Toolkit on the Proposed Rule Changes to End The Flores Agreement

The Department of Homeland Security and the Department of Health and Human Services have issued proposed rules that would dismantle what are called the “Flores Settlement” standards, allowing for the indefinite detention of immigrant children and families, including asylum seekers. The proposed rules would allow the federal government to set their own standards for holding families and children, and attempt to undermine independent oversight of conditions. The proposed rules also reduce vulnerable families’ access to due process and humanitarian protections.

After a summer in which Americans watched in horror as the government took children away from their parents *en masse,* the administration has backed off this tactic, but switched instead to a massive and concerted effort to create large internment camps for asylum-seeking families apprehended by DHS. Ending the Flores agreement would remove the biggest roadblock to these mass internment camps.[1]

What You Can Do About It

You can influence important immigration policies and procedures by participating in the federal rulemaking process. The Administrative Procedure Act requires agencies to provide an opportunity for the public to weigh in on the rulemaking process. Engaging in administrative advocacy ensures that we are using all avenues to fight for immigrants and will more effectively amplify our collective voice.

DHS and HHS’ rule change, titled *Apprehension, Processing, Care, and Custody of Alien Minors,* is currently available for online public comment **until November 6, 2016.** Comments cannot be submitted after that time. Federal agencies must review and consider all the comments they receive before creating a final rule, which then becomes law. The final version of the rule must be based on relevant information gathered during the rulemaking process, including from public comments. Public comment is not a vote. Agencies are not required to throw out a rule if they receive more opposing than supporting comments. However, public comments with important new information, significant questions or policy arguments could force the agency to change course.[2]

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[1] Philip Elliott, “Navy Document Shows Plan to Erect 'Austere' Detention Camps,” Time, June 22, 2018. https://ti.me/2Dczu3b. Nick Miroff and Paul Sonne, “Trump administration preparing to hold immigrant children on military bases,” The Washington Post, May 15, 2018. https://wapo.st/2Ns2FnO. W.J. Hannigan, “The U.S. Military Is Preparing to Hold 32,000 Immigrants in Detention Centers,” Time, June 28, 2018. https://ti.me/2QL2Okm

[2] Adopted from CLINIC’s guide, “Defend Immigrants by Taking Part in the Federal Rulemaking Process,” n.d. http://bit.ly/2CaDoaE

Background on the Flores Settlement

In 1985, two organizations filed a class action lawsuit on behalf of immigrant children who had been detained by the former Immigration and Naturalization Service (INS) challenging procedures regarding the detention, treatment, and release of children. After many years of litigation, including an appeal to the United States Supreme Court, the parties reached a settlement in 1997.

The Flores Settlement Agreement (Flores) imposed several obligations on the immigration authorities, which fall into three broad categories:

1. The government is required to release children from immigration detention without unnecessary delay to, in order of preference, parents, other adult relatives, or licensed programs willing to accept custody.
2. If a 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.
3. The government must implement standards relating to the care and treatment of children in immigration detention.

Successive administrations have failed to issue regulations implementing the terms of the settlement, as required by the parties’ 2001 stipulation extending the agreement.[3]

Immigrant children held in DHS detention centers have faced a high risk of harm that continues to this day. The American Academy of Pediatrics has said that the “Department of Homeland Security facilities do not meet the basic standards for the care of children in residential settings.” [4] And two subject-matter experts for DHS’s Office for Civil Rights and Civil Liberties have said that “In our professional opinion, there is no amount of programming that can ameliorate the harms created by the very act of confining children to detention centers.” In their report on ten inspections conducted this year, they uncovered problems including: a child who lost a third of his body weight; an infant with bleeding of the brain that went undiagnosed for five days; numerous children who were inoculated with adult doses of a vaccine; and children with lacerations and fractures of their fingers, who had gotten their hands caught in heavy steel doors at the family facility in Karnes City, Texas.[5]

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[3] “The Flores Settlement: A Brief History and Next Steps.” Human Rights First, February 19, 2016. <https://www.humanrightsfirst.org/resource/flores-settlement-brief-history-and-next-steps>

