



Policy solutions that work for low-income people

DHS Docket No. ICEB–2018–0002
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U.S. Immigration and Customs Enforcement,
Department of Homeland Security,
500 12th Street SW, Washington, DC 20536

RE: Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children

Dear Ms. Seguin,

The Center for Law and Social Policy (CLASP) is grateful for the opportunity to comment on this proposed rule. CLASP strongly opposes the proposed changes to the Flores settlement agreement. We urge the Administration to withdraw the regulation and uphold current provisions regarding implementation of the Flores settlement. The proposed regulations, which would expand the use of family detention and weaken protections for migrant children, should be withdrawn because they are inconsistent with the terms of the settlement and are inappropriate, ineffective, immoral, and at great odds with decades of research on child wellbeing.

Established in 1968, CLASP is a national, non-partisan, non-profit, anti-poverty organization that advances policy solutions for low-income people. CLASP staff have expertise in, and have conducted national research, on how immigration enforcement policies impact the safety and wellbeing of children.¹ For decades, CLASP has been a leading expert on early education policies that promote the wellbeing and healthy development of low-income young children. We have a deep understanding of the importance of health, safety, and quality standards in early childhood settings, as well as the consequences for children and families when they do not have access to high-quality settings or are cared for in suboptimal settings. These comments draw upon CLASP expertise in the areas of child development, child care, child welfare, and immigration policy.

Our comments below explain why (1) the overall framework of the proposed regulations is deeply flawed, harmful to children, unjustified, and inconsistent with the available research and evidence and (2) many specific provisions cause additional harm to the safety and development of unaccompanied children.

1. A deeply flawed proposal that would harm children

The *Flores* settlement was established to ensure that migrant children in the custody of the federal government are afforded critical protections and cared for in settings that are in the best interest of the child. This is consistent with international, federal, and state laws recognizing that children are unique from adults and should be afforded special protections. The unique developmental needs of children, extensively described in a substantial research record, are of paramount importance when crafting policies that directly impact their health, safety, and wellbeing.

At its core, this proposed rule relies on flawed rationales and ignores relevant research to justify the expansion of family detention and the removal of protections for migrant children—both of which would greatly undermine the safety, development, and wellbeing of children. The proposed rule disregards decades of child welfare research and practice that uphold the best interests of children and the crucial importance of the parent-child relationship. It also relies on false assertions that the practice of detention itself strengthens the parent-child relationship and will deter other migrants from entering the United States.

Expanding the Harmful Practice of Family Detention

We are opposed to the harmful and dangerous practice of detaining children—alone or with their parents—and firmly believe that all facilities overseeing the care of children should be subject to standards established by an agency with expertise in child welfare. The expanded use of family detention, as a result of this proposal, will have the following damaging effects:

- *Harms to mental and physical health.* Numerous medical experts have denounced immigration detention centers as harmful to the short- and long-term health of children. Research indicates that detention for any amount of time, but especially for an extended period, undercuts children's wellbeing. Dr. Luis Zayas, a child mental health expert, evaluated nearly 50 children and mothers in multiple detention centers and found extremely high levels of anxiety, depression, suicide attempts, and regressions in child development.² These regressions include declines in language development, impaired cognitive development, bed wetting, decreased eating, sleep disturbances, social withdrawal, and aggression.³ Researchers have also found that the negative consequences of even brief detention can cause long-term trauma and mental health risks for children. Other medical experts have testified that detention centers have poor conditions and do not provide adequate access to health services, including long wait times for medical attention and inadequate treatment for chronic conditions.⁴ In one case, an 18-month-old toddler died of respiratory failure after she and her mother were released from the Dilley detention center where she was provided inadequate treatment despite a consistently high fever and progressively worsening symptoms.⁵

