § 410.1210(b)(2) and (7) because these service areas focus on the sponsor to ensure the unaccompanied child's safety and well-being after release. Specifically, the PRS services at § 410.1210(b)(2) and (7) address legal related actions the sponsor may have to take regarding the unaccompanied child's immigration status and actions the sponsor must take to ensure the child receives medical services. ORR notes that it is finalizing at § 410.1210(b)(7), as proposed in the NPRM, that PRS providers shall provide the child and sponsor with information and referrals to services relevant to health-related considerations for the unaccompanied child (88 FR 68934). ORR also notes that it provides additional guidance regarding the delivery of certain education, information, and assistance to children after release in its revised PRS policies, which is consistent with this final rule.[190] ORR will monitor implementation of the regulations and consider the commenters' recommendations for future policymaking in this area.

Lastly, regarding the commenter's recommendation to revise § 410.1210(b)(12) to include the sponsor, ORR agrees with this recommendation and is revising § 410.1210(b)(12) to specify that the sponsor can also request the services.

Comment: A commenter recommended ORR develop standardized training for PRS grantees to ensure consistent provision of PRS that is sensitive to the child's individual needs, in a way the child understands (regardless of language or ability), and meets the child's needs.

Response: ORR will evaluate whether standardized training is needed, but believes it is neither necessary nor appropriate to specify such training in regulation.

Comment: A few commenters had recommendations for funding PRS. One commenter supported the PRS service areas and recommended that ORR allocate funds for specific services. For example, the commenter recommended that instead of PRS providers referring children for mental health services, ORR should fund mental health services for children who are most at-risk and ineligible or unable to access health insurance programs. Another commenter recommended that ORR not reduce funding for the PRS services listed at § 410.1210(b) based on the availability of appropriations.

Response: As discussed in section VI., funding for the UC Program's services is dependent on annual appropriations from Congress and accordingly, § 410.1210(b) specifically mentions that PRS are limited to the extent appropriations are available. ORR will consider the commenters' recommendations if funding for UC Program services changes.

Comment: Several commenters recommended that ORR include additional service areas that PRS should support, or requested that ORR clarify the PRS service areas described at § 410.1210(b). One commenter recommended that PRS providers should help sponsors apply for patient assistance or charity care programs, which the commenter stated is critical for children released to sponsors in States where the child does not qualify for medical insurance, such as Medicaid, due to immigration status. Another commenter recommended including dental services as a required PRS service area. Another commenter recommended clarifying § 410.1210(b)(3) to reflect that sponsors may need additional assistance to effectuate decision-making in addition

to guardianship, such as parental power of attorney and complying with education and medical consent laws. Additionally, a commenter expressed the importance of children receiving education and support so they can continue attending school and pursuing safe and healthy work opportunities appropriate for minors. This commenter recommended PRS include connection to legal service providers to ensure children and families receive assistance if a child is in an exploitive job, stating that this would help protect children from exploitive labor. One commenter recommended adding housing as a PRS area, stating that housing is often a significant area of stress for sponsors and a reason that children may need to work. Another commenter recommended PRS providers provide sponsors and unaccompanied children information about alternative temporary housing and emergency and crisis response resources. One commenter expressed concern that the list of PRS did not include services for children who go missing, cultural traditions, and supporting integration and independence, and requested that ORR clarify if these areas are no longer considered PRS. Another commenter recommended ORR expand the scope of PRS to explicitly include acculturation and integration services to help unaccompanied children cope with stressors by connecting them to organizations that offer culturally and linguistically responsive services. A few commenters recommended PRS include health care resources for LGBTQI+ youth.

Response: Section 410.1210(b) provides a non-exhaustive list of service areas that PRS providers may support, and ORR notes that § 410.1210(b)(12) states that PRS providers may assist the sponsor and unaccompanied child with accessing ''other services'' not specifically enumerated. ORR believes this language is sufficiently broad to cover services such as those recommended by commenters. Lastly, ORR notes that its revised PRS policies further describe some of the services recommended by commenters.[191]

Comment: A few commenters did not support guardianship as a PRS service. Specifically, a commenter did not support including guardianship because, the commenter suggested, it will likely create confusion in States where the term ''guardianship'' has different meanings and/or States use different terms to refer to an adult's legal responsibility to care and make decisions for a child. Further, this commenter stated that they have seen well-meaning community service providers advise children and their relatives to seek custody or guardianship without first consulting with an attorney to understand the impact that custody or guardianship might have on the child's eligibility for immigration relief. Additionally, another commenter did not support including guardianship and stated that ORR should not interfere with issues that arise with a state's child protective services agency when a sponsor is not a legal guardian or custodian. The commenter instead recommended that ORR provide training to child protective services workers on challenges faced by unaccompanied children, the family unification process, and the difference between sponsorship and legal guardianship or custody, and the commenter also recommended that ORR create a hotline for child protective services workers to call with questions related to unaccompanied children. Additionally, the commenter recommended legal service providers educate child protective services workers on immigration relief for unaccompanied children and how those workers can support these children. Another commenter recommended that instead of PRS providers educating sponsors on guardianship, PRS providers should advise sponsors to seek legal counsel to understand options and the legal requirements within the applicable State. This commenter stated that PRS providers providing sponsors recommendations on legal guardianship could be construed as providing legal advice and noted the variations in legal guardianship requirements and uses among States.

Response: ORR disagrees that PRS services should not include guardianship because this is an important service for unaccompanied children and sponsors who do not have legal guardianship of the children in their care. ORR acknowledges that guardianship has different meanings and requirements among the States, and accordingly proposed in the NPRM at § 410.1210(b)(3) that a PRS provider may assist the sponsor in identifying the legal resources to obtain guardianship, which would include legal service providers that could assist the sponsor on understanding the options and legal requirements in the applicable State (88 FR 68988).[192] ORR appreciates the commenters' recommendations to educate and train child protective services workers and have a hotline available for these workers. ORR notes that it has an existing hotline, the ORR NCC, that PRS providers, and any interested party caring for an unaccompanied child, may call to be connected with relevant information. With respect to training child protective services workers on various aspects of the post-release needs of unaccompanied children, although these recommendations are outside the scope of this final rule, ORR will take them into consideration for future policymaking in this area.

Lastly, ORR does not agree with the comment that a PRS provider educating the sponsor and child on guardianship could be construed as legal advice. As proposed at § 410.1210(b)(3), the PRS provider educates the sponsor and child on the benefits of obtaining legal guardianship and then refers the sponsor to legal resources if the sponsor is interested in pursuing legal guardianship. ORR notes that under § 410.1309(b), unaccompanied children would have access to legal services, to the extent funding is available, and children and their sponsors could consult with legal counsel about guardianship.

Comment: A few commenters recommended ORR provide a definition of ''additional consideration'' at § 410.1210(c) as proposed in the NPRM. These commenters also recommended ORR provide specifics regarding PRS eligibility for unaccompanied children requiring additional consideration should ORR have inadequate appropriations to achieve universal PRS by 2025.

Response: ORR clarifies that ''additional consideration'' means that ORR may prioritize referring unaccompanied children with certain needs listed at § 410.1210(c)(1) through (10) for PRS if appropriations are not available to offer PRS to all children. To clarify this in the regulation, ORR is finalizing revisions to § 410.1210(c) to state ''*Additional considerations for prioritizing provision of PRS.* ORR may prioritize referring unaccompanied children with the following needs for PRS if appropriations are not available for it to offer PRS to all children.'' ORR also notes that it is clarifying at § 410.1210(a)(3) that ORR may give additional consideration, consistent with § 410.1210(c), for cases involving unaccompanied children with mental health or other needs who could particularly benefit from ongoing assistance from a community-based service provider, to prioritize potential cases as needed. Additionally, ORR proposed the non-exhaustive list at this section of the NPRM to describe categories of unaccompanied children who, based on their particular needs or circumstances, would particularly benefit from PRS (88 FR 68934). ORR

notes this list is distinguishable from § 410.1210(b) in this final rule, which describes a non-exhaustive list of potential PRS service areas. Lastly, ORR appreciates the commenters' recommendation to provide specifics regarding PRS eligibility for unaccompanied children requiring additional consideration should ORR have inadequate appropriations to achieve universal PRS by 2025. ORR will take this recommendation into consideration for purposes of future policymaking in this area.

Comment: A commenter recommended ORR clarify that unaccompanied children with disabilities included children with developmental delays and mental/health behavioral health issues.

Response: ORR thanks the commenter for their recommendation and agrees that unaccompanied children with disabilities include children with developmental and mental health behavioral health issues. ORR is not codifying this clarification at § 410.1210(c)(2), but refers the commenter to the definition of disability, as used in this rule, at § 410.1001.

Comment: A few commenters supported the inclusion of unaccompanied children identifying as LGBTQI+ requiring additional consideration for PRS. One commenter recommended changing ''unaccompanied children with LGBTQI+ status'' to ''unaccompanied children who identify as LGBTQI+.''

Response: ORR thanks the commenters for their support. ORR has revised § 410.1210(c)(3) to ''unaccompanied children who identify as LGBTQI+,'' and is finalizing this revision at § 410.1210(c)(3).

Comment: A few commenters requested that ORR clarify how considering LGBTQI+ status or identity for PRS would impact faith-based organizations that provide PRS to unaccompanied children.

Response: ORR is committed to providing services described in this section to all unaccompanied children, including those who identify as LGBTQI+. Section 410.1210(c) provides a non-exhaustive list of unaccompanied children who may be referred by ORR to PRS based on their individual needs. ORR expects PRS providers, including faith-based organizations, to provide services listed in § 410.1210(b) to unaccompanied children, including those who identify as LGBTQI+. ORR wishes to make clear that it operates the UC Program in compliance with the requirements of Federal religious freedom laws, including the Religious Freedom Restoration Act, and applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations. HHS regulations state, for example: ''A faith-based organization that participates in HHS awarding-agency funded programs or services will retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs.'' [193] These regulations also make clear that HHS may make accommodations, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.[194] ORR will continue to conduct its work consistent with these protections.

Comment: A few commenters recommended additional privacy protections for unaccompanied children who require additional consideration under § 410.1210(c). A commenter recommended PRS care providers honor a child's privacy to allow the child to voluntarily access the services the child needs if they are unable or unwilling to obtain the sponsor's or guardian's consent to receive PRS.

Response: At § 410.1210(i)(3), ORR is finalizing privacy protections for unaccompanied children and their sponsors, which includes requiring the PRS providers to have in place policies and procedures to protect information from being released and appropriate controls for information sharing. ORR notes that it did not intend for 45 CFR part 410 to govern or describe the entire UC Program, and that its updated PRS policies provide additional guidance on privacy protections for unaccompanied children and sponsors receiving PRS. As ORR implements these regulations, ORR will monitor and evaluate whether additional policymaking is necessary with respect to privacy protections.

Additionally, ORR agrees that in certain circumstances, unaccompanied children should have access to PRS even if they are unable or unwilling to obtain the consent of their sponsors; however, ORR disagrees that this should apply to all sponsor types. Accordingly, ORR is codifying its policy at new § 410.1210(h)(3) that if an unaccompanied child's sponsor (not including a parent or legal guardian) chooses to disengage from PRS and the child wishes to continue receiving PRS, ORR may continue to make PRS available to the child through coordination between the PRS provider and a qualified ORR staff member.[195]

Comment: A few commenters recommended additional categories of unaccompanied children who should have additional consideration for PRS at § 410.1210(c). Specifically, a few commenters recommended ORR add pregnant and parenting unaccompanied children to the list of unaccompanied children who receive additional consideration for PRS. Another commenter recommended ORR add unaccompanied children (infants through 12 years of age) to the list.

Response: At § 410.1210(a)(3), ORR is finalizing that it may offer PRS to all unaccompanied children and this will include the categories of unaccompanied children recommended by commenters—children who are pregnant and parenting and children under 12 years of age. ORR also notes that § 410.1210 describes a non-exhaustive list. ORR does not think it is necessary to codify additional categories in the final rule but will monitor implementation of this regulation to determine whether future policymaking is appropriate in this area.

Comment: A few commenters recommended ORR clarify how an unaccompanied child and sponsor would be referred for PRS when ORR receives a call to the ORR NCC and the child and sponsor are the subjects of situations that would have necessitated a NOC if they were receiving PRS. This commenter noted that if ORR receives a NOC from the PRS provider, ORR requires the PRS provider to follow-up with the child and sponsor and assess whether PRS is appropriate.

Response: ORR notes that the comment is outside the scope of this rule, which does not codify the operation of the ORR NCC. But ORR notes that its updated PRS policies provide that ORR may, at its discretion, also refer a released child to PRS at any point during the pendency of the child's immigration case and while the child is under age 18, if it becomes aware (*e.g.,* through a NOC, or a call to the ORR NCC) of a situation warranting such referral. In that event, ORR would require the relevant PRS provider to follow up with the child and assess whether PRS would be appropriate.[196]

Comment: A few commenters supported developmentally appropriate assessments for children as described in the NPRM at § 410.1210(d). One of these commenters also supported the requirement that PRS providers use trauma-informed and child-focused assessments to determine the child's level of care needed, stating that this approach supports early intervention, is

consistent with best practices, and ensures the individual needs of the child and sponsor are met and that they receive appropriately tailored services.

Response: ORR thanks the commenters for their support.

Comment: One commenter had a recommendation for how ORR can improve assessments for PRS, as proposed in the NPRM at § 410.1210(d). Specifically, the commenter recommended the assessment indicate the child's current level of need or care to ensure PRS are appropriately tailored to their diverse and evolving needs and aligns with the child's specific challenges and strengths.

Response: ORR agrees with the commenter's recommendation that the assessment for PRS must indicate the unaccompanied child's current level of need or care to ensure PRS are tailored to the child's individualized needs. ORR is revising § 410.1210(a)(3) to require ORR to make an initial determination of the level and extent of PRS, if any, based on the needs of the unaccompanied child and the sponsor to the extent appropriations are available. Additionally, ORR is clarifying at § 410.1210(a)(3) that PRS providers may conduct subsequent assessments of the needs of the unaccompanied child and sponsor that may result in a modification to the level and extent of PRS assigned. As a result, ORR does not believe further revisions are needed at § 410.1210(d).

Comment: A few commenters recommended ORR require the assessment be culturally appropriate. Specifically, one commenter recommended that a culturally appropriate assessment would protect the child's right to preservation of culture and identity. Another commenter recommended the assessment also be linguistically appropriate. This commenter also recommended ORR issue guidance regarding the use of professional interpreters during assessments.

Response: ORR again notes that it does not intend 45 CFR part 410 to govern or describe the entire UC Program. However, with respect to the commenters' recommendations, ORR notes that its revised PRS policies, which are consistent with these final regulations, require the use of evidence-based child welfare best practices that are culturally and linguistically appropriate to the unique needs of each child and are grounded in a trauma-informed approach. ORR also thanks the commenter for their recommendation that ORR issue guidance regarding the use of professional interpreters during assessments. Although ORR also declines to codify this recommendation in this final regulation, it notes that under its updated PRS policies, if the PRS provider is not highly proficient in the child's preferred language, they must use a qualified interpreter.[197]

Comment: A few commenters recommended ORR collaborate with PRS providers to develop a standardized assessment for all PRS providers, stating that variations within assessments have caused complications and resulted in PRS providers experiencing issues with data collection and in how PRS providers assess the need for PRS, which may result in discrepancies and protection gaps. One commenter recommended ORR provide guidance on suggestions and/or examples of appropriate standardized or validated assessments and tools and examples of culturally adapted or cross-cultural assessments, mentioning as examples the Refugee Health Screener-15 [198] and the Trauma History Profile.[199]

Response: Although the development of specific screening tools is outside the scope of this rule, ORR will continue to assess the effectiveness of the regulations and take these recommendations into consideration for future policymaking in this area.

Comment: A few commenters either did not support or expressed concern about PRS providers identifying traumatic events and symptoms. One commenter stated that discussing traumatic events and symptoms with children risks re-traumatizing them and instead, mental health professionals or pediatricians with trauma-informed training should conduct trauma screening. Another commenter stated this is outside the scope of PRS case managers' work; PRS providers do not have the requisite experience, education, and training to assess childhood trauma; and they cannot provide support when screening measures uncover trauma, except in cases of Level Three PRS, as described in ORR's updated PRS policies, where support includes clinical services.

Response: ORR declines to remove ''trauma-informed'' from the assessment because it is important for PRS providers' assessments to include a trauma-informed approach to accurately assess the unaccompanied child and the sponsor for their individualized needs so they can receive appropriate services to address those needs and ensure the safety and well-being of the child post-release. For example, ORR's revised policies for PRS services state that the impact of childhood trauma, in addition to other factors, must be part of the PRS provider's assessment of the child's medical and behavioral health needs so that they can refer the child to community health centers and healthcare providers. If the assessment did not include a trauma-informed approach, the PRS provider may not refer the child to services appropriate to the child's individualized needs. ORR also notes that it did not intend for § 410.1210 to describe all requirements for PRS providers and the revised PRS policies provide more guidance to PRS providers on how to work with children who have experienced trauma.

ORR also acknowledges the recommendation that mental health professionals or appropriately trained pediatricians conduct trauma screening. Although not included in this final rule, ORR notes that its updated PRS policies, which are consistent with this final rule, provide that PRS case managers may connect children, along with their sponsor family, with specialized services and provide psychoeducation on trauma and on the short- and long-term effects of adverse childhood experiences on the children and family.[200] However, this is done after screening the child. As ORR implements these regulations, it will monitor for any unintended consequences and consider the commenter's recommendations if it determines that future policymaking in this area is needed.

Finally, ORR acknowledges the commenter's concern that PRS case workers do not have the requisite experience, education, and training to assess trauma. Although not codified in this final rule, ORR notes under its updated PRS policies, a core competency for PRS providers is having a foundational knowledge of trauma-informed care and initial training for PRS providers must include childhood trauma and its long-term effects.[201] ORR believes that this updated policy will result in PRS case managers being appropriately trained to perform trauma-informed assessments.

Comment: A few commenters requested that ORR release additional guidance related to on-going check-ins and in-home visits, including the structure of such check-ins and visits. One commenter requested that ORR provide guidance to PRS providers on what actions the providers must follow if they are unable to contact the child after the child's release.

Response: ORR notes that its updated PRS policies provide further guidance on the structure for ongoing check-ins and in-home visits, as well as the actions PRS providers must follow if they are unable to contact the child after release.[202] For example, ongoing contact with the unaccompanied child and sponsor should be determined by the

level of need and support required, in consultation with the child and sponsor. With respect to home visits provided for in Levels Two and Three PRS, after the first in-home visit, PRS case managers must make monthly visits for six (6) months. Monthly visits may occur in-person or if there are no safety concerns, virtually. Further, at minimum, in-person contact in the sponsor's home must be established every 90 calendar days for Level Two PRS and weekly for the first 45 to 60 calendar days for Level Three PRS. ORR's updated policies further provide that the nature of home visits may vary depending on the extensiveness or level of PRS provided. Finally, with respect to loss of contact, ORR's updated policies provide that if the PRS case manager is unable to reach the child or sponsor by phone through reasonable attempts or if the child or sponsor declines an in-home visit, the PRS case manager should document all attempts made and the reasons, if known, for why contact was not made or services were declined (*e.g.,* child is safe and secure and no longer requires services, sponsor's working schedule conflicts with case manager's schedule for an in-home visit, etc.). If the PRS provider is concerned about the child's safety (*i.e.,* potential child abuse, maltreatment, or neglect), the PRS provider must follow the mandated reporting guidelines for the locality in which they are providing service. Further, PRS providers must submit a NOC if they are unable to contact the released child within 30 days of release or referral acceptance.

Comment: One commenter expressed concern that involving a sponsor in determining the appropriate methods, timeframes, and schedule for ongoing contact with the released unaccompanied child gives too much power to the sponsor, and also expressed concern about the lack of an enforcement mechanism.

Response: ORR appreciates the commenter's concern and believes the final rule, read together with its updated PRS policies, appropriately balances the need for sponsor involvement in the delivery of PRS with the need for protective measures for children. Proposed § 410.1210(e)(1) requires the PRS provider, not the sponsor, to make a determination regarding the appropriate methods, timeframes, and schedule for ongoing contact with the released unaccompanied child and sponsor. Additionally, ORR notes that its revised PRS policies provide additional guidance for PRS providers regarding the required methods, timeframes, and schedule for ongoing contact.[203]

Comment: Several commenters had recommendations regarding the duration of PRS in response to ORR proposing in the NPRM at § 410.1210(e)(2) and (h)(2) that PRS continue for six (6) months after release. Specifically, one commenter recommended all children receive PRS for at least three (3) months to ensure their successful transition into the community with regular face-to-face visits to continuously reassess the children. This commenter recommended higher risk children, such as those released to non-relative sponsors, receive at least six months of PRS and extending services as needed. Another commenter recommended ORR clarify that PRS can be provided to a released child for a full six months from the time the child's case is accepted by a PRS provider because a child's case is not always immediately accepted by a PRS provider due to capacity issues. One commenter recommended ORR provide each child with a discharge plan and PRS for at least six months. Another commenter recommended ORR provide all children with PRS for one-year post-release because all children would benefit from PRS and waitlists for PRS can be six months or more. Additionally, one commenter recommended that ORR be flexible in the duration of PRS based on the needs of the child and sponsor, stating that some cases may require longer-term support and six months of PRS may be insufficient. Another commenter recommended unaccompanied children be eligible to receive PRS until they become 21 years of age, which the commenter stated is consistent with the definition of a child under INA § 101(b)(1)(A), or they are granted voluntary departure or issued an order of removal, whichever occurs first.

Response: ORR agrees with the commenters' recommendations to consider longer timeframes and be flexible in the duration of PRS based on the needs of the unaccompanied child and sponsor. Accordingly, ORR is not finalizing § 410.1210(e)(2) as proposed in the NPRM (88 FR 68989). To allow for flexibility in how long PRS are furnished to children and their sponsors, ORR is revising § 410.1210(h)(2) to remove ''PRS for the unaccompanied child shall presumptively continue for not less than six months'' and clarifying that PRS may be offered until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure or lawful immigration status, or the child leaves the United States pursuant to a final order of removal.

Lastly, ORR declines to revise § 410.1210(h) to state that unaccompanied children are eligible to receive PRS until they turn 21 because this would be inconsistent with the definition of ''unaccompanied child'' that ORR is finalizing at § 410.1001 (''has not attained 18 years of age''), which is consistent with the definition under the HSA, 6 U.S.C. 279(g)(2).

Comment: A few commenters supported ORR's proposal to require PRS providers to make monthly contact with released children for up to six (6) months, as originally proposed in the NPRM at § 410.1210(e)(2). Additionally, a commenter further supported the use of technology to facilitate the check-ins, *i.e.,* virtual check-ins. This commenter stated the check-ins are crucial to ensure the sponsor is complying with ORR's requirements and properly caring for the child; prevent and detect any child labor, abuse, or trafficking; assess whether the child needs adjustment to the child's support; and ensure new PRS providers comply with ORR standards and provide timely and relevant support to the child and sponsor. Another commenter recommended a monthly in-person check-in with the child, which is confidential and outside the sponsor's presence, to assess the child's risk of abuse, neglect, trafficking, and other concerns. Lastly, a commenter recommended ORR set a standard timeframe and schedule of contact that would include, at a minimum, two check-ins for the first six months and then monthly for the next six months.

Response: ORR notes that in response to comment to consider longer timeframes and be flexible in the duration of PRS based on the needs of the unaccompanied child and sponsor, ORR is not finalizing § 410.1210(e)(2) as proposed in the NPRM (88 FR 68988 through 68989). To allow for flexibility in how long PRS are furnished to children and their sponsors, ORR is revising § 410.1210(h)(2) to remove ''PRS for the unaccompanied child shall presumptively continue for not less than six months'' and clarifying that PRS may be offered until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure or lawful immigration status, or the child leaves the United States pursuant to a final order of removal. ORR will take the commenters' recommendations into consideration for future policymaking in this area.

Comment: A few commenters expressed concern about the requirement at § 410.1210(e)(3), as proposed in the NPRM, that PRS providers document ongoing check-ins and home visits as well as the progress

and outcomes of those visits. These commenters also expressed concern about PRS providers documenting community resource referrals and their outcomes as described in the NPRM at § 410.1210(f)(2). These commenters stated increased data gathering on children post-release is problematic for privacy reasons without objectives on such data and the infrastructure to support data gathering. Further, these commenters requested that ORR clarify why ORR wants this data and how ORR plans to use it.

Response: ORR proposed in the NPRM, documentation requirements at § 410.1210(e)(3) and (f)(2) to ensure PRS providers keep accurate and comprehensive records of the services they provide to unaccompanied children and their sponsors (88 FR 68935). ORR's updated PRS policies are consistent with this requirement as well.[204] Further, at § 410.1210(i)(3) in this final rule, ORR is codifying privacy protections for unaccompanied children and their sponsors, which includes requiring PRS providers have in place policies and procedures to protect information from being released and appropriate controls for information sharing. ORR notes that its revised PRS policies provide additional guidance on privacy protections for unaccompanied children and sponsors receiving PRS, which are consistent with this section.[205] ORR believes these privacy protections reasonably address the commenters' concerns regarding protection of unaccompanied children's information. Additionally, ORR is finalizing at § 410.1210(i)(1)(i) that PRS providers must upload information into ORR's online case management system within seven (7) days of completion of the services. ORR notes that it provides consistent oversight of all components of a PRS provider's program and clarifies for commenters that it plans to review information uploaded into ORR's online case management system to monitor the PRS providers' activities under ORR policies and § 410.1210 to ensure quality care for children.[206]

Comment: A few commenters supported ORR's proposal that PRS providers connect the sponsor and unaccompanied child to community resources for the child, as needed, following the child's release. Another commenter supported the requirement that PRS providers document the referral and outcome of community resources, stating documentation is essential for understanding the scope and uptake of services accessed by children and sponsors to help identify potential gaps in services, and better understand whether the services meet the children's and sponsors' needs.

Response: ORR thanks the commenters for their support.

Comment: A few commenters expressed concern that ORR did not propose to enumerate the ways PRS providers should work with children and their sponsors to access community resources. A commenter recommended ORR specify what PRS providers should assess and when needs are identified, provide support in those areas of need. This commenter further recommended ORR require a minimum standard of what PRS providers should ensure regarding school enrollment, connection to legal services, and medical, dental, and mental health services. Another commenter expressed concern that the requirement is inadequate to address the potential challenges and barriers children and sponsors face in accessing education, health care, social services, and legal assistance in their communities, which may impact the integration and well-being of children and their sponsors, and recommended ORR facilitate their access and participation in such services. This commenter further recommended PRS providers provide children and their sponsors with information on the availability of community resources to support unaccompanied children and their sponsors.

Response: As ORR stated in the NPRM preamble for proposed § 410.1210(f)(1), ORR has opted not to enumerate ways that PRS providers could comply with this proposed requirement in the regulation, because the nature of such assistance varies by case (88 FR 68935). ORR further notes that PRS can also vary by the community and/or State where unaccompanied children and their sponsors are located. To provide PRS providers with additional guidance on how to work with unaccompanied children and sponsors to access community resources, ORR has issued updated PRS policies that include many of the recommendations from commenters.[207] Nevertheless, ORR will monitor implementation of this final rule and take these recommendations into consideration with respect to potential future policymaking in this area.

Comment: A number of commenters requested clarity on why ORR is unable to collect data on what specific Government resources children access.

Response: ORR clarifies that at § 410.1210(i)(1)(i), ORR is finalizing requirements for PRS providers to upload information, including any referrals to community resources and their outcomes at § 410.1210(f)(2), into ORR's case management system.

Comment: Several commenters expressed concern that the requirement at proposed § 410.1210(g)(1), that TVPRA-mandated PRS begin within 30 days, is too long and recommended that ORR require PRS providers to start services no later than 14 days after release. A few other commenters expressed concern that PRS providers currently do not have capacity to access PRS cases in real time and recommended continued efforts to clear the existing backlog of waitlisted cases so that new cases could be accepted as close to release as possible. These commenters also recommended that care provider facilities make referrals for PRS prior to release, stating that facilities refer most cases for PRS the day of release. Lastly, a few commenters stated that the timeframes in which ORR proposes PRS providers start PRS are nearly fully dependent on appropriations and available providers, and if ORR cannot guarantee funding, these commenters requested ORR clarify how to mitigate the impacts on these timeframes.

Response: ORR agrees with the commenters' concerns about the capacity of PRS providers and is revising § 410.1210(g)(1) to state PRS shall, to the greatest extent possible, start no later than 30 days after release if PRS providers are unable, to the greatest extent practicable, start services within two (2) days of release. ORR believes that this strikes the appropriate balance of the PRS providers' capacity concerns while ensuring unaccompanied children who are legally-mandated under the TVPRA to be offered PRS receive such services in a timely manner to ensure the child's safety and well-being after release. ORR will monitor implementation of § 410.1210 and will take into consideration the commenters' recommendations for policymaking, as needed, to specify the timeframes for starting PRS.

Additionally, ORR acknowledges the commenter's concerns about clearing the backlog of PRS referrals and funding PRS. ORR notes that it is committed to pursuing additional capacity based on resources allocated by Congress.

Comment: One commenter recommended ORR clarify whether children who receive an order of removal have their PRS discontinued and recommended removing this clause if PRS continues after an order of removal.

Response: ORR's historic policy has been that PRS would end upon the receipt of an order of removal. However,

after considering the commenter's recommendation, ORR is revising § 410.1210(h)(1) and (h)(2) to state that PRS shall continue until the child is granted voluntary departure, granted immigration status, or leaves the United States pursuant to a final order of removal, whichever occurs first. Providing PRS until a child leaves the United States pursuant to a final order of removal will promote their safety and well-being post-release.

Comment: A few commenters supported the records and retention proposals for PRS providers and offered some additional recommendations. Specifically, one commenter supported requiring PRS providers to have established administrative and physical controls to prevent unauthorized electronic and physical access to records and recommended ORR update the terminology ''controls,'' as used at § 410.1210(i)(2) in the NPRM, to external, national standards describing best practices for securely handling and maintaining sensitive and restricted information. Additionally, a few commenters recommended ORR provide technical support for the submission and maintenance of files and to address any questions or complications that may arise. These commenters also requested ORR consider the additional burden of sharing hard files for the relevant record retention period.

Response: ORR thanks the commenters for their support and recommendations for ORR's record and retention proposals at § 410.1210(i). ORR declines to change the terminology used at § 410.1210(i)(2), ''controls,'' because it believes the existing term reasonably describes standards ORR may establish, including any relevant external, national standards in current or future policymaking. With respect to the recommendation that ORR provide technical support, ORR will take that recommendation into consideration for future policymaking in this area. Lastly, ORR acknowledges the request to consider the additional burden of sharing hard files and will take this into consideration for future policymaking.

Comment: Several commenters did not support the requirement for PRS providers to upload all PRS documentation on completed services provided to unaccompanied children and sponsors to ORR's case management system within seven (7) days of completion of the services, and recommended alternative timeframes. A few commenters noted that current ORR policy requires PRS providers to upload case closure reports to ORR's case management system within 30 days of case closure, and the commenters recommended ORR finalize the 30-day policy to allow PRS providers additional time. A separate commenter recommended fourteen (14) days from the completion of services to upload all PRS documentation, stating 14 days is more manageable and appropriate for PRS providers. Another commenter stated the current timing in § 410.1210(i)(1) is ambiguous and recommends ORR clarify that ''completion of the services'' means completion of individual service activities and not the overall completion of the PRS provider's services to a child, *i.e.,* when the PRS provider closes the child's case.

Response: ORR notes PRS providers are already operating under a 7-day timeframe, pursuant to its updated PRS policies.[208] ORR is thus codifying existing practice. ORR notes that the 30-day timeframe the commenter mentioned relates to closing a case and that this is also existing practice under ORR's revised PRS policies.[209] ORR is finalizing § 410.1210(i)(1) as it was originally proposed in the NPRM to ensure PRS providers upload information for individual services in a timely manner. ORR will monitor implementation of § 410.1210(i)(1) to determine if any unforeseen consequences necessitate further policymaking.

Additionally, ORR clarifies that ''completion of the services'' in § 410.1210(i)(1) means the individual service provision (*e.g.,* client case notes, referral summaries, assessments, etc.), and that this provision codifies existing practice under its revised PRS policies.[210]

Comment: A commenter requested that ORR clarify whether the record management and retention requirements apply only to PRS providers or to other types of ORR programs such as standard programs, restrictive, influx care facilities, and heightened supervisions facilities.

Response: ORR clarifies that the record management and retention requirements at § 410.1210(i) apply to PRS providers. ORR is finalizing recordkeeping requirements for care provider facilities at redesignated § 410.1303(h) and (i).

Comment: A few commenters did not support providing PRS record access to ORR upon request and sharing information regarding released children and their sponsors. Specifically, one commenter did not support ORR obtaining access to PRS files upon request, PRS providers uploading documentation into ORR's case management system, and PRS providers providing active or closed case files to ORR, stating that ORR has relinquished physical and legal custody of the child. Another commenter did not support information sharing between ORR and PRS providers due to concerns that it will discourage children and sponsors from using PRS. A separate commenter recommended that PRS providers provide only aggregated nonidentifying data to ORR and further recommended that ORR not consider PRS casefiles to be ORR property because PRS providers are subject to different laws and best practices regarding ownership of children's records that may prohibit sharing records with ORR.

Response: Although ORR does not retain custody of unaccompanied children after releasing them from its custody, ORR has the authority under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to conduct follow-up services for unaccompanied children. ORR funds PRS providers to provide these follow-up services and because PRS providers are ORR grantees, under grant administration requirements, ORR is authorized to access grantee records. ORR also notes that requiring access to PRS records is consistent with HHS's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards, codified at 45 CFR part 75.[211] ORR's updated PRS policies further clarify that PRS providers may not release these records without prior approval from ORR except for limited program administration purposes.[212] These privacy and confidentiality requirements implement the TVPRA requirement to protect children from victimization and exploitation.

Additionally, ORR acknowledges the commenter's concern regarding PRS providers uploading information into ORR's case management system. At § 410.1210(i)(1)(i), ORR is finalizing that PRS providers must upload information into ORR's online case management system within seven (7) days of completion of the services. ORR believes it is necessary for PRS providers to upload this information to keep an electronic record that is accessible to ORR to facilitate ORR's oversight and monitoring of PRS providers to ensure they comply with ORR policies and the requirements under § 410.1210.

Further, as discussed above, ORR is finalizing privacy protections for unaccompanied children and their sponsors at § 410.1210(i)(3), which includes requiring PRS providers to have policies and procedures in place to protect information from being released to unauthorized users and have appropriate controls in place for

information sharing. ORR refers the commenters to previous discussions of these protections.

Comment: A few commenters opposed the requirement for PRS providers to obtain prior ORR approval before releasing records to third parties. One commenter opposed ORR approval for release to third parties because PRS providers' security and confidentiality controls prevent release of records to potentially dangerous parties. Another commenter opposed ORR approval for release to third parties and stated all records must be available upon request by any law enforcement agency and susceptible to FOIA requests including third-party agencies.

Response: ORR notes that it funds PRS providers to provide these follow-up services. Because PRS providers are ORR grantees, the records of unaccompanied children are the property of ORR, whether in the possession of ORR or its grantees, and ORR grantees may not release these records without prior approval from ORR. ORR is revising § 410.1210(i)(2)(iii) to clarify that PRS providers may not release records to any third party without prior approval from ORR, except for program administration purposes, which is consistent with the revised PRS policies.[213] ORR has these protections in place to ensure information is not exploited by unauthorized users to the detriment of released unaccompanied children. ORR notes that it will continue to adhere to the Privacy Act, and its related System of Records Notice (SORN), under which it may release records to law enforcement and other entities for certain authorized uses.[214] Finally, ORR notes that it will evaluate requests to release information to determine if the request is appropriate and may approve the request.

Comment: A commenter recommended that ORR exclude parents or legal custodians from the term ''third party'' at § 410.1210(i)(3)(iii) due to the commenter's concern that ORR's approval prior to a PRS provider releasing records interferes with the custodial rights of sponsors, particularly parents. The commenter stated parents and legal custodians have the authority to obtain records related to their children and to determine what type of information should be shared with third parties.

Response: ORR notes that consistent with the definition of ''case file'' set forth at § 410.1001, all records of unaccompanied children are the property of ORR. Such requirement is essential to ORR's ability to provide care and custody to unaccompanied children pursuant to its statutory authorities, including appropriately managing disclosures of children's information to protect from potentially harmful disclosures. ORR notes, with respect to parents, however, that as established in its SORN, unaccompanied child case file information, including PRS records, are treated as ''mixed'' systems of record that are subject to the Privacy Act.[215] Consistent with the Privacy Act, the parents and legal guardians of minors may act on behalf of their children for purposes of the Act—including requesting their records from ORR.[216]

Comment: A commenter requested that ORR clarify how § 410.1210(i)(3)(i) and § 410.1210(i)(2)(ii), as proposed in the NPRM, differ substantively. On the one hand, as proposed in the NPRM, § 410.1210(i)(3)(i) requires PRS providers to have written policies and procedures to protect information from being accessed by unauthorized users. On the other hand, as proposed in the NPRM, § 410.1210(i)(2)(ii) requires PRS providers to have established ''administrative and physical controls'' to prevent unauthorized access to both electronic and physical records.

Response: ORR notes that proposed § 410.1210(i)(2)(ii) and (i)(3)(i) contain similar requirements because they both require PRS providers to have administrative controls in place to protect against unauthorized use of information. ORR clarifies that § 410.1210(i)(2)(ii) contains general records management and retention requirements for PRS providers and § 410.1210(i)(3) contains additional privacy protections that PRS providers shall have in their written policies and procedures to safeguard the unaccompanied child's information.

Comment: A few commenters recommended ORR strengthen the privacy protections for children and their sponsors. A few of these commenters recommended that the children's and sponsors' information and data may not be released to third parties, including law and immigration enforcement agencies, without the written request or consent of the child and/or sponsor who is subject to the information request or a judicial order. Another commenter expressed concern that PRS providers will use non-secure communication channels and recommended PRS providers conduct services in-person.

Response: ORR notes that its updated PRS policies require PRS providers to encrypt electronic communications (including, but not limited to, email and text messaging) containing healthcare or identifying information of released children.[217] ORR also notes that it will continue to adhere to the Privacy Act, under which it may release records to law enforcement for the purposes described in the Privacy Act,[218] and the UC Program SORN.

Comment: A few commenters had recommendations regarding § 410.1210(i)(4), as proposed in the NPRM, regarding NOCs. One commenter recommended including a short, exhaustive list of situations that require a NOC in the regulatory text. Further, a separate commenter recommended ORR clearly define the criteria for NOC to help identify risks and respond to the risk promptly to ensure the safety of released children. Another commenter recommended ORR clarify the language in the preamble discussing situations that require a NOC and specifically recommended updating ''potential fraud'' to mean ''being a victim of fraud'' and clarifying what ORR means by ''media attention.'' Finally, a commenter recommended elimination of the situations that require a NOC, stating several of the situations are vague and not connected to the imminent safety of the child. This commenter recommended ORR instead require PRS providers to issue NOCs exclusively for concerns, based on reliable evidence, about the imminent safety of the released child.

Response: ORR clarifies that it intentionally did not propose in the NPRM to codify a list of situations in which PRS providers would be required to submit NOCs, to allow ORR the flexibility to specify the reasons in subregulatory guidance. ORR notes that its updated PRS policies currently describe such guidance.[219] ORR believes it would be more appropriate to issue subregulatory guidance because it anticipates that the types of situations where NOCs would be appropriate may evolve over time and are highly fact-dependent. Delineating subregulatory guidance would allow ORR to make iterative updates that correspond to emerging issues in the UC Program.

Comment: A commenter requested that ORR clarify the PRS provider's obligations once the provider submits a NOC and recommended the PRS provider conduct increased home visits and follow-ups until the PRS provider is satisfied that the issue has been resolved.

Response: ORR notes that although it has not codified its requirements in the final rule, such requirements are described in its policies. These policies describe, for example, the PRS provider's obligations once it submits a NOC.[220] ORR may also refer a released child to PRS at any point during the pendency of the child's immigration

case and while the child is under age 18, if ORR becomes aware (*e.g.,* through a NOC, or a call to the ORR NCC) of a situation warranting such referral. ORR would then require the relevant PRS provider to follow up with the child and assess whether PRS would be appropriate. ORR will determine the appropriate level for which to refer all children to PRS depending on the needs and the circumstances of the case and will make PRS referrals accordingly. Under its updated PRS policies, ORR specifies the check-ins and home visits required depending on the level of PRS ORR determines appropriate.[221]

Comment: One commenter requested ORR to clarify the purpose of requiring PRS providers to submit NOCs after a child is released and requested ORR clarify what it intends to do with NOCs given ORR does not have custody of a child after release.

Response: Although ORR does not retain custody of unaccompanied children after releasing them from its custody, ORR has the authority under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to conduct follow-up services for unaccompanied children. A significant reason for requiring NOCs is to promote the safety of unaccompanied children, even out of ORR's legal custody, consistent with its statutory obligations.[222] As further set forth in its policies, ORR may refer NOCs to appropriate authorities where a child's welfare may be at risk. It is also important for ORR to receive NOCs as a matter of responsible program administration, particularly with respect to services funded by the agency. Finally, ORR notes that its updated PRS policies further describe what ORR does with NOCs once received.[223]

Comment: A commenter recommended that PRS providers document NOCs within three (3) business days of first suspicion or knowledge of the event(s) instead of the proposed 24-hour turnaround time, stating this would allow PRS caseworkers to carry out an intervention with the child and family, report the event(s) to the appropriate investigative agencies, and document the event(s) for ORR in a case note.

Response: Due to the serious nature of the reasons for concern necessitating the PRS provider to submit a NOC, ORR does not agree with the commenter's recommendation to lengthen the amount of time for PRS providers to submit a NOC. ORR is finalizing at § 410.1210(i)(4)(ii) that PRS providers shall document and submit NOCs to ORR within 24 hours of first suspicion or knowledge of the event(s) to ensure the child's safety and well-being post-release.

ORR did not receive any comments regarding the amount of time PRS providers would have under the case closure proposal at § 410.1210(i)(5) and notes that in the NPRM, it notified interested parties that ORR anticipated that it may require PRS providers to complete a case closure form and upload it to ORR's online case management system within 72 hours of a case's closure (88 FR 68936). ORR is finalizing at § 410.1210(i)(5)(iii) a requirement that PRS providers must upload any relevant forms into ORR's case management system within 30 calendar days of a case's closure. Based on the feedback ORR received in response to the seven (7) day timeframe for submitting information under § 410.1210(i)(1), ORR believes 30 days is an appropriate amount of time to allow PRS providers to review and finalize documentation for case closures.

Comment: ORR sought public comment on whether it should consider codifying SWB calls in this final rule or in future rulemaking and whether ORR should integrate SWB calls into PRS, including the factors that should be considered in doing so. A few commenters supported ORR integrating SWB calls in PRS stating this could enhance their effectiveness because PRS providers work with children post-release and research and find resources, develop relationships and partnerships, and engage with community stakeholders where children are released.

In contrast, a few commenters opposed ORR integrating SWB calls into PRS because PRS providers lack capacity to provide these calls and instead, recommended ORR codify SWB calls and require ORR to be responsible for SWB calls. Several commenters expressed concern that due to current funding levels of PRS and limited provider capacity, integrating SWB calls into PRS would place additional strain on PRS providers and lengthen the waitlist for PRS, and the commenters recommended additional funding if SWB calls are integrated into PRS.

Several commenters had recommendations for how ORR could improve SWB calls. One commenter recommended ORR provide various means of communication for SWB calls, rename them ''SWB checks,'' and permit communication via SMS text or other texting services. This commenter recommended ORR continue to refine SWB checks to optimize accessibility, cultural competency, building trust, and connection to services. Another commenter recommended SWB calls provide an opportunity to children and/or sponsors to communicate with a neutral individual to request assistance, a change in PRS provider or services, or to decline services. Additionally, the commenter recommended personnel who conduct the SWB checks should have proficiency in languages other than English, access to qualified interpreters, experience working with youth and immigrant families, and training in child welfare and other relevant areas.

Another commenter recommended that SWB calls focus on the interim time between an unaccompanied child's release and the start of PRS. Lastly, a few commenters expressed concern regarding the rate of unanswered SWB calls, the unknown whereabouts of released children, and sponsors reporting children as runaways or missing while under their care. One of these commenters recommended ORR conduct an analysis of ways to address released minors who are reported missing by their sponsors.

Response: ORR thanks the commenters for their support, recommendations, and concerns. After considering the comments received, ORR is not codifying SWB calls into this final rule and will take into consideration the commenters' concerns and recommendations for future policymaking in this area.

Comment: ORR sought public comment on updating its policies to three levels of PRS, as described in the preamble above. Several commenters supported ORR updating its policies to provide three levels of PRS, stating the levels benefit children and address their needs, strengthen PRS providers' delivery and management of PRS, and foster standardization and consistency among PRS providers. Additionally, a few of these commenters also supported codifying PRS levels in this final rule. A few commenters supporting the three levels of PRS also expressed concern about each level having different levels of engagement, stating the language is vague and presumes the amount of contact rather than variation in service. These commenters recommended ORR specify the type and frequency of contact for each level. One commenter asked ORR to clarify how and when it determines levels, stating it was unclear whether levels are assigned prior to referring for PRS.

A few commenters expressed concern about PRS Level One SWB checks. Specifically, a commenter expressed concern about PRS providers conducting Level One PRS SWB check-ins virtually. Another commenter expressed concern with describing Level One services as SWB checks,

stating these are insufficient for all children, and recommended SWB checks be distinct from PRS because they do not align with the goals of PRS. Instead, the commenter recommended that Level One PRS allow for virtual case management due to the complexity of the child's case. This commenter also stated that more unaccompanied children would benefit from Level Two PRS.

Additionally, a few commenters had recommendations or requested clarity for Level Three PRS. A few commenters requested ORR clarify intensive home engagements and the desired outcome for Level Three PRS. One commenter recommended revising the current policy for Level Three providers and aligning requirements with available resources. This commenter also stated that ORR's updated PRS policies imply the preferred intervention for Level Three PRS is from PRS providers with Trauma-Focused Cognitive Behavioral Therapy (TFCBT) training. The commenter expressed concern that TFCBT training is unattainable for PRS providers due to lack of ORR funding and recommended ORR fund PRS providers to obtain this training and hire qualified clinical staff to supervise this level of intervention.

A few commenters had recommendations and concerns regarding assessments and re-evaluations for PRS. Specifically, one commenter supported the PRS provider's assessment including the level of PRS to be provided and stated this aligned with the international law requirement to integrate unaccompanied children in the community. The commenter recommended extra measures in the assessment to tailor PRS to address the child's needs. Another commenter recommended ORR outline in its subregulatory guidance the frequency with which ORR requires PRS providers to re-evaluate the child's level of care, stating monthly evaluations are adequate unless the PRS provider anticipates significant changes and recommended ORR provide examples of factors PRS providers should consider when deciding the frequency of contact. A few separate commenters expressed concern about having different assessments for PRS providers, stating each provider will have varying definitions of cases that merit Level One, Two, or Three PRS and recommended uniform assessments.

Further, a commenter recommended ORR require that Level Three PRS include weekly contact for 45–60 days, or longer if necessary. Another commenter recommended extending the proposal that PRS providers make at least monthly contact, either in-person or virtually, for six months after release to all unaccompanied children and their sponsors regardless of the PRS Level because it allows PRS providers to regularly assess level of care. One commenter recommended that all children and sponsors who would like a PRS case manager have access to one for at least six months, including in-home visits if desired.

Response: ORR thanks the commenters for their support, recommendations, and concerns. As stated above, in this final rule, ORR is not codifying standards related to differing levels of PRS. Rather, ORR has updated its PRS policies to describe three levels of PRS in alignment with ORR's discussion in the preamble to the NPRM (88 FR 68934 through 68935).

Additionally, in this final rule, ORR is revising § 410.1210(a)(3) to require ORR to make an initial determination of the level and extent of PRS, if any, based on the needs of the unaccompanied child and the sponsor and the extent appropriations are available. ORR is clarifying at § 410.1210(a)(3) that PRS providers may conduct subsequent assessments based on the needs of the unaccompanied child and the sponsor that may result in a modification to the level and extent of PRS assigned. ORR notes that these revisions are aligned with its updated PRS policies, which specify additional guidance on the assessment requirements. As ORR continues to make refinements to its PRS policies and will take into consideration the commenters' concerns and recommendations to inform that process.

Comment: One commenter recommended that when PRS providers discharge children and their sponsors from PRS, the PRS providers should connect the children and sponsors to local community-based organizations to ensure an established support network and readily accessible services if needed.

Response: ORR thanks the commenter for the recommendation and notes that PRS providers refer unaccompanied children and sponsors to community resources pursuant to § 410.1210(f), as recommended by the commenter. Further, ORR expects that even if ORR-funded PRS cease, unaccompanied children and sponsors referred to such community resources may continue receiving services from those resources. However, ORR will monitor implementation of this final rule and consider this recommendation for future policymaking in this area as appropriate.

Comment: A few commenters recommended non-parent sponsors have access to PRS. These commenters stated non-parent sponsors should receive PRS because they may need assistance with enrolling children into school or daycare, obtaining medical treatment for the children, securing signed power of attorney forms from parents, complying with educational and medical consent laws, and/or securing court orders of custody or guardianship.

Response: ORR clarifies that § 410.1210 does not limit PRS to only parent sponsors and uses the term ''sponsor'' to include all types of sponsors.

Comment: A number of commenters expressed concern that ORR does not know the whereabouts of a large number of unaccompanied children released from its care, with some recommending a formal audit and investigation into the children's whereabouts before finalizing the rule. Additionally, several commenters expressed concern about following up with released children to ensure their safety and well-being. A few commenters expressed concern about the lack of ORR follow-up after a child has been released to a sponsor, with some commenters emphasizing the need to hold sponsors accountable in cases where they violate the terms of the Sponsor Agreement or abuse, neglect, or traffic children. Another commenter expressed their view that ORR conducts minimal follow-up on releases and the proposed rule would make follow-up discretionary. A few commenters recommended the Government check in on children after release, and one commenter recommended more routine and frequent checks to ensure the safety and well-being of released children. Another commenter recommended the Government physically check on the children through unannounced visits several times per year and coordinate with local law enforcement. One commenter recommended ORR document follow-ups with children after they are released.

Response: ORR understands that concerns that ORR does not know the whereabouts of a large number of unaccompanied children was in reference to media reporting regarding children with whom ORR was unable to make direct contact during follow-up calls after they were released from ORR custody. Although ORR's custodial authority ends when a child is released from ORR care, ORR has the authority under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to conduct follow-up services for unaccompanied children.

Pursuant to § 410.1203(c), a sponsor agrees to provide for an unaccompanied

child's physical and mental well-being, ensure the child's compliance with DHS and immigration court requirements, adhere to Federal and applicable State child labor and truancy laws, and notify appropriate authorities of a change of address, among other things. ORR has policies in place to promote unaccompanied children's safety and well-being after they have been released from ORR care to the sponsor. For example, as provided in § 410.1210(a)(2) and (3), ORR provides PRS to certain unaccompanied children, and subject to available funds, all unaccompanied children are eligible for PRS. Additionally, under existing ORR policies, ORR care provider facilities are required to make at least three SWB calls to speak with the child and sponsor individually to determine if the child is still residing with the sponsor, enrolled or attending school, aware of any upcoming court dates, and otherwise safe, as well as to assess if either the child or the sponsor would benefit from additional support or services. Although many sponsors and children may choose not to answer a call from an unknown phone number or because they may be fearful of Government entities, or they may simply miss the call, in FY 2022, ORR care provider facilities made contact with either the child, the sponsor, or both in more than 81 percent of households. Additionally, some children who have not answered a SWB call, have still been accounted for through the provision of PRS, legal services, or the ORR NCC.

Further, ORR notes that its revised PRS policies describe additional requirements for the frequency of on-going contact during PRS, which varies based on the level, with in-person visits required for Levels Two and Three PRS.[224] Additionally, pursuant to its updated PRS policies, if PRS providers are unable to reach the child and sponsor, and there is a safety concern related to potential child abuse, maltreatment, or neglect, PRS providers must follow the mandated reporting guidelines for the locality in which they are providing services, which may involve contacting local law enforcement and requesting a well-being check on the child, in addition to submitting a NOC. Finally, ORR will monitor the implementation of the regulations. If additional protections are needed for unaccompanied children after release, ORR will take the commenters' recommendations into consideration for future policymaking.

Comment: One commenter recommended ORR hold monthly listening sessions with at least one representative from each PRS provider so that providers could provide feedback on ORR policy changes and inform ORR on potential issues that could impact the proposed policies. Additionally, this commenter recommended ORR solicit feedback in formats such as surveys, questionnaires, and digital suggestion boxes, and ORR timely respond to this feedback.

Response: ORR regularly engages with PRS providers, including through ORR staff assigned to liaise with and oversee PRS providers. Further, although the recommendation that ORR hold monthly listening sessions with at least one representative from each PRS provider is outside the scope of this final rule, ORR will take it into consideration for future policymaking.

Comment: A commenter recommended ORR require a formal review conducted by an independent party within the first six months after release to assess the sponsor's ability and willingness to care for the released child until the child reaches age 18.

Response: This recommendation would represent a significant change from PRS as contemplated in the NPRM, and is outside the scope of this final rule. Nevertheless, ORR will take this into consideration for future policymaking regarding PRS.

Comment: A commenter supported ORR's updates to its PRS policies to allow children to continue to receive PRS if the child's sponsor chooses not to continue. This commenter recommended ORR create guidelines to ensure an unaccompanied child can make meaningful and confidential decisions about receiving PRS when the sponsor has decided not to participate and to include protections PRS providers will follow to ensure they safely and confidentially maintain contact with the child. Further, this commenter recommended ORR issue specific regulations requiring the recorded affirmative participation of unaccompanied children in the decision-making process to receive PRS. Lastly, the commenter recommended the guidelines be consistent with the applicable State and Federal law.

Response: ORR thanks the commenter for the support of its updated PRS policies. With respect to the recommendation that ORR create guidelines to ensure that unaccompanied children can make meaningful and confidential decisions about receiving PRS when the sponsor has decided not to participate, and to describe requirements on PRS providers in such situations, ORR wishes to clarify that unaccompanied children can continue to receive PRS even when sponsors, who are not parents or legal guardians, choose not to, and ORR is codifying this at § 410.1210(h)(3).

With respect to the recommendation that ORR issue specific regulations requiring the recorded affirmative participation of unaccompanied children in the decision-making process to receive PRS, and that such guidelines be consistent with applicable State and Federal law, ORR declines to implement the recommendation in this final rule. However, ORR will consider reviewing its revised PRS policies to determine how it would implement this recommendation, as well as the burden of implementing it, to inform future policymaking.

Comment: One commenter expressed concern that there are no penalties for PRS providers failing to meet the requirements in § 410.1210.

Response: ORR did not propose penalties in the NPRM, and has not incorporated them in this final rule, because it does not intend 45 CFR 410 to govern or describe the entire UC Program. ORR notes that all its grantees both agree to abide by ORR regulations and policies, but are also subject to requirements set forth at 45 CFR part 75.[225] Further, ORR notes that its revised PRS policies specify other follow-up and corrective actions that ORR may take if a PRS provider is found to be out of compliance with ORR policies or procedures, and ORR will communicate the concerns in writing to the Program Director or appropriate person through a written monitoring or site visit report, with corrective actions and child welfare best practice recommendations.[226]

Final Rule Action: After consideration of public comments, ORR is making the following modifications to § 410.1210. ORR is revising the first sentence of proposed § 410.1210(a)(2) to state, ''ORR shall offer post-release services (PRS) for unaccompanied children for whom a home study was conducted pursuant to § 410.1204.'' ORR is revising the end of the first sentence of § 410.1210(a)(3) to state, ''ORR may offer PRS for all released children.'' ORR is revising the second sentence of § 410.1210(a)(3) to state, ''ORR may give additional consideration, consistent with paragraph (c), for cases involving unaccompanied children with mental health or other needs who could particularly benefit from ongoing assistance from a community-based service provider, to prioritize potential cases as needed.'' ORR is revising the beginning of the third sentence of § 410.1210(a)(3) to state, ''ORR shall make an initial determination of the level . . .'' ORR is adding a sentence to

the end of § 410.1210(a)(3) to state, ''PRS providers may conduct subsequent assessments based on the needs of the unaccompanied children and the sponsors that result in a modification to the level and extent of PRS assigned to the unaccompanied children.'' ORR is revising § 410.1210(b)(1), (4), and (6) to add ''and unaccompanied children'' after ''sponsors.'' ORR is revising the first sentence of § 410.1210(b)(3) to add ''and unaccompanied child'' after ''sponsor.'' ORR is revising the first sentence of § 410.1210(b)(5) to add ''shall assist the sponsors and unaccompanied children'' after ''with school enrollment and . . .'' Due to a drafting error, ORR is revising the second sentence of § 410.1210(b)(5) to state ''exceed the State's maximum age requirement for mandatory school attendance.'' ORR is revising the first sentence of § 410.1210(b)(8) to add ''and unaccompanied child'' after ''sponsor.'' ORR is revising § 410.1210(b)(9), (10), and (11) to add ''and unaccompanied child'' after ''sponsor.'' ORR is revising § 410.1210(b)(12) to add at the end of the sentence ''or sponsor.'' ORR is revising the paragraph heading for § 410.1210(c) to state ''*Additional considerations for prioritizing the provision of PRS*.'' ORR is revising § 410.1210(c) to state ''ORR may prioritize referring unaccompanied children with the following needs for PRS if appropriations are not available for it to offer PRS to all children: . . .'' ORR is revising § 410.1210(c)(3) to state ''Unaccompanied children who identify as LGBTQI+.'' ORR is not finalizing § 410.1210(e)(2) as proposed in the NPRM, and as a result, is updating the numbering for proposed § 410.1210(e)(3) and finalizing it as § 410.1210(e)(2). ORR is revising § 410.1210(g)(1) to state ''For a released unaccompanied child who is required under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to receive an offer of PRS . . . PRS shall, to the greatest extent possible, start no later than 30 days after release.'' ORR is revising § 410.1210(g)(2) to state ''. . . but is not required to receive an offer of PRS following a home study . . .'' ORR is revising § 410.1210(h)(1) to state ''For a released unaccompanied child who is required to receive an offer of PRS under the TVPRA at 8 U.S.C. 1232(c)(3)(B), PRS shall be offered for the unaccompanied child until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure, granted immigration status, or the child leaves the United States pursuant to a final order of removal, whichever occurs first.'' ORR is revising § 410.1210(h)(2) to state ''For a released unaccompanied child who is not required to receive an offer of PRS under the TVPRA at 8 U.S.C. 1232(c)(3)(B), but who receives PRS as authorized under the TVPRA, PRS may be offered for the unaccompanied child until the unaccompanied child turns 18, or the unaccompanied child is granted voluntary departure, granted immigration status, or the child leaves the United States pursuant to a final order of removal, whichever occurs first.'' ORR is adding § 410.1210(h)(3) to state ''If an unaccompanied child's sponsor, except for a parent or legal guardian, chooses to disengage from PRS and the child wishes to continue receiving PRS, ORR may continue to make PRS available to the child through coordination between the PRS provider and a qualified ORR staff member.'' ORR is revising § 410.1210(i)(1) to remove ''keep'' and replace with ''maintain''. ORR is revising § 410.1210(i)(3)(i) to remove ''sensitive.'' ORR is revising § 410.1210(i)(3)(iii) to include at the end, ''except for program administration purposes.'' ORR is revising § 410.1210(i)(5) to add § 410.1210(i)(5)(iii) to state ''PRS providers must upload any relevant forms into ORR's case management system within 30 calendar days of a case's closure.'' ORR is otherwise finalizing the proposals as proposed.

Subpart D—Minimum Standards and Required Services

Section 410.1300 Purpose of This Subpart

In order to ensure that all unaccompanied children receive the same minimum services and a specified level of quality of those services, ORR proposed in the NPRM a set of minimum standards and required services (88 FR 68936 through 68952). ORR proposed in the NPRM to establish these standards and requirements consistent with its authorities at 6 U.S.C. 279(b)(1) (making ORR responsible for, among other things, ensuring that the interest of unaccompanied children are considered in decisions and actions relating to their care and custody, implementing policies with respect to the care and placement of unaccompanied children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside), and 8 U.S.C. 1232(c) (requiring HHS to establish policies and programs to ensure that unaccompanied children are protected from certain risks, and requiring placement of unaccompanied children in the least restrictive setting that is in their best interest). As proposed at § 410.1300, the purpose of the subpart would be to establish the standards and services that care provider facilities must meet and provide in keeping with the principles of treating unaccompanied children in ORR care with dignity, respect, and special concern for their particular vulnerability. ORR welcomed public comment on this proposal.

Comment: Although a few commenters supported ORR setting standards for unaccompanied children, many commenters stated the standards in subpart D fall short in addressing the full scope of unaccompanied children's current needs and the standards do not align with present demographics and short stays in ORR care.

Response: Regarding concerns that the standards do not align with unaccompanied children's needs, in drafting the proposals, ORR reviewed its current policies that describe the services care provider facilities must provide to address the needs of unaccompanied children. Additionally, in this final rule, ORR has taken into consideration the additional feedback provided by commenters and finalized additional provisions based on that feedback.

Comment: One commenter expressed the need for additional funding to provide Indigenous language safeguards and assessment of minimum standards relevant to Indigenous unaccompanied children in ORR's care.

Response: ORR believes that it is important to provide language access services, including translation and interpretation for all unaccompanied children, including Indigenous children, as well as services designed to meet the individualized needs of unaccompanied children in its UC Program. For this reason, ORR is finalizing requirements at § 410.1306 that standard programs and restrictive placements must offer interpretation and translation services in an unaccompanied child's native or preferred language.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1300 as proposed.

Section 410.1301 Applicability of This Subpart

ORR believes that care provider facilities serving unaccompanied children should be required to meet standards and requirements tailored to their particular placement setting so that children receive at least the same standard of care within a given placement setting. ORR proposed in the NPRM, at § 410.1301, to apply these

care provider facility standards to all standard programs and to non-standard programs where specified (88 FR 68936).

Comment: Many commenters recommended that secure facilities should be included within the scope of subpart D. These commenters believe that requiring secure facilities to meet the required minimum services proposed for other ORR care provider facilities will help to ensure that these facilities are held to the same minimum standards of care.

Response: Because ORR believes that all unaccompanied children should receive the same minimum services and at least a specified level of quality of those services, ORR proposed in the NPRM a set of minimum standards and required services tailored to particular placement settings (88 FR 68936). ORR notes, however, that its existing practice is to require secure facilities to apply the minimum standards required in the FSA at Exhibit 1, which are implemented in this final rule at subpart D. Therefore, in this final rule, ORR is revising § 410.1301 to state that subpart D is applicable to standard programs and secure facilities, as well as to other care provider facilities and PRS providers where specified. ORR notes that it is not changing any requirements that were proposed in the NPRM for PRS providers, and is merely adding ''PRS providers'' to reflect requirements that were previously specified. Notwithstanding this change to the final rule text, to make subpart D applicable to secure facilities as a general matter, ORR notes that under this final rule, secure facilities may be subject to other standards that do not apply to standard facilities. For example, as discussed in § 410.1304(d) and § 410.1304(e), secure facilities that are not RTCs are subject to different standards as compared to standard facilities and RTCs with respect to the use of restraints (88 FR 68942). ORR believes that establishing requirements in this way is consistent with its authorities under the TVPRA and HSA, as well as the requirements under the FSA.

Final Rule Action: After consideration of public comments, ORR modifying § 410.1301 to state ''This subpart applies to all standard programs and secure facilities. This subpart is applicable to other care provider facilities and to PRS providers where specified.''

Section 410.1302 Minimum Standards Applicable to Standard Programs and Secure Facilities

ORR proposed in the NPRM, at § 410.1302, minimum standards of care and services applied to standard programs (88 FR 68936 through 68939). These standards are consistent with the HSA and TVPRA, and meet, and in some cases, exceed the minimum standards of care listed in Exhibit 1 of the FSA, with the exception of considerations relating to State licensing discussed below.

ORR proposed in the NPRM at § 410.1302(a), to require that standard programs be licensed by an appropriate State or Federal agency, or meet other requirements specified by ORR if licensure is unavailable in a State to programs providing services to unaccompanied children, to provide residential, group, or foster care services for dependent children (88 FR 68937). As discussed above, however proposed § 410.1302(a) has been revised in this final rule to provide that if a standard program is located in a State that will not license care provider facilities that care or propose to care for unaccompanied children, such care provider facilities must nevertheless meet the licensing requirements that would apply in that State if the State was willing to license ORR facilities.

Additionally, because there are other State and local laws and other ORR requirements that are critical to ensuring safe and sanitary conditions at care provider facilities, ORR proposed in the NPRM at § 410.1302(b), to further require that standard programs comply with all applicable State child welfare laws and regulations and all State and local building, fire, health and safety codes, or other requirements specified by ORR if licensure is unavailable in their State to standard programs providing services to unaccompanied children (88 FR 68937). Again, in this final rule, even if a standard program is located in a State that will not license care provider facilities that care or propose to care for unaccompanied children, the facility must comply with all State and local building, fire, health and safety codes—in addition to other requirements if specified by ORR. The proposed rule provided that if there is a potential conflict between ORR's regulations and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. The NPRM also provided that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.[227]

In order to ensure that each unaccompanied child receives the same minimum services that are necessary to support their safety and well-being for daily living while in ORR care, ORR proposed in the NPRM, at § 410.1302(c), to establish the services that standard programs must provide or arrange for each unaccompanied child in care (88 FR 68937). ORR proposed in the NPRM, at § 410.1302(c)(1), to establish minimum requirements related to the provision of proper physical care and maintenance, including suitable living accommodations, food, drinking water, appropriate clothing, personal grooming and hygiene items, access to toilets and sinks, adequate temperature control and ventilation, and adequate supervision to protect unaccompanied children from others. In the NPRM, ORR also proposed to require that food be of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development according to the U.S. Department of Agriculture (USDA) Dietary Guidelines for Americans,[228] and appropriate for the child and activity level, and that drinking water always be available to each unaccompanied child.

ORR notes that access to routine medical and dental care, and other forms of healthcare described in the FSA at Exhibit 1 paragraph 2 were set forth at § 410.1307 of the NPRM, and will be codified in that section for purposes of this final rule.

ORR believes that the unique needs and background of each unaccompanied child should be assessed by standard programs to ensure that these needs are being addressed and supported by the standard program. Therefore, ORR proposed in the NPRM, under § 410.1302(c)(2), and consistent with ORR's existing policy and practice, to require that each unaccompanied child receive an individualized needs assessment that includes: various initial intake forms; essential data relating to identification and history of the unaccompanied child and their family; identification of any special needs the unaccompanied child may have, including any specific problems that appear to require immediate intervention; an education assessment and plan; whether an Indigenous language speaker; an assessment of family relationships and interaction with adults, peers and authority figures; a statement of religious preference and practice; assessment of personal goals, strengths, and weaknesses; and identifying information regarding immediate family members, other relatives, or friends who may be residing in the United States and may be able to assist in the safe and timely release of the unaccompanied child to a sponsor (88 FR 68937). ORR noted that the use of ''special needs'' in this

paragraph is being included to match Appendix 1 of the FSA; it was ORR's preference, for the reasons articulated in the preamble to §§ 410.1103 and 410.1106, to update the language to ''individualized needs,'' and ORR solicited comments on such substitution.

Access to education services for unaccompanied children in care from qualified professionals is critical to avoid lost instructional time while in care and ensure unaccompanied children are receiving appropriate social, emotional, and academic supports and services. ORR proposed in the NPRM, at § 410.1302(c)(3), to require standard programs to provide educational services appropriate to the unaccompanied child's level of development, communication skills, and disability, if applicable (88 FR 68937). ORR believes that this requirement helps ensure that educational services are tailored to meet the educational and developmental needs of unaccompanied children, including children with disabilities who may require program modifications (such as specialized instruction), reasonable modifications, or auxiliary aids and services. ORR also proposed that educational services be required to take place 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). The educational services must include instruction and educational and other reading materials in such languages as needed. Basic academic areas must include science, social studies, math, reading, writing, and physical education. The services must provide unaccompanied children with appropriate reading materials in languages other than English and spoken by the unaccompanied children in care for use during their leisure time. ORR noted that under 45 CFR 85.51, care provider facilities shall also ensure effective communication with unaccompanied children with disabilities. This means the communication is as effective as communication with children without disabilities in terms of affording an equal opportunity to participate in the UC Program and includes furnishing appropriate auxiliary aids and services such as qualified sign language interpreters, Braille materials, audio recordings, note-takers, and written materials, as appropriate for the unaccompanied child. ORR also specified additional staffing requirements inclusive of the provision of educational and other services proposed under § 410.1305.

ORR strongly believes that time for recreation is essential to supporting the health and well-being of unaccompanied children. ORR proposed in the NPRM, at § 410.1302(c)(4), to require standard programs to have a recreation and leisure time plan that includes daily outdoor activity, weather permitting, and at least 1 hour per day of large muscle activity and 1 hour per day of structured leisure time activities, which does not include time spent watching television (88 FR 68937). Activities must be increased to at least three hours on days when school is not in session.

Psychological and emotional well-being are important components of the overall health and well-being of unaccompanied children, and therefore, consistent with existing policy and practice, ORR proposed in the NPRM that these needs must be met by standard programs. ORR proposed in the NPRM at § 410.1302(c)(5) to require standard programs to provide counseling and mental health supports to unaccompanied children that includes at least one individual counseling session per week conducted by certified counseling staff with the specific objectives of reviewing the unaccompanied child's progress, establishing new short and long-term objectives, and addressing both the developmental and crisis-related needs of each unaccompanied child (88 FR 68937 through 68938). Group counseling sessions are another way that the psychological and emotional well-being of unaccompanied children can be supported while in ORR care. Therefore, ORR proposed in the NPRM to require under § 410.1302(c)(6) that group counseling sessions are provided at least twice a week. These sessions can be informal and can take place with all unaccompanied children present, providing a time when new unaccompanied children are given the opportunity to get acquainted with the staff, other children, and the rules of the program. Group counseling sessions can provide an open forum where each unaccompanied child has an opportunity to speak and discuss what is on their minds and to resolve problems. Group counseling sessions can be informal and designed so that unaccompanied children do not feel pressured to discuss their private issues in front of other children. Daily program management may be discussed at group counseling sessions, allowing unaccompanied children to be part of the decision-making process regarding recreational and other program activities, for example. In addition, ORR noted that additional mental health and substance use disorder treatment services are provided to unaccompanied children based on their medical needs, including specialized care, as appropriate, and in person and virtual options, depending on what best fits the child's needs.

ORR proposed in the NPRM at § 410.1302(c)(7) to require that unaccompanied children receive acculturation and adaptation services that include information regarding the development of social and interpersonal skills that contribute to those abilities necessary to live independently and responsibly (88 FR 68938). ORR believes these services are important to supporting the social development and meeting the cultural needs of unaccompanied children in standard programs.

Establishing an admissions process that includes assessments that unaccompanied children should receive upon admission to a standard program helps ensure the immediate needs of unaccompanied children are met in a consistent way, that other needs are identified and can be supported while in ORR care, and that all unaccompanied children are provided a standardized orientation and information about their care in ORR custody. ORR therefore proposed to require at § 410.1302(c)(8)(i) of the NPRM that upon admission, standard programs must address unaccompanied children's immediate needs for food, hydration, and personal hygiene, including the provision of clean clothing and bedding (88 FR 68938). At § 410.1302(c)(8)(ii), ORR proposed in the NPRM that standard programs must conduct an initial intakes assessment covering the biographic, family, migration, health history, substance use, and mental health history of the unaccompanied child. If the unaccompanied child's responses to questions during any examination or assessment indicate the possibility that the unaccompanied child may have been a victim of human trafficking or labor exploitation, the care provider facility must notify the ACF Office of Trafficking in Persons within twenty-four (24) hours. Care providers must also provide unaccompanied children with a comprehensive orientation in formats accessible to all children regarding program intent, services, rules (provided in writing and orally), expectations, the availability of legal assistance, information about U.S. immigration and employment/labor laws, and services from the Office of the

Ombuds that were proposed in § 410.2002 in simple, non-technical terms and in a language and manner that the child understands, if possible, under § 410.1302(c)(8)(iii) of the NPRM. In conjunction with services supporting visitation and contact with family members required under § 410.1302(c)(10), ORR proposed that newly admitted unaccompanied children receive assistance with contacting family members, following ORR guidance and the standard program's internal safety procedures under proposed § 410.1302(c)(8)(iv) of the NPRM. ORR noted that medical needs upon admission are required to be assessed comprehensively under § 410.1307. Finally, in the NPRM, ORR noted that standard programs are required under 45 CFR 411.33 to provide orientation information related to sexual abuse and sexual harassment, and must follow 45 CFR part 411, subpart E, regarding assessment of an unaccompanied child's risk of sexual victimization and abusiveness.

ORR believes the cultural, religious, and spiritual needs of unaccompanied children should be provided for while in ORR care. Therefore, at § 410.1302(c)(9) of the NPRM ORR proposed to require that standard programs, whenever possible, provide access to religious services of an unaccompanied child's choice, celebrate culture-specific events and holidays, are culturally aware in daily activities as well as food menus, choice of clothing, and hygiene routines, and cover various cultures in educational services (88 FR 68938). ORR noted that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.[229]

Under § 410.1302(c)(10) of the NPRM, ORR proposed to require standard programs provide unaccompanied children with visitation and contact with family members (regardless of their immigration status), structured to encourage such visitation, such as offering visitation and contact at regular, scheduled intervals throughout the week (88 FR 68938). As proposed in the NPRM, standard programs should provide unaccompanied children with at least 15 minutes of phone or video contact three times a week with parents and legal guardians, other family members, and caregivers located in the United States and abroad, in a private space that ensures confidentiality and at no cost to the unaccompanied child, parent, legal guardian, family member, or caregiver. ORR emphasized that this is the minimum amount of phone or video time that standard programs must provide to unaccompanied children and that standard programs may provide additional time over and above this requirement, like daily phone or video calls. Standard programs would also be required to respect an unaccompanied child's privacy during visitation while reasonably preventing unauthorized release of the child. ORR noted that standard programs should also encourage in-person visitation between unaccompanied children and their parents, legal guardians, family members, or caregivers (unless there is a documented reason to believe there is a safety concern) and have policies in place to ensure the safety and privacy of unaccompanied children and staff, such as an alternative public place for visits.

To facilitate the safe and timely release of unaccompanied children to sponsors or their family, under § 410.1302(c)(11) of the NPRM, ORR proposed to require standard programs to assist with family unification services designed to identify and verify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for release of the unaccompanied children.

Under § 410.1302(c)(12) of the NPRM, ORR proposed to require standard programs to provide unaccompanied children with information on legal services, including the availability of free legal assistance and notification that they may be represented by counsel at no expense to the government; the right to a removal hearing before an immigration judge; the ability to apply for asylum with USCIS in the first instance; and the ability to request voluntary departure in lieu of removal (88 FR 68939). These services are foundational to ensuring that unaccompanied children are aware of their legal rights and have access to legal resources.

Finally, under § 410.1302(c)(13) of the NPRM, ORR proposed to require standard programs provide information about U.S. child labor laws and permissible work opportunities in a manner that is sensitive to the age, culture, and native language of each unaccompanied child (88 FR 68939).

Cultural competency among ORR standard programs is considered an important component of a successful program by ORR and under the FSA. Under § 410.1302(d) of the NPRM, ORR proposed that standard programs would be required to deliver the services included in § 410.1302(c) in a manner that is sensitive to the age, culture, native language, and the complex needs of each unaccompanied child (88 FR 68939).

Finally, under § 410.1302(e) of the NPRM, ORR proposed that standard programs would be required to develop a comprehensive and realistic individual service plan for each unaccompanied child in accordance with the child's needs as determined by the individualized needs assessment (88 FR 68939). Individual plans would be implemented and closely coordinated through an operative case management system. To ensure that service plans are addressing meaningful and appropriate goals in partnership with unaccompanied children, ORR proposed in the NPRM that service plans should identify individualized, person-centered goals with measurable outcomes and note steps or tasks to achieve the goals, be developed with input from the children, and be reviewed and updated at regular intervals. Under current practice, this is every 30 days the child is in custody following the child's case review. Unaccompanied children aged 14 and older should be given a copy of the plan, and unaccompanied children under age 14 should be given a copy of the plan when appropriate for that particular child's development. As proposed in the NPRM, § 410.1302(e) would also require that individual plans be in the child's native language or other mode of auxiliary aid or services and/or by the use of clear, easily understood language, using concise and concrete sentences and/or visual aids and checking for understanding where appropriate.

As discussed in response to public comments received at § 410.1301 and ORR's revision to apply subpart D to secure facilities, ORR is revising § 410.1302 to specify that ''standard programs and secure facilities'' shall deliver the minimum standards and services within this section. ORR is accordingly revising the section title of § 410.1302 to ''Minimum standards applicable to standard programs and secure facilities.'' Further, for consistency, ORR is revising § 410.1302(c)(10) to remove the reference to standard programs.

Before proceeding to specific comments on § 410.1302, ORR would like to discuss a key issue raised by commenters relating to this section, where ORR has made important revisions in response to these comments. Section 410.1001 replaces the term ''licensed program'' used in the FSA with the term ''standard program.'' The NPRM had specified that standard program means ''any program, agency, or organization that is licensed by an

appropriate State agency, or that meets other requirements specified by ORR if licensure is unavailable in the State to a program providing services to unaccompanied children, to provide residential, group, or transitional or long-term home care services for dependent children, including a program operating family or group homes, or facilities for special needs unaccompanied children.'' (88 FR 68982). As stated in the preamble to the NPRM, the proposed definition of ''standard program'' was broader in scope than the FSA definition of ''licensed placement'' to account for circumstances where State licensure is unavailable to ORR care provider facilities in a State because the facility cares for unaccompanied children (88 FR 68915 through 68916). Several commenters expressed concern that the proposed language ''or that meets other requirements specified by ORR'' was not sufficiently specific or clear and could lead to allowing programs to avoid licensure requirements even in a State where licensing is available. In response, ORR is revising its requirement under § 410.1302(a) to make clear that if a standard program is in a State that does not license care provider facilities because they serve unaccompanied children, the standard program must still meet the State licensing requirements that would apply if the State allowed for licensure. Similarly, ORR is revising § 410.1302(b) to remove references to other additional requirements specified by ORR if licensure is unavailable in their State to care provider facilities providing care and services to unaccompanied children. ORR notes that it has revised § 410.1302 to require standard programs and secure facilities meet the requirements of that section but is not including secure facilities in the discussion here of State licensure because no State has ceased licensing secure facilities that care for or propose to care for unaccompanied children.

The FSA requires placement of unaccompanied children in State-licensed facilities, subject to certain exceptions, a goal that ORR has long shared.[230] The FSA also requires ORR to make ''reasonable efforts'' to place unaccompanied children in ''those geographical areas where the majority of minors are apprehended, such as southern California, southeast Texas, southern Florida and the northeast corridor.'' [231] For most of the years in which the UC Program has operated since the program came to ORR in 2003, there was no tension between these requirements. In fact, over the last two decades, ORR built a large share of its care provider facility network in Texas, Florida, and California, consistent with the FSA requirement that unaccompanied children be placed in areas where the majority of minors are apprehended. Today, Texas represents at least half of all UC Program bed capacity.

On May 31, 2021, the Governor of the State of Texas issued a proclamation directing the Texas Health and Human Service Commission (HHSC) to amend its regulations to ''discontinue state licensing of any child-care facility in this state that shelters or detains [unaccompanied children] under a contract with the Federal government.'' [232] Subsequently, HHSC exempted ORR care provider facilities from the State's licensing requirements.[233] Four months later, the Governor of the State of Florida issued an Executive Order that directed the Florida Department of Children and Families (DCF) to de-license ORR care provider facilities.[234] Accordingly, DCF then de-licensed ORR's care provider facilities. These actions were historic and unforeseen; never have States not licensed child-care facilities simply because they serve migrant youth. Since then, ORR has significantly enhanced monitoring of care provider facilities in Texas and Florida and has required that care provider facilities in those States continue to abide by the State licensing standards. ORR, however, has not stopped placements in those States. As a practical matter, ORR cannot currently operate the UC Program without using care provider facilities in Texas and Florida.

ORR also notes that on April 12, 2021, the Governor of South Carolina issued an Executive Order that ''prevent[s] placements of unaccompanied migrant children . . . into residential group care facilities or foster care facilities located in, and licensed by, the State of South Carolina.'' [235] At the time, ORR did not operate any shelter facilities in South Carolina. ORR currently operates three transitional foster care facilities in South Carolina that remain licensed by the State.

In 2021 when Texas and Florida de-licensed ORR care provider facilities, ORR was also facing a significant increase in referrals of unaccompanied children. Since 2021, annual referrals to ORR have been in the range of 120,000 or more.[236] As a result, it is now impossible for ORR to accommodate 120,000 or more referred unaccompanied children each year while also limiting placements to licensed programs in States that agree to license ORR's care provider facilities.

Shuttering facilities in Texas and Florida would result in the loss of the significant expertise that has been developed over decades in many care provider facilities in Texas and Florida. New facilities may not have staff that have worked with this population of children and new facilities may not have the same cultural competency that longstanding facilities in Texas and Florida offer. Moreover, the vast majority of unaccompanied children are apprehended at the Southwest border, usually along the Texas-Mexico border. Shuttering facilities in Texas, in particular, would lead to longer wait times for unaccompanied children in DHS custody because the children would need to be transported much longer distances. And in fiscal year 2023, nearly one-quarter of all releases of unaccompanied children was to sponsors in Texas and Florida; [237] ceasing to operate programs in those States would be enormously disruptive to efforts to promptly place children with their parents or other appropriate sponsors.

Although ORR has not stopped placements in Texas and Florida, it continues to look for ways to expand its capacity in States other than Texas and Florida. However, ORR cannot maintain needed capacity to receive referrals of unaccompanied children and find shelter for them without continued reliance on Texas and Florida.

In the meantime, ORR is committed to ensuring that the protections afforded through State licensing continue to be provided to unaccompanied children placed in ORR's care provider facilities in Texas and Florida. ORR is currently providing enhanced monitoring of its care provider facilities in Texas and Florida to ensure that they are in compliance with FSA Exhibit 1 and ORR's policies. Enhanced monitoring includes on-site visits and desk monitoring. In the final rule, ORR has committed to continuing this enhanced monitoring by requiring at new § 410.1303(e) (as redesignated) that ORR will provide enhanced monitoring of standard programs in States that do not allow State-licensing of programs providing care and services to unaccompanied children, and of emergency or influx facilities.

ORR also notes that under the terms and conditions of their Federal grants, unless waived by ORR, standard programs agree to obtain accreditation by a nationally recognized accreditation organization approved by ORR. Accreditation requires organizations to regularly demonstrate on an ongoing basis that their organization adheres to established best practice standards for

all levels of organizational operations. This includes governance and management, financial operations, risk management, performance and quality improvement, and policy. It also includes best practice standards for each type of service an organization provides and the staffing associated with that service (*i.e.,* foster care, homes studies, staff/child ratios, caseload size, training, supervisory ratios). The organization completes an extensive initial ''self-study'' assessing itself against these best practice standards, and then the accrediting body reviews it, and conducts a week-long site visit using peer reviewers to assess true implementation of the standards themselves. For each renewal cycle, the organization updates its self-assessment, assuring any updates to best practice standards are incorporated into their operations, and again undergoes a lengthy peer review site visit. Generally speaking, licensing standards are viewed as ''minimum basic standards'' and accreditation is a seal of excellence that indicates an organization is committed to implementing and sustaining the implementation of best practices in their field (*i.e.,* child welfare, mental health, residential treatment, etc.). Accreditation organizations recognized by ORR include the Council on Accreditation (COA), the Joint Commission (TJC), the Commission on Accreditation of Rehabilitation Facilities (CARF), and the American Correctional Association (ACA). As an explicit requirement under standard programs' grants, ORR monitors for compliance with this requirement, pursuant to § 410.1303; further, failure to maintain accreditation may subject standard programs to enforcement actions, including remedies for noncompliance as described at 45 CFR 75.371.

The language in this final rule pertaining to ''standard'' programs is intended to reflect the substantially changed circumstances since the parties entered into the FSA. When the parties entered into the FSA in 1997, the number of unaccompanied children entering federal custody was less than 3,000, and the agreement contemplated the availability of State licensure at facilities serving unaccompanied children. As noted above, in recent years the number of referrals to ORR has been around 120,000 a year, and it would be impossible to operate the program, at least for the foreseeable future, without programs in the States that now do not license facilities that serve unaccompanied children. Accordingly, ORR has adjusted by requiring programs in those States to continue to meet their State licensing standards and by substantially enhancing monitoring of facilities in those states. ORR continues to believe it would be preferable if all States continued to license facilities serving unaccompanied children, but ORR believes the actions it has taken are necessary adjustments to these changed circumstances.

To be clear, under this final rule, standard programs must be State-licensed if State licensure is available in their State; or if State licensure is not available, standard programs must meet the State's licensing requirements. This requirement replaces the NPRM's reference to ''other requirements specified by ORR'' at § 410.1302(a) and ''other additional requirements'' at § 410.1302(b).

Comment: ORR received several comments that objected to its proposal to use the term ''standard program,'' as defined at proposed § 410.1001, instead of ''licensed program,'' as defined in the FSA. In particular, some commenters asserted that State licensure is a material requirement of the FSA and that the proposed rule did not fully incorporate the FSA's State-licensing requirement by allowing care providers to ''meet[ ] other requirements specified by ORR if licensure is unavailable in the State.'' These same commenters asserted that the final rule must reintroduce a State licensing requirement in every provision where the FSA requires State-licensed placement. Commenters also stated that proposed § 410.1302(a) and § 410.1302(b) appeared to allow programs to avoid State licensing requirements, even in States that have a licensing framework available, which is inconsistent with the State licensing requirement of the FSA. Two commenters expressed concern that removing the State licensure requirement would relax the minimum standards for the care and placement of unaccompanied children.

Response: ORR refers readers to the previous discussion of licensed placements in the preamble. As explained, ORR must have a framework that allows for placements in States that do not license facilities because they serve unaccompanied children. ORR notes that by codifying the term ''standard program,'' instead of ''licensed program'' as used in the FSA, ORR does not intend for, and the final rule does not permit, care provider facilities to avoid State licensure requirements. ORR reiterates that in response to the comments received, ORR is revising its requirement under § 410.1302(a) to make clear that if a standard program is in a State that does not license care provider facilities because they serve unaccompanied children, the standard program must still meet the State licensing requirements that would apply if the State allowed for licensure.

Comment: A group of commenters recommended that ORR revise § 410.1302(b) to read ''(b) Comply with all applicable State child welfare laws, regulations, and standards, all State and local building, fire, health, and safety codes, and other requirements specified by ORR if licensure is unavailable in their State to care provider facilities providing services to unaccompanied children.'' Several other commenters expressed concern that proposed § 410.1302(b) did not require standard programs to follow State child welfare laws and State and local building, fire, health, and safety codes. The same commenters also expressed concern that the proposed rule included several Federal preemption provisions, including in proposed § 410.1302(b), and these provisions could be interpreted broadly to give ORR discretion to ignore State licensing requirements if the agency perceives a conflict with State law.

Response: ORR has revised § 410.1302(b) to clarify that all standard programs and secure facilities must comply with child welfare laws and regulations (such as mandatory reporting of abuse) and all State and local building, fire, health, and safety codes. However, ORR is not adding reference to ''standards'' in this final rule because it believes ''standards'' are included within its references to ''laws and regulations'' as well as ''codes.''

The intent of the language commenters referred to as a Federal preemption provision had been intended to convey that if a State took action to reduce or curtail protections of unaccompanied children under Federal law, ORR would take needed actions to ensure that Federal protections were preserved. However, in reviewing comments, it became clear to ORR that that intent had not been effectively conveyed, and in the interest of clarity, ORR has also removed the Federal preemption statement from the final rule at § 410.1302(b).

Comment: Several commenters stated that because the proposed rule did not include a preference for State-licensed placements over unlicensed placements, § 410.1103(e) may be read as prioritizing unlicensed placements in Texas over licensed placements in other geographic areas, which undermines the purpose of paragraph 6 of the FSA. Another commenter noted that facilities in States

without a licensing requirement could make more competitive bids due to potentially lower operating expenses, lower-cost environments, and the ability to provide more beds. The commenter expressed concern that ORR might also expand existing programs in States that no longer license ORR care provider facilities for those same reasons. One commenter also highlighted that facilities may opt-out of State licensure because of perceived burdens, additional requirements, or higher operating costs. This commenter was also concerned that ORR would treat State licensure and the ''other standards'' described in the NPRM as functionally equivalent, and that this construction would allow latitude for care provider facilities to meet the lowest of the available standards, including unlicensed care provider facilities in States that do offer licensure to facilities caring for unaccompanied children. Further, several commenters stated that requiring State licensure, in addition to FSA compliance, would ensure that State and local licensing agencies are able to monitor ORR facilities.

Response: ORR appreciates the commenters' concerns and reiterates its commitment to ensuring that all standard programs comply with State licensing requirements, as required in §§ 410.1302(a) and (b), whether or not specific States will license programs that serve unaccompanied children. Thus, all standard programs are similarly situated in that they are required under the final rule to comply with State licensing requirements. Also, consistent with paragraph 6 of the FSA, ORR has revised § 410.1103(e) to require ORR to ''make reasonable efforts to provide licensed placements in those geographical areas where DHS encounters the majority of unaccompanied children.''

Moreover, ORR is providing enhanced monitoring of its care provider facilities in Texas and Florida to ensure that they are in compliance with ORR's policies. In lieu of its regular monitoring of each facility every two years, ORR is currently providing enhanced monitoring of its care provider facilities in Texas and Florida to ensure that they are in compliance with FSA Exhibit 1 and ORR's policies. Enhanced monitoring may include on-site visits and desk monitoring. In the final rule, ORR has committed to continuing this additional monitoring by requiring at § 410.1303(e) (as redesignated) that ORR will provide enhanced monitoring of standard programs in States that do not allow State-licensing of programs providing care and services to unaccompanied children, and of emergency or influx facilities. ORR notes that this enhanced monitoring makes it more expensive and resource-intensive for ORR to operate programs in Texas and Florida, not less.

Comment: Multiple commenters recommended that ORR enhance its care provider staff training requirements to require training that ensures services are provided to unaccompanied children in a child-friendly, trauma-informed way. Several commenters also recommended that staff who conduct individualized assessments under § 410.1302(c)(2) be trained in trauma-informed practices. One commenter recommended that those staff also be trained professionals in medical and mental healthcare so that they can make referrals for appropriate services. Finally, one commenter suggested that ORR expressly require programs to provide services in a way that recognizes a child's culture and identity.

Response: Section 410.1302(d) requires that standard programs and secure facilities provide services in a way that is sensitive to the unaccompanied child's age, culture, native or preferred language, and their complex needs. Also, ORR is requiring at § 410.1305(a) that standard programs, restrictive placements, and post-release service providers provide training to staff, contractors, and volunteers that is tailored to the unique needs, attributes, and gender of unaccompanied children. The training also must be responsive to the challenges faced by staff and unaccompanied children. ORR agrees with commenters that staff, contractors, and volunteers should be trained in trauma-informed practices and intends for the training requirement to require training to provide services and individualized assessments in a trauma-informed manner. Additionally, ORR expects that training topics will include how to provide services in a child-friendly way and how to effectively communicate with unaccompanied children. ORR notes that it included a training requirement for standard programs and restrictive placements to ensure that staff are appropriately trained on behavior management strategies, including de-escalation techniques, as a proposed requirement in the preamble discussion of § 410.1304 (88 FR 68942) and § 410.1305(a) (88 FR 68943), but the training requirement was omitted in error in the regulation text of § 410.1305(a). Therefore, ORR is finalizing the requirement under § 410.1305(a) that ''Standard programs and restrictive placements shall ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to § 410.1304.'' ORR is not, however, specifying other training topics in the final rule but may do so in subregulatory guidance, which will allow ORR to make more frequent, iterative updates to its training requirements in order to ensure that training remains up to date on best practices and is responsive to changing needs of unaccompanied children in ORR custody.

Comment: Several commenters recommended that ORR provide a minimum standard requirement that recognizes an unaccompanied child's reasonable right to privacy and autonomy. Several commenters asserted that proposed § 410.1302(c) lacks a guarantee of a reasonable right to privacy as required by the FSA. They pointed out that Exhibit 1 of the FSA includes ''the right to: (a) wear his or her own clothes, when available; (b) retain a private space in the residential facility, group or foster home for the storage of personal belongings; (c) talk privately on the phone, as permitted by the house rules and regulations; (d) visit privately with guests, as permitted by the house rules and regulations; and (e) receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.'' They noted that proposed rule § 410.1801(b)(12) included this requirement for children placed in EIFs, but proposed rule § 410.1302(c) did not include this requirement for standard programs.

Response: ORR agrees with the commenters that the FSA requires that unaccompanied children have a reasonable right to privacy, and ORR agrees that ensuring a reasonable right to privacy is appropriate as a matter of policy. ORR is therefore revising the final rule, consistent with Exhibit 1 of the FSA, to additionally require at § 410.1302(c)(14) that unaccompanied children must have a reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, and receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

Comment: Several commenters recommended further ways to strengthen the minimum services required under proposed § 410.1302(c). Several commenters recommended that ORR incorporate minimum physical

space requirements as applicable to standard programs. Several commenters expressed support for requiring that unaccompanied children receive weekly individual counseling sessions. One commenter recommended that care provider facilities should be required to ensure all unaccompanied children have access to mental health services. One commenter supported the proposed requirement that upon admission, standard programs must address unaccompanied children's immediate needs for food, hydration, and personal hygiene, and recommended that ORR specify that this includes feminine hygiene products.

Response: As an initial matter, except as to the licensing requirements previously discussed, the final rule fully incorporates the minimum standards of care and services required in Exhibit 1 of the FSA. ORR has also exceeded those minimum standards. For example, ORR requires at § 410.1302(c) that unaccompanied children must be provided with personal grooming and hygiene items, access to toilets and sinks, adequate temperature control and ventilation, and adequate supervision. Additionally, the final rule requires that food be of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development and that water be always available to each unaccompanied child. Related to physical space requirements, ORR agrees that it is important that children have access to outdoor and indoor spaces that allow them to exercise, socialize, and move freely. ORR notes that the requirement of weekly counseling is a minimum requirement, and that group counseling is also available to support the needs of unaccompanied children. Further, § 410.1307(a) requires that unaccompanied children have access to appropriate routine medical care, which includes access to mental healthcare. And under § 410.1307(b)(1), ORR requires standard programs and restrictive placements to establish a network of licensed healthcare providers, which must include mental health practitioners. While ORR notes that the requirement to provide for immediate personal hygiene needs includes the provision of feminine hygiene products, ORR is revising § 410.1302(c)(1) to explicitly state these items and other items as follows: ''. . . personal grooming and hygiene items such as soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items.''

Comment: Many commenters proposed ways that ORR could enhance its requirements related to how unaccompanied children communicate with their families. One commenter recommended that ORR require standard programs to provide unaccompanied children with an individualized case management plan that includes family finding and outreach services. Several commenters identified that the proposed phone call requirements in § 410.1302(c)(10) have been superseded by policy changes to require daily minimum 10-minute calls Monday through Friday (or 50 minutes of phone time throughout the weekdays), as well as 45-minute calls on weekends, holidays, and the child's birthday, and additional calls as needed in exceptional circumstances. One commenter supported the proposed requirement that unaccompanied children be provided at least 15 minutes of phone or video contact three times a week with family members, and that this should be a minimum requirement, as daily contact is ideal. One commenter expressed support for the proposed rule's specific mention of in-person visitation as well as the provision of a private space for communications. A few commenters recommended that ORR codify visitation and communication standards that apply to unaccompanied children who have parents, caregivers, or family members in Federal custody. Finally, many commenters noted that the ability to provide unaccompanied children with video contact may be limited for security reasons.

