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**A Vision Forward:  
Policies Needed to Protect the Best  
Interests of “Category 4”  
Unaccompanied Immigrant Children**

The Immigrant & Refugee Advocacy Clinic,  
Columbus School of Law, The Catholic University of America

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# I. Executive Summary

"Family placements provide the best opportunities for youth to establish permanency and a family connection. When the youth is placed with a family who can meet their needs and open their hearts, the relationship that is formed is most often the reason a youth is able to heal and succeed."

- Program Director, Commonwealth Catholic Charities,  
Richmond, VA

Unaccompanied children (UC) cross the U.S. border to escape violence, trafficking, gang recruitment, extreme poverty, and natural disasters in their home countries.<sup>1</sup> They often endure long, harrowing journeys with little or no opportunity for consistent schooling. Most of these children are between the ages of 15 – 17 and are placed in the custody of the Department of Health and Human Services, Office of Refugee Resettlement (ORR).<sup>2</sup> Federal law requires ORR to place children in the least restrictive environment suited to meet their best interests. However, unaccompanied children whom ORR has determined do not have sponsors in the U.S., referred to as Category 4, particularly those over the age of 13, remain in large-scale government shelters for extended periods of time or simply age out of the ORR system and risk homelessness or detention in adult facilities.

With the advent of COVID-19 and closures of the southern border<sup>3</sup> fewer unaccompanied children were crossing into the United States during 2020 and those who did were often illegally expelled rather than placed in ORR custody. However, officials are now seeing increasing numbers of unaccompanied children entering the U.S. as immigration restrictions at the U.S. southern border slowly begin to ease and questions about how to safely house and care for these children are again in the headlines.<sup>4</sup>

As of May 26, 2021, there were 17,847 children in ORR custody.<sup>5</sup> The Department of Health and Human Services has opened influx care facilities and emergency intake sites since February 2021 to accommodate these unaccompanied children, including the previously closed Carrizo Springs influx care facility in Texas.<sup>6</sup> Advocates and faith leaders, including the U.S. Conference of Catholic Bishops, Migration and Refugee Services (USCCB/MRS), are raising concerns about operations at these unlicensed congregate facilities.<sup>7</sup> This situation is reminiscent of the migration of unaccompanied children that occurred in 2014 and 2019<sup>8</sup> and is likely to continue given the ongoing violence, poverty and natural disasters afflicting the Northern

Triangle countries of Honduras, Guatemala, and El Salvador. The response to the current increase once again highlights the flaws in the system of care for unaccompanied children, particularly those who do not have family sponsors or other available guardians in the U.S.

This report explores the system for placing and protecting unaccompanied children who do not have sponsors and offers recommendations for ensuring that ORR places these children in small, family-like settings where they can receive nurturing, proper education, and assistance recovering from trauma. The report begins by identifying gaps in publicly available data on the number of children, length of detention, and placements for those who do not have relatives or guardians to whom they can be released pending determination of their immigration claims. Under ORR's system of classification, these children are designated as belonging to "Category 4".<sup>9</sup> It also highlights policy changes over the last four years that have led to an increase in the number of Category 4 children in ORR custody and longer duration of stay in large congregate shelters. This, in turn, has impeded access of Category 4 children to legal representation, putting them at risk of aging out of ORR custody before their legal status is resolved.

The report shares findings from a survey that the USCCB/MRS, in collaboration with The Immigrant & Refugee Advocacy Clinic of The Catholic University of America, conducted of long-term foster care (LTFC) and unaccompanied refugee minor (URM) program providers in the USCCB/MRS network serving Category 4 children. The report highlights ways in which the federal custody system for unaccompanied children without sponsors departs from foundational child welfare principles underlying the U.S. child welfare system. It also includes a comparative look at the way in which countries in the European Union are using family-based foster care and supportive independent living to meet the needs of UC.

The report concludes with recommendations urging

policy makers to better protect the best interests of Category 4 children in U.S. government care. These recommendations focus on improving data collection, reducing reliance on large-scale congregate housing, implementing procedures for decreasing the time needed to refer children into family and community-based care, increasing funding to meet the educational, social, and health needs of Category 4 children, and expanding opportunities for unaccompanied youth ages 18-21.

Now is the time to implement policies ensuring that ORR places Category 4 children in individualized, family settings as quickly as possible. These policies must incentivize continuity of care, facilitate expeditious resolution of legal claims, and require that children who age out of ORR custody are not at risk of homelessness or transferred to adult detention but, instead, continue to receive care and supportive independent living assistance as they transition into young adulthood.

## Recommendations\*\*

The following recommendations for policy, regulatory, statutory, funding, and programmatic changes are directed to Congress as well as to the Department of Health and Human Services/Office of Refugee Resettlement, Department of Homeland Security, the Department of Justice, and ORR's network of care providers.

### A. Reduce Delays in Referrals of Category 4 Children to Foster Care and Small Group Homes

1. Collect data and report publicly, on a quarterly basis, the number of children in Category 4 status, the average length of time between entry into ORR custody and determination of Category 4 status, the level of care for Category 4 youth at the time of determination, the average length of time between eligibility determination and placement in LTFC or SGH, the average number of transfers for Category 4 children from entry into ORR custody through placement in LTFC or SGH, and the number of therapeutic beds available in LTFC and SGH.
2. As stabilization and permanency is vital to ensuring that children feel comfortable sharing information necessary to determine eligibility for legal relief, relax the requirement that determination of a viable legal claim be made prior to referral and placement in LTFC or SGH.
3. Minimize the number of transfers of unaccompanied children prior to placement in LTFC or SGH. Place children in existing programs that have multiple levels of care (TFC/Shelter, staff-secure, resi-

dential treatment center, and/or LTFC) and incentivize development of more multi-tiered programs, so that, when a transfer is needed it can be facilitated within the same agency and community, enhancing continuity of care.

4. Expand the use of Transitional Foster Care (TFC) for youth 14-18.
5. Increase the capacity of available TFC placements to ensure placement in the least restrictive setting in the event of a surge of unaccompanied children. Work with community organizations to further educate the public on the TFC program and encourage local community care options.

### B. Prioritize and Expand LTFC and SGH Placements for Category 4 Children

1. Prioritize placement of Category 4 children in family-based foster care or small group (no more than 12) traditional or therapeutic settings.
2. Expand LTFC programming to ensure that sufficient beds are available for Category 4 youth who qualify for LTFC placement. Prioritize the funding and development of therapeutic LTFC placement options for Category 4 children to increase the likelihood that all children will receive placement in an appropriate setting. Work with community organizations to further educate the public on the LTFC program and encourage local community care options.
3. Phase out large-scale congregate shelter care and influx care facilities and eliminate facilities management contracts to for-profit entities.
4. Consider opening LTFC programming to current URM-only foster care providers. This will reduce wait times for URM placements and enable continuity of foster care placements.
5. Conduct research on the impact of long-term foster care placement on unaccompanied minors and the efficacy of having two parallel systems of child welfare in the U.S. – the state-based child welfare system and the federal ORR-administered immigration child welfare system.

### C. Address Gaps in Care for Category 4 Children

1. Increase funding to strengthen staffing and resources for LTFC and SGH programs, including but not limited to funding for competitive salaries for specialized staff, higher stipends and specialized training to increase recruitment of foster parents capable of caring for youth with complex needs, professional tutoring, robust mentoring.

programs, technology for educational needs, enhanced medical and dental options for youth, and post-18 planning services.

2. Ensure access to counsel for all Category 4 children, funded by the government, prioritizing continuity of representation when transferring children into LTFC.

3. Relax restrictions placed on Category 4 children in LTFC to allow and encourage development of independent life skills.

4. Sponsor and implement Supportive Independent Living (SIL) pilot projects for Category 4 adolescents aged 16-18 and engage in thorough program analysis to determine whether to institute such SIL programs on a wider scale.

#### **D. Address Needs of Older Youth at Risk of Aging Out of ORR Custody and Eliminate Placement of Category 4 Youth in Adult Detention**

1. Prohibit the placement of Category 4 youth who age out of ORR custody into adult immigration detention.

2. Prioritize USCIS resources to allow for streamlined processing of SIJS and asylum applications for Category 4 youth.

3. Permit Category 4 youth to obtain work authorization upon filing an application for SIJS or asylum (as is currently permitted for Trafficking Visas) or, in the case of SIJS, once USCIS grants the I-360 petition. Require expeditious processing of such applications.

4. Require ORR care providers to develop comprehensive post-18 plans for Category 4 youth who are aging out of ORR custody.

