November 6, 2018

Debbie Seguin  
Assistant Director  
Office of Policy  
U.S. Immigration and Customs Enforcement  
Department of Homeland Security  
500 12th Street SW  
Washington, DC 20536


Dear Assistant Director Seguin:

On behalf of the American Bar Association (ABA), I submit the attached comments on the Notice of Proposed Rulemaking to terminate the Flores Settlement Agreement (FSA) by promulgating new regulations governing the apprehension, processing, care and custody of alien minors and unaccompanied children (UACs) that implement it.

With more than 400,000 members, the American Bar Association is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. Through its Commission on Immigration and Unaccompanied Minor Immigrant Working Group, the ABA advocates for improvements to immigration law and policy; provides continuing education to the legal community, judges, and the public; and develops and assists in the operation of pro bono legal representation programs.

The ABA has direct experience working with and on behalf of UACs through two of its public service projects, the South Texas Pro Bono Asylum Representation Project (ProBAR) located in Harlingen, Texas, and the Children’s Immigration Law Academy (CILA), located in Houston, Texas. Both projects work primarily on cases involving UAC who are or were previously detained in the custody of the Department of Health and Human Services’ (HHS) Office of Refugee Resettlement (ORR).

Established in 1989, and located near the U.S.-Mexico border, ProBAR is the nation’s largest legal service provider to detained unaccompanied children in ORR custody. Currently, ProBAR provides services to more than 13,000 children per year at 14 shelters in the Rio Grande Valley...
area. These services include “know your rights” presentations, legal screenings, and direct representation before the immigration court and agencies, either by staff or pro bono attorneys.

CILA was created in 2015 to provide trainings, technical assistance, working groups and other resources to support Texas attorneys and legal staff representing children in their immigration matters. To date, CILA has already answered more than 1,000 requests for technical assistance on children’s immigration matters and conducted over 100 trainings on children’s immigration law issues.

In addition to the first-hand experience and expertise gained through these projects, the ABA has developed numerous policies and standards addressing issues related to immigration detention and the treatment of children in our legal system. These include the recently updated ABA “Standards for the Custody, Placement and Care: Legal Representation and Adjudication of Unaccompanied Alien Children in the United States” (UC Standards) and the ABA Civil Immigration Detention Standards. In 2015, the ABA Commission on Immigration issued a report, Family Immigration Detention: Why the Past Cannot be Prologue, which concluded that the dramatic build-up of family detention centers and the practice of detaining families in jail-like settings are at odds with the presumption of liberty that should apply and the limited permissible goals of civil detention.

According to the notice, the proposed new regulations are intended in part to implement the Flores Settlement Agreement (FSA). The FSA was put in place to restrict the length of time children can be detained in immigration detention and to set minimum standards for their care and custody while detained. Medical professionals and child welfare specialists, among others, have warned of the detrimental physical, mental and emotional harm to children caused by even short periods of detention, as well as the trauma caused by separating children from their parents. Yet, the proposed regulations would essentially authorize the indefinite detention of children and codify the practice of family separation. As such, they are antithetical to the purpose of the FSA.

Commentary throughout the proposed regulations seems to suggest that the FSA has forced the government to either pursue a policy of family separation or a policy of expanded family detention. The ABA strongly disagrees that those are the only options available or that they are acceptable options at all. The use of family detention and family separation have not deterred desperate parents from seeking protection for their children (nor is deterrence a permissible goal) and have proven incredibly expensive through increased costs of detention and defense against litigation challenging these policies. Moreover, both practices are unwise and unnecessary. There are cost-effective and humane alternatives to detention programs, such as the family case management program, that have been successful in ensuring that families appear for their immigration court proceedings and build on the critical progress already made in ensuring legal protections and humane treatment of children in our immigration system.

We must address the immigration challenges facing the United States by means that are humane, fair, and effective – and that uphold the law and our values as a country. Therefore, while we
provide in the attached document specific comments regarding many provisions of the proposed regulations, we strongly urge that the Notice of Proposed Rulemaking be withdrawn and that the relevant agencies instead work toward strengthening the framework of legal protections available for unaccompanied children, families, and other vulnerable asylum-seekers.

Thank you for considering our views. If you have questions or need additional information, please contact Kristi Gaines in our Governmental Affairs Office at kristi.gaines@americanbar.org.

Sincerely,

[Signature]

Robert M. Carlson

Attachment
AMERICAN BAR ASSOCIATION


Acronyms:
Department of Homeland Security (DHS)
Department of Health and Human Services (HHS)
Office of Refugee Resettlement (ORR)
Flores Settlement Agreement (FSA)
ABA Standards for the Custody, Placement and Care; Legal Representation and Adjudication of Unaccompanied Alien Children in the United States (UC Standards)
Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)

DHS Proposed Rulemaking

Specific Comments to Portions of Proposed Section 212.5:
According to the proposed rule, certain portions of the regulations may be revised to read as follows:

Section 212.5 Parole of aliens into the United States.

... (b) The parole of aliens within the following groups who have been or are detained in accordance with 235.3(c) of this chapter would generally be justified only on a case-by-case basis for “urgent humanitarian reasons or significant public benefit,” provided the aliens present neither a security risk nor a risk of absconding:

... Although not included in the proposed regulations themselves, the following commentary related to this provision is also at issue:

As indicated above, DHS is proposing to remove the reference to 8 CFR 235.3(b) in section 212.5(B) to make clear that the parole standard that applies to those in expedited removal is found in section 235.3 and not 212.5.

.... Aliens in expedited removal proceedings are not generally detained in mandatory custody for long periods of time. Either a removal order is issued within a short amount of time or a Notice to Appear is issued, which may make the alien eligible for various forms of release. Consequently, DHS does not anticipate these changes will result in extended periods of detention for minors who are in expedited removal proceedings.

ABA Comments: The ABA is concerned with this provision insomuch as Section (b) previously referenced 235(b) in addition to 235(c). By eliminating the reference to Section (b), the new rule would problematically, and in conflict with the FSA, impose the standard for release on parole for those in expedited removal proceedings that is applied to adults, on children. That standard is extremely narrow, and pursuant to 8 CFR 235.3(b)(2)(iii), only called for when “required to meet a medical emergency or is necessary for a legitimate law enforcement objective.”
This narrowing of opportunities for release for children will mean more children will be detained for longer periods of time. It also contradicts the FSA’s mandate that children be placed in the least restrictive setting and its general policy favoring release. In addition, it goes against the unequivocal ruling of the District Court in *Flores v. Sessions*, dated June 27, 2017. In that order on Plaintiff’s Motion to Enforce and Appoint a Special Monitor, the District Court states:

The Court disagrees with Defendants that class members’ placement in expedited removal absolves them of their obligations under the Agreement to make individualized determinations regarding a minor’s risk of absconding. See Agreement ¶ 14. While the expedited removal statute generally requires detention, 8 C.F.R. section 212.5 gives Defendants the discretion to release certain detainees on a case by case basis, including class members (juveniles) who are in various stages of the expedited removal process. *Thus, the Agreement does not contravene the expedited removal statute.*¹ (emphasis added)

In addition, although the commentary on costs suggests expedited removal proceedings are quickly resolved so that DHS does not anticipate extended periods of detention for these children, many factors often result in lengthy stays in detention for those in expedited removal proceedings, including but not limited to 1) the availability of asylum officers to promptly conduct fear interviews and/or promptly issue decisions on those interviews, 2) delays in obtaining review of negative decisions by an immigration judge, and 3) agency delays in the filing of a Notice to Appear. The ABA UC Standards, like the FSA, recognize that children’s needs are best met by placement in the least restrictive setting.² Their placement in expedited removal proceedings does not change the fact that they are children best served by less, rather than more, time in detention.

For the foregoing reasons, the ABA recommends that the reference to Section 235.3(b) be maintained in the new rule at Section 212.5(b). The standard for parole remains a high one, allowing for release “only on a case-by-case basis for ‘urgent humanitarian reasons or significant public benefit,’ provided the aliens present neither a security risk nor a risk of absconding.” DHS should continue its expressed compliance with the FSA of conducting individualized parole determinations, based on this language, for detained minors in expedited removal proceedings.

