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Submitted via: <https://www.regulations.gov>

Toby Biswas, Director of Policy  
Unaccompanied Children Program  
Office of Refugee Resettlement  
Administration for Children and Families  
Department of Health and Human Services  
Washington, DC

Re: Comment on Notice of Proposed Rulemaking, Unaccompanied Children Program  
Foundational Rule, 45 C.F.R. Part 410, RIN 0970-AC93

Dear Mr. Biswas,

We, Government Accountability Project, write regarding the Office of Refugee Resettlement's (ORR), Administration for Children and Families' (ACF), and the U.S. Department of Health and Human Services' (HHS) Notice of Proposed Rulemaking (NPR) for the "Unaccompanied Children Program Foundational Rule."

We are specifically concerned that, as drafted, the proposed rule, specifically Section 410.1303(g)(4), violates the whistleblower rights of federal government employees, contractors and grantees to report violations of laws, rules and regulations, gross mismanagement, gross waste of funds, abuse of authority, and substantial and specific danger to public health or safety, codified in the Whistleblower Protection Act, Whistleblower Protection Enhancement Act, and the "Enhancement of contractor protection from reprisal for disclosure of certain information" provision of the National Defense Authorization Act.<sup>1</sup> It also seems to run afoul of the anti-gag laws embedded in these laws and appropriations laws as well.<sup>2</sup> As drafted, the proposed rule will potentially violate the rights of and chill the most effective compliance mechanism needed to ensure that unaccompanied children in ORR custody are protected from the consequences of such fraud, waste or abuse—ethical employees who are in the best position to witness and disclosure problems that would violate the required protections for unaccompanied children.

### **Whistleblowers Have Been Vital to Identifying HHS ORR Abuses That Have Endangered Unaccompanied Children**

Government Accountability Project is the international leader in whistleblower protection and advocacy, representing and supporting thousands of workers who have blown the whistle about issues that impact the public interest since 1977. Government Accountability Project has

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<sup>1</sup> 5 U.S.C. § 2302(b)(8); 41 U.S.C. § 4712(a).

<sup>2</sup> 5 U.S.C. § 2302(b)(13); 41 USC § 4712(c)(7).

represented whistleblowers who have spoken out about a myriad of issues; relevant to this NPR is our work representing government employees and contractors who blew the whistle on failures

to meet standards of care for unaccompanied immigrant children in government custody at the Fort Bliss Emergency Intake Site beginning in the spring of 2021.

Since 2021, Government Accountability Project has represented many whistleblowers who have spoken out about the neglectful conditions for children in government care, urging their prompt release from squalid tent camps at Fort Bliss in El Paso, Texas.<sup>3</sup> Multiple federal detailees who volunteered with HHS to support the effort to care for the influx of unaccompanied children reported that HHS operations at these facilities were negligent, mismanaged, and harmful to children, describing chaotic operations including “children held for weeks without basic needs such as clean underwear or bedding...; contractors with no experience or expertise in childcare regularly threatening children with deportation; insufficient and with rare exception, unqualified mental health staff incapable of attending to children with demonstrable mental health needs; [and] an unsafe environment for children including harmful noise levels, 24 hour lighting in sleeping areas, and sleeping arrangements that impeded supervision.”<sup>4</sup>

Whistleblowers additionally raised concerns specific to the management of minors’ cases while at Fort Bliss, implicating delays in their release from the facility to sponsors within the United States. These concerns included, for example, the lack of a coordinated case management

