



NEW YORK  
CITY BAR

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Department of Homeland Security  
500 12th Street SW  
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*Via Federal eRulemaking Portal: <https://www.regulations.gov>*

**Re: DHS Docket No. ICEB-2018-0002; Comments on Proposed Rulemaking re:  
Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied  
Alien Children**

Dear Ms. Seguin:

We, the undersigned committees of the New York City Bar Association (“City Bar”),<sup>1</sup> thank you for the opportunity to comment on your agencies’ proposal (the “Proposed Rules”) to amend and promulgate regulations relating to the apprehension, processing, care, custody, and release of immigrant children in the United States, as announced in a notice of proposed rulemaking published September 7, 2018 in the Federal Register, Vol. 83, No. 174, at 45486-534 (the “NPRM”).

**I. EXECUTIVE SUMMARY**

The City Bar opposes any regulations that codify detaining children or expanding the detention of asylum seekers generally. As we have stated previously, “family detention is not a solution for family separation. Both policies—tearing children away from their parents and holding children in jail-like conditions with their parents—are repugnant to American values and contrary to U.S. and international human rights law. Both will have lasting psychological and physical impact on

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<sup>1</sup> With 24,000 members, the mission of the City Bar is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society.

vulnerable children and families fleeing life-threatening harm.”<sup>2</sup> The City Bar urges the agencies to withdraw the proposed rules and comply with the existing terms of the Flores settlement.

The stated purpose of the Proposed Rules is to “implement the relevant and substantive terms of the Flores Settlement Agreement (FSA)”<sup>3</sup> and thereby terminate the FSA.<sup>4</sup> (FR 45487-488.) However, the Proposed Rules contravene the substance and purpose of the FSA, and their publication is therefore insufficient to trigger the termination of the FSA. Moreover, the Proposed Rules contain numerous provisions that violate the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)<sup>5</sup> and/or contravene the principle of the best interests of the child, and the rules must therefore be withdrawn or rewritten.

While we oppose the overall framework of family detention, we will submit comments that focus on several specific deficiencies in the proposed regulations:

1. The Proposed Rules would replace the FSA requirement to hold children only in state-licensed facilities with a scheme for deeming a “Family Residential Center” (FRC) to be licensed if a DHS contractor finds the jail to be compliant with Immigration and Customs Enforcement (ICE) detention standards.
2. The Proposed Rules would permit release of a child from DHS custody to a parent or legal guardian only, gutting the FSA’s “general policy favoring release.”
3. The Proposed Rules provide for loopholes based on “operational feasibility” or “emergency” that would permit relaxation of the conditions under which children in custody are held and transported.
4. The Proposed Rules would institute repeated reexamination of whether a child meets the definition of “unaccompanied alien child,” injecting instability and duplication of labor into case processing, and stripping vulnerable children of congressionally-mandated basic protections.

Given these flaws and others, the Proposed Rules are inconsistent with the FSA and therefore insufficient to trigger its termination. We respectfully request that the Department of Homeland Security (DHS) and Department of Health and Human Services (HHS) consider the following

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<sup>2</sup> New York City Bar, Letter to Attorney General Sessions, and Homeland Security Secretary Nielsen, on Criminal Prosecution, Separation, and Detention of Families Seeking Asylum, (July 6, 2018), [https://s3.amazonaws.com/documents.nycbar.org/files/2018407-Family\\_Separation.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2018407-Family_Separation.pdf) .

<sup>3</sup> The Northern District of California approved the FSA in January 1997, in settlement of *Flores v. Meese*, No. 85-4544 (C.D. Cal. 1985), a class action commenced in 1985 to challenge federal practices for detaining and releasing immigrant minors.

<sup>4</sup> Paragraph 40 of the FSA, as amended by a 2001 stipulation, provides that the FSA “shall terminate 45 days following defendants’ publication of final regulations implementing this Agreement.” *Flores v. Reno*, No. CV-85-4544-RJK(Px) (C.D. Calif. Dec. 7, 2001).

<sup>5</sup> Public Law 110-457, title II, subtitle D, 122 Stat. 5044.

recommendations in revising the Proposed Rules to faithfully implement the FSA, the Homeland Security Act (HSA), and the TVPRA.

