

The Trump Administration's Continued Attacks on Immigrant Children and Families: Dismantling the Flores Settlement Agreement

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On September 7, the Trump administration took another step toward eliminating basic protections for immigrant children and their families who enter the U.S. without documentation—including those legally seeking asylum, by issuing a notice of proposed rulemaking¹ (proposed regulation) that would dismantle constitutional protections for children established by the Flores Settlement Agreement² governing the detention and treatment of children in U.S. immigration custody.

The proposed rule would make a number of changes to both DHS and HHS regulations and policy, and it would terminate the Flores settlement 45 days after it is finalized. Among the changes, the proposed regulation would:

- » Make way for the U.S. government to hold immigrant families indefinitely—certainly longer than the current 20 days required by the Flores Agreement—until parents can have their cases adjudicated, which can take months or years;
- » Relax or altogether remove basic human rights standards including where and how children and families are housed and what they are fed;
- » Weaken protections for Unaccompanied Alien Children (UACs) including a call for on-going redetermination of whether a child fits the definition of UAC at every encounter, increasing the likelihood that he or she will lose this important designation and accompanying protections.

This proposed rule has a 60-day comment period. The deadline for submitting comments is November 6. Submit your comments to help build the administrative record in opposition to this proposed regulation and stop this administration from gutting protections provided under Flores. Doing so will help us continue to build public support for the humane treatment of immigrant children and families and voice our opposition to this administration's inhumane and lawless immigration agenda.

Submit Your Comments

**Deadline to submit your comments:
November 6**

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

Background on the Flores Settlement Agreement

The Flores Settlement Agreement (FSA) which went into effect on January 28, 1997, was an agreement settling a federal legal challenge to US immigration policy that set a nationwide policy for the detention, release, and treatment of minors in the custody of the then-Immigration and Naturalization Service (INS).¹ It stemmed from several lawsuits filed over the mistreatment of unaccompanied children in the care of the U.S. government in the 1980s and was required by the U.S. Supreme Court and the Ninth Circuit to ensure that the federal government was not violating the U.S. Constitution’s basic human rights protections when dealing with children in immigration custody.

Among other provisions, the FSA requires the federal government to (1) place children with a close relative or family friend “without unnecessary delay” rather than keeping them in custody; and (2) keep immigrant children who are in custody in the “least restrictive conditions” possible and provided with basic necessities.

Originally established to primarily protect unaccompanied children—those who arrived at the border without their parents—the FSA was later expanded to include children who arrived with their parents or legal guardians and set forth protections and parameters for the detention, care, and release of children to ensure that minors are held in appropriate conditions and not detained for more than 20 days.

The Trump Administration’s “Zero-Tolerance Policy”

The Trump administration’s broader campaign against immigration (particularly non-white immigration) and its so-called “zero-tolerance policy”³ provide the backdrop for this proposed rule intended to dismantle the FSA. The zero-tolerance policy—referring ostensibly to “zero tolerance”—which went into effect on April 6, was carried out in part through attacks on asylum seekers and our systems of protection for them. It resulted in the separation of children from parents who arrived without documentation—including those legally seeking asylum—at the U.S. border. The Administration initially carried out the policy by separating children and parents in undocumented immigrant families. During the six weeks that the family separation policy was in place (before a court ruling forced the Trump administration to seek alternatives) nearly 3,000 children—including 101 children under age 5—were separated from their parents.

As family separation came under escalating public outcry and legal challenge, on June 21, 2018, the government filed a Motion to change the Flores Settlement, seeking emergency relief from two provisions of Flores in order to permit the Department of Homeland Security (DHS) to detain families together for the pendency of their immigration proceedings. The court denied this motion. Soon after, on June 26, a federal ruling⁴ by U.S. District Court for the Southern District of California—the result of an American Civil Liberties Union (ACLU) lawsuit—ordered a stop to

¹ At the time of the enactment of FSA, the now-defunct Immigration and Naturalization Service handled all individuals encountered at the border. Today, DHS, HHS, and the Office of Refugee Resettlement (ORR) all share responsibility for immigrants entering the U.S., depending on a range of factors.

most family separations at the border and required the reunification of all families that have been separated. Today, despite this court order, more than 136⁵ of these migrant children remain separated from their parents.

Forced to end the administration's practice of family separation, President Trump is now looking once again to eliminate the protections the FSA offers for migrant children in federal custody—this time through regulations.

