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20 **UNITED STATES DISTRICT COURT**
21 **CENTRAL DISTRICT OF CALIFORNIA**
22 **WESTERN DIVISION**

23 JENNY LISETTE FLORES, *et al.*,

24 Plaintiffs,

25 v.

26 MERRICK B. GARLAND, Attorney
27 General of the United States, *et al.*,

28 Defendants.

Case No. 2:85-cv-04544-DMG

**SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTION TO
TERMINATE THE FLORES
SETTLEMENT AGREEMENT AS
TO THE U.S. DEPARTMENT OF
HEALTH AND HUMAN
SERVICES**

Hon. Dolly M. Gee

1 **I. INTRODUCTION**

2 On June 21, 2024, the Court heard oral arguments regarding Defendants’
3 Motion to Terminate the *Flores* Settlement Agreement (“FSA” or “Agreement”) as
4 to the U.S. Department of Health and Human Services (“HHS”). During the hearing,
5 Defendants requested an opportunity to address the Court’s tentative ruling
6 concerning certain issues relating to secure, heightened supervision, and out-of-
7 network (“OON”) facilities. The Court granted Defendants’ request to provide
8 supplemental briefing to address the Court’s remaining concerns with respect to
9 termination of the FSA as to HHS. ECF No. 1441. As explained below, the
10 regulations at issue in the Unaccompanied Children Program Foundational Rule
11 (“Foundational Rule”), 89 Fed. Reg. 34,384 (Apr. 30, 2024) (to be codified at 45
12 C.F.R. pt. 410), are consistent with the FSA. This Court should therefore terminate
13 the FSA as to HHS in its entirety.

14 **II. ARGUMENT**

15 **A. Under the Foundational Rule, Heightened Supervision Facilities May**
16 **Only Be Used If There is Clear and Convincing Evidence That a Child**
17 **Needs Heightened Supervision, and Merely Engaging in Isolated or**
18 **Petty Offenses Would Not, Itself, Be a Basis for Such a Placement.**

19 The Court expressed concern that under the Foundational Rule, an
20 unaccompanied child could be placed in a heightened supervision (medium security)
21 facility on the basis of isolated or petty offenses. The FSA does not specify the
22 permissible criteria for when a child should be placed in such a facility. However,
23 the Foundational Rule is explicit that the purpose of placing a child in such a facility
24 is because the child needs heightened supervision, that a child would be placed in
25 the facility only if the child meets the criteria for needing such supervision specified
26 in Section 410.1105(b)(2), and clear and convincing evidence supports that
27 determination as required by Section 410.1105(b)(1). Moreover, ORR would not
28 place a child in a heightened supervision facility if the child did not need heightened

1 supervision, because doing so would be inconsistent with the FSA’s requirement
2 that children be placed in the least restrictive setting appropriate to their age and
3 special needs, *see* FSA ¶ 11, and with the TVPRA’s requirement, at 8 U.S.C.
4 §1232(c)(2), that children be placed in the least restrictive setting that is in their best
5 interest. *See* 45 C.F.R. § 410.1103(a).

6 The FSA defines “medium security facilities”—referred to in the
7 Foundational Rule as heightened supervision facilities—in part, as facilities for
8 children who may require additional supervision compared to children in less
9 restrictive placements, “but do not need placement in juvenile correctional
10 facilities.” FSA ¶ 8. Medium security facilities must be licensed by an appropriate
11 state agency and must meet the requirements of Exhibit 1. Further, Paragraph 8 states
12 that these facilities maintain stricter security measures and may have a secure
13 perimeter. This definition contrasts “medium security facilities” with placements in
14 “juvenile correctional facilities.” *Id.*

15 The Foundational Rule defines heightened supervision facilities in a manner
16 fully consistent with Paragraph 8 of the FSA. *See* 45 C.F.R. § 410.1001; *see also* 89
17 Fed. Reg. 34,442 (describing the purpose of heightened supervision facilities as
18 “provid[ing] care to unaccompanied children who require close supervision but do
19 not need placement at a secure facility, including an RTC.”). It separately defines
20 and provides placement criteria for “secure facilities,” consistent with other
21 provisions of the FSA. *See, e.g.*, FSA ¶¶ 12.A, 21, 23.