## II. DISCUSSION

### a. The Proposed Scheme for Federal Licensing and Inspection of Family Detention Centers Circumvents, Rather than Effectuates, the FSA

*The Existing Requirement.* The FSA includes an appendix specifying minimum standards for facilities used to detain minors, and requires that the facilities comply with applicable state codes and be “licensed by an appropriate State agency.” (FSA ¶ 6, Ex. 1.) The Ninth Circuit has held that the FSA applies to all immigrant minors in federal custody, whether accompanied or unaccompanied.<sup>6</sup>

*The Proposed Rules.* The NPRM acknowledges that “States generally do not have licensing schemes for facilities to hold minors who are together with their parents or legal guardians,” and proposes to “eliminate that *barrier* to the continued use of FRCs” to detain minors with their parents. (FR 435488; emphasis added.) With that clear articulation of its agenda, the NPRM proposes to permit DHS to hold minors with their parents in facilities *not* licensed by any state, through the expedient of “an alternative licensing process that would allow FRCs to be considered ‘licensed programs’ under FSA paragraph 6.” (FR 45495.) Thus, rather than implementing the protections of the FSA, the Proposed Rule simply dispenses with the FSA’s inconvenient state licensing requirement: “As all FRCs would be licensed, *or considered licensed*, under this proposed rule, the proposed rule may result in extending detention of some minors, and their accompanying parent or legal guardian, in FRCs beyond 20 days.” (FR 45518; emphasis added.)

The NPRM sets forth the “three primary options” for use when initiating removal proceedings against members of a family unit. (FR 45492.) Two options are consistent with the FSA: “(1) Parole all family members into the United States; (2) detain the parent(s) or legal guardian(s) and either release the juvenile . . . or transfer them to HHS to be treated as an UAC.” *Id.* Instead of codifying either or both of those permissible options, the proposed regulations seek to “eliminate the barrier” to option 3, long-term use of FRCs to “detain the family unit together.” *Id.* As the NPRM acknowledges, *id.*, a federal court has already rejected a bid by the government to evade the state licensing requirements under Paragraph 19 of the FSA.<sup>7</sup>

The Proposed Rules incorporate some, but not all, of the FSA’s standards for detention facilities serving minors. (Proposed Rules §236.3(i); FR 45526-528.) Conspicuously absent from the Proposed Rules is the FSA’s prohibition against subjecting minors to “corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping.” (FSA Ex. 2, ¶ 14C.) Other FSA standards that are diluted or missing in the Proposed Rules relate to comprehensive needs assessments and care plans for each minor, and facilitation of family reunification. Yet, without the safeguard of state licensing, the sole mechanism for

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<sup>6</sup> *Flores v. Lynch*, 828 F. 3d 898, 902-903 (9<sup>th</sup> Cir. 2016).

<sup>7</sup> *Flores v. Sessions*, CV 85-4544-DMG (AGRx) (July 9, 2018).

monitoring the FRCs' compliance with those standards is that "DHS shall employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE." (Proposed Rules §236.3(b)(9); FR 45525.) In other words, entities selected and compensated by DHS will be the sole arbiters of DHS compliance with regulatory standards for FRCs—a flagrant conflict of interest. This type of conflict of interest has already led to substandard detention care in adult detention for which ICE employs outside contractors to monitor compliance with detention standards. In June 2018, in the context of adult detention, ICE's capacity for compliance with detention standards was found lacking by the DHS Office of Inspector General.<sup>8</sup> States have an obligation to ensure that children within their boundaries receive proper care, and DHS's own Inspector General has recently found that its existing monitoring system for detention standards is not working adequately.<sup>9</sup>

Furthermore, the NPRM acknowledges that the "alternative licensing process" would be a "primary source of new costs of this proposed rule," but fails to quantify those costs. (FR 45488.) Yet cost-saving alternatives to family detention exist, including release on recognizance, parole, or bond, as well as community-based alternatives to detention programs. Detention has additional, non-financial costs: it impedes access to legal representation;<sup>10</sup> and by impeding communication with family members and witnesses in the country of origin, it impairs applicants' ability to obtain evidentiary support for protection claims.

