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Enabling the Best Interests Factors

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Enabling the Best Interests Factors*

By Adrián E. Alvarez**

I. INTRODUCTION.....	90
II. ORR’S USE OF ADMISSIONS OF PRIOR GANG AFFILIATION IN THERAPY SESSIONS.....	95
III. THE BEST INTERESTS OF THE CHILD AND ACCESS TO MENTAL HEALTH SERVICES	97
A. Best Interests of the Child Standard.....	97
B. Unaccompanied Minors Right to Mental Health	98
C. Using Therapy Notes To “Step Up” Minors Violates the TVPRA.....	99
IV. DISABILITY LAW CAN PROVIDE ADDED PROTECTIONS WITHIN THE BEST INTERESTS FRAMEWORK.....	102

I. INTRODUCTION

For over a century, state courts and other child welfare agencies in the United States have been applying the “best interests of the child standard” to all decision-making concerning children.¹ The standard is also enshrined within the UN Convention on the Rights of the Child (CRC)—a treaty that every nation in the world has ratified except the United States.² Notwithstanding its widespread adoption in family law, the standard is, with

* This paper was published in November 2020 during the COVID-19 pandemic. All dates and time descriptions refer to the 2020–21 COVID-19 pandemic unless otherwise stated.

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1. See Bridgette A. Carr, *Incorporating a “Bests Interests of the Child” Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 125 (2009).

2. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

only a few exceptions,³ noticeably missing from American laws and policies pertaining to children in the immigration system.

There is a rich literature arguing that children should enjoy special protections within the immigration system and that the best interests standard should be adopted to accomplish this goal.⁴ During the Obama Administration, the federal immigration agencies recognized that applying the standard should and could be accomplished and even partnered with advocates to develop a comprehensive framework for adapting the standard to immigration law and practice.⁵ Those efforts, however, were never sufficiently codified into law, and, today, some argue⁶ that more widespread adoption of the best interests standard in immigration law would have prevented the Trump Administration from enacting the many anti-immigration policies that specifically targeted children and families.⁷

With consensus at least among advocates that the best interests standard should apply to all decisions regarding children in the immigration system, it is time to analyze more deeply how to apply this standard to specific groups of children, such as those with disabilities. There is very little in the academic literature regarding how these principles should apply to children with disabilities in the immigration system. Moreover, some advocates may miss the disability rights angle in their critiques, even where laws or policies are particularly harmful to children with disabilities.

One example is the recent revelation that the Office of Refugee Resettlement (ORR)—an agency within the U.S. Department of Health and Human Services (HHS) charged with the care and custody of unaccompanied immigrant children—was using minors' admissions of prior gang affiliation

3. See generally Dennis Stinchcomb, *In Children's Best Interests: Charting a Child Sensitive Approach to U.S. Immigration Policy* 14 (Ctr. for Latin Am. & Latino Stud.: Am. Univ., Working Paper No. 28, 2020).

4. See, e.g., David Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 980, 1008 (2002); Erin B. Corcoran, *Deconstructing and Reconstructing Rights for Immigrant Children*, 18 HARV. LATINO L. REV. 53, 87 (2015); Carr, *supra* note 1, at 150; Ann Laquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOBAL STUD. L. REV. 589, 609 (2018); JENNIFER NAGDA & MARIA WOLTJEN, FIRST FOCUS, BEST INTERESTS OF THE CHILD STANDARD: BRINGING COMMON SENSE TO IMMIGRATION DECISIONS 106–07 (2015).

5. See SUBCOMM. ON BEST INTS. OF THE INTERAGENCY WORKING GRP. ON UNACCOMPANIED & SEPARATED CHILD., FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 12 (2016).

6. See e.g., *In Children's Best Interests: Advancing a Fundamental Standard for the Treatment of Immigrants*, YOUTUBE, at 6:24:50 (Feb. 13, 2020), <https://youtu.be/OEzcl4ZwTjE> [<https://perma.cc/K9FV-74NB>] (Jennifer Nagda's address at the American University Washington College of Law Symposium).

7. See generally Stinchcomb, *supra* note 3 (manuscript at 17).

during confidential therapy sessions as the sole criteria for “stepping up”⁸ children from low-security shelters to more restrictive and punitive detention facilities.⁹ ORR was also then sharing the therapy notes with the Department of Homeland Security (DHS) to use them against children in deportation proceedings.¹⁰ The newspaper article that broke the story noted that while the information sharing between HHS and DHS was “technically legal,” it was “a profound violation of patient confidentiality.”¹¹

This article argues that these practices are not “technically legal” at all. They are illegal because they violate basic best interests principles now enshrined in the William Wilberforce Trafficking Victims Protection Recovery Act of 2008 (TVPRA),¹² and, in some instances, they may violate Section 504 of the Rehabilitation Act (Section 504)¹³ and Title II of the Americans with Disabilities Act (Title II),¹⁴ federal anti-discrimination laws designed to protect people with disabilities.