Response: As an initial matter, ORR encourages and supports contact between unaccompanied children and their families. ORR believes that unaccompanied children should be assisted as soon as possible upon their admission into ORR custody with contacting their family members and has included in § 410.1302(c)(8)(iv) a requirement that unaccompanied children be assisted with contacting family members as part of the admissions process. Also, ORR appreciates the commenters' concerns that its current policy as reflected in the ORR Policy Guide provides for more opportunities for phone calls than was specified in the proposed regulation. ORR emphasizes that the requirements under § 410.1302(c)(10) are the minimum requirements that care provider facilities must meet and that standard programs and secure facilities may provide additional phone call time over and above this requirement, such as daily phone or video calls or calls for a longer length of time. ORR intends to continue to apply its subregulatory guidance to require additional phone call time above the requirements of this part. Also, ORR intends for § 410.1302(c)(10) to apply to calls with family members who may be in Federal custody. Finally, ORR notes that care provider facilities may provide phone calls if video calls are not feasible due to security concerns.

Comment: One commenter expressed concern that foster care facilities, or ''long-term home care'' facilities as referenced in this final rule, may not be able to meet the standards for standard programs.

Response: ORR notes that the standards under this section are consistent with its existing policies and procedures that are required for long-term home care facilities, such that meeting the requirements under this section will not pose an additional burden for care provider facilities. ORR believes that all unaccompanied children in standard programs and secure facilities should receive the same minimum services and at least a specified level of quality of those services, and for that reason is establishing the same minimum standards for all standard programs and secure facilities.

Comment: Some commenters expressed concern that the NPRM contemplated placement of unaccompanied children in OON placements, which were not defined as meeting either State licensing or ''standard program'' requirements. One commenter recommended that the final rule must provide that any OON placement shall be State-licensed and meet the other requirements for licensed facilities outlined in the FSA, including the minimum standards in Exhibit 1. The same commenter recommended that the final rule state that a child may be placed in an OON placement only if it is in the least restrictive placement appropriate, consistent with paragraph 11 of the FSA, and that any secure OON placement must satisfy the secure placement criteria in paragraph 21 of the FSA. One commenter recommended requiring that OON facilities be State-licensed and comply with FSA minimum standards requirements.

Response: As noted by the commenters, ORR is finalizing, at § 410.1001, a definition of care provider facility that does not include OON placements. ORR refers readers to the discussion in response to comments at § 410.1001. ORR further notes that under existing policies, ORR thoroughly vets OON placements prior to placing unaccompanied children at such placements. Moreover, the final rule expressly provides that OON placements must be State licensed

under § 410.1001. As part of its vetting of OON placements, ORR conducts monitoring of OON placements to ensure they are in good standing with State licensing authorities and are complying with all applicable State child welfare laws and regulations and all State and local building, fire, health, and safety codes.

Comment: Some commenters expressed concern that under the NPRM ORR proposed to permit unlicensed placements of unaccompanied children without safeguards established in the FSA at paragraph 12A (requiring that ''minors shall be separated from delinquent offenders''). Specifically, these commenters recommended that the final rule specify that until an unaccompanied child is placed in a program licensed by the State to provide services for dependent children, the child ''shall be separated from delinquent offenders,'' consistent with paragraph 12A of the FSA, except as provided in paragraph 21 of the FSA.

Response: ORR refers commenters to ORR's previous response to similar comments at § 410.1103, as well as its discussion of revisions made to the final rule at § 410.1102.

Comment: Many commenters recommended that ORR explicitly protect LGBTQI+ unaccompanied children from discriminatory treatment and abuse as a minimum standard, noting that such an obligation would align with current ORR policies. One commenter recommended increasing safeguards by requiring standard programs and secure facilities to consider factors relating to gender and sexual orientation under § 410.1302(c)(2). A number of commenters recommended that ORR require that unaccompanied children be provided with clothing that reflects a child's gender identity and hygiene items that reflect their identity and needs.

Response: ORR believes that protecting unaccompanied children from discriminatory treatment is important. ORR's existing policies for the care of LGBTQI+ unaccompanied children require that all children in ORR care are entitled to human rights protections and freedom from discrimination and abuse.[238] For example, care providers must ensure that children who identify as LGBTQI+ are fairly treated and served during their time in ORR custody. ORR's existing policy also establishes zero tolerance for discrimination or harassment of all children, including LGBTQI+ children, a prohibition on segregating or isolating children on the basis of their sexual orientation or gender identity, and ensures confidentiality of personal information unless disclosure is necessary for medical or mental health treatment or the child requests it to be shared. ORR notes that, as set forth at § 410.1302(c)(2)(iii), each unaccompanied child must receive an assessment that includes identification of individualized needs, which may include needs based on the child's sexual orientation or gender identity. ORR notes that while some children affirmatively identify as LGBTQI+ and readily share this information unprompted or when asked, other children may not be comfortable providing this information as a part of the individualized needs assessment or otherwise. As such, ORR will continue to consider how to best identify LGBTQI+ children so that they may be cared for fairly and with sensitivity. Further, section 410.1302(c)(8)(i) of this final rule requires that ORR establish an admissions process that meets each unaccompanied child's immediate needs for food, hydration, and personal hygiene, including clean clothing and bedding, and ORR has existing policies that require care provider facilities to provide unaccompanied children with clothing of their choice.

Comment: One commenter recommended that ORR add a provision to § 410.1302(c), requiring ORR to conduct post-18 planning, to include sufficient lead time to prevent any child 17 or older from aging out of ORR custody without a concrete and actionable post-18 plan that takes into account the child's resources and needs.

Response: As noted previously, ORR's existing policies already include requirements regarding post-18 planning, and ORR believes these policies are sufficient to meet the needs of children who ''age out'' of ORR care. Through the post-18 planning process, care provider facilities explore other planning options for the future of unaccompanied children if release to a sponsor is not an option. ORR declines to further amend the final rule in response to these comments at this time and will take them into consideration as part of its continuous evaluation of its existing policies and potential future updates to this part. ORR notes that addressing these concerns through its policies in particular allows ORR to make more frequent, iterative updates in keeping with best practices, to communicate its requirements in greater detail, and to be responsive to the needs of unaccompanied children and care provider facilities.

Comment: One commenter recommended that group counseling under § 410.1302(c)(6) include language and supports appropriate for LGBTQI+ unaccompanied children, and that counseling groups specifically for LGBTQI+ children should be available and implemented by trained staff. Another commenter stated that unaccompanied children should have access to age-appropriate professional counseling services that respects Catholic Church teachings.

Response: ORR believes that care providers should affirmatively support LGBTQI+ unaccompanied children in their placement settings, and notes that existing policies require that LGBTQI+ unaccompanied children be treated with dignity and respect, receive recognition of their sexual orientation and gender identity, not be discriminated against or harassed based on actual or perceived sexual orientation or gender identity, and be cared for in an inclusive and respectful environment.[239]

With respect to the second comment, ORR believes that counseling services should respect the religious and cultural beliefs of unaccompanied children. For example, it is ORR's existing policy that if an unaccompanied child requests religious information or other religious items, such as religious texts, books, or clothing, the care provider must provide the applicable materials in the unaccompanied child's native language, as long as the request is reasonable. Unaccompanied children also have access to religious services whenever possible under § 410.1302(c)(9), and ORR notes that this can include religious counseling.

Comment: One commenter recommended that ORR expressly include the child's religious and cultural background in the lists of factors for conducting an individualized needs assessment under proposed § 410.1302(c)(2) in order to ensure that all appropriate measures are taken to preserve the child's culture and identity. One commenter recommended that ORR include language to ensure that unaccompanied children have access to ''culturally responsive and religiously appropriate'' meals and freely available snacks to ensure that unaccompanied children are receiving adequate nutrition. One commenter recommended that ORR add language guaranteeing that unaccompanied children have better access to laundry and clean clothing and are provided with clothing that is sensitive to the unaccompanied child's cultural and religious identity. One commenter recommended that ORR include access to cultural and religious hygiene needs as a requirement under § 410.1302(c)(1).

Response: ORR agrees it is important to respect unaccompanied children's

religious and cultural identities and practices. For that reason, ORR proposed under § 410.1302(c)(2) that each unaccompanied child receive an individualized needs assessment that includes identification and history of the unaccompanied child and their family, the identification of any individualized needs the unaccompanied child may have, and religious preferences and practices, among other requirements (88 FR 68937). ORR is finalizing clarifying edits to § 410.1302(c)(2)(v) to state ''Identification of whether the child is an Indigenous language speaker'' instead of ''whether an Indigenous language speaker.'' ORR agrees that it is important that unaccompanied children receive adequate nutrition, and therefore proposed to require that food be of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development according to the USDA Dietary Guidelines for Americans, and appropriate for the child and activity level, and that drinking water is always available to each unaccompanied child. ORR notes that its existing policies further require that care provider facilities must establish procedures to accommodate dietary restrictions, food allergies, health issues, and religious or spiritual requirements, and that part 410 is not intended to govern or describe the entire UC Program. ORR notes that § 410.1302(c)(8)(i) of this final rule provides as a minimum standard an admissions process including meeting unaccompanied children's needs to, among other things, ensure that children have appropriate clean clothing and bedding. Further, at § 410.1302(c)(9), the final rule requires standard programs and secure facilities to practice cultural awareness in, among other areas, choice of clothing. ORR agrees that children should be provided with personal hygiene and grooming items that reflect their needs and identities, including their religious needs and identities. Under existing policies, ORR requires care provider facilities to provide religious or spiritual items in the child's native or preferred language, as long as the request for items in the particular language is reasonable, as further discussed in the response to public comment at § 410.1306(e).

Comment: One commenter expressed concern that proposed § 410.1302(c)(9) is not sufficiently responsive to meeting unaccompanied children's religious and cultural needs, recommending that ORR delete ''Whenever possible'' from proposed § 410.1302(c)(9) to ensure that unaccompanied children have access to individualized religious and cultural services.

Response: ORR notes that the requirement to provide religious and cultural services of a child's choice ''whenever possible'' is consistent with the requirements under the FSA at Exhibit 1 and ORR's existing practice in the Policy Guide. Under existing policies, ORR requires care provider facilities to provide opportunities for unaccompanied children to observe and practice their spiritual or religious beliefs, and to comply with any requested religious or spiritual items as long as the request is reasonable. ORR encourages care provider facilities to proactively create opportunities to support children's religious and cultural needs, to provide access to religious services, and to provide transportation to outside places of worship or specific items or information if the requests are reasonable.

Comment: One commenter expressed concern around the conditions of care provider facilities and their ability to provide children with basic services such as bathrooms, recommending that ORR inspect facilities to ensure sufficient access to clean bathrooms and clean running hot/cold water.

Response: ORR thanks the commenter for their recommendation and is making edits to clarify, consistent with ORR's original intent, that § 410.1302(c)(1) includes that access to showers must be provided, in addition to toilets and sinks as proposed in the NPRM, and requires that care provider facilities maintain safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of children. ORR is also requiring at § 410.1302(c)(1), among other things, that care provider facilities must provide suitable living accommodations and provide drinking water that is always available. As also clarified in this section, all standard programs and secure facilities must meet State licensing requirements as well as all local building, fire, health, and safety codes.

Comment: Many commenters recommended that ORR list the specific initial intake forms, or otherwise include language that ORR will develop specific policies and procedures based on this rule. One commenter recommended that self-identification for Indigenous peoples should be considered in intake forms.

Response: ORR has opted to not provide specific descriptions of forms in these regulations because the forms and their contents, will necessarily change over time to be responsive and adaptive to the evolving needs of the UC Program. ORR thanks the commenter for the recommendation related to the self-identification of Indigenous peoples on intake forms and will take this feedback into consideration as it continues to update its forms.

Comment: Many commenters expressed the view that the proposed educational services do not adequately prioritize the skills that unaccompanied children will need following their release from ORR care or to integrate into schools in the United States. Many commenters recommended that educational instruction for children with extremely short lengths of stay be primarily focused on acculturation, psychosocial education, self-regulation techniques, and beginning language learning, with a secondary focus on the standard academic subjects. For example, they recommended that education focus not on basic academic competencies or subject matter education, but rather on intensive English language immersion to help prepare unaccompanied children for their transition to their community school after release and on other forms of learning and healthy routines that would prepare them for release given the average short stay in ORR custody. Commenters also suggested a number of subjects that should be covered in ORR-provided education, as well as resources including books in preferred languages and the ability to earn transferable academic credits.

Many commenters recommended that ORR strengthen its standard of care to, at a minimum, meet the current standards provided to unaccompanied children in ORR care, noting that the ORR Policy Guide requires a minimum of six hours of structured education, Monday through Friday. Many commenters recommended that ORR should not limit education to Monday through Friday because this limits educational programming for short stay unaccompanied children.

One commenter supported the provision of educational services to the extent that such educational services aligned with international standards under the Convention on the Rights of the Child. However, the commenter expressed concern that proposed educational services do not extend to secure facilities. Additionally, the commenter noted that the proposed rule provides a much narrower description of the education services that standard programs must provide to unaccompanied children than what international standards require.

Response: ORR expects care provider facilities to tailor their education offerings to meet the educational and

developmental needs of unaccompanied children to ensure they are receiving appropriate social, emotional and academic supports and services. Further, ORR believes that acculturation skills and other life skills are necessary for unaccompanied children to prepare them for release to a sponsor, and as such, is finalizing the rule to state that educational services are required to take place in a structured classroom setting, Monday through Friday, and should concentrate on the development of basic academic competencies and on English Language Training (ELT), as well as acculturation and life skills development. The educational services must include instruction and education and other reading materials in such languages as needed. Basic academic areas may include such subjects as science, social studies, math, reading, writing, and physical education.

Comment: A number of commenters expressed support for adaptation of educational services to a child's disability and requested that the final rule include explicit language to ensure that unaccompanied children with disabilities receive program modifications, auxiliary aids, and services and that care provider facilities must communicate as effectively with children with disabilities as with children without disabilities to ensure they have an equal opportunity to engage in the program. The commenters recommended that needs for educational modifications should be documented in the child's individual service plan (ISP). The commenter also recommended referencing the Department of Education's section 504 regulations for requirements for educational programs.

Response: Under § 410.1311(c), as revised in this final rule, ORR shall provide reasonable modifications to the UC Program, including the provision of services, equipment, and treatment, so that an unaccompanied child with one or more disabilities can have equal access to the UC Program in the most integrated setting appropriate to their needs, as is consistent with section 504 and HHS implementing regulations at 45 CFR part 85. ORR notes that it is not, however, required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. ORR is further requiring that any program modifications be documented in the child's case file under § 410.1311(d).

Comment: One commenter expressed support for the proposal to require facilities to provide recreation services to unaccompanied children because it provides them with learning, exercise, and socialization. Additionally, the commenter noted that these activities provide an important outlet and routine for children to occupy themselves, and help manage their anxiety.

Response: ORR agrees that recreation and outdoor activities are important to children's development, and thanks the commenter for their support.

Comment: One commenter expressed concern that group counseling sessions proposed under § 410.1302(c)(6) are not sufficient to meet the needs of unaccompanied children in ORR care, recommending that ORR consider factors such as the size of the group and the age ranges in the group to ensure that the forum is appropriate for group counseling sessions.

Response: ORR notes that this standard is consistent with FSA Exhibit 1 minimum standards. Further, as also consistent with FSA Exhibit 1, ORR is finalizing the provision of weekly individual counseling, under § 410.1302(c)(5). Further, under § 410.1307(b), as finalized, ORR must ensure unaccompanied children have access to appropriate routine medical and dental care, including addressing the mental health needs of unaccompanied children.

Comment: One commenter recommended that the requirement at § 410.1302(c)(8)(iii) of the NPRM requiring that the comprehensive orientation presentation given to unaccompanied children including information about the Ombuds be made mandatory for all programs, and not limited to those meeting the definition of ''standard program.''

Response: ORR notes that ORR is expanding the applicability of 410.1302(c)(8)(iii) to secure facilities and that this requirement is included at § 410.1800(b)(9) for EIFs.

Comment: A few commenters requested clarification regarding whether § 410.1302(c)(10) as proposed in the NPRM applies to EIFs.

Response: Section 410.1302(c)(10) as finalized is applicable to standard programs and secure facilities. Requirements for EIFs are in subpart I, and ORR refers comments to that section for further discussion on requirements ORR is finalizing.

Comment: Many commenters recommended that § 410.1302(c)(13) provide information to unaccompanied children regarding the purposes of the Legal Services Provider, and their scope of work and authority, and focus on providing information on practical areas such as the employment approval process, permissible and prohibited work, human trafficking awareness, and how to remain safe when engaging in employment. Many commenters expressed concern that ORR may miscommunicate information on child labor laws and work opportunities and therefore requested examples of how ORR will convey this information.

Response: ORR agrees that information related to the scope of LSPs, and practical information relating to employment and labor laws are important for unaccompanied children. ORR is engaging in a partnership with the Department of Labor to effectively provide communications, such as Know Your Rights videos and information, to unaccompanied children and their sponsors.[240]

Comment: Many commenters expressed support for the proposed requirement that individual service plans for each unaccompanied child be developed under § 410.1302(e).

Response: ORR thanks the commenter for their comment.

Comment: Several commenters recommended the final rule include specific provisions for individual service plans and section 504 service plans for unaccompanied children with disabilities. This includes identification of disability-related needs, and a description of services, supports, and modifications the child will receive including a plan for release. These commenters stated that ISPs should also include services for children with mental health disabilities. Commenters recommended that the child should be included in the development of their ISP along with others knowledgeable about the child, such as the unaccompanied child's parent/legal guardian, child advocate, LSP, and treating professionals. Commenters recommended that the final rule require, consistent with the *Lucas R.* settlement agreement regarding disabilities, that the service plan of an unaccompanied child with disabilities be reviewed every six months or within 30 days of any of the following: (a) a transfer to a more restrictive placement; (b) psychiatric hospitalization of the unaccompanied child (unless the plan has already been reviewed within a 3-month period); or (c) upon the recommendation of a licensed medical or mental health provider, including the unaccompanied child's clinician. Commenters also recommended that, if an unaccompanied child has one or more disabilities, the unaccompanied child's individual service plan should include any triggers of the unaccompanied child's disability-related behaviors and identify individualized responses staff should attempt to de-escalate a situation. Commenters further recommended that

if an unaccompanied child with disabilities exhibits persistent behaviors that affect their safety or that of others, this should trigger a re-evaluation of their individual service plan by the same group of knowledgeable persons that developed the plan. The commenters requested that a pending service plan not delay the release of a child. With regard to changes in placement to more segregated settings, the commenter requested that a new assessment and review of the ISP take place before placement changes when possible.

Response: Consistent with the discussion of the *Lucas R.* litigation above at section III.B.4, ORR is not incorporating in this rule all aspects of the disability settlement agreement. However, ORR will be assessing implementation of the relevant portions of the agreement, and will evaluate future policymaking in this area, which may be informed by the anticipated year-long comprehensive disability needs assessment that ORR will be undertaking in collaboration with subject matter experts, and ORR's development of a disability plan.

Comment: One commenter recommended that care provider facilities provide the ISP in the unaccompanied child's primary language. The commenter also recommended that given the complexity of ISPs, such documents should be applied to unaccompanied children in restrictive or longer-term placements, not standard or EIFs placements.

Response: ORR agrees that if the child's native language is not their preferred language, then the ISP should be provided in the preferred language as this is consistent with language access requirements under § 410.1306. ORR is therefore, in this final rule, requiring that the ISP be provided in the child's native or preferred language. Consistent with this, ORR is finalizing this change to ''native or preferred language'' throughout § 410.1302 (specifically at § 410.1302(d) and § 410.1302(c)(13)), rather than ''native language'' as ORR had proposed. ORR also emphasizes that the finalized requirements under § 410.1302(e) pertain to standard programs and secure facilities, and that ORR's existing requirement is that all care provider facilities provide ISPs for each child in their care. ORR did not propose to adopt each of its existing requirements into this rule because of the sheer number and detail of those requirements and because keeping those requirements at the subregulatory level will allow ORR to make more appropriate, timely, and iterative updates in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and care provider facilities.

Final Rule Action: After consideration of public comments, ORR is revising the section title of § 410.1302 to ''Minimum standards applicable to standard programs and secure facilities''; § 410.1302 to add ''secure facilities'' to standard programs so that secure facilities are required to provide the minimum standards under this section; § 410.1302(a) to require standard programs and secure facilities be licensed by an appropriate State agency, or meet the requirements of State licensing if located in a State that does not allow State licensing of programs that care or propose to care for unaccompanied children; § 410.1302(b) to require standard programs and secure facilities to comply with all State child welfare laws and regulations (such as mandatory reporting of abuse) and all State and local building, fire, health, and safety codes and by removing ''and other additional requirements specified by ORR if licensure is unavailable in their State to care provider facilities providing services to unaccompanied children'' and removing ''If there is a potential conflict between ORR's regulations and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. If a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties;'' § 410.1302(c)(2)(iii) to use the term ''individualized needs'' instead of ''special needs'' as was finalized in this final rule at § 410.1001; § 410.1302(c)(1) to specify that personal grooming and hygiene items include items ''such as soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items,'' to include access ''showers'' in addition to toilets and sinks, and to include ''maintenance of safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of children;'' § 410.1302(c)(2)(v) to state ''Identification of whether the child is an Indigenous language speaker'' instead of ''whether an Indigenous language speaker;'' § 410.1302(c)(3) to replace ''concentrate primarily on the development of basic academic competencies and secondarily on English Language Training (ELT), including: . . .'' with '' concentrate on the development of basic academic competencies and on English Language Training (ELT), as well as acculturation and life skills development, including . . .;'' § 410.1302(c)(13) to state ''native or preferred language instead of ''native language;'' § 410.1302(c)(14) to add a requirement that unaccompanied children must have a reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, and receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband; § 410.1302(d) to state ''native or preferred language'' instead of ''native language;'' and § 410.1302(e) to state ''native or preferred language'' instead of ''native language;'' and is otherwise finalizing this section as proposed in the NPRM.

Section 410.1303 Reporting, Monitoring, Quality Control, and Recordkeeping Standards

ORR conducts ongoing monitoring of all components of care provider facilities' activities. These efforts ensure consistent oversight, accountability standards, and put in place checkpoints at regular intervals, consistent with ORR's authorities.[241] ORR proposed in the NPRM language at § 410.1303 to describe how ORR would ensure that care provider facilities are providing required services (88 FR 68939 through 68941). Under § 410.1303(a), ORR proposed in the NPRM to monitor all care provider facilities for compliance with the terms of the regulations in parts 410 and 411. ORR proposed in the NPRM the types of monitoring activities that it would perform: desk monitoring, routine site visits, site visits in response to ORR or other reports, and monitoring visits. Desk monitoring would include ongoing oversight from ORR headquarters. Examples of desk monitoring include monthly check-ins by ORR Federal staff with the care provider facility, regular record and report reviews, financial/budget statements analysis, ongoing reviews of staff background checks and vetting of employees, subcontractors, and grantees, and communications review. Routine site visits would be day-long visits to facilities to review compliance for policies, procedures, and practices and guidelines. Typically, routine site visits occur on a once or twice monthly basis, both unannounced and announced. Site visits in response to ORR or other requests would be visits for a specific purpose or investigation

(*e.g.,* regarding a corrective action plan). Routine monitoring visits would be conducted as part of comprehensive reviews of all care provider facilities. Typically, these may be week-long visits and are usually conducted by ORR not less than every two (2) years.

When care provider facilities are out of compliance with ORR policies and procedures, ORR issues a corrective action. A list of corrective actions may be communicated by ORR to care provider facilities, for example, as part of a report provided to the care provider facility after a monitoring visit. Under § 410.1303(b), ORR proposed in the NPRM to issue corrective actions to care provider facilities when it finds that a care provider facility is out of compliance with ORR regulations and subregulatory policies, including guidance and terms of its contracts and cooperative agreements (88 FR 68939). If ORR finds a care provider facility to be out of compliance, it would communicate the concerns in writing to the care provider facility's director or appropriate person through a written monitoring or site visit report, with a list of corrective actions and child welfare best practice recommendations, as appropriate. ORR would request a response to the corrective action findings from the care provider facility and specify a timeframe for resolution and the disciplinary consequences for not responding within the required timeframes. Examples of disciplinary consequences would include stopping placements at the care provider facility until all corrective actions have been addressed or possible non-renewal of the grant for the program, as appropriate.[242]

ORR proposed in the NPRM, language at § 410.1303(c) describing additional monitoring activities that ORR would conduct at secure facilities. In addition to other monitoring activities, consistent with existing policy and practice, ORR would review individual unaccompanied children's case files to ensure unaccompanied children placed in secure facilities are assessed at least every 30 days for the possibility of a transfer to a less restrictive setting (88 FR 68939).

ORR proposed in the NPRM, language at § 410.1303(d) describing monitoring of long-term home care and transitional home care facilities (88 FR 68939 through 68940). ORR proposed that long-term and transitional foster care homes be subject to the same types of monitoring as other ORR care but tailored to the foster care arrangement. For example, under § 410.1303(d), ORR proposed in the NPRM that during on site monitoring visits, ORR would be able to schedule a visit with the staff of a particular home care facility to conduct a first-hand assessment of the home environment and the care provider's oversight of the home. In addition to ORR monitoring, ORR proposed in the NPRM that ORR long-term home care and transitional home care facilities that provide services through a sub-contract or sub-grant be responsible for conducting annual monitoring or site visits of the sub-recipient, as well as weekly desk monitoring. Finally, ORR proposed to require that care providers provide the findings of such reviews to the designated ORR point of contact.

ORR proposed in the NPRM at § 410.1303(e),) that the care provider facilities develop quality assurance assessment procedures that accurately measure and evaluate service delivery in compliance with the requirements of this part, as well as those delineated in 45 CFR part 411 (88 FR 68940).

ORR proposed in the NPRM under § 410.1303(f), to establish care provider facility reporting requirements (88 FR 68940). The purpose of such reporting is to help ensure that incidents involving unaccompanied children are documented and responded to in a way that protects the best interests of children in ORR care, including their safety and well-being. Reporting requirements increase safety for children in ORR's care, and promote transparency and accuracy, and improve the care provided. ORR would require care provider facilities to report any emergency incident, significant incident, or program-level event to ORR, and in accordance with any applicable Federal, State, and local reporting laws. Accurately documenting incidents and program-level events is essential to ensuring the health and well-being of all unaccompanied children in care.

ORR proposed in the NPRM under § 410.1303(f)(1) to require that care provider facilities document incidents and events with sufficient detail to ensure that any relevant entity can facilitate any required follow-up; document incidents in a way that is trauma-informed and grounded in child welfare best practices; and update the report with any findings or documentation that are made after the fact (88 FR 68940). Additionally, proposed § 410.1303(f)(2) states that care provider facilities must never fabricate, exaggerate, or minimize incidents; use disparaging or judgmental language about unaccompanied children in incident reports; use incident reporting or the threat of incident reporting as a way to manage the behavior of unaccompanied children or for any other illegitimate reason. By ''illegitimate reason,'' ORR means a reason that is unrelated to the purposes of incident reporting, which as stated above are to help ensure that incidents involving unaccompanied children are documented and responded to in a way that protects the best interest of children in ORR care, including their safety and well-being. Further, illegitimate reasons include those that would be inconsistent with ORR's statutory responsibilities (*e.g.,* to ensure that the interest of the child are considered in decisions and actions relating to the care and custody of an unaccompanied child, to place unaccompanied children in the least restrictive setting that is in the best interest of the child); or inconsistent with these regulations and subregulatory policies, including ORR guidance and the terms of its contracts or cooperative agreements.

ORR proposed in the NPRM, limitations on how certain reports may be used by ORR or care provider facilities (88 FR 68940). ORR believes that these limitations will protect the best interests of unaccompanied children and put their safety first as well as help ensure that reports do not become a potential hindrance to placement in the least restrictive setting. Under § 410.1303(f)(3), ORR proposed in the NPRM to prohibit care provider facilities from using reports of significant incidents as a method of punishment or threat towards any child in ORR care for any reason. Under § 410.1303(f)(4), ORR proposed in the NPRM that the existence of a report of a significant incident may not be used by ORR as a basis for an unaccompanied child's step-up to a restrictive placement or as the sole basis for a refusal to step a child down to a less restrictive placement. Care provider facilities would likewise be prohibited from using the existence of a report of a significant incident as a basis for refusing an unaccompanied child's placement in their facilities. Reports of significant incidents could be used as examples or citations of concerning behavior. However, the existence of a report itself would not be sufficient for a step-up, a refusal to step-down, or a care provider facility to refuse a placement.

ORR noted that 45 CFR part 411, subpart G, requires reporting to ORR of any allegation, suspicion, or knowledge of sexual abuse, sexual harassment, inappropriate sexual behavior, and Staff Code of Conduct[243] violations occurring in ORR care, along with any retaliatory actions resulting from reporting such incidents; ORR also noted that part 411

requires compliance with required staff background checks at subpart B.

ORR also proposed at § 410.1307(c) of the NPRM to require that ORR monitor compliance with the requirements to issue required notices and documentation for medical services requiring heightened ORR involvement, as well as the other listed requirements. ORR proposed in the NPRM to initiate a Graduated Corrective Action Plan, with reporting requirements increasing along with oversight measures if programs remain non-compliant. ORR refers readers to § 410.1307(c) for additional discussion.

Safeguarding and maintaining the confidentiality of unaccompanied children's case file records is critical to carrying out ORR's responsibilities under the HSA and the TVPRA. The HSA places responsibility on ORR for implementing policies with respect to the care and placement of unaccompanied children, ensuring that the interests of the child are considered in decisions and actions relating to their care and custody, overseeing the infrastructure and personnel of facilities in which unaccompanied children reside, and maintaining data on unaccompanied children.[244] Additionally, the TVPRA places responsibility for the care and custody of unaccompanied children on HHS and requires HHS to ''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, including policies and programs reflecting best practices in witness security programs.'' [245] These program statutes recognize that ORR is responsible for maintaining and safeguarding unaccompanied children's records and data and that unaccompanied children are vulnerable persons, and therefore, the privacy and confidentiality of their records is paramount. Unaccompanied children may have histories of abuse, may be seeking safety from threats of violence, or may have been trafficked or smuggled into the U.S. Accordingly, HHS's longstanding policy is to protect from disclosure information about unaccompanied children that could compromise the children's and sponsors' location, identity, safety, and privacy.

Consistent with its statutory responsibilities, ORR proposed in the NPRM in § 410.1303(g) that all care provider facilities must develop, maintain, and safeguard the individual case file records of unaccompanied children (88 FR 68941). The provisions in § 410.1303(g) would apply to all care provider facilities responsible for the care and custody of unaccompanied children, whether the program is a standard program or not. ORR noted that under its current policies the records of unaccompanied children generated in the course of post-release services (PRS) are not always considered to be included in the individual case files of unaccompanied children. However, ORR has determined that all unaccompanied children's records, including those produced for PRS, should be included in the individual case file records of unaccompanied children, whether generated while the child is in ORR custody or after release to their sponsor.[246] PRS records are created by, or on behalf of, ORR and assist ORR in coordinating supportive services for the child and their sponsor in the community where the child resides, as authorized under 8 U.S.C. 1232(c)(3)(B), which provides HHS authority to ''conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.'' ORR facilitates the provision of PRS services through its network of PRS providers under cooperative agreements with ORR.

Under § 410.1303(g)(1) of the NPRM, ORR proposed to require care provider facilities and PRS providers to maintain the confidentiality of case file records and protect them from unauthorized use or disclosure (88 FR 68941). ORR also proposed in § 410.1303(g)(2) that the records in unaccompanied children's case files are the property of ORR, whether in the possession of ORR, a care provider facility, or PRS provider, including those entities that receive funding from ORR through cooperative agreements, and care provider facilities and PRS providers may not release unaccompanied children's case file records or information contained in the case files for purposes other than program administration without prior approval from ORR. This provision allows ORR to ensure that disclosure of unaccompanied children's records is compatible with program goals, to ensure the safety and privacy of unaccompanied children, to not discourage unaccompanied children from disclosing information relevant to their care and placement, and to prevent potential sponsors from being deterred from sponsoring unaccompanied children. Further, under proposed § 410.1303(g)(3), ORR would require care provider facilities and PRS providers to provide the case files of unaccompanied children to ORR immediately upon ORR's request.

Under § 410.1303(g)(4) of the NPRM, ORR proposed that employees, former employees, or contractors of a care provider facility or PRS provider must not disclose unaccompanied children's case file records or provide information about unaccompanied children, their sponsors, family or household members to anyone except for purposes of program administration, without first providing advance notice to ORR of the request, allowing ORR to ensure that disclosure of unaccompanied children's information is compatible with program goals and ensures the safety and privacy of unaccompanied children (88 FR 68941). Safeguarding unaccompanied children's information is consistent with ORR's responsibilities under its program statutes, including 8 U.S.C. 1232(c)(1), which requires the Secretary to establish ''policies and programs reflecting best practices in witness security programs,'' and House Report 116–450 recommendations to restrict sharing certain information with other Federal agencies. A request for an unaccompanied child's case file information must be made directly to ORR, allowing ORR to consider whether disclosure meets these requirements, is in the best interest of the unaccompanied child, safeguards the unaccompanied child's and their sponsor's, family and household member's personally identifiable and protected health information, and is compatible with statutory program goals and all applicable Federal laws and regulations.

For purposes of facilitating efficient program administration, ORR policy is to allow certain limited disclosures by ORR grantees and contractors for program administration purposes without attaining prior ORR approval such as (1) registration for school and for other routine educational purposes; (2) routine medical, dental, or mental health treatment; (3) emergency medical care; (4) to obtain services for unaccompanied children in accordance with ORR policies; and (5) pursuant to any applicable whistleblower protection laws. These record safeguarding policies allow ORR to protect the privacy and safety of each unaccompanied child while also ensuring that certain routine and emergency services and treatment are provided expeditiously without waiting for approval from ORR.

ORR proposed in the NPRM at § 410.1303(h) to require standard programs to maintain adequate records and make regular reports as required by ORR that permit ORR to monitor and

enforce the regulations in parts 410 and 411 and other requirements and standards as ORR may determine are in the best interests of each unaccompanied child (88 FR 68941). ORR welcomed public comment on these proposals.

Finally, ORR notes that as mentioned previously in the preamble in relation to § 410.1302, this final rule includes a new § 410.1303(e), requiring enhanced monitoring of unlicensed standard programs and EIFs. Under this new paragraph, ORR will require enhanced monitoring, including on-site visits and desk monitoring, in addition to other requirements of this section, for all standard programs that are not State-licensed because the State does not allow State licensing of programs providing care and services to unaccompanied children, and emergency or influx facilities. Accordingly, paragraphs (e) through (h) as published in the NPRM have been redesignated in this final rule.

Comment: Several commenters expressed concern that the proposed rule does not indicate the frequency, duration, or scope of ORR's monitoring and emphasized the need for more regular and rigorous monitoring of all care provider facilities by ORR to ensure risks to children and corrective actions are addressed in a timely manner. A few commenters recommended incorporating more details from the ORR Policy Guide for consistent implementation across all care provider facility types, for example stating that routine site visits described in the NPRM at § 410.1303(a)(2) occur at ''every facility'' rather than at ''facilities,'' to avoid leaving open the possibility for ORR to not monitor facilities. They requested additional information on what ''desk monitoring'' or ''ongoing oversight'' entails, how often such oversight occurs, or who is part of such oversight. One commenter noted that the language in the NPRM only describes monitoring activities but does not directly require monitoring activities under § 410.1303(a).

Response: ORR thanks the commenters for their feedback. ORR will continue to use and update its existing guidance to provide more detailed requirements for care provider facilities related to monitoring. ORR notes that its existing policies provide more detailed descriptions of desk monitoring and the ongoing monitoring activities that are part of it. ORR opted for this approach so that it can remain agile and provide more frequent iterative updates to its monitoring requirements in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and care provider facilities. Where the regulations contain less detail, other guidance and communications from ORR to care provider facilities will provide specific guidance on requirements. Related to the concern about requiring monitoring at § 410.1303(a), ORR is revising to ''ORR shall monitor'' rather than ''ORR monitors'' to more accurately reflect that monitoring of care provider facilities is indeed a requirement for ORR. Similarly, ORR is revising § 410.1303(c) to state ''ORR shall review'' instead of ''ORR reviews'' to reflect that this is a requirement of ORR; and new § 410.1303(f) (previously § 410.1303(e) in the NPRM) to state ''Care providers shall'' instead of ''ORR shall require care providers to'', new §§ 410.1303(g)(1) through (4) (previously §§ 410.1303(f)(1) through (4) in the NPRM) to state ''shall'' instead of ''must'' and ''shall not'' instead of ''must never'' or ''are prohibited from'', new §§ 410.1303(h)(1) through (4) (previously §§ 410.1303(g) (1) through (4) in the NPRM) to state ''shall'' instead of ''must'' or ''may'', and new § 410.1303(i) (previously § 410.1303(h) in the NPRM) to state ''shall'' instead of ''must'', to reflect that they are requirements of care provider facilities and PRS providers, where specified.

With respect to the commenter's suggested revision to § 410.1303(a)(2), ORR does not believe the revision is necessary because paragraph § 410.1303(a), as codified in this final rule, already states that ORR shall monitor ''all care provider facilities.''

Comment: One commenter expressed concern that the rule weakens monitoring standards by limiting the role of independent monitors and child advocates. Similarly, one commenter expressed concern about the credibility and impartiality of ORR if it is the same entity being monitored and strongly supported the creation of independent, contracted interdisciplinary teams for oversight of all ORR facilities in order to ensure compliance with ORR standards and provide recommendations for performance improvements.

Response: ORR acknowledges the commenters' concerns but does not agree that the proposed regulation text weakens monitoring standards. ORR first clarifies that while it has legal responsibility for the care and custody of unaccompanied children in its custody by reason of their immigration status, ORR carries out this responsibility by funding care provider facilities to physically house children and provide direct care and services. ORR monitoring is therefore an essential component of ensuring care provider facilities adhere to relevant requirements set out in statute, these final regulations, and other guidance established by ORR. ORR is not in this sense monitoring itself; rather it is monitoring grantees and contractors it funds. Care provider facilities are also subject to performance and financial monitoring and reporting as described at 45 CFR part 75, but as stated at § 410.1303(a), this final rule codifies programmatic monitoring specifically with respect to care provider facilities' adherence to this part and with 45 CFR part 411. ORR also notes that § 410.1303 codifies existing policies regarding monitoring. ORR notes that its existing policies set out more detailed guidance describing ORR's monitoring activities and the requirements related to monitoring that care provider facilities must comply with. With respect to commenters' suggestion of an independent form of oversight for the program, ORR notes that at subpart K of this final rule, ORR is finalizing the creation of the UC Office of the Ombuds. In creating the Ombuds Office, ORR aims to provide an independent and impartial body that can receive reports and grievances regarding the care, placement, services, and release of unaccompanied children, and make recommendations to ORR regarding its policies and procedures, specific to protecting unaccompanied children in the care of ORR. ORR refers commenters to subpart K for more detailed discussion of the Ombuds.

Comment: A few commenters were concerned that the proposed rule limits ORR's monitoring to ''care provider facilities,'' as defined under § 410.1001 which do not include out of network placements (OON or OONs). One commenter stated that children placed in OONs often have more significant needs and relatively longer lengths of placement than children who are not and stated that it is essential that ORR monitor OON placements. One commenter recommended adding language in this section stating that ORR monitors all care provider facilities and OON placements for compliance with the terms of the regulations in this part and 45 CFR part 411.

Response: ORR thanks the commenters for their comments and emphasizes that it is current practice to conduct regular monitoring at OON placements, and it will continue to do so. Part 410 will not govern or describe the entire UC Program, and ORR will continue to use and update its existing policies to provide more detailed

requirements. ORR's monitoring activities at OON placements largely mirror the monitoring requirements that ORR uses at in-network facilities and are collaboratively conducted by the monitoring team, Federal Field Specialists, contracted field specialists, and case managers to ensure maximum visibility and compliance with all applicable standards of care at OON placements. ORR is not adding a requirement at this time under this section because the unique nature of each OON placement requires a collaborative and unique monitoring approach from ORR, and ORR does not believe a ''one size fits all'' monitoring approach would be appropriate given the array of types of OON placements, such as hospitals or other types of restrictive settings. Even still, monitoring activities at OON placements in practice largely mirror the monitoring requirements that ORR uses at in-network facilities and are conducted to ensure maximum visibility and compliance with all applicable standards of care at the OON placement. ORR also notes that OON placements are not required to meet the requirements of subpart D as they are not included in ORR's definition of care provider facilities.

Comment: A few commenters were concerned that the corrective actions and described process in proposed § 410.1303(b) address violations only on a case-by-case basis and that the proposed rule appears not to contemplate contractors or other entities who violate regulations regularly or systematically unless the violations are criminal in nature because it takes each violation as a singular event without relationship to other events or, potentially, to higher-level decisions.

The commenters stated that both ORR and children's interests are served when regulations are followed by care provider facilities, when systematic problems are identified early and resolved, and when actors who have consistently acted contrary to the best interests of children no longer have access to Federal contracts to care for children. The commenters suggested that to identify problem entities, the first step is to collect data on incidents, particularly on the more serious incidents, and aggregate incidents at the facility level as well as the grantee and contractor level. The commenters suggested that ORR follow Senate Finance Committee recommendations from 2021 stating ORR should utilize drawdowns and the discontinuation or non-continuation of grants/contracts to providers that do not effectively safeguard children in their care. One commenter recommended adding text to § 410.1303(b) requiring ORR to collect and aggregate data on violations and resulting corrective actions for both facilities and grantees. The commenter further suggested that ORR require such data to be used in ongoing monitoring and in consideration of the future composition of the ORR network, including to inform decisions regarding initiation, renewal, or discontinuation of contracts or cooperative agreements.

Response: ORR believes that data collection can play a pivotal role in facilitating the identification of potential issues, including potentially systematic issues, related to the care of unaccompanied children, and for that reason is finalizing requirements under § 410.1501 to require ORR to collect data, and care provider facilities to report data, under § 410.1501(g) that is necessary to evaluate and improve the care and services for unaccompanied children. It is ORR's existing practice to consider this aggregate data in its care provider facility scorecard reviews and ORR's Acquisition Requirements Team, the General Services Administration, and the Office of Acquisition Management Services also oversee performance under contracts and take appropriate action when contractors do not meet ORR's requirements for serving unaccompanied children. Additionally, ORR consults its Office of Grants Management and Office of General Counsel regarding performance issues for the grantee network. ORR additionally notes that under § 410.2002(c)(5), ORR is required to provide the data it maintains to the finalized UC Office of the Ombuds, and that the Ombuds is also empowered to provide recommendations and publish reports, among other duties, based on its findings. With respect to the Senate Finance Committee recommendations from 2021,[247] ORR notes that ACF already has authority to take such actions, as described at 45 CFR part 75,[248] and regularly exercises this authority (*e.g.,* through audits and enforcement actions).

Comment: Due to their concerns about potential lawsuits and treatment of children in secure placements within ORR's network, a few commenters suggested that ORR increase its monitoring requirements for secure facilities to ensure that routine site visits occur at a minimum of once per month and that weeklong monitoring visits are conducted yearly. The commenters also recommended that ORR review children's case files at least every 14 days to determine if the child is ready for a less restrictive placement, instead of at 30-day intervals, which they believe is in closer compliance with ORR's statutory and child welfare mandate.

Response: ORR has not specified specific time intervals for the various types of monitoring it conducts for all care provider facilities, including secure facilities, under § 410.1303(a) because, as previously discussed, ORR's existing policies provide more detailed descriptions of desk monitoring and the ongoing monitoring activities that are part of it. ORR opted for this approach so that it can remain agile and provide more frequent iterative updates to its monitoring requirements in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and care provider facilities.

Comment: One commenter recommended including monitoring requirements under § 410.1303(d) for care provider facilities that are unable to be licensed through their State to ensure best practices and the safety of children in care.

Response: ORR is finalizing a requirement under § 410.1302(a) that all standard programs and secure facilities be licensed by their State or meet the requirements of State licensing if located in a State that does not allow State licensing of programs providing or proposing to provide care services to unaccompanied children. ORR conducts monitoring of all care provider facilities, regardless of whether they are in a State that allows or does not allow State licensing for ORR care provider facilities. ORR notes that it already conducts enhanced monitoring which includes regular on-site visits and desk monitoring of any care provider facilities where a State will not license the facility because it cares for or proposes to care for unaccompanied children.

Comment: One commenter was concerned that there is ambiguity about whether monitoring by a prime contractor is intended to supplement or replace ORR's monitoring of subrecipient long-term home care and transitional home care facilities. The commenter recommended that ORR directly monitor long-term home care and transitional home care facilities with the activities described in § 410.1303(a), which may be tailored to the foster care arrangement, and recommended that ORR long-term home care and transitional home care facilities that provide services through a sub-contract or sub-grant are responsible for conducting annual monitoring or site visits of the sub-recipient, as well as weekly desk monitoring. The commenter further recommended

including a requirement that upon request, care provider facilities must provide findings of such reviews to the designated ORR point of contact.

Response: ORR directly monitors all care provider facilities that it funds. If a care provider facility, including a long-term home or transitional home care facility, subawards ORR funds to another entity to carry out care and custody of unaccompanied children, then consistent with 45 CFR 75.352(d) the prime recipient of ORR funds is responsible for monitoring its subrecipients ''as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved.''

Comment: A few commenters did not support the provisions at proposed § 410.1303(f)(4), stating that they are too limiting for case managers and their ability to perform essential functions.

Response: ORR acknowledges the commenters concerns but notes that the various requirements described at proposed § 410.1303(f)(4) in the NPRM (redesignated at § 410.1303(g)(4) in the final rule) concern placement decisions, and that ORR has statutory authority to make placement determinations. Care provider facilities, including case managers, do not decide on the placement of unaccompanied children in ORR custody. Further, as stated in the NPRM preamble, ORR believes that these provisions will protect the best interests of unaccompanied children and put their safety first as well as help ensure that reports do not become a potential hindrance to placement in the least restrictive setting (88 FR 68940).

Comment: A few commenters shared concerns that ORR care provider facilities often engage in over-reporting of incidents and that many SIRs frequently document minor rule infractions or developmentally appropriate child or adolescent behavior such as when children fail to follow facility rules, test boundaries, appropriately express frustration, or engage in horseplay or recreational activities. The commenters stated that SIRs frequently fail to contextualize children's behavior within the stressful circumstances, conditions, and length of time in government custody, or the trauma experienced. One commenter therefore recommended that regulatory language at proposed § 410.1303(f)(4) additionally state that care provider facilities may deny a placement only on the basis of the reasons and in accordance with the procedures set forth in § 410.1103(f) through (g). The commenter further recommended that ORR add language to § 410.1303(f)(4) to directly state that these reports are not complete or comprehensive and information in the reports may not be fully verified, and that staff should also consider that ORR does not intend for an incident report to provide complete context of the incident described or a child's experience in home country, journey, or time in care.

Response: ORR proposed in the NPRM at §§ 410.1303(f)(1) and (2) (redesignated at §§ 410.1303(g)(1) and (2) in the final rule) to provide additional parameters around the information contained in such reports to help ensure that incidents involving unaccompanied children are documented and responded to in a way that protects the best interests of children in ORR care, including their safety and well-being. ORR intends to continue to use its subregulatory guidance to provide additional details and requirements for care provider facilities. ORR notes, as stated by the commenters, that SIRs are not intended to provide complete context because they are internal records that contain information that may not be fully verified about a given incident or of the child's experience in home country, journey, or time in care.

Comment: Several commenters recommended revisions to § 410.1303(g), as proposed in the NPRM (redesignated as § 410.1303(h) in the final rule), to limit unauthorized access, use and disclosure of information and to preserve confidentiality of children's data and information. One commenter stated that the final rule should safeguard the personal information of unaccompanied children and their sponsors from unauthorized access, use, or disclosure, and include examples of parameters for what privacy and confidentiality should include, such as only collecting information that is necessary for the purposes of the UC Program and reporting privacy breaches to affected individuals. Commenters further recommended that ORR require compliance with applicable Federal and State laws and regulations regarding privacy and confidentiality because unaccompanied children may be vulnerable to discrimination, harassment, or retaliation based on their immigration status or background and face risks due to their personal information being accessed, used, or disclosed without their knowledge or consent. A few commenters stated that the proposed rule should not only prohibit the mishandling of unaccompanied children's information but also require organizations to implement policies and procedures to reduce the risk of mishandling such as proactively ensuring the privacy, security, and confidentiality of program data in accordance with national standards for protecting sensitive and restricted data. Another commenter recommended that proposed § 410.1303(g)(4) (redesignated to § 410.1303(h)(4) in the final rule) be expanded to address both unauthorized use and unauthorized disclosure of the sensitive information it describes. One commenter recommended that where the proposed rule uses the phrase ''unauthorized use or disclosure'' or a similar phrase, to include the terms unauthorized access, unauthorized use, misuse, and improper disclosure, stating that authorized users fulfilling job-related functions can still misuse private and sensitive data about children, and improper disclosure of the protected information in a case file (or elsewhere) does not require access to the file itself.

Response: ORR notes that the requirements under proposed § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the final rule) are supplemented by existing policies that speak to many of these concerns, particularly related to care provider facilities policies for maintaining case files and for record management, retention and safekeeping. ORR notes that care provider facilities must ensure compliance with all requirements imposed by Federal statutes concerning the collection and maintenance of records that includes personal identifying information. With regard to compliance with national standards and State laws, ORR further notes, consistent with § 410.1302(a) as codified in this final rule, that standard care provider facilities must follow State licensing requirements, even if they are in a State that does not license facilities that care for unaccompanied children; further, all care provider facilities must follow the requirements of part 410, and ORR policies and procedures.

Comment: A few commenters stated concerns that ORR's proposal to share information about the children and their sponsors with other Federal agencies, such as DHS, for immigration enforcement purposes would violate the children's privacy rights and deter potential sponsors from coming forward, resulting in prolonged detention and increased costs for ORR.

Response: ORR clarifies that proposed § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the final rule) also prohibits the sharing of information with other Federal agencies without prior approval from ORR. This

provision, like ORR's current policies, is consistent with provisions in House Report 116–450,[249] and restricts sharing certain case-specific information with EOIR and DHS that may deter a child from seeking relief through their legal service provider.

Comment: A few commenters noted that the ownership of records including case files of unaccompanied children is a complicated issue in part because many organizations are direct providers of different types of services for unaccompanied children, and that different providers are subject to different laws and best practices concerning the ownership of children's records. One commenter recommended that this section should address the different types of records kept by language access services providers, stating that some may be protected by attorney-client privilege. One commenter stated that while they agree that there is good reason for ORR to have ultimate responsibility for safeguarding some unaccompanied children's records, such as case files maintained by care provider facilities and PRS providers, the same approach may not be appropriate for ownership of other types of records such as a birth certificate, which belongs to the child and the child's parent or legal guardian, and the document and its contents can be shared with the child's or parent's consent. The commenter also included examples where ORR ownership would not apply, such as records maintained by legal services providers, which are protected by attorney-client privilege and cannot be shared with ORR, or medical or sensitive personal information protected by Federal and State policies. The commenter recommended that proposed § 410.1303(g)(2) in the NPRM, which identifies ORR as the owner of unaccompanied children's case files, should instead be addressed by a separate section not intended to establish a single rule for all records kept by all types of providers. The commenter also stated that the ownership of children's records is unnecessarily tied to restrictions on how providers may access or share information about a child and that the provision of services by particular providers may require explicit carve-outs from certain aspects of the uniform standards. The commenter therefore recommended that ORR include a new section in the rule which addresses the ownership of records maintained by different types of service providers, arguing that this would affirm ORR's ultimate responsibility for case files and other records kept by care provider facilities and PRS providers and its right to oversee and to regulate its grantees' and contractors' policies and procedures. The commenter recommended that ORR explicitly state that records maintained by legal service providers are not the property of ORR and address relevant issues raised by providers of other types of services in a manner that preserves their ability to efficiently serve unaccompanied children according to the relevant legal regimes and best practices of their field.

Response: ORR acknowledges the commenters' concerns related to legal service providers or other types of service providers that have records pertaining to unaccompanied children in ORR care. ORR clarifies that the requirements related to privacy and confidentiality of unaccompanied children's case file records under part 410 apply to care provider facilities and PRS providers, and do not apply to legal service providers. ORR notes that it includes privacy and confidentiality requirements in its grants, cooperative agreements, and contracts with other types of service providers, including legal service providers. This allows ORR to ensure all record keeping, privacy, and confidentiality terms are tailored as appropriate to the nature of the grant or contract. ORR further emphasizes that disclosures can be made, consistent with § 410.1303(g)(2), in accordance with law or for program administration purposes.

Comment: A few commenters noted that proposed § 410.1210(i) contains similar language to that found in proposed § 410.1303(g) in the NPRM and therefore recommended consolidating the general guidelines of proposed §§ 410.1303(g) through (h) in the NPRM (redesignated to §§ 410.1303(h) through (i) in the final rule) with the provisions of § 410.1210(i)(1) through (3) so that provisions currently focused solely on records managed by PRS providers will also apply to other types of service providers. One commenter stated that the proposed guidelines for the management, retention, and privacy of records maintained by PRS providers are both stronger and more detailed than the more general requirements proposed at § 410.1303(g) through (h) (redesignated to §§ 410.1303(h) through (i) in the final rule) that apply to care providers and suggested that the PRS provider facilities as well. Another commenter encouraged ORR to consolidate § 410.1210(i) with proposed § 410.1303(g) in the NPRM by using the version with stronger privacy and confidentiality protections, notably § 410.1210(i)(2)(iii). A few commenters, noting that proposed § 410.1210(i)(3)(iii) states that PRS providers' controls on information-sharing within the PRS provider network shall extend to subcontractors, similarly suggested extending safeguards from unauthorized access, inappropriate access, misuse, and inappropriate disclosure to subcontractors of all agencies and stated that the explicit inclusion of subcontractors is an important clarification that should be incorporated into other sections that safeguard children's information.

Response: ORR has many detailed subregulatory requirements for care provider facilities related to the privacy and confidentiality of the case file records of unaccompanied children, but did not propose to adopt each of its existing requirements into this rule because of the length and detail of those requirements and because maintaining those requirements in subregulatory guidance will allow ORR to make more appropriate, timely, and iterative updates to record management and privacy policy in keeping with best practices and to allow continued responsiveness to the evolving needs of unaccompanied children and care provider facilities. In contrast, ORR does not have as many subregulatory requirements for PRS providers related to the privacy and confidentiality of the case file records of unaccompanied children, and notes that the circumstances are different because the children served by PRS providers are no longer in ORR custody. For this reason, ORR chose to include more detail in the requirements under § 410.1210(i)(2) for PRS providers. ORR thanks the commenters for highlighting the nuances between § 410.1210(i) and proposed § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the final rule) but does not believe these nuances cause a conflict between the requirements under this part or in ORR's existing policies pertaining to care provider facilities.

Comment: A few commenters expressed concern that the proposed rule does not have uniformly high standards for all entities who may keep records regarding unaccompanied children's personally identifiable information (PII), and that the sections contemplating data collection and safeguarding should be aligned to a high standard of protection and made consistent across different types of service providers and information. One commenter stated that, in contrast to the requirements listed in proposed § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the

final rule), the proposed rule's guidelines for the handling of PII by child advocates under § 410.1308(f) and the providers of language access services under § 410.1306(i) are sparse. One commenter suggested that ORR should revise any text describing what organizations are subject to the guidelines of proposed § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the final rule), to ensure consistent inclusion of PRS providers and to ensure that other types of service providers that encounter or handle records involving unaccompanied children's PII are following best practices for developing, maintaining, and safeguarding them. A few commenters noted that, while the rule contemplates information and data that ORR receives via its network of grantees and contractors, the proposed rule fails to contemplate information and data that arrives via other means and that implicates the continued well-being of children or safety and security of children's placements.

Response: ORR includes privacy and confidentiality requirements in its cooperative agreements and contracts with other types of service providers and prefers to keep these requirements subregulatory so they can be tailored, as appropriate, to the nature of a particular contract or cooperative agreement. Related to data and information that ORR receives via its network of grantees and contractors, ORR notes that its requirements apply to all information contained in an unaccompanied child's case file record, regardless of how it was received.

Comment: A few commenters stated concerns that ORR's policies in this section would limit children's and their family's access to their records of their treatment, thereby posing a potential infringement on parental and family rights. One commenter expressed concern that the provisions for prior approval and advance notice from ORR for disclosure of case file records improperly limit the access of the unaccompanied child, child's attorney, and child advocate to the case file, stating that the child, their attorney, and their child advocate should have unrestricted access to all non-classified records. The commenter stated that unrestricted access to all documents will help ensure that children are generally informed about their case. The commenter suggested that the child, child's attorney, and child advocate be afforded unrestricted access to the case file and that advance notice or approval only be required before disclosing the case file information to anyone else for any purpose.

Response: ORR does not agree that its proposed policies under § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the final rule) limit access to case files for unaccompanied children, children's families, or children's LSPs, attorneys of record, or child advocates. As stated above, regarding the definition of ''case file,'' ORR notes that, consistent with the Privacy Act, codified at 5 U.S.C. 552a, the UC Program's System of Records Notice (SORN), and ORR policies, unaccompanied children have access to, and are entitled to copies of, their own case file records.[250] As such, both unaccompanied children and their parents or legal guardians may request their own files. ORR further notes that pursuant to the TVPRA, child advocates are ''provided access to materials necessary to effectively advocate for the best interest of the child,'' [251] and that under current ORR policies, child advocates have immediate access to children's case files without needing to submit a formal request to ORR. Further, under current ORR policies, unaccompanied children's attorneys may request their clients' case files, including on an expedited timeframe, as needed. ORR notes that its existing subregulatory guidance contains more detailed requirements related to the disclosure of records for these individuals, and the process for requesting access to case files or records. ORR believes that its established process for requesting access to case files safeguard and maintain the confidentiality of unaccompanied children's case file records consistent with ORR's responsibilities under the HSA and the TVPRA, as stated in the preamble discussion. Further, ORR believes that its proposed policies under § 410.1303(g) in the NPRM (redesignated to §§ 410.1303(h) in the final rule) recognize that unaccompanied children are vulnerable persons, and therefore, the privacy and confidentiality of their records is paramount, and carry out ORR's responsibility for maintaining and safeguarding unaccompanied children's records and information under the HSA and the TVPRA.

Comment: One commenter recommended that ORR require care provider facilities to keep detailed records of any circumstance in which they believe an unaccompanied child to have been separated from, a parent, legal guardian, or other family member at the time of apprehension into Federal custody. The commenter suggested that even if the separation cannot be substantiated, care provider facilities must collect all available information relating to the biographical information of the separated parent, legal guardian, or family member, the specific facts of the separation, documentation of notification to the child of the child's rights, and documentation of a referral for a child advocate.

Response: ORR thanks the commenter for the recommendation, and notes that under § 410.1302(c)(2)(ii) it is finalizing a requirement that essential data relating to the identification and history of the unaccompanied child and family be collected upon the referral of an unaccompanied child by another Federal department or agency into the custody of ORR. ORR also notes that it is already required to collect and share significant amounts of information relating to separated children as part of a Settlement Agreement reached in the class action *Ms. L.* litigation.[252] The settlement requires that ORR receive the information described by the commenter at or near the time of such child's transfer to ORR custody. ORR further notes that this information will be part of the separated child's case file.

Comment: Several commenters stated concerns that the requirement to provide advance notice to ORR prior to disclosure of information under proposed § 410.1303(g)(4) in the NPRM (redesignated to § 410.1303(h)(4) in the final rule) would violate the Whistleblower Protection Act, its subsequent amendments, and 5 U.S.C. 7211 and the right of employees to furnish information to Congress without interference. One commenter stated that proposed § 410.1303(g)(4) in the NPRM (redesignated to § 410.1303(h)(4) in the final rule) appears to formalize a blanket prohibition on certain personnel from releasing information without ORR's prior approval and without consideration for whistleblower protection and disclosure laws. One commenter stated that, because ORR is requiring care provider facilities and PRS providers to furnish records immediately, ORR should be able to provide this same information to state and local agencies for oversight of ORR.

Response: ORR emphasizes that no portion of this regulation impacts the rights, protections, and vital work of whistleblowers in providing information for the protection of children in ORR custody and for the general public interest. Section 410.1303(g) as proposed in the NPRM (redesignated to § 410.1303(h)(4) in the final rule) has no bearing on whistleblower policy and protections in any way and does not intend to infringe upon them. ORR will continue to comply with all required whistleblower

protection laws and encourages all whistleblowers to come forward as necessary and appropriate. Whistleblowers can initiate the process to report concerns to appropriate authorities, such as OIG or Congress. If case records are needed, OIG or Congress can request them from ORR. ORR discusses in the preamble of the NPRM its pre-approval of certain limited disclosures for the purposes of facilitating efficient program administration, and notes that it includes disclosures pursuant to all available whistleblower protection laws. ORR is committed to fully respecting and enforcing whistleblower protections, and nothing in part 410 should be read as removing or weakening those protections and rights. ORR's policy of allowing certain limited disclosures by ORR grantees and contractors without attaining prior ORR approval allows ORR to protect the privacy and safety of each unaccompanied child while also ensuring that certain routine and emergency services and treatment are provided expeditiously without waiting for approval from ORR, and it ensures that whistleblowing is not hindered or discouraged. ORR's intention with these requirements is first and foremost to protect the privacy and confidentiality of unaccompanied children and their families. It is in their interest, broad child welfare interest, and the public interest to ensure that their information is not freely or erroneously shared with others. These information sharing requirements have no bearing on existing whistleblower protections, which remain in place and continue to be a key mechanism for ensuring the safety and well-being of all children in ORR care. In order to make this clear, in this final rule, ORR is amending proposed § 410.1303(g)(4) in the NPRM (redesignated to § 410.1303(h)(4) in the final rule) to explicitly state that the provision is subject to applicable whistleblower protection laws.

Comment: Several commenters stated that providing a file to ORR ''immediately'' on request will likely be problematic for many programs and requested that ORR include a reasonable standard of within 4 business days for routine requests and 4 business hours for urgent requests. One commenter stated that the rationale for requiring immediate access to a case file for a child in ORR's custody would not necessarily apply to PRS providers, noting that the current policy of ORR does not always consider PRS to be included in the case file and that the proposed rule would be an expansion intended to apply to PRS providers and files. While the commenter expressed support for the expansion of PRS services, they did not believe that such an expansion necessitated that ORR be given immediate access to all PRS case files and noted that a requirement for immediate access could cause difficulties with the stated goals of providing the expanded services.

Response: ORR acknowledges the commenters' concerns related to the immediate provision of case files to ORR but believes the immediate provision of case files is necessary to ensure ORR has timely and accurate information. ORR will continue to monitor the impact of these requirements as they are implemented and may provide additional guidance related to the timelines for the immediate provision of case file information.

As to the concern about this requirement applying to PRS providers, ORR notes that it provides PRS to unaccompanied children by funding organizations through cooperative agreements. As a matter of prudent program management, ORR requires access to PRS provider records. ORR notes this requirement is also consistent with HHS regulations requiring agencies to have access to grantee records.[253] ORR also reiterates its discussion in the preamble that PRS records are created by, or on behalf of, ORR and assist ORR in coordinating supportive services for the child and their sponsor in the community where the child resides, as authorized under 8 U.S.C. 1232(c)(3)(B), which provides HHS authority to ''conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.'' Lastly, it was unclear from the comments why an ORR requirement for immediate access to PRS records would cause difficulties with expanding services. However, ORR notes that it may provide additional subregulatory guidance as necessary to support the implementation of expanded PRS while ensuring ORR access to information as requested.

Comment: One commenter agreed that the language at proposed § 410.1303(g)(4) in the NPRM (redesignated to § 410.1303(h)(4) in the final rule) prohibiting certain individuals from disclosing sensitive information is appropriately strong and wide-ranging, but believed the term ''program administration'' is ambiguous. The commenter recommended that this should refer only to the administration of ORR's own programs, and not to the administration of programs of other agencies, such as those operated by U.S. Immigration and Customs Enforcement. The commenter suggested that individuals affiliated with ORR-funded service providers should not be allowed to communicate sensitive information about a child or their family for purposes other than the care and well-being of a child and that ORR should specify here that the named exception applies only to its own programs.

Response: ORR clarifies that ''program administration'' refers to administration of the UC Program and routine disclosures that are necessary to provide relevant services to unaccompanied children. ORR refers the commenter to its discussion above describing ORR's policy of allowing certain limited disclosures by ORR grantees and contractors without attaining prior ORR approval (noting examples such as registration for school and for other routine educational purposes; routine medical, dental, or mental health treatment; emergency medical care; and otherwise obtaining services for unaccompanied children in accordance with ORR policies). ORR reiterates that the provisions in § 410.1303(h) as codified in this final rule apply to all care provider facilities responsible for the care and custody of unaccompanied children, whether the program is a standard program or not. ORR also notes that its authority to regulate does not extend to the programs of other agencies, and thus records requirements, along with any of the requirements described in this final rule, apply only to the ORR UC Program.

Comment: One commenter stated that it is unclear how accountability systems for preserving the confidentiality of children's information and protecting their records from unauthorized use or disclosure at § 410.1801(b)(17) in the NPRM (redesignated as § 410.1801(c)(13) in the final rule) should be integrated with similar requirements proposed at § 410.1303(g) through (h) (redesignated to §§ 410.1303(h) through (i) in the final rule) that apply to all care providers, including emergency facilities.

Response: The requirements at proposed § 410.1801(b)(17) in the NPRM (redesignated as § 410.1801(c)(13) in the final rule) state that emergency or influx facilities maintains records of case files and make regular reports to ORR and must have accountability systems in place which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure. ORR notes that proposed § 410.1303(g) through (h) in the NPRM, finalized at redesignated§ 410.1303(h)

through (i), provides more detailed requirements for all care provider facilities, and in the case of emergency or influx facilities, provides additional parameters for the accountability systems that the EIFs must have in place. However, ORR agrees that accountability to ensure that EIFs faithfully follow these recordkeeping requirements is important. Therefore, ORR will move the provision that was proposed at § 410.1801(b)(17) in the NPRM (''The EIF shall maintain records of case files and make regular reports to ORR. EIFs must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.'') into the newly designated § 410.1801(c)(13) so that the provision is non-waivable for EIFs.

Comment: One commenter stated that the rule should also provide for mechanisms to inform, obtain consent, and redress any breaches of privacy and confidentiality, and recommended including language in this section to explicitly address that.

Response: ORR notes that it has requirements related to informing and obtaining consent for record disclosure in its existing subregulatory guidance. In addition, as described above, ORR considers unaccompanied children's records to be subject to the Privacy Act. Therefore, it understands that unlawful disclosures may be subject to remedies described in that Act. ORR further notes that the Office of the Ombuds, as finalized and described under subpart K, may make efforts to resolve complaints or concerns raised by interested parties as it relates to ORR's implementation or adherence to Federal law or ORR policy, including any concerns reported to the Ombuds related to privacy and confidentiality. However, ORR will continue to monitor the impact of these requirements as they are implemented.

Final Rule Action: After consideration of public comments, ORR is revising § 410.1303(a) to state ''ORR shall monitor'' rather than ''ORR monitors;'' § 410.1303(c) to state ''ORR shall review'' instead of ''ORR reviews;'' and new § 410.1303(f) (previously § 410.1303(e) in the NPRM) to state ''Care providers shall'' instead of ''ORR shall require care providers to;'' new §§ 410.1303(g)(1) through (4) (previously §§ 410.1303(f)(1) through (4) in the NPRM) to state ''shall'' instead of ''must'' and ''shall not'' instead of ''must never'' or ''are prohibited from;'' new §§ 410.1303(h)(1) through (4) (previously §§ 410.1303(g) (1) through (4) in the NPRM) to state ''shall'' instead of ''must'' or ''may;'' and new § 410.1303(i) (previously § 410.1303(h) in the NPRM) to state ''shall'' instead of ''must.'' ORR is also adding a new paragraph, (e), requiring enhanced monitoring of unlicensed standard programs and emergency or influx facilities, which states, ''In addition to the other requirements of this section, for all standard programs that are not State-licensed for the care of unaccompanied children and for emergency or influx facilities, ORR shall conduct enhanced monitoring, including on-site visits and desk monitoring.'' The remaining paragraphs of § 410.1303 have been redesignated accordingly. Additionally, ORR makes a clarifying revision at new § 410.1303(h) (previously § 410.1303(g) in the NPRM) to delete ''whether the program is a standard program or not'' as both standard and non-standard programs are already included in the definition of care provider facilities. ORR makes grammatical revisions to the previous § 410.1303(g)(2) in the NPRM, now § 410.1303(h)(2), and divides this provision into two sentences. It now states ''The records included in an unaccompanied child's case files are ORR's property, regardless of whether they are in ORR's possession or in the possession of a care provider facility or PRS provider. Care provider facilities and PRS providers may not release those records or information within the records without prior approval from ORR except for program administration purposes.'' ORR is revising the previous § 410.1303(g)(4) in the NPRM, now § 410.1303(h)(4), to add that ORR's requirements to not disclose case file records or information are ''subject to applicable whistleblower protection laws.'' ORR is also revising the previous § 410.1303(h) in the NPRM, now § 410.1303(i), to specify that care provider facilities and PRS providers shall maintain adequate records in the unaccompanied child case file. ORR is otherwise finalizing § 410.1303 as proposed.

Section 410.1304 Behavior Management and Prohibition on Seclusion and Restraint

ORR proposed in the NPRM language at § 410.1304 describing the requirements for behavior management and the prohibition on seclusion and restraint (88 FR 68941 through 68942). ORR proposed in the NPRM these requirements consistent with its statutory responsibilities to implement policies with respect to the care and placement of unaccompanied children, to place unaccompanied children in the least restrictive setting available that is in their best interest, and to ensure the interest of unaccompanied children are considered in decisions and actions related to their care and custody. ORR understands that its responsibilities apply to each unaccompanied child in its care, including unaccompanied children who are subject to behavioral interventions, as well as to other unaccompanied children placed at the same care provider facility as an unaccompanied child who is subject to behavioral interventions.

Effective behavior management is critical to supporting the health, safety, and well-being of unaccompanied children in ORR care and can help prevent emergencies and safety situations. Consistent with ORR's statutory responsibilities, ORR proposed in the NPRM at § 410.1304(a) to incorporate FSA paragraph 11 requirements and child welfare best practices by requiring care provider facilities to have behavior management strategies that include techniques for care provider facilities to follow. Under § 410.1304(a), ORR proposed in the NPRM that care provider facilities must develop behavior management strategies that include evidence-based, trauma-informed, and linguistically responsive program rules and behavior management policies that take into consideration the range of ages and maturity of unaccompanied children in the program and that are culturally sensitive to the needs of each unaccompanied child. Examples of evidence-based standards and approaches may include setting clear and healthy expectations and limits for their behaviors and the behaviors of others; creating a healthy structured environment with routines and schedules; utilizing positive reinforcement strategies and avoiding negative reinforcement strategies; and fostering a supportive environment that encourages cooperation, problem-solving, healthy de-escalation strategies, and positive behavioral management skills. Further, ORR proposed in the NPRM that the behavior management strategies must not use any practices that involve negative reinforcement or involve consequences or measures that are not constructive or not logically related to the behavior being regulated. This would include, as proposed under § 410.1304(a)(1), prohibiting the use or threatened use of corporal punishment, significant incident reports as punishment, and unfavorable consequences related to family/sponsor unification or legal matters (*e.g.,* immigration relief). It would also include prohibiting the use of forced chores or other activities that serve no

purpose except to demean or humiliate an unaccompanied child, search an unaccompanied child's personal belongings solely for the purpose of behavior management, and medical interventions that are not prescribed by a medical provider acting within the usual course of professional practice for a medical diagnosis or that increase risk of harm to the unaccompanied child or others. Under § 410.1304(a)(2), ORR proposed in the NPRM to require that any sanctions employed not adversely affect either an unaccompanied child's health or physical, emotional, or psychological well-being; or deny an unaccompanied child meals, hydration, sufficient sleep, routine personal grooming activities, exercise (including daily outdoor activity), medical care, correspondence or communication privileges, or legal assistance. ORR noted that under § 410.1305 of the NPRM it proposed requiring training for care provider facility staff on behavior management strategies, including the use of de-escalation strategies. Under § 410.1304(a)(3), ORR proposed in the NPRM to prohibit the use of prone physical restraints, chemical restraints, or peer restraints for any reason in any care provider facility setting.

ORR proposed in the NPRM, language at § 410.1304(b), requiring that involvement of law enforcement would be a last resort and a call by a care provider facility to law enforcement may trigger an evaluation of staff involved regarding their qualifications and training in trauma-informed, de-escalation techniques. ORR noted that calls to law enforcement are not considered a behavior management strategy, and care provider facilities are expected to apply other means to de-escalate concerning behavior. But in some cases, such as emergencies or where the safety of unaccompanied children or staff are at issue, care provider facilities may need to call 9–1–1. ORR also noted that § 410.1302(f) describes requirements for care provider facilities regarding the sharing of information about unaccompanied children. Additionally, because ORR would like to ensure law enforcement is called in response to an unaccompanied child's behavior only as a last resort in emergencies or where the safety of unaccompanied children or staff are at issue, ORR requested comments on the process ORR should require care provider facilities to follow before engaging law enforcement, such as the de-escalation strategies that must first be attempted and the specific sets of behaviors exhibited by unaccompanied children that warrant intervention from law enforcement.

ORR proposed in the NPRM at § 410.1304(c) to prohibit standard programs and RTCs from the use of seclusion as a behavioral intervention. ORR noted that this prohibition on the use of seclusion specifically relates to its potential use as a behavioral intervention, and not to a medical need for isolation or quarantine, as discussed in § 410.1307(a)(10). Standard programs and RTCs would also be prohibited from using restraints, except as described at proposed § 410.1304(d) and (f). In emergency safety situations only, ORR proposed in the NPRM that standard programs and RTCs should be permitted to use personal restraints under § 410.1304(d). ORR believes that emergency safety situations should be prevented wherever possible and that personal restraints should only be used after de-escalation strategies and less restrictive approaches have been attempted and failed. As such, ORR emphasized in its proposed requirements under § 410.1304(a) that behavior management strategies used by care provider facilities be evidence-based, trauma-informed, and linguistically responsive. ORR further emphasized in its requirements under proposed § 410.1305 that staff must be trained in these behavior management strategies, including de-escalation techniques.

In secure facilities, not including RTCs, there may be situations where an unaccompanied child becomes a danger to themselves, other unaccompanied children, care provider facility staff, or property. As a result, secure facilities may need to employ more restrictive forms of behavior management than shelters or other types of care provider facilities in emergency safety situations or during transport to or from immigration court or asylum interviews when there are certain imminent safety concerns. ORR noted that under proposed § 410.1303(f) in the NPRM and ORR's current policy, all care provider facilities, regardless of setting, are required to report any emergency incident, significant incident, or program-level event to ORR, and in accordance with any applicable Federal, State, and local reporting laws.

Therefore, ORR proposed in the NPRM under § 410.1304(e)(1) to allow secure facilities except for RTCs to use personal restraints, mechanical restraints, and/or seclusion in emergency safety situations. ORR noted under proposed § 410.1304(a)(3) that the use of prone physical restraints, chemical restraints, or peer restraints is prohibited for any reason for all care provider facilities, including secure facilities. ORR proposed in the NPRM at § 410.1304(e)(2) to allow secure facilities to restrain an unaccompanied child for their own immediate safety or that of others during transport to an immigration court or an asylum interview. ORR proposed in the NPRM at § 410.1304(e)(3) that secure facilities may restrain an unaccompanied child while at an immigration court or asylum interview if the child exhibits imminent runaway behavior, makes violent threats, demonstrates violent behavior, or if the secure facility has made an individualized determination that the child poses a serious risk of violence or running away if the child is unrestrained in court or the interview. ORR noted that while secure facilities may have safety or runaway risk concerns for which they deem restraints necessary for certain unaccompanied children, immigration judges retain discretion to provide input as to whether the unaccompanied child should remain in restraints while in their courtroom. ORR proposed in the NPRM to require under § 410.1304(e)(4) that secure facilities must provide all mandated services under this subpart to an unaccompanied child, to the greatest extent practicable under the circumstances, while ensuring the safety of the unaccompanied child, other unaccompanied children at the secure facility, and others. Finally, under § 410.1304(f) ORR proposed in the NPRM to allow care provider facilities to use soft restraints (*e.g.,* zip ties and leg or ankle weights) only during transport to and from secure facilities, and only when the care provider believes a child poses a serious risk of physical harm to self or others or a serious risk of running away from ORR custody.

Comment: One commenter wrote that proposed § 410.1304(a) aligns with many State laws and recommended that ORR require care provider facilities to employ trauma-informed, evidence-based de-escalation and intervention techniques when responding to the behavior. The commenter recommended an additional provision under § 410.1304(b) requiring that trauma-informed, evidence-based de-escalation and intervention techniques be exhausted before resorting to law enforcement, and that facilities should develop collaborative relationships with community-based service organizations that provide culturally relevant and trauma-informed services to the children served by the facility.

Response: Section 410.1304(a) of this final rule provides that care provider facilities must develop behavior

management strategies that include evidence-based, trauma-informed, and linguistically responsive program rules and behavior management policies, and notes that the requirements for these strategies include behavior intervention techniques utilized by care provider facilities. As discussed in the preamble of the NPRM, examples of evidence-based standards and approaches may include setting clear and healthy expectations and limits for their behaviors and the behaviors of others, creating a healthy structured environment with routines and schedules, utilizing positive reinforcement strategies and avoiding negative reinforcement strategies, and fostering a supportive environment that encourages cooperation, problem-solving, healthy de-escalation strategies, and positive behavioral management skills (88 FR 68941). ORR notes that under § 410.1305 it is finalizing a requirement for training for staff at standard programs and restrictive placements on the behavior management strategies, including the use of de-escalation strategies. ORR is revising § 410.1304(a) to state ''shall'' instead of ''must'' and ''care provider facilities shall'' instead of ''the behavior management strategies must'' to reflect that these are requirements of care provider facilities. ORR is also revising § 410.1304(a)(1) to replace ''family/sponsor'' with ''sponsor,'' as family in this context is redundant of sponsor.

Related to the recommendations for § 410.1304(b), ORR reiterates its discussion in the NPRM that ORR expects care provider facilities to apply other means to de-escalate concerning behavior before a call to law enforcement is made. ORR notes that it requested comments in the NPRM on the process ORR should require care provider facilities to follow before engaging law enforcement, such as the de-escalation strategies that must first be attempted and the specific sets of behaviors exhibited by unaccompanied children that warrant intervention from law enforcement.

Comment: One commenter recommended that access to privacy should not be routinely used as an incentive or punishment for behavior management because they believe it is ineffective.

Response: ORR believes that having a reasonable right to privacy is important for unaccompanied children and is in line with the requirements under Exhibit 1 of the FSA, and for that reason has further revised its proposal to add § 410.1302(c)(14) to require a reasonable right to privacy as a minimum standard. ORR believes its revisions at § 410.1302(c)(14) establishing a reasonable right to privacy as a minimum standard adequately protects unaccompanied children's access to privacy related to behavior management as well.

Comment: A few commenters supported the prohibition of certain practices under § 410.1304(a)(2)(ii) and recommended that that the provision should also state that limiting access to religious services should not be a punishment for behavior, as children who miss religious services often report anxiety and frustration.

Response: ORR believes that access to religious services is an important source of support for unaccompanied children and is therefore revising § 410.1304(a)(2)(ii) to include religious observation and services as part of the activities and items care provider facilities shall not deny as part of behavior management strategies.

Comment: In response to ORR's request in the NPRM for comments on the process ORR should require care provider facilities to follow before engaging law enforcement, one commenter recommended factors to consider before a call to law enforcement, including the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk without the involvement of law enforcement. Another commenter recommended ORR implement a trauma-informed care system that begins at the moment a child first enters ORR custody, rather than in the midst of a crisis that warrants intervention. Another commenter recommended that ORR implement behavioral support systems that are fair, consistent, and equitably enforced, with consideration for individualized needs and unconscious bias.

Response: ORR thanks the commenters for their feedback related to ORR's request for comments on the procedures that care provider facilities should be required to follow before engaging law enforcement. ORR may consider these suggestions for future policymaking in this area.

Comment: Several commenters did not support § 410.1304(b) as proposed in the NPRM and were concerned that it would disincentivize staff from contacting law enforcement with safety concerns or reporting escalating behavior. Some commenters were concerned that a call to law enforcement could trigger an evaluation of the staff involved, but not an evaluation of the child's behavior or the care provider facility's policies or procedures. One commenter stated that law enforcement could be effective in preventing children from being involved in emergencies and are better equipped to respond to such situations. One commenter noted that in some cases, like emergencies, care provider facilities may need to call 9–1–1. Other commenters did not support the proposal under § 410.1304(b) and were concerned that it would impede the ability of law enforcement to investigate child trafficking.

Response: ORR disagrees that engaging law enforcement is an effective first-line strategy to prevent emergency safety situations arising from behaviors, because as stated in the preamble to the NPRM, ORR does not believe that calls to law enforcement are an effective behavior management strategy, and care provider facilities are expected to apply other means to de-escalate concerning behavior (88 FR 68942). ORR reiterates that it does believe that calls to law enforcement may sometimes be necessary when other less restrictive approaches have been tried and failed, when there is an emergency, or when the safety of children or staff are at issue, and that care provider facilities may need to call 9–1–1 as a last resort. ORR's proposal is intended to ensure that calls to law enforcement occur only in these limited scenarios, and that an evaluation of staff may be required to determine compliance with this proposal.

ORR notes that it is finalizing under § 410.1303(g) that all care provider facilities, regardless of setting, are required to report any emergency incident, significant incident, or program-level event to ORR, and in accordance with any applicable Federal, State, and local reporting laws. ORR routinely reviews all such reports and determines whether further follow-up or corrective actions are necessary when care providers are out of compliance with ORR's requirements. Further, ORR is finalizing behavior management requirements under § 410.1304(a) pursuant to which care providers shall use evidence-based, trauma-informed, and linguistically responsive program rules and behavior management policies.

Comment: A few commenters supported the proposal under § 410.1304(b) and had recommendations related to calls to law enforcement for unaccompanied children with disabilities. Recommendations included that a call to law enforcement should trigger a mandatory evaluation of the involved staff and of compliance with

the requirements of the child's current ISP, as well as a re-assessment of the child's ISP and whether the child needs additional services or reasonable modifications.

Response: ORR will study these important issues further and will consider the commenters' recommendations in future policymaking, which may be informed by the anticipated comprehensive disability needs assessment that ORR will be undertaking in collaboration with subject matter experts, and ORR's development of a disability plan.

Comment: One commenter was concerned that the proposal would impede whistleblowers and limit outside accountability.

Response: ORR does not believe that requiring a call to law enforcement be a last resort to address behavior issues impedes the ability of whistleblowers, and notes that this requirement under § 410.1304(b) is specific to behavior management. ORR wishes to emphasize that no portion of this regulation impacts the rights, protections, and vital work of whistleblowers in protecting children in ORR custody and for the general public interest. ORR notes that it is finalizing its proposal to require, under § 410.1303(g), reporting of all program-level events, significant incidents, and emergency incidents consistent with any applicable Federal, State, and local reporting laws because ORR believes such reporting can increase safety for children in ORR's care, and promote transparency and improve the care provided. Specifically related to child trafficking, ORR's current policies, as outlined in the ORR Policy Guide, require that care provider facilities report suspicions about the possibility of human trafficking or smuggling to OTIP within 24 hours, and that a child be referred to a child advocate for support if a historical disclosure is made related to labor or sex trafficking. Lastly, ORR is finalizing its proposal under § 410.2000 to establish a UC Office of the Ombuds; its goals in doing so are to provide an independent and impartial body that can receive reports and grievances regarding the care, placement, services, and release of unaccompanied children.

Comment: One commenter stressed that special consideration should be given to Indigenous children when calling law enforcement due to historical and ongoing trauma of Indigenous peoples in their countries of origin.

Response: ORR thanks the commenter for their feedback. ORR agrees that culturally sensitive and trauma-informed approaches should be exhausted first before resorting to a call to law enforcement for all unaccompanied children, including Indigenous children, and that individual needs assessments, outlined at § 410.1302(c)(2), are an important part of taking the historical and cultural backgrounds of children into account when developing goals and plans for the children while in ORR care.

Comment: A few commenters supporting the proposal had additional recommendations, including requiring that a child's contact with law enforcement trigger a referral for mental health services; requiring an evaluation of staff in all instances of calls to law enforcement due to the impact of unconscious bias and potential harm to children from unnecessary interactions with the police; requiring staff to apply other trauma-informed, evidence-based, age appropriate and strengths-based means to deescalate concerning behavior, and principles for effective de-escalation, such as requiring a mental health response for a mental health crisis. One commenter recommended that ORR clarify that law enforcement should only be called in emergency safety situations.

Response: ORR believes that the mental health needs of unaccompanied children should be supported, and for that reason is finalizing at § 410.1307(a)(1) that care provider facilities must have mental health professionals as part of their network of licensed healthcare providers to ensure access to such healthcare services, and at §§ 410.1302(c)(5) and (6) that individual and group counseling must be provided to unaccompanied children. ORR believes that calls to law enforcement should only be made as a last resort, such as emergencies or where the safety of unaccompanied children or staff are at issue. ORR is not requiring staff evaluations in all instances of calls to law enforcement out of concern that this could prevent staff from calling law enforcement when it is indeed appropriate (*i.e.,* in emergency safety situations when it is a last resort and other, less restrictive methods have been tried and failed).

Comment: One commenter recommended that ORR require documentation of the use of restraints and seclusion, including the type of restraint used, if applicable, and the justification to align with external standards. The commenter also recommended that ORR clarify that any use of restraints should be treated as an emergency incident, significant incident, or program-level event subject to documentation under proposed § 410.1303(f) in the NPRM. A few commenters recommended that ORR require documentation of any use of a restraint on a child, including the evidence the staff relied upon in determining that the use of a restraint or seclusion of a child was warranted. They recommended every instance in which a restraint is used on a child be reviewed and evaluated for compliance and staff qualification and training, noting that this can be used to determine whether any corrective action is warranted at the staff or facility-level.

Response: ORR is finalizing under § 410.1303(g) that all care provider facilities, regardless of setting, are required to report any emergency incident, significant incident, or program-level event to ORR, and in accordance with any applicable Federal, State, and local reporting laws. ORR notes that the definition of significant incident expressly includes the use of safety measures, such as restraints, and the definition of emergency incident means an urgent situation in which there is an immediate and severe threat to a child's safety and well-being that requires immediate action. Accordingly, all uses of restraints or seclusion must be appropriately documented and reported to ORR, consistent with § 410.1303(g). ORR believes these reporting requirements are sufficient to document the use of restraints and seclusion with enough detail to enable further incident review.

ORR emphasizes that, as finalized under § 410.1304(e)(1), mechanical restraints are permitted only in secure facilities (that are not RTCs), in emergency safety situations, and consistent with State licensure requirements. ORR notes that under § 410.1001 it is finalizing the definition of emergency safety situation to mean a situation in which a child presents a risk of imminent physical harm to themselves, or others, as demonstrated by overt acts or expressed threats. ORR is further clarifying in the definition of mechanical restraints at § 410.1001 by adding that, ''For purposes of the Unaccompanied Children Program, mechanical restraints are prohibited across all care provider types except in secure facilities, where they are permitted only as consistent with State licensure requirements.''

ORR reiterates that, as discussed in the preamble of this final rule addressing subpart D and as it proposed in the NPRM, it believes that mechanical restraints should only be used after de-escalation strategies and less restrictive approaches have been attempted and failed (88 FR 68942). ORR further emphasizes that it is finalizing, under § 410.1305(a), that

standard programs and restrictive placements (which include secure facilities) shall ensure that staff are appropriately trained on behavior management strategies, including de-escalation techniques. In addition, under § 410.1303(g), all uses of mechanical restraint as well as personal restraint and seclusion must be appropriately documented and reported to ORR. ORR will use these reports to closely examine each use by a secure facility of restraints or seclusion to ensure that it comports with these regulations as well as governing Federal constitutional and statutory requirements.

Comment: One commenter recommended that ORR adopt a requirement to frequently monitor a child during the use of restraints or seclusion, and that staff should use only the minimum amount of force for the minimum amount of time necessary to gain control of the child and that restraints should never be used in a manner that causes physical, emotional, or psychological pain, extreme discomfort, or injury. The commenter noted that this is in alignment with external standards.

Response: For standard programs and RTCs, ORR reiterates that it is finalizing under § 410.1304(c) that seclusion and restraint are prohibited, except for the circumstances under § 410.1304(d) which permit the use of personal restraint only in emergency safety situations. ORR is revising § 410.1304(c) to remove the phrase ''as a behavioral intervention'' because ORR believes seclusion is already distinct, by definition, from medical isolation. ORR reiterates believes that personal restraints should only be used after de-escalation strategies and less restrictive approaches have been attempted and have failed.

Related to secure facilities, ORR first notes that it is replacing ''except for RTCs'' with ''(that are not RTCs)'' for consistency with phrasing throughout the regulation text of part 410. Furthermore, ORR is finalizing at § 410.1304(e)(1) that personal restraint, mechanical restraint, and/or seclusion are permitted in emergency safety situations, and as consistent with State licensure requirements. ORR believes that adding ''and as consistent with State licensure requirements'' emphasizes how ORR requirements are intended to complement State requirements related to the use of restraints and seclusion in secure facilities that are not RTCs. Additionally, ORR is adding at § 410.1304(e)(1) that ''All instances of seclusion must be supervised and for the short time-limited purpose of ameliorating the underlying emergency risk that poses a serious and immediate danger to the safety of others.'' ORR also notes that it is revising the definition of seclusion at § 410.1001 to ''the involuntary confinement of a child alone in a room or area from which the child is instructed not to leave or is physically prevented from leaving'' by adding ''is instructed not to leave or.'' ORR believes that the use of restraints or seclusion should only be utilized in emergency safety situations, that staff should use only the minimum amount of force for the minimum amount of time necessary to gain control of the child, and that restraints and seclusion should never be used in a manner that causes physical, emotional, or psychological pain, extreme discomfort, or injury, but believes its policy otherwise as proposed is sufficient to protect children from improper use of restraints or seclusion. This policy is based on ORR's existing practices, and ORR prefers to keep the details of its policy in subregulatory guidance so ORR can make timely updates as best practices continue to evolve.

Comment: One commenter wrote that unaccompanied children with disabilities are at a higher risk of being subjected to restraints or seclusion due to their disability-related behavior. While the commenter opposed the use of seclusion in any care provider setting, they recommended, at minimum, that any use of personal restraints or seclusion of a child with a disability trigger an evaluation of the staff involved, including an evaluation for compliance with the child's ISP and an assessment whether reasonable modifications could have eliminated the need for the use of restraint or seclusion. Finally, the commenter recommended that ORR delineate specific factors that staff should consider when deciding whether it is appropriate to utilize restraint or seclusion, such as the nature, duration, and severity of the risk presented by the child's behavior and develop guidance to ensure the child's physical health and safety and guard against the use of restraint or seclusion where contraindicated based on the child's individualized needs.

Response: ORR agrees that a child's disability is an important factor to consider when determining whether restraint or seclusion is appropriate. As noted in the background discussion at III.B.4 and responses to previous comments, ORR is intending to work with experts to undertake a year-long comprehensive needs assessment to evaluate the adequacy of services, supports, and resources currently in place for unaccompanied children with disabilities in ORR's custody across its network, and to identify gaps in the current system, which will inform the development of a disability plan and future policymaking that best address how to effectively meet the needs of children in ORR's care and custody. These efforts will provide ORR with an opportunity to consider commenters' recommendations in greater depth.

Comment: One commenter supported ORR's provision limiting the use of personal restraints to emergency safety situations. A few commenters wrote that ORR should ensure personal restraints are used only when absolutely necessary in emergency safety situations when the child presents an imminent risk of physical harm to self or others. One commenter recommended that ORR clarify that emergency safety situations should be prevented wherever possible; that alternative interventions to de-escalate emergency safety situations be exhausted, including following a child's ISP; that decisions on whether a situation necessitates personal restraints be made by staff with appropriate training and child welfare expertise; that care providers only be permitted to use a restraint for as long as necessary to ensure the safety of the child or others and use of the restraint must immediately end upon the cessation of the safety threat, with a maximum duration of 15 minutes.

Response: ORR agrees that emergency safety situations should be prevented wherever possible, and that personal restraint should only be used after de-escalation strategies and less restrictive approaches, such as any detailed in a child's ISP, have been attempted and failed. ORR also agrees that personal restraint should only be used when absolutely necessary in emergency safety situations and for that reason, is finalizing at § 410.1304(d) that standard programs and RTCs may use personal restraint only in emergency safety situations. ORR further notes that under § 410.1001 it is finalizing the definition of emergency safety situation to mean a situation in which a child presents a risk of imminent physical harm to themselves, or others, as demonstrated by overt acts or expressed threats.

ORR notes that it included a training requirement for standard programs and restrictive placements to ensure that staff are appropriately trained on behavior management strategies, including de-escalation techniques, as a proposed requirement in the preamble discussion of § 410.1304 (88 FR 68942) and § 410.1305(a) (88 FR 68943), but the training requirement was omitted in

error in the regulation text of § 410.1305(a). As such, ORR is finalizing the requirement under § 410.1305(a) that ''Standard programs and restrictive placements shall ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to § 410.1304.'' As previously discussed, ORR is not specifying further training topics in this rule so it can provide more timely, frequent, and iterative updates through its existing policies. However, ORR agrees that training on the use of restraints, including how to determine when a situation necessitates restraints, is a type of training that may be appropriately required of staff pursuant to § 410.1305. ORR appreciates the commenters' feedback relating to potential time limitations on personal restraint and decisions by staff on whether restraint is necessitated.

Comment: One commenter was concerned, related to § 410.1304(e)(2), that an unaccompanied child that is a danger to self or others during secure transport has that same level of risk regardless of the destination, and requested clarification.

Response: While placed at secure facilities (that are not RTCs), children will rarely have the occasion to be transported for circumstances other than for appearances in immigration court or asylum interviews. However, because there could be other circumstances in which transportation is needed, we have revised 410.1304(e)(2) to apply to transportation generally. ORR notes that § 410.1304(f) provides for the use of soft restraints during transport to and from secure facilities when the care provider facility believes a child poses a serious risk of physical harm to self or others or a serious risk of running away from ORR custody.

Comment: One commenter was concerned about the use of restraints while unaccompanied children appear in immigration court or at an asylum interview and recommended that ORR include a requirement for staff to demonstrate that no reasonable alternative is available before using restraints in court proceedings.

Response: ORR thanks the commenter for their feedback. ORR reiterates that secure facilities may have safety or runaway risk concerns for which they deem restraints necessary for certain unaccompanied children. Further, the conduct of an immigration court proceedings or asylum interviews are outside the scope of this rule. Therefore, ORR does not adopt the commenter's recommendation.

Comment: One commenter was concerned about the qualifications of staff determining whether to use restraints during transport and while at immigration court or asylum hearings, noting that there is a risk of harm from unnecessary use of restraints and trauma-informed approaches are available instead. They recommended that the decision whether to use restraints be made by a licensed psychologist or psychiatrist and include a confirmation that there are no other alternatives available. Finally, the commenter recommended that ORR require care provider facilities to notify ORR, the child, and the legal services provider when restraints are being considered to coordinate with children and their legal representatives if assistance is requested to reschedule hearings or interviews or for other accommodations; and documenting any use of restraints.

Response: ORR agrees that trauma-informed and less restrictive approaches should be attempted and failed before an unaccompanied child is restrained. ORR thanks the commenters for their feedback related to the qualifications of staff making determinations for the use of restraints and notifications related to the potential use or use of restraints. ORR is not requiring advanced notification related to the use of restraints because such decisions may be time-sensitive and in response to emergency safety situations or behaviors by the child that demonstrate a risk of harm. ORR notes that it is finalizing requirements requiring the reporting and documentation of any emergency incident, significant incident, or program level event, which include the documentation of the use of any restraints, and ORR has existing policies on the reporting of certain significant incidents to attorneys of record and legal service providers, among other individuals.

Comment: One commenter was concerned about the use of restraints and seclusion in secure facilities under § 410.1304(e), noting that the limitation to emergency safety situations is too vague and does not limit their use to exceptionally rare circumstances when there is no reasonable alternative to prevent escape or physical injury, as required by external standards. A few commenters opposed the provision because mechanical restraints and seclusion are not permitted in other placement types, due to concern over past alleged improper use of mechanical restraints and seclusion in secure facilities, because mechanical restraints and seclusion can cause harm even in emergency safety situations, and finally, because the commenter asserted that children in secure facilities have the greatest need for supports and services, mechanical restraints and seclusion are particularly inappropriate.

