

February 23, 2015

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Office of Refugee Resettlement
Administration of Children and Families
Department of Health and Human Services
370 L'Enfant Promenade, SW
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Washington, DC 20024

Subject: Public Comments from Youth Advocates on the Department of Health and Human Services' Interim Final Rule to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children

Dear Ms. Sohn:

Thank you for the opportunity to comment on the Department's Interim Final Rule on procedures to prevent, detect, and respond to sexual abuse and sexual harassment involving unaccompanied children (UCs) in the Office of Refugee Resettlement's (ORR) care provider facilities. The undersigned represent organizations that advocate for youth at the local, state, and federal levels. Many of these organizations submitted or signed on to public comments on the Department of Justice's proposed Prison Rape Elimination Act (PREA) standards for juvenile facilities and the Department of Homeland Security's proposed standards as well.

We applaud the Department for proposing strong regulations with the potential to significantly improve the safety of UCs in ORR facilities. We appreciate that the Department looked to the Department of Justice (DOJ) PREA standards for juvenile facilities when developing regulations for ORR care provider facilities. The DOJ standards reflect years of careful research and analysis, as well as the input from hundreds of public comments. Thus, they are a solid foundation from which to work.

We also commend the Department for departing from the DOJ standards in a number of ways that provide additional protections to youth in the Department's care. These include:

- In § 411.11, requiring that all policies and services related to the standards be implemented in a culturally-sensitive and knowledgeable manner that is tailored for a diverse population. This language recognizes the need to frame the approach to sexual misconduct prevention, detection, and response in ways that respond to the culturally diverse group of children in ORR's care provider facilities.
- In § 411.17, requiring that when care providers make upgrades to video or monitoring technology, they do so in a way that maintains UC's privacy and dignity. Video and other monitoring technology can serve an important role in a

facility's approach to sexual misconduct, but the Department correctly recognizes that officials must not over-rely on such technology in a way that unnecessarily exposes UCs or degrades their dignity.

- In § 411.63, requiring that care provider facilities that receive allegations that a UC was sexually abused or harassed at another care provider facility notify ORR immediately, but no later than 24 hours after receiving the allegation. This timeframe is shorter than that in the corresponding DOJ standard and better reflects the urgency of the need to take action to investigate an allegation.
- In § 411.81, barring any staff members with substantiated allegations of sexual abuse or sexual harassment against UCs from employment at any ORR care provider facility. The Department has taken a strong stance on the seriousness of sexual misconduct against UCs by requiring that perpetrators not be rehired – a stance that reinforces the agency's zero-tolerance approach to sexual misconduct prevention, detection, and response.
- In § 411.91, requiring that, when the facility gathers information indicating that a youth has experienced prior sexual victimization or has perpetrated sexual abuse, the facility makes appropriate medical and/or mental health referrals and provides youth with a consultation with a medical and/or mental health professional within 72 hours of the referral. This timeline is more appropriate than the 14-day timeline outlined in the DOJ standards and will help ensure that the greatest number of youth in ORR custody will receive the benefit of health and mental health services.

Although we strongly support these proposed standards and many others, we recommend several revisions that will ensure that the Department does its best to protect UCs in ORR's custody.

- **§ 411.10 (Coverage of ORR care provider facilities):** We are concerned about the breadth of the language in the standard that allows the Director of ORR to waive compliance with standards in emergency care facilities “for good cause.” Although we recognize that compliance may raise some challenges for particular care providers, the Department's standard bases justification for granting a good cause exception upon “the temporary nature of the emergency care provider facility.” Given the fluid nature of the population in ORR facilities, and the fact that victimization can occur at any time during a youth's custody, we are concerned that the exception leaves youth in a number of facilities vulnerable to sexual abuse and harassment. We recommend removing the good cause exception and working with providers on ways of meeting the Department's standards. For example, the Department could permit a provider to use alternative means of meeting one or more provisions of the standards as long as the alternative satisfies the intent of the standard. If, however, the Department chooses to retain the good cause exception, we urge it to add language that conditions any waiver on a finding by the Director that the waiver will not jeopardize the safety of children in

the facility and that requires the care provider facility to outline how it plans to protect youth in spite of being unable to comply with a particular aspect of the standards. Additionally, while it is not practicable to apply all the standards to community-based foster care placements, ORR should ensure that children in all ORR placements are protected and that ORR is monitoring all facilities in which it places children. The rule should apply basic standards, such as the zero tolerance toward sexual abuse and sexual harassment, reporting of allegations to Child Protective Services and ORR, and access to medical care and confidential support services, to the agencies that provide traditional foster care placements.