The TVPRA, one of the few places in immigration law that has adopted the best interests standard, requires HHS to promptly place unaccompanied minors in its custody “in the least restrictive setting that is in the best interest[s] of the child.”¹⁵ In making this determination, the statute allows HHS to consider whether “the child poses a danger to self or others or has been charged with having committed a criminal offense.”¹⁶ However, the best interests approach “is a dynamic concept that requires an assessment appropriate to the specific context,”¹⁷ and stepping up a child to a more restrictive setting based solely on prior gang affiliation is inconsistent with the procedural aspects of the best interests standard. This standard would require ORR to consider various factors, including whether or not the child is *presently* a danger to self or others, whether or not the child is able to access appropriate treatment at the stepped up placement, and whether or not it is in

8. See OFF. OF REFUGEE RESETTLEMENT, CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED § 1.3.2 (2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied> [<https://perma.cc/QG8G-URSZ>].

9. See e.g., Hannah Dreier, *Trust and Consequences*, WASH. POST (Feb. 15, 2020), <https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/> [<https://perma.cc/7U83-DW9H>].

10. *Id.*

11. *Id.*

12. 8 U.S.C. § 1232.

13. 29 U.S.C. § 794.

14. 42 U.S.C. §§ 12131–12165.

15. See 8 U.S.C. § 1232(c)(2)(A).

16. *Id.*

17. U.N. Comm. on the Rts. of the Child, General Comment No. 14: The Right of the Child To Have His or Her Best Interests Taken as a Primary Consideration, art. 3, ¶ 1, U.N. Doc. CRC/c/gc/14 (2013) [hereinafter General Comment 14], <https://www.refworld.org/docid/51a84b5e4.html> [<https://perma.cc/LE7U-L63Y>].

the child's best interests to simply be released into the community to parents or family members who could care for them.

Unaccompanied minors who come to the United States experience severe trauma before, during, and after their migration to the United States.¹⁸ If they are not provided timely access to treatment, the trauma can lead to debilitating conditions such as post-traumatic stress disorder (PTSD), anxiety, and major depression.¹⁹ Indeed, many unaccompanied minors enter the United States with one or more of these disabilities already.²⁰ While ORR is required to provide children in its care with at least one counseling session a week,²¹ a child must have absolute trust in their therapist for therapy to work. But using confidential therapy notes to place children in punitive, high-security placements violates the trust between psychotherapist and patient. This in turn has a chilling effect on a child's ability to speak freely in therapy and being able to speak freely in therapy is the very thing that helps to make therapy work. As a result, these placement practices violate the TVPRA because they interfere with a child's right to mental health care and are thus not in a child's best interests.

Moreover, using gang affiliation revealed in therapy sessions as the sole criteria for sending a child to a more restrictive setting may also violate federal anti-discrimination statutes designed to protect children with disabilities. For instance, Section 504 and Title II's regulations prohibit recipients of federal funds and public entities, respectively, from using "criteria or methods of administration . . . that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons."²² Because confidentiality is required for therapy to succeed, this policy may unintentionally have the effect of substantially impairing unaccompanied minors from receiving the intended therapeutic benefits of the therapy session. Although this gang affiliation is disability neutral on its face, it has

18. Diana Franco, *Trauma Without Borders: The Necessity for School-Based Interventions in Treating Unaccompanied Refugee Minors*, 35 CHILD & ADOLESCENT SOC. WORK J. 551, 551 (2018).

19. See Diedra Coleman & Adam Avrushin, *Education Access for Unaccompanied Immigrant Children*, LOY. UNIV. CHI.: CTR. FOR THE HUM. RTS. OF CHILD. 5 (2017), <https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1015&context=chrc> [<https://perma.cc/U8LC-E27R>].

20. See Charles D. R. Baily et al., *The Mental Health Needs of Unaccompanied Immigrant Children: Lawyers' Role as a Conduit to Services*, 15 GRAD. STUDENT J. PSYCH. 3, 3 (2014).

21. See Stipulated Settlement Agreement at Ex. 1 ¶ 6, *Flores v. Reno*, No. CV 85-4544-RJK, (C.D. Cal. Jan. 17, 1997), https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf [<https://perma.cc/M25Y-763A>].

22. 45 C.F.R. § 84.4(b)(4)(i) (2020); 28 C.F.R. § 35.130(b)(3)(ii) (2020).

a disparate impact on unaccompanied minors with psychosocial disabilities because there is a correlation between gang affiliation and emotional and behavioral disorders.

In addition, these practices may also lead to other violations of Section 504 and Title II. Section 504's integration mandate requires recipients of federal funds to administer their aids, services, and benefits "in the most integrated setting appropriate to the person's needs."²³ If children are not benefitting from therapy because ORR is sharing confidential therapy notes with outside agencies or if children are not otherwise receiving appropriate accommodations for their mental health conditions, they may be stepped up to more restrictive settings based on behaviors or misconduct that results from their disability when they may have been able to receive services in less restrictive settings with appropriate treatment and accommodations.

