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THE VOICE FOR HEALTH CARE CONSUMERS

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 20563

Re: DHS Docket No. ICEB-2018-0002/RIN 1653-AA75, 0970-AC42 [Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children]

Submitted electronically at https://www.regulations.gov

Dear Assistant Director Seguin:

Families USA appreciates the opportunity to provide comment on the notice of proposed rulemaking on relevant and substantive terms of the Flores Settlement Agreement, specifically the apprehension, processing, care, and custody of alien minors and unaccompanied alien children (UACs).

Families USA, a leading national voice for health care consumers, is dedicated to the achievement of high-quality, affordable health care and improved health for all. We seek to make concrete and tangible improvements to the health and health care of the nation – improvements that make a real difference in people's lives. In all of our work, we strive to elevate the interests of children and families in public policy to ensure that their health and well-being is foremost on the minds of policymakers. We are writing today to voice our strong opposition to the Administration's proposed changes to the Flores Settlement Agreement and to share a number of specific concerns about the impact of the proposed regulation on the safety and well-being of immigrant children who are held in the custody of the U.S. government.

The Flores Settlement Agreement, which went into effect on January 28, 1997, was an agreement settling a federal legal challenge to U.S. 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). 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.

FamiliesUSA.org
1225 New York Avenue, NW, Suite 800
Washington, DC 20005
main 202-628-3030 / fax 202-347-2417

As part of the Flores Settlement Agreement, the government pledged to put regulations in place that would create official rules about how federal agencies should treat children detained in immigration custody. A 2001 stipulation allowed the government to publish final regulations that would implement and terminate the Flores Settlement Agreement. The final regulations however, must be consistent with the substantive terms and spirit of the Flores Settlement Agreement. As outlined in our comments below, we believe that the proposed regulations remove many of the standard rights for children and families within the immigration system outlined in the Flores Settlement Agreement, including length of stay in a detention facility, the conditions of the facility, the options for release, a person's right to a bond hearing, and the legal protections for UACs, among others. As such, the proposed regulations are inconsistent with and fail to follow the rules set forth in the Flores Settlement Agreement for the safe and humane treatment of children in U.S. custody. It is our strong recommendation that the administration withdraw this rule. At a minimum, in light of the serious consequences that would result for affected children if implemented, the rule should not be finalized. Below we have outlined several areas of grave concern in the proposed regulation:

Department of Homeland Security (DHS) Regulations

Proposed 8 CFR 236.3(b) – Definitions

Emergency and Influx. The proposed regulation would add problematic definitions of 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 any so-called "emergency" or "influx" periods.

As currently implemented, the Flores Settlement Agreement allows 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 snacks or a meal or 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." Similarly, "influx" is defined in such a broad way that if applied retroactively, it would cover much of the past several years. If implemented, this change would allow the government to delay access to basic care and essential services and supports for children, including adequate nutrition.

Proposed 8 CFR 236.3 (b) (9) – Licensed Program Definition

Currently, the government has three options for purposes of immigration custody: 1) parole 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 Health and Human Services (HHS) to be treated as unaccompanied; or 3) detain the family together by placing them in family detention during their immigration proceedings.

The proposed regulation 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. Under current law,

the detention of children in an unlicensed family detention center is limited to 20 days. This alternative licensing structure would allow localities significant flexibility to work around this requirement, effectively eliminating what the government views as a barrier to the continued and expanded use of family detention.

Under the Flores Settlement Agreement, 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 the Flores requirements, the government can only hold families together in detention for a limited period of time – and in a limited number of licensed facilities.

The proposed regulation would establish a new licensing 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, it 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 that there is 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. Under the Flores Settlement Agreement, facilities that house detained minors during immigration proceedings must be licensed *for dependent children* by an appropriate state agency. Not surprising, there are few state licensing schemes for family residential centers, because states typically do not have criminal detention facilities for families, only individuals. Currently, the government operates only three detention facilities for families. [1] In keeping with the Flores Settlement requirements, the government can only hold families together in detention for a limited period of time and only in these licensed facilities. Now, the government is attempting to establish a new licensing 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. In its argument, the government notes that the practical implications of the Flores Settlement Agreement have prevented it from using family detention "for more than a limited period of time and in turn 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 Flores Settlement Agreement. We strongly oppose this change to existing licensing requirements for family detention facilities given the well-established traumatic impact of family detention for children and families.

[1] 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).