- **§ 411.12 (Contracting with or having a grant from ORR for the care of UCs):** We support the requirement that contracts with care providers include terms obligating providers to comply with the Department's standards. However, we are concerned that the current language may delay full implementation of the standards among providers that are not scheduled for contract renewals in the near future. If care providers are under contracts that are not up for renewal for a year or more, facilities may wait until the time of contract renegotiation to begin their implementation work. This also seems inconsistent with the Department's stated intent to have all care provider facilities comply with the standards by June 23, 2015. To ensure full implementation of the standards in the timeliest way, we recommend changing section (a) to require that care provider facilities under existing contracts comply with the standards within 60 days of publication of the final rule, and that this requirement also be memorialized in any new contracts or contract renewals. If the Department cannot require compliance under existing contracts, we urge the Department to renegotiate all contracts prior to June 2015 in order to meet the June 23, 2015 deadline.
- **§ 411.13 (UC supervision and monitoring):** As written, the standard only requires that care provider facilities make their "best effort[s]" to comply with staffing plans. Staffing plans serve a key role in ensuring adequate supervision. Thus, we recommend that the Department revise the standard to align with the DOJ's juvenile facility standards: care provider facilities "shall comply with the staffing plan except during limited and discrete exigent circumstances, and shall fully document deviations from the plan during such circumstances." This language will ensure adequate supervision levels while also allowing for flexibility in the case of emergencies.
- **§ 411.14 (Limits to cross-gender viewing and searches):** We applaud the Department's decision to ask youth who identify as transgender or intersex by which gender of staff they feel most comfortable being searched. However, we are concerned that the standard does not obligate care provider facilities to honor that request. We recommend adding the following language to the standard: "Care provider facilities shall honor this request absent exigent circumstances and shall document and justify any such deviations from the youth's preferred gender of staff." We also observed that the Department's standards, unlike the DOJ juvenile facility standards, do not include a requirement that care provider facilities offer

transgender and intersex UCs the opportunity to shower separately from other UCs. This may be because all ORR care provider facilities allow all youth to shower separately. If this is not the case, however, we recommend incorporating this protection into the standard. Finally, we recommend modifying the final sentence of section (d) of the standard to read “If the UC has special needs and requires assistance with such activities, the care provider facility staff member must be of the same gender as the UC, or, if the UC identifies as transgender or intersex, of the UC’s preferred gender of staff, when assisting with such activities.”

- **§ 411.16 (Hiring and promotion decisions):** We are concerned that the Department has not specified what care provider facilities must include in a “background investigation” prior to hiring new staff or enlisting the services of contractors. Without greater detail, care provider facilities may vary widely in their interpretation of this standard. We urge the Department to adopt the requirements in the corresponding DOJ juvenile facility standard (§ 28 C.F.R. § 115.317(c)), which would require care provider facilities to perform a criminal background records check; consult any child abuse registry maintained by the state or locality in which the employee would work; and consistent with federal, state, and local law, make their best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse. We would encourage the Department to go beyond the DOJ standard to require that providers ask previous employers about any past substantiated child abuse or sexual harassment of staff or youth as well. This added guidance will ensure that ORR can have confidence in the quality and scope of background investigations.
- **§ 411.31 (Care provider facility staff training):** Although we agree with all of the topics that the Department has included in the staff training standard, we urge the Department to add a number of topics that are listed in the DOJ juvenile facility standard on staff training (28 C.F.R. § 331): the dynamics of sexual abuse and sexual harassment in facilities that house youth, the common reactions of youth victims of sexual abuse and sexual harassment, and how to distinguish between consensual sexual contact and sexual abuse between youth. We also recommend including training on evidence preservation techniques as a discrete requirement of the staff training curriculum, given the importance of evidence preservation to full and effective investigations of allegations of sexual misconduct. Parts of the Department’s standards imply that staff should have this knowledge (e.g., § 411.64, Responder duties), but including it as an identified topic will ensure that all staff have these skills. Finally, we recommend that the Department include a schedule for refresher training instead of stating that staff must receive refresher training “as appropriate.” We believe that the DOJ standards’ requirement that staff receive refresher training every two years, with facilities providing refresher information in interim years, is a sound approach that ensures that staff retain critical knowledge and skills.