[4] Julie M. Linton, Marsha Griffin, and Alan J. Shapiro, "Detention of Immigrant Children," Council on Community Pediatrics, American Academy of Pediatrics. <http://bit.ly/2C5ynjV>

[5] Miriam Jordan, “Whistle-Blowers Say Detaining Migrant Families ‘Poses High Risk of Harm’,” New York Times, July 18, 2018. <https://nyti.ms/2OOec0k>

How to Comment (and What To Say)

Comments on these proposed rule changes are due by November 6th.

a) Go here: http://bit.ly/flores-nprm
b) Click on the blue "Comment Now!" button;
c) File a substantive comment. (The rest of this document provides help on that.)

To provide advice on what to say in your comments, we are going to reproduce here in its entirety the "section-by-section analysis" of the proposed rules in this National Immigrant Justice Center document. After each section, we provide sample comments, sometimes with citations, which you can adapt or use as a jumping off point for your own comments.

Your comments need not cover everything in the rules. Find the elements of the rules you are uniquely qualified to respond to, or that otherwise speak to you, and comment on those parts.

How to write effective comments

Administrative advocacy emphasizes quality over quantity. Your comment doesn't have to be lengthy, but it should be thoughtful and drawn from your experience, expertise and perspective as an advocate or person affected by the rule.

It is also beneficial to read comments other people have already made on a rule. They might give you new perspectives or thoughts to strengthen your arguments.

As Regulations.gov says, "A single, well-supported comment may carry more weight than a thousand form letters." Use facts. Cite studies, point out costs, make policy arguments, and include personal stories about yourself or others to illustrate your points.

Be very organized when writing your comment. It may be helpful to make an outline of the points you wish to make before you start writing. Using numbers to order your points and arguments is a suggested and effective technique.

Use respectful and professional language to make sure your comment is considered. Also remember that, with limited exceptions, all comments are public and anyone can read what you wrote.

Here is the NIJC's detailed breakdown of what the rules propose to change:

§ Strips parole (release) authority for children in expedited removal proceedings: The NPRM amends 8 CFR 212.5 by removing an internal cross-reference to 8 CFR 235.3(b), provisions governing parole. In effect, this change will mean that minors placed in expedited removal are held to the same strict standard for release on parole as adults. Judge Gee has previously found and Flores class counsel has long argued that under 8 CFR 212.5 children subject to expedited removal may nonetheless be considered for release on parole on a

case-by-case basis for “urgent humanitarian reasons” or “significant public benefit” providing that he or she is not a security or flight risk; the change here would limit such release only for medical necessity or law enforcement need. (p. 2)

> *Example comment: The NPRM limits parole authority to remove the case-by-case assessement of parole for “urgent humanitarian reasons” or “significant public benefit.” By its nature parole authority is at the discretion of DHS, there is no need to limit the agency’s parole authority, particularly for a vulnerable population like children. We expect DHS to administer and enforce immigration law in a manner that is humane, and the agency should have the parole discretion to do that.*

§ Restricts release options for children in DHS custody: 8 CFR 236.3 currently provides several categories of individuals to whom a child can be released from custody, in order of preference, including: 1) a parent; 2) a legal guardian; or 3) an adult relative (brother, sister, aunt, uncle, or grandparent). The NPRM amends this section to only permit release to a parent or legal guardian not in detention. This change is directly at odds with paragraph 14 of the Flores settlement, the heart of the settlement’s protections, requiring DHS and HHS to release children “without unnecessary delay” to a relative, with the order and categories identical to those currently listed in 8 CFR 236.3. (p. 2)

Codifies fingerprinting of sponsors, leaves open questions regarding post-release services: 45 CFR 410.302 outlines the process requirements leading to the release of a 4 child from ORR custody to a sponsor, including the new requirement that a sponsor sign an affirmation of abiding by a sponsor care agreement. The NPRM invites public comment on whether to set forth in the final rule policies on: requirements for home studies; criteria for denial of release to a prospective sponsor; and post-release service requirements. (p. 4-5)

