

Before the
Department of Homeland Security
Department of Health and Human Services

In the Matter of

Apprehension, Processing, Care, and
Custody of Alien Minors and
Unaccompanied Alien Children

DHS Docket No. ICEB-2018-0002

COMMENTS OF

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I. Introduction and Summary

The Department of Health and Human Services (HHS) seeks comment on the process requirements that will permit release of an unaccompanied child from HHS custody to a sponsor. Commenters oppose the expanded sponsorship suitability assessments, detailed in Section 410.302 of the Proposed Rule, as currently written.

Commenters object because the Proposed Rule would codify this administration's misguided, unlawful, and harmful misuse of information collected during suitability assessments to drive deportation efforts. Since 2017, the Trump administration has had a de facto policy of misusing information provided by families hoping to be reunited with a child to instead target family members for deportation. Kids in Need of Defense (KIND) issued a report in December 2017 describing evidence that the Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) was using unaccompanied children as "bait" to target prospective sponsors and their families for deportation.¹ According to KIND, evidence indicated that ICE had started using information provided by the Department of Health and HHS Office of Refugee Resettlement (ORR) — shared by families and others volunteering to be vetted as sponsors — to instead target them for deportation.² ICE's policy of using ORR data to target families contradicted past practice.³ And KIND warned the about-face could "lead sponsors to avoid interactions with ORR."⁴

ICE and HHS have since doubled down on this new policy of using children to trap parents. In April of 2018, ICE and HHS reached a memorandum of agreement (MOA) memorializing and expanding HHS's data collection and data sharing practices. According to the MOA, HHS has implemented procedures for collecting and providing ICE with the name, date of birth, address, fingerprints, and any available identification documents or biographic information about a prospective sponsor and adult household members.⁵ ICE in turn has established procedures to provide HHS with criminal history

¹ Kids in Need of Defense (KIND), *Targeting Families, How ICE Enforcement Against Parents and Family members Endangers Children* 6 (Dec. 2017), https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families_-December-2017.pdf [hereinafter *Targeting Families*].

² *Id.* at 8.

³ *Id.*

⁴ *Id.* at 12.

⁵ U.S. Dep't of Homeland Sec. & U.S. Dep't of Health and Human Serv's, *Memorandum of Agreement Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters* 5 (Apr. 13, 2018), <https://www.scribd.com/document/380771850/HHS-DHS-MOA-signed-2018-04-13-1> [hereinafter *Memorandum of Agreement*].

and immigration status information.⁶ And ICE issued a notice of proposed rulemaking clarifying that it “may use [ORR sponsorship] information . . . for other purposes consistent with its statutory authorities.”⁷

ICE makes no secret of the fact that it is actively using information collected during suitability assessments for immigration enforcement. ICE claims to have arrested 41 people who came forward to take in these children.⁸

With Section 410.302 of the Proposed Rule, HHS now seeks to formalize its practice of using children to trap parents. The Proposed Rule would codify HHS’s process for collecting the information about sponsors that it shares with ICE for deportation.⁹

This proposal is unacceptable. The current procedures, which the Proposed Rule would codify, are triggering significant delays in the release of children from federal custody to their families.¹⁰ Not only do the new procedures render the sponsorship assessment process longer and more difficult to complete, but they frighten potential sponsors away from coming forward to claim unaccompanied children. And from the stories of sponsors being arrested by immigration authorities, it is easy to see why:

- A seven-year-old child fled Honduras after his father was murdered and his mother abandoned him. His uncle came forward and took him in. ICE agents came to their home claiming that they were checking on the child. With the child watching, the agents arrested the uncle and subsequently placed him in removal proceedings.¹¹

⁶ *Id.*

⁷ Privacy Act of 1974: Implementation of Exemptions; Dep’t of Homeland Sec./U.S. Immigration and Customs Enforcement-007 Criminal History and Immigration Verification (CHIVe) System of Records, 83 Fed. Reg. 20738 (proposed May 5, 2018) (to be codified at 6 C.F.R. pt. 5).

⁸ Tal Kopan, *ICE Arrested Undocumented Immigrants Who Came Forward to Take in Undocumented Children*, CNN (Sept. 20, 2018, 4:09 PM), <https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html>.

⁹ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45531 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R. pt. 212, 236, and 45 C.F.R. pt. 410) [hereinafter *Apprehension NPRM*].

¹⁰ Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. Times (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>.

¹¹ National Immigrant Justice Center et al., *Complaint to the Department of Homeland Security Office of Civil Rights & Civil Liberties*, 8-9 (Dec. 6, 2017), https://www.immigrantjustice.org/sites/default/files/content-type/press-release/documents/2017-12/Sponsor%20Enforcement-OIG_CRCL_Complaint_Cover_Letter-FINAL_PUBLIC.pdf; Targeting Families, *supra* note 1 at 4.