Advocates may be missing the disability rights angle to these practices because the frameworks created to adapt the best interests standard to immigration law have not thoroughly explored how the right to be free from discrimination intersects with best interests principles. However, over the past fifty years, the global disability rights movement has begun to develop various frameworks with which to analyze the historic oppression that people with disabilities continue to suffer.²⁴ One such framework, known as the social model of disability, roots disability not within the person's impairment but within the societal barriers that keep people with disabilities oppressed and marginalized.²⁵ The social model is in stark contrast to the now discredited medical model of disability, which roots disability with the individual and simply seeks to treat and rehabilitate people with disabilities, but not to work to end their societal oppression.²⁶ Without including an anti-discrimination component to advocacy on behalf of unaccompanied minors, lawyers may risk simply asking for better medical treatment for children with disabilities without also seeking to dismantle the barriers that keep people with disabilities segregated.

This article argues that advocates should identify and call out disability discrimination in conducting a best interests analysis in order to help break down societal barriers that oppress people with disabilities. One way to do

23. 45 C.F.R. § 84.4(b)(2). Title II's integration mandate provides, "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).

24. See generally Arlene S. Kanter, *The Law: What's Disability Studies Got To Do with It or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 418 (2011).

25. *Id.* at 426–27.

26. *Id.* at 419–20.

this is for advocates to at least identify ways that laws, policies and procedures violate Section 504 and Title II.

Part II of this article explains the problems that arise when ORR uses confidential admissions of gang affiliation during psychotherapy sessions as the sole criterion for “stepping up” unaccompanied immigrant children to more restrictive placements within its network of shelters. Part III provides a brief summary of the best interests of the child standard and argues that ORR’s “stepping up” practices violate the TVPRA. Finally, Part IV explains that, in addition to violating the TVPRA, these practices violate Section 504 of the Rehabilitation Act because they have a disparate impact on children with mental health disabilities.

II. ORR’S USE OF ADMISSIONS OF PRIOR GANG AFFILIATION IN THERAPY SESSIONS

In February 2020, *The Washington Post* reported that ORR was sending children to “secure” facilities, the agency’s most restrictive placement, immediately after they confided in mental health counselors that they had prior gang affiliations.²⁷ ORR would then share these confidential therapy notes with the Immigration and Customs Enforcement (ICE) to be used against the child in deportation proceedings. The story centered around Kevin, a 19-year-old man from Honduras whom the government had detained for over 850 days even though an immigration judge had already granted him asylum based on a well-founded fear that members of the MS-13 gang would kill him if he returned home.²⁸

When Kevin was seventeen, he had confided in a therapist at an ORR shelter that he was forcibly recruited into MS-13 and forced to witness his own cousin being tortured.²⁹ After sharing these details in therapy, the counselor followed ORR policy and sent her notes to the shelter director and to four ORR supervisors.³⁰ The next week, ORR transferred Kevin to Shenandoah Valley Juvenile Center (Shenandoah Valley), a high-security facility in rural Virginia for children in the juvenile justice system.³¹ Known

27. Dreier, *supra* note 9; *Children Entering the United States Unaccompanied: Guide to Terms*, OFF. OF REFUGEE RESETTLEMENT (Mar. 21, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms> [<https://perma.cc/ZVT4-TSJG>].

28. Dreier, *supra* note 9.

29. *Id.*

30. *Id.*

31. *Id.*

as a “secure facility” in ORR parlance, this is where the agency houses unaccompanied minors that it deems to be dangers to self or others.³²

Secure facilities are difficult placements for any unaccompanied minor to endure. Shenandoah Valley in particular was the subject of both a civil action³³ and a child welfare investigation by the Commonwealth of Virginia³⁴ after multiple unaccompanied minors alleged that staff members had abused them and subjected them to national origin discrimination.³⁵ Moreover, unaccompanied minors are detained on average for longer periods of time at secure facilities because, among other factors, ORR does not review the reasons for placement at these sites on a monthly basis³⁶ as required by law.³⁷

Kevin’s story was not an isolated incident. ORR has sent minors to secure facilities on other occasions based on unverified information provided in therapy. One child told his therapist that his brother was wanted for murder in El Salvador, but the therapist misunderstood and thought that the child himself was wanted for murder.³⁸ ORR transferred the child to a secure facility that same day.³⁹ Kevin’s story is also not unique because many other unaccompanied minors experience severe trauma before, during, and after their migration to the United States.⁴⁰ If left untreated, the trauma can lead to debilitating conditions such as PTSD, anxiety, and depression.⁴¹ For some unaccompanied minors, the trauma experienced in home countries has

32. See OFF. OF REFUGEE RESETTLEMENT, *supra* note 8, at § 1.2.4.

33. See *Doe v. Shenandoah Valley Juv. Ctr. Comm’n*, No. 5:17-cv-00097, 2018 WL 10593355 (W.D. Va. June 27, 2018).

34. See SEC’Y OF PUB. SAFETY & HOMELAND SEC., COMMONWEALTH OF VA, VIRGINIA DEPARTMENT OF JUVENILE JUSTICE REPORT OF FINDINGS: SHENANDOAH VALLEY JUVENILE CENTER 11 (2018), <https://www.governor.virginia.gov/media/governorvirginiagov/secretary-of-public-safety-and-homeland-security/pdf/Virginia-DJJ-Report-of-Findings.pdf> [<https://perma.cc/JY5V-JF4C>]. Although the state did not find sufficient evidence of abuse and neglect, among other things, the report makes recommendations suggesting that Shenandoah Valley needed to do better to provide more trauma sensitive services to the children in its care. *Id.* at 8–10.

