



children's
defense fund
Leave No Child Behind®

November 6, 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: Comments on the Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, DHS Docket No. ICEB-2018-0002

Dear Ms. Seguin:

The Children's Defense Fund (CDF) appreciates the opportunity to offer comments on the proposed rule to amend regulations relating to the apprehension, processing, care, and custody of alien minors and unaccompanied alien children, in response to the Notice of Proposed Rulemaking published in the Federal Register on September 7, 2018 (Federal Register Vol. 83, No. 174, page 45486).ⁱ Since even before the first settlement was negotiated in *Flores v. Reno*, CDF has followed the matter and its enforcement and was committed to seeing core principles of child development and child well-being, and core federal protections for children in the nation's child welfare system, built into the settlement agreement. Given our commitment to those principles and protections, CDF strongly opposes the proposed changes to the *Flores* settlement agreement and urges the United States (U.S.) Departments of Homeland Security (DHS) and Health and Human Services (HHS) to withdraw the proposed regulations. The proposed rule would remove core protections for migrant children and expand the use of family detention, steps that are contrary to both the letter and the spirit of the reforms in the *Flores* settlement agreement. The proposed rule also is at odds with decades of research on child development and child well-being and we believe would cause severe harm to children.

CDF has been advocating for children for 45 years and seeking strong support for families through passage of laws and implementation of rules, regulations, programs, practices, 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. This mission includes migrant children who come to the U.S. whether their status is defined as alien minors, unaccompanied alien children, unaccompanied minors, or in other ways. In addition to its national office in Washington, D.C., CDF also has state offices in California, Minnesota, New York, Ohio, and Texas, and our Southern Regional Office in Mississippi reaches into Alabama, Arkansas, Florida, Georgia and Louisiana. Certainly our CDF-Texas office has been actively engaged in recent efforts to protect children in immigrant families and those who are unaccompanied as they cross the border, and has worked in numerous ways on behalf of these children and families over the years. Similarly our other CDF state offices also have

sought to welcome and offer opportunities to children in immigrant families as well as children who arrive unaccompanied.

CDF's comments below on the proposed rule provide (I) a strong case for the protection of migrant children and discuss the severe harm that results to children without such safeguards, identify (II) harmful proposals for migrant children in the proposed rule, and conclude with (III) a call for the federal government to maintain protections for migrant children and families in the U.S., to withdraw this proposed rule on the apprehension, processing, care, and custody of alien minors and unaccompanied alien children, and to instead work to enforce the protections for children in the *Flores* settlement agreement without delay.

I. The Case for Migrant Child Protection

The *Flores* settlement agreement was established to ensure migrant children in the custody of the federal government are afforded critical protections and cared for in settings that are in the best interest of the child under the circumstances. Migrant children, like all children, have unique vulnerabilities due to their age and experiences, which require special child protection and support. An excerpt from the *Flores* settlement agreement provides:

“Whenever the INS takes a minor into custody, it shall expeditiously process the minor and shall provide the minor with a notice of rights, including the right to a bond redetermination hearing if applicable. Following arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors. Facilities 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. The INS will segregate unaccompanied minors from unrelated adults.”ⁱⁱ

These *Flores* protections are consistent with international, federal, and state laws, which all recognize that children, especially those who have endured an arduous trek to the U.S. from another country, are more vulnerable and their safety and holistic well-being (i.e., physical, mental, and emotional) should be ensured upon arrival. In fact, Exhibit 1 of the *Flores* settlement agreement, titled Minimum Standards for Licensed Programs, acknowledges this by requiring compliance with applicable state child welfare and safety laws, proper physical care and maintenance, appropriate medical and dental care, individualized needs assessments, educational services, activities, counseling, contact with family members, and access to legal services, among other things.