Response: ORR reiterates that it proposed in the NPRM to only allow the use of mechanical restraints and seclusion in emergency safety situations, and that it believes that they should only be used after de-escalation strategies and less restrictive approaches have been attempted and failed (88 FR 68942). ORR notes that under § 410.1001 it is finalizing the definition of emergency safety situation to mean a situation in which a child presents a risk of imminent physical harm to themselves, or others, as demonstrated by overt acts or expressed threats, and is finalizing the definition of mechanical restraint to add ''For purposes of the Unaccompanied Children Program, mechanical restraints are prohibited across all care provider types except in secure facilities, where they are permitted only as consistent with State licensure requirements.''

Final Rule Action: After consideration of public comments, ORR is revising § 410.1304(a) by replacing ''must,'' as used in the NPRM, to ''shall'' and ''care provider facilities shall'' instead of ''the behavior management strategies must.'' ORR is revising § 410.1304(a)(1) to replace ''family/sponsor'' with ''sponsor.'' In addition, ORR is revising § 410.1304(a)(2)(ii) to include ''religious observation and services'' as one of the activities that care providers are prohibited from denying to unaccompanied children and is otherwise finalizing this section as proposed. Finally, ORR is revising § 410.1304(e)(1) by adding ''and as consistent with State licensure requirements,'' and ''All instances of seclusion must be supervised and for the short time-limited purpose of ameliorating the underlying emergency risk that poses a serious and immediate danger to the safety of others;'' and by replacing ''except for RTCs'' with ''(that are not RTCs).'' Finally, ORR is revising § 410.1304(e)(2) to apply to transportation generally.

Section 410.1305 Staff, Training, and Case Manager Requirements

Having requirements for staff, training, and case managers is in the best interest of unaccompanied children and is supportive to their health and development while in ORR care. ORR proposed in the NPRM at § 410.1305 to establish certain requirements consistent with ORR's authority to oversee the infrastructure and personnel of facilities in which unaccompanied

children reside (88 FR 68942 through 68943).[254] Under § 410.1305(a), ORR proposed in the NPRM to require that standard programs, restrictive placements, and post-release service providers, must provide training to all staff, contractors, and volunteers; and that training ensures that staff, contractors, and volunteers understand their obligations under ORR regulations and policies and are responsive to the challenges faced by staff and unaccompanied children at the facility. ORR anticipated that examples of training topics under this paragraph would include the rights of unaccompanied children, including to educational services, creating bias-free environments, supporting children with disabilities, supporting the mental health needs of unaccompanied children, trauma, child development, prevention of sexual abuse, the identification of victims of human trafficking, and racial and cultural sensitivity. Standard programs and restrictive placements would also be required to ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to proposed § 410.1304. All trainings would be required to be tailored to the unique needs, attributes, and gender of the unaccompanied children in care at the individual care provider facility. For example, staff who work with early childhood unaccompanied children should be provided with training in early childhood care best practices. Additionally, case managers should be trained on child welfare best practices before providing services to children.[255] Care provider facilities must document the completion of all trainings in personnel files. In addition to training, ORR would require all staff to complete background check requirements and vetting for their respective roles prior to service provision and care provider facilities would need to provide documentation to ORR of compliance.

Under § 410.1305(b), ORR proposed in the NPRM that standard programs and restrictive placements would be required to meet the staff-to-child ratios established by their respective States or other licensing entities, or ratios established by ORR if State licensure is unavailable. Under current practice, ORR generally requires staffing ratios of a minimum of 1 staff to 8 unaccompanied children during the day and 1 staff to 16 unaccompanied children at night while children are sleeping. If, however, State requirements require a stricter staff-to-child ratio, then under § 410.1305(b), ORR proposed in the NPRM to require the care provider to abide by that smaller ratio.

Standard programs and restrictive placements must provide case management services in their facilities. Effective case management systems and policy are important to ensuring care provider facilities are effective in attaining positive outcomes for unaccompanied children. Areas for attention include specifying case manager-to-unaccompanied-child ratios that take the occupancy level of the facility into account, ensuring that case management staff are site-based and provide their services in person, and ensuring that case management staffing levels are appropriate to meet ORR's standards for the length of care of unaccompanied children. ORR proposed in the NPRM to require under § 410.1305(c) that standard programs and restrictive placements have case managers based at the facility's site. To meet the unique needs of a given facility, ORR could then determine the appropriate ratio of case managers-per-unaccompanied-child through its cooperative agreements and contracts with care provider facilities, as appropriate. This will allow ORR to include changes in the staffing ratio relative to the occupancy of unaccompanied children at the facility and consider the policies related to unaccompanied children's length of stay.

Before proceeding to discuss comments on § 410.1305, ORR would like to discuss a key issue raised by commenters relating to § 410.1302 that pertain to § 410.1305 as well. Several commenters expressed concern that the proposed language ''or that meets other requirements specified by ORR'' at § 410.1302(a) was not sufficiently specific or clear and could lead to allowing programs to avoid licensure requirements even in a State where licensing is available. In response, ORR revised its requirement under § 410.1302(a) to make clear that if a standard program is in a State that does not license care provider facilities because they serve unaccompanied children, the standard program must still meet the State licensing requirements that would apply if the State allowed for licensure. Similarly, ORR is revising § 410.1305(b), to remove ''or ratios established by ORR if State licensure is unavailable'' and to apply to ''care provider facilities'' to replace ''standard programs and restrictive placements.'' Therefore, ORR is requiring at § 410.1305(b) that care provider facilities shall meet the staff-to-child ratios established by their respective States or other licensing entities.

Comment: One commenter recommended that ORR require standard programs that are congregate care facilities to have registered or licensed nurse and other licensed clinical and child welfare staff onsite.

Response: ORR thanks the commenter for their recommendation. ORR includes requirements for care provider facilities to have clinician and lead clinician positions within its cooperative agreements and believes this is sufficient to ensure clinical oversight at standard programs.

Comment: Several commenters recommended all staff and contractors interacting with children in ORR custody receive training in trauma-informed care approaches. A few commenters noted that such training improves awareness of trauma-related symptoms, promotes an emotionally safe environment, and provides interventions to mitigate the effects of trauma. Several commenters recommended that ORR mandate training on comprehensive, trauma-informed, culturally, and linguistically best practices for all staff and providers who have access to unaccompanied children.

Response: ORR notes that it included a proposed training requirement in the preamble discussion of § 410.1304 (88 FR 68942) and § 410.1305(a) (88 FR 68943) for standard programs and restrictive placements to ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques; however, the training requirement was omitted in error in the regulation text of § 410.1305(a). As such, ORR is adding the requirement under § 410.1305(a) that ''Standard programs and restrictive placements shall ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to § 410.1304.'' ORR further notes that the preamble to the NPRM describes examples of trainings that standard programs and restrictive placements may provide, including: the rights of unaccompanied children, including to educational services, creating bias-free environments, supporting children with disabilities, supporting the mental health needs of unaccompanied children, trauma, child development, prevention of sexual abuse, the identification of victims of human trafficking, and racial and cultural sensitivity (88 FR 68943). ORR notes that it is also revising § 410.1305(a) to remove the phrase ''at

the facility'' for clarity because it is a requirement for PRS providers, but PRS providers are not facility-based.

Comment: One commenter recommended that ORR require congregate care facilities to conduct criminal records checks and checks on any State child abuse and neglect registries for adults working in the facility. A few commenters expressed concern that proposed § 410.1305 does not include standards for minimum training or prohibitive background criteria.

Response: ORR believes that thorough background checks for all care provider facility staff and contractors are a critical element of the UC Program. For that reason, ORR is finalizing at § 410.1305(a) that standard programs and restrictive placements complete and document completion of background check requirements. Further, ORR's existing policies for care provider facilities require complete background investigations on staff, contractors, and volunteers, and a national criminal history fingerprint check if not already required by State law. ORR notes that 45 CFR part 411 sets forth the relevant background check requirements that staff at care provider facilities must undergo prior to being hired, which include criminal background checks, child protective services check, and in addition, staff must undergo periodic criminal background check updates every five years. These standards continue to apply. ORR will continue to use and update its existing guidance to provide more detailed requirements regarding background checks for care provider facilities. This includes having procedures in place to help care provider facilities navigate circumstances in which care provider facilities are awaiting the background check results of prospective personnel. ORR has encountered issues with some state public safety agencies that refuse to either conduct child safety background checks or conduct them in a timely manner. Because of this, ORR has memorialized into policy that care provider facility staff whose FBI background checks, sex offender registry checks, and reference checks are complete but whose Federal suitability investigation and Federally required State-based child abuse and neglect checks are not yet fully adjudicated must either be supervised by direct care staff whose checks are complete or satisfy the provisional hiring requirements that ORR has established in policy pursuant to 45 CFR part 411. Details on how ORR utilizes child welfare best practices and robust background check measures to onboard staff are further provided in ORR policy.

Therefore, ORR is removing the proposed text ''prior to service provision'' and finalizing, ''All staff, contractors, and volunteers must have completed required background checks and vetting for their respective roles required by ORR'' in order to provide for the efficient onboarding of staff even if there is a delay in the completion of background checks due to circumstances outside the control of the care provider facility or staff member.

Comment: A few commenters recommended that ORR require staff receive cultural competency training. One commenter specifically requested that such cultural competency training include indigenous cultural competency.

A few commenters recommended that ORR mandate training on unaccompanied children's rights and responsibilities. One commenter recommended that ORR require care providers to provide their staff with quarterly Know Your Rights trainings to ensure that unaccompanied children, and Indigenous unaccompanied children in particular, are protected from human trafficking and other crimes while in ORR care. A few commenters recommended ORR mandate training on language access services and linguistically best practices for all staff and providers who have access to unaccompanied children.

Many commenters recommended that ORR include staff training on gender identity and sexual orientation in order to support the needs of unaccompanied children in ORR care who identify as LGBTQI+.

Many commenters recommended that ORR incorporate staff training on the impact of racial discrimination on sponsor communities and the criminal justice system, in order to inform the use of such information in unification decisions.

Response: ORR thanks the commenters for their feedback and declines to accept commenter's recommendations to specify training topics. ORR believes these recommendations are consistent with the examples provided of training topics in the NPRM at 88 FR 68943, which included the rights of unaccompanied children, including to educational services, creating discrimination-free environments, supporting children with disabilities, supporting the mental health needs of unaccompanied children, trauma, child development, prevention of sexual abuse, the identification of victims of human trafficking, and racial and cultural sensitivity. ORR requires at § 410.1305(a) that trainings provided are responsive to the challenges faced by staff and unaccompanied children. ORR believes that keeping the topics of trainings in subregulatory guidance will allow ORR to make more appropriate, timely, and iterative updates in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and care provider facilities.

Comment: One commenter expressed support for codifying an expectation of onsite case management but recommended that ORR strengthen the language in proposed § 410.1305(c) to explicitly require that all case management occur in-person and onsite. This commenter expressed concern that the current language may be interpreted to permit virtual case management services, which commenter believes is insufficient to meet the needs of each individual unaccompanied child.

Response: ORR believes its requirement at § 410.1305(c) that standard programs and restrictive placement must have case managers based on site at the facility is sufficient for ensuring that case management services occur onsite, and for that reason is updating this requirement at § 410.1305(c) to apply to all care provider facilities. ORR believes this requirement provides care provider facilities some flexibility to meet the needs for case management of unaccompanied children while balancing the potential operational infeasibility of providing onsite services for all case management. ORR encourages care provider facilities to provide onsite services to the fullest extent possible.

Final Rule Action: After consideration of public comments, ORR is revising § 410.1305(a) to remove the phrases ''at the facility'' and ''prior to service provision'' and to replace ''and must provide documentation to ORR of compliance'' with ''required by ORR.'' So that it states ''All staff, contractors, and volunteers must have completed required background checks and vetting for their respective roles required by ORR, '' instead of ''All staff, contractors, and volunteers must have completed all required background checks and vetting for their respective roles prior to service provision and care provider facilities must provide documentation to ORR of compliance,'' and to replace ''standard programs and restrictive placements'' with ''care provider facilities.'' ORR is adding the requirement under § 410.1305(a) that ''Standard programs and restrictive placements shall ensure that staff are appropriately trained on its

behavior management strategies, including de-escalation techniques, as established pursuant to § 410.1304.'' ORR is revising § 410.1305(b) to remove the phrase ''or ratios established by ORR if State licensure is not available'' and to apply to ''care provider facilities'' to replace ''standard programs and restrictive placements.'' ORR is revising § 410.1305(c) to apply to ''care provider facilities'' to replace ''standard programs and restrictive placements.'' ORR is otherwise finalizing § 410.1305 as proposed.

Section 410.1306 Language Access Services

ORR described under § 410.1306 proposed requirements to provide language accessibility for unaccompanied children (88 FR 68943 through 68945). ORR believes that it is important to establish specific, minimum language access requirements, which are critical to ensuring that unaccompanied children understand their rights, the release process, and the services they may receive while in ORR care. In the NPRM, ORR's proposed requirements under § 410.1306 applied to standard programs and restrictive placements. As discussed later in this section, ORR's finalized language access service requirements apply to all care provider facilities.

Under § 410.1306(a), ORR proposed in the NPRM that standard programs and restrictive placements would be required, to the greatest extent practicable, to consistently offer all unaccompanied children the option of interpretation and translation services in their native or preferred language, depending on their preference, and in a way they understand to the greatest extent practicable (88 FR 68943). ORR noted in the NPRM that under 45 CFR 85.51, standard programs and restrictive placements shall also ensure effective communication with unaccompanied children with disabilities (88 FR 68945). This includes furnishing appropriate auxiliary aids and services such as qualified sign language interpreters, Braille materials, audio recordings, note-takers, and written materials, as appropriate for the unaccompanied child. In the NPRM, ORR stated that under its existing policies, standard programs and restrictive placements are required to make every effort possible to provide interpretation and translation services (88 FR 68943). However, ORR noted in the NPRM its belief that it was important to propose the additional requirement that standard programs and restrictive placements consistently offer each unaccompanied child the option of effective interpretation and translation services to ensure meaningful and timely access to these services. ORR stated in the NPRM that if standard programs and restrictive placements are unable to obtain a qualified interpreter or translator in the unaccompanied children's native or preferred language, depending on their preference, after taking reasonable efforts, standard programs and restrictive placements would then be required to consult with qualified ORR staff (under current policy, the Federal Field Specialist and Project Officer) for guidance on how to provide meaningful access to their programs and activities to children with limited English proficiency (88 FR 68943). Under the proposals in the NPRM, standard programs and restrictive placements would be permitted to use professional telephonic interpreter services after they take reasonable efforts to obtain in-person, qualified interpreters (as defined). In the NPRM, ORR stated its belief that the proposals struck a good balance between the importance of interpretation and translation services and the reality of the vast array of language access needs of unaccompanied children. In the NPRM, ORR stated that standard programs and restrictive placements would also be required to translate all documents and materials shared with unaccompanied children in their native or preferred language, depending on their preference, and in a timely manner.

To ensure efficient and reliable access to necessary interpretation and translation services during placement, ORR stated in the NPRM that under § 410.1306(b) it would be required to make placement decisions informed by language access considerations (88 FR 68943). In the NPRM, ORR proposed that to the extent it is appropriate and practicable, giving due consideration to unaccompanied child's individualized needs, ORR would place unaccompanied children with similar language needs within the same standard program or restrictive placement. ORR stated its belief that this would further ensure the efficient use of resources while also considering the need for timely and appropriate placement.

ORR proposed in the NPRM at § 410.1306(c) to codify language access requirements during intake, orientation, and while informing unaccompanied children of their rights to confidentiality and limits of confidentiality of information while in ORR care (88 FR 68944). ORR stated in the NPRM that under current ORR practice, among other things, standard programs and heightened supervision facilities complete an initial intakes assessment of an unaccompanied child; provide a standardized orientation that is appropriate for the age, culture, language, and accessibility needs of the unaccompanied child; and complete a UC Assessment that covers biographic, family, legal/migration, medical, substance use, and mental health history and is subject to ongoing updates. ORR stated in the NPRM that under current practice, standard programs and restrictive placements provide unaccompanied children with a Disclosure Notice, which is an ORR document explaining the limits to the confidentiality of information unaccompanied children share while in ORR care and custody, as well as the types of information that standard programs and restrictive placements and ORR must share if disclosed by the unaccompanied children for the safety of the unaccompanied children or for the safety of others.

ORR proposed in the NPRM under § 410.1306(c)(1) to require that standard programs and restrictive placements both provide a written notice of the limits of confidentiality they share while in ORR care and custody, and to orally explain the contents of the written notice to the unaccompanied children, in their native preferred language, depending on their preference, and in a way they can effectively understand (88 FR 68944). Under the proposals in the NPRM, standard programs and restrictive placements would be required to do both prior to the completion of the UC Assessment, and prior to unaccompanied children starting counseling services as proposed at § 410.1302(c)(5) and (6).

ORR proposed in the NPRM under § 410.1306(c)(2), to require that standard programs and restrictive placements would be required to ensure assessments and initial medical exams are conducted in the unaccompanied children's native or preferred language, depending on their preference, and in a way they effectively understand (88 FR 68944). ORR proposed in the NPRM under § 410.1306(c)(3) to require that standard programs and heightened supervision facilities provide a standardized and comprehensive orientation to all unaccompanied children within 48 hours of admission in the unaccompanied children's native or preferred language and in a way they effectively understand regardless of spoken language, reading comprehension level, or disability. Further, under § 410.1306(c)(4), ORR proposed in the NPRM for all step-ups to and step-downs from restrictive

placements, standard programs and restrictive placements would be required to specifically explain to the unaccompanied children why they were placed in a restrictive placement or, if stepped down, why their placement was changed, while doing so in the unaccompanied children's native or preferred language, and in a way they effectively understand.

Under § 410.1306(c)(5), ORR proposed in the NPRM that if the unaccompanied children are not literate, or if documents provided during intakes and/or orientation are not in a language that they can read and effectively understand, standard programs and restrictive placements would be required to have a qualified interpreter orally translate or sign language translate and explain all the documents in the unaccompanied children's native or preferred language, depending on their preference, and confirm with the unaccompanied children that they fully comprehend all materials (88 FR 68944). Additionally, at § 410.1306(c)(6) and (7), ORR proposed in the NPRM that standard programs and restrictive placements would be required to provide unaccompanied children information regarding grievance reporting and ORR's sexual abuse and harassment policies and procedures in the unaccompanied children's native or preferred language, based on their preference, and in a way they effectively understand. Under § 410.1306(c)(8), ORR proposed in the NPRM that standard programs and restrictive placements would be required to notify the unaccompanied children that standard programs and restrictive placements will accommodate the unaccompanied children's language needs while they remain in ORR care.

Under § 410.1306(c)(9), with respect to all requirements described in § 410.1306(c), ORR proposed in the NPRM to require standard programs and restrictive placements to document in each unaccompanied children's case file that they acknowledged that they effectively understand what was provided to them (88 FR 68944).

Under § 410.1306(d), ORR described proposed requirements regarding language access and education. In order to provide meaningful education services to unaccompanied children, ORR believes that it is important to ensure that educational services are presented to unaccompanied children in a language that is accessible to them. In the NPRM, ORR proposed at section 410.1306(d)(1) to require standard programs and heightened supervision facilities to provide educational instruction and relevant materials in a format and language accessible to all unaccompanied children, regardless of their native or preferred language, including by providing in-person interpretation, professional telephonic interpretation, and written translations, all by qualified interpreters or translators. ORR proposed in the NPRM under § 410.1306(d)(2) to require standard programs and heightened supervision facilities to provide recreational reading materials in formats and languages accessible to all unaccompanied children, which would facilitate their out-of-class enrichment and engagement. ORR proposed in the NPRM under § 410.1306(d)(3) to require standard programs and heightened supervision facilities to translate all ORR-required documents provided to unaccompanied children for use in educational lessons, in formats and languages accessible to all unaccompanied children.

ORR believes that it is important to ensure that the unaccompanied children's religious and cultural expressions, practices, and identities are accommodated to the extent practicable. Accordingly, under § 410.1306(e), when an unaccompanied child makes a reasonable request for religious and/or cultural information or other religious/cultural items, such as books or clothing, ORR proposed in the NPRM the standard program or restrictive placement would be required to provide the applicable items, in the unaccompanied child's native or preferred language, depending on the unaccompanied child's preference. At the same time, with respect to the obligations of care provider facilities, ORR noted that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations (88 FR 68944).[256]

ORR proposed in the NPRM in § 410.1306(f) that standard programs and restrictive placements would be required to utilize any necessary professional interpretation or translation services needed to ensure meaningful access by an unaccompanied child's parent(s), guardian(s), and/or potential sponsor(s). Under the proposals in the NPRM, standard programs and restrictive placements would also be required to translate all documents and materials shared with the parent(s), guardian(s), and/or potential sponsors in their native or preferred language, depending on their preference. ORR noted in the NPRM that under 45 CFR 85.51, standard programs and restrictive placements shall also ensure effective communication with parent(s), guardian(s), and/or potential sponsor(s) with disabilities (88 FR 68944).

In the NPRM, ORR acknowledged the importance of making appropriate interpretation and translation services available to all unaccompanied children while receiving healthcare services so that they understand the services that are being offered and/or provided (88 FR 68945). Under § 410.1306(g), while unaccompanied children are receiving healthcare services, ORR proposed in the NPRM to require that standard programs and restrictive placements ensure that unaccompanied children are able to communicate with physicians, clinicians, and other healthcare staff in their native or preferred language, depending on their preference, and in a way they effectively understand, prioritizing services from an in-person, qualified interpreter before using professional telephonic interpretation services.

In the NPRM, § 410.1306(h) proposed language access requirements for standard programs and restrictive placements while unaccompanied children receive legal services. To facilitate unaccompanied children receiving effective legal services, ORR stated its belief that it is essential that unaccompanied children understand the legal services offered to them and the process for participation in removal proceedings post-release, and accordingly, unaccompanied children should be provided with meaningful access to language services as relates to legal services (88 FR 68945). ORR proposed in the NPRM to require that standard programs and restrictive placements make qualified interpretation and translation services available upon request to unaccompanied children, child advocates, and legal service providers while unaccompanied children are being provided with legal services. Additionally, ORR proposed in the NPRM in § 410.1306(i) that interpreters and translators would be required to keep information about the unaccompanied children's cases and/or services confidential from non-ORR grantees, contractors, and Federal staff.

Comment: A number of commenters supported ORR's proposals for language access services, stating the proposals ensure unaccompanied children can effectively communicate with their caregivers, legal representatives, and other service providers. One commenter specifically supported the requirement that care provider facilities offer all unaccompanied children the option of interpretation and translation services

in their native or preferred language, depending on their preference, and in a way they understand to the greatest extent practicable. Another commenter supported consistently offering all unaccompanied children the option of interpretation and translation services; language access considerations informing placement decisions; and providing educational instruction, relevant materials, appropriate recreational reading materials, and documents that are part of the educational lessons in a format and language accessible to all children. This commenter stated that language access is critical to ensure unaccompanied children can fully participate in available services and effectively communicate with their caregivers about their needs and reduce the isolation that comes with being unable to communicate. Another commenter supported providing language access services when an unaccompanied child received legal services, stating legal service providers and child advocates cannot render effective services without quality interpretation and translation, and the commenter also supported providing interpretation and translation services for children who speak indigenous dialects, which the commenter stated has been a problem.

Response: ORR thanks the commenters for their support. As described in the NPRM, ORR's proposed requirements under § 410.1306 applied to standard programs and restrictive placements. Upon further review of this section and other finalized requirements, ORR is revising § 410.1306 such that the language access service requirements apply to all care provider facilities.

Comment: A few commenters recommended ORR clarify how care provider facilities will identify an unaccompanied child's native or preferred language. One commenter recommended that ORR specify the methods and tools care provider facilities should use to comprehensively assess an unaccompanied child's language proficiency, which the commenter stated ensures an accurate understanding of the child's language needs. Another commenter expressed concern that unaccompanied children may feel intimidated or be unaware of their language access rights and recommended care provider facility staff proactively approach the children at the earliest point of contact at the facility to correctly identify the children's ''primary'' or preferred language and evaluate the children's language throughout the duration of their care. A separate commenter recommended that ORR take specific steps to assess an unaccompanied child's language needs in a culturally competent and child sensitive manner.

Response: ORR does not intend § 410.1306 to describe all requirements related to language access services, including procedures care provider facilities should implement. Where § 410.1306 contains less detail, ORR will consider issuing policy guidance, if needed, to provide specific guidance to address the commenters' recommendations.

Comment: One commenter expressed concern about § 410.1306(a)(1) and treating interpretation and translation services as an option offered to unaccompanied children without more guidance may not be enough to ensure that these services are utilized by children. The commenter recommended that care provider facilities specifically offer each child interpreter and translation services to alleviate the burden on the child to request those services.

Response: As revised, section 410.1306(a)(1) states that, to the greatest extent practicable, care provider facilities shall consistently offer interpretation and translation services to unaccompanied children. ORR believes that this requirement addresses the commenter's concern that care provider facilities specifically offer each child these services. ORR clarifies that this requirement places the burden on the care provider facilities to ensure children are aware of their ability to access and receive these services so that the burden is not on children to request these services. Further, ORR believes the language ''to the greatest extent possible'' and ''consistently offer'' are appropriate safeguards to guarantee that care provider facilities ensure unaccompanied children are aware of their ability to access and receive interpretation and translation services.

Comment: A commenter recommended ORR focus on ''language justice'' by prioritizing the provision of services in the child's preferred language as much as possible, rather than using translators and interpreters, to ensure children can effectively and confidently access services in their preferred language. This commenter also stated that language justice is critical with highly sensitive and personal services, such as health care, where a child may feel uncomfortable disclosing information to a third party or important details may get lost in translation. Lastly, the commenter recommended that when providing services in the child's preferred language is not possible, in-person interpreter services should be used with an aim of minimizing their necessity.

Response: ORR understands ''language justice,'' as used by the commenter, to mean ''the right everyone has to communicate, to understand, and to be understood in [their] language(s)'' and ''entails a commitment to facilitating equitable communication across languages in spaces where no language will dominate over any other.'' [257] ORR acknowledges the importance of ensuring unaccompanied children can communicate in the language they feel comfortable speaking and/or reading and feel respected in their language choice. However, in this final rule, ORR declines to codify the commenter's recommendation to prioritize the provision of services in the child's preferred language as much as possible, rather than using qualified translators and interpreters, because this standard is not required by any applicable laws, regulations, or guidance. Instead, ORR provides, and will continue to provide, meaningful access to its programs and services to LEP individuals through language access services as required by applicable laws, regulations, and guidance from the Department, and as set forth in Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency.* Accordingly, ORR is finalizing, under § 410.1306(a)(1), that care provider facilities must, to the greatest extent practicable, consistently offer unaccompanied children the option of interpretation and translation services in their native or preferred language, depending on the unaccompanied children's preference, and in a way they effectively understand.

Lastly, ORR notes that it is finalizing language access requirements related to education services at § 410.1306(e), healthcare services at § 410.1306(g), and legal services at § 410.1306(h), so that unaccompanied children understand the services that are being offered and/or provided. ORR's policies prohibit staff, contractors, and volunteers from engaging in or permitting discriminatory treatment or harassment of anyone on the basis of their language, which ensures unaccompanied children feel respected in their choice of language.[258] Finally, ORR will monitor implementation of the regulations and will consider additional revisions if needed in future policymaking to ensure all unaccompanied children have meaningful access to the program regardless of the child's language, are provided the option of interpretation and translation services in their native or preferred language to the greatest

extent practicable, and are respected in their language choice.

Comment: One commenter recommended clarifying the phrase ''in a way they effectively understand'' used throughout § 410.1306 by adding to the phrase ''given the child's level of literacy, cultural background, age, and developmental stage'' to ensure better understanding.

Response: ORR clarifies that ''in a way they effectively understand'' includes consideration of the child's level of literacy, cultural background, age, and developmental stage, as recommended by the commenter but believes it is unnecessary to revise § 410.1306 to state so explicitly. ORR will monitor implementation of the regulation to assess whether any additional clarification is needed in future policymaking.

Comment: One commenter recommended ORR authorize the engagement of qualified and vetted interpreters, regardless of whether they are located within or outside the United States, and potentially require interpreters be affiliated with a licensed business within the United States.

Response: ORR declines to codify this level of detail at § 410.1306 as it did not intend for this regulation to govern or describe all requirements for language access services. ORR will consider whether any additional clarification is needed in future policymaking.

Comment: A few commenters had recommendations for ORR to improve unaccompanied children's access to language access services when the children's native or preferred language is less commonly spoken. One commenter recommended ORR work with the Guatemalan government to ensure that certified individuals conduct interpretation and translation of Mayan, Xinca, and Garilima languages. Another commenter recommended that for less commonly spoken languages, interpretation services should allow staff to communicate with the interpreter in Spanish and not just English because there may be a limited number of available interpreters due to the rarity of some dialects. This commenter also recommended that interpretation services for indigenous individuals should encompass their native language and not just English and Spanish.

Response: ORR appreciates the recommendations for how to best implement the rule when unaccompanied children's native or preferred language is less commonly spoken. At § 410.1306(a), ORR is finalizing the requirement that interpretation and translation services be offered in the child's native or preferred language, depending on the child's preference, which could include the Mayan, Xinca, and Garilima languages as mentioned by the commenter.

Additionally, ORR notes that currently staff could communicate with qualified interpreters in Spanish and not just English. However, ORR declines to codify this recommendation in § 410.1306 because it did not intend for the final regulation to contain this level of detail, and where the regulation contains less detail, ORR will consider the recommendation during future policymaking.

Comment: One commenter recommended several revisions and additions to § 410.1306 to ensure each unaccompanied child and sponsor can communicate effectively and respectfully with ORR staff and providers, regardless of their language or dialect, and receive language access services while in ORR custody. Specifically, this commenter recommended definitions for the following terms: language access services, interpretation services, translation services, multilingual materials, and cultural competency training. The commenter also recommended ORR provide language access services in a timely, confidential, and culturally appropriate manner. Additionally, the commenter recommended that ORR provide language access services in accordance with applicable laws and regulations, such as Title VI of the Civil Rights Act of 1964 and Executive Order 13166, and follow the standards and guidelines issued by HHS and DOJ. Lastly, this commenter recommended each unaccompanied child and sponsor receive services and care that are respectful and responsive to their cultural and linguistic diversity, staff and providers receive cultural competency training in accordance standards and guidelines issued by HHS and DOJ, and ORR hire staff and providers who are competent and sensitive to the cultural and linguistic diversity of unaccompanied children and sponsors.

Response: As finalized, ORR is requiring care provider facilities to adhere to many of these recommendations, as reflected in this final rule. ORR did not propose to codify all terms used in the NPRM, including those that have generally accepted definitions like interpretation and translation services. ORR believes the meaning of the identified terms is generally accepted and can be further clarified, if needed, through future policymaking. Additionally, ORR notes that it is finalizing confidentiality requirements for interpreters and translators under § 410.1306(i), and standards for ''qualified interpreter'' and ''qualified translator'' at § 410.1001.

ORR provides, and will continue to provide, meaningful access to its programs and services to LEP individuals through language access services in accordance with applicable laws, regulations, and guidance from the Department, and as set forth in Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency.* ORR did not propose to add language in this rule stating it adheres to existing sources of authority. Further, ORR notes that under its current policies it requires care provider facilities to respect and support the cultural identity of unaccompanied children when providing services. ORR also requires that care provider facility staff, contractors, and volunteers receive cultural competency and sensitivity training.[259] ORR will continue to monitor its requirements for language access services as they are implemented and will consider whether additional clarification is needed through future policymaking.

Comment: One commenter recommended virtual interpretation, noting that other care provider organizations prefer virtual over in-person.

Response: ORR notes, first, that although the NPRM § 410.1306 used the term ''professional telephonic'' interpretation, the definition of ''qualified interpreter'' at § 410.1001 refers to ''remote'' interpretation. For the sake of consistency and accuracy, ORR is revising the use of ''professional telephonic'' to ''qualified remote interpretation'' throughout § 410.1306. Regarding the use of in-person versus remote interpretation, ORR is finalizing as proposed in the NPRM at § 410.1306(a)(2), (d)(1) and (3), and (g) that care provider facilities utilize in-person interpretation before using qualified remote interpretation to ensure unaccompanied children effectively understand what is being communicated to them. By using in-person interpretation, qualified interpreters can read non-verbal cues (*e.g.,* body language and facial expressions), they can build trusting relationships with the unaccompanied children and sponsors, and they can securely discuss sensitive information (*e.g.,* health information and legal services). In-person qualified interpreters are better able to accomplish these important aspects of

interpretation services than interpreters using visual forms of remote communication. Further, ORR clarifies that care provider facilities may utilize qualified remote, or virtual, interpreters if they undertake reasonable efforts to secure qualified in-person interpreters and are unable to do so, provided that the qualified remote interpreters meet the requirements set forth in ORR's policies.[260]

Comment: One commenter opposed the proposal at § 410.1306(a)(3) that all posted materials must be in every unaccompanied child's preferred language, stating this poses challenges to care provider facilities that serve children whose native or preferred languages span four to six different languages. Instead, the commenter recommended that all posted materials be in the majority of languages with a provision for additional language support as needed.

Response: ORR will monitor implementation of the regulation and will take into consideration the concerns raised during future policymaking if needed.

Comment: One commenter recommended ORR make grammatical revisions to the regulation text at § 410.1306(c)(1) to clarify that the limits of confidentiality are related to the information they share while in ORR care and custody.

Response: ORR appreciates the commenter's concern, but believes the current regulatory text clearly states care provider facilities must provide a written notice of the limits of confidentiality they share while in ORR care and custody to the unaccompanied children and no further revision is necessary.

Comment: One commenter recommended § 410.1306(c)(6) state that other grievance reporting policies and procedures must be provided in a manner accessible to unaccompanied children with disabilities. Additionally, this commenter recommended § 410.1306(c)(6) require care provider facilities to adopt grievance reporting procedures consistent with 45 CFR 84.7.

Response: ORR agrees that grievance reporting policies and procedures must be provided in a manner accessible to unaccompanied children with disabilities, and therefore is adding that to § 410.1306(c)(6) as finalized. Additionally, while ORR acknowledges that care provider facilities must adopt grievance reporting procedures consistent with 45 CFR 84.7, ORR is not explicitly adding such a requirement that otherwise exists to this final rule.

Comment: One commenter recommended ORR require at § 410.1306(c)(7) that care provider facilities educate unaccompanied children on ORR's sexual abuse and sexual harassment policies in an age-appropriate manner.

Response: ORR is not incorporating this recommendation at § 410.1306(c)(7) because the existing regulations governing ORR at § 411.33 already provide that unaccompanied children be notified and informed of ORR's sexual abuse and sexual harassment policies in an age and culturally appropriate fashion and in accordance with § 411.15. Additionally, ORR is finalizing at § 410.1306(c)(7) that unaccompanied children be educated in a way they effectively understand, which includes in an age-appropriate manner.

Comment: One commenter recommended ORR define or provide examples of what would constitute an unreasonable request for religious accommodations at § 410.1306(e), stating the standard, as proposed, subjects programs to multiple interpretations of what actions are acceptable.

Response: ORR notes that § 410.1306(e) pertains specifically to the language in which requested religious and/or cultural information or items are provided to an unaccompanied child. ORR clarifies that a request for religious and/or cultural information or items in the unaccompanied child's native or preferred language, depending on the child's preference, may be unreasonable, for example, if the request would require the care provider facility to obtain a voluminous text not published in the preferred language, or items that could not be imported into the United States without great expense. ORR facilitates the free exercise of religion by unaccompanied children in its Federal custody and, in accordance with § 410.1302(c)(9), ORR provides access to religious services whenever possible. As such, ORR is revising § 410.1306(e) to remove ''accommodation'' to avoid confusion with the distinct standard that applies under Religious Freedom Restoration Act (RFRA). ORR is making clarifying edits to reflect that § 410.1306(e) concerns ''Religious and cultural observation and services.''

Finally, ORR notes that it operates and will continue to operate the UC Program in compliance with the requirements of the RFRA, Title VII of the Civil Rights Act of 1964, and all applicable Federal conscience protections, as well as all applicable Federal civil rights laws and HHS regulations.

Comment: One commenter stated that some unaccompanied children have waited three weeks or more to have an initial conversation with their parents or other family members because the care provider facilities were unable to obtain interpretation services in the relevant language to approve contact. This commenter also expressed concern that there are delays in unification due to delays in translating birth certificates or other identity documents. Additionally, the commenter stated that these delays unnecessarily detain unaccompanied children for longer lengths of stay and impact the children's mental health and well-being. To address delays in interpretation and translation services, the commenter recommended revising § 410.1306(f) to require care provider facilities make all efforts to expeditiously obtain interpretation and translation services needed to approve contact between children, their family, and potential sponsors, and not delay contact approval due to the children's language. The commenter also recommended that care provider facilities must secure timely translation services needed for documents required to complete the unification process. Lastly, the commenter recommended care provider facilities immediately notify ORR if they need translation and interpretation services to facilitate family contact or unification, and ORR would expeditiously provide such assistance.

Response: At § 410.1306(a)(1), ORR is finalizing the requirement that care provider facilities must make all efforts to consistently offer interpretation and translation services to unaccompanied children. ORR is also finalizing at § 410.1306(a)(1) that if after taking reasonable efforts, care provider facilities are unable to obtain a qualified interpreter or translator for the unaccompanied children's native or preferred language, depending on the children's preference, care provider facilities shall consult with qualified ORR staff for guidance on how to ensure meaningful access to their programs and activities for the children, including those with limited English proficiency. ORR notes that if the care provider facility is unable to secure qualified in-person interpretation, the facilities may use qualified remote interpreter services. ORR believes these requirements will improve unaccompanied children's access to language access services and alleviate the commenter's concerns. Lastly, ORR will consider the commenter's recommendations during future policymaking if needed to improve

unaccompanied children's access to language access services.

Comment: ORR received a few comments supporting privacy and confidentiality requirements for interpreters at § 410.1306(i) but seeking further clarification and recommending additional requirements to protect unaccompanied children receiving translation and interpretation services. A few commenters recommended that ORR clarify whether ORR requires interpreters to keep information confidential from ORR personnel and stated the current language is not clear. Another commenter recommended that ORR clarify the list of entities to whom language access services providers are prohibited from disclosing information about children's cases and/or services.

A few commenters recommended that interpreters involved in communications between unaccompanied children and legal representatives, or child advocates, must maintain confidentiality of such communications. One of these commenters recommended additional confidentiality protections for unaccompanied children receiving legal services, stating that when an unaccompanied child receives legal services, including consultations, meetings, or other communications between the child and the child's attorney, accredited representative, or legal service provider, interpreters must keep all information confidential. Additionally, this commenter recommended that the unaccompanied child's case file should not include interpretation provided during legal services and that the interpreter or translator should not disclose any information interpreted or translated during confidential communications between the child and the child's legal representative to any third party (including ORR staff or subcontracted staff).

Finally, one commenter recommended additional safeguards for data that should apply to all language access service providers.

Response: ORR agrees that it is important to protect the privacy and confidentiality of interpretation and translation services unaccompanied children receive.

ORR clarifies that § 410.1306(i) of this final rule requires interpreters and translators to keep all information about the unaccompanied children's cases and/or services, confidential from non-ORR grantees, contractors, and Federal staff. ORR clarifies that interpreters and translators would be permitted to share information about the unaccompanied child's case and/or services to care provider facilities, care provider facility staff, ORR staff, ORR contractors, and others providing services under the direction of ORR.

ORR also appreciates the recommendations to require additional safeguards for data and additional confidentiality requirements for communications made between unaccompanied children and their child advocate and/or legal service providers. ORR notes that in other sections of this final rule, it is finalizing confidentiality requirements that would apply to communications made to child advocates and legal services providers as well as data safeguard protections for the unaccompanied children's case files. ORR clarifies that these confidentiality requirements, discussed further below, will apply to information that interpreters and translators have concerning unaccompanied children's cases and/or services, and § 410.1306(i) of this final rule should be read in congruence with these other confidentiality requirements.

Under the definitions of qualified interpreters and qualified translators at § 410.1001, ORR is finalizing the requirement that qualified interpreters and translators adhere to generally accepted ethics principles for interpreters and translators. At § 410.1303(h), ORR is finalizing data safeguard and confidentiality protections for the unaccompanied child's case file, which includes the requirement that care provider facilities preserve the confidentiality of the child's case and the facilities must protect the case file from unauthorized use or disclosure. Further, under § 410.1309(a)(2)(v) and (vi), ORR is finalizing requirements that unaccompanied children receive a confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or DOJ Accredited Representative), that is provided in an enclosed area that allows for confidentiality. ORR also notes that its current policies contain confidentiality requirements for care provider facilities that would be applicable to unaccompanied children receiving interpretation and translation services.[261] ORR believes that the data safeguard and confidentiality requirements being finalized in this rule, and the additional requirements set forth in ORR's current policies, are sufficient to protect the confidentiality of the unaccompanied child's information. However, based on the concerns raised by the commenters, ORR is revising § 410.1306(i) to clarify the requirements for interpreters and translators with respect to confidentiality of information. ORR is amending § 410.1306(i) as follows: ''*Interpreter's and translator's responsibility with respect to confidentiality of information.* Qualified interpreters and translators shall keep confidential all information they receive about the unaccompanied children's cases and/or services while assisting ORR, its grantees, and its contractors, with the provision of case management or other services. Qualified interpreters and translators shall not disclose case file information to other interested parties or to individuals or entities that are not employed by ORR or its grantees and contractors or that are not providing services under the direction of ORR. Qualified interpreters and translators shall not disclose any communication that is privileged by law or protected as confidential under this part unless authorized to do so by the parties to the communication or pursuant to court order.''

Final Rule Action: After consideration of public comments, ORR is finalizing this section with the following modifications. ORR is revising § 410.1306 to apply to all care provider facilities. ORR is revising § 410.1306 to align with the definition of qualified interpreter at § 410.1001 by replacing ''professional telephonic'' with ''qualified remote'' at § 410.1306(a)(2), (d)(1), (d)(3), and (g). ORR is also making clarifying edits to § 410.1306(e) to state ''*Religious and cultural observation and services*'' instead of ''*Religious and cultural accommodations.*'' Additionally, ORR is revising § 410.1306(c)(6) to add the following sentence at the end: ''Care provider facilities shall also provide grievance reporting policies and procedures in a manner accessible to unaccompanied children with disabilities.'' Finally, ORR is revising § 410.1306(i) by making clarifying edits, such that the provision now states: ''*Interpreter's and translator's responsibility with respect to confidentiality of information.* Qualified interpreters and translators shall keep confidential all information they receive about the unaccompanied children's cases and/or services while assisting ORR, its grantees, and its contractors, with the provision of case management or other services. Qualified interpreters and translators shall not disclose case file information to other interested parties or to individuals or entities that are not employed by ORR or its grantees and contractors or that are not providing services under the direction of ORR. Qualified interpreters and translators shall not disclose any communication

that is privileged by law or protected as confidential under this part unless authorized to do so by the parties to the communication or pursuant to court order.''

Section 410.1307 Healthcare Services

The provision of healthcare to unaccompanied children is foundational to their health and well-being and to supporting their childhood development. Therefore, ORR proposed in the NPRM at § 410.1307(a) to codify that ORR shall ensure the provision of appropriate routine medical and dental care; access to medical services requiring heightened ORR involvement, consistent with § 410.1307(c); family planning services; and emergency health services (88 FR 68945 through 68946). ORR notes that it stated in error in the NPRM preamble that ORR shall ensure this access only ''in standard programs and restrictive placements'' (88 FR 68945), and clarifies that § 410.1307(a), as reflected in the regulation text, applies to all unaccompanied children in all care provider facilities. This paragraph would codify corresponding requirements from Exhibit 1 of the FSA. ORR notes that § 410.1307(b), as reflected in the regulation text, applies to standard programs and restrictive placements; corresponding requirements relating to emergency and influx facilities are discussed, infra, at subpart I. Further, under § 410.1307(b), ORR proposed in the NPRM that standard programs and restrictive placements must establish a network of licensed healthcare providers, including specialists, emergency care services, mental health practitioners, and dental providers that will accept ORR's fee-for-service billing system under proposed § 410.1307(b)(1). To assess the unique healthcare needs of each unaccompanied child, consistent with existing policy and practice, ORR included a requirement that unaccompanied children in standard programs and restrictive placements receive a complete medical examination (including screening for infectious disease) within two business days of admission unless an unaccompanied child was recently examined at another facility and if an unaccompanied child is still in ORR custody 60 to 90 days after admission, an initial dental exam, or sooner if directed by State licensing requirements under § 410.1307(b)(2).

In order to prevent the spread of diseases and avoid preventable illness among unaccompanied children, ORR also proposed to require in standard programs and restrictive placements that children receive appropriate immunizations as recommended by the Advisory Committee on Immunization Practices' Child and Adolescent Immunization Schedule and approved by HHS's Centers for Disease Control and Prevention under proposed § 410.1307(b)(3). To aid in the early detection of potential health conditions and ensure unaccompanied children's health conditions are appropriately managed, under proposed § 410.1307(b)(4) ORR would require an annual physical examination, including hearing and vision screening, and follow-up care for acute and chronic conditions. ORR noted in the NPRM that it facilitates an array of health services, such as medications, surgeries, or other follow-up care, that have been ordered or prescribed by a healthcare provider (88 FR 68945). ORR would require the administration of prescribed medication and special diets under § 410.1307(b)(5) and appropriate mental health interventions when necessary, under § 410.1307(b)(6). ORR noted that it proposed in the NPRM to require routine individual and group counseling session at § 410.1302(c)(5) and (6).

There are a number of policies and procedures related to medical care and medications that ORR proposed in the NPRM to require in order to promote health and safety at their facilities. ORR proposed in the NPRM under § 410.1307(b)(7), that standard programs and restrictive placements must have policies and procedures for identifying, reporting, and controlling communicable diseases that are consistent with applicable State, local, and Federal laws and regulations. ORR proposed in the NPRM under § 410.1307(b)(8), that standard programs and restrictive placements must have policies and procedures that enable unaccompanied children, including those with language and literacy barriers, to convey written and oral requests for emergency and non-emergency healthcare services. Finally, under § 410.1307(b)(9), ORR proposed in the NPRM to require standard programs and restrictive placements have policies and procedures based on State or local laws and regulations to ensure the safe, discreet, and confidential provision of prescription and nonprescription medications to unaccompanied children, secure storage of medications, and controlled administration and disposal of all drugs. A licensed healthcare provider must write or orally order all nonprescription medications and oral orders must be documented in the unaccompanied child's file.

At times, the use of medical isolation or quarantine for unaccompanied children may be required to prevent the spread of an infectious disease due to a potential exposure. ORR proposed in the NPRM under § 410.1307(b)(10) to allow unaccompanied children to be placed in medical isolation and excluded from contact with general population when medically necessary to prevent the spread of an infectious disease due to a potential exposure, protect other unaccompanied children and care provider facility staff for a medical purpose or as required under State, local, or other licensing rules, as long as the medically required isolation is limited to only the extent necessary to ensure the health and welfare of the unaccompanied child, other unaccompanied children at a care provider facility and care provider facility staff, or the public at large. To ensure that unaccompanied children have access to necessary services during medical isolation, ORR proposed in the NPRM that standard programs and restrictive placements must provide all mandated services under this subpart to the greatest extent practicable under the circumstances of the medical isolation. A medically isolated unaccompanied child still must be supervised under State, local, or other licensing ratios, and, if multiple unaccompanied children are in medical isolation, they should be placed in units or housing together (as practicable, given the nature or type of medical issue giving rise to the requirement for isolation in the first instance).

In § 410.1307(c), ORR proposed in the NPRM requirements ensuring access to medical care for unaccompanied children. At § 410.1307(c)(1), consistent with the requirements of § 410.1103, ORR proposed in the NPRM that to the greatest extent possible, an unaccompanied child whom ORR determines requires medical care or who reasonably requests such medical care will be placed in a care provider facility that has available and appropriate bed space, is able to care for such an unaccompanied child, and is in a location where the relevant medical services are accessible. ORR noted that the proposal aligns with subpart B, Determining the Placement of an Unaccompanied Child at a Care Provider Facility, which would require that ORR shall place unaccompanied children in the least restrictive setting that is in the best interest of the child and appropriate to the child's age and individualized needs, and that ORR considers ''any specialized services or treatment required'' when determining placement of all unaccompanied children.

Additionally, ORR proposed in the NPRM that if an initial placement in a care provider facility that meets the requirements in § 410.1307(c)(1) is not immediately available or if a medical need or reasonable request, as described in § 410.1307(c)(1), arises after the Initial Medical Exam, ORR shall transfer the unaccompanied child to a care provider facility that is able to accommodate the medical needs of the unaccompanied child. If the medical need is identified, or a reasonable request is received, after the Initial Medical Exam, the care provider facility shall immediately notify ORR. This proposal aligned with subpart G, Transfers, which would require transfer of an unaccompanied child within the ORR care provider facility network when it is determined that an alternate placement for the unaccompanied child that would best meet the child's individual needs. Care provider facilities would be required to follow the process proposed in subpart G such as submitting a transfer recommendation to ORR for approval within three (3) business days of identifying the need for a transfer.

As described in the NPRM at § 410.1307(c)(2), ORR proposed to codify requirements ensuring that unaccompanied children are provided transportation to access medical services, including across State lines if necessary, and associated ancillary services. This would ensure unaccompanied children can access appointments with medical specialists (*e.g.,* neonatologists, oncologists, pediatric cardiologists, pediatric surgeons, or others), family planning services, prenatal services and pregnancy care, or care that may be geographically limited including but not limited to an unaccompanied child's need or request for medical services requiring heightened ORR involvement. ORR noted that the proposal was consistent with current policy, as noted in subpart E, Transportation of an Unaccompanied Child, that ORR, or its care provider facilities, provide transportation for purposes of service provision including medical services. ORR stated that if there is a potential conflict between ORR's regulations and State law, ORR would review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. The NPRM noted, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.

These proposals maintained existing policy that ORR must not prevent unaccompanied children in ORR care from accessing healthcare services, which may include medical services requiring heightened ORR involvement or family planning services, and must make reasonable efforts to facilitate access to those services if requested by the unaccompanied child.[262] This includes providing transport across State lines and associated ancillary services if necessary to access appropriate medical services, including access to medical specialists and medical services requiring heightened ORR involvement. Under these proposals, ORR will continue to facilitate access to medical services requiring heightened ORR involvement, including access to abortions, in light of ORR's statutory responsibility to ensure that the interests of the unaccompanied child are considered in decisions and actions relating to their care and custody, and to implement policies with respect to their care and placement.[263] In the NPRM, ORR stated that it would continue to permit such access in a manner consistent with limitations on the use of Federal funds for abortions which are regularly included in HHS's annual appropriations, commonly referred to as the ''Hyde Amendment.'' [264] For purposes of this final rule, consistent with current policy, ORR will continue to facilitate such access. ORR's policies are consistent with the Hyde Amendment. ORR further noted that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.[265]

Lastly, ORR proposed in the NPRM a requirement in § 410.1307(d) that care provider facilities shall notify ORR within 24 hours of an unaccompanied child's need or request for a medical service requiring heightened ORR involvement or the discovery of a pregnancy. This proposal was consistent with ORR's current policy requirements for notifying ORR of significant incidents and medical services requiring heightened ORR involvement.

Comment: Many commenters expressed support for the proposed provisions that seek to protect and ensure access to medical services that require heightened ORR involvement in § 410.1307(a), including access to abortion, citing the need to support unaccompanied children's health and safety.

Response: ORR believes that providing access to medical care, including access to abortion, is essential in light of ORR's statutory responsibility to ensure that the interests of unaccompanied children are considered in decisions and actions relating to their care and custody.[266] ORR also believes that the availability of medical services is foundational to the health and well-being of unaccompanied children.

Comment: One commenter expressed concern that the proposed requirements do not adequately address the potential trauma and mental health needs of unaccompanied children, who may have experienced violence, abuse, or exploitation in their home countries or during their migration journey. The commenter recommended that ORR ensure that unaccompanied children receive appropriate health services related to trauma and mental health issues. One commenter expressed the need to have mental health care services available that are tailored to the specific needs of Indigenous children.

Response: ORR believes that trauma-informed approaches should be used to support unaccompanied children in ORR custody. Under § 410.1304, ORR finalized that behavior management practices must include evidence-based and trauma-informed strategies. Under § 410.1302(c)(5) and § 410.1302(c)(6), ORR finalized that at least one weekly individual counseling session and at least two weekly group counseling sessions must be provided to unaccompanied children in standard programs and secure facilities. Further, under § 410.1307(b), care providers must establish a network of licensed healthcare providers that includes mental health practitioners and that will accept ORR's fee-for-service billing system under § 410.1307(b)(1). ORR believes that, wherever possible, services should be tailored to the individualized needs of unaccompanied children, including Indigenous children.

Comment: ORR received comments seeking clarity on the rule's impact on the provision of gender-affirming healthcare for unaccompanied children. A few commenters asked ORR to clarify whether ''medical services requiring heightened ORR involvement'' included gender-affirming healthcare.

A few commenters recommended that ORR explicitly state that gender-affirming medical and mental care should be provided when medically necessary.

A few commenters expressed concerns about providing

unaccompanied children with access to gender-affirming healthcare because they believe this care is not in the best interests of the unaccompanied children.

Response: ORR is not changing the final rule to include provisions specific to gender-affirming healthcare because the NPRM did not address this topic.

Comment: One commenter recommended that ORR add language requiring that ORR coordinate with other Federal, State, and local agencies as well as non-governmental organizations to ensure that unaccompanied children receive appropriate healthcare services while in ORR care. The commenter also recommended that ORR coordinate with other agencies and providers to facilitate the continuity of healthcare services for unaccompanied children after they are released from ORR custody.

Response: ORR understands the commenter's recommendation for coordination to refer to efforts to communicate and partner with agencies and organizations to ensure that children receive healthcare. ORR believes such coordination is in alignment with the proposed requirements of § 410.1307(b) for standard programs and restrictive placements to establish a network of licensed healthcare providers and encourages care provider facilities to engage in coordination with other Federal, State, and local agencies as well as non-governmental organizations to support the health care needs of unaccompanied children. Related to care after children are released from ORR custody, ORR notes that it has existing subregulatory requirements that allow for PRS case managers to provide referrals to community health centers and healthcare providers and inform released children and sponsor families of medical insurance options, including supplemental coverage, and assist them in obtaining insurance, if possible, so that the family is able to effectively manage the child's health-related needs. ORR prefers to keep these requirements subregulatory at this time so that they may evolve as needed to reflect best practices and the needs of unaccompanied children.

Comment: One commenter recommended that ORR ensure that Indigenous unaccompanied children have access to their communities' traditional medicines as part of meeting their medical needs.

Response: ORR encourages care provider facilities and PRS case managers to help connect children with communities, groups, and activities that foster the growth of their personal beliefs and practices and that celebrate their cultural heritage. ORR thanks the commenter for their feedback and may take it into further consideration for future policymaking.

Comment: Many commenters recommended that ORR should help coordinate medical recordkeeping to ensure the continued accuracy of health records after release from ORR care, and one commenter recommended adding a requirement that vaccines be recorded in State immunization registries and that records of vaccinations be provided to sponsors upon the unaccompanied child's release. One commenter supported the proposed immunization requirements, and further recommended that any available vaccination records from other countries be reviewed and included in the U.S. vaccination record if they have been given at the appropriate age, dose, interval, and U.S. accepted format.

Response: ORR agrees that accurate health care records, particularly related to vaccinations, are important for the continuity of care of unaccompanied children after their release from ORR custody. ORR notes that unaccompanied children are eligible for the Vaccine for Children (VFC) Program and must receive follow-up vaccinations in accordance with the Advisory Committee on Immunization Practices (ACIP) Catch-up schedule. ORR also notes that all health documents, including vaccine records, must be recorded in the UC Portal. ORR thanks the commenters for their support and feedback and may consider whether further policymaking is needed in this area.

Comment: One commenter recommended clarifying that an exception to completing a medical examination within two business days of admission to a standard program or restrictive placement only be granted if the unaccompanied child was recently examined at another ORR facility. The commenter also suggested adding a requirement that the initial medical examination document all medications ordered by a health care provider in the unaccompanied child's file. The commenter further recommended that ORR require that providers ask about and document any medications and medical records the unaccompanied child arrived in the United States with during the initial medical examination.

Response: Proposed § 410.1307(b)(2) states that the medical examination shall be conducted within two business days of admission, excluding weekends and holidays, unless the child was recently examined at another facility. ORR's existing subregulatory guidance further clarifies that children who transfer between ORR care provider programs do not need to receive a new initial medical examination, however State licensing may require a new ''baseline'' medical examination. Additionally, existing ORR procedures require care provider facilities to request information from the referring agency about whether the child had any medication or prescription information, including how many days' supply of the medication will be provided with the child when transferred into ORR custody and suggests that clinicians and caseworkers ask unaccompanied children about medication they were taking.

Comment: Many commenters expressed concern with the proposal to provide all unaccompanied children with routine dental care under § 410.1307(a), recommending that ORR update the provision to align with current practice that provides routine dental care to any children in ORR care beyond two months. One commenter recommended clarifying that an initial dental exam should occur if a dental concern arises, in addition to circumstances proposed under § 410.1307(b)(2). One commenter expressed concern that the proposed timeframe for an initial dental examination was ambiguous and recommended that ORR clarify that an initial dental examination be provided to unaccompanied children who are still in ORR care 60 days after referral to ORR care, rather than admission to ORR care, as transfers may interrupt the timeline necessary to be eligible for dental care.

Response: ORR clarifies that routine dental care, as specified in § 410.1307(a), provided to unaccompanied children is provided consistent with proposed § 410.1307(b)(2), which states that an initial dental exam is provided 60 to 90 days after admission, or sooner if directed by State licensing requirements. ORR thanks the commenter for the feedback related to the timeline, and notes that its existing subregulatory guidance states between 60 and 90 days after admission into ORR care, and this proposal is consistent with that requirement. Related to dental concerns that may arise, ORR notes that its existing subregulatory guidance further specifies that urgent dental care should be given as soon as possible. After considering public comments, ORR is codifying a new provision at § 410.1307(b)(11) that is consistent with its current policies to ensure that unaccompanied children experiencing urgent dental issues, such

as acute tooth pain, receive care as soon as possible and should not wait for the initial dental examination.

Comment: One commenter recommended adding pharmacies to the network of licensed healthcare providers that must be established by standard programs and restrictive placements. The commenter also recommended adding a requirement that care providers meet State and local licensing as well as public health requirements, which the commenter noted would be consistent with existing ORR policies.

Response: ORR agrees that health care providers must meet State and local licensing requirements and notes, as highlighted by the commenter, that this is a requirement under its existing subregulatory guidance. ORR thanks the commenter for the recommendations, and notes that it may continue to use and update its existing guidance to provide more detailed requirements for care provider facilities.

Comment: One commenter recommended that medical isolation be appropriately tailored to a child's age and that young children should not be left alone when in medical isolation. The commenter also recommended adding a requirement that medical isolation be limited to the least amount of time possible, supported by expedited testing to determine diagnoses if necessary.

Response: ORR agrees that medical care should be appropriate for a child's age and maturation, and that medical isolation should be limited to the least amount of time consistent with health care provider recommendations and best practices. ORR notes that, pursuant to its existing policies, during medical isolation, children should continue to receive tailored services (educational, recreational, social, and legal services) when feasible, and facilities must provide regular updates to ORR regarding the mental and physical health of children in isolation.

Comment: Many commenters recommended that ORR ensure that unaccompanied children's reproductive healthcare is confidential and that children's consent must be obtained before sharing healthcare information with others. Commenters recommended that ORR update the list of services proposed under § 410.1307(b) to include access to prenatal and postnatal care, which commenters believe is a critical aspect of ORR's commitment to the health of youth and also ensures that providers understand their duties.

Response: ORR notes that it has existing subregulatory requirements related to the sharing of health care information, and that care provider facilities must follow applicable Federal and State laws regarding consent for release of medical or mental health records. As part 410 will not govern or describe the entire UC Program, ORR will continue to use and update its existing guidance to provide more detailed requirements for care provider facilities. ORR notes that medical care required under § 410.1307(b) is inclusive of prenatal and postnatal care.

Comment: Many commenters recommended that ORR strengthen and clarify its healthcare service provisions by specifying that it will use pediatric specialists and will also address health needs that arise outside of the envisioned care timeframes. These commenters also recommended that ORR align mental health interventions with Medicaid Early and Periodic Screening, Diagnostic, and Treatment benefit coverage when medically necessary.

Response: ORR notes that the proposed requirement under § 410.1307(b) to establish a network of licensed healthcare providers includes specialists such as pediatric specialists, and mental health practitioners. ORR notes that Medicaid covered services vary by State, making it difficult for ORR to align interventions across the States it operates within. Nonetheless, ORR emphasizes that under § 410.1302(c)(5) and § 410.1302(c)(6), at least one weekly individual counseling session and at least two weekly group counseling sessions must be provided to unaccompanied children in standard programs.

Comment: One commenter recommended that Indigenous unaccompanied children must provide their consent to all medical procedures and medications due to historical sterilization practices and should also have a child advocate to help with medical decision making.

Response: ORR agrees that consent is a critical component of the provision of all health care services for all unaccompanied children, including Indigenous unaccompanied children, and believes the current rule sufficiently protects the health interests of all children.

Comment: Many commenters supported ORR's proposal at § 410.1307(c)(1)(ii) to transfer unaccompanied children to a care provider facility within three business days if medical services, specifically abortions, are unavailable at the initial placement to help ensure access to healthcare services regardless of geographic location.

Response: ORR agrees and believes this proposal will help provide unaccompanied children with access to medical care, including medical services requiring heightened ORR involvement.

Comment: Many commenters supported the proposal at § 410.1307(c) to provide access to medical care, including reproductive healthcare, noting that this proposal is consistent with ORR's Field Guidance #21—Compliance with *Garza* Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare [267] and *J.D.* v. *Azar.* One commenter supported the proposal but recommended the proposal specify that ORR provides access to ''pediatric'' medical specialists and providers.

Response: ORR believes that providing access to medical care, whether prenatal services, pregnancy care, or abortion, is essential in light of ORR's statutory responsibility to ensure that the interests of unaccompanied children are considered in decisions and actions relating to their care and custody [268] and that having access to these medical services is foundational to the health and well-being of unaccompanied children. Finally, ORR notes that medical providers and specialists can include, but are not limited to, pediatric-trained medical providers, such as pediatric cardiologists and pediatric surgeons, as discussed in the NPRM (88 CFR 68946).

Comment: A few commenters requested that ORR provide more information on how ORR may facilitate access to medical care, specifically as it relates to abortion. For instance, commenters requested that ORR provide an estimate on the number of abortions ORR would facilitate under this proposal, the associated costs of such abortions, information on where abortions would take place, the types of abortion procedures that may be provided to unaccompanied children, and how ORR will determine whether abortions are in the best interests of unaccompanied children.

Response: ORR notes that in § 410.1307(c), ORR must make reasonable efforts to facilitate access to medical services requiring heightened ORR involvement, including access to abortion, if requested by the unaccompanied child. These efforts include considering relevant needs in initial placement and transfer decisions and providing transportation for medical services as needed. Any specific needs related to abortion will be determined on an individual basis, and ORR is unable to reliably estimate how many unaccompanied children in ORR

care may need an abortion and any associated transportation costs under this rule. Additionally, given the rapidly changing landscape of State abortion laws and access to abortion, ORR is unable to reliably estimate where abortions may take place.

Comment: Many commenters expressed concerns about the availability and manner of abortion counseling. Some commenters believed that pregnant unaccompanied children should receive unbiased options counseling about alternatives to abortion. Finally, one commenter requested more information on the counseling available to pregnant unaccompanied children and victims of sexual assault, and the types of staff that will provide this counseling.

Response: ORR acknowledges commenters' concerns and reiterates that unaccompanied children are provided with family planning services, which include non-directive options counseling among other services. ORR also notes that under its current policies,[269] ORR specifies that pregnant minors will receive non-directive options counseling and referrals to specialty care, such as obstetricians, for further evaluation and services.

For additional counseling services available to unaccompanied children, as discussed at § 410.1302(c)(5), ORR is requiring standard programs and secure facilities to provide counseling and mental health supports to unaccompanied children that include at least one individual counseling session per week conducted by certified counseling staff. These counseling sessions would address both the developmental and crisis-related needs of each unaccompanied child. ORR notes that this requirement would apply to unaccompanied children who have experienced sexual abuse or assault. For further information on services for victims of sexual abuse, ORR refers readers to the interim final rule, Standards To Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children (79 FR 77768, codified under 45 CFR part 411).

Comment: Many commenters did not support ORR's proposal to provide unaccompanied children with transportation and access to medical services requiring heightened ORR involvement, specifically abortion. Some commenters expressed their belief that providing access to abortion would violate the Hyde Amendment, an annual appropriations rider that prohibits the use of Federal funds for abortions subject to limited exceptions. Commenters also expressed the view that the Hyde Amendment extends to services that facilitate access to abortion, such as transportation. Further, commenters stated that ORR policies related to the *Garza* lawsuit, or any other policies that provide unaccompanied children with access to abortions, no longer apply in light of the Supreme Court's decision in *Dobbs* v. *Jackson Women's Health Organization,* which overturned *Roe* v. *Wade* and *Planned Parenthood* v. *Casey.*

Response: ORR acknowledges commenters' concerns but reiterates that ORR policy, as set out in § 410.1307(c), is consistent with limitations on the use of Federal funds for abortions. ORR must make reasonable efforts to facilitate access to medical services requiring heightened ORR involvement—which may include abortion—if requested by the unaccompanied child; these efforts include considering relevant needs in initial placement and transfer decisions and providing transportation for medical services as needed. Additionally, in order to fulfill its statutory responsibilities regarding the care of unaccompanied children, ORR staff and care provider facilities must not prevent unaccompanied children from accessing legal abortion and related services, and ORR staff and care provider facilities must make all reasonable efforts to facilitate lawful access to these services if requested by unaccompanied children. The U.S. Supreme Court's decision in *Dobbs* is not inconsistent with the terms of the *Garza* settlement, nor ORR's determination to maintain these previously-binding requirements. For further information, ORR refers readers to Field Guidance #21 [270] and the Policy Memorandum on Medical Services Requiring Heightened ORR Involvement [271] where ORR explains its responsibilities under *Garza* while complying with the Hyde Amendment.

Regarding comments on the Hyde Amendment's implications for transportation, ORR refers readers to the September 2022 memo from the Department of Justice Office of Legal Counsel,[272] which states that ''the Hyde Amendment is best read to permit expenditures to fund transportation for women seeking abortions where HHS otherwise possesses the requisite authority and appropriations,'' and ''best read to prohibit only direct expenses for the'' discrete medical procedure of abortion ''itself and not indirect expenses, such as those for transportation to and from the medical facility where the procedure is performed.'' In light of OLC's interpretation, ORR's policy providing transportation for medical services is consistent with the Hyde Amendment.

Comment: Many commenters did not support ORR's proposal to provide access to medical care, specifically abortion, because in their view abortions are not in the best interests of unaccompanied children and could have detrimental impacts on their health. Commenters expressed concern that ORR would force unaccompanied children to have unwanted abortions, including through potential miscommunication due to language barriers, or that the policy might encourage human traffickers to force unaccompanied children to have abortions.

Response: ORR has determined that it should facilitate access to legal abortions for unaccompanied children in ORR custody in light of ORR's statutory responsibility to ensure that the interests of unaccompanied children are considered in decisions and actions relating to their care and custody and to implement policies with respect to the care of unaccompanied children.[273] The unaccompanied child, in consultation with medical professionals, will make the decision whether to access legally-permissible medical services requiring heightened ORR involvement, including abortion. ORR also notes that this proposal pertains to unaccompanied children in ORR custody and therefore, ORR does not believe that there are human trafficking risks associated with this proposal.

Regarding the commenter's concerns regarding language barriers, ORR reiterates that it is finalizing at § 410.1306(g), that while unaccompanied children are receiving healthcare services, care provider facilities would be required to ensure that unaccompanied children are able to communicate with physicians, clinicians, and healthcare staff in their native or preferred language, depending on the unaccompanied children's preference, and in a way they effectively understand. Further, under § 410.1801, ORR is finalizing that EIFs must deliver services, including medical services requiring heightened ORR involvement, in a manner that is sensitive to the age, culture, native language, religious preferences and practices, and other needs of each unaccompanied child. ORR believes these provisions protect unaccompanied children against miscommunication with care providers.

Comment: A few commenters did not support ORR's proposal to provide access to medical care, specifically abortion, because they believed that this proposal may negatively impact unaccompanied children and their

families. Commenters believed that ORR would provide abortions to unaccompanied children without the knowledge or consent of their parents or legal guardians. Finally, commenters believed this proposal would limit families' ability to access records of unaccompanied children and that children may be separated from their siblings if one of them seeks an abortion.

Response: Under current ORR policies, if a State-licensed physician seeks consent from ORR to provide an abortion to an unaccompanied child, neither ORR nor a care provider may provide consent to provide abortions to unaccompanied children.[274] Rather, the child would need to obtain such consent from the appropriate individual identified under State law (typically the parent or legal guardian) or, if available, seek a judicial bypass of parental notification and consent. ORR Federal staff and ORR care providers are required to ensure unaccompanied children have access to medical appointments related to pregnancy in the same way they would with respect to other medical conditions.

ORR believes that safeguarding and maintaining the confidentiality of unaccompanied children is critical to carrying out ORR's responsibilities under the HSA and TVPRA. For further information on confidentiality policies, ORR refers readers to the ORR Policy Guide, Policy Memorandum on Medical Services Requiring Heightened ORR Involvement, and Field Guidance #21 where ORR provides greater detail on information sharing policies and how ORR will address circumstances in which State laws may require parental notification. Finally, ORR notes that in the case of related children, where at least one of the related children is pregnant and requests an abortion, ORR will make every effort to keep related children together while considering the best interests of each child as described in Field Guidance #21.

Comment: A few commenters did not support ORR's proposal to provide access to medical care, specifically abortion, because they believed that ORR should provide the fetus with the same level of care as provided to pregnant unaccompanied children.

Response: ORR carries out its statutory responsibilities for the care and custody of unaccompanied children as established in the TVPRA and the HSA, and consistent with its responsibilities under the FSA. Under these authorities, ORR must prioritize the best interests and individualized needs of unaccompanied children, including pregnant youth, in ORR custody. This includes facilitating access to medical services, including access to abortions when requested by a pregnant individual in ORR custody, consistent with relevant appropriations restrictions (*e.g.,* the ''Hyde Amendment'') and in compliance with the requirements of the RFRA, Title VII of the Civil Rights Act of 1964, and all applicable Federal conscience protections, as well as all applicable Federal civil rights laws and HHS regulations. To the extent the commenters are suggesting that ORR owes statutory duties to the fetus such that ORR facilitating pregnant individuals' access to abortion is legally impermissible, that theory is not supported by ORR's statutory authority.[275]

Comment: Many commenters did not support ORR's proposal to provide unaccompanied children with transportation and access to medical care, specifically abortions, because they believed this policy violates or circumvents State laws that place restrictions on abortion. Commenters requested that ORR clarify the federalism implications of its proposals and whether this proposal means to preempt State laws. A few commenters expressed concerns regarding ORR's proposal to require ORR employees to abide by the Federal duties if there are conflicts between ORR's regulations and State law. Additionally, one commenter believed that if programs are State licensed as required by the FSA, then they must follow State licensure requirements if there are potential conflicts between ORR regulations and State law. One commenter requested ORR clarify if ''ORR employees'' includes grantee and contract staff, and another commenter believed that ORR has misconstrued the Supremacy Clause in a manner that enables ORR to overstep its authority by overriding State laws when conflicts arise.

Response: ORR clarifies that the phrase ''ORR employees'' means Federal employees of ORR and does not include grantee and contract staff. Such individuals, who are care provider facility or other service provider staff, are not Federal employees. ORR notes that it expects and requires, under §§ 410.1302(a) and (b) of this final rule, that standard program and secure facility employees will follow State licensure requirements. However, ORR Federal employees must abide by their Federal duties in the limited circumstances where ORR regulations and State laws may conflict, subject to Federal conscience protections discussed below. Further, ORR refers readers to the Regulatory Impact Analysis in the NPRM where ORR explains that the proposed regulations do not have significant federalism implications and would not substantially affect the relationship between the National Government and the States (88 FR 68976). In proposing these regulations, ORR was mindful of its obligations to ensure that it implements its statutory responsibilities while also minimizing conflicts between State law and Federal interests.

ORR refers readers to its Policy Memorandum on Medical Services Requiring Heightened ORR Involvement and Field Guidance #21—Compliance with *Garza* Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare for further information on alignment with State law. ORR does not intend for this rulemaking to preempt general State law restrictions on the availability of abortions. For example, this rulemaking does not authorize any pregnant individual in ORR custody to obtain an abortion in a State where the abortion is illegal under that State's laws. This rulemaking does contemplate, however, that State law cannot restrict ORR employees in carrying out their Federal duties, including, when appropriate and consistent with religious freedom and conscience protections, transferring pregnant individuals in ORR custody to States where abortion is lawful. This approach is fully consistent with principles of federalism, given States' different approaches to regulating abortion within their borders.

Comment: Many commenters did not support ORR's proposal to provide unaccompanied children with transportation and access to medical care, specifically abortions, because they believed it does not adequately safeguard the religious freedom and conscience protections of ORR staff and requested that ORR modify this proposal to more expressly protect these rights. Commenters asserted that ORR staff and contractors would be required to facilitate access to abortions under this proposal, even if it violates their personal beliefs, religion, or conscience. Commenters requested that ORR discuss specific religious freedom and conscience protections such as the Religious Freedom Restoration Act, Title VII of the Civil Rights Act of 1964, and the First Amendment and explicitly explain how ORR will operate the UC Program in compliance with these laws. These commenters also requested that ORR incorporate these religious freedom and conscience protection provisions into the regulatory text, in addition to the preamble of the rule. One

commenter also expressed concerns that ORR will discriminate or disadvantage faith-based providers when awarding grants or contracts for the UC Program.

Response: ORR reiterates that it operates and will continue to operate the UC Program in compliance with the requirements of RFRA, Title VII of the Civil Rights Act of 1964, and all applicable Federal religious freedom and conscience protections, as well as all applicable Federal civil rights laws and HHS regulations. Additionally, consistent with ORR's Policy Memorandum on Medical Services Requiring Heightened ORR Involvement [276] and Field Guidance #21,[277] ORR will provide legally required accommodations to care provider facilities who maintain a sincerely held religious objection to abortion. ORR also refers readers to other regulations, such as the Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities Final Rule [278] and the Safeguarding the Rights of Conscience as Protected by Federal Statutes Final Rule,[279] which establish rules and mechanisms for ensuring religious freedom and conscience protections for faith-based providers participating in Federal programs, such as the UC Program. Moreover, as to its own employees, ORR highlights 29 CFR parts 1605 and 1614, which contain religious discrimination and accommodation protections available to Federal employees, including those of ORR. Pursuant to these regulations, ORR will continue to provide legally required religious accommodations to requesting employees. ORR anticipates that non-objecting staff will be available to perform those duties. Given these existing protections for religious freedom for participating facilities, providers, and employees, ORR does not believe it is necessary to create new or additional policies. However, ORR is updating § 410.1307(c) to clarify that ORR employees must abide by their Federal duties if there is a conflict between ORR's regulations and State law, subject to applicable Federal religious freedom and conscience protections.

Final Rule Action: After consideration of public comments, ORR is codifying a provision at § 410.1307(b)(11) to state that unaccompanied children experiencing urgent dental issues, such as acute tooth pain, should receive care as soon as possible and should not wait for the initial dental exam. ORR believes this addition is consistent with its current policies and will help ensure unaccompanied children receive necessary dental care that is foundational to their health and well-being. ORR is also amending § 410.1307(c) in three ways. First, it is adopting clarifying language to include language that was in the preamble at § 410.1307(c)(2) to the regulation text at § 410.1307(c) to underscore that ''ORR must not prevent unaccompanied children in ORR care from accessing healthcare services, including medical services requiring heightened ORR involvement and family planning services. ORR must make reasonable efforts to facilitate access to those services if requested by the unaccompanied child.'' Second, ORR is moving language previously included at § 410.1307(c)(2) to § 410.1307(c), with edits such that in the final rule that paragraph contains the following additional sentences: ''Further, if there is a potential conflict between the standards and requirements set forth in this section and State law, such that following the requirements of State law would diminish the services available to unaccompanied children under this section and ORR policies, ORR will review the circumstances to determine how to ensure that it is able to meet its responsibilities under Federal law. If a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties, subject to applicable Federal religious freedom and conscience protections, to ensure unaccompanied children have access to all services available under this section and ORR policies.'' Third, at § 410.1307(c)(1)(i), ORR is amending the text to state that ORR ''shall consider'' a child's individualized needs, in contrast to the NPRM text, which provided that ''ORR considers'' the child's individualized needs. ORR is finalizing all other paragraphs of § 410.1307 as proposed.

Section 410.1308 Child Advocates

ORR proposed in the NPRM, at § 410.1308(a), to codify standards and requirements relating to the appointment of independent child advocates for child trafficking victims and other vulnerable unaccompanied children (88 FR 68946 through 68948). The TVPRA, at 8 U.S.C. 1232(c)(6), authorizes HHS to appoint child advocates for child trafficking victims and other vulnerable unaccompanied children. In 2016, the Government Accountability Office (GAO) carried out an assessment of the ORR child advocate program [280] and recommended improving ORR monitoring of contractor referrals to the program and improving information sharing with child advocates regarding the unaccompanied children assigned to them. ORR noted that the need for child advocates in helping to protect the interests of unaccompanied children has continued to grow over time, especially given the increasing numbers of unaccompanied children who are referred to ORR custody. Under § 410.1308, ORR proposed in the NPRM to codify specific child advocates' roles and responsibilities which are currently described primarily in ORR policy documents.

At § 410.1308(b), ORR proposed in the NPRM to define the role of child advocates as third parties who identify and make independent recommendations regarding the best interests of unaccompanied children. The recommendations of child advocates are based on information obtained from the unaccompanied children and other sources (including the unaccompanied child's parents, family, potential sponsors/sponsors, government agencies, legal service providers, protection and advocacy system representatives in appropriate cases, representatives of the unaccompanied child's care provider, health professionals, and others). Child advocates formally submit their recommendations to ORR and/or the immigration court as written best interest determinations (BIDs). ORR considers BIDs when making decisions regarding the care, placement, and release of unaccompanied children, but it is not bound to follow BID recommendations.

ORR considered several ways to strengthen or expand the role of child advocates, including: granting child advocates rights of access to ORR records and information on unaccompanied children (in order to advocate for unaccompanied children more effectively); allowing advocates to be present at all ORR hearings and interviews with their client (except meetings between an unaccompanied child and their attorney or DOJ Accredited Representative); and expanding the child advocates program to operate at more locations, or expanding eligibility for the program to allow unaccompanied children who age past their 18th birthday to continue receiving advocates' services. ORR noted that, as required by the TVPRA, it already provides child advocates with access to materials necessary to effectively advocate for the best interests of unaccompanied children. In particular, per current ORR policies, child advocates have access to their clients and to their clients' records.

Child advocates may access their clients' entire original case files at care provider facilities, or request copies from care providers. Further, they may participate in case staffings, which are meetings organized by an unaccompanied child's care provider with other relevant stakeholders to help discuss and plan for the unaccompanied child's care. In drafting the NPRM, ORR believed that the language at § 410.1308(b) (together with other paragraphs proposed in § 410.1308) represented an appropriate balance in codifying the role of child advocates. ORR invited comment on these issues, and on the proposals of § 410.1308(b).

At paragraph § 410.1308(c), ORR proposed in the NPRM to specify the responsibilities of child advocates, which include (1) visiting with their unaccompanied children clients; (2) explaining the consequences and potential outcomes of decisions that may affect the unaccompanied child; (3) advocating for the unaccompanied child client's best interest with respect to care, placement, services, release, and, where appropriate, within proceedings to which the child is a party; (4) providing best interest determinations, where appropriate and within a reasonable time to ORR, an immigration court, and/or other interested parties involved in a proceeding or matter in which the child is a party or has an interest; and (5) regularly communicating case updates with the care provider, ORR, and/or other interested parties in the planning and performance of advocacy efforts, including updates related to services provided to unaccompanied children after their release from ORR care.

Consistent with the TVPRA at 8 U.S.C. 1232(c)(6)(A), ORR proposed in the NPRM under § 410.1308(d), that it may appoint child advocates for unaccompanied children who are victims of trafficking or are especially vulnerable. Under § 410.1308(d)(1), ORR proposed in the NPRM that an interested party may refer an unaccompanied child to ORR for a child advocate after notifying ORR that a particular unaccompanied child in or previously in ORR's care is a victim of trafficking or is especially vulnerable. As used in this section, ''interested parties'' means individuals or organizations involved in the care, service, or proceeding involving an unaccompanied child, including but not limited to, ORR Federal or contracted staff; an immigration court judge; DHS staff; a legal service provider, attorney of record, or DOJ Accredited Representative; an ORR care provider; a healthcare professional; or a child advocate organization.

Under § 410.1308(d)(2), ORR proposed in the NPRM that it would make an appointment decision within five (5) business days of referral for a child advocate, except under exceptional circumstances including, but not limited to, natural disasters (such as hurricane, fire, or flood) or operational capacity issues due to influx which may delay a decision regarding an appointment. ORR typically would consider the available resources, including the availability of child advocates in a particular region, as well as specialized subject-matter expertise of the child advocate, including disability expertise, when appointing a child advocate for unaccompanied children in ORR care. ORR would appoint child advocates only for unaccompanied children who are currently in or were previously in ORR care.

Under § 410.1308(d)(3), ORR proposed in the NPRM that child advocate appointments would terminate upon the closure of the unaccompanied child's case by the child advocate, when the unaccompanied child turns 18, or when the unaccompanied child obtains lawful immigrant status. Regarding the appointment of child advocates, ORR considered allowing that any stakeholder should be able to make a confidential referral of an unaccompanied child for child advocate services, and also that any termination of such services should be determined in collaboration with the unaccompanied child and the unaccompanied child's parent or legal guardian (if applicable).

In terms of referrals, proposed § 410.1308(d) would allow for referrals for child advocate services from a broad range of possible individuals. Regarding terminating child advocate services, ORR considered making terminations contingent on a collaborative process between the child advocate, the unaccompanied child, and the unaccompanied child's sponsor, but ORR believed that the proposal at § 410.1308(d)(3) would impose reasonable limits for the termination of child advocate services, and that termination itself otherwise falls within the role and responsibilities of child advocates when advocating for an unaccompanied child's best interests.

Under § 410.1308(e), ORR proposed in the NPRM standards concerning child advocates' access to information about unaccompanied children for whom they are appointed. After a child advocate is appointed for an unaccompanied child, the child advocate would be provided access to materials to effectively advocate for the best interest of the unaccompanied child.[281] Consistent with existing policy, child advocates would be provided access to their clients during normal business hours at an ORR care provider facility in a private area, would be provided access to all their client's case file information, and may request copies of the case file directly from the unaccompanied child's care provider without going through ORR's standard case file request process, subject to confidentiality requirements described below. A child advocate would receive timely notice concerning any transfer of an unaccompanied child assigned to them.

Under § 410.1308(f), ORR proposed in the NPRM standards for a child advocate's responsibility with respect to confidentiality of information. Notwithstanding the access to their clients' case file information granted to child advocates under paragraph (e), child advocates would be required to keep the information in the case file, and information about the unaccompanied child's case, confidential. Child advocates would be prohibited from sharing case file information with anyone except with ORR grantees, contractors, and Federal staff. Child advocates would not be permitted to disclose case file information to other parties, including parties with an interest in a child's case. Other parties are able to request an unaccompanied child's case file information according to existing procedures. ORR proposed in the NPRM these protections consistent with its interest in protecting the privacy of unaccompanied children in its care, and for effective control and management of its records. Also, under § 410.1308(f), ORR proposed to establish that, with regard to an unaccompanied child in ORR care, ORR would allow the child advocate of that unaccompanied child to conduct private communications with the child, in a private area that allows for confidentiality for in-person and virtual or telephone meetings. In drafting § 410.1308(f), ORR considered suggestions that a child advocate should be protected from compelled disclosure of any information concerning an unaccompanied child shared with them in the course of their advocacy work and that unaccompanied children and child advocates must have access to private space to ensure confidentiality of in-person meetings and virtual meetings. ORR noted that § 410.1308(f) is to be read consistently with the TVPRA requirement that child advocates ''shall not be compelled to

testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate.'' [282] Also, ORR sought comment on specific ways to ensure confidentiality of unaccompanied child-child advocate meetings, and invited public comment on that issue, in particular on appropriate ways to ensure privacy, as well as on the text of § 410.1308(f) generally.

Under § 410.1308(g), ORR proposed in the NPRM that it would not retaliate against a child advocate for actions taken within the scope of their responsibilities. For example, ORR would not retaliate against a child advocate because of any disagreement with a best interest determination or because of a child advocate's advocacy on behalf of an unaccompanied child. ORR noted that § 410.1308(g) is intended to be read consistently with its statutory obligation to provide access to materials necessary to effectively advocate for the best interest of the child, and consistently with a presumption that the child advocate acts in good faith with respect to their advocacy on behalf of the child.[283] At the same time, ORR has the responsibility and authority to effectively manage its unaccompanied children's program, which includes, for example, ensuring that the interests of the child are considered in decisions and actions relating to care and custody, implementing policies with respect to the care and placement of unaccompanied children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.[284]

Comment: A few commenters expressed broad opposition to the § 410.1308 proposals concerning child advocates. One commenter opined that under historical practice, ORR has released unaccompanied children to sponsors prior to effectively coordinating with the Office on Trafficking in Persons, in order to determine whether an unaccompanied child has been trafficked. The commenter therefore concluded that ORR has demonstrated an inability and unwillingness to prevent child trafficking, such as to make moot the proposed standards concerning child advocates. Another commenter raised similar concerns, as well as concerns about expanding bureaucracy and inefficiency, in opposing proposed § 410.1308 on child advocates.

Response: As described more fully in comment responses under subpart A, under historical practice and consistent with statutory mandates under the TVPRA, ORR has long coordinated with other Federal authorities, including the Office on Trafficking in Persons, when carrying out its responsibility for caring for unaccompanied children in its custody. ORR is committed to protecting unaccompanied children in its care from any further victimization through child trafficking. The proposals under § 410.1308, by codifying and strengthening the role of child advocates, will have the impact of protecting vulnerable children, particularly with regard to child trafficking risks. ORR believes that these proposals are well-calibrated to achieve this impact, and that the proposals will strengthen ORR's operations and care for unaccompanied children.

Comment: A few commenters expressed general concern about the importance of independence for child advocates under the proposed rule. A few other commenters recommended strengthening the language of § 410.1308(b) on the role of child advocates, in order to better protect advocates' independence. In support of these recommendations, the commenters observed that the independence of child advocates from other service providers was sufficiently important that such independence was called out explicitly under the TVPRA. The commenters also recommended making additional changes to § 410.1308, to ensure that best interests determinations are informed by trusted adults in children's lives, citing best practices in child-centered advocacy in support of this recommendation.

Response: ORR agrees with the commenters that protecting the independence of child advocates is important, and ORR recognizes that TVPRA addresses this issue by authorizing the appointment of advocates. ORR, believes that proposed § 410.1308 strikes the correct balance in outlining the role and responsibilities for child advocates, in ways that will enhance the independence of the child advocacy function, and thereby contribute to protecting the best interests of unaccompanied children. While ORR respects best practices in child-centered advocacy, ORR believes that proposed § 410.1308 already stipulates that best interest determinations may draw on information from trusted adults in a child's life, and that the proposed rule is consistent with related best practices in child-centered advocacy. ORR will take under consideration issuing additional future guidance regarding child advocates, the standards for best interest determinations, and best practices in child-centered advocacy.

Comment: One commenter recommended that all government actors be required to consider an unaccompanied child's best interests at each decision along the continuum of a child's case, from apprehension, to custody, to release.

Response: ORR believes that it is beyond the scope of this rule, and also beyond the scope of ORR's authority, to mandate the use of best interest determinations by other government authorities, across a wide range of enforcement and judicial proceedings that might intersect with the full continuum of the case for any and all specific unaccompanied children.

Comment: A few commenters recommended changes to the proposed rule at § 410.1308(c), to codify that child advocates have an obligation to submit best interest determinations to any official or agency that has the power to make decisions about a child.

Response: ORR believes that the language of § 410.1308(c), as proposed, strikes the correct balance in outlining and illustrating the responsibilities for child advocates, but without limitation to those responsibilities. ORR will take under consideration issuing additional future guidance regarding child advocates, and standards for best interest determinations made by child advocates.

Comment: A few commenters recommended changing proposed regulatory language at § 410.1308(c), to remove any implication that children ''belong'' to child advocates, by amending each reference to ''their child'' under the rule.

Response: ORR believes that § 410.1308(c) makes it clear that child advocates stand in a professional-to-client relationship with unaccompanied child clients, rather than in an ownership relationship with them. When read in its entirety, ORR does not believe that there is any implication of ownership in the phrasing of § 410.1308. However, for clarity and consistency of expression, ORR has added the word ''client'' after ''unaccompanied child'' at the end of § 410.1308(c)(2).

Comment: Several commenters recommended expanding ORR's obligations to appoint child advocates for unaccompanied children under § 410.1308(d) of the rule. A few commenters recommended making the appointment of child advocates mandatory for all unaccompanied children, on the grounds that all are vulnerable, and that all would benefit from having child advocates. Several commenters recommended making the appointment of child advocates

mandatory by ORR with regard to specific sub-groups of unaccompanied children, on grounds of heightened vulnerability, including a few commenters each recommending the appointment of child advocates for LGBTQI+ children; or for children who have been sex-trafficked; or for children lacking the capacity to make decisions regarding their own cases; or for certain youth beyond the age of 18 (when youth age is in dispute, or when the government's actions or inactions have put the 18-year-old in a dangerous situation).

Response: ORR recognizes the importance of child advocates in protecting the interests of child trafficking victims and other especially vulnerable unaccompanied children. As described in this final rule's discussion in subpart A, availability of child advocates is dependent on appropriations. For this reason, ORR believes that proposed § 410.1308(d) strikes an important balance in seeking to align child advocacy services with the children who are most in need of them. Further, ORR specifically chose not to specify detailed standards under § 410.1308(d) for exactly which children will be considered ''especially vulnerable.'' ORR will consider addressing more detailed standards on this issue in future policymaking. Finally, ORR notes that the current language of § 410.1308(d) makes it clear that child advocate appointments terminate when an unaccompanied child turns 18. In recognition of ORR's limited resources, statutory mandates, and the primary aim of § 410.1308(d) in protecting especially vulnerable children, ORR believes that limiting child advocate appointments to unaccompanied children under the age of 18 is reasonable and appropriate under the rule.

Comment: A few commenters recommended modifying § 410.1308(d) to allow for appointment of child advocates to unaccompanied children who were never transferred to ORR custody, or else who passed through ORR custody only briefly, before being immediately reunified with accompanying adult family members. The commenters argued that the TVPRA statute, in authorizing the appointment of child advocates, did not specifically constrain this authority based on ORR custody. The commenters also argued that allowing for appointment of child advocates for vulnerable children without regard to ORR custody status could help to limit the number of children unnecessarily transferred to ORR custody when such transfer is not in a child's best interests, and when that transfer could result in a significant expense to the government.

Response: ORR believes that as written, § 410.1308(d) allows for appointment of child advocates for unaccompanied children who have passed through, but who are not currently in, ORR custody (subject to other applicable standards, such as being ''especially vulnerable''). As for the recommendation made by a few commenters to extend the appointment of child advocates to unaccompanied children who have never been in ORR custody, it is beyond the scope of this rule to address, since this rule focuses on children referred to ORR custody from other Federal agencies.

Comment: One commenter expressed concern about the lack of requirements in proposed § 410.1308(d) for the qualifications and training of child advocates in the appointments process. The commenter recommended that ORR add those requirements to the proposals in § 410.1308(d).

Response: The child advocate program is operated through a contract that includes specific and comprehensive requirements for relevant qualifications and skills, which includes, but is not limited to, bilingual skills, minimum and advanced college degree requirements, and minimum years of experience in child and family welfare, immigration law, social work, trauma-informed approaches to advocacy, and program management. Additionally, ORR's child advocate contract requires the contractor to undergo and provide ongoing training and professional development in areas such as cultural competency, case confidentiality, child development theory, trauma-informed care, child abuse and neglect reporting, issues around family separation, human trafficking reporting, and health and mental health issues. Because standards for the qualification and training of child advocates are set by ORR under contract, ORR has chosen not to codify those standards as a part of this rule.

Comment: A few commenters objected to the language of § 410.1308(d) of the proposed rule allowing ORR discretion to determine which unaccompanied cases are appointed child advocates, rather than empowering the child advocate contractor to make independent decisions about this. The commenters also argued that the proposed rule would require an unnecessarily duplicative process for an interested stakeholder to notify ORR of a referral before submitting the referral to the child advocate contractor, and that this would involve adding costs and delays to current ORR practice. The commenters recommended instead that ORR maintain the current, well-established system, in which the child advocate contractor receives all referrals, and then submits referrals to ORR for a decision to appoint or decline to appoint.

Response: The language at § 410.1308(d) that allows ORR to appoint child advocates is consistent with the TVPRA, which grants the Secretary of HHS the authority to appoint child advocates. As discussed in the background section, the Secretary's authority under the TVPRA has been delegated to the Director of ORR. It is ultimately ORR's responsibility and under its authority to appoint child advocates, and the language at § 410.1308(d) is consistent with that.

ORR has decided, after review, that the proposed language in § 410.1308(d) that described the referral process for child advocates was unnecessarily detailed, in a way that could unintentionally contribute to inefficiency in ORR's processes. Accordingly, ORR in this final rule has streamlined the language of § 410.1308(d)(1), to say that ''an interested party may refer an unaccompanied child for a child advocate, when that unaccompanied child is or previously was in ORR's custody, and when that child has been determined to be a victim of trafficking or especially vulnerable.'' This rephrasing remains consistent with the intent of the original proposal language and is also consistent with ORR's operations and current policies in how referrals for child advocate appointments are carried out.

Comment: A few commenters recommended adding proposal language to § 410.1308(d), to allow for ORR to make child advocate appointment decisions more rapidly than the five-day standard, in specific time-sensitive cases. The commenters recommended language allowing for ORR to make child advocate appointment decisions within 24 hours of receiving a recommendation to appoint, in time-sensitive cases including when unaccompanied children are at-risk of aging out of ORR custody, or have complex medical needs, or are facing upcoming court hearings or agency interviews.

Response: There is nothing in § 410.1308(d) to preclude ORR from making child advocacy appointment decisions more rapidly than the five-day standard, especially given the context of time-sensitive circumstances being referred to by commenters above. ORR

likewise believes that there is no conflict between § 410.1308(d), and recent ORR practices concerning expedited appointment of child advocates in time-sensitive circumstances. For these reasons, ORR believes that the § 410.1308(d) proposals are reasonable and appropriate in their current form.

Comment: One commenter recommended that as a matter of equity under § 410.1308(d), ORR should ensure that all stakeholders, community-based service providers, consulates, other children in custody, and children's family members or proposed sponsors, are able to make referrals for child advocate services for an unaccompanied child.

Response: As proposed, § 410.1308(d) establishes that interested parties may refer an unaccompanied child to ORR for a child advocate, and then the proposal goes on to define ''interested parties'' broadly, including individuals or organizations involved in the care, service, or proceeding involving an unaccompanied child. ORR believes that the language of § 410.1308(d) is appropriate and well-balanced as currently proposed and will allow a broad range of interested stakeholders to initiate referrals for child advocacy services.

Comment: A few commenters recommended modifying the proposed § 410.1308(e), to ensure that child advocates will be able to access their unaccompanied child clients on weekends, evenings, and outside of business hours. The commenters observed that unaccompanied children often prefer to meet with their child advocates on weekends or evenings, when not in classes and when there tends to be less facility-based programming. The commenters also noted that child advocates may need to meet with children on weekends or evenings to address urgent situations, such as transfers, releases, court dates, and other time-sensitive matters.

