

# UPDATES ON PROTECTIONS FOR UNACCOMPANIED CHILDREN

## The ORR Foundational Rule and the Flores Settlement Agreement

### OVERVIEW

For the past 27 years, all children in federal immigration custody have been protected by the *Flores* Settlement Agreement (“the Settlement”). **Recently, a series of legal and legislative developments have shifted the landscape of rights for unaccompanied children.**

As detailed below:

- The Office of Refugee Resettlement (“ORR”) issued a Foundational Rule setting out rules and standards for the treatment of immigrant children in its custody.
- A federal court modified and partially terminated the Settlement as to ORR.
- Senators introduced a Congressional Review Act joint resolution disapproving the Foundational Rule.

### ORR FOUNDATIONAL RULE

ORR issued new regulations governing its Unaccompanied Children Program. See 45 C.F.R. 410.1000, et seq. This ORR Foundational Rule took effect on July 1, 2024, and implements portions of the Settlement. ORR’s regulations apply only to children who enter the United States without a parent or legal guardian and are transferred to ORR custody.

Although the Foundational Rule adds to some of the basic requirements of the Settlement and is more protective of children’s rights than the prior Trump Administration regulations, it is still not fully consistent with the Settlement. Most significantly, the Foundational Rule permits ORR facilities in certain states to operate without a state license. This is a response to Florida, South Carolina, and Texas refusing to license ORR facilities. **The absence of state licensure eliminates essential safeguards and independent oversight necessary to keep children safe.**

In addition to the absence of state licensing, the Foundational Rule deprives children placed in heightened supervision and Out-of-Network (“OON”) facilities of important protections required by the *Flores* Settlement.

### DISTRICT COURT ORDER PARTIALLY TERMINATING FLORES SETTLEMENT

After the ORR Foundational Rule was published, the government asked a federal district court to release ORR from its obligations under the Settlement. ***Flores* class counsel opposed this motion because the Rule fails to ensure adequate oversight of unlicensed ORR facilities and is inconsistent with the Settlement.**

# The ORR Foundational Rule and the Flores Settlement Agreement

On June 28, 2024, the court partially granted the government's request.

Specifically, the court:

- **Modified** the Settlement to permit ORR to operate unlicensed programs in states that refuse to license ORR facilities, with additional monitoring from ORR.
- **Conditionally terminated** most provisions of the Settlement as to ORR.
  - This means that the majority of unaccompanied children in ORR custody no longer have substantive rights under the Settlement.
- **Held the Rule was not consistent with the Settlement** as to heightened supervision and OON facilities.
  - This means that children placed in secure, heightened supervision, and OON facilities continue to be fully protected by the Settlement.
- **Preserved** *Flores* class counsel's ability to monitor ORR facilities.
- **Reserved the right to reconsider its order** in appropriate circumstances, such as if the Rule is later rescinded or if ORR fails to issue promised regulations on child abuse and neglect reporting.

## CONGRESSIONAL REVIEW ACT RESOLUTION

On June 5, 2024, 46 Senators introduced a joint resolution under the Congressional Review Act ("CRA") that disapproves of the Unaccompanied Children Program Foundational Rule. The Congressional Review Act is a federal law that permits Congress to disapprove and rescind federal regulations. As of July 12, 2024, there has been no vote on this resolution.

If the resolution passes, the ORR Foundational Rule would be rescinded. ORR would also be prohibited from enacting new regulations in the future that are "substantially the same" as the Foundational Rule. 5 U.S.C. § 801(b)(2).

Rescinding the Foundational Rule will not remedy the Rule's flaws and is not in the best interest of children. The likely result would be a reversion to the Trump Administration regulations, which do not protect the safety and well-being of children.

The CRA joint resolution would nullify the Foundational Rule's new protections for unaccompanied children and leave ORR facilities with even fewer requirements and less required oversight.

# Frequently Asked Questions

## Does anything change for children in DHS (CBP or ICE) custody?

- Nothing changes for children in DHS custody. The *Flores* Settlement remains intact for children in the custody of the Department of Homeland Security including children in CBP or ICE custody.

## Do children in ORR custody still have rights under the Settlement?

- Children placed in secure, heightened supervision, and Out-of-Network facilities are still protected by the Settlement. Children in shelters and foster care placements are no longer covered by the Settlement but have similar rights under the ORR Foundational Rule.

## Are ORR programs still required to have state licenses?

- Standard ORR programs and heightened supervision facilities are required to have state licenses if they are in a state that will provide one. However, if they operate in a state that will not provide a state license for the care of immigrant children, they are not required to obtain one.

## Are ORR programs still required to follow state licensing requirements?

- With the exception of emergency or influx facilities and secure facilities, ORR facilities are required to either have a state license or meet the requirements of state licensing that would otherwise be applicable in a state if the state refuses

to license ORR facilities. See 45 C.F.R. §§ 410.1001, 410.1302. Importantly, this is not the same as actually being licensed by a state and the only oversight mechanism to ensure care providers meet state licensing requirements is through ORR itself.

## What oversight will exist in states that refuse to license ORR facilities?

- The ORR Foundational Rule requires “enhanced monitoring” of unlicensed ORR facilities. See 45 C.F.R. § 410.1303(e). In addition, ORR has told the court that it will require ORR facilities to obtain accreditation, that a “Licensing Advisory Team” will monitor unlicensed facilities, and that it will issue new regulations on child abuse and neglect reporting.

## Can the *Flores* Settlement be reinstated as to ORR in the future?

- The court reserved the right to reconsider its partial termination decision if the government fails to do what it has assured the court it will do. For example, if ORR modifies its regulations in the future to remove essential protections for unaccompanied children, the court could reinstate the Settlement’s protections.

## Frequently Asked Questions, continued

### What will happen to the Settlement if the Congressional Review Act resolution passes?

- If the CRA passes, the Foundational Rule will be rescinded. In that instance, *Flores* counsel could request that the court reinstate portions of the *Flores* settlement applicable to ORR. However, there is no guarantee that the court would grant this motion. In any event, ORR would still be allowed to operate unlicensed facilities in Texas and Florida and children would lose the additional protections that exist only in the Rule. It is in children's best interests for the Rule to remain in effect.

### What is the role of *Flores* counsel going forward?

- *Flores* counsel will continue to monitor ORR facilities and address systemic violations of children's rights. Additionally, *Flores* counsel will continue to receive and analyze data on children in federal immigration custody, including children in ORR custody.

### What can I do if I have concerns about the treatment of a child in ORR custody?

- Please contact **Mishan Wroe** ([mwroe@youthlaw.org](mailto:mwroe@youthlaw.org)) and **Diane de Gramont** ([ddegramont@youthlaw.org](mailto:ddegramont@youthlaw.org)) at the **National Center for Youth Law** if you would like to discuss potential legal violations and explore options for relief.

You can also contact the program director and Federal Field Supervisor for the child's facility.

The Foundational Rule creates a UC Office of the Ombuds with the authority to receive and investigate complaints regarding ORR's adherence to federal law and ORR regulations and standards. See 45 C.F.R. § 410.2002. As of July 12, 2024, this office is not yet operational.

## FOR MORE INFORMATION, CONTACT NCYL

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