

Explainer: Biden's Proposed Regulations on the Care of Unaccompanied Children in Federal Custody

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In October 2023, the Biden administration released a Notice of Proposed Rulemaking to adopt [regulations](#) relating to the care of unaccompanied children in the Department of Health and Human Services Office of Refugee Resettlement's (ORR) custody. When finalized, the regulation will clarify and codify certain protections that are already in place, impacting children for decades to come. Crucially, final regulations would likely replace the part of the [Flores Settlement Agreement](#) that relates to HHS custody, which currently provides the only independent safety net to protect children in federal custody. The explainer below details the proposed regulation's interaction with *Flores*, the stakes at hand, and the response by dozens of experts in child welfare and the service and care of unaccompanied children.

How does ORR's proposed rule impact the *Flores* Settlement Agreement?

The *Flores* Settlement currently binds both ORR and the Department of Homeland Security (DHS). The settlement sets minimum standards for the placement, release, and treatment of *all* immigrant children and youth detained in federal custody—whether they enter with their parents or legal guardians, or they enter unaccompanied. 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.

If the Biden administration's proposed Foundational Rule is consistent with the *Flores* Settlement agreement, **substantial elements of *Flores* may be terminated for children and youth in ORR custody.** However, *Flores* will remain intact for youth in DHS custody, which remains a dangerous and deadly place for countless [Black](#), [Brown](#), and [Indigenous](#) children and youth.

The Trump administration made the evisceration of *Flores* one of its central policy goals and published joint ORR and DHS regulations that were fundamentally inconsistent with the *Flores* Settlement. Nearly [100,000](#) stakeholders and immigration, child welfare, and medical experts rose in opposition to the Trump regulations and a series of legal challenges ensued. In 2020, a federal court of appeals [agreed](#) with the federal judge presiding over *Flores* that most of the Trump rule provisions impacting children and youth in DHS custody and some of the provisions impacting kids in ORR custody could not go into effect.

The Biden administration's proposed ORR Foundational Rule presents some improvements and challenges, while learning from previous regulatory efforts to end *Flores*. Codifying ORR's obligations presents both a great opportunity and risk for unaccompanied children and youth, who have relied on court-appointed monitors and litigation to guarantee basic standards of care for decades. **It is therefore important to ensure that the ORR Foundational Rule not only includes all the basic protections guaranteed by *Flores*, but also expands on them.**

raising standards for the care and custody of unaccompanied children and youth to reflect best practices in the fields of child health, welfare, and development.

How have children's advocates responded to this rule?

To ensure the regulations are as strong as possible, a coalition of nearly 200 organizations, academics, attorneys, and medical practitioners dedicated to serving and defending the rights of children, individuals with disabilities, immigrants, and refugees have submitted a series of detailed comments to the government. These comments include calls to:

- **Establish strong, critical oversight over ORR**, given the possible termination of part of *Flores*. ORR's proposed rule includes an Ombuds office which, if strengthened, would provide new, independent oversight to support children if and when *Flores* oversight ends.
- **Ensure that ORR requires state licensing** and improve detention conditions for unaccompanied children in any ORR facility, including **emergency or "influx" facilities**, which have been the subject of reports of abuse and neglect of children and youth under the **Trump** and **Biden** administrations.
- **Support the robust expansion of legal and child advocate services** for unaccompanied children, so every child has the support they need while facing the risk of deportation and return to their families and communities.
- **Guarantee access to reproductive and abortion care**—a right that was strenuously attacked under the Trump administration and remains in danger as over 80% of children and youth in ORR's network are in states that either fully or partially ban abortion access—and access to stronger protections for pregnant and parenting youth.
- **End the use of juvenile jails, or "secure" ORR facilities**, for unaccompanied children facing restrictive placements and ensure that children and youth have access to supportive, **not punitive**, behavioral supports while in ORR custody.
- **Protect the rights of children with disabilities**, since ORR has long **fallen short** on compliance with decades of disability legislation and in meeting the individualized needs of all children in its care, including children and youth with disabilities.
- **Advance safe standards for sponsor vetting** as well as, when appropriate, **home studies to assess the living conditions and standards of care children would receive, and expand access to post-release services** that protect children from exploitation. The prior administration **weaponized** the sponsor vetting process, keeping children and youth in prolonged detention and deporting their families.
- **Codify safeguards for LGBTQ+ children and youth in ORR custody**, including requirements for staff training and expanded services to help guarantee their safety, wellbeing and protection from discrimination.

By law, the federal government is required to review all submitted comments. Input from a diverse coalition of experts, summarized in this **global comment**, pushes ORR to consistently do right by children without requiring monitoring by a federal court. ORR has long trailed the domestic child welfare sector in its treatment of unaccompanied children and youth. This rulemaking offers ORR an opportunity to treat unaccompanied children as children first and foremost, deserving of care and protection.

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