22 Given the important differences between heightened supervision facilities
23 (i.e., medium security facilities) and secure placements, the Foundational Rule
24 separately describes factors for placement at secure and heightened supervision
25 facilities. *See* 45 C.F.R. §§ 410.1105(a) and 410.1105(b). In establishing criteria for
26 placement in heightened supervision facilities, the Foundational Rule differs from
27 the 2019 Rule (Apprehension, Processing, Care, and Custody of Alien Minors and
28 Unaccompanied Alien Children, 84 Fed. Reg. 44,392–535 (Aug. 23, 2019), which

1 did not specify any criteria for placement of children in such facilities. This is
2 another protection provided by the Foundational Rule.

3 Section 410.1105(b)(1) provides that a placement in a heightened supervision
4 facility requires clear and convincing evidence, and Section 410.1105(b)(2)
5 describes criteria for such placements. Each criterion describes circumstances in
6 which there is a need for heightened supervision. Section 410.1105(b)(2)(iv),
7 describing one criterion, provides: “Has a non-violent criminal or delinquent history
8 not warranting placement in a secure facility, such as isolated or petty offenses as
9 described in paragraph (b)(2)(iii) of this section.” This language must be read in
10 conjunction with Section 410.1105(b)(2)(iii), which is expressly incorporated into
11 Section 410.1105(b)(2)(iv). And Section 410.1105(b)(2)(iii) states: “Has displayed
12 a pattern of severity of behavior, either prior to entering ORR custody or while in
13 ORR care, that requires an increase in supervision by trained staff[.]”

14 Read together, these provisions do not provide that isolated or petty offenses
15 alone are a justification for placement in a heightened supervision facility. Rather,
16 they explain that in some circumstances non-violent or delinquent offenses could
17 demonstrate a pattern of severity and behavior that prompts the need for heightened
18 supervision. This heightened supervision is important both for the well-being of the
19 child and the protection of others.

20 This reading is further consistent with both the FSA’s requirement that
21 children be placed in the least restrictive setting appropriate to their age and special
22 needs, FSA Paragraph 11, and the requirements of the TVPRA,¹ as implemented at
23 Rule Sections 410.1103 and 1105.

24
25 ¹ See 8 U.S.C. § 1232(c)(2) (“Subject to section 279(b)(2) of title 6, an
26 unaccompanied alien child in the custody of the Secretary of Health and Human
27 Services shall be promptly placed in the least restrictive setting that is in the best
28 interest of the child. In making such placements, the Secretary may consider danger
to self, danger to the community, and risk of flight.”).

1 The requirement that children must be placed in the least restrictive setting
2 that is in the best interest of the child is a fundamental principle informing ORR’s
3 administration of the Unaccompanied Children Program, is referenced multiple
4 times throughout the Preamble and text of the Foundational Rule,² and applies to
5 any use of heightened supervision facilities and any other restrictive settings. The
6 Foundational Rule is fully consistent with this requirement and likewise provides
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11 ² See, e.g., Foundational Rule Sections 410.1003(f); 1103(a); 1109(a)(2); 1601(a);
12 1802(a). See also Preamble at 89 Fed. Reg. 34,403 (discussing circumstances in
13 which additional time may be needed to make an initial placement determination for
14 children when they are referred from other agencies); 89 Fed. Reg. 34,410 (stating
15 that ORR senior staff “must approve any [out-of-network] placement as the least
16 restrictive setting appropriate for the child’s needs”); 89 Fed. Reg. 34,413 (“ORR
17 agrees that each unaccompanied child should be placed in the least restrictive setting
18 that is in the best interest of the child and appropriate to the unaccompanied child’s
19 age and individualized needs, and that consideration of each child’s individualized
20 needs is a key component to ensuring their safety and welfare.”); 89 Fed. Reg.
21 34,422 (describing the purpose of Section 410.1104 of the Rule as “establish[ing]
22 ORR’s obligation to place unaccompanied children in standard programs as opposed
23 to restrictive placements or emergency or influx facilities” except in delineated
24 circumstances); 89 Fed. Reg. 34,427 (stating that “in all cases where an
25 unaccompanied child is placed in a secure facility (including an RTC), such a setting
26 must be the least restrictive setting that is in the best interests of the child and
27 appropriate to the child’s age and individualized needs”); 89 Fed. Reg. 34,493
28 (describing limitations on the use of significant incident reports, based on the
requirement to place children in the least restrictive setting); 89 Fed. Reg. 34,501
(describing the behavior management provisions of the Rule at Section 410.1304 as
being consistent with statutory responsibilities to place unaccompanied children in
the least restrictive setting available that is in their best interest, among others); 89
Fed. Reg. 34,563 (describing review of ORR decisions under Subpart J as
“fundamental to ensuring unaccompanied children are placed in the least restrictive
setting that is in their best interest while also considering the safety of others and
runaway risk”).