Response: Although proposed § 410.1308(e) establishes that child advocates shall be provided access to their clients during normal business hours at an ORR care provider facility, the provision would not preclude or prevent care provider facilities from granting child advocates access to their clients outside of normal business hours or on weekends, particularly given the context of urgent situations such as transfers, releases, court dates, etc. ORR believes it is reasonable to only require access during business hours, given the potential burden on the facilities to provide access to the facilities on evenings or weekends, but will take under consideration addressing more detailed standards or considerations for access outside of formal business hours, in future policymaking, as necessary.

Comment: A few commenters recommended that the provisions under § 410.1308(e) be modified to emphasize that child advocates need to be given prompt access to all information related to a child's case. The commenters argued that child advocates may need to act urgently when a situation affecting a child's safety or well-being arises, which necessitates their having rapid access to the records, even outside of business hours. A few commenters also argued that timeliness of information access and advance notice for child advocates is critical in some situations, including before a child is transferred over their objection, is stepped up to a more restrictive facility, is required to appear in court to request voluntary departure, or is at risk of receiving a court order of removal.

Response: ORR agrees that prompt access for child advocates to the case file records of their clients is important to protecting the interests of unaccompanied children, in a range of time-sensitive circumstances. The current language of § 410.1308(e) establishes minimum requirements for access by child advocates to the case file records of their clients, including that advocates shall be provided access to such case file information during normal business hours at an ORR care provider facility, and that advocates may request copies of the case file directly from the care provider facility. This language does not preclude child advocates from accessing their clients' records quickly, nor does it exempt ORR care provider facilities from being responsive to requests by child advocates for rapid access to records (including outside of regular business hours) when time-sensitive circumstances create a need for such access. Again, ORR believes the requirements of § 410.1308(e) are reasonable given the burden to care provider facilities. However, ORR will consider whether it should address more detailed standards or considerations for expedited access by child advocates to the case file records of their clients in ORR care facilities in future policymaking.

Comment: One commenter recommended superseding and amending the proposal at § 410.1308(e) with a new consolidated proposal on data safeguarding.

Response: After considering different approaches to drafting the regulation, ORR concluded that the language of § 410.1308(e) (on child advocates' access to information), § 410.1303(h) (on safeguarding each individual unaccompanied child's case file) and at subpart F (on data and reporting requirements) is reasonable and appropriate, and offers clarity with regard to the intersection between data safeguarding issues, and with regard to the powers and responsibilities of child advocates, in particular. For these reasons, ORR has chosen to proceed with finalizing § 410.1308(e), § 410.1303(h), and subpart F as described in this final rule.

Comment: One commenter recommended that ORR should codify a legal obligation recently recognized in the *Ms. L* settlement agreement, to ensure that in cases where the Federal Government has separated a parent and child who traveled together, the Federal Government must provide ORR with information regarding the separation at the time of the child's transfer to ORR custody, and furthermore, that ORR is then required to provide this information within three business days to any appointed child advocate. The commenter argued that it is critical for child advocates of separated children in ORR custody to have access to all available information regarding the government's separation of the child from their parent.

Response: ORR acknowledges the settlement agreement that addresses these issues but believes that there is no conflict or inconsistency between the proposed rule under § 410.1308 and that settlement agreement.[285]

Comment: Several commenters recommended that ORR revise its proposals at § 410.1308(f) on the confidentiality obligations of child advocates, in order to establish that child advocates may disclose information in an unaccompanied child's case file, either with the child's consent or based on a best interests determination, for a variety of purposes, including in State court proceedings, in Federal court proceedings, as well as to attorneys considering representation of unaccompanied children, when such representation has been determined by a child advocate to be in a child's best interests. Several commenters also asserted that the proposed rule should reflect that child advocates shall keep communications with an unaccompanied child confidential, except where the child advocate determines that sharing of information is required to ensure the child's safety or otherwise to serve the child's best interests.

Response: Under the language of § 410.1308 as proposed, ORR did not intend for there to be any conflict

between § 410.1308(c) (which establishes that the responsibilities of a child advocate include providing best interest determinations and advocating in a proceeding or matter in which the unaccompanied child is a party or has an interest) and § 410.1308(f) (which otherwise imposes confidentiality requirements on child advocates, with respect to information in the unaccompanied child's case file). Per § 410.1308(c), child advocates have both the responsibility and authority to advocate in the manner and in proceedings as described under that paragraph. Apart from and beyond that responsibility, both ORR and child advocates also have broader duties to protect the confidentiality of the case file records of their unaccompanied child clients, as specified under § 410.1308(f). In ORR's view, the language of §§ 410.1308(c) and (f), read in totality, serves to empower child advocates to appropriately advocate for their unaccompanied child clients through best interest determinations and in a range of proceedings where those clients have an interest, while also imposing appropriate confidentiality obligations on child advocates in other contexts. Consistent with the originally proposed intent for § 410.1308(f), ORR has decided to clarify the language of that provision to read, in relevant part, ''Child advocates must keep the information in the case file, and information about the unaccompanied child's case, confidential. A child advocate may only disclose information from the case file with informed consent from the child, when this is in the child's best interests.'' These updates reflect ORR's dual intent (1) to emphasize that child advocates must be given appropriate access to materials necessary to effectively advocate for the best interest of the child, consistent with the TVPRA; and (2) to express ORR's responsibility to safeguard unaccompanied children's case files. See above preamble discussion regarding § 410.1303(h). ORR may engage in additional policymaking to further refine the application of these principles, but for purposes of this rule ORR underscores its commitment to ensuring that child advocates retain their ability to effectively advocate for the best interest of the child.

Comment: One commenter recommended modifying proposed § 410.1308(f) to prohibit a child advocate from being compelled to testify or otherwise provide evidence. That commenter specifically recommended that the proposed rule cross-reference the proceedings contemplated by proposed §§ 410.1902 and 410.1903 and clarify that child advocates cannot be compelled to testify in these proceedings. The commenter stated that the statutory provisions of the TVPRA establish that child advocates shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from a child in the course of serving as a child advocate.

Response: ORR acknowledges that the TVPRA states that a ''child advocate shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate.'' [286] With regard to the proceedings contemplated by proposed §§ 410.1902 and 410.1903 of this rule, the intent of those proceedings is to provide an unaccompanied child review of a restrictive placement decision made by ORR. In these administrative proceedings, an unaccompanied child may ask their child advocate to assist in their representation. Neither the unaccompanied child nor ORR can compel a child advocate to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate. However, a child advocate may choose to participate in the proceeding when doing so is in the child's best interest. ORR will consider providing more detailed standards for child advocates in these administrative proceedings in future guidance.

Comment: A few commenters expressed support for the § 410.1308(g) proposal to protect child advocates from retaliation by ORR. The commenters noted that because child advocates make best interest determinations for unaccompanied children, this sometimes results in the advocates challenging ORR's decisions with regard to unaccompanied children. The commenters expressed appreciation for the inclusion by ORR of language in the rule to prohibit retaliation against child advocates, but also called for strengthening the proposal language to be consistent with other laws prohibiting retaliation. One commenter went further, by recommending the addition of specific regulatory language to define ''retaliation'' against a child advocate as including any adverse action impacting the child advocate's ability to fulfill their role, including with regard to access to unaccompanied children, referrals, or timely appointment decisions.

Response: ORR recognizes the importance of non-retaliation against child advocates by ORR as a necessary foundation in order for child advocates to carry out their function. ORR believes that the proposed language of § 410.1308(g) in protecting advocates from ''retaliation for actions taken within the scope of their duties'' is both sufficient and well-tailored to accomplish this purpose.

Final Rule Action: After consideration of public comments, ORR is revising § 410.1308(c)(2) to add the word ''client'' after the phrase ''unaccompanied child;'' is revising § 410.1308(d)(1) to clarify that an interested party may refer an unaccompanied child for a child advocate when the unaccompanied child is currently, or was previously in, ORR's care and custody; and is revising § 410.1308(f) to clarify that a child advocate may only disclose information from the case file with informed consent from the child when this is in the child's best interests. ORR is otherwise finalizing this section as proposed.

Section 410.1309 Legal Services

ORR proposed in the NPRM, at § 410.1309, standards and requirements relating to the provision of legal services to unaccompanied children following entry into ORR care (88 FR 68948 through 68951). The proposals under § 410.1309 also included standards relating to ORR funding for legal service providers for unaccompanied children.

ORR believes that legal service providers who represent unaccompanied children undertake an important function by representing such children while in ORR care and in some instances after release. The proposals under § 410.1309 are built on current ORR policies, which articulate standards for legal services for unaccompanied children. ORR strives for 100 percent legal representation of unaccompanied children and will continue to work towards that goal to the extent possible. ORR invited public comment as to whether and how to broaden representation for unaccompanied children (88 FR 68948).

In the NPRM, ORR noted that under the TVPRA, at 8 U.S.C. 1232(c)(5), the Secretary of HHS must ''ensure, to the greatest extent practicable and consistent with section 292 of the INA (8 U.S.C. 1362),'' that all unaccompanied children who are or have been in its custody or in the custody of DHS, with exceptions for children who are habitual residents of certain countries, have counsel ''to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.'' The Secretary of Health and

Human Services ''shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.'' The INA, 8 U.S.C. 1362, provides, ''In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.''

Thus, under the TVPRA, HHS has an obligation, ''to the greatest extent practicable,'' to ensure that unaccompanied children have counsel in (1) immigration proceedings and (2) to protect them from mistreatment, exploitation, and trafficking. Because 8 U.S.C. 1232(c)(5) states these responsibilities are ''consistent with'' 8 U.S.C. 1362, ORR read these provisions together as establishing that, while the statute establishes HHS's obligations in relation to legal services, there is not a right to government-funded counsel under 8 U.S.C. 1232(c)(5). Rather, ORR understands that it has a duty to ensure to ''the greatest extent practicable'' that unaccompanied children have counsel at no expense to the government, for both purposes described by the TVPRA. Further, the second sentence of 8 U.S.C. 1232(c)(5) states that the Secretary of HHS shall, ''to the greatest extent practicable,'' make every effort to utilize the services of pro bono counsel. ORR understands this requirement as establishing the preferred means by which counsel is provided to unaccompanied children, but also that the Secretary has authority to utilize other types of services—namely services that are not pro bono—in areas where pro bono services are not available. In summary, insofar as it is not practicable for the Secretary of HHS to utilize the services of pro bono counsel for all unaccompanied children specified at 8 U.S.C. 1232(c)(5), and insofar as appropriations are available, the Secretary has discretion under that section also to fund client representation for counsel for the unaccompanied children both (1) in immigration proceedings, and (2) to protect them from mistreatment, exploitation, and trafficking—as such concerns may arise outside the context of immigration proceedings (*e.g.,* other discrete services outside the context of immigration proceedings as described in the paragraphs below).

ORR proposed in the NPRM, at § 410.1309(a)(1), that ORR would ensure, to the greatest extent practicable and consistent with section 292 of the INA (8 U.S.C. 1362), that all unaccompanied children who are or have been in ORR care, and who are not subject to special rules for children from contiguous countries, have access to legal advice and representation in immigration legal proceedings or matters, consistent with current policy and as further described in this section. ORR stated in the NPRM that it understood ''to the greatest extent practicable'' to reflect that the provision of legal services must be subject to available resources, as determined by ORR, and otherwise practicable (88 FR 68949).

ORR proposed in the NPRM, at § 410.1309(a)(2), that an unaccompanied child in ORR care receive (1) a presentation concerning the rights and responsibilities of unaccompanied children in the immigration system, including information about protections under child labor laws and educational rights, presented in the language of the unaccompanied child and in an age-appropriate manner; (2) information regarding availability of free legal assistance, and that they may be represented by counsel, at no expense to the Government; [287] (3) notification of the ability to petition for SIJ classification, to request that a State juvenile court determine dependency or placement, and notification of the ability to apply for asylum or other forms of relief from removal; (4) information regarding the unaccompanied child's right to a removal hearing before an immigration judge, the ability to apply for asylum with USCIS in the first instance, and the ability to request voluntary departure in lieu of removal; and (5) a confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or DOJ Accredited Representative) to determine possible forms of legal relief in relation to the unaccompanied child's immigration case. ORR also proposed in § 410.1309(a)(2) that an unaccompanied child in ORR care be able to communicate privately with their attorney of record, DOJ Accredited Representative, or legal service provider, in a private enclosed area that allows for confidentiality for in-person and virtual or telephone meetings. ORR noted that these proposed services go beyond that which is required under the FSA. For example, although both the FSA and proposed § 410.1309(a)(2) require that unaccompanied children receive information regarding their legal rights and availability of free legal assistance, § 410.1309(a)(2) would provide additional specificity about the type of information that would be provided. Additionally, ORR noted that § 410.1309(a)(2) goes beyond the scope of what is required under the FSA by providing that unaccompanied children receive not just information regarding the availability of legal counsel, but also requiring that unaccompanied children receive a confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or a DOJ Accredited Representative) to help them understand their individual immigration case. Finally, although the FSA requires that unaccompanied children have ''a reasonable right to privacy,'' which includes the right to talk privately on the phone and meet privately with guests (as permitted by the facility's house rules and regulations), FSA Exhibit 1 at paragraph 12A, § 410.1309(a)(2) would go beyond the FSA's requirement to make explicit that communications and meetings with the unaccompanied child's attorney of record, DOJ Accredited Representative, and legal service provider must be held in enclosed designated spaces, without reference to any limitation on such rights by the facility's house rules and regulations.

With respect to the confidential legal consultation, ORR noted the importance of allowing unaccompanied children and their legal service providers, attorneys of record, or DOJ Accredited Representatives access to private space, to ensure that any communications or meetings about legal matters can be held confidentially. In addition, in developing the proposal to require a presentation on the rights of unaccompanied children in the immigration system, ORR considered including a requirement for additional presentations for unaccompanied children who remain in ORR care beyond six months.

At § 410.1309(a)(3), ORR proposed in the NPRM that it would require this information, regarding unaccompanied children's legal rights and access to services while in ORR care, to be posted in an age-appropriate format and translated into each child's preferred language consistent with proposed § 410.1306, in any ORR contracted or grant-funded facility where unaccompanied children are in ORR care.

ORR proposed in the NPRM, at § 410.1309(a)(4), that to the extent that appropriations are available, and insofar as it is not practicable to secure pro bono counsel for unaccompanied children as specified at 8 U.S.C. 1232(c)(5), ORR would fund legal service providers to provide direct

immigration legal representation to certain unaccompanied children subject to ORR's discretion to the extent it determines appropriations are available. Examples of direct immigration legal representation include, but are not limited to, (1) for unrepresented unaccompanied children who become enrolled in ORR URM Programs, provided they have not yet obtained lawful status or reached 18 years of age at the time of retention of an attorney; (2) for unaccompanied children in ORR care who must appear before EOIR, including children seeking voluntary departure, or who must appear before U.S. Citizenship and Immigration Services (USCIS); (3) for unaccompanied children released to a sponsor residing in the defined service area of the same legal service provider who provided the child legal services in ORR care, to promote continuity of legal services; and (4) for other unaccompanied children, in ORR's discretion.

Under § 410.1309(b), ORR proposed in the NPRM that it would fund legal services for the protection of an unaccompanied child's interests in certain matters not involving direct immigration representation, consistent with its obligations under the HSA, 6 U.S.C. 279(b)(1)(B), and the TVPRA, 8 U.S.C. 1232(c)(5). In addition to the direct immigration representation outlined in § 410.1309(a)(4), to the extent ORR determines that appropriations are available and use of pro bono counsel is impracticable, ORR proposed in the NPRM that it may (but is not required to) make funding for additional access to counsel available for unaccompanied children in the following enumerated situations for proceedings outside of the immigration system when appropriations allow and subject to ORR's discretion in no particular order of prioritization: (1) ORR appellate procedures, including the Placement Review Panel (PRP) related to placement in restrictive facilities under § 410.1902, risk determination hearings under § 410.1903, and the denial of a release to the child's parent or legal guardian or close relative potential sponsor under § 410.1206; (2) for unaccompanied children upon their placement in ORR long-term home care or in an RTC outside a licensed ORR facility and for whom other legal assistance does not satisfy the legal needs of the individual child; (3) for unaccompanied children with no identified sponsor who are unable to be placed in ORR long-term home care or ORR transitional home care; (4) for purposes of judicial bypass or similar legal processes as necessary to enable an unaccompanied child to access certain lawful medical procedures that require the consent of the parent or legal guardian under State law and the unaccompanied child is unable or unwilling to obtain such consent; (5) for the purpose of representing an unaccompanied child in State juvenile court proceedings, when the unaccompanied child already possesses SIJ classification; and (6) for the purpose of helping an unaccompanied child to obtain an employment authorization document. ORR invited comment on these proposals under § 410.1309(b), and with regard to how a mechanism might be incorporated into the rule to help prevent, or reduce the likelihood of, the zeroing-out of funding for legal representation, while also ensuring sufficient funding for capacity to address influxes.

At § 410.1309(c), ORR proposed in the NPRM to establish relevant requirements and expectations for the provision of the legal services described at § 410.1309(a) and (b). ORR proposed in the NPRM at § 410.1309(c)(1) that in the course of funding legal counsel for any unaccompanied children under § 410.1309(a)(4) or (b)(2), in-person meetings would be preferred, although unaccompanied children and their representatives would be able to meet by telephone or teleconference as an alternative option when needed and when such meetings can be facilitated in such a way as to preserve the unaccompanied child's privacy. Either the unaccompanied child's attorney of record or DOJ Accredited Representative or an ORR staff member or care provider would always accompany the unaccompanied child to any in-person hearing or proceeding, in connection with any legal representation of an unaccompanied child pursuant to § 410.1309.

When developing § 410.1309(c)(1), ORR considered the alternatives of enacting a requirement that an unaccompanied child's attorney of record or DOJ Accredited Representative always be required to attend court hearings and proceedings in-person with the unaccompanied child, or that the attorney of record or DOJ Accredited Representative always engage in in-person meetings with the unaccompanied child while representing them, absent a good cause reason not to do so (88 FR 68950). ORR concluded that the proposal at § 410.1309(c)(1) reflected a balance between ensuring that unaccompanied children have effective access to legal representation and services, while establishing a preference for in-person meetings, and ensuring that unaccompanied children will not have to walk into physical proceedings alone.

Under § 410.1309(c)(2), ORR proposed in the NPRM to require the sharing of certain information with an unaccompanied child's representative, including certain notices. Under paragraph (c)(2), upon receipt by ORR of (1) proof of representation and (2) authorization for release of records signed by the unaccompanied child or other authorized representative, ORR would, upon request, share the unaccompanied child's complete case file apart from any legally required redactions to assist with legal representation of that child. Section 410.1309(c)(2) reflected current ORR policy guidance describing the process by which an individual will be recognized by ORR as the attorney of record or DOJ Accredited Representative for an unaccompanied child. Under current practice, ORR recognizes an individual as an unaccompanied child's attorney of record or DOJ Accredited Representative through the submission of an ORR form, the ORR Notice of Attorney Representation. ORR noted that this form is not identified specifically in the proposed regulatory text to preserve operational flexibility for ORR to accept different forms of proof as appropriate. ORR also considered the importance of timely notice by ORR to the unaccompanied child's representative to allow for effective legal representation, in connection with law enforcement events, age redetermination processes, and allegations of sexual abuse or harassment.

ORR sought public comment on these issues, including the scope of reportable events or interactions with law enforcement and scope of notice depending on the unaccompanied child's involvement in the reportable event (*i.e.,* as an alleged victim, alleged perpetrator, or as a witness). With allegations or accusations of sexual abuse or harassment, ORR solicited public comment on privacy concerns and other considerations. ORR also solicited comments on the appropriate timeframes for various types of notification (88 FR 68950).

As discussed in section III.B of this final rule, the Secretary's authority under 8 U.S.C. 1232 has been delegated to the ORR Director. As discussed above, ORR understands that in addition to expanding access to pro bono services and funding legal services in immigration-related proceedings or matters, it may also promote pro bono services and fund legal services for

broader purposes that relate to protecting unaccompanied children from mistreatment, exploitation, and trafficking. Consistent with the TVPRA, ORR makes every effort to use pro bono legal services to the greatest extent practicable to secure counsel for unaccompanied children in these contexts. Specifically, ORR-funded legal service providers may help coordinate a referral to pro bono services, and ORR provides each unaccompanied child with lists of pro bono legal service providers by State and pro bono services available through a national organization upon admission into a care provider facility.[288] That said, in some cases it is impracticable for ORR to secure pro bono legal services for unaccompanied children. For example, it may be impracticable to secure pro bono services if the demand for such services exceeds the supply of pro bono services, as may occur at certain locations or during times of influx. To the extent pro bono legal services are unavailable or impracticable to secure because ORR has limited resources, ORR must be selective in the kinds of legal services it funds. As a result, ORR proposed in the NPRM to establish its discretion to fund legal services for specific purposes, based on its judgment and priorities.

In terms of funding legal services, at § 410.1309(d), ORR also proposed, in its discretion and subject to available resources, to make available funds (if appropriated) to relevant agencies or organizations to provide legal services for unaccompanied children who have been released from ORR care and custody. ORR would establish authority to make available grants–including formula grants distributed geographically in proportion to the population of released unaccompanied children–or contracts for immigration legal representation, assistance, and related services to unaccompanied children.

To prevent retaliation against legal service providers, at § 410.1309(e), ORR proposed in the NPRM that it shall presume that legal service providers are acting in good faith with respect to their advocacy on behalf of unaccompanied children, and ORR shall not retaliate against a legal service provider for actions taken within the scope of the legal service provider's responsibilities. For example, ORR shall not engage in retaliatory actions against legal service providers or any other representative for reporting harm or misconduct on behalf of an unaccompanied child. As noted at § 410.1309(e), ORR will not retaliate against legal service providers; however, ORR has the responsibility and authority to effectively manage its unaccompanied children's program which includes, for example, ensuring that the interests of the child are considered in decisions and actions relating to care and custody, implementing policies with respect to the care and placement of unaccompanied children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.

Comment: Several commenters suggested that ORR should provide additional language access to unaccompanied children by ensuring that legal services are provided in the child's ''native or preferred'' language. One commenter explained that this is especially important for indigenous unaccompanied children so that they can make informed legal decisions and file complaints with the correct oversight bodies.

Response: ORR agrees with the commenters that good quality legal advice and representation for all children depends on the child's ability to effectively communicate with their attorney in their native or preferred language. After considering the public comments, ORR is revising § 410.1309(a)(2)(i) to state ''native or preferred language of the unaccompanied child'' rather than ''the language of the unaccompanied child.''

Comment: ORR sought public comments regarding whether and how to broaden representation for unaccompanied children in its care. ORR received multiple comments supporting the expansion of legal services for unaccompanied children and offering ideas about how ORR could do so. ORR also received multiple comments questioning ORR's legal authority to pay for legal services for unaccompanied children and suggesting that ORR not use taxpayer dollars to fund legal representation for unaccompanied children.

Response: ORR recognizes that most unaccompanied children need legal services to resolve their immigration status and that representation appears to have a significant impact on both the court appearance rate and the outcome of cases for unaccompanied children. As ORR has explained, pursuant to the TVPRA, HHS has an obligation, ''to the greatest extent practicable,'' and consistent with section 292 of the Immigration and Nationality Act, to ensure that unaccompanied children have counsel in their immigration proceedings. But as explained in the preamble, the fact that the statute says that the Secretary shall make every effort to utilize the services of pro bono counsel to ''the greatest extent practicable'' makes clear that HHS also has authority to pay for legal services beyond what is available from pro bono counsel when meeting the Secretary's statutory obligations.[289]

ORR understands that some commenters would like ORR to fully fund legal services to all unaccompanied children while others do not believe tax dollars should be spent on legal services for unaccompanied children. After reviewing the various comments, ORR has determined that its approach to providing legal services to unaccompanied children by enabling them to access pro bono counsel ''to the greatest extent practicable'' and funding legal services for additional unaccompanied children, as resources allow, is consistent with ORR's statutory obligations.

ORR believes that the commenters who challenged whether ORR has the authority to pay for legal representation are mistaken. INA section 292 does not prohibit ''aliens in removal proceedings'' from receiving Government-funded representation. Instead, section 292 establishes that aliens have a privilege to be represented by counsel of their choice, if the counsel is authorized to practice in immigration proceedings, but that the aliens do not have a right to counsel paid for by the Government. It does not place any limitation on the Government's discretion to fund client representation and therefore does not limit the Secretary's authority to fund such representation under section 235(c)(5) of the TVPRA.

Several commenters suggested that ORR should commit to fully funding legal representation for all unaccompanied children or should include language in the rule that requires appointment of an attorney for every child in ORR's custody.

Response: While ORR does seek to expand legal representation for unaccompanied children and will continue to seek appropriations from Congress to make this possible,[290] ORR cannot, by regulation, commit itself to pay for representation without regard to whether Congress has appropriated sufficient funds to do so. ORR has clarified at § 410.1309(a)(2), however, its responsibility to provide unaccompanied children with a list and contact information for pro bono attorneys and assist them with retaining an attorney as needed.

Comment: Several commenters provided specific ideas for expanding access to legal services short of mandated funding. One commenter

suggested using collaborative intake hubs which co-locate legal services providers with other types of social services providers for unaccompanied children. The commenter argued that such hubs can reduce the need for children to engage in extensive outreach to numerous providers to access both legal and social services, and that hubs enable efficiencies in referring cases and screening children for eligibility for relief. Several commenters also encouraged the use of the ImportaMi program via Apps like WhatsApp, Facebook, and Facebook Messenger. These commenters argued that these modes of communication are more regularly used by unaccompanied children than telephone or email, and that children have had greater success in finding counsel with help from ImportaMi than by using ORR's conventional lists of legal service providers. Another comment suggested deepening and retaining pools of talented attorneys and legal staff through partnerships and fellowships dedicated to public interest immigration representation. The commenter also recommended convening regular stakeholder engagements on a local and regional basis to gather feedback about specific representation landscapes, barriers, and opportunities. Another commenter argued that trainings and outreach should be continuously available, with particular focus on trauma-informed interviewing techniques, child-centered practices, cultural responsiveness, and fluency or proficiency in languages commonly spoken by unaccompanied children.

Response: ORR is considering these and additional options but has deliberately not specified the specific mechanisms of service delivery or the technical details of the modes of communication that an unaccompanied child may use to communicate with or retain an attorney given that technology platforms and applications continuously change over time.

Comment: Multiple commenters suggested expanding the scope of legal services orientations and information provided to children about their rights. One commenter recommended that children should be provided with information about avoiding exploitative situations, legal rights in the context of labor exploitation, and local resources where children can turn to for assistance. Several commenters recommended including in a legal rights orientation notice information regarding the right to counsel, steps for finding counsel, the right to confidential meetings with counsel, and the right to counsel in step-up proceedings.

A few commenters indicated that telephonic and video legal services orientations should only be permitted in rare instances and only to protect the health and wellness of children in ORR's care. One commenter argued that telephonic and video orientations limit presenters' ability to gauge children's comprehension, engage children throughout the orientation, and minimize external distractions. A commenter pointed out that orientations serve to inform children of critical information about the legal process and their rights, but also lay a foundation for a child to begin to establish trust with a legal service provider.

A few commenters offered feedback and recommendations on the posting of legal services orientation information. One commenter recommended that the rule should be expanded to incorporate specific examples of what age-appropriate legal rights postings should look like, for different age groups.

Response: ORR is committed to ensuring that all unaccompanied children receive a comprehensive orientation and information about their legal rights in an age-appropriate format. ORR believes that the rule recognizes the minimal foundational requirements for the orientation and accessibility of information while also providing ORR with flexibility on how to operationalize it. Having said that, ORR recognizes the benefit of providing unaccompanied children specific notification of and information regarding their right to a risk determination hearing during such orientations to ensure that they are aware of this right and the process for exercising this right. Given the multiple comments suggesting that ORR expand the scope of legal services orientations and information provided to unaccompanied children about their rights, ORR is adding new paragraph (a)(2)(vii) to § 410.1309 to provide that as part of a child's orientation, the child shall receive information regarding the child's right to a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, as described at § 410.1903(a) and (b).

ORR appreciates the benefits of providing legal orientations in-person. However, the feasibility of providing in-person orientations may vary, particularly given the need to do so in a timely manner, and the need to do so in each unaccompanied child's native or preferred language. ORR anticipates that sometimes there may be unavoidable trade-offs between providing a timely legal services orientation versus providing an in-person legal services orientation. Rather than establish detailed requirements or standards to address this issue, ORR's proposal under § 410.1309(a)(2)(i)(A) deliberately leaves these details unspecified, in anticipation of future ORR guidance, contracting terms, and the likelihood that ORR's policies and standards regarding in-person versus telephonic or video legal services orientations may need to be updated over time.

Comment: One commenter argued that the term ''in an age-appropriate manner'' in § 410.1309(a)(2) does not adequately address the differences between age and development. The commenter recommended replacing this language with the phrase ''in an age, developmentally, and culturally appropriate matter.''

Response: ORR intends that the phrase ''age-appropriate,'' as used in § 410.1309(a)(2), is synonymous with the term ''developmentally appropriate.'' ORR is revising the paragraph to state that the required presentation must be presented in the native or preferred language of the unaccompanied child, which ORR believes would cover the language being culturally appropriate.

Comment: One commenter expressed support for the proposal under § 410.1309(a)(2) for confidential legal consultations for unaccompanied children, and for the proposal for a second consultation for some children once identified as falling into one of several enumerated, high-risk categories. Several commenters recommended modifying the proposals under § 410.1309(a)(2) to require ORR to allow at least one additional legal consultation for all unaccompanied children to the extent practicable, rather than only to those children at heightened risk as specified under § 410.1309(a)(2)(v). The commenters argued that, based on trauma-informed care experience, a substantial number of contacts with an unaccompanied child may be necessary to establish the rapport and trust needed for the child to feel safe enough to disclose the difficult details of the events that may make them eligible for various forms of relief. Another commenter argued that it was over-inclusive for the proposal to require a second legal consultation for those unaccompanied children at heightened risk as specified under § 410.1309(a)(2)(v), because for many of those children, the heightened risk factors might already have been identified during the first legal consultation, so as to render a second consultation duplicative. The commenter recommended making the

second consultation subject to ORR's discretion, while adding an additional category of children for whom ORR could permit a second follow-up legal consultation to apply in other circumstances in which ORR learns of new information or particular vulnerabilities that suggest a child might benefit from additional information or advice about their legal options.

Response: ORR believes that access to a confidential legal consultation under § 410.1309(a)(2)(v) constitutes an important protection for the rights and welfare of unaccompanied children in ORR care, and that a second (repeated) legal consultation can be very valuable in protecting high-risk unaccompanied children, both by helping to establish trust through repeated contact, and also by allowing for more tailored discussion of an unaccompanied child's legal situation, as new facts and vulnerabilities concerning the child are discovered. In ORR's view, the current language of § 410.1309(a)(2)(v) strikes a reasonable balance in making confidential legal consultations available to unaccompanied children, while prioritizing mandatory access to a second consultation when children are identified as falling into a high-risk category. ORR also notes that § 410.1309(a)(2)(v) says that legal consultations shall occur or shall be requested by ORR under stated conditions, but this does not preclude ORR from requesting additional legal consultations for other unaccompanied children, when deemed appropriate (*e.g.,* when ORR learns of new information that suggests a child might benefit from additional advice about legal options). In sum, ORR believes that the current proposal language of § 410.1309(a)(2)(v) provides flexibility for providing confidential legal consultations to unaccompanied children, based on their needs and sensitive to changing conditions and new information about the vulnerability of specific children in ORR custody.

Comment: A few commenters recommended changing the proposal under § 410.1309(a)(2), which requires a legal services orientation to occur within 10 business days of a child's admission to ORR, or transfer to a new ORR facility other than long-term home care or transitional home care. The commenters observed that the exception for unaccompanied children in long-term care makes sense, because most or all such children receive direct, full-scope representation by a legal service provider upon their placement. However, the commenters argued that the same is not true for children placed in transitional foster care, which is typically short term, and for which it does not make sense to forego the requirement for a timely refresher legal services orientation. The commenters therefore recommended dropping the exception regarding unaccompanied children placed in transitional home care.

Response: In ORR's view, one of the defining attributes of a placement for an unaccompanied child in transitional home care is that such placements are short-term and will therefore typically be followed in the short-term by another transfer, or by placement into long-term home care, or by a release from ORR custody to a suitable sponsor. As written, the exception in § 410.1309(a)(2) contemplates this and compels a follow-up legal services orientation to take place in the short-term, in those situations where an unaccompanied child is once again transferred by ORR out of the transitional home care setting, while remaining in ORR custody. Taken in this light, ORR believes that the § 410.1309(a)(2) exception to the requirement for a legal services orientation, in the case of transfers to transitional home care, is reasonable and appropriate.

Comment: One commenter recommended, regarding § 410.1309(a)(2), that ORR should require facilities to set aside sufficient space for attorneys to meet confidentially with their clients. The commenter asserted that many facilities do not have designated space for legal screenings and scramble at the last minute to find such space. The commenter argued that as a result, legal screenings often take place in a variety of inappropriate spaces. The commenter further argued that to address these issues, ORR should provide clear guidelines to shelters about the number of appropriate confidential spaces for legal screenings and meetings that are needed, based on facility capacity.

Response: ORR notes that § 410.1309(a)(2)(vi) provides that an unaccompanied child in ORR care shall be able to conduct private communications with their attorney of record, DOJ Accredited Representative, or legal service provider in a private enclosed area that allows for confidentiality for in-person, virtual, or telephonic meetings. While ORR does agree with the importance of providing unaccompanied children with access to private spaces for the conduct of confidential legal meetings with counsel and is requiring it, ORR believes that it is beyond the scope of § 410.1309(a)(2) to address this issue with detailed physical plant requirements for care facilities.

Comment: One commenter recommended a change to the proposed language at § 410.1309(a)(2)(v) (which requires a legal consultation meeting within 10 business days of a child's transfer to a new ORR facility, either with a qualified attorney, supervised paralegal, or DOJ Accredited Representative), by arguing that clarity would be enhanced by stating that an ORR care provider facility should not retain a child in its care solely to fulfill this requirement, if the child is ready for unification before the 10-day mark. Another commenter recommended revising the language of this proposal, by replacing the word ''paralegal'' with ''other legal professional working under the supervision of an attorney,'' regarding the types of professionals who can carry out legal consultation meetings with unaccompanied children. The commenter argued in support that many legal service providers now serving unaccompanied children employ qualified non-attorney legal services professionals who do not carry the specific title of ''paralegal.''

Response: In ORR's view, there is nothing in the text of § 410.1309(a)(2)(v) to compel a provider to hold unaccompanied children in custody who are otherwise ready for unification for the sole purpose of ensuring that a legal consultation meeting occurs and it is not ORR's intent that a child otherwise ready to be released to a sponsor should ever remain in custody on the basis of the need for a legal services orientation. Regarding the use of the term ''paralegal'' in § 410.1309(a)(2)(v), and those categories of persons who are authorized to engage in confidential legal consultations with an unaccompanied child: ORR intended, when using the term ''paralegal,'' to refer to legal services professionals with technical skills and experience akin to those possessed by a traditional paralegal. ORR will consider issuing more detailed technical guidance in the future, to address licensing, experience, and supervision requirements for legal services professionals in this context, including paralegals.

Comment: One commenter expressed concern about the lack of quality standards for legal counsel to unaccompanied children under proposed § 410.1309(a)(4). The commenter argued, by analogy, that in the commenter's view, there can be quality concerns within the criminal justice system regarding public defenders. The commenter questioned whether the same deficiencies might be

true of appointed counsel in unaccompanied children's immigration cases.

Response: ORR notes that attorneys are licensed and monitored by State licensing authorities and that DOJ Accredited Representatives are accredited according to DOJ standards. It is beyond the scope of this rulemaking to address detailed quality standards for legal counsel to unaccompanied children in immigration cases.

Comment: A few commenters expressed opposition to language in proposed § 410.1309(a)(4) that would exclude from potential funding for legal representation unaccompanied children in the URM Program who have reached the age of 18. One commenter argued that under this proposed language, a child might turn 18 before being able to complete their applications for relief, and that this result would be contrary to the stated aims of the TVPRA statute. The commenter recommended that, in order to uphold both the TVPRA and the mission of the URM program, ORR should eliminate age-based restrictions on counsel for children in URM. Another commenter made several additional arguments against excluding children from legal representation based on turning 18, including that there might not be LSP capacity to serve a child close to her 18th birthday; that indigenous language speakers might face greater challenges in communicating with LSPs, leading to added delays in accessing counsel; that the States are varied in recognizing the age of majority, such that some States do not recognize the age of majority until 21; and that recent neuroscientific evidence suggests that adult brain development and reasoning skills are not achieved until age 25. The commenter concluded that ORR should allow unaccompanied children in URM custody to continue to be eligible for legal representation until the age of 25, or at the very least until age 21.

Response: ORR does recognize that the language in proposed § 410.1309(a)(4), with regard to unaccompanied children in the URM Program, may result in some children, who would otherwise be eligible for legal representation funded by ORR, turning 18 before attaining legal representation. However, ORR notes that similar problems could also arise under any other bright-line eligibility criterion, based on age, for access by unaccompanied children to legal counsel. Based on ORR's analysis of § 235(c)(5) of the TVPRA and § 292 of the INA, ORR believes that the language under § 410.1309(a)(4) for funding for immigration legal counsel for unaccompanied children is reasonable and appropriate, including the exclusion from funding for legal representation of unaccompanied children in the URM Program who have reached the age of 18 before retention of an attorney.

Comment: A few commenters recommended modifying the proposals at § 410.1309(c)(2), to expand on ORR's obligations regarding disclosing information from an unaccompanied child's case file to the child's attorney. One commenter recommended adding an explicit list of types of information that ORR is required to disclose to a child's attorney, including all interactions with law enforcement; all allegations or accusations of sexual harassment or abuse; and any information that can or will be shared with any enforcement agencies. One commenter argued that the current proposal does not specify a reasonable timeframe for the delivery of the case file, and recommended that at a minimum, the case file must be provided to counsel in a reasonable timeframe before any applicable hearing. A few commenters recommended that information from the case file regarding contact with law enforcement or allegations of abuse and harassment should be turned over no later than 30 days after the incident, or in the case of investigations or reports, not more than 30 days after the creation of the document. These commenters went on to assert that all interactions with law enforcement or allegations of harassment should be shared with counsel for the child, because such interactions and allegations will likely be relevant to the child's immigration relief. A few commenters recommended that the proposed language in § 410.1309(c)(2) (regarding disclosures of case file information by ORR to an unaccompanied child's legal counsel) should be harmonized with current ORR policy, which permits care provider facilities to share certain information directly with a child's attorney, subject to the child's consent and as related to the child's legal case.

Response: Under § 410.1309(c)(2), as proposed, ORR ''shall share, upon request, the unaccompanied child's complete case file, apart from any legally required redactions.'' In ORR's view, this language makes it clear that ORR will disclose, and is required to disclose, all aspects of an unaccompanied child's case file to that child's attorney of record, including, without limitation, contacts with law enforcement and abuse and harassment allegations. In order to clarify this point under the rule, ORR is revising § 410.1309(c)(2) to read, in pertinent part, that ''. . . ORR shall share, upon request and within a reasonable timeframe to be established by ORR, the unaccompanied child's complete case file, apart from any legally required redactions, to assist in the legal representation of the unaccompanied child.'' Because the rule contemplates that ORR will disclose the entire case file to the attorney of record or DOJ Accredited Representative within a reasonable time frame, it is ORR's judgment and intent that this policy will usually result in full disclosure well before a 30-day disclosure deadline would apply. It is also ORR's judgment that it is better policy for ORR to retain discretion through future guidance about what constitutes a reasonable timeframe for disclosure of the complete case file upon request by the attorney of record or DOJ Accredited Representative, since this may need to be revisited by ORR from time to time, particularly as circumstances change.

Furthermore, to clarify ORR's responsibility to provide access by unaccompanied children and their attorney of record or DOJ Accredited Representative to key documents from the case file on an expedited basis, in the context of time-sensitive proceedings, ORR is revising § 410.1309(c) to add two new sub-paragraphs, to define what an ''expedited basis'' situation refers to, and to establish that ''If an unaccompanied child's attorney of record or DOJ Accredited Representative properly requests their client's case file on an expedited basis, ORR shall, within seven calendar days, unless otherwise provided herein, provide the attorney of record with key documents from the unaccompanied child's case file, as determined by ORR.''

In addition, ORR is also clarifying at § 410.1309(c)(2) its responsibility to share with an attorney of record or DOJ Accredited Representative, upon request, the name and telephone number of all potential sponsors who have submitted a completed Family Reunification Application to ORR, if the sponsors have provided consent to release their information.

Further, in response to comments about providing complete documentation to attorneys of record, DOJ Accredited Representatives, and unaccompanied children, ORR has clarified at § 410.1309(c)(2) that it will allow an unaccompanied child to review, upon request and in the company of their attorney of record or DOJ Accredited Representative, if any, such papers or writings as the child possessed at the time they were

apprehended by DHS or came into the custody of the relevant Federal department or agency, if those papers or writings are in ORR's or an ORR care provider facility's possession. Specifically, ORR has revised § 410.1309(c)(2) to include the following language: ''Absent a reasonable belief based upon articulable facts that doing so would endanger an unaccompanied child, ORR shall ensure that unaccompanied children are allowed to review, upon request and in the company of their attorney of record or DOJ Accredited Representative if any, such papers, notes, and other writings they possessed at the time they were apprehended by DHS, or another Federal department or agency, that are in ORR or an ORR care provider's possession.''

Finally, and to ensure that ORR is aware of and responsive to any problems in timely disclosure of information to attorneys of record or DOJ Accredited Representatives, as well as any other complaints or problems from legal representatives regarding emerging issues, ORR is further revising § 410.1309 by adding a new paragraph (f), as follows: ''*Resource email box.* ORR shall create and maintain a resource email box for feedback from legal services providers regarding emerging issues related to immediate performance of legal services at care provider facilities. ORR shall address such emerging issues as needed.''

Comment: One commenter recommended that ORR should codify in the NPRM, at § 410.1309(c)(2), certain requirements specified in the recent *Ms. L* litigation relating to family separations, including a requirement that where the Department of Homeland Security (DHS) has separated a parent and child who traveled together, DHS must provide ORR with information regarding the separation at the time of the child's transfer to ORR custody. This information includes information regarding DHS' reason for separation and the location and contact information for the parent or legal guardian. ORR is then required to provide this information, within three business days, to the facility where the child is being held, to the child's attorney of record and/or DOJ Accredited Representative, and to any appointed child advocate. The commenter argued that ORR should codify this legal obligation in the regulations to ensure that separated children's counsel and advocates are promptly provided with the information they need to effectively advocate for them, and to facilitate prompt unification of the child with their parent whenever possible.

Response: ORR welcomed the judicial approval of the settlement in the *Ms. L* litigation, which, among other things, established important restrictions on future family separations and specified a set of significant procedural protections when separations do occur. ORR appreciates the importance of ORR receiving information about the reasons for separations and sharing that information with the child's attorney, child advocate, and the program in which a separated child is placed. ORR is not codifying requirements of the *Ms. L* settlement in this rule because they were not subject to notice and comment procedures, but intends to fully comply with those requirements, and believes that there is no conflict or inconsistency between the proposed rule under § 410.1309(c)(2) and ORR's obligations under the settlement agreement.

Comment: A few commenters recommended additional steps that ORR should take, moving beyond what is currently proposed under § 410.1309(d), in order to increase the likelihood of ORR meeting its goal of ensuring legal representation for all unaccompanied children by 2027. A few commenters objected to the proposed funding mechanism described in the rule, ''based on the historic proportion of the unaccompanied child population in the State within a lookback period determined by the Director [of ORR].'' The commenters argued that reliance on past apportioning across States could fail to account for current referral volumes and recommended that ORR modify its proposal to determine grant funding to States based in part on current ORR and CBP referrals. The commenters also objected to giving discretion to the ORR Director to determine the lookback period for determining apportionment based on States' historical data, as creating another opportunity for bias and gaming in funding decisions.

Response: Under § 410.1309(d), ORR may make grants or contracts, in its discretion and subject to available resources—including formula grants distributed geographically in proportion to the population of released unaccompanied children—as determined by ORR in accordance with the eligibility requirements outlined in the authorizing statute, for the purpose of providing legal representation. ORR would note that this language broadly describes what ORR may do, rather than what it must do, by way of grant and contract funding mechanisms for immigration legal services to unaccompanied children. In ORR's view, the proposal at § 410.1309(d) is appropriate and consistent with its statutory authorities.

Comment: A few commenters expressed support for the proposals at § 410.1309(e), codifying ORR's duty not to retaliate against legal service providers who represent unaccompanied children. The commenters observed that this safeguard is needed to uphold children's right to receive independent legal counsel, and to ensure that their attorneys can exercise their professional and ethical obligations free of intimidation or interference.

Response: ORR thanks the commenters for their support of proposed § 410.1309(e) on non-retaliation against legal service providers. ORR is correcting a typo in the language of § 410.1309(e), by adding an apostrophe to the expression ''for actions taken within the scope of the legal service provider's . . . responsibilities.''

Final Rule Action: After consideration of public comments, ORR is revising § 410.1309(a)(2)(i) to refer to the native or preferred language of the unaccompanied child; § 410.1309(a)(2)(ii) to require that when an unaccompanied child requests legal counsel, ORR will ensure that the child is provided with a list and contact information for pro bono counsel, and reasonable assistance to ensure that the child is able to successfully engage an attorney at no cost to the Government; § 410.1309(a)(2) to add new paragraph (a)(2)(vii) to provide that as part of a child's orientation, the child shall receive information regarding the child's right to a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, as described at § 410.1903(a) and (b); § 410.1309(c)(2) to clarify that ORR shall share, upon request and within a reasonable timeframe to be established by ORR, the unaccompanied child's complete case file, apart from any legally required redactions; § 410.1309(c)(2) to require that ORR share information with an attorney of record or DOJ Accredited Representative, upon request, the name and telephone number of all potential sponsors who have submitted a completed Family Reunification Application, if the sponsors have provided consent to release their information; § 410.1309(c)(2) to clarify that ORR shall, absent a reasonable belief based upon articulable facts that doing so would endanger an

unaccompanied child, ensure that unaccompanied children are allowed to review, upon request and in the company of their attorney of record or DOJ Accredited Representative, if any, such papers, notes, and other writings they possessed at the time they were apprehended by DHS or another Federal department or agency, that are in ORR or an ORR care provider's possession; § 410.1309(c) by adding two new sub-paragraphs (3) and (4), to define what an ''expedited basis'' situation refers to, and to establish that if an unaccompanied child's attorney of record or DOJ Accredited Representative properly requests their client's case file on an expedited basis, ORR shall, within seven calendar days, unless otherwise provided herein, provide the attorney of record or DOJ Accredited Representative with key documents from the unaccompanied child's case file, as determined by ORR; § 410.1309(e), by adding an apostrophe to the phrase ''legal service provider's,'' to clarify that ORR shall not retaliate against a legal service provider for actions taken within the scope of that person's responsibilities; and adding § 410.1309(f) to state that ORR shall create and maintain a resource email box for feedback from legal services providers regarding emerging issues related to immediate performance of legal services at care provider facilities, and that ORR shall address such emerging issues as needed; and is otherwise finalizing this section as proposed.

Section 410.1310 Psychotropic Medications

ORR proposed in the NPRM requirements related to the administration of psychotropic medications to unaccompanied children while in ORR care (88 FR 68951). ORR noted that the third of the five plaintiff classes certified by the United States District Court for the Central District of California in the *Lucas R.* case, as discussed in section III.B.4. of this final rule, is the ''drug administration class.'' The class is comprised of unaccompanied children in ORR custody ''who are or will be prescribed or administered one or more psychotropic medications without procedural safeguards[.]'' [291] At the time of this writing, the parties in the *Lucas R.* case have negotiated a proposed settlement agreement that would resolve this claim. The settlement agreement was preliminarily approved by the Court on January 5, 2024,[292] and the final approval hearing is scheduled for May 3, 2024.

The proposed rule stated ORR's belief that psychotropic medications should only be administered appropriately and in the best interest of the child and with meaningful oversight (88 FR 68951). Therefore, ORR proposed in the NPRM in § 410.1310(a) that, except in the case of a psychiatric emergency, ORR must ensure that, whenever possible, authorized individuals provide informed consent prior to the administration of psychotropic medications to unaccompanied children. In § 410.1310(b), ORR proposed in the NPRM that it would ensure meaningful oversight of the administration of psychotropic medication(s) to unaccompanied children. Examples of such oversight are the review of cases flagged by care providers, and secondary retrospective reviews of the administration of psychotropic medication(s) in certain circumstances, such as based on the child's age, the number of psychotropic medications that have been prescribed, or the dosages of such psychotropic medications.

Comment: One commenter recommended ORR strengthen due process protections for unaccompanied children and provide enhanced safeguards for children who are administered psychotropic medications.

Response: ORR agrees that safeguards for unaccompanied children who are administered psychotropic medications are important and believes that ensuring unaccompanied children have assistance of legal counsel can help ensure their protection. Therefore, ORR is adding a new § 410.1310(c) that ORR shall permit unaccompanied children to have the assistance of counsel, at no cost to the Federal Government, with respect to the administration of psychotropic medications.

Comment: A few commenters emphasized that in non-psychiatric emergencies, ORR must ensure that an authorized individual provides informed consent prior to the administration of psychotropic medication and requested that ORR removed the term ''whenever possible'' from § 410.1310(a) since the regulatory text already includes an exception for psychiatric emergencies.

Response: ORR agrees and is therefore removing the term ''whenever possible'' from § 410.1310(a) so that it states, ''Except in the case of a psychiatric emergency, ORR shall ensure that authorized individuals provide informed consent prior to the administration of psychotropic medications to unaccompanied children.''

Comment: Several commenters stated that ORR should define who can be an ''authorized consenter'' and recommended that it should be a child's parent or legal guardian, whenever reasonably available, followed by a close relative sponsor, and then the unaccompanied child themself (if the child is of sufficient age and permitted to consent under State law). They also stated that care provider staff must never be considered authorized individuals for the purpose of informed consent to psychotropic medication. One commenter requested clarification if ORR intended that authorized consent should be obtained according to authorized consent laws in the State where the program operates.

Response: ORR agrees that additional detail regarding who can provide authorized consent would provide additional clarity. Therefore, ORR is clarifying at § 410.1310(a)(1) that three categories of persons can serve as an ''authorized consenter'' and provide informed consent for the administration of psychotropic medication to unaccompanied children in ORR custody: the child's parent or legal guardian, followed by a close relative sponsor, and then the unaccompanied child themself if the child is of sufficient age and a doctor has obtained informed consent. ORR believes that this additional language clarifies that care provider facility staff are not ''authorized consenters'' for the purposes of providing informed consent prior to the administration of psychotropic medications to unaccompanied children. Finally, ORR recognizes that medical providers are required to operate within their respective State's licensing laws and regulations.

Comment: One commenter stated that ORR should require that consent be obtained voluntarily, without undue influence or coercion. A few commenters recommended that ORR include language that care provider facilities must not retaliate against an unaccompanied child or an authorized consenter for withholding consent or refusing to take any psychotropic medication, including, as noted by one commenter, when consent is initially given, but the unaccompanied child or authorized consenter later changes their mind. A few commenters also noted that refusing to consent should not be used to step-up youth to more restrictive placements or to coerce youth into taking medication as a condition of placement.

Response: ORR agrees and is therefore incorporating a requirement at § 410.1310(a)(2) that consent must be

obtained voluntarily, without undue influence or coercion, and ORR will not retaliate against an unaccompanied child or an authorized consenter for refusing to take or consent to any psychotropic medication. ORR notes that this would include when consent is initially given, but then retracted later. ORR further notes that it believes the terms ''voluntarily, without undue influence or coercion'' encompasses that refusal to consent should not be used to step-up children to a more restrictive placement, or that taking medication should not be used as a condition of placement.

Comment: A few commenters specified that ORR, in the instance of a psychiatric emergency, should require that any emergency administration of psychotropic medication be documented, that the child's authorized consenter be notified as soon as possible, and that the care provider and ORR review the incident to ensure compliance with ORR policies and avoid future emergency administrations of medication.

Response: ORR agrees and is therefore adding § 410.1310(a)(3) requiring that any emergency administration of psychotropic medication be documented, the child's authorized consenter be notified as soon as possible, and the care provider and ORR must review the incident to ensure compliance with ORR policies to reasonably avoid future emergency administrations of medication.

Comment: One commenter emphasized that psychotropic medications should not be used as a behavior management tool in lieu of or as a substitute for identified psychosocial or behavioral supports required to meet an unaccompanied child's mental health needs. They noted that serious incidence reports have been used by care provider facilities to document psychotropic medication non-compliance in ways that suggest that youth who refuse to take their medications are being difficult or oppositional. One commenter expressed that care provider facilities should not use psychotropic medications to address an unaccompanied child's history of trauma.

Response: ORR believes that a variety of behavioral supports and trauma-informed approaches should support unaccompanied children with mental health needs or those with a history of trauma, and that psychotropic medications should only be used when medically appropriate and when authorized consent is given by an authorized consenter. Accordingly, psychotropic medications should not be used as a replacement for effective and evidence-based behavior management tools. ORR notes that it is adding under § 410.1310(a)(2) that consent must be obtained voluntarily, without undue influence or coercion, and ORR will not retaliate against an unaccompanied child or an authorized consenter for refusing to take or consent to any psychotropic medication, and further notes that this includes the use of serious incident reports as retaliation for refusing to take psychotropic medication and applies to how such refusal is documented by care provider facilities.

Comment: One commenter requested that ORR provide additional clarification on what ''meaningful oversight'' will entail. The commenter recommended including examples such as reviewing cases flagged by care providers and conducting additional reviews of the administration of psychotropic medications in high-risk circumstances, including but not limited to cases involving young children, simultaneous administration of multiple psychotropic medications, and high dosages.

Response: ORR agrees and is modifying § 410.1310(b) to clarify that ''meaningful oversight'' includes reviewing cases flagged by care providers and conducting additional reviews of the administration of psychotropic medications in high-risk circumstances, including but not limited to cases involving young children, simultaneous administration of multiple psychotropic medications, and high dosages.

Comment: A few commenters recommended that ORR must also engage a child and adolescent psychiatrist as part of its oversight function because they are qualified professionals who are able to oversee prescription practices and provide guidance to care providers.

Response: ORR agrees that qualified professionals are needed for proper oversight of prescription practices and to provide guidance to care providers. These qualified professionals may include child and adolescent psychiatrists. Given the scarcity of child and adolescent psychiatrists around the country, ORR is retaining some flexibility to rely on other qualified professionals with similar backgrounds, expertise, and educational experiences to child and adolescent psychiatrists. Accordingly, ORR is revising § 410.1310(b) to clarify that ORR will engage qualified professionals who are able to oversee prescription practices and provide guidance to care providers, such as a child and adolescent psychiatrist.

Comment: One commenter recommended that ORR gather data on unaccompanied children who are administered psychotropic medications for oversight and so that ORR can understand how psychotropic medications are administered across its network and within individual care provider facilities. Another commenter expressed concern over ORR's ability to monitor and assess patterns and trends relating to unaccompanied children's needs for psychotropic medications.

Response: ORR agrees is incorporating additional data collection requirements related to the administration of psychotropic medications at § 410.1501 (Data on unaccompanied children). Specifically, ORR is requiring that care providers report information to ORR relating to the administration of psychotropic medications, including children's diagnoses, the prescribing physician's information, the name and dosage of the medication prescribed, documentation of informed consent, and any emergency administration of medication. Such data must be compiled and aggregated in a manner that enables ORR to track how psychotropic medications are administered across its network and in individual facilities. ORR believes this data collection will enable ORR to monitor potential patterns and trends related to the use of psychotropic medications.

Final Rule Action: After consideration of public comments, ORR is finalizing its proposal with the following modifications: At § 410.1310(a) ORR is removing the phrase ''whenever possible'' and is adding § 410.1310(a)(1) that defines ''authorized consenter,'' which is a person who can provide informed consent for the administration of psychotropic medication to unaccompanied children in ORR custody: the child's parent or legal guardian, followed by a close relative sponsor, and then the unaccompanied child themself if the child is of sufficient age and a doctor has obtained informed consent; § 410.1310(a)(2) requires that consent must be obtained voluntarily, without undue influence or coercion, and ORR will not retaliate against an unaccompanied child or an authorized consenter for refusing to take or consent to any psychotropic medication; and § 410.1310(a)(3) that requires that any emergency administration of psychotropic medication be documented, that the child's authorized consenter be notified as soon as possible, and that the care provider and ORR review the incident

to ensure compliance with ORR policies and avoid future emergency administrations of medication. ORR is also revising § 410.1310(b) to require that ''meaningful oversight'' of the administration of psychotropic medication(s) to accompanied children includes reviewing cases flagged by care providers and conducting additional reviews of the administration of psychotropic medications in high-risk circumstances, including but not limited to cases involving young children, simultaneous administration of multiple psychotropic medications, and high dosages. Section 410.1310(b) also requires that ORR must engage qualified professionals who are able to oversee prescription practices and provide guidance to care providers, such as a child and adolescent psychiatrist. ORR is adding a new § 410.1310(c) that ORR shall permit unaccompanied children to have the assistance of counsel, at no cost to the Federal Government, with respect to the administration of psychotropic medications.

Section 410.1311 Unaccompanied Children With Disabilities

ORR believes that protection against discrimination and equal access to the UC Program is inherent to ensuring that unaccompanied children with disabilities receive appropriate care while in ORR custody. In the NPRM, ORR noted that the *Lucas R.* case, discussed in the Background of this rule, is relevant to this topic area and that ORR will be bound by any potential future court decisions or settlements in the case (88 FR 68951). The fifth of the five plaintiff classes certified by the United States District Court for the Central District of California in *Lucas R.* is the ''disability class'' that includes unaccompanied children ''who have or will have a behavioral, mental health, intellectual, and/or developmental disability as defined in 29 U.S.C. 705, and who are or will be placed in a secure facility, medium-secure facility, or [RTC] because of such disabilities [(*i.e.,* the 'disability class')].'' [293] The Court's Preliminary Injunction ordered on August 30, 2022, did not settle this claim and, as stated in the NPRM, as of April 2023, ORR remained in active litigation regarding this claim. ORR proposed in the NPRM requirements to ensure the UC Program's compliance with the HHS section 504 implementing regulations at 45 CFR part 85. ORR therefore proposed at § 410.1311(a) to provide notice of the protections against discrimination assured to unaccompanied children with disabilities by section 504 at 45 CFR part 85 while in the custody of ORR and the available procedures for seeking reasonable modifications or making a complaint about alleged discrimination against children with disabilities in ORR's custody (88 FR 68951).

ORR understands its obligations under section 504 to administer programs and activities in the most integrated setting appropriate to the needs of qualified unaccompanied children with disabilities.[294] ORR proposed in the NPRM at § 410.1311(b) to administer the UC Program in the most integrated setting appropriate to the needs of children with disabilities, in accordance with 45 CFR 85.21(d), unless ORR can demonstrate that this would fundamentally alter the nature of its UC Program. As noted, the most integrated setting is a setting that enables individuals with disabilities to interact with non-disabled individuals to the fullest extent possible.[295]

ORR proposed in the NPRM at § 410.1311(c) to provide reasonable modifications to the UC Program for each unaccompanied child with one or more disabilities as needed to ensure equal access to the UC Program. ORR would not, however, be required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. Under § 410.1311(d), ORR proposed in the NPRM to require that services, supports, and program modifications being provided to an unaccompanied child with one or more disabilities be documented in the child's case file, where applicable.

Under § 410.1311(e), in addition to the requirements for release of unaccompanied children established elsewhere in this regulation and through any subregulatory guidance ORR may issue, ORR proposed in the NPRM requirements regarding the release of an unaccompanied child with one or more disabilities to a sponsor. Section 410.1311(e)(1) would require that ORR's assessment under § 410.1202 of a potential sponsor's capability to provide for the physical and mental well-being of the unaccompanied child must include explicit consideration of the impact of the child's disability or disabilities. Under § 410.1311(e)(2), in conducting PRS, ORR and any entities through which ORR provides PRS shall make reasonable modifications to their policies, practices, and procedures if needed to enable released unaccompanied children with disabilities to live in the most integrated setting appropriate to their needs, such as with a sponsor. ORR is not required, however, to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. Additionally, ORR would affirmatively support and assist otherwise viable potential sponsors in accessing and coordinating appropriate post-release, community-based services and supports available in the community to support the sponsor's ability to care for the unaccompanied child with one or more disabilities, as provided for under § 410.1210. Under § 410.1311(e)(3), ORR would not delay the release of an unaccompanied child with one or more disabilities solely because post-release services are not in place prior to the child's release.

Comment: A few commenters recommended that ORR designate an ORR staff member as a section 504 coordinator to oversee ORR's compliance with section 504 and ORR's treatment of unaccompanied children with disabilities. These commenters also recommended this role have authority to respond to complaints and approve additional resources for unaccompanied children with disabilities. Many commenters also recommended that ORR coordinate with Protection and Advocacy agencies (P&As) to ensure independent oversight regarding the rights of unaccompanied children with disabilities. These commenters recommended that ORR cooperate with P&As across its network, providing reasonable access to facilities as well as information regarding disability law compliance.

Response: ORR agrees that Protection and Advocacy agencies are often a valuable resource and partner considering their access to facilities and expertise in disability law compliance. ORR also refers readers to subpart K regarding the Office of Ombuds and its role in responding to complaints and independent oversight of ORR's compliance with applicable laws. Additionally, as noted in the Background section, ORR will work with experts to undertake a year-long comprehensive needs assessment to evaluate the adequacy of services, supports, and resources currently in place for children with disabilities in ORR's custody across its network, and to identify gaps in the current system, which will inform the development of a disability plan and future policymaking that best address how to meet the needs of children with disabilities in ORR's care and custody effectively. These efforts will provide ORR with an opportunity to consider commenters' recommendations in greater depth.

Comment: Commenters recommended, consistent with the proposed *Lucas R.* settlement agreement related to children with disabilities in

ORR's custody, that ORR create a mailbox for concerns raised by or on behalf of unaccompanied children with suspected or identified disabilities, and that ORR respond to concerns within no more than 30 days explaining what, if any, steps were taken or are planned to address the concerns.

Response: Regarding the process for making a complaint, ORR again refers readers to the provisions related to the Office of the Ombuds at § 410.2002(a)(1) that enables the Ombuds to receive ''reports from unaccompanied children, potential sponsors, other stakeholders in a child's case, and the public regarding ORR's adherence to its own regulations and standards.''

Comment: Many commenters recommended that ORR include language requiring that notices of rights and procedures are provided to unaccompanied children in a manner accessible to children with disabilities.

Response: ORR agrees that a notice of rights must be accessible to children with disabilities to be consistent with section 504. ORR is therefore adding a requirement to § 410.1311(a) that the notice must be provided in a manner that is accessible to children with disabilities.

Comment: Some commenters recommended that ORR specify it will set up procedural safeguards, which are analogous to 34 CFR 104.36, for requesting reasonable accommodations or modifications or for making a complaint about disability discrimination, including easily accessible, child-friendly procedures, and promptly respond to any requests or complaints. Commenters recommended that ORR have a clear process for requesting and receiving auxiliary aids or services in a timely manner as well as require training for providers to ensure effective communication.

Response: ORR notes that 34 CFR 104.36 does not apply to ORR but appreciates that it is an example of the codification of procedural safeguards. ORR may consider commenters' feedback related to the process for requesting reasonable modifications or for making a complaint in future policymaking, which may be informed by the anticipated comprehensive disability needs assessment process, and the development of the disability plan.

Comment: Many commenters expressed general support for the recognition of ORR's legal obligation to administer the UC Program in the most integrated setting appropriate to the needs of unaccompanied children and recommended that ORR adopt more specific requirements regarding unaccompanied children with disabilities. Many commenters recommended that ORR clarify that the most integrated setting for unaccompanied children with disabilities will always be in a community setting, and in a family setting wherever possible. Many commenters recommended that unaccompanied children with disabilities be prioritized for community-based placement to ensure that unaccompanied children with disabilities are served in the most integrated setting appropriate to their needs. These commenters also recommended that ORR prioritize grants and outreach to community-based care providers that can serve children with disabilities.

Some commenters expressed concern that they believe placement decisions for unaccompanied children with disabilities are often made quickly, by staff without training and who have limited information on resources and services. These commenters requested that a review process be put in place to ensure stays in congregate care are as short as possible, believing that such placements can cause significant harm to unaccompanied children with disabilities. These commenters also noted that unaccompanied children with disabilities should never be placed in residential treatment centers for things like medication management and therapeutic services.

Response: ORR prefers to place unaccompanied children in transitional and long-term foster care settings rather than large congregate care facilities when possible and is making efforts to move toward a community-based care model. Accordingly, ORR will provide children with disabilities equal access to community-based placements such as individual family homes and believes children with disabilities should be included among the groups prioritized for community-based placement. ORR intends to prioritize outreach and grants to community-based care providers that can serve children with a variety of disabilities as part of its efforts to move towards a community-based care model. ORR's response to concerns expressed by commenters about placement of children with disabilities who have serious mental or behavioral health issues in RTCs are addressed at length in responses to comments under § 410.1105.

Comment: Although many commenters expressed support for the proposed requirements under § 410.1311(c), these commenters recommended that the proposed regulations should set out more specific requirements for unaccompanied children with disabilities. These commenters also recommended that ORR explicitly incorporate the consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement. These commenters recommended that such a determination should be made by clear and convincing evidence that a less restrictive placement with additional modifications or services is not possible. Commenters also recommended that reasonable modifications for unaccompanied children with disabilities should include delivery of crisis intervention and stabilization services in a non-secure setting.

Response: ORR is revising § 410.1311(c) in this rule to state more explicitly that ORR shall make reasonable modifications to its programs, including the provision of services, equipment, and treatment, so that an unaccompanied child with one or more disabilities can have equal access to the program in the most integrated setting appropriate to their needs. In addition, ORR notes that it is finalizing § 410.1105(a)(1) and (b)(1) to state that restrictive placement determinations under paragraphs (a) and (b) must be made based on clear and convincing evidence documented in the unaccompanied child's case file. ORR may also consider in future policymaking commenters' recommendation that reasonable modifications for unaccompanied children with disabilities should include delivery of crisis intervention and stabilization services in a non-secure setting, consideration which may be informed by the anticipated year-long comprehensive disability needs assessment and development of a disability plan.

Comment: Commenters recommended that § 410.1311(e)(1) specify more context and instruction on how ORR evaluates the unaccompanied child's disability as part of determining the potential sponsor's suitability because, the commenters argued, the provision as proposed could result in discrimination against unaccompanied children with disabilities by adding obstacles to release not faced by unaccompanied children without disabilities. These commenters noted that ORR has a legal obligation to ensure unaccompanied children with disabilities have an equal opportunity to prompt release. These commenters also recommended, consistent with the *Lucas R.* settlement agreement and caselaw, the final rule specify ORR's consideration of the impact of an unaccompanied child's disability or disabilities must also

include explicit consideration of the potential benefit to the unaccompanied child of release to a community placement and/or a sponsor.

Response: ORR agrees that a potential sponsor's capability to provide for the physical and mental well-being of the child must necessarily include explicit consideration of the impact of the child's disability or disabilities. Under § 410.1202(f)(5), ORR is finalizing that it will evaluate any individualized needs of the unaccompanied child, including those related to disabilities or other medical or behavioral/mental health issues, and under § 410.1202(h)(1) assess the sponsor's understanding of the child's needs as part of determining the sponsor's suitability. ORR agrees that unaccompanied children with disabilities should have an equal opportunity for prompt release, and for that reason proposed under § 410.1311(e)(3) that release will not be delayed solely because PRS is not in place. Finally, ORR agrees that consideration must be given to the explicit benefits of community-based settings and is therefore modifying § 410.1311(e)(1) to state that ORR must consider the potential benefits to the child of release to a community-based setting.

Comment: Many commenters expressed support for the proposed language in § 410.1311(e)(2) requiring reasonable modifications in the provision of PRS to enable unaccompanied children to live in integrated settings with their sponsors. One commenter recommended that ORR revise the regulatory language to incorporate reasonable modifications for unaccompanied children with disabilities as part of the release and PRS planning process to ensure prompt release.

Response: ORR agrees that reasonable modifications should be made as part of the release process. Accordingly, ORR is modifying § 410.1311(e)(2) to add ''planning for a child's release,'' so that it requires ORR and any entities through which ORR provides PRS to make reasonable modifications in their policies, practices, and procedures in planning for a child's release and conducting PRS.

Comment: Many commenters recommended that unaccompanied children with disabilities who wish to receive more intensive PRS should receive service planning that develops a plan of services and supports such as case management, community-based mental health services, and medical care. Commenters recommended the final rule clarify that ORR document its efforts to educate the sponsor about the unaccompanied child's needs and assist the sponsor in accessing and coordinating PRS and supports, and recommended the final rule state that ORR will not deny release to sponsors prior to such education and assistance being offered. One commenter also recommended that ORR explicitly state that unaccompanied children will not be denied release solely based on a finding that the unaccompanied child is a danger to themself, and that ORR should affirmatively support sponsors in accessing PRS for unaccompanied children with serious mental health needs.

Response: ORR notes that § 410.1311(e)(2) as proposed in the NPRM states that ORR will affirmatively assist sponsors in accessing PRS to support the disability-related needs of a child upon release (88 FR 68952, 68997). ORR believes that a child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the child that cannot be mitigated through the provision of services and reasonable modifications, and ORR has documented its efforts to educate the sponsor about the child's disability-related needs and coordinated PRS. Related to findings of dangerousness and release, ORR may take the commenter's feedback into consideration for future policymaking.

Comment: One commenter noted that PRS would be especially important for unaccompanied children with disabilities, and that these services should include a focus on insurance eligibility in the State to which the child will be released.

Response: ORR agrees that unaccompanied children may need particular services and treatment due to a disability but reiterates that not all unaccompanied children with disabilities necessarily require particular services and treatment. As such, ORR proposed in the NPRM under § 410.1311(e)(2) that it would affirmatively support and assist otherwise viable potential sponsors in accessing and coordinating appropriate post-release, community-based services and supports available in the community to support the sponsor's ability to care for the unaccompanied child with one or more disabilities, as provided for under § 410.1210. ORR notes that existing PRS services may include informing released children and sponsor families of medical insurance options, including supplemental coverage, and assist them in obtaining insurance, if possible, so that the family is able to manage the child's health-related needs effectively.

Comment: Many commenters expressed support for proposed § 410.1311(e)(3) and recommended that ORR further specify that a pending assessment for unaccompanied children with a disability or service plan development will not delay a child's release to an otherwise suitable sponsor. One commenter also recommended that the final rule clarify that an unaccompanied child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the unaccompanied child that cannot be mitigated through the provision of services and reasonable modifications.

Response: ORR agrees that a child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the child that cannot be mitigated through the provision of services and reasonable modifications, and ORR has documented its efforts to educate the sponsor about the child's disability-related needs and coordinated PRS. ORR further agrees that a pending assessment for an unaccompanied child should likewise not delay a child's release to an otherwise suitable sponsor. ORR notes that, pursuant to § 410.1311(e)(2), ORR will affirmatively assist sponsors in accessing PRS to support the disability-related needs of a child upon release.

Final Rule Action: After consideration of public comments, ORR is finalizing its proposal as proposed with additions to § 410.1311(a) to require that notices must be provided ''in a manner that is accessible to children with disabilities;'' to § 410.1311(c) to specify that ''ORR shall make reasonable modifications to its programs, including the provision of services, equipment, and treatment, so that an unaccompanied child with one or more disabilities can have equal access to the UC Program in the most integrated setting appropriate to their needs,'' and to state more clearly that ''ORR is not required, however, to take any action that it can demonstrate would fundamentally alter the nature of a program or activity;'' to § 410.1311(e)(1) to require ORR to correspondingly consider the potential benefits to the child of release to a community-based setting; and to § 410.1311(e)(2) to add ''planning for a child's release'' as an activity for which ORR is required to provide reasonable modifications in their policies, practices, and procedures, in addition to conducting PRS.

Subpart E—Transportation of an Unaccompanied Child

Section 410.1400 Purpose of This Subpart

This subpart concerns the safe transportation of each unaccompanied child while in ORR's care (88 FR 68952). ORR noted in the NPRM that ORR generally does not provide transportation for initial placements upon referral from another Federal agency, but rather, it is the responsibility of other Federal agencies to transfer the unaccompanied child to ORR custody within 72 hours of determining the individual is an unaccompanied child.[296] ORR, or its care provider facilities, provides transportation while the unaccompanied child is in its care including, in the following circumstances: (1) for purposes of service provision, such as for medical services, immigration court hearings, or community services; (2) when transferring between facilities or to an out-of-network placement; (3) group transfers due to an emergency or influx; and (4) for release of an unaccompanied child to a sponsor who is not able to pick up the unaccompanied child, as approved by ORR. Subpart E provides certain requirements for such transportation while unaccompanied children are under ORR care.

Comment: One commenter requested clarification on the expected accountability of the transportation provider when transporting unaccompanied children from DHS to ORR and the expectations for communication between the transportation provider and care provider facility.

Response: ORR reiterates that the TVPRA [297] places the responsibility for the transfer of custody of unaccompanied children on referring Federal agencies. Therefore, the referring Federal agency with custody of the child is responsible for the transportation of the child to ORR and ensuring such accountability. ORR custody begins when it assumes physical custody of the unaccompanied child from the referring Federal agency as discussed at § 410.1101(e). However, ORR does collaborate closely with referring Federal agencies during the referral of unaccompanied children to ORR custody. ORR refers readers to § 410.1101 for further information on the placement and referral process. Also, ORR notes that the ORR Policy Guide provides more detailed information on placement and transfer of unaccompanied children in ORR care provider facilities. In this guidance, ORR states that it remains in contact with care provider facilities to identify, designate, and confirm placements during initial referrals.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1400 as proposed.

Section 410.1401 Transportation of an Unaccompanied Child in ORR's Care

ORR proposed in the NPRM transportation requirements for care provider facilities to help ensure that unaccompanied children are safely transported during their time in ORR care (88 FR 68952). ORR proposed in the NPRM at § 410.1401(a) to require care provider facilities to transport an unaccompanied child in a manner that is appropriate to the child's age and physical and mental needs, including proper use of car seats for young children, and consistent with proposed § 410.1304. For example, individuals transporting unaccompanied children would be able to use de-escalation or other positive behavior management techniques to ensure safety, as explained in the discussion of proposed § 410.1304(a). As discussed in § 410.1304(f), care provider facilities may only use soft restraints (*e.g.,* zip ties and leg or ankle weights) during transport to and from secure facilities, and only when the care provider facility believes the child poses a serious risk of physical harm to self or others or a serious risk of running away from ORR custody. As discussed in § 410.1304(e)(2), secure facilities, except for RTCs, may restrain a child for their own immediate safety or that of others during transportation to an immigration court or an asylum interview. ORR stated that it believes the requirements at § 410.1401(a) are important to ensuring the safety of unaccompanied children as well as those around them while being transported in ORR care.

ORR proposed in the NPRM at § 410.1401(b), to codify a requirement in the FSA that it assist without undue delay in making transportation arrangements where it has approved the release of an unaccompanied child to a sponsor, pursuant to §§ 410.1202 and 410.1203. ORR also proposed that it would have the authority to require the care provider facility to transport an unaccompanied child. In these circumstances, ORR may, in its discretion, reimburse the care provider facility or pay directly for the child and/or sponsor's transportation, as appropriate, to facilitate timely release.

To further ensure safe transportation of unaccompanied children, ORR proposed in the NPRM at § 410.1401(c) to codify existing ORR policy that care provider facilities shall comply with all relevant State and local licensing requirements and State and Federal regulations regarding transportation of children, such as meeting or exceeding the minimum staff/child ratio required by the care provider facility's licensing agency, maintaining and inspecting all vehicles used for transportation, etc. If there is a potential conflict between ORR's regulations and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. ORR proposed in the NPRM at § 410.1401(d), however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties. ORR proposed in the NPRM at § 410.1401(e), to require the care provider facility to conduct all necessary background checks for drivers transporting unaccompanied children, in compliance with § 410.1305(a). Finally, ORR proposed in the NPRM at § 410.1401(f) to codify existing ORR policy that if a care provider facility is transporting an unaccompanied child, then at least one transport staff of the same gender as the unaccompanied child being transported must be present in the vehicle to the greatest extent possible under the circumstances.

Comment: A few commenters supported ORR's proposals to provide safe transportation of unaccompanied children while in ORR care. Commenters believed these requirements will help ensure the safety and well-being of unaccompanied children, establish high minimum standards for facilities that transport unaccompanied children while in ORR care, and enhance public transparency on the operations of the UC Program. A few commenters specifically supported ORR's proposal at § 410.1401(f) that would require transport staff and unaccompanied children to be of the same gender to the greatest extent possible under the circumstances.

Response: ORR thanks commenters for their support. ORR agrees with commenters and believes that these requirements are important to ensuring the safety of unaccompanied children transported in ORR care.

Comment: A few commenters requested clarification on ORR's proposals to provide for the safe transportation of unaccompanied children in ORR care. One commenter requested ORR provide more detail on the transportation of unaccompanied children to heightened security facilities, and another commenter

requested information on the payment and planning processes for transporting children. One commenter requested that ORR provide clarity on the proposal at § 410.1401(d) that requires ORR employees to abide by their Federal duties if there are potential conflicts between ORR's regulations and State law and inquired as to whether ORR employees include care providers, grantees, and/or contractor staff. Additionally, one commenter requested more information on if the transportation requirements at proposed § 410.1401(f) apply to transfers, releases, or all circumstances in which a child is being transported and whether children, deemed age-appropriate, are permitted to travel alone for unification purposes.

Response: ORR refers commenters to the requirements proposed at §§ 410.1401 and 410.1601 regarding the transportation and transfer of unaccompanied children to heightened supervision facilities, and notes that under current ORR policies, referring and receiving care providers will coordinate the logistics of the transfer. ORR also clarifies that ''ORR employees'' means Federal employees of ORR and does not include care provider facility staff or other service providers who are not employed by ORR. As described in § 410.1400, ORR reiterates that the proposed transportation requirements would apply in all circumstances where unaccompanied children in ORR care require transportation, including: (1) for purposes of service provision; (2) when transferring between facilities or to an out-of-network placement; (3) group transfers due to an emergency or influx and (4) for release of an unaccompanied child to a sponsor who is not able to pick up the unaccompanied child. The transportation requirements would apply while unaccompanied children are in ORR care, and therefore, children would not be able to travel alone, even for unification purposes. ORR believes this requirement is necessary to ensure the safe transportation of unaccompanied children while in ORR care. ORR also notes that subregulatory guidance and other communications from ORR to care provider facilities provide more detailed and specific guidance on transportation requirements, such as information regarding the planning and payment processes for transporting unaccompanied children.

Comment: A few commenters requested that ORR make technical changes or clarifications to the rule. One commenter recommended that ORR include language at proposed § 410.1401(c) to clarify that State-licensed programs must follow State licensure requirements if there is a potential conflict between ORR's regulations and State law. Another commenter noted an inconsistency between the preamble and regulation text at proposed § 410.1401(b). In the preamble, ORR states that it may have the authority to ''require'' a care provider facility to transport an unaccompanied child when releasing an unaccompanied child to a sponsor whereas the regulation text states that ORR may have the authority to ''request'' a care provider facility to transport an unaccompanied child. The commenter recommended using the term ''require'' consistently in the preamble and regulation text. Lastly, one commenter recommended ORR define the term ''gender'' to provide clarification whether this term includes ''gender identity'' or to replace the word ''gender'' with ''sex.''

Response: ORR has updated the language at § 410.1401(b) to state that ORR may ''require'' a care provider facility to transport an unaccompanied child for release to a sponsor. ORR believes this update ensures consistency between the preamble and regulation text. Further, ORR reiterates that § 410.1401(c) requires that care provider facilities comply with all relevant State and local licensing requirements and State and Federal regulations regarding transportation of children. Care provider facilities means any facility in which an unaccompanied child may be placed while in the custody of ORR and are operated by an ORR-funded program that provides residential services for children. Additionally, ORR clarifies that, consistent with § 410.1302(a), all standard programs and secure facilities are required to be State-licensed as long as State licensing is available where they are located. Even where State licensure is not available, under this final rule, such programs must still meet the requirements established by the relevant State licensing authority. ORR also expects and requires under §§ 410.1302(a) and (b) of this final rule that standard program and secure facility employees will follow State licensure requirements. If a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties. Lastly, ORR notes that it uses the term ''gender'' in a way that aligns with its current policies and follows the definitions of the terms ''gender'' and ''sex'' as defined in existing Federal regulations governing ORR at 45 CFR 411.5.

Comment: A few commenters expressed concerns related to the safety and well-being of unaccompanied children during transportation. One commenter expressed concern with the proposal regarding of the use of restraints while transporting unaccompanied children at § 410.1401(a). The commenter stated that the use of restraints could pose serious risk of harm to and traumatization of children and recommended that ORR conduct holistic evaluations of children's needs before using restraints during transportation. The commenter also recommended that ORR codify existing policies to ensure children are afforded due process when restraints are used, such as notifying the child's legal services provider when restraints are being considered for court appearances and documenting any use of restraints. Another commenter expressed concerns about the lack of staffing for providing unaccompanied children with transportation to religious services. The commenter recommended ORR add an explicit requirement to ensure care provider facilities maintain sufficient staffing to allow equal access to religious services. One commenter recommended that ORR establish additional safeguards to protect children during transportation, including equipping vehicles with GPS capabilities to enable facilities to track vehicles, requiring more than one staff person to accompany children during transportation, and notifying children's attorneys or legal representatives of the transportation schedule. Another commenter recommended that ORR transport children to an ORR care provider facility nearest to the location of the child's sponsor, while another recommended restricting the transportation of unaccompanied children with detained adults.

Response: ORR notes that § 410.1401(a) is aligned with existing ORR policy and with § 410.1304, where ORR enumerates limited circumstances under which restraints may be used. For example, staff may only use soft restraints during transportation to and from secure facilities only when the care provider facility believes the child poses a serious risk of physical harm to self or others or is a serious risk of running away from ORR custody. Also, ORR staff will employ de-escalation and positive behavior management techniques before using restraints during transportation. ORR believes these requirements regarding the use of restraints are important to ensure the safety of

unaccompanied children and those around them while being transported in ORR care. ORR policy describes additional guidance on the use of restraints during transportation, including due process protections. ORR did not propose to adopt each of its existing requirements into the Foundational rule because maintaining subregulatory guidance in this area will allow ORR to make more appropriate, timely, and iterative updates in keeping with best practices. It also allows ORR to continue to be responsive to the needs of unaccompanied children and care provider facilities.

Regarding access to religious services, ORR reiterates that at § 410.1305(b), care provider facilities are required to meet the staff-to-child ratios established by their respective States. ORR believes that this requirement would provide care provider facilities with adequate staff to ensure access to minimum standards, including religious services, as described at § 410.1302(c)(9). Further, in the event ORR has identified a suitable sponsor for an unaccompanied child, ORR assists without undue delay in making transportation arrangements for release. Consistent with the FSA paragraph 26, ORR will provide assistance in making transportation arrangements for the release of unaccompanied children to the nearest location of the person or facility the child is released to, as described at § 410.1401(b). Additionally, ORR agrees with the commenter that unaccompanied children should not be transported with detained adults, consistent with the FSA. ORR does not have adults in custody. ORR reiterates that unaccompanied children's attorneys or legal representatives will be notified of all transfers within 48 hours prior to the unaccompanied child's physical transfer, as discussed at proposed § 410.1601(a)(3). However, such advance notice is not required in unusual and compelling circumstances which are further detailed at proposed § 410.1601(a)(3). Regarding commenters' requests for additional transportation safeguards, such as equipping vehicles with GPS capabilities, ORR notes that these are not required by statute or the FSA nor are they current ORR practice. ORR may consider the commenters' recommendations on additional transportation safeguards for future policymaking.

Comment: A few commenters did not support the proposal to provide for the safe transportation of unaccompanied children while in ORR care due to concerns about the risk of child trafficking while transporting unaccompanied children.

Response: ORR acknowledges the commenters' concerns, but ORR believes that the proposal will not increase the risk of child trafficking. Instead, ORR believes the proposal will help ensure the safety of unaccompanied children being transported in ORR care. For example, ORR believes that § 410.1401(e), which requires care provider facilities to conduct background checks for all drivers, will help promote child safety and well-being and reduce the risk of child trafficking. ORR notes that it is updating § 410.1401(e) to require care provider facilities or contractors to conduct background checks for all individuals who may be transporting unaccompanied children. ORR believes this revision reflects ORR's use of transportation contractors that are not operated by a care provider facility and encompasses various modes of transportation in addition to driving.

Final Rule Action: After consideration of public comments, ORR is revising § 410.1401(b) to state that ORR may ''require'' a care provider facility to transport an unaccompanied child when releasing a child to a sponsor. Also, at § 410.1401(b), ORR is amending the text to state that ORR ''shall assist'' without undue delay in making transportation arrangements, in contrast to the NPRM text, which provided that ''ORR assists'' in making arrangements. ORR believes this revision ensures consistency with other requirements described in the rule. Additionally, ORR is updating § 410.1401(d) to clarify that ORR employees must abide by their Federal duties if there is a conflict between ORR's regulations and State law, subject to applicable Federal religious freedom and conscience protections. Also, at § 410.1401(d), ORR is amending the text to state that ORR ''shall review'' the circumstances to determine how to ensure that it is able to meet its statutory responsibilities, in contrast to the NPRM text, which provided that ''ORR reviews'' the circumstances. Finally, ORR is revising § 410.1401(e) to state that care provider facilities or contractors shall conduct all necessary background checks for individuals transporting unaccompanied children, in compliance with § 410.1305(a). ORR is finalizing the remaining paragraphs of § 410.1401 as proposed.

Subpart F—Data and Reporting Requirements

45 CFR part 410, subpart F, provides guidelines for care provider facilities to report information such that ORR may compile and maintain statistical information and other data on unaccompanied children (88 FR 68952 through 68953).

Section 410.1500 Purpose of This Subpart

The HSA requires the collection of certain data about the children in ORR's care and custody.[298] Specifically, 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.

Comment: Many commenters expressed general support for the requirements proposed under subpart F. One commenter believed that codifying data requirements will improve accountability and public transparency.

Response: ORR thanks the commenters for their support.

Comment: Many commenters expressed concern that ORR is not capable of collecting and properly storing data on unaccompanied children. Many commenters also expressed concern regarding the reliability of data collected by ORR because commenters believe that ORR does not have appropriate data collection tools. Many commenters noted that sometimes case information may be contained in multiple systems and recommended that ORR use one official system of record to ensure data integrity.

Response: ORR notes that subpart F generally codifies and implements existing ORR requirements under the HSA. ORR is already substantively complying with these data collection and recordkeeping requirements.

Comment: Many commenters recommended that ORR publicly report aggregate data collected, noting that public data reporting is an important step towards transparency given the absence of FSA monitoring. Many commenters believed that ORR should require public reporting on the demographics of unaccompanied children, their status with respect to ORR programs, and the quality of care that ORR provides. Many commenters also noted that ORR currently publishes a significant quantity of aggregated information on its website and recommended that ORR include guarantees that this publication will

continue and that currently available data will remain accessible. The commenters also expressed concern that the proposed rule also does not address the breadth, specificity, frequency of publication, quality, or purpose of information that ORR must make publicly available in the future and recommended that subpart F include a new section that would require public reporting of ORR data in a manner that is reliable, frequent, and regular, and guarantee the continued public availability of critical information about unaccompanied children and their care.

Response: ORR thanks the commenters for their recommendations and will take them into consideration in future policymaking. Regarding commenters' requests for more information or additional requirements related to public reporting of ORR data, ORR notes that the scope of data and reporting requirements proposed under subpart F would codify and implement existing ORR requirements under the HSA. Although additional requirements regarding public reporting of ORR data are not required by statute or the FSA, ORR may provide additional information or guidance regarding publicly available ORR data in future policymaking.

Comment: Many commenters noted that ORR's data protections are found elsewhere in the NPRM and recommended that ORR consolidate all data collection requirements and protections into a single location for ease of reference and to eliminate ambiguity.

Response: ORR appreciates the commenters' recommendation but notes that data collection and recordkeeping requirements are organized in a way that aligns with the requirements of the parties responsible for data collection and reporting requirements.

Comment: Many commenters expressed concern that the proposed rule does not contemplate how ORR should handle information about unaccompanied children that it learns through routes other than its own service providers, contractors, and grantees, nor the necessity of recording, codifying, and protecting such information. These commenters suggested that the proposed rule include a new section addressing information that arrives from these other sources (such as information included in referrals or investigations from other Government agencies, media reports, legal case information, or other information that is available to ORR but is not directly provided to ORR by care provider facilities). The commenters also recommended that ORR should be required to record that information in a manner allowing it to be aggregated, analyzed, disaggregated, and reported out, as appropriate.

Response: ORR thanks the commenters for their comments and acknowledges their concerns. ORR notes that nothing in the Foundational Rule would preclude ORR from collecting and recording information obtained through certain data sources not specified in subpart F and does not believe that additional requirements regarding the treatment of such data are necessary at this time. However, ORR will continue to monitor the requirements finalized under subpart F as they are implemented and may consider providing additional guidance, as necessary, regarding the treatment of such information obtained through unspecified data sources through future policymaking.

Comment: Many commenters expressed concern that the proposed rule would prevent the sharing of relevant data with law enforcement or other agencies. Many commenters also recommended that ORR share information with State and local law enforcement entities to provide additional oversight.

Response: ORR notes that the data collection and reporting requirements proposed under subpart F provide guidelines for care provider facilities to report information such that ORR may compile and maintain statistical information and other data on unaccompanied children. Accordingly, the requirements proposed under subpart F are not relevant to ORR's obligations relating to sharing data with law enforcement entities. ORR also notes that it is establishing the Office of the Ombuds under subpart K of this final rule, which will provide additional oversight as an independent, impartial office with authority to receive reports, including confidential and informal reports, of concerns regarding the care of unaccompanied children; to investigate such reports; to work collaboratively with ORR to potentially resolve such reports; and issue reports concerning its efforts.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1501 Data on Unaccompanied Children

ORR proposed in the NPRM at § 410.1501 to implement the HSA by requiring care provider facilities to maintain and periodically report to ORR data described in § 410.1501(a) through (e): biographical information, such as an unaccompanied child's name, gender, date of birth, country of birth, whether of indigenous origin and country of habitual residence; the 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 any case in which the unaccompanied child is placed in detention or released, an explanation relating to the detention or release; and the disposition of any actions in which the child is the subject (88 FR 68953). In addition, for purposes of ensuring that ORR can continue to appropriately support and care for children in its care throughout their time in ORR care provider facilities, as well as to allow additional program review, ORR proposed in the NPRM at § 410.1501(f) and (g) that care provider facilities also document and periodically report to ORR information gathered from assessments, evaluations, or reports of the child and data necessary to evaluate and improve the care and services for unaccompanied children. ORR noted that some of the information described in this section, such as requirements described at paragraphs (f) and (g), or reporting regarding whether an unaccompanied child is of indigenous origin, is not specifically enumerated at 6 U.S.C. 279(b)(1)(J). Nevertheless, ORR proposed in the NPRM including such information in the rule text because it understands maintaining such information to be consistent with other duties under the HSA to coordinate and implement the care and placement of unaccompanied children.

Comment: Many commenters expressed support for ORR's commitment to codifying the minimum data that care providers are required to maintain and report to ORR.

Response: ORR thanks the commenters for their support.

Comment: Many commenters recommended that ORR include additional provisions under § 410.1501 to expand data collection and reporting requirements to include children separated from parents/guardians, children separated from family members (not parents or legal guardians), as well as data collection on children with disabilities and their needs.

Response: ORR thanks the commenters for their recommendations. ORR believes that such data is included in the reporting requirements in § 410.1501. However, ORR also notes that § 410.1501 specifies minimum

requirements and does not preclude adding additional categories over time. ORR will continue to monitor the regulatory requirements as they are implemented and will consider whether additional clarification is required through future policymaking.

Comment: Many commenters recommended that ORR require care providers to collect and report data on children who identify as LGBTQI+ to ORR, noting the importance of tracking how many children in custody identify as LGBTQI+ to better meet the needs and placement preferences of LGBTQI+ children. One commenter recommended that such data reporting requirement should be limited to unaccompanied children who voluntarily disclose such information.

Response: ORR thanks the commenters for their recommendations. ORR agrees with commenters' recommendation that improving data collection on LGBTQI+ children in ORR custody is a tool for strengthening service delivery, and accordingly will finalize § 410.1501(a) with a revision to implement reporting of voluntarily disclosed data regarding self-identified LGBTQI+ status or identity. ORR notes that the terms ''gender'' and ''sex'' are not synonymous and are separately defined in the existing Federal regulations governing ORR at 45 CFR 411.5. Therefore, ORR declines to list ''sex'' as a factor in lieu of ''gender'' in this rule. ORR believes that data collection about ''gender'' is sufficient and will maintain that requirement. ORR also emphasizes that data collection related to a child's LGBTQI+ status or identity pursuant to an Assessment for Risk under 45 CFR 411.41(a) is intended only for purposes of reducing the risk of sexual abuse or sexual harassment among unaccompanied children. Use and maintenance of this information is also subject to the privacy safeguards in 45 CFR 411.41(d) ''in order to ensure that sensitive information is not exploited to the [unaccompanied child's] detriment by staff or other [unaccompanied children].'' Additionally, ORR's information collection and sharing practices comport with Privacy Act requirements to ensure that any information sharing is pursuant to ''a purpose which is compatible with the purpose for which it was collected.'' 5 U.S.C. 552a(a)(7).

Comment: One commenter recommended that ORR utilize additional resources to determine what data to gather on unaccompanied children, their families, and sponsors, recommending that ORR collect data regarding race and nationality, LGBTQI+ status or identity, disability status, native language, and language preference.

Response: ORR thanks the commenter for their recommendations. ORR notes that information regarding an unaccompanied child's family and potential sponsors may be collected as part of the release requirements provided under §§ 410.1201 and 410.1202. ORR notes that, under § 410.1501(a), care provider facilities would be required to report biographical data including information related to an unaccompanied child's nationality and LGBTQI+ status or identity. Under § 410.1501(c) and § 410.1501(f), care provider facilities would be required to report information that may include a child's native language and language preference. Finally, under § 410.1501(f) and § 410.1501(g)(2), care provider facilities would be required to report information related to a child's disability status.

Comment: Commenters recommended that to ensure meaningful oversight of psychotropic medications, care provider facilities should be required to report information relating to the administration of psychotropic medications, including the child's diagnoses, the prescribing physician's information, the name and dosage of the medication prescribed, documentation of informed consent, and any emergency administration of medication, and commenter states that ORR should compile this data in a manner that enables ORR to track how psychotropic medications are administered across facilities and among individual families.

Response: ORR agrees with commenters, and for that reason, is incorporating requirements at § 410.1501 that care providers must report information relating to the administration of psychotropic medications, including children's diagnoses, the prescribing physician's information, the name and dosage of the medication prescribed, documentation of informed consent, and any emergency administration of medication. Such data must be compiled in a manner that enables ORR to track how psychotropic medications are administered across the network and in individual facilities.

Comment: Many commenters stated the proposed rule is unclear whether the data reporting requirements under § 410.1501 include sufficient information to enable ORR to provide effective oversight of the treatment of unaccompanied children with disabilities. Several commenters recommended, consistent with the *Lucas R.* settlement, required data include, at a minimum: whether an unaccompanied child has been identified as having a disability; the unaccompanied child's diagnosis; the unaccompanied child's need for reasonable modifications or other services; and information related to release planning. These commenters also recommended data regarding unaccompanied children with disabilities be compiled in a manner that enables ORR to track how many unaccompanied children with disabilities are in its custody, where they are placed, what services they are receiving, and their lengths of stay in order to facilitate ORR's ongoing oversight to ensure unaccompanied children with disabilities are receiving appropriate care in while ORR care.

Response: ORR agrees that such data collection could be useful for the purpose of identifying children with disabilities in order to ensure they are receiving appropriate care and services, and for that reason, is incorporating requirements at § 410.1501 that care providers must report information relating to the treatment of unaccompanied children with disabilities, including whether an unaccompanied child has been identified as having a disability; the unaccompanied child's diagnosis; the unaccompanied child's need for reasonable modifications or other services; and information related to release planning. Such data must be compiled in a manner that enables ORR ongoing oversight to ensure unaccompanied children with disabilities are receiving appropriate care while in ORR care across the network and in individual facilities. ORR will also be working with experts on a year-long comprehensive needs assessment of ORR's disability services and developing a disability plan. Such efforts may inform future policymaking concerning data collection and reporting to enhance the care of children with disabilities in ORR's custody.