**Specific Comments to Portions of Proposed Section 236.3(b):**

According to the proposed rule, certain definitions may be revised or added to read as follows:

(b)(5) **Emergency** means an act or event (including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or public health concerns at one or more facilities) that prevents timely transport or placement of minors, or impacts other conditions provided by this section.

² UC Standards VII.B.1.
(b)(7) **Family unit** means a group of two or more aliens consisting of a minor or minors accompanied by his/her/their adult parent(s) or legal guardian(s). In determining the existence of a parental relationship or a legal guardianship for purposes of this definition, DHS will consider all available evidence. If DHS determines that there is insufficient reliable evidence available that confirms the relationship, the minor will be treated as a UAC.

(b)(8) **Family Residential Center** means a facility used by ICE for the detention of Family Units.

Although not included in the proposed regulations themselves, the following commentary related to the provisions is also at issue:

The impact, severity, and timing of a given emergency situation dictate the operational feasibility of providing certain items to minors, and thus the regulations cannot contain every possible reality DHS will face. Thus, the definition of “emergency” is flexible and designed to cover a wide range of possible emergencies.

The proposed rule does, however, add definitions of the terms “custody,” “family unit,” and “family residential center” because the enactment of the TVPRA and current DHS detention practices require the use of these terms to accurately describe the requirements and processes necessary in the apprehension, processing, care, and custody of alien juveniles.

**ABA Comments:** The ABA is concerned that the proposed definition of “emergency” grants DHS the ability to suspend compliance with certain FSA provisions relating to conditions for children. The definition of “emergency” provided in the FSA references an inability to comply with the time frame for placement. It does not address any inability to comply with “other conditions,” as the proposed definition does.

The ABA notes that the example provided by DHS is delayed access to a snack or meal “if a minor is being transported from a facility in the path of a major hurricane to another facility in a safer location and that transportation happens during a time when the minor would have access to a snack or meal.” This example seems reasonable. However, as written, the proposed definition would provide DHS the flexibility to label any act or event an “emergency.” The ABA has defined “emergency” in its UC Standards in a more limited way. The ABA recommends adoption of a more limited, non-circular definition, to avoid unnecessary relaxation of the FSA.

The addition of a definition for “family unit” as proposed also presents cause for concern as it is unnecessarily narrow in that it excludes family members beyond a child’s parent or legal guardian, and will likely cause the separation of more children from family members. The FSA does not currently define “family unit.” The ABA UC Standards discuss detention, if deemed necessary, with a parent, legal guardian, or adult family member. “Adult family member” is defined as encompassing those persons age 18 or over with whom the child has a familial bond through blood or a legal relationship, including, but not limited to a parent, step-parent,

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4 UC Standard VII.C.2. defines emergency as “a natural disaster, Detention Facility fire, or civil or medical emergency.”
5 UC Standards VII.G.1.
grandparent (of any degree), sibling, aunt, uncle, or cousin. The ABA encourages DHS to adopt a similarly broad definition to ensure children held at Family Residential Centers can remain with adult family members in an effort to reduce the trauma of family separation.

Although the commentary regarding “family unit” suggests it is required by the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), nothing in the language of the statute as codified at 8 U.S.C. 1232 appears to restrict DHS’ ability to release an unaccompanied child to someone other than a parent or legal guardian. Rather, the language at section 1232(c)(3) states that “an unaccompanied child may not be placed with a person or entity unless the Secretary of Health and Human Services determines that the proposed custodian is capable of providing for the child’s physical and mental well-being.” It further provides that “[s]uch determination shall, at a minimum, include verification of the custodian’s identity and relationship to the child, if any.” Similarly, the language at section 1232(c)(4) refers to “sponsor,” without specifying any specific relationship.

Accordingly, the ABA sees no legal requirement for a definition of “family unit” that is limited to parents and legal guardians. Indeed, in the experience of ProBAR and CILA, children often travel with extended family members who, although not their parents or legal guardians, are a tremendous source of stability, comfort and protection. These relatives have often been the sole caregivers for the children for a significant portion of their lives. The ABA would therefore encourage DHS to consider a definition of “family unit” that recognizes this reality and seeks to decrease the trauma of these children.

Specific Comments to Portions of Proposed Section 236.3(c):
According to the proposed rule, certain portions of the regulations may be revised to read as follows:

(c) Age Determination.
(1) For purposes of exercising the authorities described in this part, DHS shall determine the age of an alien in accordance with 8 U.S.C. 1232(b)(4). Age determination persons shall be based on a totality of the evidence and circumstances.
(2) If a reasonable person would conclude that an individual is an adult, despite his or her claim to be under the age of 18, DHS may treat such person as an adult for all purposes, including conditions of release. In making this determination, an immigration officer may require such an individual to submit to a medical or dental examination conducted by a medical professional or other appropriate procedures to verify his or her age.
(3) If an individual previously considered to have been an adult is subsequently determined to be under the age of 18, DHS will then treat such individual as a minor or UAC as prescribed by this section.

ABA Comments: The ABA proposes edits to this provision, in accordance with its UC Standards, that would ensure fewer children find themselves incorrectly designated as adults as described at provision (3) above. As provided in the comments to the UC Standards on this issue, “[a]n individual’s age has a fundamental impact on his custodial arrangement, right to an

6 UC Standards I.
As the comments to the UC Standards elaborate, an accurate determination of whether an individual is a minor is crucial, but many children find it difficult to prove that they are under 18 years of age due to the difficult circumstances under which they came to the United States.\(^7\)

Accordingly, and to ensure that no child is deprived of his fundamental rights, the ABA recommends providing for a presumption of minor status when there is doubt, as supported by the TVPRA at 8 U.S.C. 1232(b)(2)(B). In addition, the ABA proposes considering only reliable evidence and providing the ability to appeal an incorrect age determination, pursuant to the ABA’s UC Standards at Section VII.C.4-5.

**Specific Comments to Portions of Proposed Section 236.3(d):**

According to the proposed rule, the current regulations make no distinction between UACs and other minors. Such a distinction is necessary though, so the new regulations include the following:

**(d) Determining whether an alien is a UAC.**

(1) Immigration officers will make a determination as to whether an alien under the age of 18 is a UAC at the time of encounter or apprehension and prior to the detention or release of such alien.

(2) When an alien previously determined to have been a UAC has reached the age of 18, when a parent or legal guardian in the United States is available to provide care and physical custody for such an alien, or when such alien has obtained lawful immigration status, the alien is no longer a UAC. An alien who is no longer a UAC is not eligible to receive legal protections limited to UACs under the relevant sections of the Act. Nothing in this paragraph affects USCIS’ independent determination of its initial jurisdiction over asylum applications filed by UACs pursuant to section 208(b)(3)(C) of the Act.

(3) **Age-out procedures.** When an alien previously determined to have been a UAC is no longer a UAC because he or she turns eighteen years old, relevant ORR and ICE procedures shall apply.

Although not included in the proposed regulations themselves, the following commentary related to the provisions is also at issue:

Under the proposed rule, immigration officers will make a determination of whether an alien meets the definition of a UAC each time they encounter the alien. Therefore, even though an alien may have been previously determined to be a UAC, the alien may no longer meet the statutory definition of a UAC if the alien reaches the age of 18, acquires legal status, or if a parent or legal guardian is available in the United States to provide care and physical custody. The proposed paragraph also highlights that, once an alien no longer meets the definition of a UAC, the legal protections afforded only to UACs under the law cease to apply.

**ABA Comments:** The ABA is concerned that as drafted, this provision unnecessarily limits the scope of the Homeland Security Act of 2002 (HSA), the TVPRA, and the FSA by reducing the

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\(^7\) UC Standards VII.C.4, Commentary.

\(^8\) Id.
number of children who will meaningfully benefit from these legal protections. The provision as proposed above, in allowing for re-determination of UAC status at every encounter, will surely cause confusion and add administrative burdens to the process. In addition, though children may reunify with a parent legal guardian, the reunifications are at times precarious and unstable. Many of these vulnerable children still need the vital protections that UAC status affords them. It is also in the interest of administrative consistency and uniformity to allow a child initially designated as a UAC to remain so designated throughout the life of his or her removal proceedings.

Stripping children of UAC status could also impact their ability to secure or maintain legal representation. The TVPRA requires HHS to make counsel available to UACs “to the greatest extent practicable.” Removing this protection is of serious concern to the ABA, which has long supported efforts to increase access to counsel for UACs, including the appointment of counsel at government expense, where necessary, for all immigration processes and proceedings.