1 critical due process protections to guard against inappropriate restrictive
2 placements.³

3 **B. Under the Foundational Rule, a Child May be Stepped Down From a**
4 **Secure Facility to a Non-Restrictive Facility; If Placement in a Secure**
5 **Facility Is No Longer Justified, a Child May Be Placed in a Heightened**
6 **Supervision Facility Only Based on Clear and Convincing Evidence.**

7 The Court expressed concern that under the Foundational Rule, a child in a
8 secure facility could be stepped down only to a heightened supervision facility, and
9 not to a standard program that is non-restrictive. However, under the Foundational
10 Rule, a child may be stepped down to a heightened supervision facility or directly
11 to a shelter, whichever is the least restrictive setting in the child’s best interests, and
12 consistent with other relevant considerations (e.g., ensuring the unaccompanied
13 child’s timely appearance before the immigration courts and protecting the
14 unaccompanied child’s well-being and that of others), as well as taking into account
15 danger to self, danger to the community, and risk of flight, consistent with 8 U.S.C.
16 § 1232(c)(2).

17 As noted above, ORR is required to place children “in the least restrictive
18 setting appropriate to the minor’s age and special needs.” *See* FSA ¶ 11; *see also* 45
19 C.F.R. § 410.1103(a) (“ORR shall place each unaccompanied child in the least
20 restrictive setting that is in the best interest of the child and appropriate to the
21 unaccompanied child’s age and individualized needs...”). These requirements are
22 also consistent with the requirements of 8 U.S.C. § 1232(c)(2). For example, if after
23 initial placement of a child in a restrictive placement ORR learns of additional
24 information indicating that the child should be stepped down, ORR would transfer
25 the child to the least restrictive setting that is in the child’s best interests, based on

26 ³ If a child is placed in a heightened supervision facility, the Foundational Rule
27 requires that notice, administrative review, and an opportunity to challenge the
28 placement be provided. *See, e.g.*, §§ 410.1901 (restrictive placement case reviews),
410.1902 (placement review panel).

1 its updated information. *See* 45 C.F.R. § 410.1601(a). Further, Section
2 410.1105(b)(1) expressly requires that any placement of a child in a heightened
3 supervision facility must be based on clear and convincing evidence documented in
4 the child’s case file, consistent with the *Lucas R.* preliminary injunction, *Lucas R. v.*
5 *Becerra*, No. 18-cv-05741, ECF No. 391, Step-Up Class, ¶ 2. (C.D. Cal.). These
6 same principles apply equally to initial placements and to stepping a child *down* from
7 a secure placement.

8 In other words, if a child is ready to be stepped down from a secure facility,
9 but continues to need additional supervision and support, the child may be stepped
10 down to a heightened supervision facility. In fact, a placement in a heightened
11 supervision facility can only be made if clear and convincing evidence supports such
12 a restrictive placement, and if clear and convincing evidence does not support such
13 a placement, a non-restrictive placement will be the appropriate placement. And,
14 notably, if a child *is* stepped down to a heightened supervision facility, the same due
15 process rights that apply to step-ups to any restrictive setting, such as notice,
16 administrative review, and an opportunity to challenge the placement, also apply to
17 step-downs to restrictive settings. *See, e.g.*, §§ 410.1901 (restrictive placement case
18 reviews), 410.1902 (placement review panel).