Comment: A few commenters recommended that ORR collect information in addition to the information enumerated in the rule, such as information on biographical relatives, criminal history, number of unaccompanied children that access legal representation, the number of unaccompanied children that receive PRS, the number of unaccompanied children receiving home visits and well-being calls, and the number of unaccompanied children that ran away from sponsors after released. A few commenters recommended that ORR also collect data on child trafficking to track the extent of the problem and effectiveness of intervention efforts.

Response: ORR thanks the commenters for their recommendations and may take them into consideration in future policymaking. ORR currently collects some of this information in various capacities as part of its operations relating to placement, minimum services, and release and PRS. ORR notes that § 410.1501 specifies minimum requirements and does not preclude adding additional information collection requirements over time. However, ORR is not required by the HSA or the FSA to collect such information, and does not believe additional information collection requirements recommended by the commenters are necessary at this time.

Comment: One commenter recommended removing ''whether of Indigenous origin'' from § 410.1501(a) and adjusting to recognize their Indigenous Nation, Native Identity, or Tribal affiliation to recognize distinct nations with unique rights. This commenter noted the need for more accurate data collection to determine how many Indigenous unaccompanied children are migrating, as well as the Tribal affiliation and Indigenous Nation of the unaccompanied child and recommended that experts should be consulted to ensure proper collection and analysis of data regarding Indigenous unaccompanied children. The commenter stressed the importance of Indigenous identity being identified so that the Indigenous unaccompanied child's rights as members of their Native Nations can be upheld and ensure that their best interest is considered during placement.

Response: ORR thanks the commenter for their recommendations but believes the proposed section of the rule as written adequately captures the data element that ORR uses on a daily basis. ORR notes that requiring care provider facilities to report such information goes beyond the scope of current obligations specifically enumerated at 6 U.S.C. 279(b)(1)(J). ORR agrees that it is important to collect data on Indigenous unaccompanied children in order to better support their needs, and that is why such biographical information is included under § 410.1501(a). Although nothing precludes care provider facilities from reporting more specific data pertaining to a child's individual Indigenous Nation, Native Identity, or Tribal Affiliation, ORR believes that the current language is sufficient for ORR's data collection purposes. However, ORR will continue to monitor the regulatory requirements as they are implemented and will consider whether additional clarification is required through future policymaking.

Comment: Many commenters recommended aligning the list of required data from care provider facilities with requirements elsewhere in the final rule noting that § 410.1302(c)(2)(iv) requires providers to assess ''whether [the child is] an indigenous language speaker'' and asserting that proposed § 410.1501(a) should align so that preferred language can be aggregated and captured population-wide.

Response: ORR thanks commenters for their recommendation. ORR notes that because data regarding the unaccompanied child's preferred language is required to be collected pursuant to an individualized needs assessment under § 410.1302(c)(2), such data would be required to be reported to ORR under § 410.1501(f).

Comment: Many commenters expressed concern that proposed § 410.1501(b) contemplates a basic data input for the duration of a child's stay in custody which is potentially operationalized by time of DHS apprehension rather than transfer to ORR care and recommended that the rule should include both date of DHS apprehension and date of placement into HHS custody.

Response: ORR acknowledges the commenters' concerns and has updated the language in § 410.1501(b) to clarify that such data includes the date on which the unaccompanied child came into ORR custody.

Comment: Although many commenters appreciated that proposed § 410.1501(d) requires documentation for when an ''unaccompanied child is placed in detention or released,'' commenters noted that internal transfers to heightened supervision facilities, restrictive placements, and out-of-network facilities should also require documentation of the justification. These commenters also recommended that § 410.1501(d) should add ''removals'' to ensure data fidelity for a future circumstance in which another agency (such as DHS) effectuates a removal that it believes does not meet the definitional requirements for detention.

Response: ORR thanks the commenters for their recommendations. ORR notes that data relating to a child's placement, release, removal, or transfer would be required to be reported to ORR under § 410.1501(c). ORR will continue to monitor the regulatory requirements as they are implemented and will consider whether additional clarification is required through future policymaking.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed, with the exception of § 410.1501(a), § 410.1501(b), § 410.1501(c), and § 410.1501(g). ORR is finalizing language for § 410.1501(a) that is updated from the proposed rule in order to include, if voluntarily disclosed, self-identified LGBTQI+ status or identity as biographical information that care provider facilities are required to report. ORR is finalizing language for § 410.1501(b) that is updated from the proposed rule in order to clarify that such data includes the date on which the unaccompanied child came into ORR custody. ORR is finalizing language for § 410.1501(c) that is updated from the proposed rule to clarify that information relating to the unaccompanied child's placement, removal, or release from each care provider facility in which the unaccompanied child has resided includes the date on which and to whom the child is transferred, removed, or released. ORR is finalizing language for § 410.1501(g) that is updated from the proposed rule in order to specify that such data includes information relating to the administration of psychotropic medication and information relating to the treatment of unaccompanied children with disabilities.

Subpart G—Transfers

ORR proposed in the NPRM to codify requirements and policies regarding the transfer of an unaccompanied child in ORR care (88 FR 68953). The following provisions identify general requirements for the transfer of an unaccompanied child, as well as certain circumstances in which transfers are necessary, such as in emergencies.

Section 410.1600 Purpose of This Subpart

ORR proposed in the NPRM at § 410.1600 that the purpose of this subpart is to provide guidelines for the transfer of an unaccompanied child (88 FR 68953).

Comment: One commenter recommended that subpart G either reference back to subpart E (Transportation) for information regarding requirements for transportation or include those same standards in subpart G.

Response: ORR thanks the commenter but believes that subpart G adequately addresses ORR's requirements for the transfer of an unaccompanied child.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1601 Transfer of an Unaccompanied Child Within the ORR Care Provider Facility Network

ORR proposed in the NPRM, at § 410.1601(a), to codify general requirements for transfers of an unaccompanied child within the ORR care provider network (88 FR 68953 through 68954). ORR proposed in the NPRM that care provider facilities would be required to continuously assess an unaccompanied child in their care to ensure that unaccompanied child placements are appropriate. This requirement is consistent with the TVPRA, which provides that an unaccompanied child shall be placed in the least restrictive setting that is in their best interests, subject to considerations of danger to self or the community and runaway risk.[299] Additionally, care provider facilities would be required to follow ORR policy guidance, including guidance regarding placement considerations, when making transfer recommendations. ORR also proposed requirements for care provider facilities to ensure the health and safety of an unaccompanied child. The proposed requirements in the NPRM align with § 410.1307(b), where ORR proposed procedures related to placements upon the ORR transfer of an unaccompanied child to a facility that is able to accommodate the medical needs or requests of the unaccompanied child.

ORR proposed in the NPRM, at § 410.1601(a)(1), care provider facilities would be required to make transfer recommendations to ORR if they identify an alternate placement for a child that best meets a child's needs. Under § 410.1601(a)(2), when ORR transfers an unaccompanied child, the unaccompanied child's current care provider facility would be required to ensure that the unaccompanied child is medically cleared for transfer within three business days, provided the unaccompanied child's health allows and unless otherwise waived by ORR. For an unaccompanied child with acute or chronic medical conditions, or seeking medical services requiring heightened ORR involvement, the appropriate care provider facility staff and ORR would be required to meet to review the transfer recommendation. Should the unaccompanied child not be medically cleared for transfer within three business days, the care provider facility would be required to notify ORR. ORR would provide the final determination of a child's fitness for travel if the child is not medically cleared for transfer by a care provider facility. Should ORR determine the unaccompanied child is not fit for travel, ORR would be required to notify the unaccompanied child's current care provider facility of the denial and specify a timeframe for the care provider facility to re-evaluate the transfer of the unaccompanied child. ORR welcomed public comment on these proposals.

ORR proposed in the NPRM at § 410.1601(a)(3), notifications that would be required when ORR transfers an unaccompanied child to another care provider facility, including required timeframes for such notifications. Specifically, ORR proposed in the NPRM that within 48 hours prior to the unaccompanied child's physical transfer, the referring care provider facility would be required to notify all appropriate interested parties of the transfer, including the child, the child's attorney of record, legal service provider, or Child Advocate, as applicable. ORR noted, in addition, that interested parties may include EOIR. ORR proposed in the NPRM at § 410.1601(a)(3) that advanced notice shall not be required in unusual and compelling circumstances. In such a case, notice to interested parties must be provided within 24 hours following the transfer of an unaccompanied child in such circumstances. ORR is aware of concerns around notifications regarding the transfer of an unaccompanied child and believes that finalizing these proposed requirements provide an effective timeline and notice while still allowing for flexibility if there are unusual and compelling circumstances. ORR believes that § 410.1601(a)(3) of the NPRM is consistent with, and even goes beyond, the requirements set out in the FSA at paragraph 27, which requires only ''advance notice'' to counsel when an unaccompanied child is transferred but does not specify how much advance notice is required.

ORR proposed in the NPRM, at § 410.1601(a)(4) and (5), to codify requirements from paragraph 27 of the FSA that children be transferred with their possessions and legal papers, and any possessions that exceed the normally permitted amount by carriers be shipped in a timely manner to where the child is placed. ORR would also require that children be transferred with a 30-day supply of medications, if applicable. Consistent with existing practice, ORR would require that the accepting care provider is instructed in the proper administration of the unaccompanied child's medications.

ORR proposed in the NPRM, at § 410.1601(b) to codify current ORR practices regarding the review of restrictive placements. When unaccompanied children are placed in a restrictive setting (secure, heightened supervision, or Residential Treatment Center), the receiving care provider facility and ORR would be required to review their placement at least every 30 days to determine if another level of care is appropriate. Should the care provider facility and ORR determine that continued placement in a restrictive setting is necessary, the care provider facility would be required to document, and as requested, provide the rationale for continued placement to the child's attorney of record, legal service provider, and their child advocate.

ORR sought public comment on proposed § 410.1601(c), requirements related to group transfers. Group transfers are described as circumstances where a care provider facility transfers more than one child at a time, due to emergencies or program closures, for example. Under § 410.1601(c), when group transfers are necessary, care provider facilities would be required to follow ORR policy guidance and additionally be required to follow the substantive requirements provided in § 410.1601(a). ORR believed that clarifying these requirements for care provider facilities engaging in group transfers would help to ensure the safety and health of unaccompanied children in emergency and other situations that require the transfer of multiple unaccompanied children.

ORR proposed in the NPRM, at § 410.1601(d), requirements related to the transfer of an unaccompanied child in a care provider facility's care to an RTC. Under this proposed provision, care provider facilities would be permitted to request the transfer of an unaccompanied child in their care pursuant to the requirements of proposed § 410.1105(c).

ORR proposed in the NPRM, at § 410.1601(e), requirements concerning the temporary transfer of an unaccompanied child during emergency situations. In § 410.1601(e), ORR makes clear that, consistent with the HSA and TVPRA, an unaccompanied child remains in the legal custody of ORR and may only be transferred or released by ORR. As allowed under the FSA, ORR proposed in the NPRM, in emergency situations, to allow care provider facilities to temporarily change the physical placement of an unaccompanied child prior to securing permission from ORR. But in these situations, ORR would require the care provider to notify ORR of the change of placement as soon as possible, but in all cases within 8 hours of transfer.

ORR's intent in the NPRM, was to minimize the transfer of an unaccompanied child and limit transfers to situations in which a

transfer is necessary in order to promote stability and encourage establishment of relationships, particularly among vulnerable children in ORR care (88 FR 68954). ORR invited public comment on all of the proposals under subpart G, and solicited input regarding the specifics, language, and scope of additional provisions related to minimizing the transfers of an unaccompanied child and the placement of an unaccompanied child with disabilities.

Comment: Several commenters supported the proposal and recommended modifications to transfer procedures, including revising the proposal such that the care provider will submit a transfer request to ORR and ORR will be responsible for identifying the transfer program most appropriate for the unaccompanied child; provide oral and written notice of the transfer; provide the reason for the transfer, particularly for transfers from a family or small community-based program to a congregate shelter setting; and limit transfers that are outside of ORR's child welfare mandate and that go beyond the TVPRA.

Response: ORR did not propose codifying procedures that are beyond the general requirements for transfers of an unaccompanied child within the care provider network. Where the final regulation contains less detail, subregulatory guidance provides more specificity and will support future iteration that allows more timely responsiveness to the needs of unaccompanied children and care provider facilities.

Comment: A few commenters supported the proposal and recommend that ORR document modifications and auxiliary aids and services that could avert a restrictive placement and document reasons for a transfer to a restrictive facility, in alignment with the proposed policy concerning Restrictive Placement Case Reviews in § 410.1901, the proposed policy concerning Criteria for Placing a UC in a Restrictive Placement in § 410.1105, and the proposed definition of Notice of Placement in § 410.1001.

Response: ORR agrees that the consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement should be explicitly incorporated into the regulation text and apply both to an initial transfer decision and to a child's 30-day restrictive placement case review under proposed §§ 410.1105, 410.1601, and 410.1901. Accordingly, ORR is adding new § 410.1105(d) to state that for an unaccompanied child with one or more disabilities, consistent with section 504 and § 410.1311(c), ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. Section 410.1105(d) further states that ORR's consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement shall also apply to transfer decisions under § 410.1601 and will be incorporated into restrictive placement case reviews under § 410.1901. Additionally, pursuant to § 410.1311(d), ORR shall document in the child's ORR case file any services, supports, or program modifications being provided to an unaccompanied child with one or more disabilities.

Comment: Several commenters supported ORR's proposal to codify the care provider facilities' requirements for transfer of an unaccompanied child and recommended that they notify the following individuals prior to the child's transfer: a parent, family member or guardian, sponsors who have completed a sponsorship packet, and the attorney, legal service provider, DOJ Accredited Representative, or accredited representative of the unaccompanied child.

Response: ORR thanks commenters for their support and notes the list of appropriate interested parties required to be notified prior to a transfer of an unaccompanied child is not limited to the examples noted in § 410.1601(a)(3). The proposed and final regulation's list of all appropriate interested parties to be notified is not all-inclusive. ORR may consider lengthening the list of appropriate interested parties in subsequent rulemaking or subregulatory guidance.

Comment: A few commenters supported the proposal to specify a timeframe for advance notice of a transfer but recommended advance notice modifications, including specifying 48 business hours, or providing a 72-hour rather than 48-hour timeframe.

Response: ORR believes requiring 48 hours of advance notice prior to an unaccompanied child's physical transfer goes beyond the requirements of the FSA (paragraph 27 of the FSA requires 24 hours of advance notice to the child's counsel), and is, therefore, adequate time for the referring care provider facility to notify all appropriate interested parties.

Comment: One commenter supported the requirement that the unaccompanied child is transferred with health records and recommended providing an attestation that all health records are in the UC Portal and provide the receiving program access to the records prior to the unaccompanied child's arrival, to protect against loss during transportation or duplication of paper copies.

Response: ORR thanks the commenter and may consider more specificity. Current ORR policy guidance requires all health records for unaccompanied children to be recorded in the UC Portal. ORR's policy guidance requires the sending medical coordinator or medical staff to complete a medical check list for transfers and place an electronic copy in the UC Portal so that a receiving care provider may review the medical check list within the unaccompanied child's transfer request file, and access the UC Portal information about the unaccompanied child prior to the physical transfer of the unaccompanied child. ORR will continue to use and update its existing guidance to provide detailed requirements for care provider facilities regarding the timely and complete availability of health records of unaccompanied children upon a transfer.

Comment: One commenter supported the proposal to continuously assess an unaccompanied child to ensure placements are appropriate and recommend adding factors, including diagnosed and undiagnosed disabilities, placement proximity to family, the unaccompanied child's language barriers at the facility, restrictiveness, family separation, and detention fatigue.

Response: ORR thanks the commenter and may consider additional factors in support of assessing an unaccompanied child to ensure the appropriateness of transfer in future policymaking. ORR directs readers to the considerations generally applicable to placement in § 410.1103 for the discussion about placement of an unaccompanied child with disabilities, the placement proximity of an unaccompanied child to family and the unaccompanied child's mental well-being. ORR directs readers to § 410.1105 for the discussion about the criteria for placing an unaccompanied child in a restrictive placement. ORR also directs readers to the minimum standards and required services that care provider facilities must meet and provide for the discussion in § 410.1306 about offering interpretation and translation services in an unaccompanied child's native or

preferred language. Additionally, ORR directs readers to the considerations generally applicable to placement in § 410.1103(b) for the discussion about placement of an unaccompanied child with disabilities, § 410.1306 for the discussion about an unaccompanied child's native or preferred language.

Comment: One commenter supported the proposal at § 410.1601(a)(2) and recommended a revision that the care provider facility shall ensure the unaccompanied child is medically cleared for transfer within three business days of ORR approving the transfer.

Response: ORR appreciates the comment and notes that the standard of care required to transfer an unaccompanied child to appropriate care provider facility includes the requirement that an unaccompanied child is medically cleared for transfer within three business days.

Comment: One commenter supported the transfer proposal and recommended a right for unaccompanied children to appeal the determination of an appropriate transfer and the procedures for such an appeal.

Response: ORR notes that pursuant to § 410.1902 as proposed in the NPRM and finalized, an unaccompanied child transferred to a restrictive placement (secure, heightened supervision or Residential Treatment Center) will be able to request reconsideration of such placement. Upon such request, ORR shall afford the unaccompanied child a hearing before the Placement Review Panel (PRP) at which the unaccompanied child may, with the assistance of counsel if preferred, present evidence on their own behalf. Further, when an unaccompanied child is placed in a restrictive setting, the care provider facility in which the child is placed and ORR shall review the placement at least every 30 days to determine whether a new level of care is appropriate for the child. If the care provider facility and ORR determine in the review that continued placement in a restrictive setting is appropriate, the care provider facility shall document the basis for its determination and, upon request, provide documentation of the review and rationale for continued placement to the child's attorney of record, legal service provider, and/or child advocate. While ORR did not propose codifying corresponding procedures for a child to request reconsideration of a transfer to a non-restrictive placement, ORR notes that, as is consistent with current subregulatory policy, it will consider information from stakeholders, including the child's legal service provider, attorney of record or child advocate, as applicable, when making transfer recommendations. Thus, under § 410.1601(a)(3) as proposed and finalized, within 48 hours prior to the unaccompanied child's physical transfer, the referring care provider facility shall notify all appropriate interested parties of the transfer, including the child's attorney of record or DOJ Accredited Representative legal service provider, or child advocate, as applicable (88 FR 68953). However, such advance notice is not required in unusual and compelling circumstances.

Comment: One commenter expressed concern about the scope of the interested parties in § 410.1601(a)(3)(iii) who may have the ability to waive advance notice of an unaccompanied child's transfer and recommended specific and explicit paperwork that the unaccompanied child can review before agreeing to the waiver of notice of transfer.

Response: As proposed and finalized in § 410.1003(d), ORR encourages unaccompanied children, as developmentally appropriate and in their best interests, to be active participants in ORR's decision-making processes relating to their care and placement. Additionally, the responsibilities of child advocates, as proposed and finalized in § 410.1308, include requirements that child advocates visit with their unaccompanied child client, explain consequences and outcomes of decisions that may affect the unaccompanied child, and advocate for the unaccompanied child's best interest with respect to placement. Thus, the interested parties, as proposed and finalized in § 410.1601(a)(3), would have access to materials necessary to effectively advocate for the best interests of an unaccompanied child, and their responsibilities could include a review of specific paperwork, explanation of consequences and outcomes of a transfer or a waiver of advance notice of a transfer.

Comment: One commenter requested the clarification that the § 410.1601(b) protections regarding automatic 30-day review of restrictive placement also are applicable to Out-of-Network RTC facilities.

Response: As discussed at § 410.1105(c), the clinical criteria for placement in or transfer to a residential treatment center would also apply to transfers to or placements in out-of-network residential treatment centers. As such, the protections regarding automatic 30-day review of restrictive placement also are applicable to out-of-network residential treatment facilities.

Comment: One commenter recommended that ORR cross reference the Restrictive Care Provider Facility Placements and Transfer provision in § 410.1601(b) with the proposed criteria for placing an unaccompanied child in a restrictive placement in § 410.1105, the proposed restrictive placement case reviews in § 410.1901, and the proposed practice of reviewing restrictive placements at least every 30 days in § 410.1103(d).

Response: While ORR does not explicitly cross reference § 410.1601(b) with §§ 410.1105, 410.1901, and 410.1103(d), as proposed in the NPRM and finalized in this rule, ORR acknowledges that those provisions which concern restrictive placements are interrelated and should be read in tandem with each other regardless.

Comment: One commenter recommended the Group Transfer proposal include language to protect the individual rights of an unaccompanied child within a group of unaccompanied children being transferred so that timelines or due process rights of each unaccompanied child is recognized.

Response: Group transfer procedures support circumstances where a care provider facility transfers more than one child at a time. As previously discussed in § 410.1302, care provider facilities, as discussed previously in § 410.1302, will continue to follow ORR policy to ensure that the best interests of unaccompanied children are met. As previously discussed in § 410.1308, child advocates for unaccompanied children are able to make independent recommendations regarding the best interest of an unaccompanied child. This includes advocating for the unaccompanied child's best interest with respect to their placement, and providing best interest determinations, where appropriate and within a reasonable time, to ORR in a matter in which the child is a party or has an interest.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Subpart H—Age Determinations

In subpart H of this rule, ORR provides guidelines for determining the age of an individual in ORR care (88 FR 68954 through 68955). The TVPRA instructs HHS to devise, in consultation with DHS, age determination procedures for children in their respective custody.[300] Consistent with the TVPRA, HHS and DHS jointly developed policies and procedures to assist in the process of determining the correct age of individuals in Federal custody. Establishing the age of the individual is critical because, for

purposes of the UC Program, HHS only has authority to provide care to unaccompanied children, who are defined, in relevant part, as individuals who have not attained 18 years of age. ORR also notes that the FSA allows for age determinations in the event there is a question as to veracity of the individual's alleged age.

Section 410.1700 Purpose of This Subpart

In the NPRM, ORR acknowledged the challenges in determining the age of individuals who are in Federal care and custody (88 FR 68954). These challenges include, but are not limited to, lack of available documentation; contradictory or fraudulent identity documentation and/or statements; ambiguous physical appearance of the individual; and diminished capacity of the individual. As proposed in § 410.1700, the purpose of this subpart is to establish provisions for determining the age of an individual in ORR custody. ORR noted that under this section, and as a matter of current practice, it would only conduct age determination procedures if there is a reasonable suspicion that an individual is not a minor. ORR believes that the requirements and standards described within this subpart properly balance the concerns of children who are truly unaccompanied children with the importance of ensuring individuals are appropriately identified as a minor. ORR noted that § 410.1309 covers required notification to legal counsel regarding age determinations.

Comment: One commenter commended the protections incorporated into the proposed rule's section regarding age determinations. The commenter also suggested that to ensure that unaccompanied children are protected to the greatest extent possible through this process, ORR should add ''if there is a reasonable suspicion that an individual is not a minor'' to align with ABA UC Standards.

Response: ORR appreciates the input from the commenter. ORR believes that the standard requiring a reasonable belief that the individual is 18 years of age or older to determine that the individual is not a minor is already explicitly stated at § 410.1704. ORR notes that under this section, and as a matter of current practice, ORR would only conduct age determination procedures if there is a reasonable suspicion that an individual is not a minor.

Comment: One commenter agreed with the language in the NPRM considering the totality of the evidence in making age determinations rather than relying on any single piece of evidence to the exclusion of all others, stating that this aligns with international standards. The commenter further stated that international best practices indicate that age assessment procedures should be conducted only in cases where a child's age is in doubt. The commenter stated that while ORR's proposal in the NPRM incorporates many of the elements of international best practices, the commenter recommended that ORR strengthen the standards to specify that age determination should not be carried out immediately, but rather in a safe and culturally sensitive manner after the child has had time to develop a feeling of safety after crossing the border. The commenter urged ORR to emphasize considerations of the psychological maturity of the individual.

Response: ORR thanks the commenter for their additional considerations. ORR notes that age determinations are not carried out in all cases, but only when there is a reasonable suspicion that an individual is not a minor and in accordance with the procedures described in this section to make such a determination based on the totality of evidence presented. This is a process that would necessarily require time to initiate and would therefore not be carried out immediately. However, to meet the definition of an unaccompanied child and remain in ORR custody, an individual must be under 18 years of age. ORR believes that it is imperative to the safety and security of children in its custody to ensure that individuals who are under 18 years of age are not placed in facilities where they could be inadvertently sharing housing with adults who have reached the age of 18 years or older. These procedures will ensure that children in ORR's custody receive care in a safe and culturally sensitive manner per the standards described in §§ 410.1302 and 410.1801. Furthermore, the types of evidence accepted in this section are intended to take into account information that is culturally relevant to the individual, such as baptismal certificates and sworn affidavits from parents, guardians, and relatives. ORR appreciates that a child needs time to develop a feeling of safety; ORR's obligation is to ensure proper placement of a child without undue delay in a setting where they can receive adaptation and acculturation services in accordance with the standards described in this subpart. ORR does not believe that considering the psychological maturity of the individual should be a factor in the process for making an age determination, primarily because such considerations are highly subjective.

Comment: A few commenters disagreed with the reasonable suspicion standard as proposed in this section. One commenter recommended that ORR replace the ''reasonable suspicion'' standard required to initiate an age determination with the higher ''probable cause'' and that ORR require staff to provide probable cause that the child is an adult given the potential impact of an adverse finding on children. One commenter requested that ORR further clarify what constitutes reasonable evidence or suspicion of a falsely provided age. One commenter stated that § 410.1704 as proposed concludes that ORR will treat a person as an adult if a reasonable person concludes that the individual is an adult but argued that this does not sufficiently protect the due process rights of unaccompanied children.

Response: ORR thanks the commenters for their input. ORR notes that initiating an age determination based on a reasonable suspicion that an individual in custody is not a minor is a matter of current practice consistent with the ''reasonable person'' standard for age determinations under the FSA that ORR is now codifying under this section. In this context, ORR is concerned that limiting age determinations only to instances where there is probable cause would limit ORR's ability to consider factors such as lack of available documentation; contradictory or fraudulent identity documentation and/or statements; and ambiguous physical appearance of the individual. As noted earlier in this section, ORR will consider available documentation or statements from the presumed child in ORR's custody or the child's attorney. ORR notes that an individual would be treated as an adult under this section only when the totality of the evidence indicates that an individual in ORR custody is age 18 years or older.

Comment: One commenter requested that ORR provide additional information to clarify its age determination procedures, including questions surrounding what happens for a child while the age determination process is ongoing; what occurs in the event that the totality of evidence is inconclusive; what happens for children who claim to be adults or present paperwork as adults but are suspected to be minors; detail surrounding the use of social media, internet, and pictures in the process of age determination; and details surrounding protective plans in place in the event potential adults are

placed with children for a period of time.

Response: Upon referral to ORR's legal custody, ORR would only conduct an age determination in accordance with the procedures described in this section if ORR has a reasonable suspicion that the individual is not a minor. This section does not require ORR to conduct an age determination when an individual claims to be an adult, but in the event such a claim gives rise to a reasonable suspicion that the individual is not a minor, ORR may decide to conduct an age determination. In instances where the medical age assessment does not reach the 75 percent probability threshold at § 410.1703(b)(8) and is therefore ambiguous, debatable, or borderline, forensic examination results must be resolved in favor of finding the individual is a minor. At this time, ORR does not agree to consider social media, internet, and pictures as evidence of an individual's age because ORR does not believe that this type of documentation is as reliable as the types of evidence accepted under this section. In the event that potential adults are placed with children for a period of time, as provided in current ORR policy, an individual in ORR care or their attorney of record may, at any time, present new information or evidence that they are 18 or older for reevaluation of an age determination. If the new information or evidence indicates that an individual who is presumed to be an unaccompanied child is an adult, then ORR will coordinate with DHS to take appropriate actions, which may include transferring the individual out of ORR custody back to DHS custody. ORR further emphasizes that pursuant to minimum standards under §§ 410.1302 and 1801, programs must provide at least one individual counseling session per week conducted by certified counseling staff with the specific objectives of reviewing the unaccompanied child's progress, establishing new short and long-term objectives, and addressing both the developmental and crisis-related needs of each unaccompanied child.

Comment: One commenter recommended that ORR create standards of protection from discrimination such as standards for documenting concerns of age and having those concerns verified by multidisciplinary teams, suggesting that if a direct care staff member says they think a child is actually an adult, a second opinion from the case management supervisor or medical staff should be pursued before addressing anything with the client.

Response: ORR thanks the commenter for their recommendation. ORR notes that only when there is a reasonable suspicion that the presumed child in ORR custody is not a minor would ORR proceed with conducting an age determination, and not solely based upon an opinion. After initiating an age determination, ORR would follow the procedures in this section to collect and verify the available evidence, during which time there will be additional opportunities to present documentation and testimony, including medical assessments. ORR notes that during this process, the presumed child who remains in ORR's custody will not be treated as an adult until the age determination is resolved.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1701 Applicability

ORR proposed in the NPRM at § 410.1701 that this subpart would apply to individuals in the custody of ORR (88 FR 68954). This is consistent with 8 U.S.C. 1232(b)(4), which specifies that DHS' and HHS's age determination procedures ''shall'' be used by each department ''for children in their respective custody.'' Section 410.1701 also reiterates that under the statutory definition of an unaccompanied child,[301] an individual must be under 18 years of age.

Comment: One commenter stated concern that the adoption of a trauma-informed approach in verifying critical information such as age could inadvertently result in adults falsely claiming to be minors and accessing services meant for vulnerable children.

Response: ORR disagrees that providing trauma-informed services to children in its legal custody is an impediment to conducting an age determination when there is a reasonable suspicion when the individual in custody is not a minor. ORR believes that the requirements in this subpart properly balance the concerns of children who are truly unaccompanied children with the importance of ensuring individuals are appropriately identified as minors.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1702 Conducting Age Determinations

ORR proposed in the NPRM at § 410.1702 to codify general requirements for conducting age determinations (88 FR 68954). The TVPRA requires that age determination procedures, at a minimum, consider multiple forms of evidence, including non-exclusive use of radiographs. Given these minimum requirements, § 410.1702 would allow for the use of medical or dental examinations, including X-rays, conducted by a medical professional, and other appropriate procedures. The terms ''medical'' and ''dental examinations'' are taken from the FSA at paragraph 13, and ORR interprets them to include ''radiographs'' as discussed in the TVPRA. Under § 410.1702, ORR 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.

Comment: A number of commenters expressed concern that proposed § 410.1702 is inconsistent with ORR policy updates to remove X-rays and other changes in April 2022.

Response: ORR thanks commenters for their input. ORR notes that it revised its policy to remove skeletal (bone) maturity assessments since DHS does not accept this form of medical age assessment for age determinations.[302] However, ORR also notes that the policy under the TVPRA requires that age determination procedures, at a minimum, consider multiple forms of evidence, including ''non-exclusive'' use of radiographs. Therefore, ORR is finalizing its proposal that X-rays for medical age assessments may be taken into account in totality of the evidence.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1703 Information Used as Evidence To Conduct Age Determinations

ORR proposed in the NPRM, at § 410.1703, information that ORR would be able to use as evidence to conduct age determination (88 FR 68954 through 68955). Under § 410.1703(a), ORR would establish that it considers multiple forms of evidence, and that it makes age determinations based upon a totality of evidence. Under § 410.1703(b), 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.

Regarding the use of medical age assessments, ORR proposed in the NPRM at § 410.1703(b)(8), to codify a 75 percent probability threshold, that, when used in conjunction with other evidence, reflects a reasonable standard that would prevent inappropriate placements in housing intended for unaccompanied children. The examining doctor would be required to submit a written report indicating the probability percentage that the individual is a minor or an adult. If an individual's estimated probability of being 18 or older is 75 percent or greater according to a medical age assessment, then ORR would accept the assessment as one piece of evidence in favor of a finding that the individual is not an unaccompanied child. Consistent with the TVPRA, ORR would not be permitted to rely on such a finding alone; only if such a finding has been considered together with other forms of evidence, and the totality of the evidence supports such a finding, would ORR determine that the individual is 18 or older. The 75 percent probability threshold applies to all medical methods and approaches identified by the medical community as appropriate methods for assessing age. Ambiguous, debatable, or borderline forensic examination results are resolved in favor of finding the individual is a minor. ORR believes that requirements at § 410.1703 enable ORR to utilize multiple forms of evidence.

Comment: A number of commenters expressed the view that ORR is unable to verify the age of a purported unaccompanied child. A few commenters disagreed with the documentation that ORR proposes would allow it to make an age determination, stating concerns that ORR would accept unverified documents and copies which remove all security features. One commenter stated a concern that ORR's approach would trust a facsimile or a baptismal certificate sent via a messaging application, but diminish the use of medical age assessments.

Response: ORR recognizes the challenges in obtaining evidence to verify the age of individuals in ORR's legal custody due to the circumstances of entering the country unaccompanied and with undocumented status. It is for this reason that ORR will not make an age determination on the sole basis of one document or document type, but rather based on the totality of the evidence. ORR notes that a legible facsimile of a birth certificate is acceptable when the original is not available. ORR believes that types of evidence accepted under this section are aligned with standard documentation that are widely accepted to verify age across multiple Federal agencies. ORR disagrees that the requirements under this subpart diminish the use of medical age assessments; rather, forensic results are recognized and taken into consideration with other evidence.

Comment: A few commenters provided recommendations for preventing wrongful age determinations. A few commenters recommended that consulate-verified birth certificates be standard practice where possible for age determination to prevent errors. One commenter suggested that the Government invest in advanced document verification technology to ensure the authenticity of birth certificates and other identification documents, also stating that collaboration with foreign consulates and embassies, as mentioned in § 410.1703, should be expedited to verify the validity of documents presented.

Response: ORR thanks commenters for their recommendations. ORR notes that it may consult with the consulate or embassy of the individual's country of birth to verify the validity of the birth certificate presented. However, due to the variation in standards in other nations outside of the U.S. for document protections, ORR does not believe that it would be able to apply advanced document verification technology consistently and believes the current types of documents accepted as evidence of an individual's age are sufficient to proceed with an age determination.

Comment: One commenter recommended that ORR minimize the use of medical age assessments, and instead prioritize vulnerability-based assessments and incorporate the benefit of the doubt and the best interest principle in these assessments. The commenter recommended that ORR ensure the children have access to legal counsel and a child advocate during age assessments, so their rights and best interests are represented during the process, and ensure all relevant staff are trained on and have access to ORR policy on age assessments.

Response: ORR thanks the commenter for their input. While ORR believes that the use of medical age assessments is still relevant to making an age determination, ORR emphasizes that they are one kind of evidence considered in making a determination based on the totality of the evidence. Rather, medical age assessments are taken into consideration with the totality of evidence accumulated if there is a reasonable suspicion that an individual is not a minor. Additionally, as stated at § 410.1309(a)(2)(i)(B), ORR must provide an unaccompanied child access to legal representation before and during an age assessment to ensure their rights and best interests are represented. ORR agrees that all relevant staff should be trained on and have access to ORR policy on age assessments in accordance with provisions at § 410.1305, requiring that standard programs, restrictive placements, and post-release service providers shall provide training to all staff, contractors, and volunteers, to ensure that they understand their obligations under ORR regulations in this part and policies, and are responsive to the challenges faced by staff and unaccompanied children at the facility.

Comment: A few commenters recommended eliminating or reducing the use of medical age determinations altogether, stating the process is difficult and inaccurate, and expressing concerns about the consequences of an erroneous age determination, such as sending a child to an adult detention facility, causing them to lose access to the range of services and protections to which children are entitled. Specifically, a few commenters stated that the scientific community agrees that bone and dental radiographs are unreliable because children grow at different rates, with one commenter stating that radiographs can only provide an age range of the person in question and ORR should, therefore, not include them in the age determination process at all, given their limitations. Additionally, a few commenters questioned the reliability of dental examinations to determine age. One commenter stated that age assessments of adolescents based on wisdom teeth growth have an accuracy of only 2 to 4 years, also stating the timing of eruption of the third molar depends on ethnicity, gender, socio-economic status, and even birth weight. The commenter stated that for these reasons, all forensic examination results should be deemed debatable and

resolved in favor of finding that the individual is a child.

Response: ORR thanks the commenters for their input. Regarding the proposed use of medical age assessments, at proposed § 410.1703(b)(8), ORR is codifying a 75 percent probability threshold, that, when used in conjunction with other evidence, reflects a reasonable standard that would prevent inappropriate placements in housing intended for unaccompanied children (88 FR 68955). The examining doctor would be required to submit a written report indicating the probability percentage that the individual is a minor or an adult. If an individual's estimated probability of being 18 or older is 75 percent or greater according to a medical age assessment, then ORR would accept the assessment as one piece of evidence in favor of a finding that the individual is not an unaccompanied child. Consistent with the TVPRA, ORR would not rely on such a finding alone; only if such a finding has been considered together with other forms of evidence, and the totality of the evidence supports such a finding, would ORR determine that the individual is 18 or older. The 75 percent probability threshold applies to all medical methods and approaches identified by the medical community as appropriate methods for assessing age, including evidence such as bone and dental radiographs. ORR disagrees that all forensic examination results are deemed debatable because they are evidence that merit consideration, but as noted, they are one type of evidence considered in looking at the totality of the evidence. ORR believes that requirements at proposed § 410.1703 would enable ORR to utilize multiple forms of evidence.

Comment: A few commenters recommended that ORR use DNA testing in age determinations for unaccompanied children. One commenter cited an example from an Inspector General report [303] stating that ICE, HSI, and CBP officials stated that testing with Rapid DNA helped deter and investigate false claims about parent-child relationships and therefore recommended that ORR include a provision to clearly allow for rapid DNA testing, not only for age determinations, but also for verifying familial relationships to deter and detect fraud and abuse and better protect children.

Response: ORR thanks commenters for their recommendations and for their concern. The referenced report is applicable to law enforcement activities undertaken by immigration agencies and ORR does not believe universal use of DNA is required under ORR's obligations under the HSA to coordinate care and placement of unaccompanied children. For a discussion of considerations relating to use of DNA in the sponsor approval process, please see ORR's response to comments on § 410.1201.

Comment: A few commenters agreed with the regulations as proposed in this section, commending the protections incorporated in the NPRM regarding age determinations and stating that this framework for age determination can help protect children. One commenter agreed with the proposed regulation and requested that ORR clarify at § 410.1703(b)(8) that the medical age assessment report come from the examining doctor as stated in the beginning of this subsection.

Response: ORR thanks commenters for their support. ORR believes that the regulation text is sufficiently clear as proposed. However, ORR will continue to monitor the requirements as they are implemented and may provide additional clarification through future policymaking if needed.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1704 Treatment of an Individual Whom ORR Has Determined To Be an Adult

ORR proposed in the NPRM, at § 410.1704, to codify the substantive requirement from paragraph 13 of the FSA regarding treatment of an individual who appears to be an adult (88 FR 68955). Specifically, if the procedures in this subpart would result in a reasonable person concluding, based on the totality of the evidence, that an individual is an adult, despite the individual's claim to be under the age of 18, ORR would treat such person as an adult for all purposes. As provided in current ORR policy,[304] an individual in ORR care or their attorney of record may, at any time, present new information or evidence that they are 18 or older for re-evaluation of an age determination. If the new information or evidence indicates that an individual who is presumed to be an unaccompanied child is an adult, then ORR will coordinate with DHS to take appropriate actions, which may include transferring the individual out of ORR custody back to DHS custody.

Comment: One commenter stated that ORR must report all adults they uncover who fraudulently pose as minors in ORR facilities to ICE and State and local law enforcement.

Response: In cases where ORR has conducted an age determination and concludes that the individual is not a minor, ORR follows all required procedures including referral for a transfer evaluation with DHS/ICE. If the individual is determined to be an adult based on the age determination the individual is transferred to the custody of DHS/ICE.

Comment: One commenter recommended, ''for due process reasons,'' that the final rule provide for appeals of age determinations to an independent reviewer outside of ORR.

Response: ORR believes its age determination practices as codified in this section of the final rule are consistent with principles of due process. ORR has a significant interest in having age determination procedures not only to fulfill its statutory mandate,[305] but also because it is authorized only to care for unaccompanied children as defined in the HSA. With respect to the adequacy of ORR's age determination process, ORR relies not only on any information in its possession, but also gives the individual, in addition to notice, the opportunity to submit evidence in support of their claim to be a minor. Based on these considerations, ORR believes its current processes align with the principles of due process.

Final Rule Action: After consideration of public comments, ORR is updating the heading for § 410.1704 to clarify that it applies to an individual whom ORR ''has determined to be'' an adult rather than to an individual who ''appears to be'' an adult. ORR is otherwise finalizing § 410.1704 as proposed in the NPRM.

Subpart I—Emergency and Influx Operations

In subpart I of the NPRM, ORR proposed to codify requirements applicable to emergency or influx facilities that ORR opens or operates during a time of and in response to emergency or influx (88 FR 68955 through 68958). This subpart applies the requirement at paragraph 12C of the FSA to have a written plan that describes the reasonable efforts the former INS, now ORR, will take to place all unaccompanied children as expeditiously as possible.

As a matter of policy, and consistent with the discussion at § 410.1302 of this final rule, ORR has a strong preference to house unaccompanied children in standard programs. However, ORR recognizes that in times of emergency or influx additional facilities may be needed, on short notice, to house unaccompanied children. As used in this subpart, 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 unaccompanied children, or impacts other conditions provided by this part. Influx means a situation in which the net bed capacity of ORR's standard programs that is occupied or held for placement of unaccompanied children meets or exceeds 85 percent for a period of seven consecutive days. In this final rule, ORR defines ''Emergency or Influx Facilities'' as a single term to encompass a care provider facility opened in response to either an emergency or influx and to propose that such a facility would meet the minimum requirements described in this subpart. These facilities may be contracted for and stood up in advance of an emergency or an influx in preparation of such an event, but no children would be placed in such a facility until an emergency or influx exists.

Importantly, this definition of ''influx'' departs from and sets a substantially higher threshold for what constitutes an influx that used in the FSA which defined ''influx'' as a situation in which 130 or more unaccompanied children were awaiting placement. In the NPRM, ORR stated that it takes a new approach to defining ''influx'' based on its experiences in the years after the settlement agreement and in light of the increased numbers of unaccompanied children over time. In this rule, ORR defines an ''influx'' without reference to a set number of unaccompanied children, but rather to circumstances reflecting a significant increase in the number of unaccompanied children that exceeds the standard capabilities of the Federal Government to process and transport them timely and/or to shelter them with existing resources. ORR believes that using the 85 percent threshold provides a reasonable measure to determine when bed capacity in the standard programs is strained to the point that accepting referrals from other Federal agencies within 72 hours becomes very challenging. ORR notes that this 85 percent threshold would align with ORR's current practices and is based on ORR's experience with influx trends and organizational capacity. During these times of emergency or influx, ORR may house unaccompanied children at emergency or influx facilities. ORR notes that, consistent with current policy, placements of unaccompanied children at emergency or influx facilities cease when net bed capacity in standard programs drops below 85 percent for a period of at least seven consecutive days.[306]

Section 410.1800 Contingency Planning and Procedures During an Emergency or Influx

ORR recognizes that during times of emergency or when there is an influx of unaccompanied children, it is important to have policies and procedures in place to ensure that all unaccompanied children have their needs met and receive appropriate care and protection. Because emergency or influx facilities are intended to be a temporary response to an influx or emergency, when speed may be critical, these facilities may be unlicensed or may be exempted from licensing requirements by State or local licensing agencies, or both. Although ORR's preference is to place unaccompanied children in standard programs whenever possible, these emergency or influx facilities may be used to house unaccompanied children temporarily to ensure children remain safe during an emergency and do not remain in CBP border stations, which are neither designed nor equipped to care for children, for prolonged periods of time during an influx. Regardless of licensure status, these facilities must meet ORR standards and must comply to the greatest extent possible with State child welfare laws and regulations. ORR proposed at § 410.1800 to codify guidelines for contingency planning and procedures to use during an emergency or influx (88 FR 68955 through 68956).

ORR proposed in the NPRM, at § 410.1800(a), to regularly reevaluate the number of placements needed for unaccompanied children to determine whether the number of shelters, heightened supervision facilities, and ORR transitional home care beds should be adjusted to accommodate an increased or decreased number of unaccompanied children eligible for placement in care in ORR custody provider facilities.

ORR proposed in the NPRM, at § 410.1800(b), consistent with paragraph 12A of the FSA, that in the event of an emergency or influx that prevents the prompt placement of unaccompanied children in standard programs, ORR shall make all reasonable efforts to place each unaccompanied child in a standard program as expeditiously as possible. As described in proposed § 410.1800(a) and consistent with ORR's preference to place unaccompanied children in standard care provider facilities, ORR's commitment to regularly reevaluating the number of placements needed will help this effort to place unaccompanied children in licensed programs quickly.

ORR proposed in the NPRM, at § 410.1800(c), that activities during an influx or emergency include the following: (1) ORR implements its contingency plan on emergencies and influxes, which may include opening facilities in times of emergency or influx; (2) ORR continually develops standard programs that are available to accept emergency or influx placements; and (3) ORR maintains a list of unaccompanied children affected by the emergency or influx including each unaccompanied child's: (i) name; (ii) date and country of birth; (iii) date of placement in ORR's custody; and (iv) place and date of current placement.

Comment: One commenter supported the updates to ORR's emergency preparedness and contingency planning, agreeing with the focus on placing children in standard programs first and ongoing efforts to further expand the availability of standard programs.

Response: ORR thanks the commenter for their support.

Comment: One commenter welcomed updates to the definition of an influx during which ORR can use unlicensed or emergency shelters that do not have to meet the same standards as its network of licensed facilities. The commenter also supported ORR's stated commitment to regularly reevaluating and expanding regular shelter capacity as needed to minimize the need to utilize influx facilities. The commenter stated that together these proposed sections work toward a reduction in use of unlicensed and large congregate care facilities and promote the best interests of the children in ORR's care.

Response: ORR appreciates the commenter's agreement with the updates in this section and agrees that such provisions will work towards ORR's stated commitment to minimize the need to utilize emergency or influx facilities.

Comment: Several commenters expressed concern that this section created ambiguity by not distinguishing between Emergency Intake Site (EIS) and Influx Care Facility (ICF). One commenter stated that the text seems to treat them interchangeably, and references regulations and policies applicable to the standard program, contributing to an additional lack of clarity. One commenter questioned the purpose of listing two program types within a single set of rules and requested that ORR clarify and define what constitutes an EIS and an ICF. A few commenters recommended that ORR remove EIS from this subpart and establish it as a distinct subpart, stating that EIS should be reserved exclusively for emergency declarations rather than

as an emergency response to sudden influx. The commenter stated that existing ICFs should be used to manage influx situations at the border.

Response: ORR intends for ''Emergency or Influx Facilities'' (''EIFs'') as a single term to encompass both care provider facilities that ORR opens in response to either an emergency (*e.g.,* a public health emergency), and facilities that ORR opens in response to an influx, as defined in this final rule. ORR notes that using a single term is consistent with the FSA which refers to emergencies and influx together.[307] EIFs will be subject to the minimum standards under this section for the safety and well-being of children as codified at § 410.1801. ORR notes that these standards are consistent with the requirements of Exhibit 1 of the FSA, even though the FSA does not require emergency or influx facilities to apply those standards. Further, the standards for EIFs are similar to the standards described at § 410.1302(a), though with some differences to allow for greater operational flexibility, which ORR believes are appropriate in order to relatively quickly provide child-appropriate care for unaccompanied children during times of emergency or influx. ORR further notes that all the regulations not related to licensure or minimum standards in this part would apply to all care provider facilities, including both standard and non-standard programs as defined below unless otherwise specified. ORR is not incorporating in this regulation the terms ''ICF'' or ''EIS,'' which are terms it has used in the past. Whatever terms ORR uses to describe facilities opened in the event of an emergency or influx, such facilities will be subject to the standards described in this section.

Comment: A few commenters suggested investment in or expanding licensed shelter beds. One commenter suggested that, instead of relying on influx shelter beds, ORR should favor contingency planning for onboarding of more licensed shelter beds and staff and focus on the expansion of small-scale shelter models and community-based models. Another commenter suggested that although under the FSA, the Government is not obligated to fund additional beds on an ongoing basis, such funding is necessary and may well be cost efficient. The commenter suggested that ORR conduct research and analyze whether funding additional beds on an ongoing basis would lead to cost savings when compared to the costs ORR incurs operationalizing massive influx facilities in a crisis environment. Another commenter expressed a concern that EIFs would be used to replace licensed facilities, including appropriate family and community-based placements.

Response: ORR thanks the commenters for their recommendations. ORR currently operates a network of 289 care provider facilities in 29 States,[308] and continually assesses its bed capacity and potential opportunities for additional standard bed capacity as appropriate in relation to trends in the rates of referrals of unaccompanied children to ORR. ORR also notes that EIFs are not to be used as substitutes for standard programs where such programs are available. EIFs are specifically for situations of emergency or influx. ORR has worked to build up its standard bed capacity, but because the frequency and size of influxes of unaccompanied children, and the timing of emergencies or conditions of influx are not always predictable, as a matter of prudent planning ORR requires the ability to quickly add bed capacity when circumstances require it to ensure child-appropriate placements. ORR continually assesses its bed capacity and considers the comparative costs between funding additional beds on an ongoing basis and placement in EIFs, and has issued Notices of Funding Opportunity (NOFOs) to qualified applicants to increase standard program capacity.

Comment: Several commenters expressed concern that § 410.1800(b) would not be compliant with the FSA's requirement to make licensed placements of unaccompanied children ''as expeditiously as possible.'' One commenter stated concerns that § 410.1800(b) introduces qualifying language that would permit a delay in licensed placement under circumstances inconsistent with the FSA. The commenter further argued that the FSA's reference to licensed placement ''as expeditiously as possible'' already provides ORR with leeway to delay licensed placement when it is operationally infeasible to place children within the FSA's time limits and stated that adding ''make all reasonable efforts'' weakens the ''as expeditiously as possible'' requirement for placement in a licensed program. The commenter suggested that ORR eliminate this additional qualifying language in order to comply with the requirements of the FSA. Several commenters stated the NPRM did not define ''expeditiously'' nor did it clearly specify a timeframe for placement in a licensed facility, and stated that this was in contravention of court decisions that have addressed this question. Several commenters stated that the proposed rule implies at § 410.1802(a)(1) that ''expeditiously'' is within a 30-day period but the U.S. Court of Appeals for the Ninth Circuit which is monitoring compliance of FSA has opined that a 20-day extension may be ''expeditious.'' The commenter argued that ORR's 30-day window for release from an ''emergency or influx facility'' may be considered noncompliance, especially if the facilities are unlicensed and do not meet minimum safety requirements of the FSA. One commenter stated that the court monitoring compliance of the FSA has suggested that it may be reasonable for ORR to exceed normal requirements up to 20 days in the event of an influx and to adopt this timeframe in the proposed rule.

Response: ORR thanks the commenters for their input, and notes that in this final rule it is updating § 410.1800(b), to strike ''make all reasonable efforts,'' and instead state that ORR shall place each unaccompanied child in a standard program ''as expeditiously as possible.'' ORR notes that the FSA itself does not establish a specific timeline for placement in a licensed program. Instead, the FSA requires ORR to place children ''as expeditiously as possible'' in a licensed placement. ORR would also note that EIFs are required to follow the minimum standards set forth at § 410.1801. Even though not required by the FSA, those standards essentially mirror the standards set forth at Exhibit 1 of the FSA. Finally, ORR notes that the commenter's reference to a 20-day period was in the court's discussion of standards applicable to children in DHS custody in the context of family detention,[309] which presents a different set of considerations than those applicable to expeditious transfer in conditions of emergency or influx for the UC Program.

Comment: Several commenters asserted that ORR inappropriately defined influx as an ''exceptional circumstance'' preventing the placement of a child from other Federal agencies within 72 hours permitted under Flores. One commenter argued that this proposal would allow ORR to absolve itself of the responsibility to comply with the terms of the FSA whenever it is presented with challenges to placing children in standard programs within 72 hours and was concerned that this would directly risk the safety of unaccompanied children for which the agreement was issued to protect.

Response: ORR notes that, although an exceptional circumstance under § 410.1101(d) would include an influx, this final rule also substantially raises

the threshold for influx above what is specified in the FSA. This final rule, at § 401.1001, defines influx as a situation in which the percentage of ORR's existing net bed capacity in standard programs that is occupied or held for placement by unaccompanied children meets or exceeds 85 percent for a period of seven consecutive days, in contrast with the FSA definition of more than 130 minors eligible for placement in a licensed program. As a practical matter, it has been the case for the last several years (with the exception of the period in 2020 in which unaccompanied children were being expelled at the border) that the daily average of unaccompanied child referrals from DHS substantially exceeds 130.

Comment: One commenter argued that under this proposed definition, ORR would have the authority to operate a temporary unlicensed facility for any number of situations it considers an emergency, including an influx, stating concerns that emergency and influx shelters are large, often in remote areas, and child welfare advocates have long expressed grave concerns with the treatment of children and the general conditions in such facilities. The commenter recommended that emergency or influx facilities only be allowed to shelter children if in alignment with ORR's own stated minimum standards and with standards under international law.

Response: ORR reiterates that emergency or influx facilities must comply with the minimum standards set forth at § 410.1801, which is based on parts of Exhibit 1 of the FSA, as well as other requirements and standards set by ORR under its statutory authorities. ORR notes that EIFs are only authorized under the situations defined as an emergency or influx under § 401.1001. ORR additionally notes that it operates EIFs as emergency care provider facilities in accordance with the standards finalized at 45 CFR 411 in the Interim Final Rule, Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children.

Comment: One commenter stated that HHS has omitted data that shows how frequently ORR operates under conditions that would permit ORR to relax standards under this proposal. The commenter stated that there has not been a single month since January 2021 in which ORR or its contractors have not been operating at ''influx'' capacity, as defined by the proposed rule. The commenter therefore requested that HHS make data available to the public regarding how frequently ''emergency'' or ''influx'' conditions are present.

Response: As previously noted, the final rule is substantially raising the threshold for determining that there is an influx. ORR believes that rather than ''relaxing'' standards, this policy would make placements in an EIF less frequent. For data regarding placements in an EIF, ORR refers commenters to publicly available information posted on its website.[310]

Comment: One commenter expressed concern that § 410.1800(c)(2), as proposed in the NPRM, merely stated that during an influx ORR continually develops standard programs that are available to accept emergency or influx placements and does not comport with the FSA requirement to undertake extensive advance contingency planning. The commenter argued that this provision is insufficient to minimize the use of unlicensed congregate influx facilities.

Response: ORR thanks the commenter for their input. ORR is committed to minimizing the use of unlicensed emergency or influx facilities (EIFs) while ensuring that EIFs adhere to minimum standards. ORR notes that it annually reviews its contingency plans based on the actual and anticipated number of unaccompanied children referrals to monitor available resources in light of expected needs. This is consistent with the requirement set forth at Exhibit 3 of the FSA at paragraph 5.[311] ORR believes the requirements related to contingency plans under § 410.1800(c) of this final rule sufficiently comports with the FSA requirement to undertake extensive advance contingency planning.

Comment: One commenter asserted that it is not enough to regularly ''reevaluate'' the number of placements needed as stated in § 410.1800(a) and recommended instead that ORR establish a sizeable list of placements in waiting. The commenter stated that numbers required under the FSA suggest the Government must have a list of beds equal to 62 percent of the capacity threshold constituting an influx and that the FSA also requires the Government to maintain a list and ''. . . update this listing of additional beds on a quarterly basis . . .'' and should therefore revise § 410.1800(c)(2) to require ORR to engage in extensive contingency planning which at a minimum includes a list of licensed placements in waiting equal to at least 62 percent of the capacity threshold at which an influx facility can be utilized. The commenter further stated such a list should include pre-vetted temporary family foster care and small group home options. One commenter suggested a proactive approach by ORR to address potential influx situations, ensuring readiness for accommodating children.

Response: ORR thanks the commenter for their recommendation. ORR notes that it annually reviews its contingency plans based on the actual and anticipated number of unaccompanied children referrals to monitor available resources in light of expected needs. Further, the current scale of the UC Program, which in recent years has experienced around 120,000 referrals of unaccompanied children per year, is significantly greater than the situation in 1997 when the FSA was finalized. Given the dramatically changed circumstances since that time, ORR has repeatedly needed to engage in far more extensive contingency planning than was envisioned in 1997. ORR notes that the commenter's calculation of 62 percent of capacity threshold appears to be a reference to FSA paragraph 12C, which required the former INS to have 80 beds available for placement; 80 beds in no longer a meaningful preparedness number in light of current trends in referrals of unaccompanied children to ORR.

Comment: One commenter requested clarification on the population of children meant by ''placement of such facilities of certain unaccompanied children'' at § 410.1800(c)(1) of the NPRM. The commenter recommended that ORR consider serving children together at specialized facilities catering to those who speak certain languages, who are sibling sets, and/or who are turning 18 in fewer than 30 days.

Response: ORR thanks the commenter for their recommendation. By ''certain unaccompanied children,'' ORR means those children ORR determines could be safely and appropriately placed at an EIF, including as consistent with the standards set forth at § 410.1802(a). ORR further clarifies that providers are required to render services in the child's native or preferred language, thus minimizing the need to consider grouping children in specialized facilities based on certain language. With respect to siblings, ORR stated at § 410.1802(b)(1) that a child cannot be placed in an EIF if the child is part of a sibling group with a sibling(s) age 12 years or younger. As a matter of policy, the interactions and interrelationship of the unaccompanied child with the child's parents, siblings, and any other person who may significantly affect the unaccompanied child's well-being must be considered as a factor in determining the child's best interests.

Comment: A few commenters suggested revisions or clarifications to the provisions at § 410.1800(c)(3) for the list of unaccompanied children affected

by the emergency or influx. One commenter stated that this subpart does not explain how this list would be used or whether only children housed at an emergency or influx facility would be included. The commenter further stated that it also does not appear to include all relevant information needed to ensure that it only includes unaccompanied children who meet the criteria at § 410.1802(a). One commenter stated that this list is a creation of ORR and argued that since the extant privacy protections and policies specify the requirements of contractors and grantees, the proposed rule failed to specify which data protections apply to this information. The commenter suggested that ORR specify how long the information in proposed § 410.1800(c)(3) is retained, and whether this information is part of the case file, included in the case file but separate, or altogether separate from the case file.

Response: ORR first notes that this requirement is consistent with Exhibit 3, paragraph 2 of the FSA. ORR also clarifies that the requirements pertaining to maintenance and confidentiality of records apply to the list described at § 410.1800(c)(3) and the use of this list is limited only to ensuring that ORR is aware of the volume of children are placed in an EIF at any given time and is able to timely transfer and place children.

Comment: A few commenters suggested defined timeframes for emergency declarations, citing concerns such as the presence of cold status sites awaiting activation and the changes in capacity facilitated by the IDIQ vehicle which provides access to multiple ICFs/EIS. One commenter recommended that if unlicensed influx facilities are to be utilized, they should be temporarily open for no more than 60 days.

Response: ORR thanks the commenters for their recommendations. ORR agrees that placements in EIFs should be temporary in nature but cannot commit to closing EIFs when they are still needed due to emergency or influx circumstances.

Comment: Several commenters cited concerns with health and safety risks to unaccompanied children in emergency or influx facilities, with one commenter stating that facilities that are overwhelmed pose heightened risks for exploitation, abuse, and mismanagement. A few commenters expressed concern that influx facilities are already failing to meet minimum standards required under State law thus creating health and safety risks and included examples where unaccompanied children have experienced sexual assault, not enough staff to supervise them, not eating throughout the day, or have tested positive for the coronavirus are not being physically separated from others.

Response: ORR thanks the commenters for their concerns. ORR takes reports of such incidents seriously and will continue to be responsive to any information about failing to meet minimum standards in this section and pursuant to the requirements for monitoring all providers under § 410.1303.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1800 as proposed in the NPRM, except that it is clarifying that ORR shall regularly reevaluate the number of standard program placements, and updating § 410.1800(b) to state that ORR shall place each unaccompanied child in a standard program ''as expeditiously as possible,'' not that ORR will ''make all reasonable efforts'' to place each unaccompanied child in a standard program as expeditiously as possible.

Section 410.1801 Minimum Standards for Emergency or Influx Facilities (EIFs)

At § 410.1801(a), ORR notes that in addition to the standards it has for standard programs and restrictive placements, this section provides a set of minimum standards that must be followed for emergency or influx facilities (88 FR 68956 through 68958).

ORR proposed in the NPRM, at § 410.1801(b), a list of minimum services that must be provided to all unaccompanied children in the care of emergency or influx facilities (EIFs), and available at the time of the facility opening. These services, which are consistent with Exhibit 1 of the FSA, would generally apply the same minimum service requirements that apply under the FSA to standard care facilities to emergency or influx facilities. Under § 410.1801(b)(1), these minimum services would require that emergency or influx facilities provide unaccompanied children with proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items. ORR proposed in the NPRM, at § 410.1801(b)(2), that emergency and influx facilities provide unaccompanied children with appropriate routine medical and dental care; family planning services, including pregnancy tests; medical services requiring heightened ORR involvement; emergency healthcare services; a complete medical examination (including screenings for infectious diseases) generally within 48 hours of admission; appropriate immunizations as recommended by the Advisory Committee on Immunization Practices' Child and Adolescent Immunization Schedule and approved by HHS's Centers for Disease Control and prevention; administration of prescribed medication and special diets; and appropriate mental health interventions when necessary.

ORR believes that the unique needs and background of each unaccompanied child should be assessed by emergency or influx facilities to ensure that these needs are being addressed and supported by the emergency or influx facility. Therefore, ORR proposed in the NPRM at § 410.1801(b)(3), and consistent with ORR's existing policy and practice, to require that each unaccompanied child at an emergency or influx facility receive an individualized needs assessment that includes: the various initial intake forms, collection of essential data relating to the identification and history of the child and the child's family, identification of the unaccompanied child's special needs including any specific problems which appear to require immediate intervention, an educational assessment and plan, and an assessment of family relationships and interaction with adults, peers and authority figures; a statement of religious preference and practice; an assessment of the unaccompanied child's personal goals, strengths and weaknesses; 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 connecting the child with family members.

Access to education services for unaccompanied children in care from qualified professionals is critical to avoid learning loss while in care and ensure unaccompanied children are developing academically. Under § 410.1801(b)(4), ORR would require that emergency or influx facilities provide educational services appropriate to the unaccompanied child's level of development and communication skills in a structured classroom setting Monday through Friday, which concentrates on the development of basic academic competencies, and on English Language Training. ORR proposed in the NPRM that, as part of these minimum services for unaccompanied children in emergency or influx facilities, the educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas may

include such subjects as Science, Social Studies, Math, Reading, Writing and Physical Education. The program must provide unaccompanied children with appropriate reading materials in languages other than English for use during leisure time.

ORR strongly believes that time for recreation is essential to supporting the health and well-being of unaccompanied children. ORR proposed in the NPRM, at § 410.1801(b)(5), to require that emergency or influx facilities provide unaccompanied children with activities according to a recreation and leisure time plan that include daily outdoor activity—weather permitting—with at least one hour per day of large muscle activity and 1 hour per day of structured leisure time activities (that should not include time spent watching television). Activities should be increased to a total of 3 hours on days when school is not in session.

The psychological and emotional well-being of unaccompanied children are an important component of their overall health and well-being, and therefore ORR proposed in the NPRM that these needs must be met by emergency or influx facilities. ORR proposed in the NPRM, at § 410.1801(b)(6), emergency or influx facilities would be required to provide at least one individual counseling session per week conducted by trained social work staff with the specific objective of reviewing the child's progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each child. Group counseling sessions are another way that the psychological and emotional well-being of unaccompanied children can be supported while in ORR care. Therefore, ORR proposed in the NPRM under § 410.1801(b)(7), that unaccompanied children would also receive group counseling sessions at least twice a week. As is the case at standard facilities, these sessions are usually informal and take place with all unaccompanied children present. ORR believes that these group sessions would give new children the opportunity to get acquainted with staff, other children, and the rules of the program, as well as provide them with an open forum where everyone gets a chance to speak. Daily program management is discussed, and decisions are made about recreational and other activities. ORR notes that these group sessions would provide a meaningful opportunity to allow staff and unaccompanied children to discuss whatever is on their minds and to resolve problems.

ORR proposed in the NPRM, at § 410.1801(b)(8), emergency or influx facilities would be required to provide unaccompanied children with acculturation and adaptation services, which include information regarding the development of social and interpersonal skills which contribute to those abilities necessary to live independently and responsibly. ORR believes these services are important to supporting the social development and meeting the cultural needs of unaccompanied children in emergency or influx facilities. ORR proposed in the NPRM, at § 410.1801(b)(9), to require that emergency or influx facilities provide a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations, and the availability of legal assistance. In an effort to support each child's spiritual and religious practices, ORR proposed in the NPRM at § 410.1801(b)(10), that emergency or influx facilities would be required to provide unaccompanied children access to religious services of the child's choice whenever possible. At the same time, with respect to the obligations of care provider facilities, ORR notes that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.[312]

ORR proposed in the NPRM at § 410.1801(b)(11) that emergency or influx facilities would make visitation and contact with family members (regardless of their immigration status) available to unaccompanied children in such a way that is structured to encourage such visitation. ORR notes that the staff must respect the child's privacy while reasonably preventing the unauthorized release of the unaccompanied child. ORR proposed in the NPRM, at § 410.1801(b)(12), unaccompanied children at emergency or influx facilities have a reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband. ORR proposed in the NPRM at § 410.1801(b)(13) that unaccompanied children at emergency or influx facilities would be provided services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied child. ORR proposed in the NPRM at § 410.1801(b)(14), emergency or influx facilities be required to provide unaccompanied children with legal services information, including the availability of free legal assistance, and that they may be represented by counsel at no expense to the Government the right to a removal hearing before an immigration judge; the ability to apply for asylum with USCIS in the first instance; and the ability to request voluntary departure in lieu of deportation.

ORR proposed in the NPRM at § 410.1801(b)(15) that emergency or influx facilities, whether State-licensed or not, comply, to the greatest extent possible, with State child welfare laws and regulations (such as mandatory reporting of abuse), as well as State and local building, fire, health and safety codes. If there is a potential conflict between ORR's regulations and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. The proposed rule also stated that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.[313] ORR proposed in the NPRM at § 410.1801(b)(16), emergency or influx facilities deliver services in a manner that is sensitive to the age, culture, native language, and needs of each unaccompanied child. To support this minimum service, emergency or influx facilities would be required to develop an individual service plan for the care of each child. Finally, ORR proposed in the NPRM at § 410.1801(b)(17) that the emergency or influx facility be required to maintain records of case files and make regular reports to ORR. Emergency or influx facilities must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.

ORR proposed in the NPRM at § 410.1801(c), that emergency or influx facilities must do the following when providing services to unaccompanied children: (1) Maintain safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of minors; (2) Provide access to toilets, showers and sinks, as well as personal hygiene items such as

soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items; (3) Provide drinking water and food; (4) Provide medical assistance if the unaccompanied child is in need of emergency services; (5) Maintain adequate temperature control and ventilation; (6) Provide adequate supervision to protect unaccompanied children; (7) separate from other unaccompanied children those unaccompanied children who are subsequently found to have past criminal or juvenile detention histories or have perpetrated sexual abuse that present a danger to themselves or others; (8) Provide contact with family members who were arrested with the unaccompanied child; and (9) Provide access to legal services at § 410.1309 in this rule. ORR notes that these requirements are based in part on standards described in the FSA at paragraph 12A. Although ORR understands these requirements apply specifically to the conditions in DHS facilities following initial arrest or encounter by immigration officers at DHS, nevertheless, because they set out additional safeguards for unaccompanied children, ORR proposed in the NPRM to adopt them for purposes of emergency or influx facilities under this rule. Additionally, consistent with paragraph 12A of the FSA, ORR would transfer an unaccompanied child to another care provider facility if necessary to provide adequate language services. These language access requirements are intended to protect unaccompanied children's interests and ensure that they understand their legal rights and options available to them, the nature of ORR custody and the general ORR principles regarding their care, and that they have access to adequate and effective legal representation if necessary. Many of these services are provided by case managers, who must have a presence onsite at the emergency or influx facility.

ORR proposed in the NPRM at § 410.1801(d), certain scenarios in which ORR may grant waivers for an emergency or influx facility operator, whether a contractor or grantee, from the standards proposed under § 410.1801(b). Specifically, waivers may be granted for any or all of the services identified under § 410.1801(b) if the facility is activated for a period of six consecutive months or less and ORR determines that such standards are operationally infeasible. For example, an emergency or influx facility operator may be unable to provide services at the site within the timeframe required by ORR. ORR determines whether certain standards are operationally infeasible on a case-by-case basis, taking into consideration the circumstances presented by a specific emergency or influx facility. ORR also would require that such waivers be made publicly available.

Comment: A few commenters agreed with the improvements in the minimum standards for standard programs and emergency or influx facilities outlined in the NPRM. One commenter supported the inclusion of requirements that both types of facility provide an individualized needs assessment and an individualized services plan for each child. The commenter likewise supported the requirement that facilities provide services in a manner that is sensitive to the age, culture, native language and needs of each child. The commenter further agreed with requirements that standard programs implement trauma-informed positive behavior management systems, stating the minimum standards represent important protections for unaccompanied children in ORR's care and custody. Another commenter stated that ORR's proposed rule advances its efforts to plan for emergency and influx contingencies in a way that seeks to minimize the impact on children, requiring a higher standard of care than used in past temporary facilities, in particular the Emergency Intake Sites opened in 2021.

Response: ORR thanks commenters for their comments concerning the minimum standard provisions in this section.

Comment: One commenter stated that proposed § 410.1801 offers important protections for unaccompanied children and, if implemented, would help mitigate some of the harms of unlicensed congregate influx facilities documented in HHS Office of the Inspector General and NGO reports. The commenter stated that the minimum standards and services as outlined in the NPRM appear to address many of the challenges they have identified during previous visits to Emergency Intake Sites at the southern border. One commenter also stated agreement that as described, the group counseling sessions and the acculturation and adaptation services provide an opportunity for meaningful dialogue between staff and children and stated the requirement for an individualized needs assessment helps identify and address a child's particular situation and determine whether the child should not be placed in an emergency or influx facility. The commenter also agreed with ORR's requirement that visitation and contact with family members is structured in a way to encourage such visitation helps maintain communication with family members and serves to enhance a child's feeling of connection and safety in a challenging environment. The commenter further agreed that provision of legal services information is always essential, but particularly in a setting which may not be State-licensed.

Response: ORR thanks commenters for their comments.

Comment: One commenter suggested that to avoid confusion regarding what standards to apply to emergency and influx facilities, as opposed to standard programs, ORR remove a listing of minimum standards for emergency and influx facilities instead require EIFs to meet the minimum standards set forth at § 410.1302.

Response: ORR thanks the commenter for their recommendation. ORR clarifies that having a separate provision for EIF minimum standards is appropriate due to the differing operational context when EIFs may be activated (*e.g.,* during influx, natural disaster, or medical emergency). Codifying separate standards enables ORR to require services consistent with the FSA at Exhibit 1, while preserving operational flexibility that is appropriate in times of emergency or influx.

Comment: One commenter expressed concern that the minimum standards for both standard programs and emergency or influx facilities do not address all of the issues for which the States have developed licensing standards for children's residential facilities, including such examples as minimum staff-to-child ratios, specifications as to the size and maintenance of living quarters, children's independence and access to the community, as appropriate, including access to participation in recreational, cultural, and extra-curricular activities outside the facility. The commenter stated that it is not clear whether other requirements subsequently developed by ORR for unlicensed standard programs would be consistent with or address all issues addressed by the States' standards. The commenter recommended that the minimum standards and any other requirements that ORR develops for standard programs and emergency or influx facilities address the issues for which the States have developed licensing standards, including but not limited to the examples identified above. The commenter suggested that ORR look to the States' licensing standards and requirements for guidance in developing and elaborating its own standards.

Response: ORR thanks the commenter for their concerns. Traditionally, emergency or influx facilities are not State-licensed since placements are made under exceptional circumstances and intended to be temporary in duration. Also, under its terms, the FSA did not contemplate that Exhibit 1 standards would apply to emergency or influx facilities. Nevertheless, in this final rule ORR goes beyond the requirements of the FSA to define minimum standards specific to emergency or influx facilities in this section that are similar to those described at Exhibit 1 and at § 410.1302 of this rule, to strengthen protections for unaccompanied children and ensure that they receive specified services.

Comment: Several commenters disagreed with the inclusion of unlicensed facilities in the operation of influx or emergency intake sites and stated that such facilities should be required to meet the same minimum standards for licensed facilities under this section, or should be required to be State-licensed, or conform to State licensure requirements even in influx or emergency circumstances to the greatest extent possible. One commenter suggested that ORR should revise the proposed rule to clearly require that standard programs and emergency and influx programs meet both ORR requirements and applicable State laws and regulations. One commenter urged ORR to revise § 410.1801 to require that an emergency or influx facility be licensed by an appropriate State agency if State licensure is available. One commenter suggested that Federal preemption language be followed by qualifying language stating: (1) State licensure is required, and (2) if a conflict between ORR's policies or regulations and State law arises, the State-licensed program must still follow State licensure requirements.

Response: ORR thanks the commenters for their recommendations. ORR declines to require EIFs to be state-licensed because it may be essential for emergency or influx facilities to operate in exceptional circumstances in which it is not possible to attain State licensure. ORR further notes that the FSA does not require facilities operated in response to emergency or influx conditions to be state-licensed. However, this final rule goes beyond the requirements of the FSA by establishing a set of minimum standards applicable to EIFs. ORR notes these minimum standards are similar to those described at § 410.1302. Nevertheless, § 410.1302 and § 410.1801 are separate. Section 410.1302 applies to standard programs and secure facilities, and § 410.1801 applies to EIFs. While they bear some similarities, ORR disagrees that all of the minimum standard requirements for the standard programs and secure facilities should apply to emergency or influx sites because the priority for these facilities is to provide essential services to unaccompanied children when time is of the essence. Issues relating to standard programs and secure facilities are addressed at subpart D.

Comment: A few commenters stated that the minimum standards need to provide trauma-based staffing criteria or training of staff at influx facilities, with one commenter specifically stating this should consist of licensed, trained, and trauma-informed child welfare staff who should serve as the initial point of contact for any unaccompanied children at influx facilities. The commenter stated that influx facilities should be prepared to provide culturally and linguistically appropriate trauma informed care and have registered and licensed nursing and other medical and behavioral health professionals onsite. The commenter also emphasized that facilities must be child-centered, trauma-informed, and prioritize children's best interests that expedite their safe release to family. One commenter stated that when opening an emergency or influx facility, it is essential to ensure that staff, many of whom may be newly hired in such a facility, are trained in all aspects of working with and providing services to unaccompanied children.

Response: ORR thanks the commenter for their input. ORR reiterates its belief that a trauma-informed approach to the care and placement of unaccompanied children is essential to ensuring that the interests of children are considered in decisions and actions relating to their care and custody.[314] ORR emphasizes that pursuant to § 410.1801(b)(16) (redesignated as § 410.1801(b)(14) in the final rule), emergency or influx facilities must deliver services in a manner that is sensitive to the age, culture, native language, and complex needs of each unaccompanied child, and must also develop an individual service plan for the care of each child. Furthermore, an individualized needs assessment must be conducted pursuant to § 410.1801(b)(3), which identifies the unaccompanied child's special needs including any specific problems which appear to require immediate intervention. ORR policies prioritize release to an ORR vetted and approved sponsor when release is appropriate as described in subpart C of this rule. ORR believes that, in order to comply with the requirements provided under § 410.1801(b), EIF staff must have the appropriate professional experience and training relevant to working with and providing services to unaccompanied children.

Comment: One commenter expressed concern with the temporary nature of placements in an EIF, stating that any temporary operation inevitably creates confusion and uncertainty for children and staff. The commenter recommended prioritizing the need to appropriately inform children in their preferred language about where they are, who is responsible for them, the reasons for these arrangements, what to expect, and their rights and how to exercise them. The commenter further recommended ensuring services that interface with children and impact their length of stay, such as case management, are in place from the outset, arguing that this is critical to managing children's right to information, their expectations, and planning for release from custody and unification with family. The commenter stated that children should not be placed in a temporary care arrangement that does not have a plan in place to manage their eventual release.

Response: ORR thanks the commenter for their recommendations. ORR agrees that minimizing transfers is in the child's best interest and therefore seeks to place children in emergency intake sites and influx care facilities only when there are exceptional circumstances and only for children that meet the criteria for placement in an EIF described in this section as discussed in previous responses. ORR notes that at § 410.1801(b)(3), EIF sites are required to perform individualized needs assessment, which includes the various initial intake forms, identification of the unaccompanied child's special needs including any specific problems which appear to require immediate intervention, and an educational assessment and plan; and a statement of religious preference and practice; an assessment of the unaccompanied child's personal goals, strengths and weaknesses. ORR agrees with one of the commenter's recommendations that some provisions within § 410.1801(b)(3) that involve planning for release from custody and unification with family should be available at the outset at EIFs and thus be non-waivable. As a result, ORR will move the provision of ''Services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied child'' out of § 410.1801(b)(3) and place it into the newly designated § 410.1801(c)(10) as a non-waivable provision, while

adding ''Family unification'' before ''Services'' at the beginning of the sentence. Relatedly, ORR will update § 410.1801(b)(3) by removing the provisions of ''collection of essential data relating to the identification and history of the child and the child's family''; ''assessment of family relationships and interaction with adults, peers and authority figures''; and ''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 connecting the child with family members'' from 410.1801(b)(3) and place them into the newly designated 410.1801(c)(11) as a non-waivable provision. ORR also notes that it is updating § 410.1801(b)(3) to include consideration of whether a child is an indigenous language speaker as part of the individualized needs assessment. ORR further agrees with commenter recommendations to ensure that children understand services that they will interface with, as well as understand their right to information and expectations. ORR will therefore move what was previously § 410.1801(b)(9) (''A comprehensive orientation regarding program intent, services, rules (written and verbal), expectations, and the availability of legal assistance.'') to the newly designated § 410.1801(c)(12) as a non-waivable provision and add a clarifying edit that this orientation will include information about U.S. child labor laws to conform with language in § 410.1302(c)(8)(iii). Additionally, § 410.1801(b)(16) (redesignated as § 410.1801(b)(14) in the final rule) requires that EIFs develop an individual service plan for each child. ORR believes these requirements, as well as other requirements under § 410.1801(b), will ensure appropriate interfacing with children to keep them informed of their rights regarding placement and available services.

Comment: One commenter stated that under § 410.1801(b)(1), the nutrition standards should mirror those for standard programs and be consistent with USDA recommendations.

Response: ORR thanks the commenter for their input. ORR believes that while the requirement for nutrition standards consistent with USDA recommendations is established for standard programs under § 410.1302(c), ORR must consider the circumstances requiring placement in an emergency or influx facility and the need to meet more immediate care for needs during periods of influx or emergency such as adequate shelter, health and safety, and provision of other required services for facilities where housing is meant to be temporary. However, ORR agrees with the commenter that further specificity is needed and is therefore updating § 410.1801(b)(1) to clarify that EIFs shall provide sufficient quantity of food that is appropriate for children, as well as drinking water. Although ORR requires the provision of food and drinking water in emergency or influx facilities at § 410.1801(c)(3), this may preclude the availability of food menus and the type of variety and quality ORR would normally require. ORR will continue to monitor these requirements as they are implemented and may consider providing additional specificity through future policymaking.

Comment: One commenter stated the concern that many children in emergency or influx facilities may be proficient in neither English nor Spanish, and therefore recommended provision of alternative language services.

Response: ORR thanks the commenter for their concern. ORR is clarifying that it will always require the provision of services under this subpart in a child's native or preferred language. ORR also notes that it is updating § 410.1801(b)(3) to include consideration of whether a child is an indigenous language speaker as part of the individualized needs assessment. ORR further notes that at § 410.1802(a) criteria for placement in an emergency or influx facility to the extent feasible include that the child speaks English or Spanish as their preferred language. If ORR becomes aware that a child does not meet any of the criteria at any time after placement into an emergency or influx facility, ORR shall transfer the unaccompanied child to the least restrictive setting appropriate for that child's need as expeditiously as possible.

Comment: One commenter stated that the inclusion of educational services is necessary to ensure that children are actively engaged and learning while at an emergency or influx facility. A few commenters stated that education services described in § 410.1801(b)(4) should be focused on English immersion, with one commenter suggesting to concentrates primarily on the integration of the child into a routine of education attendance and on foundational English language learning rather than on development of basic academic competencies.

Response: ORR thanks the commenters for their input. ORR notes that English language acquisition is already stated as a consideration for providing educational services at § 410.1801(b)(4). ORR also believes, however, that instructing children in basic academic areas such as science, social studies, math, reading, writing, and physical education should be a consideration. Instruction is required to be given under this section in such languages as needed so that children do not miss critical instruction appropriate for the child's level of development and communication skills.

Comment: One commenter suggested that group counseling at § 410.1801(b)(7) should be better defined, stating that group counseling should not include everyone at the site but should be much smaller groups based on age and other criteria. Furthermore, the commenter stated that greater attention is needed to clarify and clearly state the purpose and scope of mental health services in ORR programs.

Response: ORR thanks the commenter for their input. In relation to group counseling, ORR notes that since these sessions are required to take place twice per week, children have options as to which session to attend and may establish their own preferences based on age of those in attendance and other criteria. However, ORR believes it is important to allow all unaccompanied children to attend this open forum to speak about decisions that affect them such as daily program management and to get acquainted with staff. Given the limited nature and availability of such sessions and limited capacity of emergency or influx facilities, ORR believes that excluding certain children from some sessions to establish specialized groupings may be unfair or infeasible. ORR notes that it is updating § 410.1801(b)(7) to more closely align with the language at § 410.1302(c)(6), which may provide additional flexibility for EIFs to facilitate group counseling sessions in a way that is appropriate to the unaccompanied children in their care.

Comment: One commenter recommended that ORR focus mental health services on stabilization, acculturation, and psychoeducation to mitigate future risks due to the duration of the vast majority of stays in ORR programs. To support this, the commenter recommended to change the language from ''counseling session'' to ''adjustment support'' with trained mental health staff. The commenter asserted that ''counseling session'' implies a solution-focused service that cannot be reasonably accomplished in such a short time period, while adjustment support implies to provide transitional well-being support and individualized advocacy sounds more feasible.

Response: ORR thanks the commenter for their input. ORR notes that ''counseling session,'' conforms to the language in the FSA and therefore ORR disagrees with the recommended change in terms. ORR further notes that acculturation and adaptation services are described in the next subparagraph at § 410.1801(b)(8) and provides for the development of social and interpersonal skills which contribute to those abilities necessary to live independently and responsibly. The focus of such individual counseling sessions is to establish objectives and review progress, and address both the developmental and crisis-related needs of each child. The provisions in this section do not prescribe certain methods for mitigation of risks, but rather require trained social work professionals to evaluate and address individualized needs on a case-by-case basis.

Comment: One commenter recommended that proposed § 410.1801(b)(15), governing emergency or influx facilities, be revised as follows: ''(15) Emergency or influx facilities, whether State-licensed or not, must comply, to the greatest extent possible, with all applicable State child welfare laws, and regulations (such as mandatory reporting of abuse), and standards, as well as State and local building, fire, health and safety codes, that ORR determines are applicable to non-State licensed facilities.''

Response: ORR thanks the commenter for their recommendation, and notes that it is updating § 410.1801(b)(15) (redesignated as § 410.1801(b)(13) in the final rule) to specify ''all'' State child welfare laws and regulations, and ''all'' State and local building, fire, health and safety codes, as applicable to non-State licensed facilities.

Comment: One commenter sought clarification on accountability systems under § 410.1801(b)(17) (redesignated as § 410.1801(c)(13) in the final rule), stating that it is unclear how this section specific to emergency or influx facilities should be integrated with similar requirements of all care providers described at § 410.1303(g) through (h) as proposed in the NPRM (which includes emergency facilities). The commenter recommended that if ORR intends to use this subsection to emphasize that emergency or influx facilities are subject to the minimum requirements of proposed § 410.1303(g) or the proposed consolidated section on data safeguarding, it should add a cross reference and that if some other meaning is intended, ORR should clarify the text of proposed § 410.1801(b)(17) (redesignated as § 410.1801(c)(13) in the final rule).

Response: ORR thanks the commenter for their recommendation. ORR notes that § 410.1303(h) (proposed in the NPRM as § 410.1303(g)) explicitly applies to all care provider facilities responsible for the care and custody of unaccompanied children, whether the program is a standard program or not. This includes emergency or influx facilities. ORR refers readers to paragraph § 410.1303(h) for requirements and standards for safeguarding a child's case file. ORR notes that § 410.1801(b)(17) (redesignated as § 410.1801(c)(13) in the final rule) only applies to facilities that meet the definition of an EIF under this rule and although it reads similarly in part to § 410.1303(i) for maintaining records of case files and regularly reporting to ORR, an important distinction for non EIFs is the exclusion of language stating ''permit ORR to monitor and enforce the regulations in this part'' since not all regulations in this part apply to emergency or influx facilities.

Comment: One commenter recommended that § 410.1801(b)(17) (redesignated as § 410.1801(c)(13) in the final rule) explicitly outline that children's artistic works should not become a part of the official case file, and there is no requirement to retain them.

Response: ORR thanks the commenter for their recommendation. ORR does not believe an amendment to the final rule is necessary, as no part of the rule or prior guidance states or implies that artistic works be part of the child's official case file.

Comment: One commenter suggested that § 410.1801(c)(4) should provide pediatric medical care to the unaccompanied child instead of limiting this to ''if the unaccompanied child is in need of emergency services,'' stating that as medical care should be provided whenever needed, not just in emergency circumstances. The commenter also recommended adding a requirement to maintain full-time pediatric medical expertise on site.

Response: ORR thanks the commenter for their recommendation. ORR notes that appropriate routine medical and dental care is among the required services at § 410.1801(b)(2) and emergency services are specified at § 410.1801(c)(4) to ensure that children have access to emergency medical services. ORR notes that ensuring full-time pediatric medical expertise is on site is not necessary to ensure routine medical and dental needs are met and would exceed the requirements for both licensed and unlicensed emergency or influx facilities under the FSA. However, ORR will make a clarifying revision to § 410.1801(c)(4) that modified medical examinations are non-waivable at EIFs.

Comment: One commenter stated that § 410.1801(d) does not make clear what factors will be used to determine whether the standards are operationally infeasible and what law is referenced. The commenter suggested that clearer guidelines should be provided, and that a waiver should only be granted in extreme situations. Another commenter expressed concern that the waiver language was too broad and recommended that the provision be amended or withdrawn.

Response: ORR thanks the commenters for their input. ORR notes that, consistent with existing policies, which implement Congressional appropriations requirements,[315] ORR may grant a waiver of one or more standards in this subsection only if the facility has been activated for a period of six consecutive months or less; further, ORR would consider which standards may be operationally infeasible on a case-by-case basis. ORR does not agree that no waivers should be permitted or that a waiver should be granted only in extreme circumstances, because this language is potentially ambiguous and extreme circumstances are likely to exist in many situations giving rise to placement in an emergency or influx facilities. Instead, ORR believes waivers should be limited to situations where one or more standards are in fact operationally infeasible and only for facilities that are activated for a period of 6 consecutive months or less. ORR believes that this will limit the volume and scope of waivers granted under this subsection. However, ORR has revised the language of § 410.1801(d) to clarify that while waivers may be granted during the first six months of EIF activation, these waivers will only be granted to the extent that ORR determines that they are necessary because it would be operationally infeasible to comply with the specified standards. Further, waivers will be granted for no longer than necessary in light of operational feasibility. Finally, ORR is also adding language at § 410.1801(d) to state that, even where a waiver is granted, EIFs shall make all efforts to meet requisite standards under § 410.1801(b) as expeditiously as possible.

Comment: One commenter expressed concern that the rule does not explain how ORR will provide oversight to emergency or influx facilities or ensure that such facilities comply with ORR's standards and with State law. The commenter recommended that ORR

implement a more comprehensive regime for Federal oversight of unlicensed facilities housing unaccompanied children where a State will not be providing oversight, including EIFs. The commenter recommended that ORR adopt additional monitoring and enforcement functions for facilities that are not State-licensed such as requirements for: inspection, screening, and documentation, criminal and child abuse and neglect background checks, frequency of monitoring visits and evaluations receiving, investigating, and responding to complaints; enforcement of standards. The commenter urged ORR to allocate sufficient staffing and other resources to ensure that oversight of any unlicensed facilities is as robust as that which would otherwise have been provided by the State in which the facilities are located.

Response: ORR thanks the commenter for their recommendations. ORR notes that, as stated in § 410.1303, it will monitor all care provider facilities, including unlicensed standard programs and EIFs for compliance with the terms of the regulations in parts 410 and 411 of this title. With respect to the specific recommendations made by the commenters, ORR notes: regarding inspection, screening, and documentation, such requirements are already built into the ORR grant and contracting process through which grantees and contractors are selected to operate care provider facilities, whereby care providers agree to such requirements under ORR policies and as consistent with 45 CFR part 75; regarding background checks for EIF staff, ORR notes that, like standard programs, EIFs are subject to requirements set forth at 45 CFR 411.16; regarding frequency of monitoring visits and evaluations and responding to complaints, ORR notes that it would conduct enhanced monitoring of EIFs; regarding investigating and responding to complaints, ORR notes that the requirements established at § 410.1303(f) apply to EIFs; and regarding establishing a framework for the enforcement of standards at EIFs, ORR notes that § 410.1303 establishes such a framework, which is in addition to other established enforcement mechanisms such as those described at 45 CFR 75.371.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed in the NPRM with the following changes. ORR is making clarifying edits at § 410.1801(b)(1) to specify that proper physical care and maintenance includes providing children with a sufficient quantity of food and drinking water, replacement of ''special needs'' with ''individualized needs'' at § 410.1801(b)(3), addition of whether the child is an indigenous language speaker at § 410.1801(b)(3), removal of ''in the residential facility, group or foster home'' at § 410.1801(b)(11), replacement of ''deportation'' with ''removal'' at § 410.1801(b)(12), addition of the word ''all'' in reference to complying with State child welfare laws and regulations to the greatest extent possible at § 410.1801(b)(15) (redesignated to § 410.1801(b)(13)), and addition of the word ''complex'' at § 410.1801(b)(16) (redesignated to § 410.1801(b)(14)) to more closely align with the language at § 410.1302(d). ORR is also updating § 410.1801(b)(7) to more closely align with the language at § 410.1302(c)(6). As a result of the changes discussed in this final rule action, ORR is redesignating § 410.1801(b)(10) as § 410.1801(b)(9), § 410.1801(b)(11) as § 410.1801(b)(10), § 410.1801(b)(12) as § 410.1801(b)(11), § 410.1801(b)(14) as § 410.1801(b)(12), § 410.1801(b)(15) as § 410.1801(b)(13), and § 410.1801(b)(16) as § 410.1801(b)(14). ORR is further updating § 410.1801(b)(3) by moving the provision of ''Services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied child'' from § 410.1801(b)(3) and placing it in the newly designated § 410.1801(c)(10) as a non-waivable provision, while also adding ''Family unification'' before ''services'' at the beginning of the sentence. ORR is also updating § 410.1801(b)(3) by removing the provisions of ''collection of essential data relating to the identification and history of the child and the child's family''; ''assessment of family relationships and interaction with adults, peers and authority figures''; and ''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 connecting the child with family members'' from § 410.1801(b)(3) and placing them into the newly designated § 410.1801(c)(11) as a non-waivable provision. ORR is also moving what was previously § 410.1801(b)(9) (''A comprehensive orientation regarding program intent, services, rules (written and verbal), expectations, and the availability of legal assistance.'') to the newly designated § 410.1801(c)(12) and adding a clarifying edit that this orientation will include ''information about U.S. child labor laws'' to conform with language in § 410.1302(c)(8)(iii)). Additionally, ORR is updating § 410.1801(b)(15) (redesignated to § 410.1801(b)(13)) to remove language regarding the obligation of ORR employees to comply with their responsibilities under Federal law where there is a potential conflict between State and Federal law. ORR is moving the provision that was proposed previously at § 410.1801(b)(17) in the NPRM (''The EIF shall maintain records of case files and make regular reports to ORR. EIFs must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.'') into the newly designated § 410.1801(c)(13) so that the provision is non-waivable for EIFs. ORR is also replacing ''arrested'' with ''apprehended'' at § 410.1801(c)(7). ORR is updating § 410.1801(c)(9) to correctly refer to § 410.1309(a). Additionally, ORR is making clarifying edits to § 410.1801(d), including the addition of ''waivers are granted in accordance with law,'' as well as clarifying edits to make clear how long waivers may last, to what extent, and to which parts waivers may apply. ORR is also revising § 410.1801(c)(4) to add ''and provide a modified medical examination'' after ''services.'' Finally, ORR is adding language at § 410.1801(d) to state that, even where a waiver is granted, EIFs shall make all efforts to meet requisite standards under § 410.1801(b) as expeditiously as possible.

Section 410.1802 Placement Standards for Emergency or Influx Facilities

ORR proposed in the NPRM at § 410.1802 to codify the criteria and requirements for placement of unaccompanied children at emergency or influx facilities (88 FR 68958). These requirements are consistent with existing ORR policies.[316]

ORR proposed in the NPRM at § 410.1802(a), that, to the extent feasible, unaccompanied children who are placed in an emergency or influx facility meet all of the following criteria: the child (1) is expected to be released to a sponsor within 30 days; (2) is age 13 or older; (3) speaks English or Spanish as their preferred language; (4) does not have a known disability or other mental health or medical issue or dental issue requiring additional evaluation, treatment, or monitoring by a healthcare provider; (5) is not a pregnant or parenting teenager; (6) would not have a diminution of legal services as a result of the transfer to an unlicensed facility; and (7) is not a

danger to themselves or to others (including not having been charged with or convicted of a criminal offense). Additionally, if ORR becomes aware that a child does not meet any of the criteria specified under § 410.1802(a) at any time after placement into an emergency or influx facility, ORR shall transfer the unaccompanied child to the least restrictive setting appropriate for that child's need as expeditiously as possible. ORR believes that these criteria will help to ensure that the unaccompanied child is placed in a setting that is appropriate to accommodate the child's specific needs.

ORR proposed in the NPRM at § 410.1802(b) that it would also consider the following factors for the placement of an unaccompanied child in an EIF: (1) the unaccompanied child should not be part of a sibling group with a sibling(s) age 12 years or younger; (2) the unaccompanied child should not be subject to a pending age determination; (3) the unaccompanied child should not be involved in an active State licensing, child protective services, or law enforcement investigation, or an investigation resulting from a sexual abuse allegation; (4) the unaccompanied child should not have a pending home study; (5) the unaccompanied child should not be turning 18 years old within 30 days of the transfer to an emergency or influx facility; (6) the unaccompanied child should not be scheduled to be discharged in three days or less; (7) the unaccompanied child should not have a current set docket date in immigration court or State/family court (juvenile included), not have a pending adjustment of legal status, and not have an attorney of record or DOJ Accredited Representative; (8) the unaccompanied child should be medically cleared and vaccinated as required by the emergency or influx care facility (for instance, if the influx care facility is on a U.S. Department of Defense site); and (9) the unaccompanied child should have no known mental health, dental, or medical issues, including contagious diseases requiring additional evaluation, treatment, or monitoring by a healthcare provider. ORR believes that these provisions will help support the safe and appropriate placement of unaccompanied children in ORR care. For purposes of this final rule, ORR further clarifies that these categories of children, to include particularly vulnerable children and children likely to have extended lengths of stay, would be prioritized for initial placement in standard programs as opposed to EIFs; they would also be prioritized for transfer to standard programs if currently placed at EIFs.

Comment: One commenter expressed concern that transfers between care provider facilities are a barrier to care for the child, given the delays that can be experienced from transfers. The commenter recommended ORR implement an emergency placement system for children with exceptional needs and that intakes should have 24 hours to place that child with a safe and appropriate program. The commenter further suggested that if a child is placed in an ICF but is then found to not meet ICF placement criteria, the child's placement into an appropriate facility should be considered under the same criteria as a border placement. The commenter suggested that the ORR Intakes team would obtain jurisdiction and assign the child to an appropriate program in a manner similar to how ORR Intakes placed children arriving from the border and that placement responsibility would not fall on the ICF.