*City Bar's Recommendations:* DHS has made it clear that it wants to eliminate the *Flores* settlement because it "handicap[s] the government's ability to detain and promptly remove UACs."<sup>11</sup> The proposal to permit ICE to deem unlicensed facilities to be "licensed," and to charge its own contractors with compliance review, would eviscerate the FSA rather than implement it, and must therefore be eliminated from the Proposed Rules. Instead, regulations should codify the alternative options identified in the NPRM: paroling the family unit under an appropriate alternative to detention; or at minimum, in a case where a parent cannot be released, releasing children to other appropriate caregivers, as further discussed in Part 2.<sup>12</sup>

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<sup>8</sup> "Neither type of inspection ICE uses to examine detention facilities ensures consistent compliance with detention standards or comprehensive correction of identified deficiencies." DHS Office of Inspector General, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, OIG-18-67, at 4 (June 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>

<sup>9</sup> "ICE needs to comprehensively examine and assess its inspections process, improve its follow-up procedures for corrective actions, and ensure ERO field offices more consistently engage in overseeing detention operations. Taking such actions will help limit and correct persistent deficiencies, as well as effect long-lasting changes and systemic improvements in ICE detention facilities." *Id.* at 15.

<sup>10</sup> Human Rights First, *Ailing Justice: Texas: Soaring Immigration Detention, Shrinking Due Process* at 24-27 (June 2018), [https://www.humanrightsfirst.org/sites/default/files/Ailing\\_Justice\\_Texas.pdf](https://www.humanrightsfirst.org/sites/default/files/Ailing_Justice_Texas.pdf).

<sup>11</sup> Department of Homeland Security, *Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes* (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and>.

<sup>12</sup> However, such separation of children and parents must be used a last resort, given that family unity is a fundamental Constitutional right that the Supreme Court has emphasized is "far more precious . . . than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1953).

The now-terminated Family Case Management Program (“FCMP”) was 99 percent effective in ensuring that asylum-seeking parents and their children appeared for their immigration court proceedings by helping them find legal representation, guiding them through the court system, and connecting them with other community resources.<sup>13</sup> It demonstrated that alternatives to detention can be effective in supporting an asylum-seeker while accomplishing the government’s interests. Employing these alternatives would better align U.S. policies with international human rights standards, which contain a strong presumption against the detention of asylum-seekers and immigrants except in cases where demonstrably necessary and proportionate to the objective, and where alternatives such as reporting requirements or financial deposits would not be effective.<sup>14</sup>

#### **b. The Proposed Rules Severely Restrict Options for Releasing Minors from DHS Custody, Contravening the FSA**

*The Existing Requirement.* Current DHS regulations, consistent with the FSA, provide that a juvenile may be released from custody to a parent, legal guardian, or other adult relative.<sup>15</sup> Also, minors who are subject to expedited removal currently are eligible for parole based on urgent humanitarian reasons or significant public benefit, absent a security risk or risk of absconding.<sup>16</sup>

*The Proposed Rules.* Under the Proposed Rules, the only individuals to whom or with whom minors could be released from ICE custody are parents or legal guardians. (Proposed Rules §212.5(b)(3), FR 45524; Proposed Rules §236.3(j)(1).) Also, while current regulations on parole would continue to apply to minors placed in removal proceedings under § 240 of the Immigration and Nationality Act, minors in expedited removal proceedings could be paroled only on the basis of medical necessity or law enforcement need—the same standards applicable to adults. (Proposed Rules §212.5(b)(3), FR 45524.)

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<sup>13</sup> DHS Office of the Inspector General (OIG), U.S. Immigration and Customs Enforcement’s Award of the Family Case Management Program, OIG-18-22, at 5, Nov. 30, 2017, <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf>.