The Many Problems with the Trump Regulatory Proposal

The proposed regulation, published in the Federal Register on September 7 by the Department of Health and Human Services (HHS) and (DHS) would have the effect of dramatically expanding the number of detention centers that are eligible to hold families, ultimately leading to far more children and their families being held. It would also open the door to longer stays for families detained together. Although not an exhaustive list, below are some of the most significant and problematic provisions of the proposed regulation.

Weakening Standards for Family Detention Facilities

Creating Alternative Licensing Requirements

The NPRM would create an alternative federal licensing scheme for family detention facilities if a state, county or municipality does not have a licensing scheme for these centers, effectively eliminating what the government views as a barrier to the continued and expanded use of family detention.

Currently, the government has three options for purposes of immigration custody: 1) paroleⁱⁱ all family members into the U.S.; 2) detain the parent(s) or legal guardian(s) and either release the child to another parent or legal guardian or transfer them to HHS to be treated as unaccompanied; or 3) detain the family together by placing them in family detention during their immigration proceedings.

Under the FSA, facilities that house detained minors during immigration proceedings must be licensed *for dependent children* by an appropriate state agency. States generally do not have licensing schemes for facilities to hold minors who are together with their parents or legal guardians and by definition not dependent children and in keeping with FSA requirements, the government can only hold families together in detention for a limited period of time—and in a limited number of licensed facilities.ⁱⁱⁱ Now, the government is attempting to establish a new licensing

ⁱⁱThe Immigration and Nationality Act (INA) authorizes the Secretary of Homeland Security to exercise discretion to temporarily allow certain noncitizens to physically enter the United States if they are applying for admission but are either inadmissible or do not have a legal basis for being admitted to the United States. DHS only grants parole if the agency determines that there are urgent humanitarian or significant public benefit reasons for a person to be in the United States and that person merits a favorable exercise of discretion. Grants of parole are made for limited periods of time to accomplish a discrete purpose, and individuals are typically expected to depart the United States when the authorized period expires. See <https://www.americanimmigrationcouncil.org/research/use-parole-under-immigration-law>.

ⁱⁱⁱ Currently the government operates three detention facilities for families: Berks Family Residential Center in Berks County, Pennsylvania (Berks), Karnes Residential Center in Karnes City, Texas (Karnes) and South Texas Family Residential Center in Dilley, Texas (Dilley).

Family Detention is Not the Answer

Administrative complaints⁶ have documented sexual assault in family detention centers and the absence of meaningful mental health and medical care. Reports by pediatric and mental health advocates following visits to family detention centers in 2015 and 2016 revealed discrepancies between ICE Family Residential Standards⁷ and the actual services provided to families, including reports of inadequate or inappropriate immunizations, delayed access to medical care, inadequate education services and limited mental health services. A 2016 report of the DHS Advisory Committee on Family Residential Centers highlights the problematic nature of family detention including recommendations to avoid family detention and mitigate the physical,

social, familial, and psychological consequences of current detention practices.⁸ Prison-like conditions in detention, including constant surveillance, can be confusing and intimidating for children. Children may feel unsafe in detention which could be a trigger and re-traumatizing for those who have experienced past trauma. Children can experience significant distress and toxic stress in detention conditions. The stress of detention can harm a child's developing brain and is associated with psychological distress and short-term symptoms including eating difficulties and somatic complaints, sleep problems, depression and anxiety, and long-term health consequences including developmental delays, post-traumatic stress disorder,

anxiety, depression, suicidal ideation, and behavioral problems. Research tells us that a child's well-being is closely linked to his or her parent and that a parent's ability to act as a buffer against toxic stress greatly impacts early development. Detention, even for brief periods of time, can also have adverse consequences for the health and wellbeing of parents. Detention can exacerbate existing mental health conditions for parents and compromise a parent's ability—under stress—to respond to the need of their child and to support their healthy development. Research has shown that longer periods in detention further compromise the capacity of parents to care for their children.

scheme for family detention that would eliminate the major obstacle the government faces in efforts to keep families in detention during immigration proceedings for as long as necessary. Specifically, DHS proposes that if no 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 is in compliance with family residential standards established by DHS' Immigration and Customs Enforcement (ICE). These family detention standards were created in late 2007 and are not codified, meaning they do not have the force of law and fail to confer a cause of action in court. Also problematic is the limited oversight of family

detention facilities to ensure compliance with these standards.

This alternative licensing process is designed to allow DHS to house families in detention even in areas where an applicable licensing regime is not available. In its argument, the government notes that the practical implications of the FSA have prevented it from using family detention “for more than a limited period of time and in turn often led to the release of families.” It is clear that keeping families in detention appears to be the main objective of this proposed regulation which goes against the very spirit of the FSA. Given the well-established traumatic impact of family detention, this proposal raises serious concerns.