35. *Id.*; *Shenandoah Valley Juv. Ctr. Comm’n*, 2018 WL 10593355, at *1.

36. See NEHA DESAI ET AL., NAT’L CTR. FOR YOUTH L. & SOC. EMERGENCY MED. & POPULATION HEALTH PROGRAM, CHILD WELFARE & UNACCOMPANIED CHILDREN IN FEDERAL IMMIGRATION CUSTODY: A DATA AND RESEARCH BASED GUIDE FOR FEDERAL POLICY MAKERS 16–19 (2019), <https://youthlaw.org/wp-content/uploads/2019/12/Briefing-Child-Welfare-Unaccompanied-Children-in-Federal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf> [<https://perma.cc/X69V-CCEU>].

37. 8 U.S.C. § 1232(c)(2)(A).

38. Post Reports, *ICE Is Using Therapy Notes To Deport Young Immigrants*, WASH. POST, at 20:34 (Feb. 19, 2020), <https://www.washingtonpost.com/podcasts/post-reports/ice-is-using-therapy-notes-to-deport-young-immigrants/> [<https://perma.cc/S5GK-L2PR>].

39. *Id.* at 20:25.

40. Franco, *supra* note 18, at 551.

41. *Id.*

already become debilitating and can manifest itself in behavioral outbursts and severe mental illness.⁴² Given these circumstances, the therapy that ORR provides children in its shelters is crucial to their mental and physical well-being. For those who will stay on in the United States because they have strong immigration cases, the therapy in ORR custody is an important first step to integrating into American society.

III. THE BEST INTERESTS OF THE CHILD AND ACCESS TO MENTAL HEALTH SERVICES

The TVPRA—one of the few statutes that has codified the best interests standard in immigration law—requires HHS to promptly place unaccompanied minors “in the least restrictive setting that is in the best interest of the child.”⁴³ It allows HHS to consider whether “the child poses a danger to self or others or has been charged with having committed a criminal offense.”⁴⁴ This section argues that relying exclusively on these public safety considerations to place children in secure facilities is contrary to best interests principles derived from domestic family law and the CRC.

A. *Best Interests of the Child Standard*

State courts, administrative agencies, and private entities apply the best interests standard to decisions regarding custody, parental responsibilities after divorce, and adoption approvals.⁴⁵ The standard requires decisionmakers to prioritize the child’s stated wishes, safety, permanency, and well-being.⁴⁶ Article 3 of the CRC provides that, “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁴⁷ While the United States never ratified the CRC, it is, as a signatory, “obliged to refrain from acts that would defeat the agreement’s object and purpose.”⁴⁸

The best interests of the child is a “threefold concept.”⁴⁹ It is a substantive right guaranteeing that a child will “have his or her best interests assessed and

42. *Id.* at 559.

43. *See* 8 U.S.C. § 1232(c)(2)(A).

44. *Id.*

45. Estin, *supra* note 4, at 593.

46. Carr, *supra* note 1, at 127.

47. Convention on the Rights of the Child, *supra* note 2, at art. 3.

48. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 312(3) (AM L. INST. 1987).

49. General Comment 14, *supra* note 17, at ¶ 6.

taken as a primary consideration.”⁵⁰ It is an interpretive legal principle: “If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen.”⁵¹ And it is a procedural right guaranteeing a process to analyze positive and negative aspects of decisions made for the child.⁵²

The standard eschews cookie-cutter analyses. Instead, it “is a dynamic concept that requires an assessment appropriate to the specific context” considering individual characteristics such as age, sex, disability, ethnicity, maturity level, or membership in a particular group across multiple factors.⁵³ Factors include the child’s view, identity, preservation of the family, safety, vulnerability, and the right to health and education.⁵⁴

Disability is a characteristic that could be considered across every factor. Decisionmakers must seek to understand a child’s view even if the child has a sensory or intellectual disability that may impair speech. Disability may also be part of identity, such as a child who identifies as Deaf, or a characteristic that makes a child susceptible to trafficking or exploitation. When it comes to education, disability will determine which accommodations, aids, and services a child requires. Finally, disability is a factor to consider in order to access appropriate health care.

Accessing adequate and appropriate mental health care is in a child’s best interests. Mental-health-related decisions require decisionmakers to consider the child’s wishes. Children must receive adequate and appropriate information so that they can provide informed consent to treatment.⁵⁵ Where possible, children with psychosocial disabilities should also receive treatment in the community, and “[w]here hospitalization or placement in a residential institution is necessary, the best interests of the child must be assessed prior to taking a decision and with respect for the child’s views.”⁵⁶

B. Unaccompanied Minors Right to Mental Health

The Flores Settlement Agreement (FSA), a consent decree binding on government agencies with temporary custody of unaccompanied minors, requires ORR to provide “appropriate mental health interventions when

50. *Id.* at ¶ 6(a).