- Two teenage brothers from El Salvador fled to the U.S. to be with their mother after a gang broke into their home and assaulted them. They gave CBP officers their mother's name and address. Soon afterwards, ICE agents called their mother, visited her home, arrested her, and then deported her to El Salvador.¹²
- A teenager from Guatemala arrived alone at the Arizona border. He told ORR officials to contact his brother, a husband and father of two young children, who was living in New Mexico. ORR officials asked his brother for a range of information, assuring him that it would not be used against him. Soon after the teen arrived in the home, ICE came and arrested his brother. The teen now holds himself responsible for his brother's arrest.¹³

In addition to being inhumane, the Proposed Rule violates federal law because these delays are unnecessary and contrary to the best interests of children. These procedures are also expensive and violate DHS's own privacy policy and the privacy rights of potential sponsors.

Accordingly, commenters oppose the expanded sponsorship suitability assessments contained in Section 410.302 of the Proposed Rule. To comply with the agency's federal mandate to ensure unaccompanied children are placed as quickly as possible with suitable sponsors, HHS should terminate its practice of permitting information collected in the course of its suitability assessments of potential sponsors and their households to be used for purposes unrelated to evaluating and monitoring suitability, such as for immigration enforcement. HHS should adopt a provision strictly limiting the purposes for which information collected during suitability assessments can be used, requiring information that relates to sponsors' and household members' criminal status and immigration status to be sealed upon the conclusion of a suitability assessment, and further prohibiting use of that information to support deportation proceedings.

¹² Targeting Families, *supra* note 1 at 12.

¹³ Uriel J. Garcia, ICE arrests young immigrant's sponsor months after feds assured him he'd be safe, *Santa Fe New Mexican* (Sept. 9, 2017), http://www.santafenewmexican.com/news/local_news/ice-arrests-young-immigrant-sponsor-months-after-feds-assured/article_428366f5-6d03-552c-a277-93b83d3005e2.html; Targeting Families, *supra* note 1 at 8-9.

II. The Proposed Expanded Suitability Assessments Will Delay Release of Unaccompanied Children from Custody

The expanded sponsor suitability assessments that the Proposed Rule would codify are delaying the release of unaccompanied children from custody in two ways. First, the modified procedures are more difficult and time consuming to complete. Second, because the information collected under the new policies is being used to drive deportation proceedings, these practices are chilling families from coming forward to claim their children, causing children to languish in federal custody significantly longer.

Since HHS informally adopted the expanded sponsor suitability assessment procedures in 2017, the detention duration for immigrant kids has increased significantly, causing the total number of children held in detention to balloon as well. As of January 2016, unaccompanied children were detained, on average, for 34 days.¹⁴ By April 2018, an HHS official claimed that the average detention period had escalated to 56 days.¹⁵ And according to a report issued in October 2018, one HHS official stated that detained children now spend an average of 74 days in federal custody.¹⁶ Some children are detained for as long as seven or eight months.¹⁷ HHS has released substantially fewer children to sponsors in the past fiscal year; from 52,147 in Fiscal Year 2016 to 32,112 in Fiscal Year 2018.¹⁸

As detention duration has grown, so have shelter populations. The number of children in detention has increased 433% from May 2017 to September 2018 as a result of prolonged detention.¹⁹ Child detention shelter populations increased from 2,400 children in May 2017 to 12,800 children in September 2018.²⁰

¹⁴ William A. Kandel, Cong. Research Serv., R43599, *Unaccompanied Alien Children: An Overview* 10 (2017).

¹⁵ *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse: Hearing before the Senate Comm. on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations*, 115th Cong. (2018) (statement of Steven Wagner Acting Assistant Secretary Administration for Children and Families U.S. Department of Health and Human Services).

¹⁶ Jonathan Blitzer, *To Free Detained Children, Immigrant Families Are Forced to Risk Everything*, *The New Yorker* (Oct. 16, 2018), <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything>.

¹⁷ First Amended Class Action Complaint and Petition for a Writ of Habeas Corpus, *Minor v. Lloyd* (E.D.Va. 2018) ¶ 59, <https://www.justice4all.org/wp-content/uploads/2018/07/Amended-Class-Complaint-and-Habeas-Petition-Anonymized.pdf> [hereinafter *Minor v. Lloyd*].

¹⁸ Office of Refugee Resettlement, *Unaccompanied Alien Children Released by State* (June 30, 2017), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>.

¹⁹ Dickerson, *supra* note 10.

²⁰ *Id.*

The procedures that the Proposed Rule seeks to codify are causing delays in part because they simply are more difficult to complete than were the prior existing suitability assessments. Under the policies that the Proposed Rule seeks to codify, the HHS Program Support Center transmits the fingerprints of all sponsors and all adult household members to DHS to search criminal and immigration databases.²¹ This means that a potential sponsor would not be able to claim a child if any one adult member of their household—just one—refused to undergo an immigration status check by DHS.

