Service Provider and Public Policy Practitioner Comment Guide: An Overview of USCCB's Comments on the Proposed Flores Rule[1]

COMMENTS ON THE PROPOSED RULE ARE DUE BY NOVEMBER 6th.[1]

What is the Flores Settlement Agreement[2]?

In 1997, a federal district court in California approved the Flores Settlement Agreement (FSA) in a class action lawsuit filed on behalf of immigrant children against the legacy Immigration and Naturalization Services. The FSA sets forth basic standards regarding the care, custody, and release of immigrant children – both accompanied and unaccompanied – while they are in federal custody. To learn more about the FSA, see our backgrounder[3].

What would the proposed regulations on the FSA do?

The Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) have released a Notice of Proposed Rulemaking (NPRM) to implement regulations on the FSA. Through this NPRM the government is seeking to inappropriately expand and alter the terms of the FSA. USCCB is concerned that, if implemented, this NPRM would undermine the existing FSA protections set in place to safeguard immigrant children and could lead to large-scale family detention.

Five Key Reasons USCCB Is Opposed to the Proposed Rule on FSA:

1) ### In the NPRM, DHS's revised definition of "licensed facility" seeks to circumvent court decisions and expand family detention, an inhumane and costly practice.

   The FSA generally requires that children be placed in "non-secure" facilities that are licensed for childcare by an appropriate state agency. The three current family detention centers (located in Pennsylvania and Texas), however, are not licensed for childcare in their respective states. The NPRM proposes an alternative federal licensing scheme for such facilities when state licensing schemes for the detention of accompanied children are not available. The NPRM also proposes to have an entity hired by Immigration and Customs Enforcement (ICE) monitor compliance with the proposed standards. This proposal inappropriately seeks to find an end-run around the FSA's clear state licensing requirements, as well as the numerous judicial decisions that have already been issued on the matter. Further, DHS's proposal to have an ICE contractor act as a check and balance essentially amounts to allowing self-certification of family detention centers. Ultimately, this proposal would allow for a vastly expanded use of family detention, which is found to have long-lasting negative health consequences on children by experts such as the American Academy of Pediatrics, as well as the medical and psychiatric experts that DHS itself has hired. Instead, USSCB urges DHS to expand its use of alternatives to detention (ATDs) to monitor families released from custody, as ATDs are humane, proven, and cost-effective.

2) ### DHS's proposed federal scheme for licensing family detention centers would include fewer child protections than state licensing required by the FSA.

   DHS claims that the proposed federal licensing scheme would mirror child-welfare protections required by the FSA. USCCB disagrees with this assertion. ICE's family detention center standards are often not as

---

[1] For more information about filing comments, please see our backgrounder and webinar. *10 Things You Should Know About the Proposed Flores Regulations*, JUSTICE FOR IMMIGRANTS, https://justiceforimmigrants.org/2016site/wp-content/uploads/2018/09/final-formated-10-things-flores-doc.pdf (last visited Oct. 2, 2018); Public Comments Webinar, JUSTICE FOR IMMIGRANTS, https://justiceforimmigrants.org/webinars/public-comments-webinar/ (last visited Oct. 2, 2018).

[2] Settlement Agreement, *Flores, et al. v. Reno, et al.*, Case No. CV 85-4544 (C.D. Cal., Jan. 1, 1997), *available at* https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf

[3] *Frequently Asked Questions on the Flores Settlement Agreement*, JUSTICE FOR IMMIGRANTS, https://justiceforimmigrants.org/2016site/wp-content/uploads/2018/08/Flores-Agreement-Settlement-1.pdf (last visited Oct. 2, 2018).

rigorous as state standards, making DHS's claim incorrect and unpersuasive. For instance, the state of Texas has specific licensing regulations that limit use of "mechanical restraints" (i.e., a device that restricts free movement of all or part of a child's body) on children. And, in Texas, licensed facilities can never use certain types of restraints, such as handcuffs, on children. In contrast, ICE's family detention standards do not provide similar protections for children. In fact, ICE's family detention standards specifically allow for the use of handcuffs (on children over a certain age). Not only do ICE's family detention center standards fail to mirror existing state requirements contemplated by the FSA, but there is also no reasonable argument that could be offered to justify eliminating these general child-welfare protections.

3) DHS's definition of "non-secure" facility cannot be used to classify family detention facilities as non-secure.

Under the FSA, immigrant children must be placed in state-licensed facilities that are "non-secure," but it does not provide a definition for "non-secure." In the NPRM, DHS seeks to supply a definition of "non-secure" for a facility when the state in which it is operating provides no applicable definition in its laws or regulations. This proposal gives rise to deep concern that DHS may be attempting to unilaterally supply a definition of "non-secure" to serve its own purposes - most notably to allow family detention centers to be deemed "non-secure." This is contrary to a basic understanding of what constitutes secure facilities from a social services perspective and goes against acknowledged facts that family detention centers are indeed detention facilities that have monitored egresses. Furthermore, this proposed definition of "non-secure" would contradict findings by the federal district court in California that is presiding over the Flores litigation, which has stated that the existing family detention centers are in fact "secure." DHS cannot circumvent this established judicial finding via administrative rulemaking.

4) DHS's and HHS's revised definition of "emergency" inappropriately expands the FSA's emergency exception.

Under the FSA, there is a limited exception to the requirement that children be timely placed in facilities licensed by the state when there is an emergency, including natural disasters, facility fires, civil disturbances, or medical emergencies. The parameters of this "emergency" exception in the FSA was clearly contemplated by both parties. In the NPRM, however, DHS and HHS seek to expand the definition of "emergency" to broaden the exception and excuse their noncompliance with other requirements of the FSA. This is concerning because of the implications for child safety and welfare. For example, under the proposed rule, DHS could use staff shortages to excuse holding children with unrelated adults for a prolonged period of time.

5) HHS should provide flexibility in home study and post-release services requirements to ensure ability to timely respond to emerging child protection needs.

In the NPRM, HHS questions whether it should include in its final rule standards on home studies and post-release services. As long-time service providers of home studies and post-release services, USCCB urges HHS to not implement such standards in the final rule and, instead, seek to implement specific guidelines and minimum requirements in the Office of Refugee Resettlement's (ORR) Policy Guide. This would allow ORR the flexibility to timely respond to children's emerging needs and revise home studies and the post-release standards accordingly. Such standards should be developed with input and feedback from service providers and other organizations with expertise in this area.

For more details regarding USCCB's stance on the NPRM, please read our full-length comment.