

# COMMENT

## SLEEPING WITH ONE EYE OPEN: THE RESULT OF NON-TRANSPARENT OVERSIGHT BY THE OFFICE OF REFUGEE RESETTLEMENT ON FACILITIES SHELTERING UNACCOMPANIED ALIEN CHILDREN

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## INTRODUCTION

Over the past five years, the United States has seen a surge<sup>1</sup> of unlawful immigration by unaccompanied alien children.<sup>2</sup> In fact, apprehension of unaccompanied children has almost doubled since 2012, with four countries contributing to this increase: Honduras, El Salvador, Guatemala, and Mexico.<sup>3</sup> Even more, the increased migration has seen substantial growth in younger children, especially those in the age groups of 0–9 years, 10–12 years, and 13–15 years,<sup>4</sup> and immigration is seeing more females in recent years as well.<sup>5</sup>

Reasons for the spike in immigration are varied.<sup>6</sup> Gang-member and drug-cartel violence has seen a steady increase in the Central American countries to the point where “young girls are claimed as ‘girlfriends’ by gang members and told they will be killed if they don’t surrender” or where

1. WILLIAM A. KANDEL & LISA SEGHETTI, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1 (2015).

2. The term “unaccompanied alien child” means:

A child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

The Homeland Security Act of 2002 (HSA), 6 U.S.C. § 279(g) (2012).

3. See KANDEL & SEGHETTI, *supra* note 1, at 1–2, 2 fig. 1 (noting that Mexico’s proportion has been declining since 2012).

4. RUTH ELLEN WASEM & AUSTIN MORRIS, CONG. RESEARCH SERV., R43734, UNACCOMPANIED ALIEN CHILDREN: DEMOGRAPHICS IN BRIEF 4 (2014).

5. *Id.* at 6–7.

6. A HUMANITARIAN CALL TO ACTION: UNACCOMPANIED ALIEN CHILDREN AT THE SOUTHWEST BORDER, ABA COMM’N ON IMMIGRATION 3 (July 26, 2014), <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACStatement072014.authcheckdam.pdf> [hereinafter A HUMANITARIAN CALL TO ACTION]. *But see* KANDEL & SEGHETTI, *supra* note 1, at 2 (indicating a decline in immigration rates from fiscal year 2014 to fiscal year 2015); Richard Gonzales, *Southern U.S. Border Sees A Slowdown in Unaccompanied Minors from Central America*, NPR, <http://www.npr.org/sections/thetwo-way/2015/09/03/437353556/southern-u-s-border-sees-a-slowdown-in-unaccompanied-minors-from-central-america> (last updated Sept. 3, 2015, 9:16 PM) (describing the decrease in summer migration of unaccompanied children between fiscal years 2014 and 2015).

entire communities are controlled by gangs, being forced to pay a “rent to the controlling gang.”<sup>7</sup> Additionally, these countries are still experiencing the impacts of civil wars in the 1980s and 1990s and are suffering from poor economic conditions.<sup>8</sup>

The Office of Refugee Resettlement (ORR or the Agency) is the principal office charged with taking care of these unaccompanied children pending immigration proceedings.<sup>9</sup> ORR administers custody of unaccompanied children primarily through release to a qualified family member or other sponsors or through sheltering the children in care facilities, which are contracted through and given grants from ORR.<sup>10</sup> ORR contracts three types of care facilities, each increasing in security level: shelter, staff-secure, and secure.<sup>11</sup> Most unaccompanied children are sheltered in these facilities and, on average, stay between a week and four months, though some stay longer than a year.<sup>12</sup>

Even though ORR was given the responsibility to care for these children because of its expertise,<sup>13</sup> the Agency has not been able to stymie concern over the treatment of unaccompanied children, especially in light of their increased migration to the United States.<sup>14</sup> In fact, the Agency’s coordination of the program falls within the Obama Administration’s push

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7. See A HUMANITARIAN CALL TO ACTION, *supra* note 6, at 3–4.

8. *Id.* at 4.

9. Office of Refugee Resettlement; Statement of Organization, Functions, and Delegations of Authority, 80 Fed. Reg. 3614, 3615 (Jan. 23, 2015).

10. OFFICE OF REFUGEE RESETTLEMENT (ORR or the Agency), *Services Provided*, <http://www.acf.hhs.gov/programs/orr/about/ucs/services-provided> (last visited Nov. 18, 2015).

11. Linda Kelly Hill, *The Right to Know Your Rights: Conflict of Interest and the Assistance of Unaccompanied Alien Children*, 14 U.C. DAVIS J. JUV. L & POL’Y 263, 277 (2010) (stating that as of 2007, ORR “nationally operated 25 shelter facilities, three staff-secure facilities and one secure facility”). Staff-secure and secure facilities shelter unaccompanied children who were determined “to be a danger to themselves or others.” ORR, *Children Entering the U.S. Unaccompanied: Section 1* (Jan. 30, 2015), <http://www.acf.hhs.gov/programs/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2.4> [hereinafter *Children Entering Unaccompanied*] (describing the placement considerations for assessing unaccompanied children to be placed in different types of facilities).

12. Wendy Shea, *Almost There: Unaccompanied Alien Children, Immigration Reform and a Meaningful Opportunity to Participate in the Immigration Process*, 18 U.C. DAVIS J. JUV. L & POL’Y 148, 159 (2014); Hill, *supra* note 11, at 280 (finding a correlation between the length of shelter and the higher security of the shelter because “children with greater security requirements may have more complicated immigration matters involving criminal issues, and are therefore less likely to be released to family during such proceedings.”).

13. See Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 222 (2006).

14. See, e.g., Molly Hennessy-Fiske, *Four Migrants Flee Tucson Shelter, Yet Another Concern for Immigration System*, L.A. TIMES (Oct. 22, 2015), <http://www.latimes.com/nation/la-na-immigration-shelters-20151021-story.html> (discussing the need for more oversight and transparency in housing unaccompanied children).

for immigration reform, including the June 2, 2014 directive to the Secretary of Homeland Security to create the Unified Coordination Group (UCG).<sup>15</sup> The UCG is an interagency effort intended to unify humanitarian relief to unaccompanied children, including the transportation, housing, medical treatment, and general care of unaccompanied children.<sup>16</sup> On June 30, 2014, President Obama wrote a letter to Congress, addressing former Speaker of the House John Boehner and congressional leadership, in which the President stressed our country's "legal and moral obligation to make sure we appropriately care for unaccompanied children who are apprehended."<sup>17</sup> President Obama addressed the public from the Rose Garden that same day, discussing the difficulties of immigration reform with unaccompanied children due to political disfavor from the right.<sup>18</sup> With this increased attention, local and state political concerns have risen, especially over funding for unaccompanied children.<sup>19</sup> Not only is this an issue on a societal level, but

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15. Memorandum on the Response to the Influx of Unaccompanied Alien Children Across the Southwest Border, Barack Obama, President, United States of America (June 2, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr> [hereinafter Presidential Memorandum] ("The influx of unaccompanied alien children (UAC) across the southwest border of the United States has resulted in an urgent humanitarian situation requiring a unified and coordinated Federal response.").

