FLORES REGS TEMPLATE COMMENTS - INSTRUCTIONS

This document contains template comments on a wide range of arguments opposing the DHS/HHS Flores Settlement Agreement notice of proposed rulemaking (NPRM). We encourage you to use the template sections of your choice as resources and models in crafting unique comments for your organization, partners, or supporters. Comments should be submitted online at here at regulations.gov, as a PDF if longer than 5,000 characters. As you draft your comment, here are some important tips to keep in mind.[1]

How to use this template. This template includes 26 sections,[2] each of which either a) discuss a discrete issue raised by the NPRM; or b) approach the NPRM through the lens of a particular community or expertise. We encourage you to pick and choose from these sections, modifying them whenever possible, to create a unique comment for you or your organization. You can use the jump links in the table of contents to more easily navigate the document. A sample cover letter is included for you to individualize for yourself or your organization.

Write comments in your own words. Agency staff must code and organize all comments, and the process is very different if they have to pause and consider what is similar and what is different in each comment, as opposed to just counting the number of commenters saying the same thing. For this reason,

[1] Commenters should be guided by the following administrative law principles:

- Commenters bear the burden of showing that any comment reflects a material issue that should be considered. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc*., 435 U.S. 519, 553–54 (1978) ("[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results."). The notice-and-comment provisions of the APA do not "require the agency to respond to every comment, or to analyze every issue or alternative raised by the comments, no matter how insubstantial . . . . The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not 'based on a consideration of the relevant factors.'" *Thompson v. Clark*, 741 F.2d 401, 408-09 (D.C. Cir. 1984) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)); *accord Petaluma FX Partners, LLC v. C.I.R.*, 792 F.3d 72, 81 (D.C. Cir. 2015).
- For purposes of preserving an issue for litigation, comments must be specific enough to provide the agency with meaningful notice of the issue. In other words, they must "structure [their] participation so that it ... alerts the agency to [their] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *U.S. Dep't of Transp. v. Public Citizen,* 541 U.S. 752, 764 (2004) (quoting *Vermont Yankee*, 435 U.S. 519, 553 (1978)); *see generally Post-Acute Medical at Hammond, LLC v. Azar*, 311 F.Supp.3d 176, 185 (D.D.C. 2018) ("It is black-letter administrative law that absent special circumstances, a party must initially present its comments to the agency during the rulemaking in order for the court to consider the issue.") (internal quotation marks omitted).
- To preserve an issue for litigation, the issue need only be adequately raised by one commenter. If an organization decides to bring a legal challenge on a particular issue, it need not have raised that issue itself, so long as some other organization discussed the issue in their comments. *See Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1151 (D.C.Cir.1987); *Central New York Fair Business Ass'n. v. Jewell*, 2015 WL 1400384, at *10 (N.D.N.Y. 2015); *Northern Arapaho Tribe v. Burwell*, 118 F.Supp.3d 1264, 1279 (D. Wyo. 2015) (""A plaintiff's waiver is excused where other comments presented the same issues to the agency sufficient to put the agency on notice of the existing concern").

[2] Additional sections may be added prior to the end of the public comment period. This template's sections are not meant to represent the full universe of issues posed by the proposed regulations, and as such we encourage commenters to use them as a foundation upon which to build.

you should modify the sample comment to reflect your own thoughts and experiences so that it counts as a *unique* comment. Here are a few recommended approaches:

- ➢ If you are or your organization is an **expert** on a topic relevant to the proposed regulations, such as child welfare, please detail how these proposed rules would fail to safeguard children's welfare and instead run counter to child welfare best practices. If possible, include data and examples.
- ➢ If you or your organization **work directly with immigrant children** and/or their families, please describe, *e.g.*, why they usually come to the U.S.; whether and how being detained factors into their decision to come to the U.S. and/or their decision to go through the process of seeking asylum or other protections; how detention affects their well-being and/or compromises their right to due process of law; and the need for alternatives to detention to protect family welfare and due process.

Submit separate comments, rather than signing onto comments from someone else. Federal agencies must count how many comments they receive. If ten people or organizations sign onto one comment letter, that counts as one comment. If they each send in their own comments, that counts as ten comments.

Don't suggest corrective language. Our ultimate goal is to stop these rules from moving forward and terminating the critical protections of the Flores Settlement Agreement. Therefore, while it is important to raise concerns, we do not recommend suggesting ways that the agencies can "fix" the proposed language.

Attach research and supporting documents. If you cite to research and supporting documents in your comments, we also recommend including them as attachments so they are clearly part of the administrative record. Another option is to include a live link to cited sources. If you include links, specifically request that the agency read the material at these links.

If you have credibility in an issue area, say so. If you are a subject matter expert and offer comments on your area of expertise, explain why you are uniquely qualified to offer this perspective. Feel free to explain your educational and professional background, or attach a copy of your CV to your comments.

When you submit your comments, please also share them with the Stop Family Detention campaign. After you hit send on your comments, please take a minute to file them with the Stop Family Detention campaign by uploading them to this Google folder here.

These template comments would not have been possible without the generous contributions and support of the American Academy of Pediatrics, American Immigration Council, American Immigration Lawyers Association, Center for American Progress, Center for Children's Law and Policy, Center for the Study of Social Policy, Evangelical Lutheran Church of America, Families Belong Together, FWD.us, Hope Border Institute, Human Rights First, Human Rights Watch, Immigrant Legal Resource Center, Kids In Need of Defense, Latin America Working Group, Legal Aid Justice Center, Legal Aid Society of New York, Michigan Immigrant Rights Center, Michigan State University College of Law Immigration Clinic, National Center for Youth Law, National Disability Rights Network, National Immigrant Justice Center, Physicians for Human Rights, Project on Government Oversight, Southern Poverty Law Center, Tahirih Justice Center, U.S. Conference of Catholic Bishops, Women's Refugee Commission, and Young Center for Immigrant Children's Rights.

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[DATE]

Submitted via [www.regulations.gov OR email to ice.regulations@ice.dhs.gov]

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Re: DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

Dear Sir/Madam:

I am writing on behalf of [individual/organization name] in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (proposed rule) to express my/our strong opposition to the proposed rule to amend regulations relating to the apprehension, processing, care, custody, and release of alien juveniles published in the Federal register on September 7, 2018.

[summary of individual/org's interest in this issue]

For the reasons detailed in the comments that follow, DHS and the Department of Health and Human Services (HHS) should immediately withdraw its current proposal, and dedicate their efforts to advancing policies that safeguard the health, safety, and best interests of children and their families, not least through robust, good-faith compliance with the Flores Settlement Agreement.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact [FILL IN] to provide further information.

Name
Title
[insert contact information and add signature line if desired]

DETAILED COMMENTS in opposition to DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

[Select arguments that are most critical to your organization and/or audience. You are encouraged to add new arguments, modify existing arguments to align with your priorities, and include additional data and references.]

GENERAL ARGUMENTS

1. COST

In the NPRM, the Departments of Homeland Security (DHS) and Health and Human Services (HHS) fail to estimate any of their anticipated costs, even as they argue that parts of the rule--including the new "alternative licensing" scheme--will likely mean that more children and parents are kept in custody for longer.[3]

These costs are important: Even while declining to estimate their potential new spending, the agencies argue that "[t]his rule does not exceed the $100 million expenditure threshold,"[4] which would trigger additional review under Executive Order 12866, and also deem it a major rule under the terms of the Congressional Review Act.[5]

Using data provided by the Department of Homeland Security, the Center for American Progress calculates that the costs to DHS alone from the proposed rule will--over a decade--stretch to just over $2 billion at the low end, and as high as $12.9 billion at the high end. On an annualized basis, these costs would come out to $201 million per year, at the low end, and nearly $1.3 billion per year at the high end. And while HHS has not provided sufficient data to estimate additional shelter costs under the rule, the Department must do more to estimate its potential costs.[6] *(A full explanation of the calculations*

[3] Notice of Proposed Rulemaking, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," September 7, 2018, 2018-19052, https://www.regulations.gov/document?D=ICEB-2018-0002-0001.
[4] *Ibid.* (Rule)
[5] U.S. President, Executive Order 12866, "Regulatory Planning and Review," *Federal Register*, Vol. 58, No. 190, Oct. 4, 1993, https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf and 5 U.S.C. § 801.
[6] To take just one potential cost: Two parts of the proposed rule--Section 410.203 and Proposed 8 CFR § 236.3(N)--expand the population of unaccompanied children who would be placed in secure facilities. While ORR has not provided enough data to estimate how many more children might be sent to these facilities, the potential for big expenditures is high. Bed space at the Yolo County Juvenile Detention Center, for example, costs two and a half times the average non-secure shelter bed, and children, on average, remain in secure facilities for four times the average. In total, it costs ORR nearly ten times more to hold a child in secure care than in non-secure care. *See* Philip E. Wolgin, "The High Costs of the Proposed *Flores* Regulation" (Washington, DC: Center for American Progress, 2018), https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation/.

and methodology used to produce these cost estimates can be found in: Philip E. Wolgin, "The High Costs of the Proposed Flores Regulation" (Washington, DC: Center for American Progress, 2018.)

These costs to DHS contain two parts:

1. **Additional Detention Bed Needs**

Under the alternate licensing provision, DHS would be granted a way to get around the *Flores* settlement's requirement that children not be kept in secure, unlicensed facilities for more than 20 days.[7] Whereas the average length of stay in a Family Residential Center (FRC) in FY 2014 was 47.4 days, after the *Flores* settlement protections--including the 20-day limitation on detention--were enforced for accompanied children in 2015, that had fallen to only 14.2 days (in FY 2017). While DHS argues that they are "unable to estimate the costs...because [they] are not sure how many individuals will be detained at FRCs after this rule is effective or for how much longer individuals may be detained because there are so many other variables to consider," these statistics point to what immigrant detention might look like without the *Flores* settlement in place.[8]

If the number of people who DHS incarcerates in FRCs remains largely[9] the same as in FY 2017 (where 37,825 people were sent to FRCs), but their average length of stay increases to 47.4 days, the annual additional detention costs to DHS would run to $194 million.[10]

On the other hand, if the administration were to use the abrogation of the *Flores* settlement to ramp up incarceration and detain every person apprehended in a family unit--107,063 of whom arrived in FY 2018[11]--the annual detention costs under the rule would be as high as $1.24 billion.[12]

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[7] *Jenny Lisette Flores, et al. v. Loretta E. Lynch*, CV 85-04544, U.S. Dist. Court, Central Dist. Cali., Aug. 21, 2015, https://www.aila.org/File/Related/14111359p.pdf.

[8] Notice of Proposed Rulemaking, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," Sept. 7, 2018, 2018-19052.

[9] In addition, DHS argues that--had the proposed rule been in effect in FY 2017, 2,787 additional children would have been kept in custody for longer. In addition to lengthening the lengths of stay of the overall population to FY 2014 levels, this analysis also assumes the lengths of stay of these additional 2,787 children will increase to 25 days. *See* Wolgin, "The High Costs of the Proposed *Flores* Regulation," https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation/, and Notice of Proposed Rulemaking, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children."

[10] Three important methodological points to note: First, the three FRCs that ICE currently has--the Karnes County Residential Center, the South Texas Family Residential Center, and the Berks County Residential Center--all have fixed-cost contracts, meaning that the per bed costs are the same regardless of whether the facilities are half-full or completely full. This analysis, then, assumes that costs to ICE only begin after the FRCs reach their maximum capacity (i.e. only for the 3,327th bed.) Second, while Karnes and Berks do have some variable costs on top of these fixed costs, since ICE already incorporates these into its average cost per bed per day, this estimate does not include any additional variable costs. Finally, as DHS points out, FRCs can be considered full even below their full capacity (for example, if a family of three is placed in a room with four beds.) Without a way to estimate this lower maximum capacity, the calculations assume that additional costs only begin after the full maximum capacity. *See ibid.* (Wolgin and Rule).

[11] FY 2018 October through August data (90,563 family unit apprehensions) from: U.S. Customs and Border Protection, "Southwest Border Migration FY2018," https://www.cbp.gov/newsroom/stats/sw-border-migration (last accessed Oct. 2018). September FY 2018 data (16,500 family unit apprehensions) are preliminary numbers released to *Politico*, *see* Ted Hesson, "Trump administration considers family separation option as border arrests soar,"

2. One-time Start-up Costs to Acquire New Family Residential Centers

As with the costs of additional detention beds, in the proposed rule, DHS argues that "ICE is unable to determine how the number of FRCs may change due to this proposed rule."[13] But in both scenarios above, DHS will need more family detention beds than their current 3,326 bed capacity. Thus it will need to either build or acquire new FRCs.

This estimate assumes that ICE will either choose to build facilities the size of the Karnes County Residential Center (with 830 beds) or of the South Texas Family Residential Center (known as Dilley, with 2,400 beds.) **Given the additional bed space needed, acquiring these new facilities would require one-time startup costs of at least $72 million and as much as $520 million.**[14]

Conclusion

At the low-end, including annual costs of $194 million for additional detention beds, and a one-time start-up cost of $72 million to acquire new FRCs, DHS would need to expend just over $2 billion over a decade. At the high-end, including annual costs of $1.24 billion and a one-time start-up cost of $520 million, DHS would need to expend $12.9 billion over a decade.

2. DETERRENCE

A central part of the administration's argument as to why the proposed *Flores* rule is necessary pertains to what it sees as a deterrent effect from being able to apply widespread incarceration in Family Residential Centers to children and families arriving at the southern border. In the proposed rule, the administration argues that the July 2015 court ruling—which held that the *Flores* settlement protections, including the limitation on holding children in secure, unlicensed facilities for more than 20 days, applied to accompanied as well as unaccompanied children[15]—led to an increase in families arriving at the southern border. In particular the proposed rule argues that "although it is difficult to definitively prove the causal link, DHS's assessment is that the link is real, as those limitations" i.e. the 20-day limit "correlated with a sharp increase in family migration."[16]

Politico, Oct. 12, 2018, https://www.politico.com/story/2018/10/12/trump-administration-family-separations-return-846971.

[12] Both of these scenarios assume that the administration reverts to an average length of stay similar to the 47.4 days of FY 2014. If it in facts holds families for longer, the costs above would be even higher.

[13] Notice of Proposed Rulemaking, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," September 7, 2018, 2018-19052.

[14] For a full explanation of methodology, *see* Philip E. Wolgin, "The High Costs of the Proposed *Flores* Regulation" (Washington, DC: Center for American Progress, 2018), https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation/.

[15] *Jenny Lisette Flores, et al. v. Loretta E. Lynch*, CV 85-04544, United States District Court, Central District of California, August 21, 2015, https://www.aila.org/File/Related/14111359p.pdf.

[16] Notice of Proposed Rulemaking, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," Federal Register, Vol. 83, No. 174, September 7, 2018, pgs. 45493-45494, https://www.regulations.gov/document?D=ICEB-2018-0002-0001.

Nevertheless, DHS fails to provide any of the data or methods used to make its assessment. But looking at the data on apprehensions before and after the July 2015 federal court ruling, Professor Tom K. Wong of the University of California, San Diego, finds no statistically significant increase in—nor any statistically significant relationship between—apprehensions of families at the southern border and the July 2015 ruling.[17] Professor Wong used two methodologies, interrupted time series analysis (ITSA) and autoregressive integrated moving average (ARIMA) ITSA to find that the 2015 Flores ruling had no statistically significant effect on apprehensions.[18] This analysis is consistent with other work by Professor Wong which shows that family incarceration as well as family separation has not had a statistically significant impact on family arrivals, and as such, is unlikely to be a deterrent in the future.[19]

Indeed, numerous studies and data have shown that detention and other punitive measures will not deter families from coming to the United States to seek protection. Genuine refugees, like the many families fleeing the Northern Triangle region of Central America, will continue to flee violence to save their lives and those of their children.[20] This was shown after the previous administration attempted to implement the same flawed policy, which resulted in a finding by a federal district court that the policy was unlawful.[21] Moreover, the architect of said policy shift in 2014, former Secretary of Homeland Security Jeh Johnson, recently admitted that this policy failed to achieve its stated goal of halting the numbers of families coming to our borders to seek asylum. Importantly, "[e]xperience teaches that widely publicized changes in immigration-enforcement policy may cause sharp downturns in the level of illegal migration in the short term, but migration patterns then revert to their higher, traditional levels in the long term so long as underlying conditions persist."[22]

The government's arguments regarding deterrence also serve to obfuscate the exorbitant financial cost associated with the rule while failing to engage with the efficacy of less expensive alternatives to detention (ATDs). In the fiscal year 2019 Congressional Budget Justification, ICE estimated the cost of one family detention bed at $318.79, which contrasts to the average daily cost of alternative to detention programming, which costs as little as $4 or $5 per day.[23]

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[17] Tom K. Wong, Center for American Progress, "Did a 2015 *Flores* Court Ruling Increase the Number of Families Arriving at the Southwest Border?" October 16, 2018, https://www.americanprogress.org/issues/immigration/news/2018/10/16/459358/2015-flores-court-ruling-increase-number-families-arriving-southwest-border/.

[18] *Id.*

[19] Tom K. Wong, Center for American Progress, "Do Family Separation and Detention Deter Immigration?" July 24, 2018, https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/.

[20] *See, e.g.*, Medecins sans Frontieres, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* (June 2017), https://www.msf.org/sites/msf.org/files/msf_forced-to-flee-central-americas-northern-triangle_e.pdf.

[21] *See* American Civil Liberties Union, Discussion of *R-I-L-R- v. Johnson, July 31, 2015*, *https*://www.aclu.org/cases/rilr-v-johnson.

[22] Jeh Charles Johnson, *Washington Post*, "Trump's 'zero-tolerance' border policy is immoral, un-American, and ineffective," June 18, 2018, https://www.washingtonpost.com/opinions/trumps-zero-tolerance-border-policy-is-immoral-un-american--and-ineffective/2018/06/18/efc4c514-732d-11e8-b4b7-308400242c2e_story.html?noredirect=on&utm_term=.a547532ad070

[23] *See* U.S. Immigration and Customs Enforcement, Congressional Budget Justification for FY 2019, *see also* American Immigration Lawyers Association *et al.*, *The Real Alternatives to Detention* (June 2017), https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf.

The government states in the NPRM that indefinite family incarceration is necessary to ensure families attend all immigration proceedings in their cases. This premise has been proven false and inaccurate. ATDs are extremely effective at ensuring compliance with immigration check-ins, hearings, and, if ordered, removal. DHS's own Congressional Budget Justification released in May 2017 notes that, "[h]istorically, ICE has seen strong alien cooperation with ATD requirements during the adjudication of immigration proceedings."[24]Although participants may be enrolled on ATD for a longer period of time due to court delays when they are not detained, using its own calculations in 2014 the Government Accountability Office found that an individual would have had to be on ATD for 1,229 days before time on ATD and time in detention cost the same amount.[25] Immigration detention is driven by profit and politics, not public safety; it continues to be used widely despite the availability of effective and cost-efficient alternatives to detention (ATD). A spectrum of alternatives to detention has long existed as the option the government should use in place of mass detention.[26] Alternatives to incarceration in the context of the criminal justice system have been broadly endorsed by organizations across the political spectrum, including the American Jail Association, American Probation and Parole Association, American Bar Association, Association of Prosecuting Attorneys, Heritage Foundation, International Association of Chiefs of Police, National Conference of Chief Justices, National Sheriffs' Association, Pretrial Justice Institute, and the Texas Public Policy Foundation.[27]

3. GENERAL HEALTH IMPLICATIONS

From a medical and mental health perspective, the changes proposed by DHS and DHHS to replace the standards of the Flores settlement agreement are neither safe nor humane. Legalizing prolonged and indefinite detention of families, eliminating the state licensing requirement, institutionalizing a permanent state of "emergency" to justify failure to meet standards of care, and increasing resort to inaccurate and unethical age determination procedures will further compromise the treatment of migrant families. Under these proposed changes, inadequate conditions of confinement are inevitable, heightening the risk of foreseeable health harms to the detained population.

Indefinite detention of children is deeply harmful

[24] U.S. Immigration and Customs Enforcement Congressional Justification for FY 2018 at page 179, https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf.

[25] American Immigration Lawyers Association *et al.*, *The Real Alternatives to Detention* (June 2017), https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf.

[26] In 2009, a bipartisan Independent Task Force on U.S. Immigration Policy sponsored by the Council on Foreign Relations called for an expansion of the use of alternatives to immigration detention as one of its recommendations to ensure that all immigrants have the "right to fair consideration under the law and humane treatment." Council on Foreign Relations, Independent Task Force Report No. 63: U.S. Immigration Policy (2009), https://www.cfr.org/sites/default/files/pdf/2009/08/Immigration_TFR63.pdf.

[27] *See* Julie Myers Wood and Steve Martin, *The Washington Times*, "Smart Alternatives to Immigrant Detention", Mar. 28, 2013, http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/; and American Civil Liberties Union, "Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock Up", : https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigrationdetention-atd.

The main purpose of the proposed change, that of legalizing indefinite detention of children with their families which is prohibited under the Flores settlement, is harmful in and of itself. Although separation of children from their parents is inherently harmful, so is child detention. Numerous clinical studies have demonstrated that the mitigating factor of parental presence does not negate the damaging impact of detention on the physical and mental health of children.[28] In a retrospective analysis, detained children were reported to have tenfold increase in developing psychiatric disorders.[29] Studies of health difficulties of detained children found that most children since being detained reported symptoms of depression, sleep problems, loss of appetite, and somatic complaints such as headaches and abdominal pains; specific concerns include inadequate nutritional provisions, restricted meal times, and child weight loss.[30] DHS' own medical experts recorded a case in which a 16-month-old baby lost a third of his body weight over 10 days because of untreated diarrheal disease, yet was never given IV fluids.[31] Policymakers are advised to give due weight to public health studies which have found that many migrants are fleeing epidemic levels of violence, including homicide and physical and sexual assault, and are in need of international protection and services which address their specific medical and mental health needs.[32]

Unlimited detention also violates the prohibition against torture and ill-treatment under U.S. and international law. The UN Special Rapporteur on torture has unequivocally stated that ill-treatment can amount to torture if it is intentionally imposed "for the purpose of deterring, intimidating, or punishing migrants or their families, or coercing them into withdrawing their requests for asylum".[33] Indefinite detention has severe medical and mental health consequences.[34]

Family detention centers are unable to provide adequate services

The role of structural determinants of health in health outcomes sheds light on the reasons that family detention is so dangerous to physical and mental health. Family residential centers, all located in remote

[28] Dudley, Michael, Zachary Steel, Sarah Mares, and Louise Newman. Children and Young People in Immigration Detention. Current Opinion Psychiatry 25, no. 4 (July 2012): 285-92. doi:10.1097/YCO.0b013e3283548676; Ehntholt, K., Trickey, D., Harris Hendriks, J., Chambers, H., Scott, M., Yule, W., & Tibbles, P. (2018). Mental health of unaccompanied asylum-seeking adolescents previously held in British detention centres. Clinical Child Psychology and Psychiatry, 23(2), 238–257; Kronick, R., Rousseau, C., & Cleveland, J. (2015). Asylum-seeking children's experiences of detention in Canada: A qualitative study. American Journal of Orthopsychiatry, 85(3), 287.

[29] Steel, Zachary, Shakeh Momartin, Catherine Bateman, Atena Hafshejani, Derrick M. Silove, Naleya Everson, Konya Roy, Michael Dudley, Louise Newman, Bijou Blick, and Sarah Mares. Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia. Australian and New Zealand Journal of Public Health 28, no. 6 (September 25, 2004): 527-36. doi:10.1111/j.1467-842x.2004.tb00042.x.

[30] Lorek, Ann, Kimberly Ehntholt, Anne Nesbitt, Emmanuel Wey, Chipo Githinji, Eve Rossor, and Rush Wickramasinghe. The Mental and Physical Health Difficulties of Children Held within a British Immigration Detention Center: A Pilot Study. Child Abuse & Neglect 33, no. 9 (September 2009): 573-85. doi:10.1016/j.chiabu.2008.10.005.

[31] Dr. Scott Allen and Dr. Pamela McPherson, Letter to the Senate Whistleblowing Caucus, July 17, 2018, https://www.whistleblower.org/sites/default/files/Original%20Docs%20Letter.pdf.

[32] Keller A, Joscelyne A, Granski M, Rosenfeld B. Pre-Migration Trauma Exposure and Mental Health Functioning among Central American Migrants Arriving at the US Border. PloS ONE. 2017;12(1):e0168692.

[33] Rapport of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, Migration-related Torture and Ill treatment, A/HRC/37/50 (February 2018).

[34] Physicians for Human Rights, Punishment before Justice: Indefinite Detention in the US (June 1, 2011), https://phr.org/resources/punishment-before-justice-indefinite-detention-in-the-us/.

areas far from urban centers, have consistently failed to recruit adequate health staff, including pediatricians, child and adolescent psychiatrists, and pediatric nurses.[35] Families released through non-custodial measures have access to providers based in the community, but in detention their access to qualified medical and mental health professionals has been demonstrated to be dangerously inadequate. For example, a 27-day-old infant who was born during his mother's journey was not examined by a physician until he had a seizure due to undiagnosed bleeding of the brain.[36] In another facility, numerous children vaccinated with adult doses of vaccine as the providers were not familiar with labels on pediatric vaccines.[37] Another crucial factor in health care access is language: requests for medical care, information about available care and access to care are all conditioned on being able to communicate with health professionals in an understandable language. Family residential centers consistently faced difficulties in providing interpretation services to ensure access to health information and services, either through recruitment of an adequate number of bilingual staff or telephonic translation of indigenous languages, described as "a pervasive concern across facilities."[38] In any emergency situation, there is no reliable mechanism to allow staff to communicate effectively with all detainees.

Facilities of detention centers are not suitable for housing children

The architectural layout and design of the facilities themselves increase the likelihood of injury as they are not adapted to the needs of children. Troubling revisions to the Pennsylvania code definition of secure facilities in the proposed changes (from "voluntary egress" to "egress", from "a building" to "a portion of a building") indicate that DHS will continue to inappropriately house families in minimally adapted maximum security facilities with heavy duty locks and doors which are not adapted to child care. DHS' own medical experts have documented numerous severe finger injuries (including lacerations and fractures) due to spring-loaded closure of heavy doors in a converted medium-security prison used as a family detention center.[39] Many facilities lacked medical space, in addition to constrained residential space; in one case the gymnasium was used as ad hoc overflow medical space.[40] Detention facilities and processing centers under the authority of CBP and DHHS in recent months exposed children to constant illumination which caused sleep, deprivation and affected circadian rhythms that are crucial for development.[41] Research shows that constant exposure to light can contribute to loss of muscle strength and inflammation; newborns in neonatal intensive care units who are exposed to constant light spend an average of 15 days longer in intensive care than those whose eyes are shielded.[42] The proposed self-licensing scheme is likely to exempt facilities from standards of traditional child care licensing, such as those considered by Texas Pediatric Society in opposition to a rule creating a "family residential center"

[35] Dr. Scott Allen and Dr. Pamela McPherson, Letter to the Senate Whistleblowing Caucus, July 17, 2018, https://www.whistleblower.org/sites/default/files/Original%20Docs%20Letter.pdf.
[36] Allen and McPherson, *id.*
[37] Allen and McPherson, *id.*
[38] Allen and McPherson, *id.*
[39] Allen and McPherson, *id.*
[40] Allen and McPherson, *id.*
[41] Czeisler, C., Housing Immigrant Children — The Inhumanity of Constant Illumination (July 12, 2018) New England Journal of Medicine 379:e3, https://www.nejm.org/doi/full/10.1056/NEJMp1808450?query=TOC.
[42] Vásquez-Ruiz S, Maya-Barrios JA, Torres-Narváez P, et al. A light/dark cycle in the NICU accelerates body weight gain and shortens time to discharge in preterm infants. Early Hum Dev 2014;90:535-540.

licensing category in Texas in 2015.[43] These missing standards can include limiting the number of room occupants and prevention of children sharing a room with unrelated adults and with adults of the opposite gender, which puts children at an increased risk of child abuse.[44] In current family detention facilities, families are typically placed in rooms that accommodate six people at a time and where children share rooms with unrelated adults, including sleeping, dressing, and using the restroom with no door or privacy from adults.[45]

In contrast, least restrictive alternatives address structural determinants of health by enabling access to supportive familial, social, co-ethnic and host community networks and resources. Access to health care and holistic services, including education, is best facilitated through placement in the community. Clinical studies have repeatedly demonstrated that a sense of belonging and connectedness in schools and neighborhoods is a strong supportive factor for positive health outcomes for immigrant and refugee families.[46]

State licensing is essential to ensure a minimum level of protection

DHS states that challenges to state licensing of family residential facilities are a justification for eliminating the Flores requirement of state licensing.[47] However, challenges to licensing these facilities have come about as state oversight mechanisms exercised their authority to enforce accountability for unacceptable conditions of confinement for children and families. It is not difficult to detain children due to state licensing requirements—it is difficult to detain families because detention center facilities are inappropriate for housing families for any length of time. Family detention by definition cannot comply with requirements that protect the safety, health and well-being of children. State-level oversight has confirmed that in practice family detention has failed to fulfill standards for adequate conditions of confinement. Inadequate medical and mental health staff, lack of provision for adequate language interpretation, inappropriate physical facilities which are not child-proofed, inadequate preparation for emergency situations, combined with the stated intent to greatly increase the number of detained families and the duration for which they are detained, is an intentional decision to greatly increase the foreseeable risk of harm to families. The self-licensing scheme is unrealistic and unfeasible, given the recent OIG report which stated that current audits "do not ensure adequate oversight or systemic improvements in detention conditions".[48]

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[43] Texas Pediatric Society, Letter to Judge John J. Specia Jr., Dec. 13, 2015, https://txpeds.org/sites/txpeds.org/files/documents/newsletters/tps-comments-on-dfps-detention-center-licensing.pdf.
[44] Dr. Scott Allen and Dr. Pamela McPherson, Letter to the Senate Whistleblowing Caucus, July 17, 2018, https://www.whistleblower.org/sites/default/files/Original%20Docs%20Letter.pdf.
[45] Human Rights First, "Health Concerns at the Berks Family Detention Center," Feb. 19, 2016, https://www.humanrightsfirst.org/resource/health-concerns-berks-family-detention-center.
[46] Fazel, Mina and Ruth Reed, Catherine Panter-Brick, Alan Stein. (2012) Mental health of displaced and refugee children resettled in high-income countries: risk and protective factors, The Lancet, 379(9812) 266-282; Zwi, K., Mares, S., Nathanson, D., Tay, A. K., & Silove, D. (2018). The impact of detention on the social–emotional wellbeing of children seeking asylum: a comparison with community-based children. European Child & Adolescent Psychiatry, 27(4), 411-422.
[47] NPRM p. 47.
[48] Dept. of Homeland Security Office of Inspector General, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, OIG-18-67 (June 26, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf.

Emergencies do not excuse inhumane treatment through denial of food or medical care

Through the proposed rule, DHS seeks to expand the definition of "emergencies" as events that delay the placement of minors within the required time frame[49] to include delaying or excusing noncompliance.[50] Children will have a greater risk of exposure to dangerous conditions if DHS operates under an influx standard that states that minors must be transferred "as expeditiously as possible", which can be broadly interpreted, instead of a defined period of 3-5 days.[51] DHS is currently operating under the unchanged influx definition of more than 130 minors eligible for placement,[52] so that the transfer of minors must occur "as expeditiously as possible" rather than within the required 3-5 days.[53] From a public health perspective, designation of an emergency should trigger additional resources, prepared in advance through contingency planning and made available through standing mechanisms.

It is unacceptable that an emergency situation should legitimize violation of minimum standards and remove the mandatory requirement that deviations from minimum standards must be recorded. DHS offers as an example delaying access to meal during transfer from a facility in the path of a natural disaster; the hypothetical example should instead ensure that non-perishable, nutritious food and bottled water in packs will be kept on site at all times in case of an emergency evacuation in order to ensure that nutritional needs of children are met. Critical medical care for acute and infectious conditions that require immediate attention might be ignored or delayed during "emergency" conditions which can nearly always be met. Recent cases have demonstrated the current deficiencies in emergency care for detained families, including the death of a 19-month-old toddler due a respiratory infection that went untreated[54] and the near death of a 5-year-old due to an untreated ruptured appendix,[55] both shortly after being released from Dilley family detention center.

Proposed age determination procedures are both unreliable and unethical

From a medical perspective, the proposed age determination procedures are both unreliable and unethical. Clinical evaluation of radiographs, proposed in the change, have concluded that hand and wrist radiographs cannot provide accurate estimate of age of living individuals.[56] Furthermore, the Royal College of Paediatrics and Child Health, among others, has indicated that taking radiographs for non-medical purposes is unethical as it exposes children to radiation unnecessarily with no anticipated health benefit.[57] A recent systematic review of age determination on the basis of dental maturation found that

[49] Flores Settlement Agreement at para. 12B.
[50] NPRM p. 44.
[51] *Id.* at 45, 87.
[52] *Id.* at 45, 158.
[53] *Id.* at 45, 87.
[54] Jamiel Lynch, Dave Alsup and Madison Park, *CNN*, "Law firm alleges neglectful medical care after child dies weeks after ICE custody," Aug. 28, 2018, https://www.cnn.com/2018/08/28/us/texas-ice-child-death/index.html.
[55] Debbie Nathan, *The Intercept*, "A 5-year-old Girl in Immigrant Detention Nearly Died of an Untreated Ruptured Appendix," Sept. 2, 2018, https://theintercept.com/2018/09/02/border-patrol-immigrant-detention-medical-neglect-texas/.
[56] Serinelli S, Panetta V, Pasqualetti P, et al. Accuracy of three age determination X-ray methods on the left hand-wrist: A systematic review and meta-analysis. Leg Med (Tokyo) 2011; 13: 120–133.
[57] Royal College of Paediatrics and Child Health UK, X-Rays and Asylum Seeking Children: Policy Statement, 19th November 2007.

ages of individuals under consideration were consistently overestimated.[58] Skeletal maturity data is unreliable because skeletal tissue development is impacted by nutritional and environmental influences, not solely chronological age.[59] In conclusion, there is no scientific or medical consensus on a reliable and ethical clinical method of age assessment. Individuals should be given the benefit of the doubt as no procedure can verify age with certainty. Improper age determination carries the risk of excluding vulnerable children from age-appropriate preventative health screening and services. More concerning is that improper age determination may cause a child to unnecessarily lose UAC status and associated legal protections, such as a non-adversarial asylum interview and release to an eligible sponsor.

Age assessment procedures should be regarded as a measure of last resort, when documentation and interviews failed to establish the child's age and when there are serious grounds for doubting the child's self-declared age.[60] Children should be offered a range of options through which to prove their age and should have the right to refuse to undergo a procedure which subjects them to medical risks. International child protection standards emphasize the importance of the best interests of the child during age determination procedures, in accordance with medical ethical principles of patient autonomy, welfare and consent and with human rights law provisions that views of children must be given due weight in relation to their age and maturity and that children have the right to protection from arbitrary interference with their privacy.[61] Informed consent of children to age assessment procedures must take into account their age, maturity and understanding of the procedure and its possible medical and legal consequences. The findings should be shared with the child in writing in a language that they understand and a mechanism should be provided to appeal the outcome.[62] Best practices indicate that the procedures should be undertaken by a multidisciplinary, independent team, including medical and mental health professionals and social workers, as well as legal counsel, including expertise in relevant cultural factors.[63]

4. CHILD HEALTH IMPLICATIONS

Model Comments on Child Health Implications of Family Detention
American Academy of Pediatrics

According to medical experts, DHS detention facilities are not appropriate places for children to be housed. In 2017, the American Academy of Pediatrics published a policy statement titled *Detention of Immigrant Children* stating that immigrant children seeking safe haven in the United States should never be placed in detention facilities.[64] The American Medical Association has also adopted a policy opposing family immigration detention given the negative health consequences that detention has on both children

[58] Jayaraman J, Wong HM, King NM, et al. The French Canadian dataset of Demirjian for dental age estimation: A systematic and meta-analysis. J Forensic Legal Med 2013; 20: 373–381.
[59] Jayakumar J, Roberts GJ, Wong HM, et al. Ages of legal importance: Implications in relation to birth registration and age assessment practices. Medicine, Science and the Law 2016; 56(1): 77–82 pg. 81.
[60] Smith T and Brownlees L. Age assessment practices: A literature review & annotated bibliography, http://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf.
[61] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, UNTS 1577(3).
[62] Smith and Brownlees, *id.*
[63] Smith and Brownlees, *id.*
[64] Julie M. Linton, Marsha Griffin, Alan Shapiro, American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.

and their parents.[65] In 2018, the American College of Physicians released a policy stating that "forced family detention—indefinitely holding children and their parents, or children and their other primary adult family caregivers, in government detention centers until the adults' immigration status is resolved—can be expected to result in considerable adverse harm to the detained children and other family members, including physical and mental health, that may follow them through their entire lives, and accordingly should not be implemented by the U.S. government."[66]

Despite these and many other warnings from medical experts, DHS proposes in this NPRM to substitute its own Immigration and Customs Enforcement (ICE) family residential standards where its family detention facilities cannot obtain licensing from state, municipal, or other appropriate child welfare entities.[67] This would have the effect of eliminating the critical Flores Settlement Agreement limitation on the detention of children in unlicensed facilities. As a result, and as explicitly intended by DHS in promulgating these proposed rules, DHS would detain children with their families for the entirety of their immigration proceedings--in effect, indefinitely.