- *Harms to young children.* Detention is harmful and inappropriate for children of any age, but it is particularly bad for young children. The first years of a child’s life are of paramount importance to their later success and wellbeing.⁶ Many children in family detention centers are infants, toddlers, or children under the age of six.⁷ Young children’s early experiences shape their long-term development. Detention centers are extremely stressful and unstable environments that often undermine parent-child relationships, which are the foundation of children’s healthy development. Children’s mental health and social-emotional development is also inextricably linked to that of their parents and caregivers, and the suffering of their parents has a collateral impact on them. Persistent and substantial exposure to fear and anxiety—sometimes called “toxic stress”—can do immense damage to children’s health. This level of stress can interfere with young children’s physical brain development leading to mental health disorders, developmental delays, and physical and mental health problems that last into adulthood.⁸
- *Harms to the parent-child relationship.* DHS claims that the “proposed rule may in some respects strengthen the stability of the family and the authority of and rights of parents in the education, nurture, and supervision of their children, within the immigrant detention context.” This statement has no factual basis and runs counter to research showing that detention centers interfere with the parent-child relationship by undermining parental authority in matters of discipline and basic decision-making, such as child care, education, and social interactions.⁹ Sharing bedrooms and eating quarters with multiple families on a daily basis prevents parents from creating normal family routines; this lack of control creates additional stress for parents that is passed on to children. For babies and toddlers, especially, institutions interfere with the developing parent-child relationship and create high levels of stress for parent and child.¹⁰

We ultimately concur with findings of the advisory committee of experts in child development, education, and children’s rights that made the following over-arching recommendation with regards to family detention in its 2016 report:

DHS’s immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families – and that detention or the separation of families for purposes of immigration enforcement or management, or detention is never in the best interest of children. DHS should discontinue the general use of family detention, reserving it for rare cases when necessary following an individualized assessment of the need to detain because of danger or flight risk that cannot be mitigated by conditions of release. If such an assessment determines that continued custody is absolutely necessary, families should be detained for the shortest amount of time and in the least restrictive setting possible; all detention facilities should be licensed, non-secure and family-friendly.¹¹

The rule is based on the flawed premise that family detention is effective.

One of DHS's rationales for the prolonged use of family detention is that it will deter other migrants from entering the United States.¹² Neither family separation nor detention have been effective deterrents for migrants as shown by both DHS and external researchers.¹³ Many of the families who are detained by DHS entered the United States to escape the extraordinarily high rates of murder and gender-based violence in El Salvador, Guatemala, and Honduras.¹⁴ So long as the conditions in these countries are unchanged, families will continue to have a compelling motive to enter the United States and other countries in the region. It is important to note that many of the children and families who would be impacted by this rule are likely eligible for asylum based on U.S. Citizenship and Immigration Services (USCIS) data showing that nearly 88 percent of families in its detention centers have exhibited credible fear.¹⁵

The rule ignores the effectiveness of more child-appropriate alternatives to detention programs.

The rule sets up a false dichotomy between two options: family separation or detention. In fact, more humane and developmentally appropriate alternative methods exist to ensure that families comply with their immigration orders. Family case management models that place families in communities and connect them to services that support them throughout their immigration case not only provide a more humane and cost-effective alternative to detention, but also promote healthy child development and can help families better integrate into their new communities. In fact, following the increase in family units in 2014, DHS introduced a pilot program in 2016 known as the Family Case Management Program (FCMP). The FCMP operated from January 2016 to June 2017 with 952 families across five major cities. The FCMP solely served families seeking asylum and used research-based individualized case management and partnerships with community-based organizations to give families in the program a deep understanding of the immigration process to encourage their compliance with U.S. immigration law.¹⁶

The FCMP was successful at ensuring compliance at a low cost. Of the program's participants, 99.3 percent attended their immigration court hearings and 99.4 percent attended their appointments with ICE. Some of the participants were granted immigration relief including asylum, while others were ordered removed. Importantly, those who were ordered removed complied with their removal. The FCMP achieved extremely high rates of compliance at much lower costs than family detention. While detaining families in DHS facilities costs nearly \$320 per person per day,¹⁷ the FCMP costs \$38 per day per family unit. The cost to detain a family of 3 for 20 days is more than 25 times the cost to enroll them in the FCMP.

