

Explainer: Final Regulations on the Care of Unaccompanied Children in Federal Custody

Since 1997, the [Flores settlement agreement](#) has set basic standards of care for the custody, care, and release of all children in federal immigration custody, including unaccompanied immigrant children. The Trump administration tried and failed to eviscerate this settlement, by replacing it with regulations that further endangered children. On April 30, 2024, the Biden administration published its own final regulations, which govern the care of unaccompanied children in the Department of Health and Human Services (HHS) Office of Refugee Resettlement's (ORR) custody. **The final rule codifies — and in some respect expands — protections for unaccompanied children in ORR custody. Unfortunately, it also leaves critical gaps in oversight, transparency, and licensing.**

ORR is set to implement this rule on July 1, 2024, and has already gone to court to terminate the *Flores* settlement agreement as to HHS. The explainer below details the rule's interaction with the *Flores* settlement and offers a high-level analysis of the rule by experts in the rights and well-being of unaccompanied immigrant children.

How Could the Final Rule Impact the *Flores* Settlement Agreement?

The *Flores* settlement currently binds both ORR and the Department of Homeland Security (DHS). Under U.S. law, DHS must generally transfer unaccompanied children into ORR custody within 72 hours of their apprehension. ORR is then required to facilitate children's safe release to sponsors, usually family members.

The *Flores* settlement agreement was never meant to be permanent. The federal judge who presides over the implementation of the *Flores* settlement agreement has the authority to release the federal government from the agreement so long as the administration fully codifies the protections in *Flores*.

On May 10, 2024, the government [moved to terminate](#) the *Flores* settlement agreement as to HHS, arguing that ORR's final rule sufficiently codifies *Flores*. If the court finds the final rule to be consistent with the *Flores* settlement agreement and finds partial termination as to HHS appropriate, children and youth in ORR custody would lose the settlement's oversight protections. However, the settlement agreement will remain intact for youth in DHS custody, which remains a dangerous and deadly place for children and youth, particularly for [Black](#), [Brown](#), or [Indigenous](#) children.

The Biden administration's ORR Foundational Rule generally raises the standards for children in federal custody beyond the terms of the *Flores* settlement agreement. It is not without problems, however, especially if the final rule leads to the termination of *Flores* oversight.

What Is the Issue with the Final Rule Fully Replacing *Flores* Monitoring for Children in ORR Custody?

Flores has been the primary tool for oversight and accountability for safe conditions for children in immigration custody for decades. Over the past few years, *Flores* counsel has successfully enforced the *Flores* Settlement as to HHS on a wide range of issues, including: the administration of psychotropic medication ([2018](#)), inadequate federal regulations under the Trump Administration ([2019](#)), inappropriately delayed release of children during the COVID-19 pandemic ([2020](#)), and unlicensed emergency intake sites ([2021](#)).

A primary concern with the Biden administration's final rule is that it fails to codify the core requirement of state licensing. This is particularly concerning as **a majority of unaccompanied children are located in ORR shelters within states (Texas and Florida) that refuse to license ORR facilities, due to anti-immigrant governments.** Lack of state licensing means, for example, that state child welfare agencies do not regularly respond to reports of abuse or neglect in ORR facilities. **Without state licensing, *Flores* monitoring has been the only external mechanism available to those children to ensure that they do not suffer rampant abuse or mistreatment.** The final rule permits ORR to place children in facilities in these states as long as those facilities

“meet the State’s licensing requirements,” without the oversight needed to ensure those requirements are met in practice. Although *Flores* counsel are not a replacement for the robust capacity of state licensing authorities, the termination of *Flores* would mean that no third party, whether state child welfare authorities or *Flores* monitors, could ensure the safety of most unaccompanied children in those states. While the explanatory text to the final rule references forthcoming proposed federal licensing rules, it provides no insight into what federal licensing will entail or when those regulations will be issued.

State licensing is a core protection of the *Flores* settlement agreement because state licensing agencies have the independence, administrative infrastructure, and specialized expertise to ensure that ORR complies with child welfare standards and investigates reported violations that endanger the safety and wellbeing of children. **State licensing is such an essential protection for children that it is the only requirement that both the plaintiffs and the government agreed should survive even after the termination of the *Flores* settlement.** By failing to preserve state licensing as a baseline protection, the rule fails to codify this core provision in *Flores*.

In the final rule, the Biden administration purports to address oversight concerns via the creation of a new HHS Ombuds. Unfortunately, the office lacks sufficient oversight authority and independence. The importance of strong regulatory provisions regarding oversight cannot be overstated. An effective oversight body would need to meet some basic criteria, such as having true independence from ORR; capacity to screen and inspect facilities; robust access to information needed for investigations; resources to investigate all complaints and make findings, continuous monitoring, and inspections of facilities; and perhaps most importantly, the power to compel ORR to correct any misconduct. ORR fails to provide such guardrails in its proposed Ombuds office. The capacity of the HHS Ombuds office, or other oversight body, must be significantly strengthened if it is to provide meaningful oversight for children in custody.

How Does the Final Rule Otherwise Improve the Standards of Care for Children in ORR Custody?