The proposed provision suggests that USCIS can continue to independently determine its initial jurisdiction over asylum applications filed by UAC, but having different DHS agencies operate independently with respect to analyzing UAC status will create unnecessary confusion among the UAC population about key rights they are ensured under the TVPRA, including the right to pursue asylum claims before the asylum office and the exception to the one-year filing deadline. It may also lead to a lack of consistency in decisions across asylum offices with respect to their exercise of initial jurisdiction. This was the experience of ProBAR serving UACs when the TVPRA was first enacted, and the confusion continued until issuance of the May 28, 2013 USCIS Memo, “Updated Procedures for Determination of Initial Jurisdiction Over Asylum Applications Filed by Unaccompanied Alien Children.”

Accordingly, the ABA recommends that status as a UAC should continue to be determined at the time of apprehension and remain valid until the case is completed. In addition, there should be a prohibition on revoking or rescinding status awarded to a child unless there has been an affirmative finding of fraud or misrepresentation. For these reasons, the ABA suggests striking the provision as drafted altogether.

Specific Comments to Portions of Proposed Section 236.3(g):
According to the proposed rule, certain portions of the regulations may be revised to read as follows:

(1)(i) Notice of rights and request for disposition. Every minor or UAC who enters DHS custody, including minors and UACs who request voluntary departure or request to withdraw their application for admission, will be issued a Form I-770, Notice of Rights and Request for Disposition, which will include a statement that the minor or UAC may make a telephone call to a parent, close relative, or friend. If the minor or UAC is believed to be less than 14 years of age, or is unable to comprehend the information contained in the Form I-770, the notice shall be read

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10 UC Standards III; American Bar Association, Resolution 301 (February 2017).
11 Id.
and explained to the minor or UAC in a language that he or she understands. In the event that a minor or UAC is no longer amenable to voluntary departure or to a withdrawal of an application for admission, the minor or UAC will be issued a new Form I-770 or the Form I-770 will be updated, as needed.

(1)(ii) Notice of right to judicial review. Every minor who is not a UAC who is transferred to or remains in a DHS detention facility will be provided with a Notice of Right to Judicial Review, which informs the minor of his or her right to seek judicial review in the United States District Court with jurisdiction and venue over the matter if the minor believes that his or her detention does not comply with the terms of paragraph (i) of this section.

... 

(2) DHS custodial care immediately following apprehension. i) Following the apprehension of a minor or UAC, DHS will process the minor or UAC as expeditiously as possible. Consistent with 6 CFR 115.114, minors and UACs shall be held in the least restrictive setting appropriate to the minor or UAC’s age and special needs, provided that such setting is consistent with the need to protect the minor or UAC’s well being and that of others, as well as with any other laws, regulations, or legal requirements. DHS will hold minors and UACs in facilities that are safe and sanitary and that are consistent with DHS’s concern for their particular vulnerability. Facilities will provide access to toilets and sinks, drinking water and food as appropriate, access to emergency medical assistance as needed, and adequate temperature and ventilation. DHS will provide adequate supervision and will provide contact with family members arrested with the minor or UAC in consideration of the safety and well-being of the minor or UAC, and operational feasibility. UACs generally will be held separately from unrelated adult detainees in accordance with 6 CFR 115.14(b) and 6 CFR 115.114(b). In the event that such separation is not immediately possible, UACs in facilities covered by 6 CFR 115.114 may be housed with an unrelated adult for no more than 24 hours except in the case of an emergency or other exigent circumstances.

ABA Comments: With respect to provision 236.3g(1)(i), the ABA would note that there is no mention of a minor or UAC’s ability to contact his or her consulate. Consistent with the ABA UC Standards, upon apprehension, a child should immediately be informed, both orally and in writing, in the child’s best language and, where applicable, dialect, that he has the right to contact his parents and his consulate. The ABA proposes that the duty to inform a minor or UAC of the right to contact his or her consulate be mentioned explicitly in provision (1)(i). In addition, consistent with the ABA UC Standards, the ABA would propose that the following specific notice provisions be included:

Once a [minor or UAC] is processed for Removal Proceedings, he has the right, without limitation, to the following: (a) an attorney; (b) immediate contact with a parent, or any relative, friend, or social service organization within or without the United States; (c) judicial review of his immigration and detention status, including his right to seek asylum and other legal relief; (d) consular notification and access, as required by the U.S. Department of State; (e) to remain silent and notification that any statements he does make can be used against him; (f) information concerning the basis for his initial apprehension and his temporary

12 UC Standards VII.C.1.

13 UC Standards use defined term “Child,” replaced here with minor or UAC.
detention; (g) if applicable, reunification procedures and information on alternatives to detention; and (h) information on his rights while in detention and before transfer, including basic necessities [such as food, water, bedding, sanitation facilities, and necessary medical attention, as well as to treatment with dignity and respect].

Regarding provision 236.3(g)(2), additional elements of custodial care should be incorporated, consistent with the ABA’s UC Standards. First, pursuant to the UC Standards at VII.C.3, the term “bedding” should be added to the listed elements that facilities will provide. In addition, the ABA would propose striking the language “as appropriate” after “food and water” to avoid confusion, as food and water should never be withheld. Even more significant, the proposal mentions that DHS “will provide contact with family members arrested with the minor or UAC in consideration of the safety and well-being of the minor or UAC, and operational feasibility.” The ABA’s UC Standards contemplate that family members be kept together, not merely given the opportunity for contact. Accordingly, the ABA proposes the addition of language reflecting as much within provision (g)(2).

Finally, the ABA has concerns about provision (g)(2) because it provides for housing UACs with unrelated adults for up to 24 hours (and sometimes longer) if separation is not immediately possible. It also carves out this limit for UACs only. If minors other than UACs can be housed with unrelated adults for longer periods of time, this is highly problematic. The ABA’s UC Standards speak to this issue, and studies have shown children commingled with adults are more likely to commit suicide and to be physically or sexually assaulted. The ABA therefore recommends adoption of a narrower rule.

Specific Comments to Portions of Proposed Section 236.3(h):

According to the proposed rule, certain portions of the regulations may be revised to read as follows:

(h) Detention of family units. DHS’s policy is to maintain family unity, including by detaining families together where appropriate and consistent with law and available resources. If DHS determines that detention of a family unit is required by law, or is otherwise appropriate, the family unit may be transferred to a Family Residential Center which is a licensed facility and non-secure.

ABA Comments: The ABA is concerned with this provision because it cannot be reconciled with the FSA, and is inconsistent with the ABA’s UC Standards, which are based on the vulnerability of all children. The District Court found, in *Flores*, that Family Residential Centers are secure, not unsecure settings. *Flores v. Sessions*, CV 85-4544 DMG (AGR), 2017 WL 6060252, at *19 (C.D. Cal. June 27, 2017), appeal dismissed, 18-55063, 2018 WL 3472723 (9th Cir. Apr. 27, 2018). Accordingly, prolonged family detention means minors will not be placed in the least restrictive setting. This provision is in tension section 236.3(i), which in turn references 6 CFR 115.14 and requires the least restrictive setting. Section 236.3(i) likewise requires the

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14 UC Standards VII.C.1.
15 UC Standards VII.G.1.
16 UC Standards Section VII.B.7, Commentary.
placement of non-UACs in DHS custody in non-secure facilities. For all of the foregoing reasons, this provision is problematic and should be stricken in its entirety.

**Specific Comments to Portions of Proposed Section 236.3(i):**

According to the proposed rule, certain portions of the regulations may be revised to read as follows:

(i) **Detention of minors who are not UACs in DHS custody.** In any case in which DHS does not release a minor who is not a UAC, said minor shall remain in DHS detention. Consistent with 6 CFR 115.14, minors shall be detained in the least restrictive setting appropriate to the minor’s age and special needs, provided that such setting is consistent with the need to ensure the minor’s timely appearance before DHS and the immigration courts and protect the minor’s well being and that of others, as well as with any other laws, regulations or legal requirements. The minor shall be placed temporarily in a licensed facility, which will be non-secure, until such time as release can be effected or until the minor’s immigration proceedings are concluded, whichever occurs earlier. If immigration proceedings are concluded and result in a final order of removal, DHS will detain the minor for the purpose of removal. If immigration proceedings result in a grant of relief or protection from removal where both parties have waived appeal or the appeal period defined in 8 CFR 1003.38(b) has expired, DHS will release the minor.