5. Make long-term foster care placement and supportive services available for Category 4 youth who age out of ORR custody while awaiting resolution of their legal claims.

## II. Caring for Unaccompanied Children – Placement Options and Legal Protections

### A. Care Options for Unaccompanied Children

The Office of Refugee Resettlement (ORR) within the Administration for Children and Families (ACF) of the Department of Health and Human Services (HHS) is responsible for the care and custody of children who enter the U.S., are 18 or under, lack legal immigration status, and are not accompanied by a parent or guardian.<sup>10</sup> ORR contracts with state-licensed providers who operate shelter and temporary foster care programs to house UC and determine whether there are suitable sponsors available to whom children can be released. Through its network of providers ORR has over 13,500 licensed beds for unaccompanied minors in approximately 200 facilities and programs operating in twenty-two states.<sup>11</sup>

ORR has created a system for classifying UC based on the type and availability of sponsors for each child.<sup>12</sup> Categories 1-3 are comprised of children whom ORR has identified as having either a relative or non-relative sponsor available.<sup>13</sup> Children in Category 1 have a potential sponsor who is a parent or legal guardian, those in Category 2 have an immediate relative such as a sibling, grandparent or other close relative available as a potential sponsor,<sup>14</sup> and children designated as Category 3 have potential sponsors who may be distant relatives or unrelated adults. Unaccompanied children in ORR custody who do not have identified sponsors are designated as “Category 4,” and ORR remains responsible for their care until they reach the age of 18.<sup>15</sup>

As of March 31, 2021, publicly available data regarding the ages and sponsor categorization for children in ORR care indicate there were 14,809 children in custody.<sup>16</sup> 78% of these children were over the age of 15 and 90% were over the age of 13.<sup>17</sup> In addition, ORR had identified sponsors and classified 6,527 of these children as Category 1, Category 2, or Category 3. There is no breakdown as to how many of the remaining 8,282 children have potential sponsors or how many ORR has determined do not have viable sponsors and therefore belong in Category 4 status.<sup>18</sup> ORR does not publish clear and consistent information on the number of Category 4 children in their custody, the location of Category 4 placements, duration of placements, or number of transfers.

ORR places UC in a variety of short-term or long-term placements depending on the duration of their stay in ORR custody. These placement options include:

#### 1. Shelter Care, Influx Centers, and Emergency Intake Sites

Upon entry into ORR care and pending placement with sponsors or longer term care arrangements, unaccompanied children are typically placed in shelter care.<sup>19</sup> ORR defines shelter care as “a residential care provider facility in which all of the programmatic components are administered on-site, in the least restrictive environment.”<sup>20</sup> These shelters range in size from about 16 to 300 including approximately thirty-three large-scale, congregate shelters housing more than 100 children.<sup>21</sup> ORR shelters are licensed pursuant to state child welfare standards<sup>22</sup> and are designed to temporarily house children and provide medical, educational, and legal services on a short-term basis.<sup>23</sup>

During times of increased migration of UC, ORR has utilized temporary Influx Care Facilities (ICF) to house large numbers of children on an emergency basis.<sup>24</sup> For example, ORR re-opened an ICF in Carrizo Springs, Texas on February 22, 2021 that accommodates 952 children ages 13-17 in hard-sided structures.<sup>25</sup> The ICF uses additional semi-permanent, tent structures to expand capacity further.<sup>26</sup> Courts have determined that generally, children are to be housed in influx centers for no more than 20 days.<sup>27</sup> Unlike other shelter programs, ICFs do not need to meet state licensing requirements.

In addition, ORR has recently established temporary Emergency Intake Sites (EIS) designed to process the large numbers of UC in ORR care. These facilities are unlicensed and provide fewer services than those offered in Influx Facilities or licensed shelters.<sup>28</sup>

#### 2. Transitional Foster Care [TFC]

Children awaiting placement with sponsors or long-term foster care placements may be placed in Transitional Foster Care, defined as “...an initial placement option for unaccompanied children under 13 years of age, sibling groups with one sibling under 13 years of age, pregnant/parenting teens, or unaccompanied children with special needs. Unaccompanied alien children are placed with foster families in the ORR network of care but may attend school and receive most service components at the care provider site.”<sup>29</sup>

#### 3. Long-term Foster Care [LTFC]

ORR defines LTFC care as “ORR-funded community-based foster care placements and services to which eligible unaccompanied alien children are transferred after a determination is made that the child will be in ORR custody for an extended period. Unaccompanied

alien children in ORR long-term foster care typically reside in licensed foster homes, attend public school, and receive community-based services.<sup>30</sup> ORR contracts with non-profit organizations, including USCCB/MRS, to place unaccompanied Category 4 children in LTFC.

A LTFC placement can be either a traditional or a therapeutic placement. According to ORR policies, a therapeutic foster placement is “funded by ORR for unaccompanied alien children whose exceptional needs cannot be met in regular family foster care homes and consists of intensive supportive and clinical services in the homes of specially trained foster parents. Foster care programs work in collaboration with foster parents to provide interventions, treatment, protection, care, and nurturance to meet the medical, developmental, and/or psychiatric needs of unaccompanied alien children. The unaccompanied alien child typically attends public school and receives community-based services.”<sup>31</sup>

#### 4. Group Homes

ORR defines a group home as “a care provider facility that offers a group home setting and that specializes in caring for specific populations (e.g., teen mothers). A group home, which is run by 24-hour staff or house parents, typically houses 4 to 12 unaccompanied alien children.”<sup>32</sup> In group home settings, children may attend public school.<sup>33</sup>

### **B. Policy Mandates for Care of Category 4 Unaccompanied Children -- Best Interests of the Child and Least Restrictive Alternatives**

The law requires, and ORR policy guidelines repeatedly underscore, that ORR must prioritize the best interests of unaccompanied children in their care and place them in the least restrictive environment possible given each child’s age and needs.<sup>34</sup> Pursuant to federal law, Customs and Border Control (CBP) must transfer UC to ORR’s custody within 72 hours of their apprehension.<sup>35</sup> ORR policy guidelines state that ORR must refer UC for placement within 24 hours of the child’s initial transfer from CBP whenever possible.<sup>36</sup> The placement of each unaccompanied child must be based on “child welfare best practices in order to provide a safe environment and place the child in the least restrictive setting appropriate for the child’s needs.”<sup>37</sup>

Category 4 children are eligible for family-based, individualized long-term foster care (LTFC) or small group home (SGH) placements if it is anticipated they will be

in ORR custody for at least four months (designated as an “extended stay”),<sup>38</sup> are under the age of 17 and 6 months at the time of placement,<sup>39</sup> and are determined to have a valid legal claim.<sup>40</sup>

It is widely recognized that children who do not have or are unable to live with their parents, whether due to abuse, neglect, or other circumstances, fare best when placed with other family members or in a family-like, community setting.<sup>41</sup> U.S. child welfare policy recognizes the detrimental effects of large-scale congregate care on children.<sup>42</sup> In response to such research, state child welfare agencies have decreased placements in such settings by 37% between 2004 and 2013.<sup>43</sup> In 2018, Congress authorized the Family First Prevention Services Act which recognizes the long-term benefits of family-based care and uses financial incentives to discourage congregate care and increase the use of licensed foster homes.<sup>44</sup> The Family First Prevention Services Act generally prohibits reimbursement to states for placement of children in congregate care for longer than two weeks.<sup>45</sup>

Despite the numbers of UC entering the U.S. over the last six years, there has been relatively little research on the outcomes of long-term foster care and small group home placement for unaccompanied minors in ORR custody.<sup>46</sup> Similarly, there is little research on the impact of placing children who age out of ORR custody in adult detention.