51. *Id.* at ¶ 6(b).

52. *Id.* at ¶ 6(c).

53. *Id.* at ¶ 1.

54. *Id.* at ¶¶ 52–79.

55. *Id.* at ¶ 77.

56. *Id.* at ¶ 78.

necessary,”⁵⁷ including “[a]t least one (1) individual counseling session per week conducted by trained social work staff with the specific objectives of reviewing the minor’s progress, establishing new short term objectives, and addressing both the development and crisis-related needs of each minor.”⁵⁸

Advocates have developed these requirements further. The *Framework for Considering the Best Interests of Unaccompanied Children* states that ORR should provide children “mental health services necessary to ensure their safety and well-being while in custody.”⁵⁹ The American Bar Association’s Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States (ABA Standards) specifies the process for assessing unaccompanied minors’ mental health needs.⁶⁰ This includes placement in a facility capable of providing appropriate psychological services and ensuring that therapy is goal-oriented and effective.⁶¹ Furthermore, the ABA Standards recognize that treatment cannot be deferred because children’s psychological development is incomplete and that children face greater psychological risks than adults.⁶² The ABA Standards also recognize that refugee children are in particular need of psychological services given the trauma that they have experienced, “due to witnessing or being the victim of torture, sexual assault, or other forms of violence.”⁶³

C. Using Therapy Notes To “Step Up” Minors Violates the TVPRA

Initially, ORR did not tell the children that it might transfer the therapy notes to DHS to be used in deportation proceedings or that it could use the notes to make placement decisions to more restrictive settings.⁶⁴ On first

57. Stipulated Settlement Agreement, *supra* note 21, at Ex. 1, ¶ 2.

58. *Id.* at Ex. 1, ¶ 6. Children are also entitled to group counseling at least two times per week. *Id.* at Ex. 1, ¶ 7; *see also* OFF. OF REFUGEE RESETTLEMENT, *supra* note 8, at § 4.9.

59. SUBCOMM. ON BEST INTS. OF THE INTERAGENCY WORKING GRP. ON UNACCOMPANIED & SEPARATED CHILD., *supra* note 5, at 19.

60. ABA COMM’N. ON IMMIGR., STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES 44–46, https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/standards_for_children_2018.pdf [<https://perma.cc/UBX5-HJA9>] (2018).

61. *Id.* at 46 (“Detention Facilities and Custodial Agencies shall provide Children with appropriate individual counseling sessions and group counseling conducted by trained social work personnel with the specific objectives of reviewing the Child’s progress, establishing objectives, and addressing both the developmental and crisis-related needs of each Child.”).

62. *Id.* (“[A] Child’s developmental needs cannot be deferred until the uncertain resolution of his immigration status is reached.”).

63. *Id.*

64. Dreier, *supra* note 9.

blush, then, it would appear that all ORR would have to do to comply with the best interests principles codified in the TVPRA is to simply inform the children that their admissions could be used to place them in high-security facilities. Indeed, in providing treatment, children must receive adequate and appropriate information so that they can provide informed consent.⁶⁵ But confidential information shared in therapy should not be disclosed absent very narrow exceptions because these disclosures undermine therapy's effectiveness.

For therapy to work, a child must have absolute trust in their therapist. But using confidential therapy notes to send children to punitive, high-security placements or using these notes against the child in deportation proceedings violates the trust between psychotherapist and patient. In a letter to the heads of HHS and DHS, the president of the American Psychological Association (APA) explained that sharing therapy notes with ICE was particularly troubling for unaccompanied minors, who come to the United States with "serious emotional and psychological stressors" and "significant trauma." If left untreated, the trauma had "the potential to cause long-lasting negative impacts on physical and mental health."⁶⁶ Therefore, it is "vital that children can share their experiences truthfully and fully with mental health professionals."⁶⁷ The APA letter explains that when mental health providers share "confidential information obtained from patient therapy sessions" this causes "distrust and impede[s] children from accessing evidence-based mental health care."⁶⁸

The U.S. Supreme Court has also recognized the importance of protecting the confidentiality of therapists and patients in order for the therapy to accomplish its intended purpose. In recognizing that the Federal Rules of Evidence recognize a psychotherapist-patient privilege, the U.S. Supreme Court noted that "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears."⁶⁹ Breaking the confidence and trust between the therapist and patient therefore could "impede development of the confidential relationship necessary for successful treatment."⁷⁰

65. General Comment 14, *supra* note 17, at ¶ 77.

66. Letter from Arthur C. Evans, Jr., Chief Exec. Officer, Am. Psych. Ass'n, to Alex Azar, Sec'y, U.S. Dep't of Health & Hum. Servs., & Chad F. Wolf, Acting Sec'y, U.S. Dep't of Homeland Sec. (Feb. 21, 2020), <https://www.apa.org/news/press/releases/azar-wolf-letter.pdf> [<https://perma.cc/L6W2-NYXJ>].