**ABA Comments:** This provision lists, as an exception to the least restrictive setting requirement, “the need to ensure the minor’s timely appearance before DHS and the immigration courts.” However, in doing so, it cross-references 6 CFR 115.14. The ABA would note no such language is included in 6 CFR 115.14. The ABA would strike the referenced language, as it appears to prioritize appearances before DHS over the minor’s special needs and well-being.

The ABA also opposes the provision which only provides for release of a minor after both parties have waived appeal or the appeal period has expired. Limiting release in such a way is inconsistent with the presumption set forth in the ABA’s UC Standards that children should only be detained as long as necessary because release from detention and family reunification should be primary goals at all times.17

**Specific Comments to Portions of Proposed Section 236.3(i)(1):**

According to the proposed rule, certain portions of the regulations may be revised to read as follows:

(i)(1) A minor who is not a UAC referenced under this paragraph may be held in or transferred to a suitable state or county juvenile detention facility, or a secure DHS detention facility, or DHS contracted facility having separate accommodations for minors, whenever the Field Office and the ICE supervisory or management personnel have probable cause to believe that the minor:

(i) Has been charged with, is chargeable with, or has been convicted of a crime or crimes, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act or acts, that fit within a pattern or practice of criminal activity;
(ii) Has been charged with, is chargeable with, or has been convicted of a crime or crimes, or is the subject or delinquency proceedings, has been adjudicated delinquent, or

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17 UC Standards at VII.A.
is chargeable with a delinquent act or acts, that involve violence against a person or the use or carrying of a weapon;
(iii) Has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in federal or state government custody or while in the presence of an immigration officer;
(iv) Has engaged, while in the licensed facility, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed facility in which the minor has been placed and transfer to another facility is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed facility;
(v) Is determined to be an escape-risk pursuant to paragraph (b)(6) of this section; or
(vi) Must be held in a secure facility for his or her own safety.

ABA Comments: This section affords an inappropriate level of discretion to DHS and shelter staff in determining a minor’s placement. We recommend narrowing this section by deleting provisions (i), (ii), (iv), and (v). As written, the language in these provisions is unacceptably broad and may be subject to arbitrary application. Experience has shown that similar language included in the FSA has been interpreted by immigration officers to allow placement of a child in secure detention for minor matters such as shouting or smoking a cigarette. For this reason, the UC Standards specifically exclude such language and provide more narrowly-tailored criteria for a child’s placement in a secure detention facility.18

With respect to the language at (vi), the ABA would propose a separate provision with more specific language, to provide that when a minor is at a demonstrated risk of harm from smugglers, traffickers, or others who might seek to victimize or otherwise engage him in criminal, harmful, or exploitative activity, the minor shall be placed in the least restrictive developmentally appropriate19 placement consistent with his safety and the safety of others.20

The ABA also notes that there is no provision for a periodic reassessment of a minor’s placement at least every 30 days, as required by the TVPRA at 8 USC. 1232(c)(2)(A), and for independent review of a placement decision that satisfies due process requirements.21 The ABA’s UC Standards provide for both of these protections, necessary to ensure secure placements are limited to extreme circumstances only.

18 UC Standard VII.G.2., Commentary.
19 The UC Standards define “developmentally appropriate” as “[s]uitable to the Unaccompanied Child’s age; level of education; gender, gender identity, and gender expression; cultural background; intellectual, social, and emotional development; degree of language proficiency; Special Needs; and other individual circumstances in order to ensure the Unaccompanied Child’s comprehension and meaningful participation.” The UC Standards in turn define “special needs” as “any condition or disability, such as an intellectual disability, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, developmental disability, orthopedic impairment, autism, traumatic brain injury, specific learning disability, or other disability as further defined in the regulations implementing the Individuals with Disabilities Education Act (34 U.S.C. § 1400 et seq.) found at 34 C.F.R. § 300.7.”
20 UC Standards VII.G.2.c.
21 UC Standards VII.G.2.b, VII.F.
Specific Comments to Portions of Proposed Section 236.3(i)(4):
According to the proposed rule, certain portions of the regulations may be revised to read as follows:

(4) **Standards.** Non-secure, licensed facilities to which minors who are not UACs are transferred pursuant to the procedures in paragraph (e) of this section shall abide by applicable standards established by ICE. At a minimum, such standards shall include provision or arrangements for the following services for each minor who is not a UAC in its care:

... (xii) A reasonable right to privacy, which shall include the right to:

(A) Wear his or her own clothes, when available;
(B) Retain a private space in the residential facility for the storage of personal belongings;
(C) Talk privately on the phone, as permitted by applicable facility rules and regulations;
(D) Visit privately with guests, as permitted by applicable facility rules and regulations;
(E) Receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

(xiii) When necessary, communication with adult relatives living in the United States and in foreign countries regarding legal issue related to the release and/or removal of the minor;
(xv) Attorney-client visits in accordance with applicable facility rules and regulations.

ABA Comments: The ABA is concerned about the restrictive and qualifying language regarding a minor’s right to communicate privately and visit with guests, family members, and counsel. As set forth in the UC Standards, detained minors should have the right to receive regular and frequent visits (not less than once a week) from family and friends in circumstances that respect the minor’s needs for privacy, contact, and unrestricted communication. Minors should also be permitted to visit with their attorney, child advocate, or other persons necessary for their representation, including, but not limited to, interpreters, paralegals, experts, and witnesses any day of the week, including holidays. Such visits should be permitted at any time during the period of at least eight hours a day. Accordingly, the ABA proposes changes to provisions (xii)(C) (D), as well as provisions (xiii) and (xv), that incorporate these protections and do not leave facilities free to encroach upon them through facility-specific rules.

Specific Comments to Portions of Proposed Section 236.3(j):
According to the proposed rule, certain portions of the regulations may be revised to read as follows:

(j) **Release of Minors from DHS Custody.** DHS will make and record prompt and continuous efforts on its part toward the release of the minor. If DHS determines that detention of a minor who is not a UAC is not required to secure the minor’s timely appearance before DHS or the immigration court, or to ensure the minor’s safety or the safety of others, the minor may be released, as provided under existing statutes and regulations, pursuant to the procedures set forth in this paragraph.

(1) DHS will release a minor from custody to a parent or legal guardian who is available to provide care and physical custody.

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22 UC Standards at VIII.D.1-2.
23 Id.
24 Id.
(2) Prior to releasing to a parent or legal guardian, DHS will use all available reliable evidence to determine whether the relationship is bona fide. If no reliable evidence is available that confirms the relationship, the minor will be treated as a UAC and transferred to the custody of HHS as outlined in paragraph (f) of this section.

(3) For minors in DHS custody, DHS shall assist without undue delay in making transportation arrangements to the DHS office nearest the location of the person to whom a minor is to be released. DHS may, in its discretion, provide transportation to minors.

(4) Nothing herein shall require DHS to release a minor to any person or agency whom DHS has reason to believe may harm or neglect the minor or fail to present him or her before DHS or the immigration courts when requested to do so.

ABA Comments: The ABA finds the main provision at (j) and the sub-provision at (4) to be highly problematic for many reasons. The goal of securing a minor’s timely appearance before DHS or the immigration courts should not be a factor in evaluating release to a parent or legal guardian, as specified in the ABA’s UC Standards at Section VII.D.3. As provided in the commentary, “[a] preference for family unity and for the safety and stability of the [minor] shall be the primary criteria for determining placement of the [minor].”25 The commentary to Section VII.D. further provides:

A reasonable basis to believe that an applicant 1) is not in fact the [Minor]’s parent/legal guardian/Adult Family Member, 2) is not truly willing to care for the [Minor], or 3) is unfit to take the [Minor] should be the only basis for denying release of the [Minor] to the parent/legal guardian/Adult Family Member. Because the parent’s/legal guardian’s/Adult Family Member’s financial condition or immigration status is not determinative of the integrity of the family unit or the safety of the Child, it shall not be a criterion by which to determine with whom the Child is placed. (emphasis added)

The commentary further indicates assurance that a minor will appear at relevant court proceedings is “irrelevant to the integrity of the family unit and the [b]est [i]nterests of the [minor].”26 Recognizing DHS’s duty to enforce relevant immigration law however, the ABA indicates that it may consider this criterion “only with respect to a requested release to individuals and entities other than the parent/legal guardian/[a]dult [f]amily [m]ember.”27

How would DHS evaluate this consideration of timely appearance? An argument could be made in the case of every minor that the best way to ensure timely appearances is by never freeing the individual and by DHS transport to and from hearings. The FSA would then be rendered meaningless, however, as the “least restrictive setting” would be scrapped for “the setting that guarantees DHS and immigration court appearances.” The referenced language is wholly at odds with the FSA. Accordingly, the ABA requests the language be stricken from (j) and (4).