In 2017, USCCB/MRS conducted a preliminary study to identify the internal and external factors impacting UC adjustment, well-being, and integration into U.S. society.<sup>47</sup> Researchers interviewed former UC in LTFC (as well as children who had been reunited with family), caregivers, and case managers. The findings suggest that several factors facilitate or inhibit integration of UC in long-term foster care into U.S. communities: engagement and cultural competency of case managers; children’s ability to make decisions, set goals, and move toward independence; access to medical and mental health care; educational opportunities; and immigration legal status, among others. Feedback from former UC highlighted the important role that foster parents’ consistent and committed care play in creating successful foster care placements.<sup>48</sup>

These findings coincide with those of other studies indicating that creating a supportive environment for UC in which they have a measure of autonomy to set goals and make decisions allows them to build competencies, more easily integrate into communities, and develop long lasting relationships.<sup>49</sup> Several studies also suggest an association between ethnically matched placements (either a foster parent or another UC in the home of the same ethnic or cultural background) and better mental health outcomes

for children.<sup>50</sup>

### III. Trends Regarding UC/ Category 4 Children in ORR Care

#### A. Increased Numbers of UC Category 4 Children Due to Federal Immigration Policy Directives

While the number of unaccompanied minors entering the U.S. fluctuated during the Trump Administration,<sup>51</sup> the number of Category 4 children increased.<sup>52</sup> This increase was the direct result of federal immigration policy initiatives implemented from 2017-2020. These policies include:

##### 1. Memorandum of Agreement Allowing Information Sharing Between Department of Health & Human Services and Department of Homeland Security

In May 2018, the Department of Health and Human Services (HHS) and the Department of Homeland Security (DHS) entered into a Memorandum of Agreement (MOA), to permit sharing of information about unaccompanied children in ORR's custody and their prospective sponsors.<sup>53</sup> Prior to 2018, ORR conducted background checks of all prospective sponsors but did not authorize information sharing with DHS. In addition, fingerprinting and background checks were not required of all household members.<sup>54</sup> The MOA required ORR to collect fingerprints and background documentation from the sponsoring adults as well as all the adults in the household living with the sponsor.<sup>55</sup> With the change in policy, fear spread among potential sponsors who were undocumented or who had undocumented household members that coming forward would lead to information sharing with ICE and deportation.<sup>56</sup>

The MOA policy had a chilling effect on the ability of ORR to reunite unaccompanied children with family or approved sponsors. The expanded background check policy led to longer processing times for vetting of sponsors which increased the duration of stay in ORR custody. In FY 2016, ORR reunited approximately 90% of UC with sponsors within an average of 34 days, whereas by 2019, with heightened background checks in place, the process was taking, on average, 59 days.<sup>57</sup>

As of December 2018, ORR stopped requiring background checks and fingerprinting of adults in the household living with the sponsor.<sup>58</sup> Nevertheless, the agencies continued to share information and DHS used that information to arrest approximately 170 prospective sponsors, though the number of sponsors actually

targeted is a matter of debate.<sup>59</sup> One survey found that three in four professionals working with unaccompanied children “were aware of a potential sponsor deciding not to come forward or withdrawing due to the MOA.”<sup>60</sup> This fear impacted the availability of sponsors for UC and thereby increased the number of children in Category 4 for whom viable sponsors remained unavailable.<sup>61</sup>

Fortunately, DHS and HHS rescinded the MOA on March 12, 2021,<sup>62</sup> however the fear permeating the undocumented community lingers. It will take time to reassure undocumented parents and relatives that they can claim unaccompanied children without facing enforcement repercussions.

##### 2. Zero Tolerance & Family Separation

In April 2018, the U.S. Department of Justice implemented new enforcement practices and began prosecuting 100% of individuals apprehended at the border.<sup>63</sup> Upon arrest, parents were taken to federal jails and children were not permitted to accompany them. Some of these parents were then deported prior to being reunited with their children. This “zero tolerance” policy led to the separation of a reported 2,816 children from parents who were arrested and charged with the federal crime of unlawful entry.<sup>64</sup>

At the height of the family separation policy, ORR housed many children in congregate care. One study confirmed that between January 2018 and September 2019, over half of UC in ORR facilities were housed in placements that could accommodate over 200 children.<sup>65</sup> At that time, there were 33 ORR facilities that could accommodate more than 100 children.<sup>66</sup> The authors of the study note that, in comparison, state welfare foster group homes typically accommodate between 7 and 12 children.<sup>67</sup>

As of February 2021, approximately 628 children separated from their parents remained in ORR custody with those who had no viable sponsors designated as Category 4.<sup>68</sup>

##### 3. “Closing” of the Border Pursuant to Title 42

With the advent of COVID-19, the number of unaccompanied children crossing the border and transferred into ORR custody dropped precipitously during 2020.<sup>69</sup> This was largely attributable to the decision of the Centers for Disease Control (CDC) to invoke the Public Health Service Act of Title 42 of the U.S. Code in March 2020 that prohibited entry at the southern border to prevent the spread of the COVID-19 virus.<sup>70</sup> Although the law

was not supposed to apply to unaccompanied minors, Customs and Border Patrol apprehended UC and failed to transfer them to ORR custody as required by federal law.<sup>71</sup> Instead, CBP maintained custody of UC, housed many in hotels under the supervision of staff who lacked child welfare experience, and then expelled them back to their home countries.<sup>72</sup> The government expelled nearly 9,000 children before November 18, 2020.<sup>73</sup> The expulsions impacted the numbers of UC entering the U.S. and, by the end of 2020, some ORR shelters and long-term foster care programs were under-capacity.<sup>74</sup>

The tide began to turn when, on February 11, 2021, the CDC exempted unaccompanied children from expulsion under Title 42.<sup>75</sup> The Secretary of the Department of Homeland Security, Alejandro Mayorkas, reiterated that DHS is “...not expelling unaccompanied children.”<sup>76</sup> However, the Biden Administration has not rescinded Title 42 as it applies to single adults and families. Therefore, families waiting in Mexico still face the wrenching choice of whether to remain together in extremely dangerous conditions or send their children alone into the United States knowing that the children will no longer be expelled.<sup>77</sup> This is contributing to higher numbers of unaccompanied children entering the U.S. Even if Title 42 is rescinded, there is likely to be a phased entry and the resulting delays will cause families to continue sending children unaccompanied.

#### 4. Migrant Protection Protocols

On January 25, 2019, the Department of Homeland Security (DHS) implemented a new policy for processing asylum seekers, the Migrant Protection Protocols (MPP), often referred to as the “Remain in Mexico” program.<sup>78</sup> Immigrants arriving at the southern border of the U.S. seeking asylum were required to wait in Mexico during the pendency of their asylum cases.<sup>79</sup> Asylum seekers were permitted to enter the U.S. temporarily to attend immigration court proceedings but were required to return immediately to Mexico to await subsequent hearings.<sup>80</sup>

Unaccompanied minors are not subject to MPP.<sup>81</sup> However, many children who initially remained in Mexico with their families journeyed from Mexico alone and entered the U.S. to escape the squalid and dangerous conditions in Mexico.<sup>82</sup> In some cases, parents were abducted or harmed in Mexico leaving children to cross the border unaccompanied. According to HHS data, between October 2019 and May 2020, at least 500 children crossed the U.S.-Mexico border without their parents or legal guardians after remaining in Mexico pursuant to MPP.<sup>83</sup> USCCB/MRS, through its network of children’s services providers, observed and cared for

children who had been part of an MPP family and then entered the United States as unaccompanied children. Legal services providers serving UC in the U.S. filed a lawsuit alleging that the government, in some cases, failed to transfer these unaccompanied children into ORR custody and instead fast-tracked UC for removal.<sup>84</sup>

On February 19, 2021, DHS began winding down MPP and on June 1, 2021 the Secretary of DHS officially terminated the program.<sup>85</sup> However, many asylum seekers remain in treacherous conditions in Mexico, awaiting the opportunity to enter the U.S. The gradual nature of this process forces families still in Mexico to weigh the risks of keeping their family together under abominable conditions or sending their children alone to relative safety in the U.S. Left with this horrible choice, many are choosing to send their children, unaccompanied, to the U.S.<sup>86</sup>

### **B. Increased Duration of Stay in Congregate Care**

These immigration policies have led to unaccompanied children spending extended periods of time in large congregate care facilities. According to annual reports to Congress, in FY 2018, the average length of stay in an ORR facility was 59 days, a 68.5% increase from FY 2016 (35 days) and a 23% increase from FY 2017 (48 days).<sup>87</sup>

Over the last six years, more than 25,000 UC have been detained in ORR custody for longer than 100 days.<sup>88</sup> During the last two years and four months of the Obama administration, 7,401 or 6% of children entering ORR custody remained in shelters for more than 100 days. During the first three years and seven months of the Trump administration, 17,676 or 12% of children in the shelter system remained for more than 100 days.<sup>89</sup> At the height of the family separation policy in 2018, 20% of children in shelters remained there for more than 100 days.<sup>90</sup> Since September 2014, more than 942 children have spent a year or longer in ORR shelters.<sup>91</sup> Perhaps most concerning of all, 1,893 children who spent more than 100 days in shelters volunteered to be deported even though ORR had determined that they had viable claims for legal relief.<sup>92</sup>

ORR reports that as of March 31, 2021, the average length of UC care for children discharged to sponsors was 35 days while the average length of care for those who remained in ORR care was 27 days.<sup>93</sup> It is not entirely clear what “remaining in ORR care” means in this context. While this reduction seems positive, the increase in numbers of UC entering the U.S. is straining

ORR resources and has likely resulted in increased duration of stay in large congregate care for children for whom viable sponsors cannot be identified.