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<sup>3</sup> In total, Government Accountability Project represents six whistleblowers who made public disclosures about poor conditions and management at Fort Bliss. Letters to the U.S. House of Representatives, U.S. Senate, U.S. Office of Special Counsel, and HHS-OIG from the Government Accountability Project on July 7, 2021, July 28, 2021, and September 8, 2021. See <https://whistleblower.org/wp-content/uploads/2021/07/070721-Fort-Bliss-Whistleblowers-Disclosure.pdf>, <https://whistleblower.org/wp-content/uploads/2021/07/072821-2nd-Fort-Bliss-Whistleblower-Disclosure-FINAL.pdf>, and <https://whistleblower.org/wp-content/uploads/2021/09/2021-09-08-Govt-Accountability-Project-Third-Disclosure-on-Ft-Bliss-EIS-Exhibits.pdf> (hereinafter referred to as First, Second and Third Protected Whistleblower Disclosure Letter, respectively); Letter to the U.S. House of Representatives, U.S. Senate, U.S. Office of Special Counsel, and HHS-OIG from the Government Accountability Project on April 5, 2022, <https://whistleblower.org/wp-content/uploads/2022/04/040522-Letter-to-Cong-re-UCs-EISs-w-Hess-Whistleblower-Disclosure.pdf> on June 5, 2023 (hereinafter referred to as Fourth Protected Whistleblower Disclosure). Government Accountability Project additionally represents other whistleblowers who made confidential disclosures to the HHS OIG. See also Keegan Hamilton, “Migrant Kids Face Danger, Trauma, and Separation at ‘Hellhole’ Border Tent Camp,” *Vice News*, April 6, 2022, <https://www.vice.com/en/article/bvnmvm/whistleblower-kaitlin-hess-migrant-kids> (reporting on Government Accountability Project’s whistleblower clients’ public-facing disclosures made between July 2021-April 2022 to the HHS Office of Inspector General, the Office of Special Counsel, Congress and the press).

<sup>4</sup> Government Accountability Project, Fourth Protected Disclosure Letter, p. 2 (outlining concerns previously identified in First, Second and Third Protected Whistleblower Disclosure Letters). See also Julia Ainsley, “Whistleblowers Allege Poor Care for Migrant Kids by Contractor Specializing in Disaster Cleanup,” *NBC News*, July 7, 2021, <https://www.nbcnews.com/politics/immigration/whistleblowers-allege-poor-care-migrant-kids-contractor-specializing-disaster-cleanup-n1273124>; Priscilla Alvarez, “Whistleblowers Allege Poor Conditions at Fort Bliss Facility for Migrant Children,” *CNN Politics*, July 28, 2021, <https://www.cnn.com/2021/07/28/politics/fort-bliss-whistleblowers-immigration/index.html>; Adolfo Flores and Hamed Aleaziz, “Immigrant Children Were Burned With Scalding Water And Threatened At An Emergency Shelter, A Whistleblower Said,” *Buzzfeed News*, September 8, 2021, <https://www.buzzfeednews.com/article/adolfoflores/fort-bliss-immigrant-children-shelter-whistleblower>.

tracking system, resulting in hundreds of children languishing at the facility for weeks without ever talking with a case manager; egregious errors in discharge procedures, with some children listed as having been discharged despite still being on site in HHS custody; and alarming incompetence of contractors who could not perform basic duties, such as completing transport manifests necessary to discharge children from the site.<sup>5</sup> When whistleblowers raised concerns, they were ignored.<sup>6</sup>

Prompted by the media frenzy covering the disclosures of Government Accountability Project's multiple whistleblower clients to the Office of Special Counsel, the HHS Office of Inspector General, and to Congress, HHS OIG commenced some oversight initiatives into its emergency operations for unaccompanied minors.<sup>7</sup> This and other subsequent reports issued after investigations into Fort Bliss validated many of the whistleblowers' disclosures about poor oversight of conditions and case management.<sup>8</sup>

Specifically, the HHS OIG found that staff at Fort Bliss lacked relevant experience or training, that safeguards which may have decreased children's risk of release to unsafe sponsors were quickly removed, and deficiencies in the online case management system "potentially increased children's risk of release to unsafe sponsors."<sup>9</sup> Two years later, reports, including from the HHS Office of Inspector General (OIG), indicate that these case management failures contributed to unaccompanied minors being released to work in exploitive food production factories.<sup>10</sup>

It is worth highlighting that the 2022 HHS OIG report that was prompted by our whistleblower clients' disclosures **validated the existence of a chilled environment noting, "reported acts of**

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<sup>5</sup> Government Accountability Project, Fourth Protected Disclosure Letter, Exhibit 1.