> *Example Comment: The proposed rule changes would eliminate adult relatives such as sisters, brothers, aunts, uncles, or grandparents as potential sponsors for children in custody. Reducing the number of relatives who qualify to be sponsores will lead to more children in detention for longer periods of time, which is opposite the intent off the Flores Agreement (to release children “without unnecessary delay” to a relative). We have evidence for this in the fact that DHS has mplemented more stringent background checks on sponsors, causing the number of children in detention to increase fivefold in the last year (from 2,400 to 12,800).[6] The length of child detention has also grown from 34 to 49 days.[7] Proposed changes to the rules will have a similar effect of decreasing the*

[6] Caitlin Dickerson, “Detention of Migrant Children Has Skyrocketed to Highest Levels Ever,” New York Times, September 12, 2018. <https://nyti.ms/2NkwdDz> The "tent city" in Tornillo, Texas, has had to triple in size to hold up to 3,800 children. "The delays in vetting sponsors relate, in part, to changes the Trump administration has made in how the process works. In June, the authorities announced that potential sponsors and other adult members of their households would have to submit fingerprints, and that the data would be shared with immigration authorities."

[7] Caitlin Dickerson, “Migrant Children Moved Under Cover of Darkness to a Texas Tent City,” New York Times, September 30, 2018. <https://nyti.ms/2QBc1e0>

number of sponsors and increasing the number of children in detention for longer periods of time. The existing categories of sponsors should be maintained.

The NPRM also changes 45 CFR 410.302 for the ORR, requiring that sponsors be fingerprinted and leaving open the possibility of other new requirements for sponsorship. Again we know the outcome of these proposed rule changes since DHS has expanded their insistence on fingerprinting sponsors in the last year, and as a result the number of children in detention has exploded and children are detained for longer periods of time.

Is the purpose of fingerprinting potential sponsors to protect children, or is it to find and arrest undocumented sponsors, as ICE has recently started to do?[8] If it is the latter, it is doing so at the expense of undermining the Flores Agreement. It should be stopped, not added to the regulations.

§ Establishes a "reasonable person" standard for age determinations: 8 CFR 236.3(c) codifies a "reasonable person" standard for determining age, providing that DHS may treat a person as an adult if a reasonable person would conclude the person is an adult. In making this determination, the officer is permitted, but not required, to to seek a medical 2 or dental examination. Age determination decisions are to be based upon the totality of the evidence and circumstances.

- Note that there is no mention in this provision of considering the child's own statement of his/her age, or changes in science and best practices regarding the efficacy of radiographs/dental exams to determine age of teenagers (particularly across different race, ethnicity, gender, and nutritional standards/poverty). (p. 2-3)

Provides a flimsy standard for age determinations: 45 CFR 410.700 provides that procedures for age determinations "must take into account multiple forms of evidence", but makes it optional for ORR to require a medical or dental evaluation and does not require that the medical professional conducting the examination have any expertise or training in age determinations or that the tests themselves adhere to evidence-based standards for age determinations. Like the DHS NPRM, 45 CFR 410.710 changes the standard for treatment of individuals who may be adults, stating that "if procedures would result in reasonable person concluding that the individual is an adult, despite his or her claim to be a minor, ORR must treat such person as an adult for all purposes." (p. 5)

Example Comment: ICE has in the past used dental x-rays in a scientifically inappropriate manner to determine the age of persons. When this practice has been challenged in court, ICE has lost.[9] This proposed rule change would "solve" the problem

[8] Tal Kopan, "ICE arrested undocumented immigrants who came forward to take in undocumented children," CNN, September 20, 2018. <https://cnn.it/2E7YCsr>

[9] Elizabeth A. DiGangi, "ICE Misusing Science to Determine Age of Immigrants," Real Clear Science, June 8, 2018. <http://bit.ly/2RzdtPa>

by eliminating the need to determine age using the best scientific methods currently available. Instead it replaces best practices with a "reasonable person" standard that does not evenhave to consider the statements of the persons being detained, the testimony of others, or the consular documents in their possession.