Unaccompanied children expected to reunify with sponsors often experience shorter stays in Transitional Foster Care (TFC) or small-scale shelters before reunification. However, Category 4 children often spend extended time in shelters waiting for a determination that they are eligible for LTFC or small, community group settings.<sup>94</sup> This includes demonstrating that they have a valid claim for legal relief.

These delays can significantly impact the mental health and wellbeing of unaccompanied children. In a 2019 report addressing the mental health challenges and needs of UC in ORR custody, a mental health clinician stated that, “even children who were outgoing and personable started getting more frustrated and concerned about their cases around the 70<sup>th</sup> day in care ... they become disillusioned after a lengthy stay.”<sup>95</sup>

The overwhelming majority of UC referred to ORR are teenagers. As of March 31, 2021, approximately 90 % of all children referred were over the age of 13.<sup>96</sup> These older adolescents are generally not eligible for TFC.<sup>97</sup> Most Category 4 children have gone through several transfers by the time they are placed in long-term foster care or a group home. Research confirms that children who experience multiple transfers in placement are at greater risk for negative outcomes such as behavioral issues.<sup>98</sup>

For older teens, the delay and multiple transfers in placement can have particularly harmful consequences.<sup>99</sup> Large-scale shelters, while not correctional facilities, are often institutional environments in which children’s movements inside and outside of the facilities are restricted.<sup>100</sup> The education provided can be inadequate as the facilities were designed as temporary accommodations rather than long-term schooling options.<sup>101</sup> Investigations have revealed that many of these large shelters have inadequate recreation, limited access to computers and technology, limited physical contact or affection, limited access to legal counsel, and reports of children experiencing high levels of emotional stress and trauma.<sup>102</sup> Additionally, the COVID-19 pandemic has exacerbated the problems, with children living in conditions that heighten potential exposure and spread of the virus.

Perhaps most concerning is the risk that Category 4 UC who remain in large-scale congregate care will not obtain legal relief by age 18 and will face homelessness or placement in adult immigration detention despite their vulnerability and viable claims for legal protection. This reality is the result of a policy change

in March 2018, in which ICE began transferring children aging out of ORR custody to adult detention shortly after turning 18 or on their 18<sup>th</sup> birthday.<sup>103</sup> This occurred despite the existing protections codified in law in the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2013 which states that, when children in ORR custody turn 18, ICE shall consider placement in the least restrictive setting available after taking into account the child’s danger to self, the community, and risk of flight.<sup>104</sup> In July 2020, a federal court in the District of Columbia ruled that ICE had routinely failed to consider less restrictive settings before transferring unaccompanied immigrant youth to adult detention and thereby violated U.S. immigration law. The evidence demonstrated there was considerable variability among ICE field offices as to the treatment of UC turning 18.<sup>105</sup> While ICE will now be under more scrutiny to consider alternatives to adult detention, the agency still retains discretion to place UC who age out in adult detention.

### **C. Delays in Obtaining Legal Representation, Securing Work Authorization, and Resolving Immigration Status**

The duration of stay in large congregate shelters impacts an unaccompanied child’s ability to obtain a lawyer and pursue their immigration claims. While lawyers provide “know your rights” presentations and screen children in shelters to determine if they are eligible for immigration relief, children may not be assigned a lawyer to represent them while in shelter and, even if they have a lawyer, the representation may only be temporary given that the child may relocate to a different jurisdiction when placed in LTFC or an SGH.

Several federal statutes require the government to secure legal counsel for UC, yet the Immigration and Nationality Act also specifies there is no obligation for the government to pay for attorneys for children.<sup>106</sup> Under the TVPRA, UC in HHS custody must “have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.”<sup>107</sup> The Homeland Security Act requires the Director of ORR to develop a plan to “ensure that qualified and independent legal counsel is timely appointed to represent the interests of each child.”<sup>108</sup> However, because both provisions qualify that appointment of lawyers must be “consistent with” the Immigration and Nationality Act which does not require appointment of counsel at government expense,<sup>109</sup> there is no statutory mandate that the government pay for lawyers representing UC in ORR custody.

Pursuant to the Flores settlement ORR has allocated funding for legal services for UC. Currently, ORR

funds these services through a contract with the Vera Institute of Justice.<sup>110</sup> Vera subcontracts with legal services providers throughout the country to provide know your rights presentations for UC, and screen children within ten days of their arrival to ORR care providers to determine if they have claims for legal relief.<sup>111</sup> However, in some cases, children are not ready or able to provide information, and lawyers need more time to determine whether they have a legal claim. The American Bar Association, in its standards for the custody, placement and care of unaccompanied children, emphasizes that children may be reluctant at the outset to provide information, and attorneys interviewing children must “...be mindful that Children who have had distressing experiences may find it very difficult to trust unfamiliar adults...” and avoid pressuring Children to talk before they are ready.”<sup>112</sup>

In addition to conducting legal screenings, the ORR-contracted providers also make pro bono referrals and, in some cases, directly represent UC.<sup>113</sup> However, once ORR designates a child as Category 4 and determines they are eligible for LTFC, the child often relocates to another state and must be assigned a lawyer in the new jurisdiction, causing delays and disruption of the representation.<sup>114</sup> As a result, Category 4 children do not typically secure long term legal representation until they are transferred to long-term foster care. The delay in placement and the lack of continuity of representation inhibits UC’s ability to resolve their immigration status.

Many of these legal cases take long periods of time to complete. Lawyers report, for example, that affirmative asylum cases for UC typically take anywhere from one month to several years to process.<sup>115</sup> These delays place older UC in a precarious position as they get closer to their 18<sup>th</sup> birthday and risk aging out of ORR custody without resolution of their legal status.

Children who qualify for asylum and trafficking visas can apply for employment authorization [EAD] while their application is pending. However, under regulations implemented in August 2020, asylum-seekers must wait 365 days before becoming eligible for authorization. Meanwhile, children applying for Special Immigrant Juvenile Status [SIJS] must have their status approved and then apply for Legal Permanent Residency before they can file for an EAD. The current delay in processing cases, particularly, SIJS, means that older UC must endure long and stressful waits to obtain work authorization.

## **D. The Aging Out Problem and Lack of Resources for Unaccompanied Youth Ages 18-21**

Category 4 children whose legal status is resolved prior to age 18 become eligible for the Unaccompanied Refugee Minors Program [URM].<sup>116</sup> The URM Program is an ORR-funded foster care services program that ensures that unaccompanied children who receive refugee status, asylum, special immigrant juvenile status, trafficking certification or other legal relief are entitled to the same care and services available to all foster children in a state.<sup>117</sup> Children in the URM program may be eligible to continue in supportive living arrangements until age 21 or in some states up to age 23. The program offers “culturally and linguistically appropriate child welfare, foster care, and independent living services.... Refugee children who enter the U.S. with family, but later experience a family breakdown may be eligible for the URM program.”<sup>118</sup>

ORR only maintains custody of UC until they reach the age of 18. At that point, if the 18-year-old has not obtained lawful immigration status, ICE decides whether to detain them or release them pending resolution of the legal claim.<sup>119</sup> ICE refers to those UC who turn 18 as “age outs”<sup>120</sup> and, in making its custody or placement decision, ICE has several less restrictive alternatives to adult detention.<sup>121</sup>

Child welfare experts in the U.S. and around the globe recognize that teenagers turning 18 years old do not typically have the education, maturity, or life skills necessary to live independently.<sup>122</sup> A majority of U.S. states recognize this reality and give teens in state foster care systems the opportunity to continue in foster care or in supported independent living arrangements until age 21 (sometimes older). However, teens in the federal U.S. immigration system who have not attained legal status by age 18 do not have these opportunities. In rare circumstances, state-funded programs can step in.<sup>123</sup> However, in most cases, unless a foster parent is willing to volunteer their services or a caseworker can secure donations to help pay for housing and basic needs, agencies do their best to craft viable post-release plans for teens to prevent ICE from detaining the UC and to keep the teen safe. If these plans are unsuccessful, however, youth face potential homelessness, are at increased risk of being trafficked or exploited, and are ultimately less prepared to integrate into communities.

Twenty-eight states, the District of Columbia, and nine Tribes provide extended foster care beyond age 18.<sup>124</sup> The Fostering Connections to Success Act of 2008 (FCA) offers states the option to continue providing Title IV-E reimbursable foster care payments up to the age of 19, 20 or 21 if the young adult is:

- Completing secondary education or a program leading to an equivalent credential.