These procedures also cause massive delays because, as noted above, they deter and prevent families from coming forward to claim their children. One undocumented Virginia father weighing whether or not to claim a detained nephew wondered, “If I’m the sponsor, and they deport me, what are my kids going to do?”²² That families faced with this agonizing choice are chilled from claiming their children is known to the administration.²³ In the words of Robert Carey, the former director of ORR, “Whether accidental or intended, it’s a predictable consequence of arresting sponsors who come forward that fewer sponsors are going to come forward, and children are going to stay in care for longer periods of time.”²⁴ Indeed, the federal government has known for years that such checks “reduce the likelihood that sponsors would come forward to take custody of children.”²⁵

III. The Delays Caused by HHS’s Expanded Sponsor Suitability Assessments Violate Federal Law

The Proposed Rule would formalize a policy that violates federal law because it unnecessarily delays child placement and harms children. Existing law requires HHS to “promptly place[] [an unaccompanied child] in the least restrictive setting that is in the

²¹ Office of Refugee Resettlement Guide: Children Entering the U.S. Unaccompanied §2.6.2 (June 7, 2018), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.6.2> [hereinafter *ORR Resettlement Guide 2018*].

²² Blitzer, *supra* note 16.

²³ See Caitlin Dickerson, *Inside the Vast Tent City Housing Migrant Children in a Texas Desert*, N.Y. Times (Oct. 12, 2018), <https://www.nytimes.com/2018/10/12/us/migrant-children-tent-camp-texas.html>.

²⁴ *Id.*

²⁵ Julia Edwards, *Exclusive: U.S. Agencies Split Over Fingerprinting Parents of Child Immigrants*, Reuters (Apr. 26, 2016), <https://www.reuters.com/article/us-usa-immigration-fingerprints/exclusive-u-s-agencies-split-over-fingerprinting-parents-of-child-immigrants-idUSKCN0XN0BD>.

best interest of the child.”²⁶ HHS generally must release children from custody “without unnecessary delay” to live with a parent, legal guardian, or other sponsor.²⁷ But the delays caused by the procedures that the Proposed Rule seeks to codify are unnecessary, and therefore impermissible under the law. In addition, the practices that the Proposed Rule would codify are contrary to the best interests of children separated from their families. Indeed, children are *harmed* by the very practice that the Proposed Rule, if adopted, would facilitate. The misuse of information collected in the context of suitability assessments to support deportation proceedings is harmful because it will preclude many “best interest” parents and relatives from coming forward, will delay children’s reunification with their families, and will prolong children’s exposure to detention centers. DHS and HHS should therefore terminate this practice, not codify it.

A. The Delays Caused by HHS’s Expanded Sponsor Suitability Assessments Are Unnecessary

The delays caused by the procedures that the Proposed Rule seeks to codify are unnecessary for at least three reasons. First, HHS’s prior existing sponsor suitability assessments were already sufficiently robust without expanding data collection and exchange. Second, no law requires HHS even to collect information about potential sponsors’ immigration status. Finally, even if HHS determines that it requires information about potential sponsors’ immigration status for some purpose related to serving the best interests of the children in its care, there are alternate methods to obtain that information that do not require HHS to expand information collection or sharing, and that would not delay reunification of children with their families.

1. *HHS’s prior existing sponsor suitability assessments were already sufficiently robust without expanding data collection and exchange*

The expanded sponsor suitability assessment procedures that the Proposed Rule seeks to codify – and the resultant delays in releasing children – are unnecessary because HHS’s background check procedures were already sufficiently robust to assess suitability of potential sponsors. The proposed expanded procedures will not enhance the agency’s ability to determine whether or not potential sponsors are suitable.

²⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. §1232 (c)(2)(A) (2008) [hereinafter *TVPRA*].

²⁷ *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997) (emphasis added), Stipulated Settlement Agreement at ¶ 17 [hereinafter *Flores*].

HHS has always comprehensively vetted each sponsor before releasing a child into their custody. Previously, HHS conducted a public records check and a sex offender registry check on all categories of sponsors and adult household members; an FBI criminal history check on all non-parent or legal guardian sponsors; and a child abuse and neglect check on all distant relative sponsors. HHS conducted more in-depth checks if the initial background checks raised red flags, or in the case of a particularly vulnerable child.²⁸ These procedures balanced the twin goals of family reunification and child safety.²⁹ For sponsors who were not parents or legal guardians, the HHS Office of Security and Strategic Information also checked the Central Index System, the immigration database of non-citizens,³⁰ to retrieve immigration court actions and information about orders of removal or other immigration status.³¹

There is a clear consensus that the prior existing sponsor suitability assessments were already sufficiently robust. Writing in June 2018, Church World Service and International Refugee Assistance Project stated, “ORR’s screening is robust to ensure the safety of children in their care.”³² Catholic Charities of the Archdiocese of Galveston-Houston similarly commented, “The ORR screening process is robust to ensure that children are released into safe environment.”³³ And when, in April 2018, the Government Accountability Office released a report recommending improvements to HHS’s care of unaccompanied children, it made no recommendation calling for enhancements to the agency’s sponsor suitability assessments.³⁴

²⁸ Office of Refugee Resettlement Guide: Children Entering the U.S. Unaccompanied §2.5.1 (July 26, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.6.2> [<https://web.archive.org/web/20160726162834/https://www.acf.hhs.gov/orr/resource/child-renter-entering-the-united-states-unaccompanied-section-2>] [hereinafter *ORR Resettlement Guide 2016*].