16. *Id.*

17. Letter from Barack Obama, President, United States of America, to John Boehner, Speaker, House of Representatives, on Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation's Southwest Border (June 30, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>.

18. In the Rose Garden address, the President remarked:

Some in the House Republican Caucus are using the situation with unaccompanied children as their newest excuse to do nothing. Now, I want everybody to think about that. Their argument seems to be that because the system is broken, we shouldn't make an effort to fix it. It makes no sense. It's not on the level. It's just politics, plain and simple.

Press Release, The White House, Remarks by the President on Border Security and Immigration Reform (June 30, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform>; see also David Leopold, *Consequences of GOP Inaction on Immigration Reform on Display at Border*, THE HILL (July 10, 2014, 1:00 PM), <http://thehill.com/blogs/congress-blog/foreign-policy/211756-goodlatte-should-know-better> (calling for the House Republicans to promote immigration reform).

19. In Virginia, local and state agencies have addressed how unaccompanied children sheltered in the state are being funded. See, e.g., Joe Patten, LOUDOUN CTY. BD. OF SUPERVISORS, *Impact of Unaccompanied Alien Children on Loudoun County and Loudoun County Public Schools* (Oct. 1, 2014), <http://loudoun.gov/DocumentCenter/View/107627> (requesting the Loudoun County Board of Supervisors to establish the impact of sheltering 210 unaccompanied children upon placement in the first half of 2014 in Loudoun County, including per pupil educational costs and health care financing).

these children also have a unique experience that draws the need for special attention.<sup>20</sup> As children, they are undergoing a host of psychological developments<sup>21</sup> while alone in another country.<sup>22</sup> On top of this, unaccompanied children also have faced instances of abuse while in custody.<sup>23</sup>

The custodial responsibilities for unaccompanied children have shifted over time from the Immigration and Naturalization Service (INS) to ORR in an effort to increase the standard of care these children receive.<sup>24</sup> In 2009, the Women's Refugee Commission undertook a study to evaluate the status of unaccompanied children in immigration custody and found that ORR has made improvements in sheltering these children.<sup>25</sup> However, this study also addressed that ORR lacked appropriate oversight and monitoring to provide adequate care for unaccompanied children.<sup>26</sup> This Comment aims to address the problem of the lack of oversight by ORR in its custodial responsibilities of unaccompanied children and calls for increased transparency of the Agency's oversight. Part II of this Comment will contextualize how ORR came to have this responsibility and at what point these children are transferred to ORR. This Section will also discuss the standards that the ORR is required to follow while in custody of these children. Part III will analyze the quantum of oversight employed by ORR and the effects of the lack of transparent oversight by ORR. Part IV will make recommendations on how to increase oversight by ORR, including a recommendation from the Virginia foster care system, which is more transparent in exercising oversight of its facilities. This Comment concludes by summarizing the current scope of unaccompanied children's

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20. See M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 322–31 (2010) (discussing the various constructions of a child and how these are reflected in society and the immigration system).

21. See generally Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275 (2006) (highlighting modern research in child psychology, the developmental stages of children, and children's decision-making abilities compared to adults).

22. See generally Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609 (2004) (describing the experiences of unaccompanied children and the isolation and poor standards of living while in custody).

23. See, e.g., *Walding v. United States*, No. SA-08-CA-124-XR, 2009 WL 902423, at \*1 (W.D. Tex. Mar. 31, 2009) (involving sexual abuse of unaccompanied children in ORR custody).

24. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY I* (2009), <https://womensrefugeecommission.org/resources/document/download/196>.

25. *Id.*

26. *Id.* at 1–2.

vulnerability in the immigration system and how to improve the care of these children by calling for a more transparent oversight system from ORR.

## I. BACKGROUND

Once an unaccompanied child enters the United States, the treatment and processing of the child is governed by three legal authorities: the Flores Settlement Agreement of 1997 (Flores Settlement), the Homeland Security Act of 2002 (HSA), and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA or the Act).<sup>27</sup>

### A. *How the Immigration System Is Structured for Unaccompanied Children Who Cross the Border*

Prior to ORR being charged with oversight of the Unaccompanied Child Program, the former INS was responsible for the custody of these children; however, INS's role as both custodian and prosecutor of these children was highly criticized.<sup>28</sup> The first major challenge to INS's role as custodian arose out of the Flores Settlement.<sup>29</sup> In 2002, the HSA transferred the custodial role of unaccompanied children from the Commissioner of INS to the Director of ORR,<sup>30</sup> which is under the Department of Health and Human Services (HHS) and the Office of the Administration for Children & Families, as Congress acknowledged that ORR had a demonstrated expertise in child care.<sup>31</sup>

Unaccompanied children are transferred to the Office of Refugee Resettlement by the U.S. Customs and Border Protection (CBP) and the U.S. Immigration and Customs Enforcement (ICE).<sup>32</sup> CBP is responsible

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27. KANDEL & SEGHETTI, *supra* note 1, at 3.

28. *See* Somers et al., *supra* note 20, at 337 (stating that the dual role of INS “was criticized as irreconcilable,” resulting in “egregious actions”); *see also* Maura M. Ooi, Note, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 887 (2011) (“Charged with both enforcing immigration law, primarily through deportation, and ensuring the care of unaccompanied minors, the INS was required to pursue distinct missions that were fundamentally at odds with each other.”).

29. *See* Somers et al., *supra* note 20, at 337–38; *infra* Part II.B.

30. *See* HSA, 6 U.S.C. § 279(a) (2012) (outlining the transfer of responsibility).

31. *See* Nugent, *supra* note 13, at 222 (describing the transfer of care and custody responsibilities to ORR).

32. *See* STEP-BY-STEP GUIDE ON APPREHENSION AND DETENTION OF JUVENILES IN THE UNITED STATES, WOMEN'S REFUGEE COMM'N I (2014), <http://www.womensrefugeecommission.org/images/zdocs/Step-by-Step-Guide-on-Apprehension-and-Detention-of-Juveniles-in-the-United-States.pdf> [hereinafter STEP-BY-STEP GUIDE] (explaining that U.S. Customs and Border Protection (CBP) is responsible for initial custody at the border, and U.S. Immigration and Customs Enforcement (ICE) is

for apprehending persons who attempt to enter the United States unlawfully.<sup>33</sup> CBP is comprised of the Office of Field Operations (OFO) and Border Patrol (BP).<sup>34</sup> OFO screens all visitors of the United States and U.S. citizens; Border Patrol works the areas between the ports of entry, totaling over almost 7,000 miles.<sup>35</sup> Most unaccompanied children are apprehended by CBP when attempting to enter the United States unlawfully, and CBP has two different policies for handling these children: (1) a policy regarding unaccompanied children from contiguous countries; and (2) a policy regarding unaccompanied children from non-contiguous countries.<sup>36</sup> Unaccompanied children from contiguous countries, Mexico and Canada, have expedited release procedures, whereas unaccompanied children from non-contiguous countries are placed in the immigration proceedings process and sheltered by ORR.<sup>37</sup> Less frequently, ICE will independently detect and apprehend unaccompanied children who are present in the interior of the county.<sup>38</sup> ICE will then transfer the unaccompanied children, in its custody or CBP's custody, to ORR for shelter pending the proceedings.<sup>39</sup>

*B. Standards of Care Required by the Office of Refugee Resettlement, Department of Health and Human Services, and Facilities Contracted for the Custody of Unaccompanied Children*

Once ORR receives custody of the children from ICE, ORR shelters unaccompanied children according to the Flores Settlement and TVPRA.<sup>40</sup> In 1997, an agreement was reached in *Flores v. Reno*<sup>41</sup> that mandates the standards for detention of unaccompanied children.<sup>42</sup> This stipulated settlement agreement sprung from nine years of litigation over INS's

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responsible for the transfers to ORR).