67. *Id.*

68. *Id.*

69. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996).

70. *Id.*

ORR's mandatory therapy sessions are therefore rendered ineffective because children know that what they say in therapy is not confidential and could lead to adverse outcomes. For instance, *The Washington Post* reported that ORR added a requirement in its public handbook stating that children should be told "that while it was essential to be honest with staff, self-disclosures [regarding gangs or drugs] could affect their release."⁷¹ Indeed, the new script that therapists now use when they begin working with an unaccompanied minor states,

While you are here, I will need to let your temporary legal guardian, the Office of Refugee Resettlement which is a part of the US Government, know if I feel you are currently a danger to yourself or others *and if you have a history of being a danger to yourself or others.*⁷²

To be sure, not everything a patient tells a therapist is confidential. Indeed the APA's Ethical Principles of Psychologists and Code of Conduct allows disclosures of otherwise confidential information without a patient's consent to "protect the client/patient, psychologist, or others from harm."⁷³ But ORR's current policy, which includes stepping up a child immediately after disclosing a "history of being a danger to self or others," departs from the APA's ethical code because a history of danger to self or others by itself does not mean that the child is *presently* a danger to self or others.

Of course, the TVPRA allows ORR to consider "danger to self, danger to the community, and risk of flight" in making placement determinations. However, using these factors as the sole considerations for making placement decisions violates best interests principles, which require an individualized, case-by-case analysis. Indeed, balancing prior admissions of gang affiliation with other characteristics such as a child's disability might militate toward keeping the child in the current placement, especially if they were not disruptive within the less restrictive shelter.

Secure facilities are particularly hard for children with disabilities. According to a U.S. Senate Subcommittee Report, ORR did not house children with serious mental disabilities in psychiatric residential treatment facilities and instead housed them with the general population in secure

71. Dreier, *supra* note 9.

72. DEP'T OF HEALTH & HUM. SERVS., SHELTER OPERATIONS MENTAL HEALTH SERVICES INTRODUCTION SCRIPT, at ¶ 9 (emphasis added), <https://www.documentcloud.org/documents/6794602-Clinical-Introduction-Script.html> [<https://perma.cc/34CQ-SJQ3>].

73. See AM. PSYCH. ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 4.05(b)(3) (2017), <https://www.apa.org/ethics/code> [<https://perma.cc/WZ5R-HQJB>].

facilities.⁷⁴ Disability Rights California, the state’s Protection and Advocacy System,⁷⁵ found in 2019 that the most restrictive ORR placement in California (which is now closed) had “the highest incidence of children with behavioral and/or mental health needs,”⁷⁶ even though secure facilities are not equipped to handle unaccompanied minors with serious mental illness. For instance, because Shenandoah Valley (the facility where ORR sent Kevin) is not a residential treatment facility, many staff members could neither administer medication nor provide “full-fledged psychiatric care.”⁷⁷ Moreover, some children who ended up at Shenandoah Valley were turned away from psychiatric residential treatment facilities that ORR contracts with because the psychiatric facilities were not secure.⁷⁸ ORR’s secure facilities have too few employees, and ORR has not provided them with “policies tailored to their function.”⁷⁹ Instead, ORR uses the same policies for all facilities, regardless of their level of restriction.⁸⁰

Therefore, ORR’s use of prior gang affiliation as the sole criteria for stepping up a child to a secure facility violates the TVPRA because this procedure is inconsistent with best interests principles.

IV. DISABILITY LAW CAN PROVIDE ADDED PROTECTIONS WITHIN THE BEST INTERESTS FRAMEWORK

Under the social model of disability, it is important to identify societal barriers that persons with disabilities face, such as discrimination, so that the person’s impairments are not an excuse to segregate or to otherwise oppress people with disabilities. Yet, beyond perfunctory statements that children

74. See U.S. S. PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SECURITY & GOV’T AFFS., OVERSIGHT OF THE CARE OF UNACCOMPANIED ALIEN CHILDREN 8 (2018), <https://www.hsgac.senate.gov/imo/media/doc/2018.08.15%20PSI%20Report%20-%20Oversight%20of%20the%20Care%20of%20UACs%20-%20FINAL.pdf> [https://perma.cc/7EY9-WRJ9].

75. The Developmental Disabilities Assistance and Bill of Rights Act of 2000 creates in each state a protection and advocacy system “to protect the legal and human rights of individuals with developmental disabilities.” 42 U.S.C. § 15001(b)(2). In July 2018, ORR Director Scott Lloyd issued a memo to ORR grantees serving unaccompanied children to explain that a Protection and Advocacy System could enter the facility to protect children with disabilities from abuse, neglect, and other human rights violations. See Memorandum from Scott Lloyd, Dir., Off. of Refugee Resettlement, to All ORR Grantees Serving Unaccompanied Alien Children (July 24, 2018).