²⁹ This balancing is in-line with typical best interest frameworks. See Children’s Bureau, Child Welfare Information Gateway, *State Statutes, Determining the Best Interests of the Child* (March 2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best%20interests%20definition; See Flores, *supra* note 27 at ¶¶ 14-17 for factors that are weighed in determining sponsor suitability.

³⁰ ORR Resettlement Guide 2016, *supra* note 28 at §2.6.3.

³¹ *Id.* at §2.6.2.

³² Comments of Church World Service and International Refugee Assistance Project, DHS-2018-0014-0003 (filed June 6, 2018), <https://www.regulations.gov/document?D=DHS-2018-0014-0003>.

³³ Comments of Catholic Charities of the Archdiocese of Galveston-Houston, DHS-2018-0014-0005 (filed June 7, 2018), <https://www.regulations.gov/document?D=DHS-2018-0014-0005>.

³⁴ See U.S. Gov’t Accountability Off. GAO-18-506T, *Unaccompanied Children: DHS and HHS Have Taken Steps to Improve Transfers and Monitoring of Care, but Actions Still Needed* (2018).

Under the procedures that the Proposed Rule would codify, however, the HHS Program Support Center intends to additionally transmit the fingerprints of all sponsors and all adult household members to DHS to search criminal and immigration databases.³⁵ HHS has provided no explanation as to why the longstanding thorough assessment it has done in the past was not sufficient, or why this additional step is necessary to assess the suitability of potential sponsors. On the contrary, HHS has indicated potential sponsors' immigration status is not even relevant to the suitability assessment. The HHS policy guide states that immigration status is not used to disqualify a parent or guardian from sponsoring their child.³⁶

2. *No law requires HHS to collect information about potential sponsors' immigration status*

The expanded sponsor suitability assessment procedures are unnecessary also because HHS is not required by any law to collect information about potential sponsors' immigration status. Neither the TVPRA nor the *Flores* settlement agreement requires HHS to collect immigration status information on parents or other sponsors, to collect any information on other adult members of the household, or to use any information collected to deport families of unaccompanied children.³⁷

DHS and HHS cite the *Flores* settlement agreement in support of the proposed expanded suitability assessment procedures, but *Flores* does not require the collection of immigration status information for purpose of evaluating sponsor suitability. The paragraph cited by HHS authorizes the agency to conduct a "positive suitability assessment."³⁸ But the agreement does not mention, let alone require, an immigration status check as part of that assessment.³⁹ And as noted above, HHS does not even consider immigration status in determining suitability of a potential sponsor.⁴⁰

³⁵ ORR Resettlement Guide 2018, *supra* note 21 at §2.6.2.

³⁶ *Id.* at §2.5.2.

³⁷ See TVPRA, *supra* note 26 (outlining the minimum evaluative methods necessary to determine that a potential sponsor will be "capable of providing for the child's physical and mental well-being," and making no mention of immigration status).

³⁸ *Flores*, *supra* note 27 at ¶ 17.

³⁹ *Id.*

⁴⁰ ORR Resettlement Guide 2018, *supra* note 21 at §2.5.2.

3. *The expanded collection and sharing of information about potential sponsors' immigration status serves no legitimate purpose*

Even if HHS were to determine that it requires information about potential sponsors' immigration status for some purpose related to serving the best interests of the children in its care,⁴¹ there are alternate methods to obtain that information that do not require HHS to expand information collection or sharing, and that would not delay reunification of children with their families. HHS simply does not need to collect that information from potential sponsors and share that information with DHS. Instead, HHS could utilize the Central Index System (CIS) to obtain immigration status information. CIS provides immigration court actions and information about orders of removal or other immigration status.⁴² HHS could also utilize the Executive Office of Immigration Review (EOIR) Hotline, which provides immigration court status.⁴³ Expanded collection is therefore unnecessary.