33. *Id.*

34. *Id.*

35. *Id.*

36. *See id.* at 2; KANDEL & SEGHETTI, *supra* note 1, at 5 (describing a distinct policy for unaccompanied children from contiguous countries).

37. STEP-BY-STEP GUIDE, *supra* note 32, at 2.

38. *See id.* at 3 (explaining when ICE may have custody over unaccompanied children, including when ICE makes faulty determinations regarding a child's age and when ICE determines that a child is "accompanied").

39. *Id.*

40. KANDEL & SEGHETTI, *supra* note 1, at 8.

41. Stipulated Settlement Agreement (Flores Settlement), No. CV 85-4544-RJK(Px) (C.D. Cal. filed Jan. 17, 1997).

42. *Id.* at 6 ("This Agreement sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS and shall supersede all previous INS policies that are inconsistent with the terms of this Agreement.").

custody of unaccompanied children,<sup>43</sup> and it applied to all minors<sup>44</sup> detained and in legal custody of the former INS.<sup>45</sup> For unaccompanied children, the Flores Settlement mandates that they will not be detained with an unrelated adult for a period of more than twenty-four hours.<sup>46</sup> In the settlement, the INS agreed to “place each detained minor in the *least restrictive setting appropriate* to the minor’s age and special needs, provided that such setting is consistent with its interests to ensure the minor’s timely appearance before the INS and the immigration courts and to protect the minor’s well-being and that of others.”<sup>47</sup> Release to a parent, legal guardian, or adult relative is preferred by the settlement over a licensed program or sponsor willing to accept custody.<sup>48</sup> A custodian of an unaccompanied child must execute an Affidavit of Support, in which he or she agrees to provide for the minor’s mental, physical, and financial welfare and to ensure the unaccompanied child’s presence at immigration proceedings, among other requirements.<sup>49</sup> The settlement outlines that the Agency “*may* terminate” the custodial arrangement of an unaccompanied child for failure of a custodian to comply.<sup>50</sup>

Unaccompanied children not released to a parent or custodian are placed temporarily in a licensed program for custody under the Flores

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43. See Ooi, *supra* note 28, at 886–87 (discussing the initial class action suit brought, which challenged INS custody and the path to Flores Settlement).

44. Under the Flores Settlement, however, the Agency may treat a person who claims to be a minor as an adult if a reasonable person would conclude the same. See Flores Settlement, *supra* note 41, at 7–9.

45. *Id.* at 6. The Flores Settlement was agreed to when the unaccompanied children were under the custody of the INS. *Id.* After the transfer of custodial responsibilities of unaccompanied children to ORR, the Agency has stated that it operates on the values of the Flores Settlement in addition to its other legal requirements, though no statute mandates ORR to specifically follow the settlement. See *About Unaccompanied Children’s Services*, ORR, <http://www.acf.hhs.gov/programs/orr/programs/ucs/about> (last visited Oct. 6, 2015) (describing custody of unaccompanied minors with ORR); KATE M. MANUEL & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R43623, UNACCOMPANIED ALIEN CHILDREN—LEGAL ISSUES: ANSWERS TO FREQUENTLY ASKED QUESTIONS 12–13 n.82 (2014) (discussing that the transfer of responsibilities in the HSA included the recognition of “completed administrative actions,” such as the Flores Agreement); M. Aryah Somers, *Zealous Advocacy for the Right to Be Heard for Children and Youth in Deportation Proceedings*, 15 CUNY L. REV. 189, 192 n.11 (2011) (stating that the Flores Agreement currently applies to ORR and the Department of Homeland Security (DHS) “in their contact with all children”).

46. See Flores Settlement, *supra* note 41, at 8.

47. *Id.* at 7 (emphasis added); see also *id.* at 14 (stating that an applicable minor who may be transferred to a secure facility will not be placed there if less restrictive alternatives are available).

48. *Id.* at 10.

49. See *id.* at 10–11.

50. *Id.* at 11 (emphasis added).

Settlement.<sup>51</sup> Facilities under the Flores Settlement, in addition to the overarching requirement of being the “least restrictive setting appropriate,” are specifically mandated to provide basic needs of the unaccompanied child, such as “access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, [and] adequate supervision to protect minors from others.”<sup>52</sup>

TVPRA was an attempt to codify an enhanced standard of care for unaccompanied children.<sup>53</sup> The Act first expanded the responsibility of the care and custody of unaccompanied children to the Secretary of Health and Human Services.<sup>54</sup> TVPRA also incorporated language from the Flores Settlement, requiring unaccompanied children to be “placed in the *least restrictive setting* that is in the best interest of the child.”<sup>55</sup> However, TVPRA’s language did not establish explicit oversight or compliance guidelines for the Agency visibly to ensure the Act was being implemented by the facilities.<sup>56</sup> In fact, in terms of safety, TVPRA addressed safety concerns uniquely related to releasing unaccompanied children to parents and custodians, including if a home study should be conducted; but when unaccompanied children remain in the government’s custody, the Act did not mention how, or even if, HHS or its designees should administer compliance checks on facilities contracted to care for unaccompanied children under the Agency’s legal authority.<sup>57</sup>

In practice, ORR is leveraging a “continuum of care” to shelter unaccompanied children who do not have a sponsor in the United States.<sup>58</sup> This includes “foster care, group homes, shelter, staff secure, secure, and

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51. *See id.* at 12–13 (allowing also for separate detention options for delinquent unaccompanied children).

52. *See* Flores Settlement, *supra* note 41, at 7–8.

53. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 8 U.S.C. § 1232 (2012) (stating that the purpose of TVPRA is to ensure the safety of unaccompanied children as they are repatriated to their country of origin).

54. *Id.* § 1232(b) (“Consistent with [HSA] . . . the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services (HHS).”).

55. *Id.* § 1232(c)(2) (emphasis added); *see* Hill, *supra* note 11, at 279 n.49 (discussing how TVPRA adopted the language of the Flores Settlement). This language also demonstrates a continuation of the values and principles that culminated in the Flores Settlement. *See* 8 U.S.C. § 1232(c)(2) (establishing also that a secure facility placement is conditioned upon determining the unaccompanied child poses a danger to himself or others or is charged of committing a criminal offense).

56. *See* 8 U.S.C. § 1232 (pointing out that nowhere in TVPRA does Congress include an oversight provision).

57. *See id.* § 1232(c).

