



Submitted via email to [ICE.Regulations@ice.dhs.gov](mailto:ICE.Regulations@ice.dhs.gov)

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**RE: DHS Docket No. ICEB-2018-0002, RIN 0970-AC421653-AA75**

To Whom It May Concern:

The Catholic Legal Immigration Network, Inc. (CLINIC) submits these comments in response to the Department of Homeland Security and the Department of Health and Human Services' Notice of Proposed Rulemaking entitled "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children" published on September 7, 2018.

CLINIC embraces the core Gospel value of welcoming the stranger. CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC is the largest nationwide network of nonprofit immigration programs, with approximately 330 affiliates in 47 states and the District of Columbia. Through its affiliates, as well as through the BIA Pro Bono Project and the Dilley Pro Bono Project (formerly known as the CARA Pro Bono Project), CLINIC advocates for the just and humane treatment of asylum seekers through direct representation, pro bono referrals, and engagement with policy makers.

CLINIC believes that U.S. policies on immigration should reflect the country's core moral values and historical practice of welcoming immigrants and refugees fleeing persecution. Immigration policies should ensure justice, offer protection, and treat immigrants humanely. Regardless of the administration in the United States, bipartisan public opinion and people of faith have consistently stood strongly against family separation and family detention because of the harmful impact this practice has on vulnerable groups of people. Detaining families together and separating mothers and fathers from their children leads to long-lasting trauma for children and adults alike and creates barriers to legal representation for people who should have the opportunity to seek and receive protection in the United States. It is inhumane, dehumanizing, cruel, and excessive to put families seeking protection in detention and to separate children from their parents.

Beyond punishing children and parents who have already endured a difficult journey to arrive in the United States in search of refuge, there is no justifiable reason to implement a rule change that will increase the detention of children. Therefore, DHS and HHS should rescind the Notice of Proposed Rulemaking “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children.”

Thank you for the opportunity to submit these comments. This document, in its entirety (this letter and the following 58 pages), constitutes CLINIC’s submission for the rulemaking record. Please do not hesitate to contact Michelle Mendez, Project Manager for CLINIC’s Defending Vulnerable Populations Project, at [mmendez@cliniclegal.org](mailto:mmendez@cliniclegal.org) should you have any questions about our comments or require further information.

Sincerely,

A handwritten signature in blue ink that reads "Jeanne M. Atkinson". The signature is written in a cursive, flowing style.

Jeanne M. Atkinson, Esq.  
Executive Director

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## **I. The Proposed Regulations Are Antithetical to American Values and in Direct Violation of the *Flores* Settlement Agreement (FSA)**

The Department of Homeland Security (DHS) and the Department of Health and Human Services' (HHS) Proposed Rules,<sup>1</sup> if finalized, would allow for the indefinite detention of immigrant children and their families and would endanger the health and safety of detained children. The government's proposed regulations appear to be in response to the public outcry and pushback it faced when it began implementing its family separation policy at the U.S.-Mexico border. In 2017 and 2018, DHS separated approximately 8,000 families under the government's "zero-tolerance" policy, inflicting immeasurable suffering on children, babies, and their caregivers.<sup>2</sup> On June 21, 2018, in accordance with the president's June 20, 2018, Executive Order "Affording Congress an Opportunity to Address Family Separation,"<sup>3</sup> the government sought emergency relief<sup>4</sup> from two provisions of the *Flores* Settlement Agreement (hereinafter "*Flores*"): the release provisions of Paragraph 14, as well as the licensing requirements of Paragraph 19. The government sought relief to permit DHS to detain immigrant family units together for the duration of their immigration proceedings. The court denied this motion to modify the *Flores* agreement on July 9, 2018 with Judge Dolly Gee describing the government's application as a "cynical attempt . . . to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action."<sup>5</sup> Despite this ruling, the government issued the current proposed regulations on September 7, 2018 in another attempt to curtail the government's obligations to protect immigrant children in U.S. custody.

The proposed regulations appear to be an attempt by DHS to defy multiple federal court interpretations of *Flores* in terms of what "licensed" facility means and to whom it applies, and in terms of the presumption in favor of release. The government admits that through the proposed regulations it seeks to accomplish what its motion to modify *Flores* in June of 2018 was trying to achieve, and which the court swiftly struck down: "[t]his Motion to Modify sought relief consistent with this proposed rule, although this rule includes some affirmative proposals (like the federal licensing regime) that were not at issue in that motion."<sup>6</sup> This statement amounts to a concession that these proposed regulations are inconsistent with *Flores*. The government thus acknowledges

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<sup>1</sup> DHS Docket No. ICEB-2018-0002, RIN 0970-AC421653-AA75, *Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, <https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children#h-3>. The Notice of Proposed Rulemaking is hereinafter referred in the text of these comments as "NPRM" and citations to it are based on the Federal Register page. The proposed regulations themselves are referred to as "proposed regulations" and are cited by their proposed number in the Code of Federal Regulations (CFR).

<sup>2</sup>Amnesty International, *USA: 'You Don't Have Any Rights Here' Illegal Pushbacks, Arbitrary Detention & Ill-Treatment Of Asylum-Seekers In The United States* (2018), <https://www.amnestyusa.org/wp-content/uploads/2018/10/You-Dont-Have-Any-Rights-Here.pdf>.

<sup>3</sup> U.S. President, Executive Order 13841, "Affording Congress an Opportunity to Address Family Separation," 83 Fed. Reg. 29435, June 20, 2018, <https://www.federalregister.gov/documents/2018/06/25/2018-13696/affording-congress-an-opportunity-to-address-family-separation>.

<sup>4</sup> *Flores v. Sessions*, No. 2:85-cv-04544-DMG-AGR, (C.D. Cal. filed June 21, 2018), Defendants' Memorandum Of Points And Authorities In Support Of Ex Parte Application For Relief From The Flores Settlement Agreement <https://www.aila.org/File/Related/14111359z.pdf>.

<sup>5</sup> *Flores v. Sessions*, No. 2:85-cv-04544-DMG-AGR (Order, C.D. Cal. July 9, 2018), <https://www.politico.com/f/?id=00000164-8176-d66b-a166-8bf6cdaa0000>.

<sup>6</sup> 83 Fed. Reg. 45492.

that the proposed rules are designed to permit detaining families indefinitely, which federal courts have not allowed the government to do since doing so would be in direct violation of *Flores*, stating: “[t]he practical implications of [*Flores*], including the lack of state licensing for [family residential centers],<sup>7</sup> have effectively prevented the Government from [detaining the family unit together during their immigration proceedings] for more than a limited period of time. This rule change would, when finalized, eliminate that barrier and allow for the full range of options at each stage of proceedings.”<sup>8</sup>

It appears that DHS’s purpose in implementing these regulations is specifically to authorize indefinite, prolonged detention of children. Moreover, the proposed DHS and HHS regulations consistently dilute strong commanding terms in *Flores*, such as “shall” and “must,” with weaker present and future tense verbs.<sup>9</sup> These changes impermissibly insulate DHS and HHS from liability and accountability. These changes, allowing for expanding the detention of children, are the opposite of the intention behind the *Flores* agreement and the rule change would destroy child protection standards the U.S. government and court system has established. There is no justification to enact a rule change that would keep families and children in detention longer. Our government should provide broad protections for all children, regardless of citizenship, in the custody of the U.S. government. Although separation of children from their parents is inherently harmful, so is child detention. Numerous clinical studies have demonstrated the mitigating factor of parental presence does not negate or lighten the impact of detention on the physical and mental health of children.<sup>10</sup>

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<sup>7</sup> CLINIC generally will refer to what the government terms “Family Residential Centers” as “family detention centers” throughout these comments. CLINIC believes the term “family detention center” more accurately reflects the reality of being held in a facility which the family is not free to leave.

<sup>8</sup> 83 Fed. Reg. 45492.

<sup>9</sup> See, e.g., *Flores* ¶ 12 (“minors *shall be separated* from delinquent offenders” becomes “ORR *separates* UAC from delinquent offenders” at 45 CFR § 410.201(b)); *Flores* ¶ 14 (“INS *shall release* a minor from its custody without unnecessary delay” becomes “DHS *will release* a minor from custody to a parent or legal guardian who is available to provide care and physical custody” at 8 CFR § 236.3(j)(1)); *Flores* ¶ 18 (“INS . . . *shall make and record* the prompt and continuous efforts on its part toward family reunification and the release of the minor . . . Such efforts at family reunification *shall* continue so long as the minor is in INS custody” becomes “ORR *makes and records* the prompt and continuous efforts on its part toward family reunification. ORR continues such efforts at family reunification for as long as the minor is in ORR custody” at 45 CFR § 410.102(f)); *Flores* ¶ 25 (“Unaccompanied minors arrested or taken into custody by the INS *should not be* transported by the INS in vehicles with detained adults” becomes “ORR *does not* transport UAC with adult detainees” at 45 CFR § 410.500(a)); *Flores* ¶ 27 (“Whenever a minor is transferred from one placement to another, the minor *shall be* transferred with all of his or her possessions and legal papers” becomes “Whenever a minor or UAC is transferred from one ICE placement to another, or from an ICE placement to an ORR placement, he or she *will be* transferred with all possessions and legal papers” at 8 CFR § 236.3(k)(1)); *Flores* ¶ 27 (“No minor who is represented by counsel *shall be* transferred without advance notice to such counsel, except in unusual and compelling circumstances” becomes “A minor or UAC who is represented *will not be* transferred from one ICE placement to another, or from an ICE placement to an ORR placement, until notice is provided to his or her counsel” at 8 CFR § 236.3(k)(2)) (Emphases added).

<sup>10</sup> See, e.g., Michael Dudley, et al., *Children and Young People in Immigration Detention*, 25 CURRENT OPINION PSYCHIATRY 285-92 (July 2012),

[https://www.researchgate.net/publication/224925280\\_Children\\_and\\_young\\_people\\_in\\_immigration\\_detention](https://www.researchgate.net/publication/224925280_Children_and_young_people_in_immigration_detention); K. Ehntholt, et al., *Mental Health of Unaccompanied Asylum-Seeking Adolescents Previously Held in British Detention Centres*, 23 CLINICAL CHILD PSYCHOLOGY AND PSYCHIATRY 238-257 (2018),

<http://journals.sagepub.com/doi/abs/10.1177/1359104518758839>; R. Kronick, et al., *Asylum-Seeking Children’s*

## A. Brief Overview of *Flores*: Purpose and Core Provisions

The *Flores* agreement has been in effect for over 20 years. In 1985, immigrant and child advocates sued to enact stronger safeguards for children fleeing their home countries to the United States. Specifically, two organizations filed a class action lawsuit on behalf of immigrant children previously 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 agreement in 1997.<sup>11</sup> This agreement became a set of rules now known as the “*Flores* Settlement Agreement” or FSA.

*Flores* imposes a general policy favoring children’s release from detention and obligations on the federal government with respect to the treatment of children in immigration detention, including the following key components:

- 1) Generally, the *Flores* agreement places certain requirements on the government to ensure the safety of immigrant children. Above all, *Flores* obligates U.S. immigration officials to treat children with “dignity, respect and special concern for their particular vulnerability as minors.”<sup>12</sup> More specifically, each detained child should be placed in the “least restrictive setting” appropriate to the minor’s age and special needs, provided that such setting is consistent with the government’s interests to ensure the child’s timely appearance before the INS and immigration courts and to protect the child’s well-being and that of others.<sup>13</sup> Moreover, the detention setting for children must be licensed by a state agency to provide residential, group, or foster care services for dependent children;<sup>14</sup>
- 2) Paragraph 14 requires the government to release children from immigration detention “without unnecessary delay” to family members in the following order: a parent, legal guardian, an adult relative, an adult individual or entity designated by the parent or legal guardian as capable or willing to care for the minor’s well-being, a licensed program willing to accept legal custody or an adult individual or entity seeking custody in the discretion of the INS when it appears that there is no likely alternative to long term detention and family reunification does not appear to be a reasonable possibility;<sup>15</sup>
- 3) Throughout a child’s time in federal immigration custody, the government is required to make and record “prompt and continuous efforts” toward family reunification and

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*Experiences of Detention in Canada: A Qualitative Study*, 85 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 287 (2015), <https://www.ncbi.nlm.nih.gov/pubmed/25985114>.

<sup>11</sup> U.S. District Court stipulated settlement agreement in *Flores v. Reno* (1997), [https://cliniclegal.org/sites/default/files/attachments/flores\\_v\\_reno\\_settlement\\_agreement\\_1.pdf](https://cliniclegal.org/sites/default/files/attachments/flores_v_reno_settlement_agreement_1.pdf) [hereinafter “*Flores*”].

<sup>12</sup> See *Flores* ¶ 11 and *Flores* Exh. 2 “Instructions to Service Officers re: Processing, Treatment, and Placement of Minors” Part (b) General Policy of settlement agreement of *Flores* Settlement Agreement.

<sup>13</sup> See *Flores* ¶ 11.

<sup>14</sup> See *Flores* ¶ 6.

<sup>15</sup> See *Flores* ¶ 14.

the release of the child. Efforts at family reunification shall continue so long as the minor is in custody;<sup>16</sup> and

- 4) Additionally, pursuant to Paragraph 19 of *Flores*, while a child is in government custody, he or she must be placed “temporarily in a licensed program until such time as release can be effected in accordance with Paragraph 14 above or until the minor’s immigration proceedings are concluded, whichever occurs earlier.”<sup>17</sup>

Among others, Paragraphs 14 and 19 of *Flores* are core provisions that the government is currently trying to change in order to:

- 1) permit U.S. immigration officials to detain a child indefinitely regardless of the availability of a parent, legal guardian, or adult relative willing to accept custody, thus eradicating the protections to children’s safety ensured by the *Flores* provision in Paragraph 14 of requiring the government to release a minor from its custody without “unnecessary delay;” and
- 2) forego the licensing requirement in Paragraph 19 of *Flores* and instead set up a self-licensing scheme under which the government could certify its own detention facilities’ compliance with standards it creates that fail to meet the current minimum standards for keeping children safe and allow for the indefinite detention of families.

#### **B. The Proposed Regulations Pave the Way for Children to Remain in DHS Custody Through the Entirety of Their Removal Proceedings, Thwarting *Flores*’s Presumption in Favor of Release and Causing Lasting Harm to Children**

The government claims that the proposed regulations would maintain family unity and provide children with “materially identical protections” as under *Flores*,<sup>18</sup> but this is a false claim. In fact, the outcome of the proposed regulations will be indefinite detention, the opposite of *Flores*’s purpose and contrary to the very definition of “family unity” based on studies of the impact of indefinite detention.<sup>19</sup> Family unity is a laudable goal and if it were really DHS’s purpose it could be achieved through alternatives to detention described in section C of Part I, which would achieve *Flores*’s purposes and maintain family unity at the same time.

Instead, the proposed regulations pave the way for indefinite detention of children by tightening the standards for releasing children from detention. The proposed regulations would also delay children’s release from detention to a family member or keep them detained indefinitely in contradiction to the proposed regulations’ purported intent to “maintain family unity.”<sup>20</sup> The proposed regulations would limit bond hearings for children in DHS custody and place HHS in the role of both jailer and judge for children in HHS custody, instead of providing for a neutral

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<sup>16</sup> See *Flores* ¶ 18.

<sup>17</sup> See *Flores* ¶ 19 (emphases added).

<sup>18</sup> 83 Fed. Reg. 45488.

<sup>19</sup> See sources cited in part I.B.2 below.

<sup>20</sup> See, e.g., proposed 8 CFR 236.3(h).

immigration judge to decide whether continued detention is appropriate. CLINIC therefore opposes this change.

1. The Proposed Regulations' Preface Admits that the Indefinite Detention of Children with Their Parents Is the Goal (for Enforcement/Deterrence Purposes), Which Flies in the Face of Flores

By citing family detention as an “effective enforcement tool,”<sup>21</sup> the government is admitting that these proposed regulations are focused not on protecting the basic safety and health of children but on carrying out the punishment of asylum-seeking families in the hope of deterring migration to the United States. A central part of the government’s argument as to why the proposed regulations are necessary pertains to what it sees as a deterrent effect from being able to apply widespread incarceration in family detention centers (which the government refers to as “Family Residential Centers” or “FRCs”) to children and their families arriving at the southern border. As the Notice of Proposed Rulemaking (NPRM) states:

The application of the FSA’s requirement for “state” licensing to accompanied minors can effectively require DHS to release minors from detention in a non-state-licensed facility even if the parent/legal guardian and child would otherwise continue to be detained together during their removal proceedings, consistent with applicable law. The rule here would *eliminate that barrier to the continued use of FRCs*, by creating an alternative federal licensing scheme for such facilities. The goal is to provide materially identical assurances about the conditions of such facilities, and thus to implement the underlying purpose of the FSA’s licensing requirement, and in turn to allow families to remain together during their immigration proceedings.<sup>22</sup>

The proposed regulations accomplish the government’s preferred policy of indefinite detention of children by permitting the federal government to self-license its own federal detention facilities. With family detention centers thus transformed into “licensed programs” for children, the government explains, children could then be kept in the family detention centers beyond 20 days (i.e., indefinitely, pending resolution of all of the immigration proceedings relating to the child and his or her parents). For the reasons discussed below, CLINIC opposes the government’s proposed self-licensing plan.

Self-licensing is the equivalent of no licensing, as there is no assurance of standards when the entity being licensed is also setting the licensing standards and monitoring compliance with the standards set. Licensing requires review or oversight by an independent entity. Ample evidence demonstrates that the federal government is incapable of effectively or meaningfully inspecting its immigration detention facilities. Of particular note are recent reports from DHS’s own Office of the Inspector General (OIG), which found that ICE’s inspections are “very very very difficult to fail.”<sup>23</sup> Some examples of ill treatment and poor conditions at such facilities include the “untimely

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<sup>21</sup> 83 Fed. Reg. 45520.

<sup>22</sup> 83 Fed. Reg. 45488.

<sup>23</sup> DHS Office of the Inspector General (OIG), *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, *OIG-18-67*, June 26, 2018, <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

and inadequate detainee medical care” and “nooses in detainee cells” found in the OIG’s unannounced inspection of an ICE detention facility in Adelanto, California that had passed its recent inspection only last year.<sup>24</sup> These failures strongly indicate that the removal of the outside licensing and monitoring system enshrined in *Flores*, in favor of the government’s proposed self-licensing scheme, will jeopardize children’s lives.

The proposed regulations seek to modify the text of *Flores* in order for “DHS to ensure that it retains discretion to detain families, as appropriate and pursuant to its statutory and regulatory authorities, to meet its enforcement needs.”<sup>25</sup> The proposed regulations expressly state that a significant purpose of the changes with regard to minors who arrive in the United States with family members, is to “allow decisions regarding the detention of families to be made together as a unit, under a single legal regime, and without having a disparate legal regime applicable to the parent versus the child.”<sup>26</sup> The “disparate legal regime” to which the NPRM refers, appears to be that children’s detention must comply with *Flores*, which is precisely what the government is trying to eviscerate through the proposed regulations. But *Flores* was designed to protect children precisely because they are different from adults and have special vulnerabilities. Many of these children are especially at risk for facing further harm through detention after fleeing brutal violence and trauma in their home countries in order to seek asylum in the United States.<sup>27</sup> CLINIC opposes the indefinite detention of children is morally reprehensible but the indefinite detention of family units is also not the solution as family detention has shown.

The proposed regulations contain vague terms and provisions for detaining children that the government will use to justify and argue for mandatory detention. For example, the NPRM refers to immigration law under which “an individual alien may not be released from detention, regardless of whether that alien is part of a family unit,” and states that “[i]f the parent or legal guardian of a family unit is subject to mandatory detention, but the non-UAC minor of the family unit is otherwise eligible for release, DHS must continue to detain the parent or legal guardian, consistent with applicable law and policy.”<sup>28</sup> This section ends there, with no elaboration on what would happen to a child who has no family or adequate placement other than with an adult subject to the “mandatory detention” referenced in this scenario. Proposed 8 CFR § 236.3(h) provides for family detention whenever “DHS determines that detention of a family unit is required by law, or is otherwise appropriate.”<sup>29</sup> However, civil detention of immigrants is never “required by law.” Even where detention is “mandatory,” DHS invariably retains discretion over its parole authority.

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<sup>24</sup> DHS OIG, *Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California*, OIG 18-86, Sept. 27, 2018, <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf>.

<sup>25</sup> 83 Fed. Reg. 45489.

<sup>26</sup> 83 Fed. Reg. 45492 n.6.

<sup>27</sup> See Sarah Bermeo, Brookings Institution, *Violence Drives Immigration from Central America*, June 26, 2018, <https://www.brookings.edu/blog/future-development/2018/06/26/violence-drives-immigration-from-central-america/>; Alex Nowrasteh, CATO Institute, *Why Aren’t Child Migrants Fleeing to the U.S. From Nicaragua?*, July 16, 2014, <https://www.cato.org/publications/commentary/why-arent-child-migrants-fleeing-us-nicaragua>; UNHCR, *UNHCR Alarmed by Sharp Rise in Forced Displacement in North of Central America*, May 22, 2018, <http://www.unhcr.org/en-us/news/briefing/2018/5/5b03d89c4/unhcr-alarmed-sharp-rise-forced-displacement-north-central-america.html>.

<sup>28</sup> 83 Fed. Reg. 45501.

<sup>29</sup> 83 Fed. Reg. 45526, proposed 8 CFR § 236.3(h).

By adding the phrase “otherwise appropriate,” DHS is giving itself carte blanche to detain a family with a minor child indefinitely. This is contrary to *Flores* and should not be permitted.