25 UC Standards at VII.D, Commentary.
26 Id.
27 Id.
With respect to the remaining provisions, the ABA would note that provision (j) indicates that a minor “may” be released. The ABA’s UC Standards require that a minor “should” be released where the criteria (other than timely appearances) are met. To ensure the least restrictive setting is pursued in each and every case, the ABA proposes striking “may” and replacing it with “shall.”

Provision (j)(1) also fails to provide for release to adults other than a parent or legal guardian. Allowing release to additional, appropriate adults is consistent with placing children in the least restrictive setting and to pursuing the primary, articulated goals in the UC Standards of release from detention and family reunification. Although DHS points to the TVPRA as the basis for limiting release to parents or legal guardians, nothing in the language of the codified TVPRA at 8 USC 1232 restricts DHS’ ability to release a minor to someone other than a parent or legal guardian.

Additionally, we are concerned that the vague language at (b)(2) will result in arbitrary decision-making by DHS when evaluating whether relations are bona fide. That provision indicates that “all available reliable evidence” will be used to make the determination, and contemplates the situation where “no reliable evidence” is available. Without more, it is unclear what evidence will be deemed reliable.

Finally, we note that this provision does not provide for any review of a decision not to release a minor, as contemplated in the ABA UC Standards at Section VII.D.6-7. The ABA therefore urges DHS to include language from the UC Standards reflecting a right to an independent review of a decision denying release that satisfies due process requirements, and places the burden of persuasion that release was not suitable on DHS, and allows a dissatisfied parent/legal guardian/adult family member to seek further de novo review in federal court.

Specific Comments to Portions of Proposed Section 236.3(k);
According to the proposed rule, certain portions of the regulations may be revised to read as follows:

(k) Procedures upon transfer.

(2) Notice of counsel. A minor or UAC who is represented will not be transferred from one ICE placement to another, or from an ICE placement to an ORR placement, until notice is provided to his or her counsel, except in unusual and compelling circumstances, such as whether the safety of the minor or UAC or others is threatened or the minor or UAC has been determined to be an escape-risk, or where counsel has waived such notice. In unusual and compelling circumstances, notice will be sent to counsel within 24 hours following the transfer.

ABA Comments: The ABA is concerned that as written, this provision does not require that notice to the minor or UAC, counsel, as well as any advocate, be provided both orally and in writing, and that the notice explain the reasons for the transfer and procedures for appeal. The UC Standards at Section VI.H.2 set forth clear guidance on this issue.

28 UC Standards VII.D.3.
a. Prior to transfer, the Child and his Attorney shall be advised both orally and in writing, in the Child’s best language and, where applicable, dialect, of the following:
   i. the reason the Child is being transferred;
   ii. his right to appeal the determination of appropriate transfer; and
   iii. the procedures for such an appeal.

The UC Standards further require that prior to the transfer, actual and written notice be provided to the minor or UAC’s attorney and child advocate, including the date or transfer and the location, address and phone number of the new detention facility. The ABA would urge DHS to include these provisions to reflect the same rights.

Additionally, the ABA has concerns about the use of “unusual and compelling circumstances” without further guidance. The ABA would suggest that DHS instead adopt the following language from the UC Standards, at Section VII.H.2.c, that notice to the minor or UAC’s attorney and child advocate be provided in all cases prior to the transfer, and in no case less than 24 hours prior to such transfer, unless compelling and unusual circumstances arise, and further defines what compelling and unusual circumstances might be.

Finally, the ABA urges DHS to include language from the UC Standards at Section VII.H.3 reflecting a right to an independent review of a transfer decision that satisfies due process requirements and places the burden of persuasion that the transfer is necessary on DHS, and allows a dissatisfied minor or UAC to seek further de novo review in federal court.

Specific Comments to Portions of Proposed Section 236.3(l):
According to the proposed rule, certain portions of the regulations may be revised to read as follows:

(1) Notice to parent of refusal of release or application for relief.

\[\text{...} \]

(2) Upon notification, the parent will be afforded an opportunity to present his or her views and assert his or her interest to DHS before a determination is made as to the merits of the request for relief.

ABA Comments: The ABA is concerned that this provision is vague and therefore does not adequately protect a minor or UAC’s interest in family unity or parental rights. The provision does not provide how a parent’s views or interest will be asserted, considered, and with what guidance. Additionally, unlike the UC Standards which speak directly on this issue, the provision does not provide for a formal review and appeal. At Section VII.D.6-7, the UC Standards outline such rights, previously mentioned above. Accordingly, the ABA would urge DHS to amend this provision to eliminate ambiguities and provide a right to review and appeal.

Specific Comments to Portions of Proposed Section 236.3(m):
According to the proposed rule, certain portions of the regulations may be revised to read as follows:

\[\text{...} \]

29 UC Standards VI.H.2.b.
(m) **Bond hearings.** Bond determinations made by DHS for minors who are in removal proceedings pursuant to section 240 of the Act and who are also in DHS custody may be reviewed by an immigration judge pursuant to 8 CFR 1236 to the extent permitted by 8 CFR 1003.19. Minors in DHS custody who are not in section 240 proceedings are ineligible to seek review by an immigration judge of their DHS custody determinations.

Although not included in the proposed regulations themselves, the following commentary related to the provision is also at issue:

…

DHS proposes this paragraph to provide for bond hearings as under FSA paragraph 24(A), while updating the language to be consistent with developments in immigration law since the FSA was signed, including the TVPRA.

…

Additionally, the proposed rule would clarify that this provision applies only to minors in DHS custody, in accordance with the TVPRA.

**ABA Comments:** This provision as drafted takes away the rights of certain minors (those unaccompanied minors transferred to HHS custody) to bond hearings before an immigration judge. Despite the language in the commentary, this change is neither consistent with the FSA at paragraph 24A nor required by the TVPRA. Paragraph 24A provides that “[a] minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing.” (emphasis added)

Significantly, the Ninth Circuit has already considered and rejected government arguments, based on subsequent statutes, for the limiting of bond hearings to minors in DHS custody only. In doing so, the court has stated in *Flores v. Sessions*, 862 F.3d 863, 881 (9thCir. 2017) that:

> Nothing in the text, structure, or purpose of the HSA or TVPRA renders continued compliance with Paragraph 24A, as it applies to unaccompanied minors, "impermissible." See *Flores v. Lynch*, 828 F.3d at 910. Nor does anything in the two statutes turn the Flores Settlement or any part of it into an "instrument of wrong." See *Wright*, 364 U.S. at 647, 81 S.Ct. 368. Not a single word in either statute indicates that Congress intended to supersede, terminate, or take away any right enjoyed by unaccompanied minors at the time of the acts' passage. Thus, we hold that the statutes have not terminated the Flores Settlement's bond-hearing requirement for unaccompanied minors.

Additionally, the provision is inconsistent with the ABA’s UC Standards on this issue, which require a bond hearing for every UAC at Section VII.F.3. The ABA would urge DHS to strike this provision altogether, or revise it to reflect the language of the FSA at 24A.

**Specific Comments to Portions of Proposed Section 236.3(n):**

According to the proposed rule, certain portions of the regulations may be revised to read as follows:

(n) **Retaking custody of a previously released minor.**
(1) In addition to the ability to make a UAC determination upon each encounter as set forth in paragraph (c) of this section, DHS may take a minor back into custody if there is a material change in circumstances indicating the minor is an escape-risk, a danger to the community, or has a final order of removal. If the minor is a UAC, DHS shall transfer the minor into HHS custody in accordance with paragraph (e) of this section.