58. *See About Unaccompanied Children’s Services*, *supra* note 45.

residential treatment centers,” which operate on cooperative contracts to “provide children with classroom education, health care, socialization/recreation, vocational training, mental health services, family reunification, access to legal services, and case management.”<sup>59</sup> Looking more closely, however, these services are not as expansive as one might assume under the least restrictive setting prompted by the Flores Settlement and TVPRA.<sup>60</sup> Education is limited to instruction in English and science by certified teachers, and recreational activities include arts and crafts and daily indoor and outdoor activity.<sup>61</sup> Legal services are the following: “the mandated ‘Know Your Rights’ workshop; pro bono legal service provider lists; [and notification] of Special Immigrant Juvenile Status eligibility guidelines.”<sup>62</sup> Mental and medical health services are to include medical screening and vaccinations.<sup>63</sup> This “continuum of care” is a start to providing unaccompanied children with the least restrictive setting available, but because the lack of transparent oversight by the Agency, the public is left in the dark in assessing the extent to which ORR is fulfilling its obligations under the Flores Settlement and TVPRA.<sup>64</sup>

### III. THE LACK OF TRANSPARENCY IN FACILITY OVERSIGHT BY THE OFFICE OF REFUGEE RESETTLEMENT

This Part discusses why unaccompanied children would benefit from transparent oversight of ORR because of their status as non-citizens and minors. Additionally, it discusses what issues have arisen because of the lack of transparent oversight and why ORR’s oversight has been insufficient to date.

#### *A. Unaccompanied Children’s Unique Situation Requires Transparent Oversight*

One of the general principles of immigration law is the dominance of the federal government to administer and oversee immigration issues.<sup>65</sup>

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59. *Id.*; see also *Children Entering Unaccompanied*, *supra* note 11 (describing each type of facility and the considerations in placing unaccompanied children in them).

60. See *Services Provided*, ORR, <http://www.acf.hhs.gov/programs/orr/ucs-services-provided> (last visited Oct. 6, 2015).

61. *Id.*

62. *Id.*

63. *Id.*

64. See *infra* Part III; Hennessy-Fiske, *supra* note 14 (stating that both conservative and liberal critics declare the immigration system’s sheltering of unaccompanied children needs more oversight and transparency).

65. See Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 BYU L. REV. 1563, 1600 (2013) (discussing Supreme Court cases that have given birth to limited constitutional and judicial review).

Congress, in particular, has been vested with immense plenary power over immigrants.<sup>66</sup> This power has roots in our system going back to the 1889 case of *Chae Chan Ping v. United States*,<sup>67</sup> and although there have been some limitations on this power, it has been largely unfettered.<sup>68</sup>

Unaccompanied children are faced with two realities that make them more vulnerable in our political and legal system: their status as non-citizens and as minors.<sup>69</sup> From a political standpoint, the federal government's plenary power is further amplified because of their non-citizen and minor status.<sup>70</sup> The very aspect of unaccompanied children being "children" is also what necessitated their distinct treatment under immigration law.<sup>71</sup> The purpose of ORR custody in particular "is generally not focused upon immigration enforcement, but instead to provide [unaccompanied children] with temporary shelter care and protect them from trafficking and other forms of exploitation."<sup>72</sup> The truth is, however, that many of these children are fleeing settings where they already incurred psychological, emotional, or physical harm,<sup>73</sup> so when dealing with these children, ORR must realize that poor sheltering conditions can also trigger these previous traumas the children experienced.<sup>74</sup>

From the mandates of the HSA, Flores Settlement, and TVPRA, ORR is operating its custodial responsibilities, in conjunction with HHS, through

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66. *Id.* at 1600–01.

67. 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

68. Tirres, *supra* note 65, at 1600–01.

69. *See id.* at 1601 (discussing the political context of immigrants); MANUEL ET AL., *supra* note 45, at 4 (discussing a purpose of the Flores Agreement was to respond to the particular vulnerability unaccompanied children have as minors).

70. Tirres, *supra* note 65, at 1601 ("Normally we consider members of Congress to be accountable through the judiciary and through the ballot box; if individuals do not like a particular policy, they can vote against a representative who supported it. But immigrants do not have this power since they cannot vote in state or federal elections.").

71. *See* MANUEL & GARCIA, *supra* note 45, at 1–3.

72. *Id.* at 12.

73. *See* A HUMANITARIAN CALL TO ACTION, *supra* note 6, at 3–4 (discussing the conditions encouraging unaccompanied children to immigrate, such as gang violence and other poor living conditions); Emily A. Benfer, Note, *In the Best Interests of the Child?: An International Human Rights Analysis of the Treatment of Unaccompanied Minors in Australia and the United States*, 14 IND. INT'L & COMP. L. REV. 729, 730 (2004) ("When they arrive in a country perceived as a safe haven, these children are extremely vulnerable and are often suffering, emotionally and psychologically, from the trauma they experienced and from which they fled.").

74. Benfer, *supra* note 73, at 759 (detailing how inappropriate settings can trigger previous torture or hardship experienced by the child and cause psychological and physical harm and new trauma).

a mostly discretionary lens.<sup>75</sup> Recently, and over the years, a number of regulations have been drafted, but none have been promulgated to cover ORR's implementation of its expansive oversight power.<sup>76</sup> Moreover, even when a rule has been promulgated under ORR oversight, its language was overly broad, allowing the internal, non-transparent monitoring by ORR to leave the door open for the problems discussed below.<sup>77</sup>

### *B. The Problem of Insufficient Transparent Oversight*

Transparency in oversight is valuable in this area of law, one whose participants are in a vulnerable position socially and politically.<sup>78</sup> Agencies that lack transparency run the risk of lacking consistency in implementing their responsibilities and risk undermining the principles that supported their creation in the first place.<sup>79</sup> The lack of transparency can also impede an agency's efficiency, especially its use of resources, by causing increased numbers of court actions, appeals, and agency reviews.<sup>80</sup>

ORR's lack of transparent oversight has led to unfavorable outcomes for

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75. Cases have arisen questioning ORR's discretionary oversight. *See, e.g.*, *Fabian v. Dunn*, No. SA-08-cv-269-XR, 2009 WL 2567866 (W.D. Tex. Aug. 14, 2009) (requesting injunctive relief to enforce the Flores Settlement and remedy negligent oversight by ORR); *Walding v. United States*, No. SA-08-CA-124-XR, 2009 WL 902423 (W.D. Tex. Mar. 31, 2009) (asserting negligence of ORR in oversight and selection of care provider facilities). *See generally* Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1662–64 (2012) (emphasizing that the Flores Settlement did not create rights of unaccompanied children which make it hard to remedy violations of the Flores Settlement).

76. *See* MANUEL & GARCIA, *supra* note 45, at 5 (discussing that no regulations have been promulgated to implement the Flores Settlement despite a call for the Agency to do so in the agreement and subsequent stipulation).

77. *See* Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77,768, 77,797 (Dec. 24, 2014) (to be codified at 45 C.F.R. pt. 411) [hereinafter ORR Interim Final Rule] (outlining requirements for ORR monitoring of reported incidents of sexual abuse but not delineating the frequency or depth of monitoring); *see also* Susan Carroll, *Crossing Alone: Children Fleeing to U.S. Land in Shadowy System*, HOUS. CHRON. (May 29, 2014, 5:24 PM), <http://www.houstonchronicle.com/news/investigations/article/Crossing-alone-Children-fleeing-to-U-S-land-in-5503127.php> (showing that the aforementioned sexual abuse regulation was put into action only after direct congressional directive to do so).