Response: ORR notes that at § 410.1802(a), ORR shall transfer the unaccompanied child to the least restrictive setting appropriate for that child's need as expeditiously as possible if the child is found not to have made the specific criteria stated therein for placement at an EIF.

Comment: One commenter stated that under § 410.1802(a)(4) of the NPRM, it was unclear which healthcare professionals determine eligibility for having a known disability or other mental health or medical issue—including pregnancy—or dental issue requiring additional evaluation, treatment, or monitoring by a healthcare provider. The commenter recommended that ORR medical staff be the ones to complete this assessment and it is preferable for ORR staff to be onsite at DHS and aiding in this determination as transfers of unaccompanied children between programs is disruptive for the child and that steps should be taken to minimize the number of transfers of unaccompanied children between ORR facilities. The commenter further expressed concern regarding ORR's ability to accurately make the assessment of all the criteria for over 100,000 children under proposed § 410.1802(a).

Response: ORR thanks the commenter for their concerns, and first clarifies that CBP personnel are not involved in placing unaccompanied children in EIFs. Further, ORR understands that when transferring unaccompanied children CBP relays available information, which may come from a variety of sources (*e.g.,* including officer observations, contracted medical care providers, or existing CBP records). After an unaccompanied child is transferred into ORR custody, pursuant to its authority under the HSA, ORR makes all placement decisions. ORR agrees that it is necessary to have information to make appropriate placement determinations for children, and bases decisions to place an unaccompanied child in an EIF on the criteria described in this section, information in the child's case file, and, if the child is being transferred into an EIF from another ORR care provider facility, recommendations from the child's previous case manager as well as an independent reviewer and ORR Federal field staff. In addition, consistent with existing policies, ORR does not place particularly vulnerable children in EIFs (*e.g.,* children 12 years of age or younger; children who are not proficient in English or Spanish; children who have a known disability or other mental health or medical issue requiring additional evaluation, treatment, or monitoring by a healthcare provider; pregnant or parenting teenagers; children who are at a documented enhanced risk due to their identification as LGBTQI+). If a child is placed into an EIF as an initial placement and as a result lacks records sufficient to indicate particular vulnerability (*i.e.,* immediately upon transfer into ORR custody from another Federal agency), ORR screens such children for the particular vulnerabilities within 5 days of EIS placement and continues to monitor children for particular vulnerabilities thereafter.

Comment: One commenter questioned why children turning 18 within 30 days of the transfer should be excluded from placement at an ICF, stating that an unaccompanied child who is within 30 days of turning 18 and has a potential sponsor who is a parent or legal guardian would be best served at an ICF due to the short length of stay. Another commenter recommended that an unaccompanied child only be placed in an EIF if they are more than 90 days from turning 18 years old, not more than 30 days as contemplated by § 410.1802(b)(5) of the NPRM.

Response: ORR thanks commenters for their input. ORR notes that under § 410.1802(a)(1), the expectation that an unaccompanied child will be released to a sponsor within 30 days is a factor in favor of transfer into an EIF, because in this way, in the event of an emergency or influx, ORR can prioritize placement in standard programs for children potentially may need to stay in ORR custody for a longer period (88 FR 68958). With respect to unaccompanied

children who are expected to be released to a sponsor within 30 days, but who are also within 30 days of turning 18, ORR notes that it would determine placement on a case-by-case basis, consistent with its responsibility to place unaccompanied children in the least restrictive setting that is in the best interest of the child—which requires an individualized determination based on a totality of factors. Because ORR favors placing unaccompanied children in EIFs whom it expects can be released without complications that would typically delay release, ORR does not believe at this time that it is necessary to update its proposed 30-day criteria for unaccompanied children who are close to turning 18.

Comment: One commenter requested clarification regarding whether § 410.1802(b)(8) requires that children be fully vaccinated prior to being placed at an ICF.

Response: ORR clarifies that this paragraph refers to criteria that ORR shall use to determine transfer from an EIF and not requirements to be placed into an EIF. Regarding vaccination, if the specific EIF site requires the child be medically cleared or vaccinated [317] and ORR finds out this condition has not been met, rather than requiring children to conform to the facility, ORR shall transfer the unaccompanied child to another standard program of appropriate non-EIF facility based on the individualized needs of the child as expeditiously as possible.

Final Rule Action: After consideration of public comments, ORR is finalizing this section with the following modification to clarify at § 410.1802(b)(7), so that it now reads, ''The unaccompanied child should not have a current set date in immigration court or State/family court (juvenile included), and not have an attorney of record or DOJ Accredited Representative.'' ORR is otherwise finalizing this section as proposed in the NPRM with the additional clarifications described above.

Subpart J—Availability of Review of Certain ORR Decisions

Section 410.1900 Purpose of This Subpart

Ensuring that placement decisions involving restrictive placements,[318] such as decisions to place unaccompanied children in a restrictive placement, to step-up a child to a more restrictive level of care, to step-down a child from one restrictive placement to another (*e.g.,* from secure to a heightened supervision facility), or to continue to keep a child in a restrictive placement, are subject to review is fundamental to ensuring unaccompanied children are placed in the least restrictive setting that is in their best interest while also considering the safety of others and runaway risk. ORR believes that establishing the availability of regular administrative reviews helps ensure, for the relatively few unaccompanied children that are placed in restrictive placements, that such placement is appropriate and based on clear and convincing evidence, as discussed in subpart B. In the NPRM, ORR noted that its proposals in this subpart are consistent with the preliminary injunction issued on August 30, 2022, in *Lucas R.* v. *Becerra,* as discussed in section III.B.4. of this final rule. ORR proposed in the NPRM at § 410.1900 that the purpose of this subpart is to describe the availability of review of certain ORR decisions regarding the care and placement of unaccompanied children (88 FR 68958 through 68959).

Final Rule Action: No public comments were received on this section. ORR is finalizing its proposal as proposed.

Section 410.1901 Restrictive Placement Case Reviews

ORR is required under the TVPRA to place unaccompanied children in the least restrictive setting that is in their best interests, and in making placements may consider danger to self, danger to the community, and runaway risk.[319] ORR believes that this requirement entails consideration of the safety of individual unaccompanied children whom it places, as well as the other unaccompanied children who have already been placed at the same care provider facility. ORR continually and routinely assesses whether an unaccompanied child's placement in a restrictive placement meets the criteria for such placements as discussed in § 410.1105 Criteria for Placing an Unaccompanied Child in Restrictive Placement. ORR proposed in the NPRM, at § 410.1901(a), in all cases involving restrictive placements, ORR would determine, based on clear and convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement (88 FR 68959). ORR further proposed a requirement that the evidence supporting a restrictive placement decision be recorded in the unaccompanied child's case file.

ORR believes that it is imperative that unaccompanied children placed in restrictive placements understand the reasons for their placement and their rights, including their right to contest such a placement and their right to counsel. Therefore, ORR proposed in the NPRM at § 410.1901(b), to require that a written Notice of Placement (NOP) be provided to unaccompanied children no later than 48 hours after step-up to a restrictive placement, as well as at least every 30 days an unaccompanied child remains in a restrictive placement (88 FR 68959). ORR notes that whenever possible, ORR seeks to provide NOPs in advance of a step-up to a restrictive placement. ORR further proposed requiring that the NOP clearly and thoroughly set forth the reason(s) for placement and a summary of supporting evidence under § 410.1901(b)(1); inform the unaccompanied child of their right to contest the restrictive placement before the Placement Review Panel (PRP) upon receipt of the NOP, the procedures by which the unaccompanied child may do so, and all other available administrative review processes under § 410.1901(b)(2); and include an explanation of the unaccompanied child's right to be represented by counsel in challenging such restrictive placements under § 410.1901(b)(3). Finally, to ensure that the unaccompanied child understands the information provided under this paragraph, ORR proposed in the NPRM that a case manager would be required to explain the NOP to the unaccompanied child, in the child's native or preferred language, depending on the child's preference, and in a way the child understands, under § 410.1901(b)(4). ORR notes that communications with unaccompanied children would be required to meet ORR's language access standards under § 410.1306.

As part of ensuring that unaccompanied children are informed regarding their restrictive placement, it is critical that any legal counsel or other representative or advocate, and a parent or guardian for an unaccompanied child also receive such notification. Therefore, ORR proposed in the NPRM at § 410.1901(c), to require that the care provider facility provide a copy of the NOP to the unaccompanied child's legal counsel of record, legal service provider, child advocate, and to a parent or legal guardian of record, no later than 48 hours after step-up, as well as every 30 days the unaccompanied child remains in a restrictive placement (88 FR 68959 through 68960). ORR notes that this requirement may be subject to specific child welfare-related exceptions.

ORR believes that placements of unaccompanied children in restrictive placements should be routinely assessed

to ensure they meet the criteria at § 410.1105. If an unaccompanied child does not meet such criteria, they should accordingly be stepped down to a placement that is the least restrictive setting that is in their best interest, prioritizing their safety and the safety of others. ORR proposed in the NPRM, at § 410.1901(d), to establish regular administrative reviews for restrictive placements (88 FR 68960). ORR proposed in the NPRM regular intervals for administrative reviews depending on the type of restrictive placement: 30-day, at minimum, for all restrictive placements under § 410.1901(d)(1); and more intensive 45-day reviews by ORR supervisory staff for unaccompanied children in secure facilities, under proposed § 410.1901(d)(2).[320] For unaccompanied children in RTCs, the 30-day review at proposed § 410.1901(d)(1) would be required to involve a psychiatrist or psychologist to determine whether the unaccompanied child should remain in restrictive residential care, under § 410.1901(d)(3). ORR welcomed public comment on these proposals.

Comment: One commenter recommended adding to § 410.1901(b)(2) that the Notice of Placement (NOP) would inform the child of available administrative review processes in their language of preference.

Response: ORR agrees that children should be informed in their native or preferred language consistent with its language access requirements under § 410.1306 and is therefore revising § 410.1901(b) to state that ORR shall provide an unaccompanied child with a Notice of Placement (NOP) ''in the child's native or preferred language.''

Comment: Related to unaccompanied children with disabilities, one commenter recommended that § 410.1901(a) should require clear and convincing evidence that a child cannot be placed in a less restrictive facility with additional accommodations or services.

Response: ORR agrees and is finalizing at § 410.1105(d) that ORR's determination whether to place an unaccompanied child in a restrictive placement shall include consideration of whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the child to be placed in that less restrictive facility. ORR agrees that evidence of such consideration should be documented in the child's case file, consistent with section 504. ORR is also finalizing at § 410.1105(d) that ORR's consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placements shall also apply to transfer decisions under § 410.1601 and will be incorporated into restrictive placement case reviews under § 410.1901. ORR notes, however, that consistent with its finalized proposal at § 410.1311, it is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. ORR notes further that the final rule incorporates a clear and convincing requirement at § 410.1901(a), and that it is correcting a technical error to replace ''In all cases involving placement in a restrictive setting'' with ''In all cases involving a restrictive placement'' in order to use the defined term ''restrictive placement.'' Lastly, ORR is clarifying that the burden to determine if sufficient grounds exists rests on ORR by adding the phrase ''have the burden to'' to § 410.1901(a) so that it states ''In all cases involving placement in a restrictive placement, ORR shall have the burden to determine, based on clear and convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement.''

Comment: One commenter expressed concern about the unaccompanied child's and their attorney's access to the evidence related to the restrictive placement decision under § 410.1901(a), noting that it is critical that the child and their counsel have access to any relevant document in advance of a PRP hearing when one is requested.

Response: ORR agrees that an unaccompanied child and their attorney of record must have access to relevant documents in advance of the PRP hearing, and notes that ORR is requiring that a summary of evidence supporting the restrictive placement be provided with the NOP under § 410.1901(b)(1). Under § 410.1902(b), ORR shall permit the unaccompanied child or their counsel to review the evidence in support of step-up or continued restrictive placement before the PRP review is conducted.

Comment: Several commenters recommended that ORR provide NOPs in advance of a step-up to a restrictive placement, stating their belief that this would better align with child welfare principles and external standards, provide unaccompanied children the opportunity to challenge the step-up, and provide unaccompanied children an understanding of what is happening before the step-up occurs and of the justification for the step-up decision. Several commenters who recommended ORR provide NOPs in advance of a step-up to a restrictive setting stated they believe unaccompanied children should have the opportunity to challenge the step-up, and the reasons for it, before a transfer to the restrictive placement occurs. One commenter argued that the lack of notice and opportunity to be heard before being transferred to a restrictive facility does not comply with international law. Another commenter said that ORR could design and implement an independent hearing process that takes place before the transfer to a restrictive placement happens.

A few of the commenters who recommended that ORR provide advanced notice of step-ups into restrictive placements provided alternatives for consideration. One commenter recommended that ORR establish an exception that ORR could transfer an unaccompanied child to a restrictive placement without prior notice only upon a reasonable belief that the child is a present, imminent danger to self or others. Another commenter recommended ORR, at minimum, incorporate the intent expressed in preamble into the final regulation text that ORR would provide NOPs in advance of a step-up to a restrictive placement whenever possible.

Response: ORR's proposal under § 410.1901(b) to provide the NOP no later than 48 hours after a step-up does not preclude ORR from providing the NOP before the step-up to a restrictive placement occurs when it is safe and appropriate to do so. Thus, as ORR emphasized in the NPRM preamble, ORR seeks to provide NOPs in advance of a step-up to a restrictive placement whenever possible, although ORR is not explicitly stating so in the final rule regulation text (88 FR 68959). ORR agrees that unaccompanied children must understand the reasons for their placement and their rights, including their right to contest such a placement and their right to counsel, and for that reason ORR proposed in the NPRM the requirements under § 410.1901(b)(1) to (4). ORR is finalizing a clarification at § 410.1901(b)(3) that unaccompanied children's right to counsel is ''at no cost to the Federal Government'' for consistency with 8 U.S.C. 1232(c)(5). ORR further notes that its proposals under § 410.1901(b)(1) to (4) are consistent with the *Lucas R.* Court's finding on summary judgment that, ''in light of the important Government interests at stake, as well as the safety of the minors, full pre-deprivation notice and hearing are not constitutionally required.'' [321]

Comment: Regarding § 410.1901(c) in the NPRM, one commenter recommended a clarification that both the attorney at the prior facility or the legal service provider at the new, more restrictive placement receive the NOP 48 hours within a step-up.

Response: ORR clarifies that the NOP shall be provided to the unaccompanied child's attorney of record and LSP, regardless of whether the child has a different attorney of record and LSP at the new, more restrictive placement. Related to notice to the child's parent or legal guardian, and as is consistent with the *Lucas R.* preliminary injunction and ORR's role as the Federal custodian responsible for the care and custody of the child, ORR is adding § 410.1901(c)(1) to state that service of the NOP on a parent or legal guardian shall not be required where there are child welfare reasons not to do so, where the parent or legal guardian cannot be reached, or where a unaccompanied child 14 or over states that the unaccompanied child does not wish for the parent or legal guardian to receive the NOP. Additionally, ORR is finalizing a new provision at § 410.1901(c)(2) to describe child welfare rationales, which include but are not limited to, a finding that the automatic provision of the notice could endanger the unaccompanied child; potential abuse or neglect by the parent or legal guardian; a parent or legal guardian who resides in the United States but refuses to act as the unaccompanied child's sponsor; or a scenario where the parent or legal guardian is non-custodial and the unaccompanied child's prior caregiver (such as a caregiver in home country) requests that the non-custodial parent not be notified of the placement. Finally, ORR is adding § 410.1901(c)(3) to state that when an NOP is not automatically provided to a parent or legal guardian, ORR shall document, within the unaccompanied child's case file, the child welfare reason for not providing the NOP to the parent or legal guardian.

Comment: One commenter urged ORR to conduct reviews of children's restrictive placements within 14 days, rather than the 30-day or 45-day marks proposed under § 410.1901(d) of the NPRM to ensure compliance with its legal obligation under the TVPRA to place children in the least restrictive setting in their best interests. Another commenter supported the proposal for periodic administrative reviews and stated that international standards also require that until the one-month mark after the initial review, there should be a review every seven days so that unaccompanied children have multiple opportunities to be assessed for step-down or release from restrictive facilities.

Response: ORR appreciates the commenters' recommendations. ORR continues to believe that requiring review of all restrictive placements at least every 30 days is a reasonable standard and consistent with the TVPRA at 8 U.S.C. 1232(c)(2)(A). ORR does not believe § 410.1901(d) prevents more frequent reviews when needed. Therefore, § 410.1901(d) states that restrictive placements must be reviewed ''at least'' every 30 days, allowing ORR and its care provider facilities the flexibility to assess placements more frequently as determined appropriate in any given case. As such, ORR believes that the frequency of reviews required under § 410.1901(d) will reasonably allow ORR to determine whether a restrictive placement continues to be warranted.

Comment: One commenter requested that ORR clarify what is meant by ''more intensive'' relating to the 45-day review of placements in secure facilities under § 410.1901(d)(2) of the NPRM.

Response: ORR notes that its proposal in the NPRM at § 410.1901(d)(2) of a 45-day ''more intensive'' review was a technical error. In this final rule, ORR is codifying in the final rule at § 410.1901(d)(2) a ''more intensive'' review every 90 days for unaccompanied children in secure facilities to determine whether the placement in a secure facility continues to be appropriate or whether the child's needs could be met in a less restrictive setting. Ninety days is consistent with current ORR policies, and with ORR policies as they existed at the time the NPRM was published. These 90-day ''more intensive'' reviews are conducted by ORR supervisory staff. Typically, those staff review the child's case file, consult with clinical and healthcare professionals who have examined or treated the child, and discuss the case with the assigned ORR field staff.

Comment: A few commenters recommended that ORR, in its periodic reviews of children in restrictive placements, should require consideration of whether reasonable modifications and auxiliary aids and services would permit a less restrictive placement for an unaccompanied child with disabilities to adequately protect the child's rights.

Response: ORR agrees that periodic reviews should take into consideration whether reasonable modifications and auxiliary aids and services would permit a less restrictive placement for an unaccompanied child with disabilities. Therefore, ORR is adding in new § 410.1105(d) which provides in pertinent part that, for an unaccompanied child with one or more disabilities, restrictive placement case reviews under § 410.1901 shall incorporate consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement.

Comment: One commenter recommended that periodic reviews include additional procedural protections, specifically that the 30-day review of a placement in an RTC or OON RTC facility, as described at § 410.1901(d)(3) of the NPRM, include a detailed and specific review prepared by a qualified, licensed psychologist or psychiatrist of the mental health needs of the child. The commenter included a list of elements that should be required, such as medical assessment of diagnoses, prescriptions, and therapeutic interventions, whether the child continues to be a danger to self or others, explanation of the reasons for continued placement in a restrictive setting, and whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of additional support services or auxiliary aids that would allow the child to be placed in a less restrictive facility.

Response: ORR believes that reviews should be conducted in consultation with a qualified licensed psychologist or psychiatrist, and should contain sufficiently detailed documentation and for that reason incorporated the requirement at § 410.1903(d)(3) for review by a psychiatrist or psychologist for children in restrictive placements in residential treatment centers. ORR notes that the list of elements recommended for the review are consistent with ORR's beliefs, but that ORR declines to adopt them into regulation because it prefers to continue to use and update its existing guidance to provide more detailed requirements for care provider facilities. Lastly, ORR refers the commenter to the discussion at § 410.1105(d) where it is finalizing a requirement to incorporate consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement for children with one or more disabilities.

Final Rule Action: After consideration of public comments, ORR is finalizing its proposal as proposed with revisions at § 410.1901(a) to replace ''In all cases involving placement in a restrictive setting, ORR shall determine'' with ''In all cases involving a restrictive

placement, ORR shall have the burden to determine;'' at § 410.1901(b) to state, ''in the child's native or preferred language;'' at § 410.1901(b)(3) to add ''at no cost to the Federal Government;'' at § 410.1901(c) to replace ''legal counsel'' with ''attorney;'' at § 410.1901(d)(2), to correct a technical error in the NPRM by updating ''45 days'' to ''90 days;'' at § 410.1901(d)(3) to write out residential treatment center instead of ''RTC;'' and at § 410.1901(c), to add the following provisions:

(1) Service of the NOP on a parent or legal guardian shall not be required where there are child welfare reasons not to do so, where the parent/legal guardian cannot be reached, or where an unaccompanied child 14 or over states that the unaccompanied child does not wish for the parent or legal guardian to receive the NOP.

(2) Child welfare rationales include but are not limited to: a finding that the automatic provision of the notice could endanger the unaccompanied child; potential abuse or neglect by the parent or legal guardian; a parent or legal guardian who resides in the United States but refuses to act as the unaccompanied child's sponsor; or a scenario where the parent or legal guardian is non-custodial and the unaccompanied child's prior caregiver (such as a caregiver in home country) requests that the non-custodial parent not be notified of the placement.

(3) When an NOP is not automatically provided to a parent or legal guardian, ORR shall document, within the unaccompanied child's case file, the child welfare reason for not providing the NOP to the parent or legal guardian.

Section 410.1902 Placement Review Panel

ORR believes that unaccompanied children who are placed in a restrictive placement should have the ability to request reconsideration of their placement at any time after receiving an NOP. Consistent with existing policy, under paragraph (a), ORR proposed in the NPRM to convene a Placement Review Panel (PRP) when an unaccompanied child requests reconsideration of their placement in a restrictive placement, for the purposes of reviewing the unaccompanied child's reconsideration request (88 FR 68959 through 68960). As stated in the NPRM, under current practice, the PRP is a three-member panel consisting of ORR's senior-level career staff with requisite experience in child welfare, including restorative justice, adverse childhood experiences, special populations, and/or mental health. ORR proposed in the NPRM at § 410.1902(a), that upon request for reconsideration of their placement in a restrictive placement, ORR would afford the unaccompanied child a hearing before the PRP, at which the unaccompanied child may, with the assistance of counsel if preferred, present evidence on their own behalf. An unaccompanied child could present witnesses and cross-examine ORR's witnesses if such witnesses are willing to voluntarily testify. ORR noted that an unaccompanied child and/or their legal counsel of record would be provided with the child's case file information, in accordance with ORR's case file policies. An unaccompanied child that does not wish to request a hearing could also have their placement reconsidered by submitting a request for a reconsideration along with any supporting documents as evidence.

ORR proposed in the NPRM at § 410.1902(b), that the PRP would afford any unaccompanied children in a restrictive placement the opportunity to request a PRP review as soon as the unaccompanied child receives an NOP and anytime thereafter.

ORR proposed in the NPRM at § 410.1902(c), that the ORR would require itself to convene the PRP within a reasonable timeframe, to allow the unaccompanied child to have a hearing without undue delay. ORR proposed in the NPRM to require, at § 410.1902(d), that the PRP would issue a decision within 30 calendar days of the PRP request whenever possible. ORR believes these requirements would help ensure reconsideration requests are decided in a timely manner.

Finally, ORR believes ORR staff members should be recused from participation in a PRP under certain circumstances to help ensure an impartial reconsideration of an unaccompanied child's placement. Thus, ORR proposed in the NPRM at § 410.1902(e) that an ORR staff member who was involved with the decision to step-up an unaccompanied child to a restrictive placement could not serve as a Placement Review Panel member with respect to that unaccompanied child's placement. ORR welcomed public comment on these proposals.

Comment: A few commenters stated that ORR should include a requirement in the final rule for care provider facilities to seek legal assistance for unaccompanied children throughout the PRP process. Another commenter wrote that ORR should ensure each unaccompanied child that requests a PRP has legal representation and a child advocate. One commenter urged ORR to clarify that the child has a right to counsel of their choosing and a right to present witnesses and evidence under § 410.1902.

Response: ORR is revising its proposal under § 410.1902(a) to additionally state that where the child does not have an attorney, ORR shall encourage the care provider facility to seek assistance for the child from a contracted legal service provider or child advocate. ORR believes that unaccompanied children should have the ability to present witnesses and evidence, and for that reason, proposed these requirements under § 410.1902(a). ORR is also clarifying that the assistance of counsel is ''at no cost to the Federal Government'' instead of ''if preferred'' for consistency with 8 U.S.C. 1232(c)(5). Related to § 410.1902(a) and for consistency with 8 U.S.C. 1232(c)(5), ORR is clarifying that a child's request to have their placement reconsidered without a hearing must be written by adding the word ''written'' before request, so that the sentence reads ''An unaccompanied child that does not wish to request a hearing may also have their placement reconsidered by submitting a written request for a reconsideration along with any supporting documents as evidence.'' Finally, ORR is clarifying at § 410.1902(a) to add ''child and ORR'' to describe the witnesses that may be willing to voluntarily testify, so that it reads ''An unaccompanied child may present witnesses and cross-examine ORR's witnesses, if such child and ORR witnesses are willing to voluntarily testify.''

Comment: A few commenters recommended that ORR both inform children of their right to an interpreter and provide a certified interpreter in the child's preferred language at the PRP hearing, noting that this is consistent with most State laws and Federal law and would promote effective communication and a fair hearing.

Response: ORR is adding at § 410.1902(a) a requirement that an unaccompanied child shall be provided access at the PRP hearing to interpretation services in their native or preferred language, depending on the unaccompanied child's preference, and in a way they effectively understand.

Comment: A few commenters noted that § 410.1902(a) does not specify that unaccompanied children and their attorney will have a right to review ORR's evidence before the hearing and will be provided the casefile in a reasonable time. One commenter recommended that ORR disclose the child's case file and all evidence supporting restrictive placement no later than five business days prior to the PRP hearing.

Response: ORR is revising its requirement under § 410.1902(b) to additionally require that ORR shall permit the child or the child's counsel to review the evidence in support of step-up or continued restrictive placement, including any countervailing or otherwise unfavorable evidence, within a reasonable time before the PRP review is conducted. ORR shall also share the unaccompanied child's complete case file apart from any legally required redactions with their counsel within a reasonable timeframe to be established by ORR to assist in the legal representation of the unaccompanied child. ORR recognizes that the complete case file will need to be provided with sufficient time for the unaccompanied child (and their counsel, if any) to review the case file in advance of the PRP review, and for that reason added ''within a reasonable time'' to its revision of § 410.1902(b).

Comment: One commenter expressed concern that in the majority of States, court review of the secure detention of a child is ensured, and that in those States, detention is either time-limited or the child is entitled to a rehearing by the court upon request. The commenter believed that unaccompanied children should similarly have a right to continued placement review through periodic hearings.

Response: As is consistent with ORR's current policy, under this final rule at § 410.1901(d), periodic administrative reviews of restrictive placements are automatically conducted every 30 days. In accordance with current policy and pursuant to language finalized at § 410.1902(a) through (e), unaccompanied children have the opportunity, with the assistance of legal counsel at no cost to the Federal Government, to make a request for reconsideration of their restrictive placement to the PRP, which is comprised of neutral senior-level career staff who have experience in child welfare, restorative justice, adverse childhood experiences, special populations, and mental health and must not have been involved in the initial decision to place the child in a restrictive setting.

Comment: A few commenters recommended that ORR provide additional procedural protections. One commenter stated their belief that this would decrease burden on ORR by eliminating the financial cost and administrative challenges of transferring an accompanied child to a new placement after a successful PRP challenge. One commenter stated that ORR should provide unaccompanied children with NOPs and PRPs, absent a present, imminent danger to self or others, before they are stepped up to a more restrictive placement and that this would protect the unaccompanied children's liberty interests, mental health, and well-being. Another commenter stated that a specific timeframe for scheduling the hearing should be provided, noting that an unaccompanied child should not be transferred to the restrictive placement until the PRP makes a decision regarding placement of the child.

A few commenters recommended that ORR should require an automatic review of all placements in restrictive settings by the PRP. One commenter recommended ORR provide the following timelines for such automatic reviews: 5 business days prior to the step-up and no sooner than 72 hours after receiving notice of the restrictive placement. Another commenter noted their belief that ORR would face minimal burden in scheduling automatic PRP reviews. Another commenter added that ORR should then allow unaccompanied children, if they choose, to opt-out of such hearings. The commenter noted that because many unaccompanied children lack the English proficiency or literacy to request a PRP review, that automatic PRP reviews are consistent with State juvenile proceedings and would ensure the child's private interest in freedom from prolonged detention, due process rights, and well-being.

Response: ORR thanks commenters for their recommendations. Due process does not require that ORR provide a PRP review prior to the step-up to a more restrictive placement or provide automatic PRP reviews. As the *Lucas R.* Court found on summary judgment, ''in light of the important Government interests at stake, as well as the safety of the minors, full pre-deprivation notice and hearing are not constitutionally required.'' [322] The Court also did not require automatic adversarial hearings for each stepped up unaccompanied child, finding that the required 30-day administrative review for all restrictive placements, and the more intensive 90-day reviews of placements in secure facilities, ''already provide automatic procedural safeguards'' for unaccompanied children.[323]

Comment: One commenter expressed concern that the PRP is not a substitute for the FSA's mandatory and automatic juvenile coordinator review and approval of all secure placements, noting that it is an important safeguard because it eliminates the burden on the child to contest the placement in cases where an error could have been identified by the juvenile coordinator. The commenter recommended that ORR include a requirement for juvenile coordinator review in the final rule.

Response: ORR staff (*e.g.,* a Federal Field Specialist (FFS) or FFS Supervisor) perform the function of the juvenile coordinator described in FSA paragraph 23 in order to provide the mandatory reviews and approvals for all placements in secure facilities. Therefore, at § 410.1902(a) ORR is adding that ''All determinations to place an unaccompanied child in a secure facility that is not a residential treatment center will be reviewed and approved by ORR federal field staff.''

Comment: One commenter recommended requiring ORR witnesses to testify because they may be crucial to a placement decision, and a child does not have the same ability to call them to testify as ORR does.

Response: Under § 410.1902(a) of this final rule, an unaccompanied child may present their own witnesses and cross-examine ORR's witnesses, if any are willing to voluntarily testify. ORR may, but is not required to, call and present its own witnesses.

Comment: Several commenters recommended that ORR require that the placement review panel (PRP) issue a decision within 7 days of a hearing and submission of evidence or, if no hearing or review of additional evidence is requested, within 7 days following receipt of a child's written statement. They noted that ORR could extend this deadline as necessary under specified circumstances.

Response: ORR agrees and is revising § 410.1902(c) to require that ORR shall convene the PRP within 7 days of a child's request for a hearing, and that ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances.

Comment: A few commenters also noted that § 410.1902(d) does not require the PRP decision be in writing and recommended that the final rule require a written decision. One commenter stated that ORR should require the PRP to set forth, in writing, detailed, specific, and individualized reasoning for any decision so that the reasoning behind the decision is well-documented and there is access to the evidence used to make the decision.

Response: ORR agrees and is accordingly revising § 410.1902(d) to require the PRP to issue a written decision within 7 days of a hearing and submission of evidence or, if no hearing or review of additional evidence is requested, within 7 days following

receipt of a child's written statement. ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances. It is ORR's existing practice that PRP decisions are detailed, specific, and provide individualized reasons because ORR believes this is beneficial to unaccompanied children and supports transparency.

Comment: A few commenters recommended that ORR require that the PRP decision be issued or translated in a language the unaccompanied child understands, and that the case manager explain the PRP decision to the child in a language the child understands and prefers.

Response: ORR agrees that the PRP decision should be in a language the unaccompanied child understands as this is consistent with § 410.1306 language access requirements for written materials. ORR is accordingly revising § 410.1902(d) to require the PRP be issued in the child's native or preferred language.

Comment: A few commenters recommended that ORR state that PRP proceedings are separate and apart from the unaccompanied child's immigration A-File and not relied upon in any deportation or removal hearing or any USCIS adjudication because the potential for a negative impact on their immigration case may discourage children from exercising their right to the PRP review. One commenter suggested ORR clarify that the PRP is conducted exclusively within the scope of ORR's duty under the HSA as the custodian of unaccompanied children.

Response: ORR notes that § 410.1902(a) explicitly provides that PRP reviews are conducted for the purpose of determining the appropriateness of an unaccompanied child's placement. Placement is a defined term in this final rule, and assumes the unaccompanied child is in ORR custody. ORR further clarifies, consistent with other parts of this preamble, that ORR is not an immigration enforcement authority. ORR notes that the A-file is the immigration file which belongs to DHS, and not to ORR.

Comment: One commenter expressed concern that no timeline is specified for step-down when the PRP decides the unaccompanied child should be moved to a less restrictive setting, and stated if that is not possible, ORR should provide a plan for an expeditious step-down to the child and their counsel, along with documentation of all efforts to find a placement.

Response: ORR agrees that when the PRP decides an unaccompanied child is ready for step-down to a less restrictive setting, the child should be stepped down as expeditiously as is possible, consistent with § 410.1101(f) in this final rule which would require that all facilities accept children absent limited specific reasons (*e.g.,* licensing requirements).

Comment: One commenter requested clarification regarding the members of the PRP, including where the PRP would be located organizationally within ORR, and whether care provider staff would be members of the panel. The commenter recommended the PRP contain both administrative as well as field staff to encourage decisions accounting for a diversity of experience. Another commenter recommended that § 410.1902(e) require that all PRP members be neutral and detached because they believe this would be consistent with State child welfare laws and court decisions.

Response: The PRP is a three-member panel of ORR senior-level career staff, and as such is not organizationally located within any certain unit of ORR. ORR's policy currently requires PRP panel members have experience in child welfare, including restorative justice, adverse childhood experiences, special populations, and/or mental health. ORR is finalizing under § 410.1902(e) that panel members shall not have been involved with the decision to step-up an unaccompanied child to a restrictive placement and believes this requirement is sufficient to ensure an impartial reconsideration of such placements.

Final Rule Action: After consideration of public comments, ORR is finalizing its proposal as proposed, with the following revisions and additions: At § 410.1902(a) ORR is adding that ''All determinations to place an unaccompanied child in a secure facility that is not a residential treatment center will be reviewed and approved by ORR federal field staff.'' ORR is also adding at § 410.1902(a) that ''Where the minor does not have an attorney, ORR shall encourage the care provider facility to seek assistance for the minor from a contracted legal service provider or child advocate'', and that ''An unaccompanied child shall be provided access at the PRP hearing to interpretation services in their native or preferred language, depending on the unaccompanied child's preference, and in a way they effectively understand.'' At 410.1902(a), ORR is stating ''at no cost to the Federal Government'' instead of ''if preferred.'' At § 410.1902(a) ORR is adding the word ''written'' before request so that the sentence reads ''An unaccompanied child that does not wish to request a hearing may also have their placement reconsidered by submitting a written request for a reconsideration along with any supporting documents as evidence.'' At § 410.1902(a) ORR is adding ''child and ORR'' so that the sentence reads ''An unaccompanied child may present witnesses and cross-examine ORR's witnesses, if such child and ORR witnesses are willing to voluntarily testify.'' At § 410.1902(b), ORR is adding that ''ORR shall permit the minor or the minor's counsel to review the evidence in support of step-up or continued restrictive placement, and any countervailing or otherwise unfavorable evidence, within a reasonable time before the PRP review is conducted. ORR shall also share the unaccompanied child's complete case file apart from any legally required redactions with their counsel within a reasonable timeframe to be established by ORR to assist in the legal representation of the unaccompanied child.'' At § 410.1902(c), ORR is revising the text to state that ''ORR shall convene the PRP within 7 days of a child's request for a hearing. ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances.'' At § 410.1902(d), ORR is revising the text to state that ''The PRP shall issue a written decision in the child's native or preferred language within 7 days of a hearing and submission of evidence or, if no hearing or review of additional evidence is requested, within 7 days following receipt of a child's written statement. ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances.'' Finally, ORR is revising language at § 410.1902(e) to replace ''must'' with ''shall.''

Section 410.1903 Risk Determination Hearings

The decision in *Flores* v. *Sessions,* 862 F.3d 863 (9th Cir. 2017), held that notwithstanding the passage of the HSA and the TVPRA, pursuant to the FSA unaccompanied children in ORR custody continue to have the ability to seek a bond hearing before an immigration judge in every case, unless waived by the unaccompanied child.[324] The regulations under this section are intended to afford the same type of hearing for unaccompanied children, while recognizing that the HSA, enacted after the FSA went into effect, transferred the responsibility of care and

custody of unaccompanied children from the former INS to ORR.[325]

ORR proposed in the NPRM at § 410.1903, to establish a hearing process that provides the same substantive protections as immigration court bond hearings under the FSA, but through an independent and neutral HHS hearing officer (88 FR 68960 through 68962). Further, these hearings would take place at HHS rather than the Department of Justice (DOJ). ORR explained in the NPRM that this arrangement would parallel the arrangement under the FSA because when the FSA was enacted, the former INS, which then was responsible for the care and custody of unaccompanied children, and the immigration courts were located in the same department, DOJ. Similarly, ORR proposed in the NPRM the availability of risk determination hearings before hearing officers who are within the same department, HHS, but independent of ORR. In the NPRM, ORR explained that it believes that utilizing an independent hearing officer within HHS would help prevent undue delay for a hearing while the unaccompanied child is in ORR care because generally HHS hearing officer schedules have greater availability in the short term, particularly as compared to immigration courts. ORR noted in the NPRM that it codified a similar provision in the 2019 Final Rule which the Ninth Circuit held was consistent with the FSA, except to the extent the 2019 Final Rule did not automatically place unaccompanied children in restrictive placements in bond hearings.[326] ORR proposed in the NPRM to implement a process substantially the same as the one in the 2019 Final Rule but updated to conform with the Ninth Circuit's ruling.

Unlike typical ''bond redetermination hearings'' in the immigration court context, which refer to an immigration judge's review of a custody decision, including any bond set, by DHS,[327] ORR does not require payment of money in relation to any aspect of its care and placement of unaccompanied children. Instead, the function of risk determination hearings in the ORR context is to determine whether an unaccompanied child would be a danger to the community or a runaway risk if released. With respect to these functions, ORR notes, first, that consistent with its discretion as described at 8 U.S.C. 1232(c)(2)(A), it does not consider runaway risk when making release decisions regarding unaccompanied children in its care. As a result, unlike when the FSA was implemented in 1997, runaway risk is no longer a relevant issue in risk determination hearings for unaccompanied children.[328] Therefore, the relevant issue for risk determination hearings for unaccompanied children is whether they would present a danger if released from ORR custody. With respect to this function, ORR notes that for the great majority of unaccompanied children in ORR custody, it has determined they are not a danger and therefore has placed them in non-restrictive placements such as shelters and group homes. These unaccompanied children remain in ORR care only because a suitable sponsor has not yet been found and approved. ORR also notes that if an unaccompanied child is found not to be a danger to self or others through a hearing described in this section, such a finding may be relevant to questions of placement and release, but any change of placement or potential release must be implemented consistent with the other requirements of this part (*e.g.,* subparts B, C, and G). Therefore, in hearings described in this section, an ALJ is unable to order the release or change in placement of an unaccompanied child. The ALJ rules only on the question of danger to self or the community.

ORR proposed in the NPRM at § 410.1903(a), to codify that all unaccompanied children in restrictive placements would be afforded a risk determination hearing before an independent HHS hearing officer to determine, through a written decision, whether the unaccompanied child would present a risk of danger to the community if released, unless the unaccompanied child indicates in writing that they refuse such a hearing (88 FR 68960). For all other unaccompanied children in ORR custody, ORR proposed in the NPRM that they may request such a hearing.

ORR proposed in the NPRM a process for providing notifications and receiving requests related to risk determination hearings (88 FR 68960). ORR proposed in the NPRM at § 410.1903(a)(1), to require that requests under this section be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form. ORR proposed in the NPRM at § 410.1903(a)(2), that unaccompanied children in restrictive placements based on a finding of dangerousness would automatically be provided a risk determination hearing, unless they refuse in writing. They would also receive a notice of the procedures under this section and would be able to use a form provided to them to decline a hearing under this section. ORR proposed in the NPRM that unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel. ORR would require that such choice be communicated to ORR in writing.

ORR proposed in the NPRM procedures related to risk determination hearings so that the roles of each party are clear (88 FR 68960 through 68961). ORR proposed in the NPRM at § 410.1903(b), that it would bear an initial burden of production, providing relevant arguments and documents to support its determination that an unaccompanied child would pose a danger if discharged from ORR care and custody. ORR proposed in the NPRM that the unaccompanied child would have a burden of persuasion to show that they would not be a danger to the community if released, under a preponderance of the evidence standard. ORR notes that it has established a subregulatory process to ensure access to case files and documents for unaccompanied children and their legal counsel in a timely manner for these purposes. ORR proposed in the NPRM at § 410.1903(c), the unaccompanied child would have the ability to be represented by a person of the unaccompanied child's choosing, would be permitted to present oral and written evidence to the hearing officer, and would be permitted to appear by video or teleconference. Finally, ORR proposed in the NPRM that ORR may also choose to present evidence at the hearing, whether in writing, or by appearing in person or by video or teleconference.

ORR also proposed regulations related to hearing officers' decisions in risk determination hearings (88 FR 68961). First, ORR proposed in the NPRM at § 410.1903(d), a decision that an unaccompanied child would not be a danger to the community if released would be binding upon ORR unless appealed. ORR believes that unaccompanied children must also have the opportunity to appeal decisions finding that they are a danger to the community if released. However, HHS does not have a two-tier administrative appellate system that closely mirrors that of the EOIR within the DOJ, where immigration court decisions may be appealed to the Board of Immigration Appeals. To provide similar protections without such a two-tier system, under § 410.1903(e) of the NPRM, ORR proposed that decisions under this section may be appealed to the Assistant Secretary of ACF, or the Assistant

Secretary's designee. ORR proposed in the NPRM that appeal requests be in writing and be received by the Assistant Secretary or their designee within 30 days of the hearing officer's decision under § 410.1903(e)(1). Under § 410.1903(e)(2), ORR is proposing that the Assistant Secretary, or their designee, will reverse a hearing officer decision only if there is a clear error of fact, or if the decision includes an error of law. Further, ORR proposed in the NPRM at § 410.1903(e)(3), that if the hearing officer finds that the unaccompanied child would not pose a danger to the community if released, and such decision would result in ORR releasing the unaccompanied child from its custody (*e.g.,* because ORR had otherwise completed its assessment for the release of the unaccompanied child to a sponsor, and the only factor preventing release was its determination that the unaccompanied child posed a danger to the community), an appeal to the Assistant Secretary would not effect a stay of the hearing officer's decision, unless the Assistant Secretary or their designee issues a decision in writing within five business days of such hearing officer decision that release of the unaccompanied child would likely result in a danger to the community. ORR proposed in the NPRM to require that such a stay decision must include a description of behaviors of the unaccompanied child while in ORR custody and/or documented criminal or juvenile behavior records from the unaccompanied child demonstrating that the unaccompanied child would present a danger to community, if released.

Alternatively, ORR considered an appeal structure under which a politically accountable official (*e.g.,* the Assistant Secretary of ACF), or their designee would have discretion to conduct de novo review of hearing officer determinations. As under the proposed approach, the official conducting de novo review would be able to reverse hearing officer determinations. But the official would not be constrained to reversing hearing officer determinations based only on clear error of fact, or error of law. Instead, the official would step into the position of the hearing officer and re-decide the issues. ORR requested comments as to whether it should adopt this alternative scheme.

ORR reiterates that in the context of risk determination hearings, although a finding of non-dangerousness may ultimately result in an unaccompanied child's release, neither the hearing officer nor the Assistant Secretary, on appeal, may order the release or change of placement of an unaccompanied child, because release or change of placement implicate additional requirements described in this part (*e.g.,* sponsor suitability assessment, in the case of release; or available bed space at a suitable care provider facility, in the case of a change of placement). Placement and release decision-making authority is vested in the Director of ORR under the HSA and TVPRA.[329] The fundamental question at issue in an ORR risk determination hearing is whether an unaccompanied child would pose a danger to the community if released. Having said that, to the extent the hearing officer or Assistant Secretary, or designee, makes other findings with respect to the unaccompanied children, ORR will consider those in making placement and release decisions. For example, if a hearing officer finds that the child is not a flight risk, ORR will consider that finding when assessing the child's placement and conditions of placement—though the decision does not affect release because ORR does not determine flight risk for purposes of deciding whether a child will be released.

ORR proposed in the NPRM at § 410.1903(f) that decisions under this section would be final and binding on the Department, meaning, for example, that when deciding whether to release an unaccompanied child (in accordance with the ordinary procedures on release for unaccompanied children as discussed in subpart C of this rule), the ORR Director would not be able to disregard a determination that an unaccompanied child is not a danger (88 FR 68961). Further, in the case of an unaccompanied child who was determined to pose a danger to the community if released, the child would be permitted to seek another hearing under this section only if they can demonstrate a material change in circumstances. Similarly, because ORR may not have located a suitable sponsor at the time a hearing officer issues a decision, it may find that circumstances have changed by the time a sponsor is found such that the original hearing officer decision should no longer apply. Therefore, ORR proposed that it 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/or ORR can show that a material change in circumstances means the unaccompanied child should no longer be released due to presenting a danger to the community. Based on experience under current policies, ORR stated that one month is a reasonable length of time for a material change in circumstances to have occurred and best balances operational constraints with the safety concerns of all children under ORR care. It also ensures that children who have newly exhibited dangerous behaviors are accurately adjudicated. ORR notes that it previously proposed and finalized this same length of time (one month) in the 2019 Final Rule. ORR notes that because it always seeks to release an unaccompanied child to a sponsor whenever appropriate, ORR can make determinations to release a child previously determined to be a danger to the community without a new risk determination hearing because the purpose of a risk determination hearing is to ensure a child who is not a danger to the community is not kept in ORR custody.

ORR proposed in the NPRM at § 410.1903(g) that this section cannot be used to determine whether an unaccompanied child has a suitable sponsor, and neither the hearing officer nor the Assistant Secretary, or the Assistant Secretary's designee, would be authorized to order the unaccompanied child released (88 FR 68961 through 68962). This means that an unaccompanied child that has been determined by a hearing officer to not present a danger would only be released in accordance with the ordinary procedures on release for unaccompanied children as discussed in subpart C of this rule.

Finally, ORR proposed in the NPRM at § 410.1903(h) that this section may not be invoked to determine an unaccompanied child's placement while in ORR custody or to determine level of custody for the unaccompanied child (88 FR 68962). Under this section, the purpose of a risk determination hearing is only to determine whether an unaccompanied child presents a danger to the community if released, not to determine placement or level of custody. ORR would determine placement and level of custody as part of its ordinary procedures for the placement of unaccompanied children as discussed in subpart B of this final rule. That said, ORR would be able to take into consideration the hearing officer's decision on an unaccompanied child's level of danger (and runaway risk) for those purposes.

For purposes of this final rule, as further explained below at Final Rule Action, ORR notes that it is amending this section to reorganize certain provisions proposed in the NPRM, including consolidation of certain provisions; and to make changes regarding the burden of proof. ORR is revising § 410.1903(a) to encompass the

requirements of former §§ 410.1903(a) and (a)(1) in the NPRM so that it states ''All unaccompanied children in restrictive placements based on a finding of dangerousness shall be afforded a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, unless the unaccompanied child indicates in writing that they refuse such a hearing. Unaccompanied children placed in restrictive placements shall receive a written notice of the procedures under this section and may use a form provided to them to decline a hearing under this section. Unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel.''

ORR is revising new § 410.1903(b) to incorporate the requirements of former § 410.1903(a)(2) in the NPRM so that it states ''All other unaccompanied children in ORR custody may request a hearing under this section to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released. Requests under this section must be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form.''

For clarity, ORR is also revising new § 410.1903(i) (formerly § 410.1903(g) in the NPRM) to remove the phrase ''and neither the hearing officer nor the Assistant Secretary may order the unaccompanied child released'' and new § 410.1903(j) (formerly § 410.1903(h) to remove ''This section may not be invoked to determine the unaccompanied child's placement while in ORR custody. Nor may this section be invoked to determine the level of custody for the unaccompanied child'' and replace it with ''Determinations under this section will not compel an unaccompanied child's release; nor will determinations under this section compel transfer of an unaccompanied child to a different placement. Regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may not be released unless ORR identifies a safe and appropriate placement pursuant to subpart C; and regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may only be transferred to another placement by ORR pursuant to requirements set forth at subparts B and G.''

Comment: One commenter requested clarity regarding where independent hearing officers within HHS would be located organizationally and emphasized the importance of hearing officers having the proper knowledge and qualifications to preside over risk determination hearings. Another commenter was concerned that a hearing before a hearing officer within HHS would eliminate the right of an unaccompanied child to have a hearing before an immigration judge, and that there would be an inherent conflict of interest between ORR's role as custodian and decision-maker relating to release.

Response: The independent HHS hearing officers described in this final rule will be administrative law judges (ALJs) that are situated within HHS's Departmental Appeals Board (DAB). DAB ALJs are appointed by the Secretary of HHS, and as such, are independent of ORR. Further, they have the appropriate experience and credentials to preside over risk determination hearings.

ORR also notes that the Ninth Circuit found that ORR's similar requirement in the 2019 Final Rule was not a material departure from the FSA, and that ''shifting bond redetermination hearings for unaccompanied minors from immigration judges, adjudicators employed by the Justice Department, to independent adjudicators employed by HHS is a permissible interpretation of the Agreement, so long as the shift does not diminish the due process rights the Agreement guarantees.'' [330] Consistent with the Ninth Circuit's holding, ORR does not agree with the commenters that there is a conflict of interest in providing risk determination hearings before HHS independent hearing officers, who are ALJs. ORR anticipates that the independent hearing officers will accrue specialized expertise allowing them to make adjudications more quickly and effectively than immigration judges who remain largely unfamiliar with ORR policies and practices.

Comment: One commenter noted that risk determination hearings are proposed to be available to unaccompanied children determined by ORR to pose a danger to the community, but that the proposed rule did not specify the availability of such hearings for a child determined by ORR to pose a danger to self. The commenter believes that the child must have the ability to challenge such a determination under this section.

Response: ORR clarifies its intent that risk determination hearings are available to unaccompanied children determined by ORR to pose a danger to self. To make that more explicit, in the final rule at § 410.1903(a) ORR will specify that an unaccompanied child whom ORR determines is a ''danger to self or to the community if released'' will have the opportunity to challenge such a determination in a risk determination hearing.

Comment: One commenter believes that ORR should guarantee the appointment of counsel to represent unaccompanied children in risk determination hearings, as the outcome directly impacts their liberty.

Response: ORR will make legal services available for unaccompanied children, subject to budget appropriations, consistent with 8 U.S.C. 1232(c)(5) and as finalized under § 410.1309 of this part. ORR is not able to guarantee the appointment of counsel to represent unaccompanied children in risk determination hearings due to budgetary fluctuations year to year.

Comment: One commenter expressed concern that some unaccompanied children who are not placed in a restrictive placement may still be determined as dangerous and subject to restrictive measures even though they are not placed in a restrictive placement, and should nevertheless receive an automatic risk determination hearing, like unaccompanied children who are placed in a restrictive placement.

Response: ORR will provide automatic risk determination hearings to unaccompanied children in restrictive placements due to a determination of dangerousness. A restrictive placement may deprive an unaccompanied child of certain liberties due to stricter security measures in those facilities. ORR does not believe that unaccompanied children in non-restrictive facilities need automatic hearings because such settings do not restrict children's liberty to the same degree. Yet even so, under this final rule, all unaccompanied children in non-restrictive placements may request a risk determination hearing. ORR expects, however, that in cases involving unaccompanied children in non-restrictive placements, it typically would not consider the children to be a danger to self or others, and so it would send notice to the ALJ of that point. Subject to the relevant procedures established by the DAB, such notice may obviate the need for a hearing. ORR informs all unaccompanied children of their ability to request a risk determination hearing during their orientation and makes

request forms available to them at all times.

Comment: One commenter requested clarification of what constitutes a finding of dangerousness under § 410.1903(a)(2).

Response: ORR refers the commenter to the factors it considers for placing unaccompanied children under § 410.1103(b), including whether an unaccompanied child presents a danger to self or others, consistent with the factors the Secretary of HHS may consider under the TVPRA at 8 U.S.C. 1232(c)(2)(A) in making placement determinations for unaccompanied children (88 FR 68921).

Comment: One commenter stated that ORR should inform children of their right to contest the hearing officer's findings following a risk determination hearing.

Response: As stated in proposed § 410.1903(e), an administrative law judge's decision under this section may be appealed by either the unaccompanied child or ORR to the Assistant Secretary of ACF, or the Assistant Secretary's designee (88 FR 68961). ORR will ensure the child is aware of the right to appeal in a written notice provided consistent with § 410.1903(a).

Comment: A few commenters recommended that ORR unambiguously state in the regulations that a child has a right to review ORR's evidence within a reasonable time in advance of a risk determination hearing or, alternatively, specify that ORR's evidence at the risk determination hearing will be limited to the evidence provided to the child as part of the NOP in a restrictive placement.

A few commenters also stated the proposed regulations should further clarify that ORR bears the burden of proof, with one commenter recommending a beyond a reasonable doubt standard and others suggesting a clear and convincing standard. Another commenter recommended that ORR should bear the burden of proving the legitimacy of placement determinations, which commenter asserted is supported by Federal case law.

Response: In response to the commenters' suggestions about the burden of proof in a risk determination hearing, ORR has revised § 410.1903(c) to state that ORR will bear the burden of proof by clear and convincing evidence that the unaccompanied child would pose a danger to self or others if released from ORR's custody. This revision is consistent with the burden applied in PRP reviews, as discussed in § 410.1902.

In order to enable an unaccompanied child and their counsel to prepare for a risk determination hearing, ORR has clarified at § 410.1903(e) that within a reasonable time prior to a hearing, ORR will provide to the unaccompanied child and their counsel the evidence and information supporting ORR's determination, including the evidentiary record.

Comment: One commenter recommends that ORR use clearer language to describe unaccompanied children's right to counsel, a right to present evidence, and a right to present and cross-examine witnesses.

Response: Section 410.1903 of the final rule includes additional procedural protections for unaccompanied children. First, new § 410.1903(d) (previously § 410.1903(c) in the NPRM) states that the unaccompanied child may be represented by a person of their choosing, which may include counsel, and may present oral and written evidence to the hearing officer and may appear by video or teleconference. Also, new § 410.1903(e) requires ORR to provide the unaccompanied child and their counsel the evidence and information supporting ORR's dangerousness determination, including the evidentiary record, within a reasonable time prior to the hearing.

Comment: A few commenters stated that only allowing an unaccompanied child to seek another hearing under this section if they can demonstrate a material change in circumstances is in violation of the FSA's stated policy favoring release. The commenters expressed concern that ORR may request reconsideration every month while barring the child from requesting reconsideration absent a material change and recommended that ORR either establish a policy permitting recurring risk determination hearings for children detained long-term or permit an unaccompanied child to request a new hearing under the same bases as ORR.

Response: As an initial matter, the FSA did not include a right to recurring bond hearings, which, among other things, would create an enormous administrative burden on the Agency without offering any additional procedural protections to an unaccompanied child. The final rule permits the unaccompanied child to request a new hearing if they can demonstrate a ''material change in circumstances.'' Without such a material change in circumstances, the hearing officer would have no new evidence to review and consider, rendering a new hearing superfluous. ORR is revising new § 410.1903(h) (previously § 410.1903(f) in the NPRM), however, to state that ORR may only seek a new hearing if ORR can show a material change in circumstances as well, which is consistent with the unaccompanied child's standard for reconsideration.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1903 as follows: ORR is updating throughout § 410.1903 to replace ''danger to the community'' with ''danger to self or to the community;'' ORR is revising § 410.1903(a) to encompass the requirements of former §§ 410.1903(a) and (a)(1) in the NPRM so that it states, ''All unaccompanied children in restrictive placements based on a finding of dangerousness shall be afforded a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, unless the unaccompanied child indicates in writing that they refuse such a hearing. Unaccompanied children placed in restrictive placements shall receive a written notice of the procedures under this section and may use a form provided to them to decline a hearing under this section. Unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel.''

ORR is revising new § 410.1903(b) to incorporate the requirements of former § 410.1903(a)(2) in the NPRM so that it states ''All other unaccompanied children in ORR custody may request a hearing under this section to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released. Requests under this section must be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form;'' at new § 410.1903(c) (formerly § 410.1903(b) in the NPRM) to use the term ''proof'' instead of ''production'' and ''persuasion'', at new § 410.1903(h) (formerly § 410.1903(f) in the NPRM) to remove the phrase ''if at least one month has passed since the original decision, and'' and replace it with ''only if;'' at new § 410.1903(i) (formerly § 410.1903(g) in the NPRM) to remove the phrase ''and neither the hearing officer nor the Assistant Secretary may order the unaccompanied child released;'' and new § 410.1903(j)

(formerly § 410.1903(h) in the NPRM) to remove ''This section may not be invoked to determine the unaccompanied child's placement while in ORR custody. Nor may this section be invoked to determine the level of custody for the unaccompanied child'' and replace it with ''Determinations under this section will not compel an unaccompanied child's release; nor will determinations under this section compel transfer of an unaccompanied child to a different placement. Regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may not be released unless ORR identifies a safe and appropriate placement pursuant to subpart C; and regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may only be transferred to another placement by ORR pursuant to requirements set forth at subparts B and G.''

Subpart K—UC Office of the Ombuds

Subpart K of this final rule is issued by the Secretary of HHS pursuant to his retained authority under the TVPRA, rather than by ORR. This is to ensure the new office's independence from ORR.

The NPRM proposed to establish an independent ombuds office that would promote important protections for all children in ORR care (88 FR 68962). An ombuds office to address unaccompanied children's issues does not currently exist, and HHS 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.'' [331] An ombuds for the UC Program would be an independent, impartial, and confidential public official with authority and responsibility to receive, investigate and informally address complaints about Government actions, make findings and recommendations and publicize them when appropriate, and publish reports on its activities. Although an ombud's office would not have authority to compel HHS or ORR to take certain actions, HHS believes an Office of the Ombuds would provide a mechanism by which unaccompanied children, sponsors, and other stakeholders, including federal staff and care provider facility staff, could confidentially raise concerns with an independent, impartial entity that could conduct investigations and make recommendations regarding program operations and decision-making, and refer concerns to other Federal agencies (*e.g.,* HHS Office of the Inspector General, Department of Justice, etc.) or entities. HHS believes that an Office of the Ombudsman is a sound solution to serve a similar function as the oversight currently provided by the *Flores* monitor. While this section would not create an oversight mechanism with authorities that equate with court oversight under a consent decree, HHS notes that it is important to maintain an independent mechanism to identify and report concerns regarding the care of unaccompanied children; it further believes that this independent mechanism should have the ability to investigate such claims, to work collaboratively with HHS and ORR to potentially resolve such issues and publish reports on its activities. HHS therefore proposed to add new subpart K to part 410 to establish the UC Office of the Ombuds.

Key Principles of an Office of the Ombuds

HHS reviewed literature published by several national organizations—including the Administrative Conference of the United States (ACUS), American Bar Association (ABA), International Ombudsman Association (IOA), the United States Ombudsman Association (USOA), and the Coalition of Federal Ombudsman (COFO)—pertaining to standards of practice and establishment of ombuds offices.[332] The literature identifies independence, confidentiality, and impartiality as core standards of any Federal ombuds office. The literature also identifies common definitional characteristics among Federal ombuds offices, such as informality (*i.e.,* ombuds offices do not make decisions binding on the agency or provide formal rights-based processes for redress) and a commitment to credible practices and procedures. In addition, most ombuds offices adhere to the concepts of providing credible review of the issues that come to the office, a commitment to fairness, and assistance in the resolution of issues without making binding agency decisions.[333] These attributes align with HHS's goals for the creation of an office that can provide an independent and impartial body that can receive reports and grievances regarding the care, placement, services, and release of unaccompanied children. The NPRM therefore included a proposal for the creation of an Office of the Ombuds that incorporates lessons and recommendations identified in the 2016 ACUS report, follows the model of other established Federal ombuds offices, and takes into consideration feedback from interested parties (88 FR 68962).

Comment: A few commenters recommended the Office of the Ombuds finalize minimum standards for a credible review process based upon the United States Ombudsman Association (USOA) Governmental Ombudsman Standards.

Response: HHS thanks commenters and may take into consideration whether to adopt standards for a credible review process for the new Office of the Ombuds consistent with those from the USOA Governmental Ombudsman Standards and from other nationally recognized ombuds organizations. However, HHS notes that such standards would be promulgated through a future regulatory or subregulatory process to more efficiently reflect standards as they evolve. Further, HHS anticipates this future process would be undertaken by ACF or the Office of the Ombuds, consistent with its independence from ORR.

Section 410.2000 Establishment of the UC Office of the Ombuds

§ 410.2000 of the NPRM described the establishment of a UC Office of the Ombuds (88 FR 68962). As the literature identified independence of the office as one of the key standards of an ombuds, HHS proposed in the NPRM at § 410.2000(a) that the ombuds will report directly to the ACF Assistant Secretary and will be managed as a distinct entity separate from the UC Program. HHS requested input on options relating to placement and reporting structure of this office within ORR or in another part of ACF.

HHS proposed in the NPRM at § 410.2000(b), that the UC Office of the Ombuds would be an independent, impartial office with authority to receive and investigate complaints and concerns related to unaccompanied children's experiences in ORR care confidentially and informally. This paragraph captured two additional key standards of an ombuds identified by literature: impartiality and confidentiality. In the NPRM, HHS noted the UC Office of the Ombuds would not serve as a legal advocate for any person or issue binding decisions; rather, it would work as a neutral third party that can investigate concerns and attempt to resolve issues which are brought to the office. HHS stated that it intends for the UC Office of the Ombuds to be an additional resource for the UC Program and ORR, unaccompanied children, their sponsors and advocates, and other interested parties. Further, the UC Office of the Ombuds would not supplant other roles and responsibilities of other entities such as the HHS Office

of Inspector General, ORR's monitoring activities of its grants and contracts, or services included in this rule, such as child advocate services (discussed in § 410.1308 of the NPRM) or legal services (discussed in § 410.1309 of the NPRM). Rather, as proposed in the NPRM, the UC Office of the Ombuds would be responsible for acting as a neutral third party to receive, investigate, or address complaints about Government actions.

Comment: Several commenters supported the proposal to establish the Office of the Ombuds.

Response: ORR thanks commenters for their support.

Comment: A few commenters did not support the establishment of the Office of the Ombuds, due to concern about the authority to establish the office, the ability of other Government agencies to fulfill the proposed role, and the cost to establish the office.

Response: HHS notes that the TVPRA requires it, among other agencies, to ''establish policies and programs'' to ensure that unaccompanied 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.[334] HHS and ORR have identified the need for this office in order to ensure the effective implementation of HHS's and ORR's statutory responsibilities. An ombuds office, within HHS or ACF, to address unaccompanied children's issues does not currently exist. As a result, HHS proposed to create an independent ombuds office to specifically promote protections for all children in ORR care. HHS further refers the commenters to the discussion of costs to establish the Ombuds Office at Section VI.

Comment: One commenter requested clarification about the role of the Office of the Ombuds given that ORR has an internal Prevention of Child Abuse and Neglect (PCAN) unit.

Response: The Office of the Ombuds and the PCAN Team perform two key, but distinct, functions. The PCAN Team is situated within ORR and oversees compliance with policies and procedures related to allegations of staff-perpetrated child abuse and neglect arising at care provider facilities.

In contrast, the Ombuds for the UC Program will be situated outside of ORR, within ACF. As discussed above, and as codified in this final rule at § 410.2000, it will be an independent, impartial, and confidential public official with authority and responsibility to receive, investigate and informally address complaints about Government actions, make findings and recommendations and publicize them when appropriate, and publish reports on its activities. Additionally, the Ombuds will publish annual findings from its activities, will report to the ACF Assistant Secretary, and will be managed as an entity distinct from ORR.

Comment: Several commenters supported the establishment of the Office of the Ombuds but expressed concern about its independence and authority as the Office is not required to report to Congress. Commenters also recommended the office report to the HHS Secretary.

Response: The agency's literature review pertaining to standards of practice and establishment of ombuds offices identified independence, confidentiality, and impartiality as core standards of any Federal Ombuds office. These attributes will be present in the Office of the Ombuds as it exists within ACF. The ability of the Office of the Ombuds to refer concerns to the HHS Office of the Inspector General as well as other Federal agencies such as DOJ, and to Congress, are examples of the Office's ability to act independently while situated within ACF.

Comment: Several commenters supported the Office of the Ombuds and recommended ensuring the Office's ability to access system data to identify trends as part of its oversight and enforcement authority. Several commenters also recommended an annual review process to evaluate the Office of the Ombuds' effectiveness.

Response: HHS notes that ACF may take into consideration the recommendations regarding access to system data in future policymaking. ACF may consider adopting an annual review process to evaluate the Office of the Ombuds' effectiveness as ACF develops practices, policies, and procedures for the Office of the Ombuds consistent with practices, policies, and procedures from nationally recognized ombuds organizations.

Final Rule Action: After consideration of public comments, this section is finalized as proposed.

Section 410.2001 UC Office of the Ombuds Policies and Procedures; Contact Information

HHS proposed in the NPRM at § 410.2001(a) and (b), that the UC Office of the Ombuds shall develop and make publicly available the office's standards, practices, and policies and procedures giving consideration to the recommendations by nationally recognized ombuds organizations (88 FR 68963). HHS requested comments identifying potential standards, practices, and policies and procedures for ombuds consideration. For example, HHS requested comments regarding whether the UC Office the Ombuds should adopt standards, practices, and policies and procedures that are consistent with the ABA, IOA, USOA, COFO, or another nationally recognized ombuds organization that should be considered.

HHS further proposed at § 410.2001(c) of the NPRM that the UC Office of the Ombuds ensure that information about the office, including how to contact the office, is publicly available and that the office provide notice to unaccompanied children, sponsors, and others of its scope and responsibilities, in both English and other languages spoken and understood by unaccompanied children in ORR care. Per the NPRM, notice shall be provided in an accessible manner, including through the provision of auxiliary aids and services and in clear, easily understood language, using concise and concrete sentences and/or visual aids. HHS's review of other ombuds office outreach activities found multiple approaches to raising awareness about an ombuds office, such as flyers, information posted at care provider facilities, a website and onsite visits to facilities or constituents.[335] HHS proposed in the NPRM providing the UC Office of the Ombuds with the discretion to determine the best approaches to providing outreach and awareness of the office's ability to act as a neutral third party, including visiting ORR facilities and publishing aggregated information annually about the number and types of concerns the UC Office of the Ombuds receives.

Comment: A few commenters supported the Office of the Ombuds making information about the office available and understandable by unaccompanied children, paying special attention to the needs of Indigenous children, and recommended using verbal and written means to share the information with unaccompanied children, include anti-retaliation messages in the information.

Response: HHS notes that ACF will take into consideration in future policymaking the recommendation to share information about the Office of the Ombuds with unaccompanied children verbally and in writing. ACF will share information about the office in a child appropriate way including information about anti-retaliation messaging.

Comment: Several commenters supported the Office of the Ombuds and recommended that the Office of the Ombuds follow accepted best practices for ombuds including confidentiality, transparency, impartiality, accessibility,

and a code of ethics, and take a child-rights centered approach.

Response: The value of the Office of the Ombuds is predicated on appropriate professional standards of practice and definitional characteristics.[336] The office will adhere to core standards associated with federal ombuds—independence, confidentiality and impartiality—and common characteristics that include a commitment to fairness.[337] HHS expects an Office of the Ombuds created to address issues pertaining to unaccompanied children would adhere to the professional attributes associated with ombuds while also specifically protecting and advancing the interests and the rights of children in the care and custody of ORR.

Comment: One commenter requested clarification on the interaction of the Office of the Ombuds and the ORR Policy Guide relating to investigative authority.

Response: The Office of the Ombuds will sit outside of ORR, within ACF, will be independent of ORR, and have authority and responsibility to receive, investigate and informally address complaints about Government actions, make findings and recommendations and publicize them when appropriate. The ORR Policy Guide is a guide for the actions of ORR and its care providers.

Comment: Several commenters recommended that HHS provide more details about communicating with the Office of the Ombuds, including establishing a timeframe to enable public contact with the office, the widespread publication of a toll-free hotline, contact information for Office of the Ombuds on the agency website, and a process to annually review the contact method effectiveness.

Response: HHS notes that ACF will provide further information about methods made available to the public to communicate with the Office of the Ombuds through subregulatory guidance, as such information may change over time.

Final Rule Action: After consideration of public comments, this section is finalized as proposed.

Section 410.2002 UC Office of the Ombuds Scope and Responsibilities

The 2016 ACUS Report described different kinds of ombuds offices which perform different functions based on their mandates. They may identify new issues and patterns of concerns that are not well known or are being ignored; support procedural changes; contribute to significant cost savings by dealing with identified issues, often at the earliest or pre-complaint stages, thereby reducing litigation and settling serious disputes; prevent problems through training and briefings; and serve as an important liaison between colleagues, units, or agencies.[338] HHS intends to establish an ombuds office as an independent, impartial office with authority to receive and investigate issues and concerns related to unaccompanied children's experience in ORR care.

HHS proposed in the NPRM at § 410.2002(a), that the scope of the activities of the UC Office of the Ombuds may include: reviewing ORR compliance with Federal law and meeting with interested parties to hear input on ORR's implementation of and adherence to Federal law; visiting ORR facilities where unaccompanied children are or will be housed; investigating issues or concerns related to unaccompanied children's access to services while in ORR care; reviewing the implementation and execution of ORR policy and procedures; reviewing individual circumstances that raise concerns such as issues with access to services, communications with advocates or sponsors, transfers, or discharge from ORR care; and providing general education and information about ORR and the legal and regulatory landscape relevant to unaccompanied children (88 FR 68963). HHS proposed in the NPRM that the UC Office of the Ombuds may request information and documents from ORR and ORR care provider facilities and shall be provided with such information and documents to the fullest extent possible. HHS further proposed that the UC Office of the Ombuds may recommend new or revised UC Program policies and procedures, or other process improvements. HHS included these anticipated areas of activity at § 410.2002(a) of the NPRM.

HHS anticipates that the UC Office of the Ombuds may have the opportunity to not only field individual concerns from unaccompanied children, their representatives, and program and facility staff, but may also identify patterns of concerns and may be well positioned to offer recommendations to improve ORR program processes and procedures. HHS proposed in the NPRM that, as an independent office reporting to the ACF Assistant Secretary, the UC Office of the Ombuds may determine its caseload and agenda and expects that such caseload may vary due to a variety of circumstances.

HHS proposed in the NPRM at § 410.2002(b), that, because the UC Office of the Ombuds is not an enforcement entity, it should have the discretion to refer matters to other offices or entities, such as State or local law enforcement or the HHS Office of Inspector General (OIG), as appropriate (88 FR 68963).

Finally, to assist the UC Office of the Ombuds in accomplishing its responsibilities, HHS proposed in the NPRM at § 410.2002(c) that the Ombuds must be able to meet with unaccompanied children in ORR care upon receiving a complaint or based on relevant findings while investigating issues or concerns, have access to ORR facilities, premises, and case file information; and have access to care provider and Federal staff responsible for the children's care (88 FR 68963).

Comment: Many commenters supported the proposed scope and responsibilities.

Response: HHS thanks the commenters for their support.

Comment: A few commenters expressed support for the scope of the Office of Ombuds, but also expressed concern the office would not be able to refer matters to State licensing agencies for investigation and enforcement.

Response: HHS believes the Office of the Ombuds would provide a mechanism for independent review of care provider facilities. HHS believes that § 410.2002(b) broadly provides the Ombuds office with making referrals to ''offices with jurisdiction over a particular matter'' which could include State licensing entities.

Comment: A few commenters requested clarification if the reference to § 410.2100 in the regulation text at proposed § 410.2002(a) was in error as the regulatory text does not include § 410.2100.

Response: HHS thanks commenters for identifying the error. The correct reference is to § 410.2001 and will be updated in the final rule regulatory text at § 410.2002(a).

Comment: A few commenters supported the Office of the Ombuds and recommended the Office of the Ombuds scope and responsibilities include protections from retaliation against those reporting concerns for the care of unaccompanied children to the office.

Response: HHS notes that ACF may consider measures in future policymaking that would clarify the protections against retaliation available for individuals that would report concerns about the care of unaccompanied children in ORR care to the Office of the Ombuds. In this rule, the Office of the Ombuds is being created by the Secretary and not ORR. In the future, the Secretary can advance requirements through policymaking that would be mandatory for the Office to implement, including protections from

retaliation by HHS against those who make reports to the Office.

Comment: A few commenters recommended removing the term ''non-binding'' from the description of the office's recommendations to ORR in § 410.2002(a)(10), adding a timeframe for ORR written responses to the recommendations, and reporting recommendations and responses to Congress.

Response: HHS believes the fact that Office of the Ombuds recommendations will not constitute a binding decision on the agency is aligned with common characteristics among Federal ombuds offices and will not impede the ability of the Office of the Ombuds to conduct investigations and make recommendations and to refer concerns to other Federal agencies. HHS notes that ACF will provide further details regarding timeframes for ORR written responses and the process for reporting recommendations and responses to Congress through subregulatory guidance.

Comment: Several commenters support the Office of the Ombuds proposed scope and responsibilities and recommend the Ombuds publish an annual report describing activities conducted in the prior year, summarize child welfare trends and challenges experienced by ORR, and submit the annual reports to Congress.

Response: HHS may take this into consideration for future policymaking.

Comment: Many commenters recommended expanding the Office of the Ombuds' scope and responsibilities, including authority for comprehensive oversight of facilities located in states where State licensure is unavailable because the facility is housing unaccompanied children, and specifying ORR responsibilities in response to Office of the Ombuds reports and recommendations such as providing written responses and corrective actions ORR agrees to take. One commenter recommended a new proposal to provide the Ombuds unobstructed access to any facility to meet confidentially with facility staff, ORR employees and contractors and any unaccompanied children, and to ensure unobstructed access by the Ombuds to information pertinent to the care and custody of an unaccompanied child. One commenter recommended a new subsection to give the Ombuds investigation and enforcement authority for section 504 violations. One commenter recommended a requirement that the Ombuds seek input from the unaccompanied children and former unaccompanied children concerning what affects unaccompanied children while in ORR care. A few commenters recommended making the proposed activities in § 410.2002(a) mandatory.

Response: HHS may take these recommendations into consideration for future policymaking. As provided at § 410.2001(a), the Office of the Ombuds shall develop appropriate standards, practices, and policies and procedures, giving consideration to the recommendations by nationally recognized Ombudsperson organizations. The scope and responsibilities of the Office shall be consistent with the standards, practices, and policies and procedures to be developed, and ACF may consider these recommendations in that context as well.

Comment: A few commenters expressed support for the Office of the Ombuds scope and responsibilities and recommended expanding the scope by revising § 410.2002(a)(3) to include access to documents and information from out-of-network provider facilities and emergency placements as the office deems the information relevant. Other commenters recommended specifying the annual reports proposed in § 410.2002(a)(4) will be made to the Director of ORR, the Assistant Secretary for Children and Families and the Secretary of HHS and will be publicly available. Several commenters recommended expanding and strengthening the Office of the Ombuds investigatory authority, including revising § 410.2002(a)(5) to remove the phrase '' as necessary'' to expand and strengthen the Ombuds' authority and recommend specifying what an investigation shall entail, creating a new subsection to grant the Office of the Ombuds subpoena authority, expanding § 410.2002(a)(6) to require frequent visits and monitoring out-of-network facilities and unlicensed facilities including Influx Care Facilities (ICFs) and Emergency Intake Sites (EISs).

Response: HHS may take these recommendations into consideration for future policymaking.

Comment: One commenter recommended revising § 410.2002(a)(12) so that the responsibility to advise and update the Director of ORR, Assistant Secretary, and the Secretary on the status of ORR's implementation and adherence to Federal law or ORR policy is not discretionary.

Response: HHS may take this recommendation into consideration for future policymaking.

Comment: One commenter recommended revising § 410.2002(a)(8) so the Ombuds resolves complaints or concerns raised by interested parties as it relates to ORR's implementation or adherence to Federal law or ORR regulations and policy and HHS policy.

Response: HHS may take this recommendation into consideration for future policymaking.

Comment: One commenter recommended that § 410.2002(a) include a new subsection stating the Office of the Ombuds shall create processes for conducting coaching, mediation, and dispute resolution for reports it receives and the processes invite participation by all interested parties.

Response: HHS may take these recommendations into consideration for future policymaking.

Final Rule Action: After consideration of public comments, the reference at § 410.2002(a) is being updated to correctly refer to § 410.2001 and the section is otherwise finalized as proposed.

Section 410.2003 Organization of the UC Office of the Ombuds

The 2016 ACUS Report recommends that agencies should support the credibility of offices of the ombuds by selecting an ombuds with sufficient professional stature and requisite knowledge, skills, and abilities to effectively execute the duties of the office.[339] This should include, at a minimum, knowledge of informal dispute resolution practices as well as, depending on the office mandate, familiarity with process design, training, data analysis, and facilitation and group work with diverse populations.[340] To align with the recommendations, HHS proposed in the NPRM at § 410.2003(a) that the UC Ombuds should be hired as a career civil servant. HHS believes that requiring the UC Ombuds position be hired as a career civil servant, rather than a political appointee, will support the important goal of impartiality (88 FR 68963). HHS proposed in the NPRM at § 410.2003(b), that the UC Ombuds have the requisite knowledge and experience to effectively fulfill the work and role, including membership in good standing in a nationally recognized organization, State bar association, or association of ombudsmen. Expertise should include but is not limited to informal dispute resolution practices, services and matters related to unaccompanied children and in child welfare, familiarity and experience with oversight and regulatory matters, and knowledge of ORR policy and regulations. In addition, HHS proposed in the NPRM at § 410.2003(c) that the Ombuds may engage additional staff as it deems necessary and practicable to support the functions and responsibilities of the Office; and, at

§ 410.2003(d), HHS proposed in the NPRM that the UC Ombuds shall establish procedures for training, certification, and continuing education for staff and other representatives of the Office.

Comment: One commenter supported the proposed § 410.2003.

Response: HHS thanks the commenter for its support.

Comment: Several commenters supported the proposal and recommended strengthening the requirements in § 410.2003(b) for the Ombuds position, including possessing a career's worth of demonstrated leadership in the field of public child welfare administration ideally with experience in the plight of unaccompanied children; must be inclusive of LGBTQI+ affirming best practices; possess familiarity with HHS functions, policies and procedures; experience in establishment and assessment of Quality Assurance/Improvement practices; and membership in good standing of a nationally recognized association of ombudsmen or State bar association throughout the course of employment as the Ombuds.

Response: HHS agrees that the Ombuds should possess demonstrated leadership in public child welfare administration ideally experienced with the experiences of unaccompanied children, inclusive of LGBTQI+ affirming best practices, content, and knowledge, experienced in quality assurance and improvement practices, has familiarity with HHS functions, policies and procedures and recognized as a member in good standing of a State bar association or association of ombudsmen. HHS notes that ACF will provide further details regarding the professional experiences and credentials considered for the Ombuds position through subregulatory guidance.

Comment: Several commenters supported the proposal for the Ombuds to hire additional staff but expressed concern about the lack of guidance on structure, framework or staffing criteria. Commenters also recommended that Ombuds staff include individuals with lived experience as an unaccompanied child and there are sufficient staff for timely responses to reports received from across the nation.

Response: HHS notes that ACF may provide further details regarding the Office of the Ombuds' structure, framework or staffing criteria through future policymaking or subregulatory guidance. HHS believes that Ombuds staff should include individuals with appropriate professional and personal experiences that are relevant to the functions of the office, which may include lived experience as an unaccompanied child. HHS agrees that it is important that the Office of the Ombuds be sufficiently staffed to ensure timely responses to reports.

Comment: A few commenters supported the proposal the Ombuds establish procedures for training, certification, and continuing education for staff, and recommend consulting the ACUS framework for training standards that link the Ombuds to professional ombuds organizations and establish minimum standards for training and certification that include but are not limited to mandatory reporting laws and ombuds standards and practices offered by ombuds professional associations or training programs.

Response: HHS may take these recommendations into consideration for future policymaking.

Comment: One commenter did not support the proposal that the Ombuds shall be a career civil servant, and recommended the Ombuds be appointed by, and report directly to, the HHS Secretary to ensure appropriate level of authority and impact.

Response: As discussed in the Background section, the Secretary of HHS delegated the authority under the TVPRA to the Assistant Secretary for Children and Families. The Office of the Ombuds will be managed as an entity distinct from ORR. HHS believes the unaccompanied children Ombuds should be a career civil servant, rather than a political appointee, to support the goal of impartiality. Additionally, HHS believes the Office of the Ombuds should report to the ACF Assistant Secretary to be well positioned to offer recommendations to improve ORR program processes and procedures.

Final Rule Action: After consideration of public comments, this section is being finalized as proposed.

Section 410.2004 Confidentiality

HHS proposed in the NPRM at § 410.2004(a), basic requirements that the Ombuds ensure that records and proceedings should be kept in a confidential manner, except to address an imminent risk of serious harm or in response to judicial action (88 FR 68964). Additionally, the Ombuds is prohibited from using or sharing information for any immigration enforcement related purpose. This provision is in line with the 2016 ACUS Report identification of confidentiality of ombuds communications and proceedings as being of paramount importance to encourage reporting of concerns, thereby affording the ombuds the opportunity to assist the constituent and the agency in resolving the concern.[341] HHS also proposed at § 410.2004(b) that the UC Office of the Ombuds may accept reports from anonymous reporters.

To align to these goals and to help in the development of the UC Office of the Ombuds, HHS requested public comment on best practices for preserving the confidentiality of parties that may submit a complaint, as well as building trust in the confidentiality of the office so that individuals feel comfortable and safe, without the fear of retaliation, to report concerns.

Comment: A few commenters supported the proposal at § 410.2004(a), noting that confidentiality will help to establish trust with the unaccompanied child.

Response: HHS thanks the commenters for their support.

Comment: One commenter supported the proposal at § 410.2004(a) that the Ombuds shall manage files and records in a manner that preserves confidentiality and recommended adding a statement that an exception may apply dependent on circumstances.

Response: HHS may consider this recommendation in future policymaking.

Comment: A few commenters expressed concern that the proposal does not explicitly indicate whether the Ombuds and associated staff are considered mandated reporters and recommended establishing the expectation that the Ombuds and associated staff are mandated reporters and required to adhere to mandated reporting laws in States where they are acting in their professional capacity.

Response: HHS may take this recommendation into consideration in future policymaking.

Comment: One commenter recommended revising the proposal at § 410.2004(b) so the Office of the Ombuds shall accept reports of concerns from anonymous reporters.

Response: Under § 410.2004(b) as proposed, the Office of the Ombuds may accept reports of concern from anonymous reporters. HHS believes this language sufficiently provides the Office of the Ombuds the discretion necessary to review reports of concern from anonymous reporters on a case-by-case basis.

Final Rule Action: After consideration of public comments, this section is being finalized as proposed.

Request for Information

As stated in the NPRM, HHS believes the UC Office of the Ombuds should be intentionally designed and requests any other comments and input on how the

Ombuds should handle concerns relating to ORR practices (88 FR 68964). HHS therefore included in the NPRM a request for information for additional public input on the proposed UC Office of the Ombuds. HHS sought public comment on whether the Office should provide services relating to oversight in other areas, including more generalized concerns about ORR conduct and services. HHS also sought comment on potential intersections between the Ombuds and other avenues for mitigation or redress of grievances (*e.g.,* the ORR Placement Review Panel). Additionally, HHS sought comment on additional independent and impartial mechanisms to address grievances or complaints related to children's experiences in ORR care.

Finally, HHS welcomed comments on other organizational and structural matters relevant to the proposed UC Office of the Ombuds.

Comment: A few commenters recommended that the Office of the Ombuds establish relationships with State and local law enforcement, CPS agencies and other actors, enter into memoranda of understanding with DHS, Office of the Immigration Detention Ombudsman (OIDO), and Office for Civil Rights and Civil Liberties (CRCL) to address oversight of unaccompanied children in Federal custody, and requiring the Office of the Ombuds to collaborate with State and local ombuds as appropriate.

Response: HHS may consider these recommendations in future policymaking.

Comment: A few commenters recommended a new provision requiring ongoing engagement by the Ombuds and community stakeholders, FSA class counsel, and the FSA court-appointed monitor to ensure the Ombuds is aware of stakeholder concerns and priorities, and that the Ombuds should invite collaboration with oversight entities and nonprofit and international organizations with expertise in monitoring and protecting children's rights.

Response: HHS may take into consideration these recommendations in future policymaking.

Comment: A few commenters recommended clarification on the connection between the ORR NCC and the Office of the Ombuds to streamline reporting concerns and reduce confusion.

Response: The Office of the Ombuds is an entity situated outside of ORR, within ACF, and with authority and responsibility to receive, investigate and informally address complaints about Government actions. The ORR NCC is funded directly by ORR. Given their distinct roles, concerns reported to the ORR NCC would not be forwarded to the Office of the Ombuds.

Comment: A few commenters recommended increasing the office size to promote accessibility to unaccompanied children throughout the United States.

Response: HHS may take this recommendation into consideration in future policymaking.

Comment: One commenter recommended extending the scope of the Office of the Ombuds to unaccompanied children within 6 months post-release and to youth who are trafficking victims to age 18.

Response: The focus of the Ombuds office will be related to the care, treatment, and access to services for children in ORR custody.

Comment: One commenter recommended the Office of the Ombuds prioritize investigating and publishing a comprehensive report reviewing systematic gaps in care of Indigenous unaccompanied children and consult Indigenous experts in the report's development.

Response: The Office of the Ombuds will investigate and report on all unaccompanied children in ORR custody pursuant to requirements under § 410.2002(a).

Final Rule Action: ACF welcomed the additional input on the organizational and structural matters of the Office of the Ombuds and may take these recommendations into consideration in future policymaking.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), HHS is required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a control number assigned by OMB. This final rule does not require information collections for which HHS plans to seek OMB approval.

Under § 410.1902, as discussed in section IV. of this final rule, ORR is finalizing its proposal to establish processes for unaccompanied children to appeal the denial of release and for certain prospective sponsors to appeal sponsorship denials. While this appeals process may require unaccompanied children or prospective sponsors to submit information to ORR, information collections imposed subsequent to an administrative action are not subject to the PRA under 5 CFR 1320.4(a)(2). Therefore, ORR is not estimating any information collection burden associated with this process.

Under § 410.1903, as discussed in section IV. of this final rule, ORR is finalizing its proposal to establish processes for risk determination hearings. As part of these processes, five forms will be made available to unaccompanied children placed in ORR custody by their case manager or by individuals associated with the HHS Departmental Appeals Board, which is responsible for the actual day-to-day logistical operations of these hearings. These forms will be provided to all unaccompanied children placed in a restrictive setting (*i.e.,* secure facilities (including residential treatment facilities) and heightened supervision facilities), and to unaccompanied children placed in other types of facilities upon request. The five forms include the Request for Risk Determination Hearing (Form RDH–1), the Risk Determination Hearing Opt-Out (Form RDH–2), the Appointment of Representation for Risk Determination Hearing (Form RDH–3), the Risk Determination Hearing Transcript Request (Form RDH–4), and the Request for Appeal of Risk Determination Hearing (Form RDH–5). ORR estimates each form will require 10 minutes (0.167 hours) to complete. Prospective respondents include ORR grantee and contractor staff, unaccompanied children, parents/legal guardians of unaccompanied children, attorneys of record, and legal service providers. ORR is unable to estimate how many of each type of respondent will complete each form, therefore ORR uses a range to estimate the cost associated with completing these forms. For this range, ORR assumes unaccompanied children and parents of unaccompanied children as a minimum and lawyers as a maximum.

ORR believes that the cost for unaccompanied children and parents of unaccompanied children undertaking administrative and other tasks on their own time is a post-tax wage of $24.04/hour. The Valuing Time in U.S. Department of Health and Human Services Regulatory Impact Analyses: Conceptual Framework and Best Practices identifies the approach for valuing time when individuals undertake activities on their own time.[342] To derive these costs, a measurement of the usual weekly earnings of wage and salary workers of $1,145, divided by 40 hours to calculate an hourly pre-tax wage rate of $28.63/

hour.[343] This rate is adjusted downwards by an estimate of the effective tax rate for median income households of about 14 percent calculated by comparing pre- and post-tax income,[344] resulting in the post-tax hourly wage rate of $24.62/hour. Unlike State and private sector wage adjustments, ORR is not adjusting these wages for fringe benefits and other indirect costs since the individuals' activities, if any, would occur outside the scope of their employment. For lawyers, ORR utilizes the median hourly wage rate of $65.26 in accordance with the Bureau of Labor Statistics (BLS).[345] ORR calculates the cost of overhead, including fringe benefits, at 100 percent of the median hourly wage. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly by employer and methods of estimating these costs vary widely in the literature. Nonetheless, ORR believes that doubling the hourly wage rate ($65.26 × 2 = $130.52) to estimate total cost is a reasonably accurate estimation method. ORR provides burden estimates for forms RDH–1 through RDH–5 in Table 1 below.

TABLE 1—BURDEN ESTIMATES ASSOCIATED WITH RISK DETERMINATION HEARING FORMS

Form	# Annual respondents	Responses per respondent	Burden hours per response	Annual total burden hours	Minimum cost ($24.62/hr)	Maximum cost ($130.52/hr)
Request for Risk Determination Hearing (Form RDH–1)	435	1	0.167	72.5	$1,785	$9,463
Risk Determination Hearing Opt-Out (Form RDH–2)	435	1	0.167	72.5	1,785	9,463
Appointment of Representative for Risk Determination Hearing (Form RDH–3)	1740	1	0.167	290	7,140	37,851
Risk Determination Hearing Transcript Request (Form RDH–4)	16	1	0.167	2.67	66	348
Request for Appeal of Risk Determination Hearing (Form RDH–5)	3	1	0.167	0.5	12	65
Total	2,614	1	0.167	438	10,788	57,190

As shown in Table 1, ORR estimates an annual total burden of 438 hours at a cost ranging from $10,788 to $57,190 to complete and submit forms associated with risk determination hearings. ORR will submit these information collection estimates to OMB for approval as part of a new information collection request.

Once the new risk determination hearing forms are in effect, ORR will prepare a non-substantive change request to the OMB to discontinue the use of three instruments currently approved under OMB control number 0970–0565 (expiration date November 30, 2024). The forms to be replaced by the Risk Determination Hearing forms described above include the following: Request for a Flores Bond Hearing (Form LRG–7), Motion Requesting a Bond Hearing—Secure or Staff Secure (Form LRG–8A), Motion Requesting a Bond Hearing—Non-Secure (Form LRG–8B). ORR assumes these forms will be completed by a Child, Family, or School Social Worker at a wage rate of $42.94 per hour.[346] The currently approved annual burden hours associated with these three forms is 14 hours at a cost of $601 (14 hours × $42.94). In aggregate, we estimate a total net burden of 424 hours (438 hours − 14 hours) at a cost ranging from $10,187 ($10,788 − $601) to $56,589 ($57,190 − $601).

ORR has reviewed the requirements being codified in subparts A and B and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0554 (*Placement and Transfer of Unaccompanied Children into ORR Care Provider Facilities*) and OMB control number 0970–0547 (*Administration and Oversight of the Unaccompanied Children Program*). ORR did not propose any new requirements which result in a change in burden.

ORR has reviewed the requirements being codified in subpart C and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0278 (*Family Reunification Packet for Sponsors of Unaccompanied Children*), OMB control number 0970–0552 (*Release of Unaccompanied Children from ORR Custody*) and OMB control number 0970–0553 (*Services Provided to Unaccompanied Children*). ORR did not propose any new requirements which result in a change in burden.

ORR has reviewed the requirements being codified in subpart D and determined that, with the exception of the regulatory burden associated with risk determination hearing forms discussed previously, the regulatory burden associated with reporting and recordkeeping requirements is otherwise accounted for under OMB control number 0970–0547 (*Administration and Oversight of the Unaccompanied Children Program*), OMB control number 0970–0564 (*Monitoring and Compliance for Office of Refugee Resettlement (ORR) Care Provider Facilities*), and OMB control number 0970–0565 (*Legal Services for Unaccompanied Children*).

ORR has reviewed the requirements being codified in subparts E through I and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0554 (*Placement and Transfer of Unaccompanied Children into ORR Care Provider Facilities*). ORR did not propose any new requirements which result in a change in burden.

ORR has reviewed the requirements being codified in subpart J and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0565 (*Legal Services for Unaccompanied Children*). ORR did not propose any new requirements which result in a change in burden.

VI. Regulatory Impact Analysis

Executive Orders 12866 and 13563 direct agencies to assess all 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). Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) having an annual effect on the economy of $200 million or more (adjusted every 3 years for changes in gross domestic product), or adversely affecting in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal Governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impact of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. While there is uncertainty about the magnitude of effects associated with these regulations, it cannot be ruled out that they exceed the threshold for significance set forth in section 3(f)(1) of Executive Order 12866. Therefore, the regulation is section 3(f)(1) significant and has been reviewed by OMB.

A. Economic Analysis

1. 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 ''an analytically reasonable forecast of the way the world would look absent the regulatory action being assessed, including any expected changes to current conditions over time.'' ORR considers its current operations and procedures for implementing the terms of the FSA, the HSA, and the TVPRA to be an informative baseline for this analysis, from which it estimates the costs and benefits that would result from implementing this rule. The section below discusses some examples of the current cost for ORR's operations and procedures under this baseline. The costs described below are already being incurred as part of ORR's implementation of the terms of FSA, the HSA, and the TVPRA. However, the future in the absence of the rule is unclear, including because the end of temporary legal structures could change the UC Program's operations. Relative to some future trajectories—that is, other analytic baselines—there could be additional new costs (and new effects more generally) associated with the policies being promulgated in this final rule.

Referrals of unaccompanied children to the UC Program vary considerably from one year to the next, even from month to month, and are largely unpredictable. Funding for the UC Program's services are dependent on annual appropriations, which rely in part on fluctuating migration numbers. For example, in fiscal year (FY) 2019, the UC Program served 69,488 unaccompanied children and received $1.3 billion in appropriations.[347] In contrast, in FY 2022, ORR served 128,904 unaccompanied children and received $5.5 billion in appropriations.[348] Appropriations account for uncertainty inherent in migration numbers by providing additional resources in any month when the UC Program receives referrals over a certain threshold. For example, in FY 2023, a contingency fund provided $27 million for each increment of 500 referrals (or pro rata share) above a threshold of 13,000 unaccompanied children referrals in a month.[349]

The UC Program funds private non-profit and for-profit agencies to provide shelter, counseling, medical care, legal services, and other support services to children in custody. In addition, some funding is provided for limited post-release services to certain unaccompanied children. Care provider 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 82 percent) are for care in ORR shelters. Other services for unaccompanied children, such as medical care, background checks, and family unification services, make up approximately 16 percent of the budget. Administrative expenses to carry out the program total approximately 2 percent of the budget.

2. Estimated Costs

This rule codifies current ORR and HHS requirements for compliance with the HSA, the TVPRA, the FSA, court orders, and other requirements described under existing ORR policies and cooperative agreements. Because the majority of requirements being codified in this final rule are already enforced by ORR, ORR does not expect this rule to impose any additional costs aside from those costs incurred by the Federal Government to establish the risk determination hearing process described in § 410.1903 and the UC Office of the Ombuds described in subpart K. Existing staff are currently responsible for conducting both Internal Compliance Reviews and Placement Review Panels as described in §§ 410.1901 and 410.1902, respectively, therefore no additional cost will be incurred.

In § 410.1309, ORR is finalizing the proposal that to the greatest extent practicable and consistent with section 292 of the INA (8 U.S.C. 1362), that all unaccompanied children who are or have been in ORR care would have access to legal advice and representation in immigration legal proceedings or other matters, consistent with current policy. ORR is finalizing the proposal that to the extent that appropriations are available, and insofar as it is not practicable to secure pro bono counsel for unaccompanied children as specified at 8 U.S.C. 1232(c)(5), ORR would have discretion to fund legal service providers to provide direct immigration legal representation. Similarly, ORR is finalizing under § 410.1210 that ORR may offer PRS, which is voluntary for the unaccompanied child and sponsor, for all released children based on their needs and the extent to which appropriations are available. As discussed in Section VI, funding for UC Program services is dependent on annual appropriations from Congress. While ORR is unable to estimate the extent of the need for PRS and legal services and the associated costs, the regulations specifically mention that funding for PRS and legal service providers are limited to the extent appropriations are available. ACF's Justification of Estimates for Appropriation Committees provides additional information regarding the impact of its requested budget.[350]

At § 410.1903, ORR is finalizing the proposal to establish a hearing process that provides the same substantive protections as immigration court bond hearings under the FSA, but through an independent and neutral HHS adjudicator. This rule shifts responsibility for these hearings from DOJ to HHS. ORR estimates that some resources will be required to implement this shift. ORR believes that this burden will fall on DOJ and HHS staff and estimates that it will require approximately 2,000 to 4,000 hours to implement. This estimate reflects 6 to 12 staff working full-time for 2 months

to create the new system. After this shift in responsibility has been implemented, ORR estimates that the rule will lead to no change in net resources required for risk determination hearings, and therefore estimate no incremental costs or savings. ORR sought public comment on these estimates but did not receive any comments.