- Enrolled in an institution that provides post-secondary or vocational education.
- Participating in a program or activity designed to promote, or remove barriers to, employment.
- Employed for at least 80 hours per month.
- Incapable of doing any of the above because of a medical condition.<sup>125</sup>

Some states do not have federally approved extended foster care programs, but instead fund their programs through state appropriations.<sup>126</sup>

Studies confirm that youth who remained in extended foster care achieve more positive outcomes when compared to those required to leave care at age 18. The Chapin Hall Center for Children conducted a study comparing outcomes for 19-year-olds in Illinois who voluntarily chose to continue in foster care with 19-year-olds in Wisconsin and Iowa where state law required exit from foster care at 18. “The Illinois children received more independent living services, progressed further in their education, had more access to health and mental health services, and experienced less economic hardship and involvement in the criminal justice system than did those who left care.”<sup>127</sup>

In addition, research demonstrates that extended foster care yields long-term cost savings. One cost-benefit analysis conducted in California estimated a \$2.40 return on each dollar spent on extended foster care for children who obtain a bachelor’s degree. Extended foster care for young adults was correlated with a \$72,000 estimated increase in per-person lifetime earnings and former foster care children who obtained a college degree earned \$481,000 more in projected earnings during their lifetime than foster children who earned a high school degree.<sup>128</sup>

## IV. A View from the Ground – Findings from Survey of UC Long-Term Foster Care and URM Providers

ORR contracts with USCCB/MRS to administer UC and URM programs for children throughout the country. These programs place UC in foster homes, small group homes and various independent living options; facilitate access to educational, vocational, English language, medical, dental, mental health, and legal resources; and provide family reunification services. USCCB/MRS is one of two agencies providing continuing

care and transition services through URM programs for unaccompanied children who have obtained legal protection prior to their 18<sup>th</sup> birthday.<sup>129</sup> In 2020, the USCCB/MRS UC Program and URM Program operated in 13 states and placed 277 children from 18 countries into care. Of those, 201 were UC children placed either in shelter care, transitional foster care, or long-term foster care.

USCCB/MRS’s affiliated long-term foster care and group home providers are in a unique position to assess the impact of family foster care and small group care settings on Category 4 children and identify the challenges facing teens who risk aging out of ORR custody prior to obtaining legal immigration status. To harness these observations and insights, USCCB/MRS, in partnership with the Immigrant and Refugee Advocacy Clinic at The Catholic University of America, conducted a survey and follow-up interviews with program directors and staff of five agencies under the auspices of USCCB/MRS. The agencies are in geographically diverse locations including Richmond, Virginia; Dallas, Texas; Phoenix, Arizona; Grand Rapids, Michigan; and Rochester, New York. Four of the agencies are affiliated with Catholic Charities and one is an agency of Bethany Christian Services.

### A. LTFC and URM Programs

All five agencies administer an LTFC program and a URM program. The LTFC programs range in maximum capacity from 8 to 26 kids in care at any one time. Most of the unaccompanied minors entering the LTFC programs are between the ages of 15-17. Two of the agencies surveyed do not generally accept children over 17 into LTFC due to the timeframe for a UC to obtain legal relief in their local jurisdictions, which means that youth aged 17 or older would likely age out of care before their legal claims can be resolved.

Each agency offers individual family placements, and one also runs a group home for boys ages 13-17 and a group home for girls ages 13-17. The group homes consist of houses located in residential neighborhoods in which social service professionals are on staff, a clinician works regularly with the residents, and the children go to local schools. Individual placements in four of the five agencies as well as the group homes are therapeutic placements. For children enrolled in the URM program, several of the agencies offer supportive independent living (SIL) options.

Each agency undertakes a thorough matching process when determining a LTFC placement for a child. They consider the foster families’ strengths and the child’s needs (including cultural/linguistic), trauma history,

"Our program has seen great successes in Category 4 youth receiving their status and successfully transitioning to our URM program. From there they have been able to graduate high school, get their green cards, find employment and become successful and contributing members of our community. Many of our youth benefit from having a foster family they can build connections with, as these become resources and "forever families" for them."

Program Director, Catholic Family Center, Rochester, NY

gender preferences, likelihood of legal success in the jurisdiction,<sup>130</sup> and educational needs among other factors. The foster parents are trained and certified pursuant to state child welfare requirements. In addition, in four of the five agencies, foster parents receive training on strategies for helping children who have experienced significant trauma.

All five agencies transition the majority of their LTFC children into the URM program, where young people can receive services until the age of 21. When the child turns 18, the relationship between the agency and the UC changes from one of agency responsibility to a partnership between the agency and the young adult who voluntarily chooses to participate in the URM program. At Catholic Charities Community Services in Phoenix, for example, the agency continues to provide ongoing case management, independent living stipends, educational support, and housing assistance. Some of the young adults continue to live in their foster home but pay rent to develop financial responsibility and other independent living skills. Others live with adults in the community, many of whom were refugees, who provide a supportive living environment. At Commonwealth Catholic Charities in Richmond, youth are encouraged to enter the Independent Living program by the age of 20 where they receive a stipend, live in their own apartments, and receive assistance finding employment.

## B. Benefits of LTFC and URM Programs

Program directors identified numerous benefits of LTFC; primary among them, is the ability of children to connect with foster parents, build community, access educational opportunities, develop independent living skills, and obtain legal representation. In comparison to large-scale shelter-care, directors reported that LTFC gives children more stability. The move from shelter to a foster family affords children a greater sense of permanency and helps them envision a path forward.

Program staff explained that UC frequently experience

trauma on their journeys to the U.S. and those who are then placed in large-scale shelters can experience further trauma. The adults with whom the children interact in these large-scale congregate settings change each shift and there is high turnover which inhibits relationship building. In a foster home, there is a routine, the child goes to school, and the child can "see a glimmer of a future they can have."<sup>131</sup> Immigrant children build long-term relationships in their foster homes. As one program manager commented, "[a] foster parent is not

someone on shift that day or doing it for a job. Yes, they get reimbursed, but no one can get rich from it. This continuous relationship with the foster parent allows the children to share their traumatic experiences and build on their relationship with their foster parents."<sup>132</sup> Programs report that the Category 4 children they serve are resilient and resourceful as demonstrated by their ability to travel thousands of miles to make a new life in the U.S. The staff has witnessed again and again that with supportive environments the children have enormous potential to succeed.

For those children who obtain legal relief before they turn 17 and 6 months, agencies report a smooth transition into URM programs. One director noted, "[t]he legal services provider (LSP) who works with our children are very quick at applying for legal relief for older children and have been successful the majority of the time."<sup>133</sup> Another director explained, "[w]e typically see several 17+ year old youth per year. [O]verall, the experience has been positive. The majority of our youth are able to transition to the URM program and continue to receive placement services until 21 years old."<sup>134</sup> Catholic Family Center in Rochester, for example, works with the local county Social Services Department (who has custody of the children in URM) to provide foster home and supportive care up to age 21, and ensures youth receive supportive educational services and scholarships. Under the program, youth can attend college or vocational school beyond age 21.

For those UC who do not obtain legal relief before their 18<sup>th</sup> birthday, agencies report that the relationship they have with their local ICE office plays a critical role in whether the child will be transferred to adult detention. Four of the five agencies indicated they have a positive working relationship with their ICE field office.<sup>135</sup> One program director commented, "[t]he positive working relationship that we have built with [the] ICE field office over the years has greatly benefited the few Cat[egory] 4 UC who have aged out. As long as there is solid post-18 planning for the youth, the ICE officers do not

"We have one former UC who has now completed high school and is entering a Certified Nursing Assistants program which is paid for by a local non-profit. She cannot get a scholarship or FAFSA as she is still pending EAD [employment authorization] and [permanent immigration] status."

- Catholic Charities Community Services, Phoenix, AZ

take the youth into detention but update their system with the youth's information and allow the youth the opportunity to continue showing up for court and working with a legal provider."<sup>136</sup> Another program director commented that the assigned Field Office Juvenile Coordinator (FOJC), the ICE liaison responsible for monitoring the child's removal case and determining post-18 placement status, was willing to allow children to check in by phone rather than requiring in-person check ins to avoid the long drive and resulting school absences.

These collaborative practices are not universal, however, as ICE policies and practices regarding whether to place children who turn 18 in adult detention vary by city and state.<sup>137</sup> One director commented that she receives calls from shelters in a neighboring state seeking to place children about to turn 18 because in the adjacent jurisdiction ICE routinely detains children at age 18.