78. Tirres, *supra* note 65, at 1601.

79. Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 264 (2002) (“Systems that lack transparency are likely to lack consistency as well, thus, undermining the system’s integrity and[,] therefore, respect for the system.”); *see also* David Alan Sklansky, *Crime, Immigration, and Ad hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 217–18 (2012) (discussing that immigration has an “accountability deficit,” partly arising from the “ad hoc instrumentalism”—procedures, penalties, and tools that are employed selectively by officials in regard to alleged criminal immigrant offenders).

80. Benson, *supra* note 79, at 264.

unaccompanied children, but it is important to note, at the onset, that this problem is not unique to ORR. The federal government's custodial administration of unaccompanied children has been under continuous review and subject to litigation over the years, as exemplified by the INS's history leading up to and after the Flores Settlement.<sup>81</sup> Recently, DHS has also encountered scrutiny over its custodial administration of unaccompanied children.<sup>82</sup> On June 11, 2014, the American Civil Liberties Union (ACLU) filed an administrative complaint with DHS on behalf of 116 unaccompanied children who allegedly experienced abuse under the custody of CBP.<sup>83</sup> The DHS Office of the Inspector General found potential violations of the Flores Settlement and TVPRA in sheltering conditions of CBP facilities housing unaccompanied children but stated that the investigations were "ongoing."<sup>84</sup>

ORR, following in the footsteps of its predecessor, has been subject to litigation over its discretionary oversight. One issue that has seen much attention is the lack of oversight resulting in sexual abuse of unaccompanied children.<sup>85</sup> In 2009, *Walding v. United States*<sup>86</sup> entailed litigation of reported sexual abuse in ORR facilities.<sup>87</sup> The plaintiffs were unaccompanied minors from Central America placed in the custody of ORR as their immigration proceedings were pending.<sup>88</sup> While the unaccompanied children were in custody at a facility located in Nixon, Texas, they allegedly were subject to "grave and repeated sexual, physical and emotional abuse at the facility" by facility personnel and brought suit alleging the negligence of ORR's oversight.<sup>89</sup> In response to the claim, the Government argued that ORR had general discretion in its manner of oversight because HSA

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81. See generally López, *supra* note 75, at 1646–66 (detailing the history of the Flores Settlement and cases litigated on deviations from the standards of care envisioned by the Settlement).

82. See Letter from Ashley Huebner et al., Nat'l Immigrant Justice Ctr., to Meghan H. Mack, Officer for Civil Rights and Civil Liberties, DHS, and John Roth, Inspector General, DHS (June 11, 2014), <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf> [hereinafter Huebner Letter]; see also Memorandum from John Roth, Inspector General, DHS, to the Honorable Jeh C. Johnson, Secretary, DHS (July 30, 2014).

83. See Huebner Letter, *supra* note 82, at 1–3.

84. Roth, *supra* note 82, at 1.

85. For the first time, ORR leveraged rulemaking for its unaccompanied children program in 2015 with its interim final rule responding to sexual abuse of these children. See ORR Interim Final Rule, 79 Fed. Reg. 77,768, 77,791 (Dec. 24, 2014).

86. No. SA-08-CA-124-XR, 2009 WL 902423 (W.D. Tex. Mar. 31, 2009).

87. *Id.* at \*1.

88. *Id.*

89. *Id.* at \*1–2 (claiming negligent oversight over the facilities and negligent selection of facility care providers).

did not describe how the oversight should be conducted.<sup>90</sup> The United States District Court for the Western District of Texas agreed, asserting that the quality of the discretion was not an issue to review; rather, the issue was whether ORR exercised its discretion at all, which it had.<sup>91</sup>

Furthermore, the plaintiffs also brought a claim for negligent selection by ORR for the contractor of the facility.<sup>92</sup> Here, too, the district court found that selection of a facility contractor was within the Agency's broad discretionary powers and that discretionary power was beyond evaluation of how it was exercised.<sup>93</sup> Specifically, the court accepted the government's assertion that while HSA requires ORR to identify "qualified" facilities for the custody of unaccompanied children, the statute did not enumerate what "qualified" meant; therefore, ORR was able to select facilities according to its discretion.<sup>94</sup>

The 2009 Texas cases were not isolated incidents. Recently, in 2014, the *Houston Chronicle* investigated ORR's "strained and secretive federal detention network" through Freedom of Information Act (FOIA) requests.<sup>95</sup> The *Houston Chronicle* started its findings with a caveat that "the full extent of sexual and physical abuse in [ORR's contracted] shelters is unknown," especially since ORR had "no specific system that tracks abuse allegations all the way through the investigative process—from outcry to outcome."<sup>96</sup> In fact, ORR typically removed itself in the oversight of these allegations, relying on state childcare licensing officials and local police to investigate the allegations.<sup>97</sup> However, in its review of 101 "significant incident reports" released pursuant to its FOIA request, the newspaper found that unaccompanied children had reported sexual contact by staff in shelters in at least four states.<sup>98</sup> In the past decade, state childcare licensing

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90. *Id.* at \*8.

91. *Id.* at \*10.

92. *Walding v. United States*, No. SA-08-CA-124-XR, 2009 WL 902423, at \*10–11 (W.D. Tex. Mar. 31, 2009).

93. *Id.* at \*5–6 (W.D. Tex. Mar. 31, 2009) ("The United States asserts that ORR has not promulgated regulations regarding the advertising and award of cooperative agreements, but instead uses the U.S. Department of Health and Human Service's Awarding Agency Grants Administration Manual and the regulations at 45 C.F.R. Part 74 for general guidance.").

94. *Id.* ("No statute, regulation, or agency policy specifically defines the term 'qualified.'").

95. Carroll, *supra* note 77.

96. *Id.*

97. *Id.* (showing how this reliance was faulty because cases fall apart due to, for instance, the inapplicability of state law to the allegations or the child aging out of ORR custody).