(2) DHS may take a minor back into custody if there is no longer a parent or legal guardian available to care for the minor. In these cases, DHS will treat the minor as a UAC and transfer custody to HHS as outlined in paragraph (e) of this section.

(3) Minors who are not UACs and who are taken back into DHS custody may request a custody redetermination hearing in accordance with paragraph (m) of this section and the extent permitted by 8 CFR 1003.19.

ABA Comments: As previously stated, the ABA opposes provisions allowing DHS to make a UAC determination upon each encounter. Likewise, we oppose the limitation at provision (3) of custody redetermination hearings for non-UAC minors only. Such language does not comport with the FSA and the Ninth Circuit’s on point opinion in *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017), nor the ABA UC Standards requiring such hearings for all minors.

In addition, the ABA is concerned that this provision grants DHS broad discretion to re-detain a minor. In doing so, it presents a danger for arbitrary application and needless traumatization. The ABA’s UC Standards at VII.H provide specific guidance for when minors might be transferred, with the aim of prohibiting arbitrary transfers and minimizing the number of times a minor is transferred. These provisions offer guidance that DHS might rely upon to better delineate this authority.

Furthermore, this provision makes detention the default in cases where a parent or legal guardian is not available to care for the minor. DHS should consider whether other adult family members are available to take care of a minor before subjecting him/her to further detention.30 Nothing in the TVPRA requires this provision, and it is inconsistent with the ABA’s UC Standards insomuch as it does not prioritize release or family unity. Lastly, it inconsistent with the FSA, which requires minors to be placed in the least restrictive setting possible.

HHS Proposed Rulemaking

Specific Comments to Portions of Proposed Section 410.101 (Definitions: Unaccompanied Alien Child):

Section 410.101 of the proposed regulation, consistent with the HSA, defines an “unaccompanied alien child” as an individual who “has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom: there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody.”

The proposed regulation goes on to provide that:

30 UC Standards VII.D.
“When an alien previously determined to have been a UAC has reached the age of 18, when a parent or legal guardian in the United States is available to provide care and physical custody for such an alien, or when such alien has obtained lawful immigration status, the alien is no longer a UAC. An alien who is no longer a UAC is not eligible to receive legal protections limited to UACs.”

The commentary related to this provision further states:

“Section 410.101 defines unaccompanied alien child according to the definition set forth in the HSA. It, as well as the TVPRA, only gives ORR authority to provide care and custody of individuals who meet that definition. The statutes, however, do not set forth a process for determining whether an individual is a UAC. . . . §410.101 would make clear that ORR’s determination of whether a particular person is a UAC is an ongoing determination that may change based on the facts available to ORR.”

ABA Comments: The ABA is concerned that the proposed regulation is inconsistent with the ABA UC Standards, which require that a child’s designation as an unaccompanied child be maintained until the conclusion of the child’s immigration court proceedings.31 Allowing for constant re-determination of UAC status will confuse the children, as well as the administrative agencies with whom they interact. In addition to ABA comments to section 236.3(d) above, which are incorporated here as they address similar concerns, the ABA notes that allowing HHS to re-determine UAC status will undermine that agency’s responsibility to provide for the care and custody of UAC, and limit such children’s access to legal counsel.

Under the HSA and TVPRA, HHS has a unique role as it relates to UACs – to provide for their care and custody. The HSA specifically transferred care of UAC to ORR, reflecting a Congressional intent to separate responsibility for the care and custody of UACs from the adjudication of immigration benefits.32 ORR’s responsibilities include ensuring “to the greatest extent practicable . . . that all unaccompanied alien children who are or have been in the custody of . . . [HHS or DHS] have counsel to represent them in legal proceedings or matters to protect them from mistreatment, exploitation, and trafficking.”33 Consistent with this mandate, the ABA in its UC Standards, provides that all UACs should have the right to an attorney, and when children are not represented, an attorney should be appointed to them at public expense.34

31 UC Standards III.A.
33 8 U.S.C. § 1232(c)(5).
34 UC Standards Section III.H. (Right to Attorney), TVPRA, 8 U.S.C. § 1232(a)(2)(B) (Children from contiguous countries can be returned to their country of nationality upon a set of determinations of an immigration officer); ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, preface (ABA 1996) (“All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court’s jurisdiction continues.”); id. § H-1 commentary (“These . . . Standards take the position that courts must assure the appointment of a lawyer for a child as soon as practical (ideally, on the day the court first has jurisdiction over the case, and hopefully, no later than the next business day).’’); Juvenile Justice Standards, Annotated Standards Relating to the Juvenile Intake Function § 2.13 (ABA 1996), https://www.ncjrs.gov/pdffiles1/ojdp/166773.pdf (a juvenile should have an unwaivable right to the assistance of counsel in connection with any questioning by intake personnel or in connection with any discussions or negotiations regarding a nonjudicial disposition); 6 U.S.C. § 279(b)(1)(A) (directing ORR to develop a plan “to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each
The proposed regulation inappropriately puts HHS in the position of making a determination that has significant impact on legal and procedural protections available to UACs in their immigration proceedings. Such protections facilitate UAC’s fair access to immigration proceedings and humanitarian protection and are needed because UACs are especially vulnerable, are likely to be eligible for humanitarian relief, and have unique challenges to navigating the complicated immigration legal process alone. Yet, under the proposed rule, HHS would be in the position of designating children as UAC one day, and stripping them of this status the next. This puts HHS in the inappropriate position of impacting the adjudication of children’s immigration benefits, contrary to its mandate under federal law.35

The proposed regulation would create significant confusion for UACs in terms of where, when, and how to meet their legal immigration obligations and/or seek humanitarian protection. This confusion would be further exacerbated by the proposed regulation’s likely impact on the UAC population’s access to legal assistance. Currently, UACs receive pro bono legal services provided by nonprofit or legal service organizations based on the children’s status as a UAC. Without an attorney, children are significantly more likely to be deported.36 Allowing ORR to constantly re-determine children’s UAC status, undercuts ORR’s responsibly to facilitate children’s access to legal counsel and ensure protection from mistreatment, trafficking and other harms. This would be contrary to the children’s best interest and cannot be the intended result of the HSA or TVPRA.

Finally, this proposed regulation would impose significant and needless confusion on the government agencies who interact with UACs. For example, under the proposed regulation both DHS and HHS can re-determine UAC status. Yet, there is no reference to how different agency determinations should be resolved. Nor is there any indication that either HHS or DHS have processes in place to inform each agency or the immigration courts of their evolving determinations. The potential for confusion and miscommunication is immense, and creates significantly greater obstacles for the UAC population to meet their immigration obligations and/or have their humanitarian relief applications promptly adjudicated.

Specific Comments to Portions of Proposed Section 410.101 of the Regulations (Definitions: Emergency):

[unaccompanied] child, consistent with the law regarding appointment of counsel that is in effect on” the date of enactment of this Act); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”); Plyler, 457 U.S. at 210 (“Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”); In re Gault, 387 U.S. 1, 41 (1967) (holding that the Due Process Clause of the Fourteenth Amendment provides a right to counsel in juvenile delinquent proceedings in which the juvenile’s freedom may be curtailed and that if the juvenile’s family is unable to afford counsel, the Court will appoint counsel to represent the juvenile); CRC art. 37(d) (“Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance.”). Children who have legal representation have significantly different outcomes than children without legal representation. William A. Kandel, Cong. Research Serv., R43599, Unaccompanied Alien Children: An Overview 12 (2017), https://fas.org/sgp/crs/homesec/R43599.pdf.35 See e.g., 6 U.S.C. § 279(a).

Section 401.101 of the proposed regulation defines “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 UACs or impacts other conditions provided by this part.”

ABA Comments: The ABA is concerned that this definition of “emergency” is overly broad and not in compliance with the FSA. Consistent with the UC Standards, the ABA recommends that the definition of “emergency” be further limited. The ABA comments to proposed regulation Section 236.3(b) address the same issue and are incorporated here by reference.

Specific Comments to Portions of Proposed Section 410.201(a)(c) & (d) (Placement Considerations):

Section 401.201(a) of the proposed regulation states that “ORR places each UAC in the least restrictive setting that is in the best interest of the child and the UAC’s age and special needs, provided that such setting is consistent with its interest to ensure the UAC’s timely appearance before DHS and the immigration courts.”