### C. Challenges Facing LTFC and URM Programs

#### *Obtaining Legal Representation, Legal Relief, & Employment Authorization*

A recurring theme that surfaced in the surveys is the influence that availability of legal representation plays in the foster care placement and transition process. Typically, UC coming into LTFC from shelter care or other ORR placements are relocating from another jurisdiction and must be assigned a new attorney. All agencies surveyed responded that ORR assigns a legal services provider in their local area to work with the agency. The provider screens LTFC referrals to determine whether the child is likely to obtain legal relief in

"We have a youth who was unable to get her asylum approved before she turned 18 years old. She remained with her foster family so that she could continue to attend school and receive emotional support from her foster parents. She continues to thrive today."

- Program Director, Commonwealth Catholic Charities, Richmond, VA

that jurisdiction. If so, once the child is placed in LTFC the assigned legal services provider then represents the child.

Agencies lamented the time lag children experience trying to access legal counsel. One agency emphasized the need to reduce the time it takes to refer the children in shelters to LTFC

and thereby increase the likelihood that the child will receive ongoing legal representation and legal relief before they age out of the LTFC program.

According to the program directors, the most common form of legal relief that UC pursue is Special Immigrant Juvenile Status (SIJS). Secondary relief was either asylum or T visas for victims of trafficking, though several agencies commented that obtaining asylum was nearly impossible for children to achieve in their jurisdiction. Regardless of the form of relief, the process for securing legal resolution was generally long, sometimes upwards of 18 months to 2 years.

Agencies also consistently pointed to the delays children face in obtaining social security numbers and employment authorization. The delay is particularly notable for children who receive trafficking eligibility letters. These delays inhibit children from developing independent living skills such as opening a bank account, learning to drive, or obtaining employment, and this legal limbo heightens the stress UC experience.

#### *Gaps in Services for Children Who Are 17+*

Program directors noted the gap in services for children aged 17 and older. Few options exist for children who are placed in LTFC and attain the age of 17 +6 months but whose legal status has not yet been resolved. As one director noted, this causes "extreme anxiety for the client about their future making it difficult for case manager[s] to effectively do post-18 planning...."<sup>138</sup> There is a "lack of resources in [the] entire network for this age group if they do not yet have their legal relief."<sup>139</sup> Agency and program directors try to avoid this situation by only accepting children who are likely to obtain legal relief prior to their 18<sup>th</sup> birthday, thereby paving the way for entry into the agency's URM program.

For UC who age out before their legal status is resolved, agencies must rely on the goodwill of foster parents to continue to care

for the UC without compensation. As one program director noted, “The child who emancipated at 18 in FY2020 [without legal relief] continues to live with their foster family as a member of their family and without funding.” One agency has recruited non-foster families willing to rent rooms for a modest amount and obtained donations to pay for the child’s rent, food, and bus passes. Another agency has accessed state funds available to refugee children who turn 18. For the other agencies, the only option available is to help those teens aging out of ORR care plan for the transition and identify local programs and resources assisting homeless youth.

Program directors note that increasing access to timely legal relief and thereby allowing UC access to URM programs would enable UC to develop independent living skills, engage in work, and reduce the stress and anxiety they experience.

Agencies uniformly expressed the view that children should not be placed in adult detention at the age of 18. In addition, program directors recommended ICE and ORR develop clear guidelines for determining when, if ever, placing a child in adult detention would be appropriate, rather than placing the onus on agencies to plead each individual case and rely on the good graces of an FOJC officer in their jurisdiction. Criteria might include whether the child has lived in his or her current placement for a reasonable period of time, is enrolled in school, has a pending legal case, and shows interest in accessing post-18 support. Clear guidelines would reduce inconsistent practices among ICE offices.

### *Funding Gaps*

One agency reported funding gaps that prevented them from offering competitive salaries and hiring specialized staff such as bilingual clinicians. Another agency noted that higher payments would incentivize foster parents to accept children with more complex needs by enabling them to defray the costs of addressing these needs.

Two agencies stressed that additional funding would allow them to provide needed resources to children including professional tutoring, more robust mentoring programs, technology such as laptops or tablets to use for educational programming, enhanced medical and dental options for children, post-18 planning services, and specialized classes or extracurricular activities.

“We had a parenting teen who transitioned into the URM program. She remained with her foster family after she emancipated and they adopted her as an adult. She changed her last name to theirs and is cemented in their family as their daughter. With their help, she graduated high school and college and now has a successful career with Capitol One. She recently got married with her father walking her down the aisle.”

Program Director, Commonwealth Catholic Charities,  
Richmond, VA

### *ORR Policies & Practices Inhibiting Placement and Adjustment to LTFC Family-Based Setting*

Agency directors noted that certain ORR policies and practices diminished their ability to place children expeditiously and facilitate a smooth transition to LTFC. For example, the practice of issuing significant incident reports (SIRs) for minor misconduct imposes delays and obstacles to LTFC placement. Also, restrictions on children’s movements and independence while in LTFC, can inhibit UC’s ability to adapt to their new placements and integrate into the community.

Program staff explained that some older children, who have lived independently and financially contributed to supporting relatives in their home countries, may be reluctant to be parented in the U.S. These older children may adapt more easily to small group home environments where there are clear and predictable routines and more opportunities to practice independent living skills.

Program directors also acknowledged that because LTFC is a less restrictive environment than shelter care, children in LTFC have a heightened risk of running away. Factors motivating this behavior include the UC’s desire to reunite with family who were denied as sponsors, fear of not obtaining legal relief in time to avoid adult detention, need to work to help support families or pay immigration journey debt, and desire for more freedom.

While each agency has had children in LTFC who have run away, the incidence is quite low. Four agencies reported that Category 4 children “rarely” run, and one organization reported that children “sometimes” take this action. One agency reported they had one runaway in 2020 and none in 2019, stating that they generally experience an occurrence once every two years. Two agencies reported an increase during the past year with one attributing this rise to COVID-19 stay-at-home restrictions and children feeling trapped in their place-

ments.

## Impact of COVID-19

Several agencies reported that the COVID-19 pandemic significantly impacted their programs. One agency observed “increase[ed] stress on foster parents dealing with at-home learning and also not having respite options available.”<sup>140</sup> Some placements have dissolved as a result. Children also experienced “increase[ed] stress, anxiety, boredom etc. ... as they are stuck at home, not having normal life experiences, and worrying about family members in [their] home country dealing with COVID.”<sup>141</sup> In some cases, older UC have remained at home while their foster parents work. Virtual education has often been offered in English and some children have not been able to benefit from this instruction. In addition, immigration court hearings have been disrupted and delayed causing greater uncertainty for attaining legal relief.

The closing of the border pursuant to Title 42 also impacted USCCB/MRS affiliated programs. Although Title 42 no longer applies to UC, under the previous policy, UC seeking asylum and other forms of humanitarian protection were refused entry into the U.S. or expelled from the U.S. As a result, fewer children were placed in shelters and subsequently in LTFC. This caused competition among LTFC providers for children referred for LTFC and forced programs to operate below capacity even though the conditions and persecution children faced in their home countries had not improved.

## V. A Comparative View

In developing policies and practices that prioritize the best interests of Category 4 children and ensure least restrictive placements, it is useful to look at model practices in other countries. International guidelines state, in unequivocal terms, that large congregate care settings are detrimental to children. The United Nations (UN) Guidelines on Alternative Care of Children calls on countries around the world to eliminate institutionalization of UC and prioritize small, family or community-based options. The guidelines state:

[W]here large residential care facilities (institutions) remain, alternatives should be developed in the context of an overall deinstitutionalization [sic] strategy, with precise goals and objectives, which will allow for their progressive elimination.”<sup>142</sup> [Care should be] small and organised [sic] around the rights and needs of the child, in a setting as close as possible to a family or small group situation.<sup>143</sup>

Both the UN Convention on the Rights of Children as

well as the UN Guidelines on Alternative Care consider families “the natural environment for the growth, well-being and protection of children,”<sup>144</sup> offering care and treatment based on the individual needs and best interests of each child.

Most of the European Union’s Member States grant UC refugee status or other protection, which can include temporary residency pending determination of immigration status.<sup>145</sup> Some Member States, such as France, provide the same level of care to UC as they provide to French-born children who are wards of the child welfare system.<sup>146</sup> There is consensus among Member States that family-based care is the most appropriate setting. Studies of European Union programs have also found family-based care to be more cost effective than institutional care.<sup>147</sup> While the implementation of family-based foster care in the EU has not kept pace with calls for its broad scale adoption,<sup>148</sup> one country offers a model for U.S. policymakers to consider, the Netherlands.