Proposed 8 CFR 236.3 (b)(5), (b)(10), (e)(1) Transfer of Minors who are Not UACs from one Facility to Another

The proposed rule's definition of "emergency" clarifies that an emergency may create adequate cause to depart from any of proposed 236.3, not just the transfer timeline. Under the Flores settlement agreement, the government must transfer minors to a "non-secure" and "licensed program", and do so "as expeditiously as possible". With respect to transfer, transfer in a timely manner refers to three days to five days max with exceptions, such as emergency or influx, which again, requires placement as expeditiously as possible. This change would give the government significant latitude in the time permitted for children to be transferred between facilities, increasing the likelihood that children will spend longer periods of time in inappropriate, restrictive and all together problematic settings.

Proposed 8 CFR 236.3 (c) – Age Determination

The proposed rule codifies a "reasonable person" standard for determining age, allowing DHS to treat a person as an adult if a reasonable person would conclude that the person is an adult. In making this determination, the office is permitted but not required to seek a medical or dental examination. The proposed rule requires that age determination decisions be made based upon the totality of the evidence and circumstances. We have concerns that this provision fails to consider the child's own statement of his or her age, or recognize advances in science and best practices regarding the efficacy of radiographs/dental exams to determine the age of teenagers (specifically across different race, ethnicity, gender and nutritional standards/poverty). We oppose this standard for age determination since applying this standard could incorrectly identify children as adults, stripping them of basic protections and leading to the mistreatment of minors. It is unimaginable that the government proposes to depart from an evidence-based standard to assess a child's age and instead is seeking authority to use an arbitrary standard.

Proposed 8 CFR 236.3 (d) – Determining Whether an Alien is a UAC

The proposed regulation calls for an on-going redetermination of whether a child fits the definition of UAC at every encounter, increasing the likelihood the he or she will lose this important designation and accompanying protections. Specifically, under the proposed regulation, immigration officers will make a determination of whether a child meets the definition of UAC each time they come into contact with the child. This means that even if a child was initially determined to be a UAC – meaning he or she lacks lawful immigration status in the U.S., is under the age of 18 and without a parent or legal guardian in the U.S. or without a parent or legal guardian in the U.S. who is available to provide care and physical custody - that initial determination can be challenged down the road during future encounters with immigration officials. 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. This continuous redetermination process is problematic and could jeopardize a child's access to the minimal legal protections afforded to UACs, including an exception to the one-year filing deadline for asylum and the opportunity for non-adversarial asylum adjudication.

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

The proposed regulations weaken protections for children during their time in the custody of Customs and Border Patrol (CBP) processing. The proposed regulations allow DHS to house UACs with unrelated adults,

exposing children to potentially inappropriate or even dangerous encounters. Currently, the Flores Settlement Agreement requires that UACs should be held separately from unrelated adults unless this 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 hours limit under Flores on the amount of time UACs can be house with an unrelated adult in emergencies or other "exigent circumstances." Permitting young children to be housed, even for short period of time, with unrelated adults presents a serious risk for children. The administration's proposal is wholly inappropriate and runs directly counter to the spirit of the Flores Settlement Agreement, which is to ensure that the government protects the health and well-being of the children in its care.

Proposed 8 CFR 236.3 (j) – Release of Minors from DHS Custody

The 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 amends this section to limit release of children to a parent or legal guardian not in detention. This change will inevitably mean more children will be held in detention for extended periods of time. We believe it is at direct odds with the Flores Settlement Agreement, and jeopardizes the very core of the settlement's protections which require that DHS and HHS release children "without unnecessary delay" to a relative, with the order and categories of individuals listed above.

Proposed 8 CFR 212.5/8 CFR 235.3(b) - Parole

The proposed regulation aims to significantly restrict the release of children from family detention on parole and keep families in detention for the duration of their immigration proceedings which could last months or years. The proposed regulation amends 8CFR 212.5, removing an internal cross-reference to 8 CFR 23 5.3(b) provisions governing parole. This change effectively means that minors placed in expedited removal are held to the same strict standard for release on parole as adults. Currently, a child 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 prosecution or torture in the home country or are still pending a credible fear determination may nonetheless be considered for release on parole on a case-by-case basis for "an urgent humanitarian or significant public benefit" providing that he or she is not a security or flight risk. This proposal would raise the bar for parole, limiting such release to a medical necessity or law enforcement need. This change, by the government's own admission, will likely result in fewer children being released on parole and lengthier stays in detention for children – both are problematic and go against the spirit and intent of Flores.