98. *Id.* ("Children and teenagers reported having sexual contact—ranging from kissing to unwanted touching to intercourse—with staff in Texas, Florida, New York and Illinois, the federal records show.").

investigators documented that ORR shelters in Texas alone had “more than 100 serious incidents.”<sup>99</sup> These unaccompanied children not only reported incidents of abuse, but also alleged that they experienced retaliation from the facility staff for reporting the incidents, such as being pushed, punched, kicked, and threatened.<sup>100</sup> Additionally, the *Houston Chronicle* found that although a change in the federal statute in 2008 opened the door for federal prosecution of facility personnel who sexually abuse detainees, where previously they fell through a loophole of the previous version of the statute,<sup>101</sup> ORR had not notified the FBI of any abuse allegations of facility personnel since the change.<sup>102</sup>

The key theme for oversight by ORR, as outlined by the previous instances, is that it is non-transparent and internal. ORR’s lack of transparent oversight is also reflected in its (in)visibility to the public on how the unaccompanied children program is operated; visiting ORR’s website, no public information exists on which contractors are granted funding to shelter unaccompanied children.<sup>103</sup> Moreover, there is no information regarding what oversight checks have been conducted by the Agency.<sup>104</sup> Finally, ORR’s website currently houses no reports made to the public or congressional committees on the Agency’s oversight.<sup>105</sup>

In response to the instances of sexual abuse and lack of transparency, ORR promulgated an interim final rule on December 24, 2014, entitled “Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children”—the first piece of regulation ORR has promulgated for unaccompanied children.<sup>106</sup> This

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99. *Id.*

100. *Id.*

101. Carroll, *supra* note 77. Previously, unaccompanied children attempted to bring federal claims against facility employees through a federal law criminalizing sexual abuse of a ward; however, the statute was held only to apply to inmates in Department of Justice custody. *Id.* The law was, thus, amended to allow facility personnel to be charged. *See id.*

102. *Id.* (“[Jallyn Sualog, director of ORR unaccompanied children program] said that the FBI ‘defers to local law enforcement, and they will only take the lead and do an investigation if there is no local law enforcement involved.’”).

103. *See generally About Unaccompanied Children’s Services*, *supra* note 45 (providing no basic information on facilities, such as a listing of the contractors or the number of facility contracts in the United States).

104. *See generally id.* (publishing no facility oversight reports or details on oversight checks of those facilities).

105. *Id.*

106. ORR Interim Final Rule, 79 Fed. Reg. 77,768 (Dec. 24, 2014) (to be codified at 45 C.F.R. pt. 411); *see* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999) (stating that interim final rules are promulgated without prior public comment or notice, which is enabled by the Administrative Procedure Act’s (APA’s) provision that foregoes those procedures when either “impracticable or contrary to the public’s interest” for the issuing agency to do so, but that the issuing agency will consider

interim rule is a step in the right direction by establishing ORR's responsibility to respond to abuses of these children.<sup>107</sup> It also, for the first time, creates some type of visibility on ORR's oversight of the unaccompanied children program by mandating the Agency to create, at the very least, an annual report to the public on aggregated sexual abuse and harassment data of its contracted facilities.<sup>108</sup> Lastly, the interim rule also provides for auditing of the facilities, which will be aggregated and made public annually.<sup>109</sup> ORR has yet to publish these reports, and the visibility of ORR's oversight is still questionable, especially since ORR is only required to publish the reports yearly and the data within them is to be aggregated.<sup>110</sup> ORR should pursue more effective transparent oversight to keep it accountable to the public for the unaccompanied children program and remedy the concerns outlined by documented instances of abuse.

#### IV. RECOMMENDATIONS

##### *A. ORR Should Apply the Virginia Oversight Model of Foster Care Facilities*

The question of oversight for child welfare programs is not unique to ORR's unaccompanied children program. ORR can learn from state models, specifically, in overseeing foster care programs to effectuate better oversight of its unaccompanied children program. ORR would benefit from these models because the custody and care of unaccompanied children is moving away from juvenile detention toward a "continuum of care" for its facilities, including foster care.<sup>111</sup> In fact, ORR already relies on state childcare licensing requirements as an element of ensuring a better standard of care.<sup>112</sup>

A trend that has taken hold in many states is the creation of Children's

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public comments afterward, modify the interim rule if necessary, and adopt a final rule).

107. 79 Fed. Reg. at 77,771 (narrowing the rule to only cover "sexual abuse and sexual harassment" of children in § 411.10).

108. *Id.* at 77,786 (requiring that the Agency also publicize the report on its website for public review in C.F.R. pts. 411.103–411.104).

109. *Id.*

110. See generally American Civil Liberties Union, Common Letter on Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children (Feb. 23, 2015), [https://www.aclu.org/sites/default/files/assets/2015-02-23-\\_comments\\_on\\_orr\\_prea\\_regulations\\_-\\_aclu\\_-\\_final.pdf](https://www.aclu.org/sites/default/files/assets/2015-02-23-_comments_on_orr_prea_regulations_-_aclu_-_final.pdf) (discussing how ORR can improve the interim rule to be aligned with the child's best interest and ensure more effective oversight).

111. See Nugent, *supra* note 13, at 223 ("ORR developed a continuum of care for unaccompanied children by adding a variety of housing options, such as shelter care, staff secure, foster care, and more innovative secure settings, as well as residential treatment care.").

112. See Carroll, *supra* note 77.

Ombudsman Offices (Ombudsman offices), which were established to provide oversight of a state's child services programs or departments.<sup>113</sup> Although the responsibilities of each office vary by state, they primarily handle and investigate all complaints regarding services for children, monitor child services programs and departments, and act as an accountability mechanism by providing reports and recommendations on such services.<sup>114</sup> Eleven states have created an Ombudsman office that specifically handles child welfare issues and is operated independently and autonomously from the state's division of child and family services.<sup>115</sup> Moreover, other states have Ombudsman offices that are independent but within the children services division, that are non-independent within the division, or that are part of a general Ombudsman office for the state that includes oversight for children services.<sup>116</sup> ORR, in turn, could create a subdivision that has the primary responsibility of investigating complaints, facilitating communication to the public, and publishing reports for public accountability.

Virginia's model for transparent oversight of foster care however, has implemented a system that is even simpler and adequately demonstrates continual accountability that ORR could also implement.<sup>117</sup> In Virginia, the State Board of Social Services and the State Department of Social Services (the Department) administer the foster care system.<sup>118</sup> Pursuant to regulations promulgated by the State Department of Social Services, the

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113. Kate Bartell Nowak, NAT'L CONFERENCE OF STATE LEGISLATURES, *Children's Ombudsman Offices: Office of the Child Advocate* (Sept. 3, 2014), <http://www.ncsl.org/research/human-services/childrens-ombudsman-offices.aspx>.

114. *Id.*

115. *Id.* (emphasis added) (listing the eleven states with Ombudsman offices that are specifically designed for "oversight" of child welfare services and that are independent and autonomous of the states' agencies providing children welfare services—Colorado, Connecticut, Georgia, Indiana, Maine, Massachusetts, Michigan, Missouri, Rhode Island, Tennessee, and Washington).

116. *Compare id.* (showing that California, Texas, and Utah have *autonomous* Ombudsman offices designed to oversee child welfare services but that operate within the state agency that provides the child welfare services), *with id.* (stating that Alaska, Arizona, Hawaii, Iowa, and Nebraska have *general* Ombudsman offices that oversee all state agencies and their services, including the oversight of child welfare services), *and with id.* (providing that Arkansas, Kentucky, Illinois, Oklahoma, New Hampshire, New Jersey, New York, and Oregon have *non-independent* Ombudsman offices that provide oversight while operating within the state agency providing child welfare services).

117. For instance, Virginia decided to give the public information on its facilities, their licenses, and the inspections and violations of the facilities. *See, e.g., CPA - Search for a Licensed Facility*, VA. DEPT OF SOCIAL SERVS., <http://www.dss.virginia.gov/facility/search/cpa.cgi?rm=Search> (last visited Jan. 19, 2016) [hereafter *Facility Search*] (press search without limiting search terms and then click on a facility).