There is no evidence that any amount of time in detention is safe for children.[68] In fact, even short periods of detention can cause psychological trauma and long-term mental health risks for children.[69] Studies of detained immigrants have shown that children and parents may suffer negative physical and emotional symptoms from detention, including anxiety, depression and posttraumatic stress disorder.[70] Detention itself undermines parental authority and capacity to respond to their children's needs; this difficulty is complicated by parental mental health problems.[71] Parents in detention centers have described regressive behavioral changes in their children, including decreased eating, sleep disturbances, clinginess, withdrawal, self-injurious behavior, and aggression.[72]

Visits to family detention centers by pediatric and mental health advocates have revealed discrepancies between the standards outlined by ICE and the actual services provided, including inadequate or inappropriate immunizations, delayed medical care, inadequate education services, and limited mental health services.[73] Other reports describe prison-like conditions; inconsistent access to quality medical, dental, or mental health care;[74] and lack of appropriate developmental or educational opportunities.[75] Conditions in CBP processing facilities, which include forcing children to sleep on cement floors, open

[65] American Medical Association, "AMA Adopts New Policies to Improve Health of Immigrants and Refugees," June 12, 2017, https://www.ama-assn.org/ama-adopts-new-policies-improve-health-immigrants-and-refugees.
[66] American College of Physicians, "The Health Impact of Family Detentions in Immigration Cases," July 3, 2018, https://www.acponline.org/acp_policy/policies/family_detention_position_statement_2018.pdf.
[67] *See* 83 FR 45525
[68] Julie M. Linton, Marsha Griffin, Alan Shapiro, American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] American Medical Association, "AMA Adopts New Policies to Improve Health of Immigrants and Refugees," June 12, 2017, https://www.ama-assn.org/ama-adopts-new-policies-improve-health-immigrants-and-refugees.
[75] Julie M. Linton, Marsha Griffin, Alan Shapiro, American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.

toilets, constant light exposure, insufficient food and water, no bathing facilities, and extremely cold temperatures, are traumatizing for children.[76] No child should ever have to endure these conditions.

In July, fourteen major medical organizations joined together to voice deep concerns about the treatment that immigrant children and their parents face in federal custody.[77] The letter from these organizations note that two physicians within DHS' Office of Civil Rights and Civil Liberties found serious compliance issues in DHS-run facilities resulting in "imminent risk of significant mental health and medical harm."[78] The DHS physicians stated that "detention of innocent children should never occur in a civilized society, especially if there are less restrictive options, because the risk of harm to children simply cannot be justified."[79] Currently, there is no mechanism for health professionals to regularly monitor the conditions in DHS facilities and their appropriateness for children.

After almost a year of investigation, the DHS Advisory Committee on Family Residential Centers concluded that detention is generally neither appropriate nor necessary for families— and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children.[80] We must remember that immigrant children are still children. Protections for children in law or by the courts exist because children are uniquely vulnerable and are at high risk for trauma, trafficking, and violence. Proposals like this rule that seek to override the *Flores Settlement Agreement* in order to allow for the longer-term detention of children with or without their parents or to weaken federal child trafficking laws strip children of protections designed for their safety and well-being and put their health and well-being at risk.

5. GOVERNMENT OVERSIGHT FAILURES

The Department of Homeland Security Has a Poor Track Record of Accountability and Transparency with Respect to Immigration Detention Facilities

The *Flores v. Reno* settlement agreement and the court decisions implementing it require that immigration detention facilities that hold children for more than twenty days be licensed by "an appropriate State agency" to meet certain standards of care.[81] Because most states have not licensed facilities to detain parents with their children, the Department of Homeland Security (DHS) has had difficulty obtaining licenses for family detention centers, limiting the length of family detention.

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[76] *Id.*
[77] Letter from American Pediatric Association *et al.* to The Honorable Charles Grassley, *et al.*, July 24, 2018, https://downloads.aap.org/DOFA/Senate%20Congressional%20Oversight%20Request%20Letter%20Final%2007%2024%2018.pdf.
[78] Letter from Dr. Scott Allen and Dr. Pamela McPherson to the Honorable Charles Grassley and the Honorable Ron Wyden, July 17, 2018, https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf.
[79] *Id.*
[80] *Report of the DHS Advisory Committee on Family Residential Centers*, Sept. 30, 2016, https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf.
[81] *Flores v. Reno* Stipulated Settlement Agreement, Aug. 12, 1996, p. 4. https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf (Downloaded Oct. 15, 2018)

Under the proposed regulation that would supersede *Flores*, DHS would be able to detain children for prolonged periods in facilities that are not licensed by a state child welfare agency. The proposal would allow DHS to "employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE [Immigration and Customs Enforcement]."[82] DHS claims that this would provide "materially identical assurances about the conditions" of family detention centers while allowing for longer periods of detention.[83]

If implemented, the regulation would also end both *Flores* class counsel's access to DHS and Health and Human Services (HHS) facilities that hold minors, and ongoing reporting and monitoring requirements imposed by the court.

Self-inspections by DHS and its contractors are much weaker than the protections that *Flores* provides. **DHS's record of oversight, transparency, and accountability with regard to immigration detention facilities is abysmal**. This record demonstrates just how dangerous it would be to allow DHS to bypass state certification standards for facilities that detain children.

A. Gaps in Inspections of Family Residential Centers

The proposed regulations make clear that DHS does **not** intend to increase oversight of family detention centers as part of its new licensing authority. DHS asserts in its proposed regulation that "ICE currently meets the proposed licensing requirements" because it currently requires family detention facilities to comply with ICE's detention standards and hires inspectors to monitor compliance, and therefore "DHS would not incur additional costs in fulfilling the requirements of the proposed alternative licensing scheme."[84]

Since May 2015, DHS has contracted with a company called Danya International to inspect family detention centers (which ICE calls family residential centers, or FRCs) for compliance with ICE's internal standards. According to court documents, Danya has conducted unannounced monthly inspections of all three family residential centers since August 2015.[85] Only three reports from those inspections—one from each facility, as selected by ICE—are publicly available.[86] With respect to the others, the only information available to the public is an assertion by an ICE official in a court declaration that "Danya has generally found the FRCs to be compliant with a majority" of standards, and "[w]here Danya observed individual issues of non-compliance, the facilities took corrective action as appropriate and achieved compliance although this is a continuous process."[87] These vague descriptions provide very little information about what individual standards were violated, or how severe and prolonged those violations were.

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[82] Department of Homeland Security and Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," *Federal Register*, Vol. 83, No. 174, Sept. 7, 2018, p. 45525. https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf (Downloaded Oct. 15, 2018)
[83] *Id.*, p. 45488.
[84] *Id.*, p. 45518.
[85] Declaration of Jon Gurule, ¶6, *Flores* v. *Holder*, No. CV 85-4544-DMG (C.D. Cal June 3, 2016) https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0030.pdf (Downloaded Oct. 11, 2018)
[86] *Id.*, exhibits 1, 2 and 3.
[87] *Id.* ¶6.

ICE denied requests by DHS's own Advisory Committee on Family Residential Centers for access to the other Danya International inspection reports.[88] The three reviews that are available consist mainly of checklists of standards with limited further explanation of the findings, and no apparent input from detainees.

DHS's Office of Civil Rights and Civil Liberties has conducted more in-depth inspections and investigations of family detention centers, but those documents and reports are likewise unavailable to the public. Two medical doctors who served as subject matter experts for the Office of Civil Rights and Civil Liberties on family detention centers, Dr. Pamela McPherson and Dr. Scott Allen, recently reported to Congress that their investigations "frequently revealed serious compliance issues resulting in harm to children."[89] Drs. McPherson and Allen stated that family detention centers "still have significant deficiencies that violate federal detention standards," including repeated violations of the standards for medical staffing, clinic space, timely access to medical care, and language access, and gave detailed examples of cases when children have been harmed by inadequate medical care.

B. Systematic Failings in Inspections of Adult Detention Centers

More information is publicly available regarding DHS's record on inspections of adult ICE detention centers—but that record provides further evidence that the agency's self-inspections are a poor substitute for state child welfare agencies or court supervision.

A DHS Office of Inspector General (OIG) investigation published in June found that because of the flaws in inspections of ICE detention facilities, deficiencies "remain uncorrected for years."[90] The most frequent inspections of ICE facilities are conducted by a private contractor called the Nakamoto Group. The OIG found that Nakamoto's inspections were severely lacking. According to OIG, "typically, three to five inspectors have only 3 days to complete the inspection, interview 85 to 100 detainees, brief facility staff, and begin writing their inspection report for ICE." An ICE employee told the OIG that this was not "enough time to see if the [facility] is actually implementing" required policies. Other ICE personnel described Nakamoto inspections as "very, very, very difficult to fail" and "useless."

For the inspections that DHS OIG observed, Nakamoto reported having conducted 85 to 100 detainee interviews. But contrary to what Nakamoto's contract required, the conversations with detainees that OIG saw were not conducted in private, were conducted only in English, and OIG wrote that it "would not characterize them as interviews." (OIG found that inspections conducted by the Office of Detention

[88] *Report of the DHS Advisory Committee on Family Residential Centers*, Oct. 7, 2016, p. 93 https://www.humanrightsfirst.org/sites/default/files/dhs-advisory-committee-on-family-residential-centers.pdf (Downloaded Oct. 11, 2018)

[89] Letter from Dr. Scott Allen and Dr. Pamela McPherson of the Department of Homeland Security Office of Civil Rights and Civil Liberties, to Sens. Charles E. Grassley and Ron Wyden, Senate Whistleblowing Caucus, July 17, 2018 https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf (Downloaded Oct. 11, 2018)

[90] Department of Homeland Security Office of Inspector General, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements: DHS OIG Highlights* (OIG-18-67), June 26, 2018 https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf (Downloaded Oct. 11, 2018)

Oversight were much more thorough, but occurred only once every three years on average, and ICE did not adequately follow up to ensure that problems were corrected.)

C. Inaccurate Statements by DHS Leadership

In addition to the systemic flaws in detention monitoring described above, DHS's current leadership has shown a disturbing pattern of deceiving Congress and the public about the agency's treatment of children. Over the last few months, Secretary of Homeland Security Kirstjen Nielsen has claimed that DHS does not detain children;[91] that DHS did not have a policy of family separation;[92] that deterrence was not one of the purposes of family separation;[93] and that parents deported without their children had been given the opportunity to reunite and declined to take it.[94] All of those statements are false, and provide further evidence that DHS cannot be trusted to monitor itself with regard to treatment of children in detention.[95]

6. ROOT CAUSES

Root causes of forced migration from the Northern Triangle countries of Central America (NTCA)
Daniella Burgi-Palomino, Latin America Working Group (LAWG)

There is substantial evidence to demonstrate that not only poverty but also violence, corruption, and impunity drive forced migration from the Northern Triangle countries of Central America, Guatemala, Honduras, and El Salvador, to the United States and the rest of the region. In recent years, numerous studies have evidenced that violence is a main push factor of forced migration from this region and a major reason that individuals seek international protection.[96] Indefinite detention in the United States for

[91] Testimony of Kirstjen Nielsen, Secretary of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on "Threats to the Homeland," Oct. 10, 2018 [Quote at 1:29:43]. https://www.c-span.org/video/?452548-1/secretary-nielsen-fbi-director-wray-testify-homeland-security-threats&live&start=5375 (Downloaded Oct. 15, 2018)
[92] Kirstjen Nielsen, Twitter Post, June 17, 2018, 2:52 p.m. https://twitter.com/secnielsen/status/1008467414235992069?lang=en (Downloaded Oct. 15, 2018).
[93] Testimony of Kirstjen Nielsen, Secretary of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on "Authorities and Resources Needed to Protect and Secure the United States," May 15, 2018. [Quote at 56:58]. https://www.c-span.org/video/?445411-1/homeland-security-secretary-kirstjen-nielsen-testifies-senate-panel&start=3406 (Downloaded Oct. 15, 2018)
[94] Samuel Chamberlain, "DHS Secretary Nielsen says White House is 'on track' to reunite separated families by deadline," *Fox News*, July 24, 2018. https://www.foxnews.com/politics/dhs-secretary-nielsen-says-white-house-is-on-track-to-reunite-separated-families-by-deadline (Downloaded Oct. 15, 2018)
[95] Letter from Danielle Brian and Lisa Rosenberg to Sens. Ron Johnson and Claire McCaskill, Oct. 2, 2018. https://www.pogo.org/letter/2018/10/letter-to-senators-regarding-kirstjen-nielsens-inaccurate-testimony/ (Hereinafter Brian and Rosenberg Letter); Department of Homeland Security Office of Inspector General, "Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, OIG-18-84, Sept. 27, 2018. https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf (Downloaded Oct. 12, 2018)
[96] *See, e.g.*, United Nations High Commissioner for Refugees, *Children on the Run* (May 13, 2014), http://www.unhcr.org/56fc266f4.html; United Nations High Commissioner for Refugees, *Women on the Run* (Oct. 26, 2015), http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html; Jonathan T. Hiskey, Abby Cordova, Diana Orces, Mary Fran Malone, American Immigration Council, *Understanding the Central American Refugee Crisis: Why They are Fleeing and How U.S. Policies are Used to Deter Them* (Feb. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/understanding_the_central_american_refugee_crisis.pdf, Center for Gender and Refugee Studies, *Childhood and Migration in Central and North America:*

children and families would compound the trauma that these individuals have already suffered before arriving at the U.S.-Mexico border given the conditions in their home countries. Moreover, a substantial number of children, families, and individuals fleeing this region have grounds for asylum based on these conditions.

The NPRM fails to engage the ample evidence demonstrating these realities of forced migration, with the Department of Homeland Security (DHS) instead choosing to assert its conviction that an unsupported correlation demonstrates that the Flores Settlement Agreement's limitations on child detention draw families to the U.S.[97] The willful blindness of both DHS and HHS not only comes with an unacceptable human cost for traumatized children and families forced to flee untenable conditions, but also guarantees the failure of this proposed deterrence effort at significant cost to U.S. taxpayers.

Despite slight decreases, national level homicide rates in Guatemala, Honduras, and El Salvador from 2017 remain above the minimum number of homicides identified by the United Nations as constituting an epidemic of violence, and are among the top six highest homicide rates in Latin America, which itself is a region characterized by high levels of non-war-related violence.[98] Violence is perpetuated not just by non-state actors including gangs and organized crime, but also by state security forces. Gangs such as the Mara Salvatrucha (MS-13) and Barrio 18 exercise control over neighborhoods, forcing populations into hiding, and carry out brutal tactics such as extortion, rape, threats, assault, homicides, sexual and gender based-violence, and the forced recruitment of children and adolescents.[99] Extortion levied by gangs remains a serious problem affecting individuals in this region–Salvadorans and Hondurans pay an estimated $390 million and $200 million, respectively, in annual extortion fees to gangs and organized crime groups.[100] Nearly 80 percent of registered small businesses in Honduras report having been extorted.[101] Internal displacement, often a precursor to international migration, has also increased in the last year in El Salvador and Honduras. The top reasons behind this forced displacement in both countries include threats, assassinations, and extortion from gangs.[102] The Internal Displacement Monitoring Center (IDMC) estimates that there were at least 432,000 internally displaced persons in El Salvador, Guatemala,

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Causes, Policies, Practices and Challenges (Feb. 2015), https://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_English_1.pdf, and Michael Clemens, Center for Global Development, *Violence, Development, and Migration Waves: Evidence from Central American Child Migrant Apprehensions* (July 27, 2017), https://www.cgdev.org/publication/violence-development-and-migration-waves-evidence-central-american-childmigrant.

[97] 83 FR 45493-94

[98] Tristan Clavel, Insight Crime, "Insight Crime's 2017 Homicide Round Up", Jan. 19, 2018, https://www.insightcrime.org/news/analysis/2017-homicide-round-up/.

[99] Latin America Working Group Education Fund, *Between a Wall and a Dangerous Place* (Mar. 2018), http://lawg.org/storage/documents/Between_a_Wall_and_a_Dangerous_Place_LAWGEF_web.pdf.

[100] *La Prensa*, "'Imperios de la extorsión' están en Honduras y El Salvador", July 1, 2015, http://www.laprensa.hn/honduras/854572-410/imperios-de-la-extorsi%C3%B3n-est%C3%A1n-en-honduras-y-el-salvador.

[101] International Crisis Group, *Mafia of the Poor: Gang Violence and Extortion in Central America*, report no. 62, Apr. 6, 2017, https://www.crisisgroup.org/es/latin-america-caribbean/central-america/62-mafia-poor-gang-violence-and-extortion-central-america.

[102] Daniella Burgi-Palomino, Latin America Working Group, "Nowhere to Call Home: Internally Displaced in Honduras and El Salvador", Oct. 31, 2017, http://lawg.org/action-center/lawg-blog/69-general/1936-nowhere-to-call-home-internally-displaced-in-honduras-and-el-salvador.

and Honduras as of the end of 2017 due to violence in their communities.[103] Often, displacement is not the first time a person is threatened, but rather it is the culmination of multiple threats and incidents of violence over time to an individual or family.[104] Individuals will frequently move several times within the country in search of safety before migrating internationally due to an inability to escape threats and violence.[105]

Violence is compounded for marginalized populations such as women, children, youth, LGBTI, Afro-descendant, and indigenous communities. Sexual and gender-based violence has been documented to be a driver of forced migration from the region causing women and girls to seek international protection.[106] Physical and sexual violence against women and girls is mostly perpetuated by gangs and family members, but also by police and other authorities.[107] Sexual violence is deeply embedded within gang culture and utilized as a form of territorial control.[108] The United Nations has categorized this violence and the forced recruitment of girls and women as constituting a contemporary form of slavery.[109] Intra-familial violence is also pervasive in all three countries. According to one local NGO in El Salvador, approximately 70 percent of perpetrators of sexual violence know the victim and 20 percent are family members.[110] All three countries have some of the highest rates of femicides in the world.[111]

Civil society organizations in Guatemala, El Salvador, and Honduras have also reported that LGBTI people are at high risk for violence and extortion by gangs and organized criminal groups, hate crimes, and abuse by authorities, leading many LGBTI individuals to migrate in search of safety.[112] These rates of targeted violence against the LGBTI community are ongoing and have also increased–for example, more LGBTI individuals were murdered in 2017 than in the previous year in Honduras.[113]

Violence by gangs and corrupt and abusive law enforcement members also disproportionately affects children and youth. They are often forced into recruitment by gangs or targeted due to profiling by law

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[103] Internal Displacement Monitoring Center, "Understanding and Estimating Displacement in the Northern Triangle of Central America," Sept. 2018, http://www.internal-displacement.org/publications/understanding-and-estimating-displacement-in-the-northern-triangle-of-central-america.
[104] Burgi-Palomino, "Nowhere to Call Home".
[105] *Ibid.*
[106] *Women on the Run.*
[107] *See Women on the Run*; *see also* Kids in Need of Defense, *Neither Security nor Justice: Sexual and Gender Based Violence in El Salvador, Honduras, and Guatemala,* May 4, 2017, https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf.
[108]Andrea Fernández Aponte, Latin America Working Group, "Left in the Dark: Violence Against Women and LGBTI Persons in Honduras and El Salvador," Mar. 7, 2018, http://lawg.org/action-center/lawg-blog/69-general/2002-left-in-the-dark-violence-against-women-and-lgbti-persons-in-honduras-and-el-salvador.
[109] Kids in Need of Defense, Latin America Working Group, Women's Refugee Commission, "Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet," July 2018, https://supportkind.org/wp-content/uploads/2018/08/SGBV-Fact-sheet.-July-2018.pdf.
[110] Fernández Aponte, "Left in the Dark".
[111] Geneva Declaration of Armed Violence and Development, "Lethal Violence Against Women and Girls" in *Global Burden of Armed Violence 2015: Every Body Counts*, May 8, 2015, 87-120, http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch3_pp87-120.pdf.
[112] Comisión Interamericana de Derechos Humanos, "Informe sobre el 154 Período de Sesiones de la CIDH", 2015, 9-10, https://www.oas.org/es/cidh/prensa/docs/Informe-154.pdf.
[113] Red Lésbica Cattrachas, *Informe sobre muertes violentas de la comunidad LGBTTBI Cattrachas 2009 al 2017,* Feb. 28, 2018, http://www.cattrachas.org/index.php.

enforcement, typically as members of gangs, or in response to their participation in social demonstrations.[114] For example, there was an increase in multiple homicides or massacres, the killing of three people or more in the same location and context, including of minors and children during the first six months of 2017 in Honduras.[115]

Finally, Afro-descendant, indigenous, and other community leaders who defend their lands against the development of infrastructure or extractive projects are also at specific risk in this region. Guatemala and Honduras rank among the most dangerous countries in the world for environmental defenders.[116]

These various forms of violence and insecurity faced by citizens in Guatemala, Honduras, and El Salvador are compounded by a lack of access to justice, systemic corruption, weak rule of law, and high rates of poverty. Access to justice for ordinary citizens in the region is still elusive; the majority of crimes, including abuses involving high-level officials, remain in impunity. Citizens are forced to migrate not just because of the human rights violations they suffer but also because they lack trust in their authorities to investigate and prosecute these crimes or to take steps to protect them. Crimes of sexual and gender-based violence, in particular, have impunity rates of close to 98 percent.[117] The institutions and law enforcement agencies meant to protect citizens do not have the capacity or resources to do so or are penetrated by corruption and organized crime, and often also serve as the perpetrators of human rights violations. In both El Salvador and Honduras, the police commit serious abuses including extrajudicial executions that often go unpunished.[118] The armed forces have been used in Guatemala and Honduras to legitimize the expansion of executive power, threaten advances in investigating corruption, and to repress citizens.

Ongoing crises of corruption and rule of law in the region are also drivers of migration and result in governments' inability to protect their citizens or offer them basic services in the face of this violence. This is evident currently in Guatemala and Honduras where independent commissions brought to light high-level government officials' theft of public funds destined for social services. Child welfare and women's protection agencies, human rights ombudsmen's offices, and mechanisms to protect human rights defenders and marginalized communities remain weak and under-resourced. Poverty remains high, especially for rural and marginalized communities. Guatemala has the highest poverty rates in Latin America according to recent data from the World Bank, followed directly by Honduras.[119] El Salvador is

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[114] Lisa Haugaard, Latin America Working Group, "Public Security in Honduras: Who Can Citizens Trust?" Nov. 6, 2017, http://lawg.org/action-center/lawg-blog/69-general/1941-public-security-in-honduras-who-can-citizens-trust.

[115] Casa Alianza, *Informe mensual de la situación de los derechos de las niñas, niños y jóvenes en Honduras*, 30-31, June 2017, http://www.casa-alianza.org.hn/images/documentos/CAH.2017/1.Inf.Mensuales/6.%20informe%20mensual%20junio%202017.pdf.

[116] United Nations Special Rapporteur on the Situation of Human Rights Defenders, *They Spoke Truth to Power and were Murdered in Cold Blood* (2016), https://www.protecting-defenders.org/sites/protecting-defenders.org/files/environmentaldefenders_0.pdf.

[117] Kids in Need of Defense, *Neither Security nor Justice: Sexual and Gender-based Violence and Gang Violence in El Salvador, Honduras, and Guatemala* (May 7, 2017), https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf.

[118] Latin America Working Group Education Fund, *Between a Wall and a Dangerous Place: The Intersection of Human Rights, Public Security, Corruption and Migration in Honduras and El Salvador* (Mar. 2018), http://lawg.org/storage/documents/Between_a_Wall_and_a_Dangerous_Place_LAWGEF_web.pdf.

[119] World Bank Group: Poverty and Equity, *Latin America and The Caribbean*, Oct. 2018, http://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_LAC.pdf.

in the top third of countries in the region with the highest poverty rates.[120] Incidents of coffee blight and droughts in the region have also increased food insecurity, malnutrition, and led to outwards migration.[121]

To conclude, the root causes of the forced migration from Guatemala, Honduras, and El Salvador are complex and inter-related. Poverty, citizen insecurity, corruption, and impunity do not exist in isolation from each other, but rather reinforce each other and all contribute to an individual's decision to leave their home country and seek international protection.

7. BORDER COMMUNITIES

Impact on border communities

"The traditions of the oppressed teach us that the state of emergency in which we live is not the exception, but the rule" (Walter Benjamin, Theses on the Philosophy of History, Thesis VIII)[122]

The proposed rule issued by DHS and HHS has a direct and disproportionate impact on communities in the U.S.-Mexico border region, which deepens the persistent human rights crisis that has characterized this region. This crisis reflects the intensification of immigration enforcement and criminalization of migrants under the Trump administration through the border wall, "Zero Tolerance", family separation, and related forms of deterrence and punishment of asylum seekers, including "turn-backs" at ports of entry and bridges.[123] All of this is what the proposed rule refers to as the need to align approaches to the detention of families with a "sustainable operational model of immigration enforcement".[124]

The draft rule in effect thus seeks to transform recurrent policies and practices of family separation into a policy of indefinite family detention. This approach violates both U.S. law and internationally recognized human rights standards. It also further undermines the quality of life and security of border communities, which has been eroded since the militarization of the border was first imposed in El Paso, Texas in 1993 through "Operation Blockade", and in 1994 in San Diego, California through "Operation Gatekeeper".[125]

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[120] *Ibid.*

[121] World Food Programme, *Food Security and Emigration: Why people flee and the impact on family members left behind in El Salvador, Guatemala and Honduras* (Aug. 2017), https://docs.wfp.org/api/documents/WFP-0000022124/download/?_ga=2.213960087.102193405.1503476858-197666741.1485441955; Carrie Seay-Fleming, "Beyond Violence: Drought and Migration in Central America's Northern Triangle," New Security Beat, The Wilson Center, Apr. 12, 2018, https://www.newsecuritybeat.org/2018/04/violence-drought-migration-central-americas-northern-triangle/.

[122]Walter Benjamin, *Theses on the Philosophy of History, Thesis VIII*, https://www.sfu.ca/~andrewf/CONCEPT2.html

[123] Hope Border Institute, *Sealing the Border: The Criminalization of Asylum Seekers in the Trump Era* (2018), https://docs.wixstatic.com/ugd/e07ba9_909b9230ae734e179cda4574ef4b6dbb.pdf; Amnesty International, *You Don't Have Any Rights Here: Illegal Push-backs, Arbitrary Detention, and Ill-Treatment of Asylum Seekers in the United States* (2018), https://www.amnestyusa.org/wp-content/uploads/2018/10/You-Dont-Have-Any-Rights-Here.pdf.

[124] 83 FR 45487.

[125] *See, e.g.*, Border Network for Human Rights et al, U.S.-Mexico Border Policy Report (Nov. 2008), https://law.utexas.edu/humanrights/borderwall/communities/municipalities-US-Mexico-Border-Policy-Report.pdf; Jeremy Slack et al, The Geography of Border Militarization: Violence, Death, and Health in Mexico and the United

This proposed rule is also the latest example of the U.S.-Mexico border being used as a laboratory for testing unjust approaches to U.S. immigration policy, which are first deployed there and then weaponized and applied on a national scale. Key examples of this, as referenced above, include the militarization of the border in El Paso and San Diego, which set the processes in motion that have culminated in the push for the expansion of the border wall, and the testing of family separation as a practice in the El Paso sector between July and November 2017,[126] which laid the basis for its implementation on a national scale between April and June 2018.

Another recent example is the opening of the Tornillo "tent city" detention facility (35 miles east of El Paso, in the desert) for unaccompanied minors at the height of the family separation crisis in June, and its recent expansion to hold over 1,600 migrant youth - the single largest such site in the U.S. - as a pilot of the kinds of "exceptional" measures that would be authorized pursuant to the proposed rule.[127] Moreover, Tornillo is exempt from precisely the same kind of licensing requirements that the proposed rule seeks to prevent from being applied to Office of Refugee Resettlement (ORR) facilities whenever the agency can claim an emergency or influx under extremely broad definitions, as well as those licensing requirements the rule seeks to prevent being applied to "family residential centers".[128]

All of this exemplifies the recurrent tendency in the U.S. immigration policy debate for the border region to be positioned as a pretext for the intensification of measures in service to "border security" or "national security", as a trade-off for supposed concessions such as the extension of DACA or other steps towards legalization. A very different calculus would apply if the human rights, safety, and health of border communities were put at the center of such debates, rather than at their periphery. Instead, the most salient tendency which predominates in U.S. immigration enforcement is to extend the current model prevalent at the border to the rest of the country and to national policy as a whole, thereby eroding respect for rights and the rule of law throughout the nation at the expense of its most vulnerable sectors.

8. RACIAL JUSTICE

States, Mar. 2016, https://las.arizona.edu/sites/las.arizona.edu/files/The_Geography_of_Border_Militarization_V%20(2).pdf; Douglas S. Massey et al, Why Border Enforcement Failed, American Journal of Sociology, Mar. 2016, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5049707/.

[126] *See Sealing the Border*, p. 12-13, Appendix 3; and *You Don't Have Rights Here*, p. 29, 42-43; *see also* Maria Sacchetti, *Washington Post*, "Top Homeland Security officials urge criminal prosecution of parents crossing border with children", https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a-3b1697adcc2a_story.html?noredirect=on&utm_term=.d8b682c5fa9c.

[127] 83 FR 45507, 45530-31; *see also* Caitlin Dickerson, *The New York Times*, "Migrant Children Moved Under Cover of Darkness to a Texas Tent City": Sept. 30, 2018, https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html; The New York Times Editorial Board, *The New York Times*, "Hundreds of Children Rot in the Desert," Oct. 1, 2018, https://www.nytimes.com/2018/10/01/opinion/migrant-children-tent-city-texas.html; Kristen Torres, First Focus, "Inside the Tornillo Shelter for Unaccompanied Children", https://firstfocus.org/blog/inside-the-tornillo-shelter-for-unaccompanied-children.

[128] 83 FR 45486, 45507, 45530-31.

The proposed regulations do not "implement" the *Flores* Settlement's terms; instead, they undermine the critical protections the Settlement guarantees to children held in immigration prison. This is not the first time that an administration has attempted to enact punitive immigration policy on the basis of fear, xenophobia, and scapegoating. Rather, this latest policy proposal is only the most recent step in furthering the white supremacist goals of a coalition of anti-immigrant policy think tanks with acolytes in the President's Administration.[129]

A core goal of the Federation for American Immigration Reform (FAIR) and other powerful anti-immigrant coalition organizations[130] has been to strip any and all rights to due process from immigrants contesting their deportation. It should come as no surprise that when given basic resources – a lawyer[131], access to a way to collect evidence[132], and, most importantly, *time* to put together their case[133] – migrants in removal proceedings fare better in their pursuit of relief from deportation.[134] Anti-immigrant nativists identified this logical result of fair process as a "loophole" as early as 1986 when a FAIR board member, Roger Connor, wrote that FAIR should shift focus to "[c]los[ing] the loopholes which give illegals rights to . . . lengthy bureaucratic procedural rights."[135] The proposed regulations serve exactly this purpose: to make the Department of Health and Human Services both jailer and judge, removing any meaningful review authority or time limits on a child's detention.[136] The detention preference is further entrenched through permission for non-medical DHS enforcement officers to use their best guess in concluding a child's age to be over 18, leading to that child being incarcerated in adult detention without hearing or review.[137] Eviscerating procedures that ensure the law is applied correctly and fairly disproportionately

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[129] *See* Innovation Law Lab, "Sessions, Connections and Bias," https://innovationlawlab.org/sessions-connections/; The Southern Poverty Law Center, *The Trump administration's 'public charge' policy is the latest of many that reflect the playbook of anti-immigrant hate groups* (Oct. 1, 2018), https://www.splcenter.org/hatewatch/2018/10/01/trump-administrations-public-charge-policy-latest-many-reflect-playbook-anti-immigrant-hate.

[130] Southern Poverty Law Center, *Anti-Immigrant: Extremist Files*, https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-immigrant.

[131] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U.Penn. L.R. 1, 34-35, Fig. 8 (2015), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review (discussing the disparity in representation rates between detained and non-detained individuals, showing that non-detained respondents were able to secure legal counsel on average 68% of the time, while detained respondents were only able to secure legal counsel 36% of the time).

[132] *See* Julia Harumi Mass & Carl Takei, American Civil Liberties Union, *Forget about calling a lawyer or anyone at all if you're in an immigration detention facility* (June 15, 2016), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/forget-about-calling-lawyer-or-anyone-all-if (describing the complicated detention center phone system, including the inability to leave a voice mail, and financial barriers to making a telephone call out of an immigrant detention center and the impact on a detainee's ability to collect evidence).

[133] Eagly at 33, Fig. 7 (showing a marked difference in availability of continuances where the detainee is detained versus non-detained).

[134] On average, a respondent who was never detained and has legal counsel is thirty times more likely to obtain relief from deportation than a detained respondent without legal counsel. Eagly at 50, Fig. 14. Moreover, a respondent who was never detained is still three times more likely to obtain relief than a represented respondent in detention. *Id.* Detained respondents appear without presentation approximately 86% of the time. *Id.* at 36.

[135] Southern Poverty Law Center, *'WITAN Memo' II*, https://www.splcenter.org/fighting-hate/intelligence-report/2015/witan-memo-ii (publication of a July 11, 1986 memo from Roger Conner to the FAIR Board of Directors).

[136] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 7, 2018), proposed 45 CFR 410.810.