<sup>14</sup> See, e.g., International Covenant on Civil and Political Rights (“ICCPR”), Articles 17(1), 23(2) (setting out the right to be free from arbitrary detention); and U.N. High Commissioner for Refugees, Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), citing CRC, <http://www.unhcr.org/505b10ee9.html>. See also *Damus et al. v. Nielsen*, Case No. CV 18-578 (D.D.C., July 2, 2018), [https://www.humanrightsfirst.org/sites/default/files/memorandum\\_opinion.pdf](https://www.humanrightsfirst.org/sites/default/files/memorandum_opinion.pdf) (Granting a class-wide preliminary injunction and holding DHS must follow its “Parole Directive” and give asylum-seekers individualized parole determinations). See also City Bar Letter to President Obama and Secretary Johnson, May 26, 2015 (“The City Bar believes that the United States can and must stop family detention, in accordance with due process and domestic and international law on the treatment of children and asylum seekers.”) <https://www2.nycbar.org/pdf/report/uploads/20072910-LettertoPresidentObamareLarge-ScaleDetentionofImmigrantMothersandChildren.pdf>.

<sup>15</sup> 8 CFR §236.3(b)(1); FSA ¶ 14.

<sup>16</sup> 8 CFR §212.5(b)(3).

*City Bar Recommendation.* Detention is almost never in the best interests of a child.<sup>17</sup> The FSA was designed to ensure that when children are detained, it should be in the least restrictive environment and for the shortest period of time necessary, pursuant to an individualized assessment and judicial review, and in accordance with appropriate standards. Although the NPRM alludes repeatedly to “intervening statutory and operational changes” (e.g., FR 45486), it does not explain how the HSA, TVPRA, or “operational changes” justify amendments that would result in more minors spending more time in detention. The Proposed Rules must retain the options for release of minors as provided in existing regulations, consistent with the FSA’s presumption favoring release “without unnecessary delay.” (FSA ¶ 14.)

**c. The Proposed Rules Elevate “Operational Feasibility” Over the Best Interests of the Child by Relaxing Mandates to Meet Custody and Transport Standards**

*The Existing Requirement.* The FSA contains mandatory and concrete language setting explicit standards for the transfer and custody of minors in DHS and HHS care, except in certain enumerated situations. Except during situations of “influx,” when transfers are required to occur “as expeditiously as possible,” the FSA set forth time limits for the transfer of minors to licensed facilities, later mandated by Congress to occur within 72 hours.<sup>18</sup> The government must not engage in “corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping.” (FSA Exhibit 1 section C.) Where independent transportation of UACs is impractical, the FSA nonetheless mandates that UACs be kept separated from unrelated adults. (FSA ¶25.)

*The Proposed Rules.* Within the Proposed Rules, DHS and HHS use the cover of “operational realities on the ground” to remove mandatory language and weaken the protections of the FSA and the TVPRA. By adopting a static and dated definition of “influx” that in fact mirrors the current, ongoing situation on the ground, the Proposed Rules turn the FSA’s provisions for exceptional circumstances into the default rule: Children need only be transferred to licensed facilities “as expeditiously as possible;” UACs would be transported with unrelated, detained adults whenever “separate transportation is impractical *or* unavailable;” and UACs would be transported separately from adults only “whenever operationally feasible.” (Proposed Rule §236.3(e), FR 45498; Proposed Rule §236.3(f), FR 45498.)

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<sup>17</sup> All 50 states, the District of Columbia, and U.S. territories require consideration of a child’s best interests in decisions about the child’s custody. See Child Welfare Information Gateway, Determining the Best Interests of the Child (2012), [https://www.childwelfare.gov/pubPDFs/best\\_interest.pdf](https://www.childwelfare.gov/pubPDFs/best_interest.pdf). See United States Citizenship and immigration Service, RAIO [Asylum] Officer Training, Children’s Claims at 13 (Nov. 30, 2015) (applying “the internationally recognized ‘best interests of the child’ principle” to interview procedures for child asylum seekers), [https://www.uscis.gov/sites/default/files/files/nativedocuments/Legal\\_standards\\_governing\\_Asylum\\_claims\\_and\\_issues\\_related\\_to\\_the\\_adjudication\\_of\\_children.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf) (internal pagination at 1193). The Convention on the Rights of the Child reflects virtually unanimous global consensus that “[i]n all actions concerning children ... the best interests of the child shall be a primary consideration.” United Nations, G.A. Res. 44/25, Convention on the Rights of the Child, art. 3 (Nov. 20, 1989). Every country in the world but the United States has ratified the Convention on the Rights of the Child, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en).