In the Netherlands, over 50% of UC are placed in family-based foster care. All children under age 15 and those over 15 with special vulnerabilities or needs are placed in family care.<sup>149</sup> Two additional noteworthy features of the Netherlands’ system distinguish it from many programs in the U.S. First, temporary foster care placements are available to children older than 13. TFC placements are located near the asylum application center in the north of the country where they remain accessible to house children from the moment of arrival until they are placed in long-term foster care.<sup>150</sup> Secondly, the number of available long-term family-based placements intentionally exceeds the need for placements so the country is prepared to receive larger numbers of children in the event of a surge. As a result, UC entering the country do not need to be housed in large influx shelters or other institutionalized settings.

In addition to family-based care, some EU countries employ small group home settings for UC without sponsors.<sup>151</sup> However, as one report concluded, while housing UC in small group homes can be beneficial to children, it is also essential “to ensure that a small group home is not just a small-scale institution but provides quality care, designed around the individual needs of the child.”<sup>152</sup>

Several EU countries have implemented semi-independent living arrangements for older teens. According to a UNICEF report on accommodations for migrant children:

When the number of unaccompanied and separated children is high and the majority are adolescents, different forms of semi-independent living arrange-

ments should be explored. Children and young persons, for example, can live alone or in a small group of peers, while assisted by qualified social workers to acquire the necessary competencies for autonomy in society. Group homes can also be an effective form of alternative care for unaccompanied and separated children. In such arrangements children are cared for in small groups (around 10 children), in a manner and under conditions that resemble those of an autonomous family, with one or more specific parental figures as caregivers, but not in the caregivers' usual domestic environment."<sup>153</sup>

In further support of community-based and semi-independent living programs for the accommodation of older UC, the Lumos Foundation, an international non-governmental organization purposed with ending the institutionalization of children globally by 2050, concluded:

Family-based care and supported independent living ...are centered around the child's needs, consider the life situation and original social environment of the child and facilitate their integration into the community. Supported independent living is a positive initiative which can enable and support the transition to adult independence for older unaccompanied migrants, asylum-seekers and refugee teenagers. Family-based care is widely recognized as the most beneficial option for all children."<sup>154</sup>

Several countries offer semi-independent living (SIL) to older UC who have permanent immigrant status or who will be aging out of shelters or other child protection arrangements. These facilities typically house 4-6 children, ages 15-17, who exhibit financial and emotional independence.<sup>155</sup>

In France, for example, older UC are placed in SIL programs throughout the country. Government councils, in collaboration with non-profit organizations, house small groups of children in apartments and provide wrap-around services including medical, psycho-social, educational, employment, and legal support.<sup>156</sup> Staff receive training to enable them to address the unique needs of refugee children.<sup>157</sup>

Greece employs a SIL program, geared for UC aged 16 to 17, in which four teens live in an apartment and a multi-disciplinary team (e.g., social worker, career counselor, and lawyer) supports up to 24 UC living in six apartments. The team develops an action plan for each child and helps them access services as well as build independent living skills. Emergency support is available 24 hours/7 days per week as needed.<sup>158</sup>

A particularly well developed SIL program for UC exists in Leeds City, England. The program consists of three tiers of accommodations: supported lodg-

ing, supported accommodations, and shared housing.<sup>159</sup> Supported lodging offers many features of family-based foster care, though with less monitoring of the child. The child has his or her own room and shares a kitchen and bathroom with the family or host. The family or host provides some meals and oversight but engages in their own routines including going to work and spending weekends or holidays away from the home. The host "establish[es] an appropriate and consistent personal relationship with the young person, including non-intrusive practical help and advice. They typically provide general skills development, training, and experience-sharing events..."<sup>160</sup>

The next tier of SIL is supported accommodation, akin to a group home though with fewer restrictions on movement and activities. The UC living in the residence provide support to one another and staff are available on site (often 24/7) conducting sessions on independent living skills and assisting with homework needs. The youth cook for themselves, manage their money, do their own laundry, and generally determine when they will come and go. These accommodations have common study areas, outdoor space, and group meeting rooms, as well as security protocols such as visitors signing in and out and security cameras. The goal of supported accommodation is "to nurture a sense of belonging – strengthening their confidence and trust in adults – and provide them with the emotional stability needed to develop positive friendships and engage with their wider community."<sup>161</sup>

The final level of accommodation is shared housing. UC (mostly asylum-seekers but others as well) live independently in a multi-occupancy dwelling while counselors or other adults visit the home to provide support as needed. Those occupying shared housing may have previously resided in more supervised settings and staff has determined they possess the skills needed to handle more independence.<sup>162</sup>

Studies of unaccompanied migrant children in the U.S. and Europe indicate that family-based foster care is preferable to other placements, however the evidence is inconclusive. Experts note that "...until we reach a clear answer on the best type of accommodation for URM, investment should be made in the provision and quality of all placement types, including group homes and semi-independent accommodation, to make these environments as conducive as possible to good mental health."<sup>163</sup> Therefore, the semi-independent placement options utilized for older unaccompanied children in EU countries offer approaches to consider in seeking to meet the best interests of Category 4 children.

## VI. Recommendations\*\*

The following recommendations for policy, regulatory, statutory, funding, and programmatic changes are directed to Congress as well as to the Department of Health and Human Services/Office of Refugee Resettlement, Department of Homeland Security, the Department of Justice, and ORR's network of care providers.

### A. Reduce Delays in Referrals of Category 4 Children to Foster Care and Small Group Homes

1. Collect data and report publicly, on a quarterly basis, the number of children in Category 4 status, the average length of time between entry into ORR custody and determination of Category 4 status, the level of care for Category 4 youth at the time of determination, the average length of time between eligibility determination and placement in LTFC or SGH, the average number of transfers for Category 4 children from entry into ORR custody through placement in LTFC or SGH, and the number of therapeutic beds available in LTFC and SGH.
2. As stabilization and permanency is vital to ensuring that children feel comfortable sharing information necessary to determine eligibility for legal relief, relax the requirement that determination of a viable legal claim be made prior to referral and placement in LTFC or SGH.
3. Minimize the number of transfers of unaccompanied children prior to placement in LTFC or SGH. Place children in existing programs that have multiple levels of care (TFC/Shelter, staff-secure, residential treatment center, and/or LTFC) and incentivize development of more multi-tiered programs, so that, when a transfer is needed it can be facilitated within the same agency and community, enhancing continuity of care.
4. Expand the use of Transitional Foster Care (TFC) for youth 14-18.
5. Increase the capacity of available TFC placements to ensure placement in the least restrictive setting in the event of a surge of unaccompanied children. Work with community organizations to further educate the public on the TFC program and encourage local community care options.

### B. Prioritize and Expand LTFC and SGH Placements for Category 4 Children

1. Prioritize placement of Category 4 children in family-based foster care or small group (no more than 12) traditional or therapeutic settings.
2. Expand LTFC programming to ensure that sufficient beds are available for Category 4 youth who qualify for LTFC placement. Prioritize the funding and development of therapeutic LTFC placement options for Category 4 children to increase the likelihood that all children will receive placement in an appropriate setting. Work with community organizations to further educate the public on the LTFC program and encourage local community care options.
3. Phase out large-scale congregate shelter care and influx care facilities and eliminate facilities management contracts to for-profit entities.
4. Consider opening LTFC programming to current URM-only foster care providers. This will reduce wait times for URM placements and enable continuity of foster care placements.
5. Conduct research on the impact of long-term foster care placement on unaccompanied minors and the efficacy of having two parallel systems of child welfare in the U.S. – the state-based child welfare system and the federal ORR-administered immigration child welfare system.

### C. Address Gaps in Care for Category 4 Children

1. Increase funding to strengthen staffing and resources for LTFC and SGH programs, including but not limited to funding for competitive salaries for specialized staff, higher stipends and specialized training to increase recruitment of foster parents capable of caring for youth with complex needs, professional tutoring, robust mentoring programs, technology for educational needs, enhanced medical and dental options for youth, and post-18 planning services.
2. Ensure access to counsel for all Category 4 children, funded by the government, prioritizing continuity of representation when transferring children into LTFC.
3. Relax restrictions placed on Category 4 children in LTFC to allow and encourage development of

independent life skills.

4. Sponsor and implement Supportive Independent Living (SIL) pilot projects for Category 4 adolescents aged 16-18 and engage in thorough program analysis to determine whether to institute such SIL programs on a wider scale.