[137] *Id.*, proposed 8 CFR 236.3(d).

impacts immigrant communities of color, especially Central Americans, who are detained at high rates.[138] Research has further shown that "availability of detention and deportation can incentivize law enforcement to engage in racial profiling of the Latino community."[139]

An outright attack on child migrants is a newer feature in the nativist immigration policy agenda.[140] However, the blatant failure to provide for the particular vulnerabilities of migrant children is nothing new, and the battle to ensure that children's rights are respected has progressed in-step with the modern anti-immigrant movement. In 1985, the same year that a fifteen-year-old girl named Jenny Lisette Flores arrived in the United States having fled civil war in El Salvador[141], John Tanton founded the Center of Immigration Studies (CIS), an offshoot of his primary organization, FAIR, in part through donations made by the Pioneer Fund, a proudly neo-Nazi organization.[142] The *Flores* Settlement itself was signed in 1997, only one year after a victory for anti-immigrant activists in the form of the vague but draconian measures to deport purportedly "criminal" noncitizens written into the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[143] The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 provided critical safety and welfare measures for unaccompanied children in the shadow of a vigorous and hateful defeat of the DREAM Act led by CIS.[144] And now,

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[138] Eagly at 46, Fig. 13.
[139] Eagly at 46.
[140] *Compare* Federation for American Immigration Reform, *An Immigration Reform Agenda for the 109th Congress* (Jan. 2005), *archived at* https://web.archive.org/web/20050511082630/http://www.fairus.org:80/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=2613&c=12 (Jan. 2005) (not mentioning any policies related to children) *with* Center for Immigration Studies, *A Pen and a Phone*, (April 6, 2016), https://cis.org/Report/Pen-and-Phone (outlining 79 steps the incoming president can take to reduce immigration, including four directed at unaccompanied children).
[141] The *Flores* case was the result of over a decade of litigation following the government's horrific treatment of children in detention who had fled from violent Central American civil wars. *See* Women's Refugee Commission, *The Flores Settlement & Family Separation at the Border* (June 15, 2018), https://www.aila.org/File/Related/14111359ab.pdf. The treatment of Central Americans during this era spawned a number of federal court orders recognizing that the United States engaged in discrimination to the detriment of Central Americans. *See Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1511-13 (C.D. Cal. 1988) (mandating certain rights for Salvadorans after the court found evidence that the U.S. government had misled Salvadorans about their right to seek asylum, denied Salvadorans access to counsel, and misused solitary confinement); *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (nationwide class settlement following allegations that the U.S. government had exhibited bias in adjudication of asylum applications by Salvadoran and Guatemalans); *see also* Ken Sullivan & Mary Jordan, *The Washington Post*, "In Central America, Reagan remains a polarizing figure," June 10, 2004, http://www.washingtonpost.com/wp-dyn/articles/A29546-2004Jun9.html (describing U.S. involvement in Central American civil wars on the basis of fear of Soviet influence).
[142] Southern Poverty Law Center, *John Tanton is the Mastermind Behind the Organized Anti-Immigrant Movement* (June 18, 2002), https://www.splcenter.org/fighting-hate/intelligence-report/2002/john-tanton-mastermind-behind-organized-anti-immigration-movement.
[143] *See, e.g.*, Patrisia Macías-Rojas, *Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 6 J. on Migration and Human Security 1 (2018) (describing the evolution of Democratic "tough-on-crime" legislation as it began to intersect with the discourse on unauthorized migration).
[144] Center for Immigration Studies, *Immigration, Mainstream Media, and the 2008 Election* (Dec. 8, 2007), https://cis.org/Report/Immigration-Mainstream-Media-and-2008-Election-Updated-December-2008 (taking credit for reports that led to the "populist revolt" that defeated the DREAM Act); *see also* The Southern Poverty Law Center, *Center for Immigration Studies: Extremist Files* (quoting Illinois Rep. Luis Gutierrez as stating, "[CIS'] research is always questionable because they torture the data to make it arrive at the conclusion they desire, which is that immigrants are criminals and a burden on the U.S. and our economy. It is the worst kind of deception.").

against the backdrop of children either being ripped from their parents' arms,[145] spirited to a tent city in Tornillo, Texas,[146] or otherwise indefinitely incarcerated with their parents at a family detention center,[147] the Trump administration moves to gut *Flores* in an attempt to strip away even the most basic procedural safeguards and ramp up deportations of primarily Central American immigrants.[148]

Frighteningly, the proposed regulations double down on family detention, removing any shred of oversight through DHS granting itself licensing and inspection authority, and by creating a regulatory hook for indefinite detention of children with their parents.[149] Family detention centers overwhelmingly incarcerate Central American families;[150] considering the administration's open hostility to migrants from Central America,[151] it is indisputable that the burden of this closed system will fall on children from countries with the highest murder rates in the world.[152] These proposed regulations, shielding the administration's actions from view and scrutiny, are written with the intent and impact of directly harming migrant children,[153] specifically those from Central America, under a perverse theory of

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[145] *See Ms. L v. ICE*, No. 18-cv-0428 at 2 (S.D. Cal. June 26, 2018) (order granting plantiffs' motion for classwide preliminary injunction) ("Over the ensuing weeks, hundreds of migrant children were separated from their parents, sparking international condemnation of the practice.").

[146] Molly Hennessy-Fiske, *Los Angeles Times*, "Trump administration transfers hundreds of migrant children to border tent camp," Oct. 3, 2018, http://www.latimes.com/nation/la-na-texas-tornillo-20181003-story.html.

[147] Tal Copan, *CNN, 'I wouldn't wish it even on my worst enemy': Reunited immigrant moms write letters from detention*, Sept. 30, 2018, https://www.cnn.com/2018/09/30/politics/separated-mothers-reunited-letters/index.html; John Burnett, *NPR*, "Detained fathers turn to hunger strike," Aug. 2, 2018, https://www.npr.org/2018/08/02/634909493/detained-fathers-turn-to-hunger-strike.

[148] Even with the full force of the Settlement terms in place, the government has continually attempted to undermine it and carve out categories of children who it believes are not included within its protective language. *See* American Civil Liberties Union, *ACLU challenges prison-like conditions at Hutton Detention Center* (Aug. 27, 2007), https://www.aclu.org/aclu-challenges-prison-conditions-hutto-detention-center; *In Re Hutto Family Detention Center*, No. 07-ca-164 (Aug. 26, 2007) (settlement agreement); *see also* Stephen Manning, Innovation Law Lab, *Ending Artesia*, (Jan. 2015), https://innovationlawlab.org/the-artesia-report. American Immigration Lawyers Association, *Documents Relating to Flores v. Reno Settlement Agreement on Minors in Immigration Custody* (updated Sept. 7, 2018), https://www.aila.org/infonet/flores-v-reno-settlement-agreement.

[149] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 7, 2018), proposed 8 CFR 236.3(b) and 8 CFR 236.3(j).

[150] In the first 10 months of 2018, approximately 90% of families in the South Texas Family Residential Center, the family detention center located in Dilley, Texas, were from the Northern Triangle of Central America. Data made available by Katy Murdza, Advocacy Coordinator of the Dilley Pro Bono Project.

[151] Southern Poverty Law Center, *Bad Hombres?* (Oct. 2, 2018), https://www.splcenter.org/20181002/bad-hombres; Southern Poverty Law Center, *Trump and his troll army declare war on 'caravan' of migrants fleeing persecution*, (Apr. 2, 2018), https://www.splcenter.org/hatewatch/2018/04/02/trump-and-his-troll-army-declare-war-caravan-migrants-fleeing-persecution.

[152] The last year of recorded data by the U.S. was 2016; at that time, El Salvador had the highest murder rate at a rate of about 82 per 100,000 citizens; Honduras followed closely with a rate of about 57 per 100,000 citizens. United Nations Office on Drugs and Crime, *Intentional Homicide Victims*, https://dataunodc.un.org/crime/intentional-homicide-victims.

[153] Julie M. Linton, Marsha Griffin & Alan J. Shapiro, American Academy of Pediatrics, *Detention of Immigrant Children* (Mar. 2017) ("Young detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school. Qualitative reports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems. Additionally, expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children."); DHS Advisory Committee on Family Residential Centers, *Report of the DHS Advisory Committee on Family Residential Centers* (Sept. 30, 2016), https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf (established under the

deterrence that has been both proven ineffective[154] and decried as unlawful by a federal judge.[155] They undermine the very object of a contract the government willingly signed twenty years ago and insult the dignity of the children the *Flores* Settlement was designed to protect.

9. GENDER-BASED VIOLENCE

I. Prolonged incarceration re-traumatizes and delays healing for mothers and children fleeing gender-based violence.

According to the *Flores Settlement Agreement*, the government must minimize the frequency and duration of incarceration of children. If incarceration is deemed necessary as a last resort, the government must maximize children's well-being while in custody. Contrary to the *Agreement*, however, the proposed rule permits prolonged incarceration of children, including those arriving with their parents, and imposes very narrow criteria for release.

Many asylum seeking mothers and children who flee to the US have survived horrific violence such as domestic and child abuse, rape, sexual slavery, and human trafficking. In one example, an 11-year-old girl from Mexico named Sophia (pseudonym) found her mother lying unconscious in a pool of blood after a brutal attack by her stepfather. Sophia bravely called for help and, in retaliation, her stepfather violently raped her, causing her to become pregnant. She gave birth at age 12. Survivors of such abuses overwhelmingly suffer Post-Traumatic-Stress-Disorder (PTSD) as a result. Trauma can manifest in children as chronic anxiety, depression, and sleep and digestive disturbances, which in turn cause developmental delays physically, cognitively, and emotionally. Compounding this trauma are the profoundly damaging effects of incarceration in and of itself, on both mothers and children. Experts are unanimous that children should never be unnecessarily incarcerated even when held along with their parents. According to the American Academy of Pediatrics, "[t]he act of detention or incarceration itself is associated with poorer health outcomes, higher rates of psychological distress, and suicidality making the situation for already vulnerable women and children even worse."[156]

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authority of then-Secretary Jeh Johnson, the committee recommended operationalizing "the presumption that detention is generally neither appropriate nor necessary for families – and that detention or the separation of families for purposes of immigration enforcement or management, or detention is never in the best interest of children.").

[154] *See, e.g.*, Tom K. Wong, Center for American Progress, *Do Family Separation and Detention Deter Migration?* (July 24, 2018), https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/ (using DHS data to show that neither detention nor separation deter migration patterns at the southern border).

[155] *R.I.L.R. v. Johnson*, 80 F.Supp.3d 164, (D.D.C. 2015) (granting plaintiffs' preliminary injunction on the basis of DHS' policy to primarily consider deterrence of future migrant in its decisions whether to release Central American mothers and children from custody).

[156] Letter to Secretary Jeh Johnson, July 24, 2015, https://www.aap.org/en-us/advocacy-and-policy/federaladvocacy/Documents/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final.pdf; Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003) , https://s3.amazonaws.com/PHR_Reports/persecution-to-prison-US-2003.pdf; *see also* A. S. Keller, et al, *The Mental Health of Detained Asylum Seekers*, 362 The Lancet 1721 (2003); Tahirih Justice Center, *Righting the Wrong: Why Detention of Asylum-Seeking Mothers in America Must End Now* (Oct. 28, 2015), https://www.tahirih.org/wp-content/uploads/2015/10/Righting-the-Wrong-Why-Detention-of-Asylum-Seeking-Mothers-and-Children-Must-End-Now-Web-Copy.pdf.

The proposed rule's stricter standards for parole will further exacerbate survivors' existing trauma.[157] In practice, DHS will have broad discretion to apply the narrow new standard, leaving mothers and children with minimal hope of release while awaiting lengthy adjudication[158] of complex, evidence-driven asylum claims. DHS acknowledges in the NPRM that the new standard will lead to release of fewer families and increased taxpayer costs.

DHS asserts that the rule reflects its duty to treat children with "dignity, respect, and special concern for their particular vulnerability as minors."[159] Yet, locking up children is patently inhumane, along with forcing traumatized mothers to care for their children in an intimidating and punishing environment with little if any access to the outside world. Meaningful access to trauma-informed mental health care, particularly in cases of sexual assault, is critical to ensure that both adult and child survivors heal and ultimately achieve self-sufficiency. The longer survivors go without such desperately needed services, the more challenging the healing process may be.[160] Finally, the power dynamics inherent in any custodial setting are especially damaging to survivors of gender-based violence. These dynamics are reminiscent of the power and control maintained by traffickers and abusers to keep survivors in a chronic state of fear, submission, and helplessness.[161]

II. DHS' proposed federal licensing scheme for so-called "Family Residential Centers" - jails for immigrant families – will not provide adequate oversight and standards of care for survivors.

While the rule proposes a federal licensing scheme for immigration prisons, it does not explain who will develop such a scheme. At a minimum, the rule should prohibit DHS from taking on this role. The rule also requires "third party oversight of compliance" with the scheme, but likewise does not describe the weight of authority and level of objectivity of the third party responsible for oversight.[162] These are crucial details given that DHS has been accused of harming children in its custody, including committing

[157] 83 FR 45495.
[158] On average, immigration cases are heard within 1.5 - 2 years; wait times in several major cities are averaging almost 4 years as of June 2018; *see* "New Judge Hiring Fails to Stem Rising Immigration Court Backlog," June 7, 2011, http://trac.syr.edu/immigration/reports/250/.
[159] 83 FR 45495
[160] Elyssa Barbash, PhD., *Psychology Today*, "Overcoming sexual assault: symptoms and recovery," Apr. 18, 2017, https://www.psychologytoday.com/us/blog/trauma-and-hope/201704/overcoming-sexual-assault-symptoms-recovery: "From a clinical perspective, the amount of suffering and distress is substantially reduced when a person seeks treatment earlier on."
[161] Women's Refugee Commission, *Locking Up Family Values Again* (May 2016), https://www.womensrefugeecommission.org/resources/document/1085-locking-up-family-values-again; Tahirih Justice Center interview with Jonathan Ryan, Executive Director of RAICES, conducted in June 2015.
[162] DHS's current inspections and compliance processes for immigration detention are woefully inadequate and result in death and grave harm to those the agency detains. Nothing in the NPRM indicates that the proposed oversight scheme would correct the agency's ongoing compliance failures. *See, e.g.*, DHS Office of the Inspector General (OIG), ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements, OIG -18-67, June 26, 2018, https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf; DHS OIG, Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California, OIG 18-86, Sept. 27, 2018, https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf; Spencer Woodman and Jose Olivares, *The Intercept*, Immigrant Detainee Called ICE Help Line Before Killing Himself in Isolation Cell," Oct. 8, 2018, https://theintercept.com/2018/10/08/ice-detention-suicide-solitary-confinement/.

sexual, verbal, and physical assaults, depriving children of food and water, and subjecting them to extreme temperatures.[163] Regardless, no amount of oversight can alleviate the traumatizing nature of imprisonment itself for children and survivors of gender-based violence as explained above.

10. LGBTQ

As an organization that is committed to furthering the well-being and equal rights of lesbian, gay, bisexual, and transgender (LGBT) people, we are concerned that the proposed rule will put LGBT immigrants, including LGBT immigrant children, at increased risk of discrimination and abuse. Furthermore, the proposed rule will endanger their lives by negatively impacting their immigration cases for reasons unrelated to the strength of their cases.

The proposed rule would result in the prolonged detention of LGBT people in facilities where they do not have basic protections from abuse or access to necessary medical care

The proposal to make family detention facilities licensed facilities for holding children in §236.3 (b)(9) and (h) would lead to the prolonged detention of LGBT immigrants and their families. Immigration detention is extremely unsafe for LGBT immigrants. Numerous studies demonstrate that LGBT people in detention are at heightened risk of verbal and physical abuse, harassment, sexual violence, and inadequate access to necessary medical care.[164] Although LGBT people make up less than one percent of people in immigration detention each year, they account for 12 percent of reported victims of sexual abuse and assault in ICE detention.[165]

Immigration and Customs Enforcement (ICE) uses solitary confinement as a method to protect LGBT people in detention from abuse, however, this is inappropriate and causes further harm. Prolonged solitary confinement is demonstrated to cause irreparable psychological harm and the United Nations Special Rapporteur on Torture has reported on ICE's use of solitary confinement for LGBT immigrants in detention as a violation of U.S. treaty obligations.[166]

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[163] Blake Ellis, Melanie Hicken, Bob Ortega, *CNN*, "Children allege grave abuse at migrant detention facilities," June 21, 2018, https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html; University of Chicago Law School International Human Rights Clinic *et al.*, *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* (May 2018), https://www.dropbox.com/s/lplnnufjbwci0xn/CBP%20Report%20ACLU_IHRC%205.23%20FINAL.pdf?dl=0; Guillermo Contreras, *My San Antonio*, "Complaint: Women at Karnes Immigration Facility are Preyed upon by Guards," Oct. 3, 2014, http://www.mysanantonio.com/news/local/article/Complaint-Women-at-Karnes-immigration-facility-5797039.php.

[164] Sharita Gruberg, Center for American Progress, *Dignity Denied: LGBT Immigrants in U.S. Immigration Detention* (2013), https://www.americanprogress.org/issues/immigration/reports/2013/11/25/79987/dignity-denied-lgbt-immigrants-in-u-s-immigration-detention/; Shana Tabak, Rachel Levitan, *LGBTI Migrants in Immigration Detention: a Global* Perspective, Harv. J.L. & Gender 1 (2014), http://harvardjlg.com/wp-content/uploads/2012/01/2014.1.pdf; Lauren Zitsch, "Where the American Dream Becomes a Nightmare: LGBT Detainees in Immigration Detention Facilities, 22 Wm. & Mary J. Women & L. 105 (2015-2016).

[165] Letter from Congresswoman Kathleen Rice to the Department of Homeland Security Secretary Kirstjen Nielsen (May 30, 2018).

[166] U.N. General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, addendum observations on communications transmitted to Governments and replies received*, ¶178 U.N. Doc. A/HRC/22/53/Add.4 (March 12, 2013).

The withholding of necessary medical care as well as provision of inadequate medical care for LGBT immigrants in detention is well-documented. The worst reported result of this was the recent death of transgender asylum seeker Roxana Hernandez from complications related to HIV after being detained by ICE. LGBT people living with HIV face delays in receiving the life-saving treatment they rely on.[167]

Rather than taking steps to ensure LGBT people are not arbitrarily subjected to threats to their safety and health, the proposed rule does exactly the opposite. Under the proposed rule, ICE would be able to detain LGBT people and their families for prolonged periods of time and, by lengthening the time they are detained and exposed to risks to their safety, increasing their risk of abuse.[168]

The proposed rule would allow the government to detain LGBT people and their families for prolonged periods of time in facilities that are inappropriate for housing children.

The Flores Settlement Agreement requires facilities housing children to be licensed by the state the facility is in. Section 236.3(b)(9) of the proposed rule seeks to bypass this basic child welfare requirement by establishing what it purports to be the equivalent. Despite the proposed rule's attempt to establish a comparison, the licensing regime it proposes is in no way comparable to the rigorous licensing standards state child welfare agencies use. Family detention facilities applying the government's standards were found to not be in compliance with minimum child welfare standards in the states the facilities are located in.[169] A cursory checklist inspection of whether a facility is in compliance with the inadequate standards that already in theory govern family detention facilities does not fulfill the letter, or even the spirit, of the Flores Agreement.

The proposed rule's "emergency influx" definition would lead to the prolonged detention of vulnerable LGBT youth in extremely unsafe CBP hold facilities.

The rule proposes defining "influx" to mean just 130 minors in custody eligible for placement, without regard to actual capacity or need for emergency protocols. Even limiting time in CBP facilities to under 72 hours, 2016 report on sexual abuse in CBP facilities found that children accounted for 60 percent of reported victims of sexual abuse.[170] These facilities are entirely inappropriate for holding children and the time children are held in these facilities should be limited, not expanded.

The proposed rule would put LGBT youth in harm's way by subjecting them to more restrictive custody settings, increasing their vulnerability to abuse.

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[167] John Washington, *The Nation*, "An HIV-Positive Gay Asylum Seeker Staged a 7-Day Hunger Strike in an ICE Detention Facility," Dec. 12, 2017, https://www.thenation.com/article/an-hiv-positive-gay-asylum-seekerstaged-a-seven-day-hunger-strike-in-an-ice-detention-facility/; Shana Tabak, Rachel Levitan, *LGBTI Migrants in Immigration Detention: a Global* Perspective, Harv. J.L. & Gender 1 (2014), http://harvardjlg.com/wp-content/uploads/2012/01/2014.1.pdf.

[168] National Prison Rape Elimination Commission, National Prison Rape Elimination Commission, https://www.ncjrs.gov/pdffiles1/226680.pdf (2009).

[169] Letter from Matthew Jones, Dir. Pa. Dep't of Human Serv. to Diane Edwards, Exec. Dir. Berks County Comm'rs (Jan. 27, 2016).

[170] U.S. Customs and Border Prot., *Ann. Rep. on Sexual Abuse and Sexual Assault by CBP Emp.*, (2016).

Proposed sections 8 CFR 236.3(c), 8 CFR 236.3(D), and 8 CFR 236.3(E) would cause minors to lose the protections of the Trafficking Victims Protection Reauthorization Act and subject them to the harms LGBT people face in ICE detention facilities.[171] We are also concerned with 236.3(i)(1) inclusion of "chargeable" offenses as a reason to place non-UAC minors and 45 CFR 410.203 for UACs in state or county juvenile detention facilities or other secure facilities. Unlike in the FSA, which includes exceptions for isolated offenses that did not involve violence and petty offenses, the proposed rule's enumeration of vague offenses could provide DHS with an excuse to subject LGBT immigrant youth and immigrant youth living with HIV to placement in secure facilities.[172] Due to negative stereotypes about LGBT people as being more likely to engage in coercive sexual conduct, LGBT youth are more likely than their straight and cisgender counterparts to face criminal consequences for consensual sexual activity and in the juvenile justice system LGBT youth are sometimes even classified as sex offenders at intake.[173] We are concerned that the proposed rule's inclusion of "chargeable" offenses will subject LGBT youth to placement in secure facilities where they are unsafe.

Including "engagement in unacceptably disruptive behavior that interferes with the normal functioning" of the shelter as a chargeable offense that would allow for placement in a secure facility and adding "displays sexual predatory behavior" to the list of behaviors that may be considered unacceptably disruptive is also concerning.[174] Given what we know of discrimination against LGBT youth and assumptions of their sexual orientation and gender identity as being predatory, we are very concerned that this provision could be used to funnel LGBT youth in more secure placements where they are subjected to higher risks of abuse. According to the Bureau of Justice Statistics, youth who identified as lesbian, gay, bisexual, or "other" reported a rate of sexual victimization by other youth in juvenile detention facilities at a rate of nearly 7 times higher than straight youth.[175] Preventing LGBT youth from being moved to more secure facilities is an important factor in protecting them from sexual violence. We are concerned that the proposed rule would instead put LGBT youth in more restrictive settings, increasing their vulnerability to abuse.

The proposed rule would endanger LGBT immigrants and their families by arbitrarily putting them at a disadvantage in seeking protection.

Immigrants are less likely to win their immigration cases when they are detained.[176] Not being detained improves an asylum applicant's ability to gather evidence and document the persecution they escaped and secure counsel to help them obtain asylum or related protection.[177] For LGBT people, who face

[171] National Prison Rape Elimination Commission, National Prison Rape Elimination Commission (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf.
[172] Flores Settlement Agreement paragraph 21(A)
[173] Matayoon Majd, Jody Marksamer, and Carolyn Reyes, *Hidden Injustice: Lesbian, gay, bisexual, and transgender youth in juvenile courts* (2009).
[174] 45 CFR § 410.203
[175] U.S. Dep't of Justice Bureau of Justice Statistics, *Sexual Victimization in Juvenile Facilities Reported by Youth* (2012), https://www.bjs.gov/content/pub/pdf/svjfry12.pdf.
[176] New York Immigrant Representation Study, *Accessing Justice: the Availability and Adequacy of Counsel in Immigration Proceedings* (2011), https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1551&context=faculty.
[177] Anneliese Hermann, Center for American Program, *Asylum in the Trump Era* (2018).

criminalization and persecution in much of the world, losing their case could mean death. The impact of detaining LGBT asylum seekers for longer periods of time is too dangerous to disregard. A study from the Center for American Progress found that, controlling for all other factors, being detained made LGBT asylum seekers with excellent legal counsel over 10 percent less likely to win their cases than their counterparts who were not detained.[178] In other words, detaining LGBT asylum seekers makes them less likely to receive protection, regardless of the strength of their asylum case.

Given that freedom from detention is so critical to being granted asylum, the proposed rule's expansion of the time families spend in detention as well as the increased ease of the proposed rule's movement of unaccompanied children to adult detention facilities unnecessarily puts the lives of LGBT asylum seekers in jeopardy.

11. JUVENILE JUSTICE

Harms of Prolonged Detention in Secure Juvenile Detention Centers

In this NPRM both DHS and HHS propose regulations that would increase (1) the number of children and youth subjected to secure detention, and (2) the length of time children and youth would be subjected to secure detention.[179] Troublingly, the NPRM lacks any meaningful analysis of the dire consequences of such detention for children and society, rendering hollow the agencies' claims that their proposed changes reflect any "special concern" for children's "particular vulnerability".[180]

Research has demonstrated the profound and negative impact of secure detention on young people in a wide range of areas.[181] In a 2017 study published in *Pediatrics*, researchers found that 12 years after being released from detention, just one in five male youth and one in two female youth had achieved a majority of key measures of well-being in domains such as educational attainment, interpersonal functioning, and parenting responsibility.[182] Youth who are incarcerated may experience new mental health problems or see a worsening of existing mental health conditions[183] and can be more likely to engage in self-harm and suicide.[184]

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[178] Sharita Gruberg and Rachel West, *Humanitarian Diplomacy: the U.S. Asylum System's Role in Protecting Global LGBT Rights* (2015), https://www.americanprogress.org/issues/lgbt/reports/2015/06/18/115370/humanitarian-diplomacy/.

[179] First, DHS's proposal to substitute its own family residential standards where other licensing is not available will remove the current limitation under the Flores Settlement Agreement that most children may only be held temporarily in unlicensed, secure facilities, freeing DHS to hold children in its so-called family residential centers, which constitute secure detention, indefinitely. *See* 83 FR 45525. Second, HHS's proposal includes significant and unjustified expansion of the qualifying circumstances for placing an unaccompanied child in secure ORR custody, which are juvenile jail settings. *See* 83 FR 45530. This is by no means an exhaustive list, as demonstrated by the additional harms posed in 83 FR 45507, *see* **Releasing a UAC from ORR custody (sponsors)**.

[180] Proposed 8 CFR § 236.3(a)(1), 83 FR 45505

[181] Barry Holman and Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), http://www.justicepolicy.org/research/1978.

[182] Karen M. Abram et al., *Sex and Racial/Ethnic Differences in Positive Outcomes in Delinquent Youth After Detention: A 12-Year Longitudinal Study*, 171 JAMA PEDIATRICS, 123, 123–132 (2017).

[183] *See, e.g.*, Javad H. Kashani et al., *Depression Among Incarcerated Delinquents*, 3 PSYCHIATRY RESOURCES 185, 185-191 (1980) (stating that 1/3 of youth who had been incarcerated and diagnosed with depression noted that the onset of their depression occurred after their incarceration began); Christopher B. Forrest et al., *The Health Profile*

The negative impact of detention on individual young people extends to broader society. Youth who have been incarcerated have lower future earning potential and are less likely to remain in the workforce as taxpayers.[185] Moreover, placement in detention significantly lowers a youth's likelihood of attending and graduating from school, with studies finding that the majority of youth who have been incarcerated do not go back or end up dropping out of school after their return to the community.[186] Importantly, the harms of detention on young people's education and employment prospects have been documented even when comparing youth with similar backgrounds who are not placed in detention. For example, a 2013 study released by the National Bureau of Economic Research found that placement in detention "results in large decreases in the likelihood of high school completion and large increases in the likelihood of adult incarceration" when compared with similarly situated youth who are not detained.[187]

Simply put, the use of detention carries significant and negative consequences for young people and society at large. This is one of the primary reasons that cities, states, and counties throughout the country have significantly reduced the inappropriate and unnecessary use of secure detention for young people in public systems, specifically the juvenile justice system.[188] These jurisdictions have achieved better outcomes for young people and their communities by avoiding the use of detention for youth who do not require it and by identifying alternatives to incarceration for young people who require some degree of supervision or custody.

Cost Effectiveness of Alternative Programs v. Prolonged Juvenile Detention

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of Incarcerated Male Youths, 105 PEDIATRICS 286, 286-291 (2001) (stating that the transition into incarceration could be responsible for some of the increase in mental illness in detention). *See also* D.E. Mace et al., *Psychological Patterns of Depression and Suicidal Behavior of Adolescents in a Juvenile Detention Facility*, 12 J. OF JUV. JUST. AND DETENTION SERVICES 18, 18-23 (1997) (suggesting that poor mental health combined with living conditions youth experience while incarcerated makes it more likely for them to engage in self-harm and suicide).

[184] *Id.*

[185] Barry Holman and Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), http://www.justicepolicy.org/research/1978, at p. 2.

[186] *Id.* at 9 (stating that 60% of youth who have been incarcerated do not go back or end up dropping out of school altogether within five months of their return).

[187] Anna Aizer and Joeseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned* Judges, 2013 Nat'l Bureau of Econ. Res. Working Paper Series (2013).

[188] *See* Richard A. Mendel, *Two Decades of JDAI: From Demonstration Project to National Standard* (2009), https://www.aecf.org/m//resourcedoc/aecf-TwoDecadesofJDAIfromDemotoNatl-2009.pdf.
See also Josh Weber et al., Georgetown University Center for Juvenile Justice Reform, *Transforming Juvenile Justice Systems to Improve Public Safety and Youth Outcomes* (2018), http://cjjr.georgetown.edu/wp-content/uploads/2018/05/Transforming-Juvenile-Justice-Systems-to-Improve-Public-Safety-and-Youth-Outcomes.pdf; The Pew Charitable Trusts, *Re-Examining Juvenile Incarceration* (April 2015), https://www.pewtrusts.org/-/media/assets/2015/04/reexamining_juvenile_incarceration.pdf; Tony Fabelo et al., Council of State Governments Justice Center, *Closer to Home: An Analysis of the State and Local Impact of the Texas Juvenile Justice Reforms* (2015), https://csgjusticecenter.org/wp-content/uploads/2015/01/exec-summary-closer-to-home.pdf.

Incarceration of youth is extremely expensive – particularly when compared with alternatives that accomplish the same goals at a fraction of the cost of secure facilities.[189] In many jurisdictions, the daily cost of youth incarceration is hundreds of dollars per day[190] and hundreds of thousands of dollars per year in direct costs to taxpayers.[191] These dollar figures frequently omit the costs associated with the short and long-term negative impacts upon society that are associated with secure detention.[192] Indeed, the high costs of incarceration have made the use of cheaper, effective alternative to detention programs popular across the political aisle.[193] Those alternatives, including electronic monitoring and intensive supervision, can cost a tenth as much as an institutional placement or less.[194]

In the juvenile justice field, jurisdictions throughout the country have sharply reduced their use of incarceration in favor of cheaper and more effective alternatives to secure custody during the last several decades. For example, since 1992, the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI) has helped jurisdictions in 39 states and the District of Columbia reduce the number of youth in detention by an average of 43%.[195] These jurisdictions have achieved better public safety outcomes at lower costs through the use of effective alternatives to detention, such as foster care placements, shelter care, and community-based supervision programs.[196] These programs ensure that youth appear for scheduled court appearances while allowing them to retain the connections to school, family, and community that are vital to healthy child and adolescent development.

There is no need to reinvent the wheel here. The programs described above have a demonstrated track record of being effective, and cost-effective, in rural, suburban, and urban localities throughout the country. These same programs can and should be employed as alternatives to secure facilities here.

12. INTERFAITH

Our faithful calling

[189] Barry Holman and Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), http://www.justicepolicy.org/research/1978 at 10.
[190] Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, 2, 19 (2011), http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf (citing an American Correctional Association survey finding that the average cost of juvenile incarceration per youth was roughly $241.00 a day).
[191] Amanda Petteruti, Marc Schindler, and Jason Ziedenberg, Justice Policy Institute, *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration* (2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.
[192] *Id.*
[193] *See, e.g.*, Alex Nowrasteh, *Alternatives to Detention Are Cheaper than Universal Detention*, The Cato Institute, Cato At Liberty (June 2018), https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention; American Civil Liberties Union, *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up* (January 2014), https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigration-detention-atd.
[194] *See* Barry Holman and Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), http://www.justicepolicy.org/research/1978 at 11.
[195] The Annie E. Casey Foundation, *JDAI at 25: Insights from the Annual Results Reports* (2017).
[196] Richard A. Mendel, *Two Decades of JDAI: From Demonstration Project to National Standard* (2009), https://www.aecf.org/m//resourcedoc/aecf-TwoDecadesofJDAIfromDemotoNatl-2009.pdf.

Welcoming others and caring for the most vulnerable are part of my/our core beliefs as people of faith. I/we believe U.S policies should reflect core moral values that I/we was/were taught through my faith. Our government should provide broad protections for all children, regardless of citizenship, in the custody of the United States government.

U.S. policies on immigration and the treatment of all children should recognize the gifts, contributions, and struggles of immigrants and refugees, ensuring justice and protection for all.

Our/my faith tradition(s) have presence around the world. Through this work, we know the families and children who will be affected by this rule change. They are fleeing their communities due to violence and have faced incredible challenges in hopes of seeking protection in the United States. The rule change would hurt already vulnerable children who had hope to find a safe place in our country.

Faith and Child protection

This rule change would destroy child protection standards the U.S. government and court system established, hurting some of the most vulnerable among us. Our faith grounding has led my/our denomination to advocate for the highest child protection standards to be applied to children in U.S. custody without additional qualifiers. Our treatment of children in U.S. policy is a moral decision that speaks to who we are as a nation.

There is no reason to enact a rule change that would keep families and children in detention longer. Faith-based organizations, such as Lutheran Immigration and Refugee Service and the U.S. Conference of Catholic Bishops, have piloted community-based alternatives to detention (ATDs) that are humane, cost-effective and successful in ensuring families continue their immigration cases. Most recently, in 2013 these organizations coordinated ATDs for asylum seekers and vulnerable communities. Faith-based and secular organizations have the expertise to provide services to children and families that honor their God-given humanity and follow child protection standards while they go through their legal process.

People of faith have started ministries so that children are held in the least restrictive setting while going through their immigration process. Faithful people foster children who do not have a family member in the U.S. and become their sponsors so they can go to school, receive the mental health care they need, and be welcomed into our communities. We live out our faith in many ways. The proposed change would make it harder for our communities to walk alongside people we are called to welcome.

Faith and expanding detention

People of faith have stood strongly against family separation and family detention, regardless of administration, because it hurts some of the most vulnerable among us.

Detaining mothers and fathers with their children leads to long-term trauma for children and creates barriers to legal representation for people who should receive protection in the U.S. It is inhumane and dehumanizing to put families seeking protection in detention.

Beyond punishing children and parents who have already been through a difficult journey to arrive in the U.S., there is no reason to implement rule changes that could potentially increase the detention of children.

DHS REGULATIONS

13. PAROLE AND RELEASE FROM DHS CUSTODY

The proposed regulations seek to limit parole for accompanied children (and adults) in expedited removal

The proposed regulations impose heightened parole standards for detained individuals – both accompanied children and adults – in expedited removal proceedings. The current parole regulations allow detained individuals in expedited removal proceedings to seek parole for "urgent humanitarian reasons" or "significant public benefit" under 8 CFR § 212.5(b). In 2017, a federal district court judge ruling on the Flores Settlement Agreement found that under that provision DHS had discretion to release detained children on a case-by-case basis, including those in the expedited removal process.[197] The proposed regulations, however, limit children (and adults) in expedited removal proceedings who have not yet passed a credible or reasonable fear interview to parole under the much narrower circumstances of a medical emergency or for law enforcement purposes. *See* 8 CFR § 235.3(b)(2)(iii), (4)(ii). Given the already limited use of parole in general, the proposed regulation would further reduce the release of children from detention who pose no flight or security risk. Under this regulation, children with urgent humanitarian needs, including pregnant young women as well as children with physical disabilities, cognitive impairments or chronic medical conditions, would likely no longer qualify for parole under the exacting medical emergency standard.

The proposed regulations eliminate the requirement that DHS evaluate simultaneous release of a parent, legal guardian, or adult relative who is also detained when releasing juveniles from DHS custody

Currently, 8 C.F.R. § 236.3(b)(2) provides that, when a minor in DHS custody is authorized for release on bond, parole, or recognizance, and there is no suitable sponsor available, DHS shall evaluate, on a "discretionary case-by-case basis," the simultaneous release of a "parent, legal guardian, or adult relative in Service detention." The proposed regulations eliminate this provision entirely. Without the requirement to consider simultaneous release for parents along with their children, more children may be denied liberty as they are left in family detention for longer, or separated from their parents and placed in ORR custody.

Instead of releasing children with their parents from detention, the proposed regulations codify procedures to separate children from their parents

[197] *Flores* v. *Sessions*, No. 2:85-cv-04544 (C.D. Cal. June 27, 2017).