Furthermore, this proposed rule change fails to follow or implement the recommendations of the DHS' Office of the Inspector General, which recommended: 1) that age determination practices follow the requirements of the TVPRA as regulated by Health and Human Services; and 2) that ICE should prioritize the use of providers with specialized experience in determining age from radiographic exams.[10]

§ Institutes continual re-determinations of "unaccompanied alien child" (UAC) status: Under the new 8 CFR 236.3(d), "immigration officers will make a determination of whether an alien meets the definition of a UAC (under 18, without lawful immigration status, and with no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody) each time they encounter the alien" (see p. 50). This is critical because it means that the minimal legal protections afforded to children designated as UACs (including an exception to the one-year filing deadline for asylum and the opportunity for a non-adversarial asylum adjudication) will be stripped from many children despite having arrived as truly unaccompanied and enduring the resulting vulnerabilities. (p. 3)

Example Comment: The proposed rule changes would require that "immigration officers will make a determination of whether an alien meets the definition of a UAC….each time they encounter the alien" (p. 50). It appears possible that children, while waiting for their immigration cases to be adjudicated, could "age out" of the protections afforded to them as a vulnerable population. This is despite the fact that it can take years for immgration and asylum cases to be decided by the immigration courts. This violates basic notions of due process. Children should be treated as children no matter how long the U.S. government takes to process their cases. The facts of an immigration case shouldn't change over time through no fault of the children involved.

§ Allows ICE to self-license and inspect family jails: As described at p. 47, "The proposed rule would eliminate that barrier to the continued use of [Family Residential Centers] FRCs by creating an alternative federal licensing scheme for such detention…. Specifically, DHS proposes that if no such licensing scheme is available in a given jurisdiction, a facility will be considered licensed if DHS employs an outside entity to ensure that the facility complies with family residential standards established by ICE.

- Note that the government appears to have included this provision in part to avoid having to comply with Judge Gee's 2015 order clarifying that the government must limit the detention

[10] Age Determination Practices for Unaccompanied Alien Children in ICE Custody. Department of Homeland Security, Office of the Inspector General, 2019, p. 17-18. Report OIG-10-12. <http://bit.ly/2zYhHcG>

of children in unlicensed family detention centers to the minimal time possible, with 20 days provided as the estimate for reasonable processing time.

○ Note that DHS's Office of Inspector General recently found ICE's inspections regime in the context of adult detention to be woefully inadequate, and in that context the agency also employs an independent contractor, Nakamoto. The OIG found the Nakamoto inspection practices "not consistently thorough" and unable to fully examine conditions or identify deficiencies. One ICE employee described Nakamoto inspections as "very, very, very difficult to fail." (p. 3)

Example Comment: The NPRM would expand the user of Family Residential Centers "by creating an alternative federal licensing scheme for such detention…. Specifically, DHS proposes that if no such licensing scheme is available in a given jurisdiction, a facility will be considered licensed if DHS employs an outside entity to ensure that the facility complies with family residential standards established by ICE" (p. 47).

ICE already has standards for adult detention centers that are reviewed for compliance by outside inspectors. They continually fail to meet or uphold these standards, according to DHS' own inspector general.[11] DHS and the private prison companies it contracts with should succeed in complying with these standards for adult facilities, and demonstrate they can do so to the satisfaction of their own inspector general, before they attempt to do the same with a vulnerable population like children.

As recently as July of this year, one judge appointed a special monitor to investigate reports of child neglect and abuse at ICE facilities, while another judge ordered ICE to remove all children from the Shiloh Residential Treatment Center due to allegations of abuse and overmedication of children.[12] So issues with abuse in ICE detention centers are not a historical problem. This agency cannot credibly license and regulate itself, and it should consider this before it puts children at risk of further harm.

Even if ICE successfully implemented a licensing and review process with standards that met the Flores Agreement (standards higher than those set in this NPRM), long-term detention of children is traumatic and harmful, so these changes should not allow for detention beyond the 20 day target set by the Flores Agreement.