B. HHS's Expanded Sponsor Suitability Assessments Are Contrary to Children's Best Interests

In addition to being unnecessary, the procedures that the Proposed Rule seeks to codify are contrary to children's best interests, which the law requires HHS to prioritize. As noted above, these procedures will preclude many parents and relatives from coming forward, delaying children's reunification with their families. Family unity, or keeping children with family members, is a key factor in determining the best interests of children in custody.⁴⁴ Under the *Flores* settlement agreement, sponsorship preference is given to parents, legal guardians, and adult relatives.⁴⁵ Children are more likely to experience physical and emotional well-being, safety, and stability when they are living with and being cared for by family members.⁴⁶ By contrast, children in foster or

⁴¹ *Id.* at §2.6 (For example, HHS states that it requires this expanded collection of immigration status information to create a contingency plan in the event a child's family needs to leave the country).

⁴² ORR Resettlement Guide 2016, *supra* note 28 at §2.6.3.

⁴³ *Id.*

⁴⁴ *State Statutes, Determining the Best Interests of the Child*, Child Welfare Information Gateway, Children's Bureau (Mar. 2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best%20interests%20definition.

⁴⁵ *Flores*, *supra* note 27 at ¶¶ 14-15.

⁴⁶ *See Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families*, The Annie E. Casey Foundation 2 (2012) <https://www.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf>.

government care are more likely to experience emotional, behavioral, and academic issues.⁴⁷ Family unity is particularly important for immigrant children, who are more likely to be disadvantaged in navigating a new country, language, and culture.⁴⁸

Consider, for example, the story of Armando, a father who submitted fingerprints and other information to government officials in order to gain custody of his daughter. Armando knew that his fingerprints and other data could be used to arrest or deport him. He submitted fingerprints anyway. Despite his bravery, Armando and his daughter have remained separated for more than three months because an adult living in Armando's house has refused to submit fingerprints to the government.⁴⁹ These policies are having consequences that disrupt family unity and harm children, against children's best interests.

Not only will children whose release is delayed miss out on the benefits of family unification, they will be affirmatively harmed by prolonged detention. In Brownsville,

⁴⁷ See Alysse ElHage, *Keeping Children in the Family Instead of Foster Care*, Institute for Family Studies (Aug. 18, 2016), <https://ifstudies.org/blog/keeping-children-in-the-family-instead-of-foster-care>; see also Julie M. Linton et al., *Detention of Immigrant Children*, American Academy of Pediatrics, (Apr. 2017); see also *Minor v. Lloyd*, *supra* note 17 (child in detention center suffered due to "prolonged imprisonment at a young age, and his inability to be with his family caused him significant anxiety and sadness. He often cries when speaking to family members on the phone and is struggling to cope with the daily bullying he experienced ... [he] seeks to leave this environment where he feels depressed, sad, and alone.").

⁴⁸ See, *UNHCR Guidelines on Determining the Best Interest of the Child*, United Nations High Commissioner for Refugees (May 2008), <http://www.unhcr.org/4566b16b2.pdf> ("unaccompanied and separated children require special attention in identifying their best interests, given the particular risks that they face."); see also *UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, United Nations High Commissioner for Refugees (Feb. 1997), <http://www.unhcr.org/en-us/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html> ("Considering their vulnerability and special needs, it is essential that children's refugee status applications be given priority and that every effort be made to reach a decision promptly and fairly."); see also Nancy Landale et al., *The Living Arrangements of Children of Immigrants*, NIH Public Access, *Future Child* 1 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3241619/pdf/nihms-341452.pdf> ("Immigrant families face unique challenges as they adapt to their new country ... Mexican immigrant families [for example] face challenges with respect to assimilation because of low parental education, poverty, and language barriers, and because a relatively high share of parents are unauthorized.").

⁴⁹ Gisela Salomon & Claudia Torrens, 'I Don't Know What to Do.' *Immigrant Parents Face Tougher Rules to Get Children Back*, *Time* (Sept. 22, 2018), <http://time.com/5403954/immigrants-tougher-rules-children-back/> [<https://web.archive.org/web/20180927061142/http://time.com/5403954/immigrants-tougher-rules-children-back/>].

Texas, for example, children have been reportedly detained in metal cages.⁵⁰ In Virginia, children as young as 14 years old have allegedly been handcuffed, beaten, put in solitary confinement, and left nude in cold concrete cells.⁵¹ In Arizona, two detention workers were charged with sexually assaulting detained teenagers.⁵² In Dilley, Texas, a toddler died shortly after being released from detention.⁵³ Some children are being forced to take mood-altering medications.⁵⁴ These conditions plainly are not in children's best interests.

The harm done by prolonged detention is not temporary – affected children may suffer the consequences for the rest of their lives. Erik Lanuza, for example, a 12-year-old Guatemalan boy, was put on a strong antipsychotic drug while at a detention center in Chicago. Erik's parents were never consulted about the medication. After Erik returned home to Guatemala, his parents shared that he acted “distant” and quieter than before.⁵⁵ More children like Erik will be kept separate from their family members and suffer traumatizing consequences. The American Academy of Pediatrics has stated that detention of immigrants can lead to permanent problems for children, including musculoskeletal, gastrointestinal, respiratory, and neurologic, anxiety and depression issues.⁵⁶ These issues run contrary to children's best interests.