## 2. Indefinite Detention of Children with Their Parents in Family Detention Will Cause Serious Harm to Children

The government is already failing to protect children in federal detention, even with the *Flores* standard in place. Children regularly suffer cruel and abusive treatment in federal detention facilities, including family detention facilities, where they have been starved, taunted, and physically or sexually assaulted.<sup>30</sup> For example, at the Karnes family detention center in Texas, which incarcerates recently reunited families, authorities intentionally re-traumatize children by taking away their parents to punish parents for protesting inhumane treatment.<sup>31</sup> In July, a federal judge ordered the government to remove children from a detention center that was using psychotropic drugs as a “chemical strait jacket.”<sup>32</sup> The judge also ordered an independent monitor to review alleged abuses at other child detention centers along the border.<sup>33</sup> Medical professionals such as the American Association of Pediatrics have condemned the detention of children, finding:

The conditions in which children are detained and the support services that are available to them are of great concern to pediatricians and other advocates for children. In accordance with internationally accepted rights of the child, immigrant and refugee children should be treated with dignity and respect and should not be exposed to conditions that may harm or traumatize them. DHS facilities do not meet the basic standards for the care of children in residential settings.<sup>34</sup>

The American College of Physicians has likewise denounced both separating families and detaining them together, concluding: “the health impact of prolonged family detention would be similar, as it is consistent with experiences known as Adverse Childhood Experiences which result

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<sup>30</sup> See, e.g., Michael Grabell and Topher Sanders, *Immigrant Youth Shelters: “If You’re a Predator, It’s a Gold Mine,”* PROPUBLICA, July 27, 2018, <https://www.propublica.org/article/immigrant-youth-shelters-sexual-abuse-fights-missing-children>.

<sup>31</sup> Scott Bixby, *Detained Dads: ICE Re-Separated Our Families as Punishment*, THE DAILY BEAST, Aug. 20, 2018, <https://www.thedailybeast.com/detained-dads-ice-re-separated-our-families-as-punishment>.

<sup>32</sup> Alex Johnson, *Judge orders many migrant children removed from Texas facility said to use psychotropic drugs*, NBC NEWS, July 30, 2018, <https://www.nbcnews.com/news/us-news/judge-orders-most-migrant-children-removed-texas-facility-uses-psychotropic-n895966>.

<sup>33</sup> Nick Watt and Jason Kravarik, *Federal Judge to appoint independent monitor for detained migrant children*, CNN NEWS, July 27, 2018, <https://www.cnn.com/2018/07/27/us/federal-judge-independent-monitor-migrant-children/index.html>.

<sup>34</sup> See M. Linton, et al., American Academy of Pediatrics, *Detention of Immigrant Children at 6* (Mar. 2017) <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>.

in emotional and physical illness and chronic disease.”<sup>35</sup> And human rights organizations such as Human Rights Watch have also denounced the practice.<sup>36</sup>

The government attempts to sidestep the protection of minors in its custody, which is ensured by *Flores*, and allow for the indefinite detention of families, in order to punish asylum-seekers thus deterring the migration of families to the United States. As DHS states in the NPRM: “This proposed rule will provide DHS with the option of *keeping families who must or should be detained together at appropriately licensed FRCs for the time needed to complete immigration proceedings*, subject to the sound implementation of existing statutes and regulations governing release on parole or bond.”<sup>37</sup> Although the government claims that the proposed regulations, which will result in indefinite family detention and keeping minors detained for longer periods of time, will ensure that immigrants do not “abscond from DHS custody,”<sup>38</sup> the government is foregoing any consideration to the health and well-being of detained children. This change would not deter families from coming to the United States to seek asylum, as these vulnerable individuals have few options as they flee violence and persecution in the home countries. On the contrary, finalizing these regulations would codify inhumane treatment of children and families and cast doubt on the role the United States has played in the international community as being a leader in protecting human rights and refugees. See Section D of Part I for further discussion.

### **C. DHS’s Attempts to Justify Indefinite Detention of Children with Their Parents Are Also Based on Incomplete Data or Lack of Data Altogether**

Incomplete data or lack of data undergird the government’s justification for proposed indefinite detention of children. DHS attempts to avoid the cost estimate requirement and should be required to conduct an accurate cost estimate for public comment. In the NPRM, DHS and HHS fail to estimate any of their anticipated costs, even as they acknowledge that parts of the rule—including the new “alternative licensing” scheme—will likely mean that more children and parents are kept in custody for longer periods of time.<sup>39</sup> But even while declining to estimate their potential new spending, the agencies argue that “[t]his rule does not exceed the \$100 million expenditure threshold,”<sup>40</sup> which would trigger additional review under Executive Order 12866, and also deem it a major rule under the terms of the Congressional Review Act.<sup>41</sup> DHS must be required to provide accurate and detailed cost estimates that include stating the agency’s intentions about construction of new family detention centers and the total number of family detention beds it intends to fill on a daily basis.

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<sup>35</sup> American College of Physicians, *ACP Says Family Detention Harms the Health of Children, Other Family Members* (July 5, 2018), <https://www.acponline.org/acp-newsroom/acp-says-family-detention-harms-the-health-of-children-other-family-members>.

<sup>36</sup> Human Rights Watch, *US: Trauma in Family Immigration Detention, Release Asylum-Seeking Mothers, Children* (May 15, 2015), <https://www.hrw.org/news/2015/05/15/us-trauma-family-immigration-detention-0>.

<sup>37</sup> 83 Fed. Reg. 45494.

<sup>38</sup> 83 Fed. Reg. 45495 (“DHS proposes these changes to allow DHS to fully and consistently apply the law to all aliens who are subject to detention, *so that aliens do not have the opportunity to abscond from DHS custody simply because they were encountered with children.*” (emphasis added)).

<sup>39</sup> 83 Fed. Reg. 45514.

<sup>40</sup> 83 Fed. Reg. 45522.

<sup>41</sup> U.S. President, Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 190 (Oct. 4, 1993), [https://www.reginfo.gov/public/jsp/Utilities/EO\\_12866.pdf](https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf).

The data that DHS does provide paints an incomplete and misleading picture. For example, the estimate for the number of minors who are likely to experience increased detention is inaccurate. The NPRM states that “[o]f the 14,993 minors shown in Table 12 who had positive credible fear determinations, about 99 percent were paroled or released on their own recognizance. The remaining one percent of minors are those in categories that might have their length of stay in an FRC increased due to this proposed rule.”<sup>42</sup> This statistic misses the point. DHS previously paroled those 99 percent because release was required by *Flores*, as children were being detained in unlicensed, non-*Flores* compliant jails. Under the proposed regulations, those 99 percent, who pass the credible fear interview, can remain indefinitely in detention in DHS-licensed facilities even though they lack a state license.<sup>43</sup> Furthermore, it appears that DHS is only calculating the cost of increased detention of children and not calculating the cost of detaining their parents.

The proposed regulations are riddled with uncertainty, especially with relation to costs, and DHS has a history of failing to calculate correctly budget and costs. According to the U.S. Government Accountability Office’s (GAO) report on immigration detention, there were a number of inconsistencies and errors in ICE’s calculations for its congressional budget justifications.<sup>44</sup> The GAO report listed an example: “[I]n its fiscal year 2015 budget request, ICE made an error that resulted in an underestimation of \$129 million for immigration detention expenses. While ICE officials stated their budget documents undergo multiple reviews to ensure accuracy, ICE was not able to provide documentation of such reviews. Without a documented review process for revising the accuracy of its budget request, ICE is not positioned to ensure the credibility of its budget requests.”<sup>45</sup> The NPRM claims that DHS is simply unable to provide a quantified estimate with relation to costs, but this is simply an effort to evade the more stringent review of its proposed regulations, as well as an admission of its own poor recordkeeping regarding the true costs of detention. “While DHS acknowledges that this rule may result in additional or longer detention for certain minors, *DHS is unsure how many individuals will be detained at FRCs after this rule is effective or for how much longer individuals may be detained because there are so many other variables to consider. Therefore, DHS is unable to provide a quantified estimate of any increased FRC costs.*”<sup>46</sup>

The Center for American Progress (CAP), using the data provided by DHS, found that the costs to DHS alone from the proposed rule will—over a decade—stretch to just over \$2 billion at the low end, and to as high as \$12.9 billion at the high end.<sup>47</sup> This equates to \$201 million to nearly \$1.3

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<sup>42</sup> 83 Fed. Reg. 45519.

<sup>43</sup> The NPRM concedes that those who pass their credible fear (and are included in the 99% statistics) could be detained under the proposed scheme, but do not include these numbers in their calculation of how many children might be detained longer. *See* 83 Fed. Reg. 45518-19 (recognizing certain groups of immigrants “are likely to have their length of stay in an FRC increased as a result of this proposed rule” and citing as an example “aliens who have received a positive credible fear determination, and who are not suitable for parole,” who “may be held throughout their asylum proceedings”).

<sup>44</sup> U.S. Government Accountability Office (GAO), *Immigration Detention: Opportunities Exist to Improve Cost Estimates*, GAO-18-343 (Apr 18, 2018), <https://www.gao.gov/products/GAO-18-343>.

<sup>45</sup> *Id.* at 1.

<sup>46</sup> 83 Fed. Reg. 45488 (emphasis added).

<sup>47</sup> Philip E. Wolgin, Center for American Progress, *The High Costs of the Proposed Flores Regulation* (2018), <https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation/>.

billion per year in costs under the rule. With such a wide range of numbers, DHS should provide more data to estimate the potential costs under the rule. To illustrate one such potential cost, two parts of the proposed rule (proposed 45 CFR § 410.203 and proposed 8 CFR § 236.3(j)) expand the population of children who would be placed in secure facilities. While HHS has not provided enough data to estimate how many more children might be sent to these facilities, the potential for significantly increased expenditures is high. Bed space at the secure Yolo County Juvenile Detention Center, for example, costs two and a half times the average non-secure shelter bed, and children, on average, remain in secure facilities for four times the average stay in non-secure facilities.<sup>48</sup> In total, it costs the Office of Refugee Resettlement (ORR) nearly ten times more to hold a child in secure care than in non-secure care.<sup>49</sup>

DHS seeks to “ensure it retains discretion to detain families . . . to meet its enforcement needs.”<sup>50</sup> However, the NPRM offers no data to support that DHS cannot meet its “enforcements needs” without prolonged detention of children and their families. There is no evidence to support the assumption that families will abscond if given an opportunity, nor to support the assertion that many families fail to appear for immigration court hearings to such great extent that it would warrant lowering care standards to the detriment of children’s health and safety. Further, DHS fails to account for factors outside of the respondent’s control leading to families not appearing at their hearings, such as lack of notice and lack of legal orientation.<sup>51</sup> The NPRM shows DHS’s reluctance to consider any alternatives that may address the challenges to DHS’s enforcement needs while mitigating risks of harm to children, despite the observations and ample recommendations of its own Advisory Committee on Family Residential Centers (ACFRC)<sup>52</sup> and other organizations.<sup>53</sup>

There are alternatives to detention that are humane, consistent with the government’s proposed intention of “maintaining family unity,” and defy the assumption that detention is the only solution

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> 83 Fed. Reg. 45489.

<sup>51</sup> In 2018, CLINIC and the Asylum Seeker Advocacy Project published a report, *Denied A Day in Court*, on the government’s use of *in absentia* removal orders against families seeking asylum with ample evidence and analysis of the reasons beyond respondents’ control for missing hearings, including missed notices, government errors and omissions, physical, geographical and language obstacles, trauma and mental health issues, and absent or ineffective legal representation. Asylum Seeker Advocacy Project and CLINIC, *Denied a Day in Court: The Government’s Use of In Absentia Removal Orders Against Families Seeking Asylum (2018)*, <https://cliniclegal.org/sites/default/files/Denied-a-Day-in-Court.pdf>.

<sup>52</sup> The ICE ACFRC was established on July 24, 2015, under the authority of DHS, and comprises experts in the fields of primary education, detention management, detention reform, immigration law, family and youth services, trauma-informed services, and physical and mental health. The purpose of the Committee was to develop recommendations for best practices at family detention centers. The Committee’s primary recommendation was to discontinue the use of family detention. On the topic of alternatives to detention, the Committee advised that “[f]or many families, release on recognizance with information about rights and responsibilities and referrals to legal services and psycho-social supports is sufficient to ensure compliance with immigration proceedings. Other families may benefit from community-based case management alternatives to detention or case management programs that provide more robust support.” Report of the ICE Advisory Committee on Family Residential Centers (Oct. 7, 2016). at 23. <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf> [hereinafter “ACFRC Report”].

<sup>53</sup> American Immigration Lawyers Association, et al., *The Real Alternatives to Detention*, (2018), <https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf>.

to ensure court hearing appearances. The Family Case Management Program (FCMP)<sup>54</sup> used caseworkers to help migrants meet their legal and judicial obligations, such as reporting to ICE Enforcement and Removal Operations (ERO) check-ins, appearing at immigration court hearings, and departing the United States when ordered by the courts.<sup>55</sup> ICE began the program in 2015 and shut it down in mid-2017<sup>56</sup> despite remarkable success.<sup>57</sup> About 99 percent of all migrants in the program appeared at their ICE-ERO check-ins, 100 percent appeared for their court appearances, and only 2 percent absconded after receiving removal orders.<sup>58</sup>

CLINIC favors alternatives to detention which are more cost-effective in the short-term: family detention costs over \$240 per person per day whereas intensive case management programs by faith-based groups and other social service organizations can cost less than \$10 per person per day.<sup>59</sup> Moreover, these programs have had success rates ranging from 91 percent to 97 percent at ensuring the appearance of participants at their removal proceedings.<sup>60</sup> In the long-term, these alternatives to detention ensure court appearances without incurring the lasting medical and psychological costs associated with the detention of children.

The government also falsely claims that family detention is justified to assure compliance with removal orders, but provides no reasoning for why FCMP would not accomplish that goal, stating in the NPRM:

*Without codifying the FSA as proposed in this rule, family detention is a less effective tool to meet the enforcement mission of ICE. In many cases, families do not appear for immigration court hearings after being released from an FRC, and even when they do, many more fail to comply with the lawfully issued removal orders from the immigration courts and some families engage in dilatory legal tactics when ICE works to enforce those orders. By departing from the FSA in limited cases to reflect the intervening statutory and operational changes, ICE is reflecting its existing discretion to detain families together, as appropriate, given enforcement needs, which will ensure that family detention remains an effective enforcement tool.*<sup>61</sup>

Instead, the evidence has shown that the FCMP has a high rate of appearance.<sup>62</sup> CLINIC therefore strongly favors the use of the FCMP over detention. It is both more cost-effective and a more humane way to treat vulnerable populations.

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<sup>54</sup> ACFRC Report, *supra* note 52.

<sup>55</sup> Alex Nowrasteh, Cato Institute, *Alternatives to Detention Are Cheaper than Universal Detention*, (June 20, 2018), <https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention>.

<sup>56</sup> Aria Bendix, *ICE Shuts Down Program for Asylum-Seekers*, THE ATLANTIC, June 9, 2018, <https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/>.

<sup>57</sup> DHS OIG, *U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program*, OIG-18-22 (Nov. 30, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> CLINIC, *Alternative to Detention Programs*, <https://cliniclegal.org/sites/default/files/cara/Alternatives-to-Detention-Backgrounder.pdf>.

<sup>60</sup> *Id.*

<sup>61</sup> 83 Fed. Reg. 45520 (emphases added).

<sup>62</sup> DHS OIG, *U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program*, OIG-18-22, at 5 (Nov. 30, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf>.

#### **D. The Proposed Regulations Do Not Recognize Families as Asylum Seekers and Are Based on the Unsupported Assumption that Increased Detention Will Deter Family Migration**

A fundamental premise of the proposed regulations is that increased detention will serve as a deterrent to families entering the United States. This premise lays bare the government's belief that families fleeing from Central America are not really refugees, but instead are somehow using their children as a ploy to enter the United States. The NPRM claims that "an unprecedented number of family units from Central America illegally entered or were found inadmissible to the United States,"<sup>63</sup> but it fails to acknowledge that most of these families are seeking asylum.

Any individual who presents himself or herself at a port of entry who does not have a visa or other proper entry documents to enter the United States, may be placed in expedited removal proceedings.<sup>64</sup> Likewise, an individual apprehended within 100 miles of a border and within 14 days of entry may be subject to expedited removal.<sup>65</sup> A noncitizen subject to expedited removal must pass a credible fear or reasonable fear interview to be allowed into the United States.<sup>66</sup> In the first three months of fiscal year 2018, from October through December 2017, 16,184 individuals received favorable decisions out of 21,017 credible fear interviews (CFI) conducted.<sup>67</sup> This 77 percent CFI grant rate demonstrates that the vast majority of entrants who have come to the United States to seek asylum have a significant possibility of prevailing on their claims.

Statistics from the Executive Office for Immigration Review (EOIR) show that there has been a marked increase in grants of asylum from El Salvador, Guatemala, and Honduras over the past few years.<sup>68</sup> In the last EOIR statistical yearbook that is publicly available, issued in March 2017, China remained the country with the highest number of asylum grant rates throughout the 2012-2016 period tracked. However, Guatemala, El Salvador, and Honduras were not listed in the top five countries until 2015. For 2015 and 2016, those three Northern Triangle countries comprise the second, third, and fourth highest asylum grant rates. And, in 2016, Mexico was the country with the fifth highest asylum grant rate.<sup>69</sup> During the same period of time, affirmative asylum statistics from USCIS also show a dramatic increase in asylum grants from these three Northern Triangle countries, with El Salvador overtaking China in 2016 as the country with the highest asylum grant rate, Guatemala having the third highest grant rate (behind China), and Honduras having the fourth highest grant rate.<sup>70</sup> Of course, neither the EOIR statistics nor the USCIS statistics track the age of the asylees or how they entered the United States, but the significant rise

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<sup>63</sup> 83 Fed. Reg. 45493.

<sup>64</sup> INA § 235; 69 Fed. Reg. 48877-48881 (August 11, 2004).

<sup>65</sup> 69 Fed. Reg. 48879.

<sup>66</sup> INA § 235; 8 CFR §§ 1208.30, 1208.31.

<sup>67</sup> USCIS, *Credible Fear And Reasonable Fear Statistics* (Fiscal Year 2018), [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED\\_CredibleFearandReasonableFearStatisticsandNationalityReport.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearandReasonableFearStatisticsandNationalityReport.pdf).

<sup>68</sup> U.S. Department of Justice Executive Office for Immigration Review, *FY 2016 Statistics Yearbook Prepared by the Office of Planning, Analysis, & Statistics* at L1 (Mar. 2017), <https://www.justice.gov/eoir/page/file/fysb16/download>.

<sup>69</sup> *Id.*

<sup>70</sup> Department of Homeland Security, *Table 17. Individuals Granted Asylum Affirmatively By Region And Country Of Nationality: Fiscal Years 2014 To 2016*, <https://www.dhs.gov/immigration-statistics/yearbook/2016/table17#> (last published date Jan. 8, 2018).

in asylum grant rates from these countries shows that a high proportion of those entering as unaccompanied children or in family units entered specifically to seek asylum.<sup>71</sup>

DHS also mischaracterizes appeals and petitions for review of removal orders by higher courts as “dilatatory legal tactics.” Yet pursuing legal challenges to which individuals have a statutory right should not be construed as baseless delays or attempts to circumvent a removal order. In many instances, cases are won and lives are saved at the appellate level after months or years of review. By insisting on detention throughout proceedings, DHS is risking the welfare of children to coerce the family unit against asserting their rights under the law.

The NPRM begins with the assumption that “catch and release” led to “an unprecedented number of families decid[ing] to undertake the dangerous journey to the United States in 2014.”<sup>72</sup> However, independent research from CAP refutes this assertion.<sup>73</sup> The CAP data study found:

Despite the government’s claims, there is no evidence that the 2015 *Flores* ruling had an effect on the number of families arriving at the border. Using interrupted time series analysis (ITSA), this analysis estimates the relationship between the July 2015 federal court ruling upholding *Flores* and the monthly number of U.S. Border Patrol apprehensions of families at the southwest border. (The monthly number of U.S. Border Patrol apprehensions of families at the southwest border is a metric used by CBP as a proxy for number of families coming to the border.) The analysis finds that there is no statistically significant increase in apprehensions of families at the border after the July 2015 *Flores* ruling.<sup>74</sup>

Thus, a foundational assumption of the proposed regulations—that the *Flores* Settlement has tied the government’s hands and led to increased immigration by families and children—is not borne out by the data. The NPRM casually asserts, “although it is difficult to definitively prove the causal link, DHS’s assessment is that the link is real.”<sup>75</sup> Yet, even while acknowledging the difficulty of proving this causal link, DHS uses deterrence as a justification for a policy that results in unquestionable, lasting harm to the children who are detained.<sup>76</sup> DHS makes no effort to offer any explanation for changes in the number of families seeking asylum at the border, such as worsening

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<sup>71</sup> William A. Kandel, Congressional Research Service, *Unaccompanied Alien Children: An Overview*, at 3 (Jan. 18, 2017), <https://fas.org/sgp/crs/homesecc/R43599.pdf> (“Nationals of Guatemala, Honduras, El Salvador, and Mexico account for the majority of unaccompanied alien children apprehended at the Mexico-U.S. border.”).

<sup>72</sup> 83 Fed. Reg. 45493.

<sup>73</sup> Center for American Progress, *Did a 2015 Flores Court Ruling Increase the Number of Families Arriving at the Southwest Border?* (Oct. 16, 2018), <https://www.americanprogress.org/issues/immigration/news/2018/10/16/459358/2015-flores-court-ruling-increase-number-families-arriving-southwest-border/>.

<sup>74</sup> *Id.*

<sup>75</sup> 83 Fed. Reg. 45494.

<sup>76</sup> See, e.g., sources cited *supra* part I.B.2; UNICEF, *Child Refugee & Migrant Crisis Why Detaining Children Is Harmful* (June 21, 2018), <https://www.unicefusa.org/stories/why-detaining-children-harmful/34488>. (“The harmful effects of toxic stress last a lifetime: Research has shown definitive links between adverse childhood events and trauma with poor long-term health prospects and greater susceptibility to alcoholism, substance misuse, depression, suicide and obesity.”).

country conditions in the countries of origin for those fleeing.<sup>77</sup> Nor does it try to assess the dollar costs to those who win asylum and remain in the United States, who will have ongoing health impacts from their unnecessary and inhumane detention.