Under the proposed regulations when a detained parent/guardian is not released with a child who receives parole from DHS custody and no parent/guardian is available to take custody of the child, DHS may treat the child as an unaccompanied alien child (UAC), separate the child from the detained parent/guardian, and transfer the child to ORR custody to begin the process of locating a sponsor.[198] The transfer of accompanied children to ORR custody to secure their release is not required by law. DHS should instead release detained children and parents together to avoid inflicting further unnecessary trauma on children. The American Psychiatric Association has concluded that forced separation "is highly stressful for children and can cause lifelong trauma, as well as an increased risk of other mental illnesses, such as depression, anxiety, and posttraumatic stress disorder (PTSD)."[199] Further, it would delay their release and prolong their institutionalization, contrary to the regulation's purported intention to maintain family unity, and would swell an already overburdened ORR shelter system.

14. EMERGENCY AND INFLUX

Relaxing standards in times of emergency or influx

The proposed regulations provide for broad exemptions to existing child protections by expansively defining the terms "emergency" and "influx."[200] These broad definitions provide massive leeway to DHS and HHS to selectively ignore the important children's rights provisions of the regulation, essentially leaving immigration operations impacting migrant children unregulated.

The term emergency, under the proposed regulations, "means an act or event...that prevents timely transport or placement of minors or impacts other conditions" touching on the basic needs of children including the very provision of snacks and meals or prolonged detention of children in border jails.[201] The regulations propose natural disaster, facility fire, civil disturbance, medical or public health concerns in the list of examples of such events but indicate that other kinds of events might also qualify, leaving significant room for interpretation.

DHS and HHS also propose to adopt an antiquated definition of influx, a situation, according to the proposed regulations, in which there are, "at any given time, more than 130 minors or UACs eligible for placement in a licensed facility".[202] This original numerical cut off of 130 was set by the children's lawyers' and the government in the late 1990s when the then INS apprehended 1.4 million people a year.[203] Divided equally each of the almost 7,000 border agents apprehended an average of 17 people a month. In fiscal year 2017, by comparison, Border Patrol arrested a much smaller number of 310,531 people at the U.S. border, and each of the almost 20,000 agents made an average of only 1.3 arrests a

[198] Proposed regulation 8 CFR § 236.3(j)(2).
[199] The American Psychiatric Association, *APA Statement Opposing Separation of Children from Parents at the Border* (May 30, 2018), https://www.psychiatry.org/newsroom/news-releases/apa-statement-opposing-separation-of-children-from-parents-at-the-border.
[200] 83 FR 45496
[201] 83 FR 45525
[202] *Id.*
[203] In fiscal year 1997, INS apprehended 1,412,953 at the US border. United States Border Patrol, Nationwide Illegal Alien Apprehensions Fiscal Years 1925-2017, https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Apps%20FY1925-FY2017.pdf.

month. DHS and HHS disingenuously argue that they exist within a "constant state of influx" even while overall border crossings are 20 percent of what they were in the moment that term was defined in the FSA while staffing has increased by almost three times. The border is not in crisis -- except in terms of protection of vulnerable people's rights -- and DHS suffers from no shortage of resources to respond to historically low migratory flows.

Border arrests and staffing 1997, 2017

Year	1997	2017
Total border arrests[204]	1,412,953	310,531
Number of border agents[205]	6,895	19,437

Instead DHS and HHS appear to be using these proposed regulations as a means of quietly erasing the FSA's time limitations on transferring children out of DHS custody, admitting that the impact of the definitions of emergency and influx is to make ignoring limitations on transfer the "default."[206] This would continue to expose children to dangerous conditions documented repeatedly by government inspectors and outside researchers including inadequate and inappropriate food, severely cold temperatures, bullying and abuse and lack of medical care.[207] Codifying this "default," would allow the government to continue to ignore the intent of the Flores Settlement agreement, which is to protect children's rights.

Most worryingly, the language of the proposed rule also allows the government to routinely ignore standards of care included in the FSA such as the requirement that the government provide a meal or snack to a child at a certain periodicity and of certain quality while that child is detained, or the requirement to keep unaccompanied children held for periods of over a day separate from unrelated adults.[208] This expansion of the weakening of protections triggered by an emergency or influx is new and is especially worrying given the agencies' current record of failure to adhere to basic standards of child protection.[209] Constant exemption not just of the requirements to transfer children to child care facilities but to provide for their basic care while in border jails makes a mockery of the FSA's scheme.

15. INDEFINITE DETENTION OF CHILDREN AND FAMILIES ("SELF-LICENSING")

[204] United States Border Patrol, Nationwide Illegal Alien Apprehensions Fiscal Years 1925-2017, https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Apps%20FY1925-FY2017.pdf.
[205] United States Border Patrol, Border Patrol Agent Staffing by Fiscal Year, https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Staffing%20FY1992-FY2017.pdf.
[206] *See* 83 FR 45498.
[207] *See* Human Rights Watch, In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells, February 28, 2018, https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells.
[208] 83 FR 45496, 45526.
[209] *See* Human Rights Watch, In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells, February 28, 2018, https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells.

A. The Stated Purpose and Effect of the Proposed Regulations Is to Provide for *Indefinite* Detention of Children--Which is the Opposite of the FSA's Stated Purpose and Requirement of *Expeditious* Release of Children from Detention

The core principle and requirement of the FSA is that migrant children taken into detention should be released from detention as "expeditiously" as possible. The FSA provides that minors taken into custody must be "expeditiously process[ed]."[210] The Section of the FSA entitled "General Policy Favoring Release," provides clearly and unambiguously that "the INS shall release a minor from its custody without unnecessary delay" (absent certain limited circumstances).[211] Moreover, while a child is detained, the FSA requires that "the INS, or the licensed program in which the minor is placed, shall make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor...," and requires that such efforts "shall continue so long as the minor is in INS custody."[212]

The FSA requires that, within 3 (or, under certain circumstances, 5) days of a child being in federal immigration detention, the child must be released to a parent or relative, or if that is not possible then placed into a program licensed by a State child welfare agency (a "licensed program"). The FSA provides that a child cannot be held in detention in an "unlicensed program"[213] for longer than 3 days (or, under some circumstances, 5) days.[214] If the Government faces an "emergency" or a major "influx" of minor children at the border, then the 3 or 5-day timeframe does not apply and the release must be effected "as expeditiously as possible."[215] In 2014, the court acceded to the Government's request that a time period of up to 20 days be considered "expeditious" in these circumstances. The 20-day period was set based on the government's representation to the court that that is the amount of time required for the Government, "in good faith and in the exercise of due diligence," to screen family members or others to whom a child could be released.[216]

Further, under the FSA, the child's release must be to the "least restrictive setting" possible--with priority given, first, to release to a parent or other family member and then to a "licensed program" or, "when it

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[210] FSA, ¶ 12A.

[211] FSA, ¶ 14. The only exceptions to expeditious release are the unusual circumstances where there is a particular reason that detention is "required either to secure [the child's] timely appearance before the INS or immigration court, or to ensure the minor's safety or that of others." FSA, ¶ 14.

[212] FSA, ¶ 18.

[213] FSA, ¶ 6A "licensed program" is defined in the SFA as "any program, agency of organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors…and that] meets those standards for licensed programs set forth in Exhibit I [to the FSA]."

[214] FSA, ¶ 12.

[215] FSA, ¶ 12A(3). The term "emergency" is defined as follows: "[A]ny act or event that *prevents* the [transfer] within the time frame provided." The FSA provides that "such emergencies include natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies (e.g., a chicken pox epidemic among a group of minors)." The phrase "influx of minors into the United States" is defined as follows: "[T]hose circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program…, including those who have been so placed or are awaiting such placement." The FSA requires that, "[i]n preparation for an 'emergency' or 'influx,'…the INS shall have a written plan that describes the reasonable efforts that it will take to place all minors as expeditiously as possible" (including the identification of potentially available "licensed programs"). *Id.*

[216] *See* Order re Response to Order to Show Cause, *Jenny L. Flores et al. v. Loretta Lynch*, Case No. CV 85-04544 (U.S. Dist. Ct. Central Dist. Cali. Aug. 21, 2015), p. 10, https://www.aila.org/File/Related/14111359p.pdf.

appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility," then to another suitable adult or entity seeking custody of the child.[217] These provisions reflect the two basic premises of the FSA. First, pending a child's further immigration proceedings, the child should be released almost immediately to family members or other acceptable sponsors rather than held in detention. Second, if a child will remain in detention longer term (as contemplated by the FSA, because there are no family members or acceptable sponsors to whom the child can be released), then the child should not be in a federal immigration facility (*i.e.*, a facility such as an FRC--which, we note, is similar to a prison setting), but, rather, should be in a setting that is licensed by a State child welfare agency for the longer-term housing and care of children (such as a group home, foster home or juvenile delinquent facility).

By contrast, the Proposed Regulations provide for *indefinite* detention of Accompanied Children in federal immigration facilities pending resolution of the long process of their and their parents' immigration proceedings. The Proposed Regulations provide that Accompanied Children can be kept in detention in FRCs *indefinitely* during the pendency of their and their parents' immigration proceedings.[218] These regulations mirror the Government's request in [July 2017] to the *Flores* court to modify the FSA to permit detention of children for up to the entire pendency of their and their parents' immigration proceedings.[219] We note that these proceedings typically take many months and can take years.[220] The court rejected that request. Judge Gee noted that in July 2017, the government, "now seek[s] to hold minors in indefinite detention in unlicensed facilities, which would constitute a fundamental and material breach of the parties' Agreement."[221] The Government now seeks, through the Proposed Regulations that it contends materially *implement* the FSA, to accomplish the *material modification* of the FSA that the Government sought from the court and the court rejected.

B. <u>The Federal Government's Grant to Itself of a Right to *Self*-License Detention Facilities for Prolonged Detention of Children Eviscerates the Core Protections of the FSA</u>

The Proposed Regulations accomplish the Government's preferred policy of indefinite detention of children by providing that the federal Government can self-license its own federal detention facilities. The Government explains in the Proposed Regulations that, to avoid the requirement of releasing children within 20 days from an FRC to a parent or relative or (if no parent or relative is available) to a State child welfare agency-licensed program, the federal Government will consider parents

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[217] FSA, ¶ 14.

[218] 83 FR 45493. We note that, under the FSA, the Government's policy with respect to *Unaccompanied* Children (*i.e.*, children who cross the border *without* a parent or legal guardian) has been to place them in a licensed program pending resolution of their immigration claims--at which time they would then, depending on the resolution, either be removed from the country or returned to a licensed program until they reached the age of majority and could be released. The Proposed Regulations would not change this policy relating to Unaccompanied Children. The change that the Proposed Regulations would effect is that *Accompanied* Children (*i.e.*, children who cross the border with a parent or legal guardian) would be detained indefinitely in federal immigration facilities (FRCs) pending resolution of their and their parents' immigration claims--rather than, as was the case before 2014, being released with their parents (subject to ankle monitoring, bond, or other compliance programs), or, as was the case under the family separation policy in April-June 2018, forcibly separated from their parents to be housed alone in a licensed program.

[219] *Jenny L. Flores et al. v. Jefferson B. Sessions, III, et al.*, Case No. CV 85-4544-DMG, U.S. Dist. Ct. Central Dist. Cal., July 9, 2018.

[220] *Id.*

[221] *Id.* at 4.

in detention as not available and will authorize itself to *self*-license FRCs for the housing and care of children on a long-term basis.[222] With the FRCs thus transformed into "licensed programs" for children, the Government explains, children could then be kept in the FRCs beyond 20 days (*i.e.*, indefinitely pending resolution of all of the immigration proceedings relating to the child and his or her parents).

Self-licensing is the equivalent of no licensing. *Self*-licensing is an oxymoron, a contradiction in terms.[223] It is axiomatic that one cannot license one's self. There is no assurance of standards associated with "licensing" when the entity being licensed is also setting the licensing standards and monitoring compliance with the standards set. The concept of licensing inherently requires review or oversight by *another entity* than the one being regulated--or the concept of licensing is transformed into "do as you wish." At a minimum, it is a clear perversion of the FSA's requirement that children who are detained on a longer-term basis must be protected through the establishment and monitoring of appropriate standards for their care and well-being (taking into account their "special vulnerability as minors"). This perversion of the FSA's concept of a "licensed program" that is suitable for children underscores that the Proposed Regulations do not implement--and, in fact, flatly contradict--the key terms and the very purpose of the FSA.

Ample evidence demonstrates that the Government is incapable of effectively or meaningfully inspecting its immigration detention facilities, a cruelly negligent failure of governance that puts the lives of children and adults alike at risk. Of particular note are recent reports from the Department of Homeland Security's own Office of the Inspector General (OIG), finding that Immigration and Customs Enforcement (ICE)'s inspections are "very, very, very difficult to fail".[224] This systemic failure is borne out by, among other examples, the "untimely and inadequate detainee medical care" and "nooses in detainee cells" found in the OIG's unannounced inspection of an ICE detention facility in Adelanto, California that had passed its most recent inspection only last year.[225] In another example, the Stewart Detention Center in Georgia passed its inspection just days before the suicide of a mentally-ill detainee kept in solitary confinement in

[222] 83 FR 45525. The Government explains that, under the requirements of the FSA, the Government has three options with respect to the custody of migrant children who are accompanied by a parent (or legal guardian): "1) parole all family members into the United States; 2) detain the parent(s) or legal guardian(s) and either release the juvenile to another person or legal guardian or transfer them to HHS to be treated as an UAC [(*i.e.*, detain the children, separately from the parents, in state-licensed facilities for children who are dependent on the state)]; or 3) detain the family unit together by placing them at an appropriate FRC [(family residential center)] during [(i.e.., for "the pendency of] their immigration proceedings." The Government states that it prefers the third option--and needs the Proposed Regulations because the FSA creates "a barrier" to the utilization of this option given that the FSA prohibits prolonged (more than 20 days) detention of children in facilities that are not licensed by a State child welfare agency. PR, § IV.C.1 (pp. 29-31).

[223] The concept of "self-licensing" does not even really exist. If one Googles "self- licensing," the only result is a Wikipedia definition of a term "used in social psychology and marketing to describe the subconscious phenomenon whereby increased confidence and security in one's self-image or self-concept tends to make that individual worry less about the consequences of subsequent immoral behavior and, therefore, [to be] more likely to make immoral choices and act immorally." *See, e.g.*, https://en.wikipedia.org/wiki/Self-licensing.

[224] DHS Office of the Inspector General (OIG), ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements, OIG -18-67, June 26, 2018, https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf.

[225] DHS OIG, Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California, OIG 18-86, Sept. 27, 2018, https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf.

violation of ICE's own detention standards.[226] These failures strongly indicate that the removal of the core outside licensing and monitoring protections of Flores in favor of the Government's proposed self-licensing scheme will jeopardize children's lives. For additional information and analysis, see **Government oversight failures.**

The Government justifies its proposed "licensing scheme" by pointing out that it is very difficult to accomplish the licensing of federal FRCs by State agencies because few States have agencies that establish standards and provide licenses for facilities that house children together with adults. Rather, State agencies typically license only facilities for the care of children who are alone and therefore "dependent" on the state, the Government explains. We submit that the very fact of the rarity of licensing for a situation where children are detained with their parents underscores that the natural, expected course would be children being released together with their parents to care for them (as was the Government's policy until 2014)[227], rather than detained together with their parent to be cared for by the Government.

Also, we observe that children in detention with their parents actually *are* "dependent" on the Government, as it is the Government (not the child's parents) that makes the rules, enforces discipline, provides the food and water, determines when medical attention can be sought and what the medical care will be, etc.[228] Thus, the Government's emphasis on the lack of licensing for facilities housing children with their parents highlights that children who are detained with their parents in FRCs are not, even under the FSA, protected by basic licensing-type standards set by appropriate agencies. The only counterweight to this problem is that, at least, under the FSA, the detention in federal facilities has been limited to 20 days.[229]

16. AGE DETERMINATION

MODEL COMMENT ON AGE REDETERMINATION—DHS
83 Fed. Reg 45497

[226] Spencer Woodman and Jose Olivares, *The Intercept*, "Immigrant Detainee Called ICE Help Line Before Killing Himself in Isolation Cell," Oct. 8, 2018, https://theintercept.com/2018/10/08/ice-detention-suicide-solitary-confinement/.
[227] *See* Wil S. Hylton, *The New York Times Magazine*, "The Shame of America's Family Detention Camps," Feb. 8, 2015, https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html.
[228] In this connection, we take the opportunity to make the observation that currently, even under the FSA, Accompanied Children in detention in FRCs are not afforded the basic protections that State licensing affords to Unaccompanied Children in licensed programs even though the child in an FRC is still "dependent" on the Government. For example, children in FRCs are routinely housed in rooms with bunk beds accommodating several families so that a child sleeps right under, over, or next to unrelated adults (which, under the FSA, would not be allowed in a licensed program).
[229] As discussed below, however, currently, Accompanied Children are being held in FRCs far longer than 20 days. *See, e.g.*, Tal Kopan, *CNN*, "Reunited moms write letters from detention," Sep. 30, 2018, https://www.cnn.com/2018/09/30/politics/separated-mothers-reunited-letters/index.html. The Government has justified this lack of compliance with the FSA on the basis that the litigation against family separation was settled on the basis that families would not be separated. Therefore, the Government asserts, it cannot release the children without the parents under the settlement terms. We observe that what the Government really means is that, under the settlement, it cannot do what it wants to do (keep the parents in detention) without also releasing the children--so it simply keeps the children in detention and claims that it "has to" do so.

1. Proposed Regulations Conflict with the Flores Agreement, the TVPRA, and Agency Practice, and Give Undue Weight to Medical Testing

The proposed regulations purport to rely on both the Flores Agreement and TVPRA in setting forth a standard for evaluating the age of children. Yet they contradict both the language and the clear intent of Flores, the clear, statutory language enacted by Congress in the TVPRA, and well-established agency practices promulgated over more than a decade pursuant to Flores and the TVPRA. Specifically, the proposed regulations: (1) fail to start with a presumption that the individual is a child; (2) fail to indicate that medical tests cannot serve as the sole basis for age determinations; (3) fail to limit medical testing to bone and dental radiographs; (4) fail to require or even identify other forms of evidence that must be considered when available; and (5) fail to take into account significant advances in medical knowledge, which have demonstrated the unreliability of medical tests to make accurate determinations of whether an individual is younger or older than 18, particularly for migrant children. Individuals who claim to be minors must be presumed to be minors until/unless the totality of the circumstances indicate that the individual is 18 years old or older.

a. Flores Agreement's "Reasonable Person" Standard

The Flores Agreement recognizes that there will be circumstances in which the age of a child is not known with certainty but permits the individual to be treated as an adult only when a reasonable person would hear the child's claim to childhood but still conclude that she or he was an adult. In other words, the language of Flores starts with the child's claim, and provides a mechanism to override the child's claim only when it would be reasonable to do so.

Similarly, under the Flores Agreement, medical tests are permissible "to verify" age. This language presumes that medical tests can verify--determine with certainty--a child's age. However, the most current science tells us that medical tests cannot verify whether a person is 18 or older, but only provide estimates that have a wide margin of error. Moreover, these tests may be particularly inaccurate in determining the ages of children who have lived in poverty, experienced malnutrition, or for whom there are not representative samples to serve as points of comparison. Because medical tests cannot accurately determine whether an individual is just under, or just over, the age of 18, it would be unreasonable to rely on these tests.

b. TVPRA Standard: Multiple forms of Evidence, Non-Exclusive Use of Radiographs

The proposed regulations conflict with the express language of the TVPRA in that they fail to explicitly require multiple forms of evidence and fail to prohibit the exclusive use of medical exams to determine the age of an individual. The TVPRA, at Section 235(b)(4) requires the development of procedures: "to make a prompt determination of the age of an alien, which shall be used by the Secretary of Homeland Security and the Secretary of HHS for children in their respective custody. At a minimum, these procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien." By identifying only medical or dental examinations or even "other appropriate procedures" as evidence of age, the proposed regulations would permit exclusive reliance on medical tests in direct violation of the statute. Moreover, "other appropriate

procedures" could be understood as limited to medical tests, further demonstrating an over-reliance on medical testing to the exclusion of non-medical evaluations of age.

c. Agency Practice: Far Different from the Proposed Regulations

i. HHS

ORR has recognized the inherent lack of precision in medical tests to determine age and has adopted a very high standard for relying on these tests. Section 1.6.2 of ORR's policies regarding children entering the U.S. unaccompanied states:

> As no current medical assessment method can determine an exact age, best practice relies on the estimated probability that an individual is 18 or older. . . . If an individual's estimated probability of being 18 or older is 75 percent or greater according to a medical age assessment, and this evidence has been considered in conjunction with the totality of the evidence, ORR may refer the individual to DHS. The 75 percent probability threshold applies to all medical methods and approaches identified by the medical community as appropriate methods for assessing age.[230]

In other words, under current ORR practice, not only must the medical test have a 75% or greater probability that the person is 18 or older, even that evidence is just one factor in a totality of the circumstances approach that also considers the child's claim and other evidence.[231]

This approach remains problematic because a doctor's determination of a probability of a person being 18 is wrought with uncertainty as discussed below.[232] The consequences of mistakenly identifying a child as an adult are too severe to allow such a decision to be made based on a preponderance of the evidence.

ii. DHS

DHS guidance[233] promulgated in 2004 in consideration of the Flores agreement also recognizes the complexity of determining whether a person is under or over 18, and sets forth a clear totality of the circumstances test. Unlike the proposed regulations, the 2004 guidance explicitly precludes

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[230] Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1*, U.S. DEP'T OF HEALTH & HUM. SERV. (Jan. 30, 2015, rev. Jul. 5, 2016), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1.

[231] Despite this, recent reporting indicates that ORR is violating its own agency policies and the TVPRA by relying exclusively on dental examinations by a single contractor in Texas. Mimi Dwyer et al, *VICE News*, "The U.S. Is Checking Immigrant Kids' Teeth to See If They Actually Belong in Adult Detention," Oct. 11, 2018, https://news.vice.com/en_us/article/qv9mbx/the-us-is-checking-immigrant-kids-teeth-to-see-if-they-actually-belong-in-adult-detention.

[232] *See also* Mimi Dwyer et al, *VICE News*, "The U.S. Is Checking Immigrant Kids' Teeth to See If They Actually Belong in Adult Detention," Oct. 11, 2018, https://news.vice.com/en_us/article/qv9mbx/the-us-is-checking-immigrant-kids-teeth-to-see-if-they-actually-belong-in-adult-detention (discussing the grave limitations and extremely dubious reliability of dental-examination age assessments provided by a single contractor in Texas).

[233] Victor X. Cerda, U.S. Immigr. & Customs Enforcement, *Age Determination Procedures for Custody Decisions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Aug. 20, 2004), https://www.ice.gov/doclib/foia/dro_policy_memos/agedeterminationproceduresforcustodydecisionsaug202004.pdf.

determinations that rely solely on medical tests and lists specific information that must be considered, if available, in any age determination, including: statements of the individual; information obtained from other government agencies; statements by individuals with knowledge of the individual's age if their testimony is credible; documents that credibly attest to age; documents obtained by ICE pursuant to a discretionary investigation; results of medical tests (limited to bone and dental x-rays conducted by an expert); and assessments of physical appearance, but with the express warning that "[o]fficers must be extremely cautious when basing conclusions about a person's age upon such an assessment. Where age is in dispute, the physical appearance and demeanor . . . should not be the sole or deciding factor determining that the alien is an adult, absent clear and compelling articulable facts."

The proposed regulations also expressly conflict with over a decade of established DHS practice under Flores, the HSA and TVPRA, in failing to require that: medical tests be limited to "wrist-bone and/or dental xrays"[234] (the proposed regulations permit consideration of "other procedures) They also fail to require that the examining clinician provide a statement of the "percentage of probability" that the individual is either a juvenile or adult.[235] Nor do they advise DHS officials to consider what is known about the degree of reliability of medical tests.[236]

2. Advances in forensic testing have rendered the medical examinations proposed by rule unreliable evidence; they may also be unethical.

The consequences of an erroneous age determination are great. An inaccurate age determination—one that incorrectly designates a child as 18-- and strip a child of age-appropriate legal protections, from placement in and conditions of custody to specialized procedures for adjudicating their protection claims. For example, a child who turns 18 or who is determined to be 18 or older while in ORR custody is immediately transferred out of HHS custody to DHS custody. Although DHS must "consider placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight,"[237] DHS frequently transfers children to adult detention facilities on or after their 18th birthday without considering alternative, less restrictive settings.[238] A mistaken age determination means that a child, despite informing ORR/DHS that he or she is a child, will be sent to an adult detention facility with almost no recourse for the mistake. While in adult custody they will lose access to the range of services required by Flores and currently provided by ORR.[239]

The most common types of medical testing to determine age are radiographs of teeth and bones, but the results of these tests are recognized as both imprecise and inaccurate for determining whether an individual is 18 years old.

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[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] 8 U.S.C. § 1232(c)(2)(B).
[238] *See, e.g.*, Complaint at 4, *Ramirez v. ICE, et al*., 310 F. Supp. 3d 7 (D. D.C. 2018); Jennifer Podkul and Cory Shindel, Kids in Need of Defense, *Death by a Thousand Cuts, the Trump Administration's Systematic Assault on the Protection of Unaccompanied Children* (2018)), https://supportkind.org/wp-content/uploads/2018/05/Death-by-a-Thousand-Cuts_May-2018.pdf; David Brand, *Documented NY, "A 'Cruel Birthday Present' for Immigrant Children*," June 20, 2018, https://documentedny.com/2018/06/20/a-cruel-birthday-present-for-immigrant-children/.
[239] *See* Office of Refugee Resettlement, U.S. Dep't of Health & Hum. Serv., *Services Provided*, https://www.acf.hhs.gov/orr/about/ucs/services-provided (last visited Oct. 8, 2018).

A. Bone radiographs

Radiographs of bones (x-rays) to assess age are not sufficiently precise to provide valuable insight regarding a person's age because children grow at wildly different rates. According to Tim Cole, a professor of medical statistics at University College of London Institute of Child Health, bone radiographs can provide the wrong answer as to whether someone is 18 up to one-third of the time.[240] Researchers reviewing bone radiographs of adolescents found that the average chronological age for wrist maturity was 17.6 years, but with a margin of error of 1.3 years.[241] In other words: 61% of people will have fully matured bones in their wrist before turning 18, rendering a finding of mature bones almost meaningless in determining whether a person is over 18. Together these studies confirm that bone radiographs are a highly unreliable test for determining the age of a child or young adult.

Furthermore, the process for estimating age based on bone radiographs does not adequately consider the many variables affecting development. Generally, after x-rays are taken, the images are compared to compiled atlases of images from control subjects to determine age.[242] Comparisons should be based on images taken from the same population as the subject;[243] but atlases of radiograph images do not exist for children from many countries in Asia, Africa or the Middle East and assessing their images from the standards derived from Caucasian, European or North American children is insufficient.[244] Bone development can depend significantly on socio-economic status.[245] Factors including "ethnicity, genetic background, nutrition, deprivation, previous and current illnesses—especially endocrine diseases— [ ] can all have profound effects on physical development, skeletal and dental maturity."[246] Even when comparative normative images do exist, at best chronological age correlates to ±2 years of maturity age, and in some entirely normal children, this may be discordant by as much as 4 to 5 years.[247] Researchers have therefore concluded that, "maturity 'age' from an X-ray does not necessarily translate to the same chronological age, and that, as a result, this is not a reliable method by which the age of a child or young person can be accurately assessed."[248]

B. Dental examinations

Dental examinations to determine age are equally unreliable. A study published in the Journal of Forensic Dental Sciences acknowledges that after the age of 14 years, the third molar (or wisdom tooth) is the only

[240] Andy Coghlan, *New Scientist*, "With no paper trail, can science determine age?" May 9, 2012, https://www.newscientist.com/article/mg21428644-300-with-no-paper-trail-can-science-determine-age/.
[241] A. Aynsley-Green et al., *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control*, 102 BRIT. MED. BULL. 17, 39 (2012).
[242] *Id.*
[243] *See* Andreas Schmeling et al., Review Article, *Forensic Age Estimation*, 113 DEUTSCHES ÄRZTEBLATT INT'L 44, 46 (2016).
[244] A. Aynsley-Green et al., *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control*, 102 BRIT. MED. BULL. 17, 24 (2012).
[245] *See* Andreas Schmeling et al., Review Article, *Forensic Age Estimation*, 113 DEUTSCHES ÄRZTEBLATT INT'L 44, 46 (2016).
[246] A. Aynsley-Green et al., *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control*, 102 BRIT. MED. BULL. 17, 28 (2012).
[247] *Id.*
[248] *Id.*

remaining tooth which is still developing; and consequently, dental age estimation methods have to rely on the development of this tooth until the age of 20.[249] However, wisdom tooth growth varies dramatically from person to person, making such tests highly unreliable. For example, one study found that mature third molars can be seen in some individuals as young as 15 years old; whereas some individuals as old as 25 years still did not have mature third molars.[250] Experts in forensic dentistry have determined that wisdom teeth may evidence growth deviations of 4 to 8 years, and that age assessments of adolescents based on wisdom teeth growth has an accuracy of only ±2 to 4 years.[251]

Tooth development, like bone growth, is affected by several factors that can impact determinations of maturity and therefore produce incorrect results. For example, the timing of eruption of the third molar depends on ethnicity, so population specific reference studies must be used for comparative purposes.[252] Gender may also affect tooth development. A study of third molar development among Hispanic individuals found that development was faster in males than in females.[253] Other studies identify socio-economic status and even birth weight as crucial factors in the timing of dental development.[254]

In light of these concerns, organizations such as the British Dental Association oppose the use of dental X-rays to assess age:

> The BDA is vigorously opposed to the use of dental x-rays to determine whether asylum seekers have reached 18. This is an inaccurate method for assessing this age. We also believe that it is inappropriate and unethical to take radiographs of people when there is no health benefit for them.[255]

C. Medical Testing Raises Ethical Concerns

Subjecting children to medical tests that involve radiation, even in small amounts, raises significant ethical concerns, and more so when parents and children are not asked to provide consent and are not positioned to provide informed consent. "Even though the radiation dose from an X-ray of the hand is small . . . radiologists, dentists and others cannot simply downplay the effects of 'a little bit of

[249] Nishant Singh, et al., *Age estimation from physiological changes of teeth: A reliable age marker?*, 6 J. OF FORENSIC DENTAL SCI. 113 (2014).
[250] A. Aynsley-Green et al., *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control*, 102 BRIT. MED. BULL. 17, 34 (2012).
[251] *See* Ines Willershausen et al., Review Article, *Possibilities of Dental Age Assessment in Permanent Teeth: A Review*, S1 DENTISTRY 1, 3 (2012) (citations omitted).
[252] *See* Andreas Schmeling et al., Review Article, *Forensic Age Estimation*, 113 DEUTSCHES ÄRZTEBLATT INT'L 44, 47 (2016) (internal citations omitted); *see also* Ines Willershausen et al., Review Article, *Possibilities of Dental Age Assessment in Permanent Teeth: A Review*, S1 DENTISTRY 1, 2 (2012) (citations omitted).
[253] *See* A.S. Panchbhai, Review, *Dental radiographic indicators, a key to age estimation*, 40 DENTOMAXILLOFACIAL RADIOLOGY 199, 211 (2011), citing Ana C. Solari & Kenneth Abramovitch, *The Accuracy and Precision of Third Molar Development as an Indicator of Chronological Age in Hispanics*, 47 J. FORENSIC SCI. 531 (2002).
[254] *See* B.S. Manjunatha and Nishit K. Soni, Review Article, *Estimation of age from development and eruption of teeth*, 6 J. OF FORENSIC DENTAL SCI. 73 (2014).
[255] British Dental Association, British Dental Association Response to Home Office Consultation Paper, *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children* (2007), https://www.dentalage.co.uk/wp-content/uploads/2014/09/bda_position_paper_on_daa_2012_0917_from2008.pdf.

radiation' but rather must consider the As Low As Reasonably Achievable (ALARA) principle."[256] Given the inability of these procedures to determine age with any degree of certainty, the benefits of subjecting children to x-rays, particularly without their informed consent or the informed consent of their parents, are unacceptably small.

3. NPRM Proposals Run Counter to International Standards for Age Determinations

Undue reliance on medical testing to determine the age of an individual in DHS custody is more likely to mislead a "reasonable person" in determining whether an individual is 18 than it is to provide helpful information. Notably, this inappropriate and unsupported reliance on medical testing contravenes international best practices produced by the Separated Children in Europe Programme (SCEP):

> Age assessment procedures should only be undertaken as a measure of last resort, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual's age. If an age assessment is thought to be necessary, informed consent must be gained and the procedure should be multi-disciplinary and undertaken by independent professionals with appropriate expertise and familiarity with the child's ethnic and cultural background. They must balance physical, developmental, psychological, environmental and cultural factors. It is important to note that age assessment is not an exact science and a considerable margin of uncertainty will always remain inherent in any procedure. When making an age assessment, individuals whose age is being assessed should be given the benefit of the doubt. Examinations must never be forced or culturally inappropriate. The least invasive option must always be followed and the individual's dignity must be respected at all times. Particular care must be taken to ensure assessments are gender appropriate and that an independent guardian has oversight of the procedure and should be present if requested to attend by the individual concerned.[257]

It would violate both the language and the clear intent of Flores to subject a child to x-ray examinations that find that the individual could be under the age of 18, but then have a "reasonable person" (agency official) base their decision on a "most likely age" figure even though such a figure is wrought with uncertainty. Instead, decision-makers in age determination should only consider the likely minimum age that a person has attained. "Due to the evident margin of errors in all age assessment methods, children should always be given the benefit of the doubt, with the lowest age selected."[258]

Finally, as discussed previously, physical development varies significantly based on ethnicity, gender, socio-economic status, and other factors, and it must be clear how physicians or dentists selected by the agencies are accounting for such variables. This was recommended by the DHS OIG in 2009, which

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[256] A. Aynsley-Green et al., *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control*, 102 BRIT. MED. BULL. 17, 34 (2012).
[257] SEPARATED CHILDREN IN EUROPE PROGRAMME, STATEMENT OF GOOD PRACTICE 25 (Terry Smith ed., 4th rev. ed. 2009), http://www.scepnetwork.org/images/18/219.pdf.
[258] INT'L ORG. FOR MIGRATION, RESOURCE BOOK FOR LAW ENFORCEMENT OFFICERS ON GOOD PRACTICES IN COMBATING CHILD TRAFFICKING 72, (Int'l Org. for Migration Vienna comp., 2006), http://publications.iom.int/system/files/pdf/resource_book_on_good_practices.pdf.

called for the agencies to make their methods for selecting experts qualified to make age determinations available.[259]

17. DETERMINING WHETHER CHILD IS AN UNACCOMPANIED ALIEN CHILD (UAC) (a.k.a. UAC REDETERMINATIONS) - DHS

Provisions on Redeterminations of UAC Status (DHS)

Section 8 CFR 236.3(d)

Re-determinations of a child's unaccompanied status under 8 CFR 236.3(d) would exacerbate the vulnerability of children and run directly contrary to the aims of the TVPRA in screening children for protection needs and preventing their return to harm.

For more than 15 years, federal law has uniquely defined and afforded protections to children who arrive in the United States without parents or guardians in recognition of their particular and enduring vulnerability. The Homeland Security Act of 2002 provided the first definition of an "unaccompanied alien child" as "a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody."[260]

More than a mere technical definition, status as an unaccompanied alien child brings with it certain substantive and procedural protections tailored to ensure the efficiency of our immigration system as well as the safety and well-being of children, and their ability to meaningfully participate in immigration proceedings that may determine their futures. The proposed regulations, however, would allow DHS to potentially strip these protections from unaccompanied alien children and make them even more vulnerable. This result thwarts congressional intent as demonstrated by the HSA and the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA).