In subpart K, ORR discusses the establishment of an Office of the Ombuds for the UC Program. Although the scope of the Office of the Ombuds may be varied, ORR anticipates that it would provide a mechanism by which unaccompanied children, sponsors, and other relevant parties could raise concerns, be empowered to independently investigate claims, issue findings, and make recommendations to ORR, and refer findings to other Federal agencies or Congress as appropriate. The Ombuds role will be filled by a career civil servant who has expertise in dispute resolution, familiarity with oversight and regulatory matters, experience working with unaccompanied children or in child welfare, and knowledge of ORR policy and regulations. In addition to the Ombuds position itself, ORR anticipates the need for support staff as well. In order to estimate the costs associated with the Office of the Ombuds and its potential staffing requirements, ORR conferred with budgetary experts and analyzed the needs anticipated to accommodate the likely case load. ORR assumes the Ombuds would be a GS–15 ($176,458 per year) while support staff would consist of one GS–14 ($150,016 per year), four GS–13s ($126,949 per year), and four GS–12s ($106,759 per staff per year). For estimating purposes, ORR assumes each position will be a Step 5 and include a factor 36.25 percent for overhead, per OMB.[351] In total, ORR estimates the cost of establishing this office would be $1,718,529 per year [($176,458 + 150,016 + ($126,949 × 4) + ($106,759 × 4) × 136.25 percent]. ORR welcomed comments on the proposed staffing and structure for the Office of the Ombuds but did not receive any comments other than those previously included in subpart K.

ORR notes that all care provider facilities discussed in this final rule are ORR grantees and the costs of maintaining compliance with these requirements are allowable costs to grant awards under the Basic Considerations for cost provisions at 45 CFR 75.403 through 75.405, in that the costs are reasonable, necessary, ordinary, treated consistently, and are allocable to the award. Additional costs associated with the policies discussed in this final rule that were not budgeted, and cannot be absorbed within existing budgets, would be allowable for the grant recipient to submit a request for supplemental funds to cover the costs.

ORR also notes that EIFs discussed in this final rule are operated by contractors who provide facility management and wraparound services to safely house and care for unaccompanied children during a time of and in response to emergency or influx. Because ORR is finalizing subpart I to codify existing requirements and are not finalizing any additional requirements which we believe will result in changes to current operational practices which impact either facility or staffing costs to operate EIFs, ORR does not estimate any additional costs.

ORR sought public comment on any additional costs associated with the proposals in the NPRM which have not been otherwise addressed (88 FR 68975).

ORR did not receive any comments on additional costs which were not otherwise addressed in the discussion of the proposals in this final rule. As a result, ORR is making no changes or additions to the costs previously discussed in the NPRM. In addition, ORR is making no changes or additions to costs resulting from changes and amendments to regulatory text.

3. Benefits

The primary benefit of the rule is to ensure that applicable regulations reflect ORR's custody and treatment of unaccompanied children in accordance with the relevant and substantive terms of the FSA, the HSA, and the TVPRA. Additionally, the proposed codification of minimum standards for licensed facilities and the release process ensures a measure of consistency across the programs network of standard facilities. ORR also anticipates that many of the previously discussed costs will be partially offset by a reduction in legal costs and staff time associated with the FSA and associated motions to enforce that require significant usage of staff time—often at extremely short notice—and require ORR to pay attorneys' fees.

As required by OMB Circular A–4 (available on the Office of Management and Budget website at: *https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf*), ORR has prepared an accounting statement to illustrate the impacts of the finalized policies in this final rule in Table 3.

TABLE 2—ACCOUNTING STATEMENT: ESTIMATED ANNUAL COSTS AND BENEFITS

Category	Estimate
Benefits:	
Annualized Monetized Benefits	$0.
Annualized quantified, but non-monetized, benefits	None.
Unquantified Benefits	(1) Applicable regulations reflect ORR's custody and treatment of unaccompanied children in accordance with the relevant and substantive terms of the FSA, the HSA, and the TVPRA. (2) Codification of minimum standards for licensed facilities and the release process ensures a measure of consistency across the programs network of standard facilities. (3) Reduction in legal costs and staff time associated with the FSA and associated motions to enforce.
Costs:	
Annualized monetized costs	$1,718,529.
Annualized quantified, but non-monetized, costs	2,000–4,000 hours.
Unquantified Costs.	
Transfers	$0.
Net Benefits	$0.

B. Regulatory Flexibility Analysis

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.

The purpose of this action is to promulgate regulations that 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. Publication of final regulations would result in termination of the FSA, as provided for in FSA paragraph 40. The FSA provides standards for the detention, treatment, and transfer of minors and unaccompanied children. Section 462 of the HSA and section 235 of the TVPRA prescribe substantive requirements and procedural safeguards to be implemented by ORR with respect to unaccompanied children. Additionally, court decisions have dictated how the FSA is to be implemented.[352]

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 children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization.'' [353] 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.[354]

Consistent with provisions in the HSA, the TVPRA places the responsibility for the care and custody of unaccompanied children with the Secretary of Health and Human Services.[355] Prior to the enactment of the HSA, 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.'' [356] In accordance with the relevant savings and transfer provisions of the HSA,[357] the ORR Director now possesses the authority to promulgate regulations concerning ORR's administration of its responsibilities under the HSA and TVPRA.

This rule would directly regulate ORR. ORR funds grantees and contractors to provide shelter, counseling, medical care, legal services, and other support services to unaccompanied children in custody. Because the requirements being finalized in this rule are already largely enforced by ORR, ORR does not expect this final rule to impose any additional costs to any of their grantees or contractors related to the provision of these services. It is possible that some grantees or contractors may experience costs to remedy any unmet requirements, however ORR is unable to make any specific assumptions due to the unique nature of each grantee and contractor. Additional costs associated with remedial actions necessary to meet requirements promulgated in this final rule that were not budgeted, and cannot be absorbed within existing budgets, would be allowable for the grant recipient to submit a request for supplemental funds to cover the costs.

Per the most recent SBA size standards effective March 17, 2023, the SBA size standard for NAICS 561210 Facilities Support Services is $47.0 million. The SBA size standards for NAICS 561612 Security Guards and Patrol Services is $29.0 million. Currently, ORR funds 52 grantees to provide services to unaccompanied children. ORR finds that all 52 current grantees are non-profits that do not appear to be dominant in their field. Consequently, ORR believes all 52 grantees are likely to be small entities for the purposes of the RFA. The provisions in this final rule make changes to ORR regulations and would not directly financially impact any small entities. ORR reiterates that additional costs associated with remedial actions necessary to meet requirements promulgated in this final rule that were not budgeted, and cannot be absorbed within existing budgets, would be allowable for the small entity grantee to submit a request for supplemental funds to cover the costs.

ORR requested information and data from the public that would assist in better understanding the direct effects of this final rule on small entities (88 FR 68976). Members of the public were invited to submit a comment, as described in the NPRM under Public Participation, if they think that their business, organization, or governmental jurisdiction qualifies as a small entity and that the policies proposed in the NPRM would have a significant economic impact on it. ORR requested that commenters provide as much information as possible as to why the policies proposed in the NPRM would create an impact on small businesses.

ORR is unaware of any relevant Federal rule that may duplicate, overlap, or conflict with the final rule and is not aware of any alternatives to the final rule which accomplish the stated objectives that would minimize economic impact of the proposed rule on small entities. ORR requested comment and also sought alternatives from the public that will accomplish the same objectives and minimize the proposed rule's economic impact on small entities (88 FR 68976). ORR did not receive any comments on the impacts of these policies on small entities.

Based on this analysis, the Secretary certifies that the rule, if finalized, will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. The current threshold after adjustment for inflation is $183 million, using the most current (2023) Implicit Price Deflator for the Gross Domestic Product. This final rule would not mandate any requirements that meet or exceed the threshold for State, local, or tribal Governments, or the private sector.

Though this rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere 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 ORR 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 ORR. 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.

D. 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.*).

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), ORR submitted a copy of this section to the Office of Management and Budget (OMB) for its review. This final rule complies with settlement agreements, court orders, and statutory requirements, most of whose terms have been in place for over 20 years. This final 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. ORR received approval from OMB for use of its forms under OMB control number 0970–0278, with an expiration date of August 31, 2025. Separately, ORR received approval from OMB for its placement and service forms under OMB control number 0970–0498, with an expiration date of August 31, 2023. A form associated with the specific consent process is currently pending approval with OMB (OMB Control Number 0970–0385). We will be submitting forms associated with risk determination hearings to OMB for approval as part of a new information collection request as well as submitting associated revisions for approval under OMB control number 0970–0565.

E. Executive Order 13132: Federalism

This final rule would 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 would implement ORR statutory responsibilities and the FSA by codifying ORR practices that comply with the terms of the FSA and relevant law for the care and custody of unaccompanied children. In finalizing its proposal to codify these practices, ORR was mindful of its obligations to meet the requirements of Federal statutes and the FSA while also minimizing conflicts between State law and Federal interests. At the same time, ORR is also mindful that its fundamental obligations are to ensure that it implements its statutory responsibilities and the agreement that the Federal Government entered into through the FSA.

Typically, ORR enters into cooperative agreements or contracts with non-profit and private organizations to provide shelter and care for unaccompanied children in a facility licensed by the appropriate State or local licensing authority if the State licensing agency provides for licensing of facilities that provide services to unaccompanied children. Where ORR enters into a cooperative agreement or contract with a facility, ORR requires that the organization administering the facility abide by all applicable State or local licensing regulations and laws. ORR designed agency policies and proposed regulations, as well as the terms of ORR cooperative agreements and contracts with the agency's grantees/contractors, to complement applicable State and licensing rules, not to supplant or replace the requirements.

Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Notwithstanding the determination that the formal consultation process described in Executive Order 13132 is not required for this rule, ORR welcomed any comments from representatives of State and local juvenile or family residential facilities—among other individuals and groups—during the course of this rulemaking. ORR did not receive any comments regarding the effects of these policies on the States or on the distribution of power and responsibilities among the various levels of Government.

F. Executive Order 12988: Civil Justice Reform

This final 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.

VII. Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing criteria specified in the law. This regulation will not have an impact on family well-being as defined in this legislation, which asks agencies to assess policies with respect to whether the policy: strengthens or erodes family stability and the authority and rights of parents in the education, nurture, and supervision of their children; helps the family perform its functions; and increases or decreases disposable income.

Comment: One commenter disagreed that the rule did not erode family stability, stating a belief that facilitating access to abortion has a negative impact on families.

Response: While ORR acknowledges the opinion and concern of the commenter, ORR concluded that the rule does not have an impact on family-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act of 1999.

Final Rule Action: ORR is making no changes to its assessment of the impact of the regulation on families in this final rule.

VIII. Alternatives Considered

ORR considered several alternatives to the proposed regulations prior to finalizing this rule. First, ORR could have chosen not to promulgate this rule proposing to codify requirements that would protect unaccompanied children in ORR care. However, as discussed at Section III.B.3, pursuant to a stipulation in *California* v. *Mayorkas,* HHS agreed to pursue a new rulemaking to replace and supersede the 2019 Final Rule, which had been enjoined. This rulemaking represents that broader rulemaking effort. Had HHS violated its stipulated agreement and moved to lift the injunction of the 2019 Final Rule, it is likely the *California* v. *Mayorkas* litigation would have resumed. In any case, ORR believes that this rule is warranted at this time in order to codify a uniform set of standards and procedures open to public inspection and feedback that will help to ensure the safety and well-being of unaccompanied children in ORR care, implement the substantive terms of the FSA, and enhance public transparency as to the policies governing the operation of the UC Program.

Once ORR decided to pursue a framework of regulatory requirements through a rule, it considered the scope of a rule and whether to propose additional regulations addressing further areas of authority under the TVPRA. ORR rejected this alternative in order to solely focus this rule on requirements that relate specifically to the care and placement of unaccompanied children in ORR custody, pursuant to 6 U.S.C. 279 and 8 U.S.C. 1232, and that would implement the terms of the FSA. ORR

notes that its decision to finalize more targeted regulations in this final rule does not preclude ORR or other agencies from subsequently issuing regulations to address other issues within ORR's statutory authorities in the future.

After considering these alternatives, ORR is finalizing standards that are consistent with its statutory authorities, implement the terms of the FSA that create responsibilities for ORR, and reflect and are consistent with current ORR practices and requirements, including enhanced standards, procedures, and oversight mechanisms to help ensure the safety and well-being of unaccompanied children in ORR care where appropriate, consistent with ORR's statutory authorities and the FSA. In this way, it would be possible to finalize a codified set of standards and requirements that are uniform across care provider facilities and in a way that accords with the way the UC Program functions.

The FSA contemplates the publication of regulations implementing the agreement. In a 2001 Stipulation, the parties agreed to a termination of the FSA ''45 days following the defendants' publication of final regulations implementing this Agreement.'' In 2020, the U.S. Court of Appeals for the Ninth Circuit ruled that if the Government wishes to terminate those portions of the FSA covered by valid portions of HHS regulations, it may do so.[358] In this final rule, ORR is therefore finalizing regulations implementing the agreement by codifying terms of the FSA that prescribe ORR responsibilities for unaccompanied children in order to ensure that unaccompanied children continue to be treated in accordance with the FSA, the HSA, and the TVPRA.

Jeff Hild, Acting Assistant Secretary of the Administration for Children and Families, approved this document on April 14, 2024.

List of Subjects in 45 CFR Part 410

Administrative practice and procedure, Aliens, Child welfare, Immigration, Reporting and recordkeeping requirements, Unaccompanied children.

■ For the reasons set forth in the preamble, we revise 45 CFR part 410 to read as follows:

PART 410—CARE AND PLACEMENT OF UNACCOMPANIED CHILDREN

Subpart A—Care and Placement of Unaccompanied Children

Sec.

Subpart B—Determining the Placement of an Unaccompanied Child at a Care Provider Facility

Subpart C—Releasing an Unaccompanied Child From ORR Custody

Subpart D—Minimum Standards and Required Services

Subpart E—Transportation of an Unaccompanied Child

Subpart F—Data and Reporting Requirements

Subpart G—Transfers

Subpart H—Age Determinations

Subpart I—Emergency and Influx Operations

Subpart J—Availability of Review of Certain ORR Decisions

Subpart K—Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds)

Authority: 6 U.S.C. 279, 8 U.S.C. 1232.

Subpart A—Care and Placement of Unaccompanied Children

§ 410.1000 Scope of this part.

(a) This part governs those aspects of the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to the Unaccompanied Children Program (UC 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 includes provisions

implementing 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).

(b) The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

(c) ORR does not fund or operate facilities other than standard programs, restrictive placements (which includes secure facilities, including residential treatment centers, and heightened supervision facilities), or emergency or influx facilities, absent a specific waiver as described under § 410.1801(d) or such additional waivers as are permitted by law.

§ 410.1001 Definitions.

For the purposes of this part, the following definitions apply.

ACF means the Administration for Children and Families, Department of Health and Human Services.

Attorney of record means an attorney who represents an unaccompanied child in legal proceedings or matters subject to the consent of the unaccompanied child. In order to be recognized as an unaccompanied child's attorney of record by the Office of Refugee Resettlement (ORR), for matters within ORR's authority, the individual must provide proof of representation of the child to ORR. ORR notes that attorneys of record may engage with ORR in the course of this representation in order to obtain custody-related document and to engage in other communications necessary to facilitate the representation.

Best interest is a standard ORR applies in determining the types of decisions and actions it makes in relation to the care of an unaccompanied child. When evaluating what is in a child's best interests, ORR considers, as appropriate, the following non-exhaustive list of factors: the unaccompanied child's expressed interests, in accordance with the unaccompanied child's age and maturity; the unaccompanied child's mental and physical health; the wishes of the unaccompanied child's parents or legal guardians; the intimacy of relationship(s) between the unaccompanied child and the child's family, including the interactions and interrelationship of the unaccompanied child with the child's parents, siblings, and any other person who may significantly affect the unaccompanied child's well-being; the unaccompanied child's adjustment to the community; the unaccompanied child's cultural background and primary language; length or lack of time the unaccompanied child has lived in a stable environment; individualized needs, including any needs related to the unaccompanied child's disability; and the unaccompanied child's development and identity.

Care provider facility means any physical site, including an individual family home, that houses one or more unaccompanied children in ORR custody and is operated by an ORR-funded program that provides residential services for unaccompanied children. Out of network (OON) placements are not included within this definition.

Case file means the physical and electronic records for each unaccompanied child that are pertinent to the care and placement of the child. Case file materials include but are not limited to biographical information on each unaccompanied child; copies of birth and marriage certificates; various ORR forms and supporting documents (and attachments, *e.g.,* photographs); incident reports; medical and dental records; mental health evaluations; case notes and records, including educational records, clinical notes and records; immigration forms and notifications; legal papers; home studies and/or post-release service records on a sponsor of an unaccompanied child; family unification information including the sponsor's individual and financial data; case disposition; correspondence regarding the child's case; and Social Security number (SSN); juvenile/criminal history records; and other relevant records. The records of unaccompanied children are the property of ORR, whether in the possession of ORR or a grantee or contractor, and grantees and contractors may not release these records without prior approval from ORR, except for program administration purposes.

Case manager means the individual that coordinates, in whole or in part, assessments of unaccompanied children, individual service plans, and efforts to release unaccompanied children from ORR custody. Case managers also ensure services for unaccompanied children are documented within the case files for each unaccompanied child.

Chemical restraints include, but are not limited to, drugs administered to children to chemically restrain them, and external chemicals such as pepper spray or other forms of inflammatory and/or aerosol agents.

Child advocates means third parties, appointed by ORR consistent with its authority under TVPRA at 8 U.S.C. 1232(c)(6), who make independent recommendations regarding the best interests of an unaccompanied child.

Clear and convincing evidence means a standard of evidence requiring that a factfinder be convinced that a contention is highly probable—*i.e.,* substantially more likely to be true than untrue.

Close relative means a brother, sister, grandparent, aunt, uncle, first cousin, or other immediate biological relative, or immediate relative through legal marriage or adoption, and half-sibling.

Corrective action means steps taken to correct any care provider facility noncompliance identified by ORR.

Department of Justice Accredited Representative, or *DOJ Accredited Representative,* means a representative of a qualified nonprofit religious, charitable, social service, or other similar organization established in the United States and recognized by the Department of Justice in accordance with 8 CFR part 1292. A DOJ Accredited Representative who is representing a child in ORR custody may file a notice of such representation in order to receive updates on the unaccompanied child.

DHS means the U.S. Department of Homeland Security.

Director means the Deputy Assistant Secretary for Humanitarian Services and Director of the Office of Refugee Resettlement (ORR), Administration for Children and Families, Department of Health and Human Services.

Disability means, with respect to an individual, the definition provided by section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102, which is adopted by reference in section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), and its implementing regulations, 45 CFR 84.3 (programs receiving Department of Health and Human Services (HHS) financial assistance) and 45 CFR 85.3 (programs conducted by HHS), as well as in the TVPRA at 8 U.S.C. 1232(c)(3)(B).

Discharge means an unaccompanied child that exits ORR custody, or the act of an unaccompanied child exiting ORR custody.

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 unaccompanied children, or impacts other conditions provided by this part.

Emergency incidents means urgent situations in which there is an immediate and severe threat to a child's safety and well-being that requires

immediate action, and also includes unauthorized absences of unaccompanied children from a care provider facility. Emergency incidents include, but are not limited to:

(1) Abuse or neglect in ORR care where there is an immediate and severe threat to the child's safety and well-being, such as physical assault resulting in serious injury, sexual abuse, or suicide attempt;

(2) Death of an unaccompanied child in ORR custody, including out-of-network facilities;

(3) Medical emergencies;

(4) Mental health emergencies requiring hospitalization; and

(5) Unauthorized absences of unaccompanied children in ORR custody.

Emergency or influx facility (EIF) means a type of care provider facility that opens temporarily to provide shelter and services for unaccompanied children during an influx or emergency. An EIF is not defined as a standard program, shelter, or secure facility under this part. Because of the emergency nature of EIFs, they may be unlicensed or may be exempted from licensing requirements by State and/or local licensing agencies. EIFs may also be operated on federally-owned or leased property, in which case, the facility may not be subject to State or local licensing standards.

Emergency safety situation means a situation in which a child presents a risk of imminent physical harm to themselves, or others, as demonstrated by overt acts or expressed threats.

Family planning services include, but are not limited to, Food and Drug Administration (FDA)-approved contraceptive products (including emergency contraception), pregnancy testing and non-directive options counseling, sexually transmitted infection (STI) services, and referrals to appropriate specialists. ORR notes that the term ''family planning services'' does not include abortions. Instead, abortion is included in the definition of *medical services requiring heightened ORR involvement,* and is further discussed in § 410.1307.

Family Reunification Packet means an application and supporting documentation which must be completed by a potential sponsor who wishes to have an unaccompanied child released from ORR to their care. ORR uses the application and supporting documentation, as well as other procedures, to determine the sponsor's ability to provide for the unaccompanied child's physical and mental well-being.

Heightened supervision facility means a facility that is operated by a program, agency or organization licensed by an appropriate State agency, or that meets the requirements of State licensing that would otherwise be applicable if it is in a State that does not allow state licensing of programs providing care and services to unaccompanied children, and that meets the standards for standard programs set forth in § 410.1302, and that is designed for an unaccompanied child who requires close supervision but does not need placement in a secure facility, including a residential treatment center (RTC). It provides 24-hour supervision, custody, care, and treatment. It maintains stricter security measures than a shelter, such as intensive staff supervision, in order to provide supports, manage problem behavior, and prevent children from running away. A heightened supervision facility may have a secure perimeter but shall not be equipped internally with major restraining construction or procedures typically associated with juvenile detention centers or correctional facilities.

HHS means the U.S. Department of Health and Human Services.

Home study means an in-depth investigation of the potential sponsor's ability to ensure the child's safety and well-being, initiated by ORR as part of the sponsor suitability assessment. A home study includes an investigation of the living conditions in which the unaccompanied child would be placed if released to a particular potential sponsor, the standard of care that the unaccompanied child would receive, and interviews with the potential sponsor and other household members. A home study is conducted for any case where it is required by the TVPRA, this part, and for other cases at ORR's discretion, including for those in which the safety and well-being of the unaccompanied child is in question.

Influx means, for purposes of HHS operations, a situation in which the net bed capacity of ORR's standard programs that is occupied or held for placement by unaccompanied children meets or exceeds 85 percent for a period of seven consecutive days.

Legal guardian means an individual who has been lawfully vested with the power, and charged with the duty of caring for, including managing the property, rights, and affairs of, a child or incapacitated adult by a court of competent jurisdiction, whether foreign or domestic.

Legal service provider means an organization or individual attorney who provides legal services to unaccompanied children, either on a pro bono basis or through ORR funding for unaccompanied children's legal services. Legal service providers provide Know Your Rights presentations and screenings for legal relief to unaccompanied children, and/or direct legal representation to unaccompanied children.

LGBTQI+ includes lesbian, gay, bisexual, transgender, queer or questioning, and intersex.

Mechanical restraint means any device attached or adjacent to the child's body that the child cannot easily remove that restricts freedom of movement or normal access to the child's body. For purposes of the Unaccompanied Children Program, mechanical restraints are prohibited across all care provider types except in secure facilities, where they are permitted only as consistent with State licensure requirements.

Medical services requiring heightened ORR involvement means:

(1) Significant surgical or medical procedures;

(2) Abortions; and

(3) Medical services necessary to address threats to the life of or serious jeopardy to the health of an unaccompanied child.

Notification of Concern (NOC) means an instrument used by home study and post-release services providers, ORR care providers, and the ORR National Call Center staff to document and notify ORR of certain concerns that arise after a child is released from ORR care and custody.

Notice of Placement (NOP) means a written notice provided to unaccompanied children placed in restrictive placements, explaining the reasons for placement in the restrictive placement and kept as part of the child's case file. The care provider facility where the unaccompanied child is placed must provide the NOP to the child within 48 hours after an unaccompanied child's arrival at a restrictive placement, as well as at minimum every 30 days the child remains in a restrictive placement.

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

ORR long-term home care means an ORR-funded family or group home placement in a community-based setting. An unaccompanied child may be placed in long-term home care if ORR is unable to identify an appropriate sponsor with whom to place the unaccompanied child during the pendency of their immigration legal proceedings. ''Long-term home care'' has the same meaning as ''long-term

foster care,'' as that term is used in the definition of *traditional foster care* provided at 45 CFR 411.5.

ORR transitional home care means an ORR-funded short-term placement in a family or group home. ''Transitional home care'' has the same meaning as ''transitional foster care,'' as that term is used in the definition of *traditional foster care* provided at 45 CFR 411.5.

Out of network (OON) placement means a facility that is licensed by an appropriate State agency and that provides physical care and services for individual unaccompanied children as requested by ORR on a case-by-case basis, that operates under a single case agreement for care of a specific child between ORR and the OON provider. OON may include hospitals, restrictive settings, or other settings outside of the ORR network of care. An OON placement is not defined as a standard program under this part.

Peer restraints mean asking or permitting other children to physically restrain another child.

Personal restraint means the application of physical force without the use of any device, for the purpose of restraining the free movement of a child's body. This does not include briefly holding a child without undue force in order to calm or comfort them.

Placement means delivering the unaccompanied child to the physical custody and care of either a care provider facility or an alternative to such a facility. An unaccompanied child who is placed pursuant to this part is in the legal custody of ORR and may only be transferred or released by ORR. An unaccompanied child remains in the custody of a referring agency until the child is physically transferred to a care provider facility or an alternative to such a facility.

Placement Review Panel means a three-member panel consisting of ORR's senior-level career staff with requisite experience in child welfare that is convened for the purposes of reviewing requests for reconsideration of restrictive placements. An ORR staff member who was involved with the decision to step-up an unaccompanied child to a restrictive placement may not serve as a Placement Review Panel member with respect to that unaccompanied child's placement.

Post-release services (PRS) mean follow-up services as that term is used in the TVPRA at 8 U.S.C. 1232(c)(3)(B). PRS are ORR-approved services which may, and when required by statute must, be provided to an unaccompanied child and the child's sponsor, subject to available resources as determined by ORR, after the child's release from ORR custody. Assistance may include linking families to educational and community resources, home visits, case management, in-home counseling, and other social welfare services, as needed. When follow-up services are required by statute, the nature and extent of those services would be subject to available resources.

Program-level events mean situations that affect the entire care provider facility and/or unaccompanied children and its staff within and require immediate action and include, but are not limited to:

(1) Death of a staff member, other adult, or a child who is not an unaccompanied child but is in the care provider facility's care under non-ORR funding;

(2) Major disturbances such as a shooting, attack, riot, protest, or similar occurrence;

(3) Natural disasters such as an earthquake, flood, tornado, wildfire, hurricane, or similar occurrence;

(4) Any event that affects normal operations for the care provider facility such as, for instance, a long-term power outage, gas leaks, inoperable fire alarm system, infectious disease outbreak, or similar occurrence.

Prone physical restraint means a restraint restricting a child's breathing, restricting a child's joints or hyperextending a child's joints, or requiring a child to take an uncomfortable position.

PRS provider means an organization funded by ORR to connect the sponsor and unaccompanied child to community resources for the child and for other child welfare services, as needed, following the release of the unaccompanied child from ORR custody.

Psychotropic medication(s) means medication(s) that are prescribed for the treatment of symptoms of psychosis or another mental, emotional, or behavioral disorder and that are used to exercise an effect on the central nervous system to influence and modify behavior, cognition, or affective state. The term includes the following categories:

(1) Psychomotor stimulants;

(2) Antidepressants;

(3) Antipsychotics or neuroleptics;

(4) Agents for control of mania or depression;

(5) Antianxiety agents; and

(6) Sedatives, hypnotics, or other sleep-promoting medications.

Qualified interpreter means:

(1) For an individual with a disability, an interpreter who, via a video remote interpreting service (VRI) or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

(2) For a limited English proficient individual, an interpreter who via a remote interpreting service or an on-site appearance:

(i) Has demonstrated proficiency in speaking and understanding both spoken English and at least one other spoken language;

(ii) Is able to interpret effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary or terms without changes, omissions, or additions and while preserving the tone, sentiment, and emotional level of the original oral statement; and

(3) Adheres to generally accepted interpreter ethics principles, including client confidentiality.

Qualified translator means a translator who:

(1) Has demonstrated proficiency in writing and understanding both written English and at least one other written non-English language;

(2) Is able to translate effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary or terms without changes, omissions, or additions and while preserving the tone, sentiment, and emotional level of the original written statement; and

(3) Adheres to generally accepted translator ethics principles, including client confidentiality.

Release means discharge of an unaccompanied child to an ORR-vetted and approved sponsor. After release, ORR does not have legal custody of the unaccompanied child, and the sponsor becomes responsible for providing for the unaccompanied child's physical and mental well-being.

Residential treatment center (RTC) means a sub-acute, time limited, interdisciplinary, psycho-educational, and therapeutic 24-hour-a-day structured program with community linkages, provided through non-coercive, coordinated, individualized care, specialized services, and interventions. RTCs provide highly customized care and services to individuals following either a community-based placement or more intensive intervention, with the aim of moving individuals toward a stable, less intensive level of care or independence. RTCs are a type of secure facility and are not a standard program under this part.

Restrictive placement means a secure facility, including RTCs, or a heightened supervision facility.

Runaway risk means it is highly probable or reasonably certain that an unaccompanied child will attempt to abscond from ORR care. Such determinations must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away.

Seclusion means the involuntary confinement of a child alone in a room or area from which the child is instructed not to leave or is physically prevented from leaving.

Secure facility means a facility with an ORR contract or cooperative agreement having separate accommodations for minors, in a physically secure structure with staff able to control violent behavior. ORR uses a secure facility as the most restrictive placement option for an unaccompanied child who poses a danger to self or others or has been charged with having committed a criminal offense. A secure facility is not defined as a standard program or shelter under this part.

Shelter means a kind of standard program in which all of the programmatic components are administered on-site, consistent with the standards set forth in § 410.1302.

Significant incidents mean non-emergency situations that may immediately affect the safety and well-being of a child. Significant incidents include, but are not limited to:

(1) Abuse or neglect in ORR care;

(2) Sexual harassment or inappropriate sexual behavior;

(3) Staff Code of Conduct violations;

(4) Contact or threats to an unaccompanied child while in ORR care from trafficking or smuggling syndicates, organized crime, or other criminal actors;

(5) Incidents involving law enforcement on site;

(6) Potential fraud schemes perpetrated by outside actors on unaccompanied children's sponsors;

(7) Separation from a parent or legal guardian upon apprehension by a Federal agency;

(8) Mental health concerns; and

(9) Use of safety measures, such as restraints.

Sponsor means an individual (or entity) to whom ORR releases an unaccompanied child out of ORR custody, in accordance with ORR's sponsor suitability assessment process and release procedures.

Staff Code of Conduct means the set of personnel requirements established by ORR in order to promote a safe environment for unaccompanied children in its care, including protecting unaccompanied children from sexual abuse and sexual harassment.

Standard program means any program, agency, or organization that is licensed by an appropriate State agency to provide residential, group, or transitional or long-term home care services for dependent children, including a program operating family or group homes, or facilities for unaccompanied children with specific individualized needs; or that meets the requirements of State licensing that would otherwise be applicable if it is in a State that does not allow state licensing of programs providing care and services to unaccompanied children. A standard program must meet the standards set forth in § 410.1302. All homes and facilities operated by a standard program, including facilities for unaccompanied children with specific individualized needs, shall be non-secure as required under State law. However, a facility for unaccompanied children with specific individualized needs may maintain that level of security permitted under State law which is necessary for the protection of an unaccompanied child or others in appropriate circumstances.

Tender age means twelve years of age or younger.

Transfer means the movement of an unaccompanied child from one ORR care provider facility to another ORR care provider facility, such that the receiving care provider facility takes over physical custody of the child. ORR sometimes uses the terms ''step-up'' and ''step-down'' to describe transfers of unaccompanied children to or from restrictive placements. For example, if ORR transfers an unaccompanied child from a shelter facility to a heightened supervision facility, that transfer would be a ''step-up,'' and a transfer from a heightened supervision facility to a shelter facility would be a ''step-down.'' But a transfer from a shelter to a community-based care facility, or vice versa, would be neither a step-up nor a step-down, because both placement types are not considered restrictive.

Trauma bond means when a trafficker uses rewards and punishments within cycles of abuse to foster a powerful emotional connection with the victim.

Trauma-informed means a system, standard, process, or practice that realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in unaccompanied children, families, staff, and others involved with the system; and responds by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively resist re-traumatization.

Unaccompanied child/children means a child who:

(1) Has no lawful immigration status in the United States;

(2) Has not attained 18 years of age; and

(3) 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.

Unaccompanied Refugee Minors (URM) Program means the child welfare services program available pursuant to 8 U.S.C. 1522(d).

§ 410.1002 ORR care and placement of unaccompanied children.

ORR coordinates and implements the care and placement of unaccompanied children who are in ORR custody by reason of their immigration status.

§ 410.1003 General principles that apply to the care and placement of unaccompanied children.

(a) Within all placements, unaccompanied children shall be treated with dignity, respect, and special concern for their particular vulnerability.

(b) ORR shall hold unaccompanied children in facilities that are safe and sanitary and that are consistent with ORR's concern for the particular vulnerability of unaccompanied children.

(c) ORR plans and provides care and services based on the individual needs of and focusing on the strengths of the unaccompanied child.

(d) ORR encourages unaccompanied children, as developmentally appropriate and in their best interests, to be active participants in ORR's decision-making process relating to their care and placement.

(e) ORR strives to provide quality care tailored to the individualized needs of each unaccompanied child in its custody, ensuring the interests of the child are considered, and that unaccompanied children are protected from traffickers and other persons seeking to victimize or otherwise engage them in criminal, harmful, or exploitative activity, both while in ORR custody and upon release from the UC Program.

(f) In making placement determinations, ORR shall place each unaccompanied child in the least restrictive setting that is in the best interests of the child, giving consideration to the child's danger to self, danger to others, and runaway risk.

(g) When requesting information or consent from unaccompanied children ORR consults with parents, legal guardians, child advocates, and attorneys of record or DOJ Accredited Representatives as needed.

§ 410.1004 ORR custody of unaccompanied children.

All unaccompanied children placed by ORR in care provider facilities remain in the legal custody of ORR and may be transferred or released only with ORR approval; provided, however, that in the event of an emergency, a care provider facility may transfer temporary physical custody of an unaccompanied child prior to securing approval from ORR but shall notify ORR of the transfer as soon as is practicable thereafter, and in all cases within 8 hours.

Subpart B—Determining the Placement of an Unaccompanied Child at a Care Provider Facility

§ 410.1100 Purpose of this subpart.

This subpart sets forth the process by which ORR receives referrals of unaccompanied children from other Federal agencies and the factors ORR considers when placing an unaccompanied child in a particular care provider facility. As used in this subpart, ''placement determinations'' or ''placements'' refers to placements in ORR-approved care provider facilities during the time an unaccompanied child is in ORR care, and not to the location of an unaccompanied child once the unaccompanied child is released in accordance with subpart C of this part.

§ 410.1101 Process for placement of an unaccompanied child after referral from another Federal agency.

(a) ORR shall accept referrals of unaccompanied children, from any department or agency of the Federal Government at any time of day, every day of the year.

(b) Upon notification from any department or agency of the Federal Government that a child in its custody is an unaccompanied child and therefore must be transferred to ORR custody, ORR shall identify a standard program placement for the unaccompanied child, unless one of the listed exceptions in § 410.1104 applies, and notify the referring Federal agency within 24 hours of receiving the referring agency's notification whenever possible, and no later than within 48 hours of receiving notification, barring exceptional circumstances. ORR may seek clarification about the information provided by the referring agency as needed. In such instances, ORR shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory time frames.

(c) ORR shall work with the referring Federal Government department or agency to accept transfer of custody of the unaccompanied child, consistent with the statutory requirements at 8 U.S.C. 1232(b)(3).

(d) For purposes of paragraphs (b) and (c) of this section, ORR may be unable to timely identify a placement for and timely accept transfer of custody of an unaccompanied child due to exceptional circumstances, including:

(1) Any court decree or court-approved settlement that requires otherwise;

(2) An influx, as defined at § 410.1001;

(3) An emergency, including a natural disaster such as an earthquake or hurricane, a facility fire, or a civil disturbance;

(4) A medical emergency, such as a viral epidemic or pandemic among a group of unaccompanied children;

(5) The apprehension of an unaccompanied child in a remote location;

(6) The apprehension of an unaccompanied child whom the referring Federal agency indicates:

(i) Poses a danger to self or others; or

(ii) Has been charged with or has been convicted of a crime, or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent, and additional information is essential in order to determine an appropriate ORR placement.

(e) ORR shall take legal custody of an unaccompanied child when it assumes physical custody from the referring agency.

§ 410.1102 Care provider facility types.

ORR may place unaccompanied children in care provider facilities as defined at § 410.1001, including but not limited to shelters, group homes, individual family homes, heightened supervision facilities, or secure facilities, including RTCs. ORR may place unaccompanied children in out-of-network (OON) placements, subject to § 410.1103, if ORR determines that a child has a specific need that cannot be met within the ORR network of facilities, if no in-network care provider facility equipped to meet the child's needs has the capacity to accept a new placement, or if transfer to a less restrictive facility is warranted and ORR is unable to place the child in a less restrictive in-network facility. Unaccompanied children shall be separated from delinquent offenders in OON placements (except those unaccompanied children who meet the requirements for a secure placement pursuant to § 410.1105). In times of influx or emergency, as further discussed in subpart I of this part, ORR may place unaccompanied children in care provider facilities that may not meet the standards of a standard program, but rather meet the standards in subpart I.

§ 410.1103 Considerations generally applicable to the placement of an unaccompanied child.

(a) ORR shall place each unaccompanied child in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child's age and individualized needs, provided that such setting is consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and in protecting the unaccompanied child's well-being and that of others.

(b) ORR shall consider the following factors to the extent they are relevant to the unaccompanied child's placement, including:

(1) Danger to self;

(2) Danger to the community/others;

(3) Runaway risk;

(4) Trafficking in persons or other safety concerns;

(5) Age;

(6) Gender;

(7) LGBTQI+ status or identity;

(8) Disability;

(9) Any specialized services or treatment required or requested by the unaccompanied child;

(10) Criminal background;

(11) Location of potential sponsor and safe and timely release options;

(12) Behavior;

(13) Siblings in ORR custody;

(14) Language access;

(15) Whether the unaccompanied child is pregnant or parenting;

(16) Location of the unaccompanied child's apprehension; and

(17) Length of stay in ORR custody.

(c) ORR may utilize information provided by the referring Federal agency, child assessment tools, interviews, and pertinent documentation to determine the placement of all unaccompanied children. ORR may obtain any records from local, State, and Federal agencies regarding an unaccompanied child to inform placement decisions.

(d) ORR shall review, at least every 30 days, the placement of an unaccompanied child in a restrictive placement to determine whether a new level of care is appropriate.

(e) ORR shall make reasonable efforts to provide licensed placements in those geographical areas where DHS encounters the majority of unaccompanied children.

(f) A care provider facility must accept the placement of unaccompanied children as determined by ORR, and may deny placement only for the following reasons:

(1) Lack of available bed space;

(2) Placement of the unaccompanied child would conflict with the care provider facility's State or local licensing rules;

(3) Initial placement involves an unaccompanied child with a significant physical or mental illness for which the referring Federal agency does not provide a medical clearance; or

(4) In the case of the placement of an unaccompanied child with a disability, the care provider facility concludes it is unable to meet the child's disability-related needs, without fundamentally altering the nature of its program, even by providing reasonable modifications and even with additional support from ORR.

(g) Care provider facilities must submit a written request to ORR for authorization to deny placement of unaccompanied children, providing the individualized reasons for the denial. Any such request must be approved by ORR before the care provider facility may deny a placement. ORR may follow up with a care provider facility about a placement denial to find a solution to the reason for the denial.

§ 410.1104 Placement of an unaccompanied child in a standard program that is not restrictive.

ORR shall place all unaccompanied children in standard programs that are not restrictive placements, except in the following circumstances:

(a) An unaccompanied child meets the criteria for placement in a restrictive placement set forth in § 410.1105; or

(b) In the event of an emergency or influx of unaccompanied children into the United States, in which case ORR shall place the unaccompanied child as expeditiously as possible in accordance with subpart I of this part.

§ 410.1105 Criteria for placing an unaccompanied child in a restrictive placement.

(a) *Criteria for placing an unaccompanied child in a secure facility that is not a residential treatment center (RTC).* (1) ORR may place an unaccompanied child in a secure facility (that is not an RTC) either at initial placement or through a transfer to another care provider facility from the initial placement. This determination must be made based on clear and convincing evidence documented in the unaccompanied child's case file. All determinations to place an unaccompanied child in a secure facility (that is not an RTC) will be reviewed and approved by ORR Federal field staff. A finding that a child poses a danger to self shall not be the sole basis for a child's placement in a secure facility (that is not an RTC).

(2) ORR shall not place an unaccompanied child in a secure facility (that is not an RTC) if less restrictive alternatives in the best interests of the unaccompanied child are available and appropriate under the circumstances. ORR shall place an unaccompanied child in a heightened supervision facility or other non-secure care provider facility as an alternative, provided that the unaccompanied child does not currently pose a danger to others and does not need placement in an RTC pursuant to the standard set forth at 410.1105(c).

(3) ORR may place an unaccompanied child in a secure facility (that is not an RTC) only if the unaccompanied child:

(i) Has been charged with or has been convicted of a crime, or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent, and where ORR deems that those circumstances demonstrate that the unaccompanied child poses a danger to others, not including:

(A) 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

(B) A petty offense, which is not considered grounds for stricter means of detention in any case;

(ii) While in DHS or ORR's custody, or while in the presence of an immigration officer or ORR official or ORR contracted staff, has committed, or has made credible threats to commit, a violent or malicious act directed at others; or

(iii) Has engaged, while in a restrictive placement, in conduct that has proven to be unacceptably disruptive of the normal functioning of the care provider facility, and removal is necessary to ensure the welfare of others, as determined by the staff of the care provider facility (*e.g.,* stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR determines the unaccompanied child poses a danger to others based on such conduct.

(b) *Criteria for placing an unaccompanied child in a heightened supervision facility.* (1) ORR may place an unaccompanied child in a heightened supervision facility either at initial placement or through a transfer to another facility from the initial placement. This determination must be made based on clear and convincing evidence documented in the unaccompanied child's case file.

(2) In determining whether to place an unaccompanied child in a heightened supervision facility, ORR considers if the unaccompanied child:

(i) Has been unacceptably disruptive to the normal functioning of a shelter such that transfer is necessary to ensure the welfare of the unaccompanied child or others;

(ii) Is a runaway risk;

(iii) Has displayed a pattern of severity of behavior, either prior to entering ORR custody or while in ORR care, that requires an increase in supervision by trained staff;

(iv) Has a non-violent criminal or delinquent history not warranting placement in a secure facility, such as isolated or petty offenses as described in paragraph (b)(2)(iii) of this section; or

(v) Is assessed as ready for step-down from a secure facility, including an RTC.

(c) *Criteria for placing an unaccompanied child in an RTC.* (1) An unaccompanied child with serious mental health or behavioral health issues may be placed in an RTC only if the unaccompanied child is evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file, including documentation by a licensed psychologist or psychiatrist that placement in an RTC is appropriate.

(2) ORR may place an unaccompanied child in an out of network (OON) RTC when a licensed clinical psychologist or psychiatrist consulted by ORR or a care provider facility has determined that the unaccompanied child requires a level of care only found in an OON RTC either because the unaccompanied child has identified needs that cannot be met within the ORR network of RTCs or no placements are available within ORR's network of RTCs, or that an OON RTC would best meet the unaccompanied child's identified needs.

(3) The criteria for placement in or transfer to an RTC also apply to transfers to or placements in OON RTCs. Care provider facilities may request ORR to transfer an unaccompanied child to an RTC in accordance with § 410.1601(d).

(d) For an unaccompanied child with one or more disabilities, consistent with

section 504 of the Rehabilitation Act, 29 U.S.C. 794(a), ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. ORR's consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement shall also apply to transfer decisions under § 410.1601 and will be incorporated into restrictive placement case reviews under § 410.1901. However, ORR is not required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity.

§ 410.1106 Unaccompanied children who need particular services and treatment.

ORR shall assess each unaccompanied child in its care to determine whether the unaccompanied child requires particular services and treatment by staff to address their individualized needs while in the care and custody of the UC Program. An unaccompanied child's assessed needs may require particular services, equipment, and treatment by staff for various reasons, including, but not limited to disability, alcohol or substance use, a history of serious neglect or abuse, tender age, pregnancy, or parenting. If ORR determines that an unaccompanied child's individualized needs require particular services and treatment by staff or particular equipment, ORR shall place the unaccompanied child, whenever possible, in a standard program in which the unaccompanied child with individualized needs can interact with children without those individualized needs to the fullest extent possible, but which provides services and treatment or equipment for such individualized needs.

§ 410.1107 Considerations when determining whether an unaccompanied child is a runaway risk for purposes of placement decisions.

When determining whether an unaccompanied child is a runaway risk for purposes of placement decisions, ORR shall consider, among other factors, whether:

(a) The unaccompanied child is currently under a final order of removal.

(b) The unaccompanied child has previously absconded or attempted to abscond from State or Federal custody.

(c) The unaccompanied child has displayed behaviors indicative of flight or has expressed intent to run away.

(d) Evidence that the unaccompanied child is experiencing a strong trauma bond to or is threatened by a trafficker in persons or drugs.

§ 410.1108 Placement and services for children of unaccompanied children.

(a) *Placement.* ORR shall accept referrals for placement of parenting unaccompanied children who arrive with children of their own to the same extent that it receives referrals of other unaccompanied children and shall prioritize placing and keeping the parent and child together in the interest of family unity.

(b) *Services.* (1) ORR shall provide the same care and services to the children of unaccompanied children as it provides to unaccompanied children, as appropriate, regardless of the children's immigration or citizenship status.

(2) U.S. citizen children of unaccompanied children are eligible for public benefits and services to the same extent as other U.S. citizens. Application(s) for public benefits and services shall be submitted on behalf of the U.S. citizen children of unaccompanied children by care provider facilities. Utilization of those benefits and services shall be exhausted to the greatest extent practicable before ORR-funded services are utilized.

§ 410.1109 Required notice of legal rights.

(a) ORR shall promptly provide each unaccompanied child in its custody, in a language and manner the unaccompanied child understands, with:

(1) A State-by-State list of free legal service providers compiled and annually updated by ORR and that is provided to unaccompanied children as part of a Legal Resource Guide for unaccompanied children;

(2) The following explanation of the right of potential review: ''ORR usually houses persons under the age of 18 in the least restrictive setting that is in an unaccompanied child's best interest, and generally not in restrictive placements (which means secure facilities, heightened supervision facilities, or residential treatment centers). 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 and get advice about your rights to challenge this action. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form;'' and

(3) A presentation regarding their legal rights, as provided under § 410.1309(a)(2).

Subpart C—Releasing an Unaccompanied Child From ORR Custody

§ 410.1200 Purpose of this subpart.

This subpart covers the policies and procedures used to release, without unnecessary delay, an unaccompanied child from ORR custody to a vetted and approved sponsor.

§ 410.1201 Sponsors to whom ORR releases an unaccompanied child.

(a) Subject to an assessment of sponsor suitability, when ORR determines that the detention of the unaccompanied child is not required either to secure the child's timely appearance before DHS or the immigration court, or to ensure the child's safety or that of others, ORR shall release a child from its custody without unnecessary delay, in the following order of preference, to:

(1) A parent;

(2) A legal guardian;

(3) An adult relative;

(4) An adult individual or entity designated by the parent or legal guardian as capable and willing to care for the unaccompanied child'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 unification does not appear to be a reasonable possibility.

(b) ORR shall not disqualify potential sponsors based solely on their immigration status and shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes. ORR shall not share any immigration status information relating to potential sponsors with any law enforcement or immigration enforcement related entity at any time.

(c) In making determinations regarding the release of unaccompanied children to potential sponsors, ORR shall not release unaccompanied children on their own recognizance.

§ 410.1202 Sponsor suitability.

(a) Potential sponsors shall complete an application package to be considered as a sponsor for an unaccompanied child. The application package may be obtained from either the care provider facility or ORR directly.

(b) Prior to releasing an unaccompanied child, ORR shall conduct a suitability assessment to determine whether the potential sponsor is capable of providing for the unaccompanied child's physical and mental well-being. At minimum, such assessment shall consist of review of the potential sponsor's application package, including verification of the potential sponsor's identity, physical environment of the sponsor's home, and relationship to the unaccompanied child, if any, and an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the unaccompanied child. ORR may consult with the issuing agency (*e.g.,* consulate or embassy) of the sponsor's identity documentation to verify the validity of the sponsor identity document presented.

(c) ORR's suitability assessment shall include taking all needed steps to determine that the potential sponsor is capable of providing for the unaccompanied child's physical and mental well-being. As part of its suitability assessment, ORR may require such components as an investigation of the living conditions in which the unaccompanied child would be placed and the standard of care the unaccompanied child would receive, verification of the employment, income, or other information provided by the potential sponsor as evidence of the ability to support the child, interviews with members of the household, a home visit or home study as discussed at § 410.1204. In all cases, ORR shall require background and criminal records checks, which at minimum includes an investigation of public records sex offender registry conducted through the U.S. Department of Justice National Sex Offender public website for all sponsors and adult residents of the potential sponsor's household, and may include a public records background check or an FBI National Criminal history check based on fingerprints for some potential sponsors and adult residents of the potential sponsor's household. Any such assessment shall also take into consideration the wishes and concerns of the unaccompanied child.

(d) ORR shall assess the nature and extent of the potential sponsor's previous and current relationship with the unaccompanied child, and the unaccompanied child's family, if applicable. Lack of a pre-existing relationship with the child does not categorically disqualify a potential sponsor, but the lack of such relationship will be a factor in ORR's overall suitability assessment.

(e) ORR shall consider the potential sponsor's motivation for sponsorship; the unaccompanied child's preferences and perspective regarding release to the potential sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the potential sponsor, as applicable.

(f) ORR shall evaluate the unaccompanied child's current functioning and strengths in conjunction with any risks or concerns such as:

(1) Victim of sex or labor trafficking or other crime, or is considered to be at risk for such trafficking due, for example, to observed or expressed current needs, *e.g.,* expressed need to work or earn money;

(2) History of criminal or juvenile justice system involvement (including evaluation of the nature of the involvement, for example, whether the child was adjudicated and represented by counsel, and the type of offense) or gang involvement;

(3) History of behavioral issues;

(4) History of violence;

(5) Any individualized needs, including those related to disabilities or other medical or behavioral/mental health issues;

(6) History of substance use; or

(7) Parenting or pregnant unaccompanied child.

(g) For individual sponsors, ORR shall consider the potential sponsor's strengths and resources in conjunction with any risks or concerns that could affect their ability to function as a sponsor including:

(1) Criminal background;

(2) Substance use or history of abuse or neglect;

(3) The physical environment of the home; and/or

(4) Other child welfare concerns.

(h) ORR shall assess the potential sponsor's:

(1) Understanding of the unaccompanied child's needs;

(2) Plan to provide adequate care, supervision, and housing to meet the unaccompanied child's needs;

(3) Understanding and awareness of responsibilities related to compliance with the unaccompanied child's immigration court proceedings, school attendance, and U.S. child labor laws; and

(4) Awareness of and ability to access community resources.

(i) ORR shall develop a release plan that will enable a safe release to a potential sponsor through the provision of post-release services if needed.

§ 410.1203 Release approval process.

(a) ORR or the care provider providing care for the unaccompanied child shall make and record the prompt and continuous efforts on its part towards family unification and the release of the unaccompanied child pursuant to the provisions of this section. These efforts include intakes and admissions assessments and the provision of ongoing case management services to identify potential sponsors.

(b) If a potential sponsor is identified, ORR shall explain to both the unaccompanied child and the potential sponsor the requirements and procedures for release.

(c) Pursuant to the requirements of § 410.1202, the potential sponsor shall complete an application for release of the unaccompanied child, which includes supporting information and documentation regarding the sponsor's identity; the sponsor's relationship to the child; background information on the potential sponsor and the potential sponsor's household members; the sponsor's ability to provide care for the unaccompanied child; and the sponsor's commitment to fulfill the sponsor's obligations in the Sponsor Care Agreement, which requires the sponsor to:

(1) Provide for the unaccompanied child's physical and mental well-being;

(2) Ensure the unaccompanied child's compliance with DHS and immigration courts' requirements;

(3) Adhere to existing Federal and applicable state child labor and truancy laws;

(4) Notify DHS, the Executive Office for Immigration Review (EOIR) at the Department of Justice, and other relevant parties of changes of address;

(5) Provide notice of initiation of any dependency proceedings or any risk to the unaccompanied child as described in the Sponsor Care Agreement; and

(6) In the case of sponsors other than parents or legal guardians, notify ORR of a child moving to another location with another individual or change of address. 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 unaccompanied child to another person who will comply with the Sponsor Care Agreement, but the sponsor must notify ORR as soon as possible and no later than 72 hours after the transfer.

(d) ORR shall conduct a sponsor suitability assessment consistent with the requirements of § 410.1202.

(e) ORR shall not be required to release an unaccompanied child to any person or agency it has reason to believe may harm or neglect the unaccompanied child or fail to present the unaccompanied child before DHS or the immigration courts when requested to do so.

(f) During the release approval process, ORR shall educate the sponsor about the needs of the unaccompanied child and develop an appropriate plan to care for the unaccompanied child.

§ 410.1204 Home studies.

(a) As part of assessing the suitability of a potential sponsor, ORR may require a home study. A home study includes an investigation of the living conditions in which the unaccompanied child would be placed and takes place prior to the child's physical release, the standard of care the child would receive, and interviews with the potential sponsor and others in the sponsor's household.

(b) ORR shall require home studies under the following circumstances:

(1) Under the conditions identified in TVPRA at 8 U.S.C. 1232(c)(3)(B), which requires home studies for the following:

(i) A child who is a victim of a severe form of trafficking in persons;

(ii) A child with a disability (as defined in 42 U.S.C. 12102) who requires particularized services or treatment;

(iii) 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

(iv) A child whose potential sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence.

(2) 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.

(3) Before releasing any child who is 12 years old or younger to a non-relative sponsor.

(c) ORR may, in its discretion, initiate home studies if it determines that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child.

(d) The care provider must inform the potential sponsor whenever a home study is conducted, explaining the scope and purpose of the study and answering the potential sponsor's questions about the process.

(e) An unaccompanied child for whom a home study is conducted shall receive an offer of post-release services as described at § 410.1210.

§ 410.1205 Release decisions; denial of release to a sponsor.

(a) A potential sponsorship shall be denied, if as part of the sponsor assessment process described at § 410.1202 or the release process described at § 410.1203, ORR determines that the potential sponsor is not capable of providing for the physical and mental well-being of the unaccompanied child or that the placement would result in danger to the unaccompanied child or the community.

(b) ORR shall adjudicate the completed sponsor application of a parent or legal guardian; brother, sister, or grandparent; or other close relative who has been the child's primary caregiver within 10 calendar days of receipt of the completed sponsor application, absent an unexpected delay (such as a case that requires completion of a home study). ORR shall adjudicate the completed sponsor application of other close relatives who were not the child's primary caregiver within 14 calendar days of receipt of the completed sponsor application, absent an unexpected delay (such as a case that requires completion of a home study).

(c) If ORR denies release of an unaccompanied child to a potential sponsor who is a parent or legal guardian or close relative, the ORR Director or their designee who is a neutral and detached decision maker shall promptly notify the potential sponsor of the denial in writing via a Notification of Denial letter. The Notification of Denial letter shall include:

(1) An explanation of the reason(s) for the denial;

(2) The evidence and information supporting ORR's denial decision and shall advise the potential sponsor that they have the opportunity to examine the evidence upon request, unless ORR determines that providing the evidence and information, or part thereof, to the potential sponsor would compromise the safety and well-being of the unaccompanied child or is not permitted by law;

(3) Notice that the proposed sponsor may request an appeal of the denial to the Assistant Secretary for Children and Families, or a designee who is a neutral and detached decision maker and instructions for doing so;

(4) Notice that the potential sponsor may submit additional evidence, in writing before a hearing occurs, or orally during a hearing;

(5) Notice that the potential sponsor may present witnesses and cross-examine ORR's witnesses, if such sponsor and ORR witnesses are willing to voluntarily testify; and

(6) Notice that the potential sponsor may be represented by counsel in proceedings related to the release denial at no cost to the Federal Government.

(d) The ORR Director, or a designee who is a neutral and detached decision maker, shall review denials of completed sponsor applications submitted by parents or legal guardians or close relative potential sponsors.

(e) ORR shall inform the unaccompanied child, the unaccompanied child's child advocate, and the unaccompanied child's counsel (or if the unaccompanied child has no attorney of record or DOJ Accredited Representative, the local legal service provider) of a denial of release to the unaccompanied child's parent or legal guardian or close relative potential sponsor and inform them that they have the right to inspect the evidence underlying ORR's decision upon request unless ORR determines that disclosure is not permitted by law.

(f) If the sole reason for denial of release is a concern that the unaccompanied child is a danger to self or others, ORR shall send the unaccompanied child and their counsel (if represented by counsel) a copy of the Notification of Denial described at paragraph (c) of this section. The child may seek an appeal of the denial.

(g) ORR shall permit unaccompanied children to have the assistance of counsel, at no cost to the Federal Government, with respect to release or the denial of release to a potential sponsor.

§ 410.1206 Appeals of release denials.

(a) Denied parent or legal guardian or close relative potential sponsors to whom ORR's Director or their designee, who is a neutral and detached decision maker, must send Notification of Denial letters pursuant to § 410.1205 may seek an appeal of ORR's decision by submitting a written request to the Assistant Secretary for ACF, or the Assistant Secretary's neutral and detached designee.

(b) The requestor may seek an appeal with a hearing or without a hearing. The Assistant Secretary, or their neutral and detached designee, shall acknowledge

the request for appeal within five business days of receipt.

(c) If the sole reason for denial of release is concern that the unaccompanied child is a danger to self or others, the unaccompanied child may seek an appeal of the denial as described in paragraphs (a) and (b) of this section. If the unaccompanied child expresses a desire to seek an appeal, the unaccompanied child may consult with their attorney of record at no cost to the Federal Government or a legal service provider for assistance with the appeal. The unaccompanied child may seek such appeal at any time after denial of release while the unaccompanied child is in ORR custody.

(d) ORR shall deliver the full evidentiary record including any countervailing or otherwise unfavorable evidence, apart from any legally required redactions, to the denied parent or legal guardian or close relative potential sponsor within a reasonable timeframe to be established by ORR, unless ORR determines that providing the evidentiary record, or part(s) thereof, to the potential sponsor would compromise the safety and well-being of the unaccompanied child.

(e) ORR shall deliver the unaccompanied child's complete case file, apart from any legally required redactions, to a parent or legal guardian potential sponsor on request within a reasonable timeframe to be established by ORR, unless ORR determines that providing the complete case file, or part(s) thereof, to the parent or legal guardian potential sponsor would compromise the safety and well-being of the unaccompanied child. ORR shall deliver the unaccompanied child's complete case file, apart from any legally required redactions, to the unaccompanied child and the unaccompanied child's attorney or legal service provider on request within a reasonable timeframe to be established by ORR.

(f) The appeal process, including notice of decision on appeal sent to the potential sponsor, shall be completed within 30 calendar days of the potential sponsor's request for an appeal, unless an extension of time is granted by the Assistant Secretary or their neutral and detached designee for good cause.

(g) The appeal of a release denial shall be considered, and any hearing shall be conducted, by the Assistant Secretary, or their neutral and detached designee. Upon making a decision to reverse or uphold the decision denying release to the potential sponsor, the Assistant Secretary or their neutral and detached designee, shall issue a written decision, either ordering or denying release to the potential sponsor within the timeframe described in § 410.1206(f). If the Assistant Secretary, or their neutral and detached designee, denies release to the potential sponsor, the decision shall set forth detailed, specific, and individualized reasoning for the decision. ORR shall also notify the unaccompanied child and the child's attorney of the denial. ORR shall inform the potential sponsor and the unaccompanied child of any right to seek review of an adverse decision in the United States District Court.

(h) ORR shall make qualified interpretation and/or translation services available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors upon request for purposes of appealing denials of release. Such services shall be available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors in enclosed, confidential areas.

(i) If a child is released to another sponsor during the pendency of the appeal process, the appeal will be deemed moot.

(j)(1) Denied parent or legal guardian or close relative potential sponsors to whom ORR must send Notification of Denial letters pursuant to § 410.1205 have the right to be represented by counsel in proceedings related to the release denial, including at any hearing, at no cost to the Federal Government.

(2) The unaccompanied child has the right to consult with counsel during the potential sponsor's appeal process at no cost to the Federal Government.

§ 410.1207 Ninety (90)-day review of pending sponsor applications.

(a) ORR supervisory staff who supervise field staff shall conduct an automatic review of all pending sponsor applications. The first automatic review shall occur within 90 days of an unaccompanied child entering ORR custody to identify and resolve in a timely manner the reasons that a sponsor application remains pending and to determine possible steps to accelerate the unaccompanied child's safe release.

(b) Upon completion of the initial 90-day review, unaccompanied child case managers or other designated agency or care provider staff shall update the potential sponsor and unaccompanied child on the status of the case, explaining the reasons that the release process is incomplete. Case managers or other designated agency or care provider staff shall work with the potential sponsor, relevant stakeholders, and ORR to address the portions of the sponsor application that remain unresolved.

(c) For cases that are not resolved after the initial 90-day review, ORR supervisory staff who supervise field staff shall conduct additional reviews as provided in § 410.1207(a) at least every 90 days until the pending sponsor application is resolved. ORR may in its discretion and subject to resource availability conduct additional reviews on a more frequent basis than every 90 days.

§ 410.1208 ORR's discretion to place an unaccompanied child in the Unaccompanied Refugee Minors Program.

(a) An unaccompanied child may be eligible for services through the ORR Unaccompanied Refugee Minors (URM) Program. Eligible categories of unaccompanied children include:

(1) Cuban and Haitian entrant as defined in section 501 of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, and as provided for at 45 CFR 400.43;

(2) An individual determined to be a victim of a severe form of trafficking as defined in 22 U.S.C. 7102(11);

(3) An individual DHS has classified as a Special Immigrant Juvenile (SIJ) under section 101(a)(27)(J) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(27)(J), and who was either in the custody of HHS at the time a dependency order was granted for such child or who was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, at the time such dependency order was granted;

(4) U nonimmigrant status recipients under 8 U.S.C. 1101(a)(15)(U); or

(5) Other populations of children as authorized by Congress.

(b) With respect to unaccompanied children described in paragraph (a) of this section, ORR shall evaluate each unaccompanied child case to determine whether it is in the child's best interests to be placed in the URM Program.

(c) When ORR places an unaccompanied child pursuant to this section to receive services through the URM Program, legal responsibility of the child, including legal custody or guardianship, must be established under State law as required by 45 CFR 400.115. Until such legal custody or guardianship is established, the ORR Director shall retain legal custody of the child.

§ 410.1209 Requesting specific consent from ORR regarding custody proceedings.

(a) An unaccompanied child in ORR custody is required to request specific consent from ORR if the child seeks to

invoke the jurisdiction of a juvenile court to determine or alter the child's custody status or release from ORR custody.

(b) If an unaccompanied child seeks to invoke the jurisdiction of a juvenile court for a dependency order to petition for Special Immigrant Juvenile (SIJ) classification or to otherwise permit a juvenile court to establish jurisdiction regarding a child's placement and does not seek the juvenile court's jurisdiction to determine or alter the child's custody status or release, the unaccompanied child does not need to request specific consent from ORR.

(c) Prior to a juvenile court determining or altering the unaccompanied child's custody status or release from ORR, attorneys or others acting on behalf of an unaccompanied child must complete a request for specific consent.

(d) ORR shall acknowledge receipt of the request within two business days.

(e) Consistent with its duty to promptly place unaccompanied children in the least restrictive setting that is in the best interest of the child, ORR shall consider whether ORR custody is required to:

(1) Ensure a child's safety; or

(2) Ensure the safety of the community.

(f) ORR shall make determinations on specific consent requests within 60 business days of receipt of a request. When possible, ORR shall expedite urgent requests.

(g) ORR shall inform the unaccompanied child, or the unaccompanied child's attorney or other authorized representative of the decision on the specific consent request in writing, along with the evidence utilized to make the decision.

(h) The unaccompanied child, the unaccompanied child's attorney of record, or other authorized representative may request reconsideration of ORR's denial with the Assistant Secretary for ACF within 30 business days of receipt of the ORR notification of denial of the request. The unaccompanied child, the unaccompanied child's attorney, or authorized representative may submit additional (including new) evidence to be considered with the reconsideration request.

(i) The Assistant Secretary, or their designee, shall consider the request for reconsideration and any additional evidence, and send a final administrative decision to the unaccompanied child, or the unaccompanied child's attorney or other authorized representative, within 15 business days of receipt of the request.

§ 410.1210 Post-release services.

(a) *General.* (1) Before releasing unaccompanied children, care provider facilities shall work with sponsors and unaccompanied children to prepare for safe and timely release of the unaccompanied children, to assess whether the unaccompanied children may need assistance in accessing community resources, and to provide guidance regarding safety planning and accessing services.

(2) ORR shall offer post-release services (PRS) for unaccompanied children for whom a home study was conducted pursuant to § 410.1204. An unaccompanied child who receives a home study and PRS may also receive home visits by a PRS provider.

(3) To the extent that ORR determines appropriations are available, and in its discretion, ORR may offer PRS for all released children. ORR may give additional consideration, consistent with paragraph (c), for cases involving unaccompanied children with mental health or other needs who could particularly benefit from ongoing assistance from a community-based service provider, to prioritize potential cases as needed. ORR shall make an initial determination of the level and extent of PRS, if any, based on the needs of the unaccompanied children and the sponsors and the extent appropriations are available. PRS providers may conduct subsequent assessments based on the needs of the unaccompanied children and the sponsors that result in a modification to the level and extent of PRS assigned to the unaccompanied children.

(4) ORR shall not delay the release of an unaccompanied child if PRS are not immediately available.

(b) *Service areas.* PRS include services in the areas listed in paragraphs (b)(1) through (12) of this section, which shall be provided in a manner that is sensitive to the individual needs of the unaccompanied child and in a way they effectively understand regardless of spoken language, reading comprehension, or disability to ensure meaningful access for all eligible children, including those with limited English proficiency. The comprehensiveness of PRS shall depend on the extent appropriations are available.

(1) *Placement stability and safety.* PRS providers shall work with sponsors and unaccompanied children to address challenges in parenting and caring for unaccompanied children. This may include guidance about maintaining a safe home; supervision of unaccompanied children; protecting unaccompanied children from threats by smugglers, traffickers, and gangs; and information about child abuse, neglect, separation, grief, and loss, and how these issues affect children.

(2) *Immigration proceedings.* The PRS provider shall help facilitate the sponsor's plan to ensure the unaccompanied child's attendance at all immigration court proceedings and compliance with DHS requirements.

(3) *Guardianship.* If the sponsor is not a parent or legal guardian of the unaccompanied child, then the PRS provider shall provide the sponsor and unaccompanied child information about the benefits of obtaining legal guardianship of the child. If the sponsor is interested in becoming the unaccompanied child's legal guardian, then the PRS provider may assist the sponsor in identifying the legal resources to do so.

(4) *Legal services.* PRS providers shall assist sponsors and unaccompanied children in accessing relevant legal service resources including resources for immigration matters and unresolved juvenile justice issues.

(5) *Education.* PRS providers shall assist sponsors with school enrollment and shall assist the sponsors and unaccompanied children with addressing issues relating to the unaccompanied children's progress in school, including attendance. PRS providers may also assist with alternative education plans for unaccompanied children who exceed the State's maximum age requirement for mandatory school attendance. PRS providers may also assist sponsors with obtaining evaluations for unaccompanied children reasonably suspected of having a disability to determine eligibility for a free appropriate public education (which can include special education and related services) or reasonable modifications and auxiliary aids and services.

(6) *Employment.* PRS providers shall educate sponsors and unaccompanied children on U.S. child labor laws and requirements.

(7) *Medical services.* PRS providers shall assist the sponsor in obtaining medical insurance for the unaccompanied child if available and in locating medical providers that meet the individual needs of the unaccompanied child and the sponsor. If the unaccompanied child requires specialized medical assistance, the PRS provider shall assist the sponsor in making and keeping medical appointments and monitoring the unaccompanied child's medical requirements. PRS providers shall provide the unaccompanied child and

sponsor with information and referrals to services relevant to health-related considerations for the unaccompanied child.

(8) *Individual mental health services.* PRS providers shall provide the sponsor and unaccompanied child with relevant mental health resources and referrals for the child. The resources and referrals shall take into account the individual needs of the unaccompanied child and sponsor. If an unaccompanied child requires specialized mental health assistance, PRS providers shall assist the sponsor in making and keeping mental health appointments and monitoring the unaccompanied child's mental health requirements.

(9) *Family stabilization/counseling.* PRS providers shall provide the sponsor and unaccompanied child with relevant resources and referrals for family counseling and/or individual counseling that meet individual needs of the child and the sponsor.

(10) *Substance use.* PRS providers shall assist the sponsor and unaccompanied child in locating resources to help address any substance use-related needs of the child.

(11) *Gang prevention.* PRS providers shall provide the sponsor and unaccompanied child information about gang prevention programs in the sponsor's community.

(12) *Other services.* PRS providers may assist the sponsor and unaccompanied child with accessing local resources in other specialized service areas based on the needs and at the request of the unaccompanied child or the sponsor.

(c) *Additional considerations for prioritizing provision of PRS.* ORR may prioritize referring unaccompanied children with the following needs for PRS if appropriations are not available for it to offer PRS to all children:

(1) Unaccompanied children in need of particular services or treatment;

(2) Unaccompanied children with disabilities;

(3) Unaccompanied children who identify as LGBTQI+;

(4) Unaccompanied children who are adjudicated delinquent or who have been involved in, or are at high risk of involvement with the juvenile justice system;

(5) Unaccompanied children who entered ORR care after being separated by DHS from a parent or legal guardian;

(6) Unaccompanied children who are victims of human trafficking or other crimes;

(7) Unaccompanied children who are victims of, or at risk of, worker exploitation;

(8) Unaccompanied children who are at risk for labor trafficking;

(9) Unaccompanied children who are certain parolees; and

(10) Unaccompanied children enrolled in school who are chronically absent or retained at the end of their school year.

(d) *Assessments.* The PRS provider shall assess the released unaccompanied child and sponsor for PRS needs and shall document the assessment. The assessment shall be developmentally appropriate, trauma-informed, and focused on the needs of the unaccompanied child and sponsor.

(e) *Ongoing check-ins and in-home visits.* (1) In consultation with the released unaccompanied child and sponsor, the PRS provider shall make a determination regarding the appropriate methods, timeframes, and schedule for ongoing contact with the released unaccompanied child and sponsor based on the level of need and support needed.

(2) PRS providers shall document all ongoing check-ins and in-home visits, as well as document progress and outcomes of their home visits.

(f) *Referrals to community resources.* (1) PRS providers shall work with released unaccompanied children and their sponsors to access community resources.

(2) PRS providers shall document any community resource referrals and their outcomes.

(g) *Timeframes for PRS.* (1) For a released unaccompanied child who is required under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to receive an offer of PRS, the PRS provider shall to the greatest extent practicable start services within two (2) days of the unaccompanied child's released from ORR care. If a PRS provider is unable to start PRS within two (2) days of the unaccompanied child's release, PRS shall, to the greatest extent possible, start no later than 30 days after release.

(2) For a released unaccompanied child who is referred by ORR to receive PRS but is not required to receive an offer of PRS following a home study, the PRS provider shall to the greatest extent practicable start services within two (2) days of accepting a referral.

(h) *Termination of PRS.* (1) For a released unaccompanied child who is required to receive an offer of PRS under the TVPRA at 8 U.S.C. 1232(c)(3)(B), PRS shall be offered for the unaccompanied child until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure, granted immigration status, or the child leaves the United States pursuant to a final order of removal, whichever occurs first.

(2) For a released unaccompanied child who is not required to receive an offer of PRS under the TVPRA at 8 U.S.C. 1232(c)(3)(B), but who receives PRS as authorized under the TVPRA, PRS may be offered for the unaccompanied child until the unaccompanied child turns 18, or the unaccompanied child is granted voluntary departure, granted immigration status, or the child leaves pursuant to a final order of removal, whichever occurs first.

(3) If an unaccompanied child's sponsor, except for a parent or legal guardian, chooses to disengage from PRS and the child wishes to continue receiving PRS, ORR may continue to make PRS available to the child through coordination between the PRS provider and a qualified ORR staff member.

(i) *Records and reporting requirements for PRS providers*—(1) *General.* (i) PRS providers shall maintain comprehensive, accurate, and current case files on unaccompanied children that are kept confidential and secure at all times and shall be accessible to ORR upon request. PRS providers shall maintain all case file information together in the PRS provider's physical and electronic files.

(ii) PRS providers shall upload all PRS documentation on services provided to unaccompanied children and sponsors to ORR's case management system within seven (7) days of completion of the services.

(2) *Records management and retention.* (i) PRS providers shall have written policies and procedures for organizing and maintaining the content of active and closed case files, which incorporate ORR policies and procedures. The PRS provider's policies and procedures shall also address preventing the physical damage or destruction of records.

(ii) Before providing PRS, PRS providers shall have established administrative and physical controls to prevent unauthorized access to both electronic and physical records.

(iii) PRS providers may not release records to any third party without prior approval from ORR, except for program administration purposes.

(iv) If a PRS provider is no longer providing PRS for ORR, the PRS provider shall provide all active and closed case file records to ORR according to instructions issued by ORR.

(3) *Privacy.* (i) PRS providers shall have written policy and procedure in place that protects the information of

released unaccompanied children from access by unauthorized users.

(ii) PRS providers shall explain to released unaccompanied children and their sponsors how, when, and under what circumstances sensitive information may be shared while the unaccompanied children receive PRS.

(iii) PRS providers shall have appropriate controls on information-sharing within the PRS provider network, including, but not limited to, subcontractors.

(4) *Notification of Concern.* (i) If the PRS provider is concerned about the unaccompanied child's safety and well-being, the PRS provider shall document a Notification of Concern (NOC) and report the concern(s) to ORR, and as applicable, the appropriate investigative agencies (including law enforcement and child protective services).

(ii) PRS providers shall document and submit NOCs to ORR within 24 hours of first suspicion or knowledge of the event(s).

(5) *Case closures.* (i) PRS providers shall formally close a case when ORR terminates PRS in accordance with paragraph (h) of this section.

(ii) ORR shall provide appropriate instructions, including any relevant forms, that PRS providers must follow when closing a case.

(iii) PRS providers shall upload any relevant forms into ORR's case management system within 30 calendar days of a case's closure.

Subpart D—Minimum Standards and Required Services

§ 410.1300 Purpose of this subpart.

This subpart covers standards and required services that care provider facilities must meet and provide in keeping with the principles of treating unaccompanied children in custody with dignity, respect, and special concern for their particular vulnerability.

§ 410.1301 Applicability of this subpart.

This subpart applies to all standard programs and secure facilities. This subpart is applicable to other care provider facilities and to PRS providers where specified.

§ 410.1302 Minimum standards applicable to standard programs and secure facilities.

Standard programs and secure facilities shall:

(a) Be licensed by an appropriate State agency, or meet the State's licensing requirements if located in a State that does not allow State licensing of programs providing or proposing to provide care and services to unaccompanied children.

(b) Comply with all State child welfare laws and regulations (such as mandatory reporting of abuse) and all State and local building, fire, health, and safety codes.

(c) Provide or arrange for the following services for each unaccompanied child in care:

(1) Proper physical care and maintenance, including suitable living accommodations, food that is of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development, which can be accomplished by following the USDA Dietary Guidelines for Americans, and appropriate for the child and activity level, drinking water that is always available to each unaccompanied child, appropriate clothing, personal grooming and hygiene items such as soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items, access to toilets, showers, and sinks, adequate temperature control and ventilation, maintenance of safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of children, and adequate supervision to protect unaccompanied children from others;

(2) An individualized needs assessment that shall include:

(i) Various initial intake forms;

(ii) Essential data relating to the identification and history of the unaccompanied child and family;

(iii) Identification of the unaccompanied child's individualized needs including any specific problems that appear to require immediate intervention;

(iv) An educational assessment and plan;

(v) Identification of whether the child is an Indigenous language speaker;

(vi) An assessment of family relationships and interaction with adults, peers and authority figures;

(vii) A statement of religious preference and practice;

(viii) An assessment of the unaccompanied child's personal goals, strengths, and weaknesses; and

(iv) 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 unification;

(3) Educational services appropriate to the unaccompanied child's level of development, communication skills, and disability, if applicable, in a structured classroom setting, Monday through Friday, which concentrate on the development of basic academic competencies and on English Language Training (ELT), as well as acculturation and life skills development including:

(i) Instruction and educational and other reading materials in such languages as needed;

(ii) Instruction in basic academic areas that may include science, social studies, math, reading, writing, and physical education; and

(iii) The provision to an unaccompanied child of appropriate reading materials in languages other than English for use during the unaccompanied child's leisure time;

(4) 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;

(5) At least one individual counseling session per week conducted by certified counseling staff with the specific objectives of reviewing the unaccompanied child's progress, establishing new short and long-term objectives, and addressing both the developmental and crisis-related needs of each unaccompanied child;

(6) Group counseling sessions at least twice a week;

(7) 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;

(8) An admissions process, including:

(i) Meeting unaccompanied children's immediate needs to food, hydration, and personal hygiene including the provision of clean clothing and bedding;

(ii) An initial intakes assessment covering biographic, family, migration, health history, substance use, and mental health history of the unaccompanied child. If the unaccompanied child's responses to questions during any examination or assessment indicate the possibility that the unaccompanied child may have been a victim of human trafficking or labor exploitation, the care provider facility must notify the ACF Office of Trafficking in Persons within twenty-four (24) hours;

(iii) A comprehensive orientation regarding program purpose, services, rules (provided in writing and orally), expectations, their rights in ORR care, and the availability of legal assistance, information about U.S. immigration and employment/labor laws, and services from the Unaccompanied Children Office of the Ombuds (UC Office of the

Ombuds) in simple, non-technical terms and in a language and manner that the child understands, if practicable; and

(iv) Assistance with contacting family members, following the ORR Guide and the care provider facility's internal safety procedures;

(9) Whenever possible, access to religious services of the unaccompanied child's choice, celebrating culture-specific events and holidays, being culturally aware in daily activities as well as food menus, choice of clothing, and hygiene routines, and covering various cultures in children's educational services;

(10) Visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation, including at least 15 minutes of phone or video contact three times a week with parents and legal guardians, family members, and caregivers located in the United States and abroad, in a private space that ensures confidentiality and at no cost to the unaccompanied child, parent, legal guardian, family member, or caregiver. The staff shall respect the unaccompanied child's privacy while reasonably preventing the unauthorized release of the unaccompanied child;

(11) Assistance with family unification services designed to identify and verify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for release of the unaccompanied child;

(12) Legal services information regarding the availability of free legal assistance, and that they may be represented by counsel at no expense to the Government, the right to a removal hearing before an immigration judge; the ability to apply for asylum with U.S. Citizenship and Immigration Services (USCIS) in the first instance, and the ability to request voluntary departure in lieu of removal;

(13) Information about U.S. child labor laws and education around permissible work opportunities in a manner that is sensitive to the age, culture, and native or preferred language of each unaccompanied child; and

(14) Unaccompanied children must have a reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, and receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

(d) Deliver services in a manner that is sensitive to the age, culture, native or preferred language, and the complex needs of each unaccompanied child.

(e) Develop a comprehensive and realistic individual service plan for the care of each unaccompanied child in accordance with the unaccompanied child 's needs as determined by the individualized needs assessment. Individual plans must be implemented and closely coordinated through an operative case management system. Service plans should identify individualized, person-centered goals with measurable outcomes and with steps or tasks to achieve the goals, be developed with input from the unaccompanied child, and be reviewed and updated at regular intervals. Unaccompanied children ages 14 and older should be given a copy of the plan, and unaccompanied children under age 14 should be given a copy of the plan when appropriate for that particular child's development. Individual plans shall be in that child's native or preferred language or other mode of auxiliary aid or services and/or use clear, easily understood language, using concise and concrete sentences and/or visual aids and checking for understanding where appropriate.

§ 410.1303 ORR Reporting, monitoring, quality control, and recordkeeping standards.

(a) *Monitoring activities.* ORR shall monitor all care provider facilities for compliance with the terms of the regulations in this part and 45 CFR part 411. ORR monitoring activities include:

(1) Desk monitoring that is ongoing oversight from ORR headquarters;

(2) Routine site visits that are day-long visits to facilities to review compliance for policies, procedures, and practices and guidelines;

(3) Site visits in response to ORR or other reports that are for a specific purpose or investigation; and

(4) Monitoring visits that are part of comprehensive reviews of all care provider facilities.

(b) *Corrective actions.* If ORR finds a care provider facility to be out of compliance with the regulations in this part and 45 CFR part 411 or subregulatory policies such as its guidance and the terms of its contracts or cooperative agreements, ORR will communicate the concerns in writing to the care provider facility director or appropriate person through a written monitoring or site visit report, with a list of corrective actions and child welfare best practice recommendations, as appropriate. ORR will request a response to the corrective action findings from the care provider facility and specify a timeframe for resolution and the disciplinary consequences for not responding within the required timeframes.

(c) *Monitoring of secure facilities.* At secure facilities, in addition to other monitoring activities, ORR shall review individual unaccompanied child case files to make sure children placed in secure facilities are assessed at least every 30 days for the possibility of a transfer to a less restrictive setting.

(d) *Monitoring of long-term home care and transitional home care facilities.* ORR long-term home care and transitional home care facilities are subject to the same types of monitoring as other care provider facilities, but the activities are tailored to the foster care arrangement. ORR long-term home care and transitional home care facilities that provide services through a sub-contract or sub-grant are responsible for conducting annual monitoring or site visits of the sub-recipient, as well as weekly desk monitoring. Upon request, care provider facilities must provide findings of such reviews to the designated ORR point of contact.

(e) *Enhanced monitoring of unlicensed standard programs and emergency or influx facilities.* In addition to the other requirements of this section, for all standard programs that are not State-licensed because the State does not allow State licensing of programs providing care and services to unaccompanied children, and emergency or influx facilities, ORR shall conduct enhanced monitoring, including on-site visits and desk monitoring.

(f) *Care provider facility quality assurance.* Care provider facilities shall develop quality assurance assessment procedures that accurately measure and evaluate service delivery in compliance with the requirements of the regulations in this part, as well as those delineated in 45 CFR part 411.

(g) *Reporting.* Care provider facilities shall report to ORR any emergency incident, significant incident, or program-level event and in accordance with any applicable Federal, State, and local reporting laws. Such reports are subject to the following rules:

(1) Care provider facilities shall document incidents with sufficient detail to ensure that any relevant entity can facilitate any required follow-up; document incidents in a way that is trauma-informed and grounded in child welfare best practices; and update the report with any findings or

documentation that are made after the fact.

(2) Care provider facilities shall not fabricate, exaggerate, or minimize incidents; use disparaging or judgmental language about unaccompanied children in incident reports; use incident reporting or the threat of incident reporting as a way to manage the behavior of unaccompanied children or for any other illegitimate reason.

(3) Care provider facilities shall not use reports of significant incidents as a method of punishment or threat towards any child in ORR care for any reason.

(4) The existence of a report of a significant incident shall not be used by ORR as a basis for an unaccompanied child's step-up to a restrictive placement or as the sole basis for a refusal to step a child down to a less restrictive placement. Care provider facilities are likewise prohibited from using the existence of a report of a significant incident as a basis for refusing an unaccompanied child's placement in their facilities. Reports of significant incidents may be used as examples or citations of concerning behavior. However, the existence of a report itself is not sufficient for a step-up, a refusal to step-down, or a care provider facility to refuse a placement.

(h) *Develop, maintain, and safeguard each individual unaccompanied child's case file.* This paragraph (h) applies to all care provider facilities responsible for the care and custody of unaccompanied children.

(1) Care provider facilities and PRS providers shall preserve the confidentiality of unaccompanied child case file records and information, and protect the records and information from unauthorized use or disclosure;

(2) The records included in an unaccompanied child's case file are ORR's property, regardless of whether they are in ORR's possession or in the possession of a care provider facility or PRS provider. Care providers facilities and PRS providers shall not release those records or information within the records without prior approval from ORR, except for program administration purposes;

(3) Care provider facilities and PRS providers shall provide unaccompanied child case file records to ORR immediately upon ORR's request; and

(4) Subject to applicable whistleblower protection laws, employees, former employees, or contractors of a care provider facility or PRS provider shall not disclose case file records or information about unaccompanied children, their sponsors, family, or household members to anyone for any purpose, except for purposes of program administration, without first providing advanced notice to ORR to allow ORR to ensure that disclosure of unaccompanied children's information is compatible with program goals and to ensure the safety and privacy of unaccompanied children.

(i) *Records.* Care provider facilities and PRS providers shall maintain adequate records in the unaccompanied child case file 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 unaccompanied child.

§ 410.1304 Behavior management and prohibition on seclusion and restraint.

(a) Care provider facilities shall develop behavior management strategies that include evidence-based, trauma-informed, and linguistically responsive program rules and behavior management policies that take into consideration the range of ages and maturity in the program and that are culturally sensitive to the needs of each unaccompanied child. Care provider facilities shall not use any practices that involve negative reinforcement or involve consequences or measures that are not constructive and are not logically related to the behavior being regulated. Care provider facilities shall not:

(1) Use or threaten use of corporal punishment, significant incident reports as punishment, unfavorable consequences related to sponsor unification or legal matters (*e.g.,* immigration, asylum); use forced chores or work that serves no purpose except to demean or humiliate the child; forced physical movement, such as push-ups and running, or uncomfortable physical positions as a form of punishment or humiliation; search an unaccompanied child's personal belongings solely for the purpose of behavior management; apply medical interventions that are not prescribed by a medical provider acting within the usual course of professional practice for a medical diagnosis or that increase risk of harm to the unaccompanied child or others; and

(2) Use any sanctions employed in relation to an individual unaccompanied child that:

(i) Adversely affect an unaccompanied child's health, or physical, emotional, or psychological well-being; or

(ii) Deny unaccompanied children meals, hydration, sufficient sleep, routine personal grooming activities, exercise (including daily outdoor activity), medical care, correspondence or communication privileges, religious observation and services, or legal assistance.

(3) Use prone physical restraints, chemical restraints, or peer restraints for any reason in any care provider facility setting.

(b) Involving law enforcement should be a last resort. A call by a facility to law enforcement may trigger an evaluation of staff involved regarding their qualifications and training in trauma-informed, de-escalation techniques.

(c) Standard programs and residential treatment centers (RTCs) are prohibited from using seclusion. Standard programs and RTCs are also prohibited from using restraints, except as described at paragraphs (d) and (f) of this section.

(d) Standard programs and RTCs may use personal restraint only in emergency safety situations.

(e) Secure facilities (that are not RTCs):

(1) May use personal restraints, mechanical restraints and/or seclusion in emergency safety situations, and as consistent with State licensure requirements. All instances of seclusion must be supervised and for the short time-limited purpose of ameliorating the underlying emergency risk that poses a serious and immediate danger to the safety of others.

(2) May restrain an unaccompanied child for their own immediate safety or that of others during transport.

(3) May restrain an unaccompanied child while at an immigration court or asylum interview if the child exhibits imminent runaway behavior, makes violent threats, demonstrates violent behavior, or if the secure facility has made an individualized determination that the child poses a serious risk of violence or running away if the child is unrestrained in court or the interview.

(4) Must provide all mandated services under this subpart to the unaccompanied child to the greatest extent practicable under the circumstances while ensuring the safety of the unaccompanied child, other unaccompanied children at the secure facility, and others.

(f) Care provider facilities may only use soft restraints (*e.g.,* zip ties and leg or ankle weights) during transport to and from secure facilities, and only when the care provider believes a child poses a serious risk of physical harm to self or others or a serious risk of running away from ORR custody.

§ 410.1305 Staff, training, and case manager requirements.

(a) Standard programs, restrictive placements, and post-release service

(PRS) providers shall provide training to all staff, contractors, and volunteers, to ensure that they understand their obligations under ORR regulations in this part and policies and are responsive to the challenges faced by staff and unaccompanied children. Standard programs and restrictive placements shall ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to § 410.1304. All trainings should be tailored to the unique needs, attributes, and gender of the unaccompanied children in care at the individual care provider facility. Standard programs, restrictive placements, and PRS providers must document the completion of all trainings in personnel files. All staff, contractors, and volunteers must have completed required background checks and vetting for their respective roles required by ORR;

(b) Care provider facilities shall meet the staff to child ratios established by their respective States or other licensing entities; and

(c) Care provider facilities shall have case managers based on site at the facility.

§ 410.1306 Language access services.

(a) *General.* (1) To the greatest extent practicable, care provider facilities shall consistently offer unaccompanied children the option of interpretation and translation services in their native or preferred language, depending on the unaccompanied children's preference, and in a way they effectively understand. If after taking reasonable efforts, care provider facilities are unable to obtain a qualified interpreter or translator for the unaccompanied children's native or preferred language, depending on the children's preference, care provider facilities shall consult with qualified ORR staff for guidance on how to ensure meaningful access to their programs and activities for the children, including those with limited English proficiency.

(2) Care provider facilities shall prioritize the ability to provide in-person, qualified interpreters for unaccompanied children who need them, particularly for rare or indigenous languages. After care provider facilities take reasonable efforts to obtain in-person, qualified interpreters, then they may use qualified remote interpreter services.

(3) Care provider facilities shall translate all documents and materials shared with the unaccompanied children, including those posted in the facilities, in the unaccompanied children's native or preferred language, depending on the children's preference, and in a timely manner.

(b) *Placement considerations.* ORR shall make placement decisions for the unaccompanied children that are informed in part by language access considerations and other factors as listed in § 410.1103(b). To the extent appropriate and practicable, giving due consideration to an unaccompanied child's individualized needs, ORR shall place unaccompanied children with similar language needs within the same care provider facility.

(c) *Intake, orientation, and confidentiality.* (1) Prior to completing the UC Assessment and starting counseling services, care provider facilities shall provide a written notice of the limits of confidentiality they share while in ORR care and custody, and orally explain the contents of the written notice to the unaccompanied children, in their native or preferred language, depending on the children's preference, and in a way they can effectively understand.

(2) Care provider facilities shall conduct assessments and initial medical exams with unaccompanied children in their native or preferred language, depending on the children's preference, and in a way they effectively understand.

(3) Care provider facilities shall provide a standardized and comprehensive orientation to all unaccompanied children in their native or preferred language, depending on the children's preference, and in a way they effectively understand regardless of spoken language, reading comprehension level, or disability.

(4) For all step-ups to and step-downs from restrictive placements, care provider facilities shall explain to the unaccompanied children why they were placed in a restrictive setting and/or if their placement was changed and do so in the unaccompanied children's native or preferred language, depending on the children's preference, and in a way they effectively understand. All documents shall be translated into the unaccompanied children's and/or sponsor's native or preferred language, depending on the children's preference.

(5) If the unaccompanied children are not literate, or if the documents provided during intakes and/or orientation are not translated into a language that they can read and effectively understand, the care provider facility shall have a qualified interpreter orally translate or sign language translate and explain all the documents in the unaccompanied children's native or preferred language, depending on the children's preference, and confirm with the unaccompanied children that they fully comprehend all material.

(6) Care provider facilities shall provide information regarding grievance reporting policies and procedures in the unaccompanied children's native or preferred language, depending on the children's preference, and in a way they effectively understand. Care provider facilities shall also provide grievance reporting policies and procedures in a manner accessible to unaccompanied children with disabilities.

(7) Care provider facilities shall educate unaccompanied children on ORR's sexual abuse and sexual harassment policies in the unaccompanied children's native or preferred language, depending on the children's preference, and in a way they effectively understand.

(8) Care provider facilities shall notify the unaccompanied children that care provider facilities shall accommodate the unaccompanied children's language needs while they remain in ORR care.

(9) For paragraphs (c)(1) through (8) of this section, care provider facilities shall document that the unaccompanied children acknowledge that they effectively understand what was provided to them in the child's case files.

(d) *Education.* (1) Care provider facilities shall provide educational instruction and relevant materials in a format and language accessible to all unaccompanied children, regardless of the child's native or preferred language, including, but not limited to, providing services from an in-person, qualified interpreter, written translations of materials, and qualified remote interpretation when in-person interpretation options have been exhausted.

(2) Care provider facilities shall provide unaccompanied children with appropriate recreational reading materials in languages in formats and languages accessible to all unaccompanied children for use during their leisure time.

(3) Care provider facilities shall translate all ORR-required documents provided to unaccompanied children that are part of educational lessons in formats and languages accessible to all unaccompanied children. If written translations are not available, care provider facilities shall orally translate or sign language translate all documents, prioritizing services from an in-person, qualified interpreter and translation before using qualified remote interpretation and translation services.

(e) *Religious and cultural observation and services.* If an unaccompanied child

requests religious and/or cultural information or items, the care provider facility shall provide the requested items in the unaccompanied child's native or preferred language, depending on the child's preference, and as long as the request is reasonable.

(f) *Parent and sponsor communications.* Care provider facilities shall utilize any necessary qualified interpretation or translation services needed to ensure meaningful access by an unaccompanied child's parent(s), guardian(s), and/or potential sponsor(s). Care provider facilities shall translate all documents and materials shared with the parent(s), guardian, and/or potential sponsors in their native or preferred language, depending on their preference.

(g) *Healthcare services.* While providing or arranging healthcare services for unaccompanied children, care provider facilities shall ensure that unaccompanied children are able to communicate with physicians, clinicians, and healthcare staff in their native or preferred language, depending on the unaccompanied children's preference, and in a way the unaccompanied children effectively understand, prioritizing services from an in-person, qualified interpreter before using qualified remote interpretation services.

(h) *Legal services.* Care provider facilities shall make qualified interpretation and/or translation services available to unaccompanied children, child advocates, and legal service providers upon request while unaccompanied children are being provided with those services. Such services shall be available to unaccompanied children in enclosed, confidential areas.

(i) *Interpreter's and translator's responsibility with respect to confidentiality of information.* Qualified interpreters and translators shall keep confidential all information they receive about the unaccompanied children's cases and/or services while assisting ORR, its grantees, and its contractors, with the provision of case management or other services. Qualified interpreters and translators shall not disclose case file information to other interested parties or to individuals or entities that are not employed by ORR or its grantees and contractors or that are not providing services under the direction of ORR. Qualified interpreters and translators shall not disclose any communication that is privileged by law or protected as confidential under this part unless authorized to do so by the parties to the communication or pursuant to court order.

§ 410.1307 Healthcare services.

(a) ORR shall ensure that all unaccompanied children in ORR custody will be provided with routine medical and dental care; access to medical services requiring heightened ORR involvement, consistent with paragraph (c) of this section; family planning services; and emergency healthcare services.

(b) Standard programs and restrictive placements shall be responsible for:

(1) Establishment of a network of licensed healthcare providers established by the care provider facility, including specialists, emergency care services, mental health practitioners, and dental providers that will accept ORR's fee-for-service billing system;

(2) A complete medical examination (including screening for infectious disease) within 2 business days of admission, excluding weekends and holidays, unless the unaccompanied child was recently examined at another facility and if unaccompanied children are still in ORR custody 60 to 90 days after admission, an initial dental exam, or sooner if directed by State licensing requirements;

(3) Appropriate immunizations as recommended by the Advisory Committee on Immunization Practices' Child and Adolescent Immunization Schedule and approved by HHS's Centers for Disease Control and Prevention;

(4) An annual physical examination, including hearing and vision screening, and follow-up care for acute and chronic conditions;

(5) Administration of prescribed medication and special diets;

(6) Appropriate mental health interventions when necessary;

(7) Having policies and procedures for identifying, reporting, and controlling communicable diseases that are consistent with applicable State, local, and Federal laws and regulations.