118. *See* VA. CODE ANN. § 63.2-900 (West 2015).

Department must maintain a toll-free telephone line for the receipt of complaints on all licensed facilities.<sup>119</sup> The Department's regulations also explicitly require it to investigate any complaints of violations, and if the complaint involves suspected neglect, child abuse, or exploitation at a facility, the local department of social services is also prompted to investigate.<sup>120</sup> Additionally, the Department's regulations explicitly outline the sanctions and remedies to be imposed,<sup>121</sup> and "when conditions or practices exist that pose an imminent and substantial threat to the health, safety and welfare of the residents, the commissioner [of the Department] may issue a summary suspension of the [facility's] license."<sup>122</sup>

As a result of the legal framework set up by Virginia, the commonwealth has created a more transparent oversight mechanism for its foster care facilities. As part of Virginia's oversight of its facilities, the State Department of Social Services publicly discloses all contracted foster care facilities.<sup>123</sup> This listing includes the name, address, contact information, including the administrator's information and facility's phone number, the facility's license and qualification type, and the contact information for the designated inspector of the facility.<sup>124</sup> More importantly, Virginia's online system allows the public to view the inspection history of each facility.<sup>125</sup> The inspection history outlines whether the inspection was prompted by a complaint or not.<sup>126</sup> It additionally tells the public whether the inspector found any violations during the inspection.<sup>127</sup> The online system also details more substantive parts of the inspection, such as the inspector's comments, the description of the violation, and the actions to be taken.<sup>128</sup>

ORR, therefore, could implement the strategies that Virginia has implemented. First, the Agency could upload a list of contractors to its

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119. 22 VA. ADMIN. CODE § 40-80-290 (2015).

120. *Id.* § 40-80-300.

121. *See, e.g., id.* § 40-80-340.

122. *Id.* § 40-80-345.

123. VA. DEP'T OF SOCIAL SERVS., DIRECTORY OF LICENSED CHILD-PLACING AGENCIES (2015), <http://www.dss.virginia.gov/pub/pdf/childplacedir.pdf>.

124. *See, e.g., Facility Search, supra* note 117 (press search without limiting search terms and then click on a facility).

125. *Id.*

126. *Id.* (once on a facility's page, click on an inspection date to view details).

127. *Id.*

128. *Id.* For example, an inspector named Leslie S. Armstrong evaluated the ABC Adoption Services facility on November 12, 2014, finding that the facility was not compliant with its documentation and requirements for confidentiality agreements and corporal punishment statements; the violations were also accompanied by steps to be taken by the Executor Director and Social Work Coordinator to correct the violations. *See ABC Adoption Services, VA. DEP'T OF SOCIAL SERVS.*, <http://www.dss.virginia.gov/printer/facility/search/cpa.cgi?rm=Inspection;Inspection=1938;ID=26819> (last visited Feb. 13, 2016).

website so that the public is able to see which contractors are responsible for sheltering unaccompanied children.<sup>129</sup> Second, ORR can create an online reporting system similar to Virginia's, which would detail when violations were communicated to the Agency and how the Agency is overseeing their resolution. These two simple measures can give the public a better starting point in assessing the effectiveness of ORR oversight.

*B. ORR and HHS Should Issue Regulations Concerning Transparent Oversight on Facilities*

Moreover, as both ORR and HHS were delegated broad discretionary power over the custody of unaccompanied children by HSA and TVPRA, respectively, these agencies should engage in increased rulemaking on the oversight of facilities through notice-and-comment rulemaking.<sup>130</sup> Although immigration agencies have often implemented non-legislative rules instead of through notice-and-comment,<sup>131</sup> the latter would allow the public to comment on the oversight mechanisms and create opportunities for further transparency, such as the agency's discussion section-by-section in creating the rule.<sup>132</sup> Specifically, these rules can outline a system of oversight that does not just pay lip-service to the legal principles regarding the custody of unaccompanied children; rather, they can introduce methods for increased oversight and transparency, which would open the door, thereby forcing the Agency to defend the adequacy of its methods to the public.<sup>133</sup> This public oversight will add to the accountability of ORR, which is vital in this context because these unaccompanied children have a

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129. *But see* Brendan Farber, *How the Immigration Debate Could Erode Privacy for Children*, INT'L ASS'N OF PRIVACY PROF'LS. (Dec. 9, 2014), <https://iapp.org/news/a/how-the-immigration-debate-could-erode-privacy-for-children/> (proposing that a lack of transparency protects unaccompanied children from harmful protests).

130. *See* APA, 5 U.S.C. § 553 (2012) (enacting rulemaking procedures for federal agencies); HSA, 6 U.S.C. § 279(a) (2012) (transferring the care of unaccompanied children to ORR); TVPRA, 8 U.S.C. § 1232(b) (2012) (establishing that the HHS Secretary has responsibility for the care and custody of unaccompanied children consistent with HSA); Linda Kelly Hill, *The Right of Safe Repatriation for Unaccompanied Alien Children: Advancing the Intent of the Trafficking Victims Protection Reauthorization Act*, 12 LOY. J. PUB. INT. L. 85, 101–07 (2010) (discussing the benefits of instituting a regulatory right of safe repatriation, including establishing rules for the detention of unaccompanied children).

131. Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 593–94 (2012) (“Two examples that set the tone for usual immigration law practice involve a complete lack of legislative rulemaking to implement a major statutory change and heavy use of guidance to resolve a multitude of issues.”).

132. *See id.* at 613–15 (discussing the issue of immigration law neglecting notice-and-comment rulemaking but also noting immigration agencies' willingness to solicit public comments before adopting nonlegislative rules, which derives the same benefits of legislative rulemaking such as notice, transparency, and the opportunity to comment).

133. *Id.* at 598–99.

diminished, if even nonexistent, political voice in the United States.<sup>134</sup>

*C. Congress Should Pass Legislation Mandating More Transparent Oversight  
Mechanisms by the Office of Refugee Resettlement*

The violations of the federal government in exercising custody over unaccompanied children necessitated the Flores Settlement and the HSA transfer of that responsibility outside the agency that conducts enforcement of immigration laws; to effectuate these principles, however, a codification on how they should be enforced—i.e., oversight—and the visibility of that oversight should be mandated.<sup>135</sup> Therefore, one avenue is for Congress to outline a more explicit and transparent oversight mechanism by amending the current federal statutes, HSA or TVPRA, or by finally codifying the Flores Settlement in detail.<sup>136</sup>

One of the current issues is that unaccompanied children and the public are left in the dark on what ORR is actually doing, which was exemplified by allegations that ORR was insufficiently overseeing shelter facilities.<sup>137</sup> Attacks on ORR's type, frequency, and degree of oversight were set aside in these instances because the courts found the oversight to be under the Agency's sole discretion.<sup>138</sup> Therefore, Congress should first set an expressed minimum standard for ORR oversight, removing the purely discretionary standard currently read by HSA and TVPRA.<sup>139</sup> Establishing an ORR transparent oversight standard will allow unaccompanied children and the public to assess whether ORR is sufficiently exercising its legal oversight responsibilities and will enable us better to identify how oversight can be improved and modified.<sup>140</sup> This change would be consistent with

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134. See Tirres, *supra* note 65, at 1563.