In 2008, Congress enacted the TVPRA, a bipartisan reauthorization of legislation aimed at preventing and combating human trafficking and exploitation, and providing support and protection to survivors. Responding to concerns that children arriving alone to the U.S. were not receiving adequate screenings for human trafficking and other protection needs, the TVPRA set forth specific procedures for screening, processing, and caring for unaccompanied alien children.[261] These provisions enable access to child-

[259] Richard Skinner, Dep't of Homeland Sec., Office of Inspector General, *Age Determination Practices for Unaccompanied Alien Children – Update*, OIG-10-122 (2010), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-122_Sep10.pdf.
[260] Homeland Security Act of 2002, Sec. 462; 6 U.S.C. § 279.
[261] 8 U.S.C. § 1232. The TVPRA provides distinct procedures for unaccompanied children depending on whether they are from contiguous or non-contiguous countries. Unaccompanied children from non-contiguous countries, including those in Central America, must be transferred to the custody of ORR within 72 hours, where they are screened for trafficking and protection concerns. Children from contiguous countries are screened by CBP for trafficking concerns and protection needs, and transferred to ORR if found to have either or if a determination cannot be made in the requisite period.

appropriate care, including medical and mental health services, that is critical to the safety and well-being of detained unaccompanied alien children and to their ability to heal from and reveal trauma they have experienced. The TVPRA also ensures that most unaccompanied alien children will be screened for protection needs while in ORR custody, rather than by border patrol officers, after they have had some time to recover from a harsh journey to safety.

Procedural protections in the TVPRA afford unaccompanied alien children the opportunity to tell their stories and access any legal relief for which they may qualify, such as asylum and special immigrant juvenile status. To this end, the TVPRA exempts unaccompanied alien children from the one-year filing deadline that otherwise applies to asylum claims.[262] This exemption reflects sensitivity to the particular needs and vulnerabilities of children fleeing persecution, who may require time to heal and establish trust so they can reveal what they have experienced to caregivers and legal service providers and assist in preparing their legal cases. The exemption also addresses the unique challenges facing unaccompanied alien children who typically are detained in one or more ORR facilities, sometimes for extended periods, before release to a caregiver. Flexibility for children to submit their asylum claims once they are settled and have an opportunity to prepare their cases with counsel accords with basic notions of fairness.

The TVPRA also authorizes HHS to appoint "independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children."[263] A child advocate's role is to identify and advocate for the best interests of a child and to ensure the child's best interests are considered in any decision on behalf of or about the child, including those made by immigration courts or asylum officers. Child advocates frequently serve the most vulnerable children in the immigration system, including victims of trafficking and abuse, children with disabilities, children who express a fear of return, children who face prolonged custody, and children who have lost their parents to violence. They provide critical support by advancing and safeguarding the safety and well-being of children in custody who do not have adults with them to advocate on their behalf.

In immigration removal proceedings, individuals seeking asylum present their asylum claims before an immigration judge and across from a trained government attorney arguing for their deportation. These circumstances, which would be intimidating for an adult, are unfathomably difficult for children. The TVPRA recognizes the inappropriateness of this setting for children arriving without a parent or legal guardian, who frequently do not have legal counsel to represent them, and provides for more child-appropriate procedures to ensure unaccompanied alien children are not returned to harm. Rather than appearing in immigration court to assert their asylum claims, unaccompanied alien children may have their asylum cases first heard in a private, non-adversarial setting before an asylum officer trained in trauma-informed interviewing techniques.[264]

TVPRA protections are essential to ensuring fair treatment and due process for unaccompanied alien children in our immigration system. Yet under DHS (and HHS') proposal, an immigration officer could determine that an unaccompanied alien child no longer meets the definition of an unaccompanied alien

[262] INA § 208(a)(2)(E).
[263] 8 U.S.C. § 1232(c)(6)(A).
[264] INA § 208(b)(3)(C); 8 U.S.C. § 1158(b)(3)(C).

child and potentially strip access to protections if a child has turned 18,[265] or if a parent or legal guardian is available to provide care and custody for the child. This could occur *even though* the child's vulnerability endures after having turned 18 or been reunified with a parent or legal guardian. Importantly, neither reunification with a parent or sponsor nor turning 18 changes the fact that children will be required to defend their own immigration cases. Reunification with a sponsor or family member does not mean that a child's case automatically attaches to that of an adult or that the child's vulnerability in the system is eliminated. Procedural fairness, children's best interests, and administrative efficiency demand that once determined, a child's status as an unaccompanied alien child should remain for the duration of the child's immigration case.

Particularly troubling, the proposed regulations state that determinations or re-determinations will occur after DHS encounters or apprehends the child and before detention or release. In addition to exposing children to additional questioning and strain at a time of extreme vulnerability, this process could well undermine the screening and processing procedures that lie at the heart of the TVPRA. For example, if a child from Central America is apprehended by CBP and determined to meet the definition of an unaccompanied alien child, the TVPRA requires prompt transfer to ORR custody, where he or she would receive child-appropriate services, including a screening for any protection needs. Yet under the proposed regulations, before being transferred out of DHS custody, the child could be found by DHS to no longer meet the definition. By virtue of the redetermination, the child could be deemed no longer eligible for transfer to ORR, and for associated protections. In addition to administrative inefficiency, the proposed regulation could well lead to situations in which unaccompanied alien children do not receive screenings for protection needs at all, as CBP initially anticipated that these would be conducted by ORR and may fail to conduct them if a child's status is subsequently stripped. Such a result would turn the TVPRA on its head and bring about the very result TVPRA protections intended to avoid.

A one-time determination of a child's status not only promotes due process, the safety of children, and their meaningful access to protection, but also maximizes efficiencies in the immigration system. Once identified as an unaccompanied alien child, a child can be screened by child welfare professionals for protection needs and by legal service providers to help them determine whether they are eligible for legal relief. Pro bono legal counsel can advise the child about any forms of protection for which they might qualify, and if there are none, inform the child of his or her options. This not only assists children in better understanding their legal rights, but also contributes to more orderly and efficient filings and adjudications. In contrast, the ongoing re-determination of a child's status and the ability to strip children of the related protections would work the opposite result, compounding burdens on the system and the child. Duplicated filings and proceedings, impacts to scheduling, and confusion over the procedures to be applied would increase costs, create systemic delays, and increase the vulnerability of children in proceedings.

Section 8 CFR 236.3(d), as proposed, directly contravenes the TVPRA's provisions assigning initial jurisdiction over unaccompanied alien children's asylum cases to USCIS and undermines the exemption of unaccompanied alien children's cases from the one-year filing deadline.

[265] *Cf. Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018) (finding that an Immigration Judge can assume jurisdiction over an asylum applicant filed by a UAC after turning 18). As demonstrated by the above and foregoing analysis, this BIA decision is contrary to Congressional intent and was wrongly decided.

The proposed regulation states that "[n]othing in this paragraph affects USCIS' independent determination of its initial jurisdiction over asylum applications filed by UACs pursuant to section 208(b)(3)(c) of the Act." Yet the proposed regulation directly achieves, if not intends, this very result. In so doing, the proposed provision is directly at odds with existing law and cannot stand.

Under the proposed regulation, an unaccompanied alien child could lose critical procedural protections, such as the ability to first present an asylum claim before a USCIS asylum officer or exemption from the one-year filing bar, if determined by DHS to no longer meet the definition of an unaccompanied alien child, even after these protections have already attached. Indeed, in explaining the proposed provision, the agency asserts that "immigration officers will make a determination of whether an alien meets the definition of a UAC each time they encounter the alien."[266] Under this formulation, DHS would have unfettered discretion to eliminate, interfere with, and undermine procedural protections once in place, effectively rendering protections of the TVPRA hollow. This interpretation defies basic tenets of statutory interpretation and would impermissibly grant DHS authority to undermine the direct will of Congress in extending particular protections to unaccompanied alien children based on their vulnerability to harm. It would also create confusion in the immigration system about how to proceed with children's cases once they are determined to be non-UAC.

Section 8 CFR 236.3(d) would have a pronounced and devastating impact on unaccompanied alien children and their access to humanitarian protection.

In addition to undermining the screening procedures set forth in the TVPRA, the potential re-determination of a child's status as an unaccompanied alien child poses severe consequences for children's well-being and access to legal protection. According to DHS' proposed regulations, a child's status could be reconsidered and potentially re-determined at each encounter with an immigration officer.[267] The proposed regulation would subject unaccompanied alien children to repeated and continuous questioning by uniformed officials at a time in which they may already struggle to reveal grave harms they have experienced and to trust unfamiliar adults. The proposal makes no mention of the methods by which officers would make these determinations on subsequent encounters, heightening the possibility that these decisions will be made arbitrarily and yield disparate results, despite profound impacts on children and their ability to access protection.

The proposed regulation also injects instability and uncertainty into a process that is already fraught with challenges and inequities for unaccompanied alien children in particular. While most children already do not have legal counsel to represent them,[268] the proposed regulation would further tip the scale in favor of the government in proceedings by allowing DHS to effectively change the procedures by which a child's case is processed in the middle of a child's case. This would demand that a child repeatedly share painful and difficult facts that form the basis of their claims in different settings and potentially prepare their cases according to distinct procedures and timelines if protections are lost or changed. For example, under

[266] 83 Fed. Reg. at 45497 (Proposed 8 CFR § 236.3(d)).
[267] 83 Fed. Reg. at 45497 (Proposed 8 CFR § 236.3(d)).
[268] *See, e.g.,* Laila Hlass, *Slate*, "Defenseless Children: It's unconscionable that many kids detained at the border don't have lawyers at their immigration hearings," Jul. 5, 2018, at https://slate.com/news-and-politics/2018/07/children-detained-at-border-dont-have-lawyers-must-represent-themselves.html.

the proposed regulation an unaccompanied alien child who is exempt from the one-year filing deadline could have this protection stripped from them, with the timeline for their asylum case shifting even after it has begun. This violates basic notions of procedural fairness, due process, and access to justice.

Children arriving to the U.S. alone face countless challenges, from healing from prior trauma to contending with a new and unfamiliar language, and complex legal proceedings. These difficulties are particularly pronounced for child survivors of trafficking, violence, abuse, and neglect, who deeply fear they will be returned to countries in which their safety and their lives are at risk. The proposed regulation compounds the uncertainty and unpredictability children confront in their efforts to secure protection, and could lead to additional transfers in custody, including to potentially restrictive settings, and repeated legal appearances at times in which these children most need stability and access to support services. The proposed regulation would also demand that children prepare and present their claims in more adversarial settings, at further injury to their ability to meaningfully participate in proceedings and establish their eligibility for legal protection, *despite* their unique vulnerability. With procedural rules changing in the middle of a child's case, adjudications may be prolonged and access to legal relief significantly undermined or delayed.

The proposed rule could also strip children of critical access to legal counsel and social services dedicated for unaccompanied alien children. If a child is stripped of unaccompanied alien child status, their eligibility for nonprofit, state, and federal programs for unaccompanied alien children may be lost, including access to government-funded pro bono counsel or social services. This would increase the vulnerability of children exponentially and deprive them of services intended to alleviate and address the unique challenges they are facing.

These grave consequences violate due process protections and expose children to greater risk of return to danger or harm. The HSA, FSA, and TVPRA cannot be read to permit such a result.

Section 236.3(d) creates undue administrative burdens, delays, costs, and inefficiencies for the immigration system.

Under the proposed regulation, the procedures applicable to a child's claims could be changed even after the child's case has begun. In addition to creating new and grave challenges for unaccompanied alien children, re-determinations of a child's unaccompanied status would lead to new administrative burdens and additional processing delays for DHS and DOJ. The provision would exacerbate the very delays and backlog targeted by several recent changes undertaken by the agencies.

With the potential for a child to be stripped of protections at any time, the proposed rule incentivizes the rushed filing of claims before an event that could alter a child's status. As a result, adjudicators may be required to consider less comprehensive and well-prepared filings--a reality that threatens to slow the evaluation of cases and delay relief to those in need. The rule also duplicates the labor of federal agencies, as claims first filed with USCIS may be shifted to the caseload of the Executive Office for Immigration Review. These changes in jurisdiction, apart from creating logistical and administrative challenges, increase the potential for inconsistent results in children's cases. The proposed regulation thus poses new burdens and costs for both DHS and DOJ without promising any related benefits--and indeed directly undermines the efficient administration of our immigration laws and the adjudication of benefits.

Section 236.3(d) strips the minimal legal protections afforded to children designated as UACs, despite their having arrived as truly unaccompanied.

The proposed regulations could strip the minimal legal protections afforded to children designated as UACs, despite their having arrived as truly unaccompanied. By allowing immigration officers to make a determination of whether a child meets the definition of a UAC each time they encounter the child, the minimal protections afforded to UACs, including an exception to the one-year filing deadline for asylum and the opportunity for a non-adversarial asylum adjudication, could be stripped. This frustrates access to due process and humanitarian protection by subjecting children to harsh questioning by DHS at nearly any encounter with immigration officials.

Many children will face this alone. They will be forced to speak to immigration officials and stand in front of an immigration judge, opposed by a federal prosecuting attorney, without the help of a lawyer, as there is no appointed counsel for children in deportation proceedings. Without an attorney, the child does not have anyone to interview relatives and family in the children's country of origin to determine whether the child may be eligible for any form of immigration relief to stay in the country or whether there is a risk of returning. Moreover, some forms of immigration relief require action outside the immigration court. In the case of Special Immigrant Juvenile Status, for example, children must navigate a state court proceeding before filing their petition with the government.

By stripping the minimal protections afforded to children and forcing them to defend the rights afforded to them by the TVPRA, the children's safety, well-being, and their ability to meaningfully participate in immigration proceedings are severely undermined.

18. DHS TRANSFER OF CHILDREN WITHIN DHS AND TO HHS

8 CFR 236.3(e) - *Transfer of minors who are not UAC from one facility to another*

In 2015, *Flores* counsel sought to enforce the Flores settlement[269] on behalf of all minors in the custody of immigration officials.[270] Both the U.S. District Court for the Central District of California and the Ninth Circuit Court of Appeals affirmed that the Flores Settlement agreement "unambiguously applies"[271] to **all minors** in the government's custody.[272] The government now seeks to undermine the Flores settlement

[269] *Jenny Lissette Flores v. Reno*, Case No. 85-4544-RJK (Px), Stipulated Settlement Agreement, (C.D. Cal 1997) (*Flores* Settlement).
[270] *Jenny L. Flores, et al. v. Johnson*, Plaintiff's Memorandum to Enforce Settlement of Class Action, Case No. CV 85-4544-RJK(Px) (Feb. 2015).
[271] *Flores v. Lynch*, D.C. No. 2:85-cv-04544 (9th Cir. 2016) ("[W]e conclude that the Settlement unambiguously applies to both accompanied and unaccompanied minors.").
[272] *Jenny L. Flores, et al. v. Jeh Johnson, et al*., Case No. CV 85-4544 DMG (AGRx) (Cent. Cal 2015) ("First and most importantly, the Agreement defines the class as the following: "All minors who are detained in the legal custody of the INS." (*See* Agreement ¶ 10 (emphasis added).) The Agreement defines a "minor" as "any person under the age of eighteen (18) years who is detained in the legal custody of the INS." (*See id*. ¶ 4.) . . . . "In light of the Agreement's clear and unambiguous language, which is bolstered by the regulatory framework in which the Agreement was formed and Defendants' past practice, the Court finds that the Agreement applies to accompanied minors.").

and the subsequent case law in many ways. First, the government seeks to codify an outdated definition of "influx" (a definition that ceased being valid two decades ago) thereby undermining the spirit of the settlement agreement. In addition, the government seeks to use this antiquated definition of an influx as a justification to subject children to potential prolonged detention in non-licensed government facilities by changing the transfer deadline to a licensed facility from 3-5 days to "as expeditiously as possible."[273] The government also seeks to wholly exclude non-UAC children who are subject to secure detention from 1) transfer to a licensed facility and 2) transfer within the required time frame under the Flores Settlement. In another section of the proposed regulations, the government also expands the qualifying circumstances for secure detention significantly.[274] After agreeing to terms of a settlement and failing to change those terms before the Court, the government is now proposing regulations that would undermine its obligations to quickly transfer children out of inappropriate DHS facilities and to provide children with care within a licensed facility. This change is contrary to the **best interests of the child** and will likely subject children to prolonged or indefinite detention in non-licensed facilities ill-equipped to handle their special needs. These special needs include but are not limited to: right to counsel, right to bodily integrity, liberty rights, right to education, access to social services, as well as due process rights. This will lead to increased likelihood of the abuse of children and violations of their human rights as protected domestically and under international law.

8 C.F.R. 236.3(f) *Transfer of UACs from DHS to HHS.*

The government's proposed regulations undermine both the text and spirit of the legal framework governing the treatment of unaccompanied children under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) and the Homeland Security Act of 2002 (HSA).[275]

Legislative History

The Homeland Security Act of 2002

Under § 462 of the HSA, Congress transferred "functions under the immigration laws of the United States with respect to the care of unaccompanied alien children" that were previously vested in the Commissioner of Immigration and Naturalization (legacy INS) to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services (HHS). The stated purpose of the HSA is "[t]o establish the Department of Homeland Security, and for other purposes."[276] Notwithstanding this primary purpose, the care of unaccompanied minor children was transferred to the HHS because "[i]t

[273] Department of Homeland Security and Department of Health and Human Services Proposed Regulations on the Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children, DHS Docket No. ICEB-2018-0002, at 160 ("DHS & ORR Proposed Regulations").
[274] *Id*. at 165-166. The definition was expanded by eliminating the petty offense exception, the non-violent crime exception, expanding the definition of escape risk, and expanding the government officials who may witness violent and malicious acts to include state government officials.
[275] 8 U.S.C. § 1232.
[276] Homeland Security Act of 2002, Pub. L. No. 107-296.

would not be appropriate to transfer this responsibility to a Department of Homeland Security".[277] This was in recognition of the fact that:

> Unaccompanied minors deserve special treatment under our immigration laws and policies. Many of these children have been abandoned, are fleeing persecution, or are escaping abusive situations at home. These children are either sent here by adults or forced by their circumstances, and the decision to come to our country is seldom their own.[278]

The original bill as introduced into the House had transferred to DHS the task of "administering the immigration and naturalization laws of the United States"[279] without any carve outs for unaccompanied alien children (UACs). The decision to reverse the original text, and transfer the function of care for UACs to HHS, followed extensive testimony in Congressional committees supporting the view that given UAC's unique vulnerabilities, they would be ill-suited to DHS administration and would be more appropriately cared for by HHS.[280]

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)

The TVPRA reauthorized the Trafficking Victims Protection Act of 2000[281] and made various amendments to the previous Trafficking Victims Protection Acts, including adding greater protections for unaccompanied minors in federal custody. It was the result of a bipartisan effort to reach consensus between two bills - H.R. 3887, passed by the House on December 4, 2007, and S.3061, ordered reported by the Senate Judiciary Committee on September 8, 2008.[282] Through Section 235 (Enhancing Efforts to Combat the Trafficking of Children), it also created special rules for the return of children who were nationals or habitual residents of a contiguous country, with some exceptions. Many of the "provisions of the bill and the intent behind them that are closely aligned with the original provisions of H.R. 3887" are found in House Report 110-430.[283] This explains the congressional intent behind this provision:

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[277] Congressional Record, September 4, 2002, Senate 15989. The Bill, as introduced, had stipulated that the Border Patrol of the Immigration and Naturalization Service would be transferred to the Department of Homeland Security. P.L. 107-296, 116 STAT. 2135

[278] Congressional Record, September 4, 2002, Senate 15989.

[279] H.R.5005, 107th Congress (2001-2002).

[280] *See Homeland Security Act of 2002, Hearing on H.R. 5005 Before the H. Comm on the Judiciary,*107th Cong. 38 (2002)(Statement of Ms. Lofgren) ("The issue of unaccompanied alien children is one that we have a bipartisan bill for in both the Senate and the House to do something, because these children really are not well dealt with in the Department of Justice."); *The Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002, Hearing on H.R. 5005 Before the H. Comm on the Judiciary,*107th Cong. 61 (2002)(Statement of Ms. Lofgren) ("We can go back and forth on what should go in. But one thing I think clearly does not belong in Homeland Security, the issue of foreign adoptions, and also unaccompanied minor children.") *The Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002, Hearing on H.R. 5005 Before the H. Comm on the Judiciary,* 107th Cong. (Statement of Kathleen Campbell Walker of the American Immigration Lawyers Association) ("AILA also strongly believes that the care and custody of unaccompanied alien children should be transferred to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services… They are unaccompanied minors seeking protection and support.")

[281] By authorizing congressional appropriations for the fiscal years 2008-2011 for anti-trafficking purposes.

[282] 154 Cong. Rec. S10888 (December 10, 2008).

[283] 154 Cong. Rec H10903 (December 10, 2008).

Section 236. Enhancing Efforts to Combat the Trafficking of Children

> Section 236 responds to concerns of service providers that a more effective sorting mechanism is needed to carry out the mandate in Section 107 of the TVPA of 2000 that Federal officials affirmatively seek to identify and assist trafficking victims, especially children.
> […]
> Subsection (b) provides enhanced procedures for preventing child trafficking at the U.S. border and U.S. ports of entry. It codifies and improves procedures for the repatriation of unaccompanied children from contiguous countries. It also provides that the Secretary of State shall develop a system for the safe repatriation of unaccompanied children and shall develop a pilot program for that purpose.
> Subsection (c) requires better care and custody of unaccompanied alien children to be provided by the Department of Health and Human Services (HHS).
> Subsection (d) improves procedures for the placement of unaccompanied children in safe and secure settings. It requires that HHS take steps to assist children in complying with immigration orders, assist children in accessing pro bono representation and, in certain cases involving particularly vulnerable children, to obtain guardians ad litem.[284]

During the bill's passage, Senator Dianne Feinstein spoke on the Senate floor about how the bill's provisions ensure that children "receive humane and appropriate treatment while in the custody of the U.S. government" and "are treated as children and not as criminals" while in federal custody.[285] Senator Feinstein further noted that prior to the bill's enactment, the Nation's response was "unacceptable".[286] The common practice at the time was to have children sent to detention facilities with "adults or hardened criminals" or, "rather than being placed in appropriate facilities, they were thrown in juvenile jails" rather than the least restrictive setting.[287] Children were subject to strip-searches, kept in solitary confinement and, children as young as seven years old were restrained with handcuffs and leg irons.[288] The bill sought to end these practices, including the practice of "placing children who have committed no crimes, in a prison with hardened criminals."[289] The TVPRA was reauthorized in 2013.[290]

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[284] House Report No. 101-430, pt. 1 (2007). Subsections (b) to (d) were included in the TVPRA verbatim at §235(a)-(c).
[285] 154 Cong. Rec. S10886 (December 10, 2008). Ms. Feinstein had "authored [the provision] over 8 years ago – the Unaccompanied Minor Act", which, in its 2005 form, had 25 cosponsors and passed the Senate by Unanimous Consent. Section 203 of that Act, "Appropriate Conditions for Detention of Unaccompanied Alien Children" had provided that: "[t]he conditions of such placements must be in keeping with the bests interests of the child. At a minimum, the Director shall develop standards for conditions of detention in such placements that provide for- (A) educational services appropriate to the child; (B) medical care; (C) mental health care, including treatment of trauma; (D) access to telephones; (E) access to legal services; (F) access to interpreters; (G) supervision by professionals trained in the care of children, taking into account the special cultural, linguistic, and experiential needs of children in immigration proceedings; (H) recreational programs and activities; (I) spiritual and religious needs; and (J) dietary needs." Unaccompanied Alien Child Protection Act of 2005, S.119, 109th Cong. §203 (2005).
[286] *Id*.
[287] *Id*.
[288] *Id*.
[289] *Id*. at S10887.
[290] Through an amendment in the Violence Against Women Reauthorization Act of 2013. Pub. L. No. 113-4, § 1201-1264.

As is evident from a reading of the legislative history, the child's welfare and safety are paramount considerations in the U.S. government's interactions with immigrant children. Congress has recognized, through its amendments of the HSA and the clear text of the TVPRA that additional safeguards for the protection of UACs' interests are necessary to protect this vulnerable population. Specifically, the TVPRA guarantees special protections "to recognize the special needs and circumstances of unaccompanied alien children".[291] Placing them in "safe and secure settings" in addition to "better care and custody" for them was the clearly expressed congressional intent behind the TVPRA.[292]

According to the government, the proposed regulations 8 CFR § 236.3(f) seek to "track the TVPRA requirements."[293] To the contrary, the proposed regulations at 8 C.F.R. § 236(f)[294] seek to illegally restrict the provisions of the TVPRA in an expansive manner. First, the proposed regulations indicate that "all UACs ***apprehended by DHS***, ***except those who are subject to the terms of 8 U.S.C.*** § ***1232(a)(2)***, will be transferred to ORR."[295] When cross-referenced with 8 U.S.C. § 1232(a)(2), which pertains to special considerations for children from contiguous countries, and given a literal reading of the text, it appears that the proposed regulations would transfer all UACs except UACs from contiguous countries to the custody of ORR. This is in direct contravention to the TVPRA which directs that "any department and agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child" to the Department of Health and Human Services "not later than 72 hours after determining" that the child is an unaccompanied child.[296] Under the TVPRA, there is no differentiation on how unaccompanied children should be treated. Once a child is designated a UAC, the government is obligated to treat the child in accordance with the special protections set out in the TVPRA. The government is using these proposed regulations to create an arbitrary rule in a feeble attempt to undermine the letter of the law and subject unaccompanied children from contiguous countries, particularly Mexican children, to a distinct and unlawful scheme. This scheme could leave vulnerable children subject to indefinite detention in potentially unlicensed and unknown detention facilities and without regard to a child's right to liberty, bodily integrity, due process rights, and access to counsel as well as important social services.

The proposed regulations thus appear to codify the differential treatment of UACs from contiguous countries which has flourished under the current arrangements, and has attracted widespread criticism for its human rights implications. For example, in 2011, the Appleseed Foundation released a report indicating that the enhanced 'screening' procedures mandated for UACs from continuous countries were being implemented by DHS in a manner that led to mass repatriations of minors without due process.[297] According to the report, the expedited and summary manner in which Mexican minors in particular were

[291] Summary of Legislation to Establish a Department of Homeland Security, P.L. 107-296, 116 STAT. 2135 ("Additionally, an Office of Children's Services will be created within HHS to recognize the special needs and circumstances of unaccompanied alien children. The immigration courts and the board of appeals will remain within the Department of Justice.")
[292] House Report 110-430, pt. 57 (2007).
[293] DHS & ORR Proposed Regulations at 53.
[294] *Id*. at 160-161
[295] *Id*.
[296] 8 U.S.C. § 1232(b)(3).
[297] Appleseed, *Children at the Border: the Screening, Protection and Repatriation of Unaccompanied Mexican Minors* (2011), http://www.appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf.

dealt with increased the risk of *refoulement*, contrary to international law.[298] The findings of the Appleseed Foundation are mirrored in a 2012 report conducted by the United Nations High Commission for Refugees ("UNHCR") relating to the screening of Mexican minors at the border.[299] According to the UNHCR:

> CBP's operational practices, including new efforts to implement the TVPRA mandate to DHS, continue to reinforce the presumption of an absence of protection needs for Mexican UAC rather than a ruling out of any needs as required under TVPRA 08.[300]

UNHCR's report recommended, in explicit terms, that DHS immediately transfer custody of UACs from contiguous countries to ORR, and 'outsource' the responsibility for initial protection screening to 'trained child welfare with expertise to identity indicia of trafficking and persecution.'[301] Despite this, DHS' 'operational practices' based on a presumption against protection for Mexican minors have continued to date. In 2015, a report by the Government Accountability Office indicated that, of the 17,431 Mexican children apprehended in 2014, astoundingly only 1,000 were transferred to the custody of Health and Human Services ("HHS") and the remainder were repatriated, in spite of important protections provided these children under the TVPRA.[302] The differential custody arrangements for UACs from contiguous countries continue *de jure* practice of discrimination by DHS, and are legally untenable. As with all non-citizens, UACs are entitled to equal treatment before the law.[303] There is no 'legitimate and bona fide purpose'[304] that the discriminatory detention arrangements serve, thus rendering them subject to Constitutional challenge.

Second, the proposed regulations would restrict the transfer and notification requirements to only the Department of Homeland Security rather than "any department and agency of the Federal government" as the TVPRA mandates.[305] The proposed regulations restrict the notification requirement to just DHS.[306] Not only would this be contrary to the TVPRA, but removing other agencies from notification and transfer requirements is contrary to the best interests of the child. Without the protections of the TVPRA,

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[298] *Id* at 31.
[299] United Nations High Comm'r for Refugees, *Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the US-Mexico Border*, June 20, 2014 , http://www.immigrantjustice.org/sites/immigrantjustice.org/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf.
[300] *Id* at 5.
[301] *Id* at 6.
[302] U.S. Gov't Accountability Office, *Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody* 20 (July 2015), https://www.gao.gov/assets/680/671393.pdf.
[303] *Yeung v. I.N.S.*, 76 F.3d 337 (11th Cir. 1995).
[304] In *Kleindienst v. Mandel*, 408 U.S. 753, 769-770 (1971), the Supreme Court held as follows:

> In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under s 212(a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

[305] 8 U.S.C. § 1232(b)(2)(A)-(B) and 8 U.S.C. § 1232(b)(3).
[306] DHS and ORR Proposed Regulations at 161.

children in a post-Flores settlement world were subject to abhorrent conditions which created the need for the passage of the TVPRA. Rather than bringing the government in line with the TVPRA, these proposed regulations seek to circumvent and disregard important legal protections and make it easier for the government to regress in its treatment of vulnerable children.

Finally, the proposed regulations risk expanding the instances when DHS may transfer unaccompanied children with unrelated adults outside of the scope of the Flores settlement by using arbitrary, permissive, and vague terminology. The Flores settlement states that unaccompanied children should not be transported with unrelated adults except when "a) being transported from the place of arrest or apprehension to an INS office, or b) where separate transportation would be otherwise impractical."[307] When separate transportation would otherwise be impractical, unaccompanied children "***shall*** be separated from adults."[308] The proposed regulations expand the circumstances in which a child can be transported with adults from when otherwise impractical to when separate transportation is otherwise impractical or *unavailable*.[309] In the commentary section of the proposed regulations, the government argues that the addition of "or unavailable" is "a clarification of the current standard, and not a substantive change."[310] This assertion is simply not true. Given surplusage canon, every word should be considered and none should be ignored. Therefore, the addition of "unavailable" to the regulations is vague in that there is no definition as to what "unavailable" means in the regulations, therefore the exemption may be subject to abuse by government officials.[311] In addition, the proposed regulations further undermine the Flores settlement in that the regulations expand exponentially the instances when an unaccompanied child will be transported together with an unrelated adult. Under the proposed regulations, the government asserts that DHS "will separate the UAC from the unrelated adult(s) to the extent operationally feasible . . ."[312] This is much more permissive than the Flores settlement which states that if an unaccompanied child is transported with adults they "***shall*** be separated from adults."[313] Transporting vulnerable children with adults is contrary to their best interests and may lead to violations of their right to bodily integrity. Immigrant children already face "a pattern of intimidation, harassment, physical abuse, refusal of medical services, and improper deportation" at the hands of Border Patrol officials, and transportation with unrelated adults may further exacerbate immigrant children's vulnerability to violence and abuse.[314] The government was a party to the Flores settlement and agreed to the terms of the Flores settlement which do not allow such transport. The proposed regulations would unlawfully subvert a settlement which has been in place for two decades and thus should not be promulgated as written.

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[307] *Flores* Settlement, Para. 25.
[308] *Id*.
[309] DHS and ORR Proposed Regulations at 161.
[310] *Id*. at 54, FN 17.
[311] The term unavailable should not be included in the regulations as it undermines the *Flores* settlement, a settlement in which the government is a party and could have pushed for a more permissive standard such as impractical or unavailable.
[312] DHS and ORR Proposed Regulations at 161.
[313] *Flores* Settlement, Para. 25.
[314] American Civil Liberties Union, *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* 2 (May 2018), https://www.aclusandiego.org/civil-rights-civil-liberties/. Moreover, DHS continues to demonstrate that it cannot be trusted to ensure the basic safety and wellbeing of the children in its care, not least during their transportation. *See, e.g.*, Vanessa Swales, *Reveal*, "ICE gave $185 million deal to defense contractor under investigation for housing kids in office," Oct. 15, 2018, https://www.revealnews.org/article/ice-gave-185-million-deal-to-defense-contractor-under-investigation-for-housing-kids-in-office/.

19. DHS PROCEDURES IN APPREHENSION, PROCESSING OF CHILDREN

Proposed 8 CFR 236.3(g) DHS Procedures in the Apprehension and Processing of Minors or UACs

The Flores settlement requires that minors be provided "contact with family members who were arrested with the minor."[315] The importance of maintaining family connections is clear from the research on child brain development, which has shown that parents and other caregivers play a critical role in buffering children from trauma and adverse experiences.[316] In child welfare, it is well-established best practice that when children need to be removed from their homes due to immediate safety concerns, every effort is made to keep siblings together and to place the children in the homes of family members with whom they have a relationship, in the communities where they are being raised.[317] Once children have been removed from their homes, moreover, child welfare prioritizes safe visitation as frequently as possible in normalized settings between children and their parents.

But even before the Trump administration made a conscious decision to separate families at the border to further its "zero-tolerance" policy, there was evidence that family members were separated on a routine basis by Customs and Border Patrol officers. Though mothers were often kept with their young children, fathers and older sibling were often separated from their families, and adults were routinely separated from other minor relatives, such as nieces and nephews, who were in their care.

Once relatives are separated by CBP, they may be transferred to separate facilities for longer-term detention. Single adults are sent to adult detention centers, while children and their caregivers (most often their mother) go to family detention facilities, and children who are rendered unaccompanied by separation are placed in ORR custody (discussed in more detail later in this comment).[318]

The misguided insistence that families be detained and the space limitations in existing detention facilities sometimes lead to family separation, if it has not already occurred earlier in the process of apprehension and detention. For example, DHS Family Residential Centers have only a few beds for fathers. In 2016, Berks County Residential Center in Pennsylvania had 88 family beds that could accommodate fathers. The remaining 2,900 family bed capacity were reserved for mothers and children.[319]

Once families are separated, their asylum cases generally proceed on separate tracks. This can lead to permanent family separation, for example, if fathers fail a credible fear screening and are deported, while

[315] *Flores* Settlement, Para. 12(A).
[316] National Scientific Council on the Developing Child, *Supportive Relationships and Active Skill-Building Strengthen the Foundations of Resilience: Working Paper 13* (2015), https://developingchild.harvard.edu/resources/supportive-relationships-and-active-skill-building-strengthen-the-foundations-of-resilience/.
[317] Child Welfare Information Gateway, Children's Bureau, Administration for Youth, Children and Families, "Sibling Issues in Foster Care and Adoption," Jan. 2013, https://www.childwelfare.gov/pubPDFs/siblingissues.pdf.
[318] Leigh Barrick, American Immigration Council, "Divided by Detention: Asylum-Seeking Families' Experiences of Separation," Aug. 2016, https://www.americanimmigrationcouncil.org/sites/default/files/research/divided_by_detention.pdf.
[319] Barrick, "Divided by Detention," 10.

mothers and children pass the credible fear screening and are able to stay in the country as they pursue their cases before immigration courts.

One survey of individuals deported to Nogales, Mexico, from 2014-2015 found that of the 358 participants, almost 65 percent of those traveling with immediate family members were separated from them.[320] Another survey from January to June 2016 found 36 people separated from a parent in the detention and deportation process, 128 individuals separated from their spouse, 67 individuals separated from their children, and 124 individuals separated from their siblings.[321]

By continuing to separate families, the United States is currently failing to fulfill a central goal of the *Flores* settlement. But instead of strengthening the protections against family separation, the proposed rule weakens them by saying that children will be provided contact with family members only to the extent that it does not pose an "undue burden on agency operations." Specifically, the rule states that DHS "will provide contact with family members arrested with the minor or UAC in consideration of the safety and well-being of the minor or UAC, and operational feasibility."[322] In explaining the proposed rule, DHS clarifies that "DHS's use of the term "operationally feasible" in this paragraph does not mean "possible," but is intended to indicate that there may be limited short-term circumstances in which, while a minor or UAC remains together with family members in the same CBP facility, providing such contact would place an undue burden on agency operations."[323] In effect, the rule would allow CBP to separate children from their families if it inconveniences the agency at all. This is an unacceptable watering down of the protections under *Flores*.