(8) Having policies and procedures that enable unaccompanied children, including those with language and literacy barriers, to convey written and oral requests for emergency and non-emergency healthcare services;

(9) Having policies and procedures based on State or local laws and regulations to ensure the safe, discreet, and confidential provision of prescription and nonprescription medications to unaccompanied children, secure storage of medications, and controlled administration and disposal of all drugs. A licensed healthcare provider must write or orally order all nonprescription medications, and oral orders must be documented in the unaccompanied child's file;

(10) Medical isolation may be used according to the following requirements:

(i) An unaccompanied child may be placed in medical isolation and excluded from contact with the general population in order to prevent the spread of an infectious disease due to a potential exposure, protect other unaccompanied children, and care provider facility staff for a medical purpose or as required under State, local, or other licensing rules, as long as the medically required isolation is limited only to the extent necessary to ensure the health and welfare of the unaccompanied child, other unaccompanied children at a care provider facility and care provider facility staff, or the public at large.

(ii) Standard programs and restrictive placements must provide all mandated services under this subpart to the greatest extent practicable under the circumstances to unaccompanied children in medical isolation. Medically isolated unaccompanied children still must be supervised under State, local, or other licensing ratios, and, if multiple unaccompanied children are in medical isolation, they should be placed in units or housing together (as practicable, given the nature or type of medical issue giving rise to the requirement for isolation in the first instance); and

(11) Urgent dental care if an unaccompanied child is experiencing an urgent dental issue (acute tooth pain, procedure(s) needed to maintain basic function, *i.e.,* severe and/or acute infection or a severe and/or acute infection is imminent). Care should be provided as soon as possible and not be delayed while awaiting the initial dental exam.

(c) ORR must not prevent unaccompanied children in ORR care from accessing healthcare services, including medical services requiring heightened ORR involvement and family planning services. ORR must make reasonable efforts to facilitate access to those services if requested by the unaccompanied child. Further, if there is a potential conflict between the standards and requirements set forth in this section and State law, such that following the requirements of State law would diminish the services available to unaccompanied children under this section and ORR policies, ORR will review the circumstances to determine how to ensure that it is able to meet its responsibilities under Federal law. If a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal

duties, subject to applicable Federal religious freedom and conscience protections, to ensure unaccompanied children have access to all services available under this section and other ORR policies.

(1) *Initial placement and transfer considerations*—(i) *Initial placement.* Consistent with § 410.1103, when placing an unaccompanied child, ORR shall consider the child's individualized needs and any specialized services or treatment required or reasonably requested. Such services or treatment include but are not limited to access to medical specialists, family planning services, and medical services requiring heightened ORR involvement. When such care is determined to be medically necessary during the referral, intake process, Initial Medical Exam, or at any point while the unaccompanied child is in ORR custody, or the unaccompanied child reasonably requests such medical care while in ORR custody, ORR shall, to the greatest extent possible, identify available and appropriate bed space and place the unaccompanied child at a care provider facility that is able to provide or arrange such care, is in an appropriate location to support the unaccompanied child's healthcare needs, and affords access to an appropriate medical provider who is able to perform any reasonably requested or medically necessary services.

(ii) *Transfers.* If an appropriate initial placement is not immediately available or if the unaccompanied child's need or request for medical care is identified after the Initial Medical Exam, care providers shall immediately notify ORR and ORR shall, to the greatest extent possible, transfer the unaccompanied child needing medical care to an ORR program that meets the qualifications in paragraph (c)(1)(i) of this section.

(2) *Transportation.* ORR shall ensure unaccompanied children have access to medical care, including transportation across State lines and associated ancillary services if necessary to access appropriate medical services, including access to medical specialists, family planning services, and medical services requiring heightened ORR involvement. The requirement in this paragraph (c)(2) applies regardless of whether Federal appropriations law prevents ORR from paying for the medical care itself.

(d) Care provider facilities shall notify ORR within 24 hours of an unaccompanied child's need or request for medical services requiring heightened ORR involvement or the discovery of a pregnancy.

§ 410.1308 Child advocates.

(a) *Child advocates.* This section sets forth the provisions relating to the appointment and responsibilities of independent child advocates for child trafficking victims and other especially vulnerable unaccompanied children.

(b) *Role of the child advocate.* Child advocates are third parties who make independent recommendations regarding the best interests of an unaccompanied child. Their recommendations are based on information obtained from the unaccompanied child and other sources (including, but not limited to, the unaccompanied child's parents, the family, potential sponsors/sponsors, government agencies, legal service providers, protection and advocacy system representatives in appropriate cases, representatives of the unaccompanied child's care provider, health professionals, and others). Child advocates formally submit their recommendations to ORR and/or the immigration court, where appropriate, in the form of best interest determinations (BIDs).

(c) *Responsibilities of the child advocate.* The child advocate's responsibilities include, but are not limited to:

(1) Visiting with their unaccompanied child client;

(2) Explaining the consequences and potential outcomes of decisions that may affect their unaccompanied child client;

(3) Advocating for their unaccompanied child client's best interest with respect to care, placement, services, release, and within proceedings to which the child is a party;

(4) Providing best interest determinations, where appropriate and within a reasonable time to ORR, an immigration court, and/or other stakeholders involved in a proceeding or matter in which the unaccompanied child is a party or has an interest; and,

(5) Regularly communicating case updates with the care provider facility, ORR, and/or other stakeholders in the planning and performance of advocacy efforts, including updates related to services provided to an unaccompanied child after their release from ORR care.

(d) *Appointment of child advocates.* ORR may appoint child advocates for unaccompanied children who are victims of trafficking or especially vulnerable.

(1) An interested party may refer an unaccompanied child for a child advocate when the unaccompanied child is currently, or was previously in, ORR's care and custody, and when that child has been determined to be a victim of trafficking or especially vulnerable. As used in this paragraph (d)(1), *interested parties* means individuals or organizations involved in the care, service, or proceeding involving an unaccompanied child, including but not limited to, ORR Federal or contracted staff; an immigration judge; DHS Staff; a legal service provider, attorney of record, or DOJ Accredited Representative; an ORR care provider; healthcare professional; or a child advocate organization.

(2) ORR shall make an appointment decision within five (5) business days of a referral for a child advocate, except under exceptional circumstances which may delay a decision regarding an appointment. ORR will appoint child advocates for unaccompanied children who are currently in or were previously in ORR care and custody. ORR does not appoint child advocates for unaccompanied children who are not in or were not previously in ORR care and custody.

(3) Child advocate appointments terminate upon the closure of the unaccompanied child's case by the child advocate; when the unaccompanied child turns 18; or when the unaccompanied child obtains lawful immigration status.

(e) *Child advocate's access to information.* After a child advocate is appointed for an unaccompanied child, the child advocate shall be provided access to materials to effectively advocate for the best interest of the unaccompanied child. Child advocates shall be provided access to their clients during normal business hours at an ORR care provider facility and shall be provided access to all their client's case file information and may request copies of the case file directly from the unaccompanied child's care provider without going through ORR's standard case file request process.

(f) *Child advocate's responsibility with respect to confidentiality of information.* Child advocates shall keep the information in the case file, and information about the unaccompanied child's case, confidential. A child advocate may only disclose information from the case file with informed consent from the child when this is in the child's best interests. With regard to an unaccompanied child in ORR care, ORR shall allow the child advocate of that unaccompanied child to conduct private communications with the unaccompanied child, in a private area that allows for confidentiality for in-person and virtual or telephone meetings.

(g) *Non-retaliation against child advocates.* ORR shall presume that child advocates are acting in good faith with respect to their advocacy on behalf of unaccompanied children, and shall not retaliate against a child advocate for actions taken within the scope of their responsibilities. For example, ORR shall not retaliate against child advocates because of any disagreement with a best interest determination in regard to an unaccompanied child, or because of a child advocate's advocacy on behalf of an unaccompanied child.

§ 410.1309 Legal services.

(a) *Unaccompanied children's access to immigration legal services*—(1) *Purpose.* This paragraph (a) describes ORR's responsibilities in relation to legal services for unaccompanied children, consistent with 8 U.S.C. 1232(c)(5).

(2) *Orientation.* An unaccompanied child in ORR's legal custody shall receive:

(i) An in-person, telephonic, or video presentation concerning the rights and responsibilities of undocumented children in the immigration system, presented in the native or preferred language of the unaccompanied child and in an age-appropriate manner.

(A) Such presentation shall be provided by an independent legal service provider that has appropriate qualifications and experience, as determined by ORR, to provide such presentation and shall include information notifying the unaccompanied child of their legal rights and responsibilities, including protections under child labor laws, and of services to which they are entitled, including educational services. The presentation must be delivered in the native or preferred language of the unaccompanied child and in an age-appropriate manner.

(B) Such presentation shall occur within 10 business days of child's admission to ORR, within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care or ORR transitional home care), and every 6 months for unrepresented children who remain in ORR custody, as practicable. If the unaccompanied child is released before 10 business days, a legal service provider shall follow up as soon as practicable to complete the presentation, in person or remotely.

(ii) Information regarding the availability of free legal assistance and that they may be represented by counsel at no expense to the Government. When an unaccompanied child requests legal counsel, ORR shall ensure that the child is provided with a list and contact information for pro bono counsel, and reasonable assistance to ensure that the child is able to successfully engage an attorney at no cost to the Government.

(iii) Notification regarding the child's ability to petition for Special Immigrant Juvenile (SIJ) classification, to request that a juvenile court determine dependency or placement in accordance with § 410.1209, and notification of the ability to apply for asylum or other forms of relief from removal.

(iv) Information regarding the unaccompanied child's right to a removal hearing before an immigration judge, the ability to apply for asylum with United States Citizenship and Immigration Services (USCIS) in the first instance, and the ability to request voluntary departure in lieu of removal.

(v) A confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or DOJ Accredited Representative) to determine possible forms of relief from removal in relation to the unaccompanied child's immigration case, as well as other case disposition options such as, but not limited to, voluntary departure. Such consultation shall occur within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care or ORR transitional home care) or upon request from ORR. ORR shall request an additional legal consultation on behalf of a child, if the child has been identified as:

(A) A potential victim of a severe form of trafficking;

(B) Having been abused, abandoned, or neglected; or

(C) Having been the victim of a crime or domestic violence; or

(D) Persecuted or in fear of persecution due to race, religion, nationality, membership in a particular social group, or for a political opinion.

(vi) An unaccompanied child in ORR care shall be able to conduct private communications with their attorney of record, DOJ Accredited Representative, or legal service provider in a private enclosed area that allows for confidentiality for in-person, virtual, or telephonic meetings.

(vii) Information regarding the child's right to a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, as described at § 410.1903(a) and (b).

(3) *Accessibility of information.* In addition to the requirements in paragraphs (a)(1) and (2) of this section for orienting and informing unaccompanied children of their legal rights and access to services while in ORR care, ORR shall also require this information be posted for unaccompanied children in an age-appropriate format and translated into each child's preferred language, in any ORR contracted or grant-funded facility where unaccompanied children are in ORR care.

(4) *Direct immigration legal representation services for unaccompanied children currently or previously under ORR care.* To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR shall fund legal service providers to provide direct immigration legal representation for certain unaccompanied children, subject to ORR's discretion and available appropriations. Examples of direct immigration legal representation include, but are not limited to:

(i) For unrepresented unaccompanied children who become enrolled in ORR Unaccompanied Refugee Minor (URM) programs, provided they have not yet obtained immigration relief or reached 18 years of age at the time of retention of an attorney;

(ii) For unaccompanied children in ORR care who are in proceedings before EOIR, including unaccompanied children seeking voluntary departure, and for whom other available assistance does not satisfy the legal needs of the individual child;

(iii) For unaccompanied children released to a sponsor residing in the defined service area of the same legal service provider who provided the child legal services in ORR care, to promote continuity of legal services; and

(iv) For other unaccompanied children, to the extent ORR determines that appropriations are available.

(b) *Legal services for the protection of unaccompanied children's interests in certain matters not involving direct immigration representation*—(1) *Purpose.* This paragraph (b) provides for the use of additional funding for legal services, to the extent that ORR determines it to be available, to help ensure that the interests of unaccompanied children are considered in certain matters relating to their care and custody, to the greatest extent practicable.

(2) *Funding.* To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR may fund access to counsel for unaccompanied children, including for purposes of legal representation, in the following enumerated non-immigration related

matters, subject to ORR's discretion and in no particular order of priority:

(i) ORR appellate procedures, including Placement Review Panel (PRP), under § 410.1902, and risk determination hearings, under § 410.1903;

(ii) For unaccompanied children upon their placement in ORR long-term home care or in a residential treatment center outside a licensed ORR facility, and for whom other legal assistance does not satisfy the legal needs of the individual child;

(iii) For unaccompanied children with no identified sponsor who are unable to be placed in ORR long-term home care or ORR transitional home care;

(iv) For purposes of judicial bypass or similar legal processes as necessary to enable an unaccompanied child to access certain lawful medical procedures that require the consent of the parent or legal guardian under State law, and when the unaccompanied child is unable or unwilling to obtain such consent;

(v) For the purpose of representing an unaccompanied child in state juvenile court proceedings, when the unaccompanied child already possesses SIJ classification; and

(vi) For the purpose of helping an unaccompanied child to obtain an employment authorization document.

(c) *Standards for legal services for unaccompanied children.* (1) In-person meetings are preferred during the course of providing legal counsel to any unaccompanied child under paragraph (a) or (b) of this section, though telephonic or teleconference meetings between the unaccompanied child's attorney or DOJ Accredited Representative and the unaccompanied child may substitute as appropriate. Either the unaccompanied child's attorney, DOJ Accredited Representative, or a care provider staff member or care provider shall always accompany the unaccompanied child to any in-person courtroom hearing or proceeding, in connection with any legal representation of an unaccompanied child pursuant to this section.

(2) Upon receipt by ORR of proof of representation and authorization for release of records signed by the unaccompanied child or other authorized representative, ORR shall share, upon request and within a reasonable timeframe to be established by ORR, the unaccompanied child's complete case file, apart from any legally required redactions, to assist in the legal representation of the unaccompanied child. In addition to sharing the complete case file, upon request by an attorney of record or DOJ Accredited Representative, ORR shall promptly provide the attorney of record or DOJ Accredited Representative with the name and telephone number of potential sponsors who have submitted a completed family reunification application to ORR for their client, if the potential sponsors have provided consent to release of their information. Furthermore, and absent a reasonable belief based upon articulable facts that doing so would endanger an unaccompanied child, ORR shall ensure that unaccompanied children are allowed to review, upon request and in the company of their attorney of record or DOJ Accredited Representative if any, such papers, notes, and other writings they possessed at the time they were apprehended by DHS or another Federal department or agency, that are in ORR or an ORR care provider facility's possession.

(3) If an unaccompanied child's attorney of record or DOJ Accredited Representative properly requests their client's case file on an expedited basis, ORR shall, within seven calendar days, unless otherwise provided herein, provide the attorney of record or DOJ Accredited Representative with key documents from the unaccompanied child's case file, as determined by ORR.

(4) Expedited basis refers to any of the following situations:

(i) Unaccompanied child has been reported missing to the National Center for Missing and Exploited Children;

(ii) Unaccompanied child has a court hearing scheduled within 30 calendar days;

(iii) Unaccompanied child is turning 18 years old in less than 30 calendar days;

(iv) Unaccompanied child has a risk determination hearing pursuant to § 410.1903 of this part scheduled within 30 calendar days;

(v) Records are needed for the provision of medical services to the child;

(vi) Records are needed for the child's enrollment or continued enrollment in school;

(vii) Records are needed for a Federal, State, or local agency investigation related to the subject of the request; or

(viii) Any other situation in which ORR determines, in its discretion, that an expedited response is warranted.

(d) *Grants or contracts for unaccompanied children's immigration legal services.* (1) This paragraph (d) prescribes requirements concerning grants or contracts to legal service providers to ensure that all unaccompanied children who are or have been in ORR care have access to counsel to represent them in immigration legal proceedings or matters and to protect them from mistreatment, exploitation and trafficking, to the greatest extent practicable, in accordance with the TVPRA [at 8 U.S.C. 1232(c)(5)] and 292 of the Immigration and Nationality Act [at 8 U.S.C. 1362].

(2) ORR may make grants, in its discretion and subject to available resources—including formula grants distributed geographically in proportion to the population of released unaccompanied children—or contracts under this section to qualified agencies or organizations, as determined by ORR and in accordance with the eligibility requirements outlined in the authorizing statute, for the purpose of providing immigration legal representation, assistance and related services to unaccompanied children who are in ORR care, or who have been released from ORR care and living in a State or region.

(3) Subject to the availability of funds, grants or contracts shall be calculated based on the historic proportion of the unaccompanied child population in the State within a lookback period determined by the Director, provided annually by the State.

(e) *Non-retaliation against legal service providers.* ORR shall presume that legal service providers and other legal representatives are acting in good faith with respect to their advocacy on behalf of unaccompanied children and ORR shall not retaliate against a legal service provider or other legal representative for actions taken within the scope of the legal service provider's or representative's responsibilities. For example, ORR shall not engage in retaliatory actions against legal service providers or any other representative for reporting harm or misconduct on behalf of an unaccompanied child or appearance in an action adverse to ORR.

(f) *Resource email box.* ORR shall create and maintain a resource email box for feedback from legal services providers regarding emerging issues related to immediate performance of legal services at care provider facilities. ORR shall address such emerging issues as needed.

§ 410.1310 Psychotropic medications.

(a) Except in the case of a psychiatric emergency, ORR shall ensure that authorized individuals provide informed consent prior to the administration of psychotropic medications to unaccompanied children.

(1) Three categories of persons can serve as an ''authorized consenter'' and

provide informed consent for the administration of psychotropic medication to unaccompanied children in ORR custody: the child's parent or legal guardian, followed by a close relative sponsor, and then the unaccompanied child themself if the child is of sufficient age and a doctor has obtained informed consent; and

(2) Consent must be obtained voluntarily, without undue influence or coercion, and ORR will not retaliate against an unaccompanied child or an authorized consenter for refusing to take or consent to any psychotropic medication; and

(3) Any emergency administration of psychotropic medication must be documented, the child's authorized consenter must be notified as soon as possible, and the care provider and ORR must review the incident to ensure compliance with ORR policies and reasonably avoid future emergency administrations of medication.

(b) ORR shall ensure meaningful oversight of the administration of psychotropic medication(s) to unaccompanied children including reviewing cases flagged by care providers and conducting additional reviews of the administration of psychotropic medications in high-risk circumstances, including but not limited to cases involving young children, simultaneous administration of multiple psychotropic medications, and high dosages. ORR must engage qualified professionals who are able to oversee prescription practices and provide guidance to care providers, such as a child and adolescent psychiatrist.

(c) ORR shall permit unaccompanied children to have the assistance of counsel, at no cost to the Federal Government, with respect to the administration of psychotropic medications.

§ 410.1311 Unaccompanied children with disabilities.

(a) ORR shall provide notice to the unaccompanied children in its custody of the protections against discrimination under section 504 of the Rehabilitation Act at 45 CFR part 85 assured to children with disabilities in its custody. ORR must also provide notice of the available procedures for seeking reasonable modifications or making a complaint about alleged discrimination against children with disabilities in ORR's custody. This notice must be provided in a manner that is accessible to children with disabilities.

(b) ORR shall administer the UC Program in the most integrated setting appropriate to the needs of unaccompanied children with disabilities in accordance with 45 CFR 85.21(d), unless ORR can demonstrate that this would fundamentally alter the nature of its UC Program.

(c) ORR shall make reasonable modifications to its programs, including the provision of services, equipment, and treatment, so that an unaccompanied child with one or more disabilities can have equal access to the UC Program in the most integrated setting appropriate to their needs. ORR is not required, however, to take any action that it can demonstrate would fundamentally alter the nature of a program or activity.

(d) Where applicable, ORR shall document in the child's ORR case file any services, supports, or program modifications being provided to an unaccompanied child with one or more disabilities.

(e) In addition to the requirements for release of unaccompanied children established elsewhere in this part and through any subregulatory guidance ORR may issue, ORR shall adhere to the following requirements when releasing unaccompanied children with disabilities to a sponsor:

(1) ORR's assessment under § 410.1202 of a potential sponsor's capability to provide for the physical and mental well-being of the child must necessarily include explicit consideration of the impact of the child's disability or disabilities. Correspondingly, ORR must consider the potential benefits to the child of release to a community-based setting.

(2) In planning for a child's release and conducting post-release services (PRS), ORR and any entities through which ORR provides PRS shall make reasonable modifications in their policies, practices, and procedures if needed to enable released unaccompanied children with disabilities to live in the most integrated setting appropriate to their needs, such as with a sponsor. ORR is not required, however, to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. ORR will affirmatively support and assist otherwise viable potential sponsors in accessing and coordinating appropriate post-release community-based services and supports available in the community to support the sponsor's ability to care for a child with one or more disabilities, as provided for under § 410.1210.

(3) ORR shall not delay the release of a child with one or more disabilities solely because post-release services are not in place before the child's release.

Subpart E—Transportation of an Unaccompanied Child

§ 410.1400 Purpose of this subpart.

This subpart concerns the safe transportation of each unaccompanied child while in ORR's care.

§ 410.1401 Transportation of an unaccompanied child in ORR's care.

(a) ORR care provider facilities shall transport an unaccompanied child in a manner that is appropriate to the child's age and physical and mental needs, including proper use of car seats for young children, and consistent with § 410.1304.

(b) When ORR plans to release an unaccompanied child from its care to a sponsor under the provisions at subpart C of this part, ORR shall assist without undue delay in making transportation arrangements. In its discretion, ORR may require the care provider facility to transport an unaccompanied child. In these circumstances, ORR may, in its discretion, either reimburse the care provider facility or directly pay for the child and/or sponsor's transportation, as appropriate, to facilitate timely release.

(c) The care provider facility shall comply with all relevant State and local licensing requirements and state and Federal regulations regarding transportation of children, such as meeting or exceeding the minimum staff/child ratio required by the care provider facility's licensing agency, maintaining and inspecting all vehicles used for transportation, etc.

(d) If there is a potential conflict between ORR's regulations in this part and State law, ORR shall review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. If a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties, subject to applicable Federal religious freedom and conscience protections.

(e) The care provider facility or contractor shall conduct all necessary background checks for individuals transporting unaccompanied children, in compliance with § 410.1305(a).

(f) If a care provider facility is transporting an unaccompanied child, it shall assign at least one transport staff of the same gender as the child being transported, to the greatest extent possible under the circumstances.

Subpart F—Data and Reporting Requirements

§ 410.1500 Purpose of this subpart.

ORR shall maintain statistical and other data on the unaccompanied children for whom it is responsible. ORR shall be responsible for coordinating with other Departments to obtain some of the statistical data and shall obtain additional data from care provider facilities. This subpart describes information that care provider facilities shall report to ORR such that ORR may compile and maintain statistical information and other data on unaccompanied children.

§ 410.1501 Data on unaccompanied children.

Care provider facilities are required to report information necessary for ORR to maintain data in accordance with this section. Data shall include:

(a) Biographical information, such as an unaccompanied child's name, gender, date of birth, country of birth, whether of indigenous origin, country of habitual residence, and, if voluntarily disclosed, self-identified LGBTQI+ status or identity;

(b) The date on which the unaccompanied child came into Federal custody by reason of the child's immigration status, including the date on which the unaccompanied child came into ORR custody;

(c) Information relating to the unaccompanied child's placement, removal, or release from each care provider facility in which the unaccompanied child has resided, including the date on which and to whom the child is transferred, removed, or released;

(d) In any case in which the unaccompanied child is placed in detention or released, an explanation relating to the detention or release;

(e) The disposition of any actions in which the unaccompanied child is the subject;

(f) Information gathered from assessments, evaluations, or reports of the child; and,

(g) Data necessary to evaluate and improve the care and services for unaccompanied children, including:

(1) Data relating to the administration of psychotropic medications. Such information shall include children's diagnoses, the prescribing physician's information, the name and dosage of the medication prescribed, documentation of informed consent, and any emergency administration of medication. Such data shall be compiled in a manner that enables ORR to track how psychotropic medications are administered across the network and in individual facilities.

(2) Data relating to the treatment of unaccompanied children with disabilities. Such information shall include whether an unaccompanied child has been identified as having a disability, the unaccompanied child's diagnosis, the unaccompanied child's need for reasonable modifications or other services, and information related to release planning. Such data shall be compiled in a manner that enables ORR ongoing oversight to ensure unaccompanied children with disabilities are receiving appropriate care while in ORR care across the network and in individual facilities.

Subpart G—Transfers

§ 410.1600 Purpose of this subpart.

This subpart provides guidelines for the transfer of an unaccompanied child.

§ 410.1601 Transfer of an unaccompanied child within the ORR care provider facility network.

(a) *General requirements for transfers.* The care provider facility shall continuously assess unaccompanied children in their care to review whether the children's placements are appropriate. An unaccompanied child shall be placed in the least restrictive setting that is in the best interests of the child, subject to considerations regarding danger to self or the community and runaway risk. Care provider facilities shall follow ORR guidance, including guidance regarding placement considerations, when making transfer recommendations.

(1) If the care provider facility identifies an alternate placement for the unaccompanied child that would best meet the child's needs, the care provider facility shall make a transfer recommendation to ORR for approval within three business days of identifying the need for a transfer.

(2) The care provider facility shall ensure the unaccompanied child is medically cleared for transfer within three business days of ORR identifying the need for a transfer, unless otherwise waived by ORR. For an unaccompanied child with acute or chronic medical conditions, or seeking medical services requiring heightened ORR involvement, the appropriate care provider facility staff and ORR shall meet to review the transfer recommendation. If a child is not medically cleared for transfer within three business days, the care provider facility shall notify ORR, and ORR shall review and determine if the child is fit for travel. If ORR determines the child is not fit for travel, ORR shall notify the care provider facility of the denial and specify a timeframe for the care provider facility to re-evaluate the child for transfer.

(3) Within 48 hours prior to the unaccompanied child's physical transfer, the referring care provider facility shall notify all appropriate interested parties of the transfer, including the child's attorney of record or DOJ Accredited Representative, legal service provider, or child advocate, as applicable. However, such advance notice is not required in unusual and compelling circumstances, such as the following cases in which notices shall be provided within 24 hours following transfer:

(i) Where the safety of the unaccompanied child or others has been threatened;

(ii) Where the unaccompanied child has been determined to be a runaway risk consistent with § 410.1107; or

(iii) Where the interested party has waived such notice.

(4) The unaccompanied child shall be transferred with the child's possessions and legal papers, including, but not limited to:

(i) Personal belongings;

(ii) The transfer request and tracking form;

(iii) 30-day medication supply, if applicable;

(iv) All health records; and

(v) Original documents (including birth certificates).

(5) If the unaccompanied child's possessions exceed the amount permitted normally by the carrier in use, the care provider shall ship the possessions to a subsequent placement of the unaccompanied child in a timely manner.

(b) *Restrictive care provider facility placements and transfers.* When an unaccompanied child is placed in a restrictive setting (secure, heightened supervision, or residential treatment center), the care provider facility in which the child is placed and ORR shall review the placement at least every 30 days to determine whether a new level of care is appropriate for the child. If the care provider facility and ORR determine in the review that continued placement in a restrictive setting is appropriate, the care provider facility shall document the basis for its determination and, upon request, provide documentation of the review and rationale for continued placement to the child's attorney of record, legal service provider, and/or child advocate.

(c) *Group transfers.* At times, circumstances may require a care provider facility to transfer more than one unaccompanied child at a time (*e.g.,*

emergencies, natural disasters, program closures, and bed capacity constraints). For group transfers, the care provider facility shall follow ORR guidance and the requirements in paragraph (a) of this section.

(d) *Residential treatment center placements.* A care provider facility may request ORR to transfer an unaccompanied child in its care to a residential treatment center (RTC), pursuant to the requirements described at § 410.1105(c). The care provider facility shall review the placement of a child into an RTC every 30 days in accordance with paragraph (b) of this section.

(e) *Emergency placement changes.* An unaccompanied child who is placed pursuant to subpart B of this part remains in the legal custody of ORR and may only be transferred or released by ORR. However, in the event of an emergency, a care provider facility may temporarily change the physical placement of an unaccompanied child prior to securing permission from ORR but shall notify ORR of the change of physical placement, as soon as possible, but in all cases within eight hours of transfer.

Subpart H—Age Determinations

§ 410.1700 Purpose of this subpart.

This subpart sets forth the provisions for determining the age of an individual in ORR custody.

§ 410.1701 Applicability.

This subpart applies to individuals in the custody of ORR. To meet the definition of an unaccompanied child and remain in ORR custody, an individual must be under 18 years of age.

§ 410.1702 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 custody to submit to a medical or dental examination, including X-rays, conducted by a medical professional or to submit to other appropriate procedures to verify their age. If ORR subsequently determines that such an individual is an unaccompanied child, the individual will be treated in accordance with ORR's UC Program regulations in this part for all purposes.

§ 410.1703 Information used as evidence to conduct age determinations.

(a) ORR considers multiple forms of evidence in making age determinations, and determinations are made based upon a totality of evidence.

(b) ORR may consider information or documentation to make an age determination, including but not limited to:

(1) If there is no original birth certificate, certified copy, or photocopy or facsimile copy of a birth certificate acceptable to ORR, consulting 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.

(8) Medical age assessments, which should not be used as a sole determining factor but only in concert with other factors. If an individual's estimated probability of being 18 years or older is 75 percent or greater according to a medical age assessment, and the totality of the evidence indicates that the individual is 18 years old or older, ORR must determine that the individual is 18 years old or older. The 75 percent probability threshold applies to all medical methods and approaches identified by the medical community as appropriate methods for assessing age. Ambiguous, debatable, or borderline forensic examination results are resolved in favor of finding the individual is a child.

§ 410.1704 Treatment of an individual whom ORR has determined to be an adult.

If the procedures in this subpart would result in ORR reasonably concluding that an individual is an adult, despite the individual's claim to be under the age of 18, ORR shall treat such person as an adult for all purposes.

Subpart I—Emergency and Influx Operations

§ 410.1800 Contingency planning and procedures during an emergency or influx.

(a) ORR shall regularly reevaluate the number of standard program placements needed for unaccompanied children to determine whether the number of shelters, heightened supervision facilities, and ORR transitional home care beds should be adjusted to accommodate an increased or decreased number of unaccompanied children eligible for placement in care in ORR care provider facilities.

(b) In the event of an emergency or influx that prevents the prompt placement of unaccompanied children in standard programs, ORR shall place each unaccompanied child in a standard program as expeditiously as possible.

(c) ORR activities during an influx or emergency include the following:

(1) ORR shall implement its contingency plan on emergencies and influxes, which may include opening facilities to house unaccompanied children and prioritization of placement at such facilities of certain unaccompanied children;

(2) ORR shall continually develop standard programs that are available to accept emergency or influx placements; and

(3) ORR shall maintain a list of unaccompanied children affected by the emergency or influx including each unaccompanied child's:

(i) Name;

(ii) Date and country of birth;

(iii) Date of placement in ORR's custody; and

(iv) Place and date of current placement.

§ 410.1801 Minimum standards for emergency or influx facilities.

(a) In addition to the ''standard program'' and ''restrictive placements'' defined in this part, ORR provides standards in this section for all emergency or influx facilities (EIFs).

(b) EIFs shall provide the following minimum services for all unaccompanied children in their care:

(1) Proper physical care and maintenance, including suitable living accommodations, sufficient quantity of food appropriate for children, drinking water, appropriate clothing, and personal grooming items.

(2) Appropriate routine medical and dental care; family planning services, including pregnancy tests; medical services requiring heightened ORR involvement; and emergency healthcare services; a complete medical examination (including screenings for infectious diseases) within 48 hours of admission, excluding weekends and holidays, unless the unaccompanied child was recently examined at another ORR care provider facility; appropriate immunizations as recommended by the Advisory Committee on Immunization

Practices' Child and Adolescent Immunization Schedule and approved by HHS's Centers for Disease Control and Prevention; administration of prescribed medication and special diets; and appropriate mental health interventions when necessary.

(3) An individualized needs assessment, which includes the various initial intake forms, identification of the unaccompanied child's individualized needs including any specific problems which appear to require immediate intervention, an educational assessment and plan, and whether an indigenous language speaker; a statement of religious preference and practice; and an assessment of the unaccompanied child's personal goals, strengths, and weaknesses.

(4) Educational services appropriate to the unaccompanied child's level of development and communication skills in a structured classroom setting Monday through Friday, which concentrates on the development of basic academic competencies, and on English Language acquisition. The educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas may include such subjects as science, social studies, math, reading, writing, and physical education. The program must provide unaccompanied children with appropriate reading materials in languages other than English for use during leisure time.

(5) Activities according to a recreation and leisure time plan that include daily outdoor activity—weather permitting—with at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (that must not include time spent watching television). Activities should be increased to a total of 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 objective of reviewing the child's progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each child.

(7) Group counseling sessions at least twice a week.

(8) Acculturation and adaptation services that include information regarding the development of social and interpersonal skills that contribute to those abilities necessary to live independently and responsibly.

(9) Whenever possible, access to religious services of the child's choice.

(10) Visitation and contact with family members (regardless of their immigration status), which is structured to encourage such visitation. The staff must respect the child's privacy while reasonably preventing the unauthorized release of the unaccompanied child.

(11) A reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

(12) Legal services information, including the availability of free legal assistance, and that they may be represented by counsel at no expense to the Government, the right to a removal hearing before an immigration judge, the ability to apply for asylum with USCIS in the first instance, and the ability to request voluntary departure in lieu of removal.

(13) EIFs, whether state-licensed or not, must comply, to the greatest extent possible, with all State child welfare laws and regulations (such as mandatory reporting of abuse), as well as all State and local building, fire, health and safety codes, that ORR determines are applicable to non-State licensed facilities.

(14) EIFs must deliver services in a manner that is sensitive to the age, culture, native language, and complex needs of each unaccompanied child. EIFs must develop an individual service plan for the care of each child.

(c) EIFs shall do the following when providing services to unaccompanied children:

(1) Maintain safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of children;

(2) Provide access to toilets, showers and sinks, as well as personal hygiene items such as soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items;

(3) Provide drinking water and food;

(4) Provide medical assistance if the unaccompanied child is in need of emergency services and provide a modified medical examination;

(5) Maintain adequate temperature control and ventilation;

(6) Provide adequate supervision to protect unaccompanied children;

(7) Separate from other unaccompanied children those unaccompanied children who are subsequently found to have past criminal or juvenile detention histories or have perpetrated sexual abuse that present a danger to themselves or others;

(8) Provide contact with family members who were apprehended with the unaccompanied child; and

(9) Provide access to legal services described in § 410.1309(a).

(10) Provide family unification services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied child.

(11) Provide an individualized needs assessment, which includes the collection of essential data relating to the identification and history of the child and the child's family; an assessment of family relationships and interaction with adults, peers and authority figures; and 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 connecting the child with family members.

(12) Provide a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations, information about U.S. child labor laws, and the availability of legal assistance.

(13) Maintain records of case files and make regular reports to ORR. EIFs must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.

(d) ORR may grant waivers of standards under paragraph (b) of this section, in whole or in part, during the first six months of an EIF activation, to the extent that ORR determines that the specific waivers requested are necessary because it would be operationally infeasible to comply with the specified standards, and are granted for no longer than necessary in light of operational feasibility, and the waivers are granted in accordance with law. Such waiver or waivers must be made publicly available. Even where a waiver is granted, EIFs shall make all efforts to meet requisite standards under § 410.1801(b) as expeditiously as possible.

§ 410.1802 Placement standards for emergency or influx facilities.

(a) Unaccompanied children who are placed in an emergency or influx facility (EIF) must meet all of the following criteria to the extent feasible. If ORR becomes aware that a child does not meet any of the following criteria at any time after placement into an EIF, ORR shall transfer the unaccompanied child

to the least restrictive setting appropriate for that child's need as expeditiously as possible. ORR shall only place a child in an EIF if the child:

(1) Is expected to be released to a sponsor within 30 days;

(2) Is age 13 or older;

(3) Speaks English or Spanish as their preferred language;

(4) Does not have a known disability or other mental health or medical issue or dental issue requiring additional evaluation, treatment, or monitoring by a healthcare provider;

(5) Is not a pregnant or parenting teenager;

(6) Would not have a diminution of legal services as a result of the transfer to the EIF; and

(7) Is not a danger to self or others (including not having been charged with or convicted of a criminal offense).

(b) ORR shall also consider the following factors for the placement of an unaccompanied child in an EIF:

(1) The unaccompanied child should not be part of a sibling group with a sibling(s) age 12 years or younger;

(2) The unaccompanied child should not be subject to a pending age determination;

(3) The unaccompanied child should not be involved in an active State licensing, child protective services, or law enforcement investigation, or an investigation resulting from a sexual abuse allegation;

(4) The unaccompanied child should not have a pending home study;

(5) The unaccompanied child should not be turning 18 years old within 30 days of the transfer to an EIF;

(6) The unaccompanied child should not be scheduled to be discharged in three days or less;

(7) The unaccompanied child should not have a scheduled hearing date in immigration court or State/family court (juvenile included), and not have an attorney of record or DOJ Accredited Representative;

(8) The unaccompanied child should be medically cleared and vaccinated as required by the EIF (for instance, if the EIF is on a U.S. Department of Defense site); and

(9) The unaccompanied child should have no known mental health, dental, or medical issues, including contagious diseases requiring additional evaluation, treatment, or monitoring by a healthcare provider.

Subpart J—Availability of Review of Certain ORR Decisions

§ 410.1900 Purpose of this subpart.

This subpart describes the availability of review of certain ORR decisions regarding the care and placement of unaccompanied children.

§ 410.1901 Restrictive placement case reviews.

(a) In all cases involving a restrictive placement, ORR shall have the burden to determine, based on clear and convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement. The evidence supporting a restrictive placement decision shall be recorded in the unaccompanied child's case file.

(b) ORR shall provide an unaccompanied child with a Notice of Placement (NOP) in the child's native or preferred language no later than 48 hours after step-up to a restrictive placement, as well as every 30 days the unaccompanied child remains in a restrictive placement.

(1) The NOP shall clearly and thoroughly set forth the reason(s) for placement and a summary of supporting evidence.

(2) The NOP shall inform the unaccompanied child of their right to contest the restrictive placement before a Placement Review Panel (PRP) upon receipt of the NOP and the procedures by which the unaccompanied child may do so. The NOP shall further inform the unaccompanied child of all other available administrative review processes.

(3) The NOP shall include an explanation of the unaccompanied child's right to be represented by counsel at no cost to the Federal Government in challenging such restrictive placement.

(4) A case manager shall explain the NOP to the unaccompanied child, in a language the unaccompanied child understands.

(c) The care provider facility shall provide a copy of the NOP to the unaccompanied child's attorney of record, legal service provider, child advocate, and to a parent or legal guardian of record, no later than 48 hours after step-up as well as every 30 days the unaccompanied child remains in a restrictive placement.

(1) Service of the NOP on a parent or legal guardian shall not be required where there are child welfare reasons not to do so, where the parent or legal guardian cannot be reached, or where an unaccompanied child 14 or over states that the unaccompanied child does not wish for the parent or legal guardian to receive the NOP.

(2) Child welfare rationales include but are not limited to: a finding that the automatic provision of the notice could endanger the unaccompanied child; potential abuse or neglect by the parent or legal guardian; a parent or legal guardian who resides in the United States but refuses to act as the unaccompanied child's sponsor; or a scenario where the parent or legal guardian is non-custodial and the unaccompanied child's prior caregiver (such as a caregiver in home country) requests that the non-custodial parent not be notified of the placement.

(3) When an NOP is not automatically provided to a parent or legal guardian, ORR shall document, within the unaccompanied child's case file, the child welfare reason for not providing the NOP to the parent or legal guardian.

(d) ORR shall further ensure the following automatic administrative reviews:

(1) At minimum, a 30-day administrative review for all restrictive placements;

(2) A more intensive 90-day review by ORR supervisory staff for unaccompanied children in secure facilities; and

(3) For unaccompanied children in residential treatment centers, the 30-day review at paragraph (d)(1) of this section must involve a psychiatrist or psychologist to determine whether the unaccompanied child should remain in restrictive residential care.

§ 410.1902 Placement Review Panel.

(a) All determinations to place an unaccompanied child in a secure facility that is not a residential treatment center will be reviewed and approved by ORR federal field staff. An unaccompanied child placed in a restrictive placement may request reconsideration of such placement. Upon such request, ORR shall afford the unaccompanied child a hearing before the Placement Review Panel (PRP) at which the unaccompanied child may, with the assistance of counsel at no cost to the Federal Government, present evidence on their own behalf. An unaccompanied child may present witnesses and cross-examine ORR's witnesses, if such child and ORR witnesses are willing to voluntarily testify. An unaccompanied child shall be provided access at the PRP hearing to interpretation services in their native or preferred language, depending on the unaccompanied child's preference, and in a way they effectively understand. An unaccompanied child that does not wish to request a hearing may also have their placement reconsidered by submitting a written request for a reconsideration along with any supporting documents as evidence. Where the unaccompanied child does not have an attorney, ORR shall

encourage the care provider facility to seek assistance for the unaccompanied child from a contracted legal service provider or child advocate.

(b) The PRP shall afford any unaccompanied child in a restrictive placement the opportunity to request a PRP review as soon as the unaccompanied child receives a Notice of Placement (NOP). ORR shall permit the unaccompanied child or the unaccompanied child's counsel to review the evidence in support of step-up or continued restrictive placement, and any countervailing or otherwise unfavorable evidence, within a reasonable time before the PRP review is conducted. ORR shall also share the unaccompanied child's complete case file apart from any legally required redactions with their counsel within a reasonable timeframe to be established by ORR to assist in the legal representation of the unaccompanied child.

(c) ORR shall convene the PRP within 7 days of an unaccompanied child's request for a hearing. ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances.

(d) The PRP shall issue a written decision in the child's native or preferred language within 7 days of a hearing and submission of evidence or, if no hearing or review of additional evidence is requested, within 7 days following receipt of an unaccompanied child's written statement. ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances.

(e) An ORR staff member who was involved with the decision to step-up an unaccompanied child to a restrictive placement shall not serve as a PRP member with respect to that unaccompanied child's placement.

§ 410.1903 Risk determination hearings.

(a) All unaccompanied children in restrictive placements based on a finding of dangerousness shall be afforded a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, unless the unaccompanied child indicates in writing that they refuse such a hearing. Unaccompanied children placed in restrictive placements shall receive a written notice of the procedures under this section and may use a form provided to them to decline a hearing under this section. Unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel.

(b) All other unaccompanied children in ORR custody may request a hearing under this section to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released. Requests under this section must be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form.

(c) In hearings conducted under this section, ORR bears the burden of proof to establish by clear and convincing evidence that the unaccompanied child would be a danger to self or to the community if released.

(d) In hearings under this section, the unaccompanied child may be represented by a person of their choosing. The unaccompanied child may present oral and written evidence to the hearing officer and may appear by video or teleconference. ORR may also present evidence at the hearing, whether in writing, or by appearing in person or by video or teleconference.

(e) Within a reasonable time prior to the hearing, ORR shall provide to the unaccompanied child and their attorney of record the evidence and information supporting ORR's determination, including the evidentiary record.

(f) A hearing officer's decision that an unaccompanied child would not be a danger to self or to the community if released is binding upon ORR, unless the provisions of paragraph (e) of this section apply.

(g) A hearing officer's decision under this section may be appealed by either the unaccompanied child or ORR to the Assistant Secretary of ACF, or the Assistant Secretary's designee.

(1) Any such appeal request shall be in writing and must be received by ACF within 30 days of the hearing officer decision.

(2) The Assistant Secretary, or the Assistant Secretary's designee, shall review the record of the underlying hearing, and will reverse a hearing officer's decision only if there is a clear error of fact, or if the decision includes an error of law.

(3) If the hearing officer's decision found that the unaccompanied child would not pose a danger to self or to the community if released from ORR custody, and such decision would result in ORR releasing the unaccompanied child from its custody (*e.g.,* because the only factor preventing release was ORR's determination that the unaccompanied child posed a danger to self or to the community), an appeal to the Assistant Secretary shall not effect a stay of the hearing officer's decision, unless the Assistant Secretary issues a decision in writing within five business days of such hearing officer decision that release of the unaccompanied child would result in a danger to self or to the community. Such a stay decision must include a description of behaviors of the unaccompanied child while in ORR custody and/or documented criminal or juvenile behavior records from the unaccompanied child demonstrating that the unaccompanied child would present a danger to self or to the community if released.

(h) Decisions under this section are final and binding on the Department, and an unaccompanied child who was determined to pose a danger to self or to the community if released may only seek another hearing under this section if the unaccompanied child can demonstrate a material change in circumstances. Similarly, ORR may request the hearing officer to make a new determination under this section only if ORR can show that a material change in circumstances means the unaccompanied child should no longer be released due to presenting a danger to self or to the community.

(i) This section cannot be used to determine whether an unaccompanied child has a suitable sponsor.

(j) Determinations made under this section will not compel an unaccompanied child's release; nor will determinations made under this section compel transfer of an unaccompanied child to a different placement. Regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may not be released unless ORR identifies a safe and appropriate placement pursuant to subpart C of this part; and regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may only be transferred to another placement by ORR pursuant to requirements set forth at subparts B and G of this part.

Subpart K—Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds)

§ 410.2000 Establishment of the UC Office of the Ombuds.

(a) The Unaccompanied Children Office of the Ombuds (hereafter, the ''UC Office of the Ombuds'') is located

within the Office of the ACF Assistant Secretary, and reports to the ACF Assistant Secretary.

(b) The UC Office of the Ombuds shall be an independent, impartial office with authority to receive reports, including confidential and informal reports, of concerns regarding the care of unaccompanied children; to investigate such reports; to work collaboratively with ORR to potentially resolve such reports; and issue reports concerning its efforts.

§ 410.2001 UC Office of the Ombuds policies and procedures; contact information.

(a) The UC Office of the Ombuds shall develop appropriate standards, practices, and policies and procedures, giving consideration to the recommendations by nationally recognized Ombudsperson organizations.

(b) The UC Office of the Ombuds shall make its standards, practices, reports and findings, and policies and procedures publicly available.

(c) The UC Office of the Ombuds shall make information about the office and how to contact it publicly available, in both English and other languages spoken and understood by unaccompanied children in ORR care. The Ombuds may identify preferred methods for raising awareness of the office and its activities, which may include, but not be limited to, visiting ORR facilities, or publishing aggregated information about the type and number of concerns the office receives, as well as giving recommendations.

§ 410.2002 UC Office of the Ombuds scope and responsibilities.

(a) The UC Office of the Ombuds may engage in activities consistent with § 410.2001, including but not limited to:

(1) Receiving reports from unaccompanied children, potential sponsors, other stakeholders in a child's case, and the public regarding ORR's adherence to its own regulations and standards.

(2) Investigating implementation of or adherence to Federal law and ORR regulations, in response to reports it receives, and meeting with interested parties to receive input on ORR's compliance with Federal law and ORR policy;

(3) Requesting and receiving information or documents, such as the Ombuds deems relevant, from ORR and ORR care provider facilities, to determine implementation of and adherence to Federal law and ORR policy;

(4) Preparing formal reports and recommendations on findings to publish, including an annual report describing activities conducted in the prior year;

(5) Conducting investigations, interviews, and site visits at care provider facilities as necessary to aid in the preparation of reports and recommendations;

(6) Visiting ORR care providers in which unaccompanied children are or will be housed;

(7) Reviewing individual circumstances, including but not limited to concerns about unaccompanied children's access to services, ability to communicate with service providers, parents or legal guardians of children in ORR custody, sponsors, and matters related to transfers within or discharge from ORR care;

(8) Making efforts to resolve complaints or concerns raised by interested parties as it relates to ORR's implementation or adherence to Federal law or ORR policy;

(9) Hiring and retaining others, including but not limited to independent experts, specialists, assistants, interpreters, and translators to assist the Ombuds in the performance of their duties;

(10) Making non-binding recommendations to ORR regarding its policies and procedures, specific to protecting unaccompanied children in the care of ORR;

(11) Providing general educational information about pertinent laws, regulations and policies, ORR child advocates, and legal services as appropriate; and

(12) Advising and updating the Director of ORR, Assistant Secretary, and the Secretary, as appropriate, on the status of ORR's implementation and adherence to Federal law or ORR policy.

(b) The UC Office of the Ombuds may in its discretion refer matters to other Federal agencies or offices with jurisdiction over a particular matter, for further investigation where appropriate, including to Federal or State law enforcement.

(c) To accomplish its work, the UC Office of the Ombuds may, as needed, have timely and direct access to:

(1) Unaccompanied children in ORR care;

(2) ORR care provider facilities;

(3) Case file information;

(4) Care provider and Federal staff responsible for children's care; and

(5) Statistical and other data that ORR maintains.

§ 410.2003 Organization of the UC Office of the Ombuds.

(a) The UC Ombuds shall be hired as a career civil servant.

(b) The UC Ombuds shall have the requisite knowledge and experience to effectively fulfill the work and the role, including membership in good standing of a nationally recognized organization, association of ombudsmen, or State bar association throughout the course of employment as the Ombuds, and to also include but not be limited to having demonstrated knowledge and experience in:

(1) Informal dispute resolution practices;

(2) Services and matters related to unaccompanied children and child welfare;

(3) Oversight and regulatory matters; and

(4) ORR policy and regulations.

(c) The Ombuds may engage additional staff as it deems necessary and practicable to support the functions and responsibilities of the Office.

(d) The Ombuds shall establish procedures for training, certification, and continuing education for staff and other representatives of the Office.

§ 410.2004 Confidentiality.

(a) The Ombuds shall manage the files, records, and other information of the program, regardless of format, and such files must be maintained in a manner that preserves the confidentiality of the records except in instances of imminent harm or judicial action and is prohibited from using or sharing information for any immigration enforcement related purpose.

(b) The UC Office of the Ombuds may accept reports of concerns from anonymous reporters.

Dated: April 15, 2024.

Xavier Becerra,

Secretary, Department of Health and Human Services.

Endnotes

[1] Unaccompanied Children Program Foundational Rule, 88 FR 68908 (Oct. 4, 2023).

[2] Public Law 107–296, sec. 462, 116 Stat. 2135, 2202.

[3] Public Law 110–457, title II, subtitle D, 122 Stat. 5044.

[4] *See also* 45 CFR 75.101.

[5] 6 U.S.C. 279(g)(2).

[6] *See generally* 8 U.S.C. 1232.

[7] 6 U.S.C. 279(a).

[8] *See* 6 U.S.C. 279(b)(1).

[9] 6 U.S.C. 279(b)(2).

[10] Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (Mar. 11, 2021).

[11] *See* 8 U.S.C. 1232(a).

[12] 8 U.S.C. 1232(b)(2).

[13] 8 U.S.C. 1232(c)(1).

[14] *See* Delegation of Authority, 74 FR 14564 (Mar. 31, 2009); *see also* Delegation of Authority, 74 FR 19232 (Apr. 28, 2009).

[15] As discussed further, below, INS was abolished when the Department of Homeland Security was established in 2002. 6 U.S.C. 291.

[16] *See* Complaint for Injunctive and Declaratory Relief, and Relief in the Nature of Mandamus at 2, *Flores* v. *Meese,* No. 85–4544 (C.D. Cal. filed July 11, 1985).

[17] *Id. Flores* Compl. at paragraph 1.

[18] *See id.* at paragraph 66–69.

[19] *See* Stipulated Settlement Agreement, *Flores* v. *Reno,* No. CV 85–4544–RJK(Px) (C.D. Cal. Jan. 17, 1997, as amended Dec. 7, 2001).

[20] *See Flores* v. *Lynch,* 828 F.3d 898 (9th Cir. 2016) (holding that the FSA applies to accompanied children as well as unaccompanied children).

[21] *Id.* at paragraph 11.

[22] *Id.* at paragraphs 12A, 14.

[23] *Id.* at paragraph 24A.

[24] *Id.* at paragraph 9.

[25] *See* 63 FR 39759 (July 24, 1998).

[26] Stipulated Settlement Agreement, *Flores* v. *Reno,* No. CV 85–4544–RJK(Px) (C.D. Cal. Jan. 17, 1997, as amended Dec. 7, 2001), at paragraph 40.

[27] 67 FR 1670 (Jan. 14, 2002).

[28] 83 FR 45486 (Sep. 7, 2018).

[29] *Id.*

[30] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 FR 44392, 44530 through 44535 (Aug. 23, 2019).

[31] *Id.* at 44526.

[32] *Flores* v. *Barr,* 407 F. Supp. 3d 909 (C.D. Cal. 2019).

[33] *Flores* v. *Rosen,* 984 F.3d 720 (9th Cir. 2020).

[34] *See id.*

[35] 984 F.3d 720, 737 (9th Cir. 2020).

[36] *Id.* With respect to the DHS portions of the 2019 Final Rule, the Ninth Circuit held that some of the DHS regulations regarding initial apprehension and detention were consistent with the FSA and could take effect, but that the remaining DHS regulations were inconsistent with the FSA and the district court properly enjoined them and the inconsistent HHS regulations from taking effect. *See id.* at 744.

[37] *California* v. *Mayorkas,* No. 2:19–v–07390 (C.D. Cal. filed Aug. 26, 2019).

[38] *See* Stipulation re Request to Hold Plaintiffs' Claims as to HHS Under Abeyance, *California* v. *Mayorkas,* No. 2:19–v–07390 (C.D. Cal. Apr. 12, 2022), ECF No. 159. *See also* Order Approving Stipulation, ECF No. 160.

[39] *See id.*

[40] Pending E.O. 12866 Regulatory Review, *https://www.reginfo.gov/public/do/eoDetails?rrid=312162.*

[41] *Lucas R.* v. *Becerra,* Case No. 2:18–cv–5741 (C.D. Cal. filed Jun. 29, 2018).

[42] Amended Order re Defendants' Motion to Dismiss [101] and Plaintiff's Motion for Class Certification [97], *Lucas R.* v. *Becerra,* No. 2:18–cv–05741 (C.D. Cal. December 27, 2018), ECF No. 141 at 27–28.

[43] Order re Preliminary Approval of Settlement and Approval of the Parties' Joint Proposal re Notice to Lucas R Class Members of Settlement of Plaintiffs' Third, Fourth, and Fifth Claims for Relief [Psychotropic Medications, Legal Representation, and Disability, *Lucas R.* v. *Becerra,* No. 2:18–cv–05741 (C.D. Cal. January 5, 2024), ECF No. 410.

[44] Since publication of the NPRM, the title of the ORR Director was updated to Deputy Assistant Secretary for Humanitarian Services and Director of the Office of Refugee Resettlement. The definition of ''Director'' has been updated in the regulation text, but the term has not been replaced in this final rule when discussing statutory authorities or delegations of power under the HSA or TVPRA.

[45] 6 U.S.C. 279(b)(1).

[46] 8 U.S.C. 1232(b)(2).

[47] 8 U.S.C. 1232(c)(1).

[48] 74 FR 14564 (2009).

[49] 74 FR 1232 (2009).

[50] *See* 8 U.S.C. 1232(c)(1); *see also* 6 U.S.C. 279(b)(1)(L).

[51] *https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2025-congressional-justification.pdf.*

[52] 8 U.S.C. 1232(c)(1).

[53] *See, e.g.,* Memorandum of Agreement between U.S. Department of Labor and HHS Regarding Inter-agency Data Sharing (Mar. 23, 2023), *https://www.acf.hhs.gov/sites/default/files/documents/main/23-MOA-096-between-DOL-WHD-and-HHS-ACF-Regarding-Inter-Agency-Data-Sharing-Agreement_0.pdf* (expanding interagency efforts to identify communities and employers where children may be at risk of child labor exploitation; aiding investigations with information to help identify circumstances where children are unlawfully employed; and facilitating coordination to ensure that child labor trafficking victims or potential victims have access to critical services).

[54] *https://www.hhs.gov/about/hhs-manuals/gam-part-30/302000/index.html.*

[55] To find information regarding regulatory reviews by the Office of Management and Budget, visit *https://www.reginfo.gov/public/* . To confirm the status of review of this rule, search ''Foundational Rule'' in the search box.

[56] ORR Unaccompanied Children Program Policy Guide, *https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide.*

[57] Unaccompanied Children's Program Field Guidance, *https://www.acf.hhs.gov/orr/policy-guidance/uc-program-field-guidance.*

[58] 8 U.S.C. 1232(c)(2)(A).

[59] *See, e.g.,* 8 U.S.C. 1226(c)(2) (authorizing the Attorney General to release certain noncitizens from custody where, among other circumstances, ''the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding''). *See also Matter of Guerra,* 24 I&N Dec. 37, 40 (BIA 2006) (discussing factors immigration judges may look to in determining whether an alien merits release on bond, and noting among those factors, ''any attempts by the alien to flee prosecution or otherwise escape from authorities.'').

[60] *See, e.g.,* Proclamation by the Governor of the State of Texas, May 31, 2021, *available at: https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf (*directing the Texas Health and Human Service Commission (HHSC) to amend its regulations to ''discontinue State licensing of any child-care facility in this state that shelters or detains [UC] under a contract with the Federal Government.''); *see also* Fl. Executive Order No. 21–223 (Sept. 28, 2021), *available at: https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-223.pdf.*

[61] Separate from this final rule, ACF is currently developing a notice of proposed rulemaking that would describe the creation of a Federal licensing scheme for ORR care providers located in states where licensure is unavailable to programs serving unaccompanied children.

[62] Office to Monitor and Combat Trafficking in Persons. (2020, June). *Trauma Bonding in Human Trafficking.* U.S. Department of State. *https://www.state.gov/wp-content/uploads/2020/10/TIP_Factsheet-Trauma-Bonding-in-Human-Trafficking-508.pdf.*

[63] *See* 6 U.S.C. 279(b)(1)(B); 8 U.S.C. 1232(c)(2)(A).

[64] *See* 81 FR 46683 (''As a matter of discretion, ORR will treat information that it maintains in its mixed systems of records as being subject to the provisions of the Privacy Act, regardless of whether or not the information relates to U.S. persons covered by the Privacy Act.'').

[65] *See e.g.,* 42 CFR 59.2 (defining ''family planning'' to include: ''Food and Drug Administration (FDA)-approved contraceptive products and natural family planning methods, for clients who want to prevent pregnancy and space births, pregnancy testing and counseling, assistance to achieve pregnancy, basic infertility services, sexually transmitted infection (STI) services, and other preconception health services''); the joint Centers for Disease Control and Office of Population Affairs Quality Family Planning guidebook, available at: *https://opa.hhs.gov/sites/*

default/files/2020-10/providing-quality-family-planning-services-2014_1.pdf; and the State Medicaid Manual at section 4270, available at: *https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/sm_4_4270_to_4390.1_181.doc.*

[66] 45 CFR 92.101.

[67] *See, e.g.,* 6 U.S.C. 279(b)(1); *see also* 8 U.S.C. 1232(c)(1) and (c)(2)(A).

[68] *See* 8 U.S.C. 1232(c)(1).

[69] *See, e.g.,* 79 FR 77776 (''. . . ORR requires that all care provider facilities refer all allegations, regardless of how an allegation is made or who it comes from, to the proper investigating authorities. ORR and care provider facilities have no control over whether law enforcement, Child Protective Services, or a State or local licensing agency conducts an investigation. Both ORR and care provider facilities, however, must attempt to remain informed of ongoing investigations and fully cooperate as necessary.'').

[70] *See* 8 U.S.C. 1232(b)(1).

[71] *See* FSA at paragraph 19.

[72] 8 U.S.C. 1232(b)(1).

[73] 6 U.S.C. 279(b)(1)(A).

[74] *See, e.g.,* paragraph 10 (defining the class in the action as ''All minors who are detained in the legal custody of the INS''); paragraph 14E (listing ''a licensed program willing to accept legal custody'' within the preferred order of release of children; paragraph 19 (''in any case in which the INS does not release a minor pursuant to paragraph 14, the minor shall remain in INS legal custody . . . All minors placed in . . . a licensed program remain in the legal custody of the INS and may only be transferred or released under the authority of the INS . . .'').

[75] *Jenny L. Flores* v. *William P. Barr,* No. CV854544DMGAGRX, 2020 WL 5491445, at *3 (C.D. Cal. Sept. 4, 2020).

[76] 6 U.S.C. 279(b)(1). *See also* 8 U.S.C. 1232(c)(2)(A).

[77] The TVPRA also contains specific provisions for DHS to screen children who are from contiguous countries to determine whether such children meet statutory criteria to return to the child's country of nationality or of last habitual residence. If the child does not meet the criteria to return or no determination can be made within 48 hours of apprehension, the child shall ''immediately be transferred to the Secretary of HHS and treated in accordance with subsection (b).'' 8 U.S.C. 1232(a)(4). ORR reads this language in concert with the language in 8 U.S.C. 1232(b)(3) and, thus, include the one 72-hour standard in this final rule.

[78] ORR has existing policies relating to the placement and transfer of *Saravia* class members, defined as noncitizen minors who (1) came to the United States as unaccompanied children, as defined at 6 U.S.C. 279(g)(2); (2) were previously detained in the custody of ORR but then released to a sponsor by ORR; and (3) have been or will be rearrested by DHS on the basis of a removability warrant based in whole or in part on allegations of gang affiliation. *See* Order Certifying the Settlement Class and Granting Final Approval of Class Action Settlement, *Saravia* v. *Barr,* Case No.: 3:17–cv–03615 (N.D. Cal. Jan. 19, 2021), ECF No. 249. In *Saravia* bond hearings DHS bears the burden to demonstrate changed circumstances since the minor's release by ORR which demonstrate the minor is a danger to the community. DHS must demonstrate that circumstances have changed since the child's release from ORR custody such that the child poses a danger to the community or is a flight-risk.

[79] 8 U.S.C. 1232(b)(3).

[80] *See, e.g.,* ORR Policy Guide 1.1.

[81] *See also infra* preamble discussion at subpart C.

[82] 8 U.S.C. 1232(b)(3).

[83] *See* 8 U.S.C. 1232(b)(2), (3).

[84] *See www.acf.hhs.gov/orr/fact-sheet/programs/uc/influx-care-facilities-fact-sheet.*

[85] *See* FSA paragraph 21.

[86] *See generally* 6 U.S.C. 279(b)(1).

[87] *See* FSA at paragraph 19 and Exhibit 3.

[88] The case manager is the case manager assigned at the child's initial in-network placement.

[89] *See* 8 U.S.C. 1232(c).

[90] ORR is adopting recommendations to use the term ''LGBTQI+ status or identity'' in the final rule in lieu of ''LGBTQI+ status'' as proposed in the NPRM. As used by ORR, these terms have the same meaning. Accordingly, for clarity, ORR has replaced ''LGBTQI+ status'' with ''LGBTQI+ status or identity'' in this final rule.

[91] *See generally* 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(c)(2).

[92] *See* 8 U.S.C. 1232(c)(2)(A); *see also* 2019 Final Rule at § 410.203(c).

[93] *See* 6 U.S.C. 279(b)(1)(C) and (D).

[94] *See* 8 U.S.C. 1232(b)(3).

[95] *See* 6 U.S.C. 279(b)(2)(A).

[96] 6 U.S.C. 279(b)(2)(A).

[97] ORR notes that under 45 CFR 411.11(c), care provider facilities must have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the care provider facility's approach to preventing, detecting, and responding to such conduct. Under 45 CFR 411.11(a), the care provider facility also must ensure that all policies and services related to part 411 are implemented in a culturally sensitive and knowledgeable manner that is tailored for a diverse population.

[98] *See* ORR Policy Guide 1.2.2.

[99] 45 CFR 87.3(c); *see also* 45 CFR 87.3(e) (2014).

[100] 45 CFR 87.3(b) and (n) (2014).

[101] 88 FR 66752.

[102] *See, e.g.,* 6 U.S.C. 279(b)(2)(A)(ii); 8 U.S.C. 1232(c)(1).

[103] 8 U.S.C. 1232(c)(2)(A).

[104] *The Office of Refugee Resettlement Needs to Improve Its Oversight Related to the Placement and Transfer of Unaccompanied Children* (A–06–20–07002), May 2023.

[105] 6 U.S.C. 279(b)(1).

[106] 8 U.S.C. 1232(c)(2)(A).

[107] *See* 8 U.S.C. 1232(c)(2)(A) (''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.'').

[108] *See, e.g.,* 8 U.S.C. 1232(c)(2)(A) (requiring that unaccompanied children ''shall be promptly placed in the least restrictive setting that is in the best interest of the child.'').

[109] FSA at paragraph 21C.

[110] *See also* Order Re Plaintiffs' Motion to Enforce Class Action Settlement at *11, *Flores* v. *Sessions,* No. 2:85–cv–04544, (C.D. Cal. Jul. 30, 2018), ECF No. 470 (ordering ORR to transfer all unaccompanied children placed at a particular RTC out of that facility unless a licensed psychologist or psychiatrist determined that a particular child posed a risk of harm to self or others).

[111] *See* 8 U.S.C. 1232(c)(2)(A) (''In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight.'').

[112] *See* 6 U.S.C. 279(b)(1)(G).

[113] *See, e.g.,* §§ 410.1003, 410.1103, 410.1300, 410.1302, 410.1801(b)).

[114] *See* 8 U.S.C. 1232(c)((2)(A)).

[115] *See, e.g.,* §§ 410.1302 through 1309, 1311.

[116] 8 U.S.C. 1232(c)(2)(A).

[117] *See generally* subpart J.

[118] 8 U.S.C. 1232(c)(2)(A).

[119] *Id.*

[120] *See* FSA at paragraph 21A (''. . . is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act . . .'').

[121] The Family First Prevention Services Act, which was enacted as part of Public Law 115–123 and established a Title IV–E prevention program in the domestic child welfare context, defines the term Qualified Residential Treatment Program at 42 U.S.C. 672(k)(4).

[122] 53 FR 25591, 25600 (July 8, 1988).

[123] 8 U.S.C. 1232(c)(2)(A).

[124] *See* FSA at paragraph 22 (''Factors to consider when determining whether a minor is an escape-risk or not include, but are not limited to . . .'').

[125] Existing § 410.204 also does not limit ORR to considering just the factors listed in the regulation and states ''ORR considers, among other factors . . .''

[126] Office to Monitor and Combat Trafficking in Persons. (2020, June). *Trauma Bonding in Human Trafficking.* U.S. Department of State. *https://www.state.gov/wp-content/uploads/2020/10/TIP_Factsheet-Trauma-Bonding-in-Human-Trafficking-508.pdf.*

[127] *See, e.g.,* 6 U.S.C. 279(b)(1)(B) (making ORR responsible for ''ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child'').

[128] Exhibit 6 of the FSA provides the following notice language: ''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.''

[129] *See, e.g., Nat'l Archives & Records Admin.* v. *Favish,* 541 U.S. 157, 174 (2004).

[130] 8 U.S.C. 1232(c)(3)(A).

[131] *See, e.g.,* FSA at paragraph 15 (requiring sponsors to sign an Affidavit of Support and an agreement to, among other things, provide for the unaccompanied child's physical,

mental, and financial well-being); see also paragraph 19 (noting that in any case where an unaccompanied child is not released to a sponsor, the unaccompanied child ''shall remain in INS legal custody.'').

[132] *See* 6 U.S.C. 279(b)(1); *see also* 8 U.S.C. 1232(c)(2)(A).

[133] *See* FSA at paragraph 14.

[134] *See* 8 U.S.C. 1232(c)(2)(A) (requiring HHS to ''promptly'' place unaccompanied children).

[135] *See* 88 FR 68928.

[136] 8 U.S.C. 1232(c)(3)(A).

[137] *See* 8 U.S.C. 1232(c)(3)(A); *see also* FSA paragraph 17.

[138] *See* 8 U.S.C. 1232(c)(3).

[139] *See* 8 U.S.C. 1232(c)(3).

[140] 8 U.S.C. 1232(c)(3).

[141] *See, e.g.,* 6 U.S.C. 279(b)(2).

[142] See, *e.g., Plyler* v. *Doe,* 457 U.S. 202 (1982) (finding that under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, a State may not deny access to a basic public education to any child residing in the State, whether present in the United States legally or otherwise); Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.,* and the Equal Educational Opportunity Act of 1974, 20 U.S.C. 1701 *et seq.* (prohibiting public schools from discriminating on the basis of race, color, or national origin).

[143] *See* 42 U.S.C. 2000d; *see also* U.S. Dep't of Justice, Civil Rights Division & U.S. Dep't of Education, Office for Civil Rights, *Information on the Rights of All Children to Enroll in School: Questions and Answers for States, School Districts and Parents,* Answers 3, 5, 7, and 8 (rev. May 8, 2014), *https://www2.ed.gov/about/offices/list/ocr/docs/qa-201405.pdf.*

[144] *See, e.g.,* ORR Policy Guide 2.1, 2.2.

[145] ORR. Unaccompanied Children Fact Sheet. *https://www.acf.hhs.gov/orr/about/ucs/facts-and-data#lengthofcare.*

[146] *See* 8 U.S.C. 1232(c)(3)(B).

[147] 8 U.S.C. 1232(c)(3)(A).

[148] 8 U.S.C. 1232(c)(1).

[149] 8 U.S.C. 1232(c)(3)(A).

[150] *See generally* 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(c).

[151] *See, e.g.,* 8 U.S.C. 1232(c) and (c)(3)(A); and 6 U.S.C. 279(b)(1).

[152] *Id.*

[153] A home study provider is a non-governmental agency funded by ORR to conduct home studies.

[154] *Lucas R* v. *Becerra,* Summ. J. Order, Mar. 11, 2022, at 42, No. 18–CV–5741 (C.D. Cal.).

[155] *Id.* at 41. In the Court's Summary Judgment Order, the Court was addressing instances where providing information to the child may cause distress to the child. Here, ORR is recognizing that by providing some information to a sponsor, the child may also be harmed.

[156] *Id.*

[157] *Lucas R* v. *Becerra,* Summ. J. Order, Mar. 11, 2022, at 37, No. 18–CV–5741 (C.D. Cal.).

[158] *See generally* 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(c).

[159] *See* 8 U.S.C. 1232(c)(1).

[160] *See Lucas R* v. *Becerra,* Summ. J. Order, Mar. 11, 2022, at 40, No. 18–CV–5741 (C.D. Cal.) (''Furthermore, in recognition of ORR's need to serve thousands of minors and potential sponsors and the limited liberty interests at issue for minors with no familial sponsor, the Court will not require such notice or an opportunity to be heard for denial of a Category 3 sponsor.''). The definition of a Category 3 sponsor as relied on by the court in Lucas R. includes distant relatives and unrelated adult individuals. *Id.* at 11.

[161] ORR is revising the heading of § 410.1207 to update the term ''release application'' to ''sponsor application,'' which is consistent with the terminology used in ORR's policies regarding release. *See* ORR Policy Guide 2.7.9. For clarity, ORR is also updating the term ''release application'' to ''sponsor application'' throughout the rest of this final rule, even where summarizing NPRM language, which used the term ''release application.''

[162] *See* ORR Policy Guide 2.7.9.

[163] 8 U.S.C. 1232(c)(2)(A).

[164] *See* 45 CFR 400.115.

[165] *See generally* 45 CFR 410.1001; 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(c).

[166] *See* 8 U.S.C. 1101(a)(27)(J). *See also* 8 U.S.C. 1232(d)(2).

[167] *See, e.g.,* 8 U.S.C. 1232(d).

[168] *See generally* U.S. Citizenship and Immigration Services Policy Manual, Vol. 6, Part J, Ch. 1, available at: *https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1.*

[169] Administration for Children and Families. Program Instruction: Specific Consent Requests. Issued Dec. 9, 2009. Available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/special_immigrant_juvenile_status_specific_consent_program.pdf.*

[170] *See, e.g.,* Administration for Children and Families. Program Instruction: Specific Consent Requests. Issued Dec. 9, 2009. Available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/special_immigrant_juvenile_status_specific_consent_program.pdf.*

[171] *See* 8 U.S.C. 1232(c)(3)(B).

[172] *See* Section 6 of the ORR Policy Guide.

[173] *See* 8 U.S.C. 1232(c)(3)(B).

[174] ORR's revised PRS policies state that all released children are eligible to receive PRS.

[175] ORR Policy Guide section 2.4.2 requires a home study before releasing an unaccompanied child to a non-relative sponsor who is seeking to sponsor: (1) multiple unaccompanied children; (2) additional unaccompanied children and the non-relative sponsor has previously sponsored or sought to sponsor an unaccompanied child; or (3) unaccompanied children who are 12 years and under.

[176] The types of services that would be available as part of PRS are described in ORR Policy Guide 6.2.5 through 6.5.

[177] The types of services that would be available as part of PRS are described in ORR Policy Guide 6.2.5 through 6.5.

[178] Office to Monitor and Combat Trafficking in Persons. (2020, June). *Trauma Bonding in Human Trafficking.* U.S. Department of State. *https://www.state.gov/wp-content/uploads/2020/10/TIP_Factsheet-Trauma-Bonding-in-Human-Trafficking-508.pdf.*

[179] Currently, ORR provides three levels of PRS—Levels One, Two, and Three. *See* ORR Policy Guide 6.3 through 6.5.

[180] ORR notes that care provider facilities currently conduct safety and well-being follow-up calls 30 days after the unaccompanied child's release date.

[181] *See* ORR Policy Guide 6.4, 6.5, and 6.6 (requiring PRS providers to start PRS within two (2) days of the child's release from ORR custody for Level Two and Three PRS).

[182] As revised since publication of the NPRM, ORR Policy Guide 6.3 states that for Level One PRS, PRS providers conduct three virtual check-ins at seven (7) business days, fourteen (14) business days, and thirty (30) business days after the child's release from ORR custody to a sponsor. ORR Policy Guide 6.4 states that for Level Two PRS, PRS case managers must make initial contact with the child and/or sponsor within two (2) business days of a referral being accepted by the PRS provider. ORR Policy Guide 6.5 states that for Level Three PRS, a PRS clinician must make initial contact with the child and/or sponsor within two (2) business days of a referral being accepted by the PRS provider.

[183] ORR revised the termination guidelines, and they vary by PRS level and are described in ORR Policy Guide 6.3 through 6.6.

[184] ORR Policy Guide 6.8.6 describes the list of reasons for concern that necessitates the PRS provider to submit a NOC.

[185] ORR Policy Guide 6.8.6.

[186] *See* 8 U.S.C. 1232(c)(3)(B) (''. . . The Secretary of Health and Human Services shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted . . .'').

[187] *See* ORR Policy Guide 6.2.3 (describing identification of appropriate services).

[188] 8 U.S.C. 1232(c)(3)(B).

[189] *See generally* ORR Policy Guide 6.1; 6.2.9; and 6.2.13.

[190] *See, e.g.,* ORR Guide 6.2.4 (requiring PRS providers to help educate children and their sponsor families on identifying risks and red flags that may lead to child exploitation; sex and labor trafficking; substance abuse; physical, emotional, or sexual abuse; coercion by gangs or gang affiliation; or other situations where the child would be in danger or at risk of harm).

[191] *See, e.g.,* ORR Policy Guide at 6.2.8; 6.2.9; 6.2.10.

[192] *See* ORR Policy Guide 6.2.5 (stating that the PRS case manager refers the sponsor to legal services that can assist with establishing guardianship with a local court in a reasonable timeframe).

[193] 45 CFR 87.3(c) (2014).

[194] 45 CFR 87.3(b) and (n).

[195] *See* ORR Policy Guide 6.3 through 6.6.

[196] *See* ORR Policy Guide 6.2.1.

[197] *See* ORR Policy Guide 6.1; 6.2.13.

[198] The Refugee Health Screener-15 ''screens for common mental health conditions (anxiety, depression, PTSD, adjustment, coping), but not for domestic violence, substance use, or psychotic disorders.'' CDC. (2022, March 24). *Guidance for Mental Health Screening during the Domestic Medical Examination for Newly Arrived Refugees. https://www.cdc.gov/immigrantrefugeehealth/guidelines/*

domestic/mental-health-screening-guidelines.html.

[199] The Trauma History Profile is a tool ''comprehensive list of trauma, loss, and separation exposures paired with a rating scale on which the interviewer records whether each trauma occurred or was suspected to occur.'' Betancourt, T.S., Newnham, E.A., Layne, C.M., Kim, S., Steinberg, A.M., Ellis, H., & Birman, D. (2012). Trauma History and Psychopathology in War-Affected Refugee Children Referred for Trauma-Related Mental Health Services in the United States. Journal of Traumatic Stress, 25(6), 682–690. *https://doi.org/10.1002/jts.21749.*

[200] *See* ORR Policy Guide 6.2.7.

[201] *See* ORR Policy Guide 6.7.3.

[202] *See generally* ORR Policy Guide 6.3 through 6.6.

[203] *See* ORR Policy Guide 6.3 through 6.6.

[204] *See* ORR Policy Guide 6.3; 6.4; 6.5.

[205] *See* ORR Policy Guide 6.8.5.

[206] *See also* ORR Policy Guide 6.9.

[207] *See, e.g.,* ORR Policy Guide 6.2.5; 6.2.6; and 6.2.7.

[208] *See* ORR Policy Guide 6.8.2 (stating PRS providers must upload all PRS documentation to ORR's online case management system within five to seven days of completion).

[209] *See* ORR Policy Guide 6.8.7.

[210] *See* ORR Policy Guide 6.8.2.

[211] *See, e.g.,* 45 CFR 75.364 (''The HHS awarding agency, Inspectors General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the non-Federal entity which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the non-Federal entity's personnel for the purpose of interview and discussion related to such documents.'').

[212] *See* ORR Policy Guide 6.8.3.

[213] *See* ORR Policy Guide 6.8.3.

[214] *See* 5 U.S.C. 552a(b).

[215] *See* 81 FR 46683 (''As a matter of discretion, ORR will treat information that it maintains in its mixed systems of records as being subject to the provisions of the Privacy Act, regardless of whether or not the information relates to U.S. persons covered by the Privacy Act.'').

[216] *See* 5 U.S.C. 552a(h) (''For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.'').

[217] *See* ORR Policy Guide 6.8.5.

[218] *See* 5 U.S.C. 552a(b).

[219] *See* ORR Policy Guide 6.8.6.

[220] *See* ORR Policy Guide 6.2.1.

[221] *See* ORR Policy Guide 6.3 through 6.6.

[222] *See, e.g.,* 8 U.S.C. 1232(c)(1).

[223] *See* ORR Policy Guide 6.2.1.

[224] *See* ORR Policy Guide 6.3 through 6.6.

[225] *See, e.g.,* 45 CFR 75.371 (describing remedies for noncompliance with Federal statutes, regulations, or the terms and conditions of a Federal award).

[226] *See* ORR Policy Guide 6.9.2.

[227] For reasons discussed in our responses to comments received regarding § 410.1307(c), ORR is updating the regulation to state that the ORR employee is required to abide by their Federal duties ''subject to applicable Federal religious freedom and conscience protections.''

[228] Dietary Guidelines for Americans. Available at *https://www.dietaryguidelines.gov/current-dietary-guidelines.*

[229] *See* 45 CFR part 87.

[230] *See, e.g.,* FSA at paragraphs 6, 12, and 19; *see also* paragraph 40, as amended.

[231] FSA paragraph 6.

[232] *See* Proclamation by the Governor of the State of Texas, May 31, 2021, *available at: https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf.*

[233] *See* 26 Tex. Admin. Code 745.115.

[234] Fl. Executive Order No. 21–223 (Sep. 28, 2021), *available at: https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-223.pdf.*

[235] S.C. Exec. Order No. 2021–19 (Apr. 12, 2021), *https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2021-04-12%20FILED%20Executive%20Order%20No.%202021-19%20-%20Prioritizing%20SC%20Children.pdf.*

[236] *See* ORR Fact Sheets and Data, available at *https://www.acf.hhs.gov/orr/about/ucs/facts-and-data.*

[237] Calculations based on data available at ORR, Unaccompanied Children Released to Sponsors by State, *https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-children-released-sponsors-state* (last accessed Feb. 14, 2024).

[238] *See, e.g.,* ORR Policy Guide 3.5.

[239] *See* ORR Policy Guide 3.5.

[240] *https://www.dol.gov/agencies/whd/resources/videos/know-your-rights.*

[241] *See, e.g.,* 6 U.S.C. 279(b)(1) (describing ORR responsibilities including implementing policies with the respect to the care of unaccompanied children, ensuring the interests of unaccompanied children are considered, and overseeing the infrastructure and personnel of facilities where unaccompanied children reside).

[242] ORR also notes that to the extent that a care provider has acted contrary to the terms and conditions of its funding, they may be subject to consequences described at 45 CFR part 75, subpart D.

[243] ORR Unaccompanied Children Policy Guide 4.3.5. Available at *https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-4#4.3.5.*

[244] *See* 6 U.S.C. 279(b).

[245] *See* 8 U.S.C. 1232(c)(1); *see also id.* at 1232(b).

[246] *See* 81 FR 46682 (July 18, 2016) (stating that ''[t]he case file contains information that is pertinent to the care and placement of unaccompanied children, including . . . post-release service records[.]'').

[247] Exposing the Risks of Deliberate Ignorance: Years of Mismanagement and Lack of Oversight by the Office of Refugee Resettlement, Leading to Abuses and Substandard Care of Unaccompanied Alien Children October 2021, available at: *https://www.finance.senate.gov/imo/media/doc/102821%20Finance%20Committee%20Report%20ORR%20UAC%20Program.pdf.*

[248] *See, e.g.,* 45 CFR 75.371.

[249] H.R. REP. 116–450.

[250] See 81 FR 46683.

[251] 8 U.S.C. 1232(c)(6)(A).

[252] *See* Joint Motion for Preliminary Approval of Class Action Settlement, And to Certify Settlement Class, *Ms. L.* v. *U.S Immigr. & Customs Enf't,* No. 3:18–cv–00428, (S.D. Cal. Oct. 16, 2023), ECF No. 711; Order Granting Final Approval of Settlement Agreement and Certifying the Settlement Classes, *Ms. L.* v. *U.S Immigr. & Customs Enf't,* No. 3:18–cv–00428, (S.D. Cal. Dec. 11, 2023), ECF No. 727.

[253] *See, e.g.,* 45 CFR 75.364(a).

[254] *See* 6 U.S.C. 279(b)(1)(G).

[255] Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children. Available at: *https://oig.hhs.gov/oei/reports/OEI-07-21-00251.pdf.*

[256] *See* 45 CFR 87.3(a).

[257] Atena Aire. *How to Build Language Justice.* (pg. 4). Available at: *https://antenaantena.org/wp-content/uploads/2020/10/AntenaAire_HowToBuildLanguageJustice.pdf.*

[258] *See, e.g.,* ORR Policy Guide 4.3.5, Staff Code of Conduct.

[259] *See* ORR Policy Guide 3.3.7 and 4.3.6.

[260] *See, e.g.,* Administration for Children and Families. Field Guidance #22—Interpreters Working with the Unaccompanied Children (UC) Program. Available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-22_interpreters-at-ucp-sites_10.26.2021-v2.pdf.*

[261] *See* ORR Policy Guide 5.9.

[262] *See, e.g.,* Policy Memorandum, Medical Services Requiring Heightened ORR Involvement, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf;* Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf. See also* 45 CFR 411.92(d) (requiring timely and comprehensive information about lawful pregnancy-related medical services and timely access to such services for unaccompanied children who experience sexual abuse while in ORR care).

[263] *See* 6 U.S.C. 279(b)(1)(B), (E).

[264] *See, e.g.,* Consolidated Appropriations Act, 2023, Public Law 117–328, Div. H, tit. V, sections 506–507; *see also* Department of Justice, Office of Legal Counsel, *Application of the Hyde Amendment to the Provision of Transportation for Women Seeking Abortions* (Sept. 27, 2022), *https://www.justice.gov/d9/2022-11/2022-09-27-hyde_amendment_application_to_hhs_transportation.pdf.*

[265] *See* 45 CFR part 87.

[266] 6 U.S.C. 279(b)(1)(B), (E).

[267] Administration for Children and Families. Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing

Reproductive Healthcare, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf.*

[268] 6 U.S.C. 279(b)(1)(B), (E)).

[269] *See* Administration for Children and Families. Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf.*

[270] Administration for Children and Families. Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf.*

[271] Administration for Children and Families. Policy Memorandum, Medical Services Requiring Heightened ORR Involvement, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf.*

[272] Department of Justice, Office of Legal Counsel, *Application of the Hyde Amendment to the Provision of Transportation for Women Seeking Abortions* (Sept. 27, 2022), *https://www.justice.gov/d9/2022-11/2022-09-27-hyde_amendment_application_to_hhs_transportation.pdf.*

[273] 6 U.S.C. 279(b)(1)(B), (E)).

[274] *See* Administration for Children and Families, Policy Memorandum, Medical Services Requiring Heightened ORR Involvement (Sept. 29, 2020), available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf.*

[275] *See* 6 U.S.C. 279(b)(1)(B); *see also* 1 U.S.C. 8(a).

[276] Administration for Children and Families. Policy Memorandum, Medical Services Requiring Heightened ORR Involvement, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf.*

[277] Administration for Children and Families. Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf.*

[278] 85 FR 82037, codified under 45 CFR Part 87.

[279] 89 FR 2078, codified under 45 CFR Part 88.

[280] *See* GAO, April 19, 2016, ''Unaccompanied Children: HHS Should Improve Monitoring and Information Sharing Policies to Enhance Child Advocate Program Effectiveness,'' GAO–16–367.

[281] *See* 8 U.S.C. 1232(c)(6)(A) (''. . . A child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child . . .'').

[282] 8 U.S.C. 1232(c)(6)(A).

[283] *See* 8 U.S.C. 1232(c)(6)(A).

[284] *See* 6 U.S.C. 279(b)(1)(B), (E), and (G).

[285] *See* Joint Motion for Preliminary Approval of Class Action Settlement, And to Certify Settlement Class, *Ms. L.* v. *U.S. Immigr. & Customs Enf't,* No. 3:18–cv–00428, (S.D. Cal. Oct. 16, 2023), ECF No. 711; Order Granting Final Approval of Settlement Agreement and Certifying the Settlement Classes, *Ms. L.* v. *U.S. Immigr. & Customs Enf't,* No. 3:18–cv–00428, (S.D. Cal. Dec. 11, 2023), ECF No. 727.

[286] 8 U.S.C. 1232(c)(6)(A).

[287] *See* FSA, Exhibit 1, paragraph A14 (''Legal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the Government . . .''). With respect to information regarding the availability of free legal assistance, ORR understands the proposed language at § 410.1309(a)(2)(ii) to be consistent with paragraph A14 but updated to avoid potential confusion. As discussed above, the TVPRA describes unaccompanied children's access to counsel as a ''privilege,'' and also makes HHS responsible for ensuring such privilege ''to the greatest extent practicable.'' ORR notes that this clarification does not represent a change in ORR's existing policies or practices, and as described elsewhere in this section, ORR proposes to expand the availability of legal services to unaccompanied children beyond current practice.

[288] *See* 6 U.S.C. 279(b)(1)(I). *See also* Office of Refugee Resettlement Division of Unaccompanied Children Operations, Legal Resource Guide—Legal Service Provider List for [UC] in ORR Care, *https://www.acf.hhs.gov/sites/default/files/documents/orr/english_legal_service_providers_guide_with_form_508.pdf.*

[289] *See* 8 U.S.C. 1232(c)(5).

[290] ORR cited the expansion of legal services in its budget request for FY 2024. ACF, Fiscal Year 2024 Justification for Estimates for Appropriations Committees, *https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2024-congressional-justification.pdf.*

[291] Amended Order re Defendants' Mot. to Dismiss and Plaintiffs' Mot. for Class Cert., *Lucas R., et al.* v. *Xavier Becerra, et al.,* No. 18–CV–5741 (C.D. Cal. Dec. 27, 2018), ECF No. 141.

[292] Order re Preliminary Approval of Settlement and Approval of the Parties' Joint Proposal re Notice to Lucas R Class Members of Settlement of Plaintiffs' Third, Fourth, and Fifth Claims for Relief [Psychotropic Medications, Legal Representation, and Disability, *Lucas R.* v. *Becerra,* No. 2:18–cv–05741 (C.D. Cal. Jan. 5, 2024), ECF No. 410.

[293] Amended Order re Defendants' Mot. to Dismiss and Plaintiffs' Mot. for Class Cert., *Lucas R., et al.* v. *Xavier Becerra, et al.,* No. 18–CV–5741 (C.D. Cal. Dec. 27, 2018).

[294] 45 CFR 85.21(d).

[295] 53 FR 25595, 25600 (July 8, 1988).

[296] *See* 8 U.S.C. 1232(b)(3).

[297] *See* 8 U.S.C. 1232(b)(3).

[298] 6 U.S.C. 279(b)(1)(J).

[299] 8 U.S.C. 1232(c)(3)(A).

[300] *See* 8 U.S.C. 1232(b)(4).

[301] *See* 6 U.S.C. 279(g)(2).

[302] *See* 1.6.2 Instructions for Age Determinations at *https://www.acf.hhs.gov/orr/policy-guidance/cunaccompanied-children-program-policy-guide-record-posting-and-revision-dates.*

[303] Office of the Inspector General. February 8, 2022. CBP Officials Implemented Rapid DNA Testing to Verify Claimed Parent-Child Relationships *https://www.oig.dhs.gov/sites/default/files/assets/2022-02/OIG-22-27-Feb22.pdf.*

[304] ORR Guide 1.6.2, ''Instructions for Age Determinations''. Available at: *https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1.*

[305] *See* 8 U.S.C. 1232(b)(4).

[306] ORR Policy Guide 7.2.2.

[307] *See, e.g.,* FSA paragraph 12A; Exhibit 3.

[308] *See* ORR Influx Care Facilities for Unaccompanied Children Fact Sheet (March 1, 2024), available at: *https://www.acf.hhs.gov/orr/fact-sheet/programs/uc/influx-care-facilities-fact-sheet.* Accessed on March 1, 2024.

[309] *See Flores* v. *Lynch,* 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015), *aff'd in part, rev'd in part and remanded,* 828 F.3d 898 (9th Cir. 2016).

[310] *See* ORR Fact Sheets and Data, available at: *https://www.acf.hhs.gov/orr/fact-sheet/programs/uc/influx-care-facilities-fact-sheet.*

[311] ''Each year the INS will reevaluate the number of regular placements needed for detained minors to determine whether the number of regular placements should be adjusted to accommodate an increased or decreased number of minors eligible for placement in licensed programs . . .''

[312] *See* 45 CFR 87.3(a).

[313] In this final rule, ORR is updating this language to clarify that ORR employees must abide by their Federal duties if there is a conflict between ORR's regulations and State law, subject to applicable Federal conscience protections and civil rights.

[314] *See* 6 U.S.C. 279(b)(1)(B); 8 U.S.C. 1232(c)(2)(A).

[315] *See, e.g.,* Public Law 117–328, Div. H, Tit. II, Sec. 231.

[316] *See* ORR Policy Guide 7.2.1.

[317] For example, U.S. Department of Defense or other Federal sites may have this requirement.

[318] In § 410.1001, restrictive placement is defined to include a secure facility, heightened supervision facility, or RTC.

[319] 8 U.S.C. 1232(c)(2)(A).

[320] If, hypothetically, an unaccompanied child was in secure care for 90 days, they would receive both their third 30-day review and their second, more intensive 45-day review concurrently.

[321] *Lucas R* v. *Becerra,* Summ. J. Order, Mar. 11, 2022, at 28, No. 18–CV–5741 (C.D. Cal.).

[322] *Lucas R* v. *Becerra,* Summ. J. Order, Mar. 11, 2022, at 28, No. 18–CV–5741 (C.D. Cal.).

[323] *Id.* at 31.

[324] *See* FSA at paragraph 24A.

[325] *See* 6 U.S.C. 279(a).

[326] *See Flores* v. *Rosen,* 984 F. 3d 720, 736 (9th Cir. 2020).

[327] *See, e.g.,* 8 CFR 1003.19, 1236.1.

[328] In contrast, under paragraph 14 of the FSA the former INS would detain a minor if detention was required ''to secure his or her timely appearance before the INS or immigration court.'' As a result, as they pertained to the former INS, bond hearings afforded an opportunity for the unaccompanied children to have a hearing

before an independent officer to determine whether the unaccompanied children in fact posed a risk of flight if released from custody.

[329] *See* 8 U.S.C. 1232(c)(3); *see also Flores* v. *Sessions,* 862 F.3d 863, 868 (9th Cir. 2017) (''As was the case under the *Flores* Settlement prior to the passage of the HSA and TVPRA, the determinations made at hearings held under paragraph 24A will not compel a child's release. Regardless of the outcome of a bond hearing, a minor may not be released unless the agency charged with his or her care identifies a safe and appropriate placement.'').

[330] *Flores* v. *Rosen,* 984 F.3d 720, 734 (9th Cir. 2020).

[331] 6 U.S.C. 279(b)(1)(B).

[332] *See, e.g.,* Standards Committee of the United States Ombudsman Association, Governmental Ombudsmen Standards (2003) at 1, *https://www.usombudsman.org/wp-content/uploads/USOA-STANDARDS1.pdf (promoting a model that defines a governmental ombudsman as an independent, impartial public official with authority and responsibility to receive, investigate or informally address complaints about Government actions, and, when appropriate, make findings and recommendations, and publish reports);* Houk et al., A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies, Administrative Conference of the United States (2016) at 258–67, *https://www.acus.gov/report/ombudsman-federal-agencies-final-report-2016* (''2016 ACUS Report'') (reviewing association standards and practices of different Federal ombudsman offices, and concluding that independence, confidentiality, and impartiality are essential to the ombudsman profession.).

[333] 2016 ACUS Report at 28.

[334] 8 U.S.C. 1232(c)(1).

[335] *See, e.g.,* 9 NYCRR 177.7 (NYS Office of Children and Family Services; Regulations for the Office of the Ombudsman; Visits to Facilities and Programs) and 6 U.S.C. 205 (Ombudsman for Immigration Detention).

[336] 2016 ACUS Report at 28.

[337] 2016 ACUS Report at 29.

[338] 2016 ACUS Report at 2.

[339] 2016 ACUS Report at 56.

[340] 2016 ACUS Report at 66.

[341] 2016 ACUS Report at 41.

[342] *https://aspe.hhs.gov/reports/valuing-time-us-department-health-human-services-regulatory-impact-analyses-conceptual-framework.*

[343] *https://www.bls.gov/news.release/pdf/wkyeng.pdf.* Accessed February 13, 2024.

[344] *https://www.census.gov/library/stories/2023/09/median-household-income.html.* Accessed February 13, 2024.

[345] *https://www.bls.gov/oes/current/oes231011.htm.* Accessed February 13, 2024.

[346] Under OMB control number 0970–0565, it is assumed these forms will be completed by ''Child, Family, and School Social Workers in the industry of Other Residential Care Facilities''. The most recent BLS mean wage rate associated with this occupation is $21.47 per hour (*https://www.bls.gov/oes/current/oes211021.htm;* accessed February 13, 2024). Including a 100% adjustment for overhead and fringe, this wage rate is calculated to be $21.47 × 2 or $42.94 per hour.

[347] Annual Report to Congress, Office of Refugee Resettlement (FY 2019), *https://www.acf.hhs.gov/sites/default/files/documents/orr/orr-arc-fy2019.pdf.*

[348] ACF, Justification of Estimates for Appropriations Committees, page 70, (FY 2024) *https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2024-congressional-justification.pdf.*

[349] *Id.* at 77.

[350] *https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2025-congressional-justification.pdf.*

[351] *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A76/a76_incl_tech_correction.pdf.*

[352] *See, e.g., Flores* v. *Sessions,* 862 F.3d 863 (9th Cir. 2017); *Flores* v. *Lynch,* 828 F.3d 898 (9th Cir. 2016); *Flores* v. *Sessions,* No. 2:85–cv–04544 (C.D. Cal. June 27, 2017).

[353] 6 U.S.C. 279(a).

[354] 6 U.S.C. 279(f)(1).

[355] 8 U.S.C. 1232(b)(1) (referencing 6 U.S.C. 279).

[356] INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3) (2002); 8 CFR 2.1 (2002).

[357] *See* 6 U.S.C. 279(e) and (f). See also 6 U.S.C. 552, 557; 8 U.S.C. 1232(b)(1).

[358] *See Flores* v. *Rosen,* 984 F. 3d 720, 737 (9th Cir. 2020).

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