Many asylum seekers from Central America are fleeing extreme violence and have been severely traumatized in the past.<sup>78</sup> CLINIC strongly opposes detaining those who have already suffered traumatic experiences has been shown to have lasting negative effects on those individuals. Social work researchers have concluded:

It is reported that confinement and the loss of liberty profoundly disturbed asylum seekers and triggered feelings of isolation, powerlessness, and disturbing memories of persecution that asylum seekers had suffered in their countries of origin. The study shows that detention and the negative factors associated with it has a significant deteriorative effect on asylum seekers' self-perception, with minors and long-term detainees appearing to suffer the most.<sup>79</sup>

Even if DHS and HHS continue to make the erroneous claim that these families are not legitimate asylum seekers, DHS does acknowledge that it “encountered numerous alien families and juveniles who were hungry, thirsty, exhausted, scared, vulnerable, and at times in need of medical attention, with some also having been beaten, starved, sexually assaulted or worse during their journey to the United States.”<sup>80</sup> Given the medical evidence of the lasting harm caused by detention to those who have suffered trauma, DHS and HHS should not seek to expand the detention of vulnerable children.

Furthermore, when the Obama administration implemented a similar policy of detaining families for the purpose of deterring future migration, a federal court issued a preliminary injunction blocking the practice. In the opinion accompanying the order, the district court noted, “[d]efendants have presented little empirical evidence, moreover, that their detention policy even achieves its only desired effect—i.e., that it actually deters potential immigrants from Central

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<sup>77</sup> For example, there is currently a Level 3 U.S. Department of State (DOS) Travel Advisory, warning Americans to “reconsider travel” to Honduras, <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Honduras.html>, and a similar warning for El Salvador, <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/ElSalvador.html>. Guatemala has a level 2 travel advisory, urging travelers to “exercise increased caution,” and to “reconsider travel” to six states, <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Guatemala.html>. DOS cautions travelers to “exercise increased caution” in traveling to Mexico, with the highest, Level 4, “Do not travel” warning in effect for five Mexican states, <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html>.

<sup>78</sup> See, e.g., *Salgado-Sosa v. Sessions*, 882 F.3d 451 (4th Cir. 2018); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 243 (4th Cir. 2017); *Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017), as amended (Mar. 14, 2017); *Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015); see also, e.g., UNHCR, *Children on the Run, Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* <http://www.unhcr.org/56fc266f4.html>; UNHCR, *Women on the Run, First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, <http://www.unhcr.org/en-us/about-us/background/56fc31864/women-on-the-run-full-report.html>.

<sup>79</sup> T. Filges, E. Montgomery & M. Kastrup, *The Impact of Detention on the Health of Asylum Seekers*, SAGE JOURNALS (Feb. 17, 2016), <http://journals.sagepub.com/doi/10.1177/1049731516630384>.

<sup>80</sup> 83 Fed. Reg. 45493.

America.”<sup>81</sup> Three years later, the evidence has mounted on the severe harm of detaining children, yet there is still no proof that this inhumane practice actually deters those fleeing for their safety from coming to the United States to seek asylum.

## **II. Comments on Specific Provisions of the Proposed Regulations**

### **A. DHS’s Proposed Narrowing of the Circumstances in Which Children May Be Released and to Whom Is Inconsistent with *Flores* and Promotes Prolonged Detention of Children and Other Vulnerable Populations (proposed 8 CFR §§ 212.5(b), 236.3(j))**

#### **1. The Proposed Regulations Would Transform the Parole Standard for Minors and Certain Other Individuals in Expedited Removal Proceedings, Resulting in Prolonged Detention of Children and Other Vulnerable Populations**

DHS’s proposed regulations would critically restrict children’s options for release by limiting the parole standard for certain children and limiting the categories of adults to whom children can be released from DHS custody.<sup>82</sup> The NPRM states that proposed 8 CFR § 236.3(j) “adds that any decision to release must follow a determination that such release is permitted by law, including parole regulations,”<sup>83</sup> but it does nothing to specify DHS parole procedures favoring the release of children, as *Flores* requires. On the contrary, the notice states that “ICE also is proposing changes to its current practice for parole determinations to align them with applicable statutory and regulatory authority, which may result in fewer minors or their accompanying parent or legal guardian released on parole.”<sup>84</sup>

The proposed regulations strip children in expedited removal proceedings of eligibility for parole under the framework found at 8 CFR § 212.5(b), which provides for parole on “a case-by-case basis for ‘urgent humanitarian reasons’ or ‘significant public benefit,’ provided the aliens present neither a security risk nor a risk of absconding.” With this parole standard removed for children in expedited removal, the proposed regulations leave children eligible for parole only under the restrictive framework of 8 CFR § 235.3(b)(2)(iii), “only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.”<sup>85</sup> By restricting humanitarian parole for children, the proposed regulations will mean that children have fewer opportunities for release from family detention even though they pose no danger or flight risk. Stripping children of this important parole protection by removing it from the regulations thwarts the intent of *Flores*, which favors release. In fact, the district court in the *Flores* litigation agreed that the current provision governing the parole standard for release of minors in expedited removal (which DHS proposes to remove) is consistent with *Flores* paragraph 14, noting that *Flores* “creates an affirmative obligation . . . to affirmatively assess each class members’ [sic] release, while 8 CFR section 212.5(b) allows for Defendants to do so—notwithstanding the general mandatory-detention practice—in all cases

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<sup>81</sup> *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 189 (D.D.C. 2015).

<sup>82</sup> Proposed 8 CFR §§ 212.5(b), 236.3(j).

<sup>83</sup> 83 Fed. Reg. 45516; proposed 8 CFR § 236.3(j).

<sup>84</sup> 83 Fed. Reg. 45488.

<sup>85</sup> 8 CFR §§ 235.3(b)(2)(iii), (b)(4)(ii).

involving minors in expedited removal.”<sup>86</sup> This proposed change would remove the ability to release children in expedited removal under the humanitarian parole standard, resulting in their prolonged detention, a consequence directly contrary to the *Flores* agreement’s purpose.

DHS concedes that the purpose of this change is to “permit detention in [‘family residential centers’] in lieu of release . . . in order to avoid the need to separate or release families in these circumstances,”<sup>87</sup> which contravenes *Flores*’s mandate that children be released “without unnecessary delay” if their detention is not required for safety or flight reasons.<sup>88</sup> Although DHS claims that its proposed changes “still implement the substantive and underlying purpose of the FSA, by ensuring that juveniles are provided materially identical protections as under the FSA itself,”<sup>89</sup> this claim is belied by admissions that the change to 8 CFR § 212.5(b) is intended to “change current practice and the text of FSA paragraph 14” to subject children in expedited removal “to the heightened standard in [] 8 CFR § 235.3(b),”<sup>90</sup> which DHS concedes may result in fewer children released on parole and extended detention of children.<sup>91</sup> DHS admits that this proposed change would effectively eliminate *Flores*’s release provision found at paragraph 14 for children in expedited removal.<sup>92</sup> In addition to violating *Flores* paragraph 14, DHS admits that this change will be one of the primary sources of new costs of the proposed regulations.<sup>93</sup>

The proposed regulation 8 CFR § 212.5(b) would allow for the protection of certain vulnerable populations in expedited removal proceedings. In addition to minors, the current provision allows for humanitarian parole of individuals in expedited removal proceedings, including those with serious medical conditions, pregnant women, witnesses in U.S. legal proceedings, or where continued detention is otherwise not in the public interest as determined by DHS. If DHS’s purpose in conducting this rulemaking is to implement *Flores*, this proposed change thwarts that purpose and would also negatively impact other vulnerable populations that the regulation currently protects. DHS’s claim that this change to severely restrict parole for these individuals is “intended by Congress,”<sup>94</sup> is belied by INA § 212(d)(5)(A), wherein Congress expressly authorized discretionary parole on a case-by-case basis “for urgent humanitarian reasons or significant public benefit.” While DHS states that this proposed change would merely “eliminate an ambiguity” and codify “longstanding understanding” of the regulations,<sup>95</sup> in fact the proposed change would work a significant substantive change to the parole framework, a change that is at odds with *Flores* and will harm children and other vulnerable populations.<sup>96</sup> DHS should not alter 8 CFR § 212.5(b), so

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<sup>86</sup> *Flores v. Sessions*, No. 85-4544, Doc. No. 363, at 25 (June 27, 2017 Order), [https://www.centerforhumanrights.org/PDFs/06-27-17\\_Flores\\_2016MTE\\_Order.pdf](https://www.centerforhumanrights.org/PDFs/06-27-17_Flores_2016MTE_Order.pdf).

<sup>87</sup> 83 Fed. Reg. 45494 n.8.

<sup>88</sup> *Flores* ¶ 14.

<sup>89</sup> 83 Fed. Reg. 45487-88.

<sup>90</sup> 83 Fed. Reg. 45502.

<sup>91</sup> 83 Fed. Reg. 45488, 45514, 45520.

<sup>92</sup> 83 Fed. Reg. 45493 (stating that the proposed rule would eliminate the “disparate legal regime” that currently applies to family unit detention decisions, where child is subject to *Flores* including paragraph 14’s release provision, and parent is subject to “existing statutes and regulations governing release on bond or parole”).

<sup>93</sup> 83 Fed. Reg. 45514, 45520.

<sup>94</sup> 83 Fed. Reg. 45519 (citing INA § 235(b)(1)(B)(iii)(IV)).

<sup>95</sup> See 83 Fed. Reg. 45495.

<sup>96</sup> The American College of Physicians issued a statement earlier this year that “indefinitely holding children and their parents, or children and their other primary adult family caregivers, in government detention centers until the adults’ immigration status is resolved—can be expected to result in considerable adverse harm to the detained

that minors and other special populations in expedited removal proceedings may obtain humanitarian parole after an individualized assessment.

## 2. The Proposed Regulations' Narrowing of Release Options for Minors Will Result in Prolonged Detention of Children and Family Separation

Even for children not in expedited removal proceedings, the proposed rule significantly narrows the options for release of children. Whereas the current regulation authorizes release to a willing relative not in immigration detention (even if there is another relative in detention), or to a non-relative in some circumstances,<sup>97</sup> the proposed regulation would remove these options, allowing a child to be released only to, or with, a parent or legal guardian.<sup>98</sup> Omitting all other release options eradicates a core part of *Flores* paragraph 14's release provision. The proposed regulation also removed a provision found in the current regulations that requires evaluation for "simultaneous release of the juvenile and the parent, legal guardian, or adult relative" on a "discretionary case-by-case basis."<sup>99</sup> DHS concedes that these changes "may result in fewer minors or their accompanying parent or legal guardian released on parole."<sup>100</sup> DHS states that in any case where it "determines that the accompanying parent should be detained, releasing a minor under these circumstances would be either a release to a parent who is not currently in detention, or, in all other cases, a transfer to HHS custody, rather than a release from custody as envisioned under the FSA."<sup>101</sup> DHS states that the reason for this change is that the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) does not authorize it to release a child to a non-parent or guardian,<sup>102</sup> but it does not adequately explain why the TVPRA requires this result. Nor does DHS explain why the TVPRA would govern in the context of children detained with a parent, as the TVPRA deals with the care and custody of unaccompanied children. These restrictions on release options in the proposed regulations would result in longer, possibly indefinite, detention of children, or in family separation whereby children are taken from their detained parents and transferred to HHS custody. Both of these outcomes—detention of children and separation of children from their parents—harm children.<sup>103</sup>

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children and other family members, including physical and mental health, that may follow them through their entire lives, and accordingly should not be implemented by the U.S. government." American College of Physicians, *The Health Impact of Family Detentions in Immigration Cases* (July 3, 2018), [https://www.acponline.org/acp\\_policy/policies/family\\_detention\\_position\\_statement\\_2018.pdf](https://www.acponline.org/acp_policy/policies/family_detention_position_statement_2018.pdf). The harmful effects on children of detention are well documented. *See, e.g.*, Barry Holman & Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and other Secure Facilities* at 2, (Nov. 28, 2006), [http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers\\_of\\_detention.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf) (noting that "poor mental health, and the conditions of confinement together conspire to make it more likely that incarcerated teens will engage in suicide and self-harm"); D. Mace, et al., *Psychological Patterns of Depression and Suicidal Behavior of Adolescents in a Juvenile Detention Facility*, 12 JOURNAL FOR JUVENILE JUSTICE AND DETENTION SERVICES 18-23 (1997).

<sup>97</sup> *See* 8 CFR § 212.5(b)(3).

<sup>98</sup> Proposed 8 CFR §§ 212.5(b)(3), 236.3(j)(1).

<sup>99</sup> 8 CFR § 236.3(b)(2).

<sup>100</sup> 83 Fed. Reg. 43488.

<sup>101</sup> 83 Fed. Reg. 45503.

<sup>102</sup> *See* 83 Fed. Reg. 45495, 45502.

<sup>103</sup> *See* sources cited at note 96, *supra*. The U.S. government's practice of separating children from their parents was sharply criticized and experts on child psychology and well-being have denounced the practice and detailed the potentially lifelong harm this can have on children. *See, e.g.*, American Psychiatric Association *APA Statement*

Further, DHS's references to scenarios where it determines that an accompanying parent should be detained rather than paroled,<sup>104</sup> are troubling particularly in light of the agency's widespread violations of its own policy regarding parole of asylum seekers who pass their credible fear interviews.<sup>105</sup> The harm of prolonged detention on asylum seekers, including asylum seeking families, is well documented and severe.<sup>106</sup> The proposed regulations eliminating parole and release options and removing the mandate to consider releasing parent and child simultaneously will result in needless family separation and extended child detention.

The proposed regulations dilute *Flores*'s requirement of continuous efforts toward family reunification and release of the minor. *Flores* provides that once a child is taken into custody "the INS, or the licensed program in which the minor is placed, shall make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor pursuant to Paragraph 14 above. Such efforts at family reunification shall continue so long as the minor is in INS custody."<sup>107</sup> Proposed 8 CFR § 236.3(j) contains no reference to prompt and continuous efforts toward family reunification as required by *Flores* and in fact restricts family to whom children can be released from DHS custody. Watering down the requirement for continuous efforts toward reunification and release fundamentally conflicts with the purpose of *Flores* and should not be permitted. CLINIC therefore strongly opposes this change.

### **B. The Proposed Regulations' Definitions of "Influx" and "Emergency" Would Operate to Perpetually Exempt the Government from Complying with Key *Flores* Protections Designed to Keep Children Safe**

By proposing broad and self-serving definitions for "emergency" and "influx," the government would exempt itself from complying with key *Flores* protections, including the requirement that children must be transferred to a licensed program within three or five days. Instead, under the definitions it proposes, the government would be permitted to hold children in unlicensed facilities

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*Opposing Separation of Children from Parents at the Border* (May 30, 2018), <https://www.psychiatry.org/newsroom/news-releases/apa-statement-opposing-separation-of-children-from-parents-at-the-border> ("Any forced separation is highly stressful for children and can cause lifelong trauma, as well as an increased risk of other mental illnesses, such as depression, anxiety, and posttraumatic stress disorder (PTSD)."); Lisa Firestone, PhD, *The Dangers of Separating Children from Parents*, PSYCHOLOGY TODAY, June 26, 2018, <https://www.psychologytoday.com/us/blog/compassion-matters/201806/the-dangers-separating-children-parents> (noting that children separated from their parents will face "a lifetime of painful consequences from the terror and neglect they've suffered and continue to suffer every minute they are separated from their families," affecting their "attachment system and ability to trust throughout their lifetime"); Judith L Herman M.D., *Separation from Parents is Harmful to Children*, PSYCHOLOGY TODAY, June 19, 2018, <https://www.psychologytoday.com/us/blog/decoding-trauma/201806/separation-parents-is-harmful-children>, ("Whether or not harm is intended, it is beyond dispute that separation from parents and caregivers is traumatic to children."); Patrick Timmons, U.N. Report, *Detaining Migrant Children Harms Their Mental Health*, (Oct. 19, 2018), [https://www.upi.com/Top\\_News/US/2018/10/19/UN-report-Detaining-migrant-children-harms-their-mental-health/5251539961217/](https://www.upi.com/Top_News/US/2018/10/19/UN-report-Detaining-migrant-children-harms-their-mental-health/5251539961217/).

<sup>104</sup> See 83 Fed. Reg. 45518-45519.

<sup>105</sup> See, e.g., *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018) (granting preliminary injunction in class action challenging widespread denial of parole to asylum seekers found to have a credible fear of persecution, noting that "parole rates have plummeted from over 90% to nearly zero" and noting plaintiffs' contention "that the Government is no longer following its own Parole Directive").

<sup>106</sup> See sources cited *supra* Part II A.2.

<sup>107</sup> *Flores* ¶ 18 (emphases added).

for an undefined amount of time and indefinitely suspend other key protections, posing serious danger to children.

1. The Proposed Regulations’ Broad Definition of an “Emergency” Exception and Its Alarmingly Expansive Scope Would Allow the Government to Defy Minimum Standards for Protecting Detained Children (proposed 8 CFR §§ 236.3(b)(5), 236.3(e), 236.3(g)(2); proposed 45 CFR §§ 410.101, 410.202)

The proposed regulations offer an alarming expansion of the meaning and scope of the definition of “emergency” found in *Flores*. In paragraph 12B, *Flores* defines “emergency” as follows:

[T]he term “emergency” shall be defined as any act or event that prevents the placement of minors pursuant to Paragraph 19 within the time frame provided. Such emergencies include natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies (e.g., a chicken pox epidemic among a group of minors).

*Flores* provides that in the event of an emergency, the federal government is exempted from the requirement that it transfer a minor within three or five days to a licensed program, and instead must transfer minors to a licensed program “as expeditiously as possible.”

In contrast to *Flores*’s limited definition of “emergency,” the proposed regulations expand the definition making it so amorphous that it would excuse compliance with core *Flores* principles, such as timely providing food to a child, based on the agency’s discretion and convenience.<sup>108</sup> The proposed regulations all but dispense with the three- or five-day requirement, making compliance with the *Flores* timeframe the exception rather than the rule (in the case of the DHS regulations<sup>109</sup>) or omitting reference to it altogether in favor of vague, non-mandatory language that the agency “places” children “as expeditiously as possible” (in the case of the HHS regulations<sup>110</sup>). The proposed definition replaces the term “medical emergencies” with the vague term “medical or public health concerns at one or more facilities.”<sup>111</sup> It expands the definition’s function to excuse compliance not only with the timely placement requirement, but also to excuse compliance with timely transport of a minor “or impacts other conditions provided by this section.”<sup>112</sup> This latter phrase is so vague as to be meaningless, and allows the agency to defy its own requirements whenever it determines that an “act or event” “impacts other conditions.”<sup>113</sup> Under the proposed rule, the agency could ignore its own regulatory requirements any time it is not convenient to follow them, completely gutting the “emergency” definition provided in *Flores*.

Similarly, the proposed regulations do not comply with *Flores*’s requirements for housing unaccompanied children apart from unrelated adults. *Flores* requires unaccompanied children to

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<sup>108</sup> Proposed 8 CFR § 236.3(b)(5); proposed 45 CFR § 410.101.

<sup>109</sup> Proposed 8 CFR § 236.3(e).

<sup>110</sup> Proposed 45 CFR § 410.202(a)(3).

<sup>111</sup> Proposed 8 CFR § 236.3(b)(5); proposed 45 CFR § 410.101.

<sup>112</sup> *Id.*

<sup>113</sup> See 83 Fed. Reg. 45516 (the proposed rule’s definition of “emergency” clarifies that an emergency may create adequate cause to depart from any provision of proposed 8 CFR § 236.3, not just the transfer timeline); see also 83 Fed. Reg. 45496.

be segregated from unrelated adults, and if that is not “immediately possible,” the unaccompanied child may not be detained with an unrelated adult for more than 24 hours.<sup>114</sup> The proposed regulation, rather than complying with or further limiting the circumstances permitted by *Flores* when an unaccompanied child can be housed with an unrelated adult, expands those circumstances for the convenience of DHS and allows for housing with an unrelated adult beyond 24 hours “in the case of an emergency or other exigent circumstances.”<sup>115</sup> DHS does not define “exigent circumstances.” This broad exception—“in the case of an emergency or other exigent circumstances”—is inconsistent with *Flores* and dangerous for vulnerable children.

In sum, the deviations from *Flores* in the proposed regulations will deprive minors of crucial protections that *Flores* intended, including the mandate that children be placed in a licensed program within three or five days. This rescission of protections risks profound harm to detained minors.

2. The Proposed Regulations’ Definition of “Influx” Does Not Reflect Current Realities and Will Result in a State of Perpetual Exemption from Requirements That Protect Children from Harm (proposed 8 CFR §§ 236.3(b)(10), 236.3(e); proposed 45 CFR §§ 410.101, 410.202)

The proposed rules adopt an outdated definition of “influx” that does not reflect current realities. The proposed definition of influx (derived from the 1997 *Flores* agreement) is grounded by a fixed number of 130 minors eligible for placement in a licensed program at any given time (including those who have been placed and those who are awaiting placement).<sup>116</sup> This number was chosen during a time when the yearly number of minors apprehended by federal immigration authorities was significantly smaller.<sup>117</sup>

DHS and HHS’s definition of “influx” does not reflect the current annual number of children apprehended by the federal government, and the changed “operational reality” of the federal government. It is thus inconsistent with the stated intention to promulgate regulations that enact *Flores* “with some modifications . . . to reflect intervening . . . operational changes while still providing similar substantive protections and standards.”<sup>118</sup> Instead, the proposed, outdated

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<sup>114</sup> *Flores* ¶ 12.

<sup>115</sup> Proposed 8 CFR § 236.3(g)(2); see 83 Fed. Reg. 45500 (providing examples such as a “weather related disaster” or “an outbreak of a communicable disease such as scabies or chicken pox at a facility”).

<sup>116</sup> See proposed 8 CFR § 236.3(b)(10), proposed 45 CFR § 410.101.

<sup>117</sup> See, e.g., 83 Fed. Reg. 45494 (noting “significant increases in the number of families and UACs crossing the border since 1997”); *Reno v. Flores*, 507 U.S. 295, 295 (1993) (noting that “the INS arrests thousands of alien juveniles each year (more than 8,500 in 1990 alone)” including both unaccompanied and accompanied children); see also Rebecca M. Lopez, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1651 (Summer 2012) (“The INS reported that the number of unaccompanied children detained in the United States increased twofold from 1997, when INS detained 2,375 children, to 2001, when the INS reported that it detained 5,385 children.”). In contrast, DHS reports that it apprehended or encountered some 113,920 minors in 2017 (accompanied and unaccompanied). See 83 Fed. Reg. 45511 (reflecting similarly large numbers in 2016, 2015, and 2014).

