

November 5, 2018

Debbie Seguin
Assistant Director
Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

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 Ms. Seguin:

On behalf of The Children's Defense Fund-New York, we write to offer comments on the Trump Administration's proposed Flores regulations. CDF-NY appreciates the opportunity to submit comments on behalf of children in the United States, especially young children, children with disabilities, children of color, low-income children, immigrant children, and children in complex families. For 45 years, CDF has been advocating for children and seeking strong support for families through passage of laws and implementation of rules, programs, and services in their best interest. CDF's Leave No Child Behind® mission is to ensure every child a Healthy Start, a Head Start, a Fair Start, a Safe Start, and a Moral Start in life and successful passage to adulthood with the help of caring families and communities.

The Children's Defense Fund-New York office has a unique approach to improving conditions for children, combining research, public education, policy development, community organizing and advocacy. A recognized authority in the endeavor to protect children and strengthen families, CDF-NY serves as a resource and partner for children, families and organizations throughout New York City and State. We leverage our national influence to eliminate the harmful and disproportionate impact that poverty has on children in New York and to eliminate race and gender inequities in the areas of justice, early childhood, education, health and housing.

In the past, the current Administration has made several decisions that have limited immigrants from entering the United States. These decisions include capping the number of refugees that can be resettled in the United States to 30,000 in 2019; banning entry to the U.S. for people from several predominantly Muslim countries; and ordering U.S. immigration courts to stop granting asylum to victims of domestic abuse and gang violence. The Administration has also made decisions that have directly impacted immigrant families and their children, enforcing the separation of children from their parents at the border and holding children in detention facilities. In 2017 alone, U.S. Customs and Border Protection apprehended 75,802 families and 41,456 unaccompanied alien children (UACs), a steep increase from the

15,056 families and 18,662 UACs apprehended in 2013 and 2010 respectively.¹ And in 2018, between April 19th and May 31st, 1,995 children were separated from their parents in a short 6 week period.²

In New York, there were an estimated 700 children separated from their parents and sent to facilities in New York City, Westchester County, Long Island and across the state.³ With over 300 children sent to the New York City facility, Cayuga Centers, New York City pledged to help with the legal services needed by these children and some staff even went to Dilley, Texas to offer services there.⁴ Unable to have oversight at the facilities themselves, the city and state did what they could to support the children in these facilities, but the reality is that separating children from their families or incarcerating children simply because of their immigration status is wrong. The trauma for the children and parents is cruel and immoral and we oppose the codification of this inhumane behavior.

The proposed changes to the Flores Settlement Agreement (FSA) is yet another attack on immigrant families, but this time, the administration is directly targeting children by making it easier to imprison them indefinitely. The Children's Defense Fund-NY is deeply concerned about the issue of amending the Flores Settlement Agreement (FSA) and submits these comments to identify the features of the proposed changes and highlight the severe repercussions that these changes will have on children. To that end, CDF-NY requests that DHS and HHS reject the proposals to undermine the FSA and expand family detention; and urges DHS and HHS to ensure that children are not held for prolonged periods in unlicensed family detention facilities.

Flores Settlement Agreement (FSA)

In 1997, the FSA created protections for migrant children by imposing several obligations on the immigration authorities, which fall into three broad categories:

- Children are released from detention centers without unnecessary delay to, in order of preference, parents, other adult relatives, or licensed programs willing to accept custody.
- If suitable placement is not immediately available, the government is obligated to place children in the "least restrictive" setting appropriate to their age and any special needs.
- The government must implement standards relating to the care and treatment of children in immigration detention.

The Agreement further stated that children could not be held in federal detention for longer than 20 days. However, on September 6, 2018, the Trump Administration proposed regulations that would terminate

¹ United States Border Patrol, "Total Monthly Family Units by Sector, FY13-FY 17,"

<https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Monthly%20Family%20Units%20by%20Sector%2C%20FY13-FY17.pdf>

² Kopan, Tal. "DHS: 2,000 Children Separated from Parents at Border." CNN. June 16, 2018. <https://www.cnn.com/2018/06/15/politics/dhs-family-separation-numbers/index.html>.