<sup>18</sup> 8 USC §1232(b)(3).

By codifying the FSA’s emergency exceptions into the default standard used by DHS and HHS, the Proposed Rules will have the effect of lowering the standard of care for all children. This replacement of concrete standards with greater “flexibility” for DHS and HHS will result in less accountability. Even the emergency standard itself has been watered down where it is expedient (compare FSA language directing that the government “shall place all minors [in licensed programs] as expeditiously as possible” with Proposed Rule language requiring that ORR “makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible.”)

These lowered standards recur throughout the Proposed Rules. For instance, the FSA requires that minors be provided “contact with family members who were arrested with the minor.” (FSA ¶ 12A.) The Proposed Rule, in contrast, conditions contact with family members—proven to reduce the traumatizing effects of detention—on whether the contact is unduly burdensome to the government agency. Instead, the government “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.”<sup>19</sup> Again, operational feasibility cannot and should not be used to undermine the animating principle of the FSA, which is to ameliorate the harmful effects of holding children in detention.

*City Bar Recommendation.* The Proposed Rules should adopt the considered, objectively measurable language included in the FSA setting standards for the transfer and custody of all minors. Loosening the standards based on “operational feasibility” will heighten the risk that children will be exposed to dangerous conditions during their transfer and subjected to prolonged detention in substandard facilities. Furthermore, the standards for transfer and custody should explicitly apply to all children—accompanied and unaccompanied—as required by the FSA.

#### **d. The Proposed Rules Destabilize “Unaccompanied Alien Child” Determinations and Strip Away Basic UAC Protections, Contrary to the TVPRA**

*The Existing Requirement.* In creating DHS and charging it with most of the responsibilities of the former Immigration and Naturalization Service, the HSA deliberately carved out custodial responsibility for the “unaccompanied alien child,” a newly defined term, and reserved this responsibility for ORR.<sup>20</sup> Pursuant to the TVPRA, a child determined to be a UAC benefits from measures that provide at least a minimal guarantee of child safety and facilitates the child’s participation in the immigration system. These protective measures include: ORR safety assessments before release,<sup>21</sup> exemption from the one-year filing deadline for asylum, exemption

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<sup>19</sup> Proposed Rules §236.3(g)(2).

<sup>20</sup> HSA at §462 (b)(1); 6 U.S.C. §279(b)(1). Congress’s protective intent is reflected in remarks in the Congressional Record: “It would not be appropriate to transfer this responsibility to a Department of Homeland Security. . . ORR has decades of experience working with foreign-born children, and ORR administers a specialized resettlement program for unaccompanied refugee children.” 148 Cong. Rec. S8180 (2002) (letter from Sen. Lieberman & Sen. Thompson).

<sup>21</sup> TVPRA §235(c)(3).

from the safe third country bar to asylum,<sup>22</sup> USCIS initial jurisdiction over an asylum application,<sup>23</sup> and voluntary departure at no cost to the UAC.<sup>24</sup>

*The Proposed Rules.* The Proposed Regulations provide that “[a]n alien who is no longer a UAC is not eligible to receive legal protections limited to UACs.” (Proposed Rules §236.3(d), FR 45525; Proposed Rules §410.101, FR 45530.) DHS’s Proposed Regulations purport to have no effect on USCIS’s initial jurisdiction over UACs’ asylum applications, while simultaneously stating that an individual who was initially designated a UAC ceases to receive UAC protections upon reaching age 18, being reunited with a parent or guardian, or attaining lawful status. (Proposed Rules §236.3(d), FR 45525.) But by eliminating the protections afforded to UACs, the regulations leave USCIS no basis to take jurisdiction over UAC asylum cases. To be effective, the provisions that attach when a child is determined to be a UAC must remain in place until removal proceedings are resolved or applications for relief are adjudicated. Several factors reinforce this conclusion.