<sup>118</sup> 83 Fed. Reg. 45486; see also, 83 Fed. Reg. 45489; 45495 (modifications to reflect “operational realities on the ground”); 45520; 45487 (“The proposed regulations would take account of certain changed circumstances. . . .”); 83 Fed. Reg. 45496 (“DHS . . . welcomes public comment on whether it would be appropriate to revise the definition of influx to better reflect current operational realities.”).

definition of “influx” allows DHS and HHS to operate in a default state of exemption. CLINIC opposes this self-serving definition, under which there will perpetually be an “influx,” would allow the agencies to defy the *Flores* requirement that children be transferred to a licensed facility within three or five days. The government should not be allowed to claim a perpetual state of “influx” where children are detained in unlicensed facilities.

**C. The Alternative Licensing Scheme Contained in the Proposed Definition of “Licensed Facility” Violates the Letter and Spirit of *Flores* and Will Result in Prolonged and Indefinite Detention of Children (proposed 8 CFR § 236.3(b)(9))**

*Flores* requires placement in facilities licensed by an appropriate state agency to provide “residential, group or foster care services for dependent children.”<sup>119</sup> The proposed regulations would allow a third party entity chosen by DHS with “relevant audit experience” to “ensure compliance with the family residential standards established by ICE” when a licensing scheme is not available in the state, county or municipality.<sup>120</sup> By DHS’s own admission, no such state licensing scheme exists for the detention of families, so what DHS really seeks is a self-serving scheme where it can create its own standards and choose its own overseer.

DHS proposes to set its own standard by which to be audited, rather than having a neutral authority with expertise, such as a state child welfare agency, set the standards and monitor compliance. As proposed, the regulations would allow DHS to change these standards at any time. The state should retain the authority to regulate and monitor compliance over child welfare matters. Through decades of administering child welfare services through its local systems, states have built the expertise required to regulate, monitor, and enforce the policies that provide a baseline for the protection of children. A robust and independent state licensing system prevents harm to children. DHS gives no specific information, nor any guarantees, that the proposed “entity outside of DHS” will have a comparable level of expertise in regulating and monitoring the care of children, or that it will do so in a fair and impartial manner. Adopting this autocratic definition of “licensed facility” would void the meaning of a license entirely.

DHS’s family detention centers have failed to comply with baseline standards of care in practice in every state where they have existed, yet DHS has attempted different tactics to excuse compliance. The three family detention centers that operate today do so without licenses, and thus are in violation of *Flores* and state licensing provisions. These licensing denials remain under appeal, but DHS could circumvent its ongoing state litigation by overriding the state licensing requirement altogether through the regulations it proposes. The federal district court in the *Flores* litigation has spoken on this tactic repeatedly. In response to the plaintiffs’ Motion to Enforce dated February 2, 2015,<sup>121</sup> the government argued that the *Flores* agreement’s licensing provision cannot be interpreted to apply to family detention centers, in part because there are no state licensing processes available for specific facilities.<sup>122</sup> The court rejected this argument and clarified that children who are not released must be provided temporary placement in a licensed

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<sup>119</sup> *Flores* ¶ 6.

<sup>120</sup> 83 Fed. Reg. 45525, proposed 8 CFR 236.3 (b) (9).

<sup>121</sup> *Jenny L. Flores, et al. v. Johnson*, Plaintiff’s Memorandum to Enforce Settlement of Class Action, Case No. CV 85-4544-RJK(Px) (Feb. 2015).

<sup>122</sup> *Flores v. Holder*, 2015 WL 13648967 (C.D.Cal.).

program.<sup>123</sup> The *Flores* court again rejected this argument in 2017, concluding: “As the Court previously stated ‘[t]he fact that the family residential centers cannot be licensed by an appropriate state agency simply means that, under the Agreement, class members cannot be housed in these facilities except as permitted by the Agreement.’”<sup>124</sup>

With the proposed regulations, DHS intends to create its own licensing scheme because it cannot find a state with regulations sufficiently lenient to permit the kind of operation it wants to run. The most obvious explanation for this is that family detention is not an acceptable practice in the first place. To the extent that DHS insists on any alternative to the state licensing scheme required by *Flores*, compliance with the rules as proposed by DHS will not replace compliance with the *Flores* agreement. CLINIC objects to this downgrade in the definition of “licensed facility.”

#### 1. DHS Has a History of Failing to Obtain Licensing for its Family Detention Centers.

DHS’s history of failing to appropriately license the facilities where it detains children with their families reveals the agency’s failure to afford detained children minimum protections.

In March 2001, ICE contracted with Berks County, PA to establish the Berks County Residential Facility (Berks) with an 85-bed capacity, licensed as a child residential facility. In 2014, Berks sought permission from the state to increase its capacity to 192 beds. Pennsylvania’s Department of Human Services (PA DHS) issued a statement in October 2015 that the use of the residential center as a secure facility for refugee children and their families was inconsistent with its licensing as a child residential facility.<sup>125</sup> On January 21, 2016, PA DHS announced that the licensing of Berks was officially revoked and would not be renewed.<sup>126</sup> Appeals regarding the licensing of the Berks County Residential Center remain pending.<sup>127</sup>

In the summer of 2014, ICE transformed a former Customs and Border Protection (CBP) training camp into the Artesia Family Detention Center in Artesia, New Mexico (Artesia) to supplement capacity at Berks. DHS failed to seek any licensing even months after it opened.<sup>128</sup> The facility soon became the subject of criticism by constitutional lawyers, immigrant advocates, child

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<sup>123</sup> *Flores v. Johnson*, 212 F. Supp. 3d 864, 877-878 (C.D. Cal.), clarified on denial of reconsideration *sub nom. Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015), *aff’d in part, rev’d in part and remanded*, 828 F.3d 898 (9th Cir. 2016), and *aff’d in part, rev’d in part and remanded*, 828 F.3d 898 (9th Cir. 2016).

<sup>124</sup> *Flores v. Sessions*, No. 2:85 –cv-04544 (C.D. Cal. June 27, 2017), [https://www.centerforhumanrights.org/PDFs/06-27-17\\_Flores\\_2016MTE\\_Order.pdf](https://www.centerforhumanrights.org/PDFs/06-27-17_Flores_2016MTE_Order.pdf). (citing July 24, 2015 Order, 212 F. Supp. 3d at 877).

<sup>125</sup> PA Department of Human Services, @PAHumanServices, Twitter, DHS official statement regarding Berks County Residential Center as a family residential facility (Oct. 22, 2015, 2:00pm), <http://www.kunm.org/post/immigrant-detention-center-not-approved-state-childcare>) [hereinafter “PA Human Services tweet.”]

<sup>126</sup> The Pennsylvania Bureau of Human Services Licensing, which is a sub-entity of PA DHS, revoked and refused to renew the license. The County of Berks, which owns and operates Berks County Residential Center, appealed the license revocation and non-renewal with the PA DHS Bureau of Hearings and Appeals. *See State Won’t Renew License of Berks County Residential Center*, READING EAGLE, Jan. 29, 2016, <https://www.readingeagle.com/news/article/state-wont-renew-license-of-berks-county-residential-center>.

<sup>127</sup> Valeria Fernández, *Despite losing its state child care license — and years of claims of abuses — an immigrant family detention center in Pennsylvania made room for more families*, PRI, Jul. 13, 2018, <https://www.pri.org/stories/2018-07-13/despite-losing-its-state-child-care-license-and-years-claims-abuses-immigrant>.

<sup>128</sup> PA Human Services tweet, *supra* note 125.

advocates, and members of Congress for its deplorable conditions of detention, where children were deprived of medical and dental care, education in a structured classroom setting, and counseling.<sup>129</sup>

When Artesia closed in December 2014, the families remaining at the facility were transferred to Karnes Civil Detention Center (a former correctional facility), which became known as Karnes Residential Center (Karnes) in Karnes County, Texas. Also immediately after closing Artesia, DHS opened its third and largest family detention facility in Dilley, Texas, the South Texas Family Residential Center (Dilley), with a capacity for 2,400 women and children.

Despite allegations of child sexual abuse and deficiencies uncovered during inspections, Texas initially granted a temporary child care license to Karnes in April 2016, conditioned on the improvement of such deficiencies and subject to unannounced inspections.<sup>130</sup> This temporary license, as well as the license pending for Dilley, came to a halt when detainees sued the Texas Department of Family and Protective Services (TX DFPS)<sup>131</sup> and successfully enjoined the licensing of both facilities. The State District Judge Karin Crump noted the regulation changes made by TX DFPS that granted special exemptions to immigrant detention centers, stating that “[t]he exceptions allow and have allowed for situations for children that are dangerous.”<sup>132</sup>

In December 2016, the Texas court ruled that Texas could not license immigration jails as childcare facilities, leaving both Dilley and Karnes out of compliance with *Flores* and state law.<sup>133</sup>

2. After a History of Failing to Obtain and Comply with State Licensing as Required by Flores, DHS Now Seeks to Override the Flores Licensing Requirement Through the Regulatory Process

DHS’s family detention centers continue to operate without a license, in defiance of *Flores* which requires transfer to a licensed program within three or five days, or “as expeditiously as possible” in the event of an emergency or influx. Courts have interpreted *Flores* to require release or transfer to licensed program within 20 days when there is an influx or emergency. The government wants to exempt itself from this provision, with the purpose of indefinitely detaining families, by redefining what a licensed facility means in a self-serving way that is contrary to children’s best interest and that will result in lasting and significant harm. Instead of normalizing the failure to

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<sup>129</sup> Detention Watch Network, *Expose and Close Artesia Family Residential Center, New Mexico*, (Sept. 2014), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Artesia%20Report.pdf>.

<sup>130</sup> *Texas Licenses Detention Center for Child Care, Despite Deficiencies*, TEXAS OBSERVER, <https://www.texasobserver.org/texas-licenses-detention-center-child-care-provider-despite-deficiencies/>.

<sup>131</sup> Madlin Mekelburg, *State Sued for Licensing Detention Center*, THE TEXAS TRIBUNE, May 6, 2016, <https://www.texastribune.org/2016/05/03/non-profit-sues-texas-dfps-over-detention-center-l/>.

<sup>132</sup> Michael Barajas, *Texas Blocked From Giving Childcare License to South Texas Immigration Lockup*, SAN ANTONIO CURRENT, June 2, 2016, <https://www.sacurrent.com/the-daily/archives/2016/06/02/texas-blocked-from-giving-childcare-license-to-south-texas-immigration-lockup>.

<sup>133</sup> *Grassroots Leadership Inc. v. Texas Department of Family and Protective Services et al.*, Final Judgment, No. D-1-GN-15-004336, Dec. 2, 2016, [https://grassrootsleadership.org/sites/default/files/uploads/gli\\_v.\\_dfps\\_final\\_judgment.pdf](https://grassrootsleadership.org/sites/default/files/uploads/gli_v._dfps_final_judgment.pdf).

comply with both *Flores* and state licensing provisions, regulatory efforts should comply with *Flores*'s requirements and state licensing provisions.

DHS seeks to exempt itself from the legal requirement to carry out its business without inflicting harm to children, in order to “reflect and respond to intervening statutory and operational changes.”<sup>134</sup> But none of those changes directly target or supersede the nationwide policy for the detention, release, and treatment of minors in immigration custody as established by *Flores*. Intervening statutory and operational changes must be implemented in light of existing law, particularly when it relates to the treatment of the most vulnerable. Regulations must implement these protections rather than erode them.

### 3. The Use of Private and Public Detention Contractors Incentivizes the Unwarranted Use of Detention, Which Contravenes *Flores*.

DHS has failed to act on its own ACFRC findings and recommendations against current family detention practices that may incentivize detention. The ACFRC 2016 Report vehemently condemns contracting management of family detention centers with both private and public sector correction providers. Recommendation 2-3 criticizes portions of these contracts that may incentivize detention: “DHS contract terms should not incentivize the otherwise unwarranted use of detention or supervision capacity; for example, contracts should not reduce the per bed price when the population exceeds a certain percent of occupancy, or pay for all beds, whether or not occupied.”<sup>135</sup>

Such incentives also exist in the public sector. In response to then DHS Secretary Jeh Johnson's announcing in August of 2016 that ICE would evaluate ceasing the use of private prisons, the ACFRC warned:

“[o]utsourcing to public corrections entities is not the antidote to privatization . . . County governments and their agencies . . . lack the expertise to serve migrant families. In addition, they may be motivated by their desire to augment their budgets, avoid layoffs and fill empty buildings. These are circumstances that can incentivize prolonged and unnecessary custody and result in failures to meet the needs of migrant individuals or families in DHS custody.”<sup>136</sup>

DHS continues these practices, sustaining an incentive for prolonged detention of families. This is exactly contrary to the core of *Flores* and its presumption in favor of releasing immigrant children.

By replacing the state licensing requirement and creating an alternative scheme, DHS seeks to eliminate a barrier to the continued use of unlicensed family detention centers, and create “the option of keeping families who must or should be detained together at [family residential centers] for the time needed to complete their immigration proceedings.”<sup>137</sup> By “immigration proceedings,” DHS refers to confinement throughout the course of civil immigration proceedings. Even though the proposed regulations use the term “temporary detention” in numerous places, there is no definition of “temporary,” and it is misleading because it wrongly suggests a short period of time. Prior and current detention practices show that “temporary detention” through the entire

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<sup>134</sup> 83 Fed. Reg. 45486.

<sup>135</sup> ACFRC Report, *supra*, note 52, at 28.

<sup>136</sup> *Id.* at 31.

<sup>137</sup> 83 Fed. Reg. 45494

“immigration proceeding” does not mean short detention given that immigration proceedings can continue for years.<sup>138</sup> Even more disconcerting, DHS seeks to detain children who have prevailed in their immigration proceedings and have been granted relief, in an effort to deter families from seeking asylum despite *R.I.L.-R v. Johnson*.<sup>139</sup> This effort brazenly contravenes *Flores*, and subjecting children to detention during these events is clearly punitive rather than serving any claimed purpose to ensure that children attend their immigration hearings.

4. Even Though Civil Immigration Detention Is Not Supposed to Be Punitive, the CBP Facilities Where DHS Holds Immigrants Are Notoriously Punitive and Family Detention Facilities Will Become Similarly Punitive in the Absence of a State License

DHS’s proposed self-serving family detention scheme violates *Flores*.<sup>140</sup> When the government has acknowledged that a primary motivation for detention is deterrence, it has no incentive to ensure safe conditions in detention; indeed, the worse the conditions in detention, the greater the government may consider the deterrent to be. With this stated motivation, it is therefore especially important that the barrier to the prolonged use of unlicensed family detention centers should remain in place. Detention facilities should meet the baseline child welfare requirements established by no entity other than the state where the facility is located.

DHS’s own ACFRC reports “two fundamental errors” in the guide and shape of family detention: *criminalization* of the population and *prisonization* of detention.<sup>141</sup> Inappropriately punitive conditions exist in family detention centers through the management of migrants and their children as if they were criminals, along with “prisonized policies, practices, physical plant, and personnel.”<sup>142</sup> For example, Karnes is a repurposed correctional facility. Private corrections corporations run both Karnes and Dilley. The ACFRC found that criminalization undermines family relationships and is damaging to the physical, psychological, and social well-being of detainees, while prisonization is “harmful, unnecessary and unnecessarily costly.”<sup>143</sup> Family detention as a deterrence policy was used by the previous administration, which has publicly admitted its ineffectiveness.<sup>144</sup>

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<sup>138</sup> Prolonged detention through the entire immigration proceedings is not a new practice. For example, in 2014-2015 DHS held several families at Berks pending the completion of their cases. For some families, this process translated to over 18 months of detention. Some of the families were inexplicably released after being detained for over a year, and currently remain in immigration proceedings—three years later.

<sup>139</sup> *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 187-90 (D.D.C. 2015).

<sup>140</sup> A self-serving family detention scheme seeking to punish immigrants and subject them to prolonged may also violate the Constitution, see *Zadvydas v. Davis*, 533 U.S. 678 (2001) (describing detention as civil in nature and “non-punitive in purpose and effect”).

<sup>141</sup> ACFRC Report, *supra*, note 52, at 26.

<sup>142</sup> *Id.* Immigration detention generally is inappropriately punitive. See Wheatley, C., *Punishing Immigrants: The Unconstitutional Practice of Punitive Immigration Detention in the United States* (May 24, 2015): <http://bordercriminologies.law.ox.ac.uk/punishing-immigrants/>.

<sup>143</sup> *Id.*

<sup>144</sup> Jeh Johnson, *Trump’s ‘Zero-Tolerance’ Border Policy Is Immoral, Un-American, and Ineffective*, WASHINGTON POST, June 18, 2018, [https://www.washingtonpost.com/opinions/trumps-zero-tolerance-border-policy-is-immoral-un-american--and-ineffective/2018/06/18/efc4c514-732d-11e8-b4b7-308400242c2e\\_story.html?noredirect=on&utm\\_term=.a547532ad070](https://www.washingtonpost.com/opinions/trumps-zero-tolerance-border-policy-is-immoral-un-american--and-ineffective/2018/06/18/efc4c514-732d-11e8-b4b7-308400242c2e_story.html?noredirect=on&utm_term=.a547532ad070) (“Experience teaches (as career personnel at DHS know) that widely publicized changes in immigration-enforcement policy may cause sharp downturns in the level of illegal migration in the short term, but migration patterns then revert to their higher, traditional levels in the long term so long as underlying conditions persist. I learned this hard lesson while in office...”).

CBP stations serve as an example of what an immigration detention system would look like without having a strong, competent, and independent state licensing system to provide direction and monitoring on the welfare of children, especially if the *Flores* agreement is terminated and can no longer be enforced in federal court. CBP stations were the subject of a Motion to Enforce filed by the *Flores* plaintiffs on May 17, 2016.<sup>145</sup> Families and their advocates have amply documented deplorable and unsanitary conditions,<sup>146</sup> even conditions amounting to torture,<sup>147</sup> in temporary CBP facilities. The federal district court in the *Flores* litigation found substantial non-compliance with *Flores* on the issues of access to adequate food, access to clean drinking water, unsanitary conditions, temperature control, sleeping conditions, legal notices, continuous efforts to release or to place in adequate (non-secure licensed facility), and length of detention.<sup>148</sup> Because of serious failures to comport with *Flores* provisions at CBP stations and other child detention facilities, the federal court in the *Flores* litigation appointed a Special Master/Independent Monitor to investigate for compliance.<sup>149</sup>

CBP stations are thus living proof that the alternative licensing scheme proposed by DHS not only contravenes *Flores*, but is likely to put children in dangerous situations and in circumstances where no child belongs: in cold jail-like cells, with no beds, pillows, or blankets, with insufficient and icy food.<sup>150</sup> State licensing provisions as mandated by *Flores* are the only guidance that DHS has as a reference on the treatment of children. State licensing provisions should be preserved, and not overridden by the regulatory process.

#### **D. The DHS Proposed Regulations Would Curtail Protections Required by *Flores* for Special Needs Minors (proposed 8 CFR § 236.3(b)(2))**

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<sup>145</sup> *Flores v. Lynch*, CV 85-4544 DMG (AGRx) Motion to Enforce Settlement and Appoint a Special Monitor, (C.D. Cal filed May 7, 2016) <https://www.aila.org/File/Related/14111359t.pdf>.

<sup>146</sup> *Flores v. Sessions*, No. 2:85 –cv-04544 (C.D. Cal. June 27, 2017).

<sup>147</sup> See, e.g., Human Rights Watch, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells*, (Feb. 28, 2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells> (reporting that women in CBP holding cells sleep on the floor, often with only a Mylar blanket, similar to the foil wrappers used by marathon runners, and that CBP “agents sometimes require them to remove and discard sweaters or other layers of clothing, purportedly for security reasons, before they enter the holding cells.”); Angelina Chapin, *Drinking Toilet Water, Widespread Abuse: Report Details ‘Torture’ For Child Detainees*, HUFFINGTON POST, Jul. 18, 2018, [https://www.huffingtonpost.com/entry/migrant-children-detail-experiences-border-patrol-stations-detention-centers\\_us\\_5b4d13ffe4b0de86f485ade8](https://www.huffingtonpost.com/entry/migrant-children-detail-experiences-border-patrol-stations-detention-centers_us_5b4d13ffe4b0de86f485ade8) (quoting class counsel, Peter Schey, “We see a policy of enforced hunger, enforced dehydration and enforced sleeplessness coupled with routine insults and physical assaults.”).

<sup>148</sup> *Flores v. Sessions*, No. 2:85 –cv-04544 (C.D. Cal. June 27, 2017).

<sup>149</sup> Order Appointing Special Master/Independent Monitor, *Flores v. Sessions*, Oct. 5, 2018, <https://www.courthousenews.com/wp-content/uploads/2018/10/Flores-Special-Master-ORDER.pdf>.

<sup>150</sup> *Flores v. Sessions*, No. 2:85 –cv-04544 (C.D. Cal. June 27, 2017). Of note, the Court recalls that on the specific issue of hygiene products, DHS argued that *Flores* does not explicitly require detention facilities to provide detained children with soap, towels, showers, dry clothing, or toothbrushes. The Court clarified that “[t]he Agreement certainly makes no mention of the words ‘soap,’ ‘towels,’ ‘showers,’ ‘dry clothing,’ or ‘toothbrushes.’ Nevertheless, the Court finds that these hygiene products fall within the rubric of the Agreement’s language requiring ‘safe and sanitary’ conditions and Defendants’ own established standards.” The governments argument, however, reveals its disposition towards children, and its intention to provide only the barest minimum with no consideration of the special vulnerability of children.

Despite the NPRM's claim of no change to *Flores*'s definition of a "special needs minor,"<sup>151</sup> the proposed regulations remove a key protection. *Flores* provides that "[t]he INS shall assess minors to determine if they have special needs and, if so, shall place such minors, whenever possible, in licensed programs in which the INS places children without special needs, but which provide services and treatment for such special needs."<sup>152</sup> The proposed definitions at 8 CFR § 236.3(b)(2) cut this sentence entirely from the definition of "special needs minor," and with it the responsibility of DHS to identify and provide for integrated placement with children who do not have special needs while still providing them appropriate services and treatment.

When assessed in an appropriate setting, many of the children who arrive at U.S. borders are found to be deeply traumatized, severely emotionally disturbed, or are identified as victims of abuse or neglect. Others have medical conditions that require highly specialized care. No matter the particular condition, children living with mental or physical disabilities and trauma are more acutely affected by detention making prolonged detention especially problematic for this population.