The rule would create a new licensing scheme that may put children's safety at risk.

The Flores settlement specifically requires that federal authorities must transfer children in their custody to a "qualifying adult or a non-secure facility that is licensed by the states to provide

residential, group, or foster care services for dependent children.” The rule proposes an alternative federal licensing scheme, consistent with ICE standards for family residential centers, that would govern the operation of family detention. The proposal purports that such a scheme would “provide effectively the same substantive protections that the state licensing requirement [in the Flores agreement] exists to provide” while at the same time acknowledging that “the proposed alternative license for FRCs...may result in additional or longer detention for certain minors.”

State licensing standards for the care of children in out-of-home settings exist to provide a baseline of protection for the health and safety of children in light of their particular needs and vulnerability.¹⁸ Such licensing regulations can safeguard the health and safety of children by mitigating risks of injury or death, reducing the spread of communicable diseases, and setting up conditions that promote positive child development. Agencies use such standards because their missions typically include safeguarding the wellbeing of children (such as a child welfare or child care agency). An alternative licensing scheme would not be “materially identical to the underlying principles established by Flores” in that Flores recognized the unique vulnerability of children and the unique considerations their status as children necessitates in licensing a detention facility. Regulations for the care of children differ by age as does children’s development. A lack of attention to the unique needs of the youngest children is especially harmful because the health and wellbeing of infants and toddlers are dependent on their caregivers and environments.¹⁹

Moreover, research makes clear that more frequent observations of compliance, through the monitoring of standards, are more likely to yield compliance with licensing standards. For monitoring to play that critical role, the credibility and impartiality of the monitor is essential. In the proposed regulation, DHS proposes to ensure compliance through the use of a third-party auditor. A monitor whose client is the same entity being monitored raises significant concerns regarding the monitor’s credibility and impartiality.

Current standards for ICE family detention centers fail to address core components of child wellbeing and protection. These standards lack a recognition of the wide range of children’s socio-emotional, health, mental health, and physical developmental needs at varying ages.²⁰ Moreover, DHS has a history of mistreating families and children in its detention centers. The conditions in family detention centers are clearly not conducive to providing these vulnerable families with the support they need, and evidence suggests that children’s mental health and development deteriorates the longer they are in detention.²¹ Experts report regressions in child development, suicide attempts, and high levels of anxiety and depression among detained children.²² Furthermore, various assessments—including a 2016 assessment made by a DHS-appointed advisory committee—have established that appropriate standards are simply impossible within the context of family detention.²³

The rule notes that family detention centers are not aligned with existing state licensing systems. In fact, the myriad licensing challenges that detention facilities face demonstrate the importance of this requirement of the Flores settlement agreement and the crucial role of licensing and monitoring in guarding against and identifying inappropriate conditions for children. For example, the T. Don Hutto Center in Texas closed after three years of operation due to multiple lawsuits about the center's poor conditions.²⁴ In January 2016, the Pennsylvania Department of Human Services revoked the child care license of the Berks County Residential Center because DHS was found to be using its license inappropriately.²⁵ Demonstrating the agency's disregard for child care licensure standards and regulations, the facility continued to operate for a year with a suspended license.

In late 2015, the Texas Department of Family Protective Services introduced a regulation called the "FRC rule" that would allow the Dilley detention center to detain children while exempt from statewide health and safety standards. In June 2016, a judge ruled that such an exemption could put children at risk of abuse, particularly due to shared sleeping spaces with non-related adults. In December 2016, that decision was upheld by a federal judge.²⁶ The numerous reports of sexual abuse at DHS facilities and lack of adequate medical services point to the urgent need for appropriate oversight of facilities housing families and children.²⁷

2. Undermining the Safety and Development of Unaccompanied Children

The proposal includes numerous troubling provisions that would weaken the protections guaranteed under existing law for unaccompanied children who enter the United States without their parents or family members. These changes would significantly exacerbate the trauma experienced by vulnerable children seeking refuge in the U.S.—a population that now includes an increasing number of young children—and put them at greater risk of being unnecessarily returned to the very danger they were seeking to escape. Specifically, the regulations would:

Limit the extent to which children can be released from detention.