1. The text and structure of the TVPRA’s UAC provisions reflect the intended permanent effect of those provisions. Notably, a range of protections for UACs, including those related to asylum, were enacted under the heading “Permanent protection for certain at-risk children.”<sup>25</sup> Moreover, the grant of initial jurisdiction to USCIS over “any asylum application *filed by*” a UAC clearly indicates the possibility that some applicants will not continue to meet the UAC definition throughout the pendency of the application.
2. The TVPRA protections for UACs would not be given effect if they were temporary. It is impermissible to interpret a statute in a way that renders any of its terms ineffective. For example, the provision exempting UACs from the one-year filing deadline would be ineffectual if the deadline could be subsequently reinstated against a child—potentially when the one-year timeframe was nearly or already expired.
3. In passing the TVPRA, Congress cited its purposes “to protect children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution and other life threatening circumstances” and to fulfill “a special obligation to ensure that these children are treated humanely and fairly.”<sup>26</sup> Turning 18 or reuniting with a parent does not represent a bright line that dispenses with the need to compensate for a child’s vulnerability.
4. The USCIS Asylum Division, which has been given initial jurisdiction over UAC cases by Congress, has instructed its officers that, “children . . . are prone to be more severely and

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<sup>22</sup> §235(d)(7); INA 208(a)(2)(E).

<sup>23</sup> 8 U.S.C. §1158(b)(3)(C); INA §208 (b)(3)(C).

<sup>24</sup> §235(a)(5).

<sup>25</sup> TVPRA §235(d).

<sup>26</sup> 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008).

potentially *permanently* affected by trauma than adults”<sup>27</sup> (emphasis added). HHS has referred to the HSA and TVPRA as “mov[ing] towards a child welfare-based model of care for children.” As explained in 2012 by the CIS Ombudsman, the “TVPRA’s procedural and substantive protections were designed to remain available to UACs throughout removal proceedings, housing placement, and the pursuit of any available relief.”<sup>28</sup> After three years’ experience under the TVPRA, a CIS Ombudsman report identified multiple abuses and inefficiencies inherent in practices then used to make jurisdictional determinations.<sup>29</sup> The report concluded that that “USCIS’ policy of redetermining UAC status creates delay and confusion. Instead of facilitating expedited, non-adversarial interviews for young asylum-seekers, it essentially disregards UAC status determinations rendered by other federal agencies.”<sup>30</sup> The Ombudsman recommended eliminating UAC redeterminations to promote fairness and “a predictable and uniform process.”<sup>31</sup> USCIS adopted these recommendations in 2013,<sup>32</sup> providing that USCIS would take initial jurisdiction based on a previous UAC determination, even where the applicant had turned 18 or reunited with a parent or legal guardian.<sup>33</sup> In other words, a change in circumstances taking a child outside the four corners of the UAC definition would not have the effect of removing the TVPRA’s initial jurisdiction provisions. The NPRM offers no principled reason why any other provisions that attach to UACs should be treated differently.

In practice, serial redeterminations of eligibility for UAC protections would likely entail repetitive questioning of children during a time when they are detained and vulnerable. Under the Proposed Regulation, children could be reclassified one or more times, potentially leading to changes in custody which could in turn disrupt or impair attorney-client relationships as well as the child’s mental health. The cumulative effect would be to increase uncertainty and unpredictability of case timelines and legal decision-making. It is difficult to credit DHS’s assertion that its proposed

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<sup>27</sup> See United States Citizenship and Immigration Service, RAI0 [Asylum] Officer Training, Children’s Claims at 44 (Nov. 30, 2015), [https://www.uscis.gov/sites/default/files/files/nativedocuments/Legal\\_standards\\_governing\\_Asylum\\_claims\\_and\\_issues\\_related\\_to\\_the\\_adjudication\\_of\\_children.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_issues_related_to_the_adjudication_of_children.pdf) (internal pagination at 1225).

<sup>28</sup> Office of the Citizenship and Immigration Services Ombudsman, “Ensuring a Fair and Effective Asylum Process for Unaccompanied Children” (Sept. 20, 2012), <https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac.pdf>.

<sup>29</sup> For example, the report found that “USCIS devotes significant time and effort to adjudicating UAC filings only to dismiss almost half of that work,” and that “in some instances, ICE uses the [UAC asylum information] sheet as a tool to compel children to complete pleadings or wait until certain hearing dates . . . thereby withholding access to the UAC asylum process.” *Id.* at 6.