³ Cheng, Pei-Sze and Melissa Russo, "700 Migrant Kids Separated from parents are in NY; Dozen Seen in NYC Hospitals are 'Sad, Despondent': Governor, Officials." NBC. June 21, 2018. <https://www.nbcnewyork.com/news/local/Undocumented-Immigrant-Children-Struggle-New-York-Trump-Zero-Tolerance-Foster-Care-Facilities-486198421.html>

⁴ Manskar, Noah. "NYC Pledges Legal Help for Separated Immigrant Kids: About 40 children separated from their families at the border are still in New York City." New York City Patch. September 17, 2018. <https://patch.com/new-york/new-york-city/nyc-pledges-legal-help-separated-immigrant-kids>

the FSA. The proposed regulations would permit Immigration and Customs Enforcement (ICE) to implement and enforce its own standards for family detention centers. Below are several specific features of the proposed changes:

- The proposed rules would build a self-licensing scheme whereby the Administration could certify its own detention facilities and permit over 20 days of child incarceration with the possibility for indefinite incarceration.
- The proposed rules allow states to define the term “non-secure” as part of the definition of a licensed program, meaning that the definition of a non-secure facility may vary by state or locality.
- The proposed rule allows both DHS and ORR to reevaluate and re-determine whether a child is unaccompanied even after a child's case has begun.

General Comments

Implications of self-licensing scheme

If the Administration allows states to self-license their own detention facilities, it is very likely that the facilities will not provide consistent standards of child care across the United States and that they will be lacking in those standards. Already, a number of stories have come out about children regularly suffering from subpar conditions and abusive treatment in detention facilities when they should not have ever been incarcerated in the first place. They are not criminals to be punished and even if they were, juvenile detention facilities have to meet certain standards of care to ensure their wellbeing.

In Santa Ana, California, children reported not being able to sleep because of the lights shining all night. They were hungry because they were being fed “frozen sandwiches and smelly food.”⁵ Children were crammed into caged areas, with filthy toilets and scarce running water. Likewise, in Texas, two brothers, 11 year old Franklin and 7 year old Byron, were detained and separated from their mother. They reported that they only had foil-sheet blankets to keep them warm and “cold and raw” food to stave off their hunger.⁶ And Keylin, a 16 year old girl from Honduras, called the two facilities she was detained in the “ice box” and the “dog house” because of the icy temperatures and caged areas.⁷

These stories reflect the inhumane conditions of detention facilities and the way that many centers fail to provide basic necessities. Detention centers commonly feature a lack of bedding (detainees sleep on cement floors); lack of bathing facilities; open toilets; constant light exposure; confiscation of belongings; insufficient food and water; and cold temperatures.⁸ Family residential centers in particular have been found to consistently fail to recruit adequate health personnel and have a lack of pediatricians, child and

⁵ Associated Press. *"Immigrant Children Describe Hunger, Cold in US Detention."* VOA. July 18, 2018. Accessed November 05, 2018. <https://www.voanews.com/a/immigrant-children-describe-hunger-cold-us-detention/4487374.html>.

⁶ Silva, Daniella. *"Like I Am Trash': Migrant Children Reveal Stories of Detention, Separation."* NBCNews.com. July 29, 2018. Accessed November 05, 2018. <https://www.nbcnews.com/news/latino/i-am-trash-migrant-children-reveal-stories-detention-separation-n895006>.

⁷ Associated Press. *"Immigrant Children Describe Hunger, Cold in US Detention."*

⁸ Linton, Julie M., Marsha Griffin, and Alan J. Shapiro. *"Detention of Immigrant Children."* Pediatrics 139, no. 5 (2017). doi:10.1542/peds.2017-0483. <http://pediatrics.aappublications.org/content/139/5/e20170483>

adolescent psychiatrists, and pediatric nurses.⁹ Family residential centers also have trouble with providing necessary interpretation of health information and services, which limits the ability of families to request medical care, to access information about available care, and to communicate with health professionals in an understandable language.

These are some of the most egregious conditions that we know about for immigrants in incarceration. If we allow detention facilities to be self-licensed, it is undeniable that children will be at a high risk of facing unjust and cruel treatment while in detention, no matter if they are in California or in Texas or somewhere else. Instead of maintaining children's wellbeing, detention centers are allowing hunger, dehydration, and sleeplessness, all of which are essential to a child's continued growth and development. The failure of detention facilities to provide important standards of care and access to information all contribute to putting children at risk and compromising their health and wellbeing. Children should never be subjected to such violations of their care for any reason and it is grossly inhumane what they are having to go through.