A coalition of nearly 200 organizations dedicated to serving and defending the rights of children, immigrants, refugees, and individuals with disabilities [submitted a series of detailed comments](#) to the government. The government accepted many suggestions from stakeholders; in particular, the final rule:

- **Strengthens protections for unaccompanied children with disabilities:** The final rule includes better compliance with Section 504 of the Rehabilitation Act and the U.S. Supreme Court’s *Olmstead v. L.C.*, which require that individuals with disabilities be served in the most integrated setting appropriate to their needs and not be unnecessarily segregated or held in institutional settings. The rule also requires reasonable modifications and auxiliary aids and services to support children in less restrictive placements.
- **Improves due process protections for children in restrictive settings:** The final rule codifies the procedural requirements from the [preliminary injunction in the *Lucas R. v. Becerra* case](#) about Placement Review Panels (PRPs), which give children in restrictive settings the opportunity to challenge ORR’s decisions regarding the security level of their detention. Under the injunction and the final rule, ORR must convene the panel and make a decision much faster, while bearing a higher burden to prove that a restrictive setting is appropriate.
- **Recognizes the need for expanded legal representation and Child Advocates:** The final rule recognizes the importance of legal services and Child Advocates for unaccompanied children. These critical safeguards, provided for through the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), play a vital role in protecting the rights, safety, and wellbeing of children while in custody and help children access legal protections for which they are eligible to prevent their return to trafficking, exploitation, or other harm.
- **Redefines and limits the use of “influx” facilities:** Influx generally refers to a period when the numbers of unaccompanied children arriving at the border are high. During an influx, ORR can use unlicensed or emergency shelters that do not have to meet the same standards as its network of licensed facilities. The final rule updates the definition of influx to be a situation in which 85% or more of ORR’s net standard bed capacity is occupied or held for placement for seven consecutive days. This new definition will limit the placement of children in emergency facilities.

- **Explicitly considers the harms of continued federal custody and the benefits of release:** This is an important step in recognizing the value of community and family placement. With this rule, ORR’s release and reunification decisions must also include explicit consideration of the potential benefit to the child of release to a community placement. The final rule also ensures that post-release services (PRS) are voluntary, which aligns the program with longstanding principles of case management. It also ensures that children who want to continue receiving PRS can still receive them even if a non-parent sponsor is no longer interested.
- **Protects the right to access reproductive care and better protects parenting youth:** The final rule codifies protections for abortion access and non-directive counseling—something the prior administration actively sought to preclude before facing a federal court injunction. Since nearly 80% of unaccompanied children are held in states where abortion access is severely limited, timely and prompt transportation and access to the full scope of reproductive care is critical. The codification of these rights ensures that pregnant youth are permitted to make their own decisions about their medical care, their bodies, and their future. We also applaud ORR for removing language from the proposed rule related to circumstances in which parenting youth could be separated from their children. The final rule instead affirms the importance of family unity.
- **Improves language identification practices and language access for children:** We welcome the final rule’s broad guarantees of language access to unaccompanied children. We also welcome specific improvements to language access made elsewhere in the rule, such as requiring that a notice of placement be provided in the child’s native or preferred language and including consideration of Indigenous language speakers in needs assessment.
- **Prevents retaliation against legal service providers:** We applaud the language directing ORR not to engage in retaliatory actions against legal service providers because of advocacy or appearance in an action adverse to ORR. This language is consistent with ORR’s intent to promote and protect unaccompanied children’s ability to access legal counsel. Immigration proceedings are adversarial in nature and litigants should not be punished or retaliated against for taking positions that advance the legal rights of the children they represent.
- **Recognizes that INA section 292 does not prohibit individuals in removal proceedings from receiving Government-funded representation:** We appreciate the clarification in the final rule that, while ORR does not read Section 292 of the Immigration and Nationality Act (INA) as establishing a “right to counsel paid for by the government,” Section 292 also does not “place any limitation on the Government’s discretion to fund representation under section 235(c) of the TVPRA.”

In these and other respects, ORR has been responsive to stakeholder input and finalized regulations that will improve conditions for generations of children. The final rule failed, however, to include [robust data transparency provisions](#) advocates proposed, and critically failed to [eliminate the use of secure facilities](#) within ORR’s network.

Could this Final Rule Co-Exist with Flores Monitoring?

Yes! All the benefits of the final rule could exist concurrently with the *Flores* settlement agreement. This outcome would preserve the critical need for oversight in unlicensed ORR facilities, while children benefit from the significant improvements ORR made in the final rule. However, the Biden administration has opted to pursue the termination of *Flores* as it impacts HHS.

What Happens Next?

The judge overseeing the *Flores* settlement agreement has scheduled a hearing on the government’s motion to terminate *Flores* as to HHS on June 21, 2024. It will be up to the federal court to decide the future of *Flores* monitoring for those children, in light of this final rule. Without further protections that address the concerns outlined above, it would be premature to end the *Flores* settlement agreement.

For more information, please contact Anne Kelsey at the Young Center for Immigrant Children’s Rights (akelsey@theyoungcenter.org) and Megan Mack at Acacia Center for Justice (mmack@acaciajustice.org).