Section 401.201(c) of the proposed regulation states that “ORR makes reasonable efforts to provide placement in those geographical areas where DHS apprehends the majority of UAC.”

Section 401.201(d) of the proposed regulation states that “Facilities where ORR places UAC will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the UAC is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect the UAC from others, and contact with family members who were arrested with the minor.”

ABA Comments: Proposed regulation 410.201(a) is inconsistent with the ABA UC Standards, which provide that placement decisions for UACs should always be made in the “Best Interest of the Child.” Children should always be cared for in the least restrictive setting. Timely appearance in immigration court is not an appropriate exception to this requirement, nor should it be given priority over children’s bests interests and special needs.

Proposed regulation 410.201(c) is inconsistent with the ABA UC Standards, which note that a number of considerations should be taken into account when determining placement for UACs, including proximity to family, lawyers, immigration court, community resources, and interpreters.

37 UC Standards VII.C.2.
38 UC Standard VIIB. “Best Interests” as defined by the UC Standards is “[a] guiding principle in child protection matters that includes considerations of the following factors: the Child’s safety and well-being; expressed interests; health; family integrity; liberty; development; past experiences; Special Needs; age; gender, gender identity, and gender expression; sexual orientation; and religious and cultural background.”
39 UC Standards VIIB.
Proposed regulation 410.201(d) is inconsistent with the ABA UC Standards. It makes no mention of children’s access to showers or bedding.\(^{40}\) It limits children’s access to medical care only to emergencies, whereas the UC Standards require children to have access to “regular medical care.”\(^{41}\) Finally, the proposed regulation provides that UACs will have “contact” with family members with whom they are arrested. The UC Standards, however, require that consistent with children’s best interest, they be housed with non-parent relatives with whom they have a close relationship.\(^{42}\) Often times UACs are traveling with relatives, including grandparents, aunts, uncles, and siblings. Separating children from close relatives can be extremely traumatic and is inconsistent with children’s best interest.\(^{43}\)

**Specific Comments to Portions of Proposed Section 410.201(e) (Placement Considerations):**

Section 401.201(e) of the proposed regulation states that “If there is no appropriate licensed program immediately available for placement of a UAC . . . and no one to whom ORR may release the UAC . . . the UAC may be placed in an ORR contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility.”

**ABA Comments:** Proposed regulation 410.201(e) is inconsistent with the ABA UC Standards because it appears to give ORR wide latitude to place UACs in secure settings and to do so for an indefinite period of time. Under the proposed regulation, ORR can place children in a more restrictive setting if there is a lack of space in an appropriate program. The UC Standards, however, make clear that a lack of available space cannot serve as a justification for placing children in secure detention facilities indefinitely.\(^{44}\) This regulation also is inconsistent with the TVPRA, which 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.”\(^{45}\)

**Specific Comments to Portions of Proposed Section 410.202 (Placement in a licensed program):**

Section 401.202(a) of the proposed regulation states that “ORR places UAC into a licensed program promptly after a UAC is transferred to ORR legal custody, except in the following circumstances . . . (4) if a reasonable person would conclude that the UAC is an adult despite his or her claim to be a minor.”

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\(^{40}\) UC Standards VIIC.3.
\(^{41}\) UC Standards VIIC.3.
\(^{42}\) UC Standards VIIB.

\(^{44}\) UC Standards VII.G.2.
\(^{45}\) TVPRA § 235(c)(2)(A).
ABA Comments: Proposed regulation 401.202(a) is inconsistent with the ABA UC Standards and TVPRA which provide for a presumption of minor status when there is doubt. The ABA comments to proposed regulation Section 236.3(c) address the same issue and are incorporated here by reference.

Specific Comments to Portions of Proposed Sections 410.203 (Criteria for placement in a secure facility), Section 410.205 (Applicability to placement in a secure facility), and Section 410.206 (Information concerning reasons for placement):

Section 401.203(a) of the proposed regulation states that “ORR may place a UAC in a secure facility if the UAC: (1) Has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act . . . (2) While in DHS or ORR custody . . . has committed, or has made credible threats to commit, a violent or malicious act . . . (3) Has engaged, while in a licensed program or staff secure facility, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program . . . as determined by the staff of the licensed program . . . and ORR determines that the UAC poses a danger to self and others based on such conduct; (4) For purpose of placement in a secure RTC, if a licensed psychologist or psychiatrist determines that the UAC poses a risk of harm to self or others; (5) Is otherwise a danger to self or others.”

Section 401.203(b) states that “ORR Federal Field Specialists review and approve all placements of UAC in secure facilities consistent with legal requirements.”

Section 401.205 states, “ORR does not place UAC in a secure facility pursuant to § 410.203 . . . if less restrictive alternatives are available and appropriate under the circumstances. ORR may place a UAC in a staff secure facility or another licensed program as an alternative to a secure facility.”

Section 401.206 states, “Within a reasonable period of time, ORR provides each UAC placed or transferred to a secure or staff secure facility with a notice of the reasons for the placement in a language the UAC understands.”

ABA Comments: Proposed regulation 401.203(a) and (b) are inconsistent with the ABA UC Standards in that they provide overly vague and broad criteria for placement of UACs in secure facilities and do not require regular review of such placements consistent with due process requirements. The ABA UC Standards clearly delineate when UACs may be placed in a secure facility. Such placements are limited to “extreme circumstances, for example, where the child has previously exhibited violent or criminal behavior that poses a danger to others.” Such decisions must be reviewed every 30 days, and review must comport with due process, meaning children must receive notice of the determination and their right to be heard, must be provided with the reasons for their placement, and must have the right to an independent review of their placement by a federal court.

47 UC Standards VII.G.2.
48 UC Standards VII.G.2; ABA UC Standards VII.F; see also TVPRA § 235(c)(2).
Circumstances under which children can be placed in secure settings must be clearly and carefully enumerated and subject to rigorous independent review to prevent children from being placed for innocuous or highly subjective reasons. Proposed regulation sections 401.203(a) and (b) are overly vague in a number of ways. For example, they include a broad catch-all that children may be placed in a secure setting if they are “otherwise” a danger to self or others. The proposed regulation provides that ORR field specialists shall approve placements “consistent with legal requirements,” but provides no explanation of what those legal requirements are and clearly diverges from existing legal requirements, which at a minimum require that placement decisions be reviewed monthly. The regulation as written would provide inappropriate and unchecked discretion to ORR to place UACs in secure facilities, without consideration of the child’s best interest.

Similarly, while section 401.206 of the proposed regulations requires that UACs receive notice of the reasons for their placement, there is no requirement that the children’s attorneys or parents or legal guardians are provided notice. Nor is there any opportunity for meaningful substantive review of the department’s decision regarding placement.

Specific Comments to Portions of Proposed Section 410.204 (Considerations when determining escape risk):

Section 401.204 of the proposed regulation states, “When determining whether a UAC is an escape risk, ORR considers, among other factors, whether: ... (3) Evidence that the UAC is indebted to organized smugglers for his or her transport . . .”

ABA Comments: The proposed regulations include “evidence that the UAC is indebted to organized smugglers” as a factor in determining whether an unaccompanied child is an escape risk and, as written, could be a consideration in placing UACs in secure detention. As discussed above, the ABA UC Standards state that secure detention is only appropriate in extremely limited circumstances. Similarly, the TVPRA limits situations in which an unaccompanied child can be detained in secure detention to cases in which the child is a “danger to self or others or has been charged with having committed a criminal offense.”

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49 TVPRA 8 U.S.C. § 1232 (c)(2)(A)
51 UC Standards VII.G.2.
Specific Comments to Portions of Proposed Section 410.301 (Release to sponsors) and Section 410.302 (Sponsor suitability assessment process):

Section 401.301 of the proposed regulation states: “ORR releases a UAC to an approved sponsor without necessary delay, but may continue to retain custody of a UAC if ORR determines that continued custody is necessary to ensure the UAC’s safety or the safety of others, or that continued custody is required to secure the UAC’s timely appearance before DHS or the immigration courts.”