<sup>6</sup> All of the whistleblowers Government Accountability Project represents—some of whom continue to remain anonymous for fear of retaliation—reported working in an environment where secrecy was made paramount and raising concerns was actively deterred, with instructions to just use a "suggestion box" and go through an opaque chain of command, or worse, suffered direct reprisal. *See* Government Accountability Project, Third Protected Whistleblower Disclosure Letter and Exhibits 1 and 2; Government Accountability Project, Fourth Protected Whistleblower Disclosure Letter. Other senior HHS ORR employees not represented by Government Accountability Project filed whistleblower complaints after their efforts to warn about risks to child safety from problems with case management and sponsor vetting were met with both inaction and reprisal. Hannah Dreier, "As Migrant Children Were Put to Work, U.S. Ignored Warnings," *New York Times*, April 17, 2023, <https://www.nytimes.com/2023/04/17/us/politics/migrant-child-labor-biden.html>.

<sup>7</sup> Department of Health and Human Services, Office of Inspector General, *Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children* (Washington, DC: OEI-07-21-00251, September 2022), <https://oig.hhs.gov/oei/reports/OEI-07-21-00251.pdf>.

<sup>8</sup> Department of Health and Human Services, Office of Inspector General, *The Office of Refugee Resettlement Needs To Improve Its Practices for Background Checks During Influxes* (Washington, DC: A-06-21-07003, May 2023), <https://oig.hhs.gov/oas/reports/region6/62107003.pdf>; Department of Health and Human Services, Office of Refugee Resettlement, *Update on Efforts to Mitigate Child Labor Exploitation and Internal Audit on Placement Process Used to Transfer Custody of Unaccompanied Children to Vetted Sponsors*, June 2, 2023, <https://www.acf.hhs.gov/sites/default/files/documents/orr/update-on-efforts-to-mitigate-child-labor-exploitation-internal-audit-placement-process.pdf>.

<sup>9</sup> DHHS OIG, *Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children*. pp. 17-19.

<sup>10</sup> Dreier, "Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S."; Department of Health and Human Services, Office of Inspector General, *Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children* (Washington, DC: OEI-07-21-00251, September 2022), <https://oig.hhs.gov/oei/reports/OEI-07-21-00251.pdf>.

**potential retaliation and whistleblower chilling may have affected staff’s willingness to share feedback with ORR management who might have been better able to remedy problems.”<sup>11</sup>**

HHS’s creation of a chilled environment rather than implementinng strong whistleblower protections and effective reporting channels for employees and contractors with concerns enabled a culture that suppressed and/or dismissed urgent complaints about problems that, rather than been later confirmed through retrospective investigations, might have sooner been addressed to the benefit and protection of unaccompanied children in government custody.

**Section 410.1303(g)(4) of the Proposed Rule Poses an Illegal Gag on Federal Employees, Contractors and Grantees for Protected Whistleblowing**

Section 410.1303(g)(4), “Reporting, Monitoring, Quality Control, and Recordkeeping Standards,” of the proposed rule states that “employees, former employees, or contractors of of a care provider facility or PRS [post-release service] provider must not disclose “case file records or information about unaccompanied children, their sponsors, family, or household members to anyone for any purpose, except for purposes of program administration, without first providing advanced notice to ORR to allow ORR to ensure that disclosure of unaccompanied children's information is compatible with program goals and to ensure the safety and privacy of unaccompanied children.”<sup>12</sup>

This language on its face violates the rights of federal employees, contractors and grantees to disclose information to a whole range of entities—including to an OIG, law enforcement agencies, Congress, senior managers and grant managers, the Office of Special Counsel, and the press—that they reasonably believe evidences violations of law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.<sup>13</sup>