## **D. Address Needs of Older Youth at Risk of Aging Out of ORR Custody and Eliminate Placement of Category 4 Youth in Adult Detention**

1. Prohibit the placement of Category 4 youth who age out of ORR custody into adult immigration detention.
2. Prioritize USCIS resources to allow for streamlined processing of SIJS and asylum applications for Category 4 youth.
3. Permit Category 4 youth to obtain work authorization upon filing an application for SIJS or asylum (as is currently permitted for Trafficking Visas) or, in the case of SIJS, once USCIS grants the I-360 petition. Require expeditious processing of such applications.
4. Require ORR care providers to develop comprehensive post-18 plans for Category 4 youth who are aging out of ORR custody.
5. Make long-term foster care placement and supportive services available for Category 4 youth who age out of ORR custody while awaiting resolution of their legal claims.

## **VII. Conclusion**

The law requires, and ORR policy guidelines repeatedly underscore, the need to prioritize the best interests of unaccompanied children in government custody and place them in the least restrictive environment possible given each child's needs. However, ORR is routinely transferring children to large-scale shelters where children without identified sponsors and who are under the age of 17 and 6 months endure lengthy waits before they are eligible for long-term foster care or small group home placement. UC with viable legal claims risk aging out of ORR custody at 18 without immigration status and without needed wrap-around services. This cycle must end. We urge ORR to 1) transition from a system reliant on extended stays in large-scale congregate housing for Category 4 children to one that facilitates expeditious transfer into family and small, community-based placement and 2) expand opportunities for children turning 18 to receive continuing care and supportive independent living assistance.

## **Endnotes**

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11 *Carrizo Springs Influx Care Facility*, *supra* note 7.

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- 123 Council on Foreign Rel., *U.S. Detention of Child Migrants* (Oct. 29, 2020), <https://www.cfr.org/backgrounder/us-detention-child-migrants>.
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- 125 *Id.* See Fostering Connections to Success and Increasing Adoptions Act of 2008, H.R. 6893, 110th Cong., Sec. 401 (2008).
- 126 *Older Youth Housing*, *supra* note 124.
- 127 *Id.*
- 128 *Id.*
- 129 The children who are eligible for the program include the following: refugees, asylees, Cuban or Haitian entrants, certain minors with Special Immigrant Juvenile Status, victims of human trafficking and U Visa recipients. *Unaccompanied Refugee Minors Program*, Off. of Refugee Resettlement, An Off. of the Admin. for Child. & Families (Last updated Mar. 18, 2021), <https://www.acf.hhs.gov/orr/programs/refugees/urm>.
- 130 The legal service providers assigned to the LTFC programs screen referrals for legal relief prior to a program accepting the case. If the provider has concerns about a child aging out, it can also play a role in the program’s ability to accept the case.
- 131 Interview with Program Director, Catholic Charities Community Services, Phoenix, AZ, November 2020.
- 132 Interview with Senior Resource Manager, Catholic Charities Community Services, Phoenix, AZ, January 2021.
- 133 Survey Response, Commonwealth Catholic Charities, Richmond VA.
- 134 *Id.*
- 135 See U.S. Immigr. and Customs Enf’t, Juv. and Fam. Residential Mgmt. Unit, *Field Office Juvenile Coordinator Handbook*, at 21–23 (2018) [hereinafter JFRM Handbook], <https://www.aila.org/File/DownloadEmbeddedFile/75783>; 8 U.S.C. § 1232(b)(4).
- 136 Survey Response, Catholic Charities of Dallas.
- 137 *Garcia Ramirez*, *supra* note 105.
- 138 Survey Response, Catholic Charities of Dallas.
- 139 *Id.*
- 140 Survey Response, Catholic Charities of Dallas.
- 141 *Id.*
- 142 U.N. Guidelines for Alternative Care of Children, G.A. Res. 64/142, ¶ 23 (Feb. 24, 2010).
- 143 *Id.*, ¶ 123.
- 144 Lumos Found., *Rethinking Care: Improving Support for Unaccompanied Migrant, Asylum-Seeking and Refugee Children in the European Union*, at 64 (2020), [https://lumos.contentfiles.net/media/documents/document/2020/04/UMRC\\_Report\\_2020\\_v2\\_ABZD7Uz.pdf](https://lumos.contentfiles.net/media/documents/document/2020/04/UMRC_Report_2020_v2_ABZD7Uz.pdf) (citing UN CRC preamble, Alternative Care Guidelines II A 3).
- 145 Eur. Migration Network, *Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway* (Jul. 2018),

[https://ec.europa.eu/home-affairs/sites/default/files/00\\_eu\\_synthesis\\_report\\_unaccompanied\\_minors\\_2017\\_en.pdf](https://ec.europa.eu/home-affairs/sites/default/files/00_eu_synthesis_report_unaccompanied_minors_2017_en.pdf).

146 The government has authority to place UC in general child shelter homes with French-born children. *Id.* at 19.

147 Lumos Found., *supra* note 144 (citing Lumos Found., *Ending Institutionalization: An analysis of the financing of the deinstitutionalization process in Bulgaria* (2017), <https://www.wearelumos.org/resources/analysis-financing-deinstitutionalisation-process-bulgaria/>; Lumos Found., *Investing in Children: The case for diverting Czech government finances away from institutions towards families and communities* (2018), <https://www.wearelumos.org/resources/investing-children-czech-2018/>).

148 Nevertheless, few countries have adopted family-based foster care for UC on a broad scale. In Italy only 4% of all UC receive foster-family placements and in Spain only 0.5% are in family-based care. Lumos Found., *supra* note 144, at 66-68. Analysts suggest multiple reasons for the tepid use of foster care including states failing to target human and financial resources at foster care, prospective foster parents lacking specialized training and preferring younger children, and administrative coordination challenges among local and regional municipalities.

149 Lumos Found., *supra* note 144, at 68.

150 *Id.*

151 *Id.* at 59-60.

152 *Id.* at 60.

153 UNICEF, *A home away from home for refugee and migrant children*, at 4 (Aug. 2016), [https://www.unicef.org/eca/sites/unicef.org/eca/files/A\\_home\\_away\\_from\\_home\\_29\\_08\\_2016.pdf](https://www.unicef.org/eca/sites/unicef.org/eca/files/A_home_away_from_home_29_08_2016.pdf); *See also* Lumos Found., *supra* note 144.

154 Lumos Found., *supra* note 144, at 70-71.

155 *Id.* at 60-61. Some programs admit children aged 14. 91% of the children entering Greece, Italy, and Bulgaria during 2018 were 15 years or older. *Id.* (citing UNICEF, *Latest Statistics and Graphics on Refugee and Migrant Children*, <https://www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children>).

156 Lumos Found., *supra* note 144, at 61. France Terre d'Asile has programs in 17 facilities across five departments in France. Apprentis d'Auteuil has around 25 services which provide daytime support during the week for children in the SIL apartments.

157 *Id.*

158 UNICEF, *Building on promising practices to protect children in migration across the European Union*, at 3 (Jan. 2019), <https://www.unicef.org/eca/media/5866/file/Promising%20practices%20in%20protection%20of%20refugee%20and%20migrant%20children%20in%20Europe.pdf>. *See also* Lumos Found., *supra* note 148, at 18, 61.

159 Lumos Found., *supra* note 144.

160 Leaving Care, 3.13.1, Leeds City Council, *amended* to reflect provisions of the Children and Social Work Act of 2017 (2019), [https://leedschildcare.proceduresonline.com/chapters/p\\_leaving\\_care.html#qualify](https://leedschildcare.proceduresonline.com/chapters/p_leaving_care.html#qualify).

161 *Id.*

162 *Id.*

163 O'Higgins, *supra* note 46 at 363.

\*\* As this report was being published ORR issued new Field Guidance announcing it would expand eligibility for long-term foster care for certain Category 4 UC using an existing exception under ORR Policy Guide Section 1.2.6. This new guidance aligns with this Report's recommendations to relax the viable legal relief eligibility requirement for placement of Category 4 children into LTFC and to prioritize expeditious placement of Category 4 children in LTFC and SGH. ORR will review this new field guidance in 60 days and we urge permanent changes in ORR policy to expand eligibility for TFC and LTFC for Category 4 children as well as additional funding to ensure sufficient TFC and LTFC placements are available to meet the need. *See* Off. Of Refugee Resettlement, U.S. Dep't of Health & Hum. Servs., Field Guidance #18 – Expansion of Long-Term Foster Care Eligibility, June 21, 2021.