#### **E. The Proposed Definition of "Family Unit" and Parental/Guardianship Relationship Should Clarify that Reliable Statements Are Sufficient Evidence to Confirm the Family Relationships (proposed 8 CFR §§ 236.3(b)(7), 236.3(j))**

The proposed regulations state that "DHS will consider all available reliable evidence" in determining if a parental relationship or a legal guardianship relationship exists and that if there is insufficient reliable evidence the minor will be treated as an unaccompanied child.<sup>153</sup> According to the NPRM, examples of the type of evidence considered include "birth certificates or other available documentation."<sup>154</sup> The term "available reliable evidence" is not otherwise defined.

In many cases, families fleeing for their lives, crossing several countries, and being exposed to the elements will not have any documentation with them. By imposing a nearly impossible burden of requiring documentation that most families will not be able to meet, the family will then be separated under the pretext of protection, but where separation will, in fact, result in irreparable harm to children and parents.

Asylum case law routinely recognizes corroborating evidence may not be readily available where an applicant flees a country in haste.<sup>155</sup> The Second Circuit Court of Appeals cautioned that with respect to demands for corroborative evidence in the asylum context "there is a serious risk that unreasonable demands will inadvertently be made," noting that what evidence "is 'reasonably available' differs among societies and, given the widely varied and sometimes terrifying

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<sup>151</sup> 83 Fed. Reg. 45514.

<sup>152</sup> *Flores* Definitions.

<sup>153</sup> Proposed 8 CFR § 236.3(b)(7); *see also* proposed 8 CFR § 236.3(j)(2) ("Prior to releasing to a parent or legal guardian, DHS will use all available reliable evidence to determine whether the relationship is bona fide. If no reliable evidence is available that confirms the relationship, the minor will be treated as a UAC. . . .").

<sup>154</sup> 83 Fed. Reg. 45503.

<sup>155</sup> *See, e.g., Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (*per curiam*); *Shah v. INS*, 220 F.3d 1062, 1070 (9th Cir. 2000); *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) ("[W]e recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution.").

circumstances under which refugees flee their homelands, from one asylum seeker to the next.”<sup>156</sup> In fact, under the REAL ID Act, an applicant may establish eligibility for asylum on his or her credible testimony alone, without any corroboration.<sup>157</sup> In the context of determining a parent/legal guardian-child relationship shortly after entering the United States, as opposed to months or years later as may be the case in the asylum context, it is even more doubtful that families will have any access to documentation regarding their familial relationship.

DHS should clarify that the statements of the parent/legal guardian and of children who are already verbal, coupled with the child’s conduct toward the adult, are relevant evidence and may be sufficient without any documentation.<sup>158</sup> As family unity, or keeping children with family members, is at the heart of the *Flores* agreement and these proposed regulations, DHS should not impose overly burdensome documentary requirements in the context of determining the existence of a parental relationship or legal guardianship relationship.

**F. The Proposed Regulation on Age Assessment Does Not Allow for Informed Decisions or Ameliorate the Possibility of Erroneous Determinations (proposed 8 CFR § 236.3(c); 45 CFR § 410.700)**

Age determinations are a crucial aspect of these proposed regulations because inaccurate age determinations will lead DHS and HHS to label children as adults who will not benefit from *Flores*’s protections. Age determination errors will thus deprive minors of special protections in a complex immigration system where the stakes are often life or death.

*Flores* contains a “reasonable person” standard for determining whether a detained individual is an adult or a child and allows for medical or dental examinations by a medical professional, or other appropriate procedures, for purposes of age verification. The proposed DHS regulation at 8 CFR § 236.3(c) seeks to incorporate the *Flores* “reasonable person” standard, suggests a totality of the evidence and circumstances standard for age determinations, and includes *Flores*’s standards with respect to medical and dental examinations. The proposed HHS regulation at 8 CFR § 410.700 states that procedures for determining the age of an individual “must take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the individual.” The proposed HHS regulation further states that “ORR may require an individual in ORR’s custody to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age.”<sup>159</sup>

The proposed DHS and HHS regulations use different language that may lead to disparate processes for determining age. First, unlike the proposed DHS regulation, the proposed HHS

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<sup>156</sup> *Qiu v. Ashcroft*, 329 F.3d 140, 153 (2d Cir. 2003), overruled on other grounds by *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296 (2d Cir. 2007).

<sup>157</sup> INA § 208(b)(1)(B)(ii).

<sup>158</sup> See, e.g., Nicholas Bala, et al., *Judicial Assessment of the Credibility of Child Witnesses*, 42(4) ALTA LAW REV. 995-1017 (2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4640896/> (finding “children are perceived to generally be more honest than adult witnesses.”). Although this article notes that “children are generally more likely when testifying to make errors due to limitations of their memory or communication skills and due to the effects of suggestive questions,” age is a factual issue that does not test the limitations of memory or communication skills and is not vulnerable to suggestive questions.

<sup>159</sup> Proposed 45 CFR § 410.700.

regulation does not discuss using a “reasonable person” standard. Second, while the proposed DHS regulation suggests a totality of the evidence and circumstances standard, the proposed HHS regulation does not include a specific evidentiary standard through which to assess the “multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the individual.” Third, the proposed HHS regulation discusses the non-exclusive use of radiographs yet the proposed DHS regulation does not mention radiographs as an option. Fourth, the proposed HHS regulation does not require that a medical professional administer radiographs. Without an explicit totality of the evidence and circumstances standard incorporated into the HHS regulation, HHS could give radiographs not administered by a medical professional greater evidentiary weight. In fact, in one habeas action, the U.S. District Court for the Western District of Washington recognized that, pursuant to ORR’s guide on “Children Entering the United States Unaccompanied,”<sup>160</sup> ORR had improperly relied exclusively on radiographic analysis in determining the petitioner to be over 18 years old (yet the radiographic analysis did not rule out the possibility that the individual could be a minor).<sup>161</sup> Also, despite denying the petitioner’s motion for a temporary restraining order, the court held that the petitioner had a strong likelihood of success on the merits of his claim that ORR’s age determination was invalid under the TVPRA and that the ORR Guide contravenes the TVPRA. The TVPRA provides:

The Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, shall develop procedures to make a prompt determination of the age of an alien, which shall be used by the Secretary of Homeland Security and the Secretary of Health and Human Services for children in their respective custody. *At a minimum, these procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien.*<sup>162</sup>

To ensure consistent and fair application of age determination methods and standards, DHS and HHS should propose specific and identical language.

The proposed DHS regulation, 8 CFR § 236.3(c), discusses a “reasonable person” standard for determining whether a detained noncitizen is an adult or a minor, but does not specify what evidence comprises this standard and when DHS should shift from a “reasonable person” standard to scientific-based age assessments. The “reasonable person” standard should incorporate informational interviews and attempts to gather documentary evidence before shifting to scientific-based age assessments in conjunction with the other evidence.<sup>163</sup> To ensure full compliance with *Flores*, DHS should treat an individual claiming to be less than 18 years old as such during the entirety of the age assessment process and until a different age has been reliably assessed.<sup>164</sup> This means that if scientific-based age assessments are required, DHS should provide the individual clear information about the purpose, process, and decisions of the age assessment procedure in a language they understand. This also means that these individuals should be placed in ORR custody and not DHS custody during the age assessment process.

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<sup>160</sup> ORR, *Children Entering the United States Unaccompanied*, Jan. 30, 2015,

<https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied>.

<sup>161</sup> *B.I.C. v. Asher*, NO. C16-132-MJP-JPD, 2016 WL 8672760.

<sup>162</sup> TVPRA § 235(b)(4) (emphasis added).

<sup>163</sup> See Terry Smith and Laura Brownlees, UNICEF, *Age Assessment Practices: A Literature Review & Annotated Bibliography*, 2011, [https://www.unicef.org/protection/Age\\_Assessment\\_Practices\\_2010.pdf](https://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf).

<sup>164</sup> *Id.*

The proposed DHS regulations allow for “medical or dental examinations.” These types of assessments have proven to be unreliable for adolescents, those who are most vulnerable to erroneous assessment under the “reasonable person” standard. Dental age examinations often overestimate age and forensic evaluations are only reliable if there is a reliable data set for comparison for individuals from the same localized population.<sup>165</sup> Furthermore, the reliable markers are subject to caveats like congenital variability, mineralization, eruption, or if the tooth is impacted or removed as part of standard dental care.<sup>166</sup> The American Board of Forensic Odontology uses wisdom teeth examinations, but this method has a margin of error of about two years, and other entities do not use this method at all because about 25 percent of people do not grow wisdom teeth, and there is much variation from person to person in the maturation process.<sup>167</sup> Similarly, while examining the formation stages of the left mandibular teeth (excluding the third molar) is widely accepted as the most accurate dental assessment, “there is absolutely unanimity in the scientific literature that it is impossible to exactly determine a patient’s chronological age from dental radiographs.”<sup>168</sup> Like wisdom teeth evaluations, this method has a margin of error of about two years.<sup>169</sup> Some studies have found this method is inaccurate for some ethnicities or for those with substandard nutrition.<sup>170</sup>

Radiographs of bones are also an inaccurate way to measure age, as other developed nations have concluded. Hand-wrist x-rays may be common, but there are a limited number of reliable studies of foreign populations and, if there is no ethnically compatible comparison to use for the individual, then this method is not reliable.<sup>171</sup> In fact, hand-wrist x-rays are reliable within certain ethnicities, but not as reliable in multiethnic populations or across socio-economic differences.<sup>172</sup> Furthermore, many of the standards used to measure the bones were set four or five decades ago, and studies show minors reach bone maturity significantly earlier than they did at that time, leading to determinations that minors are older than they are.<sup>173</sup> Overall, for nine- to 18-year-olds, this test has a two-year margin of error.<sup>174</sup>

Australia conducted an inquiry into wrist and dental x-rays, including interviewing many experts, and decided that these processes are not sufficiently accurate to determine whether a person is over 18 years of age, and should not be used in age assessments.<sup>175</sup> The inaccuracy of x-rays led Austria

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<sup>165</sup> Daniel Franklin, et al., *Forensic Age Estimation In Living Individuals: Methodological Considerations In The Context Of Medico-Legal Practice* (Oct. 14, 2015), <https://www.dovepress.com/forensic-age-estimation-in-living-individuals-methodological-considerations-peer-reviewed-fulltext-article-RRFMS> (Finding age study based on dental assessments may overestimate age and are less reliable when there is not an accurate data set for comparison.).

<sup>166</sup> *Id.*

<sup>167</sup> Smith and Brownlee, *supra* note 163, at 16.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 15.

<sup>170</sup> *Id.* at 16.

<sup>171</sup> Franklin, et al., *supra* note 165.

<sup>172</sup> Smith and Brownlee, *supra* note 163, at 13.

<sup>173</sup> *Id.* at 15.

<sup>174</sup> *Id.*

<sup>175</sup> Australian Senate, *Legal and Constitutional Affairs References Committee Detention of Indonesian minors in Australia* (Oct. 2012), [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed)

and Switzerland to discontinue the use of bone x-rays for age assessment.<sup>176</sup> Because skeletal attributes develop at different rates depending on localized geographic regions, physical standards derived from Europeans and North Americans should not apply to those from other regions.<sup>177</sup>

The proposed HHS regulation states that procedures for determining the age of an individual “must take into account multiple forms of evidence.”<sup>178</sup> However, both the proposed HHS regulation and the proposed DHS regulation fail to expressly recognize an age assessment as a multi-disciplinary process that balances physical, developmental, psychological, environmental, and cultural factors.<sup>179</sup> “[I]t is well established that growth and maturation are subject to variation in relation to (often unknown) environmental conditions.”<sup>180</sup> For this reason, other professionals such as a child psychologist should conduct an appropriately designed interview taking into consideration cultural factors and social history (lifestyle, familial role in country of origin, education, etc.).<sup>181</sup> Ultimately, DHS and HHS should not use a single method of physical evaluation to establish age, regardless of the method’s reliability; the multifactorial approach that incorporates physical, developmental, and psychological assessment is still necessary due to human variability.<sup>182</sup>

The proposed DHS and HHS regulations should require that qualified professionals with the required skill base and familiarity with the child’s ethnic and cultural background perform all aspects of age determinations. In fact, the Royal College of Pediatrics and Child Health and the Austrian Human Rights Advisory Board on Minors in Detention indicate that professionals with expertise with minors should carry out even the social and development assessments.<sup>183</sup> Furthermore, independent professionals, not DHS or HHS officials, should undertake the important job of age assessments. Such an independent professional will thus be educated and aware of the limitations of each age assessment method and will thus refrain from giving any one method undue evidentiary value. If neither DHS nor HHS will transfer these duties to independent, qualified professionals, then, where there is uncertainty, DHS and HHS should consider the individual a child.

Ultimately, these proposed DHS and HHS regulations do not allow for informed decisions or ameliorate the possibility of erroneous determinations. As such, new regulations are required.

**G. The Proposal to Continually Re-Determine “Unaccompanied Child” Status Contravenes the TVPRA, Is Costly and Unnecessary, and Harms Vulnerable Children the TVPRA and *Flores* Were Designed to Protect (proposed 8 CFR § 236.3(d) & (f)(2)-(3); proposed 45 CFR § 410.101)**

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[inquiries/201013/indonesianminors/report/~/media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2010-13/indonesian\\_minors/report/report.ashx](https://www.dhs.gov/inquiries/201013/indonesianminors/report/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/indonesian_minors/report/report.ashx).

<sup>176</sup> Smith and Brownlee, *supra* note 163 at 18.

<sup>177</sup> Franklin, et al, *supra* note 165.

<sup>178</sup> Proposed 45 CFR § 410.700.

<sup>179</sup> Smith and Brownlee, *supra* note 163 at 34.

<sup>180</sup> Franklin, et al, *supra* note 165.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Smith and Brownlee, *supra* note 163 at 23.

1. The Proposed Regulations’ Mandate That Immigration Officers and ORR Continually Re-Determine “Unaccompanied Alien Child” Status Is Contrary to the Text and Purpose of the TVPRA and Will Thwart Vulnerable Children’s Ability to Meaningfully Participate in Immigration Court Proceedings and Access Protections to Which They Are Entitled

The proposal to allow DHS and HHS to continuously re-determine “unaccompanied alien child”<sup>184</sup> status and make repeated determinations at every undefined DHS “encounter”<sup>185</sup> is inconsistent with the TVPRA, which only authorizes immigration authorities to make this assessment at the time the child is apprehended or discovered.<sup>186</sup> In fact, the TVPRA authorizes only a limited role for DHS in determining whether a noncitizen is an unaccompanied child at the moment of apprehension or discovery, and that determination triggers statutory protections that remain in place throughout the INA § 240 removal proceedings that are mandated for unaccompanied children.<sup>187</sup> In other words, once DHS or another federal agency makes the initial unaccompanied child determination at the moment of discovering or apprehending a noncitizen, that determination triggers the TVPRA’s framework and protections throughout INA § 240 proceedings. The TVPRA gives authority to specified agencies at specified junctures to make determinations about unaccompanied children.<sup>188</sup> The TVPRA contains no provision authorizing or prescribing procedures for re-determination of unaccompanied child status or stripping a child of the protections triggered upon the initial unaccompanied child determination. The fact that there is no procedure for re-determination of unaccompanied child status and stripping of substantive protections in the TVPRA suggests that Congress did not intend for children to lose TVPRA protections midway through removal proceedings. Rather, the TVPRA’s scheme suggests that an initial unaccompanied child determination triggers protections that remain in place through the duration of a child’s INA § 240 removal proceedings, regardless of whether the individual later turns 18 or reunifies with a parent. Further support for an interpretation of the TVPRA’s plain text

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<sup>184</sup> CLINIC believes it is dehumanizing to refer to another human being as an “alien.” We therefore only use the legal term of art “unaccompanied alien child” in quotation marks and use “unaccompanied child” rather than “UAC.” In the recent Supreme Court decision, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the majority opinion only used the word “alien” when quoting directly from the INA or regulations.

<sup>185</sup> See proposed 8 CFR § 236.3(d)(1); 83 Fed. Reg. 45497 (“Under the proposed rule, immigration officers will make a determination of whether an alien meets the definition of a UAC each time they encounter the alien.”); 83 Fed. Reg. 45505 (proposed HHS rule “would make clear that ORR’s determination of whether a particular person is a UAC is an ongoing determination that may change based on the facts available to ORR”); see also 8 CFR § 236.3(d)(2); 45 CFR § 410.101 (“When an alien previously determined to have been a UAC has reached the age of 18, when a parent or legal guardian in the United States is available to provide care and physical custody for such an alien, or when such alien has obtained lawful immigration status, the alien is no longer a UAC. An alien who is no longer a UAC is not eligible to receive legal protections limited to UACs under the relevant sections of the Act.”).

<sup>186</sup> See TVPRA § 235(b)(2)(A).

<sup>187</sup> See TVPRA § 235(b).

<sup>188</sup> See TVPRA § 235(b) (federal agencies apprehending or discovering an unaccompanied child must notify HHS and transfer to HHS within specified time frame); TVPRA § 235(d)(7) (specifying that asylum officers have “initial jurisdiction over any asylum application filed by an unaccompanied alien child”). The Board of Immigration Appeals recently issued a decision holding that immigration judges, rather than USCIS asylum officers, have the authority to assume initial jurisdiction over asylum applications filed by respondents who were previously determined to be unaccompanied children but who turned 18 before filing for asylum. *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018). This decision was wrongly decided and is subject to challenge; however, in any event, it does not address DHS and HHS’s authority to re-determine unaccompanied child status, the subject at issue in the proposed regulations.

as requiring a one-time determination can be found in the home study and post-release service provisions of that statute. Those provisions contemplate that HHS will conduct home studies and post-release services under the protections provided for unaccompanied children, TVPRA § 235(c)(3), even though in many cases the home in which the unaccompanied child is placed is with a parent.

The proposed regulations also thwart the TVPRA’s purpose to provide timely, appropriate relief to vulnerable children.<sup>189</sup> As the USCIS Ombudsman noted, the TVPRA framework is designed to provide “procedural and substantive protections” that should “remain available to UACs throughout removal proceedings, housing placement, and the pursuit of any available relief.”<sup>190</sup> Losing unaccompanied child status midway through removal proceedings could thwart vulnerable youth’s ability to meaningfully participate in their removal case and to access counsel and other crucial services. Many non-profits that provide counsel and services to unaccompanied children receive funding that is designated specifically for unaccompanied children.<sup>191</sup> And in some cases losing unaccompanied child status might mean that DHS detains a child and transfers him or her far away from his or her home and counsel. Removing unaccompanied child status midway through removal proceedings could thus obstruct vulnerable children’s access to counsel and make it more difficult for them to meaningfully access humanitarian protections to which they are entitled by law. Removing legal protections midway through removal proceedings is contrary to the principles of fair treatment and due process for vulnerable youth whose vulnerabilities do not disappear merely because they are released to a parent or legal guardian or turn 18.

Not only would the proposed regulations defy the plain language of the TVPRA and contravene its purpose, but the proposed regulations would also cost the government more money. The continuous re-evaluation of unaccompanied child status upon every “encounter” as mandated by the proposed regulations will cost significant government resources;<sup>192</sup> those costs are not factored into the NPRM’s cost analysis or even mentioned at all.

The proposed regulations would allow the government to change the rules of the game midway through removal proceedings, contrary to rule-of-law and fairness principles. This would have a destabilizing effect on unaccompanied children, making them even more vulnerable. It could also result in arbitrary treatment—for example, a child could lose legal protections because, due to the court’s growing backlog, he or she was not scheduled for an immigration court hearing until after turning 18. The proposed scheme also runs counter to reliance interests, as children would not know what to expect and what rules to rely on, because DHS could strip legal protections at any

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<sup>189</sup> See TVPRA §235(d) (section titled “Permanent Protection for Certain At-Risk Children”).

<sup>190</sup> Citizenship and Immigration Services Ombudsman, *Ensuring a Fair and Effective Asylum Process for Unaccompanied Children*, at 4 (Sept. 20, 2012), <https://www.dhs.gov/publication/ensuring-fair-and-effective-asylum-process-unaccompanied-children> [hereinafter “Ombudsman Unaccompanied Children’s Asylum Recommendations”].

<sup>191</sup> See, e.g., New York City Council, *New York City Council Unaccompanied Minors Initiative Continues To Prevent Needless Deportations*, (Aug. 12, 2016) <https://council.nyc.gov/press/2016/08/12/88/>; Katie Rose Quandt, *New White House Program Will Provide Legal Aid to Unaccompanied Migrant Kids*, MOTHER JONES, June 10, 2014, <https://www.motherjones.com/crime-justice/2014/06/justice-amicorps-legal-aid-unaccompanied-migrant-children/>.

<sup>192</sup> Ombudsman Unaccompanied Children’s Asylum Recommendations, *supra*, note 190 at 6 (“Eliminating jurisdiction redeterminations would increase fairness by preventing disparate treatment of unaccompanied children appearing in immigration court.”).

future “encounter.” The proposed regulations would also apparently give DHS the power to decide against whom, and at what time, to take away TVPRA protections, creating a risk of disparate treatment of similarly situated individuals.

DHS and HHS have provided no justification for this departure from previous practice or even acknowledged the departure. Instead of recognizing that a child’s rights under the TVPRA remain in place throughout INA § 240 proceedings, the proposed regulations are contrary to the TVPRA’s text and purpose, would deprive children of fair treatment, would be contrary to children’s best interests, and would waste government resources.

## 2. The Notification Provision in the Proposed Regulations Is Not Compliant with the TVPRA’s Notification Requirements

The notice provision of the TVPRA mandates that all federal agencies must notify HHS within 48 hours upon “the apprehension or discovery of an unaccompanied alien child” or upon “*any claim or suspicion that an alien [in federal custody] is under 18 years of age.*”<sup>193</sup> DHS’s proposed regulation ignores this mandate, requiring notification to HHS upon apprehension or discovery of an unaccompanied child or “any claim or suspicion that an *unaccompanied alien detained in DHS custody is under 18 years of age.*”<sup>194</sup> The regulation does not comply with the TVPRA’s requirement that HHS be notified upon any claim or suspicion that a detained noncitizen is under 18 years of age.