§ Weakens protections for children during their time in CBP processing: The NPRM amends 8 CFR 236.3(g) to claim that "operational feasibility" may be considered when

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[11] ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements. Department of Homeland Security, Office of the Inspector General, June 26, 2018. Report OIG-18-67. <http://bit.ly/2NvcTyI>

[12] Richard Gonzales, "Federal Judge Orders Government To Seek Consent Before Medicating Migrant Children," NPR, July 30, 2018. <https://n.pr/2CxidRq> "Judge To Appoint Special Monitor To Oversee Detention Facilities," *All Things Considered,* NPR, July 27, 2018. <https://n.pr/2Qysobh>

determining whether a child is allowed contact with accompanying family members during processing. The same section allows DHS to house unaccompanied children with unrelated adults for more than 24 hours in emergencies or "exigent circumstances". (p. 4)

Provides DHS and HHS wide discretion to suspend all protections for children in the case of an "emergency": 45 CFR 410.101(definitions) provides that an "emergency" - defined as "an act or event (including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or health concerns at one or more facilities)" - provides DHS and HHS the authority not only to delay transfer or placement of UACs, but also to suspend "other conditions" provided by the regulations. The Flores settlement currently provides at paragraph 12 that an emergency may provide justification for a delayed transfer of a child, but the expansion of the weakening of protections triggered by an emergency is new. Page 44 clarifies that an example of the type of requirements that might be waivable in the case of an emergency would include a meal or snack for a child. (p. 4)

> *Example Comment: The rule changes propose that "operational feasibility" may be considered when determining whether a child is allowed contact with accompanying family members during processing. It would also allow DHS to house children with unrelated adults for more than 24 hours in emergencies or "exigent circumstances."*
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> *One of the primary responsibilities of every federal agency is to prepare for exigencies and mitigate the risks they face in conducting their operations. Failure to do this is negligence, not emergency preparedness. DHS cannot just "waive" standards of care for a vulnerable population like children. This should be entirely removed from the NPRM.*
>
> *Similarly, the rule changes propose to allow DHS and/or HHS to "suspend" regulations in case of emergency, "including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or health concerns at one or more facilities." Again, DHS and HSS have a responsibility to plan for emergencies, not just engage in hand-waving and resolve themselves of responsibility when they occur. Excepting extreme circumstances (such as the loss of life), regulations should remain in effect.*

§ Authorizes DHS to re-detain children with no burden of proving change in circumstances: The new 8 CFR 236.3(n) provides DHS authority to take a child back into custody after she/he has been released from DHS or HHS custody if there is a material change in circumstances showing the child is an escape risk, danger to the community, or has a final order of removal. This provision appears to nominally comply with the requirements imposed on DHS by the U.S. District Court of Northern California in Saravia v. Sessions, but in effect undermines that decision by neglecting to place any burden on DHS of establishing the material change. (p. 4)

> *Example Comment: The NPRM would authorize DHS to take a child back into custody under certain circumstances, but does not appear to require any burden of proof that*

DHS must meet to make this decision. This oversight does not ensure due process. If DHS has evidence that circumstances have changed and a child must be taken back into custody, then providing that evidence in some process should be required for that detention.

§ Overturns the right to a bond hearing guaranteed by Flores, replacing it with an administrative process lacking in due process protections: Section 410.810 provides an entirely new administration procedure for custody determinations for unaccompanied children in ORR custody, arguing that it is "not clear statutory authority for DOJ to conduct such hearings still exists." This argument disregards, among others, the very clear instruction at paragraph 24(A) of the Flores settlement that, "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." This provision creates an HHS-led "independent hearing process" wherein HHS officers determine whether the child poses a danger to the community or flight risk.

○ Note that this provision gives HHS, the same agency that maintains care and custody of the children, with the authority to adjudicate children's challenges to that custody, making HHS jailer and judge. Note that appeals from a Section 810 decision are designated to go not to the Board of Immigration Appeals (as they would currently from an Immigration Judge decision) but instead directly to the Assistant Secretary for the Administration for Children and Families, a political appointee requiring Senate confirmation.