The Children's Defense Fund has worked hard over the years with others to achieve core federal protections to ensure children at risk are kept safely with their families, including grandparents and other relatives, and when out-of-home placement is necessary that children be placed in the least restrictive most family-like setting appropriate to their special needs and with a full range of quality services and supports that are reviewed regularly, and are returned to their families as promptly as appropriate. We have watched these principles and others be applied in federal and state laws

governing the care of children who come to the attention of child welfare and juvenile justice systems to ensure the best interests of children are maintained. For children who come to the child welfare system who cannot remain with their parents, placement with kin or in other family-like placements such as foster family care is preferred to congregate care, and a number of states have recently undertaken major efforts to significantly reduce the number of children in congregate care settings such as group homes and residential treatment centers, recognizing the harms children often experience in those settings and the evidence that children have better outcomes when in the care of family. For years CDF has supported efforts to keep children out of adult jails and when detention is required to place the children in community-based programs rather than large institutions. The directions established in the Adoption Assistance and Child Welfare Act of 1980 and the Juvenile Justice and Delinquency Prevention Act of 1974, and subsequent legislation and regulations, have all been grounded in established principles that promote child well-being some of which were incorporated into the *Flores* settlement agreement.

Unfortunately, the DHS/HHS proposed rule ignores this important foundation and recent advances and relies on flawed rationales to justify the expansion of family detention and the removal of important protections, which is likely to greatly undermine the safety, development, and well-being of children. CDF opposes the harmful and dangerous practice of detaining migrant children – alone or with their adult family members – especially for unlimited periods of time and firmly believes all facilities overseeing the care of children should be subject to licensing standards established by agencies with expertise in child welfare and youth development. CDF is particularly opposed to expanding the ability of DHS to detain children given DHS’s history of mistreating adults and children in its detention centers and the fact that some centers have recently been found to be dangerous and inhumane.

Moreover, the substantially increased use of family detention, as a result of the proposed rule, will have numerous negative effects and collateral consequences. Findings from multiple researchers indicate that the increased use of family detention will harm children and adults individually and collectively. Detention has been shown to impair parent-child relationships, which are critically important to healthy child development.ⁱⁱⁱ Plus, in the instance of families coming across the border, the trauma children and their parents have already faced intensifies the toxic stress and instability stemming from detention that can have negative and long-lasting effects for children.^{iv} There also need to be increased special attention, certainly not less, directed as children facing physical and mental disabilities are identified.

II. Examples of Harmful Policies and Practices in the Proposed Rule

As CDF reviewed the proposed rule, we identified numerous policies and practices we believe are contrary to established protections for children; they would negate protections already in place in the *Flores* settlement agreement and jeopardize the care and protection of children needing attention. Several of these, discussed briefly below, would impair the well-being of children from their initial contact with DHS/HHS throughout their time in detention and subsequent release.

A. Arrest and Detention

1. Removing the Right to a Bond Hearing Before an Immigration Judge

The rule proposed by HHS would amend 45 CFR Chapter IV at § 410.810 and remove a child's right to a bond hearing guaranteed by the *Flores* settlement agreement. It would replace it with an administrative proceeding lacking in due process protections.

The *Flores* settlement agreement specifically states: "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" (§ 24.A., emphasis added).

However, § 410.810(a) states: "A UAC [Unaccompanied Alien Child] may request that an **independent hearing officer employed by HHS** determine, through a written decision, whether the UAC would present a risk of danger to the community or risk of flight if released" (emphasis added). Then § 410.810(e) explains: "A hearing officer's decision under this decision may be appealed to the Assistant Secretary of the Administration for Children and Families. Any such appeal request shall be in writing, and must be received within 30 days of the hearing officer decision." Thus, rather than children having an initial right to an impartial immigration judge and an appellate right to the Board of Immigration Appeals, they would be subjected to the new HHS-led administrative process for both initial and appellate steps. Such a process essentially makes HHS both jailer and judge, which is detrimental to children's procedural and substantive rights and well-being. It is also contrary to congressional intent as exhibited by passage of the Homeland Security Act of 2002 (HSA) and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA); neither laws explicitly terminate the bond-hearing requirement for unaccompanied minors.