“When ORR releases a UAC without unnecessary delay to an approved sponsor, it releases in the following order of preference: (1) A parent; (2) A legal guardian; (3) An adult relative (brother, sister, aunt, uncle, or grandparent); (4) An adult individual or entity designated by the parent or legal guardian as capable and willing to care for the UAC’s well-being . . . (5) A licensed program willing to accept legal custody; or (6) An adult individual or entity seeking custody, in the discretion of ORR, when it appears that there is no other likely alternative to long term custody, and family reunification does not appear to be a reasonable possibility.”

Section 410.302 of the proposed regulation states: “(a) The licensed program providing care for the UAC shall make and record the prompt and continuous efforts on its part towards family reunification and the release of the UAC pursuant to the provisions of this section, (b) ORR requires a background check, including verification of identity and which may include verification of employment . . . (f) ORR is not required to release a UAC to any person or agency it has reason to believe may harm or neglect the UAC or fail to present him or her before DHS or the immigration courts . . .”

ABA Comments: An overarching principle of the ABA UC Standards is that government decision-making about the care and custody of UACs must take into account children’s “best interest.”53 When determining “best interest” the custodial agency must consider a number of factors, including the child’s safety and well-being, the child’s expressed wishes, the integrity of the child’s family, and the child’s past trauma experiences and other unique vulnerabilities.54 The ABA UC Standards make clear that there is a presumption that release from custody and family reunification are in the best interests of UACs.55 Placement of children in congregate care facilities has generally been found to be harmful to children and is discouraged in the context of the United States’ domestic child welfare system.56

53 UC Standards IIIID.
54 UC Standards IIIID.
55 UC Standards VIIA.
The proposed regulation does not appear to incorporate best interest of the child considerations, does not adequately emphasize the importance of family reunification, and provides for too many opportunities for children to remain in congregate care settings, contrary to generally accepted child welfare principles.

Specifically, section 401.301 of the proposed regulation provides that children may not be released to parents, legal guardians, adult relatives, or sponsors, “. . .[if]continued custody is required to secure the UAC’s timely appearance before DHS or the immigration courts.” Section 401.302 similarly allows ORR to deny release of UACs to DHS or the immigration court. This is contrary to the ABA UC Standards, which clarify that children should not be held in custody to “encourage the child’s acceptance of voluntary departure . . . or . . . for administrative convenience.”57 ORR is not an immigration enforcement agency and should not be required to make child placement determinations based on considerations completely disconnected from the child’s safety and well-being. A child’s timely appearance in immigration court proceedings is not relevant to family integrity or the child’s best interests and should not be a factor when ORR decides to release an unaccompanied child to a parent, legal guardian, or adult relative.58

Section 401.301 of the proposed regulation appears to require background checks, including potentially employment verification, for parents seeking placement of their children. This is contrary to the ABA UC Standards, which clarify that individuals who have been confirmed to be the child’s parent should be “presumed to be a fit parent in accordance with U.S. Supreme Court jurisprudence” and as such, should be subject to a limited background check.59

Finally, the proposed regulation appears to give preference to placement in a licensed program willing to accept legal custody over an adult individual seeking custody. The ABA UC Standards prioritize placement with an individual over placement in foster care or licensed congregate care setting.60 The proposed regulation also fails to account for a child’s expressed wishes with respect to their placements. The ABA UC Standards require that UACs consent to placement with unrelated adults.61

**Specific Comments to Portions of Proposed Section 410.402 (Minimum standards for licensed programs):**

Section 401.402 of the proposed regulation provides minimum standards applicable to licensed programs, including that licensed programs must include: “. . .A reasonable right to privacy, which must include the right to . . . (iii) Talk privately on the phone, as permitted by the house rules and regulations; (iv) Visit privately with guests, as permitted by the house rules and regulations . . .”

**ABA Comments:** The provisions of section 401.402 do not appear to provide for adequate privacy for UACs. Per the ABA UC Standards, facilities must ensure that children can have

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57 UC Standards VIID.
58 UC Standards VIID.
59 UC Standards VIID; see also Troxel v. Granville, 530 U.S. 57, 58 (2000).
60 UC Standards VIID.
61 UC Standards VIID.
confidential communication with attorneys, child advocates, consular offices, media, mental and physical health professionals, and government oversight agencies.  

Specific Comments to Portions of Proposed Section 410.600 (Transfer)

Section 401.600 of the proposed regulation addressing transfer of UACs states, “ORR does not transfer a UAC who is represented by counsel without advance notice to his or her legal counsel. However, ORR may provide notice to counsel within 24 hours of the transfer in unusual and compelling circumstances ...”

ABA Comments: The provisions of section 401.600 do not specify that notice to the minor, counsel, or any best interest advocate, be provided both orally and in writing, and give both the reasons for the transfer and procedures for appeal. The ABA comments with respect to section 236.3(k) above are applicable to this section and are incorporated here by reference.

Specific Comments to Portions of Proposed Section 410.700 (Age determinations) and 401.701 (Individual who appears to be an adult)

Section 401.700 of the proposed regulation states, “Procedures for determining the age of an individual must take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the individual. ORR may require an individual in ORR’s custody to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age.”

Section 401.701 of the proposed regulation provides, “If, the procedures in § 410.700 would result in a reasonable person concluding that an individual is an adult, despite his or her claim to be under the age of 18, ORR must treat such person as an adult for all purposes.”

ABA Comments: Sections 410.700 and 410.701 are not consistent with the ABA UC Standards, and could result in children being incorrectly designated as adults, and thereby deprived of their substantive legal rights. For the reasons, outlined above in the discussion of section 236.3(c) of the proposed regulation, the ABA recommends that the proposed regulations be revised consistent with the ABA UC Standards.

Specific Comments to Portions of Proposed Section 410.801 (Procedures for objections to ORR decisions) and Section 410.810 (Hearings regarding ORR decisions)

Sections 401.801 and 401.810, describe the procedures and hearings for UACs who object to ORR placement decisions.

Section 401.801 states, “For UACs not placed in licensed programs, ORR shall – within a reasonable period of time – provide a notice of the reasons for housing the minor in secure or staff secure facility. . . .”

62 UC Standard VIII.B.3.e.
63 The ABA UC Standards, recommend that review be conducted by an independent party, outside of HHS. UC Standards VII.H.2; UC Standard VII.D; see also 8 U.S.C. § 1232(b)(2)(B).
Section 401.810 states, “(a) A UAC may request that an independent hearing officer employed by HHS determine, through a written decision, whether the UAC would present a risk of danger to the community or risk of flight if released. . . (b) In hearings conducted under this section, the burden is on the UAC to show that he or she will not be a danger to the community (or risk of flight) if released, using a preponderance of the evidence standard. . . (e) A hearing officer’s decision under this section may be appealed to the Assistant Secretary of the Administration for Children and Families. Any such appeal request shall be in writing . . . (f) Decisions under this section are final and binding on the Department, and a UAC may only seek another hearing under this section if the UAC can demonstrate a material change or circumstances.”

ABA Comments: Sections 401.801 and 401.810 of the proposed regulations may not provide necessary due process protections for UACs in ORR’s care and custody. The proposed regulation limits review of ORR placement decisions to those conducted by an HHS employee, or an HHS political appointee. The ABA UC Standards require that UACs in ORR custody are entitled to an independent review of ORR’s placement decisions, and if they are not satisfied with the outcome of the review, they must be able to seek a bond hearing or de novo review in federal court. The ability to seek judicial review of ORR decisions through a bond hearing or de novo review in federal court is also required by the FSA, as well as federal case law.

The proposed regulation also put the burden on UACs to prove that they are not a danger to the community or a flight risk. The ABA UC Standards require that the custodial agency, not the child, bear the burden of proving the legitimacy of its placement determination. This position is supported in federal case law as well.

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64 UC Standards VII.G.; ABA UC Standard VII.D. In addition, the ABA UC Standards require that decisions regarding release of unaccompanied children to parents, guardians, relatives, and caretakers must also be subject to review by an independent party outside the custodial agency and comply with due process.

65 Flores v. Sessions, 862 F.3d 863, 868 (9th Cir. 2017); see also, O’Connor v. Donaldson, 422 U.S. 563, 580 (1975) (Justice Burger, concurring).

66 UC Standards VII.F.; see also ABA Juvenile Justice Standards, Standards Relating to Corrections Administration 4.5 (basic concepts of due process should apply to a juvenile under correctional supervision.)