<sup>30</sup>*Id.* at 1.

<sup>31</sup> *Id.* at 6.

<sup>32</sup> USCIS Asylum Division, “Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed By Unaccompanied Alien Children” (May 28, 2013), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf>.

<sup>33</sup> *Id.* at 2. Significantly, USCIS’s practice of deferring to “an affirmative act by HHS, ICE or CBP to terminate the UAC finding” is a creature of the 2013 Memo, and has no statutory basis. *Id.*

regulation would have no effect on initial asylum jurisdiction, given the ramifications of a redetermination under the UAC definition under current policy.<sup>34</sup> Accordingly, the prospect of impending redetermination could incentivize hasty or premature filings that in turn may compromise the quality of the evidence and arguments presented, further burdening adjudicators and potentially leading to the denial of a meritorious claim. A child applying for asylum after a redetermination would be forced to proceed in an adversarial setting, impeding the child's participation in the process.

*City Bar Recommendation.* Conditioning UAC protections on a child's remaining under 18 and without an available parent or legal guardian is anathema to the TVPRA, and is unnecessary to the objective of codifying the FSA. Accordingly, proposed §236.3(d) and the final sentence of proposed §410.101 should be eliminated.

### III. CONCLUSION

The NPRM expressly concedes that the Proposed Rules fall short of implementing the FSA, and merely "parallels" its substantive terms while providing "similar substantive protections and standards." (FR 45486.) Tellingly, the NPRM's brief cost-benefit analysis demurs from quantifying the fiscal costs of the Proposed Rules; not one dollar amount is mentioned.<sup>35</sup> (FR 45488-489.) Instead, the "Costs and Benefits" analysis candidly states that "[t]he primary benefit of the proposed rule would be to implement the FSA in regulations, and in turn to terminate the agreement as contemplated by the FSA itself." (FR 45489.) However, a merely illusory implementation of the FSA does not fulfill the conditions for terminating the settlement agreement.

The FSA recognizes the special vulnerability of children, and therefore seeks to minimize the harm posed by prolonged and harsh detention. The proposed Rule directly undermines this animating principle of the FSA and instead prioritizes deterrence and "operational feasibility" while parroting the terms of the FSA, but not its actual meaning. The American Academy of Pediatrics, the American Medical Association, and the American College of Physicians all oppose prolonged detention of children and families due to the documented negative health consequences inherent in detaining minors. If DHS truly wishes to fulfill its duty to treat children with "dignity, respect, and special concern for their particular vulnerability as minors," as it claims (FR 4549) it should honor the "General Policy Favoring Release" discussed at the FSA ¶¶14-18. Based on the foregoing, we respectfully urge the agencies to withdraw this rulemaking

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<sup>34</sup> See USCIS Asylum Division, *supra* n.32. Already the Board of Immigration Appeals has undermined protections for those designated UACs at apprehension by holding that an immigration judge has jurisdiction to make an independent assessment of whether a child is a UAC and whether the immigration court can take jurisdiction over the asylum case. *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018). *M-A-C-O-* does not require the immigration judge to hear the case; the jurisdictional question is left to the judge to decide.

<sup>35</sup> By ICE's estimate, each bed in an ICE facility costs taxpayers approximately \$133.99 per day, although other estimates are much higher, and ICE's estimates have been criticized by the Government Accountability Office. See Jaden Urbi, "This Is How Much It Costs to Detain an Immigrant in the US," CNBC (June 20, 2018), <https://www.cnbc.com/2018/06/20/cost-us-immigrant-detention-trump-zero-tolerance-tents-cages.html>.

Thank you for the opportunity to comment on the Proposed Rules. We look forward to your response to the public's input.

Respectfully,

Immigration & Nationality Law Committee  
Victoria F. Neilson, Chair

Children & the Law Committee  
Sara L. Hiltzik, Chair

Council on Children  
Lauren A. Shapiro, Chair

Family Court & Family Law Committee  
Glenn Metsch-Ampel, Chair

International Human Rights Committee  
Lauren Melkus, Chair