HHS REGULATIONS

Subpart A: Care and Placement of Unaccompanied Children
Proposed 45 CFR 410 Subpart A

Proposed Section 410.100--Scope of this Part

As discussed in the comments to Subpart B and other comments to the NPRM, we do not believe the NPRM implements either the letter or the spirit of the Flores Agreement with respect to the care and placement of unaccompanied children.

Proposed Section 410.101--Definitions

As discussed in the comments to Subpart B and other comments to the NPRM, the NPRM is inconsistent with the Flores agreement in its definition of "secure" facilities, particularly but not limited to the inclusions of "Residential Treatment Centers" as one form of secure facility. Additionally, as discussed in

[320] Jones, Jessica et al., Lutheran Immigration and Refugee Service, the Women's Refugee Commission, and Kids in Need of Defense, *Betraying Family Values: How Immigration Policy at the United States Border is Separating Families*, Feb. 2017, https://www.lirs.org/assets/2474/lirs_betrayingfamilyvalues_feb2017.pdf.
[321] *Id.*
[322] *§* 236.3 (g)(2)
[323] 83 Fed. Reg. 45500 (Sept. 7, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf.

comments to the proposed regulation allowing redetermination of UAC status, the NPRM conflicts with the Flores agreement and two decades of agency practice consistent with Flores and the HSA, in which the designation of UAC status is not re-determined or subject to routine or even sporadic reconsideration, thereby providing children with much needed stability; avoiding unnecessary costs, delays, and confusion; and preventing children's loss of access to vital procedural and substantive protections as described in other sections. See **Determining whether child is an unaccompanied alien child (UAC) - HHS**.

20. DETERMINING WHETHER CHILD IS AN UNACCOMPANIED ALIEN CHILD (UAC) - HHS

Proposed Section 45 CFR 410.101

Section 410.101 of the proposed regulations would permit HHS to re-determine a child's status as an unaccompanied alien child and strip the child of related protections—a practice that would run contrary to ORR's mission under the HSA and TVPRA, and to the best interests of unaccompanied alien children.

HHS' proposed regulations define the term "unaccompanied alien child" (UAC) as provided for by the Homeland Security Act of 2002--that is, as "a child who has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States or no parent or legal guardian in the United States is available to provide care and physical custody."[324]

HHS states that "[the HSA], as well as the TVPRA, only gives ORR authority to provide for care and custody of individuals who meet that definition. The statutes, however, do not set forth a process for determining whether an individual meets the definition of a UAC."[325] HHS proposes to "make clear that ORR's determination of whether a particular person is a UAC is an ongoing determination that may change based on the facts available to ORR."[326]

Status as an "unaccompanied alien child" carries with it certain substantive and procedural protections enacted by Congress in recognition of the distinct vulnerability of children who arrive in the U.S. without a parent or legal guardian. These include transfer to the care of ORR,[327] which provides child-appropriate care and services; exemption from the one-year filing deadline that generally applies to asylum claims;[328] the ability for UACs to first present their asylum claims in a non-adversarial setting before an asylum officer,[329] rather than in immigration court; and the availability of independent child advocates, who may be appointed to identify and advocate for the best interests of child trafficking victims and other vulnerable unaccompanied alien children. These protections facilitate the fair treatment of unaccompanied

[324] 6 U.S.C. § 279(g)(2).
[325] 83 Fed. Reg. 45505.
[326] *Id.*
[327] 8 U.S.C. § 1232(b)(3).
[328] INA § 208(a)(2)(E).
[329] INA § 208(b)(3)(C); 8 U.S.C. § 1158(b)(3)(C).

alien children in a system of complex laws and procedures that can be daunting to navigate, even for adults.

HHS' proposed regulation, however, would allow the agency to continuously re-determine whether a child meets the definition of an "unaccompanied alien child," and allow the agency to potentially strip a child of status and its associated protections if the child has turned 18,[330] or if a parent or legal guardian is available to provide care and custody for the child. These re-determinations could occur despite the fact that they only *increase* the child's vulnerability, which endures even if and after a child is reunified with a parent or sponsor or turns 18. A child will still be required to navigate immigration proceedings once reunified with a family member. Reunification alone does not result in the automatic joinder of child's case with that of an adult or eliminate the child's vulnerability in the immigration system. To the contrary, the best interests of children dictate that, once determined, a child's status as an "unaccompanied alien child" should endure for the duration of the child's immigration case.

HHS suggests that the absence of statutory provisions regarding how agencies are to make determinations about who meets the definition of a UAC signals that these determinations should be made on an ongoing basis. Yet HHS fails to consider that Congress may not have prescribed procedures by which to interpret the definition of a UAC precisely because it intended determinations once made to endure *throughout* a child's immigration case, in order to advance both the child's best interests and the efficiency of the immigration system.

The Homeland Security Act of 2002 transferred the care and custody of unaccompanied alien children from INS to ORR.[331] This transfer of responsibilities reflects the intent of Congress to separate responsibility for the care and custody of unaccompanied alien children from the adjudication of immigration benefits and immigration enforcement.[332] The HSA itself clarifies that "[n]othing in this section may be construed to transfer the responsibility for adjudicating benefit determinations under the Immigration and Nationality Act . . . from the authority of any official of the Department of Justice, the Department of Homeland Security, or the Department of State."[333] The Act delineates various functions that ORR is to undertake with respect to the care and custody of detained unaccompanied alien children, including as to placement determinations.[334] It does not, however, elaborate on how the definition of an "unaccompanied alien child" is to be interpreted or implemented.

The TVPRA, enacted in 2008, states that "the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary

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[330] *Cf. Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018) (finding that an Immigration Judge can assume jurisdiction over an asylum applicant filed by a UAC after turning 18). As demonstrated by the above and foregoing analysis, this BIA decision is contrary to Congressional intent and was wrongly decided.

[331] 6 U.S.C. § 279(a).

[332] *See, e.g.*, 148 Cong. Rec. S8180 (2002) (letter from Sen. Lieberman and Sen. Thompson) ("Currently, INS has responsibility for the care and custody of these children. It would not be appropriate to transfer this responsibility to the Department of Homeland Security. This legislation transfers responsibility for the care and custody of unaccompanied alien children who are in Federal custody . . . to the Office of Refugee Resettlement . . . ORR has decades of experience working with foreign-born children, and ORR administers a specialized resettlement program for unaccompanied refugee children.").

[333] 6 U.S.C. § 279(c).

[334] *Id.* at (b).

of Health and Human Services."[335] The TVPRA does not specify procedures by which federal agencies are to determine whether a child meets the definition of an "unaccompanied alien child," but rather, discusses how such children are to be processed by federal agencies. In relevant part, the TVPRA states that "[e]ach department or agency of the Federal Government shall notify the Department of Health and Human services within 48 hours upon the apprehension or discovery of an unaccompanied alien child; or any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age."[336] It further provides that "any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child."[337]

Both the HSA and TVPRA address HHS' unique role related to UACs—underscoring that such children are to be transferred to the agency's care and custody following apprehension or identification. DHS, as the federal agency responsible for apprehending children at the border, usually makes the determination about whether a child meets the definition of an "unaccompanied alien child" prior to the child's transfer to ORR custody. Although practice may differ, generally a "juvenile is classified as unaccompanied if neither a parent nor a legal guardian is with the juvenile alien at the time of apprehension, or within a geographical proximity to quickly provide care for the juvenile."[338]

Yet HHS' proposed regulations would permit ORR a broad and active role in re-determining not only a child's status as a UAC, but potentially the availability of related substantive and procedural protections. Under the proposed rule, ORR could strip unaccompanied alien children of protections intended to facilitate their access to a fair process as they navigate the immigration system and significantly undermine their ability to access humanitarian protection. Far from providing for a child's best interests, such actions would have a destabilizing effect on children, particularly survivors of violence and trauma, and make children increasingly vulnerable. The HSA and TVPRA should not be read to enable such detrimental effects to the well-being of children by the agency charged with ensuring their care and best interests. See additional related analysis in **Determining whether child is an unaccompanied alien child (UAC) - DHS**.

Re-determinations of UAC status by HHS would run counter to the TVPRA's requirement that the agency ensure "to the greatest extent practicable" that UACs have legal counsel to represent them.

Among other responsibilities, the TVPRA provides that HHS:

> shall ensure, to the greatest extent practicable . . . that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security . . . have counsel to represent them in legal proceedings or matters and protect them from mistreatment,

[335] 8 U.S.C. § 1232(b)(1).
[336] 8 U.S.C. § 1232(b)(2).
[337] *Id.* at (b)(3).
[338] Congressional Research Service, William A. Kandel, *Unaccompanied Alien Children: An Overview* (Jan. 18, 2017), at FN8, https://fas.org/sgp/crs/homesec/R43599.pdf, *citing* 8 C.F.R. § 236.3(b)(1); *see also id.* at FN7 ("Although these children may have a parent or guardian who lives in the United States, they are classified as unaccompanied if the parent or guardian cannot provide *immediate* care.").

> exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.[339]

Pro bono legal services, like social services, may be provided by nonprofit organizations and governments to children based on their status as unaccompanied alien children. Yet, under the proposed rule, ORR could re-determine a child's status and potentially render them ineligible to receive these critical services, which have a dramatic impact on the ability of children to meaningfully participate in immigration proceedings that may determine their futures, and on the outcome of children's legal cases.

For unaccompanied children's cases in FY2017, nearly 60% are currently unrepresented.[340] Without an attorney, children are five times more likely to be deported.[341] By stripping children of UAC status and the related protections, ORR would undermine its responsibility for facilitating access to legal counsel and the protection of children from mistreatment and other harm. Such actions would not only fail to advance children's best interests, but run directly opposed to them. The TVPRA cannot be read to permit this result.

Ongoing re-determinations of UAC status would depart from agency practice and policy without a stated need or justification.

HHS proposes to potentially re-determine a child's UAC status on an ongoing basis, but articulates no legitimate reason for the change to its current practice or policy, which focuses on the intake, placement, and care of unaccompanied alien children transferred to the agency.

ORR's Policy Guide outlines various procedures for placing children, including procedures for conducting intakes of children referred to the agency by DHS or other federal agencies.[342] While HHS maintains policies related to determining the age of "individuals without lawful immigration status,"[343] it does not include procedures for re-determining the status of children in ORR custody more generally or on an ongoing basis. HHS has offered no reason for implementing such policies now, which would depart from its current practice. Instead, HHS states only that "[t]he statutes . . . do not set forth a process for

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[339] 8 U.S.C. § 1232(c)(5).
[340] *See* TRAC Immigration, "Juveniles – Immigration Court Deportation Proceedings" Tracker, http://trac.syr.edu/phptools/immigration/juvenile/. Select "Fiscal Year Began" from first drop-down menu and click "2017"; select "Outcome" from the middle pull-down menu, click "All"; select "Represented" from the last drop-down menu. Starting in FY2018, cases in TRAC include all juveniles, unaccompanied children and children who arrive as a family unit. This change was made because it is no longer possible to reliably distinguish these two separate groups in the court's records.
[341] Syracuse University, TRAC Immigration, "Representation for unaccompanied children in immigration court" (Nov. 24, 2014), http://trac.syr.edu/immigration/reports/371/.
[342] *See, e.g.*, ORR, Children Entering the United States Unaccompanied: Section 1 (Section 1.3 Referrals to ORR and Initial Placement).
[343] *See id.* at 1.6 (Determining the Age of an Individual without Lawful Immigration Status) ("Until the age determination is made, the unaccompanied alien child is entitled to all services provided to UAC in HHS care and custody. There may be occasions when an unaccompanied alien child's age is questioned at the time of admission to an HHS funded care provider facility during the intakes process. In those cases, the case manager does not complete the intakes process, but consults with the HHS FFS to make the age determination.").

determining whether an individual meets the definition of a UAC."[344] The TVPRA was enacted in 2008. The agency offers no justification for why it only now seeks to re-determine UAC status on an ongoing basis. Decisions with such import and consequence for unaccompanied alien children and for the efficiency of the immigration system should not be undertaken without an articulation of legitimate need and a reason for departing from longstanding practice.

The ability of ORR to re-determine UAC status on an ongoing basis would create administrative inefficiencies, confusion, and burdens for the immigration system, and unduly impact the adjudication of benefits for UACs.

Congress provided HHS with responsibility for the care and custody of UACs based on its experience and expertise working with refugee children. It expressly decided to divide the agency's care and custody of this vulnerable population from the aims of immigration enforcement or the adjudication of benefits. The proposed change, however, would work a detriment to children, and moreover, create significant burdens for the immigration system by potentially changing the procedural and substantive protections available to children in proceedings managed by *other* agencies.

ORR's expertise, responsibilities, authority rest in child welfare, not in the commencement or management of immigration proceedings. By allowing the agency to re-determine the status of children in its care on an ongoing basis, however, the agency could strip children of protections that would, for example, determine which agency has initial jurisdiction over their asylum cases and the timeline necessary for filing their asylum claims. Such a result affords the agency inappropriate and undue latitude related to the adjudication of immigration benefits and the outcome of children's cases, contrary to federal law.[345] This would also create new inefficiencies for an already-burdened immigration system, as the potential for duplicate filings, confusion as to which procedures apply to a given case, and delays would naturally increase.

In contrast, a one-time determination of UAC status enables a child to be screened by ORR staff for protection needs and by counsel to determine whether the child may be eligible for legal relief. A pro bono attorney can advise the child about any forms of relief or protection for which the child may qualify and about options for how to proceed if none is available. Assistance of this nature contributes to more orderly and efficient filings and proceedings, and aids children in meaningfully participating in immigration proceedings.

21. DETERMINING THE PLACEMENT OF A UAC

Proposed 45 CFR 410.201

Section 410.201(c) fails to ensure the availability of licensed programs in multiple geographic areas near where UACs are apprehended and in proximity to culturally and linguistically appropriate supports.

[344] 83 Fed. Reg. 45505.
[345] *See* 6 U.S.C. § 279(a).

Paragraph 6 of the FSA provides that "[t]he INS shall make reasonable efforts to provide licensed placements in those geographical areas where the majority of minors are apprehended, such as Southern California, southeast Texas, southern Florida and the northeast corridor.

In its proposed regulations, HHS states that "ORR complies with this provision, as ORR maintains the highest number of UAC beds in the state of Texas where most UACs are currently apprehended."[346] The proposed text at Section 410.201(c) embraces this interpretation and states: "ORR makes reasonable efforts to provide placements in those geographical areas where DHS apprehends the majority of UAC,"[347] omitting reference to the multiple geographic areas referenced in the FSA.

The maintenance of licensed programs for children in several areas of the country is of particular importance, as it can minimize difficult transitions for children following apprehension and also facilitate access to critical services. Community-based programs with expertise working with immigrant youth can connect children with vital social and medical services to help in healing from trauma, legal assistance for their immigration cases, and culturally and linguistically appropriate support to ease adjustment to a new language, country, and community. The availability of a breadth of programs across the country, including near metropolitan areas, contributes not only to the well-being of children while in ORR custody but also to their safety, successful community integration, and compliance with immigration proceedings following release. Similarly, the location of facilities in areas with high numbers of sponsors can facilitate reunifications and the release of unaccompanied alien children from federal custody without unnecessary delay, as prioritized by the FSA.

HHS' proposed regulations acknowledge access to appropriate services as a consideration in locating emergency influx and emergency shelters, stating: "To the extent practicable, ORR will attempt to locate emergency placements in geographic areas where culturally and linguistically appropriate community services are available."[348] The proposed regulations should incorporate a similar reference, including to multiple geographic areas, in section 410.201(c) to ensure the availability of placements generally that best serve the needs of unaccompanied alien children.

Section 410.201(d) creates undue confusion by incorporating references to the FSA's minimum standards for temporary facilities following arrest without reference to the standards for licensed programs with which most ORR programs and facilities must comply.

The language of Section 410.201(d) parallels that of paragraph 12 of the FSA, which directs that facilities in which minors are placed following arrest "will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor."[349] These standards reflect minimums intended for facilities in which minors are placed temporarily immediately following arrest by legacy INS, which are now operated by U.S. Customs and Border Protection. They do not, however, reflect the whole of the

[346] 83 Fed. Reg. 45505.
[347] 83 Fed. Reg. 45530, Sec. 410.201(c) ("ORR makes reasonable efforts to provide placements in those geographical areas where DHS apprehends the majority of UAC.").
[348] 83 Fed. Reg. 45531, Sec. 410.209(c).
[349] FSA para. 12.

standards required of facilities in which ORR places unaccompanied alien children. Indeed, the FSA clarifies that licensed programs must be both "licensed by an appropriate State agency" and "must also meet those standards for licensed programs set forth in Exhibit 1" of the FSA, including compliance with applicable state child welfare laws and regulations as well as state and local building, fire, and health and safety codes.[350] The proposed regulations incorporate these critical standards at Section 410.402 (Minimum standards applicable to licensed programs). In order to avoid any confusion about the standards applicable to and expected of ORR's facilities, this section should clarify, cross-reference, and underscore the need for ORR to comply with the section on minimum standards for licensed programs.

Section 410.201(e) inappropriately incorporates FSA provisions addressing facilities in which a child may be held following apprehension to provide ORR broad flexibility to detain children in secure facilities indefinitely.

The *Flores* settlement agreement ("FSA"), which originally bound the Immigration and Naturalization Service, now governs the treatment of children by both the Department of Homeland Security and the Department of Health and Human Services. In the Homeland Security Act of 2002 (HSA), Congress clarified that responsibility for the care, custody, and placement of unaccompanied alien children rests with HHS.[351] DHS continues to oversee the initial processing, identification, and transfer of unaccompanied alien children to HHS.

HHS' proposed regulations necessarily interpret the FSA in light of statutory changes that have taken place since the agreement was signed--including the enactment of the HSA and the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). These changes do not, however, permit the government to escape compliance with the substantive terms of the FSA.[352]

While much of the proposed text in Section 410.201 tracks the FSA's provisions related to the placement of unaccompanied alien children, the piecemeal incorporation of provisions more appropriately related to DHS' initial processing of unaccompanied alien children at the border confuses the standards applicable to ORR's placement of children and ORR-contracted facilities. In doing so, it provides the agency with undue latitude to hold children indefinitely in temporary or secure facilities before transferring them to less restrictive, licensed placements--contravening both the terms and spirit of *Flores* and the TVPRA.

Section 410.201 of the proposed regulations--titled "Considerations generally applicable to the placement of an unaccompanied alien child"--states that "if there is no appropriate licensed program immediately available for the placement of the UAC . . ., and no one to whom ORR may release the UAC . . ., the UAC may be placed in an ORR-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility. . . .ORR makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible."

[350] FSA para. 6.
[351] Homeland Security Act of 2002, Sec. 462.
[352] *Flores v. Lynch*, 828 F.3d 898, 910 (9th Cir. 2016) ("The government also notes that the Homeland Security Act of 2002 reassigned the immigration functions of the former INS to DHS; but there is no reason why that bureaucratic reorganization should prohibit the government from adhering to the Settlement.")

This provision in part parallels language from paragraph 12 of the FSA referencing placement of children by then-INS, which states:

> "[i]f there is no one to whom the INS may release the minor pursuant to Paragraph 14 [of the FSA], and no appropriate licensed program is immediately available for placement pursuant to Paragraph 19 [discussing licensed programs], the minor may be placed in an INS detention facility, or other INS-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility. . ."

The FSA further provides that "INS will transfer a minor from a placement under this paragraph to a placement under Paragraph 19" within three to five days, except in certain enumerated circumstances.[353] These include "an emergency or influx of minors into the United States, in which case the INS shall place all minors pursuant to Paragraph 19 as expeditiously as possible."[354]

Without explicitly stating so, Section 410.201 of HHS' proposed regulation pairs FSA provisions addressing temporary placements of children following arrest with an exception for influxes and emergencies to give ORR greater flexibility when placing unaccompanied alien children--potentially delaying their transfer to licensed programs indefinitely. The FSA and TVPRA cannot be so interpreted.

The FSA provisions incorporated piecemeal in HHS' proposed regulation reflect the then-dual role of INS in both apprehending and placing children. The ability to hold children temporarily in INS detention, contracted facilities, or state or county juvenile detention facilities allowed the government limited flexibility immediately following a child's apprehension at the border at a time when dedicated facilities for immigrant youth or even licensed programs were fewer in number.

Today, these provisions must be read jointly with HHS' responsibilities under the HSA and TVPRA, and in the context of policy, practice, and capacity that has developed since the agency assumed responsibility for the care and custody of unaccompanied alien children.

The HSA transferred to HHS authority "for the functions under the immigration laws of the United States with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization. . . ."[355] These duties include "coordinating and implementing the care and placement of unaccompanied alien children," "identifying a sufficient number of qualified individuals, entities, and facilities to house unaccompanied alien children," and "overseeing the infrastructure and personnel of facilities in which unaccompanied alien children reside."[356]

Pursuant to the TVPRA, DHS must notify HHS within 48 hours of apprehending or discovering an unaccompanied alien child or upon any claim or suspicion that an individual in custody is under 18 years of age.[357] The agency must then transfer an unaccompanied alien child to HHS within 72 hours.[358] Once

[353] FSA para. 12.
[354] *Id.* at (3).
[355] HSA, Section 462.
[356] *Id.*
[357] 8 USC § 1232(b)(2).
[358] 8 USC § 1232(b)(3).

in ORR's custody, children are to "be promptly placed in the least restrictive setting that is in the best interest of the child."[359]

In practice, once DHS notifies ORR about an unaccompanied alien child in its custody, ORR begins to identify and designate an appropriate placement within its shelter network. ORR has generally interpreted "prompt" initial placement to mean the identification and designation of a placement within 24 hours of the initial referral.[360] DHS then transfers the child to the designated shelter or program.

Section 410.201, however, includes under the title "considerations generally applicable to the placement of an unaccompanied alien child" flexibility for ORR to hold children for indefinite periods in contracted facilities or state and county juvenile facilities, which may be secure, before placing them in licensed programs. While the proposed regulation shares some language with the influx provision of the FSA, it does so under a section title suggesting broader application to ORR's placement determinations more generally. This result is not only inappropriate under *Flores* but contrary to the TVPRA and HSA.

Currently, thousands of children are being held in large-scale facilities, including in Tornillo, Texas,[361] and Homestead, Florida, that are not licensed for the residential care of children and that pose particular consequences for child survivors of trauma and violence, given the facilities' remote location, size, and limited access to critical support services. These "influx" shelters, intended to be temporary, may in reality hold children for months. In recent weeks, thousands of children have been abruptly transferred from licensed programs to these remote facilities, purportedly to make room for other children as they await release to sponsors.[362] Hurried transitions with little warning further destabilize children whose trust has in many cases already been deeply eroded by prior abuse, violence, and threats to their lives. Large-scale facilities, which lack schooling and have limited mental health and legal services, compound the emotional and psychological trauma facing unaccompanied alien children and increase the risk their needs will be inadequately addressed. Yet, currently, children are being held in Tornillo for an average of 20 days.[363] Regulations expanding the ability of ORR to use such facilities more broadly are not only contrary to the best interests of children but to the very aims of *Flores*.

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[359] 8 U.S.C. § 1232(c)(2)(A).

[360] *See* ORR Policy Guide, Section 1.3.5 Initial Placements in the Event of an Emergency or Influx **("**Historically, ORR has experienced periods when DHS apprehends a significantly greater number of unaccompanied alien children than at other times of the year. These periodic intervals are called an "influx." In addition to an influx, a natural disaster or other emergency may prevent the *prompt (within 24 hours)*, initial placement of unaccompanied alien children in care provider facilities.") (emphasis added); Section 1.3.2 ORR Placement Designation ("ORR attempts to identify and designate a placement for the unaccompanied alien child within 24 hours of the initial referral whenever possible.")

[361] Dominque Mosbergen, *Huffington Post*, "Trump Administration Quietly Moves 1,600 Migrant Children to Texas Tent City: Report," Oct.1, 2018, https://www.huffingtonpost.com/entry/tornillo-tent-city-migrant-children_us_5bb1fcc6e4b0c7575966ff2e.

[362] Caitlin Dickerson, *The New York Times*, "Migrant Children Moved Under Cover of Darkness to a Texas Tent City," Sept. 30, 2018, https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html?emc=edit_nn_20181001&nl=morning-briefing&nlid=78819102201810 01&te=1.

[363] Angelina Chapin, Huffington Post, "Migrant Children Describe Tent City As 'Punishment,' Experts Say," Oct. 2, 2018, https://www.huffingtonpost.com/entry/migrant-children-say-being-in-texas-tent-city-is-punishment_us_5bb2a902e4b00fe9f4f9ab0f.

The potential for ORR to increase its use of secure state and local facilities is similarly inappropriate. The TVPRA, like *Flores*, provides criteria for when children may be placed in secure facilities. Specifically, the TVPRA states that "[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense." Yet Section 410.201 would suggest that secure placements could happen more routinely and outside of these circumstances.[364]

Recent media reports and lawsuits, including motions to enforce the FSA, have highlighted the pronounced impact of secure detention on unaccompanied alien children and the mistreatment to which they are frequently exposed in custody.[365] In 2017, unaccompanied youth challenged "unconstitutional conditions that shock the conscience, including violence by staff, abusive and excessive use of seclusion and restraints, and the denial of necessary mental health care" at Shenandoah Valley Juvenile Center--a secure facility under contract with ORR.[366] In another lawsuit in 2017, a federal court ordered the government to provide prompt hearings before an immigration judge to unaccompanied alien children who had previously been released from ORR custody, subsequently arrested by DHS on unsubstantiated allegations of gang affiliation, and then detained indefinitely by ORR in high-security facilities without receiving notice of the reasons for their detention or an opportunity to challenge such placements.[367]

In July 2018, in response to a motion by class counsel to enforce the FSA,[368] Judge Dolly Gee held that the government had breached the FSA on multiple grounds by implementing policies that unnecessarily delay the release of unaccompanied alien children, using "step ups" to secure custody without providing justification, proper notice to the child, or an opportunity for children to contest these placements, and giving psychotropic medications without required legal authorization.[369]

Mistreatment and prolonged detention have a devastating impact on children. DHS' own Advisory Committee has previously reported on the inappropriateness of continued detention for survivors of trauma in particular, stating that "[n]umerous studies have documented how detention exacerbates existing mental trauma and is likely to have additional deleterious physical and mental health effects on

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[364] 8 U.S.C. § 1232(c)(2)(A).

[365] Roque Planas and Hayley Miller, *Huffington Post*, "Migrant Children Report Physical, Verbal Abuse In At Least 3 Federal Detention Centers," June 21, 2018, https://www.huffingtonpost.com/entry/migrant-children-abuse-detention-centers_us_5b2bc787e4b0040e2740b1b9.

[366] *Doe v. Shenandoah Valley Juvenile Center Comm'n*, Class Action Complaint (W.D. Va. Oct. 4. 2017), http://www.washlaw.org/pdf/svjc_class_action_complaint_signed.PDF. *See* Bob Ortega, *CNN*, "Virginia report clears child detention center of abuse, but youths' lawyer says investigation was insufficient," Aug. 14, 2018, https://www.cnn.com/2018/08/14/us/virginia-clears-shenandoah-detention-center-abuse-allegations-invs/index.html (discussing the findings of a state investigation finding allegations related to Shenandoah did not amount to child abuse or neglect—an investigation counsel challenge as "shockingly inadequate.").

[367] *Saravia v. Sessions*, Order Granting the Motion for Preliminary Injunction, et. al (Nov. 20, 2017), https://www.aclunc.org/sites/default/files/20171121-Gomez_v_Sessions-Order_Granting_PI_and_Class_Cert.pdf.

[368] *Flores v. Sessions*, Memorandum in Support of Motion to Enforce Class Action Settlement (C.D. Ca. Apr. 16, 2018), https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf.

[369] *Flores v. Sessions*, In Chambers--Order re Plaintiff's Motion to Enforce Class Action Settlement (C.D. Ca. July 30, 2018), https://www.aila.org/File/Related/14111359ae.pdf.

immigrants – particularly traumatized persons like asylum seekers."[370] Many children suffer worsening depression[371] and engage in self-harm. The indefinite detention of children in secure conditions is precisely the situation the FSA sought to address and remedy, and the FSA, TVPRA, and HSA cannot be read together to enable this result. "The overarching purpose of the HSA and TVPRA was quite clearly to give unaccompanied minors more protection, not less."[372]

Section 410.201 allows ORR to unnecessarily delay the placement of children in licensed programs and circumvent FSA protections as a matter of course.

Worse, the proposed regulations leave undefined the potential duration of these placements by partially incorporating and weakening FSA language related to influxes and emergencies. Specifically, the proposed regulation modifies language stating that the government "*shall* place all minors [in licensed programs] *as expeditiously as possible*" to state only that ORR "makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible." (Emphasis added).

The FSA's influx and emergency provisions were intended to account for unexpected and significant increases in children in custody, and not to serve as a baseline standard for the agency's ongoing and routine care and placement of unaccompanied alien children. Flexibility of this kind is inappropriate as a "consideration generally applicable to the placement of children," as such a reading would render hollow the protections and provisions of *Flores*, the TVPRA, and HSA.

This reading would also allow for prolonged stays in custody by largely referencing the *initial* placement of children into licensed programs, without accounting for the potential transfers of children to emergency facilities following such placements, as has recently occurred in ORR's emergency influx facilities, such as Tornillo.[373] The proposed regulations should underscore the need to promptly place children into licensed programs, and to limit the time in which children are held in emergency facilities.

Section 410.201(f) omits critical language in the FSA requiring the government to document and make continuous efforts toward the release of children from custody.

Among the considerations to be applied generally to ORR's placement of unaccompanied alien children, the proposed regulation states that "ORR makes and records the prompt and continuous efforts on its part toward family reunification. ORR continues such efforts at family reunification for as long as the minor is

[370] Report of the DHS Advisory Committee on Family Residential Centers, Sept. 30, 2016, https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf (addressing family detention centers).
[371] *See, e.g.*, Samantha Michaels, *Mother Jones*, "The Feds Are Locking Up Immigrant Kids—Who Have Committed No Crimes—In Juvie," July 10, 2018, https://www.motherjones.com/crime-justice/2018/07/immigrant-kids-are-being-sent-to-violent-juvenile-halls-without-a-trial/ (discussing a child who, "now diagnosed with 'major depressive disorder,' waits in the psychiatric facility in Texas. Among his 'major stressors,' the facility notes, is the fact that he is 'being kept from family and in ORR custody.'").
[372] *Flores v. Sessions*, No. 17-55208 (9th Cir. July 5, 2017), at 32.
[373] *See, e.g.*, Caitlin Dickerson, *The New York Times*, "Migrant Children Moved Under Cover of Darkness to a Texas Tent City," Sept. 30, 2018, https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html?emc=edit_nn_20181001&nl=morning-briefing&nlid=78819102201810 01&te=1.

in ORR custody." This provision reflects in part language from paragraph 18 of the FSA, but with a critical omission.

FSA paragraph 18 reads "Upon taking into custody, the INS, or the licensed program in which the minor is placed, shall make and record the prompt and continuous efforts on its part toward family reunification ***and the release of the minor pursuant to Paragraph 14 above. Such efforts at family reunification shall continue so long as the minor is in INS custody."*** **(emphasis added).**

The omission of language directing ORR's continued efforts toward the release of children from custody is not insignificant. The FSA, by its own terms, "sets out a nationwide policy for the detention, *release,* and treatment of minors. . . ."[374] Indeed, the provision from which the proposed regulation draws is part of a larger section of the settlement titled "General Policy Favoring Release," which sets forth the process by which the government is to release minors from custody "without unnecessary delay" whenever "detention of the minor is not required either to secure his or timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others."[375] The removal of reference to continued efforts toward release is particularly troubling when read in tandem with other provisions in the proposed regulations expanding the government's ability to detain children in family detention and unlicensed programs for potentially indefinite periods.

Importantly, ORR's overarching purpose with respect to unaccompanied alien children is to provide care and custody for them only until they can be released to safe sponsors in the community.[376] As such, ORR custody serves a distinct role from ICE custody more generally, as ORR's primary purpose is not to detain children throughout their removal proceedings but to enable reunification and release of children in a manner that minimizes children's time in federal custody.[377] This accords with basic child welfare principles, domestically and internationally, advising that the detention of children should be used only as a last resort and for the shortest duration appropriate.[378] The proposed regulation's omission of references to release overlooks this critical responsibility.

The proposed regulation similarly fails to ensure ORR's prompt and continuous efforts toward the reunification and release of children by weakening the FSA's language to merely reference agency

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[374] FSA para. 9 (emphasis added).
[375] FSA para. 14.
[376] *See* ORR, Unaccompanied alien children: Frequently Asked Questions, https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-frequently-asked-questions ("HHS is legally required to provide care for all children until they are released to a suitable sponsor, almost always a parent or close relative, while they await immigration proceedings."); *see generally* FSA, para. 14.
[377] This primary purpose is significantly compromised not only by this NPRM, but also by current policies implemented by ORR hand-in-hand with ICE. *See* **Releasing a UAC from ORR custody (sponsors)**. As a result, unaccompanied children are now languishing in ORR custody for an average of 74 days prior to release, in contravention of the letter and spirit of the FSA, HSA, and TVPRA. Jonathan Blitzer, *The New Yorker*, "To Free Detained Children, Immigrant Families Are Forced to Risk Everything," Oct. 16, 2018, https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything.
[378] *See* Art. 37, United Nations General Assembly, Convention on the Rights of the Child, https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf ("The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time").

practice, rather than a requirement. While the FSA states that the government "shall" make prompt and continuous efforts to these ends, the proposed regulation states only that "ORR makes and records" such efforts.

Proposed 45 CFR 410.202

Section 410.202 of HHS' proposed regulation fails to ensure compliance with FSA and TVPRA requirements on placements of children in the least restrictive setting appropriate to their needs.

Section 410.202 states that ORR "places UAC into a licensed program promptly after a UAC is transferred to ORR legal custody," with four enumerated exceptions. Rather than focusing on how placement decisions are made or the process by which they are implemented this section instead emphasizes those circumstances in which an unaccompanied alien child is *not* placed in a licensed program. As formulated, the proposed regulations provide ORR with broad latitude in making placement decisions that may run contrary to both the well-being and best interests of children, and the TVPRA, HSA, and FSA.

The FSA, incorporated in relevant part in the TVPRA, requires that unaccompanied alien children be placed in the "least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance . . . before the immigration courts and to protect the minor's well-being and that of others."[379] This requirement reflects the widely accepted understanding among child welfare and medical professionals that confinement poses significant developmental, emotional, physical, and psychological consequences for children and youth.

The language of section 410.202, however, fails to ensure compliance with this critical provision of the FSA. Where the FSA states that a "minor *shall* be placed temporarily in a licensed program until such time as release can be effected*....,"*[380] the proposed regulation states only that "ORR places UAC in a licensed program promptly after a UAC is transferred to legal custody,"[381] replacing a directive with a mere reference to agency practice.

Also absent in section 410.202 is language ensuring that placement decisions made by the agency--whether initial placements or transfer decisions—will not be made arbitrarily. Although ORR's Policy Guide includes a section titled "Placement Considerations" (1.2.1) setting forth several factors (including age, gender, length of stay in custody, special needs, trafficking concerns, and identification as LGBTQI or gender non-conforming), ORR can and does routinely change sections of its policy guide with no notice to or comment from the public, therefore, it is imperative these standards are included in formal regulations.

In the absence of any such standards or factors, the provision permits the agency undue flexibility to place unaccompanied alien children in more restrictive settings for indefinite periods of time. This discretion is particularly troubling and inappropriate in light of the agency's recent actions running contrary to both the FSA and TVPRA.

[379] FSA para. 11.
[380] FSA para. 19 (emphasis added).
[381] Section 410.202.

Section 410.202 provides broad discretion to ORR, despite multiple recent court actions underscoring violations of due process, the FSA, and TVPRA in ORR's placement of children in restrictive custody.