Implications on physical and mental health of children

In relation to the harmful implications of the administration self-licensing detention facilities, legalizing the indefinite detention of children, even if it is with their families, is inherently harmful to children's health and wellbeing. In 2017, The American Academy of Pediatrics (AAP) published a statement saying that "immigrant children seeking safe haven in the United States should never be placed in detention facilities" because conditions in U.S. detention facilities are traumatizing for children and ones that no child should ever have to endure.¹⁰ This is supported by numerous studies demonstrating the damaging effects of detention on the physical and mental health of children:

- Studies on the health difficulties of detained children found that most reported symptoms of depression, sleep problems, loss of appetite, and child weight loss.¹¹
- AAP reported that detained children are vulnerable to developmental delay, poor psychological adjustment, post-traumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems.¹²
- A systematic review found that adolescents in detention and correctional facilities were about ten times more likely to suffer from psychosis than the general adolescent population. Girls specifically were more often diagnosed with major depression than boys.¹³

⁹ "Physicians for Human Rights (PHR) Strongly Opposes the U.S. Government's Proposal to Replace the Migrant Child Protections Mandated in the Flores Settlement Agreement with the Proposed Rule, 83 FR 45486." Physicians for Human Rights. Accessed November 05, 2018. <https://phr.org/physicians-for-human-rights-phr-strongly-opposes-the-u-s-governments-proposal-to-replace-the-migrant-child-protections-mandated-in-the-flores-settlement-agreement-with-the-proposed-rule-8/#top>.

¹⁰ Linton, Julie M., Marsha Griffin, and Alan J. Shapiro. "Detention of Immigrant Children."

¹¹ Lorek, Ann, et al. "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. <https://www.ncbi.nlm.nih.gov/pubmed/19811830>

¹² Linton, Julie M., Marsha Griffin, and Alan J. Shapiro. "Detention of Immigrant Children."

¹³ Fazel, Seena, Helen Doll, and Niklas Långström. "Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities." *Journal of the American Academy of Child & Adolescent Psychiatry* 47, no. 9 (September 2008): 1010-019. doi:10.1097/chi.0b013e31817eef3.

- Another study found that youth exiting detention facilities had particularly high rates of co-occurring health-risk behaviors and suffered a disproportionate rate of adolescent morbidity and mortality.¹⁴

Recent stories corroborate these findings and shine light on how children are suffering:

- In one NY Post article, more than 1,100 detainees were held in an old warehouse in McAllen, Texas. Nearly 200 of the detainees were unaccompanied minors and another 500 were “family units.” Detainees were kept in what could only be described as cages, separated within chain link fences, even the children. Conditions were so bad that a 4-year-old girl, separated from her aunt, “was so traumatized that she wasn’t talking...she was just curled up in a little ball.”¹⁵
- In another story, Sergio, a boy who was separated from his father for 45 days, said “The way I have been treated makes me feel like I don’t matter, like I am trash.”¹⁶
- There were even instances of death as reported by immigration attorney Mana Yegani, who stated that a child “died following her stay at an ICE Detention Center, as a result of possible negligent care and a respiratory illness she contracted from one of the other children.” This took place at the Dilley Family Detention Center in south Texas.¹⁷
- Also in Texas, at the Karnes Family Detention Center, authorities intentionally recreated trauma for children by tearing them away from their parents again to punish parents for protesting inhumane treatment.¹⁸
- And in July, a federal judge ordered the Trump Administration to remove children from a detention center that was using psychotropic drugs as a “chemical straitjacket” – just one example of the horrendous treatment children experience in detention.¹⁹

Based on these studies and stories, it is undeniable that detention facilities have an appalling effect on children. Children are being traumatized and made to feel worthless. They are suffering and even run the risk of dying due to their stay in detention facilities. It would not be a reach to say that conditions and treatment children encounter in detention facilities are akin to torture. The UN Special Rapporteur on torture explicitly 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.”²⁰

¹⁴ Golzari, M., S. Hunt, and A. Anoshiravani. “*The Health Status of Youth in Juvenile Detention Facilities.*” *Journal of Adolescent Health* 38, no. 6 (June 2006): 776-82. doi:10.1016/j.jadohealth.2005.06.008.

¹⁵ Eustachewich, Lia. “*How Children Live inside Cramped Immigration Detention Centers.*” *New York Post*. June 18, 2018. Accessed November 05, 2018. <https://nypost.com/2018/06/18/how-children-live-inside-cramped-immigration-detention-centers/>.

¹⁶ Silva, Daniella. “*Like I Am Trash: Migrant Children Reveal Stories of Detention, Separation.*”

¹⁷ Montero, David. “*ICE Denies Claim That a Migrant Child Died in Custody at a Texas Detention Facility.*” *Los Angeles Times*. August 01, 2018. Accessed November 05, 2018. <http://www.latimes.com/nation/la-na-immigration-detention-child-20180801-story.html>.