2. Ignoring Children's' Unique Needs

There are two changes in the proposed rule that would jeopardize the best interests of the migrant children who come to the attention of DHS/HHS by allowing changes in the determination as to whom is an unaccompanied alien child and who is a "child" as distinguished from an adult. The new 8 CFR 236.3(d) and 45 CFR 410.101 would allow DHS and HHS to re-determine a child's status as an "unaccompanied alien child" on an ongoing basis thereby stripping the child of already minimal due process protections during their immigration proceedings, such as the opportunity to first present their asylum claims in a non-adversarial setting, rather than immigration court, even after their cases have begun.

Also, the new 8 CFR 236.3(c) of the proposed rule would establish a "reasonable person" standard for age determinations. Under the proposed rule, it would be sufficient, for example, for DHS to treat a child under 18 as an adult if a reasonable person would conclude the person is an adult, and the immigration officer could do so without any additional medical or dental examination as now could be requested in accordance with the *Flores* settlement agreement under § V, ¶ 13. Nor is there even a requirement in the new rule that the child's own statement of his or her age be considered. Such

reasoning hampers the *Flores* settlement agreement’s “reasonable person” standard. Under *Flores*, a person is only permitted to be treated as an adult when a reasonable person would *first* hear the child’s claim to childhood but still conclude that he or she was an adult.

B. Conditions of Confinement

Establishing Federal Licensing and Inspection

The rule proposed by DHS would amend 8 CFR Chapter I at § 236.3 in order to “eliminate” the “barrier to continued use of FRCs [Federal Residential Centers] by establishing an alternative federal licensing scheme for such detention.”^v This would be contrary to the *Flores* settlement agreement, which states: “The term ‘licensed program’ shall refer to any program, agency or 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. A licensed program must also meet those standards for licensed programs set forth in Exhibit 1 attached hereto. All homes and facilities operated by licensed programs, including facilities for special needs minors, **shall be non-secure 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, e.g., cases in which a minor has drug or alcohol problems or is mentally ill. The INS shall make reasonable efforts to provide licensed placements in the geographical areas where the majority of minors are apprehended, such as southern California, southeast Texas, southern Florida and the northeast corridor” (¶ 6, emphasis added). Through subsequent court litigation, a 20-day limit has also been specified as the maximum length of time that children can be placed in unlicensed detention centers.

The DHS proposed rule seeks to get around this “barrier.” Specifically, § 236.3(b)(9) states: “*Licensed Facility* means an ICE [U.S. Immigration and Customs Enforcement] detention facility that is licensed by the state, county, or municipality in which it is located, if such a licensing scheme exists. Licensed facilities shall comply with all applicable state child welfare laws and regulations and all state and local building, fire, health, and safety codes. **If a licensing scheme for the detention of minors accompanied by a parent or legal guardian is not available in the state, county, or municipality in which an ICE detention facility is located, DHS shall employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards by ICE**” (emphasis added). This apparent federal self-licensing scheme, which threatens the credibility and impartiality of monitoring, would also allow children to be held for longer than the 20-day maximum as applied to the *Flores* settlement agreement. Such exceptions threaten the well-being of children as current standards for ICE family detention centers fail to address the core components of child protection. Those standards also lack a recognition of the varying ages of children coming to the facilities or of the broad range of children’s physical health, mental health, and socio-emotional and developmental needs for which services are needed.

Encouragement of inappropriate detention through lax licensing policies and procedures ignores the fact that research has demonstrated it can have short- and long-term negative consequences for children. It can enhance trauma for children, and in this case children who already have been

traumatized in their home countries and/or in their long journeys to the U.S. Detention also can enhance the likelihood of children experiencing more serious depression and mental health problems once placed. It interferes with children's development and the ability to develop relationships with their peers and family members. DHS's own Advisory Committee of Family Residential Centers reported in 2016 that even when children and families are detained together that it is generally never appropriate and when absolutely necessary should be done for the shortest amount of time and in the least restrictive setting possible. The DHS proposed rule also ignores policy statements issued since 2017 by the American Academy of Pediatrics, the American Medical Association and the American College of Physicians all addressing the grave negative health consequences of detention for both children and their parents or other adult family members. CDF's Texas office in its comments on the proposed rule cites a report, *No Safe Haven Here: Children and Families Face Trauma in the Hands of U.S. Immigration*, by the Unitarian Universalist Service Committee that documents the inappropriateness of detention centers across Texas. CDF-Texas also describes how children and parents have suffered in the Karnes and Dilley family detention facilities in the state.