These policies may also cause children to feel responsible for their parents' immigration issues. Children of undocumented parents are likely to experience anxiety, fear, and guilt related to their parents' deportation, regardless of their own immigration status,⁵⁷ and often interpret their own struggle for protection as the reason that their

⁵⁰ Li Zhou, *These Photos Were the Trump Administration's Attempt to Quiet Criticism. They're Only Increasing Critics' Horror*, Vox (June 18, 2018), <https://www.vox.com/policy-and-politics/2018/6/18/17474986/family-separation-border-video>.

⁵¹ Michael Biesecker et al., *Young Immigrants Detained in Virginia Center Allege Abuse*, USA Today (June 21, 2018), <https://www.usatoday.com/story/news/nation-now/2018/06/21/abused-immigrant-children-allege-mistreatment-detention-center/720773002/>.

⁵² Matthew Haag, *2 Workers at Arizona Migrant Children Centers Are Charged with Sexual Abuse*, N.Y. Times (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/us/sexual-abuse-arizona-migrant-children.html>.

⁵³ Maria Sacchetti, *Migrant Child Died After Release from Detention, Attorneys Group Alleges*, Wash. Post (Aug. 1, 2018), https://www.washingtonpost.com/local/immigration/migrant-child-reportedly-dies-after-release-from-ice-family-detention-facility/2018/08/01/6a9515ea-95a8-11e8-a679-b09212fb69c2_story.html?utm_term=.3db71383c1e7.

⁵⁴ Julie M. Linton et al., *Detention of Immigrant Children*, American Academy of Pediatrics, (Apr. 2017) [hereinafter *Linton et al.*].

⁵⁵ Cindy Carmaco, *Guatemalan Parents Reunited with Son Held in Detention, but They're Worried: 'He's not the Same Boy'*, L.A. Times (Sept. 13, 2018), <http://www.latimes.com/world/la-fg-guatemalan-reunification-20180913-story.html>.

⁵⁶ See Linton et al., *supra* note 54.

⁵⁷ Targeting Families, *supra* note 1 at 13.

parents are vulnerable to deportation or arrest.⁵⁸ Anxiety, fear, and guilt are not in children's best interests.

Parents – not detention centers – provide the best care for children. Detention substantially harms children's well-being. Every delay of release increases the harm to detained children, in violation of the best interest standard. To minimize delays and ensure that unaccompanied children are released to suitable sponsors "without unnecessary delay," as the law requires, DHS and HHS should bring an end to the practices that chill potential sponsors from coming forward. In no event should the agencies use information collected during suitability assessments for deportation purposes.

IV. The Practices that the Proposed Rule Would Codify Also Are Poor Policy

The expanded suitability assessment procedures that the Proposed Rule seeks to codify also are poor policy. As discussed above, the delays caused by these procedures are unnecessary and extremely inhumane, causing tremendous harm to children and their families that could do permanent damage. In addition, prolonged detention caused by these procedures is very expensive, and HHS's and DHS's handling of potential sponsors' data violates both DHS's own privacy policy and the privacy rights of potential sponsors. DHS and HHS should end the expanded suitability assessment procedures.

A. Prolonged Detention Caused by the Expanded Suitability Assessments Is Very Expensive

It is extremely costly to detain children for extended periods of time. In addition to the added costs of detaining more children for longer, crowded shelters are overflowing and spilling out into makeshift tent cities that are even more costly to operate.

Based on publicly available data, it appears the overall cost of detaining more children for longer in both permanent and temporary shelters may be nearly \$1.4 billion per year:

⁵⁸ *Id.*

May 2017				
	Children	Cost per day per child	Totals	
Permanent shelters	2,400 ⁵⁹	\$250	\$600,000	May 2017 daily cost
			\$219,000,000	May 2017 annual cost

September 2018				
	Children	Cost per day per child	Totals	
Permanent shelters	11,200 ⁶⁰	\$250	\$2,800,000	September 2018 daily cost of permanent shelters
Temporary facilities	1,600 ⁶¹	\$1,000	\$1,600,000	September 2018 daily cost of temporary facilities
			\$4,400,000	September 2018 total daily cost
			\$1,606,000,000	September 2018 total annual cost

Difference May 2017 - September 2018	
\$3,800,000	Additional cost per day
\$1,387,000,000	Additional cost per year

Detaining an immigrant child in a temporary facility such as a tent city reportedly is particularly costly, with the daily cost per child rising to approximately

⁵⁹ Dickerson, *supra* note 10 (“Population levels at federally contracted shelters for migrant children have quietly shot up more than fivefold since last summer, according to data obtained by *The New York Times*, reaching a total of 12,800 this month. There were 2,400 such children in custody in May 2017.”).