### **H. DHS Should Not Wait to Issue, Read, and Explain Form I-770 Until the Child Under 14 Is in DHS Custody Nor Should DHS Officials Have Discretion to Issue Form I-770 Only to Those Children “Believed to Be” Under 14 (proposed 8 CFR § 236.3(g)(1)(i))**

Form I-770, Notice of Rights and Disposition, sets forth children’s rights following apprehension, which include their rights while in DHS custody, and provides instructions to DHS officers on meeting their obligations when apprehending children. Form I-770 specifically provides children notice of the right to use the telephone to call a parent, adult relative, or adult friend, the right to be represented by an attorney, and the right to a bond hearing before the immigration judge<sup>195</sup> who will decide if he or she must leave or may stay in the United States. The current regulation requires DHS to issue Form I-770 “when a juvenile alien *is apprehended.*”<sup>196</sup> However, the proposed regulation 8 CFR § 236.3(g)(1)(i) states that all minors or unaccompanied children who “enter [] DHS custody” will be issued Form I-770. The regulation should retain the language requiring Form I-770 whenever DHS apprehends a child, regardless of whether he or she enters DHS custody. Furthermore, DHS should read and explain Form I-770 to any child less than 14 years of age, as is required by current 8 CFR § 236.3(h), as opposed to requiring DHS to read and explain

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<sup>193</sup> TVPRA § 235(b)(2) (emphasis added).

<sup>194</sup> Proposed 8 CFR § 236.3(f)(2) (emphasis added); *see also* similar characterizations of the TVPRA contained found on pages 45490 and 45498 of the NPRM, 83 Fed. Reg. 45490 and 45498.

<sup>195</sup> Indeed, proposed 45 CFR §§ 410.801, 410.810; 8 CFR § 236.3(m), (n)(3)), discussed in section S *infra* would gut the right of detained children to seek bond hearings.

<sup>196</sup> 8 CFR § 236.3(h) (emphasis added).

the form only when a juvenile “is believed to be less than 14,” as suggested by the proposed regulation.

Apprehension at the border does not equate to being in DHS custody nor does it always prompt DHS custody. Under current 8 CFR § 1236.3(h), children receive Form I-770 when they are apprehended, which is the earliest point of contact between the child and DHS. When CBP apprehends a child, CBP assesses the child and decides whether to repatriate him or her at the border (Mexican and Canadian children) or detain and take the child to the nearest CBP station for processing.<sup>197</sup> There, ICE interviews the child to determine the name, age, citizenship and whether the child is accompanied or unaccompanied and issues required immigration paperwork like Form I-770.<sup>198</sup> During processing, ICE determines if the child is an unaccompanied child from Mexico or Canada or an unaccompanied child from a noncontiguous country. ICE must then transfer all unaccompanied children from its custody to ORR custody within 72 hours.”<sup>199</sup> This description of the apprehension, detention, and processing of children, which derives from the ERO Juvenile and Family Residential Management Unit Field Office Juvenile Coordinator Handbook issued in 2017, denotes that these are three different processes with apprehension occurring first and often initiating subsequent placement into DHS custody. Furthermore, not all children will go into DHS custody following apprehension at the border. CBP may apprehend and quickly repatriate Mexican and Canadian juveniles rather than placing them in DHS custody.

Notifying children of their rights at the earliest point of contact with DHS, typically at apprehension by CBP at the border, or by ICE in the interior of the United States, will ensure that all children will receive information that will benefit them thereafter and that DHS officers are reminded of their obligations when apprehending children. Providing this notice as early as possible to children will allow the child to consider his or her rights and ask questions for a longer period of time. As DHS has recognized, “[d]evelopmentally speaking, minors do not have the same comprehension levels as adults, and comprehension levels vary greatly from very young children to teenagers,” so having more time will allow for greater opportunity to achieve comprehension.<sup>200</sup>

All children under the age of 14—not just those believed to be under 14—should benefit from the current requirement that CBP must read Form I-770 to the child in a language he or she understands. In many cases, all CBP will have to determine a child’s age at the time of apprehension based on the child’s appearance and his or her oral response to the question of age. If CBP relies on the child’s appearance to determine his or her age, this will lead to an erroneous belief that some children are over 14 when they are actually under 14. Boys under the age of 14 may appear to be older depending on the physical toll of prior employment and the journey to the United States. Girls under the age of 14 may appear older because of precocious puberty or pregnancy. A CBP officer may also believe that a child is older because he or she exceeds the normal height in that country. For example, CBP may presume that a tall Guatemalan child is older than his or her actual age. As such, CBP should take the child at his or her word and proceed to

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<sup>197</sup> DHS OIG, *A Review of DHS’ Responsibilities for Juvenile Aliens*, at 8 (Sep. 2005) [https://www.oig.dhs.gov/assets/Mgmt/OIG\\_05-45\\_Sep05.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIG_05-45_Sep05.pdf). [hereinafter OIG Review.]

<sup>198</sup> *Id.* at 15.

<sup>199</sup> ICE, *Juvenile and Family Residential Management Unit Field Office Juvenile Coordinator Handbook Enforcement and Removal Operations*, at 12 (Sep. 2017). [hereinafter ICE ERO Juvenile Handbook].

read and explain Form I-770 to the child in a language he or she understands. Until and unless CBP can base an age assessment on reasons beyond mere appearance, the default should be for CBP to take the child at his or her word as proof that he or she is under 14. In fact, even if CBP has access to other age assessment tools described in Part II section F of these comments, these tools are non-conclusive, especially for determining if a child is over or under 14, as children are still developing at this age and doing so at different rates. The safe approach that will most protect children is thus for CBP to read Form I-770 to children who state that they are under 14.

The proposed DHS regulation diminishes the protections intended for children via Form I-770.

**I. The Proposed Regulations Permit Needless Family Separation and Do Not Provide Criteria for Assessing the “Safety and Well-being of the Minor or UAC” in Determining Whether to Allow Children Contact with Their Family Members (proposed 8 CFR § 236.3(g)(2); 8 CFR §§ 236.3(i)(2), (4)(xiii); 45 § CFR 410.101)**

1. The Proposed Regulations, 8 CFR § 236.3(g)(2), Flout *Flores*’s Requirement That Children Be Permitted Contact with Family Members with Whom They Were Arrested, Instead Allowing DHS to Needlessly Separate Families Based on “Operational Feasibility”

As an initial matter, according to DHS’s commentary describing proposed 8 CFR § 236.3(g)(2)’s family contact provision, DHS intends this provision to apply only to the time that minors and unaccompanied children are held in CBP facilities upon initial arrest.<sup>201</sup> However, that limited scope is not stated in the regulation and could be wrongfully applied to minors held in non-CBP, DHS custody unless the regulation is clarified.

The proposed regulation provides for contact with family members with whom the child was arrested “in consideration of the safety and well-being of the minor or UAC, and operational feasibility.” The reference to “operational feasibility” is not found in *Flores*, which requires facilities to provide “contact with family members who were arrested with the minor” without qualification.<sup>202</sup> Nor is this language found in existing regulations covering juvenile and family detainees.<sup>203</sup> This language is contrary to *Flores*’s purpose, as it allows the agency to restrict children’s access to their families for its own convenience, with no specification as to the bounds of the vague term “operational feasibility.” The NPRM appears to define this term with the equally vague standard of not placing “an undue burden on agency operations.”<sup>204</sup> The phrase promotes needless, harmful family separation.

While DHS states its concern for the “safety and well-being of the minor or UAC,” the proposed regulations do not clarify or define this standard and could cause children to be separated from or

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<sup>201</sup> See 83 Fed. Reg. 45500 (“This paragraph . . . addresses only the issue of contact between family members while they remain in CBP custody.”).

<sup>202</sup> *Flores* ¶ 12.

<sup>203</sup> See 6 CFR §§ 114.14 (allowing juveniles to be held with adult family members “provided there are no safety or security concerns”); 115.114 (allowing unaccompanied juveniles to be held temporarily with non-parental adult family members when the agency determines it is appropriate).

<sup>204</sup> 83 Fed. Reg. 45500.

denied contact with family members to the child’s detriment. For example, DHS might use the fact that a family member brought a child with him or her to prevent family contact, based on an alleged concern for the child’s safety, even though the parents’ decision to take their child with them, fleeing violence in a home country, is generally a decision made to protect the child’s safety and well-being. As written the regulation could also needlessly limit a child’s telephone or other non-in-person contact where the child desires such contact and without any determination from a child welfare expert that such contact is not safe for the child. These situations would ignore children’s best interests and could cause profound detriment to children.<sup>205</sup> Separation of children from their family is also contrary to the stated policy of “family unity” pronounced in the President’s June 20, 2018 executive order.<sup>206</sup> The provision’s purported concern for the safety and well-being of children as a justification for limiting contact with the child’s own family members is also at odds with the proposed regulations’ apparent lack of concern or safeguards for detaining and transporting unaccompanied children with *unrelated* adults, as permitted by the same provision and proposed 8 CFR § 236.3(f)(4).

2. The Proposed Regulations Do Not Adequately Protect Children’s Rights to Visitation and Contact with Family Members, Regardless of the Detention Setting in Which a Child Is Placed

All children held in civil immigration detention should be afforded liberal visitation and contact with family members according to the child’s wishes. In fact, *Flores* requires that licensed programs be structured to “encourage such visitation.”<sup>207</sup> The proposed regulations do not provide all children in immigration detention—whether secure or non-secure—a right to visitation and contact with family members, or encourage such visitation. Specifically:

- Proposed 8 CFR § 236.3(i)(4)(xiii) inappropriately restricts a child’s ability to communicate with adult relatives in the United States and abroad concerning legal issues to when it is deemed “necessary.” There is no explanation of what is meant by “necessary” or who makes that determination.
- The proposed regulations governing secure detention do not mention visitation and contact with family members according to the child’s stated wishes or encourage such visitation. Instead, the provisions on secure detention are silent as to children’s rights to family contact.<sup>208</sup> The agencies provide no justification for why children in immigration detention should not universally be afforded visitation and contact with family members.<sup>209</sup>

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<sup>205</sup> See sources cited in Part II A.2.

<sup>206</sup> Executive Order, Affording Congress an Opportunity to Address Family Separation (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>.

<sup>207</sup> *Flores* App’x A ¶ 11.

<sup>208</sup> See proposed 8 CFR § 236.3(i)(1)-(2); proposed 45 CFR §§ 410.101; 410.203.

<sup>209</sup> See National Scientific Council on the Developing Child, *Supportive Relationships and Active Skill-Building Strengthen the Foundations of Resilience: Working Paper 13* (2015), <https://developingchild.harvard.edu/resources/supportive-relationships-and-active-skill-building-strengthen-the-foundations-of-resilience/>.

**J. DHS Regulations Permit Transportation of Children with Unrelated Adults in Expansive and Undefined Circumstances that Pose a Danger to Children (proposed 8 CFR § 236.3(f)(4))**

The proposed regulations contain broad exemptions on the transportation or transfer of children with unrelated adults. This is a departure from the more robust protection contained in *Flores*, which provides that when separate transportation is *impractical*, “minors shall be separated from adults [and] the INS shall take necessary precautions for the protection of the well-being of such minors transported with adults.”<sup>210</sup> DHS proposes adding “unavailable” to “impractical” as “a clarification of the current standard,” and not a substantive change.<sup>211</sup> But in fact adding “unavailable,” without even defining what “unavailable” means, does the exact opposite, adding vagueness and subjectivity to the current “impractical” standard. An impracticability standard implies the unanticipated occurrence of a condition, the non-occurrence of which is the norm. The norm should be that DHS would take steps in anticipation to transport children separately from adults, as *Flores* provides. Where an unanticipated condition occurs, the government may be excused due to impracticality—unfeasibility of an anticipated plan is the exception to the rule. This is what *Flores* provides. Adding “unavailability” dilutes the standard, as it would excuse DHS from taking any steps in anticipation to ensure children are transported separately and safely. The proposed regulations further state that “whenever operationally feasible” ICE and CBP make efforts to transport and hold UCs separately from unrelated adults. This turns the *Flores* standard on its head and makes feasibility the exception to the rule. Children must be transferred separately to ensure safety and, as such, this will require additional government resources, which are not taken into consideration in DHS’s costs analysis.

DHS claims that “at a minimum, CBP always assesses the mental capacity, age, and gender of unaccompanied children to ensure that the most safe and secure setting is available.”<sup>212</sup> However, it does not specify how it will assess gender for the purposes of transport when it comes to safely transferring transgender children who are far more vulnerable to abuse, including trafficking.<sup>213</sup>

**K. The Proposed Regulations Would Expand the Criteria for Placement in Secure or More Restrictive Custody, Which Is Inconsistent with *Flores* and with Children’s Best Interest**

The proposed regulations expand the situations in which children may be placed in secure detention, violating *Flores* and unnecessarily harming children. The NPRM states that the proposed rules “would satisfy the basic purpose of the FSA in ensuring that all juveniles in the government’s custody are treated with dignity, respect, and special concern for their particular vulnerability as minors.”<sup>214</sup> However, DHS and HHS fail to conduct any kind of assessment of the negative impact of secure detention on immigrant youth and society in general.

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<sup>210</sup> *Flores*, ¶ 25.

<sup>211</sup> 83 Fed. Reg. 45498, n.17.

<sup>212</sup> 83 Fed. Reg. 45499.

<sup>213</sup> See Human Rights Watch, *Do You See How Much I’m Suffering Here?* “Abuse Against Transgender Women in US Immigration Detention” (Mar. 23, 2016), [https://www.hrw.org/sites/default/files/report\\_pdf/us0316\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0316_web.pdf).

<sup>214</sup> 83 Fed. Reg. 45486.

Research shows that secure confinement causes not only immediate harm in children, but also harm that can extend into their future as adults. Incarceration may bring about mental health problems or exacerbate existing mental health conditions in young people, as well as increase the risk of children engaging in self-harm and suicide.<sup>215</sup> A 2017 study published in *Pediatrics* concluded that “positive adult outcomes after incarceration are the exception and not the rule.”<sup>216</sup> Researchers of the 12-year longitudinal study found that just one in five male youth and one in two female youth who had experienced incarceration had achieved a majority of key measures of well-being in areas such as gainful activity, educational attainment, interpersonal functioning, and parenting responsibility.<sup>217</sup> In other words, a history of secure confinement is dangerously likely to prevent children from becoming full-functioning adults.

1. The Proposed Regulations’ Expansive Definition of “Escape Risk” Will Result in More Children Being Placed in Secure Detention or More Restrictive Custody (proposed 8 CFR § 236.3(b)(6); proposed 45 CFR §§ 410.101, 410.204)

The HHS regulations, but not the DHS regulations, eliminate “escape risk” as a reason that a child could be held in a secure, unlicensed facility, recognizing that the TVPRA “removes the factor of being an escape risk as a ground upon which ORR may place a UAC in a secure facility.”<sup>218</sup> DHS uses “escape risk” as a basis for secure detention,<sup>219</sup> but does not provide adequate justification for why an “escape risk” label is an appropriate reason to require secure detention of accompanied children, when such a label is recognized as inappropriate for unaccompanied children. The use of “escape risk” as a ground justifying placement in a secure, unlicensed facility for accompanied children but not for unaccompanied children promotes inconsistent treatment of children with similar factual circumstances.

The HHS regulations define “escape risk” differently in two separate sections, creating the potential for confusion. As currently written, proposed 45 CFR § 410.101 defines “escape risk” as a “serious risk” that an unaccompanied child “will attempt to escape from custody.” Separately, proposed 45 CFR § 410.204, provides a list of factors that ORR would consider in evaluating whether an unaccompanied child is an escape risk. The regulations’ two separate provisions

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<sup>215</sup> See, e.g., Javad H. Kashani et al., *Depression Among Incarcerated Delinquents*, 3 PSYCHIATRY RESOURCES 185, 185-191 (1980), <https://www.sciencedirect.com/science/article/pii/0165178180900359> (stating that 1/3 of youth who had been incarcerated and diagnosed with depression noted that the onset of their depression occurred after their incarceration began); Christopher B. Forrest et al., *The Health Profile of Incarcerated Male Youths*, 105 PEDIATRICS 286, 286-291 (2000) <https://www.ncbi.nlm.nih.gov/pubmed/10617737> (stating that the transition into incarceration could be responsible for some of the increase in mental illness in detention); see also D.E. Mace et al., *Psychological Patterns of Depression and Suicidal Behavior of Adolescents in a Juvenile Detention Facility*, 12 J. OF JUV. JUST. AND DETENTION SERVICES 18, 18-23 (1997), <https://www.ncjrs.gov/App/abstractdb/AbstractDBDetails.aspx?id=167146> (suggesting that poor mental health combined with living conditions youth experience while incarcerated makes it more likely for them to engage in self-harm and suicide).

<sup>216</sup> Karen M. Abram et al., *Sex and Racial/Ethnic Differences in Positive Outcomes in Delinquent Youth After Detention: A 12-Year Longitudinal Study*, 171 JAMA Pediatrics, 123, 132 (2017), <https://www.ncbi.nlm.nih.gov/pubmed/27992626>.

<sup>217</sup> *Id.* at 123–132.

<sup>218</sup> 83 Fed. Reg. 45506. However, the HHS regulations would allow “escape risk” to inform a decision to place a child in a staff secure facility.

<sup>219</sup> See proposed 8 CFR § 236.3(i)(1)(v).

discussing escape risk differently could create confusion and disparate treatment of similarly situated children.

Finally, the proposed DHS and HHS regulations penalize children for their own victimization by using the fact that a child owes a smuggling debt as a factor in “escape risk” determinations. The proposed regulations offer no explanation as to why a smuggling debt is relevant to escape risk, nor any evidence that children who owe money to a smuggling organization are more likely to escape. The fact that a child owes a smuggling debt, without proof that it raises safety concerns, defies the TVPRA’s requirement that unaccompanied children be placed “in the least restrictive setting that is in the best interest of the child.”<sup>220</sup> In fact, the TVPRA envisioned that child trafficking victims might be placed in the Unaccompanied Refugee Minor program or released to a “suitable family member,”<sup>221</sup> neither of which would be equivalent to the restrictive secure or “staff secure” setting contemplated by the proposed regulations for children found to be an “escape risk.” This further suggests that it is inappropriate to treat the fact of owed smuggling debt as a sufficient reason, in and of itself, to require a more secure or restrictive setting.

## 2. The DHS Proposed Regulations’ Expansion of Situations Allowing for Secure Detention of Children Violates *Flores* (proposed 8 CFR § 236.3(i)(1))

The proposed DHS regulations expand the situations in which children may be placed in secure detention, violating *Flores* and unnecessarily harming children.

First, the regulations state that a child can be placed in a variety of secure detention settings if the agency has “probable cause” to believe any one of various triggers for secure detention exist, including having been charged or being chargeable with a crime, having been convicted, being the subject of delinquency proceedings, or being adjudicated delinquent.<sup>222</sup> In contrast, *Flores* only uses the probable cause standard to define the word “chargeable,” as meaning that DHS has probable cause to believe the individual has committed a specified offense.<sup>223</sup> Here DHS is giving itself latitude that is not permitted under *Flores* and under other provisions of law including the INA, as *Flores* only allows secure detention expressly when the agency has determined a condition exists, and not just when there is probable cause to believe the condition exists. For example, the agency should easily be able to determine whether or not a conviction exists because a “conviction” is expressly defined in the INA.<sup>224</sup> Under the regulations as proposed, DHS relieves itself of the obligation to find out if a conviction exists. Merely a “probable cause” that a conviction exists would suffice to place a child in secure detention, with no regard for the severe trauma that incarceration causes on young people.

The proposed regulations also significantly depart from *Flores* in the expansion of the qualifying circumstances for secure detention. For example, *Flores* provides unambiguous exceptions for “petty offenses, which are not considered grounds for stricter means of detention in any case, [such as] shoplifting, joyriding, disturbing the peace, etc.,” and for “isolated offenses that (1) were not

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<sup>220</sup> TVPRA § 235(c)(2).

<sup>221</sup> *Id.*

<sup>222</sup> 83 Fed. Reg. 45527, proposed 8 CFR § 236.3(i)(1).

<sup>223</sup> *Flores* ¶ 21 (A).

<sup>224</sup> INA § 101 (a) (48) (A).

within a pattern or practice of criminal activity and (2) did not involve violence against a person or the use or carrying of a weapon [such as] breaking and entering, vandalism, DUI, etc.”<sup>225</sup> DHS purports that these exceptions as listed in *Flores* are non-exhaustive and imprecise, and that listing the triggers for secure detention in the affirmative would add clarity.<sup>226</sup> On the contrary, the regulations as proposed have no definite limitations on the qualifying circumstances for secure detention, and open boundless scenarios where DHS could subject a child to prolonged detention in a secure setting for minor and isolated offenses.

Likewise, the following section states that a qualifying circumstance for secure placement includes “conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed facility in which the minor has been placed and transfer [sic] to another facility is necessary to ensure the welfare of the minor or others.”<sup>227</sup> This provision is also open-ended and provides no protection for children engaging in protest or situations where the cause for the allegedly disruptive behavior is trauma or otherwise related to the child’s mental health, where treatment in a non-secure facility would be most appropriate.

3. ORR’s Proposed Regulations Would Expand Criteria for Placement in Secure Facilities Beyond what is Permitted in *Flores* and Will Result in More Children Being Subjected to this Particularly Harmful Form of Detention

The criteria proposed by HHS at 45 CFR § 410.203 for the placement of children in secure facilities goes far beyond what was agreed to in *Flores*. Whereas *Flores* exempts from placement in secure facilities children with criminal or delinquency offenses when they were “isolated offenses” or “petty offenses,” the proposed regulation invokes the singular “offense” in both instances.<sup>228</sup> By narrowing the exceptions to “an isolated offense” or “a petty offense,” the proposed regulation renders children who have committed more than one isolated or petty offense, no matter how minor, subject to mandatory detention in a secure facility. This runs contrary to the intent of *Flores*, and risks unnecessarily placing children in facilities that are harmful to their well-being.<sup>229</sup>

Moreover, the proposed regulation removes specific examples of petty and isolated offenses listed in paragraph 21 of *Flores*. The NPRM suggests these examples must be removed because they are non-exhaustive and imprecise and “may inadvertently lead to more confusion rather than clarity, and eliminate the ability to make case-by-case determinations” of the particular acts.<sup>230</sup> However, *Flores* notes these examples are “non-exhaustive” and are merely examples. Furthermore, the government’s arguments are undercut by their inclusion of examples of other acts that may lead ORR to place children in secure facilities at proposed 45 CFR § 410.203(a)(3). The omitted examples found in *Flores* protect children from wrongful and unnecessary secure detention placements and would make the use of non-exhaustive examples internally consistent.