Since coming into force in 1997, the FSA has provided critical monitoring and oversight, including through facility and program inspections, interviews, and numerous motions to enforce on the part of class counsel. These efforts have served as a vital check on the practices of both DHS and HHS with respect to care and custody of minors, and continue to do so. In response to a recent motion to enforce the FSA, the court found that the government had breached the FSA through its unilateral "step ups" of unaccompanied alien children from licensed shelters to more restrictive staff-secure or secure facilities, or residential treatment centers without justification, transparency or requisite procedures by which unaccompanied alien children could challenge these placements, among other practices.[382]

Other recent court decisions underscore the arbitrary manner in which placement decisions have been made by ORR. In *Saravia v. Sessions*, plaintiffs challenged ORR's restrictive placements of unaccompanied alien children who had been re-arrested by DHS for alleged gang affiliation following release from ORR to sponsors. ORR accepted DHS' unsubstantiated allegations in lieu of reviewing its own case files and adhering to FSA and TVPRA requirements related to secure placements, and placed these children in staff secure or secure placements without sufficient notice or an opportunity to challenge these decisions.[383] Owing to a recent ORR policy requiring the ORR Director's personal review of release decisions for children previously in staff secure or secure facilities--which was recently enjoined by yet another court and part of the court's order in counsel's recent motion to enforce the FSA[384]--unaccompanied alien children remained in such placements for months.

Placement decisions, far from simply administrative formalities, have significant consequences for unaccompanied alien children. Unlike in licensed shelter placements, many of ORR's more restrictive settings closely resemble prison. Children may be under constant surveillance, required to wear facility uniforms, and have little contact with those outside of the facility.[385] Given the small number of secure facilities, children also may be relocated to different states, far from their family members or even their attorneys.[386]

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[382] *See Flores v. Sessions*, In Chambers--Order re Plaintiff's Motion to Enforce Class Action Settlement (C.D. Ca. July 30, 2018), https://www.aila.org/File/Related/14111359ae.pdf; *Flores v. Sessions*, Memorandum in Support of Motion to Enforce Class Action Settlement (C.D. Ca. Apr. 16, 2018), https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf.

[383] *See Saravia v. Sessions*, No. 18-15114 (N.D. Ca); https://www.aclunc.org/our-work/legal-docket/saravia-v-sessions-due-process-immigrant-youth.

[384] *LVM v. Lloyd*, Opinion and (June 27, 2018), https://www.nyclu.org/en/press-releases/court-halts-trump-administration-policy-prolonging-detention-hundreds-immigrant (noting that the agency's creation of the release policy without a record indicating need for a change "is at the zenith of impermissible agency actions"); *Flores v. Sessions*, In Chambers--Order re Plaintiff's Motion to Enforce Class Action Settlement (C.D. Ca. July 30, 2018), https://www.aila.org/File/Related/14111359ae.pdf.

[385] *Id.* at 5.

[386] *See* ACLU Northern California, *Saravia v. Sessions* (Aug. 11, 2017), https://www.aclunc.org/our-work/legal-docket/saravia-v-sessions-due-process-immigrant-youth; Order Granting Motion for Preliminary Injunction, *Saravia v. Sessions* (N.D. Ca. Nov. 20, 2017), https://www.aclunc.org/sites/default/files/20171121-Gomez_v_Sessions-Order_Granting_PI_and_Class_Cert.pdf.

The proposed regulations afford ORR even greater discretion when placing children and would terminate *Flores* counsel's role in ensuring compliance with critical FSA protections. Recent lawsuits and a motion to enforce the FSA in the last few months underscore the inappropriateness of providing even greater authority to the agency with respect to placements, and the need for rigorous, third-party monitoring and oversight, as provided by *Flores* counsel, to ensure the placement of unaccompanied alien children in the least restrictive settings appropriate.[387]

Section 410.202 and the proposed regulations lack meaningful procedures for ensuring children are not arbitrarily "stepped up" to more restrictive placements.

Section 410.202 cross-references proposed provisions on placement in secure facilities (at 410.203), which incorporate and unduly broaden FSA criteria related to secure placements. These provisions include the FSA's requirement that children receive notice of the reasons for their placement in secure and staff secure facilities and of opportunities to challenge these determinations. Section 410.202, however, does not include language ensuring that ORR routinely evaluates the appropriateness of *all* placements to ensure they are the least restrictive, including as to unaccompanied alien children in staff-secure facilities, who are not be subject to the monthly reviews provided for by the TVPRA but to whom the FSA's provisions on judicial review apply.[388]

Recent challenges to the conditions and mistreatment to which children are being exposed in ORR's more restrictive contract facilities,[389] and the arbitrary procedures and justifications underlying "step-ups" in custodial placements,[390] demand a more active role to ensure restrictive placements are not used inappropriately or arbitrarily.

Yet recent practice suggests that notice to children of the reasons for their placements in secure and staff secure facilities is frequently not provided, may not be understood even if so due to language, educational, or cultural barriers, and may prove of limited utility in preventing arbitrary or erroneous

[387] The only reference to monitoring within HHS' proposed regulations appears in section 410.403, titled "Ensuring that licensed programs are providing services as required by these regulations." That section simply states that "ORR monitors compliance with the terms of these regulations."
[388] *See* FSA para. 24.
[389] Recent lawsuits have documented rampant verbal and physical abuse, excessive use of solitary confinement and restraints, and unauthorized administration of psychotropic drugs in secure facilities, among other dangerous conditions and treatment. *See Flores v. Sessions*, Memorandum in Support of Motion to Enforce Class Action Settlement (C.D. Ca. Apr. 16, 2018), https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf; *Doe v. Shenandoah Valley Juvenile Center Comm'n*, Class Action Complaint (W.D. Va. Oct. 4. 2017), http://www.washlaw.org/pdf/svjc_class_action_complaint_signed.PDF.
[390] *See Flores v. Sessions*, Memorandum in Support of Motion to Enforce Class Action Settlement (C.D. Ca. Apr. 16, 2018), https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf. *See, e.g., Flores v. Sessions*, Memorandum in Support of Motion to Enforce Class Action Settlement (C.D. Ca. Apr. 16, 2018), https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf; *Saravia v. Sessions*, No. 18-15114 (9th Cir. 2018); https://www.aclunc.org/our-work/legal-docket/saravia-v-sessions-due-process-immigrant-youth.

placements due to restricted access to counsel who can assist youth in challenging placements in detention.[391]

In this context, the failure of the proposed regulations to state ORR's commitment to affirmatively and continuously evaluating placement decisions to ensure they are the least restrictive appropriate and in a child's best interests is of grave concern. Additions to the FSA's criteria for placing children in secure custody pose additional challenges to the well-being of children and run counter to both the spirit and literal text of the FSA. See **Placing a UAC in a secure facility**.

Section 410.202 affords ORR greater flexibility to hold children indefinitely in unlicensed programs in cases of emergency or influx, contrary to the aims of both the FSA and TVPRA.

Section 410.202 incorporates the FSA's exception for emergency or influx, which is intended to provide limited flexibility to the government to place children "as expeditiously as possible" in times of unexpectedly high numbers of arriving unaccompanied alien children or emergent situations. Under the FSA, an influx is defined as "those circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program under Paragraph 19, including those who have been so placed or are awaiting placement."[392]

HHS' proposed regulation defines an influx similarly to the FSA, but broadens the definition to incorporate DHS' proposed provision. Specifically, HHS defines influx as "a situation in which there are, at any given time, more than 130 minors or UACs eligible for placement in a licensed facility under this part or corresponding provisions of DHS regulations, including those who have been so placed or are awaiting such placement."[393]

This definition, which reflects a number that would have marked a significant increase in children in care more than two decades ago, would today allow ORR and DHS to operate at continuous influx. Despite significant increases in the number of arriving children since the FSA's signing, including a peak flow in 2014, ORR in recent years has been able to prepare for and seek appropriations to accommodate relatively steady arrivals of unaccompanied alien children.[394] Yet the emergency and influx provisions in the proposed regulations would allow the agency to relax both standards for promptly transferring children to licensed programs and potentially the conditions of children in care, even when such circumstances are foreseeable and within the ability of the agency to accommodate. Such an interpretation is not what was intended by the FSA or TVPRA and would render their vital protections hollow.

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[391] *See Flores v. Sessions*, Memorandum in Support of Motion to Enforce Class Action Settlement (C.D. Ca. Apr. 16, 2018), https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf.
[392]FSA para. 12(B).
[393] 83 Fed. Reg. 45529.
[394] *See* CBP, BP Southwest Border Family Units and UAC Apprehensions, https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20FY16.pdf (reporting 68,541 UAC apprehensions in FY14; 39,970 in FY15; and 59,692 in FY16); CBP, U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018, https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions (reporting the apprehension of 38,474 UACs in FYTD2017 and 45,704 in FYTD2018).

Acknowledging changes that have occurred in the years following the FSA's entry into force, DHS has solicited comments on whether "it would be appropriate to revise the definition of influx to better reflect current operational realities."[395] As an example of such a modification, DHS suggests that the definition could reference "a situation in which DHS determines that significantly more minors or UACs are awaiting transfer than facility space is available to accommodate them, which prevents or delays timely transport or placement of minors or impacts other conditions provided by the regulations."[396] DHS suggests that the proposed definition would provide flexibility in operations without "imposing a hard numerical trigger" under which the agency would operate at continuous influx.[397] DHS' proposed solution, like definition proposed in the regulations, would give the agency effectively unlimited ability to circumvent FSA protections. Importantly, HHS' proposed regulations do not solicit such comments, but incorporate and reference parallel provisions in DHS' proposed regulations.

By weakening language in the FSA's provisions related to influx, sections 410.202 and 410.209 (cross-referenced) impermissibly afford the agency latitude to delay placements in licensed programs.

Section 410.202 allows an exception to the prompt placement of unaccompanied alien children in licensed programs "[i]n the event of an emergency or influx of UAC into the United States, in which case *ORR places* the UAC as expeditiously as possible in accordance with §410.209 of this part. . . ."[398] (Emphasis added).

By contrast, the FSA states that "in the event of an emergency or influx . . . the [government] *shall* place all minors pursuant to Paragraph 19 as expeditiously as possible."[399] (Emphasis added). By merely reciting agency practice, rather than including the FSA's more directive language on expeditiously placing children, the proposed regulations permit the government undue flexibility to hold children for longer periods in unlicensed facilities.

The proposed regulations omit the FSA's requirement of a written plan for emergencies and influxes.

Section 410.209 of the proposed regulations dispenses with the FSA's requirement that the government develop a written plan to prepare for emergencies and influxes and merely incorporates various elements referenced in the FSA.[400] The requirement for a written plan is critical to ensuring the government's preparedness for conditions that may change over time and to the well-being and safety of children in ORR's care and custody.

Emergency influx facilities such as Tornillo are currently being used to house more than a thousand children, with even greater numbers possible in the weeks and months to come. Recognizing the

[395] 83 Fed. Reg. 45496.
[396] *Id.*
[397] *Id.*
[398] 83 Fed. Reg. at 45530 (Section 410.202).
[399] FSA para. 12, referencing para. 19.
[400] 83 Fed. Reg. 45531 (Sec. 410.209).

increased vulnerability of children in large-scale influx facilities, ORR must ensure the provision of minimum services for all children while they are in such facilities.

22. PLACING A UAC IN A SECURE FACILITY

I. The Notice's new procedures for the placement of unaccompanied children into secure custody are inconsistent with the FSA and existing law governing the treatment of unaccompanied children in government custody.

The *Flores* settlement agreement ("FSA" or "the Agreement") originally bound the Immigration and Naturalization Service but now governs the treatment of children by both the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS).[401] The FSA contemplates development of regulations that "publish the relevant and substantive terms" of the Agreement.[402] The FSA mandates that "[t]he final regulations shall not be inconsistent with the terms of this Agreement."[403] The NPRM indicates that the rule would adopt "provisions that parallel the substantive terms of the FSA" consistent with subsequent law "with some modifications . . . to reflect intervening statutory and operational changes while still providing similar substantive protections and standards."[404] The NPRM indicates that the rule would also "implement closely related provisions of the HSA and TVPRA."[405] HHS' proposed regulations therefore necessarily interpret the FSA in light of statutory changes that have taken place since the agreement was signed. Additionally, HHS' proposed regulations interpret the FSA in light of several subsequent orders interpreting and enforcing the terms of the FSA including the July 30 district court Order in *Flores v. Sessions*.[406]

Despite these assurances, NPRM sections 45 CFR 410.203, 204, 205, and 206 are inconsistent with both the terms of the agreement and subsequent laws governing the care and treatment of unaccompanied children in government custody. The departures the NPRM makes from the FSA would significantly expand the potential reasons HHS could place a child in secure detention and would likely increase the number of children placed in secure settings.

a. Proposed 45 CFR 410.203

Paragraph 21 of the FSA states that a child can be placed in a secure facility if one of five conditions have been met:

> A. [the child] has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable

[401] *Flores v. Johnson*, 212 F. Supp. 3d 864 (C.C. Cal. 2015).
[402] Flores Settlement Agreement, Case No. CV 85-4544-RJK(Px), ¶ 9.
[403] *Id.*
[404] Federal Regulation No. 174, Vol. 83 at 45486.
[405] *Id.*
[406] 2:85-cv-04544-DMG-AGR (ECF No. 470, Jul. 30, 2018) (discussing ORR Residential Treatment Centers, placement in secure facilities, notice of placement in secure facilities, and informed consent for administration of psychotropic drugs).

with a delinquent act; provided, however, that this provision shall not apply to any minor whose offense(s) fall(s) within either of the following categories:

i. Isolated offenses that (1) were not within a pattern or practice of criminal activity and (2) did not involve violence against a person or the use or carrying of a weapon (**Examples: breaking and entering, vandalism, DUI, etc.** This list is not exhaustive.);

ii. Petty offenses, which are not considered grounds for stricter means of detention in any case (Examples: **shoplifting, joy riding, disturbing the peace, etc.** This list is not exhaustive.); As used in this paragraph, "chargeable" means that the INS has probable cause to believe that the individual has committed a specified offense;

B. has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in INS legal custody or while in the presence of an INS officer;

C. has engaged, while in a licensed program, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program in which he or she has been placed and removal is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed program (Examples: drug or alcohol abuse, stealing, fighting, intimidation of others, etc. This list is not exhaustive.);

D. is an escape-risk; or

E. must be held in a secure facility for his or her own safety, such as when the INS has reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.[407]

Additionally, the TVPRA mandates that "[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense."[408]

i. *Unjustified expansion of non-violent offense criteria triggering secure placement*

Proposed section 410.203 governs HHS's placement of unaccompanied children in secure custody but makes several significant departures from the FSA that significantly alter the criteria for secure placement. First, the NPRM omits FSA Paragraph 21(A)'s examples of isolated and non-violent offenses and petty offenses (in bold above) that would not be sufficient reason to transfer a child to secure custody.[409] HHS chose not to include the examples "because [they] are non-exhaustive and imprecise" and because the examples listed in the paragraph "could be violent offences in certain circumstances depending upon the actions accompanying them"[410] and because "state law may classify these offenses as violent."[411] However, the examples in FSA Paragraph 21(A)(ii) specifically enumerate a non-exhaustive list of "petty offenses which are not grounds for stricter means of detention in any case" including

[407] Emphasis added.
[408] 8 U.S.C. § 1232(c)(2)(A).
[409] 83 Fed. Reg. 45530.
[410] 83 Fed. Reg. 45505.
[411] 83 Fed. Reg. 45506

joyriding, shoplifting, disturbing the peace.[412] Given this explicit list of offenses that the FSA clearly states are *not* grounds for placement in secure detention, HHS's decision to omit the listed offenses on grounds that they could be in some circumstances reason for placement in secure detention is extremely troubling and inconsistent with the plain text of the FSA. Moreover, HHS' justification that the enumerated examples of isolated offenses in Paragraph 21(A)(i) that "did not involve violence against a person or the use or carrying of a weapon" could be classified as violent under state law or be violent in certain circumstances is similarly dubious. The text of the FSA does not contemplate a determination of whether an offense is "classified" as violent by state law; rather it poses the clear question of whether the offense *involved* violence against a person or the use of or carrying of a weapon. HHS offers no justification for the proposed change in the interpretation of these criteria, which could lead to more children being placed in secure custody. Moreover, looking to state law to determine whether an offense is classified as "violent" would create uncertainty and inconsistency in the type of offenses sufficient for placement of a child in secure custody.

ii. *Addition of vague, broad "dangerousness" criteria*

Section 410.203(3) also expands grounds under FSA Paragraph 21(C) by which a child could be "stepped-up" or transferred into secure custody from a less restrictive setting. As noted above, the FSA provides for transfer to a secure facility where a child has engaged in "unacceptabl[y] disruptive" conduct "disruptive of the normal functioning of the licensed program" and whose removal "is necessary to ensure the welfare of the minor or others." Section 410.203 expands "disruptive conduct" to include conduct engaged in at staff-secure facilities and adds "sexually predatory behavior" to the list of example behaviors in the provision.[413] It also includes a requirement that ORR determine that the child "poses a danger to self or others based on such conduct."[414] The NPRM does not explain how or on what basis ORR will make this dangerousness determination, nor does it indicate who will be responsible for making the determination.

iii. *Increased likelihood of placement in secure psychiatric facilities*

Section 410.203(4) adds a new basis for placement in a secure residential treatment center (RTC) where "a licensed psychologist or psychiatrist" determines the child "poses a risk of harm to self or others."[415] This addition follows a July 30, 2018 district court order finding that the government had violated the FSA in placing children at the Shiloh RTC in Manvel, Texas because it was a "locked facility with 24-hour surveillance and monitoring."[416] The court specifically found that the Shiloh RTC engaged in practices "not necessary for the protection of minors or others" such a refusing to allow children drinking water and refusing to allow children to talk privately on the phone.[417] The court found that these practices violated FSA Paragraph 6 [418] and ordered the Shiloh RTC to cease these practices. It also ordered HHS to

[412] FSA ¶ 21(A)(ii).
[413] 83 Fed. Reg. 45530.
[414] *Id.*
[415] 83 Fed. Reg. 45530.
[416] *Flores v. Sessions*, 2:85-cv-04544-DMG-AGR, p. 13 (ECF No. 470, Jul. 30, 2018).
[417] *Id.* at 13-14.
[418] "[A] facility for special needs minors may maintain that level of security permitted under state law which is necessary for the protection of a minor or others."

transfer children out of Shiloh RTC unless a licensed psychologist or psychiatrist determined they posed a risk of harm to themselves or others.[419] Confusingly, the NPRM does not define the term "secure residential treatment center (RTC)" which is similarly undefined in the FSA. Because this term is undefined in the NPRM, it is unclear whether Section 410.203(4) contemplates placement in secure unlicensed facilities or licensed facilities "for special needs minors" which the FSA mandates "shall be unsecure as required under state law; provided, however, that a facility for special needs minors may maintain that level of security permitted under state law which is necessary for the protection of a minor or others in appropriate circumstances."[420] This confusion could expose HHS to legal challenges and could lead to children being placed in inappropriately secure facilities.[421]

iv. *Proposed catchall provision swallows up other enumerated criteria to give HHS unfettered discretion to jail children*

Section 410.203(5) provides for placement of a child in secure detention if the child "is otherwise a danger to self or others."[422] This language is notably and confusingly different from the text of the TVPRA, which requires a "determination that the child poses a danger to self or others"[423] HHS does not indicate what criteria or test would be used for this determination or who would be responsible for making the determination, but does state that the Federal Field Specialist is responsible for "reviewing and approving all placements of [children] in secure facilities."[424] Section 410.203(5) creates a discretionary catchall provision for placing a child in secure detention that is so vague and so broad that it would swallow up every other criteria detailed in Section. 410.203. This provision is especially concerning given that HHS is currently involved in multiple lawsuits alleging mistreatment and/or indefinite detention of children in secure facilities, including allegations that HHS "stepped up" children to secure detention without providing notice or justification for the transfer.[425]

v. *HHS omits legally required monthly review of secure placement*

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[419] *Flores v. Sessions*, 2:85-cv-04544-DMG-AGR, p. 14 (ECF No. 470, Jul. 30, 2018).
[420] FSA para 6.
[421] This is particularly troubling considering that the Senate's Homeland Security and Governmental Affairs Committee recently released a report finding that "HHS does not contract with appropriate facilities to house UACs who must be held in a secure facility and who also have significant mental health or emotional issues." Staff of S. Comm. on Homeland Security and Gov. Affairs, 115th Cong., 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.
[422] 83 Fed. Reg. 45530.
[423] 8 U.S.C. § 1232(c)(2)(A).
[424] *Id.*
[425] *See Doe v. Shenandoah Valley Juvenile Center Comm'n*, Class Action Complaint (W.D. Va. Oct. 4. 2017), http://www.washlaw.org/pdf/svjc_class_action_complaint_signed.PDF; Roque Planas and Hayley Miller, *Huffington Post*, "Migrant Children Report Physical, Verbal Abuse In At Least 3 Federal Detention Centers," June 21, 2018, https://www.huffingtonpost.com/entry/migrant-children-abuse-detention-centers_us_5b2bc787e4b0040e2740b1b9; *Saravia v. Sessions*, Order Granting the Motion for Preliminary Injunction, et. al (Nov. 20, 2017), https://www.aclunc.org/sites/default/files/20171121-Gomez_v_Sessions-Order_Granting_PI_and_Class_Cert.pdf; *Flores v. Sessions*, Memorandum in Support of Motion to Enforce Class Action Settlement (C.D. Ca. Apr. 16, 2018), https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf; and *Flores v. Sessions*, In Chambers--Order re Plaintiff's Motion to Enforce Class Action Settlement (C.D. Ca. July 30, 2018), https://www.aila.org/File/Related/14111359ae.pdf.

Section 410.203 omits several sections from the FSA and fails to include requirements from subsequent legislation. Because the TVPRA does not authorize placement of children in secure detention because they are a "flight risk," HHS has removed that specific FSA criteria from the NPRM.[426] HHS also omitted FSA Paragraph 21(E), providing for placement of a child in a secure facility "for his or her own safety."[427] However, in Section 410.203(b), HHS chose not to include the TVPRA's requirement that a child's placement in secure detention must be reviewed monthly,[428] an omission that is particularly concerning given that a Senate Committee investigation recently determined that "due to delays in ORR's internal review processes, some UACs are spending more time than necessary in secure facilities."[429]

b. Proposed 45 CFR 410.206: Weakening notice requirements for children HHS jails in secure custody

Proposed section 410.206 of the NPRM deals with providing notice for children who are placed in a secure or staff-secure facility of the reason(s) for that placement. Paragraph 24(C) of the FSA dictates that the government "shall provide minors not placed in licensed programs with a notice of the reasons for housing the minor in a detention or medium security facility." On July 30, 2018, a district court further ordered the government to provide "written notice" of reasons for placement in a secure facility, staff secure facility, or RTC "within a reasonable time of ORR's placement decisions" and in a "language the [child] understand."[430] The NPRM, on the other hand, states "within a reasonable period of time, ORR provides each UAC placed or transferred to a secure or staff secure facility with a notice of the reasons for the placement in a language the UAC understands."[431] It is unclear why HHS omitted the mandatory "shall" language from the NPRM, choosing instead to simply use descriptive language that places no affirmative requirement on ORR. The NPRM also fails to outline what would count as a "reasonable period of time" for the provision of this notice. This is despite a recent court order finding that the government had breached the FSA in "detaining a [child] in a restrictive setting for three or four months without informing the minor of the reasons for placement" which it determined "amounts to a failure to provide notice within a reasonable time."[432] Since the purpose of this notice is to permit children to seek judicial review of their placements, it is vital that they receive it in a timely manner and in a language they understand.

II. The Notice's new procedures for the placement of unaccompanied children into secure custody raise serious due process concerns.

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[426] 83 Fed. Reg. 45505.
[427] This omission presumably occurred because the inclusion of this paragraph would contradict the TVPRA, but that is not affirmatively explained by HHS.
[428] *See* TVPRA, 8 U.S.C. § 1232 (c)(2)(A).
[429] Staff of S. Comm. on Homeland Security and Gov. Affairs, 115th Cong., Oversight of the care of unaccompanied alien children 8 (2018).
[430] *Flores v. Sessions*, 2:85-cv-04544-DMG-AGR, p. 19 (ECF No. 470, Jul. 30, 2018). This order was entered following a motion to enforce based in part by declarations of several unaccompanied children held by ORR for weeks or months without receiving written notice of the reasons for their transfer. Other children who received notice only received it in English. The Court found that the government had breached the FSA by failing to provide the notice to children in a language they understand within a reasonable period of time. *Id*. at p. 16-17.
[431] 83 Fed. Reg. 45531.
[432] *Flores v. Sessions*, 2:85-cv-04544-DMG-AGR, p. 17 (ECF No. 470, Jul. 30, 2018).

Proposed 45 C.F.R. §410.203 raises significant due process concerns for children placed in staff secure or secure detention. At its base, the proposed regulation does not clearly enumerate the specific list of behaviors or offenses that lead ORR to detain a child in secure facilities. Instead, ORR authorizes itself to place children in a secure facility if the child has been charged with a crime, is chargeable (under a standard of probable cause) with a crime, has been convicted of a crime, poses a risk of danger to self or others, has made threats to commit a violent or malicious act, or engages in unacceptable behavior. This broad and non-specific list is confusing for children and fails to put them on notice of the rules that may result in them being detained in a jail-like setting. ORR claims that its updated proposed regulation brings ORR policies into compliance with a July 30 Flores court order because it clarifies the meaning of "chargeable" as requiring probable cause to believe a UAC has committed an offense. However, this clarification does not cure the proposed regulations of their failure to satisfy the requirements of basic due process.

a. *HHS proposes an unconstitutional overreach of its parens patriae role*

Any clarification provided by the proposed regulations is subsequently eliminated by the catchall categories, allowing ORR to place a child in secure custody "where ORR deems those circumstances demonstrates that the UAC poses a danger to self or others" or where a UAC "has made credible threats to commit, a violent or malicious act," or when the UAC (as determined by ORR) "engages in unacceptably disruptive behavior that interferes with the normal functioning of a 'staff secure' shelter". These justifications for placing children in highly restrictive settings give unfettered discretion to ORR staff and contractors to place a child in a juvenile jail for any reason, from disrupting the lunch line in the cafeteria to refusing to follow a dress code to actually threatening another child or staff with a weapon. It provides no guidance for who makes these decisions, how they are made, who reviews them, what threats are deemed "credible" and why, or what would be sufficiently disruptive behavior to interfere with shelter functioning. Additionally, the proposed regulations as well as the ORR Policy Guide[433] fail to elaborate what criteria ORR uses to make a determination that a child is a danger to self or others. It leaves full discretion in any such determination to ORR or its contractors. Past experience working with UACs held in staff secure or secure detention has revealed ORR's justifications for deeming children dangerous to themselves or to others to be weak at best, and highly suspect or blatantly inaccurate at worst.

Equally concerning, the NPRM also lists "fighting" and "intimidation of others" as a justification for placing a child in a more restrictive setting. This necessarily implicates behavior less serious than any of the aforementioned justifications or it would be duplicative. This suggests that normal "school yard" fights or bullying, which should be addressed in a developmentally appropriate and productive way, will instead be treated as equally serious as other enumerated behaviors, therefore placing all children, regardless of the degree of alleged misbehavior or developmental typicality, at risk of incarceration in secure settings. This is at odds with the broad field of research and best practices for children exhibiting disruptive behavior and with child development and child welfare more generally.[434]

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[433] Office of Refugee Resettlement, *ORR Guide: Children Entering the United States Unaccompanied*, https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied

[434] *See, e.g.*, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Nov. 2006, http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf; Coalition for Juvenile Justice, *Applying Research to Practice Brief: What Are the*

b. *HHS' proposal violates procedural due process obligations*

The specific process for placing a child in staff secure or secure detention, as outlined by the NPRM, violates due process by failing to lay out procedures that will meet the minimum protections mandated by the Constitution to ensure due process of law.[435] The nature of the private interest here is of the greatest magnitude – detention in a secure facility is a dramatic curtailment of a child's liberty, with serious implications for their health and development. Respect for an individual's interest in their liberty is fundamental to our legal system and, as such, civil commitment is only permitted when necessary to ensure the safety of the individual or the public.[436] This is a narrow justification, which makes clear that civil confinement cannot be used a tool to punish.[437]

i. *Failure to provide adequate notice*

The paltry procedural protections contemplated in the NPRM will expose unaccompanied children to a high risk of erroneous deprivation of their liberty. Meaningful notice and an opportunity to be heard are fundamental to due process protections. Notice must provide the specific basis for the action taken, such that the child may prepare a response and meaningfully contest ORR's decision. The proposed section 410.206 of the NPRM states only that ORR will give children in secure or staff secure facilities "notice of

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Implications of Adolescent Brain Development for Juvenile Justice? (2006), http://www.juvjustice.org/sites/default/files/resource-files/resource_138_0.pdf; Jessica Feierman, Kacey Mordecai, and Robert G. Schwartz, Juvenile Law Center, *Ten Strategies to Reduce Juvenile Length of Stay*, Apr. 22, 2015, https://jlc.org/resources/ten-strategies-reduce-juvenile-length-stay; Jessica Feierman and Lauren Fine, Juvenile Law Center, *Trauma and Resilience: A new look at legal advocacy for youth in the juvenile justice and child welfare systems*, Apr. 2014, https://jlc.org/sites/default/files/publication_pdfs/Juvenile%20Law%20Center%20-%20Trauma%20and%20Resilience%20-%20Legal%20Advocacy%20for%20Youth%20in%20Juvenile%20Justice%20and%20Child%20Welfare%20Systems.pdf.

[435] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[436] *See Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (finding due process violation when an individual who is detained on grounds of dangerousness is denied an adversarial hearing in which the state must prove by clear and convincing evidence that individual is a danger to the community); *Schall v. Martin*, 467 U.S. 253, 263 (1984) (finding no due process violation where hearing held to determine dangerousness).

[437] The Supreme Court has repeatedly affirmed that civil commitments cause "massive curtailment[s] of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). As such, "involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Justice Burger, concurring). Further, "incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends." *Id.* at 575.

The substantive component of due process forbids the government from infringing in any way upon fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301-301 (1993); *United States v. Salerno*, 481 U.S. 739, 749 (1987). It "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" *Salerno*, 481 U.S. at 746; *see also United States v. Al-Hamdi*, 356 F.3d 564, 574 (4th Cir. 2004). In the immigration context, whether the infringement is narrowly tailored to serve a compelling governmental interest is determined by evaluating whether the infringement on liberty: 1) is impermissible punishment or permissible regulation; and 2) is excessive in relation to the regulatory goal Congress sought to achieve. *See U.S. v. Salerno*, 481 U.S. 739, 747 (1987); *see also Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

the reasons" for this placement "within a reasonable time." In practice, children receive only nominal, non-specific notice of the general basis for their placement in a secure facility, as ORR does not provide the evidence or factual findings which it relied on nor does it provide a specific explanation of its reasoning. These proposed regulations establish no protections ensuring sufficient notice to children placed in highly restrictive settings. Similarly, stating that the child will receive notice "within a reasonable time" is so vague as to fail to establish requirements consistent with due process. Such opaque decision-making lacking any timeline denies the child meaningful notice.

ii. *Failure to provide adequate opportunity to be heard*

Due process also demands that ORR provide an opportunity for the child to be heard. The Supreme Court has recognized that in cases in which an individual faces immediate deprivation of their liberty, this hearing must include substantial procedural protections, including the presentation of evidence and witnesses, as well as the opportunity to be heard in person, to present testimony and evidence, and to confront and cross-examine opposing witnesses. Additionally, the opportunity to be heard must conform to the capacity of the individual at risk of deprivation of their liberty. Therefore, the due process protections guaranteed to the unaccompanied child as a part of the hearing must counterbalance their youth and vulnerability.

Proposed 45 CFR 410.203 provides only that ORR itself "will review and approve all placements of UAC in secure facilities consistent with legal requirements." This unilateral review of the child's placement by an ORR employee fails to provide an adequate opportunity to be heard. It is only an undefined amount of time after the child has been placed in a secure facility that the proposed regulations require even nominal notice. The NPRM notes that once a UAC has been placed in a secure facility, they would be subject to the review procedures under TVPRA, which include monthly placement reviews by "care provider staff, in collaboration with the Case Coordinator and the ORR/FFS" and the option to request that the ORR Director, or their designee, "reconsider their placement." ORR establishes a "hearing" in proposed section 410.810 for children deemed a danger to themselves or others (though not for any of the other listed justifications for placing a child in a secure facility). An "810 hearing", however, does not satisfy the requirements of due process. See **Opportunities for UAC to challenge placement (bond hearings)**.

III. The Notice would lead to more children being placed in secure detention, which could cause long-term harm to their health and development.

As discussed in the previous sections, the Notice significantly expands ORR's ability to place a child in secure detention. The potential that more children could be placed in secure detention because of the NPRM is inappropriate and contrary to the child-protective principles underpinning the FSA. Detained unaccompanied immigrant children in the U.S. exhibit high rates of "posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems."[438] Conditions of custody in secure detention often exacerbate the symptomology of illnesses such as post-traumatic stress disorder (PTSD)

[438] Julie M. Linton, Marsha Griffin, & Alan J. Shapiro, American Academy of Pediatrics, *Detention of Immigrant Children*, 2017, http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.

and can be re-traumatizing for children.[439] In addition, immigration custody has been shown to contribute to psychological distress, triggering "feelings of isolation, powerlessness and disturbing memories of persecution."[440] These feelings are often exacerbated by the seeming indefiniteness of custody.[441] Detention can also lead to "depression, aggression and rebellion" in children,[442] as it deprives children of healthy attachments and normal developmental experiences.[443]

Additionally, prolonged family separation and detention has been shown to lead to psychological and physiological harm in children.[444] These harms include "frustration and a sense of helplessness" and behavioral issues including self-harm, depression, and suicidal ideation, which increase with each additional week a child spends in custody.[445] The consequences may last much longer. Research has shown that "[y]oung detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school."[446] Finally, children experiencing fatigue based on the seemingly indefinite nature of their detention are often driven to make the unfair choice between detention and returning to countries where they face danger.[447]

23. ESCAPE RISK

Proposed 45 CFR § 410.204 and 8 C.F.R. § 236.3

The inclusion of a consideration of a UAC's debt to a smuggler in the definition of an "escape risk" is improper under the restrictions imposed by TVPRA.

In proposed 45 CFR 410.204, the NPRM seeks to codify the factors to be considered in determining whether a UAC is an escape risk, which, according to proposed regulation 45 CFR § 410.101 is defined as "a serious risk that an unaccompanied alien child (UAC) will attempt to escape from custody." Proposed rule 45 CFR § 410.204 borrows the language of the Flores Settlement in that it identifies the same non-exhaustive list of factors to be considered when determining if a child is an escape risk. The rule would require that ORR consider whether a UAC's "immigration history includes … [e]vidence that

[439] Karen M. Abram, et al, Off. of Juv. Justice and Delinquency Prevention Bulletin, Dept. of Justice, *PTSD, Trauma, and Comorbid Psychiatric Disorders in Detained Youth* (2013), http://www.ojjdp.gov/pubs/239603.pdf.
[440] Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* 6 (2003), http://www.survivorsoftorture.org/files/pdf/perstoprison2003.pdf.
[441] *Id.* at 7.
[442] Amy Bess, *Human Rights Update: The Impact of Immigration Detention on Children and Families*, NTN'L ASSN. OF SOCIAL WORKERS 2 (2011).
[443] Mary Dozier et al., *Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, 84 AM. J. ORTHOPSYCHIATRY 3, 219-225 (2014), https://www.apa.org/pubs/journals/features/ort-0000005.pdf.
[444] *See* Affidavit of Dr. Lisa Fortuna, Director of the Child and Adolescent Psychiatry Division at Boston Medical Center at ¶¶ 11-17, 19-23; *LVM v. Lloyd*, 18-cv-1453 (S.D.N.Y. May 9, 2018) (ECF No. 46).
[445] *Id.* at ¶ 18(c)-(d), and ¶¶ 15-16.
[446] *See, e.g.*, Julie M. Linton, et al., American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, at 6-7, http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf (citations omitted).
[447] *See* Motion for Preliminary Injunction at 15, n. 12, *LVM v. Lloyd*, 18-cv-1453 (S.D.N.Y. April 30, 2018) (ECF No. 42).

the UAC is indebted to organized smugglers for his or her transport." While the Flores Settlement had also listed this as a possible consideration for determining an escape risk, it is unclear and unexplained why a debt owed to a smuggler would have an impact on the risk that a UAC would attempt to escape from federal custody, especially when the agency holding the UAC is tasked with reunifying the child with his or her family and is presumably diligently working to do so.