⁶⁰ *Id.*; see Caitlin Dickerson, *The Government Is Moving Migrant Children to a Texas Tent City. Here’s What’s Behind It*, *N.Y. Times* (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/us/migrant-children-tent-city-camp-texas.html> (1,600 of the children detained are in temporary facilities).

⁶¹ Dickerson, *supra* note 60.

\$1,000.⁶² This is four times the cost of detaining of a child in a permanent HHS facility.⁶³ With children now spending an average of 74 days in federal custody,⁶⁴ the cost per child will come to a total of approximately \$74,000. And with more than 1,600 children currently detained in makeshift shelters,⁶⁵ the government is likely spending an additional \$1.6 million each day to house children in a tent city. These costs add up: At this rate, over the next year the total bill for detaining children in tent cities – which were not required in the absence of delays caused by the administration’s current policies – will be more than half a billion dollars.⁶⁶

Footing the bill of detaining all of these children for so long will come at the expense of Americans’ public health and well-being. To help pay for the delays that this Proposed Rule seeks to codify, HHS is cutting essential funding for vital public health and education programs for U.S. citizens. According to a September program request letter from HHS Secretary Alex Azar, HHS is cutting \$266 million from essential programs to fund its Unaccompanied Alien Child program because “existing shelter capacity” is “nearly full.”⁶⁷ HHS’s cuts include \$87.3 million from National Institutes of Health, \$16.7 million from Head Start, \$16.7 million from the Centers for Disease Control, \$13.3 million from the National Cancer Institute, and more.⁶⁸ These drastic cuts, however, likely will not even cover the cost of detaining children in tent cities for six months.⁶⁹

⁶² Dan Diamond, *HHS Reviews Refugee Operations as Trump Calls for Border Crackdown*, Politico (Oct. 23, 2018), <https://www.politico.com/story/2018/10/23/trump-caravan-border-hhs-873152> (“HHS is spending about \$1,000 per child per day at the tent city in Tornillo, Texas, and at other temporary facilities, according to three individuals briefed on the latest data.”).

⁶³ Julia Ainsley, *Trump Admin’s ‘Tent Cities’ Cost More than Keeping Migrant Kids with Parents*, NBC News (June 20, 2018), <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-s-tent-cities-cost-more-keeping-migrant-kids-n884871> (“It costs \$256 per person per night to hold children in permanent HHS facilities like Casa Padre in Brownsville, Texas.”).

⁶⁴ Blitzer, *supra* note 16.

⁶⁵ Dickerson, *supra* note 60.

⁶⁶ \$1.6 million per day multiplied by 365 days equals \$584 million total.

⁶⁷ Alex M. Azar II, *Letter to Senator Patty Murray*, CNN (Sept. 5, 2018), <http://cdn.cnn.com/cnn/2018/images/09/20/uac.transfer.notification.9.5.18.pdf>.

⁶⁸ *Id.*

⁶⁹ At the rates detailed above, \$266 million will only fund the detention of children in tent cities for 166 days, or a little over five and a half months.

B. HHS's and DHS's Handling of Potential Sponsors' Data Violates DHS's Own Privacy Policy and the Privacy Rights of Potential Sponsors

DHS's use of information to deport parents and other relatives is also poor policy because it violates DHS's own commitments concerning the Fair Information Practice Principles (FIPPs), as well as the privacy rights of potential sponsors.

On April 27, 2017, DHS released a memorandum extending FIPPs protections to *all persons* regardless of citizenship or legal status.⁷⁰ It requires, in pertinent part, that DHS adhere to the principles of use limitation and individual participation. These principles are designed to protect the privacy of data provided to the federal government, but DHS is flouting these principles – and data privacy – by engaging in the practices that the Proposed Rule seeks to codify. HHS is helping DHS violate the privacy rights of potential sponsors, as well as the agency's own policies.

DHS is violating the FIPPs principle of use limitation by using parents' personal information for enforcement instead of suitability assessments. DHS's adherence to the FIPPs means that a parent's or relative's personal data may only be used for purposes compatible with the purpose for which the information was originally collected.⁷¹ According to HHS, the information collected from parents and relatives – and then shared with DHS – is being collected in order to assess whether a parent is, pursuant to the TVPRA, “capable of providing for the child's physical and mental well-being.”⁷² Instead, DHS is using this information for a different, and fundamentally incompatible, purpose: immigration enforcement.⁷³ Removing a parent from the United States makes an otherwise suitable parent incapable of caring for their child.⁷⁴ DHS's use of parents' personal data violates the FIPPs because its use is fundamentally incompatible with the purpose for which the information was collected. And since HHS is the originator of this information, HHS is helping DHS engage in practices in violation of DHS's own policies.