Broadening the definition of Emergency and Influx Conditions to Weaken Protections

The proposed regulation would add problematic definitions for both “emergency” and “influx,” changing what is considered an emergency to provide broad discretion for the government to dispense with standards and protections for children during emergency and influx periods. It would allow the government to depart from compliance with any provisions (not just transfer timeline) and excuse non-compliance during emergency and influx periods.

Currently, the FSA permits the government, under emergency conditions, more than three or five days to transfer children to licensed programs. The proposed regulation vastly expands the definition of both emergency and influx conditions to allow the government to delay, for instance, access to a snack or a meal and basic services in an emergency that could last for days or weeks. Especially problematic is that the definition of emergency is flexible and “designed to cover a wide range of possible emergencies” and influx is defined in such a broad way that it would apply to much of the past several years.

Raising the Standard for Release on Bond or Parole to Keep Children and Parents in Detention

This proposed regulation aims to significantly restrict the release of children (and parents or legal guardians) from family detention on parole and keep families in detention for the duration of their immigration proceedings which could last months or years.

Specifically, the government argues that in order to ensure that (1) families are held together during immigration proceedings; and to (2) effectively deter

adults from choosing to enter the U.S. illegally with children (with the expectation that children will remain in the U.S. outside of immigration detention), it is making changes to statutes and regulations governing release on parole or bond.

In the proposed regulation, children detained with a parent or legal guardian who are subject to expedited removal and who have not been found to have a credible fear of persecution or torture in the home country or are still pending a credible fear determination are subject to mandatory detention. A case-by-case determination of parole is permitted for “an urgent humanitarian need or significant public benefit.” This proposed regulation raises the bar for parole, arguing that for those who are in expedited removal proceedings and are pending a credible fear determination or who have been found to not have such fear, release on parole can only meet this heightened standard when there is a medical necessity or a law enforcement need. This change, by the government’s own admission, will likely result in fewer children and parents or legal guardians being released on parole and lengthier stays in detention for children.

Limiting the Release of Non-UAC Children to a Parent or Legal Guardian

This proposed regulation aims to keep children in detention by limiting their release to a parent or legal guardian not in detention.

Currently, children in custody can be released (in order of preference) to: a parent, a legal guardian, or an adult relative (sibling, aunt, uncle, or grandparent). The proposed regulation argues that DHS does not have the authority to release children to non-parents or legal guardians. This change will inevitably mean more children will be held in detention for extended periods of time.

Weakening Protections for Unaccompanied Children

As mentioned earlier, the FSA established policies for the detention, treatment, and release of UACs,^{iv} an especially vulnerable population given that they are detained without a parent or legal guardian present. The FSA outlines basic protections and services for children including access to food and drinking water and medical assistance in emergencies, as well as separation from unrelated adults whenever possible.

[Recent reports](#) suggest that the overall number of detained migrant children—many crossing the border alone—has reached the highest ever recorded. The number of children detained at federally contracted shelters for migrant children has, according to The New York Times, reached 12,800 this month— five-fold increase since last summer. The increase is due in large part to stricter immigration enforcement which has discouraged relatives and family friends from coming forward to sponsor children. Even more concerning, while testifying before Congress this month, Immigration and Customs Enforcement senior official Matthew Albence noted⁹ that after HHS and ICE signed a memorandum of agreement to background-check and fingerprint potential “sponsors” of immigrant children, ICE arrested 41 people who came forward. The decline in the number of children released to live with families and other sponsors has meant more children in detention. As record numbers of children continue to be held in detention, changes in this proposed regulation will weaken protections for UACs and raise significant concerns.

UACs in Immigration Detention

Responsibility for UACs is divided among various agencies, including DHS which oversees the apprehension, transfer, and repatriation of UACs, and HHS which, among other responsibilities, coordinates and implements the care and placement of UACs as well as overseeing the reunification of UACs with their parents abroad if appropriate. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA, P.L. 110-457) outlines additional policies and procedures for the treatment of UAC’s, including ensuring: (1) that UACs are placed in the least restrictive setting that is in the best interest of the child; (2) the timely appointment of legal counsel for UACs; and (3) that the interests of the child are considered in decisions and actions relating to the care and custody of a UAC. At HHS, the Office of Refugee Resettlement (ORR) screens each UAC to determine if the child has been a victim of trafficking, if there is credible evidence that the child would be at risk if he or she were returned to his or her home country and if the child has a possible claim to asylum. ORR also arranges to house the child or reunites the child with a family member. The FSA creates special rules for UACs from contiguous countries (i.e., Mexico and Canada) including specific safeguards for the treatment of UAC while in the care and custody of Customs and Border Protection (CBP).