19 **C. Under the Foundational Rule, Any OON Placements in a Restrictive**
20 **Setting Are Subject to the Rule’s Requirements for Restrictive**
21 **Settings.**

22 As this Court recognized in its tentative ruling, the FSA does not expressly
23 address the placement of unaccompanied children in OON facilities, as use of these
24 facilities was not part of program operations in 1997. However, “[o]ver time, ORR
25 has found that there are certain rare circumstances where a child has specific needs
26 that cannot be accommodated within ORR’s standard facilities and placement in an
27 [OON] facility is necessary for the child to receive individualized specialized
28 services.” *See* ECF No. 1435-1, Defs.’ Ex. D, Supplemental Declaration of Toby

1 Biswas (“Biswas Suppl. Decl.”) ¶ 24. Therefore, the Foundational Rule addresses
2 placements in these OON facilities, which serve individuals other than just
3 unaccompanied children, and typically include hospitals, residential treatment
4 centers, and therapeutic shelters, among others. The Rule provides essential
5 procedural protections for the placement of children in them. *Id.*

6 While not all OON placements are restrictive, under the Foundational Rule,
7 OON placements in restrictive settings *are* subject to the very same requirements
8 that apply to ORR’s in-network restrictive placements. ORR will place an
9 unaccompanied child in an OON facility only if the federal field specialist and their
10 supervisor approve the placement as the least restrictive placement in the child’s best
11 interest. Biswas Suppl. Decl. ¶ 26 (citing 89 Fed. Reg. 34,410). Importantly, as ORR
12 explained in the Preamble, any OON restrictive placement would need to satisfy the
13 criteria for placement or transfer to the same level of restrictive placement (secure,
14 heightened supervision, or residential treatment center) within ORR’s network. 89
15 Fed. Reg. 34,410. This includes, for secure OON placements, secure placement
16 criteria codified at Section 410.1105, which are fully consistent with Paragraph 21
17 of the FSA. *Id.* Additionally, the same due process rights that apply to
18 unaccompanied children placed in restrictive placements in ORR’s network such as
19 notice, administrative review, and an opportunity to request reconsideration of the
20 placement, likewise apply to children placed in restrictive placements that are out-
21 of-network. *See, e.g.*, 45 C.F.R. §§ 410.1901 (restrictive placement case reviews),
22 410.1902 (placement review panel).

23 With respect to out-of-network residential treatment centers (“OON RTC”),
24 in particular, ORR has explained that, pursuant to Section 410.1105(c)(2), ORR will
25 place an unaccompanied child at an OON RTC only “when a licensed clinical
26 psychologist or psychiatrist consulted by ORR or a care provider facility has
27 determined that the unaccompanied child requires a level of care only found in an
28 OON RTC (either because the unaccompanied child has identified needs that cannot

1 be met within the ORR network of RTCs or no placements are available within
2 ORR's network of RTCs), or that an OON RTC would best meet the unaccompanied
3 child's identified needs." 89 Fed. Reg. 34,409. And consistent with the preliminary
4 injunction in *Lucas R.*, ECF No. 391, Step-Up Class, ¶ 1, Section 410.1105(c)(2)
5 specifically states that the criteria for placement in or transfer to RTCs within the
6 ORR network apply to placement or transfer to OON RTCs. *Id.*

7 **III. CONCLUSION**

8 For all the above reasons and those articulated in Defendants' prior briefing,
9 the Court should terminate the FSA as to HHS in its entirety.
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11 Dated: June 24, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 24, 2024, I served a copy of the foregoing pleading on all counsel of record by means of the District Court’s CM/ECF electronic filing system.

/s/ Fizza Batool
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