- **§ 411.51 (Reporting) and § 411.52 (Grievances):** We applaud the Department for outlining requirements for a strong reporting system for sexual misconduct. However, the standards omit two important provisions from the DOJ juvenile facility standards that are aimed at ensuring that reports of incidents are not directed to staff members who are the subject of the complaint (see 28 C.F.R. §§ 115.352(c)(1) and (c)(2)). We urge the Department to include language in the standard clarifying that reporting systems must ensure that youth do not have to submit grievances or make reports to staff members who are the subject of the complaint, and that care provider facilities have procedures in place to ensure that reports and grievances are not referred to staff members who are the subject of a complaint.
- **§ 411.53 (UC access to outside confidential support services):** As written, the standard only requires that facilities “utilize *available* community resources and services” for UCs who make allegations of sexual abuse (emphasis added). Victim advocacy resources vary from jurisdiction to jurisdiction, and so as written, the standard could leave youth in a position of not having access to victim advocacy services if there are none available in the community. By contrast, the corresponding DOJ standard states that juvenile facilities “shall provide residents with access to outside victim advocates,” which facilities may do by providing contact information for local, state, and national organizations. 28 C.F.R. § 115.353(a). The Department’s proposed standard does obligate care providers to enter into or attempt to enter into memoranda of understanding with national organizations. However, even if care providers are not able to secure memoranda of understanding with these organizations, they can and should still provide youth with access to these organizations. Thus, we recommend replacing the current language listed above with the DOJ’s language outlining an affirmative obligation.
- **§411.65 (Coordinated response):** We recommend including language that provides that when a victim is transferred between ORR facilities, in addition to informing the receiving facility, ORR must take affirmative steps to ensure that the victim receives needed medical or social services and take any necessary action to ensure that the investigating agency has the information it needs to complete its investigation.
- **§ 411.67 (Protection against retaliation):** We applaud the Department for including strong protections against retaliation for individuals who report or participate in investigations of alleged sexual misconduct. However, the Department’s standard departs from the DOJ juvenile facility standard by not requiring that care provider facilities establish a written policy to protect individuals from retaliation. Given that a willingness to report misconduct depends on a retaliation-free environment, we urge the Department to require care provider facilities to outline their plans in a written policy.

- **§ 411.71 (ORR monitoring and evaluation of care provider facilities following an allegation of sexual abuse or sexual harassment):** As written, the standard requires ORR to develop written policies and procedures for incident monitoring and evaluation of sexual abuse and sexual harassment allegations – policies and procedures that will be binding on ORR care facility providers. We had hoped that ORR would include details of these requirements in the proposed standards themselves so that they would receive the benefit of public comment. We now urge the Department to include more detail about these requirements in the final standards themselves. We also urge the agency to look to the DOJ’s related juvenile facility standard (28 C.F.R. § 115.386) and incorporate the detail from section (d), which outlines important variables for officials to consider when learning from incidents of sexual misconduct. Finally, we urge the Department to include language requiring the agency to refer allegations that it determines to be inadequate or incomplete to the Department of Justice or another investigating authority, either in this standard or another standard on investigations. ORR should take steps to ensure that all allegations have been investigated fully in situations where local efforts have not produced that result. ORR could also develop its own capacity to investigate alleged incidents, which would provide an important check on situations where the Department does not have confidence in the quality or scope of a local investigation.
- **§ 411.102 (Data collection):** As written, the standard requires care provider facilities to gather and provide to ORR a number of key pieces of information on allegations of sexual misconduct. However, the Department’s list of required information is much more limited than what the DOJ standards require for data collection: at a minimum, the data necessary to answer questions from the most recent version of the DOJ’s Survey of Sexual Violence (28 C.F.R. § 115.387). The Survey of Sexual Violence captures additional detail about alleged incidents that could help ORR develop additional guidance, policies, or recommendations that could help reduce sexual victimization in care provider facilities. Thus, we urge the Department to require data collection in line with the DOJ juvenile facility standard. Additionally, section (e) requires that care provider facilities provide data to ORR for the previous calendar year no later than August 31. This requirement means that ORR may receive data for the prior calendar year as late as a full eight months into the next calendar year. This could severely limit ORR’s ability to detect problematic trends and take quick action to address systematic problems. We urge the Department to move the submission date up to January 31.
- **§ 411.114 (Audit corrective action plan):** The proposed standard initially states that a finding of “Does Not Meet Standard” triggers a 90-day corrective action period, but section (d) describes a 180-day corrective action period. We encourage the Department to adopt the shorter corrective action period of 90-days to ensure that reforms benefit youth as soon as possible. Regardless of the Department’s decision, though, we encourage the agency to use the same time period in each part of the standard.

We urge you to consider and accept our proposed revisions, and we urge you, in all decisions you make while crafting the final regulations, to take extra care to recognize the unique needs and vulnerabilities of unaccompanied children in the Department's care. If you have any questions about any of the recommended revisions, please do not hesitate to contact Jason Szanyi, Staff Attorney at the Center for Children's Law and Policy, at jszanyi@cclp.org or 202-637-0377 x108.

Thank you for your consideration.

Sincerely,

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Campaign for Youth Justice
Children's Defense Fund
Coalition for Juvenile Justice
Justice for Families
Juvenile Law Center
League of United Latin American Citizens
MANA, A National Latina Organization
National Alliance of Latin America & Caribbean Communities
National Association of Hispanic Federal Executives
National Domestic Violence Hotline
National Hispanic Media Coalition
National Juvenile Justice Network
National Latin@ Network; Casa de Esperanza

Presente

SER-National

School Social Work Association of America

The National Crittenton Foundation

The National Juvenile Defender Center

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Violence Prevention Coalition of Greater Los Angeles

Youth Advocate Programs