Department of Health and Human Services (HHS) Regulations

Proposed 45 CFR 410.101 – Definitions

Continual Redetermination of UAC Status. The proposed regulation clarifies that HHS' redetermination of whether a child is a UAC will be continuous and that the protections provided to a UAC – including an exception from the one-year asylum filing deadline – are eliminated once the UAC designation terminates. As outlined in our comments on Proposed 8 CFR 236.3 (d), this change is problematic and would mean that

vulnerable children who entered this country unaccompanied could be stripped of the minimal protections afforded to them by the Flores Settlement Agreement.

Emergency. Again, the definition of emergency in the proposed regulation allows DHS and HHS wide latitude to suspend all protections for children in the case of a so-called "emergency." It would allow DHS and HHS the authority to not only delay transfer or placement of UACs, but to also suspend "other conditions" provided in the regulations. As noted in our comments on proposed 8 CFR 236.3(b), the proposed definitions of emergency and influx are expansive and problematic. The Flores Settlement Agreement currently provides that an emergency may provide justification for a delayed transfer of a child, but the expansion of the weakening protections triggered by an emergency is new. Among the examples of the type of requirements that might be waivable in the case of an emergency are a delay in providing a meal or a snack for a child.

Proposed 45 CFR 410.700 – Conducting Age Determinations

The proposed regulation provides procedures for age determinations noting that such determinations must take into account multiple forms of evidence but makes it optional for the Office of Refugee Resettlement (ORR) to require a medical or dental examination and fails to require that the medical professional conducting the examination have expertise or training in age determinations or that the tests used employ evidence-based standards for age determination. As noted in our earlier comments on the parallel DHS provision, Proposed 45 CFR 410.701 (*Treatment of an Individual who Appears to be an Adult*), changes to the standard for treatment for individuals who may be adults are problematic. Specifically, the proposed regulation states that "if procedures would result in a 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." This change could potentially strip children of basic rights and protections and expose them to inappropriate and dangerous treatment and conditions.

Proposed 45 CFR 410.810 Hearings

The proposed regulation provides a completely new administration procedure for custody determinations for UACs in ORR custody, overturning the right to a bond hearing guaranteed by the Flores Settlement Agreement and replacing it with an administrative process that appears to be lacking in due process protections. Specifically, while Flores provides clear instructions 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," the proposed regulation creates an HHS-led "independent hearing process" and allows an HHS officer to determine whether the child poses a danger to the community or a flight risk.

This is problematic for a number of reasons. First, this proposed change gives HHS – the entity that maintains the care and custody of UACs – the authority to adjudicate challenges to that custody. Second, appeals of decisions do not go to the Board of Immigration Appeals as they currently do for an immigration judge decision, but rather, to the Assistant Secretary for the Administration for Children and Families (ACF) who is a political appointee. Third, it directly contradicts a July 2017 decision by the Ninth Circuit Court which rejected the administration's claim that the Department of Justice (DOJ) does not have statutory

authority to conduct bond hearing under Flores. As the Court's ruling noted "…the statutory framework enacted by the HAS and TVPRA does not grant ORR exclusive and autonomous control over the detention of unaccompanied minors….these statutes sought to protect a uniquely vulnerable population…depriving these children of their existing right to a bond hearing is incompatible with such an aim."

Concluding Comments

As documented in the concerns listed above, the proposed regulation would dramatically expand the number of detention centers that are eligible to hold families, ultimately leading to far more children and their families being held in U.S. custody. It would also open the door to longer stays for families detained together – possibly for months or years – in substandard more dangerous conditions. This proposed rule goes against the spirit and intent of the Flores Settlement Agreement and is a significant step backward. If implemented, the proposed regulation not only strips essential basic protections for immigrant children and families, it also places children in extremely dangerous and potentially life-threating situations.

Our government has a long-standing legal obligation to protect the welfare of children in its custody. No child should be held in jail-like detention centers – with or without their parents -- that are damaging to their health and wellbeing, especially for prolonged periods of time. There is a strong body of evidence which demonstrates the traumatic impact of family detention on children. In particular, detention is shown to be detrimental for children and is a terrible source of toxic stress.

The long-established protections 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 detained immigrant children – both those who arrived with parents or legal guardians and UACs. Instead of stripping basic protections for immigrant children and families and defying its responsibility to protect their health and well-being, we urge the administration in the strongest possible terms to reaffirm that federal agencies are in compliance with the minimum requirements for the humane treatment of children in detention set forth in the Flores Settlement Agreement. These are essential protections for children and must continue to be enforced.

Thank you for the opportunity to submit these comments. If you have any questions, please contact Shadi Houshyar at Families USA, 202-626-0605 or at shoushyar@familiesusa.org.

Respectfully submitted,

Shadi Houshyar
Director of Early Childhood and Child Welfare Programs
Families USA