In the context of the settlement, the definition of "escape risk" follows ¶21 of the settlement describing when a child may be held in a secure facility. Being an escape risk is listed as one reason the INS would be permitted to place the child in secure detention. However, subsequent Congressional restrictions narrowed the situations in which a UAC may be placed in a secure facility to a finding that the child is a "danger to self or others or has been charged with having committed a criminal offense" mandated by the Trafficking Victims Protection Reauthorization Act (TVPRA).[448] Indeed, the original intention of the consideration of smuggling debt under the Flores Settlement appears to have been a safety determination, in order to protect a child from potential abduction or coercion of a child by his or her smuggler.[449] TVPRA now excludes escape risk as a reason for placement in a secure facility, specifically because it is falls short of being a safety determination. The mere fact of a UAC's debt to smugglers, without proof that it raises potential safety concerns around abduction, is not consistent with the intention of the Flores Settlement to place children in the least restrictive setting in the child's best interests, and does not inform an evaluation of whether or why a child is an escape risk. The definition of escape risk should exclude a consideration of whether a child is indebted to smugglers.

24. RELEASING A UAC FROM ORR CUSTODY (SPONSORS)

Sponsor Reunification Process
Proposed 45 CFR 410.301
Proposed 45 CFR 410.302

Proposed 45 CFR 410 Subpart C, Releasing an Unaccompanied Alien Child from ORR Custody

The Flores settlement establishes a "general policy favoring release." If detention is not required to ensure a minor's safety or compliance with immigration proceedings, ORR must release a UAC to an approved sponsor without "unnecessary delay."[450] This requirement is grounded in the recognition that children need a close and supportive relationship with a caregiver in order to thrive. It is also grounded in the recognition that congregate care facilities, where most unaccompanied children are sent before they are released to a sponsor, are harmful to children's health and well-being.

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), codified at 8 U.S.C. § 1232, also grants legal protections to children in ORR custody and tasks the agency with ensuring they are "promptly placed in the least restrictive setting that is in the best interest of the

[448] 8 U.S.C. § 1232(c)(2)(A)
[449] FSA ¶21(E), FSA Exhibit 2(i)(iv).
[450] Paragraph 14, *Flores v. Reno*, case no. CV 85-4544-RJK(Px), Stipulated Settlement Agreement.

child."[451] HHS is tasked with the "care and custody of all unaccompanied alien children, including responsibility for their detention, *where appropriate*." 8 U.S.C. § 1232(b)(1) (emphasis added). HHS' responsibilities include ensuring that the proposed sponsor "is capable of providing for the child's physical and mental well-being." 8. U.S.C. § 1232(c)(3)(A). Family members are presumptively those individuals best suited to provide for children's physical and mental well-being, barring any finding that the proposed sponsor has "engaged in any activity that would indicate a potential risk to the child." *See id.* ORR's reunification process, like its policies for providing for the care and custody of unaccompanied minors, must be governed by foster care and child welfare practices. *See* 6 U.S.C. §§ 279(b)(1)(A)-(F).

In child welfare, researchers have found that youth who have been placed in group homes, instead of family foster care, have higher rates of delinquency and worse educational outcomes. In addition, youth who have experienced trauma are at higher risk of further abuse when placed in group homes compared to family homes.[452] In recognition of the problems posed by congregate care, state child welfare systems have significantly reduced the number of children placed in these settings over the last ten years.[453] The federal government has recognized the need to further reduce the number of children in group homes, and the recently-enacted Family First Prevention Services Act of 2018 places new limits on federal funding for the use of congregate care in child welfare, as well as additional expectations for quality of care and family engagement in such facilities.[454] There has been little research on unaccompanied children's experience in congregate care in the custody of ORR, though there are serious allegations of abuse and neglect in some of the shelters that house unaccompanied minors.[455]

Evaluations of children placed in immigration detention with their families have found them to experience serious trauma.[456] Studies of detained immigrant children have found high rates of posttraumatic stress disorder, depression, and anxiety, and psychologists agree that "even brief detention can cause psychological trauma and induce long-term mental health risks for children."[457] Dr. Luis Zayas, Dean of the School of Social Work at the University of Texas at Austin and an expert on child and adolescent mental health, interviewed families in immigration detention facilities and found "regressions in

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[451] The history of ORR's obligations to care for and promptly release UACs is set forth in detail in the SAC, at ¶¶ 37-42.

[452] For a summary, *see* Casey Family Programs, "What are the outcomes for youth placed in congregate care settings," updated Jan. 2017, https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_CC-Outcomes-Resource.pdf.

[453] U.S. Department of Health and Human Services, Administration for Children and Families, U.S. Children's Bureau, "A National Look at the Use of Congregate Care in Child Welfare," May 13, 2015, https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare_brief.pdf.

[454] For a summary *see* Congressional Research Service, "Family First Prevention Service Act (FFPSA)," Feb. 9, 2018, https://www.everycrsreport.com/files/20180209_IN10858_f4acfb3c556414a49462f8d88f0d559505245e68.pdf.

[455] Aura Bogado et al., *Texas Tribune*, "Separated migrant children are headed toward shelters that have a history of abuse and neglect," June 20, 2018, https://www.texastribune.org/2018/06/20/separated-migrant-children-are-headed-toward-shelters-history-abuse-an/.

[456] Wendy Cervantes, CLASP, "Baby Jails are Not Child Care," Feb. 2018, https://www.clasp.org/sites/default/files/publications/2018/02/Baby%20Jails%20are%20not%20Child%20Care.pdf. Lutheran Immigration and Refugee Service and the Women's Refugee Commission, "Locking Up Family Values, Again" (Oct. 2014), https://innovationlawlab.org/wp-content/uploads/2015/01/Fam-Detention-Again-Full-Report.pdf.

[457] Julie Linton et al., American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Mar. 2017, http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483#xref-ref-51-1.

children's behavior; suicidal ideation in teenagers; nightmares and night terrors; and pathological levels of depression, anxiety, hopelessness, and despair."[458] The Department of Homeland Security's own Advisory Committee on Family Residential Centers concluded that "detention is generally neither appropriate nor necessary for families—and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children."[459] Troublingly, if unsurprisingly, in setting out proposed regulations codifying the family reunification process in the NPRM, HHS fails to consider the ample and readily available evidence demonstrating the harms of prolonged detention and family separation.

Proposed 45 C.F.R. §§ 410.301-302 grant ORR broad authority to deny children family reunification, raising serious due process concerns

Proposed rule 45 CFR 410.301 establishes overly broad and vague discretionary authority for ORR to continue to detain children and deny their reunification. Specifically:

- § 410.301 and §410.302(f) permit ORR to deny reunification on the basis of a belief that the child's sponsor will not secure the child's appearance before DHS or the immigration courts. These sections, however, do not establish how ORR is to determine whether custody is required to secure the child's appearance, nor does it establish any process by which a child may be protected from an erroneous determination. The regulation does not provide for any notice to the UAC of such a determination or the evidence used to make it, does not provide the UAC any opportunity to contest such a determination or provide his or her own evidence in opposition, nor does it provide for any opportunity to be heard if ORR denies reunification because it determines it must maintain custody of a child to secure that child's appearance before DHS or the immigration courts. It is unclear how ORR would make such a determination. Despite this, the proposed provisions seek to authorize HHS to make internal, unreviewable, and unilateral decisions to hold a child in federal custody indefinitely.

- §410.302 sets forth the process by which ORR assesses the suitability of a proposed sponsor; the process as proposed is lacking in any delineated timeline for decision-making or release, and which fails to provide for meaningful notice of sponsorship denial or any opportunity for a child or a sponsor to be heard. This proposed regulation establishes an opaque process with shifting goalposts and no oversight over the discretionary decisions ORR and ORR-contracted staff make in requiring additional "suitability assessment."

- §410.301(f) fails to recognize ORR's court-ordered obligation to provide due process if withholding a UAC from his or her parent. ORR may not unilaterally make

[458] Claire Hutkins Seda, Migrant Clinicians Network, "Dr. Luis Zayas Provides Testimony on Family Detention," July 29, 2015, https://www.migrantclinician.org/blog/2015/jul/dr.-luis-zayas-provides-testimony-family-detention.html.
[459] Advisory Committee on Family Residential Centers, "Report of the ICE Advisory Committee on Family Residential Centers," Oct. 7, 2016, https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf.

a determination, let alone under a standard of "reason to believe", that it will not reunify a child with his or her parent. If denying a parent-sponsor, ORR is required to provide detailed notice to the parent, including notice of the evidence leading to a denial decision, and must offer a hearing before a neutral arbiter at which the parent and/or child may be heard.[460] This proposed regulation runs afoul of due process and of past court rulings on the release of UACs to parent sponsors.

Proposed § 410.302, Sponsor Suitability Assessment Process Requirements Leading to Release of a UAC from ORR Custody, lacks accountability and oversight for ORR and establishes discretionary factors ripe for discriminatory application.

When determining whether a sponsor is suitable for a child, HHS should consider best practices in child welfare. First, as in child welfare, the goal should be to place a child in an appropriate family setting as quickly as possible. This requires vetting sponsors to verify their relationship to the child and to ensure the immediate safety of the child. It is critical, however, that unnecessary vetting is avoided, to ensure timely placement. Unnecessary vetting will cause unnecessary delay, and lead to more children being held for longer in developmentally inappropriate congregate care settings—or even tent cities, as we are seeing today.[461]

The proposed rule describes two stages of sponsor assessment. The first, which is required of all sponsors, involves a background check "involving verification of identity and which may include verification of employment of the individuals offering support."[462] The second is a "further suitability assessment" which ORR "may require" and which may include interviews with household members, a home study, a fingerprint-based background check on sponsors and household members, and follow up visits. We note that this proposed regulation cannot be read in isolation, and must be read together with the DHS Notice of Modified System of Records, Docket Number DHS-2018-0013 and with HHS ACF Sponsorship Review Procedures for Approval, OMB No.: 0970-0278. These two additional regulations establish universal information collection from all sponsors, household members, and alternate caregivers together with universal information sharing with DHS to be used for immigration enforcement purposes. Taken together, these proposed regulations and DHS' and HHS' prior regulations will cause lengthy and unnecessary delays in reunifying children with their families.[463]

Proposed § 410.302 as proposed raises several issues:

- We commend ORR for requiring thorough record keeping in §410.302(a). However, this section fails to establish any timeline requirements or requirements for prompt release.

[460] *See, e.g., Beltran v. Cardall*, 222 F.Supp.3d 476 (E.D. Va. 2016); *Santos v. Smith*, 260 F.Supp.3d 598, 614 (W.D. Va. 2017).
[461] Caitlin Dickerson, *The New York Times*, "Detention of Migrant Children Has Skyrocketed to Highest Levels Ever," Sept. 12, 2018, https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html.
[462] § 410.302 (b)
[463] Already as a result of these prior regulations, unaccompanied children are languishing in ORR custody for an average of 74 days prior to release. Jonathan Blitzer, *The New Yorker*, "To Free Detained Children, Immigrant Families Are Forced to Risk Everything," Oct. 16, 2018, https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything.

- §410.302(c) allows ORR unnecessarily and inappropriately broad discretion to require a "further suitability assessment" that will necessarily delay a child's placement with a sponsor. Instead, at a minimum good cause should be required and documented in order to justify a further suitability assessment. The sponsor must also receive notice of additional requirements and an opportunity to contest their necessity or to satisfy concerns in an alternate manner. Finally, any such assessment must take into consideration the additional length of time in ORR custody that will be imposed by requiring further assessment and the impact that prolonged detention and separation from family will have on the wellbeing of the child.

- § 410.302(b)-(c) also raise concerns about discrimination on account of economic status. Best practices in child welfare establish that poverty alone should not be a reason for a child to be removed from a family—or to not be reunified with that family. However, investigations of living conditions and home studies may lead caring family members and willing sponsors to become disqualified because of the simple fact that they are poor. This is particularly concerning given the lack of specificity in describing what standard of care is satisfactory for reunification, and what living conditions would raise concerns. We know from child welfare that caseworkers assess poor children as being at higher "risk."[464] One study of children placed into foster care in Texas found that caseworkers not only assessed children as being at higher "risk" if they were living in poverty, but that they were also more likely to remove children from their homes if they were African American, even controlling for other factors.[465] Stories from immigration attorneys suggest that racial and ethnic bias may play a similar role in disqualifying sponsors after a home study. In immigration, as in child welfare, anyone conducting a home study should be required to have training in implicit bias and cultural sensitivity.

- The specific reference to a "fingerprint-based background and criminal records check" as an element of a further suitability assessment is also concerning. Under the previous administration, ORR required fingerprint background checks of anyone who was not a parent or legal guardian.[466] Today, however, ORR is requiring fingerprint background and immigration status checks of all potential sponsors and all household members and alternate caregivers, including parents and legal guardians, and sharing the information it collects with DHS for enforcement purposes under a new Memorandum of Agreement (MOA) signed by ORR, ICE, and CBP in May 2018.[467] According to the

[464] Emma Ketteringham, *The New York Times*, "Live in a Poor Neighborhood? Better Be a Perfect Parent," Aug. 22, 2017, https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html.
[465] Rivaux, Stephanie, et al, *Child Welfare League of America*, "The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children" (2008), https://www.ncbi.nlm.nih.gov/pubmed/18972936.
[466] Mark Greenberg, "Statement by Mark Greenberg, Administration for Children and Families, U.S. Department of Health and Human Services, Before the Committee on the Judiciary, U.S. Senate, February 23, 2016," https://www.judiciary.senate.gov/imo/media/doc/02-23-16%20Greenberg%20Testimony.pdf.
[467] Women's Refugee Commission and National Immigrant Justice Center, "Backgrounder: ORR and DHS Information-Sharing Emphasizes Enforcement Over Child Safety," 2018, https://www.womensrefugeecommission.org/images/zdocs/Backgrounder-ICE-MOA.pdf; *Memorandum of*

> administration, 41 sponsors have been arrested so far under the MOA. Most analysts believe that fear of being targeted by immigration enforcement is a primary cause of the decline in the number of people willing to sponsor unaccompanied children, and the increase in the lengths of stay in ORR custody that unaccompanied children are experiencing.[468]

25. OPPORTUNITIES FOR UAC TO CHALLENGE PLACEMENT (BOND HEARINGS)

Due process concerns with the standards set out for "810 hearings"

HHS proposes, through this NPRM, to replace the Flores Settlement Agreement's (FSA) requirement that an immigration judge review a child's placement in a custody redetermination ("bond") with hearings run by an HHS administrative officer, in effect making HHS both jailer and judge.[469] Currently, FSA paragraph 24(A) requires that a child in deportation proceedings "shall be afforded a bond redetermination hearing before an immigration judge in every case", a mandate upheld by the Ninth Circuit Court of Appeals in *Flores v. Sessions*.[470] Despite this, HHS claims that a child's opportunity to be heard by a neutral, independent arbiter is reasonably replaced by an HHS employee reviewing his own agency's placement decision.[471]

Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (Apr. 13, 2018), https://www.scribd.com/document/380771850/HHS-DHS-MOA-signed-2018-04-13-1; 83 Fed. Reg. 20844 (May 8, 2018), https://www.federalregister.gov/documents/2018/05/08/2018-09902/privacy-act-of-1974-system-of-records.

[468] Tal Kopan, *CNN*, "ICE arrested undocumented immigrants who came forward to take in undocumented children," Sept. 20, 2018, https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html; Tal Kopan, *CNN*, "The simple reason more immigrant kids are in custody than ever before," Sept. 14, 2018, https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html; Jonathan Blitzer, *The New Yorker*, "To Free Detained Children, Immigrant Families Are Forced to Risk Everything," Oct. 16, 2018, https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything.

[469] Recent reporting demonstrates how HHS already assumes these inherently conflicting roles at the expense of children. Only this summer, HHS officials "helped" five-year-old Helen withdraw her request for a custody redetermination (bond) hearing:

> "[I]n early August, an unknown official handed Helen a legal document, a "Request for a Flores Bond Hearing," which described a set of legal proceedings and rights that would have been difficult for Helen to comprehend. ("In a Flores bond hearing, an immigration judge reviews your case to determine whether you pose a danger to the community," the document began.) On Helen's form, which was filled out with assistance from officials, there is a checked box next to a line that says, "I withdraw my previous request for a Flores bond hearing." Beneath that line, the five-year-old signed her name in wobbly letters."

Sarah Stillman, *The New Yorker*, "The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights," Oct. 11, 2018, https://www.newyorker.com/news/news-desk/the-five-year-old-who-was-detained-at-the-border-and-convinced-to-sign-away-her-rights.

[470] *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017).

[471] 83 FR 45509-10, 45533-34.

As such, proposed 45 C.F.R. 410.810 fails to ensure that the due process rights of unaccompanied children are protected. Due process requires a UAC to receive detailed and meaningful notice of the charges and evidence against them, and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950). This opportunity must come before a neutral, independent arbiter in order to safeguard "the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process." *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980). Indeed, "involuntary confinement of an individual for any reason is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Justice Burger, concurring). Federal courts have evaluated similar ORR procedures to those proposed in 45 C.F.R. 410.810 and found them lacking:

> Virtually all of those procedures, however, consisted of internal evaluation and unilateral investigation. In effect, Respondents contend that due process was satisfied here because ORR made a significant effort to reach the correct decision. But due process does not concern itself only with the degree to which one can trust the government to reach the right result on its own initiative; rather, due process is measured by the affected individual's opportunity to protect his or her own interests. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) ("the Due Process Clause grants the aggrieved party the opportunity to present his case").

Beltran v. Cardall, 222 F. Supp. 3d 476, 486–87 (E.D. Va. 2016).

Moreover, if the government wants to detain a child in a secure setting, "the government must establish the necessity of detention by clear and convincing evidence. . . This is no less true where the government is claiming detention is necessary due to dangerousness." *Santos v. Smith*, 260 F. Supp. 3d 598, 613 (W.D. Va. 2017) (citing *United States v. Salerno*, 481 U.S. 739, 751, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (pretrial detention); *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *Foucha v. Louisiana*, 504 U.S. 71, 81, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (finding due process violation where an individual detained on grounds of dangerousness was denied an adversarial hearing in which the state had to prove his dangerousness by clear and convincing evidence); Va. Code Ann. §§ 37.2–800 et seq. (setting forth requirements for involuntary civil commitment of an adult, which includes a judicial hearing in front of a district judge or special justice)).

First, the well-laid out requirements of procedural due process require the provision of notice to the UAC of the specific reasons and evidence HHS is depending upon for its dangerousness determination prior to any 810 hearing, with sufficient time to allow the UAC to gather their own evidence to counter HHS's assertion of dangerousness. Due process mandates that such notice be provided *prior to* a child's transfer to a secure or staff-secure facility (and the associated severe deprivation of his or her liberty), to allow the child to contest the evidence and transfer decision. Nonetheless, there is no requirement in this section or any other that HHS provide detailed notice to the UAC explaining the evidence upon which it relied to determine that the child must be placed in a secure setting. It would be impossible for a child to present evidence proving that he or she is not dangerous without seeing the evidence upon which the government is relying to make such a determination. Notice of hearing procedures does not satisfy the meaningful notice requirements of due process.

Second, the burden of demonstrating that the UAC will be a danger to the community or flight risk properly rests on HHS, rather than on the UAC. As HHS engages in its own internal research and decision-making regarding dangerousness and risk of flight, which they otherwise do not share with the UAC who is the subject of that determination, it is grossly unfair to require a detained child to provide evidence to the contrary without first seeing the evidence against them. This is in line with the Ninth Circuit's view that the bond hearings required under paragraph 24A of the FSA "compel the agency to provide its justifications and specific legal grounds for holding a given minor." *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017). It is also consistent with the Flores Settlement Agreement's requirement that the government place detained children in the "least restrictive setting appropriate to the minor's age and special needs," and its presumption of a general policy favoring release. Flores Settlement at ¶¶ 11, 14; § VI. Given the gravity of the consequences of this determination (continued detention, or continued detention in a lockdown facility), the government should demonstrate that the child is a danger to the community or flight risk by clear and convincing evidence. The clear and convincing evidence standard is the governing standard in almost all civil detentions, with the exception of immigration detention. Given that children's liberty interests are at stake in the context of detained UACs, this higher standard of proof must be applied. *See, e.g.*, *In Re Gault*, 387 U.S. 1 (1967).

Third, the "opportunity to be heard" in the proposed regulations does not meet due process requirements. We strongly disagree with HHS's assertions that "as the legal custodian of UACs who are in federal custody," it "clearly has the authority to conduct the hearings envisioned by the FSA," 83 Fed. Reg. 45486, 45509 (Sept. 7, 2018) (to be codified at 8 CFR pts. 212 and 236, 45 CFR pt. 410), or that HHS could possibly provide "the same type of hearing paragraph 24(A) [of the FSA] calls for." *Id.* By removing the option for UACs to come before an immigration judge working as a part of the DOJ, this proposed rule positions HHS/ORR as both judge and jailer. This is problematic for several reasons.

First, the Ninth Circuit Court of Appeals has already considered and rejected the same arguments advanced by HHS in the proposed regulations regarding its authority to conduct hearings that would comply with paragraph 24(A) of the FSA. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017). The court went into detail about the benefits provided by the bond hearing guaranteed to children in paragraph 24(A), despite their differences from bond hearings for accompanied minors or adults, including the importance of having their detention assessed by an independent immigration judge. *Flores* v. *Sessions*, 862 F.3d at 867 ("The hearing is a forum in which a child has the right to be represented by counsel, and to have the merits of his or her detention assessed by an independent immigration judge.") The court went on to discuss the benefits to UACs held in both secure and non-secure facilities. For UACs held in secure facilities, the hearings provide an opportunity for youth to directly contest the basis for their confinement in secure detention, as the TVPRA only allows children to be placed in secure facilities if they pose a safety risk to themselves or others, or have committed a criminal offense, both of which are determinations made by an immigration judge at a bond hearing. For youth in non-secure facilities, the hearings still provide UACs an opportunity to be represented by counsel and have their detention assessed by an independent immigration judge, outside of the ORR system, among other benefits.

Not only is proposed regulation 45 C.F.R. 410.810 completely at odds with the FSA and the Ninth Circuit's decision interpreting that provision, but in practice, the enumerated benefits of having access to a *Flores* bond hearing would be extremely curtailed were HHS to assume the role of arbiter in re-

evaluating detention decisions. In fact, there is an inherent tension in the idea that the very same agency that has the power to make placement and release decisions for UACs, including whether they are a danger to the community or present a flight risk, could neutrally re-evaluate its own decisions.

The proposed regulations raise several additional concerns. The appeal process set forth in 45 C.F.R. 410.810(e) is not only insufficient, but inappropriately tasks a political appointee with deciding the outcome of a child's appeal. This all but ensures that political considerations will take precedence over any neutral consideration of the merits of the appeal and the best interests of the child.[472] If UACs will not be provided the ability to challenge the basis for their detention in front of an independent immigration judge, they should at a minimum be advised of their right to appeal a decision of an HHS adjudicator to an independent judge in a federal court, as a binding HHS decision would constitute final agency action. Furthermore, if HHS proposes to make a binding determination that a child cannot be reunified because he or she poses a danger to the community (as opposed to a decision that pending reunification a child must be in a secure setting), a full, in-person hearing before a neutral (non-HHS) arbiter is absolutely required to satisfy due process. In either situation, an internal review by the agency itself is in no way sufficient given the liberty interests at stake, the long-term health and mental health consequences that result from the detention of children, and the relatively small population of children held in secure or staff-secure detention. Finally, best practices in child welfare and fairness require a UAC's 810 hearing to occur in person rather than through video- or teleconferencing. *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Northwestern U. L. Rev. 4, 933 (2015).

Additionally, the limitation on "810 hearings" in subsection (h) to disallow the use of these hearings for challenges to placement or level of custody decisions is in direct conflict with the Ninth Circuit's decision in *Flores v. Sessions*, and will strip children of one of the most meaningful protections provided by such a hearing. As the Ninth Circuit pointed out, "[p]roviding unaccompanied minors with the right to a hearing under Paragraph 24A therefore ensures that they are not held in secure detention without cause." *Flores v. Sessions*, 862 F.3d at 868. The level of ORR detention in which children are held can drastically affect their experiences and length of detention, so this is not to be taken lightly. *See, e.g.*, Complaint for Injunctive Relief, Declaratory Relief, and Nominal Damages, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741-DMG-PLA (C.D. Cal. filed June 28, 2018); *see also, L.V.M. v. Lloyd*, 318 F.Supp. 3d 601 (S.D. N.Y. 2018); *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017).

810 Hearings Must Consider the Best Interests of the Child, Not Just Dangerousness or Risk of Flight

Proposed 45 C.F.R. 410.810 allows an unaccompanied child to seek review of "whether [she] would present a risk of danger to the community or risk of flight if released." 83 Fd. Reg. 45533. If this paragraph is intended as HHS asserts, to afford unaccompanied children "the same type of hearing Paragraph 24(A) calls for," 83 Fed. Reg. 45509, it should provide the child with the same sort of substantive review that she would have received in a *Flores* bond hearing.

[472] Examples of harm to children from politically-driven decisions by political appointees at HHS continue to accumulate. A notable example found that such agency decision-making represented the "zenith of impermissible agency action". *LVM v. Lloyd,* Opinion and (June 27, 2018), https://www.nyclu.org/en/press-releases/court-halts-trump-administration-policy-prolonging-detention-hundreds-immigrant (noting that the agency's creation of the release policy without a record indicating need for a change "is at the zenith of impermissible agency actions").

In August 2016, the *Flores* class of accompanied and unaccompanied children filed a motion to enforce the Agreement, alleging that the government's refusal to grant bond hearings to children in immigration detention violated Paragraph 24A:

> A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing.

District court Judge Dolly Gee found the government in breach of the Agreement and granted the motion. *Flores v. Lynch*, No. 2:85-cv-04544-DMG-AGR (C.D. Cal. Jan. 20, 2017). The government immediately entered a stay and appealed, asserting, *inter alia*, that the interceding passage of HSA and TVPRA terminated the requirement of Paragraph 24A. The Ninth Circuit in *Flores v. Sessions* affirmed the district court's finding, and held that "[n]othing in the text, structure, or purpose of the HSA or TVPRA renders continued compliance with Paragraph 24A . . . impermissible" (internal citations omitted). *Flores v. Sessions*, D.C. No. 2:85-cv-04544-DMG-AGR (9th Cir. 2017). As contemplated by the Ninth Circuit, bond hearings acted as a judicial review of the child's custody based on the following provisions of the TVPRA: (1) children be placed in the least restrictive setting that is in the **best interest** of the child, and (2) that ORR consider the child's danger to self, community, and flight risk when making these placements.

The TVPRA sets the statutory standard for the custody of unaccompanied children, requiring ORR to place children in the "least restrictive setting that is in the best interests of the child" while permitting the agency to also consider the child's "danger to self, danger to the community, and risk of flight." 8 U.S.C. 1232 (c)(2) (". . . an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight." (emphasis added)). To be consistent with Paragraph 24(A) of the FSA and the TVPRA, any review of ORR's custody determination should therefore consider the full statutory standard—not just the part of it currently described in the NPRM. An 810 hearing that reviews only ORR's assessment of the child's perceived dangerousness without consideration of whether the placement is in the child's best interests would eviscerate the intent of the Ninth Circuit decision and Paragraph 24(A) of the FSA, which was to provide review of ORR's statutorily prescribed custody determination.

Importance of Evaluating Custodial Criteria through a Best Interest Lens before an Independent Arbiter (Judge)

The "810 hearings" proposed at 45 C.F.R. 410.810[473] repudiate the evidence-based consensus on best practices in evaluating custody determinations for children and youth. Again, troublingly, the NPRM fails to engage in any meaningful analysis of the large body of evidence militating against the efficacy or fairness of a custody redetermination process that casts the same government agency as judge and jailer.[474]

[473] 83 FR 45533-34.
[474] 83 FR 45509.

Custody decisions made regarding a young person's flight risk and danger to self or others should be made using objective criteria related to those specific factors. These factors should be weighed by a neutral and independent arbiter – in this case, a judge. This is precisely how custody decisions are made in other contexts, including in this country's juvenile justice system. In jurisdictions throughout the country, officials make detention decisions using a detention screening instrument, which assesses a youth's likelihood of failing to appear in court or committing a new offense prior to the adjudication of their case.[475] These instruments contain a set list of factors and assign points based on a youth's background and circumstances. Youth who receive a high score are detained, youth who score in the middle range are assigned to a detention alternative program, and youth who score in the low range are released upon conditions to appear in court.[476] These instruments also allow for a limited use of overrides to release or detain a young person when circumstances warrant reconsideration of the youth's assigned score. The use of a detention screening instrument helps ensure that decisions are made fairly and consistently, and in a way that reserves the most expensive interventions for the relatively small number of young people who are determined to require secure custody.

Independent judicial review of custody decisions is necessary to ensure that detention decisions are made through a best interest lens that applies appropriate weight to the factors listed above and the costs and benefits of potential placements. The U.S. Department of Justice has noted youth in this country's juvenile justice system are entitled to detention hearings before a judicial officer and an assessment of probable cause for their detention within 48 hours of being taken into custody.[477] Even in jurisdictions that use detention screening instruments described above to make initial decisions at the time of youth's contact with law enforcement, judicial officers ultimately make custody decisions using the results of those instruments alongside a number of other factors, including a presumption of placing youth in the least restrictive setting possible consistent with public safety and the youth's likelihood of failing to appear. Independent judicial review ensures that all legal factors are weighed independently, fairly, and objectively.

26. HOME STUDY AND POST RELEASE SERVICES

8 CFR § 410.302(e) – HHS Should Provide Flexibility in Home Study and Post-Release Services Requirements to Ensure Ability to Timely Respond to Emerging Child Protection Needs

In its discussion of 8 CFR § 410.302(e), HHS specifically invites comments[478] on whether it should set forth in the final rule policies regarding requirements for home studies,[479] denial of release to sponsors,

[475] The Annie E. Casey Foundation, *Juvenile Detention Risk Assessment: A Practice Guide for Juvenile Detention Reform* (2006), https://www.aecf.org/resources/a-practice-guide-to-juvenile-detention-reform-1/.
[476] *Id.*
[477] Letter from Assistant Attorney General Thomas E. Perez to Mississippi Governor Phil Bryant (Aug. 10, 2012), http://www.justice.gov/iso/opa/resources/2642012810121733674791.pdf. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1974); *In re Gault*, 387 U.S. at 33-57; *see also Moss v. Weaver*, 525 F.2d 1258, 1260 (5th Cir. 1976) (holding that Gerstein probable cause hearings are required for youth).
[478] 83 Fed. Reg. at 45,507.
[479] During a home study, a community-based case worker assesses the safety and suitability of the proposed caregiver and placement, including the caregiver's capacity to meet the child's unique needs, any potential risks of

and post-release services.[480] As [describe your organization's expertise/interest in this area, e.g., if you are a service provider], we encourage HHS not to include these requirements in the final rule. Instead, we recommend ORR develop specific guidelines and minimum requirements for these services in its Policy Guide.[481]

Family reunification services are vital to promote safe and stable placements of children in appropriate environments. [If applicable for your organization -- As service providers, we have seen that unaccompanied children are particularly vulnerable to human trafficking, domestic servitude, and other exploitative situations.] Standards for determining which children receive family reunification services have developed over time, responding to newly identified needs and vulnerabilities. Take, for example, the development of new home study categories in response to the Marion, Ohio egg farm case. Over a period of four months in 2014, ORR released eight children into the care of human traffickers. None of the children received home studies, and, after release, the children were subjected to labor trafficking on an egg farm in Marion.[482] Local and federal officers discovered the trafficking situation during a raid of the farm in December 2014.[483] In response to this incident and a corresponding investigation by the Senate Homeland Security and Government Affairs' Subcommittee on Permanent Investigations, ORR announced in July 2015 that it was adding two discretionary categories of home studies[484] for: (i) all unaccompanied children 12 years of age and under who are to be placed with a Category 3 sponsor; and (ii) any proposed sponsor who is a non-relative and is seeking to sponsor multiple children or has previously sponsored a child and is seeking to sponsor additional children.[485]

As new areas of vulnerability or concern are identified, it is important that ORR have the flexibility to respond and improve standards as quickly as possible. And, while the response was certainly not immediate after the Marion case, had the home study standards been regulated in a manner requiring notice-and-comment rulemaking prior to adding new categories of home studies, the process would have added months to ORR's programmatic response timeline.[486]

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the placement, and the caregiver's motivation and commitment to care for the child. Home studies result in a recommendation on whether placement with the proposed caregiver is in the child's best interest.

[480] Post-release services include risk assessment and action-planning with families around areas of need and concern, connection to community services, and provision of a referral to legal services. Consequently, these services are not only critical to ensuring a child's safe placement, but they also mitigate the risk for family breakdown, facilitate community integration, and help the family understand the need to comply with their immigration court proceedings.

[481] Office of Refugee Resettlement, *Children Entering the United States Unaccompanied*, https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied.

[482] Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Government Affairs, Protecting Unaccompanied Alien Children from Trafficking and Other Abuses 1 (2016), https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf.

[483] Abbie VanSickle, *The Washington Post*, "Overwhelmed Federal Officials Released Immigrant Teens to Traffickers in 2014," Jan. 26, 2016, https://www.washingtonpost.com/national/failures-in-handling-unaccompanied-migrant-minors-have-led-to-trafficking/2016/01/26/c47de164-c138-11e5-9443-7074c3645405_story.html?utm_term=.d4002785484e.

[484] Those that are not specifically required by statute.

[485] Permanent Subcommittee on Investigations, *supra* at 20.

[486] While ORR could try to invoke the "good cause" exception to the Administrative Procedure Act requirements, this would open the door to litigation. 5 U.S.C. § 553(d)(3); Maeve P. Carey, Congressional Research Service, The

That being said, we do support and encourage the development of minimum standards for family reunification services. To allow it the necessary flexibility, we suggest ORR do this through its Policy Guide. Standards should be developed with input and feedback from services providers and other organizations with expertise in this area. Further, while ORR has made some progress in improving and expanding family reunification services to promote the safety of children, its work is not done. The vast majority of children released from ORR care do not receive these vital services,[487] and it must continue to address new needs and vulnerabilities that are identified. To that end, ORR should facilitate annual engagement, at a minimum, with service providers and other key organizations to discuss the existing standards and evaluate new and additional risk factors for placement of unaccompanied children. [If possible, provide an example of an additional discretionary HS or PRS-only category that your organization thinks should be added].

At a minimum, if ORR decides to issue regulations on family reunification standards, we urge it to ensure that these standards are framed as *minimum* requirements. To do so would help ensure ORR has the flexibility it needs in the future to timely respond and improve standards that promote safety of children, without conflicting with the existing regulations.

In sum, we support the development of minimum standards for family reunification services, but we caution against the use of rulemaking to do so.

Federal Rulemaking Process 7 (2013), https://fas.org/sgp/crs/misc/RL32240.pdf ("A federal agency's invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review.").

[487] In FY 2017, ORR provided family reunification services for less than thirty-two percent of the 42,416 children released from its care - with only 7% of youth receiving home studies. *See* Office of Refugee Resettlement, *Facts and Data*, June 25, 2018, https://www.acf.hhs.gov/orr/about/ucs/facts-and-data.