○ In July 2017, on appeal from a Judge Gee decision, the Ninth Circuit explicitly rejected the administration's claim that DOJ does not have statutory authority to conduct bond hearings under Flores: 5

■ "By their plain text, neither law [HSA nor TVPRA] explicitly terminates the bond-hearing requirement for unaccompanied minors. Moreover, the statutory framework enacted by the HSA and TVPRA does not grant ORR exclusive and autonomous control over the detention of unaccompanied minors. Rather, the statutes leave ample room for immigration judges to conduct bond hearings for these children. Additionally, holding that the HSA and TVPRA do not deny unaccompanied minors the right to a bond hearing under Paragraph 24A affirms Congress's intent in passing both laws. These statutes sought to protect a uniquely vulnerable population: unaccompanied children. In enacting the HSA and TVPRA, Congress desired to better provide for unaccompanied minors. Depriving these children of their existing right to a bond hearing is incompatible with such an aim." (p. 5-6)

Example Comment: The NPRM creates a new administrative procedure for unaccompanied minors in ORR custody that would in the past have received a bond hearing. Others have noted that DHS is misguided in its presumption that it does not

have the authority to conduct bond hearings in these cases.[13] The administrative procedure proposed lacks basic due process, with HHS both the jailer and judge of minors in their custody. Appeals would go to a political appointee, rather than to the Board of Immigration Appeals. To ensure the rights and interests of children, they must have legal advocates separate from DHS or HHS, and a court process to adjudicate their cases. This is as true for bond proceedings as any other part of their immigration cases. This entire administrative procedure should be removed from the NPRM.

I'm overwhelmed! I just want to leave a comment!

If you are trying to get more people to comment, or don't have time to rewrite the example comments (or don't know which one to pick), here are some ideas for shorter comments. These are not as effective, but they show the public is concerned about the rulemaking:

- Detention, even for a short amount of time, has been proven to be devastating to a child's development, health and well-being. This proposed rule permitting indefinite detention is abusive and inhumane. The Flores settlement is in place to ensure children are treated with "dignity, respect and special concern for their particular vulnerability as minors" and the proposed rule fails to meet those standards. (CLINIC)

- There are proven, effective alternatives to detention—such as the Family Case Management System—that should be used instead because they are less harmful to developing child and more cost effective. (CLINIC)

- It is unacceptable for the administration to have the authority to certify that its own jails are safe for children. Detention facilities have been proven time and time again to be dangerous to the health and well-being of vulnerable children. (CLINIC)

- The proposed rule is an unnecessary burden on taxpayers. Alternatives to detention are proven to be effective and humane. The proposed rule is a needless cost and a poor and wasteful use of resources. (CLINIC)

- Tell the government to reject any regulation that would allow the detention of immigrant children and families. Use your own words and write from your own values and experiences. Here are some points to consider:

[13] "By their plain text, neither law [HSA nor TVPRA] explicitly terminates the bond-hearing requirement for unaccompanied minors. Moreover, the statutory framework enacted by the HSA and TVPRA does not grant ORR exclusive and autonomous control over the detention of unaccompanied minors. Rather, the statutes leave ample room for immigration judges to conduct bond hearings for these children. Additionally, holding that the HSA and TVPRA do not deny unaccompanied minors the right to a bond hearing under Paragraph 24A affirms Congress's intent in passing both laws. These statutes sought to protect a uniquely vulnerable population: unaccompanied children. In enacting the HSA and TVPRA, Congress desired to better provide for unaccompanied minors. Depriving these children of their existing right to a bond hearing is incompatible with such an aim." *Flores v. Sessions,* July 5, 2017.

- Keeping children in detention causes lasting trauma.
- Detention cannot be carried out humanely.
- Indefinite detention of immigrant families violates human rights, fosters abuse and * mistreatment, and is expensive, impractical, and unnecessary.
- Protecting basic human rights is not a loophole. (AFSC)

Background Materials

"DHS/HHS Notice of Public Rulemaking Regarding The Flores Settlement: Top-lines and Section-by-Section Analysis." National Immigrant Justice Center, September 7, 2018 <http://bit.ly/2QFYfYa>

"The Flores Settlement and Family Separation at the Border." Women's Refugee Commission, June 15, 2018. <https://www.aila.org/File/Related/14111359ab.pdf>

"Documents Relating to Flores v. Reno Settlement Agreement on Minors in Immigration Custody," American Immigrant Lawyers Association. Accessed September 7, 2018. <http://bit.ly/2E4lhGg>