76. DISABILITY RTS. CAL., THE DETENTION OF IMMIGRANT CHILDREN WITH DISABILITIES IN CALIFORNIA: A SNAPSHOT 26 (2019).

77. U.S. S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *supra* note 74, at 49.

78. *Id.*

79. *Id.* at 47.

80. *Id.*

should not be subject to discrimination, the best interests frameworks give short shrift to how these principles should interact with the principle of equality before the law.⁸¹ In the absence of a more developed framework for how these standards overlap, advocates should look to existing civil rights laws like Section 504 and Title II of the ADA.

Section 504 of the Rehabilitation Act of 1973 provides as follows:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any executive agency or by the United States Postal Service.⁸²

Title II's definition of discrimination is similar to the one under Section 504, except that Title II applies to public entities (i.e. state and local governments),⁸³ and not recipients of federal financial assistance.⁸⁴

Section 504 has incorporated the definition of disability found in the ADA: “a physical or mental impairment that substantially limits one or more major life activities.”⁸⁵ A mental impairment under the ADA includes mental or psychological disorders like emotional or mental illness.⁸⁶ Moreover, the Equal Employment Opportunity Commission (EEOC), charged with interpreting Title I of the ADA,⁸⁷ states that conditions such as major depression and PTSD “easily qualify” under the statute’s definition of

81. *E.g.*, General Comment 14, *supra* note 17; SUBCOMM. ON BEST INTS. OF THE INTERAGENCY WORKING GRP. ON UNACCOMPANIED & SEPARATED CHILD., *supra* note 5.

82. 29 U.S.C. § 794(a).

83. *See, e.g.*, 42 U.S.C. § 12131(1).

84. 42 U.S.C. § 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”). Although Title II only applies to ORR shelters that public entities run, it was modeled after Section 504, so many of the statutes’ regulations are almost identical, and Title II provides that the two statutes share the same “remedies, procedures, and rights.” *See generally*, 42 U.S.C. § 12133 (“The remedies, procedures, and rights set forth in [Section 505 of the Rehabilitation Act] shall be the remedies, procedures, and rights [that Title II] provides to any person alleging discrimination on the basis of disability . . .”).

85. This includes those who have the impairment and those regarded as having the impairment. *Id.* § 12102(1).

86. *See* 45 C.F.R. § 84.3(j)(2)(i)(B) (2020).

87. Title I of the ADA prohibits certain private employers from discriminating on the basis of disability.

disability.⁸⁸ As an example, the EEOC has explained that if a person enjoys little sleep due to PTSD, the person would be substantially limited in the major life activity of sleeping.⁸⁹ The Department of Justice’s regulations interpreting Title II of the ADA⁹⁰ provide that major depressive disorder and PTSD substantially limit brain function⁹¹ and as a result are disabilities under the statute. Therefore, any PTSD or social emotional disability that an unaccompanied minor had would qualify as a disability under the statutes.

As recipients of federal financial assistance, ORR-funded shelters must abide by the Section 504 regulations that HHS promulgated, which define a “program or activity” receiving federal financial assistance as including private organizations “principally engaged in the business of providing education, health care, housing, social services, or . . . recreation.”⁹² These are the precise services that ORR’s shelters provide unaccompanied minors in their custody.⁹³

While Section 504 prohibits intentional discrimination against qualified individuals with disabilities,⁹⁴ it also covers actions that have the effect of discriminating on the basis of disability (i.e. disparate impact discrimination).⁹⁵ The Supreme Court noted in *Alexander v. Choate* that “[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”⁹⁶ This distinction between the different kinds of discrimination against people with disabilities is reflected in the regulations. For example, under HHS’s Section 504 regulations, neither ORR⁹⁷ nor its grantees may use criteria or methods of administering their programs, services, or activities that have the purpose or effect of “defeating

88. *Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights*, U.S. EEOC (2020) (emphasis in original), <https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights> [https://perma.cc/9ENM-LAZD].

89. *Enforcement Guidance on the ADA and Psychiatric Disabilities*, U.S. EEOC (2020), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities> [https://perma.cc/4Z9P-Y8VN].

90. Title II of the ADA prohibits “public entities” like state and local governments from discriminating on the basis of disability.

91. 28 C.F.R. § 35.108(d)(2)(iii)(K) (2020).

92. See 29 C.F.R. § 794(b)(3)(A)(ii) (2020).

93. See generally OFF. OF REFUGEE RESETTLEMENT, *supra* note 8.

94. See generally 45 C.F.R. § 84.4(b) (2020).

95. See *Alexander v. Choate*, 469 U.S. 287 (1985).

96. *Id.* at 295.