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<sup>225</sup> *Flores* ¶ 21 (A) (i)-(ii).

<sup>226</sup> 83 Fed. Reg. 45506.

<sup>227</sup> 83 Fed. Reg. 45527, proposed 8 CFR § 236.3(i)(1)(iv).

<sup>228</sup> *Flores* ¶ 21.

<sup>229</sup> See *supra* notes 33-35; note 96.

<sup>230</sup> 83 Fed. Reg. 45530.

Section 410.203 also expands the grounds upon which a child could be transferred to a secure facility from a less restrictive setting compared to what is permitted under *Flores*. The agreement in *Flores* allows the government to transfer a child to a secure facility where the child has engaged in “unacceptably disruptive” conduct “disruptive of the normal functioning of the licensed program” and whose removal “is necessary to ensure the welfare of the minor or others.”<sup>231</sup> Proposed regulation 45 CFR § 410.203 expands “disruptive conduct” to include conduct engaged in at a “staff secure facility” and adds “sexually predatory behavior” to the list of example behaviors in the provision.<sup>232</sup> The proposed regulation 45 CFR § 410.203 (a)(3) requires that ORR determine that the child “poses a danger to self or others based on such conduct” without explaining how ORR will make this dangerousness determination.<sup>233</sup>

Through these changes, this proposed regulation impinges on the protections guaranteed under TVPRA § 235(c)(2), which states that “[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.”<sup>234</sup> The TVPRA requires that “placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.”<sup>235</sup> Proposed 45 CFR § 410.203 omits this legally required monthly review for secure placement.

#### 4. The HHS Regulations Would Give the Agency Unwarranted Latitude to Hold Children Indefinitely in Temporary or Secure Facilities (proposed 45 CFR § 410.201(e))

Proposed ORR regulations at 45 CFR § 410.201 states that “if there is no appropriate licensed program immediately available for the placement of the UAC . . . and no one to whom ORR may release the UAC . . . the UAC may be placed in an ORR-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility. . . . ORR makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible.”<sup>236</sup> This proposed language tracks provisions in *Flores* located in paragraph 12,<sup>237</sup> which address temporary placements of children following initial apprehension. Paragraph 12 of *Flores* goes on to state that “INS will transfer a minor from a placement under this paragraph to a placement under Paragraph 19” within three or five days, except in certain enumerated circumstances, which include “an emergency or influx of minors into the United States, in which case the INS shall place all minors pursuant to Paragraph 19 as expeditiously as possible.”<sup>238</sup>

By combining *Flores* provisions relating to temporary placements of children following arrest—a function which today is carried out by DHS—with an exception for emergencies or influxes, HHS

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<sup>231</sup> *Flores* ¶ 21(C).

<sup>232</sup> 83 Fed. Reg. 45530.

<sup>233</sup> *Id.*, proposed 45 CFR § 410.203 (a)(3).

<sup>234</sup> TVPRA § 235 (c)(2)(A).

<sup>235</sup> *Id.*

<sup>236</sup> 83 Fed. Reg. 45530.

<sup>237</sup> *Flores* ¶ 12 states: “[i]f there is no one to whom the INS may release the minor pursuant to Paragraph 14 [of the FSA], and no appropriate licensed program is immediately available for placement pursuant to Paragraph 19 [discussing licensed programs], the minor may be placed in an INS detention facility, or other INS-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility. . . .”

<sup>238</sup> *Id.*

is unduly broadening its authority to delay the transfer of unaccompanied children to licensed programs. This runs counter not only to *Flores*, but also to the TVPRA, which requires children to “be promptly placed in the least restrictive setting that is in the best interest of the child.”<sup>239</sup> Contrary to the TVPRA, proposed 45 CFR § 410.201(e) would allow ORR to hold children for indefinite periods in contracted facilities or state and county juvenile facilities, which may be secure, before placing them in licensed programs. The TVPRA provides criteria for placement of children in secure facilities,<sup>240</sup> just as *Flores* does. Yet section proposed 45 CFR § 410.201(e) suggests that secure placements could happen more routinely and outside of these circumstances.

Furthermore, by incorporating *Flores*’s language related to emergencies and influxes, proposed 45 CFR § 410.201(e) leaves vague the duration of the delay of placement of children in licensed programs. Specifically, proposed section 45 CFR § 410.201(e) states only that ORR “makes all reasonable efforts to place each UAC in a licensed program as expeditiously as possible.” This is a significant change from *Flores*’s requirement of placement in licensed facilities within three or five days, or even the requirement that ORR “shall place all minors [in licensed programs] as expeditiously as possible” in the event of an influx or an emergency.<sup>241</sup> Ultimately, the promulgation of the Homeland Security Act of 2002, transferring responsibility for unaccompanied children from DHS to ORR, and the TVPRA have rendered the placement of children by ORR in non-licensed facilities completely unnecessary. Unlike DHS, HHS’s role is to receive children previously in DHS custody and provide appropriately for their care and custody.

#### **L. The Proposed Regulations Interfere with Attorney-Client Relationships (proposed 8 CFR § 236.3(i)(2); 8 CFR § 236.3(i)(4)(xv))**

The proposed DHS regulations allow attorney-client visits “in accordance with applicable facility rules and regulations.”<sup>242</sup> The HHS regulations do not discuss attorney-client visits at all. Moreover, the proposed regulations are silent as to attorney-client phone calls. Without express protections for attorney-client visits and phone calls, children’s counsel, if any, will face many hurdles accessing the children, which at a minimum will result in delaying the proceedings. The current proposed regulations interfere with the attorney-client relationship, which is particularly critical given the “special concern” for vulnerable children, especially those facing possible deportation.<sup>243</sup>

Despite there being no Sixth Amendment right to counsel for children in immigration court proceedings, the U.S. Supreme Court has acknowledged the importance of access to counsel for juveniles in *In re Gault*, 387 U.S. 1, 28 (1967), stating, “under our Constitution the condition of being a boy does not justify a kangaroo court.” In the immigration context, the U.S. Supreme Court has recognized that because deportation “visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom[,] ... [m]eticulous care must be exercised lest the procedure by which [an alien] is deprived of that liberty not meet the essential

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<sup>239</sup> TVPRA § 235 (c)(2)(A).

<sup>240</sup> *Id.* “A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.”).

<sup>241</sup> *Flores* ¶ 12.

<sup>242</sup> Proposed 8 CFR § 236.3(i)(4)(xv).

<sup>243</sup> *See Flores* ¶ 9.

standards of fairness.”<sup>244</sup> Moreover, “[t]he high stakes of a removal proceeding and the maze of immigration rules and regulations make evident the necessity of the right to counsel. The proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.”<sup>245</sup> Access to counsel in removal proceedings dramatically impacts a child’s likelihood of remaining in the United States.<sup>246</sup> To not give unfettered access to counsel is to prejudice the removal case.

Under *Flores*, “[a]ll minors who are detained in the legal custody of the INS” (since re-designated to include both the DHS and HHS) are entitled to attorney-client visits, “even though [counsel] may not have the names of class members who are housed at a particular location.”<sup>247</sup> Further, the DHS Detention and Deportation Officers’ Field Manual notes, under *Flores*, “[a]ttorney-client visits shall be permitted in ALL INS and non-INS facilities.”<sup>248</sup>

Access to counsel, particularly for children, who are most vulnerable, is a critical component of *Flores*. Paragraph 32A of *Flores* entitles attorney-client visits with all children in DHS or HHS legal custody. DHS did not include comparable language in the proposed regulations, instead stating these are “[s]pecial provisions for Plaintiffs’ counsel” that are “not relevant or substantive terms” of *Flores*.<sup>249</sup> However, *Flores* established a “nationwide policy for the detention, release, and treatment of minors in the custody of the [DHS and HHS].”<sup>250</sup> DHS and HHS’s failure to include a provision comparable to *Flores* paragraph 32A entitling counsel to attorney-client visits with all children in DHS and ORR legal custody—including those whom counsel may not have met before the visit—does not comply with *Flores* and interferes with the right to counsel.

In addition to ensuring unfettered, confidential attorney-client visits, the proposed regulations should also ensure unfettered, confidential attorney-client phone calls. Detention facilities are often in remote locations, rendering it extremely impractical for counsel to access their clients.<sup>251</sup> Telephone contact with attorneys is essential to effective representation in complex removal

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<sup>244</sup> *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

<sup>245</sup> *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005); *see also Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (describing the “labyrinthine character of modern immigration law”).

<sup>246</sup> *See, e.g.*, Transactional Records Access Clearinghouse (TRAC), *Representation for Unaccompanied Children in Immigration Court* (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/> (showing that among unaccompanied children with representation 73 percent were allowed to remain in the United States whereas only 15 percent of unrepresented children are allowed to stay).

<sup>247</sup> *Flores* ¶¶ 10, 32A.

<sup>248</sup> U.S. Department of Homeland Security Immigration and Custom Enforcement Office of Detention and Removal formerly Department of Justice Immigration and Naturalization Service, *Detention and Deportation Officers’ Field Manual*, Appendix 11-4 “Juvenile Aliens: A Special Population,” Sec. 7.2.1.

<sup>249</sup> 83 Fed. Reg. 45517, Table 11.

<sup>250</sup> *Flores* ¶ 9.

<sup>251</sup> *See* Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, at 16 (June 2011), [http://www.hrw.org/sites/default/files/reports/us0611webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf); *see also* Ingrid V. Eagly and Steven Shafer, Article, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 43 (2015) (Noting that “[g]eography is a particularly harsh barrier to accessing counsel for those immigrants attending court in small cities and rural areas where few immigration attorneys practice,” and explaining that “[t]he placement of approximately one-third of detained cases in these remote court locations has only further intensified the obstacles faced by detained immigrants in accessing counsel.”).

proceedings. The proposed regulations fail to address attorney-client phone calls, and thereby interfere with the attorney-client relationship.

Moreover, access to one's attorney should not vary from facility to facility. The proposed DHS regulations allow attorney-client visits but specify they must be "in accordance with applicable facility rules and regulations."<sup>252</sup> However, there is a wide variation in facilities' rules regarding attorney-client visits and phone calls, and many facilities make it difficult to access clients.<sup>253</sup> In fact, there have been numerous complaints and lawsuits challenging detention conditions of immigrant detainees, including access to counsel, at various facilities. For example, one recent class action lawsuit, *Lyon v. ICE*, challenged phone access of immigrant detainees and resulted in a settlement whereby ICE agreed to change its policies in four northern California detention centers, ending severe restrictions on telephone use.<sup>254</sup> In another example, a lawsuit, *Dilley Pro Bono Project v. ICE*, was filed on June 1, 2017 after a full-time legal assistant with the Dilley Pro Bono Project (DPBP) was barred from entering the South Texas Family Residential Center (STFRC) in Dilley, Texas for allegedly inappropriately facilitating a mental health evaluation by telephone. The evaluation was necessary to effectively represent an asylum applicant in her asylum case. Only after the facilitation of the telephonic evaluation did ICE create a written policy requiring pre-approval for telephonic mental health evaluations that they argued applied retroactively. A settlement was reached on August 15, 2017, which sets forth a timetable for the approval process of such telephonic evaluations and limits the grounds on which ICE can deny a request for a telephonic mental health evaluation.<sup>255</sup> When every facility that houses ICE detainees has different rules regarding access to counsel, it impedes the attorney-client relationship. There must be, consistent across all immigration detention facilities for children, unfettered access to counsel both for in-person visits and phone calls.

Furthermore, if DHS plans to transfer a represented child from one facility to another, DHS must provide counsel notice of the transfer. *Flores* provides that "no minor who is represented by counsel shall be transferred without advance notice to such counsel, except in unusual and compelling circumstances such as where the safety of the minor or others is threatened or the minor has been determined to be an escape-risk, or when counsel has waived such notice, in which cases notice shall be provided to counsel within 24 hours following transfer."<sup>256</sup> The proposed regulation claims no change,<sup>257</sup> but the revision does in fact narrow the notice requirement by limiting the

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<sup>252</sup> Proposed 8 CFR § 236.3(i)(4)(xv).

<sup>253</sup> See, e.g., Kyle Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported*, LOS ANGELES TIMES, Sept. 28, 2017, <http://www.latimes.com/projects/la-na-access-to-counsel-deportation/> (describing the difficulty attorneys face in accessing clients detained in immigration custody); Seattle University School of Law, *Voices From Detention: A Report on Human Rights Violations at the Northwest Detention Center*, at 37 (July 2008) (describing the insufficient number of attorney-client meeting rooms and other problems that lead to lengthy delays and waits to access legal counsel); *id.* at 60 (describing limited phone access due to the number of detainees per phone, broken phones, and the expense of placing a call).

<sup>254</sup> ACLU Press Release, *ACLU Settlement with ICE Will Allow Immigrants Held in Detention to Use Functional Telephones for Contacting Lawyers, Families, Government Agencies* (June 14, 2016), <https://www.aclunc.org/news/aclu-settlement-ice-will-allow-immigrants-held-detention-use-functional-telephones-contacting>.

<sup>255</sup> American Immigration Council, *Challenging ICE Interference with Legal Representation at Dilley*, <https://www.americanimmigrationcouncil.org/litigation/challenging-ice-interference-legal-representation-dilley>.

<sup>256</sup> *Flores*, ¶ 27.

<sup>257</sup> 83 Fed. Reg. 45517.

situations in which notice prior to transfer is required to only transfers “from one ICE placement to another, or from an ICE placement to an ORR placement.”<sup>258</sup> *Flores*’s requirements apply to all transfers and not just transfers between ICE placements and ORR. The proposed regulations will make it more difficult for children to maintain communication with and access to counsel.

Access to one’s attorney, especially in a framework that does not provide appointed government counsel, and especially when the detained person is a child, must be upheld without interference.

**M. The Parental Notification Provision Is Unclear and Underscores the Need for the Government to Provide All Children in Removal Proceedings with Counsel (proposed 8 CFR § 236.3(I))**

The proposed DHS regulation about detention and release of children retains an unclear provision about parental notification that does not belong in this rule. This language, which was introduced more than three decades ago, *see* 52 Fed. Reg. 38245 (Oct. 1987), required the former INS to notify a parent residing in the United States if a juvenile sought immigration relief, release from detention, parole, or voluntary departure, and where the grant of that relief could “effectively terminate some interest in the parent-child relationship and/or the juvenile’s rights and interests are adverse with those of the parent.”<sup>259</sup> The regulation also required INS to notify a parent if a detained juvenile refused to be released to him or her. In either situation, the regulation provided that the parent be afforded an opportunity to present his or her views to INS or an immigration judge. These regulations were added when one agency—INS—was responsible for detention of immigrant children as well as adjudication of immigration benefits. The proposed regulation retains these dated provisions, requiring notice to a parent in the United States and an opportunity for the parent to present his or her views to DHS, when a child in DHS custody refuses to be released to the parent, or when a child or unaccompanied child seeks any form of relief from removal before DHS, which “may effectively terminate some interest inherent in the parent-child relationship and/or the minor or UAC’s rights and interests are adverse with those of the parent.”<sup>260</sup>

This parental notification provision is not found in *Flores* nor in the TVPRA. It thus does not serve the proposed regulations’ stated purpose of implementing *Flores*. DHS concedes that parental notification would rarely “if ever” be required.<sup>261</sup>

The proposed regulation lacks clarity about when a grant of relief “effectively terminate[s] some interest inherent in the parent-child relationship” or how DHS would determine when the child’s “rights and interests are adverse with those of the parent.” Nor does it specify how DHS would determine whether such notification is “otherwise prohibited by law” or “would pose a risk to the minor’s safety or well-being.” ICE and CBP lack the expertise to correctly apply complex confidentiality, child welfare, and family laws, *see, e.g.*, 8 USC § 1367, and would lack knowledge regarding the content of immigration applications needed to determine whether notifying a parent would put the child at risk or thwart his or her ability to obtain humanitarian immigration

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<sup>258</sup> Proposed 8 CFR § 236.3(k)(2).

<sup>259</sup> Former 8 CFR § 242.24 (currently found at 8 CFR §236.3(e), (f)).

<sup>260</sup> Proposed 8 CFR § 236.3(I).

<sup>261</sup> *See* 83 Fed. Reg. 45504 (stating that “ICE and CBP would seldom, if ever, be responsible for providing any type of parental notification”).

protections (for example, in an asylum, SIJS, U or T status application where the parent was the perpetrator of abuse).

The complex issues raised by proposed 8 CFR § 236.3(l) underscore the need for appointed counsel for all immigrant children in removal proceedings. This proposed regulation deals with situations in which a child either: (1) refuses to be released to his or her parent; or (2) seeks relief that could effectively terminate an interest inherent in the parent-child relationship or the child's rights and interests are adverse to the parent's. It contemplates that in this adversarial scenario, the parent would be presenting his or her views to DHS before a decision is made. The potential conflicts and the important interests highlighted by this provision underscore the need for all immigrant children to have appointed counsel in order to adequately protect their interests, and in the interest of due process.

**N. The Proposed Regulations' Authorization for Re-Arrest of Released Children Do Not Take into Consideration Accidental *In Absentia* Orders and Violate *Flores* (proposed 8 CFR § 236.3(n))**

A primary purpose of *Flores* is to ensure juveniles are placed in the "least restrictive setting available" and released "without unnecessary delay" to a parent, adult relative, or guardian yet the proposed regulation at 8 CFR § 236.3(n) offers DHS many opportunities to re-arrest a previously released child contrary to the purpose of *Flores*. Neither *Flores* nor the current regulations have provisions for reassuming custody of previously released juveniles if a juvenile becomes an escape-risk, becomes a danger to the community, or receives a final order of removal after being released, but proposed 8 CFR § 236.3(n) would provide for this scenario. Besides violating *Flores*, DHS would use this proposed regulation to re-arrest and remove a juvenile following an accidental or erroneous *in absentia* final order of removal.

It is unclear why DHS introduces 8 CFR § 236.3(n) when the current regulations lack a re-arrest provision and the re-arrest provision runs afoul of *Flores*. One reason could be that an express re-arrest provision will mean more detained individuals, which in turn is profitable to for-profit prison companies which in turn is profitable to for-profit prison companies that have close relationships with government entities.<sup>262</sup> DHS's omission of a provision for independent review of the decision to re-arrest, including omitting a reference to a bond hearing under *Flores*,<sup>263</sup> and what standard of review would apply to that review, also suggests that the goal of this regulation is to provide authority to detain children rather than release them.

Section 236.3(n) lacks express limitations to DHS's ability to re-arrest a juvenile following release from ORR. Would this proposed regulation allow DHS to re-arrest a noncitizen who DHS no longer considers an unaccompanied child because of age or reunification with a parent or legal guardian? In other words, will DHS use 8 CFR § 236.3(n) as a backdoor to re-arrest those who it deems "former" unaccompanied children? As the Trump Administration seeks to limit

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<sup>262</sup> Fredreka Schouten, *Private prisons back Trump and could see big payoffs with new policies*, USA TODAY, Feb. 23, 2007, <https://www.usatoday.com/story/news/politics/2017/02/23/private-prisons-back-trump-and-could-see-big-payoffs-new-policies/98300394/>.

<sup>263</sup> *Flores* ¶ 24(A) ("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.") (emphasis added).

unaccompanied child designation and protections,<sup>264</sup> including through these proposed regulations, this is a valid concern. At a minimum, DHS should include a specific prohibition against this re-arrest basis and set forth a clear standard and the limited circumstances under which 8 CFR § 236.3(n) would apply. Otherwise, proposed 8 CFR § 236.3(n) stands to render *Flores* meaningless, sow distrust among unaccompanied children for DHS as they witness or hear about DHS re-arresting those similarly released from ORR, and cause unnecessary trauma to a vulnerable children who may have finally found love and support with a sponsor.

One circumstance for re-arrest on which DHS is clear, is that a final order of removal would provide DHS with a basis to re-arrest a previously released child. Proposed 8 CFR 236.3(h)(i). An immigration judge may issue a final order of removal following denial of immigration relief or the respondent not appearing for an immigration court hearing, be it the preliminary master calendar hearing or the merits hearing.<sup>265</sup> This means that DHS could re-arrest a previously released child who has a final order of removal because of failing to appear at the hearing.<sup>266</sup> However, children face a host of hurdles beyond those faced by adults that impede their ability to appear at an immigration court hearing. As examples, previously released children are under the control of the sponsor, lack the resources to travel to the immigration court, which could be located hours away from their home, and are unable to independently seek legal counsel to assist with attendance.

Immigration judges often issue *in absentia* orders of removal for vulnerable populations such as children despite no intentional failure to appear<sup>267</sup> Earlier this year, CLINIC and the Asylum Seeker Advocacy Project issued a report, *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum*, that details the circumstances beyond the families' control that often lead to *in absentia* removal orders.<sup>268</sup> Government officials have touted the high number of *in absentia* removal orders to allege that noncitizens choose to not attend the scheduled court hearing. However, this is a simplistic and inaccurate view no matter what noncitizen population is at issue.

CLINIC's experience working with families released from family detention who have *in absentia* orders of removal suggests that *in absentia* removal orders are not a reliable basis for allowing a previously released child to be re-arrested. The report discusses that from 2015 to 2017, ASAP

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<sup>264</sup> See, e.g., *Matter of Castro-Tum*, 27 I&N Dec. 271, 279 n.4 (A.G. 2018) ("An alien who does not meet the statutory definition of an unaccompanied alien child is not entitled to that status."); *Matter of M-A-C-O*, 27 I&N Dec. 477 (BIA 2018) (holding that an immigration judge has initial jurisdiction over an asylum application filed by a respondent who was previously determined to be an unaccompanied alien child but who turned 18 before filing the application).

<sup>265</sup> INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5) ("Any alien who, after written notice . . . has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable . . .").