¹⁸ Baig, Maryam. “*The Current Administration Wants To Bypass Rules That Protect Immigrant Children.*” *Human Rights Initiative of North Texas*. September 13, 2018. Accessed November 05, 2018. <http://www.hrionline.org/the-current-administration-wants-to-bypass-rules-that-protect-immigrant-children/>.

¹⁹ *Ibid.*

²⁰ Satterthwaite, Meg, and Rebecca Riddell. “*Zero Tolerance and the Detention of Children: Torture under International Law.*” *Just Security*. August 21, 2018. Accessed November 05, 2018. <https://www.justsecurity.org/58269/zero-tolerance-detention-children-torture-international-law/>.

No child should ever be made to endure such traumatic experiences as the ones they face in detention facilities. Children should never have their physical and mental health put at risk for the purpose of detaining them and their families. There is a reason why children should not be detained for more than 72 hours and why they should not be incarcerated for more than 20 days; it is inherently detrimental to their wellbeing.

Implications of expanding “emergency” and “influx” definitions

If the Administration is allowed to expand the definitions of “emergency” and “influx,” children being held in detention facilities will continuously be in danger of having their protections weakened and their standards of care at risk. These two terms are used to determine circumstances under which certain protections and provisions -like meals and snacks- can be withheld for certain periods until such a time that the situation has passed. By expanding their definitions, the Administration will be allowed to broaden the circumstances under which holding back certain protections and standards of care for children is acceptable.

According to the proposed regulation on page 45496, the definition of “emergency” is to be flexible and designed to cover a wide range of possible situations. This definition is problematic because it is very broad and open to a number of interpretations and applications. An emergency could be anything from natural disasters to fires to civil disturbances to health concerns. In that case, the weakened protection of children and delay of other provisions would be justified for all those situations and whatever other ones DHS chooses. It is not right to have such an open definition of emergency when it could mean the difference between children getting food or medical attention and not.

In regards to the definition of “influx,” it is an old definition where there are more than 130 minors eligible for placement in a licensed program. This is a problem for two reasons. The first is that DHS regularly has more than 130 minors and UACs in custody who are eligible for placement in the licensed programs and so there will always be an influx.²¹ If that is the case, DHS and HHS can weaken protections and delay provisions for children at any time, which will put children at risk of regularly having their needs unmet. The second reason is that if DHS and HHS go through with weakening protections for children and delay meeting provisions, the health and wellbeing of children will be put at risk for even more harm, on top of the harm that they face for just being held in detention facilities. Going back to the studies done on the effects of incarceration and detention on children, children could suffer from depression, psychosis, stunted growth, and more. It is unacceptable to place children in such damaging situations when they should be protected and cared for at all costs.

Implications of continual redetermination of UAC status: Children’s Rights

The proposed regulation seeks to have unaccompanied minors undergo a redetermination process each time they encounter an immigration official. It also proposes to use a “totality of circumstances” approach to determine whether a child is 18 years of age via “multiple forms of evidence” including medical examinations and other procedures. These two conditions are harmful to the rights of migrant children for two reasons. First, the rule does not specify when medical examination is required nor the level of

²¹ Pg 45496 of the proposed regulation

training needed to conduct such examinations. This overly general nature of determining age could lead to the child being mistakenly classified as an adult and losing key due process protections for no reason. It reflects a certain lack of care and even indifference towards just how negatively it would affect children to be classified as an adult and everything that children have to lose.

Second, if children are found to not have unaccompanied status after their case has begun, it could strip them of critical child-appropriate protections and procedures and frustrate their access to due-process and humanitarian protection. Under the Unaccompanied Alien Children (UAC) Program, which is managed by the Office of Refugee Resettlement (ORR), unaccompanied children are entitled to the following rights, among others:²²

- Making and implementing placement decisions for the UAC
- Ensuring that the interests of the child are considered in decisions related to their care and custody
- Providing home assessments for certain categories of children
- Ensuring, to the greatest extent practicable, that all UAC in custody have access to legal representation or counsel
- Releasing UAC to qualified sponsors and family members who are determined to be capable of providing for the child's physical and mental well-being
- Providing various other legal protections such as exemption from the one-year filing deadline for asylum

With as many rights and protections that are afforded to UACs throughout their immigration process, to take away children's UAC status after their case begins is to unjustly take away all the rights and protections they are entitled to. As non-UACs, migrant children will be at risk of not having their interests taken into consideration and of not being ensured legal representation and counsel to the greatest extent possible. Throughout their immigration process, they will be at risk of harsh questioning by DHS at nearly any encounter with immigration officials, including the moment they request asylum, and of being put in inappropriate conditions that are not beneficial to their health and wellbeing. Redetermination of children's UAC status should not be permissible when it has the potential to be so detrimental to children's care, custody, and immigration proceedings.