135. See López, *supra* note 75, at 1662 (acknowledging that litigation settlements, such as the Flores Settlement, can be fruitful in establishing protections for a vulnerable class but stating that the drawback of such settlements is that they do not create any rights and that the settlements are repeatedly violated by contracting facilities).

136. See *id.* at 1662–64, 1668–71 (discussing the necessity to implement enforceable standards of the Flores Settlement through codification).

137. See *Fabian v. Dunn*, No. SA-08-cv-269-XR, 2009 WL 2567866, at \*7 (W.D. Tex. Aug. 14, 2009); *Walding v. United States*, No. SA-08-CA-124-XR, 2009 WL 902423, at \*1, \*8–9 (W.D. Tex. Mar. 31, 2009); Carroll, *supra* note 77.

138. See *Fabian*, 2009 WL 2567866, at \*7; *Walding*, 2009 WL 902423, at \*8.

139. See *Walding*, 2009 WL 90243, at \*8.

140. Carroll, *supra* note 77 (examining the results of a Freedom of Information Act request and finding that ORR's oversight has been ineffective in resolving allegations of sexual abuse at facilities); Letter from Chuck Grassley, Orrin Hatch, and Tom Coburn, Senators, United States (Oct. 9, 2014), <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/Immigration%2C%2010-10-14%2C%20Unaccompanied%20Minors%2C%20ORR%2C%20CEG%2C%20Hatch%2C%20Coburn%20letter%20to%20GAO.docx.pdf> [hereinafter Grassley et al. Letter] (requesting that the Government

other areas of immigration law where underlining legal frameworks have left agency accountability to question. For instance, Amil Kalhan, in discussing the expansion of immigration surveillance via technology, found that accountability of the federal government's use of such technology is nearly unfettered.<sup>141</sup> Kalhan asserted that transparent accountability can be achieved through a more sufficient underlying legal framework regarding an agency's oversight responsibilities, thereby reducing the agency's discretion in exercising oversight, especially in a complex area of law.<sup>142</sup>

Congress can also increase the transparency of ORR oversight by using some of its oversight techniques.<sup>143</sup> Notably, Congress could require ORR to prepare frequent reports on how it is exercising its oversight authority.<sup>144</sup> Furthermore, Congress could subject ORR to more frequent hearings on its administration of oversight, which would further require ORR to articulate how it is exercising its oversight authority.<sup>145</sup>

#### CONCLUSION

Although immigration law has received national attention after the drastic increase of unaccompanied children immigrating to the United States in 2014, much can be done to ensure that unaccompanied children are being effectively sheltered under the principles guiding ORR. The importance and feasibility of transparent oversight by ORR of its contracted shelter facilities must be underscored.

Unaccompanied children are within a unique sociopolitical context that

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Accountability Office (GAO) examine a list of questions pertaining to ORR oversight, including how ORR is overseeing and monitoring the placement of unaccompanied children and how ORR is vetting and overseeing facilities).

141. See Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 72 (2014) (arguing that immigration regulation should be more precise in its oversight mechanisms and in the principles on how the regulations should be applied).

142. See *id.* at 76 ("A major contributing factor to the lack of sufficient transparency, oversight, and accountability has been the lack of sufficiently concrete or detailed legal authority to support and guide such major and complicated [surveillance] initiatives.").

143. ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 1-9 (2014).

144. *Id.* at 80 (stating that reports can be mandated at specific intervals or when a triggering event or condition occurs); Jonathan G. Pray, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 U. COLO. L. REV. 297, 304-05 (2005) (discussing the Congressional duty to monitor and investigate activities of agencies to which it vested power to

145. See DOLAN, *supra* note 143, at 72 (discussing that hearings can enable Congress "to ask penetrating questions" on issues of agency discretion and conduct); Pray, *supra* note 144, at 305-07 (discussing how committee and subcommittee hearings are a primary function of legislative oversight).

speaks to their vulnerability. It is important to note that their place in immigration law has been given special attention due to their history of mistreatment by the U.S. government, evidenced by the necessity for the Flores Settlement<sup>146</sup> and the transfer of custodial responsibilities from the former INS to ORR.<sup>147</sup> Moreover, the demographics of unaccompanied children also position them in a vulnerable place within the law: they have a severely diminished political voice to influence a change in our law, especially as their age presents an additional set of unique challenges to their situation.<sup>148</sup> When custodial responsibilities of unaccompanied children were placed with ORR—a transfer to the Agency because Congress believed it would be better able to care for these children<sup>149</sup>—the legal authorities outlining the care and oversight ORR should exercise when contracting with care facilities were overly broad and discretionary.<sup>150</sup> ORR’s discretionary power has come under legal,<sup>151</sup> political,<sup>152</sup> and media<sup>153</sup> scrutiny due to its non-transparent exercise of oversight. Transparent oversight has a host of benefits for the Agency and unaccompanied children.<sup>154</sup> Congress, ORR, and HHS can work together to increase the oversight of ORR and restore its credibility. In examining the feasibility of transparent oversight, ORR can specifically learn from state governments, such as Virginia’s, which implements transparent oversight mechanisms of facilities in its foster care system.<sup>155</sup> Virginia’s foster care system enables the public to track the level of oversight in which the government is engaging by providing online access to a listing of facilities with which the state contracted, the inspections conducted, the violations found for facilities, and action-steps by the government to

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146. See Somers et al., *supra* note 20, at 337–38.

147. See Nugent, *supra* note 13, at 222.

148. See Tirres, *supra* note 65, at 1601, 1563; Somers et al., *supra* note 20, at 322–31.

149. Nugent, *supra* note 13, at 222.

150. See generally HSA, 6 U.S.C. § 279 (2012) (outlining the transfer of care of unaccompanied children to ORR); TVPRA, 8 U.S.C. § 1232 (2012) (instructing the HHS Secretary to be responsible for the care and custody of unaccompanied children consistent with HSA); see Flores Settlement, *supra* note 41, at 7 (providing the standards of care—“the least restrictive setting” available—for unaccompanied children in its settlement agreement implemented by ORR).

151. See *Walding v. United States*, No. SA-08-CA-124-XR, 2009 WL 902423, at \*1, \*8–9 (W.D. Tex. Mar. 31, 2009) (involving allegations of sexual abuse that resulted from a lack of oversight by ORR).

152. See Presidential Memorandum, *supra* note 15 (requesting for a commission to address the humanitarian crisis posed by the surge of immigration of unaccompanied children); Grassley et al. Letter, *supra* note 140 (requesting the GAO, *inter alia*, to examine the current oversight by ORR of unaccompanied children).

153. See Carroll, *supra* note 77.

154. See, e.g., Benson, *supra* note 79, at 264.

155. *Facility Search*, *supra* note 117.

remedy those violations.<sup>156</sup> Following in Virginia's footsteps, the oversight of facilities assuming the responsibility of sheltering unaccompanied children can become transparent through more information disclosed to the public by ORR or through a reduction in oversight discretion by either regulation or federal statute.

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156. *See supra* notes 117–128 and accompanying text.

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