<sup>266</sup> OIG Review, *supra*, note 197, at 25n.47; ICE ERO Juvenile Handbook, *supra* note 199 at 54.

<sup>267</sup> Now that the Attorney General has imposed new performance measures that require completing 700 cases per year, immigration judges may feel pressured to issue *in absentia* removal orders without putting DHS to its evidentiary burden of proof in order to show case completion and remove cases from their docket. See EOIR, Performance Plan: Adjudicative Employees (Mar. 30, 2018).

<sup>268</sup> The Catholic Legal Immigration Network, Inc., and the Asylum Seeker Advocacy Project at the Urban Justice Center, *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum* (2018), <https://cliniclegal.org/sites/default/files/Denied-a-Day-in-Court.pdf>.

and CLINIC represented 22 families, comprised of 46 clients with *in absentia* orders. Of these, ASAP and CLINIC successfully challenged the *in absentia* orders for 44 clients, or 96 percent of cases. Through this representation, CLINIC and ASAP identified several common reasons for families failing to attend immigration court and receiving *in absentia* orders. These common reasons include: DHS or EOIR providing insufficient notice, government errors or omissions, fraud by unauthorized practitioners of immigration law, and confusion in an attempt to proceed in a *pro se* capacity in a civil, yet complex, bureaucratic system in which the constitutional right to appointed counsel is unrecognized. There is no reason to doubt that these same hurdles would plague previously released children in addition to unique hurdles previously mentioned. In fact, the respondent in *Matter of Castro-Tum*<sup>269</sup> is an example of an unaccompanied child who failed to appear at the master calendar following release from ORR custody. The respondent entered the United States during the summer of 2014 during the influx of unaccompanied children when DHS and ORR scrambled to produce the required paperwork, including intended address paperwork, and to reunite the children with sponsors in the United States. In that case, the immigration judge granted a continuance rather than an *in absentia* order of removal because of concerns that the respondent had not received notice of the hearing. The immigration judge even attempted to hold DHS to its clear, unequivocal, and convincing evidence burden that the written notice was so provided,<sup>270</sup> but the immigration judge was ultimately replaced by an Assistant Chief Immigration Judge who was willing to issue an *in absentia* order of removal.<sup>271</sup>

*In absentia* orders of removal are generally unreliable markers for denoting intentional fugitive status and thus unfair as a basis for re-arrest. While the INA contains rescission and reopening mechanisms and rights,<sup>272</sup> DHS would render moot the right to file a motion to rescind and reopen by re-arresting a previously released child because it will be nearly impossible for detained children to know about this opportunity without access to counsel.<sup>273</sup> The INA provides for rescission and reopening of an *in absentia* order where: (1) the respondent did not receive proper notice; (2) the respondent was in federal or state custody and the failure to appear was not the fault of the respondent; or (3) exceptional circumstances caused the failure to appear.<sup>274</sup> Motions to rescind and reopen *in absentia* removal orders based on lack of notice may be filed at any time<sup>275</sup> and an exceptional circumstances-based motion must be filed within 180 days of the order.<sup>276</sup> Thus, if a previously released child did not receive notice of the hearing, that child has the right to submit a motion to rescind and reopen at any time and if a child failed to appear because of exceptional circumstances, that child has the right to submit a motion to rescind and reopen within

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<sup>269</sup> *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

<sup>270</sup> INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5) (“Any alien who, after written notice . . . has been provided to the alien or the alien’s counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable . . .”).

<sup>271</sup> See Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ (Aug. 8, 2018) <https://www.aila.org/File/DownloadEmbeddedFile/76937>; Tal Kopan, *Immigrant Ordered Deported After Justice Department Replaces Judge*, CNN, Aug. 7, 2018, <https://www.cnn.com/2018/08/07/politics/immigration-judge-replaced-deportation-case-justice-department/index.html>.

<sup>272</sup> INA § 240(b)(5)(C).

<sup>273</sup> Unless the government plans to support appointing children with attorneys, de facto deprivation of the right to file a motion to rescind and reopen will be the realistic outcome of a re-arrest and detention.

<sup>274</sup> INA § 240(a)(5)(C).

<sup>275</sup> INA § 240(a)(5)(C)(ii); 8 CFR §§ 1003.23(b)(4)(ii), 1003.23(b)(4)(iii)(A)(2).

<sup>276</sup> INA § 240(b)(5)(C)(i); 8 CFR §§ 1003.23(b)(4)(ii), 1003.23(b)(4)(iii)(A)(1).

180 days of the order. However, if DHS re-arrests a child because of an *in absentia* order, that child will not have access to counsel to submit a motion to rescind and reopen, let alone advise him or her of this opportunity. Furthermore, the re-arrested child may miss the 180-day exceptional circumstances deadline because DHS has taken him or her into custody. Furthermore, filing a motion to rescind and reopen based on either of these two grounds results in an automatic stay of removal while the motion is pending with the immigration judge. DHS's re-arresting a previously released child because of an *in absentia* order of removal would ultimately lead to enforcement of the *in absentia* removal order, even though the child may have a right to have the removal order stayed.

Proposed 8 CFR § 236.3(n) is a drastic departure from *Flores* and does not contemplate the risks involved with re-arresting previously released children based on *in absentia* final orders of removal.

**O. DHS's and HHS's Proposed Regulations Would Eliminate Important Monitoring Provisions that Will Fail to Hold the Government Accountable for Detention of Children (proposed 8 CFR § 236.3(o); 45 CFR § 410.403)**

*Flores* requires weekly collection of statistics on detained children by a Juvenile Coordinator who is then tasked with reporting these statistics to the *Flores* court and to the parties on an annual basis.<sup>277</sup> By contrast, the proposed regulation at 8 CFR § 236.3(o) requires CBP and ICE juvenile coordinators only to collect certain statistical information "periodically."<sup>278</sup> Beyond eliminating the requirement of weekly reporting, the proposed regulation removes *Flores*'s requirement to collect information about the reasons for placement of a child in a detention facility or in a medium security facility.<sup>279</sup> The elimination of these reporting requirements is troubling, especially given that codification of the proposed regulation would also terminate *Flores* counsel's and the *Flores* court's role in ensuring compliance with critical *Flores* protections. Data sharing requirements falling short of what *Flores* requires undercuts the accountability of DHS to the general public and are an impermissible substitution for *Flores*'s existing language.

Likewise, the proposed HHS regulation fails to require compliance monitoring to occur on a specified basis and to compel maintenance and dissemination of records as required under *Flores*. Despite recent lawsuits requiring the enforcement of *Flores*, the proposed regulation offers little guidance on compliance monitoring. The only reference to monitoring within HHS's proposed regulations appears in proposed 45 CFR § 410.403, titled "Ensuring that licensed programs are providing services as required by these regulations." That section simply states that "ORR monitors compliance with the terms of these regulations."<sup>280</sup> In its explanation for why it does not include standards for monitoring, HHS explains that "the FSA does not contain standards for how often monitoring shall occur, and this regulation does not propose to do so."<sup>281</sup> This fails to account for the important role that *Flores* counsel and the *Flores* court currently play in ensuring

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<sup>277</sup> *Flores* ¶¶ 28(A), 30.

<sup>278</sup> 8 CFR § 236.3(o)(2).

<sup>279</sup> *Flores* ¶ 28(A).

<sup>280</sup> 45 CFR § 410.403.

<sup>281</sup> 83 Fed. Reg. 45508.

compliance with critical *Flores* protections.<sup>282</sup> The codification of this proposed regulation would end *Flores*, thereby terminating this check by *Flores* counsel and court.

*Flores* requires ORR to collect weekly and maintain a “record of all minors who are placed in proceedings and remain in INS custody for longer than 72 hours.”<sup>283</sup> The agreement further requires that “[s]tatistical information on such minors shall be collected weekly from all INS district offices and Border Patrol stations.”<sup>284</sup> Per *Flores*, required statistical information includes: “at least the following: (1) biographical information such as each minor’s name, date of birth, and country of birth, (2) date placed in INS custody, (3) each date placed, removed or released, (4) to whom and where placed, transferred, removed or released, (5) immigration status, and (6) hearing dates.”<sup>285</sup> Additionally, the agreement required that “[t]he INS, through the Juvenile Coordinator, shall also collect information regarding the reasons for every placement of a minor in a detention facility or medium security facility.”<sup>286</sup> The HHS regulations fail to include these reporting requirements.

Note that DHS’s record on transparency and accountability shows its failure to provide adequate oversight over its detention facilities. For example, a June 2018 report by the DHS Office of the Inspector General found that DHS-ICE existing inspections and monitoring mechanisms for detention facilities fail to “ensure consistent compliance with detention standards, nor do they promote comprehensive deficiency corrections.”<sup>287</sup> In addition, facility inspections reports are largely kept unavailable to oversight organizations and to the public. For example, according to DHS’s own ACFRC, “a significant lack of information hindered the Committee’s efforts to fulfill” its task, including basic demographic information, information about family detention center operations and outcomes, and information related to contract monitoring and oversight of contractors, “including information about contract compliance, audits and evaluations, and possible corrective actions.”<sup>288</sup>

The inspections that are made public reveal serious noncompliance issues and threats to the health and safety of children in family detention centers. For example, Dr. Scott Allen and Dr. Pamela McPhearson, health professionals serving as medical and psychiatric subject matter experts for DHS’s Office of Civil Rights and Civil Liberties, published a letter to Congress on July 17, 2018 denouncing the “incarceration of children itself” as the fundamental flaw of family detention.<sup>289</sup> The letter cites deficiencies observed over years of inspections and investigations in areas like actual physical space, qualified staffing, trauma-informed care, and language access.<sup>290</sup>

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<sup>282</sup> See *Flores* ¶¶ 28-30 (delineating other mechanisms that ensure the government’s compliance with the *Flores* and that ensure the rights of children are protected).

<sup>283</sup> *Flores* ¶ 28(A).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> DHS OIG, *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements: DHS OIG Highlights (OIG-18-67)*, June 26, 2018, <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

<sup>288</sup> See ACFRC Report, *supra* note 52, at 39.

<sup>289</sup> Letter from Dr. Scott Allen and Dr. Pamela McPhearson of the Department of Homeland Security Office of Civil Rights and Civil Liberties, to Senators. Charles E. Grassley and Ron Wyden, Senate Whistleblowing Caucus, July 17, 2018, <https://www.whistleblower.org/sites/default/files/Original%20Docs%20Letter.pdf>.

<sup>290</sup> *Id.*

**P. The HHS Regulations Flout *Flores*'s Requirement that the Agency Must Make Continuous Efforts Toward Release (proposed 45 CFR § 410.201(f))**

Proposed 45 CFR § 410.201(f) omits the core requirement of *Flores* found in paragraph 18 that the government “shall make and record the prompt and continuous efforts on its part toward family reunification *and the release of the minor pursuant to Paragraph 14 above. Such efforts at family reunification shall continue as long as the minor is in INS custody.*” (emphasis added). The omission of language directing ORR’s continued efforts toward the release of children from custody exposes the government’s true intentions in promulgating these rules, which is to provide for the prolonged detention of immigrant children. In discussing efforts toward family reunification, but not requiring continued efforts toward release of children, this proposed rule violates *Flores*.

The proposed regulation also contravenes its stated mission to “adopt in regulations provisions that parallel the relevant and substantive terms of the FSA. . . .”<sup>291</sup> *Flores* “sets out a nationwide policy for the detention, *release*, and treatment of minors. . . .”<sup>292</sup> In fact, proposed 45 CFR § 410.201(f) draws from a *Flores* provision contained in a section titled “General Policy Favoring Release,” which lays out the process for the government to release children from custody “without unnecessary delay” whenever “detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor’s safety or that of others.”<sup>293</sup>

The proposed regulation further weakens the language put forth in *Flores* by merely proposing that “ORR makes and records the prompt and continuous efforts on its part toward family reunification.”<sup>294</sup> This proposed language dilutes mandatory language in *Flores* requiring that the government “shall” make prompt and continuous efforts to these ends.<sup>295</sup>

**Q. The Proposed HHS Regulations’ Sponsor Notification Obligations Are More Burdensome than *Flores* and May Disincentivize Loving Family Members from Coming Forward for Fear of Being Punished with Immigration Enforcement (proposed 45 CFR § 410.302)**

The safety and well-being of children should be paramount during placement in ORR shelters and once the child is released from ORR custody. While it is indeed important for ORR to keep track of children it has placed with a sponsor to ensure the safety and well-being of the child, the proposed regulation at 45 CFR § 410.302 is more burdensome than *Flores* and may disincentivize qualified family members from coming forward for fear of being targeted for enforcement by immigration authorities. These obligations include the requirement that the sponsor notify not only ORR, but also DHS, upon the occurrence of a number of events. For example, the proposed regulation requires the sponsor “notify ORR and DHS as soon as possible and no later than 24

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<sup>291</sup> 83 Fed. Reg. 45486.

<sup>292</sup> *Flores* ¶ 9 (emphasis added).

<sup>293</sup> *Flores* ¶ 14.

<sup>294</sup> Proposed 45 CFR § 410.201(f).

<sup>295</sup> *Flores* ¶ 14.

hours of learning that the UAC has disappeared, has been threatened, or has been contacted in any way by an individual or individuals believed to represent an immigrant smuggling syndicate or organized crime.”<sup>296</sup> The regulation also requires notification to ORR and DHS “at least five days prior to the sponsor’s departure from the United States” and “if dependency proceedings involving the UAC are initiated.”<sup>297</sup> The TVPRA tasks HHS with the “care and custody of all unaccompanied alien children.”<sup>298</sup> Nowhere is DHS tasked with the care and custody of unaccompanied children, and for that reason the proposed regulation’s unexplained requirements relating to notification of DHS are unnecessary, problematic.

Additionally, the proposed regulation imposes obligations on sponsors not found in the language of *Flores* or the TVPRA. These include the requirement that the sponsor “ensure the UAC reports for removal from the United States as ordered.” The safety and welfare of children can be ensured without going beyond the requirements of *Flores* and TVPRA.

#### **R. Inconsistencies Surrounding Under what Circumstances ORR Transfers Unaccompanied Children with Adults Could Put Children at Risk (proposed 45 CFR § 410.600)**

The proposed regulation is internally inconsistent with regards to whether ORR transports unaccompanied children with adults. Section 410.500 of the proposed HHS regulation states that “ORR does not transport UAC with adult detainees.” In the next section, 45 CFR § 410.600, the proposed regulation states that “ORR takes all necessary precautions for the protection of UACs during transportation with adults.” As it stands, the proposed regulation creates confusion and may put unaccompanied children in harm’s way. The proposed language also strays from the more clearly mandatory language regarding transportation of children at *Flores* paragraph 25, which requires that unaccompanied children “should not” be transported with detained adults, with some exceptions.<sup>299</sup>

#### **S. HHS and DHS Regulations Would Gut the Right of Detained Children to Seek Bond Hearings (proposed 45 CFR §§ 410.801, 410.810; 8 CFR § 236.3(m), (n)(3))**

*Flores* requires that a child 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.”<sup>300</sup> The proposed HHS regulation would replace that hearing before an immigration judge with what HHS calls an “810 Hearing.”<sup>301</sup> The “810 Hearing” would be an administrative process before “an independent hearing officer *employed by HHS*” to determine “whether the UAC would present a risk of danger to the community or risk of flight if released.”<sup>302</sup>

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<sup>296</sup> Proposed 45 CFR § 410.302(e)(8).

<sup>297</sup> Proposed 45 CFR §§ 410.302(e)(5)-(6).

<sup>298</sup> 8 U.S.C. § 1232(b)(1).

<sup>299</sup> *Flores* ¶ 25.

<sup>300</sup> *Flores* ¶ 24(A) (emphasis added).

<sup>301</sup> Proposed 45 CFR § 410.810(a).

<sup>302</sup> *Id.* (emphasis added).

The “810 Hearing” HHS proposes would place the burden of proof on the unaccompanied child to make a showing by a preponderance of the evidence that he or she does not present a risk of danger to the community nor a flight risk if released.<sup>303</sup> The unaccompanied child would not have a right to a government-appointed attorney, and would instead have the option to hire an attorney at no cost to the government.<sup>304</sup> The decision of the administrative hearing officer would be binding on ORR and could only be appealed to the Assistant Secretary of the Administration for Children and Families.<sup>305</sup> On appeal, the unaccompanied child would need to prove that the hearing officer had committed clear error of fact or error of law in finding flight risk or danger to the community.<sup>306</sup>

The proposed regulations would seriously undermine the rights of unaccompanied children. HHS’s proposed regulations would deny an unaccompanied child the opportunity to be heard by an immigration judge, a neutral, independent arbiter housed in a separate agency, and replace review with an HHS employee who would be tasked with reviewing his or her own agency’s placement decision.<sup>307</sup> The burden would rest on the unaccompanied child even though the TVPRA mandates that HHS has a duty to place unaccompanied children in the “least restrictive setting that is in the best interest of the child.”<sup>308</sup> Under *Flores*, an unaccompanied child would challenge an immigration judge’s adverse bond determination directly at the Board of Immigration Appeals. The addition of such a barrier would only serve to prolong the unaccompanied child’s detention and create an appeal regime that could ultimately serve to preclude an unaccompanied child from obtaining meaningful review contemplated in *Flores*. The unnecessary extension of an unaccompanied child’s time in detention is particularly troubling in light of the well-established harmful effects of detention on children.<sup>309</sup>

In issuing these proposed regulations that gut unaccompanied children’s right to bond redetermination hearings, HHS offers three unsatisfactory reasons for justifying departure from *Flores*. First, “[i]t is not clear statutory authority for DOJ to conduct such hearings still exists.” Second, the Homeland Security Act of 2002 specifically barred ORR from requiring “that a bond be posted for [an unaccompanied child] who is released to a qualified sponsor” under 6 U.S.C. § 279(b)(1)(A), (4). Third, the TVPRA “reaffirmed HHS’s responsibility for the custody and placement of UACs” under 8 U.S.C. §§ 1232(b)(1) and 232 (c).<sup>310</sup> The explanation for the proposed HHS regulation concludes that Congress “thus appears to have vested HHS, not DOJ, with control over the custody and release of UACs, and to have deliberately omitted any role for immigration judges in this area.”<sup>311</sup> In its proffered justification for the proposed changes from *Flores*, HHS attempts to minimize the impact of the Ninth Circuit’s decision in *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017), which held that neither the Homeland Security Act (HSA) nor the TVPRA superseded *Flores*’s bond-hearing provision. HHS contends that the Court of Appeals for the Ninth Circuit “did not identify any affirmative statutory authority for immigration judges employed by DOJ to conduct the bond hearings for [unaccompanied children] required by

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<sup>303</sup> Proposed 45 CFR § 410.810(b).

<sup>304</sup> Proposed 45 CFR § 410.810(c).

<sup>305</sup> Proposed 45 CFR §§ 410.810(d)-(e).

<sup>306</sup> Proposed 45 CFR § 410.810(e).

<sup>307</sup> Proposed 45 CFR § 410.810.

<sup>308</sup> TVPRA § 235(c)(2).

<sup>309</sup> See *supra* notes, **Error! Bookmark not defined.-Error! Bookmark not defined.**; note 96.

<sup>310</sup> 83 Fed. Reg. 45509.

<sup>311</sup> *Id.*

paragraph 24(A) of the FSA,” and that “HHS . . . as the legal custodian of [unaccompanied children] who are in federal custody, clearly has the authority to conduct the hearings envisioned by the FSA and in accordance with the court’s ruling in *Flores v. Sessions*.”<sup>312</sup>

HHS’s arguments with regard to the DOJ’s lack of authority to conduct bond hearings under *Flores* fall flat given that the Ninth Circuit rejected similar claims in *Flores v. Sessions*.<sup>313</sup> The court found that “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.”<sup>314</sup>

The proffered HHS justifications for the “810 Hearings” disregard the long-standing canon of construction that statutes should be reasonably construed to avoid implied repeal.<sup>315</sup> As the Ninth Circuit noted, courts avoid overruling the terms of a binding agreement incorporated into a judicial decree, such as *Flores*, merely because Congress failed to speak affirmatively to preserve such terms in a later legislation.<sup>316</sup> Thus, the terms of *Flores* still govern the treatment of unaccompanied children unless Congress has explicitly revised the terms of the settlement agreement. HHS attempts to sidestep existing law including the judicially enforced terms of *Flores* by explaining that the proposed regulations are “designed to eliminate judicial management, through the FSA, of functions Congress delegated to the executive branch.”<sup>317</sup>

The proposed HHS regulation does not uphold the due process rights of unaccompanied children. Due process requires that unaccompanied children receive detailed and meaningful notice of the charges and evidence against them, and a meaningful opportunity to be heard.<sup>318</sup> This opportunity must come before a neutral, independent arbiter in order to safeguard “the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process.”<sup>319</sup> If the only outlet for review of an ORR decision on placement lies within ORR’s apparatus, it would seem that such an avenue for review would likely violate the due process rights of unaccompanied children. Indeed, federal courts have evaluated ORR review procedures similar to those proposed in 45 CFR § 410.810 and found them in violation of procedural due process.<sup>320</sup>

As with other sections of the proposed regulations, these provisions would gut some of the most important protections for detained children. A fundamental tenet of the *Flores* agreement is to hold children in the least restrictive setting possible. These provisions, and the regulations in general, will have the opposite effect, establishing a long-term detention regime for children.

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<sup>312</sup> *Id.*

<sup>313</sup> 862 F.3d at 867 (“We hold that in enacting the HSA and TVPRA, Congress did not terminate Paragraph 24A of the Flores Settlement with respect to unaccompanied minors.”).

<sup>314</sup> *Id.*

<sup>315</sup> See *Hui v. Castaneda*, 559 U.S. 799, 810 (2010) (“repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest”).

<sup>316</sup> See *Flores v. Sessions*, 862 F.3d at 875.

<sup>317</sup> 83 Fed. Reg. 45520.

<sup>318</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950).

<sup>319</sup> *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980).

<sup>320</sup> See *Beltran v. Cardall*, 222 F. Supp. 3d 476 (E.D. Va. 2016) (finding the opportunity that ORR provided a mother to contest the agency’s findings on her suitability as a potential sponsor for family reunification was procedurally deficient).

The proposed regulations should be withdrawn and the important protections of *Flores* should be allowed to remain in place.