DHS is violating the FIPPs principle of individual participation by collecting parents' personal data without obtaining meaningful consent. DHS's adherence to the FIPPs means that a parent or relative's personal data may only be used subject to the

⁷⁰ U.S. Dep't of Homeland Sec., *Privacy Policy Guidance Memorandum 2017-01*, from Jonathan R. Cantor, Acting Chief Privacy Officer (April 27, 2017), <https://www.dhs.gov/sites/default/files/publications/Privacy%20Policy%20Guidance%20Memo%202017-01%20-%20FINAL.pdf> (emphasis added).

⁷¹ *Id.* at 4-5 (“must be compatible with the purposes for which the information was originally collected”).

⁷² Apprehension NPRM, *supra* note 9 at 45507.

⁷³ Kopan, *supra* note 8.

⁷⁴ *Id.*

person's consent "for the collection" or "use" or "dissemination" of the data.⁷⁵ Meaningful consent is impossible because a parent is presented by HHS with a Hobson's choice: Either consent to the release of your personal information to DHS and face possible deportation, or know that your child will languish in federal custody indefinitely.⁷⁶ For example, one lawsuit alleges that many children are *never* placed by HHS; instead, children linger in federal custody until turning 18 and are transferred to the custody of ICE.⁷⁷ Under these conditions, free and meaningful consent is impossible, and HHS's and DHS's handling of parents' data for enforcement purposes – besides violating basic standards of human compassion and decency – violates DHS's own policies.

HHS and DHS are also violating parents' privacy by failing to put sponsors on notice about DHS's data practices. When HHS collects and exchanges a parent's personal data, ICE uses the ACRIME (CHIVE) system to retain and query it.⁷⁸ CHIVE files are made available to ICE offices nationwide.⁷⁹ When a law enforcement agency requests information about a sponsor, the query is placed in an "Active Queue."⁸⁰ It is possible queries may remain in the Active Queue indefinitely. This has adverse consequences. It's conceivable that CHIVE's "Active Queue" was the tool used by ICE agents to target and hunt down the parents and parents who come forward to claim their children.⁸¹ HHS and DHS have an unmet duty to notify parents and relatives about these practices before collecting and retaining their data. And in the absence of such notice, parents' and relatives' privacy is being seriously violated.

HHS and DHS also are violating potential sponsors' privacy by collecting more information than necessary to assess sponsor suitability. HHS and DHS violate parents' privacy when the agencies collect a parent's immigration status as part of a sponsor suitability assessment. As explained above immigration status inquiries are completely unrelated to the suitability of a parent to serve as a sponsor. HHS and DHS should not collect information unnecessary to HHS's evaluation of a parent's suitability to sponsor

⁷⁵ *Id.*

⁷⁶ Memorandum of Agreement, *supra* note 5.

⁷⁷ *Minor v. Lloyd*, *supra* note 17 at 24-25.

⁷⁸ Nathalie Asher, *Privacy Impact Assessment Update for the Alien Criminal Response Information Management System (ACRIME)* U.S. Dep't of Homeland Sec. 3, 5 (Sept. 28, 2018), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-acrime-september2018.pdf>.

⁷⁹ *Id.*

⁸⁰ *Id.* at 4.

⁸¹ *Kopan supra* note 8.

a child.⁸² In addition to violating DHS's own privacy policy, collecting unnecessary information about prospective sponsors is a privacy risk; DHS acknowledges as much in its own PIA.⁸³ HHS and DHS have never convincingly articulated why immigration status determinations merit the privacy risk to parents and relatives. As a result, DHS and HHS are violating parents' privacy by collecting unnecessary information.

V. Conclusion

As currently written, the Proposed Rule would codify this administration's misuse of information collected during suitability assessments to drive deportation efforts. This violates HHS's obligations under federal law, is inhumane and expensive, and violates DHS's privacy commitments and the privacy rights of potential sponsors.

Instead of codifying these misguided practices, DHS and HHS should promulgate rules that clearly prevent the administration from using information collected from potential sponsors in the process of suitability assessments to support deportation proceedings. Specifically, HHS should cease providing potential sponsors' personally identifiable information to DHS to determine immigration status. HHS also should adopt a rule strictly limiting the purposes for which information collected during suitability assessments can be used, requiring information that relates to sponsors' and household members' criminal status and immigration status to be sealed upon the conclusion of a suitability assessment, and further prohibiting use of that information to support deportation proceedings.

⁸² U.S. Dep't of Homeland Sec., *Privacy Policy Guidance Memorandum 2017-01*, from Jonathan R. Cantor, Acting Chief Privacy Officer 5 (April 27, 2017), <https://www.dhs.gov/sites/default/files/publications/Privacy%20Policy%20Guidance%20Memo%202017-01%20-%20FINAL.pdf> ("only collect information that is relevant and necessary to accomplish the purposes specified.").

⁸³ Nathalie Asher, *Privacy Impact Assessment Update for the Alien Criminal Response Information Management System (ACRIME)* U.S. Dep't of Homeland Sec. 3, 5 (Sept. 28, 2018), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-acrime-september2018.pdf>.

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