97. See generally, 45 C.F.R. § 85.21(b)(3) (Section 504 disparate impact regulations binding on the Department of Health and Human Services itself).

or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons."⁹⁸

Sharing confidential therapy notes to step up a child to a more restrictive setting when the child admits to prior gang affiliation violates this provision with regard to children with psychosocial disabilities like depression, PTSD, or anxiety. One-on-one therapy is a program, service, or activity that ORR's grantees provide all unaccompanied minors in their custody.⁹⁹ Moreover, children with psychosocial disabilities are "qualified" to participate in therapy because it is open to *all* children in ORR custody. Furthermore, children with psychosocial disabilities meet Section 504's definition of a "handicapped person" because these disabilities have been found to impair one or more major life activities. Finally, although nothing in the press reports suggested that therapists were sharing their confidential notes in order to "defeat or substantially impair" the objectives of therapy with respect to children with psychosocial disabilities, the practice has this effect because there is a strong correlation between gang affiliation and emotional and behavioral disorders.¹⁰⁰

In a study of gang-affiliated youth, thirty-five percent had mental health-related issues such as suicide attempts or ideations, inter-personal problems, poor self-esteem, attention deficit and hyperactivity disorder (ADHD), and substance abuse problems.¹⁰¹ Moreover, a majority of the children in the study scored above the clinical range in many of the subscales of an assessment that psychologists use to measure the "degree of disruption in [a] youth's current functioning in five psychosocial areas."¹⁰² As such, while it would be disability neutral to use gang affiliation as the sole criteria for deciding when to share confidential therapy notes, it has a disparate impact on some children with disabilities because of the correlation between gang affiliation and psychosocial disabilities.

While some commentators have noted that courts may look skeptically upon disparate impact claims brought under civil rights laws,¹⁰³ advocates

98. 45 C.F.R. § 84.4(b)(4)(ii). There are similar provisions under Title II. 28 C.F.R. § 35.130(b)(3)(i)–(ii) (2020).

99. See Dreier, *supra* note 9.

100. See, e.g., Michelle Wood et al., *Understanding Psychosocial Characteristics of Gang-Involved Youths in a System of Care: Individual, Family, and System Correlates*, 20 EDUC. & TREATMENT CHILD. 281, 288 (1997).

101. *Id.* at 288.

102. *Id.* at 286.

103. See generally, Margo Schlanger, *How the ADA Regulates and Restricts Solitary Confinement for People with Disabilities*, AM. CONST. SOC'Y ISSUE BRIEF, at 7–8 (May 2016), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1123&context=other> [<https://perma.cc/D3VZ-KLFL>].

could raise other theories of liability under Section 504. For instance, under Section 504, it is disability discrimination when a recipient of federal funds does not afford a qualified person with a disability “an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.”¹⁰⁴ Moreover, failure to provide a reasonable accommodation to a qualified person with a disability is discrimination under the statute.¹⁰⁵ Finally, Section 504’s integration mandate requires recipients of federal funds to administer their aids, services, and benefits “in the most integrated setting appropriate to the person’s needs,”¹⁰⁶ and the Supreme Court has found that a violation of Title II’s integration mandate is discrimination under the statute.¹⁰⁷

There are many reasons why children can get stepped up to more restrictive settings. In addition to prior gang affiliation, children in ORR custody are sent to more restrictive settings when they misbehave.¹⁰⁸ If failure to receive appropriate therapy leads the child to misbehave because of his disability and neither ORR nor its grantees provide the child with any accommodations for his behavior, the child might be placed in a secure facility for behaviors that result from a disability.

Housing in a less restrictive placement is a benefit of the service (i.e. caring for unaccompanied minors) that ORR grantees provide unaccompanied minors. Children in less restrictive settings are on average released from custody in shorter periods of time than those in more restrictive settings.¹⁰⁹ But, without effective therapy to help unaccompanied minors manage challenging behaviors or without modifications of disciplinary rules to account for a child’s disability, many children with psychosocial disabilities will not have an opportunity to benefit from the service of being housed in a less restrictive setting or the service of being promptly reunited with family members to the same extent afforded children without psychosocial disabilities.¹¹⁰ Indeed, stepping up children with psychosocial disabilities after failing to provide them with appropriate therapy or reasonable modifications to shelter rules for behaviors that stem from the

104. 45 C.F.R. § 84.4(b)(1)(ii) (2020).

105. See *Alexander v. Choate*, 469 U.S. 287, 300 (1985) (“Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped [is] an important responsibility of HEW.”) (modifications in original).

106. See 45 C.F.R. § 84.4(b)(2). Title II’s integration mandate provides, “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d) (2018).

107. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598–99 (1999).

108. OFF. OF REFUGEE SETTLEMENT, *supra* note 8, §§ 1.2.1, 1.2.4.

109. NEHA DESAI ET AL., *supra* note 36, at 16.

110. 45 C.F.R. § 84.4(b)(1)(ii).

child's disability also violates Section 504's integration mandate, requiring recipients of federal funds to provide its services in the "most integrated setting appropriate to the person's needs."¹¹¹

In conclusion, civil rights law and anti-discrimination laws related to disability discrimination can be a powerful tool for advocates of children in the immigration system. Future areas of scholarship could include analysis of more case studies showing how the best interests framework, Title II, and Section 504 can, in specific instances, protect the rights of unaccompanied minors with disabilities. In addition, as the government seeks to circumvent the architecture protecting unaccompanied minors during the COVID-19 pandemic, more research is needed to understand how these deviations specifically affect children with disabilities.

111. *Id.* at § 84.4(b)(2).