The proposed rule would further interfere or deny the right of federal employees to furnish information to Congress in violaion of the Lloyd-LaFollette Act.<sup>14</sup>

Indeed, the proposed rule as drafted may not pass constitutional muster in dictating prior restraint on employees’ First Amendment speech rights.<sup>15</sup>

Finally, the rule as drafted would upon implementation violate the strict ant-gag rules in the Whistleblower Protection Act and in parallel protections for government contractors and grantees that mandate the inclusion of statutorily required language informing employees that their whistleblower rights supersede any non-disclosure policies. The “anti-gag” provision of the Whistleblower Protection Enhancement Act (5 U.S.C. § 2302(b)(13)) specifically states:

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<sup>11</sup> DHHS OIG, *Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children*. Pp. 20-22.

<sup>12</sup> <https://www.federalregister.gov/d/2023-21168/p-1029>.

<sup>13</sup> 5 U.S.C. § 2302(b)(8); 41 U.S.C. § 4712(a).

<sup>14</sup> Codified at 5 U.S.C. § 7211.

<sup>15</sup> *Nebraska Press Association v. Stewart*, 427 U.S. 539 (1976).

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection.<sup>16</sup>

Senator Charles Grassley has similarly noted concern about this provision violating fundamental whistleblower rights, and more disturbingly, that this proposed rule would codify or formalize currently active HHS policies, which if operational, have the dangerous effect of chilling HHS employees from exercising their protected whistleblower rights even if they are illegal and unenforceable.<sup>17</sup> Senator Grassley rightly noted the role of the whistleblowers who were vital to exposing mismanagement at the Fort Bliss facility, as well as those whose disclosures exposed the placement of unaccompanied children with ill-vetted sponsors, some dying while working in meat-processing facilities in violation of child labor laws.<sup>18</sup>

That HHS is currently enforcing illegal gag orders on its employees and contractors is consistent with our experience representing the Fort Bliss whistleblowers who reported that they were actively deterred and threatened with retaliation for raising concerns. Had they stayed silent, the problems of gross negligence in the care and oversight of operations at the the Fort Bliss EIS could have endangered hundreds more children in ORR custody than were already harmed. Whether or not this proposed rule is enacted, these currently unlawful non-disclosure directives must be remedied with statutorily mandated language as well as training for all HHS employee, contractors and grantees who have been chilled by such directives.

### **Conclusion**

With the stakes so high to ensure the care of unaccompanied children in HHS custody, along with a legacy of negligent care and oversight failures only mitigated by brave whistleblowers willing to expose fraud, waste and abuse, restricting rather than strengthening the rights of HHS employees, contractors and grantees to exercise their whistleblower rights, without prior restraint, dangerously undermines the effective enforcement of the entire Unaccompanied Children Program Foundational Rule.

Limiting or chilling the rights of employees, contractors and grantees involved with any and all aspects of the custody and care of unaccompanied migrant children to report problems they

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<sup>16</sup> 5 U.S.C. § 2302(b)(13). *Also see* 41 U.S.C. § 4712(c)(7) (“Rights and remedies not waivable.-The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.”)

<sup>17</sup> Letter from Senator Grassley to Secretary Becera, Acting Assistant Secretary Hild, and Director Marcos, November 21, 2023, [https://www.grassley.senate.gov/imo/media/doc/grassley\\_to\\_hhs\\_acf\\_and\\_orr\\_-\\_whistleblower\\_protections.pdf](https://www.grassley.senate.gov/imo/media/doc/grassley_to_hhs_acf_and_orr_-_whistleblower_protections.pdf).

<sup>18</sup> *Ibid.*

witness in the exercise of that custody and care will render this new Foundational rule fundamentally weaker than the *Flores* settlement agreement it attempts to replace. We strongly object to the language proposed in Section 410.1303(g)(4), and urge the explicit inclusion of strong, dedicated whistleblower protection provisions for the enforcement of the new rules, in addition to the reinforcement that all existing whistleblower rights are in no way superseded by the new Rule.

Sincerely,

/s/

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