C. Release

Limiting Release Options

The proposed rules would amend the current regulations concerning who children in DHS/HHS custody can be released to, and make it more difficult to release a child from custody. The rule proposed by DHS at 8 CFR 236.3(j) would limit release to only a parent or legal guardian, rather than also to non-parental adult relatives or others already specified in § 236.3(b). Such changes would be directly at odds with the heart of the *Flores* protections requiring DHS and HHS to release children to specific adults. Specifically, § VI, ¶ 14 of the *Flores* settlement agreement states:

“Where the INS determined that the detention of a minor is not required to either secure his or her timely appearance before the INS or the immigration court, or to ensure the minor’s safety or that of others, the INS shall release a minor from its custody without unnecessary delay, in the following order of preference, to:

- A. a parent;
- B. a legal guardian;
- C. an adult relative (brother, sister, aunt, uncle, or grandparent);
- D. an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor’s well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer or (ii) such other document(s) that establish(es) to the satisfaction of the INS, in its discretion;
- E. a licensed program willing to accept legal custody; or
- F. an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.”

However, the new proposed § 236.3(j)(1) states: “DHS will release a minor from custody to a parent or legal guardian who is available to provide care and physical custody.” Thus, the proposed rule limits release options for children (eliminates “adult relative” and other adults designated by the parent

or legal guardian), removes the urgency (no mention of “without unnecessary delay”) and, thus, increases the likelihood that children will remain in custody, most often detention, and delay reunification with family. Such a proposed change also ignores provisions of federal law that encourage placement with relatives to help maintain family and cultural ties and minimize the trauma, depression, and impaired child development that can result from family removal.

The rules proposed by HHS at 45 CFR §§ 410.301-302 also would make it even more difficult to be released from Office the Refugee Resettlement (ORR) to adult sponsors other than a parent or legal guardian. Although keeping thorough records is important, this section fails to establish any timeline requirements or requirements for prompt release of children. The proposed § 410.302 raises several issues:

- § 410.302(c) allows ORR unnecessary and inappropriate 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 well-being 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.
- The specific reference to a “fingerprint-based background and criminal records check” as an element of a further suitability assessment is also concerning. 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 the U.S. Customs and Border Protection in May 2018. Many analysts and advocates 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.

III. Conclusion

In closing, the Children’s Defense Fund strongly believes, and it is backed up by federal law, that every child who comes into the custody of the federal government should be guaranteed the care, protection, and services necessary to mitigate further trauma and promote healthy development, including access to their family.

To that end, CDF recommends that DHS and HHS withdraw this proposed rule on the apprehension, processing, care, and custody of alien minors and unaccompanied alien children, without delay and to commit its energy instead to ensuring robust, good-faith compliance with the *Flores* settlement agreement.

We appreciate the opportunity to comment on the proposed rule and would be happy to discuss our comments with you or your staff in more detail.

Sincerely,



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ⁱ See <https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children> at 45486.

ⁱⁱ *Flores* settlement agreement, Section V, ¶ 12.A.

ⁱⁱⁱ See Megan J. Wolff, *Fact Sheet: The Impact of Family Detention on Children, 2018*, http://psych-history.weill.cornell.edu/pdf/Family_Detention_Sheet.pdf.

^{iv} See Julie M. Linton, Marsha Griffin, Alan J. Shapiro, *Detention of Immigrant Children*, American Academy of Pediatrics, 2017, <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483#ref-59>.

^v See note i at 45497.