Implications of continual redetermination of UAC status: Family Reunification

The proposed ruling will negatively impact children's chances of reunification with their families. Under the proposed regulation, DHS proposes to restrict the release of children to only their "parent or legal guardian." This differs from the current regulation that allows children who are transferred to the care of the Office of Refugee Resettlement (ORR) to be released to a parent, legal guardian, or an adult relative -- an adult relative being a "brother," "sister," "aunt," "uncle," or "grandparent." By restricting the type of relative a child may be released to, DHS increases the likelihood of children being held indefinitely in institutional care and denies them the ability to be reunited with family.

²² "ORR Fact Sheet on Unaccompanied Alien Children's Services." ORR.
https://www.acf.hhs.gov/sites/default/files/orr/orr_fact_sheet_on_unaccompanied_alien_childrens_services_0.pdf

Adding on, the ruling states that children who are not UACs must be transferred to state or country juvenile detention facilities, a secure DHS detention facility, or a DHS-contracted facility.²³ There, they will be provided living accommodations, food, clothing, routine medical and dental care, family services, etc. However, this does not detract from the fact that children will be separated from their families nonetheless.

These conditions of the proposal reinforce the separation of children from their families and are at odds with existing child welfare principles that recognize the importance of keeping children with their families. This is in order to minimize trauma and to promote child wellbeing as studies have shown that children who are separated from their parents suffer from increased anxiety, stress, and fear and see a catastrophic effect on their development.²⁴ The New York Times reported one case in support of these findings where a 3-year-old girl, who was separated from her mother for three months, didn't recognize her. The little girl screamed and tried to wriggle away, crying for the social worker she had been living with. This story shows the harsh reality of what parental separation can do to a child and their parent-child relationship. It is cruel and unusual for DHS to fail to uphold inherent parent-child and family-child bonds and thereby subject a child to more emotional stress and trauma.

Conclusion

The Administration is attempting to dismantle the *Flores* standards of protection that have been in place for decades. The number one priority of the FSA is that children not be incarcerated. This foundational principle, which the government agreed to in the settlement, recognizes that the best way to ensure a child's wellbeing is to keep them out of jail. Children do not belong behind bars. Replacing family separation with family incarceration will only subject children to more trauma and abuse. Therefore, we urge that the proposed changes to the FSA be denied and recommend several of the remedies ordered by the U.S. District Court for the Central District of California on October 23, 2015:

- The government must make and record prompt and continuous efforts toward family reunification and release of children.²⁵
- The government must release children without unnecessary delay in accordance with the Flores order of preference.²⁶
- In situations where a child cannot be released promptly to an adult family member or a licensed program, the child may not be held in a secure or unlicensed program.²⁷
- The government must improve the overall conditions of the detention facilities.²⁸
- The Federal Government should not give states the responsibility to determine whether their detention facilities are "non-secure" and allow them to create their own definition of licensing.

²³ Pg 45501 of the proposed regulation

²⁴ Wan, William. "What Separation from Parents Does to Children: 'The Effect Is Catastrophic'." The Washington Post. June 18, 2018. Accessed November 05, 2018. https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html?utm_term=.ad21263c4e47.

²⁵ Human Rights First. "The Flores Settlement: A Brief History and Next Steps." February 19, 2016.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

As Dr. Colleen Kraft, head of the AAP, has said, “The focus needs to be on the welfare of these children, absent of politics.”²⁹ The United States has a legal and moral obligation to ensure that all children in its custody are protected and treated with care. The FSA is absolutely critical to this obligation and protects the lives of our most vulnerable children at the most key points in their development. For the reasons discussed above, CDF-NY strongly opposes the proposed regulations to the FSA and urges DHS and HHS to defend the rules for detaining immigrant children that have been in place since 1997. CDF-NY stands ready to help highlight the importance of the FSA and the need to ensure that children are not held behind bars for prolonged periods in unlicensed family detention facilities.

Sincerely,

The Children’s Defense Fund-New York

²⁹ Eustachewich, Lia. *“How Children Live inside Cramped Immigration Detention Centers.”*