^{iv} Unaccompanied alien children are defined in statute as children who: lack lawful immigration status in the United States; are under the age of 18; and are without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is available to provide care and physical custody. 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.

Among several provisions impacting UACs are the following:

» **A call for on-going redetermination of whether a child fits the definition of UAC at every encounter, increasing the likelihood that he or she will lose this important designation and accompanying protections.**

Under the proposed regulation, immigration officers will make a determination of whether a child meets the definition of UAC each time they encounter the child. This means that even if a child was previously determined to be UAC, they may no longer meet the definition of UAC at the next encounter, and as a result, no longer have the legal protections afforded to UACs. This redetermination process is problematic and could jeopardize protections for children—directly impacting access to asylum hearings once children are reunified.

» **Transporting and housing of UACs with unrelated adults, exposing children to potentially inappropriate or even dangerous encounters.**

Currently, UACs cannot be transported in vehicles with adults except when the transport is from a place of arrest or apprehension to a DHS office or when separate transportation would be impractical. The proposed regulation expands on this, allowing for UACs to be transported with unrelated adults during the initial apprehension when being transferred to a DHS facility or if separate transportation is impractical or unavailable.

Also, FSA requires that UACs should be held separately from unrelated adults unless that is not immediately possible in which case they may not be held with an unrelated adult for more than 24 hours. The proposed regulation would explicitly allow DHS to depart from the 24 hour limit under the FSA on the amount of time UACs can be housed with an unrelated adult in emergencies or other exigent circumstances.

» **More reasons for placement in a secure facility with jail-like conditions.^v**

The proposed regulation expands the criteria for placement in a secure facility based on certain behaviors that are not listed in the FSA. The proposed regulation clarifies when children can be placed in secure facilities, allowing ORR more leeway to decide whether a child should be placed in a secure facility but doesn't codify the TVPRA requirement that placement in a secure facility should be reviewed regularly or that children will be placed in the least restrictive setting in best interest of child as outlined in the TVPRA.

Looking Ahead

The Trump administration's latest proposed regulation would undoubtedly open the door to greater use of family detention. It would mean longer detention of families—possibly for months or years—in poorer, possibly more dangerous conditions. This proposed regulation is a significant step backward that strips basic protections from immigrant children and families.

^v This proposed regulation defines a secure facility as a State or county juvenile detention facility or a secure ORR detention facility, or a facility with an ORR contract or cooperative agreement having separate accommodations for minors. Secure facilities typically provide a 24-hour living setting for children with internal or exterior locks and secure, perimeter fencing.

Families should not be held in jail-like, detention centers that are damaging to the health and well-being of children, especially for prolonged periods of time. Detention can be incredibly difficult and damaging for children and is a terrible source of toxic stress. Reports have documented the traumatic impact of family detention and the absence of meaningful mental health and medical care in these facilities.

The long-standing protections established under the Flores agreement stem from a history of mistreatment of immigrant children in the custody of the U.S. government. Flores remains integral to protecting the basic rights of children—both traveling with parents or legal guardians and UACs—detained in these conditions. Instead of attempting to strip basic protections from immigrant children and families, the Trump administration should work to ensure that it is in compliance with the minimum requirements for the humane treatment of children in detention set forth in the Flores agreement.

The long-standing protections established under the Flores agreement stem from a history of mistreatment of immigrant children in the custody of the U.S.

Endnotes

¹ Available here: <https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf>

² Available here: <https://www.aila.org/File/Related/14111359b.pdf>

³ See <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>

⁴ Available here: <https://www.politico.com/f/?id=00000164-3f39-d1bc-afef-7fbbdf010001>

⁵ See <https://twitter.com/jacobsoboroff/status/104545805859445552>

⁶ Women’s Refugee Commission (June 2018). The harm of family

detention: Why modifying Flores and detaining families together cannot be the answer to family separation. Available here: <https://www.womensrefugeecommission.org/images/zdocs/WRC-harm-of-family-detention.pdf>.

⁷ Available here: <https://www.ice.gov/detention-standards/family-residential>

⁸ Report of the DHS Advisory Committee on Family Residential Centers (September 30, 2016). Recommendations only. Available here: <https://www.ice.gov/doclib/sevis/pdf/acfrcDraftSubcommRecmdOnly.pdf>.

⁹ See <https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants-sponsor-children/index.html>