NATIONAL
IMMIGRANT
JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

DHS / HHS NOTICE OF PUBLIC RULEMAKING RE THE FLORES SETTLEMENT
Top-lines and Section-by-Section Analysis
September 7, 2018

LINKS TO SOURCE DOCUMENTS

- NPRM
- American Immigration Lawyers' Association (AILA) library of documents related to *Flores* settlement agreement including the Stipulated Agreement

TOP-LINES AND SUMMARY

- Even as they continue to hold hundreds of separated children in federal detention six weeks past the court-ordered reunification deadline, the Administration has issued a Notice of Public Rulemaking (NPRM) intended to implement the Flores Settlement. The purpose underlying the Flores Settlement is the advancement of child welfare principles for immigrant children seeking protection in the United States; rather than furthering this goal, the NPRM is an unambiguous effort to expand the authority of the Department of Homeland Security (DHS) to jail families in poor conditions and dismantle established protections for immigrant children in DHS and Health and Human Services (HHS) custody.

- Substantively, the NPRM proposes numerous significant changes to DHS and HHS regulations and policy that will undercut protections for immigrant children, including provisions that:
  - Allow DHS to operate family jails under their own self-licensing scheme, removing existing Flores protections from the family detention system despite mountains of evidence showing that family detention facilities are inappropriate and dangerous places for children, and that ICE's mechanisms for self-inspections are woefully deficient
  - Grant DHS and HHS wide discretion to suspend all protections for children in the case of an "emergency"
  - Heighten the standard for release on parole for children in expedited removal proceedings
  - Limit release options for children in government custody
  - Set vague and potentially harmful standards for age determinations for children in DHS and HHS custody

- ➢ Require repeated redeterminations of a child's status as an "unaccompanied alien child", meaning that vulnerable children who arrived alone at a tender age will be stripped of minimal due process protections throughout their immigration proceedings
- ➢ Reject the right to a bond hearing guaranteed by *Flores*, instead proposing an asymmetrical administrative process making HHS jailer *and* judge.

SECTION BY SECTION - ANALYSIS OF MOST CRITICAL PROVISIONS OF PROPOSED REGULATIONS
(This analysis focuses on those provisions that change current practice and policy)

Department of Homeland Security

- ➢ **Strips parole (release) authority for children in expedited removal proceedings:** The NPRM amends 8 CFR 212.5 by removing an internal cross-reference to 8 CFR 235.3(b), provisions governing parole. In effect, this change will mean that minors placed in expedited removal are held to the same strict standard for release on parole as adults. Judge Gee has previously found and *Flores* class counsel has long argued that under 8 CFR 212.5 children subject to expedited removal may nonetheless be considered for release on parole on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit" providing that he or she is not a security or flight risk; the change here would limit such release only for medical necessity or law enforcement need.

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

- ➢ **Establishes a "reasonable person" standard for age determinations:** 8 CFR 236.3(c) codifies a "reasonable person" standard for determining age, providing that DHS may treat a person as an adult if a reasonable person would conclude the person is an adult. In making this determination, the officer is permitted, but not required, to to seek a medical

or dental examination. Age determination decisions are to be based upon the totality of the evidence and circumstances

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

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

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

- *Note* that the government appears to have included this provision in part to avoid having to comply with Judge Gee's 2015 order clarifying that the government must limit the detention of children in unlicensed family detention centers to the minimal time possible, with 20 days provided as the estimate for reasonable processing time.
- *Note* that DHS's Office of Inspector General recently found ICE's inspections regime in the context of adult detention to be woefully inadequate, and in that context the agency also employs an independent contractor, Nakamoto. The OIG found the Nakamoto inspection practices "not consistently thorough" and unable to fully examine conditions or identify deficiencies. One ICE employee described Nakamoto inspections as "very, very, very difficult to fail."

- **Weakens protections for children during their time in CBP processing:** The NPRM amends 8 CFR 236.3(g) to claim that "operational feasibility" may be considered when determining whether a child is allowed contact with accompanying family members during processing. The same section allows DHS to house unaccompanied children with unrelated adults for more than 24 hours in emergencies or "exigent circumstances".

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

Health and Human Services

- **Institutes continual re-determination of UAC status (duplicative of DHS, above):** 45 CFR 410.101 (definitions) clarifies that HHS's determination of whether a child is a UAC will be continuously redetermined and that the protections provided to a UAC (including an exception from one-year asylum filing deadline and the opportunity to have a non-adversarial asylum adjudication) cease once the UAC designation terminates.

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

- **Codifies fingerprinting of sponsors, leaves open questions regarding post-release services:** 45 CFR 410.302 outlines the process requirements leading to the release of a

child from ORR custody to a sponsor, including the new requirement that a sponsor sign an affirmation of abiding by a sponsor care agreement. The NPRM invites public comment on whether to set forth in the final rule policies on: requirements for home studies; criteria for denial of release to a prospective sponsor; and post-release service requirements.

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

➢ **Overturns the right to a bond hearing guaranteed by *Flores*, replacing it with an administrative process lacking in due process protections:** Section 410.810 provides an entirely new administration procedure for custody determinations for unaccompanied children in ORR custody, arguing that it is "not clear statutory authority for DOJ to conduct such hearings still exists." This argument disregards, among others, the very clear instruction at paragraph 24(A) of the Flores settlement that, "A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing." This provision creates an HHS-led "independent hearing process" wherein HHS officers determine whether the child poses a danger to the community or flight risk.

- *Note* that this provision gives HHS, the same agency that maintains care and custody of the children, with the authority to adjudicate children's challenges to that custody, making HHS jailer and judge. Note that appeals from a Section 810 decision are designated to go not to the Board of Immigration Appeals (as they would currently from an Immigration Judge decision) but instead directly to the Assistant Secretary for the Administration for Children and Families, a political appointee requiring Senate confirmation.
- In July 2017, on appeal from a Judge Gee decision, the Ninth Circuit explicitly rejected the administration's claim that DOJ does not have statutory authority to conduct bond hearings under *Flores*:

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

PROCEDURAL ISSUES OF NOTE

- The NPRM provides a 60-day comment period that will close on November 6, 2018.
- A 2001 extension of the settlement provides that *Flores* will terminate 45 days following publication of regulations "implementing" the settlement. *Flores* class counsel has already indicated it will challenge the regulation in court.
- The discussion of costs and benefits throughout the NPRM is sloppy and intentionally vague. DHS argues that they cannot estimate costs associated with the rule because they cannot estimate how many children will be held in family jails under the rule and/or how many children will be held for longer. DHS maintains full operational control over its detention system, and should be able to work up a reasonable predictive model. In its fiscal year 2019 Congressional Budget Justification, ICE estimated the cost of one family detention bed at $318.79, which should provide a marker to estimate the exorbitant cost of family detention in comparison to alternatives to detention, which cost a fraction the amount of secure custody. For these reasons, it is concerning that OMB has failed to designate this an economically significant regulatory action, bypassing the critical economic analysis required to undergird that determination.
- There are many misleading and concerning presentations of history and fact in the narrative sections of the NPRM. One particularly illuminating quote, however, belies the administration's true intentions in issuing these regulations, which are not to protect children's welfare, but to punish asylum seekers, at p. 136:
    - "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."

Contact:
Heidi Altman, Director of Policy, 312-718-5021, haltman@heartlandalliance.org