The proposed changes under 8 CFR 212.5 would hold children in expedited removal proceedings to the same standard as adults in parole release decisions. Children—particularly those who have undergone trauma—experience great harm from any time in detention; therefore, it is critical that they remain eligible for release on a case-by-case basis, including discretion for humanitarian circumstances.²⁸ Prolonged detention has been shown to exacerbate trauma and its negative impacts. Children in detention are 10 times more likely to develop Post-Traumatic Stress Disorder (PTSD) than adults, and their symptoms become increasingly common the longer a child is in detention.²⁹ The proposed change would only allow release for medical necessity or for law enforcement purposes. It would also limit the extent to which an immigration judge can consider other risk factors such as reunification with family or mental health needs, putting numerous children at great risk for long-term developmental harm. U.S child welfare practices have moved

progressively away from placing children in congregate care.³⁰ Settings are chosen in consideration of the best interests of the child, including placing children in the least restrictive setting available and with a preference for placing children in the care of or in close proximity of family members.³¹ The proposed rule moves even further away from well-accepted principles of child welfare by disregarding the best interest of the child and limiting children's release from detention facilities.

Make it more difficult for unaccompanied children to reunify with family.

Currently, children transferred to the care of the Office of Refugee Resettlement (ORR) can be released to a parent, legal guardian, or an adult relative. DHS proposes removing the terms "brother," "sister," "aunt," "uncle," or "grandparent" from the definition of "adult relative" and restricting release only to "parent or legal guardian." This proposal runs contrary to release standards specifically stipulated in the *Flores* settlement.³² The proposal is also at odds with existing child welfare principles that recognize the importance of keeping children with their families whenever possible to minimize trauma, promote child wellbeing and reduce the harm to children from spending time in congregate care settings. A wealth of research guiding U.S. child welfare practice supports placing children who are not able to be reunified with parents in the care of relatives (also known as "kinship care")—including with grandparents and other adult relatives—to minimize the trauma caused by separating a child from a parent and to help maintain family and cultural ties.³³ By restricting the type of relative a child may be released to, DHS is increasing the likelihood of children being held indefinitely in institutional care—at great developmental risk—and denying them the ability to be reunited with family.

Puts children at risk of losing their protections.

Under 8 CFR 236 (c), the rule proposes creating a new process for determining the age of a minor based on a "reasonable person" standard, with little guidance on who would be qualified to make such a determination or what factors should be considered, other than medical and dental examinations. Under 8 CFR 236 (d), the rule proposes that unaccompanied minors undergo a redetermination process each time they are encountered by an immigration officer. These additional burdens would delay the extent to which children are afforded the protections they are entitled to as unaccompanied children and put them at risk of losing their protections throughout the duration of their immigration process. The rule also grants increased discretion to both DHS and the Department of Health and Human Services to suspend protections for unaccompanied children, reduce accountability, and put children at greater risk of being held in inappropriate conditions for extended periods of time.

Conclusion

As experts in child development, we strongly oppose this rule and urge the Administration to withdraw the rule and uphold the standards established by the Flores settlement. The changes outlined in the NPRM would compromise the immediate safety of vulnerable children and harm their long-term development. We are deeply concerned that the proposed rule would expand the harmful practice of jailing children with their families by creating a separate licensing system for such facilities. The rationale provided for this devastating harm to children and to the parent-child relationship is deeply flawed and ignores relevant research. No modest fixes will solve the fundamental problems with this regulation; it must be withdrawn.

Rather than roll back protections, the Administration should be focused on strengthening and expanding services to children and working to ensure that vulnerable children and their families are supported throughout the immigration enforcement process. There is never an appropriate reason to jail children, rob them of their basic needs, or needlessly separate them from their parents. Every child who comes into the custody of our government, regardless of immigration status or where they came from, should be guaranteed protection and services to mitigate trauma and promote their healthy development.

Endnotes

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